

REPUBLIC OF SOUTH AFRICA

MARRIAGE BILL

*(As introduced in the National Assembly (proposed section 76); explanatory summary of Bill
and prior notice of its introduction published in Government Gazette No. 49887 of
13 December 2023)
(The English text is the official text of the Bill)*

(MINISTER OF HOME AFFAIRS)

[B 43—2023]

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BILL

To provide for the recognition of marriages; to provide for the requirements for monogamous and polygamous marriages; to provide for designation of marriage officers; to provide for solemnisation and registration of marriages; to provide for proprietary consequences and the dissolution of marriages; to provide for offences and penalties and to provide for matters incidental thereto.

PREAMBLE

WHEREAS section 7(2) of the Constitution places a responsibility on the state to respect, protect, promote and fulfil the rights in the Bill of Rights;

WHEREAS section 9(1) of the Constitution of the Republic of South Africa, 1996, provides that everyone is equal before the law and has the right to equal protection and benefit of the law;

WHEREAS section 9(2) of the Constitution allows legislative measures to be taken to achieve equality for previously disadvantaged persons or categories of persons;

WHEREAS section 9(3) of the Constitution provides that the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth;

WHEREAS section 10 of the Constitution provides that everyone has inherent dignity and the right to have their dignity respected and protected;

WHEREAS section 15(1) of the Constitution provides that everyone has the right to freedom of conscience, religion, thought, belief and opinion;

WHEREAS section 15(3)(a) of the Constitution provides the opportunity for legislative recognition of marriages concluded under any tradition, or a system of religious, personal or family law consistent with section 15 and other provisions of the Constitution;

WHEREAS the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom;

NOTING that existing family law has developed in a fragmented manner by way of the Marriage Act, 1961 (Act No. 25 of 1961), the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998) and the Civil Union Act, 2006 (Act No. 17 of 2006), and that legislative benefits should be extended to all marriages, to ensure a fair outcome to the spouses to a marriage whenever disputes arise;

NOTING that the Republic of South Africa is signatory to the Convention on the Elimination of All Forms of Discrimination Against Women (18 December 1979) and other Conventions that requires the Republic to take appropriate and reasonable measures to eradicate discrimination against women in marriages; and

NOTING that the Republic of South Africa has international obligations to take appropriate and reasonable measures to prevent child marriages;

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows:—

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CHAPTER 1
DEFINITIONS AND OBJECTS OF ACT

Definitions

1. In this Act, unless the context otherwise indicates— 10
“**Civil Union Act**” means the Civil Union Act, 2006 (Act No. 17 of 2006);
“**court**” means any division of a High Court of the Republic of South Africa contemplated in section 6(1) of the Superior Courts Act, 2013 (Act No. 10 of 2013), or a court for a regional division contemplated in section 29(1B) of the Magistrates’ Courts Act, 1944 (Act No. 32 of 1944); 15
“**Criminal Law (Sexual Offences and Related Matters) Amendment Act**” means the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007);
“**customary marriage**” means any marriage entered into in terms of the Recognition of Customary Marriages Act, before the commencement of this Act; 20
“**Department**” means the Department responsible for Home Affairs;
“**Director-General**” means the Director-General of the Department;
“**magistrate**” has a similar meaning ascribed to it in section 1 of the Magistrates Act, 1993 (Act No. 90 of 1993);
“**marriage**” means any marriage contemplated in section 3; 25
“**Marriage Act**” means the Marriage Act, 1961 (Act No. 25 of 1961);
“**marriage officer**” means any person designated as a marriage officer in accordance with Chapter 4 of this Act;
“**Matrimonial Property Act**” means the Matrimonial Property Act, 1984 (Act No. 88 of 1984); 30
“**Minister**” means the member of Cabinet responsible for Home Affairs;
“**monogamous marriage**” means a marriage where a person is married to only one spouse at a time;
“**polygamous marriage**” means a marriage in which a male spouse has more than one wife at the same time in terms of custom or religion; 35
“**population register**” means the population register contemplated in section 5 of the Identification Act, 1997 (Act No. 68 of 1997);
“**prescribed**” means prescribed by regulations;
“**Recognition of Customary Marriages Act**” means the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998); and
“**this Act**” means the Marriage Act, 2023, and includes the regulations. 40

Objects of Act

2. The objects of this Act are to—
(a) provide for the recognition of marriages;
(b) provide for the requirements of marriages; 45
(c) provide for the designation of marriage officers; and
(d) provide for the solemnisation and registration of marriages.

CHAPTER 2
RECOGNITION OF MARRIAGE AND PROOF OF IDENTITY

Recognition of marriage 50

3. The following marriages are recognised as a marriage:
(a) Any subsisting marriage concluded in terms of the Marriage Act;

- (b) any subsisting civil union concluded in terms of the Civil Union Act;
- (c) any subsisting customary marriage concluded in terms of the Recognition of Customary Marriages Act;
- (d) any subsisting monogamous or polygamous marriage concluded before the commencement of this Act, which marriage was not recognised under any other law; and
- (e) any monogamous or polygamous marriage entered into after the commencement of this Act, which complies with the requirements of this Act.

Proof of identity

4. The age of the prospective spouses to a marriage must be determined— 10
- (a) by means of a birth certificate contemplated in section 9(7) of the Births and Deaths Registration Act, 1992 (Act No. 51 of 1992);
 - (b) by means of an identity card as defined in section 1 of the Identification Act, 1997 (Act No. 68 of 1997); or
 - (c) in the case where one or both prospective spouses are foreigners, by means of a valid passport and a valid visa or permit. 15

CHAPTER 3

REQUIREMENTS FOR MONOGAMOUS AND POLYGAMOUS MARRIAGE

Requirements for monogamous marriage

5. (1) For a monogamous marriage, entered into after the commencement of this Act, the prospective spouses— 20
- (a) must both be 18 years of age or older on the date of entering into a marriage;
 - (b) must give consent to enter into a marriage; and
 - (c) must be of sound mind.
- (2) For a marriage entered into in accordance with custom or religion to be valid, it must, in addition to the requirements referred to in subsection (1), be negotiated and entered into or celebrated in accordance with the respective custom or religion. 25
- (3) Save as provided for in section 6(2), no spouse in a monogamous marriage shall be competent to enter into a further marriage under this Act during the subsistence of such monogamous marriage. 30
- (4) Any foreigner who wishes to enter into a marriage, whilst resident in the Republic, must provide an *apostilled* letter of non-impediment from the relevant authority of his or her country of origin.
- (5) Any marriage entered into after the commencement of this Act which does not comply with the requirements of this section is null and void. 35

