



PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

Direct: (021) 403-2626
Fax (021) 403-3888
E-mail: febrahim@parliament.gov.za

LEGAL SERVICES

PO Box 15 Cape Town 8000 Republic of South Africa
Tel: 27 (21) 403 29 11
www.parliament.gov.za

LEGAL OPINION

[Confidential]

TO: Mr M Mdakane, MP

**Chairperson Portfolio Committee on Cooperative Governance and
Traditional Affairs**

**COPY: Ms PN Twaya
Acting Secretary to Parliament**

**Mr M Xaso
Acting Deputy Secretary: Core Business**

**Ms R Begg
Division Manager: Core Business Support**

**FROM: Adv Z Adhikarie
Chief Legal Adviser: Constitutional and Legal Services Office**

DATE: 19 November 2018

REF: 101/2018

SUBJECT: TAGGING OF MUNICIPAL STRUCTURES AMENDMENT BILL

MESSAGE: Please find attached the above memorandum for your attention

**Adv Z Adhikarie
Chief Legal Adviser**

201118 PC COGTA



PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

MEMORANDUM

TO: Mr M Mdakane, MP
Chairperson Portfolio Committee on Cooperative Governance and
Traditional Affairs

COPY: Ms PN Twaya
Acting Secretary to Parliament

Mr M Xaso
Acting Deputy Secretary: Core Business

Ms R Begg
Division Manager: Core Business Support

FROM: Adv Z Adhikarie
Chief Legal Adviser: Constitutional and Legal Services Office

DATE: 19 November 2018


REF: 101/2018

SUBJECT: TAGGING OF MUNICIPAL STRUCTURES AMENDMENT BILL

1. The Committee's request for an independent legal opinion on the tagging of the
Local Government: Municipal Structures Amendment Bill, 2018 refers.
2. Adv. Heunis, J (SC) has provided an opinion, a copy of which is attached hereto.

3. In summary Adv. Heunis, SC is of the view that the establishment of a Municipal Public Accounts Committee as proposed in the Bill constitutes legislation as envisaged in section 175 (3) of the Constitution and should therefore qualify it for section 76 tagging.
4. As the Committee is aware the State Law Adviser and the Constitutional and Legal Services Office in Parliament shared the view that the Bill is a section 75 Bill. However, it is noted that the full impact and extent of the provisions of section 76 (3) of the Constitution has not been fully tested by our courts. It remains, in our view, a grey area for which there are strong supporting arguments for either tagging process.
5. Notwithstanding same, the Committee is advised that, based on the submissions received to date and the opinion of Adv. Heunis, SC the more cautious approach would be to refer the Bill back to the Joint Tagging Mechanism for reconsideration as an incorrectly tagged bill will be considered unconstitutional.
6. This exercise should not however delay the process within the Portfolio Committee as the processing of the Bill during this stage is not affected by the tagging.

Yours Sincerely



Adv Z Adhikarie
Chief Legal Adviser

Date: 19.11.2018

ADV. J C HEUNIS S.C.
BA LLB LLM (Cum Laude) LLD

HUGUENOTE KAMERS 1007
KONINGIN VICTORIASTRAAT 40
KAAPSTAD
8001

Telefoon: (021) 423-1792
Telefaks: (021) 426-1825

E-pos: heunisjc@law.co.za

1007 HUGUENOT CHAMBERS
40 QUEEN VICTORIA STREET
CAPE TOWN
8001

Telephone: (021) 423-1792
Telefax: (021) 426-1825

E-mail: heunisjc@law.co.za

19 November 2018

Ms F Ebrahim
Parliamentary Legal Adviser
CAPE TOWN

Dear Ms Ebrahim

RE: LOCAL GOVERNMENT MUNICIPAL STRUCTURES AMENDMENT BILL

Attached hereto please find the opinion as requested.

Kind regards,


Jan Heunis S.C.

