

REPUBLIC OF SOUTH AFRICA

REFUGEES AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 75); explanatory summary of
Bill published in Government Gazette No. 39284 of 12 October 2015)
(The English text is the official text of the Bill)*

(MINISTER OF HOME AFFAIRS)

[B 12B—2016]

ISBN 978-1-4850-0360-1

No. of copies printed 800

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 Refugees Act, 1998, so as to amend and insert certain definitions; to include further provisions relating to disqualification from refugee status; to provide for integrity measures to combat fraud and corruption among staff members at Refugee Reception Offices, the Standing Committee and the Refugee Appeals Authority; to omit provisions referring to the Status Determination Committee; to substitute certain provisions relating to the Refugee Appeals Authority; to provide for the re-establishment of the Standing Committee for Refugee Affairs and to confer additional powers on the Standing Committee; to confer additional powers on the Director-General; to clarify the procedure relating to conditions attached to asylum seeker visas and abandonment of applications; to revise provisions relating to the review of asylum applications; to provide for the withdrawal of refugee status in respect of categories of refugees; to provide for additional offences and penalties; to provide for transitional provisions; 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 130 of 1998, as amended by section 1 of Act 33 of 2008 and section 1 of Act 12 of 2011

1. Section 1 of the Refugees Act, 1998 (Act No. 130 of 1998) (hereinafter referred to as the “principal Act”), is hereby amended—

(a) by the substitution for the definition of “asylum seeker permit” of the following definition:

“**‘asylum seeker [permit] visa’** means a **[permit] visa** contemplated in section 22;”;

(b) by the substitution for the definition of “dependant” of the following definition:

“**‘dependant’** in relation to an asylum seeker or a refugee, means any unmarried minor dependant child, whether born prior to or after the application for asylum, a spouse or any destitute, aged or infirm [member of the immediate family] parent of such asylum seeker or refugee who is dependent on him or her, and who is included by the asylum seeker in the application for asylum or, in the case of a dependant”

- child born after the application for asylum, is registered in terms of section 21B(2);
- (c) by the deletion of the definition of “immediate family”;
- (d) by the substitution for the definition of “marriage” of the following definition: 5
 “**‘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. 10
 120 of 1998); or
 (c) a marriage concluded in terms of the laws of a foreign country; [or
 (d) **a marriage concluded in terms of Islamic or other religious rites;**];”;
- (e) by the insertion after the definition of “Refugee Reception Office” of the following definition: 15
 “**‘Refugee Status Determination Officer’** means an officer referred to in section 8(2);”;
- (f) by the insertion after the definition of “spouse” of the following definition: 20
 “**‘Standing Committee’** means the Standing Committee for Refugee Affairs established by section 9A;” and
- (g) by the deletion of the definition of “Status Determination Committee”.

Substitution of section 4 of Act 130 of 1998, as amended by section 5 of Act 33 of 2008 and section 2 of Act 12 of 2011

2. The following section is hereby substituted for section 4 of the principal Act: 25

“Exclusion from refugee status

- 4. (1) [A person] An asylum seeker** does not qualify for refugee status for the purposes of this Act if [**the Status Determination Committee**] a Refugee Status Determination Officer has reason to believe that he or she— 30
- (a) has committed a crime against peace, a crime involving torture, as defined in the Prevention and Combating of Torture of Persons Act, 2013 (Act No. 13 of 2013), a war crime or a crime against humanity, as defined in any international legal instrument dealing with any such crimes; or
- (b) has committed a crime outside the Republic, which is not of a political nature and which, if committed in the Republic, would be punishable by imprisonment without the option of a fine; or 35
- (c) has been guilty of acts contrary to the objects and principles of the United Nations [**Organisation**] or the [**Organisation of African Unity**] African Union; or 40
- (d) enjoys the protection of any other country in which he or she is a recognised refugee, [**permanent**] resident or citizen[.]; or
- (e) has committed a crime in the Republic, which is listed in Schedule 2 of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997), or which is punishable by imprisonment without the option of a fine; or 45
- (f) has committed an offence in relation to the fraudulent possession, acquisition or presentation of a South African identity card, passport, travel document, temporary residence visa or permanent residence permit; or
- (g) is a fugitive from justice in another country where the rule of law is upheld by a recognised judiciary; or 50
- (h) having entered the Republic, other than through a port of entry designated as such by the Minister in terms of section 9A of the Immigration Act, fails to satisfy a Refugee Status Determination Officer that there are compelling reasons for such entry; or 55
- (i) has failed to report to the Refugee Reception Office within five days of entry into the Republic as contemplated in section 21, in the absence of compelling reasons, which may include hospitalisation, institutionalisation or any other compelling reason: Provided that this

provision shall not apply to a person who, while being in the Republic on a valid visa, other than a visa issued in terms of section 23 of the Immigration Act, applies for asylum.

(2) For the purposes of subsection (1)(c), no exercise of a human right recognised under international law may be regarded as being contrary to the objects and principles of the United Nations [**Organisation**] or the [**Organisation of African Unity**] African Union.” 5

Amendment of section 5 of Act 130 of 1998, as amended by section 6 of Act 33 of 2008

3. Section 5 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection: 10

- “(1) A person ceases to qualify for refugee status for the purposes of this Act if—
- (a) he or she voluntarily [**reavails**] re-avails himself or herself in the prescribed circumstances of the protection of the country of his or her nationality; or
 - (b) having lost his or her nationality, he or she by some voluntary and formal act re-acquires it; or
 - (c) he or she becomes a permanent resident or a citizen of the Republic or acquires the nationality of some other country and enjoys the protection of that country: Provided that a person whose permanent residence status is withdrawn is not prevented from re-applying for refugee status; or 20
 - (d) he or she voluntarily re-establishes himself or herself in the country which he or she left or outside of which he or she remained owing to fear of persecution, or returns to visit such country; or
 - (e) he or she can no longer continue to refuse to avail himself or herself of the protection of the country of his or her nationality because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist and no other circumstances have arisen which justify his or her continued recognition as a refugee[.]; or 25
 - (f) he or she has committed a crime in the Republic, which is listed in Schedule 2 of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997), or which is punishable by imprisonment without the option of a fine; or 30
 - (g) he or she has committed an offence in relation to the fraudulent possession, acquisition or presentation of a South African identity card, passport, travel document, temporary residence visa or permanent residence permit; or
 - (h) the Minister may issue an order to cease the recognition of the refugee status of any individual refugee or category of refugees, or to revoke such status.” 35

Amendment of section 7 of Act 130 of 1998, as substituted by section 8 of Act 33 of 2008

