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20 April 2012

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The Department of Transport

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Dear Sir,

**COMMENTS SUBMITTED ON BEHALF OF THE CONGRESS OF SOUTH AFRICAN TRADE UNIONS (COSATU) IN RESPECT OF THE:
THE SOUTH AFRICAN NATIONAL ROADS AGENCY LIMITED AND NATIONAL ROADS ACT REGULATIONS, 2012 – NO. 35182 DATED 27 MARCH 2012**

Introduction

1. These representations are submitted on behalf of COSATU.
2. For purposes of convenience the –
 - 2.1. draft South African National Roads Act Agency Limited and National Roads Act Regulations, 2012, No. 35182 dated 27 March 2012 will be referred to as “the Draft Regulations”; and
 - 2.2. National Roads Agency and National Roads Act, 1998 will be referred to as “the Act”.

Insufficient time frame for comment

3. The Draft Regulations were published on 27 March 2012 and provided for the opportunity for comment from the public within 20 days of the publication.
4. This was shortly before the Easter holidays and in real terms the public were only given 12 working days within which to make such comments.

5. Although COSATU requested, in writing, and was granted an extension of the deadline, it is submitted that the time period within which such comments were required to be made was wholly inappropriate and insufficient.
6. Relevant jurisprudence indicates that lawmakers (both in relation to primary legislation and subordinate legislation) are required to provide citizens *"a meaningful opportunity to be heard in the making of laws that will govern them."*¹
7. The period for comment in relation to the issues raised in the Draft Regulations do not constitute a meaningful opportunity as required.
8. In the absence of such meaningful opportunity, the gazetting and publication of these Regulations will be unconstitutional and in contravention of section 195 of the Constitution. In essence, section 195 deals with the principles on which public administration must be governed. The section obliges both the Department and SANRAL to ensure that any form of public administration, even in the form of subordinate legislation, must be governed by the democratic values and principles enshrined in the Constitution including the principle that *"people's needs must be responded to, and the public must be encouraged to participate in policy-making"*. Where laws are made through legislative administrative action, the procedure of publishing draft regulations for comment serves this purpose. It is accordingly necessary that sufficient time and meaningful participation is provided to the public in relation to the Draft Regulations. It will enable people who will be affected by the regulations to make representations to the lawmaker, so that their concerns can be taken into account in deciding whether or not changes need to be made thereto².
9. It would accordingly be in the interests of the Department to ensure that this process of public participation in relation to the Draft Regulations is extended, publicised and that a process is put into place to encourage comments from the public to be made.

Regulation 2(1) and (2) – The Powers of the CEO to appoint employees to enforce the tolls

10. In terms of Regulation 2(1), the Chief Executive Officer of SANRAL ("the CEO") is authorised to appoint persons in terms of section 54 of the Act.

¹ Doctors for Life International v Speaker of the National Assembly 2006 (1) SA 474 (SCA) at para 145

² Minister of Health and Another v New Clicks South Africa (Pty) Limited and Others 2006 (2) SA 311(CC) at paras 112 to 113 and 1157

11. Regulation 2 read with section 54 effectively enables the CEO to appoint employees to take steps to prevent offences and contraventions of the Act. In terms of section 54(2), the employees appointed by the CEO will have the powers of arrest and detention such as those that are conferred on a peace officer in terms of chapter 5 of the Criminal Procedure Act No. 51 of 1977 ("the CPA").
12. In terms of the CPA, only the Minister of Justice and Constitutional Development ("MOJ") can declare a person to be a peace officer. The Draft Regulations enable the CEO to appoint employees as peace officers to enforce the tolls. This provision is clearly in contravention of the CPA, and provides a power to the CEO that is not contemplated in the Act.
13. Regulation 2(2) enables the Chief Executive Officer to appoint an employee as a peace officer subject only to the following pre-requisites -
 - (a) *In the case of an employee who is appointed to enforce the provisions of the Act on a national road, he or she is in possession of a diploma referred to in Regulation 1(b) of the National Road Traffic Regulations;*
or
 - (b) *In the case of an employee who is appointed to process documentation administratively to charge persons who fail to comply with the requirement to pay tolls as contemplated in section 27 of the Act, he or she has completed a training course as approved by the Chief Executive Officer".*
14. The pre-requisites in the Draft Regulations are significantly different from those provided in the regulations promulgated in terms of Section 334 of the CPA – "Declaration Of Peace Officers" published under GN R707 GG34583 of 2 September 2011 ("the Declaration").
15. In terms of the Declaration, before a person is appointed as a peace officer, the employer of that person must be in possession of a certificate issued by the National Commissioner of the South African Police ("the NC") which confirms that in the opinion of the NC, such person is competent to exercise the powers of a peace officer (with or without any prescribed restrictions) and that the NC has had regard to and considered -
 - (i) *The previous criminal convictions of the applicant;*
 - (ii) *Whether the person has been declared unfit to possess a firearm as contemplated in the Firearms Control Act, 2000 (Act 60 of 2000) or other relevant legislation; and*

