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MEMORANDUM

TO: Ms. P Magadzi
Chairperson: Portfolio Committee on Transport

COPY: Ms. P.N. Tyawa
Acting Secretary to Parliament

COPY: Adv. M.E Phindela
Acting Deputy Secretary: Core Business

FROM: Adv. Z. Adhikarie
Chief Legal Adviser: Constitutional and Legal Services Office

DATE: 27 November 2017

SUBJECT: National Land Transport Amendment Bill, 2016

REF No.: E7/2017

MESSAGE: Please find attached the above Memorandum for your attention.



Adv. Z. Adhikarie
Chief Legal Adviser



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INTRODUCTION

1. The Portfolio Committee on Transport requested our office to provide a legal opinion on a submission that was received on the National Land Transport Amendment Bill, 2016 [B7-2016] ("Bill"). The submission in question is from the City of Cape Town ("City").

LEGAL QUESTION

2. The City submits as follows:

"The most important issue identified in this comment pertains to the proposed amendments to the allocation of responsibilities between the spheres of government,



particularly in terms of the contracting authority. Through sections 11(1)(b)(viiA), 11(1)(c)(xxvi) and 11(10), the Bill proposes that the province be the default sphere of government for concluding subsidised service contracts, commercial service contracts, negotiated contracts and stopgap contracts. For a municipality to take on these functions, it would need to receive written confirmation from the Minister that it complies with criteria that may be set by the Minister. In addition, the national sphere may enter into these contracts in terms of proposed section 11(1)(a)(xi).

This is a significant shift from the current situation, where under section 11(1)(c)(xxvi) of the NLTA, the municipal sphere is responsible for concluding the above-named contracts with operators for services within their areas. This blanket shift away from municipalities as the contracting authority is contrary to long standing policy and is unconstitutional...

Section 156(1) and Schedule 4B of the Constitution make municipal public transport a municipal function. We believe it is not in alignment with the Constitution to shift to an arrangement where the Minister sets criteria that municipalities must comply with for devolution to take place, and where the Minister must give written confirmation of meeting these criteria."

CONSTITUTION

3. The starting point for an evaluation of this submission must be the Constitution as the City submits that the Bill is unconstitutional. Constitutional supremacy is entrenched in section 2 of the Constitution, which provides that the Constitution is the supreme law of the Republic, law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.¹ The City submits that the Bill is not in alignment with the Constitution in that it requires the Minister to set criteria that municipalities must comply with, even though this is a function assigned to a municipality in the Constitution. The City further submits that the Bill makes the province a default sphere of government for concluding subsidised service contracts,

¹ Section 2 of the Constitution states:

"Supremacy of Constitution

This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."



commercial service contracts, negotiated contracts and stopgap contracts ("contracts"). It is therefore convenient to first deal with the legislative authority of the national government in relation to provinces and municipalities.

4. National government derive the power to legislate from the Constitution. Section 44 of the Constitution provides for the national legislative authority and reads as follows:

"The national legislative authority as vested in Parliament—

(a) confers on the National Assembly the power—

(i) ...

(ii) to pass legislation with regard to any matter, including a matter within a functional listed in Schedule 4, but excluding, subject to subsection (2), a matter within a functional area listed in Schedule 5; ..."

5. Schedule 4 to the Constitution provides for functional areas of concurrent national and provincial legislative competence and Schedule 5 to the Constitution provides for functional areas of exclusive provincial legislative competence. Of importance for this opinion is Schedule 4 to the Constitution. In terms of Schedule 4, Part B, the national and provincial sphere of government have legislative competence on the list of matters listed under that Schedule, to the extent set out section 155(6) and (7) of the Constitution. Public transport and municipal public transport are amongst the areas listed in Schedule 4 to the Constitution.
6. Section 155(6) of the Constitution provides that each provincial government must establish municipalities in its province in a manner consistent with legislation enacted in terms of sections 155(2) and 155(3) of the Constitution and by legislative and other measures must provide for the monitoring and support for local government capacity to enable municipalities to perform their functions and manage their own affairs.
7. Section 155(7) of the Constitution contains a monitoring power for both national and provincial government² and reads as follows:

² De Visser (1999) 189; Steytler & De Visser in 'Local Government of South Africa' in Woolman, S et al Constitutional Law of South Africa (2005) 22-116



"The national government, subject to section 44, and the provincial governments have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in section 156 (1)." (Underlining our emphasis).

