REPUBLIC OF SOUTH AFRICA

IMMIGRATION 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. 50310 of 19 March 2024)
(The English text is the official text of the Bill)

(MINISTER OF HOME AFFAIRS)

[B 8—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 Immigration Act, 2002, so as to revise provisions relating to arrest and detention of illegal foreigners for purposes of deportation and to align these provisions with constitutional principles; and to provide for matters connected therewith.

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

Amendment of section 34 of Act 13 of 2002, as amended by section 35 of Act 19 of 2004 and section 47 of Act 19 of 2004

1. Section 34 of the Immigration Act, 2002 (Act No. 13 of 2002), (hereinafter referred to as the ''principal Act''), is hereby amended—

(a) by the deletion in subsection (1) of paragraphs *(b)* and *(d)*;

(b) by the substitution in subsection (1) for paragraph *(c)* of the following paragraph:

''*(c)* shall be informed upon arrest or immediately thereafter of the rights set out in **[the preceding two paragraphs]** paragraph *(a)* and subsection (1A)*(g)*, when possible, practicable and available in a language that he or she understands; and''; and

(c) by the insertion after subsection (1) of the following subsection:

''(1A) An immigration officer may arrest and detain an illegal foreigner for purposes of deportation, provided that—

(a) he or she has interviewed the foreigner concerned and considered whether the interests of justice permit the release of such foreigner subject to reasonable conditions, and must, if he or she so concludes that the interests of justice permit the release of such foreigner, impose reasonable conditions and record the release and reasons therefor on a prescribed form;

(b) a foreigner so detained must be brought before a court in person, within 48 hours from the time of his or her arrest or not later than the first court day after the expiry of the 48 hours, if the 48 hours expired outside ordinary court days;

(c) the court before whom the detained foreigner is brought must consider whether the interests of justice permit the release of such person subject to reasonable conditions and must, if it so concludes, order the person to be released subject to reasonable conditions;

(d) if the court concludes that the interests of justice do not permit the release of such person, the court may authorise the further detention

of the foreigner concerned for a period not exceeding 30 calendar days;

(e) if the court has ordered the further detention of such foreigner, he or she must be brought before the court prior to the expiry of the period of detention authorised by the court and the court must consider whether the interests of justice permit the release of such foreigner subject to reasonable conditions and must, if it so concludes, order the foreigner to be released subject to reasonable conditions as imposed by the court;

(f) if the court considering further detention of such a foreigner concludes that the interests of justice do not permit the release of such foreigner, the court may authorise the further detention of the foreigner for an adequate period not exceeding a further 90 calendar days; and

(g) a foreigner concerned brought before a court in terms paragraphs *(b)* or *(e)* must be given an opportunity to make representations to the court, and such representations must be considered together with the representations by the immigration officer.''.

Substitution of word in Act 13 of 2002

2. The principal Act is hereby amended by the substitution for the word ''Court'', wherever it occurs, of the word ''court''.

Short title and commencement

3. This Act is called the Immigration Amendment Act, 2024, and comes into operation on a date determined by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE IMMIGRATION AMENDMENT BILL, 2024

1. INTRODUCTION AND BACKGROUND

The review of the Immigration Act, 2002 (Act No. 13 of 2002) (''the principal Act''), was necessary in view of the following:

First Constitutional Court Judgment

1.1 On 29 June 2017, the Constitutional Court in *Lawyers for Human Rights v Minister of Home Affairs and Others [2017] ZACC 22; 2017 (10) BCLR 1242 (CC); 2017 (5) SA 480 (CC)* (''the first Constitutional Court judgment''), declared sections 34(1)*(b)* and *(d)* of the principal Act inconsistent with sections 12(1) and 35(2)*(d)* of the Constitution of the Republic of South Africa, 1996 (''the Constitution'') and therefore, invalid.

1.2 The Constitutional Court held that section 34(1) of the principal Act does not require the detainee to be informed of the rights set out in section 35(2) of the Constitution, which rights include the right to legal representation. The Constitutional Court held further that section 34(1)*(b)* of the principal Act does not require automatic judicial review of a detention before 30 calendar days expire and furthermore that section 34(1)*(b)* does not allow the detainee an opportunity to make representations to the court, either orally or in writing nor does it permit the detainee to appear in person before the court.

