REPUBLIC OF SOUTH AFRICA

ONE-STOP BORDER POST BILL

(As amended by the Portfolio Committee on Home Affairs)
(The English text is the official text of the Bill)

(MINISTER OF HOME AFFAIRS)

[B 12B—2024]

ISBN 978-1-4850-xxxx-x

No. of copies printed 150

BILL

To regulate the establishment of one-stop border posts through international agreements; to provide for the establishment of common control zones in the territory of an adjoining state; to provide for one-stop border processing arrangements; to authorise the application of the laws of the Republic and the adjoining state in the one-stop border post; and to provide for matters connected therewith.

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

ARRANGEMENT OF SECTIONS

Definitions

1. In this Act, unless the context shows that another meaning is intended—

"**adjoining state**" means a neighbouring state, including the agency of the state, with whom an agreement has been entered into;

"**agreement**" means an international agreement referred under in section 3(1) of this Act and concluded in terms of section 231 of the Constitution;

"**border law enforcement**" means the execution and enforcement of relevant legislation relating to legitimate facilitation of movement of persons and goods within the border law enforcement area and at ports of entry;

"**common control zone**" means an area established in terms of section 3(1) of this Act where the domestic laws of the Republic and an adjoining state in respect of border controls apply and where officials of both states apply their respective domestic laws;

"**Constitution**" means the Constitution of the Republic of South Africa, 1996;

"**exclusive zone**" means an area, within the common control zone, dedicated for the exclusive use by officials of the Republic or the adjoining state;

"**Minister**" means the Minister of Home Affairs;

"**official**" means an authorised person responsible for exercising border controls on behalf of any organ of state, and includes a police officer;

"**one-stop border post**" means a port of entry designated as a one-stop border post in terms of section 3(1)*(a)* of this Act;

"**port of entry**" means a port of entry designated by the Minister in terms of section 9A of the Immigration Act, 2002 (Act No.13 of 2002), and includes any port, point or place of entry or exit approved by the Minister in terms of section 30 of the Border Management Authority Act, 2020 (Act No. 2 of 2020);

"**Republic**" means the Republic of South Africa;

"**regulation**" means any regulation made under this Act; and
"**this Act**" includes the regulations.

Application of Act

2. This Act applies outside of the territory of the Republic in accordance with any international agreement entered into between the Republic and another state in terms of section 231 of the Constitution.

Establishment of one-stop border posts and common control zones

3. (1) Subject to section 231 of the Constitution, the Minister may conclude an agreement with any state to—

(a) at any port of entry, establish a one-stop border post to be jointly managed by the Republic and the adjoining state;

(b) within the one-stop border post, designate a common control zone; and

(c) authorise officials of both states to exercise—

(i) border law enforcement at the one-stop border post contemplated in paragraph *(a)*; or

(ii) any power to arrest, search, seize or detain any person or thing, in accordance with the laws of the Republic.

(2) The Minister must establish one-stop border posts and publish, by notice in the *Gazette*, a list of one-stop border posts contemplated under subsection (1)*(a)* and common control zones contemplated under subsection (1)*(b)*.

Application of border law enforcement

4. (1) The agreement contemplated under section 3(1) may, subject to the domestic laws of the respective states, during the negotiating of an agreement, take the following into consideration insofar as the laws relating to border law enforcement are applicable:

(a) The laws of the adjoining state apply in the common control zone established in the territory of the Republic and must be enforced by the officials of the adjoining state in the same way as they are enforced in the territory of the adjoining state; and

(b) the laws of the Republic apply in the common control zone established in the territory of the adjoining state and must be enforced by the officials of the Republic in the same way as they are enforced within the Republic.

(2) Any contravention of the laws relating to border law enforcement of the adjoining state within the common control zone in the territory of the Republic is subject to the laws of the adjoining state as if the contravention occurred in the territory of the adjoining state.

(3) Any contravention of the laws relating to border law enforcement of the Republic within the common control zone in the territory of the adjoining state is subject to the laws of the Republic as if the contravention occurred in the territory of the Republic.

(4) An official enforcing border law enforcement and procedures in a common control zone must do so in accordance with the border law enforcement laws of the state that he or she works for.

Application of criminal laws

5. (1) Subject to subsection (5) and the process in any Article of extradition or mutual legal assistance agreement entered between the adjoining state and the Republic of South Africa, where an act or omission that constitutes a criminal offence in an adjoining state is committed in the common control zone in the territory of the adjoining state—

(a) the offender concerned is subject to the jurisdiction of the courts of the adjoining state; and

(b) the offence is decided in terms of the criminal law of the adjoining state.