(iii) *The training undergone by the applicant with regard to the powers to be exercised”.*

16. Accordingly, Regulation 2(2) effectively entitles the CEO to appoint any person as a peace officer only on the basis of the tertiary or training courses referred to therein and without the requirement of a certificate from the NC or indeed any consideration of the factors listed in paragraph 15 above. This provision is accordingly too wide and falls short of the inherent safeguards provided for in the Declaration. The provision must be amended to comply with the provisions of the Declaration.

Regulation 2(3)

17. Regulation 2(3) provides that an employee who is appointed in terms of section 54 of the Act must be appointed as a peace officer in terms of section 334 of the CPA before that employee is empowered to exercise or perform any duty or power in terms of the Draft Regulations.

18. We make the following submissions in respect of this sub-section:

18.1. As indicated above, in terms of section 334 of the CPA, only the MOJ may declare persons to be peace officers *“by notice in the Government Gazette”*. The MOJ has done so in terms of the Declaration referred to in paragraph 15 above.

18.2. In terms of that Declaration a traffic officer appointed in terms of section 3A of the National Road Traffic Act is conferred with all powers of a peace officer in terms of the CPA. There is no provision in that Declaration for persons appointed under section 54 of the Act to be conferred with all the powers of peace officers in terms of the CPA. Accordingly, until the Declaration is amended, and the MOJ declares employees appointed under section 54 of the Act as being eligible to be peace officers, they cannot be so appointed.

19. Regulations 2(1), (2) and (3) are accordingly in contravention of the CPA and the Declaration in at least the following 4 respects:

19.1. It is the MOJ who has the power to declare in what sectors there may be peace officers and that such declaration must be via the CPA and in terms of Regulations issued in terms thereof;

- 19.2. There is currently no declaration in respect of peace officers that may be appointed in terms of the Act.
- 19.3. Peace officers do not automatically gain all the powers that are permitted under the CPA and the MOJ may specify the extent of the powers to be granted to such peace officers.
- 19.4. There is no requirement that a certificate must be issued by the National Commissioner of Police which certifies that the applicant is suitable for appointment as a peace officer.
20. Finally it is apparent that these sub-sections go beyond the powers of a CEO contemplated not only in the Act but accords him with powers that the CPA allocates to the Minister of Justice. These provisions are accordingly invalid for one or more of the reasons set out above.

Regulation 2(5)

21. In terms of this sub-section an authorised employee who has been appointed by the CEO as a peace officer must produce "*his or her certificate of appointment at the request of any person having a material interest in the matter concerned*". The provision does not indicate what details must appear on the certificate of appointment.
22. We make the following submissions in respect of this sub-section:
- 22.1. Regulations promulgated in terms of section 334 of the CPA entitled: "*Requirements and Certificate for Peace Officers in terms of Section 334 of the CPA*", published in GR210, GG23144 of 19 February 2002, as amended by GNR656 GG24849 of 16 May 2003, specify that a certificate of appointment issued in terms of section 334 must contain the following information:

"(i) The full name of the person appointed;

(ii) Identity number;

(iii) Signature;

(ii) Photograph;

- (iii) *A description of the capacity in which he/she was appointed;*
- (iv) *The name of the employer who made the appointment; and*
- (v) *The signature and official stamp of the employer or responsible person."*

22.2. Given the extensive powers contemplated in the Draft Regulations for peace officers appointed in terms of the Act, it is our submission that these provisions must be incorporated into the Draft Regulations, and in addition thereto, must contain information about the person's immediate supervisor or line manager and his or her contact details for the purposes of enquiries or complaints.

