

REPUBLIC OF SOUTH AFRICA

TRANSPORT APPEAL TRIBUNAL AMENDMENT BILL

(As amended by the Portfolio Committee on Transport (National Assembly))
(The English text is the official text of the Bill)

(MINISTER OF TRANSPORT)

[B 8B—2020]

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GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

 Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Transport Appeal Tribunal Act, 1998, so as to insert, delete and amend certain definitions; to bring the Act in line with the developments since the enactment of the Act; to provide for certain powers of the Transport Appeal Tribunal; to allow the Minister to extend the term of office of the members of the Tribunal; to empower the Transport Appeal Tribunal to take appropriate steps in cases where its rulings are not implemented or effected timeously and empower it to investigate delays in the completion of its proceedings; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of section 1 of Act 39 of 1998, as amended by section 3 of Act 70 of 1998

1. Section 1 of the Transport Appeal Tribunal Act, 1998 (hereinafter referred to as the “principal Act”), is hereby amended— 5

(a) by the insertion before the definition of “board” of the following definition:

“ **act, direction or decision**’ includes—

- (a) an act, direction or decision contemplated in section 92 of the National Land Transport Act;
- (b) a decision contemplated in section 34(1) of the Cross-Border Road Transport Act; 10
- (c) a decision to cancel an operating licence in terms of section 78 of the National Land Transport Act;
- (d) a decision to withdraw, suspend or amend an operating licence or permit in terms of section 79 of the National Land Transport Act; 15
- (e) a decision by the National Public Transport Regulator, as defined in section 1 of the National Land Transport Act, on an application for accreditation made to it under section 81(2) of the National Land Transport Act or renewal of such accreditation in terms of section 81(8) of that Act; and 20
- (f) any other act, direction, decision or omission by a regulatory entity or the Regulatory Committee made in the process of implementing the National Land Transport Act or Cross-Border Road Transport Act;

- (b) by the deletion of the definition of “board”;
- (c) by the insertion after the definition of “board” of the following definition:
 “**‘Cross-Border Road Transport Act’** means the Cross-Border Road Transport Act, 1998 (Act No. 4 of 1998);”;
- (d) by the deletion of the definition of “intraprovincial transport”; 5
- (e) by the insertion after the definition of “Minister” of the following definition:
 “**‘National Land Transport Act’** means the National Land Transport Act, 2009 (Act No. 5 of 2009);”;
- (f) by the deletion of the definition of “national land transport legislation”;
- (g) by the substitution for the definition of “Regulatory Committee” of the following definition:
 “**‘Regulatory Committee’** means the Regulatory Committee referred to in section 13 of the Cross-Border Road Transport Act [1998]; and 10
- (h) by the insertion after the definition of “Regulatory Committee” of the following definition:
 “**‘regulatory entity’** means a regulatory entity as defined in section 1 of the National Land Transport Act;”. 15

Amendment of section 4 of Act 39 of 1998, as amended by section 18 of Act 42 of 2007

2. Section 4 of the principal Act is hereby amended by the substitution in subsection (2) for paragraph (a) of the following paragraph: 20
- “(a) appoint fit and proper persons as members of the Tribunal on the grounds of their knowledge of, or experience in, [financial,] economic, commercial, legal, public transport or other matters relating to the functions of the Tribunal; and”. 25

Amendment of section 7 of Act 39 of 1998

3. Section 7 of the principal Act is hereby amended by the addition of the following subsection:
 “(4) Despite subsection (3), the Minister may, upon expiry of the term of office of a member of the Tribunal, extend the term of office of that member for a period not exceeding 12 consecutive months.”. 30

Amendment of section 9 of Act 39 of 1998

4. Section 9 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:
 “(1) The Tribunal will sit on such days and during such hours and at such place as the [chairperson of the Tribunal] Director-General may determine after consultation with the Tribunal.”. 35

Substitution of section 11 of Act 39 of 1998, as amended by section 5 of Act 70 of 1998

