

REPUBLIC OF SOUTH AFRICA

PENSION FUNDS AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 75); explanatory summary of
Bill and prior notice of its introduction published in Government Gazette No. 49558 of
26 October 2023)
(The English text is the official text of the Bill)*

(MINISTER OF FINANCE)

[B 3—2024]

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GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Pension Funds Act, 1956, so as to insert certain definitions in order to provide for the introduction of the savings withdrawal benefit; to provide for the appropriate account of a member’s interest in the savings, retirement and vested components; to provide for deductions that may be made; and to provide for matters connected therewith.

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

Amendment of section 1 of Act 24 of 1956, as amended by section 21 of Act 101 of 1976, section 9 of Act 94 of 1977, section 10 of Act 80 of 1978, section 38 of Act 99 of 1980, section 3 of Act 51 of 1988, section 20 of Act 54 of 1989, section 29 of Act 97 of 1990, section 14 of Act 83 of 1992, section 21 of Act 104 of 1993, sections 1 and 6 of Act 22 of 1996, section 1 of Act 39 of 2001, section 1 of Act 65 of 2001, section 1 of Act 11 of 2007, section 1 of Act 22 of 2008, section 1 of Act 45 of 2013, and section 290 read with Schedule 4 of Act 9 of 2017 5

1. Section 1 of the Pension Funds Act, 1956 (Act No. 24 of 1956) (hereinafter referred to as “the principal Act”), is hereby amended— 10

(a) by the insertion after the definition of “member’s individual account” of the following definitions:

“**member’s interest in the retirement component**’ has the meaning as defined in section 1(1) of the Income Tax Act, 1962 (Act No. 58 of 1962); 15

“**member’s interest in the savings component**’ has the meaning as defined in section 1(1) of the Income Tax Act, 1962 (Act No. 58 of 1962);

“**member’s interest in the vested component**’ has the meaning as defined in section 1(1) of the Income Tax Act, 1962 (Act No. 58 of 1962);” 20

(b) by the insertion after the definition of “pension fund organisation” of the following definition:

“**pension interest**’, in relation to a court order granted under section 7(8)(a) of the Divorce Act, 1979 (Act No. 70 of 1979), or a court order granted in respect of the division of assets of a marriage according to the tenets of a religion, means, in relation to a party who is a member of a fund, that member’s share of the value of the fund, determined in terms of the rules of that fund, on the date of the court order;” 25

(c) by the insertion after the definition of “retirement annuity fund” of the following definition: 30

“**retirement component**’ has the meaning as defined in section 1(1) of the Income Tax Act, 1962 (Act No. 58 of 1962), subject to the applicable *provisos* in item 6B of the Second Schedule to the Income Tax Act, 1962 (Act No. 58 of 1962);”;

- (d) by the insertion after the definition of “rules” of the following definitions: 5
 “**savings component**’ has the meaning as defined in section 1(1) of the Income Tax Act, 1962 (Act No. 58 of 1962), subject to the applicable *provisos* in item 6B of the Second Schedule to Income Tax Act, 1962 (Act No. 58 of 1962);
savings withdrawal benefit’ has the meaning as defined in section 1(1) 10
 of the Income Tax Act, 1962 (Act No. 58 of 1962);”; and
- (e) by the substitution for the definition of “valuator” of the following definitions:
valuator’ means an actuary who, in the opinion of the registrar, has sufficient actuarial knowledge to perform the duties required of a 15
 valuator in terms of the Act[.]; and
vested component’ has the meaning as defined in section 1(1) of the Income Tax Act, 1962 (Act No. 58 of 1962), subject to the applicable *provisos* in item 6B of the Second Schedule to the Income Tax Act, 1962 20
 (Act No. 52 of 1962).”.

