

NEW MPUMALANGA TOURISM LEGISLATION

1 Introduction

Tourism is one of the functional areas of concurrent national and provincial legislative competence listed in Schedule 4 of the Constitution of the Republic of South Africa, 1996. This means that the provincial legislatures have the power to pass legislation with regard to that matter (ss 43(b) and 104(1)(b)(i) of the Constitution). In contrast to most other provinces (see Vrancken "The Provincial Tourism Legislation" 2000 3 *TSAR* 506), the Mpumalanga province refrained from making use of that power for a relatively long period of time. It then took more than a year for the Premier to assent to the Mpumalanga Tourism Bill, 2001 (*PG* 920 of 2003-02-07), only for the Premier to assent, within three years, to its successor: the Mpumalanga Tourism and Parks Agency Act 5 of 2005 (*PG* 1319 of 2006-03-17). The purpose of this note is to compare this new piece of legislation, which came into effect on 1 April 2006 (*PG* 1325 of 2006-03-24), with its predecessor as well as with legislation recently brought into force in other provinces.

2 Tourism and nature conservation

With part of the Kruger National Park and a great variety of other natural attractions within its borders, Mpumalanga is known worldwide as an eco-tourism destination.

The link between tourism and nature conservation was, however, not made by the 2001 Act. As a result, the Act did not take into account the provisions of the Mpumalanga Parks Board Act 6 of 1995 (the title of the Act, which was initially the "Eastern Transvaal Parks Board Act, 1995" (*PG* 89 of 1995-09-29), was amended by section 22 of the Mpumalanga Parks Board Amendment Act 9 of 1998 (*PG* 382 of 1998-11-17)), nor those of the Mpumalanga Nature Conservation Act 10 of 1998 (*PG* 384 of 1998-11-17). The preamble to the 2001 Act made it clear, however, that its drafters took into account the fact that the tourism industry was seen as having the potential to be a catalyst for significant economic growth and development within the province. They also believed that tourism could directly or indirectly improve the quality of life of all the inhabitants of the province and, more specifically, contribute to the development of entrepreneurial opportunities for previously disadvantaged communities and persons within the province.

The drafters of the 2005 Act shared those views, but also placed a much greater emphasis on the need to respect, protect and fulfil the right to have the environment protected for the benefit of present and future generations

while promoting justifiable economic and social development (s 24(b) read with s 7(2) of the Constitution). The 2005 Act attempts to do so in several ways. Firstly, the Act repeals both the Mpumalanga Parks Board Act 6 of 1995 and the 2001 Act (s 42). Secondly, the Act merges the Mpumalanga Parks Board and the Mpumalanga Tourism Agency into a new Mpumalanga Tourism and Parks Agency (s 43). Thirdly, the Act combines as the objects of the agency, on the one hand, the sustainable management and promotion of tourism and, on the other hand, the sustainable management and promotion of nature conservation as well as the sustainable utilisation of the natural resources of the province (s 3(1)). And finally, the Act spells out the powers and functions of the agency by distinguishing between its general powers and functions (s 4(2)-(7)), its powers and functions pertaining specifically to tourism (s 4(8)-(13)), and its powers and functions pertaining specifically to nature conservation (s 4(14)-(15)).

3 The provincial tourism body

Mpumalanga's first tourism body was a section 21 company: the Mpumalanga Tourism Authority. One of the purposes of the 2001 Act was to transfer the personnel and the assets of the authority to a new Mpumalanga Tourism Agency (the MTA), a juristic person established by the Act (s 2). The MTA also assumed all the liabilities, rights and obligations of the authority (s 42(1)).

Apart from the wider sphere of jurisdiction *ratione materiae* of the Mpumalanga Tourism and Parks Agency (the MTPA), there are only relatively minor differences between the powers and functions of the new tourism body and those of its predecessor.

For instance, in contrast with the 2001 Act, the 2005 Act expressly empowers the MTPA to enter into public-private partnerships (s 4(4)). In doing so, the Act recognizes a trend that has developed worldwide.

"[I]n a general political climate favouring privatization and rolling back the frontiers of the state. They are a result too of pressures to achieve greater efficiency, it being assumed that greater private sector involvement will lead in this direction. This assumption is plausible in that the tourism industry is complex. Its marketing is sophisticated and not easily understood by the generalist official in the public sector" (Jeffries *Governments and Tourism* (2001) 137).