CC: Ms L Arendse

**EX PARTE: LEGAL SERVICES OF THE PARLIAMENT OF THE
REPUBLIC OF SOUTH AFRICA**

**RE: CLASSIFICATION OF THE LOCAL GOVERNMENT:
MUNICIPAL STRUCTURES AMENDMENT BILL [B 19-2018]**

LEGAL OPINION

Furnished to: Ms F Ebrahim
Parliamentary Legal Adviser
Legal Services
Parliament of the Republic of South Africa
P O Box 15
CAPE TOWN
8000

[e-mail: febrahim@parliament.gov.za]

**Chambers, Cape Town
19 November 2018**

INTRODUCTION

1. Consultant is the Legal Services Section of the Parliament of the Republic of South Africa.
2. The Minister of Co-operative Governance and Traditional Affairs introduced the Local Government: Municipal Structures Amendment Bill (*"the Bill"*) as a proposed section 75 (of the Constitution of the Republic of South Africa, 1996) Bill in the National Assembly.
3. This means that the Minister considers the Bill to be not one affecting the Provinces in respect of which the procedure for adoption provided for in section 76 of the Constitution applies.
4. The State Law Advisers advised that –
 - 4.1 the Bill be classified as a section 75 Bill since it does not, in their view, deal with any of the functional areas listed in Schedule 4 of the Constitution and contains no provision to which the procedure set out in section 76 of the Constitution applies; and
 - 4.2 it does not have provisions that pertain to customary law or customs of traditional communities and, accordingly, it does not need to be referred to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance

Framework Act, No. 41 of 2003 ("the TLGFA").

5. In the event, it was recommended that the Joint Tagging Mechanism ("JTM") should find that the Bill –
 - 5.1 is a section 75 Bill;
 - 5.2 includes no provision to which the procedure prescribed in section 76 of the Constitution applies; and
 - 5.3 is constitutionally and procedurally in order.
6. However, on 12 November 2018 the Western Cape Provincial Minister of Local Government, Environmental Affairs and Development Planning *inter alia* proposed that the tagging of the Bill be reconsidered.
7. Next to the heading "General legal comment", he stated as follows:

"Paragraph 8 of the Memorandum on the Objects of the Bill states that the amendment Bill does not contain provisions to which the procedure set out in section 76 of the Constitution, 1996, applies. It is submitted that the amendment Bill does indeed contain such provisions in substantial measure. The amendment Bill for example in clause 24 and 32 seeks to ensure that public administration in municipalities is accountable. These are principles set out in section 195(1)(b) and (f) of the Constitution, 1996. It is submitted that the provisions of the amendment Bill render the amendment Bill legislation referred to in section 195(3) of the Constitution and thus legislation envisaged

in section 76(3)(d) of the Constitution. In the premise and in accordance with the ratio in South African Municipal Workers Union v Minister of Co-operative Governance and Traditional Affairs, the provisions of the amendment Bill trigger the requirement that it should be dealt with in accordance with the procedure set out in section 76 of the Constitution."

REQUEST FOR ADVICE

8. Against this backdrop I have been asked to advise whether the Bill has been correctly tagged and, to this end, to look at the Bill in its entirety.

ADVICE

9. Since the Bill does not deal with amendments to the Constitution¹ and is not a money bill,² the question to be answered is whether it is a Bill to which the procedure set out in section 76 should apply.³ If not, the procedure provided for in section 75 applies and the Bill was correctly tagged.
10. The section 76 procedure applies if a Bill is one of the nature referred to in subsection (3), (4) or (5) of that section. Subsections (3) and (4), the only ones potentially relevant for present purposes, provide as follows:

"(3) A Bill must be dealt with in accordance with the procedure established

¹ Section 74.

² Section 77.

³ Section 75(1).

by either subsection (1) or subsection (2) if it falls within a functional area listed in Schedule 4 or provides for legislation envisaged in any of the following sections:

- (a) Section 65(2);*
- (b) section 163;*
- (c) section 182;*
- (d) section 195(3) and (4);*
- (e) section 196; and*
- (f) section 197.*

(4) A Bill must be dealt with in accordance with the procedure established by subsection (1) if it provides for legislation –

- (a) envisaged in section 44(2) or 220(3); or*
- (b) envisaged in Chapter 13, and which includes any provision affecting the financial interests of the provincial sphere of government."*

11. For present purposes Bills that have to be dealt with in accordance with the procedure prescribed by section 76(1) or (2) are therefore -

11.1 Bills that fall within a functional area listed in Schedule 4;⁴

11.2 Bills that provide for legislation envisaged in sections 44(2), 65(2), 163, 182, 195(3), 195(4), 196, 197 and 220(3).⁵

12. Whether a Bill falls within a functional area listed in Schedule 4 of the

⁴ Section 76(3).

⁵ Section 76(3)(a)-(f) and 76(4)(a).