1.3 The Constitutional Court held that section 34(1)*(d)* of the principal Act also does not permit the detainee to make any representations to the court on whether the grounds advanced by an immigration officer meet the standard of good and reasonable grounds. The Constitutional Court held further that section 34(1)*(d)* of the principal Act denies the detainee the right to challenge the lawfulness of his or her detention by appearing in person before a court and the Constitutional Court held that to be contrary to section 35(2)*(d)* of the Constitution. The Constitutional Court held further that section 34(1)*(d)* of the principal Act is unconstitutional, because it conferred a power to detain without any objectively determinable conditions or guidance for how to exercise that power.

1.4 The declaration of invalidity was suspended for a period of 24 months from the date of the order to enable Parliament to correct the defects in sections 34(1)*(b)* and *(d)* of the principal Act. The Constitutional Court ordered that, pending the correction of the defect within 24 months, being by 28 June 2019, or upon the expiry of this period, any illegal foreigner detained under section 34(1) of the principal Act must be brought before a court in person within 48 hours from the time of arrest or not later than the first court day after the expiry of the 48 hours, if 48 hours expired outside ordinary court days. The Constitutional Court also ordered that illegal foreigners who were in detention at the time the order was issued, must be brought before a court within 48 hours from the date of the order or on such later date as may be determined by a court.

1.5 Since the period of 24 months lapsed, on 28 June 2019, the processing of illegal foreigners for purposes of deportation is in accordance with the remedy provided by the Constitutional Court, which remedy continues to apply, and therefore, there is no gap in the law.

Second Constitutional Court Judgment

1.6 On 30 October 2023, the Constitutional Court in *Ex parte Minister of Home Affairs and Another v Lawyers for Human Rights ;In Re: Lawyers for Human Rights v Minister of Home Affairs and Others (38/16) [2023] ZACC 34 (30 October 2023),* held that, while it cannot revive statutory provisions after the expiry of the suspension period, it can, in terms of section 172(1)*(b)* of the

Constitution, order amplified just and equitable relief to supplement the 2017 order. The Constitutional Court held that the 2017 Order is not capable of an interpretation that it kept section 34(1)*(b)* and *(d)* of the principal Act alive in the event Parliament failing to enact remedial legislation. The Constitutional Court also found it apposite to cure three further constitutional defects in its order: first, to provide for an in-person appearance by a detainee when a court is considering whether to extend a detention beyond 30 days; second, to introduce the interests of justice criterion as guidance for the exercise of detention powers by immigration officers and courts. Thirdly, the Constitutional Court held that given its power to supplement and clarify its 2017 Order, as it has done, there is no need for a supervisory order.

1.7 The Constitutional Court ordered that, pending the enactment of remedial legislation within 12 months, and in the event that remedial legislation is not enacted within this period, the provisions listed in the order, which supplement the 2017 Order, apply. These provisions are that:

(a) an immigration officer must apply the interests of justice criterion when considering arrest and detention of an illegal foreigner in terms of section 34(1) of the principal Act;

(b) a detained person shall be brought before court within 48 hours from the time of arrest;

(c) the court must apply the interests of justice criterion when the arrested person is brought before it;

(d) the court may authorise the further detention of the person concerned if it concludes that the interests of justice do not permit the person's release;

(e) if the further detention of the person concerned is ordered, he or she must again be brought before court prior to the expiry of the authorised detention period and the court must again apply the interests of justice criterion at that stage;

(f) the court may then again authorise the further detention of this person, but by no more than 90 calendar days, if it concludes that the interests of justice do not permit the person's release; and

(g) whenever the person concerned is brought before court, he or she must be given an opportunity to make representations to the court.