Amendment of section 14B of Act 24 of 1956, as inserted by section 3 of Act 39 of 2001, substituted by section 10 of Act 11 of 2007, and amended by section 21 of Act 45 of 2013

2. Section 14B of the principal Act is hereby amended—

- (a) by the substitution in subsection (1)(a) for the definition of “OC” of the 25
 following definition:
 “OC represents any other amounts lawfully permitted, credited to or debited, deducted or withdrawn from the member’s individual account, in terms of this Act, if any, and includes any savings withdrawal benefit paid from the savings component; and”;
- (b) by the deletion in subsection (2)(a) of the word “and” at the end of subparagraph (i) and the addition of the following subparagraph after subparagraph (ii):
 “(iii) when determining the amounts referred to in subparagraphs (i) 35
 and (ii), the pensionable service applied in the determination of the accrued deferred pension referred to in subparagraph (i) must be reduced to take into account any savings withdrawal benefit previously paid from the savings component as permitted in terms of the Income Tax Act, 1962 (Act No. 58 of 1962) and the amount referred to in subparagraph (ii) must be reduced by any 40
 savings withdrawal benefit previously paid from the savings component; and”.

Amendment of section 19 of Act 24 of 1956, as amended by section 13 of Act 80 of 1959, section 9 of Act 58 of 1966, section 1 of Act 80 of 1969, section 2 of Act 23 of 1970, section 7(a) of Act 91 of 1972, section 23 of Act 101 of 1976, section 11 of Act 94 of 1977, section 11 of Act 80 of 1978, section 14 of Act 103 of 1979, section 39 of Act 99 of 1980, section 14 of Act 82 of 1982, section 20 of Act 46 of 1984, section 17 of Act 86 of 1984, section 11 of Act 50 of 1986, section 5 of Act 51 of 1988, section 8 of Act 53 of 1989, section 11 of Act 64 of 1990, section 2 of Act 94 of 1997, section 2 of Act 65 of 2001, section 33 of Act 45 of 2013, and section 290 read with Schedule 4 of Act 9 of 2017 45 50

3. Section 19 of the principal Act is hereby amended—

- (a) by the substitution for paragraphs (c) and (d) of subsection (5) of the following paragraphs:
 “(c) A loan or guarantee contemplated in paragraph (a) must not exceed, 55
 at the time it is granted or furnished, 65 per cent of the member’s individual account or minimum individual reserve, as the case may be, in the member’s interest in the savings, retirement and vested components.

- (d) A loan or guarantee provided by an employer, or any combination of loans or guarantees provided for the purpose of this subsection, as contemplated in section 37D(1)(b)(i), may not exceed 65 per cent of the member's individual account or minimum individual reserve in the member's interest in the savings, retirement and vested components."'; and 5
- (b) by the substitution for paragraph (a) of subsection (6) of the following paragraph:
- "(a) The [registrar] Authority may, on application by a fund and the payment of the prescribed fee, under exceptional circumstances, and [on such] subject to conditions and for [such] the periods [as he] that the Authority may determine, temporarily exempt any fund from compliance with any provision of subsection (5) or (5B)(a)."'. 10

Substitution of section 37D of Act 24 of 1956, as inserted by section 14 of Act 94 of 1977, and amended by section 14 of Act 80 of 1978, section 4 of Act 65 of 2001, section 28 of Act 11 of 2007, section 4 of Act 35 of 2007, section 16 of Act 22 of 2008, section 3 of Act 60 of 2008, and section 52 of Act 45 of 2013 15