Constitution should be determined with reference to its subject-matter.⁶

13. Even though many of a Bill's provisions might fall beyond the scope of Schedule 4, its subject-matter may yet fall in Schedule 4. In this regard Ngcobo J (as he then was) in DBV Behuising *supra* proposed the following test:

"The enquiry into whether the proclamation dealt with a matter listed in Schedule 6 involves the determination of the subject-matter or the substance of the legislation, its essence, or true purpose and effect, that is, what the proclamation is about.

*In determining the subject-matter of the proclamation it is necessary to have regard to its purpose and effect. The enquiry should focus beyond the direct legal effect of the proclamation and be directed at the purpose for which the proclamation was enacted. In this enquiry the Preamble to the proclamation and its legislative history are relevant considerations, as they serve to illuminate its subject-matter. They place the proclamation in context, provide an explanation for its provisions and articulate the policy behind them."*⁷

14. In footnote 53 Ngcobo J referred to the fact that in certain jurisdictions the subject-matter of a statute is referred to as its "pith and substance" or its "true nature and character", both useful guidelines for purposes of appropriate

⁶ Ex parte Speaker of the KwaZulu-Natal Provincial Legislature: In re KwaZulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill of 1995, Ex parte Speaker of the KwaZulu-Natal Provincial Legislature: In re Payment of Salaries, Allowances and other Privileges to the Ingonyama Bill of 1995 1996 (4) SA 653 (CC), para 19; Ex parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill 2000 (1) SA 732 (CC), para 27; Western Cape Provincial Government and Others: In re DBV Behuising (Pty) Ltd v North-West Provincial Government and Another 2001 (1) SA 500 (CC), paras 37 to 39; Abahlali baseMjondolo Movement SA and Another v Premier, KwaZulu-Natal and Others 2010 (2) BCLR 99 (CC), para 21.

⁷ Para 36.

categorisation.

15. The purpose of the Structures Act is "(t)o provide for the establishment of municipalities in accordance with the requirements relating to categories and types of municipality; to establish criteria for determining the category of municipality to be established in an area; to define the types of municipality that may be established within each category; to provide for an appropriate division of functions and powers between categories of municipalities; to regulate the internal systems, structures and office-bearers of municipalities; to provide for appropriate electoral systems; and to provide for matters in connection therewith".⁸

16. None of these concern, at face-value, a Schedule 4 functional area but, as we shall see, that is not the end of the inquiry.

17. The Bill envisages the amendment of the Structures Act in various respects, including provision for the establishment of Municipal Public Accounts Committees⁹ and the addition of Schedule 7 which will in future contain the Code of Conduct for Councillors.¹⁰

18. In Liquor Bill *supra*, the Constitutional Court held that the heading of section 76, viz, "Ordinary Bills affecting provinces", provides "a strong textual

⁸ Long title.

⁹ Clause 24.

¹⁰ Clause 32.

indication that s 76(3) must be understood as requiring that any Bill whose provisions in substantial measure fall within a functional area listed in Schedule 4, be dealt with under section 76".¹¹

19. In that case, Cameron J went on to say that "(w)hatever the proper characterisation of the Bill ... a large number of its provisions must be characterised as falling 'within a functional area listed in Schedule 4', more particularly the concurrent national and provincial legislative competences in regard to 'trade' and 'industrial promotion'".¹²

20. In Tongoane and Others v Minister for Agriculture and Land Affairs and Others,¹³ Ngcobo CJ quoted with approval the passages from the Liquor Bill case referred to hereinabove¹⁴ and concluded as follows:

"The contention of the communities that the statement, 'whose provisions in substantial measure' in **Liquor Bill**, formulates the test for determining the procedure to be followed in enacting a Bill must, in my view, be upheld ... What matters for the purposes of tagging is not the substance or the true purpose and effect of the Bill, rather, what matters is whether the provisions of the Bill 'in substantial measure fall within a functional area listed in Schedule 4'. This statement refers to the test to be adopted when tagging Bills. This test for classification or tagging is different from that used by this Court to characterise a Bill in order to determine legislative competence. This 'involves

¹¹ Para 27.

¹² Para 28.

¹³ 2010 (8) BCLR 741 (CC).

¹⁴ In para 56.

*the determination of the subject-matter or the substance of the legislation, its essence, or true purpose and effect, that is, what the [legislation] is about".*¹⁵ (My emphasis.)