Requirements for polygamous marriage

6. (1) For a polygamous marriage, entered into after the commencement of this Act, the prospective spouses—
- (a) must both be 18 years of age or older on the date of entering into a marriage;
 - (b) must give consent to enter into a marriage; and
 - (c) must be of sound mind. 40
- (2) A husband in a marriage who wishes to enter into a further marriage after the commencement of this Act, must—
- (a) obtain written consent from his wife or, in the case where there is more than one wife, his wives, as the case may be: Provided that, in the case of a royal family, the consent must be in accordance with the customs and traditions of such family; and
 - (b) make an application to the court to approve a written contract which will regulate the future matrimonial property system of his marriages. 45
- (3) For purposes of this section, a husband refers to a male person and excludes a male partner in a same-sex marriage. 50
- (4) When considering the application in terms of subsection (2)(b)—
- (a) the court must—
 - (i) in the case of a marriage which is in community of property or which is subject to the accrual system— 55

- (aa) terminate the matrimonial property system which is applicable to the marriage; and
- (bb) effect a division of the matrimonial property;
- (ii) ensure an equitable distribution of the property; and
- (iii) take into account all the relevant circumstances of the family groups which would be affected if the application is granted; 5
- (a) the court may—
 - (i) allow further amendments to the terms of the contract;
 - (ii) grant the order subject to any condition it may deem just; or
 - (iii) refuse the application if in its opinion the interests of any of the parties involved would not sufficiently be safeguarded by means of the proposed contract. 10
- (5) All persons having a sufficient and direct interest in the matter, and in particular the applicant's existing spouse or spouses and the prospective spouse, must be joined in the proceedings instituted in terms of subsection (2)(b). 15
- (6) If a court grants an application contemplated in subsection (2)(b), the registrar or clerk of the court must—
 - (a) furnish each spouse with an order of the court including a certified copy of the contract; and
 - (b) cause such order and a certified copy of the contract to be sent to each registrar of deeds of the area in which the court is situated. 20

CHAPTER 4

DESIGNATION OF MARRIAGE OFFICERS

Ex officio marriage officers

- 7. (1) Every magistrate shall, by virtue of his or her office and so long as he or she holds such office, be a marriage officer for the district or other area in respect of which he or she holds office. 25
- (2) The Minister, or any employee in the public service authorised by the Minister, may designate any employee in the Department or the diplomatic or consular service of the Republic to be, by virtue of his or her office and so long as he or she holds such office, to be a marriage officer, either generally or for any country or area. 30

Designation of other persons as marriage officers

- 8. (1) Any person may, in the prescribed manner, apply to the Director-General to be designated as a marriage officer in terms of this Act.
- (2) The person contemplated in subsection (1) who wishes to be designated as a marriage officer must— 35
 - (a) be a South African citizen or a permanent resident;
 - (b) be a fit and proper person to act as a marriage officer;
 - (c) be of a sound mind;
 - (d) have successfully completed the prescribed training to be designated as a marriage officer; 40
 - (e) not have been convicted, in the Republic or elsewhere, and imprisoned, without an option of a fine, for an offence involving theft, fraud, forgery, perjury, misrepresentation or dishonesty;
 - (f) not have been convicted of any other serious offence and sentenced to more than 12 months' imprisonment without an option of a fine; 45
 - (g) not be an unrehabilitated insolvent; or
 - (h) must not have been removed from any office on account of gross misconduct involving dishonesty.
- (3) The person contemplated in subsection (1) must hold a responsible position in any— 50
 - (a) religious institution;
 - (b) secular organisation;
 - (c) traditional council as defined in section 1 of the Traditional and Khoi-San Leadership Act, 2019 (Act No. 3 of 2019); or 55
 - (d) Khoi-San council as defined in section 1 of the Traditional and Khoi-San Leadership Act, 2019 (Act No. 3 of 2019).

(4) The Director-General, or any employee in the Department authorised thereto by the Director-General, may limit the authority of any marriage officer to solemnise marriages—

- (a) within a specified area;
- (b) for a prescribed period; and 5
- (c) for a specific religion, custom or other beliefs.

(5) Every designation of a person as a marriage officer must be in writing and specify the date as from which it has effect and any limitation to which it is subject to.

Deemed marriage officers

9. (1) Whenever any person has acted as a marriage officer during any period or within any area in respect of which that person was not a marriage officer under this Act, and the Minister or any employee in the Department authorised thereto by the Minister is satisfied that such person did so in good faith under the belief that he or she was a marriage officer during that period or within that area, he or she may, in writing, direct that such person was for all purposes deemed to have been a marriage officer during such period or within such area and duly designated as such under this Act, as the case may be. 15

(2) Whenever any person acted as a marriage officer in respect of any marriage while that person was not a marriage officer and any or both parties to that marriage in good faith believed that such person was a marriage officer, the Minister or any employee in the Department authorised thereto by the Minister may, after having conducted such inquiry as he or she may deem fit, in writing, direct that such person be deemed to have been duly designated as a marriage officer in respect of that marriage. 20

(3) A marriage solemnised by a person who in terms of this section is deemed to have been duly designated as a marriage officer, shall be as valid and binding as it would have been if such person had been duly designated as a marriage officer, provided that such marriage was in every other respect solemnised in accordance with the provisions of this Act or any prior law, and there was no lawful impediment to the marriage. 25

(4) A person deemed to be a marriage officer in terms of this Act is not relieved from liability to any prosecution contemplated in section 17 of this Act. 30

Revocation and suspension of designation as marriage officer

10. (1) The Director-General or any employee in the Department authorised by the Director-General may, in writing and on the ground of misconduct or for any other good cause, revoke or suspend the designation of any person as a marriage officer.

(2) (a) Any person affected by the decision contemplated in subsection (1), may appeal to the Minister. 35

(b) The Minister may, after considering an appeal referred to in paragraph (a), confirm, set aside or vary any decision or make any other appropriate decision the Minister deems fit.

(3) The Director-General may publish such revocation in the *Gazette*. 40

CHAPTER 5

SOLEMNISATION AND REGISTRATION OF MARRIAGE

Solemnisation of marriage

11. (1) A marriage officer may solemnise a marriage at any place within the Republic and at any time in accordance with any mode of solemnisation or in accordance with any religious, secular or customary practice. 45

(2) A marriage officer may not solemnise any marriage where the prospective spouses and two witnesses are not present during the solemnisation of the marriage: Provided that where the presence of both spouses is not required in terms of the tenets of any custom, religion or belief, the marriage may be solemnised in accordance with such custom, religion or belief. 50

(3) A marriage officer may not solemnise a marriage unless the prospective spouses produce, to the marriage officer, their proof of identity contemplated in section 4.