(2) Where an act or omission that constitutes a criminal offence in the Republic is committed in the common control zone in the territory of the Republic—

(a) the offender concerned is subject to the jurisdiction of the courts of the Republic; and

(b) the offence is decided in terms of the criminal law of the Republic.

(3) Where an act or omission that constitutes a criminal offence in the Republic is committed in the exclusive zone of the Republic in the territory of the adjoining state—

(a) the offender concerned is subject to the jurisdiction of the courts of the Republic; and

(b) the offence is decided in terms of the criminal law of the Republic.

(4) Where an act or omission that constitutes a criminal offence in the adjoining state is committed in the exclusive zone of the adjoining state in the territory of the Republic—

(a) the offender concerned is subject to the jurisdiction of the courts of the adjoining state; and

(b) the offence is decided in terms of the criminal law of the adjoining state.

(5) Despite subsection (1), where an act or omission referred to in this subsection (4) is also an offence in the Republic and is committed—

(a) in the common control zone in the territory of the Republic; and

(b) by a person who is not a citizen of the adjoining state, and the laws of the adjoining state apply to the extent that a finding of guilty of that act or omission may lead to the offender being imposed a death penalty—

(i) the offender concerned is subject to the jurisdiction of the courts of the Republic; and

(ii) the offence is decided in terms of the criminal law of the Republic.

[Free transfer] Movement of [money or] goods or money within common control zone for official purpose

6. (1) Subject to the agreement envisaged under section 3, goods or money moved by **[any]** an official, for an official **[use]** purpose, from the territory of the Republic **[on]** or the territory of an adjoining state to the territory of the **[Republic or]** adjoining state or the Republic, as the case may be, **[through]** within the common control zone, are not subject to entry or exit **[the]** import or export **[and entry or exit]** laws of the Republic or the adjoining state.

(2) Subject to proper declarations being made and appropriate inventories being kept, all equipment, which is necessary to enable an official of the Republic or adjoining state to carry out his or her official functions in the control zone, must be freely transferable within the control zone.

(3) For purposes of this section, **"official purpose"** means an act done in the execution or performance of a function, power or duty conferred by any law of the Republic or an adjoining state.

Obligation to readmit

7. (1) Where—

(a) the state of entry, either the Republic or the adjoining state, declines to admit any person, vehicle, animal, merchandise or other goods;

(b) a person illegally enters the Republic or the adjoining state at any place other than through a designated port of entry of the Republic; or

(c) the state of entry, either the Republic or the adjoining state, refuses entry of any vehicle, animal, merchandise or other goods,

the state where such person, vehicle, animal, merchandise or other goods arrived from must readmit such person, vehicle, animal, merchandise or other goods into its territory.

(2) Despite subsection (1), the competent authorities of the state of exit, when receiving such person, may take any measures, in accordance with its domestic laws, that does not impose obligations on the state of entry.

Regulations

8. The Minister may make regulations regarding—

(a) the terms and conditions relating to the use of the one-stop border posts or common control zones; and

(b) generally any other ancillary or incidental administrative or procedural process that is necessary to prescribe for the proper implementation or administration of this Act.

Short title and commencement

9. This Act is called the One-Stop Border Post Act, 2024, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE ONE-STOP BORDER POST BILL, 2024

1. INTRODUCTION

The One Stop Border Post Policy, May 2022, states that ''[T]he high-volume commercial activity at certain land ports of entry has become a major obstacle to national and regional economic development and security. Modernising key land ports of entry is a strategic priority and an economic necessity. The increased cross-border movement of people, goods and conveyances between South Africa and her neighbours has led to congestion and lengthy delays at South Africa's ports of entry. A re-think was necessary to speed up the clearance of goods, people and conveyances at ports of entry. The envisaged one stop border post concept will be applied in the land port of entry environment. This concept refers to the legal and institutional framework, facilities and associated procedures that enable goods, people and vehicles to stop at a single facility to undergo the necessary checks and controls, following applicable regional and national laws, to exit one state and enter the adjoining state. This is a move away from a traditional two-stop border post concept in which exit procedures are carried out on one side of the border and entry procedures are carried out on the other side for persons, vehicles and goods. Except for the Lebombo port of entry, all the land ports of entry in South Africa are based on a two-stop border post model.

