

# RAILWAY SAFETY BILL

2021

**Tshepo Kgobe**

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# THE GAUTENG RAPID RAIL LINK



- Concession Agreement concluded, between Gauteng Provincial Government and Bombela Concession Company, in September 2006 following Treasury Regulation 16 approvals, which makes the Gautrain Project a Public-private Partnership.

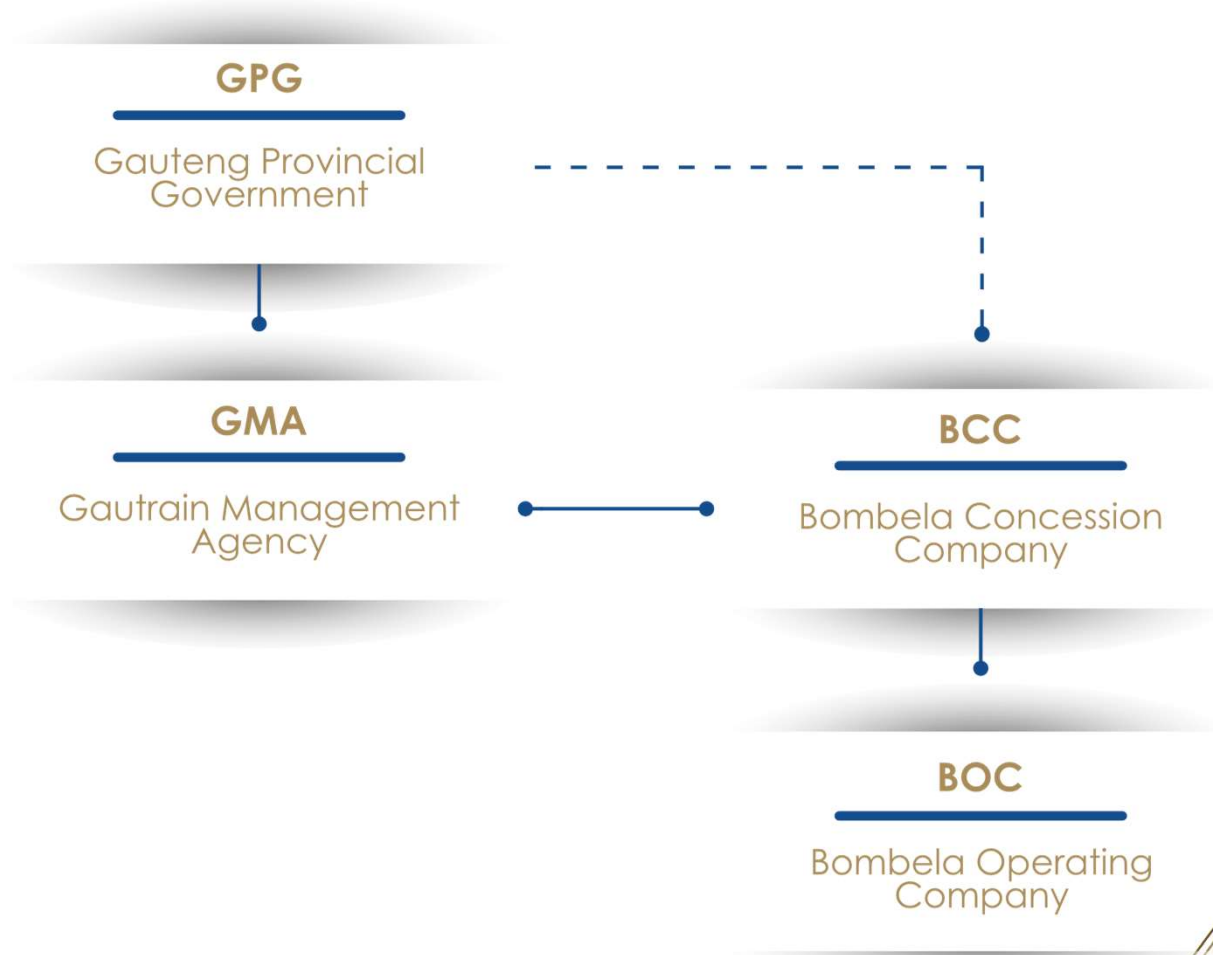


- In terms of CA, Bombela is, until March 2026, exclusively responsible for the design, construction, partial financing, operation, maintenance, and transfer of the Gautrain System to the Gauteng Provincial Government, in 2026, when the CA lapses.



- Implied in Bombela's exclusive right to operate the system is a duty to ensure possession of a valid safety permit and adherence to its conditions.

# GAUTRAIN PUBLIC-PRIVATE PARTNERSHIP



# GAUTRAIN PUBLIC-PRIVATE PARTNERSHIP ROLE-PLAYERS

## GPG

### Gauteng Provincial Government:

The public partner (owner) and the primary promoter of the Gautrain project.

## GMA

### Gautrain Management Agency:

An agent of GPG, established in terms of the Gautrain Management Agency Act 5 of 2006, which is responsible for:

- Managing and overseeing** implementation of **Gautrain Rapid Rail Link**;
- Managing the Gautrain assets** and promoting their preservation and maintenance;
- Managing contractual relationship** between GPG and Bombela Concession Company; and ensuring **protection of interests of GPG**;
- Exercising rights and performing duties of GPG** in terms of the CA;
- Managing the planning, design, construction, financing, operation, and maintenance of **possible network extensions** and similar projects.

