



For attention: Mr Nhlamulo Mathye

Email: Comments.coalitionbill@coqta.gov.za

30 August 2024

Dear Mr Mathye

The Helen Suzman Foundation attaches our written submission in response to the invitation for comments on the Local Government: Municipal Structures Amendment Bill.

We would like to confirm our interest in making oral representations at a convenient date.

Should you have any queries, it would be appreciated if you could contact me at the following email address: naseema@hsf.org.za

Yours sincerely

A handwritten signature in black ink, appearing to be 'Naseema Fakir', written over a light blue horizontal line.

Naseema Fakir

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1. Introduction

1.1. HSF recognises that unstable local government harms service delivery. However, HSF submits here that the Local Government: Municipal Structures Amendment Bill 2024 ("**Bill**") falls short as an appropriate response by:

- 1.1.1. failing to appreciate that traditional motions of no confidence ("**MONC**") work best when they function as *constant* threats to underperforming public officials – and that placing blunt limits on their frequency is an unprincipled solution to their misuse;
- 1.1.2. allowing for MONC under 'exceptional circumstances', thereby risking drawn out and potentially judicialised political disputes over MONC;
- 1.1.3. speculating that municipal coalition politics in South Africa will be so permanently fraught as to justify a blunt statutory limit on MONC, thereby, inviting unintended consequences in times of political change;
- 1.1.4. by unduly prescribing that votes to remove key municipal officials take place by public show of hands, where this may not be necessary – or even safe – in certain contexts;
- 1.1.5. excluding parties that received less than 1% of the vote in municipal elections; and
- 1.1.6. by making it optional for coalition governments to enter into public coalition agreements, when doing so should be mandatory – although such agreements should not be strictly binding and open to amendment by mutual consent.

1.2. HSF's reasoning for these submissions follows below.¹

2. Motions of no Confidence as Constant Incentives for Performance

2.1. The Bill proposes a significant limit on traditional MONC in a Municipal Council's Whip, Speaker, Executive Mayor and other Executive Members. It does so by requiring a two-year "cooling off period" during which MONC are not allowed, running from the date on which the impugned office bearer is "elected".²

¹ HSF made similar submissions in response a constitutional amendment proposed by the Democratic Alliance in 2022. That submission is available [here](#).

² The full text of the proposal reads as follows: "A municipal council may remove, by resolution taken by show of hands, the [Whip, Speaker, Executive Mayor and other Executive Members]: Provided that two years have passed since [they were] elected."

- 2.2. This is an extraordinary proposal that could leave only two lawful opportunities during a five-year administration to remove a Municipal Council's Whip, Speaker, Executive Mayor and other Executive Members by way of a traditional MONC.
- 2.3. This, despite the Constitutional Court having clearly held that MONC are an indispensable check on government power, the effectiveness of which lies crucially in being a *constant* incentive for public officials to perform their duties.
- 2.4. In *Mazibuko*, the Constitutional Court held that –

*"The Constitution does not set a time or preconditions for when the Assembly may vote on a motion of no confidence in the President. The ever-present possibility of a motion of no confidence against the President and the Cabinet is meant to keep the President accountable to the Assembly which elects her or him."*³

- 2.5. Similarly, in *UDM* the Constitutional Court held that –

*"A motion of no confidence constitutes a threat of the ultimate sanction the National Assembly can impose on the President and Cabinet should they fail or be perceived to have failed to carry out their constitutional obligations. It is one of the most effective accountability or consequence-enforcement tools designed to continuously remind the President and Cabinet of what could happen should regular mechanisms prove or appear to be ineffective."*⁴

- 2.6. While the Constitutional Court's jurisprudence relating to MONC has been developed in the context of national government, the spirit of that jurisprudence applies to local government all the same.