Border controls involve various functions performed by officers from different government organisations using the specific authority granted in a state's national laws. It is necessary for officers' functions and powers to be authorised in law as they potentially entail a limitation of the rights of persons. These functions are the expression of the sovereign power and therefore cannot be privatised. The one stop border post concept envisaged for any port of entry requires legal authority beyond what is provided by current legislation for two reasons. Firstly, it will entail various officers of one state performing border controls in terms of its national laws extraterritorially in another state.''.

2. PURPOSE OF THE BILL

The purpose of the One-Stop Border Post Bill, 2024 (the ''Bill''), is to regulate the establishment of one-stop border posts through international agreements; to provide for the establishment of common control zones in the territory of an adjoining state; to provide for one-stop border processing arrangements; to authorise the application of the laws of the Republic and the adjoining to in the one-stop border post; and to provide for matters connected therewith.

3. SUMMARY OF THE BILL

3.1 The strategic focus of this legislative intervention is to provide for a legal foundation for implementing the One Stop Border Post Policy. It supports, at least three national priorities of government, i.e. the economic transformation and job creation; social cohesion and safe communities; and building a capable, ethical and developmental state.

3.2 The Bill contains the following provisions:

3.2.1 **Clause 1** deals with the definitions used in the Bill.

3.3.2 **Clause 2** provides for the application of the Act.

3.3.3 **Clause 3** provides for the establishment of one-stop border posts and common control zones.

3.3.4 **Clause 4** provides for the application of border law enforcement.

3.3.5 **Clause 5** deals with application of criminal law within the common control zones.

3.3.6 **Clause 6** deals with movement of goods or money within common control zone for official purposes.

3.3.7 **Clause 7** deals with the obligation to readmit.

3.3.8 **Clause 8** empowers the Minister of Home Affairs to make regulations in order to give effect to the Act.

3.3.9 **Clause 9** deals with the short title and commencement of the Act.

4. ORGANISATIONAL AND PERSONNEL IMPLICATIONS

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

5. FINANCIAL IMPLICATIONS FOR STATE

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

5.2 Most of the financial implications have already been taken into account within the baseline allocations relating to operations at ports of entry. However, the funding model that will be used to fund the redevelopment of the six identified commercial ports of entry to one stop border posts is a Public-Private Partnership. The proposed funding model for the public-private partnership project will be a 20-year concession entered into with multiple successful private parties to redevelop and maintain key facilities and infrastructure at the identified land ports of entry.

6. COMMUNICATION IMPLICATIONS

The Department undertook a comprehensive Government and public consultation process on the Bill. The Department will continue working closely with the Government Communication and Information System (''GCIS'') to develop a communications strategy to ensure wider dissemination of the key changes.

7. CONSTITUTIONAL IMPLICATIONS

The supremacy of the Constitution, including principles underpinning the Constitution, will take precedence over all one-stop border post arrangements. This includes safeguarding of the sovereignty of the State and observation of human rights.

8. INSTITUTIONS AND ORGANISATIONS CONSULTED

8.1 The following institutions were consulted:
(a) Border Management Authority; and
(b) South African Revenue Service.

8.2 The Bill was also processed to Cabinet through the GSCID, ESIEID and JCPS clusters. This is necessitated by the fact that the legal provisions in the Bill require the concurrence of these clusters.

9. PARLIAMENTARY PROCEDURE

9.1 The Constitution prescribes the classification of Bills. The national legislative process regarding Bills is governed by sections 73 to 77 of the Constitution of the Republic South Africa, 1996 (the ''Constitution'') which prescribes the different procedures to be followed when enacting legislation. Four categories of Bills are distinguished: Bills amending the Constitution (section 74); ordinary Bills not affecting provinces (section 75); ordinary Bills affecting provinces (section 76); and money Bills (section 77).

A Bill must be correctly classified otherwise it is constitutionally invalid.

9.2 The following relevant Constitutional Court judgment is essential to assist in the tagging of the Bill and the legal principles from this judgment are highlighted as follows:

9.2.1 In **Tongoane and Others v Minister for Agriculture and Land Affairs and Others, CCT100/09 [2010] ZACC 10** (the ''Tongoane case''), the key issue concerned the proper classification of the Communal Land Rights Act, 2004 (Act No. 11 of 2004) (the ''CLARA''), which had been processed in terms of section 75. The test for tagging must be informed by its purpose and how the Bill must be considered by the provinces and in the National Council of Provinces. The more the Bill affects the interests, concerns and capabilities of the provinces, the more say the provinces should have on its content.