4. Section 7 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection: 40

“(1) The Minister may, subject to the conditions that he or she may [**deem**] consider necessary, delegate any power conferred on him or her by this Act, excluding a power referred to in section [**8B (2),**] 8A(3), 8B(1)(b), 8F, [8G,] 9A(3), 9B(1)(b), 9F or 38, to any officer or employee of the Department, but shall not be divested of any power so delegated.” 45

Substitution of heading to Chapter 2 of Act 130 of 1998, as amended by section 9 of Act 33 of 2008

5. The following heading is hereby substituted for the heading to Chapter 2 of the principal Act:

“REFUGEE RECEPTION OFFICES, STANDING COMMITTEE FOR REFUGEE AFFAIRS AND REFUGEE APPEALS AUTHORITY”. 50

Amendment of section 8 of Act 130 of 1998, as amended by section 10 of Act 33 of 2008 and section 3 of Act 12 of 2011

6. Section 8 of the principal Act is hereby amended by the substitution for subsections (1) and (2) of the following subsections: 55

“(1) [The] Notwithstanding the provisions of any other law, the Director-General may, by notice in the *Gazette*, establish as many Refugee Reception Offices in the Republic as he or she regards as necessary for the purposes of this Act and may disestablish any Refugee Reception Office, by notice in the *Gazette*, if considered necessary for the proper administration of this Act.” 5

(2) Each Refugee Reception Office must consist of at least one [Status Determination Committee established by the Director-General in the prescribed manner to consider and deal with applications for asylum in accordance with section 24: Provided that the Status Determination Committee may establish subcommittees consisting of no less than two members] officer of the Department, designated by the Director-General as a Refugee Status Determination Officer.” 10

Substitution of section 8B of Act 130 of 1998, as inserted by section 11 of Act 33 of 2008

7. The following section is hereby substituted for section 8B of the principal Act: 15

“Composition of Refugee Appeals Authority

8B. [(1)] The Refugee Appeals Authority consists of—

- (a) a chairperson who is legally qualified; and
- (b) such number of other legally qualified members as the Minister may [determine, having regard to the likely volume of work to be performed by the Refugee Appeals Authority: Provided that at least one of such members is legally qualified] appoint from time to time, having regard to the volume of work to be performed by the Refugee Appeals Authority. 20

[(2) The chairperson and other members of the Refugee Appeals Authority are appointed by the Minister with due regard to their experience, qualifications and expertise, as well as their ability to perform the functions of the Refugee Appeals Authority properly.]” 25

Amendment of section 8C of Act 130 of 1998, as inserted by section 11 of Act 33 of 2008 and amended by section 4 of Act 12 of 2011 30

8. Section 8C of the principal Act is hereby amended by the substitution for subsection (2) of the following subsection:

“(2) An appeal contemplated in subsection (1)(a) must be determined by a single member or such number of members of the Refugee Appeals Authority as the chairperson may [deem] consider necessary[: Provided that at least one of such members is legally qualified].” 35

Amendment of section 8D of Act 130 of 1998, as inserted by section 11 of Act 33 of 2008

9. Section 8D of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection: 40

“(1) [A member of the Refugee Appeals Authority serves for a period of five years and is eligible for reappointment upon expiry of his or her term of office] Notwithstanding the provisions of any other law, a member of the Refugee Appeals Authority is appointed for any period not exceeding five years at a time and may be reappointed for any number of additional periods, any of which may not exceed five years at a time.” 45

Amendment of section 8E of Act 130 of 1998, as inserted by section 11 of Act 33 of 2008 and amended by Act 12 of 2011

10. The following section is hereby substituted for section 8E of the principal Act:

“Disqualification from membership 50

8E. A person may not be appointed as a member of the Refugee Appeals Authority if that person—

- (a) is not a South African citizen, unless the Minister considers that he or she possesses such skills and expertise as would significantly enhance the capacity of the Refugee Appeals Authority;
- (b) has been sentenced to imprisonment without the option of a fine during the preceding **[four]** seven years;
- (c) is an unrehabilitated insolvent;
- (d) has been judicially declared of unsound mind;
- (e) has been removed from an office of trust on account of misconduct **[involving theft, fraud or corruption]; [or]**
- (f) is a political office bearer holding a position in the national executive structure of any political party[.];
- (g) has been removed from a previous position on account of theft, fraud or corruption;
- (h) refuses to submit to a vetting investigation in accordance with section 2A of the National Strategic Intelligence Act, 1994 (Act No. 39 of 1994), when required to do so; or
- (i) fails any investigation referred to in paragraph (h).”.

Amendment of section 8F of Act 130 of 1998, as inserted by section 11 of Act 33 of 2008

11. Section 8F of the principal Act is hereby amended by the addition after subsection (2) of the following subsection:
- “(3) The Minister may summarily remove a member of the Refugee Appeals Authority from office if such member becomes disqualified in terms of section 8E.”.

Repeal of section 8G as inserted by section 11 of Act 33 of 2008

12. Section 8G of the principal Act is hereby repealed.

Insertion of sections 9A to 9H in Act 130 of 1998

13. The following sections are hereby inserted in the principal Act after section 9:

“Standing Committee for Refugee Affairs

- 9A.** (1) There is hereby established a Standing Committee for Refugee Affairs.
- (2) The Standing Committee is independent and must function without any fear, favour or prejudice.
- (3) The headquarters of the Standing Committee must be determined by the Minister.

Composition of Standing Committee

- 9B.** The Standing Committee consists of—
- (a) a chairperson who is legally qualified; and
 - (b) such number of other legally qualified members as the Minister may appoint from time to time, having regard to the volume of work to be performed by the Standing Committee.

Functions of Standing Committee

- 9C.** (1) The Standing Committee—
- (a) must determine any review in terms of section 24A;
 - (b) must, in the event that an asylum seeker is permitted to work or study in the Republic, determine the period and conditions in terms of which such asylum seeker may work or study whilst awaiting the outcome of his or her application for asylum;
 - (c) may monitor and supervise all decisions taken by Refugee Status Determination Officers and may approve, disapprove or refer any such

- decision back to the Refugee Reception Office with recommendations as to how the matter must be dealt with; and
- (d) must advise the Minister or Director-General on any matter referred to it by the Minister or Director-General, including training that may be provided to members of staff at Refugee Reception Offices. 5
- (2) Any function performed by the Standing Committee in terms of this Act must be determined by a single member or, in particular matters, such number of members of the Standing Committee as the chairperson may consider necessary.