5. The following section is hereby substituted for section 11 of the principal Act: 40

“Fees in respect of Appeals

11. The Tribunal may not deal with any appeal noted under [national land transport legislation,] the National Land Transport Act, [or] under the Cross-Border Road Transport Act, [1998,] or any relevant transport legislation unless any such appeal is accompanied by the fees referred to in section 17(1)(a).”. 45

Amendment of section 12 of Act 39 of 1998, as amended by section 6 of Act 70 of 1998

6. Section 12 of the principal Act is hereby amended—

- (a) by the substitution in subsection (1) for the words preceding paragraph (a) of the following words: 5
 “Subject to **[the provisions of]** this Act, the Tribunal must consider an appeal noted with the Tribunal in accordance with the **[provisions of national land transport legislation]** National Land Transport Act, [or] the Cross-Border Road Transport Act, [1998] or any relevant transport legislation as the case may be, whereupon the Tribunal may—”; 10
- (b) by the substitution in subsection (1) for paragraph (a) of the following paragraph:
 “(a) **[reject]** dismiss the appeal and confirm the act, direction or decision appealed against; or”;
- (c) by the substitution in subsection (1)(b) for subparagraphs (i) and (ii) of the following subparagraphs, respectively: 15
 “(i) substitute therefor any other act, direction or decision which the **[board]** regulatory entity or the Regulatory Committee, as the case may be, could have performed or given; or
 (ii) refer the matter which gave rise to the appeal to the **[board]** regulatory entity or the Regulatory Committee, as the case may be, for reconsideration; or”;
- (d) by the substitution for subsections (2) and (3) of the following subsections, respectively: 25
 “(2) No decision taken by the Tribunal under this section may be inconsistent with **[national land transport legislation]** the National Land Transport Act, [or] the Cross-Border Road Transport Act, [1998,] or any relevant transport legislation as the case may be.
 (3) Any act, direction or decision of the Tribunal under subsection (1)(b)(i) or (c) will, except for the purposes of subsection (1), be deemed 30
 to be an act, direction or decision of the **[board]** regulatory entity or Regulatory Committee, as the case may be, against whose act, direction or decision the appeal was brought.”;
- (e) by the substitution in subsection (4) for paragraph (a) of the following paragraph: 35
 “(a) within the prescribed period cause the parties involved in the appeal to be notified in writing of the decision of the Tribunal, including any time limits specified by the Tribunal for the implementation of such decision;”; and
- (f) by the addition of the following subsections: 40
 “(5) Where a regulatory entity or the Regulatory Committee fails to implement or give effect to a ruling of the Tribunal within the time specified by the Tribunal, or within a time considered by the Tribunal to be reasonable, the Tribunal may issue a directive to the regulatory entity or Regulatory Committee, as the case may be, in the prescribed manner, 45
 describing the extent of its failure to comply with its obligations and stating the steps required to meet those obligations, and the regulatory entity or Regulatory Committee, as the case may be, must comply with such directive within the time specified by the Tribunal in the directive.
 (6) Where the Tribunal issues a directive under subsection (5), it must 50
 notify the Director-General and request the Director-General to notify—
 (a) the Minister, in the case where the directive is issued to the Regulatory Committee or to the National Public Transport Regulator as defined in section 1 of the National Land Transport Act;
 (b) the relevant member of the Executive Council, in the case where the 55
 directive is issued to a Provincial Regulatory Entity as defined in section 1 of the National Land Transport Act; or
 (c) the municipal council of the relevant municipality, in the case where the directive is issued to a municipality to which an operating licence function has been assigned, 60

of the issuing of the directive and request the Director-General, Minister, member of the Executive Council or municipal council, as the case may be, to assist in ensuring compliance with the directive.”.

Amendment of section 13 of Act 39 of 1998, as amended by section 7 of Act 70 of 1998

7. Section 13 of the principal Act is hereby amended by the substitution for paragraphs (a) and (b) of the following paragraphs, respectively:

- “(a) grant an application for condonation of the late filing of an appeal against the act, direction or decision of the **[board]** regulatory entity or the Regulatory Committee, as the case may be, provided the appeal is noted in the prescribed manner and within the prescribed period, or refuse such an application; or
- (b) grant or refuse an application to suspend the operation of any act, direction or decision appealed against, provided that such act, direction or decision is automatically suspended if the appeal was lodged within a period of 30 days after the date on which such act, direction or decision was communicated to the appellant.”.

