



PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

Tel: (021) 403-2478
Direct: (021) 403-8491
Fax: (021) 403-3888
E-mail: dkassan@parliament.gov.za

MEMORANDUM

[Confidential]

TO: Mrs. RN Rasmeni, MP
Chairperson of the Select Committee on Social Services

COPY: Secretary to Parliament

FROM: Constitutional and Legal Services Office
[Ms Daksha Kassan – Parliamentary Legal Adviser]

DATE: 10 October 2013

SUBJECT: Electoral Amendment Bill [B22 -2013]

REF: E22.2013/2/2013



PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

LEGAL SERVICES

PO Box 15 Cape Town 8000 Republic of South Africa
Tel: 27 (21) 403 2911
www.parliament.gov.za

MEMORANDUM

TO: Mrs. RN Rasmeni, MP
Chairperson of the Select Committee on Social Services

COPY: Secretary to Parliament

FROM: Constitutional and Legal Services Office
[Ms Daksha Kassan - Parliamentary Legal Adviser]

DATE: 10 October 2013

REF: E22.2013/2/2013

SUBJECT: Electoral Amendment Bill [B22-2013]

1. INTRODUCTION

- 1.1 On 8 October 2013, a member of the Select Committee on Social Services ("the Select Committee"), following a briefing on the Electoral Amendment Bill [B22B-2013] by the Department of Home Affairs and the Independent Electoral Commission, raised the question as to why the Electoral Amendment Bill [B22-2013] (hereinafter referred to as "the Bill") was "tagged" as a section 75 Bill (namely as an ordinary Bill not affecting provinces) and not as a section 76 Bill (namely as an ordinary Bill affecting provinces).
- 1.2 Our office was consequently requested to provide a written explanation to the question raised.

2. WHAT IS MEANT BY "TAGGING"?

2.1 Before explaining the reasons why the Bill was "tagged" as a section 75 Bill, it is necessary to explain what is meant by the term "tagging".

2.2 "Tagging" is the term used by Parliament for classifying Bills for purposes of determining the procedure to be followed, as set out in the Constitution, in enacting a Bill.

2.3 The Constitution sets out three procedures that a Bill may follow – depending on the nature and content of the Bill. These procedures are set out in section 74 (which deals with the procedure that should be followed when a Bill amends the Constitution); section 75 (which deals with the procedure that should be followed when a Bill does not affect the provinces, or is a money Bill) and section 76 (which deals with the procedure that should be followed when a Bill affects the provinces).

2.4 When a Bill is introduced in a House of Parliament, the person introducing the Bill indicates the proposed classification ("tagging") of the Bill. However, such a proposal is not binding on Parliament as only the Joint Tagging Mechanism (JTM) has the competency to classify ("tag") the procedure in terms of which a Bill may be enacted.

3. WHEN MUST A BILL BE "TAGGED" AS A SECTION 76 BILL?

3.1 In order to provide the reasons why the Bill was "tagged" as a section 75 Bill, it is necessary to understand when a Bill MUST be "tagged" as a section 76 Bill.

3.2 According to section 76(3) of the Constitution, a Bill must be dealt with in accordance with the procedure established by either section 76(1) or section 76(2) if it falls within a functional area listed in Schedule 4¹ or provides for legislation envisaged in any of the following sections:

- (a) Section 65(2) – dealing with the uniform procedure in terms of which provincial legislatures confer authority on their NCOP delegations to cast votes on their behalf;

¹ Schedule 4 of the Constitution lists the functional areas of concurrent national and provincial legislative competence. See Annexure A for a copy of Schedule 4.

- (b) section 163 – dealing with national legislation to recognize national and provincial organizations representing municipalities;
- (c) section 182 – regulating the functions of the Public Protector;
- (d) section 195(3) and (4) – legislation promoting the values and principles governing public administration and regulating the public administration;
- (e) section 196 – dealing with the Public Service Commission; and
- (f) section 197 – dealing with the Public Service.

3.3 Furthermore, section 76(4) of the Constitution provides that a Bill must be dealt with in accordance with the procedure established by section 76(1) if it provides for legislation-

- (a) envisaged in section 44(2) – namely legislation with regard to a matter falling within a functional area listed in Schedule 5²;
- (b) envisaged in section 220(3) – legislation which deals with the functions of the Financial and Fiscal Commission; or
- (c) envisaged in Chapter 13³, and which includes any provision affecting the financial interests of the provincial sphere of government.

3.4 Finally, section 76(5) of the Constitution states that a Bill envisaged in section 42(6) – a Bill which determines that the seat of Parliament is elsewhere than Cape Town – must be dealt with in accordance with section 76(1).

3.5 At this point, reference should also be made to the recent constitutional case on the classification of Bills, namely *Tongoane v Minister of Agriculture and Land Affairs*,⁴ wherein the Constitutional Court concluded that: "Whether a Bill is a section 76 Bill is determined in two ways. First, by the explicit list of legislative matters in section 76(3)(a)-(f), and second by whether the provisions of a Bill in a substantial measure fall within a concurrent provincial legislative competence."⁵

² Schedule 5 of the Constitution lists the functional areas of exclusive provincial legislative competence. See Annexure B for a copy of Schedule 5.