(4) Any person designated as a marriage officer, other than *ex officio* marriage officers contemplated section 7, may not be compelled to solemnise any marriage which is against his or her conscience, religion or belief. 55

- (5) A marriage officer may not solemnise a marriage which does not comply with the requirements in section 5 or section 6 and must enquire from the prospective spouses whether—
- (a) the prospective spouses consent to the solemnisation of the intended marriage;
 - (b) there are no lawful impediments to the solemnisation of the intended marriage; and
 - (c) the prospective spouses are not related to each other on account of consanguinity, affinity or an adoptive relationship as referred to in section 12 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act.
- (6) The spouses, marriage officer and two witnesses must sign the prescribed marriage register in each other's presence, immediately after the solemnisation of the marriage, and a signed copy thereof must be provided to the spouses.

Objection to marriage

12. (1) Any person who wishes to raise an objection to a proposed marriage may, in writing or orally and before the solemnisation of the marriage, lodge such objection with the marriage officer who is to solemnise the marriage.
- (2) Upon receipt of any such objection, the marriage officer must inquire into the grounds of the objection and—
- (a) if the marriage officer is satisfied that there is no lawful impediment to the proposed marriage, he or she may solemnise the marriage in accordance with the provisions of this Act; or
 - (b) if the marriage officer is not satisfied, the marriage officer must refuse to solemnise the marriage.

Registration of marriage

13. (1) Spouses must ensure that their marriage is registered with the Department.
- (2) Marriage officers must, in the prescribed form and manner, keep a record of all marriages solemnised by them.
- (3) Within 14 days of solemnisation of a marriage, a marriage officer must submit the prescribed marriage register and all other prescribed records to the Director-General for registration of a marriage.
- (4) The Director-General must register the marriage and include the details of the marriage in the population register.
- (5) A marriage—
- (a) entered into before the commencement of this Act, and which is not registered in terms of any other law, must be registered within a period of 12 months after commencement of this Act or within such longer period as the Minister may from time to time prescribe by notice in the *Gazette*; or
 - (b) entered into after the commencement of this Act, must be registered within a period of 14 days after the conclusion of the marriage or within such longer period as the Minister may from time to time prescribe by notice in the *Gazette*.
- (6)(a) The Director-General must, if satisfied that the spouses concluded a valid marriage, register the marriage and record the identity of the spouses, the date of the marriage and any other prescribed information in the population register.
- (b) The Director-General must issue to the spouses a certificate of registration, bearing the prescribed particulars.
- (7)(a) If a marriage is not registered, any person, who satisfies the Director-General that he or she has a sufficient and direct interest in the matter, may, in the prescribed form and manner, apply to the Director-General to register the marriage.
- (b) If the Director-General is satisfied that a valid marriage exists or existed between the spouses, the Director-General must register the marriage and issue a certificate of registration as contemplated in subsection (6)(b).
- (8) If the Director-General is not satisfied that the spouses entered into a marriage, the Director-General must refuse to register the marriage.
- (9) A court may, upon application made to that court and upon investigation instituted by that court, order—
- (a) the registration of any marriage; or
 - (b) the cancellation or rectification of any registration of a marriage effected by the Director-General.

(10) A certificate of registration of marriage issued under this section or any other law providing for the registration of marriages constitutes *prima facie* proof of the existence of the marriage and of the particulars contained in the certificate.

CHAPTER 6

PROPRIETARY CONSEQUENCES AND DISSOLUTION OF MARRIAGE 5

Equal legal status and capacity of spouses

14. All spouses in a marriage have, on the basis of equality and subject to the matrimonial property system that applies to the marriage, full legal status and capacity, including the legal capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that the spouses may have under any other law. 10

Proprietary consequences of marriage

15. (1) The proprietary consequences of a polygamous marriage entered into before the commencement of this Act, which was not registered in terms of the Recognition of Customary Marriages Act or any other law, and where the spouses do not intend to enter into further marriages, continue to be governed by law applicable to such marriage or the agreement concluded between the spouses. 15

(2) Prior to solemnisation of a marriage, the prospective spouses must voluntarily choose the matrimonial property system that will apply to their marriage.

(3) Where the matrimonial property system chosen by the prospective spouses is out of community of property, with or without accrual, the spouses must, prior to the registration of their marriage, conclude the prescribed antenuptial contract and comply with Chapter VII of the Deeds Registries Act, 1937 (Act No. 47 of 1937): Provided that, in the case where the antenuptial contract had not yet been registered as contemplated in section 87 of the Deed Registries Act, 1937 (Act No. 47 of 1937), the prospective spouses must provide the prescribed proof, from the notary or legal practitioner, that an antenuptial contract has been concluded. 20 25

(4) Chapter III and sections 18, 19, 20 and 24 of Chapter IV of the Matrimonial Property Act, is applicable in respect of any marriage which is in community of property as contemplated in subsection (2). 30

(5)(a) Spouses in a marriage entered into, before or after the commencement of this Act, may apply to a court jointly for leave to change the matrimonial property system which applies to their marriage or marriages and the court may, if satisfied that—

- (i) there are sound reasons for the proposed change;
- (ii) sufficient written notice of the proposed change has been given to all creditors of the spouses; and 35
- (iii) no other person will be prejudiced by the proposed change,

order that the matrimonial property system applicable to the marriage or marriages shall no longer apply and authorise the spouses to the marriage or marriages to enter into a written contract in terms of which the future matrimonial property system of their marriage or marriages will be regulated on conditions determined by the court. 40

(b) In the case of a husband who is a spouse in more than one marriage, all persons having a sufficient and direct interest in the matter, and in particular the applicant's existing spouse or spouses, must be joined in the proceedings.

