
NEW WESTERN CAPE TOURISM LEGISLATION

1 Introduction

The Western Cape Province, and especially the area around the Cape Peninsula, is one of the major tourist attractions of South Africa. This has been the case for much longer than in many other parts of the country. As a result, the Western Cape tourism industry is comparatively very well established and developed to the extent that tourism is a very substantial element of the provincial economy and a significant focus area of the provincial government. This was reflected in the relative sophistication of the first tourism legislation passed in the province: the Western Cape Tourism Act (3 of 1997). However, a range of factors, including political and economic ones, led quickly to a reform process that produced a Western Cape Tourism Bill in 2000 (PG 5497 of 2000-05-17) as well as the Cape Town Tourism and Events Company in 2003. (An association incorporated under s 21 of the Companies Act (Registration Number 2003/0044604/08) and hereinafter referred to as “the Company”.) That process culminated with the passing of the Western Cape Tourism Act (1 of 2004), that repealed the 1997 Act (s 25) when it came into effect on 1 April 2004 (s 26 read with Proclamation 5/2004 in PG 6116 of 2004-03-19). The aim of this contribution is to discuss this new piece of legislation, comparing it wherever appropriate with the 1997 Act and the 2000 Bill.

2 Purpose

In contrast to the 1997 Act and the 2000 Bill, the Western Cape Tourism Act, 2004 (hereinafter referred to as “the WCTA”), fits unreservedly within a transformational and developmental paradigm. While the 1997 Act and the 2000 Bill largely ignored the need to redress the injustices of the past and to improve the quality of life of all citizens, the WCTA states that the Western Cape provincial government “recognises its responsibility for the economic development of the Province and the facilitation of the growth and transformation of the provincial economy to reflect the interests of all the people of the Province” and that tourism is “a key to unlocking the economic potential of the Province and its people”. For those reasons, the said government “accepts its responsibility to develop, transform and regulate the tourism industry for the benefit of all the people of the Province” (preamble).

3 Destination marketing organisation

The WCTA establishes a juristic person known as the Destination Marketing Organisation (hereinafter referred to as “the DMO”), which is the successor-in-law of the Western Cape Tourism Board (dissolved by the WCTA (s 22)) and the Company (s 23(1), which provides that the approval of the members of the Company must first be obtained). The DMO is capable of suing and

being sued in its own name and of performing all such acts as are necessary for the performance of its functions and the carrying out of its duties, and is governed by a board that must report to the provincial parliament of the Western Cape. (S 2(1). S 1 defines the term "Provincial Parliament" as "the Provincial Parliament of the Province referred to in section 105 of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996)" (hereinafter referred to as "the 1996 Constitution"). However, s 105 deals with provincial *legislatures*. The 1996 Constitution only uses the term "Parliament" in the national sphere of government. See ss 42-82 of the 1996 Constitution.) In contrast with the 2000 Bill, which gave the name "Cape Tourism" to the juristic person to be established (s 2), the WCTA left it to the board to determine a trading name for the DMO (s 2(2)). Before doing so, the Board had to appoint a naming committee comprising two board members; one advisory committee member; the CEO; an official representative of the City of Cape Town and an official representative of the Province of the Western Cape. (Reg 2 of the regulations regarding the consultation process with which the destination marketing organisation (DMO) board must comply to determine a trading name for the DMO (PN 158/2004 published in PG 6158 of 2003-08-13). After studying current brand research and the framework documents on tourism strategic marketing and integrated tourism development, the committee had to submit a list of trading names for the DMO to the head of the provincial department responsible for tourism and the head of the relevant department in the City for their consideration. The two heads had to confer with each other after receipt of the list of names submitted to them and furnish the committee with a suggested list of names (reg 3). The committee then had, through the provincial Minister of the Western Cape responsible for tourism (hereinafter referred to as "the Minister") and the relevant department of the executive Mayor of the City of Cape Town (hereinafter referred to as "the executive Mayor"), to send a formal request to furnish their inputs and ideas on a trading name for the DMO to all the municipalities in the province; the standing committee on finance and economic development of the Provincial Parliament of the Western Cape; the portfolio committee on tourism of the City; the Western Cape Local Government Organisation; the South African Tourism Board; the National Department of Environmental Affairs and Tourism; the International Marketing Council; the Black Management Forum; the regional tourism organisations and local tourism bureaux in the Province; the South African Tourism Services Association; the Federated Hospitality Association of South Africa; the Congress of South African Trade Unions; the Association of South African Travel Agents; the Western Cape Business Opportunities Forum; the National African Federated Chamber of Commerce and Industry; the Cape Chamber of Commerce; the Tourism Forum for Black Operators; the Provincial Development Council (PDC); and WESGRO (reg 4). The committee concurrently had to cause the list to be published in local newspapers throughout the Province together with a request to the general public to make inputs on the issue (reg 5). After the final day for submission of inputs, the committee had to properly consider those inputs and compile its recommendation for submission to the board (reg 6). After proper consideration thereof (reg 7), the board determined the trading name to be "Cape Town Routes Unlimited" (PG 6200 of 2005-01-21).