Term of office of members of Standing Committee 10

- 9D.** (1) Notwithstanding the provisions of any other law, a member of the Standing Committee is appointed for any period not exceeding five years at a time and may be reappointed for any number of additional periods, any of which may not exceed five years at a time.
- (2) A member may resign by tendering a written notice of resignation to the Minister. 15

Disqualification from membership

- 9E.** A person may not be appointed as a member of the Standing Committee if that person—
- (a) is not a South African citizen, unless the Minister considers that he or she possesses such skills and expertise as would significantly enhance the capacity of the Standing Committee; 20
- (b) has been sentenced to imprisonment without the option of a fine during the preceding seven years;
- (c) is an unrehabilitated insolvent; 25
- (d) has been judicially declared of unsound mind;
- (e) has been removed from an office of trust on account of misconduct;
- (f) is a political office bearer holding a position in the national executive structure of any political party;
- (g) has been removed from a previous position on account of theft, fraud or corruption; 30
- (h) refuses to submit to a vetting investigation in accordance with section 2A of the National Strategic Intelligence Act, 1994 (Act No. 39 of 1994) when required to do so; or
- (i) fails any investigation referred to in paragraph (h). 35

Removal from office of member of Standing Committee

- 9F.** (1) The Minister may remove a member of the Standing Committee from office on account of misconduct or inability to perform the functions of his or her office effectively and efficiently.
- (2) The Minister may remove a member of the Standing Committee in terms of subsection (1) if such member has been given an opportunity to make representations or comments on the matter and the Minister has taken any such representations or comments into consideration. 40
- (3) The Minister may summarily remove a member of the Standing Committee from office if such member becomes disqualified in terms of section 9E. 45

Remuneration of members of Standing Committee

- 9G.** The members of the Standing Committee must receive such remuneration, allowances and other benefits as the Minister may determine with the concurrence of the Minister of Finance. 50

Administrative staff of Standing Committee

9H. The administrative work connected with the functions of the Standing Committee must be performed by officers of the Department, designated by the Director-General for that purpose.”.

Insertion of section 20A in Act 130 of 1998

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14. The following section is hereby inserted in the principal Act after section 20:

“Crime prevention and integrity measures

20A. (1) The Director-General must, as soon as possible after the commencement of this Act, and from time to time thereafter, and without probable cause, direct all members and administrative staff of the Standing Committee, Refugee Appeals Authority and all members of staff at any Refugee Reception Office, including persons who are not members of staff but who perform any function at such an Office, to be subjected to measures to test the integrity of those persons for purposes of—

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- (a) combating or preventing fraud, corruption or any crime of which dishonesty is an element; and
- (b) enhancing the integrity of, and confidence in, the asylum seeker and refugee system.

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(2) Measures to test the integrity of persons as referred to in subsection (1) may include—

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- (a) the gathering of information, as prescribed, by a duly authorised official in relation to—
 - (i) criminal records;
 - (ii) financial records;
 - (iii) personal information; or
 - (iv) any other information which may be relevant, to determine the integrity of a person; and
- (b) psychometric tests.

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(3) (a) The information referred to in subsection (2) must, in the prescribed manner, be stored securely.

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(b) No person may disclose any information which he or she obtained in the exercise of his or her powers or the performance of his or her duties in terms of this section, except—

- (i) to any other person who of necessity requires it for the performance of his or her functions in terms of this section;
- (ii) if he or she is a person who of necessity supplies it in the performance of his or her functions in terms of this section;
- (iii) information which is required in terms of any law or as evidence in any court of law or in any disciplinary proceedings; or
- (iv) to any competent authority which requires it for the institution, or an investigation with a view to the institution, of any criminal proceedings or any civil proceedings as contemplated in Chapter 5 or 6 of the Prevention of Organised Crime Act, 1998 (Act No. 121 of 1998).

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(4) Any information gathered in terms of subsection (2) may be used for purposes of—

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- (a) instituting criminal, civil or disciplinary proceedings against any person referred to in subsection (1);
- (b) evidence in criminal, civil or disciplinary proceedings, subject to the approval of the presiding officer in any such proceedings regarding the admissibility of such information; or
- (c) a vetting investigation in accordance with section 2A of the National Strategic Intelligence Act, 1994 (Act No. 39 of 1994).

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(5) A person contemplated in subsection (1) who is a member of the public service and who refuses to subject himself or herself to a vetting investigation as contemplated in subsection (4)(c) when instructed to do so, or who fails such investigation, is subject to such disciplinary measures as may be in operation for members of the public service at the time.”.

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Amendment of section 21 of Act 130 of 1998, as amended by section 13 of Act 33 of 2008

15. Section 21 of the principal Act is hereby amended—

(a) by the substitution for subsection (1) of the following subsection:

“(1) An application for asylum must be made in person in accordance with the prescribed procedures, within five days of entry into the Republic, to a Refugee Status Determination Officer at any Refugee Reception Office or at any other place designated by the Director-General by notice in the *Gazette*.”;

(b) by the insertion after subsection (1) of the following subsections:

“(1A) Prior to an application for asylum, every applicant must submit his or her biometrics or other data, as prescribed, to an immigration officer at a designated port of entry or a Refugee Reception Office.

(1B) An applicant who may not be in possession of an asylum transit visa as contemplated in section 23 of the Immigration Act, must be interviewed by an immigration officer to ascertain whether valid reasons exist as to why the applicant is not in possession of such visa.

(1C) The Director-General may, by notice in the *Gazette*, require any category of asylum seekers to report to any particular or designated Refugee Reception Office or other place specially designated as such when lodging an application for asylum, if the Director-General considers it necessary for the proper administration of this Act.

(1D) For purposes of subsection (1C), a category of asylum seekers refers to asylum seekers from a particular country of origin or geographic area or of a particular gender, religion, nationality, political opinion or social group.”;

(c) by the insertion after subsection (2) of the following subsection:

“(2A) When making an application for asylum, every applicant must declare all his or her spouses and dependants, whether in the Republic or elsewhere, in the application for asylum.”;

(d) by the substitution in subsection (4) for paragraph (a) of the following paragraph:

“(a) such person has applied for asylum in terms of subsection (1), until a decision has been made on the application and, where applicable, such **[person has had an opportunity to exhaust his or her rights of review or appeal in terms of Chapter 4]** application has been reviewed in terms of section 24A or where the applicant exercised his or her right to appeal in terms of section 24B; or”;
and

(e) by the addition after subsection (5) of the following subsections:

“(6) An application for asylum, which is found to contain false, dishonest or misleading information, whether by a Refugee Status Determination Officer, when considering the application, the Standing Committee, when reviewing, monitoring or supervising a decision or the Refugee Appeals Authority, when adjudicating an appeal, must be rejected.

(7) It is presumed that a person who has indicated a language of preference in an application for asylum, understands and is proficient in such language.”.

