

MBHASHE MUNICIPALITY LITIGATION MANAGEMENT POLICY



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1. BACKGROUND

The entrenchment of the rule of law as the founding value in the Constitution imposes an obligation on the organ of State to take action or make decision only when authorized by law do so. All decisions or actions of the organs of State are, in line with the doctrine of separation of powers and checks and balances susceptible to a judicial review.

Accountability and transparency are one of the values that are key to the functioning of local government. It is because of these values that one of the objects of local government is to provide democratic and accountable government for local communities.

Fundamental in these constitutional values is the demand for legal compliance by organs of State. Poor levels of or lack of compliance with legislative prescripts eventually manifests itself in litigation and consequently unnecessary expenditure in litigation costs and legal fees

It is because of this background that the State is the biggest consumer of legal services in the Republic. Consumption of legal services includes participation in litigation whether for or against organs of State.

It is therefore imperative to ensure transition from reactive litigation management into proactive legal risk management by promoting legal compliance

This policy is therefore intended to assist Mbashe Local Municipality to promote a culture of accountability, transparency and respect for the rule of law by so doing mitigating the calamitous effects of litigation in the municipality.

2. PURPOSE

- 2.1 To ensure that any litigation that Mbashe Municipality is involved in is handled in an efficient manner looking at costs and value for money, which would include prompt instructions to the instructed legal practitioners; early preparation for hearings; thorough consultations.
- 2.2 To pursue alternative dispute resolution (ADR) as a mechanism to respond to litigation and minimise costs, and further foster peaceful co-existence and amicable settlement between the warring parties.
- 2.3 To ensure that judgments for and against the municipality are promptly and properly responded to, either, by noting an appeal or giving guidance in complying with the Court order.
- 2.4 To ensure that procurement of legal practitioners in municipalities is done in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

3. DEFINITIONS

Definitions in this Policy, unless the context otherwise indicates.

Words/Terms	Definition (with examples if required)
Accounting Officer	Means an accounting officer as defined in the Local Government: Municipal Finance Management Act, 56 of 2003
Legal Processes	Means any civil law suit or criminal prosecution instituted for or against the municipality
Legal Services	Means any form of legal advice, or drafting of document, or representation of any person that requires the expertise of a person trained in the practice of law
Legal Practitioner	Means an attorney or advocate

4. APPLICATION AND SCOPE

This policy applies to all officials and all councilors in Mphashe Municipality in particular those involved in litigation management.

5. LEGISLATIVE FRAMEWORK

- Constitution of the Republic of South Africa of 1996
- Labour Relations Act, 1995 (Act No.66 of 1995) as amended
- Basic Conditions of Employment Act (Act 75 of 1997) as amended by Act 20 of 2013
- Employment Equity Act (Act 55 1998) as amended by Act 47 of 2013
- Promotion of Administrative Justice Act, 2000 (Act No.3 of 2000)
- Promotion of Access to the Information Act , 2000(Act No 2 of 2000)
- Promotion of Equity and Prevention of Unfair Discrimination Act (Act No 4 of 2000)

- Intergovernmental Relations Framework Act, 2005
- Institution of legal proceedings against certain organs of State, 2002 (Act No. 40 of 2002)
- Local Government: Municipal Structures Act, 1998 (Act No. 117 of 1998)
- Local Government: Municipal Systems Act, 2000 (Act No. 32 of 2000)
- Local Government: Municipal Finance Management Act 2003 (Act No.56 of 2003)
- Court Rules

6. PRINCIPLES

6.1 Respect for the rule of law

The municipality acknowledges that as an organ of State it must obey the law and that its functionaries cannot exercise power unless authorized by law. Any decision or conduct taken by an unauthorized functionary may be declared null and void and set aside through litigation.

6.2 Accountability and Transparency

Municipality as an organ of State must be accessible and that must be able to respond to its communities, The duty of accountability requires that a municipality must be able to explain its actions and decisions when required to do so.

It is further acknowledged that failure to observe principles of accountability and transparency may result in litigation.

6.3 Fairness

This principle relates to commitment in the observation of a fair procedure when dealing with individuals and members of the public in general as imposed by the Constitution and legislation. It is acknowledged that decisions of local government are reviewable in Court and therefore observing a fair procedure is imperative and is also a measure to mitigate incidents of litigation.

6.4 Professionalism

The staff that is entrusted to handle litigation is expected to maintain a high standard of professional ethics. Confidentiality is paramount in handling all municipality related litigations.

6.5 Value for money

In relation to litigation management, the principle of value for money relates to the local government's commitment to the principle of rule of law thus avoiding unnecessary litigation. It also refers to ensuring that legal practitioners that are instructed carry out the mandate in a competent and timely manner.

7. ROLE PLAYERS

7.1 Municipal Council

In terms of the Constitution, the executive authority of a municipality is vested in its Municipal Council. A decision to institute legal action or defend it is vested in the Municipal Council, unless that authority is delegated in writing to a relevant official in terms of section 59 of the Local Government: Municipal Systems Act.

7.2 Accounting Officer

The MFMA and its regulations prescribe specific powers to the Accounting Officer. Consequently, it is the responsibility of the accounting officer to ensure that the municipal litigation management is in accordance with this policy.

Municipal council must delegate to the Accounting Officer a decision to initiate, defend or oppose litigation matters to avoid defaults.

7.3 Municipal Legal Advisory Services

The municipality must have its own in-house legal personnel. Management of litigation of the municipality is the responsibility of the Municipal Management duly assisted and advised by the municipal Legal Advisor. Professional staff of municipal legal advisory services must have necessary competencies, qualifications, expertise and must have practical knowledge of litigation process and must be persons who qualify to practice as either Attorneys or Advocates.