The objective of the DMO is to develop and promote the province as a tourist destination without infringing on the rights of municipalities regarding local tourism (s 3). In order to do so, the DMO must manage, plan and direct the marketing activities of all sectors of the province's tourism industry, namely meetings, incentives, conventions, exhibitions, events and leisure marketing, and visitor and support services; develop new tourism products and destinations throughout the province; cooperate with other bodies involved in the marketing of the film industry, and of trade and investment in the province; provide a vehicle which facilitates public and private sector cooperation, participation, decision-making and funding in the context of the province's tourism as a whole; align marketing activities in all sectors of tourism in the province, in collaboration with existing entities; facilitate the pursuit of transformation and empowerment goals within all sectors of the province's tourism industry; foster relations and enter into agreements with organisations of all kinds, both public and private, for the purpose of promoting the objectives of the DMO; and foster close cooperation between the public and private sectors in the pursuit of tourism growth for the benefit of all the people of the province (s 3).

4 The board

The board consists of no more than 15 members, namely one member nominated by the Minister acting alone, and appointed by the said Minister after consultation with the standing committee of the provincial parliament responsible for tourism and with organised local government (s 4(5)(a) read with s 4(1)); one member nominated by the executive Mayor and appointed by the Minister after consultation with the standing committee of the provincial parliament responsible for tourism and with organised local government (s 4(5)(b) read with s 4(1)); two members nominated by organised local government, one representing category B municipalities (in terms of s 155(1)(b) of the 1996 Constitution, a category B municipality is a municipality that shares municipal executive and legislative authority in its area with a category C municipality within whose area it falls) and one representing category C municipalities (in terms of s 155(1)(c) of the 1996 Constitution, a category C municipality is a municipality that has municipal executive and legislative authority in an area that includes more than one municipality), appointed by the Minister, acting in consultation with the executive Mayor and after consultation with the standing committee of the provincial parliament responsible for tourism and with organised local government (s 4(5)(c) read with s 4(1)); one *ex officio* senior official nominated by the Minister (s 4(5)(e)); one *ex officio* senior official nominated by the executive Mayor (s 4(5)(f)); the chief executive officer of the DMO *ex officio* (s 4(5)(g) read with ss 1 and 15); and no more than eight members appointed by the Minister in consultation with the executive Mayor and after consultation with the standing committee of the provincial parliament responsible for tourism and with organised local government upon nominations by the public after the Minister, by notice in the Provincial Gazette and in such other media as the Minister or his or her nominee may consider appropriate, has invited all interested parties to submit, within the period mentioned in the notice, names of persons who in the opinion of such

interested parties have competence in, or knowledge of the tourism industry or marketing and management expertise or strategic leadership qualifications in the field of organisational transformation, and are fit and proper persons to be so appointed, stating the grounds upon which such opinion is based (s 4(5)(d) read with s 4(1) and (3)). The Minister must give due consideration to the need for the board to reflect broadly the demographic and geographic composition of the province when appointing members of the board (s 4(4)). This requirement, together with the much more substantial amount of consultation with local and provincial government that must precede most appointments, constitute significant departures from the approach that underpinned the 1997 Act and the 2000 Bill (*cf* s 4(1) of the 1997 Act and s 6 of the 2000 Bill).

The members of the board must be appointed on such terms and conditions and may be paid such allowances and be reimbursed for such expenses out of the funds of the board as are determined by the Minister in concurrence with the provincial Minister of the Western Cape responsible for finance (s 12). The appointment is for such period, not exceeding two years, as determined at the time of their appointment (s 5(1)), and the members are eligible for re-appointment for not more than three consecutive terms (s 5(3)). The members must however vacate their office if they are declared insolvent or of unsound mind by a competent court (s 6(1)(a)); they are removed from office on the ground of misconduct, incapacity or incompetence (s 6(1)(b)); and in terms of s 6(2), such a removal may be decided by the Minister, after consultation with organised local government and with due consideration to the provisions of the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000)); they are convicted of an offence and sentenced to imprisonment without the option of a fine (s 6(1)(c) that stresses that no one may be regarded as having been sentenced until an appeal against the conviction or sentence has been determined); they are absent from three consecutive meetings of the board without the consent of the chairperson (s 6(1)(d)); they submit their written resignation to the chairperson (s 6(1)(e)); they become members of Parliament, a provincial legislature, the council of a municipality or the national Cabinet or the Western Cape provincial Cabinet (s 6(1)(f)); or they become employees of the province or a municipality unless they are *ex officio* board members referred to in section 4(5)(e) and (f) (s 6(1)(g)).