Amendment of section 21A of Act 130 of 1998, as inserted by section 14 of Act 33 of 2008

16. Section 21A of the principal Act is hereby amended by the substitution in subsection (2) for the words preceding paragraph (a) of the following words:

“Any person **[with]** reasonably suspected to have a mental disability who is found under circumstances that clearly indicate that he or she is an asylum seeker, must—”.

Amendment of section 21B of Act 130 of 1998, as inserted by section 14 of Act 33 of 2008 and amended by section 6 of Act 12 of 2011

17. Section 21B of the principal Act is hereby amended—

- (a) by the insertion after subsection (2) of the following subsection: 5
“(2A) Any child of an asylum seeker born in the Republic and any person included as a dependant of an asylum seeker in the application for asylum have the same status as accorded to such asylum seeker.”;
- (b) by the substitution for subsection (3) of the following subsection: 10
“(3) Where a dependant of a recognised refugee [is within the Republic in accordance with an asylum seeker permit or has been granted asylum in terms of this Act and] ceases to be a dependant by virtue of marriage or cessation of his or her dependence upon the recognised refugee, as the case may be, he or she may apply in the prescribed manner to be permitted to continue to remain within the Republic in accordance with the provisions of this Act.”; and 15
- (c) by the insertion after subsection (3) of the following subsection: 20
“(3A) Where a dependant of an asylum seeker ceases to be a dependant by virtue of marriage or cessation of his or her dependence upon the asylum seeker, as the case may be, he or she may apply for asylum himself or herself in accordance with the provisions of this Act.”.

Substitution of section 22 of Act 130 of 1998, as amended by section 15 of Act 33 of 2008

18. The following section is hereby substituted for section 22 of the principal Act:

“Asylum seeker visa

- 22.** (1) An asylum seeker whose application in terms of section 21(1) has not been adjudicated, is entitled to be issued with an asylum seeker visa, in the prescribed form, allowing the applicant to sojourn in the Republic temporarily, subject to such conditions as may be imposed, which are not in conflict with the Constitution or international law. 25
- (2) Upon the issue of a visa in terms of subsection (1), any previous visa issued to the applicant in terms of the Immigration Act becomes null and void and must be returned to the Director-General for cancellation. 30
- (3) The visa referred to in subsection (1) must contain the biometrics of the holder thereof.
- (4) The visa referred to in subsection (1) may, pending the decision on the application in terms of section 21, from time to time be extended for such period as may be required. 35
- (5) The Director-General may at any time withdraw an asylum seeker visa in the prescribed manner if— 40
- (a) the applicant contravenes any condition endorsed on that visa;
- (b) the application for asylum has been found to be manifestly unfounded, abusive or fraudulent;
- (c) the application for asylum has been rejected; or
- (d) the applicant is or becomes ineligible for asylum in terms of section 4 or 5. 45
- (6) An asylum seeker may be assessed to determine his or her ability to sustain himself or herself, and his or her dependants, with the assistance of family or friends, for a period of at least four months.
- (7) If, after assessment, it is found that an asylum seeker is unable to sustain himself or herself and his or her dependants, as contemplated in subsection (6), that asylum seeker may be offered shelter and basic necessities provided by the UNHCR or any other charitable organisation or person. 50
- (8) The right to work in the Republic may not be endorsed on the asylum seeker visa of any applicant who— 55
- (a) is able to sustain himself or herself and his or her dependants, as contemplated in subsection (6);

- (b) is offered shelter and basic necessities by the UNHCR or any other charitable organisation or person, as contemplated in subsection (7);
or
- (c) seeks to extend the right to work, after having failed to produce a letter of employment as contemplated in subsection (9): Provided that such extension may be granted if a letter of employment is subsequently produced while the application in terms of section 21 is still pending. 5
- (9) In the event that the right to work or study is endorsed on the asylum seeker visa, the relevant employer, in the case of a right to work, and the relevant educational institution, in the case of a right to study, must furnish the Department with a letter of employment or of enrolment at the educational institution, as the case may be, in the prescribed form within a period of 14 days from the date of the asylum seeker taking up employment or being enrolled, as the case may be. 10
- (10) An employer or educational institution contemplated in subsection (9) who or which fails to comply with the duty imposed in that subsection, or fraudulently issues the letter contemplated in that subsection, is guilty of an offence and liable upon conviction to a fine not exceeding R20 000. 15
- (11) The Director-General must revoke any right to work as endorsed on an asylum seeker visa if the holder thereof is unable to prove that he or she is employed after a period of six months from the date on which such right was endorsed. 20
- (12) The application for asylum of any person who has been issued with a visa contemplated in subsection (1) must be considered to be abandoned and must be endorsed to this effect by the Standing Committee on the basis of the documentation at its disposal if such asylum seeker fails to present himself or herself for renewal of the visa after a period of one month from the date of expiry of the visa, unless the asylum seeker provides, to the satisfaction of the Standing Committee, reasons that he or she was unable to present himself or herself, as required, due to hospitalisation or any other form of institutionalisation or any other compelling reason. 25
- (13) An asylum seeker whose application is considered to be abandoned in accordance with subsection (12) may not re-apply for asylum and must be dealt with as an illegal foreigner in terms of section 32 of the Immigration Act. 30
- (14) Any person who fails to return a visa in accordance with subsection (2), or fails to comply with any condition set out in a visa issued in terms of this section, or is in possession of an expired visa, is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding five years, or to both a fine and such imprisonment.”. 35 40

Amendment of section 23 of Act 130 of 1998, as amended by section 16 of Act 33 of 2008

19. The following section is hereby substituted for section 23 of the principal Act:

“Detention of asylum seeker

23. If the Director-General has withdrawn an asylum seeker [permit] visa in terms of section 22[(6)](5), he or she may, subject to section 29, cause the holder to be arrested and detained pending the finalisation of the application for asylum, in the manner and place determined by him or her with due regard to human dignity.”. 45

Amendment of section 24 of Act 130 of 1998, as amended by section 17 of Act 33 of 2008 and section 7 of Act 12 of 2011 50

20. Section 24 of the principal Act is hereby amended—

- (a) by the substitution in subsection (2) for the words preceding paragraph (a) of the following words:

“When considering an application for asylum, the [Status Determination Committee] Refugee Status Determination Officer”;

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- (b) by the substitution in subsection (3) for the words preceding paragraph (a) of the following words:
 - “The [**Status Determination Committee**] Refugee Status Determination Officer must at the conclusion of the hearing conducted in the prescribed manner, but subject to monitoring and supervision, in the case of paragraphs (a) and (c), and subject to review, in the case of paragraph (b), by any member of the Standing Committee designated by the chairperson for this purpose—”;
- (c) by the substitution in subsection (4) for the words preceding paragraph (a) of the following words:
 - “If an application is rejected in terms of subsection (3)(b) or (c), the [**Status Determination Committee**] Refugee Status Determination Officer must—”;
- (d) by the substitution in subsection (5) for paragraph (a) of the following paragraph:
 - “(a) An asylum seeker whose application for asylum has been rejected in terms of subsection (3)(b) and confirmed by the [**Director-General**] Standing Committee in terms of section 24A[(3)](2), must be dealt with as an illegal foreigner in terms of section 32 of the Immigration Act.”; and
- (e) by the deletion of subsection (6).