3. 'Exceptional' Motions of no Confidence

- 3.1. The Bill tries to mitigate its harsh limit on traditional MONC by proposing new self-standing 'exceptional' MONC that are available at all times and subject to the impugned municipal public official meeting the following substantive constraints:

- 3.1.1. a violation of the Constitution or law,

³ *Mazibuko v Sisulu* [2013] ZACC 28; 2013 (6) SA 249 (CC); 2013 (11) BCLR 1297 (CC) at para 43;

⁴ *United Democratic Movement v Speaker of the National Assembly and Others* (CCT89/17) [2017] ZACC 21 para 43.

- 3.1.2. serious misconduct; or
 - 3.1.3. the inability to perform the functions of office.
- 3.2. Such a statutory invention cries out for an appropriate mechanism to decide whether these substantive constraints apply – but the Bill doesn't provide one.
 - 3.3. The Bill's proposed 'exceptional' MONC effectively replicates the Constitution's provision for removing the President⁵ and Premiers.⁶ This may well attract the same drawn-out fact gathering process now germane to the process for removing the President since *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another*.⁷
 - 3.4. This not only hobbles MONC as a swift mechanism of accountability but, as President Ramaphosa's challenge of the 'Section 89 Independent Panel Report' has shown,⁸ also risks drawing our courts, at their peril, into political disputes over MONC.

4. The Bill's Vision of Municipal Coalition Politics in South Africa

- 4.1. The Bill is an express response to South Africa's recent experience with chaotic coalition politics in certain metropolitan municipalities. HSF views this with caution because it is by no means proven that municipal politics in our metros will be so permanently fraught to justify the radical statutory change that the Bill proposes.
- 4.2. Indeed, legislated limits on MONC are inherently risky because they render fluid political circumstances hostage to rigid legal rules.
- 4.3. As such, the Bill creates the risk of unintended consequences in periods of changing political conditions.

5. Excluding Minority Parties from Local Governance

- 5.1. Beyond its limit on MONC, the Bill reserves representation on Municipal Councils for political parties that receive "a minimum of one percent of the valid votes cast" in a municipal election.

⁵ Section 89 of the Constitution.

⁶ Section 130 of the Constitution.

⁷ *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* (CCT76/17) [2017] ZACC 47; 2018 (3) BCLR 259 (CC); 2018 (2) SA 571 (CC) (29 December 2017) para 176 – 182.

⁸ [President Ramaphosa launches bid at ConCourt for review of Section 89 report - SABC News](#)

- 5.2. Notably, the Bill does not mention independent candidates when formulating this threshold for representation in a Municipal Council. While it would be anomalous to not subject independent candidates to similar exclusionary requirements as small parties, it is not entirely clear whether this is even possible given the split party and ward lists at local government elections.
- 5.3. Nonetheless, the Bill's proposed threshold for representation in a Municipal Council should be eliminated for three reasons.
- 5.3.1. First, it severely limits the Constitution's section 19(3)(a) right "to vote in elections for any legislative body established in terms of the Constitution..." by effectively legislating away votes cast for small parties.
- 5.3.2. Second, the Bill risks constitutional challenge by not aiming this limitation at a legitimate or justifiable end. The Bill's explanatory memorandum states that its threshold for representation is meant to (a) exclude smaller parties that "dictate terms to meet their interests at all costs"; and (b) to "increase political stability". However, there is no necessary connection between a party being *small* and its being a bad faith actor in municipal politics – the Bill's blunt threshold excludes the good with the bad. Moreover, even parties that achieve more than 1% hold the potential to be bad faith actors.⁹
- 5.3.3. Third, the Bill's heavy-handed treatment of smaller parties is likely to have a chilling effect on democratic norms in local government. Small parties often give voice to underrepresented groups and allow newcomers a chance to enter municipal politics.¹⁰ As such, the limitation is likely to diminish interest in municipal elections from the electorate and disincentivise new entrants into municipal politics.¹¹

6. Public Voting vs Secret Ballots

- 6.1. The Bill proposes that votes to remove a Municipal Whip, Speaker, Executive Mayor and other Executive Members be done by a public show of hands. According to the Bill's explanatory memorandum, this is because "experience has shown that votes are being bought by certain political parties..."