4. The following section is hereby substituted for section 37D of the principal Act:

"Fund may make certain deductions from pension benefits

- 37D.** (1) A registered fund may— 20
- (a) deduct any amount due on the benefit in question by the member in accordance with the Income Tax Act, 1962 (Act No. 58 of 1962) and the Tax Administration Act, 2011 (Act No. 28 of 2011), and requirements prescribed by regulation in relation to how deductions in terms of this section and savings withdrawal benefits must be applied by the funds, and any amount due to the fund in respect of— 25
- (i) a loan granted to a member in terms of section 19(5); or
- (ii) any amount for which the fund becomes liable under a guarantee furnished in respect of a member for a loan granted by some other person to the member in terms of section 19(5), from— 30
- (aa) the amount of the benefit to which a member becomes entitled in terms of the rules of the fund;
- (bb) in the case of a transfer of the member to another fund, the amount of the benefit which the fund is so entitled to transfer, if the board of the transferor fund is satisfied that it is not otherwise reasonably possible to negotiate the repayment or to transfer the loan or guarantee; or 35
- (cc) in the case of default on the repayment of any such loan by the member concerned in circumstances where his or her membership of the fund is not terminated, the amount of the benefit which the member would have received on termination of the membership on the date of default, if the deduction is only effected as a last resort after the board of the fund is satisfied that no other arrangement for the required repayment can be made; 40
- (b) deduct any amount due by a member to the member's employer on the date of retirement or the date on which the member ceases to be a member of the fund, in accordance with the Income Tax Act, 1962 (Act No. 58 of 1962) and the Tax Administration Act, 2011 (Act No. 28 of 2011), and requirements prescribed by regulation in relation to how deductions in terms of this section and savings withdrawal benefits must be applied by funds funds, in respect of— 45
- (i) (aa) a loan granted by the employer to the member as referred to in section 19(5)(d) for any purposes referred thereto; or 50
- (bb) any amount for which the employer is liable under a guarantee furnished in respect of a loan by some other person to the member as referred to in section 19(5)(d) for any purpose referred to in section 19(5)(a), 55

- to an amount not exceeding the amount which in terms of the Income Tax Act, 1962 (Act No. 58 of 1962), may be taken by a member or beneficiary as a lump sum benefit as defined in the Second Schedule to that Act; or
- (ii) compensation, including any legal costs recoverable from the member in a matter contemplated in subparagraph (bb), in respect of any damage caused to the employer by reason of any theft, dishonesty, fraud or misconduct by the member, and in respect of which—
- (aa) the member has in writing admitted liability to the employer; or
- (bb) judgment has been obtained against the member in any court, including a magistrate's court, and includes a compensation order granted in terms of section 300 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), from any benefit payable in respect of the member or a beneficiary in terms of the rules of the fund, and pay that amount to the employer concerned;
- (bA) permit a member to take a savings withdrawal benefit where—
- (i) a loan or guarantee has been furnished by an employer; or
- (ii) there is a judgment contemplated in paragraph (b)(ii)(bb) in favour of the employer that has not yet been executed: Provided that the withdrawal will not result in there being insufficient remaining funds to repay the loan or guarantee or to comply with the judgment;
- (bB) suspend a savings withdrawal benefit where the employer has not obtained a judgment contemplated in paragraph (b)(ii)(bb), and the withdrawal will result in there being insufficient remaining value to comply with the pending order, if granted, for a period of 12 months pending the judgment by any court including a magistrate's court;
- (c) in accordance with the Income Tax Act, 1962 (Act No. 58 of 1962) and the Tax Administration Act, 2011 (Act No. 28 of 2011), and any requirements prescribed by regulation that may be made in relation to how deductions in terms of this section and savings withdrawal benefit must be applied by the funds, deduct any amount which the fund has paid or will pay by arrangement with, and on behalf of, a member or beneficiary in respect of—
- (i) the member's or beneficiary's subscription to a medical scheme, registered otherwise than provisionally in terms of the Medical Schemes Act, 1998 (Act No. 131 of 1998);
- (ii) any insurance premium payable by such a member or beneficiary to an insurer licensed in terms of the Insurance Act, 2017 (Act No. 18 of 2017), in respect of a life insurance policy;
- (iii) any purpose approved by the Authority, on the conditions determined by that member or beneficiary, upon a request in writing from the fund,
- from the benefit to which the member or beneficiary is entitled in terms of the rules of the fund, and pay such amount, if due, to such medical scheme, insurer or person concerned, as the case may be;
- (d) deduct from a member's individual account in the case of a defined contribution category of a fund or, in any other case, from a member's interest in the fund as determined by the fund rules or as determined in accordance with the Income Tax Act, 1962 (Act No. 58 of 1962) and the Tax Administration Act, 2011 (Act No. 28 of 2011), and any requirements prescribed by regulation that may be made in relation to how deductions in terms of this section and savings withdrawal benefits must be applied by the funds—
- (i) any portion of the pension interest assigned to a non-member spouse in the court order;
- (iA) any amount payable in terms of a maintenance order as defined in section 1 of the Maintenance Act, 1998 (Act No. 99 of 1998); and

