

TO WHAT EXTENT IS NEGLIGENCE BY PROVINCIAL DEPARTMENTS OF TRANSPORT AFFECTING THE ABILITY OF MUNICIPALITIES TO PERFORM THEIR POWERS AND FUNCTIONS IN TERMS OF THE NATIONAL LAND TRANSPORT ACT, (ACT NO.5 OF 2009)?

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ABSTRACT

Section 154(1) of the Constitution of the Republic of South Africa provides that the national and provincial governments, by legislative and other measures, must support and strengthen capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions (Constitution of the Republic of South Africa, 1996).

The National Land Transport Act No.5 of 2009 (the Act) provides for amongst others, the functions of MECs (section 9(2)) and responsibilities of the provincial sphere of government (section 11(1)(b)(South Africa, National Land Transport Act, 2009, s 154(1)). This study reflects on the statutory functions and responsibilities of the provincial sphere of government in capacitating the municipalities to carry out the powers and functions in terms of the Act, as well as determine whether the provinces are actually complying with their statutory responsibilities in terms of the Act. In conducting the research, desktop study involving interpretation and analysis of primary and secondary sources have been undertaken. The results demonstrate that the majority of provincial departments responsible for transport in South Africa are not complying with their responsibilities to support and strengthen capacity of municipalities to carry out their powers and functions in terms of the Act.

1. INTRODUCTION

1.1 Aim of the Paper

The aim of this paper is to determine whether provincial departments of transport do carry out their statutory powers and functions in terms of the National Land Transport Act No.5 of 2009 (the Act) to assist and capacitate the municipalities.

1.2 Problem Statement

Provincial departments responsible for public transport are required to assist and capacitate municipalities in their provinces to carry out their powers and functions in terms of the Act. A number of sections in the Act provide for the assistance and capacitation the provincial department or the MEC responsible for public transport is required to undertake for municipalities in the province (National Land Transport Act, 2009, ss 9(2), 11(1)(b)(v), 11(1)(b)(vi), 11(1)(b)(vii), 12(1), 27(1), 30(2), 33(1)(a), 35, 85).

Currently, a number of challenges is facing municipalities throughout the country without or with little assistance from the provincial departments responsible for public transport. Many municipalities cannot even develop their own Integrated Transport Plans that are central to the transport functions of the municipalities.

The provincial departments are meant to invoke various provisions of the Act in order to assist and capacitate the municipalities in the province.

1.3 Methodology

The methodology for this research is comprised mainly of desktop study involving interpretation and analysis of primary and secondary sources. The paper will provide exposition of the regulatory framework with regards to the responsibilities of provincial departments of transport in South Africa to municipalities concerning the municipalities' transport functions in terms of the Act (National Land Transport Act, 2009). The study will also critically analyse the application and interpretation of sections 9(2), 11(1)(b)(v), 11(1)(b)(vi), 11(1)(b)(vii), 12(1), 27(1), 30(2), 33(1)(a), 35, 85, the accessible Provincial Land Transport Frameworks as well as the annual reports of the provincial departments of transport in as far as they relate to matters connected with the abovementioned sections of the Act. Relevant reports by the Auditor General of South Africa on the municipalities will be considered for the general state of municipalities in different provinces. Availability and up to date integrated transport plans will also be used as a measure of municipalities to perform their transport functions, amongst others. In this case, Western Cape Province and Limpopo Province will be compared based on their Provincial Land Transport Frameworks. Attempts to get the latest Provincial Land Transport Framework for each province has been made but in most provinces no assistance was forthcoming. Where draft frameworks have been published, same will be used.

1.4 The Scope of This Paper

This paper will address the various provisions of the Act pertaining to the assistance or capacitation of the municipalities by the provincial departments responsible for public transport function. It will also consider the Provincial Land Transport Framework for each province, where same exists, as well as the annual reports for the very same departments to determine if the reports cover the assistance or capacitation contemplated in the Act. The paper will also provide a summary of the outcome of the research conducted to establish whether provinces show any appreciation of their statutory obligations towards the municipalities as provided for by the Act. It will also cover conclusions based on the review of the statutory obligations of the provinces as well as the outcome of the research.

2. RELEVANT PROVISIONS OF THE ACT

2.1 General Responsibilities of the Provincial Sphere of Government Regarding Municipalities

Section 11 of the Act provides for the responsibilities of the three spheres of government as part of institutional arrangements for land transport. Section 11(1)(b) is dedicated to the responsibilities of the provincial sphere of government. Section 11(1)(b) needs to be read with section 9(2) of the same Act, as the latter provides for the functions of the MEC responsible for public transport in the province. For the purposes of convenience, without necessarily prioritising, this paper will start with section 11 and then follow with section 9.

