09 September 2021

Dear Honourable Madam Speaker ,

National Land Transport Amendment Bill

1 The National Land Transport Amendment Bill ("the Bill") has been submitted to me for assent and signing into law in terms of section 79 of the Constitution of the Republic of South Africa.

2 I have considerd the Bill and I also sought legal advice on its constitutionality.

3 Given my reservations about the constitutionality of aspects of the Bill, I cannot assent to it and am therefore referring it back to the National Assembly in terms of section 79(1) of the Constitution.

The nature of the issue

4 Section 11 of the existing National Land Transport Act 5 of 2009 ("the current Act") sets out the respective responsibilities of the three spheres of government: national, provincial and local regarding national land transport.

5 Clause 7 of the Bill seeks to amend that section and in doing so it will alter the statutory responsibilities of the three spheres of government.

6 In submissions by the South African Local Government Association and the City of Cape Town, it is contended that the manner in which clause 7 does so is not consistent with the Constitution.

The constitutional framework

7 Under the Constitution, municipalities have original constitutional powers. This has been made clear by the Constitutional Court.[1] It is also clear from section 151 of the Constitution. It provides, inter alia, that:

> *"(3) A municipality has the 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 or a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions."*

8 One of the matters over which municipalities have competence is "municipal public transport" which appears in Schedule 4B of the Constitution.

9 While Parliament is competent to pass laws regarding matters in Schedule 4B, that Schedule makes clear that Parliament may do so only "*to the extent set out in section 155 (6) (a) and (7)*". Sections 155(6) and (7) of the Constitution in turn provide in relevant part as follows:

> *"(6) Each provincial government must establish municipalities in its province in a manner consistent with the legislation enacted in terms of subsections (2) and (3) and, by legislative or other measures, must-*
>
> *(a) provide for the monitoring and support of local government in the province….*
>
> *(7) 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)."*

10 The Constitutional Court has repeatedly considered what the effect of these provisions is on the extent of Parliament's powers to make laws on municipal functions.

11 It has done so in numerous cases. Of particular assistance are a sequence of six cases[2] dealing with national or provincial legislation regarding "municipal

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[1] *City of Johannesburg Metropolitan Municipality v Chairman of the National Building Regulations Review Board and Others* 2018 (5) SA 1 (CC) para 21.

[2] The six cases are:

- *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 (6) SA 182 (CC);
- *Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd and Others* 2014 (1) SA 521 (CC);

planning" issues. "Municipal planning" – like "municipal transport" – is a functional area listed in Schedule 4B of the Constitution.

12 There are three main principles that emerge from the cases.

13 The first principle is that national and provincial governments are permitted to "*regulate*" the exercise by local government of its Schedule 4B functions.

13.1 This includes the power to prescribe "*norms and standards*" for this purpose.

13.2 This principle – and its limits – are explained in the Constitutional Court's decision in *Habitat Council:*

> *"... The Constitution expressly envisages that national and provincial governments have legislative and executive authority to see to the effective performance by municipalities of their planning functions. This, the other two spheres of government can achieve by "regulating the exercise by municipalities of their executive authority" in relation to municipal planning.*
>
> *But the powers in section 155(7), this Court has held, are "hands-off". In the First Certification case, the Court described those powers thus:*
>
> > *"In its various textual forms 'monitor' corresponds to 'observe', 'keep under review' and the like. In this sense it does not represent a substantial power in itself, certainly not a power to control [local government] affairs, but has reference to other, broader powers of supervision and control.*
> >
> > ...
>
> *It follows that "regulating" in section 155(7) means creating norms and guidelines for the exercise of a power or the performance of a function. It does not mean the usurpation of the power or the performance of the function itself. This is because the power of regulation is afforded to national and provincial government in order "to see to the effective performance by municipalities of their functions". The constitutional scheme does not envisage the province employing appellate power over municipalities' exercise of their planning functions. This is so even where the zoning, subdivision or land-use permission has province-wide implications."*[3]

- *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council and Others* 2014 (4) SA 437 (CC);
- *Tronox KZN Sands (Pty) Ltd v KwaZulu-Natal Planning and Development Appeal Tribunal and Others* 2016 (3) SA 160 (CC);
- *Pieterse NO v Lephalale Local Municipality* 2017 (2) BCLR 233 (CC); and
- *City of Johannesburg Metropolitan Municipality v Chairman of the National Building Regulations Review Board and Others* 2018 (5) SA 1 (CC).

[3] *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council and Others* 2014 (4) SA 437 (CC) at paras 21 – 22 (emphasis added).

14 The second principle is that national and provincial governments are not generally permitted, via legislation, to assume the local government functions for themselves.