- (iB) any amount payable as maintenance in terms of an interim maintenance order granted by the court in terms of rule 43 of the High Court rules or rule 58 of the Magistrates' Court rules, made under section 6 of the Rules Board of Courts Law Act, 1985 (Act No. 1 of 1985); and 5
- (e) deduct from a member's individual account or members interest referred to in subsection (1)(d) or the benefit payable to a pensioner referred to in subsection (1A), as the case may be, employees' tax required to be deducted or withheld in terms of the Fourth Schedule to the Income Tax Act, 1962 (Act No. 58 of 1962), as a result of a deduction referred to in this subsection. 10
- (1A) In respect of a pensioner, deductions referred to in subsection (1)(d) must be made from the member's benefit that is payable, monthly, annually or another recurring period, as the case may be.
- (1B) A fund must appropriately adjust a member's minimum individual reserve or a member's individual account, as the case may be, to take account of any deductions made in terms of this subsection, and the adjustment must be made in accordance with the requirements prescribed by regulation. 15
- (1C) The aggregate of all amounts deducted in terms of subsection (1) may not exceed the amount of the member's individual account or the member's individual reserve, as case may be, referred to in subsection (1)(d). 20
- (2) For the purposes of paragraph (a)(ii)(bb) and (cc) of subsection (1), the amounts so deducted shall be deemed to be a benefit to which the member becomes entitled upon termination of his or her membership of the fund for reasons other than as a result of retirement or death arising at the date of the transfer or the default. 25
- (3)(a) Any amount that may be deducted in terms of subsection (1)(d) may only be deducted after the member's individual account or member's minimum individual reserve, as the case may be, has been reduced by any loan amount or guarantee amount referred to in subsection (1)(a), where the loan or guarantee was granted prior to the granting of the court orders, irrespective of the fact that that amount is due and payable or not. 30
- (aA)(i) A fund may not, without the consent of the non-member spouse, grant a loan or guarantee or permit a savings withdrawal benefit to be taken by a member if— 35
- (aa) the fund received a formal notification from the member or non-member spouse that a divorce has been instituted, as defined in the Divorce Act, 1979 (Act No. 70 of 1979); or 40
- (bb) an application has been made for a court order in respect of the division of assets of a marriage in accordance with the tenets of any religion. 45
- (ii) The prohibition in terms of subparagraph (i) applies until a court order is issued. 45
- (aB) In respect of a deduction referred to in subsection (1)(d)(iA) or (iB), the fund must pay the maintenance, as directed by the maintenance order—
- (i) as a lump sum in respect of arrear maintenance;
- (ii) in monthly payments in respect of future maintenance; or
- (iii) annually in advance in respect of future maintenance where a fund is unable to make monthly payments. 50
- (aC) A fund may not allow a member to take a savings withdrawal benefit where there is a maintenance order against the fund in place, unless it is satisfied that the withdrawal will not result in there being insufficient remaining value to comply with the order. 55
- (aD) A fund may, subject to a court order authorising the suspension of a savings withdrawal, suspend a savings withdrawal benefit where it is aware that proceedings relating to a maintenance order against the fund is pending, and the withdrawal will result in there being insufficient remaining value to comply with the pending order, if granted. 60

(b) In the event that more than one of the court orders referred to in subsection (1)(d) provide for deductions at the same time, the court orders must be dealt with in accordance with the following hierarchy:

- (i) Any maintenance order referred to in subsection (1)(d)(iA) or (iB);
- (ii) any court order referred to in the definition of ‘non-member spouse’.