It is imperative for the municipalities to adequately capacitate legal advisory services personnel to deal with complex matters as people that are handling litigation.

8. Procurement of Legal Services from external legal practitioners

In terms of section 217(1) of the Constitution, when an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

Procurement of legal services from external legal practitioners therefore must be done in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. No services from a practitioner may be procured by a municipality unless it is done in terms of the municipal supply chain management policy.

Municipalities must therefore develop a database of legal practitioners to ensure equitable distribution of work. Local firms and previously disadvantaged firms must be taken into consideration when procuring legal services.

9. LITIGATION PROCESS

- 9.1 Litigation is regulated by the rules of the relevant court and requires strict adherence to time limits in order to avoid adverse orders/judgments and punitive costs orders.
- 9.2 The court papers must upon receipt be referred to a municipal legal advisor to ensure adherence with the rules of the court and prescribed time frames. A municipal legal advisor must immediately initiate contact with the relevant directorate in order to receive necessary information which will be used to formulate an advice to the accounting officer and / or municipal council on whether or not an application or action must be opposed or defended. In appropriate circumstances, a municipal legal advisor may hold a consultation with the relevant department.
- 9.3 Relevant departments of the municipality must adhere to time period as may be prescribed by a municipal legal advisor and must at all times avail themselves when information is requested. Upon receipt of requested information, the legal advisor must request instructions from the accounting officer on whether or not the matter must be opposed or defended. The request of instruction must at least explain to the accounting officer the following:
 - (a) The cause of action;
 - (b) The relief sought against the department;
 - (c) Advice on the prospects of success if the matter is defended or opposed;
 - (d) Any possibilities to initiate alternative dispute resolution mechanism;
 - (e) Recommendations.
- 9.4 On receipt of instructions from the accounting officer or municipal council, the legal advisor will prepare formal instructions to legal practitioner as may be prescribed in the database. All legal processes, notices related to the matter will be handled by the legal practitioner once they have been instructed in writing.
- 9.5 A municipal legal advisor will regularly liaise with the municipal manager on the matter and provide necessary updates to the department. It is also the responsibility of the municipal legal advisor to ensure that responsible officials are available for further consultations and provision of further information and documentation as may be required by the legal practitioner in brief. In appropriate circumstances, a municipal legal practitioner may, together with the legal practitioner on brief as well as the representative of the relevant department, attend all court hearings and pre-hearing conference on the matter.

10. LITIGATION REGISTER

- 10.1 Municipal Legal Advisors must develop and maintain a register of all litigation matters in which the municipality is involved.
- 10.2 The register will include at least the following information:
 - (a) The court where the matter was or is to be heard;
 - (b) The case number;
 - (c) The names of the parties;
 - (d) The type of litigation;
 - (e) The amount involved.

11. LITIGATION RISK ANALYSIS

- 11.1 A Municipal Legal Advisor must conduct annually an analysis of risk factors pertaining to each department's litigation. The risk analysis must assist in the tracking of litigation trends and factors that contribute to the identified trends.
- 11.2 The analysis should also identify potential risks and propose measures to mitigate these risks. To ensure the credibility and authenticity of the analysis, Risk Management Unit will take the lead in the compilation of the final risk analysis document.

12. IMPLEMENTATION OF COURT ORDERS / JUDGMENTS

- 12.1 Compliance with court orders is highly regulated by legislation. Thus in terms of section 165(5) of the Constitution, an order or decision issued by a court binds all persons to whom and organ of state to which it applies.

It is important to note that failure to comply with a court order may have serious implications because the judgment creditor may instruct the sheriff of the court to attach the municipal property.

- 12.2 A Municipal Legal Advisor must, upon receipt of a court judgment advise the Municipal Manager about its implications and facilitate compliance with it unless the municipality decides to appeal against it. The responsibility to comply with the Court Order rests with the Municipal Council or Accounting Officer delegated.
- 12.3 A decision to appeal must be taken within the prescribed timeframes of the relevant court. Municipal Legal Advisors will be responsible for advising the municipalities about the deadlines that apply.

13. LITIGATION AGAINST OTHER ORGANS OF STATE

13.1 In terms of section 41(1) (h) (vi) of the Constitution all spheres of government and organs of state within each sphere must co-operate with one another in mutual trust and good faith by avoiding legal proceedings against one another. Section 40(1) of the Intergovernmental relations framework Act further states that all organs of states must make every reasonable effort to avoid intergovernmental disputes when exercising their statutory powers or performing their statutory functions and to settle intergovernmental disputes without resorting to judicial proceedings.

13.2 Municipalities consequently have a duty to avoid litigation against other organs of state and may not resort to judicial proceedings unless the IGR processes that are prescribed in the IGR Act have been exhausted.

It is worth to note that the provisions of IGR Act, do not apply to the settlement of specific Intergovernmental Disputes in respect of which other national legislation provides resolution mechanisms or procedures or to a dispute concerning an intervention in terms of section 100 or 139 of the Constitution.

13.3 A municipality may however resort to judicial proceedings without having to exhaust the provisions of the IGR Act, if the procedures contemplated by IGR Framework Act will be time consuming and that for purposes of a particular case, following the procedures will deny effective redress to the municipality. A further reason to allow departure from the dispute resolution mechanism prescribed by IGR Framework Act is when the lawfulness of an organ of state's conduct needs to be determined.

14. IMPLEMENTATION OF THE POLICY

This policy will be implemented after approval by the council.

15. REVIEWAL OF THE POLICY

This policy will be reviewed annually.