(6) Section 21 of the Matrimonial Property Act is applicable to a monogamous marriage entered into after the commencement of this Act. 45

Dissolution of marriage

16. A marriage may be dissolved by—

- (a) death of one or both spouses; or
- (b) by a court by a decree of divorce as contemplated in the Divorce Act, 1979 (Act No. 70 of 1979). 50

CHAPTER 7
OFFENCES AND PENALTIES

Offences and penalties

17. (1) Any person who enters into a marriage with a person who is not at least 18 years of age, or any person, other than a child, who participates knowingly in such a marriage, shall be guilty of an offence and liable on conviction to a fine or in default of payment, to imprisonment for a period not exceeding 5 years or to both such fine and such imprisonment. 5

(2) Any person who makes any false representation or false statement knowing it to be false, shall be guilty of an offence and liable on conviction to the penalties prescribed by law for perjury. 10

(3) Any person who knowingly solemnises a marriage or registers or fails to register a marriage in contravention of the provisions of this Act, shall be guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding 5 years or both to such fine and such imprisonment. 15

(4) Any person who solemnises or registers a marriage knowing, or has reason to suspect, that the capacity of a prospective spouse to freely consent to the marriage is impaired due to an intellectual disability or by being under the influence of alcohol or any other intoxicating substance, shall be guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding six months or to both such fine and such imprisonment. 20

(5) A prospective spouse who enters into a marriage knowing that the other prospective spouse is related to that prospective spouse on account of consanguinity, affinity or an adoptive relationship as referred to in section 12 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, shall be guilty of an offence and liable on conviction to a sentence which a court may impose, as provided for in section 276 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), which that court considers appropriate and which is within that court's penal jurisdiction. 25

(6) A marriage officer who delegates the function to solemnise marriages to a person who has not been designated as a marriage officer or knowingly assists a person who is not designated as a marriage officer to solemnise a marriage, shall be guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding 10 years or to both such fine and such imprisonment. 30

(7) Any person who knowingly, whilst not being designated as a marriage officer, solemnises a marriage which he or she is not authorised to solemnise under this Act, or solemnises a marriage which, to his or her knowledge, is legally prohibited, shall be guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding 5 years or both to such fine or imprisonment. 35

CHAPTER 8
MISCELLANEOUS 40

Regulations

18. (1) The Minister must make regulations relating to—
- (a) the form and content of certificates, notices, affidavits and declarations for the purposes of this Act;
 - (b) the fees payable for any certificate issued or any other act performed in terms of this Act; 45
 - (c) the form, content and procedure for an application for the registration of a marriage;
 - (d) matters to be taken into account in determining whether to proceed with the registration of a marriage; 50
 - (e) the form, content and procedure for an application submitted to the Minister by any person or any officer in the Department authorised for the designation as a marriage officer;
 - (f) matters to be taken into account in determining whether to designate a marriage officer with or without limitations; 55
 - (g) the duration and renewal of a designation as a marriage officer;

- (h) the conditions that may be imposed on the grant or renewal of a designation as a marriage officer;
- (i) the training of persons to be designated as marriage officers;
- (j) the fees in respect of the grant of or renewal of a designation as a marriage officer; 5
- (k) the fees for the training of a person to be designated as a marriage officer;
- (l) the circumstances in which a designation may be granted, renewed, suspended or revoked; and
- (m) an appeal of any decision to refuse, grant or renew a designation as a marriage officer. 10

(2) The Minister may make regulations relating to any matter which by this Act is required or permitted to be prescribed or which the Minister considers necessary or expedient to prescribe for purposes of this Act or that the provisions of this Act may be effectively administered.

(3) The regulations may prescribe penalties for a contravention of the provisions thereof for— 15

- (a) a fine not exceeding the amount that, in terms of the Adjustment of Fines Act, 1991 (Act No. 101 of 1991), may be imposed as an alternative to imprisonment for a period of six months; or
- (b) instead of payment of a fine referred to in paragraph (a), imprisonment for a 20 period not exceeding six months.

(4) Any regulation made under subsection (1), which may result in financial expenditure for the State, must be made in consultation with the Minister of Finance.

Amendment of laws

19. The laws specified in the second column of Schedule 1 are hereby amended to the 25 extent set out in the fourth column thereof.

Repeal of laws

20. The laws specified in Schedule 2 are repealed to the extent set out in the fourth column thereof.

CHAPTER 9 30

TRANSITIONAL PROVISIONS

Existing marriages

21. The commencement of this Act shall not affect a marriage that was valid in terms of any prior law and such marriage shall continue to be valid under this Act.

Existing marriage officers 35

22. (1) Any person who, in terms of the Marriage Act, has been designated as marriage officer shall continue to be a marriage officer until his or her designation expires or is revoked by the Director-General for any valid reason.

(2) Any designation referred to in subsection (1) may not be renewed in terms of this Act. 40

(3) Every magistrate who, in terms of the previous Act and by virtue of his or her office was a marriage officer for the district or other area in respect of which he or she holds office, continues to be a marriage officer in terms of this Act.

CHAPTER 10

SHORT TITLE AND COMMENCEMENT 45

Short title and commencement

23. This Act is called the Marriage Act, 2023, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

SCHEDULE 1

LAWS AMENDED

(Section 19)

Item no	No. and year of law	Title	Extent of amendment
1.	Act No. 24 of 1936	Insolvency Act	By the substitution in section 21 for subsection (13) of the following subsection: “(13) In this section the word “spouse” means not only a wife or husband in the legal sense, but also a wife or husband by virtue of a marriage according to any law or custom, and also a woman living with a man as his wife or a man living with a woman as her husband, although not married to one another and includes any person married in terms of the Marriage Act, . . . (Act No. . . . of 20. . .);”.
2.	Act No. 40 of 1949	Transfer Duty Act	By the substitution in subsection 1(1) for the definition of “spouse” of the following definition: ““ spouse ” [in relation to any person,] means [the partner of such] any person— (a) in a marriage or customary union recognised in terms of the laws of the Republic; (b) in a union recognised as a marriage in accordance with the tenets of any religion; [or] (c) in a marriage entered into in terms of the Marriage Act, 20. . . (Act No. . . . of 20. . .); or (d) in a same-sex or heterosexual union which the Commissioner is satisfied is intended to be permanent: Provided that a marriage or union contemplated in paragraphs (b) or (c) shall, in the absence of proof to the contrary, be deemed to be a marriage or union [without] in community of property.”.
3.	Act No. 45 of 1955	Estate Duty Act	By the substitution in subsection 1(1) for the definition of “spouse” of the following definition: ““ spouse ”[,] in relation to any deceased person, [includes a person who at the time of death of such deceased person was] means the partner or partners of such person— (a) in a marriage or customary union recognised in terms of the laws of the Republic; (b) in a union recognised as a marriage in accordance with the tenets of any religion; [or] (c) in a same-sex or heterosexual union which the Commissioner is satisfied is intended to be permanent; or (d) a partner in marriage concluded in terms of the Marriage Act, 20. . . (Act No. . . . of 20. . .): Provided that a marriage or union contemplated in paragraph (b) or (c) shall, in the absence of proof to the contrary, be deemed to be a marriage or union [without] in community of property.”.
4.	Act No. 24 of 1956	Pension Funds Act	By the substitution in subsection 1(1) for the definition of “spouse” of the following definition: ““ spouse ” means a person who is the permanent life partner [or], spouse or civil union partner of a member in accordance with the Marriage Act, 1961 (Act No. [68] 25 of 1961), the Recognition of Customary Marriages Act, 1998 (Act No. [68] 120 of [1997] 1998), [or] the Civil Union Act, 2006 (Act No. 17 of 2006), or the tenets of a religion; or a partner in a marriage in terms of the Marriage Act, (Act No. . . . of 20. . .);”.
5.	Act No. 58 of 1962	Income Tax Act	By the substitution in subsection 1(1) for the definition of “spouse” of the following definition: ““ spouse ”, in relation to any person, means a person who is the partner of such person— (a) in a marriage or customary union recognised in terms of the laws of the Republic; (b) in a union recognised as a marriage in accordance with the tenets of any religion; or (c) in a same-sex or heterosexual union which is intended to be permanent[,]; (d) in a marriage entered into in terms of the Marriage Act, 20. . . (Act No. . . . of 20. . .); and “married”, “husband” [or] and “wife” shall be construed accordingly: Provided that a marriage or union contemplated in paragraph (b) or (c) shall, in the absence of proof to the contrary, be deemed to be a relationship or marriage [or union out of] in community of property;”.