(4)(a) For the deduction referred to in subsection (1)(d)(i), the portion of the interest assigned to the non-member spouse in terms of the court order concerned is deemed to accrue to the member on the date of the court order which—

- (i) must be deducted by—
 - (aa) the fund or funds named in or identifiable from the court order; or
 - (bb) the fund or funds to which the fund referred to in item (aa) transferred the interest referred to in the court order;
- (ii) must be deducted on the date on which an election is made in accordance with paragraph (b)(i) or, if no election is made within the period referred to in paragraph (b)(ii), the date on which that period expires; and
- (iii) must, subject to subsection (1A), reduce the member’s individual account or member’s individual reserve, as the case may be, at the date of the court order.

(b)(i) The fund must, within 45 days of the submission of the court order by the registrar of the court, request the non-member spouse to elect if the amount to be deducted must be paid directly to the non-member spouse or if it must be transferred to a fund on the non-member spouse’s behalf.

(ii) The non-member spouse must within 120 days of being requested to make an election—

- (aa) inform the fund of how the amount referred to in subparagraph (i) must be dealt with;
- (bb) if the non-member spouse elects that the amount must be paid to them directly, provide the fund with the details of how that payment must be effected; or
- (cc) if the non-member spouse elects that the amount must be transferred to a fund on their behalf, provide the fund with the details of that fund.

(iii) The fund must pay or transfer the amount within 60 days of being informed of how the amount must be dealt with in accordance with the non-member spouse’s election.

(iv) In the event that the non-member spouse fails to make an election or identify the fund to which the amount should be transferred within the period referred to in subparagraph (ii), the fund must pay the amount directly to the non-member spouse within 30 days after the expiry of that period.

(v) Despite subparagraph (iv), in the event that the fund cannot reasonably ascertain how the payment to the non-member spouse must be effected, the fund must retain the amount and any fund return referred to in paragraph (c)(ii) in the fund until such time as details of how that payment must be effected is made available to the fund by the member, the non-member spouse or any other person.

(c) A non-member spouse—

- (i) is not a member or beneficiary in relation to the fund; and
- (ii) is entitled to the accrual of fund return from the date of the court order until payment or transfer of the deduction contemplated in subsection (1)(b).

(d) Any portion of the pension interest assigned to the non-member spouse in terms of a court order granted prior to 13 September 2007 is for the purposes of any law other than the Income Tax Act, 1962 (Act No. 58 of 1962), including, but not limited to, section 7(8)(a) of the Divorce Act, 1979 (Act No. 70 of 1979), deemed to have accrued to the member on 13 September 2007 and must be paid or transferred in accordance with paragraphs (a) and (b).

Short title and commencement

5. This Act is called the Pension Funds Amendment Act, 2024, and comes into effect on a date determined by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE PENSION FUNDS AMENDMENT BILL, 2024

1. BACKGROUND OF BILL

- 1.1 South Africa has different retirement fund vehicles available to individuals who wish to save for retirement, namely, pension funds, pension preservation funds, provident funds, provident preservation funds and retirement annuity funds. Historically, these funds had differing tax treatments for contributions to the funds, as well as differing rules relating to withdrawals from these funds. To promote retirement savings, the retirement savings regime has, since 2012, undergone some significant reforms. These reforms include, *inter alia*, harmonising the tax treatment of contributions to the different types of funds (which came into effect from 1 March 2016) and increasing preservation at retirement by harmonising the requirement for annuitisation upon retirement across all retirement funds (which came into effect from 1 March 2021).
- 1.2 Government now wishes to focus on pre-retirement preservation. In accordance with the current retirement regime, individuals may make full withdrawals from their pension or provident fund when they cease employment. Further to the above, individuals are also able to make once-off withdrawals from their pension preservation or provident preservation fund(s). What is of concern for Government is the fact that many of the above-mentioned withdrawals are taking place irrespective of the tax rates applied upon withdrawal.

