



**PARLIAMENT**  
OF THE REPUBLIC OF SOUTH AFRICA

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**MEMORANDUM**

TO: Chairperson, Portfolio Committee on Finance [Mr N Nene MP]

COPY: Secretary to Parliament

FROM: Parliamentary Legal Services [Adv F S Jenkins, Parliamentary Legal Adviser]

DATE: 22 May 2007

**SUBJECT: Tagging of the Municipal Fiscal Powers and Functions Bill [B9-2007] and constitutionality of certain clauses of the Bill**

Our Ref. No. 109 / 07

**MESSAGE:**

Attached please find the opinion as requested.



## Background

1. The Portfolio Committee on Finance (the Committee) requested legal advice on the following matters in regard to the Municipal Fiscal Powers and Functions Bill [B9-2007] (the Bill):
  - (i) Whether the Bill as introduced in the National Assembly (NA) as a section 75 Bill is correct.
  - (ii) The concern raised in the submission of the Institute for Municipal Officers relating to the constitutionality of clause 4 of the Bill dealing with the authorisation of municipal tax, and whether this clause is not restrictive and infringes on the constitutional rights of municipalities.
  - (iii) The concern raised by the South Africa Local Government Association (SALGA) relating to whether clauses 6(d)(ii) and (iii) encroach upon the municipality's constitutional autonomy to determine its budget and / or spending which is beyond the intended regulation of a municipality's power to impose or raise municipal taxes.

## Classification of the Bill

2. A Bill is classified as a section 76 Bill if it deals with a functional area listed in Schedule 4 of the Constitution, or if the Bill deals with the specific matters listed in the Constitution. Sections 76(3) and (4) of the Constitution list these specific sections: namely; sections 44(2) or (6), 65(2), 163, 182, 195(3) and (4), 196, 197, 220(3), or a Bill envisaged in Chapter 13, and which includes any provision affecting the financial interests of the provincial sphere of government. Therefore, if a Bill is neither a Bill amending the Constitution (section 74) nor a money Bill (section 77), it is by default classified as a section 75 Bill if it deals with any matter other than those referred to in section 76.
3. NA rule 243 provides that a Cabinet member introduces a Bill in the Assembly by submitting to the Speaker a supporting memorandum attached to a copy of the said Bill stating, amongst others, whether the Bill is introduced as a section 75 Bill, a section 76(1) Bill, a money Bill or a mixed section 75/76 Bill. Usually such supporting memorandum is based on advice from a State Law Adviser.
4. Paragraph 6 of the Memorandum to the Bill, in this instance, states that the State Law Advisers and the National Treasury are of the opinion that the Bill must be dealt with in accordance with the procedure prescribed by section 75 of the Constitution. As such the correct procedure is to introduce the Bill as a section 75 Bill.

7. Section 229 of the Constitution provides for municipal fiscal powers and functions. Specifically, section 229(1)(b) provides that a municipality may impose, amongst others, other taxes if authorised by national legislation, provided that this national legislation may not authorise a municipality to impose income tax, value-added tax, general sales tax or customs duty. These taxes are clearly inappropriate for municipalities to impose (see *In re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (1) BCLR 1253 (CC), at para 305).

8. Clause 4 of the Bill provides as follows:

*5 by a municipality, group of municipalities or organised local government authorise a municipal tax.*

*(2) Prior to authorising a municipal tax the Minister—*



9. The only limitation in section 229(1)(b) of the Constitution is that the authorising legislation may not allow municipalities to impose income tax, value-added tax, general sales tax or customs duty.
10. Compared to section 229(1)(a) that entrenches the constitutional rights of municipalities to impose rates on property and surcharges on fees for services provided by or on behalf of a municipality, section 229(1)(b) provides that the right of municipalities to impose other taxes is wholly dependent on national legislation, with the proviso referred to above.
11. It may also be mentioned that clause 4 of the Bill foresees that the Minister will exercise his or her authority to allow a municipality, group of municipalities or organised local government to impose a municipal tax based on clear criteria set out in clause 6; i.e. by way of regulations. In my opinion the exercise of this authority is rational and rule based rather than arbitrary. As such the provision would probably survive constitutional muster around the question whether the principal act confers arbitrary authority on the Minister (see *Dawood and Another v Minister of Home Affairs and Others*; *Shalabi and Another v Minister of Home Affairs and Others*; *Thomas and Another v Minister of Home Affairs and Others* 2000 (8) BCLR 837 (CC) at para 58).
12. The question whether clause 4 of the Bill is too restrictive and infringes on the constitutional rights of municipalities must therefore be answered in the negative.

#### **Constitutionality of clauses 6(d)(ii) and (iii)**

13. Clauses 6(d)(ii) and (iii) provides as follows:

##### ***Regulations regarding imposition and administration of municipal tax***

##### ***6. The regulations—***

##### ***(d) may—***

...

*(ii) in respect of a specific purpose tax, limit the purpose for which revenue derived from the collection of the municipal tax may be utilised;*

*(iii) specify that a percentage of the revenue derived from the collection of the specific purpose tax must be utilised for a specific purpose;*

14. Clauses 6(d)(ii) and (iii), read with clauses 4(3) and 10, gives the Minister of Finance a discretion whether to determine in regulations the purpose for which the revenue, or a percentage of the revenue,



derived from a specific purpose tax may be utilised. In other words, the collection of the tax would be conditional upon spending such revenue, or a percentage of the revenue, on a specific purpose.

15. Clause 2(b) provides that the Bill, which must be read to include the abovementioned provisions, aims amongst others, to "ensure that municipal fiscal powers and functions are exercised in a manner that will not materially and unreasonably prejudice national economic policies, economic activities across municipal boundaries, or the national mobility of goods, services, capital or labour". In so doing the Bill gives effect to section 229(2) of the Constitution, from where the wording of clause 2(b) is borrowed. The Minister's discretion to make the said regulations is also subject to section 229(2).
16. In my opinion the regulation of revenue spending derived from a specific purpose tax falls within the scope of section 229(2). As such the regulation of municipal fiscal power related to imposing other taxes is consistent with the Constitution.
17. It may also be mentioned that a municipality's power to determine its budget and / or spending is limited in the Constitution; for example, conditional grants from national government (see section 227(1)).
18. In my opinion the question whether clauses 6(d)(ii) and (iii) encroach upon the municipality's constitutional autonomy to determine its budget and / or spending which is beyond the intended regulation of a municipality's power to impose or raise municipal taxes, must answered in the negative.

A handwritten signature in black ink, appearing to read 'F S Jenkins', written over a horizontal line.

Adv F S Jenkins

Parliamentary Legal Adviser