Item no	No. and year of law	Title	Extent of amendment
6.	Act No. 84 of 1976	Military Pensions Act	By the substitution in subsection 1(1) for the definition of “spouse” of the following definition: “ spouse ”, in relation to any member, means— (a) a husband or wife in terms of the Marriage Act, 1961 (Act No. 25 of 1961), the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998), [or] the Civil Union Act, 2006 (Act No. 17 of 2006)[;], or the Marriage Act, 20. . . (Act No. . . . of 20. . .); (b) a life partner (including a same sex life partner); (c) a husband or wife according to the tenets of any religion or belief of the member at the date of the member’s death; (d) a person who is the natural parent of a child under the age of 18 years who is regularly maintained by the member; or (e) a person with whom the member lived together as a husband, wife or life partner for a period of at least five years immediately before the commencement of the member’s military services within the meaning of section [2(3);] 2(3).”.
7.	Act No. 70 of 1979	Divorce Act	By the insertion in subsection 1(1) after the definition of “rules” of the following definition: “ Spouse ” means any person married in terms of the Marriage Act, 1961 (Act No. 25 of 1961), the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998), the Civil Union Act, 2006 (Act No. 17 of 2006), the Marriage Act, 20. . . (Act No. . . . of 20. . .) or a union recognised as a marriage in accordance with the tenets of any religion.”.
8.	Act No. 88 of 1984	Matrimonial Property Act	By the insertion in section 1 after the definition of “separate property” of the following definition: “ Spouse ” means any person married in terms of the Marriage Act, 1961 (Act No. 25 of 1961), the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998), the Civil Union Act, 2006 (Act No. 17 of 2006), the Marriage Act, 20. . . (Act No. . . . of 20. . .) or a union recognised as a marriage in accordance with the tenets of any religion.”.
9.	Act No. 81 of 1987	Intestate Succession Act	By the insertion in section 1 of the following subsection: “(8) “ Spouse ” means a person married in terms of the Marriage Act, 1961 (Act No. 25 of 1961), the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998), the Civil Union Act, 2006 (Act No. 17 of 2006), the Marriage Act, 20. . . (Act No. . . . of 20. . .) or a union recognised as a marriage in accordance with the tenets of any religion.”.
10.	Act No. 27 of 1990	Maintenance of Surviving Spouses Act	By the substitution in section 1 for the definition of “survivor” of the following definition: “ survivor ” means the surviving spouse in a marriage dissolved by death, and includes a spouse of a customary marriage which was dissolved by a civil marriage contracted by her husband in the customary marriage to another woman on or after 1 January 1929 (the date of commencement of sections 22 and 23 of the Black Administration Act, 1927 (Act No. 38 of 1927)), but before 2 December 1988 (the date of commencement of the Marriage and Matrimonial Property Law Amendment Act, 1988 (Act No. 3 of 1988)), Marriage Act, 1961 (Act No. 25 of 1961), the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998), the Civil Union Act, 2006 (Act No. 17 of 2006), the Marriage Act, 20. . . (Act No. . . . of 20. . .)[;] or a union recognised as a marriage in accordance with the tenets of any religion.”.
11.	Act No. 51 of 1992	Births and Deaths Registration Act	By the substitution in subsection 1(1) for the definition of “marriage” of the following definition: “ marriage ” means— (a) a marriage concluded in terms of— (i) the Marriage Act, 1961 (Act No. 25 of 1961); [or] (ii) the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998); (b) a civil union concluded in terms of the Civil Union Act, 2006 (Act No. 17 of 2006); [or] (c) a marriage concluded in terms of the laws of a foreign country; (d) any marriage entered into in terms of the Marriage Act, 20. . . (Act No. . . . of 20. . .); or (e) a union recognised as a marriage in accordance with the tenets of any religion.”.

