



Section 44 – Disputes between organs of state

Introduction

Section 44 of the Municipal Finance Management Act No. 56 of 2003 (MFMA) is intended to create an additional remedy to resolve disputes between organs of state. The provision enhances the spirit and principles of co-operative governance as entrenched in Chapter 3 of the Constitution of the Republic of South Africa, the requirements of section 44(1) of the MFMA and the Intergovernmental Relations Framework Bill, 2004.

Since the commencement of section 44(2)(b) of the MFMA in July 2004, a number of organs of state have requested the National Treasury to mediate financial disputes that arose between them. From these requests it is clear that guidance is required as to:

- the application and implications of section 44;
- the circumstances and processes to be followed before the National Treasury is likely to agree to mediate disputes in terms of section 44(2)(b).

What does section 44 require?

The parties to the dispute must:

- take all reasonable steps that may be necessary to resolve the matter out of court;
- report the dispute to the National Treasury; and
- if National Treasury is not party to the dispute, the parties may request the National Treasury to mediate or designate a person to mediate the dispute.

When does section 44 apply?

It applies where a *dispute of a financial nature* has arisen between two or more *organs of state* of which *at least one is a municipality or municipal entity*.

What is a dispute of a financial nature?

A dispute exists when one organ of state maintains a point of view and the other organ of state a contrary or a different view (i.e. the organs of state disagree with each other). In addition, the dispute must be capable of judicial proceedings by either party (i.e. must be justiciable in a court of law.)

A dispute of a *financial nature* relates to disputes arising from:

- financial implications or consequences relating to the exercise of statutory or assigned powers or functions; or
- the financial rights and obligations in terms of an agreement (contract) between organs of state regarding the implementation of statutory powers or functions.

To which organs of state does section 44 apply?

A municipality, a municipal entity and an organ of state in the national or provincial sphere of government may be a party to a dispute of a financial nature.

Section 44 also applies to disputes within local government (that is disputes between municipalities, between municipal entities or between municipalities and municipal entities) and is not limited to disputes between organs of state in different spheres of government or intergovernmental disputes.

What are the implications of the Intergovernmental Relations Framework Bill, 2004 for disputes of a financial nature?

In terms of section 36(1)(a) of the Intergovernmental Relations Framework Bill, 2004, as published for public comment in Government Gazette 26970 dated 5 November 2004, the Bill does not apply to the resolution of intergovernmental disputes where other national legislation provides mechanisms or procedures for the resolution of such disputes.

Section 44(2)(b) of the MFMA provides an alternative mechanism for the resolution of disputes of a financial nature. The Bill will therefore not apply in respect of financial related disputes unless the Bill is otherwise amended prior to enactment.

What are the implications of section 44 for agreements?

Existing contractual provisions providing for dispute resolution mechanisms?

Existing written agreements between organs of state that provide for the settlement of disputes by judicial proceedings only, are inconsistent with the principles of co-operative government provided for in the Constitution and contravene section 44(1) of the MFMA in respect of disputes of a financial nature. These agreements should be amended accordingly to reflect the requirements of the MFMA.

Where existing written agreements between organs of state provide for dispute resolution mechanisms or procedures, other than approaching the courts, the parties must make use of those mechanisms.

What should be provided for in future contractual provisions in respect of dispute resolution mechanisms?

The remedy created by section 44(2)(b) of the MFMA should be provided for in future agreements and be negotiated between organs of state in respect of disputes of a financial nature. Any mediation provisions should enable the parties to request the National Treasury to mediate or to designate a person to mediate such disputes.

However it is important that alternative dispute resolution mechanisms are provided for in the event of the National Treasury not acceding to a request to mediate.

A hierarchy of remedies could be provided for, such as –

- an amicable settlement;
- mediation by the National Treasury;
- mediation by another person, where the National Treasury does not accede to a request;
- arbitration.

What steps should be followed prior to requesting the National Treasury to mediate a dispute?

It is recommended that, prior to the National Treasury being requested to mediate a dispute of a financial nature, the following minimum steps be taken:

1. Where the dispute is between a municipality and another municipality or municipal entity:
 - ✓ The accounting officers of the municipalities or municipality and municipal entity must attempt to meet to settle the matter amicably through a process of negotiation. If the negotiations fail or no meeting has taken place within 30 days, or another period agreed upon, the officers must refer the matter to the mayors or mayor and chairperson of the board of directors of the municipal entity.
 - ✓ All parties must report the dispute to the National Treasury.
 - ✓ When referred, the mayor(s) of the municipality and the chairperson of the board of directors of the municipal entity must attempt to meet to settle the matter amicably through a process of negotiation. If the negotiations fail or no meeting has taken place within 30 days, or another period agreed upon, the parties may elect to refer the matter to the Provincial Treasury.
 - ✓ After the lapsing of 60 days or all efforts by the Provincial Treasury have failed then the MEC for Finance in the Province should refer the matter to the Premier of the Province for resolution.
 - ✓ Should no amicable solution be found then the matter should be referred to the National Treasury for resolution.