## BCC

### Bombela Concession Company:

The private partner, in terms of the CA, which is responsible for **designing, constructing, partial financing, operating, maintaining, and transferring** the Gautrain System.

## BOC

### Bombela Operating Company:

Responsible for **operating and maintaining** the Gautrain System, in terms of the Operating Contract.

## BMC

### Bombela Maintenance Company:

Responsible for **maintaining the system** in terms of the Maintainer Agreement.

## UNITRANS

### Bus Operator:

Responsible for the operation of the **Dedicated Feeder Distribution Service** in terms of the DFDS Agreement



# GENERAL COMMENTS ON BILL

## AMONGST OTHER PROPOSED REGULATORY REFORMS, GMA WELCOMES CLAUSES

### 7(1)(a) and 13(d)

Requirement that the **Regulator performs its function in a fair, equitable, transparent, efficient, and cost effective manner** – reference to previous experience where the Gautrain System was on the brink of being brought to a standstill for refusal to renew its safety permit for its refusal to pay arbitrary fees;

### 30(3)

Prohibition of the Regulator from **unreasonably withholding approval of a safety permit**;

### 30(5) read with 30(10) and 30(6)

Express **curtailment of the Regulator's powers to unreasonably withhold a safety permit** or withhold it for **failure or refusal to pay arbitrary fees**; and

### 31(2)

Requirement that **conditions imposed must be rational and aimed at facilitating safe rail operations**.

# SPECIFIC COMMENTS

## Statutory Heading

Definition of “network operator” vis-à-vis definitions of “operator”, “train operator”, and “station operator”

## Statutory Reference

Clause 1

## Comment

We notice that the terms:

“station operator”; “train operator”; and “network operator” seem to have been included for the sole purpose of clarifying the meaning of an “operator”, and are not used in the body of the Bill.

This is despite the definition of an “operator” not expressly linking the terms: “station

## Comment

operator” and “train operator” to that of an “operator”.

The practice of providing further meaning of a term in a definition of another term that is not cited in the body of an enactment is very unusual, thus expressly or by implication cross-referencing the meaning of an “operator” to these other terms may lead to varying interpretations.

## Recommendation

We recommend that the definition of the term: “operator” be with express reference to a “safety permit holder or its assignee”.

# SPECIFIC COMMENTS

## Statutory Heading

Chairperson and deputy chairperson of board

## Statutory Reference

Clause 12(4)

## Comment

The current syntax of clause 12(4) is problematic as it requires the board to elect an acting chairperson, if either the chairperson “or” deputy chairperson is unable to discharge his or her duties.

It is absurd that the board should elect an acting chairperson, if the chairperson him/herself or his or her deputy (based on the usage of the word: “or” in 12(4)) remains available to discharge chairing responsibilities.

## Recommendation

We recommend that the phrase “the position of chairperson or deputy chairperson becomes” be replaced with the phrase “both the positions of chairperson and deputy chairperson become” in clause 12(4).



# SPECIFIC COMMENTS

## Statutory Heading

Term of office and conditions of service of board members.

## Statutory Reference

Clause 13(1)(c)

## Comment

On the face of it, clause 13(1)(c), merely stipulates up to one third of non-executive members “may retire”, and that creates an impression that such retirement will be a voluntary process that is based on the principle of rotating board members, yet allowing this to happen prior to board members serving their full term (as specified in 13(1)(a)) and

## Comment

subjecting the retirement of board members to board evaluation, gives an impression that this may be a mechanism that is aimed at enabling the Minister to lay off up to one-third of a poorly performing board. We are of the view that the distinction between the two provisions can be more succinct, such that there is no apparent misalignment between 13(1)(a) and 13(1)(c).

## Recommendation

We recommend that clause 13(1)(c) be rephrased, such that its objective be explicitly clear, i.e. whether or not it is informed by a need to regularly rotate board members, or to enable the Minister to lay off up to one-third of poorly-performing non-executive members, subject to annual board evaluation.

# SPECIFIC COMMENTS

## Statutory Heading

Delegation by board

## Statutory Reference

Clauses 20(1)

## Comment

This provision entitles the board to delegate any of its functions or powers to the CEO or another senior employee of the Regulator, without providing parameters within which the said discretion will be exercised.

A decision made by an individual, to whom a function or power of the board has been delegated, could give the public an incorrect impression that a certain function or power was discharged or exercised after due application of the board's collective proficiency,

## Comment

whilst it may, in fact, have been exercised by a delegated individual, without the benefit of multi-disciplinary expertise contemplated by the composition of the board.

Without limitation, this provision could, further, lead to a substantial delegation of the board's powers or functions, thereby undermining good governance.

## Recommendation

In order to: ensure that delegations do not derogate from a multi-disciplinary approach to decision-making envisaged by the composition of the board; prevent sweeping delegation of the board's authority; and introduce checks and balances that facilitate natural rules of justice relating to impartiality and conflict of interests, we recommend that parameters within which a function, duty or power of the board would be delegated be outlined in the Bill.

It may, to this end, be useful to specify functions or powers, which the board is precluded from delegating, even to a committee of the board.



## Conclusion

- In the main, the Bill is welcome.
- To avoid unintended consequences; the GMA recommends that the Portfolio Committee considers effecting the changes it proposes.

# THANK YOU