Item no	No. and year of law	Title	Extent of amendment
	Act No. 88 of 1995	South African Citizenship Act	<p>By the substitution in section 1 for the definition of “marriage” of the following definition:</p> <p>“marriage” means—</p> <p>(a) a marriage concluded in terms of—</p> <p>(i) the Marriage Act, 1961 (Act No. 25 of 1961);</p> <p>[or]</p> <p>(ii) the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998);</p> <p>(b) a civil union concluded in terms of the Civil Union Act, 2006 (Act No. 17 of 2006); [or]</p> <p>(c) a marriage concluded in terms of the laws of a foreign country;</p> <p>(d) any marriage entered into in terms of the Marriage Act, 20. . . (Act No. . . of 20. . .) or</p> <p>(e) a union recognised as a marriage in accordance with the tenets of any religion.”</p>
13.	Proclamation No. 21 of 1996	Government Employees Pension Law	<p>By the substitution for the definition of “spouse” in Schedule 1 of the Rules of the Government Employees Pension Fund of the following definition:</p> <p>“spouse”, shall mean the following for the purpose of eligibility to benefits: A person who is—</p> <p>— a lawful husband or wife in terms of the Marriage Act, 1961 (Act No. 25 of 1961); [or]</p> <p>— a life partner (including same sex life partner); [or]</p> <p>— a husband or wife in terms of the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998); or the tenets of any religion,</p> <p>— a husband or wife in terms of the Civil Union Act, 2006 (Act No. 17 of 2006); or</p> <p>— a husband or wife in terms of the Marriage Act, 20. . . (Act No. . . of 20. . .); of the member or pensioner at the date of the member’s or pensioner’s death: Provided that a member or pensioner—</p> <p>(a) should register with the Fund his or her spouse;</p> <p>(b) should register with the Fund all spouses in terms of the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998) or the tenets of any religion;</p> <p>(c) who has [(a)] a spouse(s) in terms of the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998), [or] the Marriages Act, 1961 (Act No. 25 of 1961); the Civil Union Act, 2006 (Act No. 17 of 2006), the Marriage Act, 20. . . (Act No. . . of 20. . .), or the tenets of any religion may not register a life partner with the Fund:</p> <p>Provided further that registration of a person as a spouse will be <i>prima facie</i> proof of being a spouse:</p> <p>Provided further that a person who is not registered as a spouse may provide proof to the satisfaction of the Board that he or she is a spouse.”</p>
14.	Act No. 69 of 1996	Special Pensions Act	<p>By the substitution in subsection 31(1)(xx) for the definition of “spouse” of the following definition:</p> <p>“spouse” means an <i>applicant</i> who, at the date on which another person died or disappeared, was the partner of that person in a marriage relationship; (viii)</p> <p>(2) In the application of the definition of—</p> <p>(a) “spouse” mentioned in subsection [(1)] 31(1)(xx) “marriage relationship” means—</p> <p>(i) a marriage;</p> <p>(ii) a union contracted in accordance with customary law or which is recognised as a marriage in accordance with the tenets of any religion;</p> <p>(iii) a continuous cohabitation in a homosexual or heterosexual partnership for a period of at least 5 years; or</p> <p>(iv) a marriage entered into in terms of the Marriage Act, 20. . . (Act No. . . of 20. . .).”</p>
15.	Act No. 99 of 1996	Demobilisation Act	<p>By the substitution in section 1 for the definition of “dependant” of the following definition:</p> <p>“dependant”, for the purposes of section 7, includes—</p> <p>(a) any person in respect of whom the deceased was legally liable for maintenance at the time of his or her death;</p> <p>(b) any child of the deceased born after his or her death;</p> <p>(c) any surviving spouse of the deceased by virtue of a marriage or a union contracted in accordance with customary law or which is [recognized] recognised as a marriage in accordance with the tenets of a religion or belief.”</p>

Item no	No. and year of law	Title	Extent of amendment
16.	Act No. 99 of 1998	Maintenance Act	By the insertion in subsection 1(1) after the definition of "regulation" of the following definition: " Spouse " means in relation to any person, a person married in terms of the Marriage Act, 1961 (Act No. 25 of 1961), the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998), the Civil Union Act, 2006 (Act No. 17 of 2006), the Marriage Act, 20... (Act No. ... of 20...) or in accordance with the tenets of a religion or belief."
17.	Act No. 130 of 1998	Refugees Act	By the substitution in section 1 for the definition of "marriage" of the following definition: " marriage " means— (a) either a marriage or a civil partnership concluded in terms of the Civil Union Act, 2006 (Act No. 17 of 2006); (b) a marriage concluded in terms of— (i) the Marriage Act, 1961 (Act No. 25 of 1961); [or] (ii) the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998); [or] (iii) a marriage concluded in terms of the Marriage Act, ... (Act No. ... of ...); [or] (c) a marriage concluded in terms of the laws of a foreign country; or (d) a marriage concluded in accordance with the tenets of a religion or belief."
18.	Act No. 13 of 2002	Immigration Act	By the substitution in subsection 1(1) for the definition of "marriage" of the following definition: " marriage " means— (a) either a marriage or a civil partnership concluded in terms of— (i) the Marriage Act, 1961 (Act No. 25 of 1961); [or] (ii) the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998); (iii) the Marriage Act, ... (Act No. ... of ...); [or] [(b) (iv) [a civil union concluded in terms of] the Civil Union Act, 2006 (Act No. 17 of 2006); [(c)b) a marriage [concluded] entered into in terms of the laws of a foreign country; or (c) a marriage in accordance with the tenets of a religion or belief."
19.	Act No. 38 of 2005	Children's Act	By the substitution in subsection 1(1) for the definition of "marriage" of the following definition: " marriage " means a marriage— (a) recognised in terms of South African law or customary law; [or] (b) concluded in accordance with a system of religious law subject to specified procedures[.]; (c) concluded in terms of the Marriage Act, ... (Act No. ... of ...) and any reference to a husband, wife, widower, widow, divorced person, married person or spouse must be construed accordingly;" By the deletion of section 18(3)(c)(i) of the Children's Act, 2005 (Act No. 38 of 2005).

Schedule 2**LAWS REPEALED**

(Section 20)

Item	No and year of Act	Short title	Extent of repeal
1.	Act No. 25 of 1961	Marriage Act	The whole
2.	Act No. 21 of 1978	Transkei Marriage Act	The whole
3.	Act No. 15 of 1980	Bophuthatswana Marriage Act	The whole
4.	Act No. 24 of 1988	Ciskei Marriage Act	The whole
5.	Act No. 120 of 1998	Recognition of Customary Marriages Act	The whole
6.	Act No. 17 of 2006	Civil Union Act	The whole

MEMORANDUM ON THE OBJECTS OF THE MARRIAGE BILL, 2023

1. INTRODUCTION

The White Paper on Marriages in South Africa, which was approved by Cabinet in March 2022 for implementation, enjoins the Department of Home Affairs (the “Department”) to develop a single Marriage Act. The envisaged single Marriage Act seeks to rationalise the marriages laws pertaining to various types of marriages in order to allow for the conclusion and solemnisation of marriages regardless of religious, cultural, sex, gender, sexual orientation or any other beliefs of the prospective spouses.

The envisaged single Marriage Act will recognise the existing marriages concluded in terms of the Marriage Act, 1961 (Act No. 25 of 1961), the Civil Union Act, 2006 (Act No. 17 of 2006), and the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998), as well as marriages concluded in line with Sharia law and other religious belief or practices.