1.8 It is desirable that the principal Act be amended to bring it in line with the two Constitutional Court judgments.

2. PURPOSE OF BILL

The Immigration Amendment Bill, 2024 (''the Bill), seeks to address the two Constitutional Court judgments by amending section 34(1) of the principal Act, so as to ensure that any illegal foreigner detained under section 34(1) of the principal Act is brought before a court in person, within 48 hours from the time of his or her arrest, in order for the court to determine whether, it is in the interests of justice to order further detention, for purposes of deportation. The Bill introduces the interests of justice criterion, which serves as guidance within which immigration officers and the courts may exercise detention powers.

3. SUMMARY OF BILL

3.1 *Ad* Clause 1

Clause 1 amends sections 34 of the principal Act by the deletion in subsection (1) of paragraphs *(b)* and *(d)*.

Clause 1 further substitutes subsection (1)*(c)* to provide that the arrested foreigner shall be informed, upon arrest or immediately thereafter of the rights set out in paragraph *(a)*, which provides for the right to be notified in writing of the decision to deport him or her, the right to appeal such decision in terms of the principal Act, and of their rights in terms of the newly inserted subsection 34(1A)*(g)* which provides that in certain circumstances, which is

set out in the newly inserted section 34(1A), the arrested foreigner who is brought before court, must be given the opportunity to make representations to the court, which the court must consider, together with the representations of the immigration officer. The amended paragraph *(c)* provides that the arrested foreigner shall be informed of these rights, when it is possible, practicable and available, in a language that the arrested foreigner will understand.

Clause 1 also inserts a new subsection (1A), into section 34 of the principal Act, to provide guidance to immigration officers and to the courts on the processes that must be followed, and on the considerations that must be had when they arrest and detain an illegal foreigner for purposes of deportation.

3.2 ***Ad* Clause 2**

Clause 2 seeks to correct the spelling of the word ''court'' in the principal Act, wherever it occurs.

3.3 ***Ad* Clause 3**

Clause 3 provides for the short title of the Bill.

4. CONSULTATION

The following stakeholders were consulted:
(a) The Inspectorate within the Immigration Services;
(b) South African Police Service; and
(c) Border Management Authority (''BMA'').

5. IMPLICATIONS FOR PROVINCES

None.

6. FINANCIAL IMPLICATIONS FOR STATE

None.

7. PARLIAMENTARY PROCEDURE

7.1 In determining how a Bill must be tagged, the tagging test as formulated by the Constitutional Court in *Tongoane and Others v Minister for Agriculture and Land Affairs and Others 2010 (8) BCLR 741 (CC) ("Tongoane")* must be considered. In this case 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* [1999] *ZACC 15; 2000 (1) SA 732; 2000 (1) BCLR 1*.

7.2 In *Tongoane,* the Constitutional Court held as follows:

> ''[56] . . . 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.'
>
> [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.
>
> [59] 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.

[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.''.

7.3 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.

7.4 The subject matter of the Bill is not listed in Schedule 4, Part A to the Constitution as a functional area of concurrent national and provincial legislative competence. Whether a Bill's subject matter in substantial measure falls within the functional area of indigenous law, was considered in *Tongoane* 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.''.

7.5 The Constitutional Court held in this instance 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'' to the Constitution. 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.

7.6 The Department of Home Affairs and State Law Advisers are of the view that the purpose and effect of the Bill does not in a substantial measure fall within the functional areas of ''cultural matters; indigenous law and customary law; and traditional leadership subject to Chapter 12 of the Constitution'' as listed in Schedule 4, Part A to the Constitution.

7.7 The Department of Home Affairs and State Law Advisers have considered all the provisions in light of *Tongoane*, and found that the purpose and effect of the Bill deals primarily with the application of immigration law. Since 'immigration law' is not listed as a functional area in Schedule 4 to the Constitution, the Department of Home Affairs and State Law Advisers are of the opinion that the Bill is an ordinary Bill not affecting provinces and must be

tagged as a section 75 Bill. The Bill must be dealt with in accordance with the procedure set out in section 75 of the Constitution.

7.8 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 Leadership 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: 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.*''.

7.9 The Department of Home Affairs and State Law Advisers are of the view that it is not necessary to refer this Bill to the National House of Traditional and Khoi-San Leadership in terms of section 39(1)*(a)*(i) of the Traditional and Khoi-San Leadership Act since it does not contain 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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