Regulations 3(b), (c) and (g) and regulation 5

23. These regulations provide the equivalent of search and seizure powers normally associated with powers issued to police officers.

24. In terms of these regulations a peace officer may -

24.1. impound or confiscate any document or tag which that peace officer suspects to be invalid or which has been or appears to have been unlawfully altered or defaced or which is being put to unlawful use³;

24.2. impound any licence, document or tag produced to him which in his or her opinion may afford evidence of a contravention or evasion of any provision of the Act⁴;

24.3. at any time enter any motor vehicle and inspect such vehicle and any electronic device installed therein for the purpose of toll collection⁵.

25. Accordingly, these items may be seized by the peace officer if –

25.1. he or she suspects it to be invalid;

25.2. it appears to him or her that it has been unlawfully altered or defaced;

³ Regulation 3(b)

⁴ Regulation 3(c)

⁵ Regulation 3(g)

- 25.3. it appears to him or her to have been put to unlawful use; or
- 25.4. in his or her opinion it may afford evidence of a contravention or evasion of the Act.
26. In addition, Regulation 3(g) empowers the peace officer to *“at any time enter any motor vehicle and inspect such vehicle and any electronic device installed therein for the purpose of toll collection”*.
27. These powers are provided to employees who are effectively appointed by the CEO and are clearly not peace officers designated by the MOJ in terms of the CPA.
28. The power to enter vehicles, and the seizure and forfeiture of property connected with offences in terms of the Act must be regarded as infringements of the rights of the individual to privacy and ownership. In the circumstances it is absolutely necessary that the powers contemplated in these sub-sections –
- 28.1. must be exercised carefully and only when necessary; and
- 28.2. provide ample protection to ensure that the infringement of the constitutional rights go no further than reasonably necessary in the circumstances.
29. In their current form, these sub-sections are wide, rely on the subjective assessment of the peace officer, capable of abuse and are without limitation. They empower ordinary employees of SANRAL to exercise powers that are not even afforded to peace officers in terms of the CPA or members of the South African Police. In the absence of appropriate safeguards, the subsections are unconstitutional.
30. The Constitutional Court has had cause to consider similar powers in the context of the investigation of serious economic offences and in relation to the enforcement of the Medicines and Related Substances Control Act, 1965. The Court in that case was unambiguous that statutes which permit the power of search and seizure must do so with the necessary safeguards and guidance to the officials who are meant to conduct the searches. These regulations accordingly fall short of the standard set by the Constitutional Court⁶.

⁶ Mistry v Interim National Medical and Dental Council of South Africa 1998(4) SA 1127 (CC).

31. The sub-sections explicitly include the right of a peace officer to *"impound"* or *"confiscate"* a road user's licence, and implicitly extend this power to vehicle registration licence. Once confiscated, the driver would no longer be able to lawfully drive his or her vehicle. This provision to confiscate a driver's licence or a vehicle registration licence is one that is not contemplated in the Act and is accordingly inappropriate.

32. Where a driver's licence or vehicle registration licence is in fact impounded or confiscated, the result would be that the driver would have to *"abandon"* the vehicle at the point at which it was stopped by the officer. Regulation 5 permits an officer, where in his or her opinion the vehicle poses a danger or an obstruction to traffic to remove the vehicle to a government facility. Where passengers were being carried in the vehicle, the officer may *"arrange and contract with any other person to provide the necessary transport to such persons"*. The cost of removal of the vehicle, the transportation of the passengers to their destination and the retrieval of the vehicle would be borne by the owner of the vehicle. In the circumstances, where this cost is imposed on drivers in the context of the wide and unlimited powers of search and seizure, the constitutionality of this provision is called into question.

Kind regards



SHAMIMA GAIBIE

Cheadle Thompson & Haysom Inc.