2. PURPOSE OF THE BILL

The purpose of the draft Marriage Bill (the “Bill”) is to rationalise the marriage laws pertaining to various types of marriages; to provide for the requirements for monogamous marriages; to provide for the requirements for polygamous marriages; to provide for designation of marriage officers; to provide for solemnisation of marriages; and to provide for matters incidental thereto.

3. SUMMARY OF THE BILL

3.1 The Bill seeks to give effect to the White Paper on Marriages in South Africa and deals with the policy recommendations in thirteen areas, as well as addressing policy and legislative gaps in the current marriage laws.

3.2 The key provisions of the Bill are summarised as follows:—

3.2.1 **Clause 1: Definitions**

Clause 1 seeks to provide for definitions to be used in the interpretation of the Act.

3.2.2 **Clause 2: Objects of Act**

Clause 2 seeks to provide for the objects of the Act, which includes the recognition, requirements, solemnisation and registration of marriages. The Bill also seeks to provide for the designation of marriage officers.

3.2.3 **Clause 3: Recognition of marriage**

Clause 3 seeks to provide for the recognition of marriages, and recognises all subsisting marriages concluded in terms of the current Marriage Act, the Civil Union Act, the Recognition of Customary Marriages Act and any subsisting monogamous or polygamous marriage concluded before the commencement of this Act, which was not recognised under any other law or entered into after the commencement of this Act, which complies with the requirements of this Act.

3.2.4 **Clause 4: Proof of identity**

Clause 4 seeks to provide for the various forms of identification which is required to determine the age of the prospective spouses to a marriage.

3.2.5 Clause 5: Requirements for monogamous marriage

Clause 5 seeks to provide for the requirements of a monogamous marriage.

3.2.6 Clause 6: Requirements for polygamous marriage

Clause 6 seeks to provide for the requirements for a polygamous marriage. This includes, customary, religious and secular polygamous marriages.

3.2.7 Clause 7: *Ex officio* marriage officers

Clause 7 seeks to provide for magistrates and authorised employees in the public service to be *ex officio* marriage officers.

3.2.8 Clause 8: Designation of other persons as marriage officers

Clause 8 seeks to provide for the designation of certain specified persons as marriage officers.

3.2.9 Clause 9: Deemed marriage officers

Clause 9 seeks to provide for circumstances in which a person will be deemed to have been a marriage officer.

3.2.10 Clause 10: Revocation and suspension of designation as marriage officer

Clause 10 seeks to empower the Director-General or any employee in the Department authorised thereto by the Director-General to revoke or suspend any designation of a person as a marriage officer and provides for an appeal to the Minister.

3.2.11 Clause 11: Solemnisation of marriage

Clause 11 seeks to provide for the solemnisation of marriages and the requirements relating to the solemnisation of marriages.

3.2.12 Clause 12: Objections to marriage

Clause 12 seeks to provide for objections to a marriage and for the marriage officer to inquire into the grounds of such objections.

3.2.13 Clause 13: Registration of marriage

Clause 13 seeks to provide for the registration of marriages, the keeping of records of solemnised marriages and the issuance of a certificate of the registration of the marriage.

3.2.14 Clause 14: Equal legal status and capacity of spouses

Clause 14 seeks to provide for the equal legal status and capacity of all spouses in a marriage.

3.2.15 Clause 15: Proprietary consequences of marriage

Clause 15 seeks to regulate the proprietary consequences of a marriage.

3.2.16 Clause 16: Dissolution of marriage

Clause 16 seeks to provide for the dissolution of a marriage by death or by a court by a decree of divorce as contemplated in the Divorce Act, 1979 (Act No. 70 of 1979).

3.2.17 Clause 17: Offences and penalties

Clause 17 seeks to provide for offences in respect of certain actions specified in the Bill, and for penalties in respect of such offences.

3.2.18 Clause 18: Regulations

Clause 18 seeks to authorise the Minister to make regulations in respect of certain specified matters.

3.2.19 Clause 19: Amendment of laws

Clause 19 seeks to provide a Schedule of legislation to be amended.

3.2.20 Clause 20: Repeal of laws

Clause 20 seeks to provide for a Schedule of laws to be repealed.

3.2.21 Clause 21: Existing marriages

Clause 21 seeks to provide for the continued validity of marriages.

3.2.22 Clause 22: Existing marriage officers

Clause 22 seeks to provide for a transitional provision relating to marriage officers.

3.2.23 Clause 23: Short title and commencement

Clause 23 seeks to provide for the short title and commencement of the Act.

4. ORGANISATIONAL AND PERSONNEL IMPLICATIONS

The coming into operation of the Act will have no additional personnel implications.

5. FINANCIAL IMPLICATIONS FOR STATE

The financial implications of the draft Bill will be taken into account within the current financial baseline allocations.

6. COMMUNICATION IMPLICATIONS

The Department will continue working closely with the Government Communication and Information System to develop a communications strategy to ensure wider dissemination of the key changes.

7. CONSTITUTIONAL IMPLICATIONS

The Department is of the view that the Bill complies with the approved White Paper on Marriages in South Africa, as well as the Constitutional Court in *Women's Legal Centre Trust v President of the Republic of South Africa and Others* [2022] ZACC 23.

8. INSTITUTIONS AND ORGANISATIONS CONSULTED

- 8.1 The Department published the Bill for public comments and received written submissions from the following institutions and organisations:
- (a) Centre for Social Justice, University of Stellenbosch;
 - (b) Commission for Gender Equality;
 - (c) Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities;
 - (d) Centre for Child Law, University of Pretoria;
 - (e) Unity Fellowship Church;
 - (f) Muslim Judicial Council;
 - (g) Al Jama-ah Political Party;
 - (h) Women’s Legal Centre;
 - (i) Young Men’s Muslim Association;
 - (j) Faith-based Organisations;
 - (k) Civil Society Organisations; and
 - (l) Other Non-Governmental Organisation.
- 8.2 The Department further convened an interdepartmental workshop on the Bill with the following Departments:
- (a) Department of Social Development;
 - (b) Department of Cooperative Governance and Traditional Affairs;
 - (c) Department of Women, Youth and Persons with Disabilities;
 - (d) Department of Justice and Constitutional Development; and
 - (e) the South African Revenue Services.
- 8.3 The Minister of Home Affairs further, on 24 August 2023, convened a Ministerial Dialogue on the Bill with the following stakeholders:
- (a) Faith-based Organisations;
 - (b) Pastors; and
 - (c) Representatives from the Muslim Judicial Council.
- 8.4 The Department also received positive inputs from:
- (a) DevCom;
 - (b) Justice, Crime Prevention and Security Cluster;
 - (c) Governance, State Capacity, and Institutional Development Cluster;
 - (d) International Cooperation Trade and Security Cluster; and
 - (e) Economic Sectors Employment and Infrastructure Development Cluster.