14.1 This emerges especially clearly from the sequence of six cases discussed.

14.2 In those cases, the national or provincial legislation had set up some form of decision-making tribunal or appeal tribunal at provincial or national level to deal with planning decisions. The Constitutional Court repeatedly made clear that this was impermissible because it amounted to the national or provincial government assuming the functions of local government for themselves.

14.3 As the Court explained in the *National Building Regulations* case:

> *"At first blush [section 155(7)] may be read as authorising the national and provincial spheres to exercise the executive authority of municipalities. But when carefully read it does not. What section 155(7) means is that the national and provincial spheres may exercise their legislative and executive powers to enable municipalities to exercise their own powers and perform their own functions. Therefore, the exercise of legislative and executive authority by these spheres is limited to capacitating municipalities to manage their own affairs and regulating how this must be done. It does not mean that the national sphere may itself take over and exercise the executive authority of a municipality."*[4]

15 The third principle deals with the narrow instance where provincial governments may assume the powers of local governments. They may do so only when the requirements of section 139 of the Constitution are met and when the section 139 procedures are followed.

15.1 Section 139 contains specific and detailed requirements and procedures for provincial governments to intervene in local governments. Those must be complied with for such intervention or assumption of powers to be valid.

15.2 Section 139(1), for example, provides that "*where a municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the relevant provincial executive may intervene by taking appropriate steps to ensure fulfilment of that obligation…*"

15.3 In *Johannesburg Development Tribunal*, the Court explained:

> *"The scope of intervention by one sphere in the affairs of another is highly circumscribed. The national and provincial spheres are permitted*

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[4] *City of Johannesburg Metropolitan Municipality v Chairman of the National Building Regulations Review Board and Others* 2018 (5) SA 1 (CC) at para 34 (emphasis added)

> *by sections 100 and 139 of the Constitution to undertake interventions to assume control over the affairs of another sphere or to perform the functions of another sphere under certain well-defined circumstances, the details of which are set out below. Suffice it now to say that the national and provincial spheres are not entitled to usurp the functions of the municipal sphere except in exceptional circumstances, but only temporarily and in compliance with strict procedures. This is the constitutional scheme in the context of which the powers conferred on each sphere must be construed."*[5]

16 I have reservations about whether parts of clause 7 of the Bill complies with these principles.

The reservations

Clause 7(a) of the Bill – national contractual competence

17 Section 11(1)(a)(xi) of the current Act provides that one of the responsibilities of national government is "*acting as contracting authority for subsidised service contracts, interim contracts, current tendered contracts and negotiated contracts concluded in terms of the Transition Act*". The Transition Act is the now-repealed National Land Transport Transition Act 22 of 2000.

18 Clause 7(a) of the Bill would substitute that sub-section to provide that one of the responsibilities of national government is:

> *"concluding subsidised service contracts, negotiated contracts, and stopgap contracts contemplated in section 41A, with operators".*

19 The difficulty with clause 7(a) is that it appears to confer on national government the power to conclude a wide range of contracts concerned – irrespective of whether they are national in scope, provincial in scope or merely local in scope. If this is so, then clause appears to be in conflict with the second principle set out in paragraph 14 above.

Clause 7(b) of the Bill - provincial contractual competence

20 Section 11(1)(b) of the current Act deals with provincial responsibilities regarding land transport.

21 Clause 7(b) of the Bill would add two new sub-sections into section 11(1)(b). It would therefore confer on provinces the following additional responsibilities:

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[5] *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 (6) SA 182 (CC) at para 43 (emphasis added)

"*(viiA)* *concluding negotiated contracts, subsidised service contracts, commercial service contracts, and stopgap contracts contemplated in section 41A, with operators for services provided in the province where the relevant municipality or municipalities do not meet the requirements or criteria prescribed by the Minister under subsection 10(d), after following the prescribed procedures, which may include issuing directives in terms of subsection 10(b);*

(viiB) *concluding contracts for dedicated services for transporting scholars contemplated in section 72, unless the Minister directs otherwise under subsection (10)(b) and;"*

22 To understand the effect of this clause, one must consider it together with clause 7(n) which proposes inter alia adding the following new section 11(10).

23 The effect of clause 7(b) – in introducing section 11(1)(viiA) – is essentially that where the relevant municipality does not meet the requirements set out by the Minister, the provincial sphere of government may step in and conclude the relevant contracts with the operators instead of the municipality doing so.

24 I have reservations regarding whether this is constitutionally permissible.

24.1 It appears to me that this is likely not mere regulation nor the setting of norms and standards, as is permitted by the first principle articulated in paragraph 13 above.

24.2 Instead, it appears to allow provinces themselves to conclude the relevant public transport contracts with operators. This appears likely in breach of the second principle articulated in paragraph 14 above.