8. Section 154 of the Constitution provides for municipalities in co-operative government. This section provides that national government and provincial government, by legislative and other measures, must support and strengthen the capacity of a municipality to manage their own affairs, to exercise their powers and to perform their functions.
9. It is evident from the provisions of sections 154 and 155 of the Constitution that national and provincial governments are tasked with the responsibility to supervise local government. This supervision must take into account the status of municipalities as provided for in section 151 of the Constitution and more especially a municipality's ability or right to exercise its powers or perform its functions. In the **City of Cape Town v Premier of the Western Cape**³ the court stated that the power of the provincial government in terms of section 155(7) of the Constitution to "see to the effective performance" by municipalities of their functions, has to be exercised in a specific way "by regulating the exercise by municipalities of their executive authority referred to in section 156(1)".⁴
10. Sections 154(1) and 155(6) of the Constitution refer to support of local government. Section 154(1) of the Constitution compels national and provincial governments to 'support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions'. Section 155(6) of the Constitution on the other hand provides that provinces, by legislative or other measures, must provide for the monitoring and support of local government. The Western Cape High Court in the case of **Macpherson and Others v Stoffels and**

³ (5933/08) [2008] ZAWCHC 52; 2008 (6) SA 345 (C).

⁴ City of Cape Town v The Premier of the Western Cape paragraph. 46.10



Others⁵ held that 'section 155(6) of the Constitution contemplates legislative or other measures which must first be passed or put in place to provide for the monitoring and support of local government and to promote the development of local government capacity, to enable municipalities to perform their functions and manage their own affairs and that section 155(6) does not authorise ad hoc monitoring of local government or promotion of local government capacity.'

11. It is submitted that what sections 154(1), 155(6) and 155(7) have in mind is legislation or measures of general application, forward-looking, by which municipalities in general in the province may be supported and strengthened. It is my view that this is what the Bill seeks to achieve. The Bill puts in place legislative measures to enable the municipality to perform its function. This is part of the monitoring and support envisaged by the Constitution.

POWERS OF LOCAL GOVERNMENT AS CONTAINED IN THE CONSTITUTION

12. Chapter 7 of the Constitution provides for local government and deals with the status, establishments, powers, functions, composition, duties, objects, co-operative government and other related matters.⁶ Section 151 of the Constitution provides for the status of local government and reads as follows:

"Status of municipalities

- (1) The local sphere of government consists of municipalities, which must be established for the whole of the territory of the Republic.*
- (2) The executive and legislative authority of a municipality is vested in its Municipal Council.*
- (3) A municipality has a right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution.*
- (4) The national and provincial governments may not compromise or impede a municipality's ability or right to exercise its power or perform its functions"*

⁵ 13789/2013 [2013] ZAWCHC 174

⁶ Principles of South African Local Government by B Bekink, page 89 paragraph 3.1



13. Municipalities are given the right to govern all local government affairs, on their own initiative. It is evident from section 151(3) that local government does not have autonomy comparable to what national or provincial sphere have. Municipalities, in terms of section 151(3) are still subject to national and provincial legislation.⁷ Under section 151(4) of the Constitution, when supervising or monitoring a municipality, the national and provincial government are instructed not to compromise or impede a municipality's ability or right to exercise its power or perform its functions. The Bill does not compromise or impede this ability or right as municipalities in that municipalities still have the duty to conclude the contracts listed.
14. Even though the three spheres of government are separate they are subject to the principle of co-operative governance.⁸ In terms of the Constitution the national, provincial and local spheres of government are distinctive, interdependent and interrelated. Co-operative governance requires the system of co-operation and constructive intergovernmental relations within each separate sphere and also across all spheres of government. This principle requires each sphere of government to perform its functions in a spirit of consultation and coordination with each other.⁹ Co-operation between local government and provincial government operates in horizontal and vertical lines. For example, municipalities must not only co-operate with one another but with provincial government as well. These principles give expression to the attributes of 'distinctiveness, interrelatedness and interdependence' granted by the Constitution to the three spheres of government.¹⁰
15. It is against this background that we will discuss the Bill and the powers granted by the Constitution and legislation, be it national or provincial, to monitor and support municipalities.