2. Where the dispute is between a municipality or municipal entity and a provincial or national organ of state (department or public entity):
 - ✓ The oversight and governance structure between the parent municipality and the entity must be maintained. Hence the accounting officer of the municipal entity must report the dispute to the accounting officer of the parent municipality. The accounting officer of the municipal entity may request the accounting officer of the parent municipality to support the accounting officer of the entity in addressing the dispute or to address the dispute on behalf of the entity.
 - ✓ All parties must report the dispute to the National Treasury.
 - ✓ The accounting officer of the municipality (or entity) and the accounting officer of the relevant department or chief executive of the relevant public entity must attempt to meet to settle the matter amicably through a process of negotiation. If the negotiations fail or no meeting has taken place within 30 days, or another period agreed upon, the officials must refer the matter to the mayor, chairperson of the board of the municipal entity, the political head of the department or the chairperson of the board of the public entity (accounting authority), depending on the parties to the dispute.
 - ✓ When referred, the mayor, political head or chairperson/s must attempt to meet to endeavour to settle the matter amicably through a process of negotiation. If the negotiations fail or no meeting has taken place within 30 days, or another period agreed upon, the parties must elect to refer the matter to the Provincial Treasury.
 - ✓ After the lapsing of 60 days or all efforts by the Provincial Treasury have failed then the MEC for Finance in the Province should refer the matter to the Premier of the Province for resolution.
 - ✓ Should no amicable solution be found then the matter should be referred to the National Treasury for resolution.

It must be noted that any cost associated with resolving the dispute between the parties will have to be met by the parties concerned.

What information must be provided to the National Treasury?

Informing the National Treasury of a dispute – section 44(2)(a)

The mayor, political heads and chairperson of a board of a municipal entity must report a dispute to the National Treasury in writing.

The following information should accompany the report:

- a detailed description of the dispute;
- the dispute resolution mechanisms available to the parties; and
- the steps taken to resolve the dispute.

All reports must be made by the organs of state themselves and not their external legal representatives acting on their behalf.

Requesting the National Treasury to mediate a dispute – section 44(2)(b)

The following information must be provided:

- a detailed description of the dispute, including the precise issues that are in dispute;
- copies of all documentation informing the dispute; and
- the steps taken to date to resolve the dispute.

All requests must be made by the organs of state themselves and not their external legal representatives acting on their behalf.

How will the National Treasury mediation process work?

- The National Treasury will, within 30 working days of receiving a request in terms of section 44(2)(b), inform the organs of state whether it will mediate the dispute or designate a mediator, depending on the request received.
- Where the National Treasury has acceded to a request to mediate a dispute or designate a mediator, either will, within 10 working days of informing the parties, in their sole discretion determine the form of representations to be made. In making this determination, the National Treasury or designated mediator shall consult the disputing parties and may be guided by them on the form in which the representations are to be made. The parties will be required to agree:
 - that all representations by the parties shall be made without prejudice; and
 - to contribute equally to the cost of the mediator, if one is designated, and bear any other costs separately regardless of the outcome of the mediation.
- The mediator shall within, a further period of 20 working days after receipt of the representations of the parties, facilitate an agreement between them or determine a procedure or framework within which they can negotiate to resolve the dispute.
- All negotiated agreements shall be in writing, signed by both parties and be binding on the parties.
- If the parties fail to reach a satisfactory resolution, having exhausted all reasonable steps proposed by this circular, then the matter may be referred to arbitration or to a court

What happens if the National Treasury in terms of section 44 declines to mediate or to designate a person to mediate?

In the event that the National Treasury declines to mediate or to designate a mediator, the parties may, subject thereto that all reasonable steps that may be necessary to resolve the matter out of court have been taken, exercise any legal remedies available to them.

Such legal remedies may include mediation, arbitration or court proceedings. When a National or Provincial Department is involved the relevant Office of the State Attorney may also be approached for assistance.

Conclusion

This circular has been developed to guide municipalities on the intent and spirit of section 44 and to provide a fair and reasonable process in which to resolve intergovernmental disputes of a financial nature. The success or otherwise of the resolution achieved will ultimately rest with the parties to the dispute, as the Provincial and National Treasury are only empowered to mediate.

A mandate is provided in the MFMA requiring the parties to take all reasonable steps to resolve the dispute out of court. Only after all reasonable steps as proposed by the circular fail, should the matter be referred to a court.

Additional information on section 44 or this circular may be requested from the dedicated MFMA email address or to the facsimile number listed under contact below.

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