24.3 This is especially so as the provinces are enabled to do so without complying with the strict procedures and requirements for provincial intervention set out in section 139 of the Constitution. There therefore appears to be no compliance with the third principle articulated in paragraph 15 above.

<u>Clauses 7(h) of the Bill – municipal contractual competence</u>

25 Section 11(1)(c) of the current Act deals with municipal responsibilities regarding land transport.

26 Clause 7(h) of the Bill would seek to substitute the current section 11(1)(c)(xxvi) with the following as one of the municipal responsibilities regarding land transport:

*"concluding subsidised service contracts, commercial service contracts, **[and]** negotiated contracts, and stopgap contracts contemplated in section **[41(1)]** 41A with operators for services within their areas, subject to subsection (6) and (9) and after following the prescribed procedures: Provided that the municipality meets the requirements and criteria prescribed by the Minister under section 10(d) and the Minister has certified in writing that it has complied."*

27 The Bill in turn would introduce an amended section 11(6) and a new section 11(9).

28 I have reservations about the provision concerned making the power at issue subject to the new section 11(6). This is because, as I explain below in dealing with clause 7(m), I have reservations about the constitutionality of the new section 11(6).

Clause 7(i) of the Bill – exemption from the proviso

29 Clause 7(i) of the Bill would in turn seek to add a new section 11(1A) to the Act.

30 Read on its own, the clause does not seem to raise constitutional difficulties. However, the clause is part of the package of amendments that the Bill makes to the division of responsibilities between national, provincial and local government and in respect of which I have reservations regarding constitutionality. To that extent, I have reservations about the constitutionality of this clause.

Clauses 7(j) to (l) of the of the Bill – assignment of powers

31 Sections 11(2) to 11(5) of the current Act provide a fairly extensive power for the Minister or relevant MEC to assign functions in sections 11(1)(a) or 11(1)(b) to municipalities.

32 Clauses 7(j) to (l) of the Bill proceed to remove some of these assignment powers entirely (particularly the powers of the MEC) and to constrain other assignment powers (particularly of the Minister).

33 Section 156(4) of the Constitution deals the assignment of powers to a Municipality. Its effect is to require that national and provincial government assign matters in Part A of Schedule 4, for example "public transport", if it would be most effectively administered locally and the municipality has capacity to administer it.

34 It is not clear whether the intent and effect of clauses 7(j) to (l) of the Bill is to preclude such assignment. If that were to be their effect, that would appear to be unconstitutional.

Clause 7(m) of the Bill – existing contracts

35 Clause 7(m) of the Bill proposes amending current section 11(6) of the Act as follows:

> *"Where a province is performing **[a function contemplated in subsection (1)(a)]** the function of acting as contracting authority for contracts concluded under the Transition Act on the date of commencement of this Act, it must continue performing that function, **[unless that function is assigned to a municipality by the Minister]** until those contracts have lapsed or expired or been cancelled, or replaced by other contracts or arrangements in terms of this Act."*

36 The essence of the new section 11(6) is that, where a contract was concluded under the Transition Act, the function of contracting party "*must*" continue to be performed by the province – until the contracts have lapsed or expired or been replaced. This appears to afford no flexibility to the provinces and appears to apply:

36.1 Even if the contract concerned is exclusively for public transport within a specific municipality; and

36.2 Even if the municipality concerned has the capacity to administer the contract.

37 The amendment would also delete the provision that would allow for the function to be assigned by the Minister and instead vests the contracting authority automatically in the province.

38 I have reservations about whether this is consistent with the Constitution. In particular, I have concerns about whether the apparent rigidity that is produced by the section – that it precludes the Minister and provinces from assigning these functions to the municipalities irrespective of the circumstances – is consistent with the principle set out in paragraph 14 above.

Conclusion

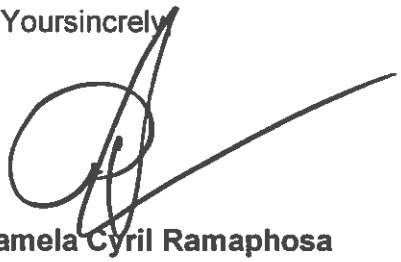
39 In the circumstances, I have reservations about the constitutionality of clauses 7(a), 7(b), 7(h), 7(i), 7(j), 7(k), 7(l) and 7(m) of the Bill.

40 While it is possible that some of these reservations could be resolved by means of interpretation, it appears to me that at least some likely cannot be resolved in this way.

41 In the circumstances, and given that the clauses identified form part of a package of amendments regarding the respective responsibilities of national, provincial and local government concerning land transport, it is appropriate and desirable for all of the clauses identified to be referred back to the National Assembly for reconsideration.

42 I therefore refer the Bill back to the National Assembly for reconsideration in terms of section 79(1) of the Constitution.

Yoursincrely



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