9.2.2 The legislative competence and the substance of the Bill must be considered when tagging a Bill. At paragraphs 70 and 72 of the Tongoane case, the Constitutional Court stated that:

> ''*. . . the test for determining how a Bill is to be tagged must be broader than that for determining legislative competence. Whether a Bill is a section 76 Bill is determined in two ways. First by the explicit list of legislative matters in section 76(3), and second by whether the provisions of a Bill in substantial measure fall within a concurrent legislative competence*.''.

9.2.3 The test for tagging must be informed by its purpose and how the Bill must be considered by the provinces and in the National Council of Provinces. At paragraph 60 of the **Tongoane** case, the Constitutional Court held that the more the Bill affects the interests, concerns and capabilities of the provinces, the more say the provinces should have on its content. Furthermore, at paragraph 72 of the Tongoane case, it was stated as follows:

> ''*To summarise: any Bill whose provisions substantially affect the interests of the provinces must be enacted in accordance with the procedure stipulated in section 76. This naturally includes proposed legislation over which the provinces themselves have concurrent legislative power, but it goes further. It includes Bills providing for legislation envisaged in the further provisions set out in section 76(3)(a)–(f), over which the provinces have no legislative competence, as well as Bills, the main substance of which falls within the exclusive national competence, but the provisions of which nevertheless substantially affect the provinces. What must be stressed, however, is that the procedure envisaged in section 75 remains relevant to all Bills that do not, in substantial measure, affect the provinces. Whether a Bill is a section 76 Bill is determined in two ways. First, by the explicit list of legislative matters in section 76(3)(a)–(f); and second by whether the provisions of a Bill in substantial measure fall within a concurrent provincial legislative competence.*'' [Our underlinining].

9.2.4 The Constitutional Court rejected the ''pith and substance'' test and endorsed the substantial measure test instead. Ngcobo CJ held as follows:

> ''*[60] The test for tagging must be informed by its purpose. Tagging is not concerned with determining the sphere of government that has the competence to legislate on a matter. Nor is the process concerned with preventing interference in*

the legislative competence of another sphere of government. The process is concerned with the question of how the Bill must be considered by the provinces and in the NCOP, and how a Bill must be considered by the provincial legislatures depends on whether it affects the provinces. The more it affects the interests, concerns and capacities of the provinces, the more say the provinces should have on its content.'' [Our underlining].

At paragraph 74 of the **Tongoane** case, the Constitutional Court then examined the CLARA to determine the extent to which its provisions regulated ''indigenous law'' and ''traditional leadership'', which are two clauses listed in Schedule 4 to the Constitution. The Constitutional Court held that any Bill whose provisions substantially affect the interests of provinces must be tagged as a section 76 Bill. This would include Bills over which provinces have concurrent jurisdiction and the Constitutional Court further stated the following:

''*[69] The tagging of Bills before Parliament must be informed by the need to ensure that the provinces fully and effectively exercise their appropriate role in the process of considering national legislation that substantially affects them. Paying less attention to the provisions of a Bill once its substance, or purpose and effect, has been identified undermines the role that provinces should play in the enactment of national legislation affecting them. The subject-matter of a Bill may lie in one area, yet its provisions may have a substantial impact on the interests of provinces. And different provisions of the legislation may be so closely intertwined that blind adherence to the subject-matter of the legislation without regard to the impact of its provisions on functional areas in Schedule 4 may frustrate the very purpose of classification.*

*[70] To apply the "pith and substance" test to the tagging question, therefore, undermines the constitutional role of the provinces in legislation in which they should have a meaningful say, and disregards the breadth of the legislative provisions that section 76(3) requires to be enacted in accordance with the section 76 procedure. It does this because it focuses on the substance of a Bill and treats provisions which fall outside its main substance as merely incidental to it and consequently irrelevant to tagging. In so doing, it ignores the impact of those provisions on the provinces. To ignore this impact is to ignore the role of the provinces in the enactment of legislation substantially affecting them. Therefore, the test for determining how a Bill is to be tagged must be broader than that for determining legislative competence***." [Our underlining].**

9.3 The Department and the State Law Advisers have considered all the provisions in the Bill in light of the **Tongoane** case, and found that the purpose and effect of the Bill is to regulate international agreements between the Republic of South Africa and adjoining states for the purposes of creating a one stop border post and common control zones.

9.4 The Department and the State Law Advisers are of the opinion that this Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution, since the purpose and effect of the Bill is based on the conclusion of international agreements as contemplated in section 231 of the Constitution.

9.5 The Department and the State Law Advisers are further of the opinion 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, 2019 (Act No. 3 of 2019), since it does not contain provisions pertaining to customary law or customs of traditional communities.