Substitution of section 24A of Act 130 of 1998, as inserted by section 19 of Act 33 of 2008 and amended by section 8 of Act 12 of 2011

21. The following section is hereby substituted for section 24A of the principal Act:

“Review by Standing Committee

24A. (1) The Standing Committee must review any decision taken by a Refugee Status Determination Officer in terms of section 24(3)(b) and may act in terms of section 9C(1)(c) in respect of any decision taken in terms of section 24(3)(a) or (c).

(2) A review contemplated in subsection (1) must be determined by a single member or, in particular matters, such number of members of the Standing Committee as the chairperson may consider necessary.

(3) The Standing Committee may, after having determined a review, confirm, set aside or substitute any decision taken by a Refugee Status Determination Officer in terms of section 24(3)(b).

(4) The Standing Committee must inform the Refugee Status Determination Officer at the Refugee Reception Office, where the application for asylum was lodged, of its decision within five working days of such decision, whereafter the Standing Committee is *functus officio*.”.

Amendment of section 24B of Act 130 of 1998, as inserted by section 19 of Act 33 of 2008 and amended by section 9 of Act 12 of 2011

22. Section 24B of the principal Act is hereby amended—

- (a) by the substitution for subsection (1) of the following subsection:
 - “(1) Any asylum seeker whose application has been rejected in terms of section 24(3)(c) may lodge an appeal with the Refugee Appeals Authority in the prescribed manner and within the prescribed period.”;
- (b) by the substitution for subsection (2) of the following subsection:
 - “(2) The Refugee Appeals Authority may, after having determined an appeal, confirm, set aside or substitute any decision taken by a [**Status Determination Committee**] Refugee Status Determination Officer in terms of section 24(3)(c).”;
- (c) by the substitution for subsection (5) of the following subsection:
 - “(5) The Refugee Appeals Authority must refer the matter back to the [**Status Determination Officer**] Refugee Status Determination Officer to deal with such asylum seeker in terms of this Act if new information, which is material to the application, is presented during the appeal.”.

Amendment of section 27 of Act 130 of 1998, as substituted by section 21 of Act 33 of 2008 and amended by section 10 of Act 12 of 2011

23. Section 27 of the principal Act is hereby amended by the substitution for paragraph (c) of the following paragraph:

“(c) apply for permanent residence in terms of section 27(d) or 31(2)(b) of the Immigration Act after [five] ten years of continuous residence in the Republic from the date on which he or she was granted asylum, if the [Minister] Standing Committee, after considering all the relevant factors and within a reasonable period of time, including efforts made to secure peace and stability in the refugee’s country of origin, certifies that he or she would remain a refugee indefinitely;”.

Substitution of section 28 of Act 130 of 1998, as amended by section 23 of Act 33 of 2008

24. The following section is hereby substituted for section 28 of the principal Act:

“Removal and detention of refugees and asylum seekers 15

28. (1) Subject to section 2, a refugee, asylum seeker or categories of refugee or asylum seeker may be removed from the Republic on grounds of national security, national interest or public order.

(2) A removal under subsection (1) may only be ordered by the Minister.

(3) Any visa or status granted to a refugee or asylum seeker who is removed from the Republic in terms of this section is revoked.

(4) If an order is made under this section for the removal from the Republic of a refugee or asylum seeker, any dependant of such refugee or asylum seeker who has not been granted asylum, may be included in such an order and removed from the Republic.

(5) Any refugee or asylum seeker ordered to be removed under this section may be detained pending his or her removal from the Republic.”.

Amendment of section 34 of Act 130 of 1998, as substituted by section 27 of Act 33 of 2008

25. Section 34 of the principal Act is hereby amended by the substitution in subsection (1) for paragraph (b) of the following paragraph: 30

“(b) inform the Refugee Reception Office of his or her residential address and of any changes to that address within 30 days.”.

Amendment of section 34A of Act 130 of 1998, as inserted by section 28 of Act 33 of 2008 35

26. Section 34A of the principal Act is hereby amended by the substitution in subsection (1) for paragraph (c) of the following paragraph:

“(c) inform the Refugee Reception Office of his or her residential address and of any changes to that address **[so provided]** within 30 days.”.

Substitution of section 36 of Act 130 of 1998, as amended by section 29 of Act 33 of 2008 and section 11 of Act 12 of 2011 40

27. The following section is hereby substituted for section 36 of the principal Act:

“Withdrawal of refugee status

36. (1) Subject to the provisions of the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000), and after consideration of all the relevant facts, the Standing Committee may withdraw a person’s refugee status if— 45

(a) such person has been recognised as a refugee due to fraud, forgery or false or misleading information of a material or substantive nature in relation to the application; 50

(b) such person has been recognised as a refugee due to an error, omission or oversight; or

(c) such person ceases to qualify for refugee status in terms of section 5.

(2) The Standing Committee must, in the prescribed manner, inform each affected person contemplated in subsection (1) of its intention to withdraw his or her status as a refugee, as well as the reasons for the withdrawal and such person may, within the prescribed period, make a written submission with regard thereto: Provided that no such notice is required if the withdrawal is requested by the refugee concerned.

(3) In the event that the Minister has issued an order to cease the recognition of refugee status in respect of a category of refugees, the Standing Committee must implement such resolution by withdrawing the refugee status of such category as a whole by notice in the *Gazette*.

(4) A person whose refugee status is withdrawn in terms of subsection (1) or (3) must be dealt with as an illegal foreigner in terms of section 32 of the Immigration Act.”.