The Minister, after consultation with organised local government, must designate a chairperson and a vice-chairperson for the board from among the members of the board (s 4(6)). The chairperson determines the time and place of the ordinary meetings of the board, which must be held at least once every three months (s 7(1)). On the other hand, it is the chief executive officer who has the task to convene a special meeting if at least three members of the board have requested him or her in writing to do so (s 7(2)). The notice whereby a special meeting of the board is convened must state the business of that meeting, and no other business may be transacted at such a meeting (s 7(3)). The vice-chairperson must act as chairperson of the board when the chairperson is absent or unable to act as chairperson, and when both the chairperson and the vice-chairperson are absent or unable to act as chairperson, the members present at such meeting must, by majority vote, elect one of their number to preside at such meeting (s 7(5)). The

quorum for a meeting of the board is the majority of all its members (s 7(4)). Decisions are taken by a majority of the members present other than the *ex officio* members (s 7(13)) and, in the event of an equality of votes, the chairperson has a casting vote over and above his or her deliberative vote (s 7(6)). When the board is in session, a member may not take part in the discussion of, or participate in the making of a decision on, any matter in which that member or that member's spouse, partner, immediate relative or employer has any personal and direct or indirect pecuniary interest, and the board may actually require that such a member recuses himself or herself from the proceedings regarding such matter (s 7(9)); and in terms of s 7(10), any member of the board who contravenes the provisions of s 7(9) is guilty of an offence and on conviction is liable to a fine or imprisonment for a period not exceeding 12 months). Furthermore, a decision taken by the board at a time when there was a vacancy on the board, when any person who was not entitled to sit as a member of the board sat as such a member, is not invalid if the decision was taken by a majority of all the members of the board and the members comprising that majority were entitled to sit as members (s 7(7)). Finally the board may allow any member of a committee who is not a member of the board to attend any meeting of the board at which any matter relating to a function of that committee is dealt with and may allow such member to take part in the proceedings at such meeting without having the right to vote (s 7(8)). This is also the case of the Minister and the executive Mayor who, in contrast, must be allowed to attend and participate (s 7(12)). The minutes of board meetings must be signed by the person who presides at the next meeting of the board (s 7(11)).

In order to achieve its objectives, the board may lease, purchase or otherwise acquire, let, sell, exchange or alienate, mortgage, burden with a servitude or confer any real right in, immovable property in consultation with the Minister and the provincial minister of the Western Cape responsible for finance; hire, purchase or acquire, hire out, sell, exchange or alienate, pledge or confer any other real right in movable property; negotiate or cooperate with any government, provincial administration or local government, or any other board or person, in South Africa or elsewhere, with regard to any matter which is directly or indirectly aimed at the achievement of the objectives of the board; enter into agreements with a similar body, within South Africa or elsewhere, for the promotion of tourism in the respective areas for which the board and that body have been established, and for that purpose the board, or a member or members of the board, may undertake journeys inside and outside South Africa; in consultation with the Minister, open and administer offices which may be necessary or advisable for the effective and proper exercise of its powers, the performance of its functions and the carrying out of its duties; acquire insurance cover for itself against any loss, damage, risk or liability which it may suffer or incur, and for the members of the board and committees and employees in respect of bodily injury, disablement or death resulting solely and directly from an accident occurring when performing their duties as such members or employees; open and conduct banking accounts at a bank as defined in the Banks Act (94 of 1990); draw up, make, publish and sell or make available free of charge books, guides, maps, publications, photographs, films, videos and similar matter intended to inform persons, in South Africa or elsewhere,

of tourist attractions and services in the province; gather, evaluate and process information relating to tourism in the province, and make such information available to persons who are engaged in the tourism industry; give marketing advice and guidance to persons who are engaged in the tourism industry in the province; with a view to the effective marketing of, and the provision of information relating to, any service, facility or product offered in connection with tourism, determine, publish and regulate the use of such distinguishing signs and wording as the board may deem fit; employ and terminate the employment of persons; in consultation with the Minister and the provincial minister of the Western Cape responsible for finance, establish, manage and administer any pension or provident fund or medical scheme for the benefit of the DMO's employees, or have such fund or scheme administered by another person or body; negotiate and cooperate with any educational institution regarding the institution, continuation or expansion of courses for the training of persons for careers in the tourism industry; recommend incentive schemes and grading, classification and accreditation systems and administer such schemes and systems; approve the use of trading names by the DMO for specific tourism marketing projects; and perform any other acts which may contribute towards the achievement of the objectives of the board (s 14(1)).