21. Ngcobo CJ helpfully added that there is **an** important difference between, on the one hand, the "pith and substance" test and the "substantial measure" test just referred to.
22. Under the "pith and substance" test, provisions of legislation that fall outside its substance are treated as incidental whereas, by contrast, the tagging test is distinct from the question of legislative competence but focuses on all the provisions of the Bill in order to determine the extent to which they substantially affect the functional areas listed in Schedule 4 and not on whether any of the provisions are incidental to its substance.¹⁶
23. The more a Bill affects the interests, concerns and capacities of the provinces, the more say the provinces should have on its content through the NCOP, the purpose of tagging being to determine the nature and extent of the input of provinces on the contents of legislation affecting them.¹⁷

24. The following remarks by the Chief Justice are also helpful in the present context:

¹⁵ At para 58. See Western Cape Provincial Government and Others: In re DVB Behuising (Pty) Ltd v Northwest Provincial Government and Another 2001 (1) SA 500 (CC); 2000 (4) BCLR 347 (CC), para 36.

¹⁶ Para 59.

¹⁷ Tongoane at paras 60 and 64.

- "[69] The tagging of Bills before Parliament must be informed by the need to ensure that the provinces fully and effectively exercise their appropriate role in the process of considering national legislation that substantially affects them. Paying less attention to the provisions of a Bill once its substance, or purpose and effect, has been identified undermines the role that provinces should play in the enactment of national legislation affecting them. The subject-matter of a Bill may lie in one area, yet its provisions may have a substantial impact on the interests of provinces. And different provisions of the legislation may be so closely intertwined that blind adherence to the subject-matter of the legislation without regard to the impact of its provisions on functional areas in Schedule 4 may frustrate the very purpose of classification.
- [70] To apply the 'pith and substance' test to the tagging question, therefore, undermines the constitutional role of the provinces in legislation in which they should have a meaningful say, and disregards the breadth of the legislative provisions that section 76(3) requires to be enacted in accordance with the section 76 procedure. It does this because it focuses on the substance of a Bill and treats provisions which fall outside its main substance as merely incidental to it and consequently irrelevant to tagging. In so doing, it ignores the impact of those provisions on the provinces. To ignore this impact is to ignore the role of the provinces in the enactment of legislation substantially affecting them. Therefore, the test for determining how a Bill is to be tagged must be broader than that for determining legislative competence.
- [71] On the other hand, the 'substantial measure' test permits a consideration of the provisions of the Bill and their impact on matters that substantially affect the provinces. This test ensures that legislation that affects the provinces will be enacted in accordance with a procedure that allows the provinces to fully and effectively play their role in the law-making process. This test must therefore be endorsed.

[72] To summarise: any Bill whose provisions substantially affect the interests of the provinces must be enacted in accordance with the procedure stipulated in section 76. This naturally includes proposed legislation over which the provinces themselves have concurrent legislative power, but it goes further. It includes Bills providing for legislation envisaged in the further provisions set out in section 76(3)(a)-(f), over which the provinces have no legislative competence, as well as Bills the main substance of which falls within the exclusive national competence, but the provisions of which nevertheless substantially affect the provinces. What must be stressed, however, is that the procedure envisaged in section 75 remains relevant to all Bills that do not, in substantial measure, affect the provinces. 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 substantial measure fall within a concurrent provincial legislative competence." (My emphasis.)

25. I would point out that in line with this approach, rule 160(3)(b) of the Joint Rules of Parliament¹⁸ provides that "(w)hen a Bill introduced as a section 75 Bill is referred to the JTM, it must make a finding on whether the Bill ... includes any provisions to which the procedure prescribed in section 76 of the Constitution applies". (My emphasis.)
26. Significantly the last two sentences of paragraph 72 of the judgment in Tongoane quoted hereinabove require, at the outset, a determination whether the provisions of a Bill fall within the explicit list of legislative matters enumerated in section 76(3)(a)-(f) and, thereafter, whether such provisions, in substantial measure, fall within a concurrent provincial legislative

¹⁸ 6th edition.

competence. It was put as follows by Khampepe J in South African Municipal Workers' Union v Minister of Co-Operative Governance and Traditional Affairs and Others:¹⁹