9. PARLIAMENTARY PROCEDURE

- 9.1 In determining how a Bill must be tagged, the tagging test as formulated in the Constitutional Court judgment of *Tongoane and Others v Minister for Agriculture and Land Affairs and Others 2010 (8) BCLR 741 (CC)* (“*Tongoane and Others v Minister for Agriculture and Land Affairs and Others*”) must be considered. In *Tongoane and Others v Minister for Agriculture and Land Affairs and Others*, the Constitutional Court confirmed and upheld the “substantial measure” test as formulated in *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill (CCT12/99) [1999] ZACC 15; 2000 (1) SA 732; 2000 (1) BCLR 1 (11 November 1999)*.
- 9.2 In *Tongoane and Others v Minister for Agriculture and Land Affairs and Others*, the Constitutional Court held as follows:

“[56] In resolving this issue, this Court held that the heading of section 76, namely, ‘Ordinary Bills affecting provinces’ provides ‘a strong textual indication that section 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.’ It went on to hold that “[w]hatever the proper characterisation of the Bill . . . a large number of provisions must be characterised as falling ‘within a functional area listed in Schedule 4’, more particularly, the concurrent

national and provincial legislative competence in regard to ‘trade’ and ‘industrial promotion’. Accordingly, “[o]nce a Bill ‘falls within a functional area listed in Schedule 4’” it must be enacted in accordance with the procedure in section 76.

[57] . . .

[58] . . . 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 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”.

[59] There is an important difference between the “pith and substance” test and the “substantial measure” test. Under the former, provisions of the legislation that fall outside of its substance are treated as incidental. By contrast, the tagging test is distinct from the question of legislative competence. It focuses on all the provisions of the Bill in order to determine the extent to which they substantially affect functional areas listed in Schedule 4 and not on whether any of its provisions are incidental to its substance.

[60] The test for tagging must be informed by its purpose. Tagging is not concerned with determining the sphere of government that has the competence to legislate on a matter. Nor is the process concerned with preventing interference in the legislative competence of another sphere of government. The process is concerned with the question of how the Bill should be considered by the provinces and in the NCOP, and how a Bill must be considered by the provincial legislatures depends on whether it affects the provinces. The more it affects the interests, concerns and capacities of the provinces, the more say the provinces should have on its content.

[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.”. (Footnotes omitted)

- 9.3 The test for tagging focuses on all the provisions in the Bill and it compels the consideration of whether the purpose and effect of the subject matter of the Bill in a substantial measure fall within the functional areas listed in Schedule 4 to the Constitution.
- 9.4 Although the subject matter of the Bill falls under family law or personal law, it also speaks to customary marriages. “Marriages” are not listed in Schedule 4, Part A to the Constitution as a functional area of concurrent national and provincial legislative competence, but cultural matters; indigenous law and customary law are listed.

- 9.5 Whether a Bill's subject matter in substantial measure falls within the functional area of indigenous law, was considered in the *Tongoane and Others v Minister for Agriculture and Land Affairs and Others* where the Constitutional Court held as follows:

“[74] The first is to recognise that statutes do not ordinarily deal with indigenous law in the abstract. They do so in the context of specific subject matter of indigenous law, such as matrimonial property, intestate succession, or the occupation and use of communal land, as CLARA does. Therefore any legislation with regard to indigenous law will ordinarily and indeed, almost invariably, also be legislation with regard to the underlying subject-matter of the indigenous law in question. The mere fact that a statute that repeals, replaces or amends indigenous law might have a different subject-matter of its own, does not detract from the fact that it also falls within the functional area of indigenous law.” (Our underlining)

- 9.6 The Constitutional Court held that “the provisions of CLARA that dealt with communal land rights in substantial measure affect ‘indigenous law and customary law’ and ‘traditional leadership’ that are functional areas listed in Schedule 4”¹ to the Constitution.
- 9.7 In applying the substantial measure test, we examined the contents of the Bill. We considered whether the provisions in the Bill fall within Schedule 4 to the Constitution, and if so, whether the provisions of the Bill in a substantial measure fall within a concurrent national and provincial legislative competence.
- 9.8 The Department of Home Affairs and the State Law Advisers are of the view that the purpose and effect of the Bill in substantial measure deal with culture and customary marriages and subsequently fall within the functional areas of cultural matters; indigenous law and customary law as listed in Schedule 4, Part A to the Constitution.
- 9.9 The Department of Home Affairs and the State Law Advisers are of the opinion that the Bill is an ordinary Bill affecting provinces and must be tagged as a section 76 Bill. The Bill must be dealt with in accordance with the procedure established by section 76(1) of the Constitution.
- 9.10 Section 39 of the Traditional and Khoi-San Leadership Act, 2019 (Act No. 3 of 2019) (“Traditional and Khoi-San Leadership Act”) provides for referral of Bills to the National House of Traditional and Khoi-San Leader by Parliament and reads as follows:

“Referral of Bills to National House

39. (1) (a) Any Parliamentary Bill—

- (i) which directly affects traditional or Khoi-San communities or pertaining to customary law or customs of traditional or Khoi-San communities; or
- (ii) pertaining to any matter referred to in section 154(2) of the Constitution, must, in the case of a Bill contemplated in subparagraph (i) and may, in the case of a Bill contemplated in subparagraph (ii), before it is passed by the house of Parliament where it was introduced, be referred by the Secretary to Parliament to the National House for its comments.

(b) The National House must, within 60 days from the date of such referral, make any comments it wishes to make and submit such comments to the Secretary to Parliament: Provided that the National House may refer any such Bill to any provincial house for comments:

¹ *Tongoane and Others v Minister for Agriculture and Land Affairs and Others*, 2010(8) BCLR 741 (CC) at paragraph [97].

Provided further that if the National House has no comments on any Bill referred to it, the National House must inform the Secretary to Parliament accordingly.”.

- 9.11 The Department of Home Affairs and the State Law Advisers are therefore of the view that it is necessary to refer this Bill to the National House of Traditional and Khoi-San Leader in terms of section 39(1)(a)(i) of the Traditional and Khoi-San Leadership Act since it contains provisions which directly affect traditional or Khoi-San communities or pertaining to customary law or customs of traditional or Khoi-San communities.

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