The Act provides that the province is responsible for ensuring that municipalities that lack capacity and resources are capacitated to perform their land transport functions (National Land Transport Act, 2009, s 11(1)(b)(v)). This provision is further reinforced by other provisions of the Act that become specific to certain functions whilst applying generally to the performance of powers and functions of the municipalities in the province.

The Act further provides that the province is responsible for building capacity in municipalities to monitor the implementation of the Act (National Land Transport Act, 2009, 11(1)(b)(vi)). This obligation may be better appreciated when the functions that need to be monitored are explained, as broadly covered in various sections of the Act.

Section 11(1)(b)(vii) further adds to the responsibilities of the province, the ensuring implementation of the provincial integrated development strategy and public transport strategy, with due attention to rural areas, with focus on less capacitated municipalities or those that do not fulfil their responsibilities in respect of transport service delivery, either by direct implementation or assistance under paragraph (v). This paragraph expands on the provisions of paragraph (v) by specifying the options, including direct implementation on behalf of the municipality as well as capacitation as broadly stated in paragraph (v).

Paragraph(viii) extends the responsibilities of the province by reference to other provincial functions assigned to the MEC in terms of the Act. For the purposes of this paper, the functions of the MEC will focus on those relevant to support and capacitation of municipalities. The support and capacitation of municipalities contemplated in the Act needs to be understood and applied in the context of section 154(1) of the Constitution.

2.2 Functions of MECs in Terms of Section 9

Section 9 (2) of the Act provides on peremptory basis, amongst others, for the MECs to:

- Ensure that the money available for land transport matters is applied in an efficient, economic, equitable and transparent manner.
- Assist municipalities that lack the necessary staff or resources in meeting their responsibilities and performing their functions and duties regarding land transport.
- Improve the planning, co-ordination and facilitation of the land transport functions of the province.
- Promote intergovernmental relations within the land transport environment.
- Set standards, performance criteria and related indicators to ensure intermodal and intramodal co-ordination and efficient management of investment in transport and of transport infrastructure and systems.
- Take an active role in sourcing international, national, local, private and public funding to promote the objects of the Act in the province.

The performance of the MEC's obligations in terms of this provision need to be assessed against the provincial interventions to the municipalities regarding the matters listed in this subsection.

2.3 Intergovernmental Relations

Section 11(1)(b) and section 9(2) of the Act expressly and impliedly promote the intergovernmental relations in ensuring assistance by the provinces to municipalities that lack the capacity and/ or resources to perform their transport functions in terms of the Act. The provisions of the Act are consistent with section 154(1) of the Constitution that states that the national government and provincial governments, by legislative and other measures, must support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions.

Section 12(1) of the Act provides for a province to may enter into an agreement with one or more municipalities in the province to provide for the joint exercise or performance of their respective powers and functions contemplated in the Act. The subsection allows even for the establishment of a provincial entity or similar body, subject to the Constitution and provisions of section 12.

Section 12 therefore provides for clear mechanism that may be explored by the provinces if they deem the transfer of money to a municipality is not sufficient to ensure the capacitation but require active involvement of the province in assisting the municipality to be capacitated.

2.4 Municipal Land Transport Funds

Section 27(1) of the Act provides for the establishment of a municipality fund for its area known as Municipal Land Transport Fund. The subsection requires every municipality that is establishing an integrated public transport network to establish the fund. The subsection lists sources of funds to be paid into the Municipal Land Transport Fund, including money appropriated by the MEC for that Fund. It is therefore important for a province to assist the municipalities in the province that meet the criteria for the fund to be established to establish the fund as it assists the municipality with additional financial resources.

Section 27(2) specifies what the fund must be used for, being to defray the cost of the functions of the municipality in terms of the Act or its integrated transport plan, and to cover any other expenditure that will promote the objects of the Act in the area of the municipality concerned. Municipal land transport fund is an important mechanism for the municipality that qualifies to create a source of funding ring-fenced for the municipal transport function beyond the normal budgeting process that is informed by the integrated transport planning process being a chapter in the Integrated Development Plan. The normal municipal budgeting process based on section 214 of the Constitution makes transport to context with all the other budget requirements of the municipality.

2.5 MEC May Provide Funds for Land Transport

In terms of section 30(2) of the Act, the MEC may, from funds received from the national Minister of Transport or appropriated by the relevant provincial legislature for that purpose, make monies available to municipalities to perform their responsibilities in terms of the Act. The significance of this provision is the fact that it is of general application to municipalities in the province as opposed to section 27 that has qualifying criteria. This provision further anticipates the provincial department to include the MEC and the department's obligations in terms of the Act as part of its budgeting process, as contemplated in terms of section 214 of the Constitution.