Moreover, the 2005 Act compels the MTPA to pay due regard to the provisions of the Constitution dealing with the legislative and executive authority of the provinces as well as provincial and municipal loans (ss 104, 125 and 230), the Borrowing Powers of Provincial Governments Act 48 of 1996, the Public Finance Management Act 1 of 1999 (see Vrancken "The Impact of the Public Finance Management Act, 1999, on the South African Tourism Board" 2000 63 *THRHR* 255-263), and the provisions of all other national legislation pertaining to tourism (s 4(10) of the 2001 Act; and see Vrancken "The National Legal Framework of Tourism: Past, Present and Future" 2000 11 *Stell LR* 85-98). The 2005 Act also requires the MTPA to

pay due regard to all national policies, guidelines and directives pertaining to tourism, with specific reference to policies, guidelines and directives pertaining to the transformation of the tourism industry (s 4(7) of the 2005 Act; and see for instance DEAT *A Transformation Strategy for the South African Tourism Industry* (2001) and the Tourism BEE Scorecard published for public comment in GG 27191 of 2005-01-21).

Otherwise, like its predecessor, the 2005 Act requires the MTPA to develop and implement comprehensive policies and programmes regarding all financial and all personnel matters, and to adhere to sound financial management, effective and equitable human resource development and efficient office administration in a responsible, accountable and transparent manner (s 4(2)). The MTPA must also, in the exercise and performance of its powers and functions, liaise and consult with relevant stakeholders such as traditional leaders, owners of existing or potential tourist attractions, organs of state, other statutory bodies, organized labour and organized business (s 4(3)). The powers and functions of the MTPA further include the marketing, promotion, fostering and development of tourism within the province, with a specific emphasis on broadening the participation in tourism of previously disadvantaged individuals and communities (s 4(8)-(9)). While doing so, the MTPA must *inter alia* take appropriate and effective steps to enhance the level and standard of service in the tourism industry, as well as assist with, and participate in, the development and implementation of a national system of standards, classification and grading for tourist accommodation, establishments, products and services (s 4(10)(c)-(d)). The MTPA must also establish and maintain a comprehensive database consisting of information pertaining for instance to existing tourism attractions, infrastructure, facilities, services and the location thereof and access thereto, within the province; the natural and cultural attractions that could potentially be developed as tourism attractions within the province; and new areas of tourism activity and potential sites where these activities could be carried out within the province (s 4(11)(e)).

4 The Mpumalanga Tourism and Parks Agency Board and the Agency's CEO

The affairs of the MTPA are managed and controlled by the Mpumalanga Tourism and Parks Agency Board (s 5(1)), which is accountable to the MEC responsible for tourism and conservation matters (s 5(2) read with s 1). The MTPA Board is slightly bigger than the MTA Board (compare s 5(2) of the 2001 Act with s 5(3) of the 2005 Act), but much smaller than the MTA Board and the Mpumalanga Parks Board combined (see also s 3 of the Mpumalanga Parks Board Act 6 of 1995).

The provisions of the 2005 Act relating to the procedure for appointment in the event of a vacancy on the board are more elaborate than in the 2001 Act. The latter merely provided that such a vacancy had to be filled by the appointment of another member by the Executive Council as soon as was reasonably practicable after the occurrence of such vacancy, and that any member so appointed remained in office for the unexpired portion of his or

her predecessor's term of office (s 10(2)). In contrast, the 2005 Act provides that the MEC, and not the whole Executive Council, may appoint a temporary member of the board until such vacancy has been duly filled but for not longer than a period of three months (s 7(3)). The 2005 Act also states that, in the event of all the positions on the board being vacant, the MEC may appoint persons as temporary members to constitute an interim board, until such vacancies have been duly filled but for not longer than a period of six months (s 7(4)). Once the vacancy has been filled, the new member concerned remains in office for the unexpired portion of his or her predecessor's term of office (s 10(2)).

On the other hand, the 2005 Act simplifies the rule relating to the removal of board members on the ground of non-attendance of meetings. The 2001 Act provided that a board member *could* be removed from office if he or she had been absent from three consecutive meetings of the board without leave of the chairperson, or did not attend at least 60% of the annual meetings of the board in person (s 9(3)). However, the Act also provided that the office of a board member became *automatically* vacant if he or she was absent from three consecutive meetings of the board without the prior consent of the chairperson (s 10(1)(d)). As far as this is concerned, the 2005 Act states that the MEC may already remove a board member if he or she has been absent from only two consecutive meetings of the board without the latter's prior consent (s 9(3)). A third consecutive absence without prior consent results in the office of the member concerned becoming vacant automatically (s 10(1)(d)).

