**ETHEKWINI MUNICIPALITY**

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 07 March 2018

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**PRESENTATION TO THE STANDING COMMITTEE ON THE AUDITOR-GENERAL:**

***COMMENTS ON THE DRAFT PUBLIC AUDIT AMENDMENT BILL, 2017***

**7 March 2018**

**Fountains Hotel, St. George’s Mall**

**Cape Town**

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1. On 19th February 2018, eThekwini Municipality submitted via e-mail, comments on the *Draft Public Audit Amendment Bill, 2017*. While the Municipality stands by its comments as submitted, we would like to use this limited opportunity afforded to us to amplify a portion of our written comments insofar as it relates to the constitutionally invalid assumption of a Municipality’s ‘debt collecting and recovery processes’ by the Auditor-General under the proposed amendments to section 5 of the Public Audit Act of 2004, ie section 5(1B) of the Amendment Bill and ancillary provisions.
2. **The Legislative Framework: Auditor General and Local Government**
	1. Afford us this opportunity to remind the Standing Committee of the legislative framework of the AG and Local Government.
	2. First and foremost, section 2 of the Constitution provides that the Constitution is the supreme law of the Republic and that law or conduct inconsistent with it is invalid, and the obligations imposed by the Constitution must be fulfilled. Accordingly, any proposed amendments to the Public Audit Act must be consistent with the powers afforded to the Auditor-General by the Constitution.
	3. The Institution of the Auditor-General as founded under chapter 9 of the Constitution, provides under paragraph 188(1)(b), that the Auditor-General has the authority to audit and report on the accounts, financial statements and financial management of all municipalities. This authority does not extend beyond an audit function which encompasses the examination and investigation of aspects to be reported on in terms of the Principal Act. It is unequivocally submitted that this function does not entail any form of debt collection or recovery processes, as proposed under 5(1B), and to do so will result in the unconstitutional and unlawful usurping of the executive function of a municipal council.

2.4. Section 41 of the Constitution lists the principles of co-operative governance and intergovernmental relations and provides that all spheres of government and all organs of state within each sphere must, *inter alia*–

(i) respect the Constitutional status, institutions, powers and functions of the government in the other spheres;

(ii) *not assume any power or function except those conferred on them in terms of the Constitution*; and

(iii) exercise their powers and perform their functions in a *manner that does not encroach* on the geographical, *functional or institutional integrity* of government in another sphere.