Reasons for change

- 1.3 Government has two primary concerns with the design of the current retirement regime. The first is the lack of preservation pre-retirement, which Government has highlighted in previous discussion papers. The ability for pension and provident fund members to access their retirement interest when terminating employment can create the incentive for fund members to terminate employment as a means of gaining access to those funds, thus prematurely terminating the ability to preserve these funds until normal retirement age is, per the fund rules, attained.
- 1.4 The second concern is that some households in financial distress have assets within their retirement fund(s) that are not accessible in case of emergencies or financial hardship. This has become more prominent since the onset of the COVID-19 pandemic, with numerous calls for financially distressed individuals to be given access to their retirement funds to alleviate their financial hardship.

2. OBJECTIVE OF BILL

- 2.1 The Revenue Laws Amendment Bill, 2023, provides for the amendments to the Income Tax Act, 1962 (Act No. 58 of 1962) (“the ITA”), which gives effect to the policy objectives referred to in paragraph 1, and the detailed legislative proposals to give effect to the policy objectives are set out in the explanatory memorandum on the Revenue Laws Amendment Bill, 2023 (“the RLAB”).
- 2.2 The Pension Funds Amendment Bill, 2024 (“the Bill”) provides for certain amendments to the Pension Funds Act, 1956 (Act No. 24 of 1956) (“the PFA”), which are necessary to enable retirement funds to be able to appropriately implement the amendments to the ITA which are contained in the RLAB.

3. CONTENTS OF BILL

3.1 *Clause 1*

This clause proposes an insertion of new definitions to assist in the interpretation of the Bill and includes the introduction of the definition of “pension interest” which is important for the implementation of deductions in terms of section 37D, in alignment with the approach set out in the RLAB.

3.2 *Clause 2*

This clause provides for amendments to section 14B of the PFA, in particular, to amend the definition of “OC” in subsection (1), and to insert a new subsection (2)(a)(iii) to align section 14B with the provisions of and the requirements contained in the RLAB. OC represents any other amounts lawfully permitted, credited to or debited from the member’s individual account.

3.3 *Clause 3*

Clause 3 amends section 19(5) of the PFA, which deals with loans and guarantees to members of retirement funds by retirement funds and employers, to align with the provisions and requirements of the RLAB. The amendments propose a cap on the amount of a loan or guarantee, or a loan or guarantee provided by an employer for the purposes of section 19(5), to a maximum of 65% of the member’s benefit available, including the member’s interest in the savings, retirement and vested components. This change also seeks to align section 19(5) to a policy decision taken and already included in regulation 28 of the Regulations made under the PFA, published in Government Notice R.98 of 26 January 1962, as amended, to reduce pension benefit exposure to loans and guarantees.

3.4 *Clause 4*

Clause 4 of the Bill proposes—

- (a) the substitution of section 37D of the PFA, to enable retirement funds to effect deductions from retirement fund benefits in accordance with the provisions and requirements of the RLAB;
- (b) the deduction of any amount due by a member to the member’s employer on the date on which the member’s employment with a participating employer in a pension fund is terminated, in accordance with the ITA and the Tax Administration Act, 2011 (Act No. 28 of 2011);
- (c) to permit a member to take a savings withdrawal benefit where a loan or guarantee has been furnished by the employer or a judgment in favour of the employer has yet to be executed provided that the withdrawal does not result in insufficient remaining funds to repay the loan or guarantee or comply with a judgment;
- (d) that a pension fund may not, without consent from a non-member spouse, grant a loan or guarantee or permit withdrawal if the fund is notified by the non-member spouse that a divorce has been instituted. Further to the above, the fund cannot permit a withdrawal if notified that a maintenance order against the fund is pending and the pension fund is uncertain if withdrawal will result in there being insufficient funds remaining to comply with pending order; and
- (e) other necessary refinements to the section, to enhance the appropriateness and effectiveness of the section.