On the other hand, in order to achieve its objectives the board is compelled by the WCTA to work with the provincial government and municipalities to implement the tourism development and marketing strategies of the province and municipalities; integrate transformation objectives into the operational activities of the board; work with other national and provincial public entities, particularly those tasked with trade and investment promotion; and work with sector-specific bodies such as those in the wine and film industries in the promotion of provincial attractions (s 14(2)).

The board may delegate in writing any power, function or duty assigned to the board or conferred or imposed upon it in terms of the WCTA to any member of the board, to any committee, or to the chief executive officer (s 11(1)), subject to any limitations, directions or conditions which the board may decide (s 11(3)). Such a delegation does not preclude the exercise of the power, the performance of the function or the carrying out of the duty concerned by the board (s 11(2)) and the latter may at any time amend or revoke such a delegation (s 11(3)). The board may also review and amend any decision taken in terms of a delegation, subject to any rights that may have accrued and with due consideration to the provisions of the Promotion of Administrative Justice Act, 2000 (s 11(4)).

5 The committees

The board, after consultation with the Minister, may establish committees to assist the board with the exercise of its powers, the performance of its functions and the carrying out of its duties (s 8(1)(a)). Committees comprising persons with relevant expertise may be established *inter alia* in the fields of meetings, incentives, conventions and exhibitions; events; leisure; new tourism product development; visitor information services; finance and human resources (s 8(2)). Those committees, which consist of

the number of members not exceeding 15 determined by the board including one member of the meetings, events, leisure, tourism products and visitor committees (s 8(2)(a)-(e)), and which must be chaired by a member of the board or a duly appointed nominee (s 8(5)), must function subject to the terms of reference determined by the board (s 8(3)) and may at any time be dissolved by the board (s 8(6)). A power, function or duty delegated by the board to a committee may be delegated further by that committee (s 11(1)).

Committee members are appointed on such terms and conditions and may be paid such allowances and be reimbursed for such expenses out of the funds of the board as are determined by the Minister in concurrence with the provincial Minister of the Western Cape responsible for finance (s 12). Those appointments are for such period, not exceeding two years, as is determined at the time of his or her appointment (s 9(1)) and members are eligible for reappointment, but may not serve more than three terms as a member of a committee (s 9(3)). The office of a member of a committee is terminated in the same circumstances under which a member of the Board must vacate his or her office (s 10).

6 Officers and employees

The board, in consultation with the Minister and after following a public advertising process, must appoint a fit and proper person with knowledge and experience of management, marketing and tourism as the CEO of the DMO. (S 15(1). In terms of s 15(5), the chief executive officer of the Cape Town Tourism and Events Company (an association incorporated under s 21), as on the date on which the WCTA came into operation was deemed to be the duly appointed chief executive officer of the DMO for the unexpired term of the chief executive officer's employment agreement with the Company.) The CEO must be appointed in terms of a fixed-term, performance-linked contract, for a period not exceeding five years, and may be reappointed after expiry of that period (s 15(2)). If the CEO is absent or for any reason unable to perform his or her functions, or whenever there is a vacancy in the office of the CEO, the board must appoint another person to act as CEO of the DMO during such absence or inability or until a CEO has been appointed (s 15(3)). An acting CEO must, for the duration of his or her appointment, perform the functions of the CEO (s 15(4)). In addition to the powers, functions and duties conferred upon the CEO by the provisions of the WCTA or by the board, the CEO must ensure that the DMO performs its functions in terms of this Act; be in charge of the other employees of the board; be accountable to the board; ensure that proper minutes are kept at meetings of the board and committees; attend meetings of the board; and submit to the Minister and the executive Mayor and any other officials nominated by the province and the City of Cape Town, within 14 days of a board meeting, a copy of the minutes thereof (s 16). A power, function or duty delegated by the board to the CEO may be delegated further by the latter (s 11(1)).