⁷ Principles of South African local government law by Bernard Bekink page 65, paragraph 7.4

⁸ Section 41 of the Constitution

⁹ Doctors for Life International v Speaker of National Assembly and Others CCT12/05

¹⁰ Section 40(1) of the Constitution; De Visser J Development of local government: a case study of South Africa (2005), 287



LEGAL ANALYSIS

The Bill

16. Clause 7 of the Bill amends section 11 of the Act. At issue is an amendment to section 11(1)(c)(xxvi) which provides as follows:

“(1) The municipal sphere government is responsible for –

...

(xxvi) concluding subsidised service contracts, commercial service contracts, and negotiated contracts contemplated in section 41(1) with operators for services within their areas;”

17. The proposed amendment provides as follows:

“The municipal sphere government is responsible for—

...

(xxvi) concluding subsidised service contracts, commercial service contracts, negotiated contracts, and stopgap contracts contemplated in section 41A with operators for services within their areas; subject to subsections (6) and (9) and after following the prescribed procedures: Provided that the municipality meets the requirements and criteria prescribed by the Minister under subsection (10)(d) and the Minister has certified in writing that it has complied;”

18. The City's submission is that municipal public transport is an exclusive municipal function and the fact that the Bill puts in place a *proviso* that the Municipality must meet the requirements and criteria prescribed by the Minister before it can conclude the list of contracts stated in sub item (xxvi). The City concludes that this is therefore unconstitutional. In our view this is not correct.

19. Clause 7 of the Bill amends section 11 of the Act to provide that municipalities may enter into new contracts for public transport services only when they meet criteria that will be prescribed by the Minister. Provisions have been made to empower



provinces to intervene, and if necessary, enter into the contracts themselves where municipalities do not comply with the prescribed requirements or criteria. This means the province will not enter into contracts on an ad hoc basis but only when the municipality does not meet the requirements or the criteria prescribed will the province enter into a contract. By entering into a contract the province is giving effect to its constitutional obligation bestowed to the province by section 154(1) of the Constitution which requires provincial government to strengthen the capacity of the municipality. This, in our view, is a general non- intrusive manner intended by the Constitution when it gave provinces the obligation to monitor and support municipalities.

20. It is also important to note that public transport and municipal transport are listed in Schedule 4 to the Constitution and therefore they are a functional area of concurrent national and provincial legislative competence. This means the national sphere of government has competency to legislate on these matters. Part B to Schedule 4 gives the right to the national and provincial governments to legislate on those matters to the extent set out section 155(6)(a) and (7) which section is discussed at length above. Moreover the Bill does not take away the contracting duty of a municipality - it simply requires a municipality to meet certain prescribed requirements and criteria. This is to ensure uniformity across provinces and to strengthen and improve the manner in which these contracts are entered into.

CONCLUSION

21. Legislation must be interpreted in light of the Constitution and provisions within the Constitution must be interpreted in light of other provisions contained in the Constitution. Such provisions include Chapter 3 of the Constitution, dealing with cooperative government, and Chapter 7 of the Constitution dealing with local government¹¹; a special role for local government; and contemplated national and provincial legislation, which should be enacted to support and strengthen municipalities. As stated above, the national and provincial government are mandated by the Constitution to monitor and support municipalities, which can be

¹¹ City of Cape Town v Premier of the Western Cape, at paragraph 48.22.1



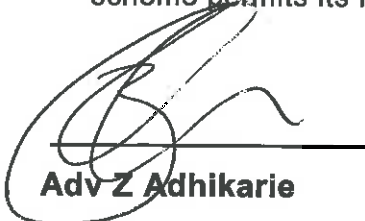
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done by legislative or other measures. We therefore submit that this Bill is a legislative measure envisaged in the Constitution, which the national government will use to monitor and support its provinces and municipalities.

22. It is therefore our view that the Bill is constitutionally sound and that the legislative scheme permits its introduction.



Adv Z Adhikarie
Chief Legal Adviser