3.5 *Clause 5*

This clause provides for the short title and commencement of the Bill.

4. ORGANISATIONS AND INSTITUTIONS CONSULTED

- 4.1 The Bill has been published for public comment. The Standing Committee on Finance of the National Assembly also conducted public hearings on the Bill. All stakeholders in the pensions and retirement industry participated and provided comments and their comments were considered in the drafting of the Bill.
- 4.2 A Socio-Economic Impact Assessment System was completed by the Presidency.
- 4.3 The Bill was further considered by Cabinet prior to its introduction in Parliament.

5. FINANCIAL IMPLICATIONS OF BILL

- 5.1 Financial implications for the State:

There are no significant financial implications envisaged for the fiscus.

- 5.2 Financial implications for retirement funds:

The financial implications for retirement funds would relate to adjustments to their systems to give effect to the requirements contained in the RLAB as facilitated through the amendments to the PFA contained in this Bill and effecting necessary amendments to their rules.

6. CONSTITUTIONAL IMPLICATIONS

None

7. PARLIAMENTARY PROCEDURE

- 7.1 The Constitution of the Republic of South Africa, 1996 (“the Constitution”) regulates the manner in which legislation may be enacted by the legislature and thus prescribes the different procedures to be followed for such enactment. The national legislative process is governed by sections 73 to 77 of the Constitution.
- 7.2 It is necessary to consider the Bill against the provisions of the Constitution relating to the tagging of Bills and against the functional areas listed in Schedule 4 (functional areas of concurrent national and provincial legislative competence) and Schedule 5 (functional areas of exclusive provincial legislative competence) to the Constitution.
- 7.3 A Bill falling within a functional area listed in Schedule 4 to the Constitution must be dealt with in accordance with the procedure set out in section 76 of the Constitution. Schedule 4 lists the functional areas of concurrent national and provincial legislative competence. Schedule 5 to the Constitution lists the functional areas of exclusive provincial legislative competence. Therefore, those areas not falling within Schedule 4 or Schedule 5, fall within the exclusive national legislative competence.
- 7.4 The test for the classification of a Bill, as established in the Constitutional Court judgment of *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* (“*Tongoane* judgment”), is that any Bill with provisions which, in substantial measure, fall within a functional area listed in Schedule 4 to the Constitution must be classified in terms of that Schedule. The *Tongoane* judgment therefore laid down the substantial measures test for the tagging of a Bill, which requires one to determine whether, to a substantial extent, the legislation under consideration actually regulates matters falling within Schedule 4 to the Constitution. If so, the Bill must be tagged in terms of section 76 of the Constitution.

- 7.5 As the Bill does not deal with a functional area listed in Schedule 4 or Schedule 5 to the Constitution, section 44(1)(a)(ii) of the Constitution is applicable with regard to the power of the National Assembly to pass legislation on “any matter”.
- 7.6 It is therefore submitted that the Bill must be dealt with in accordance with the legislative procedure outlined in section 75 of the Constitution as it contains no provisions to which the procedure set out in section 74 or 76 of the Constitution applies.
- 7.7 It is submitted that it is not necessary to refer the Bill to the National House of Traditional Leaders in terms of section 39(1)(a)(i) of the Traditional and Khoi-San Leadership Act, 2019 (Act No. 3 of 2019), since it does not contain provisions that directly affect traditional or Khoi-San communities or pertain to customary law or customs of traditional or Khoi-San communities.