Amendment of section 14 of Act 39 of 1998, as amended by section 8 of Act 70 of 1998

8. Section 14 of the principal Act is hereby amended—

- (a) by the substitution in subsection (4) for paragraph (a) of the following paragraph:

“(a) Where, in terms of **[national land transport legislation]** the National Land Transport Act or the Cross-Border Road Transport Act, [1998,] it would have been permissible for the **[board]** regulatory entity or the Regulatory Committee, as the case may be, to take any person’s road transport law enforcement profile or previous traffic or transport-related contraventions into consideration, the Tribunal may compel any such person to give self-incriminating evidence, but the person presiding at the appeal must direct that such evidence will be given *in camera* and that it will not be made public, in any manner whatsoever, except by order of a competent court for the purposes of review or appeal.”; and

- (b) by the addition of the following subsections:

“(5) The Tribunal must investigate any unreasonable delay caused by a person in the completion of its proceedings or any frivolous, vexatious or irrelevant actions on the part of any person in the course of its proceedings which appear to the Tribunal to be unreasonable and which delays or actions could cause substantial prejudice to the State, the appellant or any other interested party, and must consider the following factors in deciding whether a delay is unreasonable:

- (a) The duration of the delay;
- (b) the reasons advanced for the delay;
- (c) whether any person can be held responsible for the delay;
- (d) the effect of the delay on the personal or financial circumstances of the State, the appellant or any other interested party; and
- (e) any other factor which, in the opinion of the Tribunal, must be taken into account.

(6) If the Tribunal finds that the completion of its proceedings is being delayed unreasonably, or that any action is frivolous, vexatious or irrelevant, it may issue any order that it considers necessary to eliminate the delay or action concerned and any prejudice resulting from it or to prevent further delay or prejudice, including an order—

- (a) refusing further postponement of the proceedings; or
- (b) granting a postponement subject to such conditions as it may determine.”.

Amendment of section 16 of Act 39 of 1998, as amended by section 9 of Act 70 of 1998

9. Section 16 of the principal Act is hereby amended by substitution for subsection (1) of the following subsection:

“(1) The Director-General must[, **after consultation with the Tribunal,**] 5
designate such officers in the Department of Transport as may be necessary to
perform the administrative and secretarial work of the Tribunal and to perform any
investigations required by the Tribunal that are necessary for the taking of its
decisions.”.

Amendment of section 17 of Act 39 of 1998, as amended by section 10 of Act 70 of 1998

10. Section 17 of the principal Act is hereby amended by the substitution in subsection (1) for paragraph (b) of the following paragraph:

“(b) as to the information to be provided by the **[board]** regulatory entity or the 15
Regulatory Committee to the Tribunal or an applicant in connection with any
appeal, and the manner in which and the time within which such information
must be provided;”.

Amendment of section 18 of Act 39 of 1998, as amended by section 11 of Act 70 of 1998

11. Section 18 of the principal Act is hereby amended— 20

(a) by the substitution in subsection (1) for paragraph (a) of the following paragraph:

“(a) any matter corresponding to that in respect of which the **[Board]**
board as defined in section 1 of the National Land Transport
Transition Act, 2000 (Act No. 22 of 2000), is authorised by law to 25
perform or give any act, direction or decision;”; and

(b) by the substitution in subsection (3) for paragraph (a) of the following paragraph:

“(a) subsection (1)(a) will come into operation on the date on which
[national land transport legislation] the National Land Transport 30
Transition Act, 2000, comes into operation, subject to the National
Land Transport Act; and”.