⁹ My Vote Counts' Submission on the Municipal Structures Amendment Bill, para 1.31.

¹⁰ Ibid, para 1.30.

¹¹ Ibid.

- 6.2. However, it is by no means clear that banning secret ballots in removal votes will prevent bad faith municipal representatives from voting in line with illicit financial interests in all cases. If anything, public voting may well ensure that corrupt Councillors are more easily monitored for compliance with corrupt instructions.
- 6.3. Indeed, forced public voting will likely make it harder for Councillors to vote against party lines. This too is a well-documented risk in South African politics and should not be so wholeheartedly embraced by banning secret ballots in all removal votes.
- 6.4. At best, the extent to which public voting ultimately serves accountable government will be debatable, depending on the facts surrounding a given vote.
- 6.5. A better solution to balancing transparency and accountability in removal votes would be to leave it to the Council itself to determine the most appropriate voting procedure germane to a particular vote. This is for three reasons.
- 6.5.1. First, when the Constitutional Court considered calls to force the Speaker of the National Assembly to conduct a vote on a MONC in the President in secret, it held that it was by no means clear when a particular voting procedure would best hold public representatives accountable. In its words:
- “Some MONC might require a secret ballot but others not, depending on a conspectus of circumstances that ought reasonably and legitimately to dictate the appropriate procedure to follow in a particular situation.”¹²*
- 6.5.2. Second, a flexible approach to determining the voting procedure for MONC respects the autonomy of municipalities, as a distinct sphere of government. While we do not suggest that it is unlawful for national legislation to determine a Municipal Council's voting procedures, there is wisdom in being deferent to a its own judgment about which procedure a particular removal vote demands.
- 6.5.3. Third, there are situations where a secret ballot would serve the physical safety of individual Municipal Councillors. We have seen many troubling cases of Municipal Councillors being killed¹³ in the course of their duties and forcing them to make their votes public in removal decisions may well put them into harm's way.

¹² *United Democratic Movement v Speaker of the National Assembly and Others* (CCT89/17) [2017] ZACC 21; 2017 (8) BCLR 1061 (CC); 2017 (5) SA 300 (CC) (22 June 2017) para 83.

¹³ See reporting on this issue [here](#), [here](#) and [here](#).

6.6. As such, the Bill should not prescribe any procedures for removal votes.

7. Binding Coalition Agreements

7.1. The Bill proposes that coalition governments "may enter into a binding coalition agreement, which must be made public, to regulate their participation in the governance of the municipality". The express text of this proposal appears to make the formation of such agreements optional.

7.2. However, clearly stated and publicly available coalition agreements are a crucial mechanism by which voters can hold their elected representatives accountable and should not be an optional by-product of coalition government.

7.3. Nonetheless, such agreements should not be described as "binding" in any legislation that regulates coalition agreements. This is for two reasons.

7.3.1. First, it is unclear what the Bill means by "binding". If the Bill contemplates agreements that are ultimately enforceable by court order, this too risks drawing our courts, at their peril, into political disputes over the proper direction of municipal governments.

7.3.2. Second, even if there is another workable sense in which coalition agreements are "binding", holding coalition governments to agreements struck at the start of their administrations may well legislate away the flexibility required for coalitions to respond to the fluid demands of local governance.¹⁴ As such, the Bill should make explicit provision for coalition agreements to at least be amendable by the mutual consent of the parties thereto.

8. Conclusion

8.1. HSF has submitted here that while unstable local government is indeed a threat to service delivery, intervening to infuse municipal politics with rigid legal rules is not the right solution. Especially when those rules privilege stable government over accountable government – and even the right to vote in the first place.

¹⁴ Public Affairs Research Institute's Submission on the Municipal Structures Amendment Bill, para (l) and (m).