*"The enquiry is thus two-fold: first, whether the Bill falls within the explicit list of legislative matters; second, whether the Amendment Act, in substantial measure, falls within one of the concurrent legislative competences of the provinces listed in Schedule 4 of the Constitution."*²⁰

27. Further light was shed on the "functional area listed in Schedule 4" criterion in Democratic Alliance v President of South Africa and Others,²¹ which concerned only Bills which fall within a functional area listed in Schedule 4,²² with Rogers J concluding²³ that *"the substantial effects contemplated in Tongoane had reference to the extent to which the provisions of the legislation actually regulate a functional area listed in sch 4"*. According to the Court, *"when testing for tagging one allows for the possibility that provisions which are not sufficiently dominant to give the legislation as a whole a sch 4 character may nevertheless in substantial measure regulate a sch 4 functional area". (My emphasis.)*

28. A similar approach is called for when tagging has to discount the sections

¹⁹ 2017 (5) BCLR 641 (CC).

²⁰ Para 64.

²¹ 2014 (4) SA 402 (WCC).

²² Para 8.

²³ In para 79.

enumerated in paragraphs (a) to (f) of subsection (3) of section 76 of the Constitution.

29. Having drawn a distinction between the so-called direct-regulation approach and the knock-on effect approach, Rogers J concluded as follows:

*"I thus conclude that, in accordance with what I have called the direct-regulation approach, the 'substantial measure' test for tagging laid down in **Liquor Bill and Tongoane** requires one to determine whether to a substantial extent the legislation under consideration actually regulates matters falling within sch 4."*²⁴

30. It is, therefore, to a consideration of whether the Bill provides for legislation envisaged in any of the sections enumerated in paragraphs (a) to (f) of subsection (3) of section 76 of the Constitution and of subsection (4) thereof, that I now turn.

31. In DA v President of the RSA, Rogers J considered that a further consideration in favour of the direct-regulation approach is to be found in the parts of section 76(3) which do not concern the functional areas listed in Schedule 4, but provides for legislation envisaged in various other provisions of the Constitution in respect of which he considered that there is no reason to doubt that tagging is only required if the legislation actually regulates the matters contemplated in those provisions of the Constitution.²⁵

²⁴ Para 95.

²⁵ Para 88.

32. The Bill does not provide for ~~any~~ legislation envisaged in any of the sections enumerated in subsections ~~(3)~~(a)-(f) and (4)(a)-(b) of section 76 of the Constitution with the possible ~~exception~~ of section 195(3) of the Constitution which incorporates by reference subsection (1) which, in turn, has to be read with subsection (2).
33. According to its heading, ~~section~~ 195 concerns basic values and principles governing public administration and subsections (1) to (3) thereof provide as follows:

"(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

- (a) A high standard of professional ethics must be promoted and maintained.*
- (b) Efficient, economic and effective use of resources must be promoted.*
- (c) Public administration must be development-oriented.*
- (d) Services must be provided impartially, fairly, equitably and without bias.*
- (e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.*
- (f) Public administration must be accountable.*
- (g) Transparency must be fostered by providing the public with timely, accessible and accurate information.*
- (h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.*
- (i) Public administration must be broadly representative of the South*

African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.

(2) *The above principles apply to –*

- (a) *administration in every sphere of government;*
- (b) *organs of state; and*
- (c) *public enterprises.*

(3) *National legislation must ensure the promotion of the values and principles listed in subsection (1)."*

34. It being a given that the principles enumerated in subsection (1) apply to all administrations in all spheres of government and all organs of state, the question which arises is whether the Bill is aimed at ensuring the promotion of the values and principles listed in subsection (1) as contemplated in subsection (3).

35. As we have seen, in this regard Mr A Bredell, the Western Cape Provincial Minister of Local Government, Environmental Affairs and Development Planning, has commented as follows:

"The amendment Bill for example in clause 24 and 32 seeks to ensure that public administration in municipalities is accountable. These are principles set out in section 195(1)(b) and (f) of the Constitution, 1996. It is submitted that the provisions of the amendment Bill render the amendment Bill legislation referred to in section 195(3) of the Constitution and thus legislation envisaged in section 76(3)(d) of the Constitution. In the premise and in accordance with the ratio in South African Municipal Workers Union v Minister of Co-operative Governance and Traditional Affairs, the provisions of the amendment Bill trigger the requirement that it should be dealt with in accordance with the

procedure set out in section 76 of the Constitution."