Amendment of long title of Act 39 of 1998, as substituted by section 12 of Act 70 of 1998

12. The following long title is hereby substituted for the long title of the principal Act: 35

“**To provide for the establishment of the Transport Appeal Tribunal to**
consider and to decide appeals noted in terms of [national land transport
legislation] the National Land Transport Act, 2009, [and in terms of] the
Cross-Border Road Transport Act, 1998 or any relevant transport legislation;
and for matters connected therewith.” 40

Short title and commencement

13. This Act is called the Transport Appeal Tribunal Amendment Act, 2020, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE TRANSPORT APPEAL TRIBUNAL AMENDMENT BILL, 2020

1. BACKGROUND AND PURPOSE

- 1.1 The Transport Appeal Tribunal Act, 1998 (Act No. 39 of 1998) (“principal Act”), was passed in 1998 to create the Transport Appeal Tribunal (“TAT”) for the purpose of dealing with appeals relating to applications for public road carrier permits (now called operating licences) and cross-border or cabotage permits. Prior to the establishment of the TAT, the National Transport Commission was responsible for dealing with such appeals.
- 1.2 The National Land Transport Transition Act, 2000 (Act No. 22 of 2000) (“Transition Act”), read with the Road Transport Appeal Matters Amendment Act, 1998 (Act No. 70 of 1998), provided that persons who applied to the Regulatory Committee of the Cross-Border Road Transport Agency (“CBRTA”), or to an operating licensing board for an operating licence, and were aggrieved by a decision of the Regulatory Committee or board, could appeal to the TAT.
- 1.3 Section 128 of the Transition Act provided that provinces could establish their own provincial appeal bodies to hear appeals in respect of operating licence applications. These provincial appeal bodies would replace the TAT in the relevant province. A few provinces established such provincial appeal bodies.
- 1.4 In 2007 the then Minister of Transport commissioned the *National Land Transport Strategy for the Drafting of the National Land Transport Bill*. This Strategy recommended the following:

“A new national regulatory entity should be established. It should deal with all long-distance and tourist service operating licence (OL) applications, and perform an oversight role over the regulatory entities in other spheres and serve as their appeal body. (Alternatively this could be done by the Transport Appeal Tribunal.) It should develop standardised nationally-applicable procedures for the processing of all OL applications and decisions. These procedures should be gazetted as regulations to the new Act and will be binding on the regulatory entities in other spheres. The Transport Appeal Tribunal (TAT) should be retained as an appeal body for decisions made by the national regulatory entity.”.
- 1.5 In the process of drafting the National Land Transport Act, 2009 (Act No. 5 of 2009) (“NLTA”), it was decided—
 - (a) to establish the National Public Transport Regulator (“NPTR”) as a national body to deal with operating licences for interprovincial and tourist transport, among other functions;
 - (b) that the TAT should be retained as the appeal body for all appeals; and
 - (c) that the provincial appeal bodies should be dis-established.
- 1.6 These matters are provided for in the NLTA. In terms of the NLTA, the TAT must hear appeals from the following, which are collectively called regulatory entities:
 - (a) The NPTR — appeals relating to operating licences for interprovincial and tourist transport services. The NPTR started operating on 29 July 2016, and is at present only dealing with licences for tourist transport services and applications for accreditation of tourist transport operators. Its other functions will be phased in over time.
 - (b) The Provincial Regulatory Entities (“PREs”).
 - (c) Municipal Regulatory Entities (“MREs”). To date, no MREs have been established, but some cities have applied to establish them.
- 1.7 Since its establishment, the TAT has encountered a number of problems and issues, which require amendments to the principal Act. The principal Act also

requires updating in respect of developments since 1998. These problems and issues are addressed in the Transport Appeal Tribunal Amendment Bill, 2020, (“Bill”) and are elaborated in the clause by clause analysis below.

2. CLAUSE BY CLAUSE ANALYSIS

2.1 Clause 1: Amendment of section 1

2.1.1 Clause 1 inserts, deletes and amends certain definitions. Redundant definitions such as “board”, “intraprovincial transport” and “national land transport legislation” are deleted. The concept of “board” has been replaced by “regulatory entity” in the NLTA. The term “intraprovincial transport” was only relevant to provincial appeal bodies, which no longer exist. The term “national land transport legislation” was included in the principal Act because such legislation had not yet been enacted in 1998. The term is replaced by a reference to the NLTA.

2.1.2 A new definition of “act, direction or decision” is inserted to clarify and expand upon the acts, directions and decisions which are subject to appeal by the TAT, to address doubts expressed about this in the past.