Amendment of section 37 of Act 130 of 1998, as amended by section 30 of Act 33 of 2008

28. Section 37 of the principal Act is hereby amended—

(a) by the substitution for paragraph (f) of the following paragraph:

“(f) provides false, inaccurate or unauthorised documentation, or any benefit to a person, or otherwise assists such person to disguise his or her identity or status, or accepts undue financial or other considerations, to perform **[an] any** act or to exercise his or her discretion in terms of this Act~~[,]; or~~”; and

(b) by the addition after paragraph (f) of the following paragraphs:

“(g) as a public servant, intentionally provides false, inaccurate or unauthorised documentation or benefit, or otherwise facilitates a person to disguise his or her identity or status, or accepts any undue financial or other consideration to perform any act, or to exercise his or her discretion in terms of this Act; or

(h) wilfully, or through gross negligence, produces a false certification or document contemplated by this Act or any other Act administered by the Department; or

(i) manufactures or provides, or causes the manufacturing or provision of a document purporting to be a document issued or administered by the Department, while not being a duly authorised officer of the Department.”.

Amendment of section 38 of Act 130 of 1998, as amended by section 31 of Act 33 of 2008 and section 12 of Act 12 of 2011

29. Section 38 of the principal Act is hereby amended by the substitution in subsection (1) for paragraph (b) of the following paragraph:

“(b) the manner in which and period within which a matter must be referred to the Standing Committee or Refugee Appeals Authority.”.

Repeal of section 33 of Act 33 of 2008

30. Section 33 of the Refugees Amendment Act, 2008 (Act No. 33 of 2008), is hereby repealed.

Transitional provisions

31. (1) The Refugee Appeal Board established by section 12 of the principal Act is hereby dissolved and the Refugee Appeals Authority assumes all the rights and obligations of the Refugee Appeal Board.

(2) Any appeal pending before the Refugee Appeal Board immediately before this Act takes effect must be regarded as an appeal to be determined by the Refugee Appeals Authority in terms of the principal Act as amended by this Act.

(3) Any instruction, agreement, resolution, decision and determination made by the Refugee Appeal Board prior to this Act coming into effect remain in force and must be regarded as legally concluded by the Refugee Appeals Authority.

(4) Any matter pending before the Standing Committee immediately before this Act takes effect must be regarded as a matter to be determined by the Standing Committee in terms of the principal Act as amended by this Act.”

Substitution of phrases

- 32.** The principal Act is hereby amended by the substitution for the phrase— 5
- (a) “asylum seeker permit”, wherever it occurs, of the phrase “asylum seeker visa”;
 - (b) “permit”, in relation to an asylum seeker permit, wherever it occurs, of the phrase “visa”; and
 - (c) “Status Determination Committee”, wherever it occurs, of the phrase 10
“Refugee Status Determination Officer”.

Short title and commencement

33. This Act is called the Refugees Amendment Act, 2016, and comes into operation immediately after the commencement of the Refugees Amendment Act, 2008 (Act No. 33 of 2008) and the Refugees Amendment Act, 2011 (Act No. 12 of 2011). 15

**MEMORANDUM ON THE OBJECTS OF THE REFUGEES
AMENDMENT BILL, 2016**

1. PURPOSE OF BILL

The purpose of the Refugees Amendment Bill (the “Bill”) is to amend the Refugees Act, 1998 (Act No. 130 of 1998) (the “principal Act”), as amended by the Refugees Amendment Act, 2008 (Act No. 33 of 2008) and by the Refugees Amendment Act, 2011 (Act No. 12 of 2011), to insert, delete and amend certain definitions; to make further provisions relating to disqualification from refugee status and losing such status; to provide for integrity measures to combat fraud and corruption among staff members at Refugee Reception Offices, at the Standing Committee and in the Refugee Appeals Authority; to omit provisions referring to the Status Determination Committee; to substitute certain provisions relating to the Refugee Appeals Authority (“RAA”); to provide for the re-establishment of the Standing Committee for Refugee Affairs (“SCRA”) and to confer additional powers on the SCRA; to confer additional powers on the Director-General; to clarify the procedure relating to conditions attached to asylum seeker visas and abandonment of applications; to revise provisions relating to the review of asylum applications; to provide for the withdrawal of refugee status in respect of categories of refugees; to provide for additional offences and penalties; and to provide for matters connected therewith.

2. OBJECTS OF BILL

The Bill introduces the amendments as follows:—

- 2.1.1 Clause 1 amends section 1 of the principal Act in order to amend the definition of “**asylum seeker permit**” so as to incorporate the term “**visa**” in order to align it with the Immigration Act, 2002 (Act No. 13 of 2002) (“Immigration Act”). It also amends the definition of “**dependant**” in order to limit dependants to those who are minor children of an asylum seeker or refugee, spouses and destitute, aged or infirm parents, all of whom must be included in the application for asylum.
- 2.1.2 Clause 1 further inserts two new definitions, namely that of a “**Refugee Status Determination Officer**” and the “**Standing Committee**”, which denotes a reference to the SCRA, and to further delete the definitions of “**immediate family**” and “**Status Determination Committee**”, and amend the definition of “**marriage**” to exclude reference to Islamic and religious unions.
- 2.2 Clause 2 amends section 4 of the principal Act in order to provide for additional disqualifications from refugee status in instances where the asylum seeker has committed a crime involving torture, or has committed crime in the Republic which is punishable by imprisonment, without the option of a fine, or a serious crime, which is listed in Schedule 2 of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997), or for an offence in relation to the fraudulent possession, acquisition or presentation of a South African identity card, passport, travel document, temporary residence visa or permanent residence permit, or has entered the country at a place other than through a port of entry in the absence of compelling reasons, and also where the asylum seeker has failed to report to the Refugee Reception Office within five days of entry into the Republic.
- 2.3 Clause 3 amends section 5 of the principal Act in order to provide additional grounds on which a person ceases to qualify for refugee status. Similar to clause 2, the additional grounds are where a refugee (as opposed to an asylum seeker) has committed a crime inside the Republic, which is punishable by imprisonment without the option of a fine or a serious crime, which is listed in Schedule 2 of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997), or for an offence in relation to the fraudulent possession, acquisition or presentation of a South African identity card, passport, travel document,

temporary residence visa or permanent residence permit. In addition, a refugee or category of refugees would lose his or her or their refugee status if the Minister resolves to cease the recognition of refugee status of certain individuals or categories.