* 1. The executive and legislative authority of a municipality is vested in its municipal council, as provided for under Section 151 of the Constitution. This section further provides that 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. In addition, section 160(1)(a) of the Constitution enables a Municipal Council to make decisions regarding the exercise of all the powers and the performance of all the functions of the municipality.
	2. Section 4 of the Municipal Systems Act of 2000 echoes the constitutional competence of a municipal council to exercise its executive and legislative authority and to do so without improper interference. In addition, section 11 provides that the executive and legislative authority of a municipality is exercised by the municipal council and that the council takes all the decisions of the municipality.
	3. With regard to fiscal powers and functions, section 32 of the Municipal Finance Management Act of 2003 legislates on *“Unauthorised, irregular, or fruitless and wasteful expenditure”*, which, as an aside we submit is similar to the concept of an “undesirable audit outcome” as introduced in the amendment bill. Section 32 provides for instances under which the accounting officer, a political office bearer or an official of a municipality may be held liable for unauthorised expenditure. More importantly, subsection (2) authorises a municipality to recover unauthorised, irregular or fruitless and wasteful expenditure from the person so liable. A municipal council is afforded the power to institute an investigation into the unauthorised expenditure and may certify such debt to be irrecoverable and written off if the circumstances justify such a decision. Further, the writing off of unauthorised expenditure does not prevent any criminal or disciplinary proceedings from being instituted against a person charged with the commission of an offence and cannot be used as an excuse in such proceedings.
	4. Parallel to Section 32 of the MFMA, Section 5(1B) of the proposed amendments to the Principal Act authorises the AG to recover from the responsible Accounting Officer or Accounting Authority, as the case may be, any loss resulting from unauthorised, irregular, fruitless and wasteful expenditure, and any other losses suffered by the auditee, including money due to the State which has not been collected or money which has been improperly paid, if in the AG’s opinion, a satisfactory explanation for the failure to recover the loss is not furnished by the relevant accounting officer or accounting authority.
	5. It is our firm belief that this function, as enunciated under 5(1B), pushes the goal post of the AG from an ‘audit function’ to a ‘recovery function’ which, we respectfully submit, amounts to the usurping of the executive function of a municipal council and is constitutionally unfounded. Section 32, in no uncertain terms, correctly identifies a municipal council as the relevant body to investigate and consider the implications of unauthorised expenditure of a municipality and to make a pronouncement on the recovery of same from the individual responsible. This executive function is a natural consequence of the intended design and function of a municipal council as constitutionally legislated.
	6. One cannot circumvent the Constitutional design by merely extending the ambit of the AG’s role to include the recovery processes within the municipal sphere via an Amendment Act of Parliament. If it was legally competent to effect a disguised amendment to the Constitution in the manner proposed by the Bill (which it is not), such a course of action would violate the authority of the Constitution as the supreme law of the country. Even more unsettling is that the proposed amendment intends recovered municipal funds to be paid into the National Revenue Fund or the Provincial Revenue Fund. This simply cannot be. Not only is it constitutionally unsound and nonsensical, but it amounts to the unjust enrichment of national and provincial revenue funds with funds which should be returned to municipal coffers.
	7. Over the years, we have noticed with great concern and much apprehension, the attempt by National and Provincial Government to usurp the functions of Local government and diminish the constitutional autonomy afforded to Municipalities. The re-allocation to a Chapter 9 Institution of constitutional powers afforded, in the first instance, to local government cannot be circumvented by an amendment to a National Act. Municipalities cannot conscientiously sit idle and witness the erosion of its autonomy. Our constitutional dispensation requires us to fight for the preservation of our autonomy and for the respect of the executive authority of municipal councils, even if this means taking this fight to the highest court in our land.
	8. In the case of *Tronox v KZN Planning and Development Appeal Tribunal and Others*[[1]](#footnote-1), the Constitutional Court dealt with the issue of whether an appeal tribunal set up by the KZN Province to hear appeals arising from planning decisions taken by municipalities passes constitutional muster. The Court emphatically concluded that it does not. Making reference to other cases heard by the Constitutional Court such as “*Gauteng Development Tribunal*”[[2]](#footnote-2), “*Habitat Council*”[[3]](#footnote-3) and “*Lagoonbay*”[[4]](#footnote-4), the Constitutional Court emphasised the importance of respecting the autonomy of local government and not usurping powers not intended for national and provincial governments.
	9. In *Gauteng Development Tribunal*, the court held that “the national and provincial spheres cannot, by legislation, give themselves the power to exercise executive municipal powers or the right to administer municipal affairs. The mandate of these two spheres is ordinarily limited to regulating the exercise of executive municipal powers and the administration of municipal affairs by municipalities.”
	10. Van Der Westhuisen J held that *Gauteng Development Tribunal* provided a ringing affirmation of the need for the various spheres of government to “respect the constitutional status, institutions, powers and functions of government in the other spheres” and “not assume any power or function except those conferred on them in terms of the Constitution.
	11. In *Lagoonbay*, Mhlantla AJ summarised the Constitutional Court’s approach to autonomous municipal power by stating that, barring exceptional circumstances, national and provincial spheres of government are not entitled to usurp the functions of local government and that the constitutional vision of autonomous spheres of government must be preserved.
	12. The general vision of distinct spheres of government outlined in *Gauteng Development Tribunal* and the emphatic call for municipal autonomy in *Habitat Council*, with reliance on *Lagoonbay’s* guidelines,are most certainly applicable in the present case presented by the proposed amendments to the Public Audit Act. Moreover, the finding in *Gauteng Development Tribunal* that the a national and provincial sphere of government cannot, by legislation, give itself the right to *administer* municipal affairs is pertinent.
	13. It is further submitted that any attempt at the argument that National Government is acting in terms of section 155(7) in regulating the exercise by municipalities of their executive authority, must fail. The Constitutional Court pronounced on the interpretation of Section 155(7) in the *First Certification[[5]](#footnote-5)* case. The Court interpreted this power to correspond to “observe” and “keep under review”. It does not represent a substantial power and does not bestow additional or residual powers which intrude into the domain of local government. What the Constitution seeks to realise is a structure for local government that, on one hand, reveals a concern for the autonomy and integrity of local government and prescribes a *hands-off relationship* between local government and other spheres of government, and on the other, acknowledges the requirements that higher levels of government monitor functioning and intervene where such functioning is deficient in a manner that compromises this autonomy. 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.
	14. It is our hoped that, in light of the various judgments highlighted above, sanity will prevail and the offending provisions in the Amendment Bill will be cleansed in the colours of our constitutional order.
1. **CONCLUSION**

3.1. Any ordinary law is subject to the Constitution and must be consistent with the Constitution. Any law that is inconsistent with the Constitution can be declared unconstitutional. It is our considered view that the Amendment Bill in its current form encroaches and impedes on the powers of the municipality as confirmed by section 151 of the Constitution.

3.2. It is also our considered opinion, and a constitutional fact, that in so far as the Amendment Bill attempts to usurp a municipal council’s power to investigate unauthorised, irregular, or fruitless and wasteful expenditure and to consider the recovery of same from the official or political office bearer implicated, the proposed amendments to the Public Audit Act of 2004–

1. contravenes Section 151(4) of the Constitution by limiting the municipality’s ability to exercise its powers without *national or provincial government compromising or impeding such ability.*
2. contravenes Section 160(1) of the Constitution;
3. is at odds with section 188 of the Constitution and section 32 of the Municipal Finance Management Act of 2003; and
4. disregards the supremacy clause contained in Section 2 of the Constitution

3.3. In light of the issues highlighted above, we submit that the Bill must be revisited to eliminate encroachment into local government sphere.

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**eThekwini Municipality**

1. *Tronox KZN Sands (Pty) Ltd v KwaZulu-Natal Planning and Development Appeal Tribunal and Others* [2016] ZACC 2 [↑](#footnote-ref-1)
2. *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* [2010] ZACC 11; 2010 (6) SA 182 (CC); 2010 (9) BCLR 859 (CC) (*Gauteng Development Tribunal*) [↑](#footnote-ref-2)
3. *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v Habitat Council and Others* [2014] ZACC 9; 2014 (4) SA 437 (CC); 2014 (5) BCLR 591 (CC) (*Habitat Council*) [↑](#footnote-ref-3)
4. *Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd and Others* [2013] ZACC 39; 2014 (1) SA 521 (CC) [↑](#footnote-ref-4)
5. *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26; 1996 (4) SA 744 (CC) [↑](#footnote-ref-5)