2.6 Transport Planning

Section 33(1)(a) of the Act provides for a planning authority to enter into an agreement with any other planning authority or the provincial department to assist it in performing its functions in terms of transport planning as detailed in Chapter 4 of the Act.

This provision may be invoked by a municipality or the province to ensure that all the municipalities in a province do have compliant integrated transport plans that are up to date. The context of this provision includes a local municipality and district municipality but for the purposes of this article it is the province to any municipality within the province that is relevant. As the subsection is making reference to the chapter, it means the assistance may include all municipal functions covered by the chapter beyond the development of the integrated transport plan.

2.7 Provincial Land Transport Frameworks

In terms of section 35(1) of the Act, every MEC is required to prepare a five-year Provincial Land Transport Framework in accordance with the requirements prescribed by the Minister after consultation with all the MECs. The Minister published the Regulations relating to Minimum Requirements for the Preparation of Provincial Land Transport Frameworks, 2011 on 3 October 2011 (Minimum Requirements for PLTFs). Chapter 4 of the Minimum Requirements for PLTFs requires the chapter to include a programme for the preparation of the integrated transport plans and their coordination with the Provincial Land Transport Framework. It further requires a reference to the summary of all available integrated transport plans in the province required by section 35(7) of the Act, which must be contained as an annexure. Section 35(5) of the Act requires the PLTFs to include routes for the transporting of dangerous goods through the province, as reflected in the integrated transport plans within its jurisdiction. Based on the imperatives for the PLTFs, it is critical for the province to ensure that all the municipalities in the province do have integrated transport plans. The failure of the municipalities to develop and maintain integrated transport plans as required by the Act leads to a non-compliant PLTF by a province as it fails to provide for the prescribed requirements in its PLTF.

2.8 Law Enforcement

Section 85(1) provides that, in addition to the measures provided for in the Act with regard to law enforcement, the MECs and municipalities must take active steps to develop systems to improve land transport law enforcement in their respective jurisdictions. Section 85(2) provides for an MEC and a municipality to may enter into an agreement as enforcement authorities in terms of which land transport law enforcement functions are undertaken by one enforcement authority in the area of the jurisdiction of another; authorised officers of one such authority may be seconded to another authority temporarily or land transport law enforcement functions are undertaken jointly, or by a public or private sector agency on behalf of the authority.

The giving into effect of the provisions of section 85 rests on both the MEC and the municipality. One must take the initiative to ensure that there is such an agreement, but the MEC has primary responsibility in terms of section 9(2)(e) of the Act.

2.9 Review of Provincial Departments Providing the Capacitation and Assistance Required by Municipalities to Perform Their Powers and Functions in Terms of the Act

Two types of documents have been sourced and reviewed in order to determine whether the provincial departments are providing the capacitation and assistance required by the municipalities, being the Provincial Land Transport Frameworks (PLTFs) and Annual Reports.

With regard to the PLTFs, it has been a struggle to locate them but those that were able to be located generally reflected a picture of municipalities not complying with their planning obligations.

The Limpopo province PLTF dated 31 May 2023 (Limpopo Provincial Land Transport Framework, 2023: 194) reflected only one district municipality with a currently up to date District Integrated Transport Plan (DITP) whilst the remainder are in various situations of non-compliance. In fact, one district municipality does not have a DITP at all. Seven (7) of the 22 local municipalities never developed an ITP whilst only 4 had an up-to-date Local Integrated Transport Plan (LITP) at the time the PLTF was developed.

In the Gauteng province, one could not locate the PLTF, but a Draft PLTF dated 7 November 2022 (Review, Development and Update of the Gauteng Provincial Land Transport Framework, Executive Summary for Draft PLTF Report, 2022) was the closest to PLTF one could access. The Draft PLTF recognised different stages of non-compliant and outdated documents as Comprehensive Integrated Transport Plans for the Gauteng metropolitan municipalities (Tshwane, Johannesburg and Ekurhuleni). The district municipalities of Sedibeng and West Rand had up to date DITPs (2019-2024) (Review, Development and Update of the Gauteng Provincial Land Transport Framework, Executive Summary for Draft PLTF Report, 2022: xxiii).

Western Cape province has a published for comments Draft Provincial Land Transport Framework (2024/25-2028/29). The draft PLTF reflects that only one district municipality has an up-to-date DITP, two districts have their DITPs expired in 2024 and one expired in 2021. Only four local municipalities that have ITPs up to date, two of them have CITPs and two have LITPs. Three of the local municipalities have outdated LITPs whilst 17 reflect no records of having LITPs (Draft Provincial Land Transport Framework (2024/25-2028/29), 2025: 4-2-4-3).

Regarding the other provinces, no PLTF could be located and as such one is unable to take the matter further.