- 2.4 Clause 4 amends section 7 of the principal Act in order to deal with consequential amendments (i.e. cross-references to certain sections).
- 2.5 Clause 5 amends the heading to Chapter 2 of the principal Act in order to provide for the re-establishment of the SCRA, which was dissolved by the Refugees Amendment Act, 2008 (Act No. 33 of 2008).
- 2.6. Clause 6 amends section 8 of the principal Act in order to give the Director-General the power to disestablish Refugee Reception Offices. Currently, the Director-General only has the power to establish such Offices. The clause also removes the reference to a “Status Determination Committee” and replaces same with a reference to a “Refugee Status Determination Officer”.
- 2.7 Clause 7 amends section 8B of the principal Act in order to require that all members of the RAA must be legally qualified, and to provide for periodic appointments where circumstances so require.
- 2.8 Clause 8 amends section 8C of the principal Act as a result of the amendment to section 8B, which now requires all members of the RAA to be legally qualified.
- 2.9 Clause 9 amends section 8D of the principal Act in order to make it clear that the term of appointment of members of the RAA may not exceed five years (i.e. it could thus be for a shorter period, depending on the workload), and that any re-appointments may not exceed five years at a time.
- 2.10 Clause 10 amends section 8E of the principal Act in order to provide additional disqualifications from serving as a member of the RAA, which relate to removal from a previous office on account of theft, fraud or corruption, or where a member refuses to submit to a vetting investigation in accordance with section 2A of the National Strategic Intelligence Act, 1994 (Act No. 39 of 1994) when so required. The current requirement that a member must be a South African citizen is relaxed in the event that the Minister considers a foreigner to possess such skills and expertise as would significantly enhance the capacity of the RAA.
- 2.11 Clause 11 amends section 8F of the principal Act by giving the Minister the power to summarily remove a member of the RAA from office if he or she becomes disqualified in terms of section 8E.
- 2.12 Clause 12 repeals section 8G of the principal Act, which empowers the Minister to appoint suitable persons in the case of a vacancy occurring in the RAA, as provision is now made for periodic appointments.
- 2.13 Clause 13 inserts the new sections 9A to 9H in the principal Act to provide for the re-establishment of the SCRA. These provisions relate to the composition, term of office, disqualification from membership, removal from office, remuneration and administrative staff of the SCRA and mirror the provisions relating to members of the RAA. This clause further provides for the functions of the SCRA, with the main function being to review applications for asylum determined to be manifestly unfounded by Refugee Status Determination Officers (“RSDOs”). The SCRA is also empowered to determine the conditions in terms of which an asylum seeker may work or study while awaiting the outcome of his or her application for asylum, and to monitor and supervise decisions by RSDOs granting asylum or refusing an application as unfounded, as well as to advise the Minister or the

Director-General on any matter referred to it, including to provide training to members of staff.

- 2.14 Clause 14 introduces a procedure for integrity testing of staff members at any Refugee Reception Office, including persons who are not members of staff but who perform any functions at such an Office, and members of the SCRA and the RAA. All members of staff must, after the commencement of the Act and from time to time thereafter, undergo integrity testing as a measure to combat or prevent fraud, corruption or any crime of which dishonesty is an element. Refusal to submit to a vetting investigation, or failing such investigation would, in the case of public servants, lead to disciplinary measures.
- 2.15.1 Clause 15 amends section 21 of the principal Act by requiring that, prior to an application for asylum, an applicant must submit himself or herself for biometrics and other data to an immigration officer at a designated port of entry or a Refugee Reception Office. Those applicants without a section 23 visa (i.e. asylum transit visa), issued in terms of the Immigration Act, should be interviewed by an immigration officer to ascertain whether valid reasons exist as to why they are not in possession of a section 23 visa.
- 2.15.2 Clause 15 also empowers the Director-General to require any category of asylum seekers to report to a designated Refugee Reception Office based on geographical considerations and to avoid swamping of a particular Refugee Reception Office. A category refers to asylum seekers from a particular country, geographic area or of a particular gender, religion, nationality, political opinion or social group. The clause furthermore empowers RSDOs, the SCRA and the RAA to reject an application for asylum, which is found to contain false, dishonest or misleading information, and it creates a presumption that someone who has indicated a language preference in the application understands and is proficient in that language.
- 2.16 Clause 16 amends section 21A in order to deal with a technical amendment by inserting the phrase “reasonably suspected to have” (a mental disability).
- 2.17 Clause 17 amends section 21B of the principal Act in order to make it clear that the dependants of an asylum seeker (i.e. a child of an asylum seeker born in the Republic and any person who have been included as a dependant in the application for asylum) have the same status as the asylum seeker himself or herself. Furthermore, to also provide that where a dependant ceases to be a dependant, such a dependant must apply on his or her own for asylum.
- 2.18.1 Clause 18 substitutes the current section 22 of the principal Act, which deals with the issue of asylum seeker permits that are now to be called asylum seeker visas, in order to align the principal Act with the Immigration Act. Challenges are currently experienced with the issue of asylum seeker permits and the right to work or study pending finalisation of the application. In the judgment **Minister of Home Affairs and Others v M Watchenuka and Another** [2004 (4) SA 326 (SCA)], the court did have regard to the maxim that every sovereign nation has the power, as inherent in sovereignty and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. It also took account of the fact that the right to enter and to remain in the Republic, and the right to choose a trade or occupation or profession, are restricted to citizens by sections 21 and 22 of the Constitution of the Republic of South Africa, 1996 (“Constitution”). Granting that these and other considerations constitute reasonable and justifiable grounds for limiting the protection that section 10 of the Constitution accords to dignity, the Court held the view that, where employment is the only reasonable means for a person’s support, other considerations arise. It was pointed out that in exercising the powers and duties conferred upon it by the 1998 Act, the SCRA must take account of the circumstances of the applicant, whether on a case by case basis or by

formulating guidelines to be applied when permits are issued in particular cases.

- 2.18.2 In order to give effect to the concerns raised in the above-mentioned judgment, the amendments to section 22 of the principal Act are aimed at introducing an assessment of an asylum seeker with a view to establishing whether he or she is able to sustain himself or herself (and his or her dependants) with the assistance of family or friends for a period of at least four months, before a condition to work may be endorsed on the visa. If it is found that there is no ability to sustain himself or herself (and his or her dependants), the applicant may be offered assistance by the UNHCR or any other charitable organisation or person in regards to shelter and basic necessities. Only in the event where there is no ability to sustain himself or herself (and his or her dependants) or with assistance, may the right to work be endorsed on the visa. Such right is subject to the employer or educational institution furnishing the Department with a letter of employment or enrolment within 14 days of the asylum seeker having taken up employment or being so enrolled. The asylum seeker may not apply for extension of the right to work if he or she is unable to provide a letter of employment or enrolment. In addition, the Director-General may revoke the right to work after a period of six months in the absence of proof of employment or enrolment for study.
- 2.18.3 Clause 18 further aims to make provision for scenarios where asylum seekers fail to present themselves for renewal of their asylum seeker visas after one month of expiry of the visa. In these cases their applications are considered to be abandoned, unless they can prove hospitalisation or institutionalisation. It also provides that an asylum seeker whose application has been abandoned may not re-apply for asylum and must be dealt with as an illegal foreigner under the Immigration Act. This clause further makes it an offence to be in possession of an expired visa.
- 2.19 Clause 19 amends section 23 in order to deal with technical amendments.
- 2.20 Clause 20 amends section 24 of the principal Act in order to provide for consequential amendments relating to the use of the term “Status Determination Committee”, which is substituted by the term “Refugee Status Determination Officer”.
- 2.21 Clause 21 replaces section 24A of the principal Act in order to vest the power to review manifestly unfounded applications in the SCRA, as opposed to the Director-General, as is currently provided for. It also requires the SCRA to notify an RSDO at the Refugee Reception Office where the application for asylum was lodged of its decision within five working days of such decision.
- 2.22 Clause 22 amends section 24B of the principal Act in order to provide for consequential amendments relating to the use of the term “Status Determination Committee”, which is substituted by the term “Refugee Status Determination Officer”.
- 2.23 Clause 23 amends section 27 of the principal Act in order to provide for a period of 10 years, in which a person qualifies to apply for permanent residence, as opposed to five years, as well as to provide for consequential amendments relating to the use of the term “Status Determination Committee”.
- 2.24 Clause 24 substitutes section 28 of the principal Act in order to provide for the order of removal of both refugees and asylum seekers (and their dependants who have not been granted asylum) from the Republic to be made by the Minister on the grounds of national security or public order.