³ Chapter 13 of the Constitution is entitled "Finance" which envisages legislation, inter alia, relating to equitable shares and allocation of revenue; national, provincial and municipal budgets; treasury control; procurement; government guarantees; remuneration of persons holding public office; provincial revenue funds; provincial taxes; municipal fiscal powers and functions; and provincial and municipal loans.

⁴ 2010 (6) SA 214 (CC); 2010 (8) BCLR 741; [2010] ZACC 10.

⁵ At paragraph 72.

4. THE ELECTORAL AMENDMENT BILL "TAGGED" AS A SECTION 75 BILL

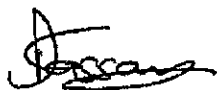
4.1 Following the introduction of the Bill into Parliament, the Bill was classified ("tagged") as a section 75 Bill as it did not contain any provisions to which the procedures set out in either section 74 or 76 of the Constitution would apply – namely it was not a Bill amending the Constitution, nor was it considered to be a Bill affecting provinces as set out in section 76 of the Constitution.

4.2 To illustrate the point further, the provisions of the Bill, *inter alia*, largely seeks to amend the definitions for "identity document" and "South African passport"; prescribes additional registration requirements for citizens ordinarily resident outside the Republic; allows for all prisoners to be registered as voters if they meet all the other relevant requirements; and provides for the casting of special votes in an election for the National Assembly and provincial legislatures. The Bill thus largely seeks to regulate "Elections".

4.3 The Bill does not:

- (a) contain provisions which in substantial measure fall within a functional area listed in Schedule 4;
- (b) provide for legislation envisaged in sections 76(3)(a)-(f) of the Constitution as described above at paragraph 3.2;
- (c) provide for legislation envisaged in sections 44(2) or 220(3) or Chapter 13 of the Constitution; and
- (d) deal with legislation envisaged in section 42(6) of the Constitution.

4.4 As the answers to the test set out in paragraph 4.3. are all negative, the Bill can only be "tagged" as a section 75 Bill.



Ms Daksha Kassan

Parliamentary Legal Adviser

Schedule 4 - Functional Areas of Concurrent National and Provincial Legislative Competence

Part A

- Administration of indigenous forests
- Agriculture
- Airports other than international and national airports
- Animal control and diseases
- Casinos, racing, gambling and wagering, excluding lotteries and sports pools
- Consumer protection
- Cultural matters
- Disaster management
- Education at all levels, excluding tertiary education
- Environment
- Health services
- Housing
- Indigenous law and customary law, subject to Chapter 12 of the Constitution
- Industrial promotion
- Language policy and the regulation of official languages to the extent that the provisions of section 6 of the Constitution expressly confer upon the provincial legislatures legislative competence
- Media services directly controlled or provided by the provincial government, subject to section 192
- Nature conservation, excluding national parks, national botanical gardens and marine resources
- Police to the extent that the provisions of Chapter 11 of the Constitution confer upon the provincial legislatures legislative competence
- Pollution control
- Population development
- Property transfer fees
- Provincial public enterprises in respect of the functional areas in this Schedule and Schedule 5
- Public transport
- Public works only in respect of the needs of provincial government departments in the discharge of their responsibilities to administer functions specifically assigned to them in terms of the Constitution or any other law
- Regional planning and development
- Road traffic regulation
- Soil conservation
- Tourism
- Trade
- Traditional leadership, subject to Chapter 12 of the Constitution

- Urban and rural development
- Vehicle licensing
- Welfare services

Part B

The following local government matters to the extent set out in section 155(6)(a) and (7):

- Air pollution
- Building regulations
- Child care facilities
- Electricity and gas reticulation
- Firefighting services
- Local tourism
- Municipal airports
- Municipal planning
- Municipal health services
- Municipal public transport
- Municipal public works only in respect of the needs of municipalities in the discharge of their responsibilities to administer functions specifically assigned to them under this Constitution or any other law
- Pontoons, ferries, jetties, piers and harbours, excluding the regulation of international and national shipping and matters related thereto
- Stormwater management systems in built-up areas
- Trading regulations
- Water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems

Schedule 5 - Functional Areas of Exclusive Provincial Legislative Competence

Part A

- Abattoirs
- Ambulance services
- Archives other than national archives
- Libraries other than national libraries
- Liquor licences
- Museums other than national museums
- Provincial planning
- Provincial cultural matters
- Provincial recreation and amenities
- Provincial sport
- Provincial roads and traffic
- Veterinary services, excluding regulation of the profession

Part B

The following local government matters to the extent set out for provinces in section 155(6)(a) and (7 :

- Beaches and amusement facilities
- Billboards and the display of advertisements in public places
- Cemeteries, funeral parlours and crematoria
- Cleansing
- Control of public nuisances
- Control of undertakings that sell liquor to the public
- Facilities for the accommodation, care and burial of animals
- Fencing and fences
- Licensing of dogs
- Licensing and control of undertakings that sell food to the public
- Local amenities
- Local sport facilities
- Markets
- Municipal abattoirs
- Municipal parks and recreation
- Municipal roads
- Noise pollution
- Pounds
- Public places

- Refuse removal, refuse dumps and solid waste disposal
- Street trading
- Street lighting
- Traffic and parking