36. In the event the Minister proposes that the tagging of the Bill be reconsidered.

37. Clause 24 envisages the insertion in the Principal Act of a section dealing with the establishment and responsibilities of Municipal Public Accounts Committees which, *inter alia*, have to –

37.1 review the Auditor-General reports and comments of the Management and Audit Committees and make recommendations to municipal councils;²⁶

37.2 review internal audit reports together with comments from the Management and Audit Committees;²⁷

37.3 initiate and develop the oversight report containing Councillors' comments on the annual reports as provided for in section 129(1) of the Local Government: Municipal Finance Management Act, No. 56 of 2003;²⁸

37.4 attend to and make recommendations to municipal councils on matters

²⁶ Sub-clause (3)(a).

²⁷ Sub-clause(3)(b).

²⁸ Sub-clause (3)(c).

referred to it by various organs of the municipality²⁹ and

37.5 on their own initiative, but subject to the directions of municipal councils, investigate and report to councils on any matter affecting the municipality.³⁰

38. Clause 32 envisages the addition of Schedule 7 to the Principal Act which sets out the Code of Conduct for Councillors of which various provisions are arguably aimed at promoting the values and principles listed in subsection (1) of section 195.

39. Against this backdrop the question to be answered is whether the Bill itself can be said to provide for legislation envisaged in section 195(3) of the Constitution.

40. One is guided in this exercise by Rogers J's dictum that "(o)n the direct-regulation approach, one examines the provisions of the Bill to see what they actually regulate; if any of the provisions regulate sch 4 functional areas, a value judgment must be made as to whether they do so in substantial measure. If so, the Bill follows the s 76 procedure".

41. The South African Municipal Workers' Union case *supra*, *inter alia* concerned the question whether the Local Government: Municipal Systems Amendment

²⁹ Sub-clause (3)(d).

³⁰ Sub-clause(3)(e).

Act, No. 7 of 2011 (*"the Amendment Act"*), which apparently intended to address the increase of maladministration within municipalities, was correctly tagged as a section 75 Bill; that is, an ordinary Bill not affecting provinces.

42. The High Court found that the Amendment Act set standards and minimum requirements for local government and therefore constituted legislation envisaged by section 195(3).³¹
43. In the event the Constitutional Court invoked Tongoane and concluded that *"all legislation mentioned in section 7(3) is legislation that substantially affects the interests of provinces"*.³²
44. Although the Amendment Act in SAMWU sought to promote on a much more significant scale a number of the values listed in section 195(1) of the Constitution, I am of the view that the Bill does the same in sufficient measure to qualify it for section 76 tagging.
45. In the words of the Constitutional Court, the provisions of clauses 24 and 32 are *"enough to trigger the requirement that the Bill should have been dealt with in accordance with the procedure set out in section 76"*.³³ This is in line with the approach that provisions not sufficiently dominant to give draft legislation as a whole a Schedule 4 character, may yet require tagging as a

³¹ Para 22.

³² Para 61.

³³ SAMWU, para 67.

section 76 Bill.

46. I do not consider, however, that any of the provisions of the Bill fall within a functional area listed in Schedule 4. It does, however, provide for legislation envisaged in section 195(3) of the Constitution as contemplated in paragraph (d) of subsection (3) of section 76 thereof. It should therefore, in my opinion, be tagged as a section 76 Bill.
47. Tagging the Bill as a section 76 Bill will also be in line with what Rogers J styled as the "*cautious approach*" which calls for tagging in accordance with section 76 rather than section 75.³⁴
48. In this regard it was held in the Liquor Bill case *supra*,³⁵ as follows:
- "It would formalistic in the extreme to hold a Bill invalid on the ground that those steering it through Parliament erred in good faith in assuming that it was required to be dealt with under the s 76 procedure, when the only consequence of their error was to give the NCOP more weight, and to make passage of the Bill by the National Assembly in the event of inter-cameral disputes more difficult. It is hard to see how a challenge based on the first two differences between the relevant parliamentary procedures can invalidate the enactment of a statute."*
49. I agree that the Bill does not have to be referred to the National House of Traditional Leaders in terms of section 18(1)(a) of the TLGFA.


³⁴ Para 89.

³⁵ Para 26.

CONCLUSION

50. I advise accordingly.

Chambers, Cape Town
19 November 2018



J C HEUNIS S.C.