With regard to the leadership of the board, the 2001 Act merely provided for a chairperson to be appointed by the MEC (s 11(1)). The Act also stated that, in the event where that chairperson could not, refused or failed to exercise his or her functions, the latter were to be exercised and performed by an acting chairperson elected by the board from among its members (s 11(4)). In contrast, the 2005 Act provides for the MEC to appoint a chairperson and a deputy chairperson (s 11(1)). As a result, the board may only elect an acting chairperson from among its members when both the chairperson and the deputy chairperson cannot, refuse or fail to exercise their functions (s 11(4)).

The 2005 Act increases the maximum period of office of the board members from three to four years (s 12(1) in both Acts) and, in case of re-appointment, from six to eight years (s 12(2) in both Acts). Moreover, the 2005 Act now provides for immediate and urgent attention to be given by the board to any matter even if it is not possible for the board to meet in order to attend to that matter. In such an event, all relevant documentation pertaining to the matter must immediately be made available to each member for consideration (s 17(5)).

As far as the agency's chief executive officer is concerned, the 2001 Act expected the MEC to take the initiative to invite interested parties to propose candidates for appointment (s 13(4)). In contrast, the 2005 Act enjoins the board to do so, after consultation with the MEC. Moreover, applications and not proposals are to be invited (s 13(4)).

As in the case of the board members, the drafters of the 2005 Act evidently aimed at ensuring greater stability in the management of the MTPA when they increased the maximum term of office of the CEO from three to five years (s 13(5)(a) of both Acts) and, in case of re-appointment, from six to ten years (s 13(5)(b) in both Acts). For the same purpose, the 2005 Act increases the resignation notice period for the CEO from one to three months (s 13(6) of both Acts).

On the other hand, the 2005 Act grants greater powers than its predecessor to the MEC in the event where the CEO cannot, refuses or fails to exercise his or her powers, rights and functions. In terms of the 2001 Act, it was the board that appointed an acting CEO, in consultation with the MEC (s 13(7)), and without any limitation to the period of time during which that person could hold office. Today, it is the MEC who appoints the acting CEO, without having to consult the board, and for a period not exceeding six months (s 13(7) of the 2005 Act).

In accordance with a trend affecting an increasing number of public and private bodies, the 2005 Act introduces the requirement of a written employment contract and performance agreement for the CEO. The appointment of the CEO by the board is now effective from the date of the entering into of the employment contract (s 15(1)), which must at least contain the CEO's personal particulars, term of office, conditions of service, powers, functions, responsibilities and duties, as well as his or her remuneration, allowances and benefits (s 15(2)). In addition, the CEO must conclude, prior to the commencement of each financial year, a performance agreement with the board, which performance agreement's term of operation coincides with that financial year (s 15(3)). That agreement must contain at least a reference to the financial year to which it pertains, the purpose of the CEO's job, the key performance areas, financial and management criteria and standards, performance guidelines and targets, as well as the standards to be used by the board to measure the performance of the CEO on at least a bi-annual basis (s 15(4)). Interestingly, the 2005 Act does not include the failure to comply with the performance agreement as a separate ground for removal. It would apparently only lead to such a step if it demonstrates the CEO's "unfitness for the functions of his or her office" (s 14(1)(b)).

5 Financial matters

The 2005 Act brings a number of changes to the financial affairs of the MTPA. First of all, the 2005 Act no longer provides for a Tourism Marketing and Development Fund, which was to be utilised for the marketing of tourism within the province as well as for the development, training and empowerment within the province of primarily previously disadvantaged persons or communities in the tourism industry (s 21 of the 2001 Act). On the other hand, the 2005 Act adds to the sources of revenue already provided by the 2001 Act the fees, levies, penalties, fines, and proceeds from sales of forfeited items received or recovered and allocated to the MTPA under the provisions of the Act or any other law (s 21(1)(a)-(b)). The 2005 Act now also authorizes the board to solicit donations, grants or

bequests from the public (s 21(3)(a) read with s 21(1)(d)). As far as procurements are concerned, the provisions of the 2005 Act have been simplified by explicitly compelling the board to comply with the Preferential Procurement Policy Framework Act 5 of 2000 (s 23(1)(d)). Finally, with regard to the annual reports and financial statements of the MTPA, the 2005 Act now requires expressly that those documents include the agency's achievements and failures, the financial implications of all such achievements and failures, as well as recommendations pertaining to tourism in the province (s 28(2)).