2.1.3 A new definition of “Cross-Border Road Transport Act” is inserted to make it easier to read in the principal Act and to standardise with the same definition in the NLTA. A new definition of “National Land Transport Act” is inserted to replace the general reference to land transport legislation. A new definition of “regulatory entity” is inserted to standardise the principal Act with the NLTA.

2.2 Clause 2: Amendment of section 4

The principal Act does not provide for the appointment of members with expertise in public transport matters, which will be cured by clause 2 of the Bill.

2.3 Clause 3: Amendment of section 7

In terms of the principal Act, TAT members must be appointed for a fixed term of office, but not for longer than three years. It sometimes happens that it would be expedient for the terms of office of individual members to be extended, for example to enable them to deal with matters that are partly completed because of their knowledge of or insight into a matter. Clause 3 of the Bill will allow the Minister to extend the period of office of any member for a period not exceeding 12 months.

2.4 Clause 4: Amendment of section 9

It is important for the TAT when fixing dates, times and places for hearings, to consult with the Director-General: Transport (“DG”), so that the necessary administrative arrangements can be put in place timeously, subject to budgetary considerations. In response to comments received, this clause has been amended to provide that the DG must fix such dates, times and places after consulting the TAT.

2.5 Clause 5: Amendment of section 11

This clause makes consequential amendments to section 11 of the principal Act.

2.6 Clause 6: Amendment of section 12

This clause makes consequential amendments and improvements to section 12 of the principal Act, as well as the following:

- (a) Sometimes when the TAT takes a decision imposing duties on parties, such as a regulatory entity, it is advisable for the TAT to impose time limits for performing the duty to ensure implementation of the TAT's decision. Clause 6 of the Bill will empower the TAT to impose such time limits when it makes its decision known to the relevant parties;
- (b) it often happens that regulatory entities, or the Regulatory Committee, fail to implement or give effect to a ruling of the TAT within the time specified by the TAT, or within a reasonable time, or at all. Clause 6 of the Bill thus provides that the TAT may issue a directive to the relevant regulatory entity or Regulatory Committee, as the case may be, describing the extent of its failure to comply with its obligations and stating the steps required to meet those obligations, and that such entity must comply with the directive within the time specified by the TAT. It also provides that when such a directive is issued, the TAT must notify the Minister, municipal council, or relevant MEC, as the case may be, so that they can assist in assuring compliance with such directives; and
- (c) in response to comments received, the words "in the prescribed manner" have been added so that the Minister may make regulations on the manner in which such directives may be issued.

2.7 Clause 7: Amendment of section 13

This clause makes consequential amendments to section 13 of the principal Act.

2.8 Clause 8: Amendment of section 14

It sometimes happens in proceedings before the TAT that parties deliberately delay the proceedings, for example where the TAT's decision is likely to have an adverse effect on the finances of the party that caused the delay. Parties also sometimes engage in frivolous, vexatious or irrelevant actions, either to cause delays or for other reasons. These actions not only waste the time of the TAT and cause wasted costs, but are also unfair to the other party or parties to the appeal. Clause 8 of the Bill will allow the TAT to investigate such delays or actions and take certain steps to counter them, as listed in the Bill. This clause also makes consequential amendments to section 14 of the principal Act.

2.9 Clause 9: Amendment of section 16

The principal Act currently provides that the DG must appoint officers in the Department of Transport ("Department") to perform the administrative and secretarial work of the TAT. Clause 9 of the Bill will also permit such staff to be appointed to undertake investigations that are necessary for the TAT to reach its decisions.

2.10 Clause 10: Amendment of section 17

This clause makes consequential amendments to section 17 of the principal Act.

2.11 Clause 11: Amendment of section 18

This clause amends section 18 of the principal Act by taking into account developments since 1998, and effects consequential amendments. The reference to "national land transport legislation" in section 18 of the principal Act is replaced with a reference to the Transition Act. This is a consequential amendment to section 18 necessitated by the fact that the definitions of "board" and "national land transport legislation" are being repealed.