When it comes to the annual reports, all the provinces had their annual reports accessible and reflected programmes and transfer payments, amongst others, that should enable a reader to determine if any support and assistance is being made to the municipalities in a province. A general overview of the annual reports is that a significant majority of the provinces do not report on assistance provided to municipalities including any expenditure or transfer payments made.

Gauteng province only reports on the conclusion of Intergovernmental Authorisation Agreements in terms of section 12(1) of the National Land Transport Act to enable the province to continue acting as a contracting authority in various municipal jurisdictions for new subsidised public transport contracts in the province (Annual Report 2023/2024

Financial Year, 2024:77. There is no other reflection that corresponds with the responsibilities of the province in terms of various provisions of the Act as dealt with above.

The Northern Cape province mentioned the building and transfer of a taxi rank to a municipality and nothing more (Northern Cape Department of Transport, Safety and Liaison Annual Report 2023/24).

The Western Cape province appears to be the only province that sought to really provide support and capacitation of the municipalities in the province. The annual reports reflect programmes carried out in various municipalities with the municipalities in line with the requirements of the Act. The Western Cape province further discloses transfer payments made to various municipalities in the province consistent with the provisions of the Act (Western Cape Department Mobility 2024:48, 63-64).

The other provinces make no mention of any projects or programmes involving the municipalities in a province and there are no funds reported to have been transferred to municipalities (Province of the Eastern Cape Transport: Annual Report 2023-2024, KwaZulu-Natal Province Transport, Annual Report 2023/24, Department of Community Safety, Roads, & Transport, Free State Province Annual Report 2022/2023, North West Department Community Safety and Transport Management - Annual Report 2024, Mpumalanga Department of Public Works, Roads and Transport - Annual Report, 2023/2024 Financial Year).

The Auditor General of South Africa reports on municipalities reflect a very positive outlook for the municipalities in the Western Cape. For the financial year 2021/2022, the municipalities from the Western Cape occupied 19 positions out of 33 financially unqualified with no findings that have been identified as having sustained clean audit status whilst only one featured from Limpopo province (Consolidated General Report on Local Government Audit Outcomes MFMA 2021-22, 2023:15). The following financial year, 2022/2023 they occupied 19 out of the first 30 financially unqualified with no findings with sustained clean audit outcomes whilst none featured from the Limpopo province (Consolidated General Report on Local Government Audit Outcomes MFMA 2022-23, 2024:20). The assistance and financial support reported in the province of the Western Cape department responsible for transport is positively affecting the performance of the municipalities.

2.10 Findings

There is a general neglect by provincial departments of transport in supporting and capacitating municipalities to perform their powers and functions in terms of the Act.

The various provisions of the Act that provide for support and capacitation by the province are generally not being invoked and applied by the provinces. The municipalities themselves do not appear to be invoking those they may invoke to get the province to support and empower them.

The review and analysis of the PLTFs that have been accessed shows that most of the municipalities have not been able to perform their powers and functions in terms of the Act, primarily, developing the integrated transport plans that are crucial to their performance in terms of the Act. The review of the sample annual reports of the provincial departments of transport indicates lack of spending and support of municipalities generally, except for the Western Cape province.

The comparative analysis between the Western Cape Province and Limpopo Province indicate two provinces that take the development of the PLTFs serious as the Limpopo province has an up-to-date version whilst the Western Cape is in the process of finalising its latest version. The contents of the PLTFs reflect the state of the municipalities in the respective provinces. Both provinces reflect many municipalities without the integrated transport plans. The annual report of the Western Cape reflects an extensive spread of expenditure on many municipalities in the province on matters related to their transport functions.

Whilst it was not possible to get the PLTFs for most provinces, the annual reports do give a picture of how the provinces neglect to support and capacitate municipalities in terms of the Act.

Failure by the provinces to capacitate and financially support the municipalities means the municipalities are likely to fail.

2.11 Recommendations

The provinces need to be capacitated themselves to understand and appreciate their roles and responsibilities in terms of the National Land Transport Act. Both, the municipal and provincial sphere of government needs to take responsibility in invoking the provisions of the Act so as to ensure that the provisions highlighted above do not just remain provisions but are acted upon in the best interest of co-operative governance as succinctly captured in section 154(1) of the Constitution. The national Department of Transport may need to intervene to ensure that provinces know the provisions of the Act and how to apply them. Department of Co-operative Governance and Traditional Affairs together with SALGA need to get involved to assist the municipalities to get what is due to the municipalities.

3. CONCLUSION

The failure or neglect by the provincial departments of transport to capacitate and assist municipalities to perform their powers and functions in terms of the Act is detrimental to the municipalities and public governance in South Africa. Capacitation and other support by the provinces to the municipalities is not only a statutory obligation but is a necessity for the three spheres of government to ensure that it is being done consistently.

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