6 Registration of tourism service providers

Like other provincial legislation and its predecessor, the 2005 Act provides for the registration of the tourism service providers operating within the province in order to establish a comprehensive database of the tourism industry in the province (s 31 of the 2001 Act and s 31(1) of the 2005 Act).

In terms of the 2001 Act, the board did not have to consult with any other organ of state before appointing the Registrar who was responsible for keeping and maintaining the register of tourism service providers (s 30(1) read with s 31). However, the 2005 Act today requires the board to make such an appointment in consultation with the MEC (s 30(1)(a)). The 2005 Act also makes it clear now that the Registrar reports to the CEO (s 30(4)).

The coming into effect of the 2005 Act results moreover in some changes to the list of persons and entities required to register if they want to be allowed to operate within the province (s 31(2)). Firstly, the definition of the term "carrier" in the 2001 Act (*ie* "a person or business providing carriage for passengers" (s 1)) has been tightened up in such a way that the concept now refers to "a person or business providing carriage for tourists, including non-scheduled air flight services" (s 1). Secondly, the concept "eating and drinking establishments" (s 31(h)) has been replaced by "restaurants" (s 31(1)(g)). If the phrase "eating and drinking establishments" meant establishments where one both eats and drinks, such an establishment would in most cases qualify as a "restaurant", which the 2005 Act defines as "premises which [are] structurally adapted and used for the purpose of supplying meals as prescribed, for a fee, to the public for consumption on the premises" (s 1). If, however, the phrase "eating and drinking establishments" referred to eating establishments, on the one hand, and drinking establishments, on the other hand, the latter would not qualify as "restaurants" whenever meals are not taken on the premises, and would therefore no longer require to be registered. Finally, the 2005 Act now also requires vehicle rental operators (*ie* "persons conducting business by providing services to tourists for the hiring of motor vehicles"), activity operators (*ie* "persons conducting business to provide recreational facilities, equipment or training to tourists in relation to tourist related activities"), and hunting operators (*ie* "persons conducting business by providing services and facilities to tourists for the hunting of game, including trophy hunting") to be registered (s 31(1)(i)-(k) read with s 1).

Another difference from the 2001 Act resides in the provision that the Registrar must, before registering any person or entity, ensure that such a registration would be consistent with all national policies, guidelines and directives pertaining to the tourism industry, with specific reference to policies, guidelines and directives pertaining to the transformation of the tourism industry (see above). The Registrar must also take into consideration whether or not the person or entity applying for registration has previously been found guilty of an offence in terms of the 2005 Act (s 33(3)).

7 Conclusion

The coming into effect of the new legislation has undoubtedly brought a range of improvements with regard to the impact of the provincial tourism body on tourism in Mpumalanga. This is particularly the case with regard to the requirement that the MTPA take into account not only national tourism legislation but also policies, guidelines and directives pertaining to tourism both in the national and the provincial spheres of government; greater stability in the management of the MTPA; greater accountability as far as the CEO is concerned; greater transparency in financial matters; and a more comprehensive system of registration of tourism service providers.

On the other hand, it must be stressed that the 2005 Act does not innovate when it combines tourism and nature conservation. For instance, the Eastern Cape Tourism Board had competences in both areas under the Eastern Cape Tourism Board Act 9 of 1995 (s 15) but the Eastern Cape decided to separate the two matters by vesting nature conservation powers in a separate statutory body, the Eastern Cape Provincial Parks Board established by the Provincial Parks Board Act 12 of 2003 (*PG* 1109 of 2003-12-31). Another instance where the two provinces follow opposing trajectories concerns the concept of a tourism development fund, which the 2005 Act abandons while it was introduced by the Eastern Cape Tourism Act 8 of 2003 (*PG* 1109 of 2003-12-31; and see Vrancken "New Eastern Cape Tourism Legislation" 2004 *Obiter* 364). The above are, however, exceptions to the process of overall approximation clearly under way as far as provincial tourism legislation is concerned (see also Vrancken "New Western Cape tourism legislation" 2005 *Obiter* 412).

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