2.12 Clause 12: Substitution of long title

Clause 12 will replace the long title of the principal Act to give effect to developments since 1998.

2.13 Clause 13: Short title and commencement

Clause 13 provides for the short title and commencement of the Act.

3. DEPARTMENTS/BODIES CONSULTED

3.1 The Bill was published for comment in the *Government Gazette* on 27 October 2017. A workshop was held at Menlyn Maine in Tshwane on 26 February 2018 with government stakeholders and a workshop at the same venue on 27 February 2018 with private sector stakeholders. The following were invited to the workshops:

- (a) The National Public Transport Regulator;
- (b) The Cross-Border Road Transport Agency;
- (c) The nine Provincial Regulatory Entities;
- (d) The nine provincial departments responsible for transport;
- (e) The South African National Taxi Council;
- (f) The National Taxi Alliance;
- (g) The Southern African Bus Operators' Association;
- (h) The South African National Small Bus Operators' Association;
- (i) The metered taxi industry, including electronic hailing operators; and
- (j) Transport Appeal Tribunal members.

3.2 Written comments were received from the following:

- (a) The Provincial Minister of Transport and Public Works, Western Cape;
- (b) The Cross-Border Road Transport Agency;
- (c) The City of Cape Town's Transport and Urban Development Authority; and
- (d) The Railway Safety Directorate of the Department.

4. FINANCIAL IMPLICATIONS

The Bill is not expected to have any additional financial implications either for Government or the public transport industry.

5. PARLIAMENTARY PROCEDURE

5.1 The State Law Advisers and the Department are of the opinion that the Bill must be dealt with in accordance with the procedure established in section 76 of the Constitution.

5.2 Chapter 4 of the Constitution specifies the manner in which legislation must be enacted by Parliament. It prescribes different procedures for Bills, including ordinary Bills not affecting provinces (section 75 procedure), and ordinary Bills affecting provinces (section 76 procedure). The determination of the procedure to be followed in processing the Bill is referred to as tagging.

5.3 In terms of section 76(3) of the Constitution, a Bill must be dealt with in accordance with section 76 if it falls within a functional area listed in Schedule 4. Schedule 4 to the Constitution lists functional areas of concurrent national and provincial legislative competence. In the Constitutional Court judgment of *Ex-Parte President of the Republic of South Africa In Re: Constitutionality of the Liquor Bill*¹ ("Liquor Bill judgment"), Cameron AJ held the following:

“[27] It must be borne in mind that section 76 is headed ‘ordinary Bills affecting provinces’. This is my view, a strong textual

¹ (CCT/12/99) [1999] ZACC 15.

indication that section 76(3) must be understood as requiring that any Bill whose provisions in substantial measure fall within a functional area listed in Schedule 4 be dealt with under section 76.

...

[29] Once a Bill falls within a functional area listed in Schedule 4, it must be dealt with not in terms of section 75, but by either the section 76 (1) or the section 76(2) procedure . . .”.

5.4 Following the *Liquor Bill* judgment, the Constitutional Court in the judgment of *Tongoane and Others vs Minister for Agriculture and Land Affairs and Others*² (“*Tongoane* judgment”) confirmed the following:

“[59] . . . the tagging test focuses on all the provisions of the Bill in order to determine the extent to which they substantially affect functional areas listed in Schedule 4, and not on whether any of its provisions are incidental to its substance.”.

5.5 Furthermore, the Constitutional Court held that—

“[66] . . . procedural safeguards are designed to give more weight to the voice of the provinces in legislation substantially affecting them . . . they are fundamental to the role of the NCOP in ensuring that provincial interests are taken into account in the national sphere of government . . .”.

5.6 As the Court held in the *Tongoane* judgment, a Bill must be tagged as a section 76 Bill if its provisions in substantial measure deal with a Schedule 4 functional area. We are therefore of the view that the Bill should be classified as a section 76 Bill, which is an ordinary Bill affecting provinces, as its provisions fall within a functional area listed in Schedule 4 to the Constitution, namely “Public transport”.

5.7 The State Law Advisers and the Department are also of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.

² 2010 (8) BCLR 741 (CC).

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