On the date on which the WCTA came into operation the staff employed by the Western Cape Tourism Board and the Company (subject to the approval of the members of the Company first being obtained) were

transferred to the DMO in accordance with the Labour Relations Act (66 of 1995; and ss 22(3)(b) and 23(2) respectively). Since then the board may, in consultation with the Minister and the provincial minister of the Western Cape responsible for finance, determine and pay to its employees remuneration, allowances, bonuses, subsidies and pensions and other service benefits; and determine and pay gratuities to its employees and former employees, and to the dependants of its employees and former employees, in the case of death or injury of such employees which occurred in the course of their employment (s 13).

7 Funding and financial control

On the date on which the WCTA came into operation, the assets, liabilities and records of the Western Cape Tourism Board and the Company (subject to the approval of the members of the Company first being obtained) were transferred to the DMO (ss 22(3)(a) and 23(1) respectively). Furthermore, the funds of the DMO consist of money appropriated by the provincial parliament for that purpose; money that may be appropriated by the council of a municipality for that purpose; and money donated to the DMO by any person or institution (s 17(1)). Acceptance by the DMO of money falling in the last two categories is subject to any applicable provisions of the Public Finance Management Act (1 of 1999), and any regulations in terms thereof (s 17(2)).

The board's financial control, accountability and responsibility and its duties to report are regulated by the Public Finance Management Act, 1999, and any regulations or directives issued in terms of that Act (s 17(3)). More specifically, the board must submit to any municipality which provides funds for the DMO and any other municipality which so requests, the reports or statements referred to in section 55(l)(d) of the Public Finance Management Act, 1999, within the period referred to in that section (s 17(4)).

The annual financial statements of the DMO must be audited by the Auditor-General, except if the DMO appoints as an auditor a person referred to in section 58(1)(b), read with section 58(2) and (3), of the Public Finance Management Act, 1999 (s 17(5)).

8 Inter-institutional relationships

The 1997 Act provided for regional, sub-regional and local tourism organisations and contained detailed provisions regarding their objects, composition, functioning, constitutions, accreditation, funding and accountability (ss 19-31). As far as the 2000 Bill is concerned, it provided more modestly for local tourism bureaux (ss 18-26; and the regional tourism organisations were to be disestablished in terms of s 31(1)(a)) as well as the formulation of a provincial tourism development policy (s 27) and the establishment of a Ministerial Provincial Tourism Forum (s 28).

In contrast, the WCTA is less prescriptive while laying greater emphasis on cooperative government. Indeed, the board must cooperate with, and participate in, any institutions for the promotion of investment, trade, the film industry and other related sectors, in order to promote inter-institutional

cooperation with reference to joint planning, cooperative budgeting, joint monitoring and evaluation, and joint reporting, which will ensure alignment of their strategies and operations (s 18(1)). More generally, the DMO, the Province and any municipality involved in the functions of the DMO must ensure that they co-operate with one another in mutual trust and good faith by fostering friendly relations; assisting and supporting one another; informing one another of, and consulting one another on, matters of common interest; co-ordinating their actions and legislation with one another; adhering to agreed procedures; and avoiding legal proceedings against one another (s 18(2) read with s 41(1)(h) of the 1996 Constitution).

On the other hand, the DMO may accredit a local tourism association or any similar tourism organisation established or recognised by a municipality in the province (s 19(1)(a)). The DMO may also formulate and prescribe accreditation criteria for the accreditation of a local tourism association or any similar tourism organisation (s 19(1)(b)). The DMO must keep a register of all accredited local tourism organisations or any similar organisations established or recognised by a municipality (s 20). Any tourism organisation or tourism bureau formerly accredited in terms of the 1997 Act, that is not accredited by the DMO, will not be audited by the Auditor-General (s 19(2)).

The DMO may further establish and accredit a visitor information network, based on patterns and demands, in accordance with the criteria determined by the board (s 21).

9 Regulations

The Minister, after consulting organised local government, may make regulations relating to any matter which may be dealt with by the Minister in terms of the WCTA, and any matter deemed necessary by the Minister for the achievement of the objects of the DMO and the WCTA. Regulations with financial implications must be made in consultation with the provincial minister of the Western Cape responsible for finance (s 24).

10 Conclusion

Overall, the WCTA shows more features of a *loi-cadre* than the 1997 Act and 2000 Bill, while laying much greater emphasis on tourism as an engine of development, the need to transform the tourism industry and the constitutional imperative of cooperative government. For those reasons, the WCTA fits more appropriately within the political, social and economic environment now prevailing in the Western Cape. This should ensure that it contributes more effectively and for a longer period of time than its predecessor to fairer and more sustainable tourism development in the province.

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