- 2.25 Clause 25 amends section 34 of the principal Act in order to provide for the period within which the changes of address for a refugee must be provided to the Refugee Reception Office.
- 2.26 Clause 26 amends section 34A of the principal Act in order to provide for the period within which the changes of address for an asylum seeker must be provided to the Refugee Reception Office.
- 2.27 Clause 27 substitutes section 36 of the principal Act in order to vest the power to withdraw a person's refugee status in the SCRA, based on the same considerations as is currently provided for (but with the Minister having this power). It further provides that, in the event that the Minister has resolved to cease the recognition of refugee status in respect of a category of refugees, the SCRA must implement such resolution by withdrawing the refugee status of such category as a whole by notice in the *Gazette*.
- 2.28 Clause 28 amends section 37 of the principal Act to introduce new offences to deal with public servants who provide false documentation or facilitates in disguising a person's identity or status, or who accept bribes, as well as persons who produce false certification on any Act administered by the Department or manufactures documents purporting to be issued by the Department.
- 2.29 Clause 29 amends section 38 of the principal Act to empower the Minister to make additional regulations regarding the manner and period in which a matter must be referred to the SCRA.
- 2.30 Clause 30 repeals section 33 of the Refugees Amendment Act, 2008, as a consequential amendment to the re-establishment of the SCRA.
- 2.31 Clause 31 contains transitional provisions to ensure that matters pending immediately before the Bill is enacted, must be determined and finalised in terms of the principal Act, as amended by this Bill, once it is enacted.
- 2.32 Clause 32 substitutes the phrases "Status Determination Committee", "asylum seeker permit" and "permit", wherever they occur, with the phrases "Refugee Status Determination Officer", "asylum seeker visa" and "visa", respectively.
- 2.33 Clause 33 contains the short title of the Amendment Act, and provides for the commencement of the Amendment Act immediately after the commencement of the Refugees Amendment Act, 2008, and the Refugees Amendment Act, 2011.

3. INSTITUTIONS CONSULTED

The Bill was published in Government *Gazette* No. 39067 dated 6 August 2015. Furthermore, the Department of Public Service and Administration, State Security Agency and the JCPS Cluster of Directors-General were consulted.

4. FINANCIAL IMPLICATIONS FOR STATE

None

5. PARLIAMENTARY PROCEDURE

- 5.1 The State Law Advisers and the Department of Home Affairs are of the opinion that the Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provision to which the procedure set out in sections 74 or 76 of the Constitution applies.

5.2 The opinion of the State Law Advisers is as follows:

- In the matter of **Tongoane and Others v National Minister for Agriculture and Land Affairs and Others** 2010 (8) BCLR 741 (CC) (the “Tongoane case”), the Constitutional Court determined the proper test for the tagging of the Communal Land Rights Bill (previously B67-2003, and now Act No. 11 of 2004) (“CLARA”), after the High Court held that, in classifying the CLARA for the purposes of “tagging”, Parliament had applied the incorrect test, namely, the “pith and substance” test, instead of the “substantial measure” test suggested by the Constitutional Court in the matter of **Ex parte the President: In re Constitutionality of the Liquor Bill** 2000 (1) BCLR 1 (CC) (the “Liquor Bill case”). The High Court, however, refused to declare the CLARA invalid for failure to enact it in accordance with the correct procedure.
- The Constitutional Court concluded that there is a difference between determining whether the National Assembly or National Council of Provinces (“NCOP”) has the competence to legislate in a particular field, and determining how a Bill ought properly to be tagged and ultimately enacted. These are two different processes for which two different tests are to be applied. Ngcobo CJ reaffirmed the decision of the Constitutional Court in the Liquor Bill case, at paragraphs 63 to 64 that the statement: “*any Bill whose provisions in substantial measure fall within a functional area listed in Schedule 4*”, formulates the test for determining the procedure to be followed in enacting a Bill. Ngcobo CJ further, at paragraph 58, states the following:

“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”**. (Our emphasis).
- The Constitutional Court thus held that 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 a Bill must be considered by the provinces and in the NCOP. The question of 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. Ngcobo CJ, at paragraphs 69 and 70, concisely dealt with the tagging question as follows:

“The tagging of Bills before Parliament **must be informed by the need to ensure that 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.

To apply the “pith and substance” test to the tagging question, therefore undermines the constitutional role of the provinces in legislation in which they should have a meaningful say, and disregards the breadth of the legislative provisions that section 76(3) requires to be enacted in accordance with the section 76 procedure.” (Our emphasis).

- In the light of the above, we are of the view that the purpose of the Bill is related to the efficient and effective administration of applications for asylum and the processes in that regard. The matters dealt with in this Bill do not fall within the ambit of Part A of Schedule 4 of the Constitution, which lists the functional areas of concurrent national and provincial legislative competence.
- Also, informed by the substantial measure test and the test for tagging, as confirmed in the *Tongoane* case, we considered every provision of the Bill, focusing on the need to ensure that provinces fully and effectively exercise their appropriate role in the process of considering national legislation that substantially affect them. In its current format, the Bill would probably not have a substantial impact on the provinces. It must also be noted that both the Refugees Amendment Bill, 2008, and the Refugees Amendment Bill, 2011, had been introduced in terms of section 75 of the Constitution. It is, therefore, our view that this Bill must be introduced in terms of the process contemplated by section 75 of the Constitution.

5.3 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.

Printed by Creda Communications

ISBN 978-1-4850-0360-1