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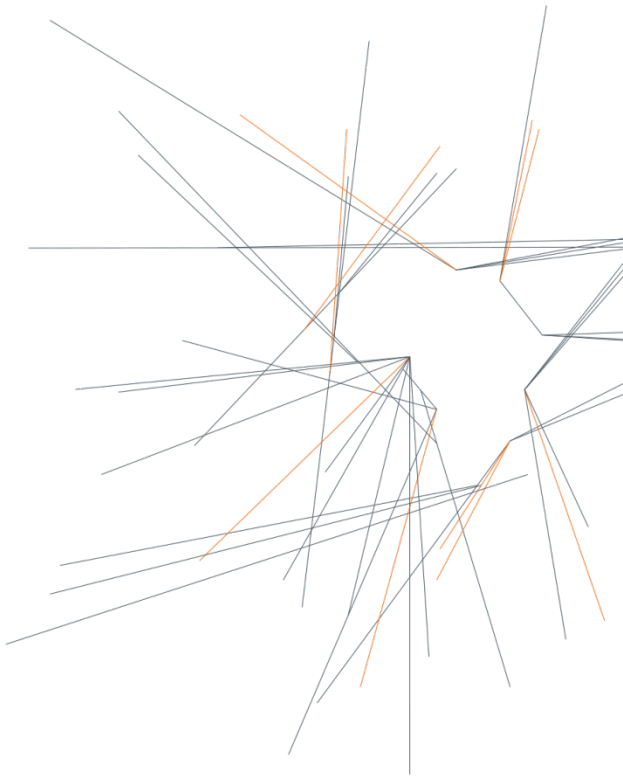

THE MINERAL AND PETROLEUM RESOURCES DEVELOPMENT AMENDMENT BILL, 2013

June 2017

INTRODUCTION

- Webber Wentzel is one of the leading law firms in South Africa.
- We have been advising the mining industry for over 100 years and has the largest on-the-ground team in Sub-Saharan African.
- Webber Wentzel has been engaging with the Mineral and Petroleum Resources Development Amendment Bill ("**Bill**") since 2012, as a concerned corporate citizen.
- This is not intended to be a critique of government policy but as stakeholders in this industry we intend to highlight unintended consequences in regulation so as to assist in creating the most appropriate legislation for South Africa in these changing times.
- These amendments should also be viewed in the context of the recently published Mining Charter which has far reaching implications for the industry.

GENERAL CONCERNS

VAGUENESS AND UNCERTAINTY

- The Bill is fraught with instances of vague and uncertain language. Not only does this give rise to regulatory uncertainty, it allows administrators who are empowered under the Bill an overly broad discretion.
- The discretion afforded to the Minister under the Bill is, in our view, **excessively broad** and **contrary** to the **rule of law**.
- The rule of law requires law to be certain, and that the exercise of powers and discretions under the law not be undertaken in an unrestricted manner.
- This means that the relevant provision must indicate with reasonable certainty to those administrative officials who are bound by it the nature of their obligations and the parameters within which said obligations are to be fulfilled, so that they may regulate their conduct accordingly.
- The Constitutional Court has also held that it would be **inappropriate** for a Minister to exercise an **unfettered** and **unguided discretion** in situations fraught with potentially **irreversible** and **prejudicial** consequences to business entities and other affected parties.

GENERAL CONCERNS

LICENSE BASED REGULATORY REGIME V MINING CONCESSION BASED REGULATORY REGIME

- The Bill now seeks to change from our current **license based regime** to a **concession regime.**
- Concession regime requires that mineral rights be effectively **auctioned** to the best **prospective concessionaire**, who meets a set of minimum requirements.
- The concession regime is best implemented when information concerning mineral deposits can be made available to investors (this information can be obtained from previous exploration, mining activities or as a result of scientific geological predictions).
- While South Africa is an advanced mining country, we have limited knowledge of our geology.

GENERAL CONCERNS

ORDER OF PROCESSING APPLICATIONS & INTRODUCTION OF A CONCESSION REGIME

- The amended Section 9 of the MPRDA abolishes the "***first-in, first-assessed***" (FIFA) principle.
- The Bill introduces an invitation system under which the **Minister must invite applications** before applicants may apply for rights to particular minerals and land under the MPRDA.
- While **any person may request the Minister to issue such invitations,** it does not appear that the Minister was required to issue invitations simply because a request is made.
- The Minister must now "***give preference to an application lodged***" by the person who first requested invitations to be issued.

TIME PERIODS

- The Bill deletes many **time periods** and replaces them with reference to a "*prescribed period*" to be determined by the Minister.
- The Bill fails to specify, among others, the following time periods:
  - the period within which an applicant must lodge a prospecting or mining right for registration;
  - the periods within which the Regional Manager must:
    - notify an applicant that its application for a prospecting or mining right does not comply with the legislative requirements;
    - grant a prospecting right; and
    - refuse to grant a mining right.
- The lack of time periods in the Bill creates **uncertainty**, and there is no guidance as to when and how the relevant periods would be determined.
- this **lack of guidance** allows the Minister to provide for the time periods in future regulations to the MPRDA or even in a directive.
- This means that industry stakeholders and other interested and affected parties would not have the opportunity to make submissions on the determination of these time periods.

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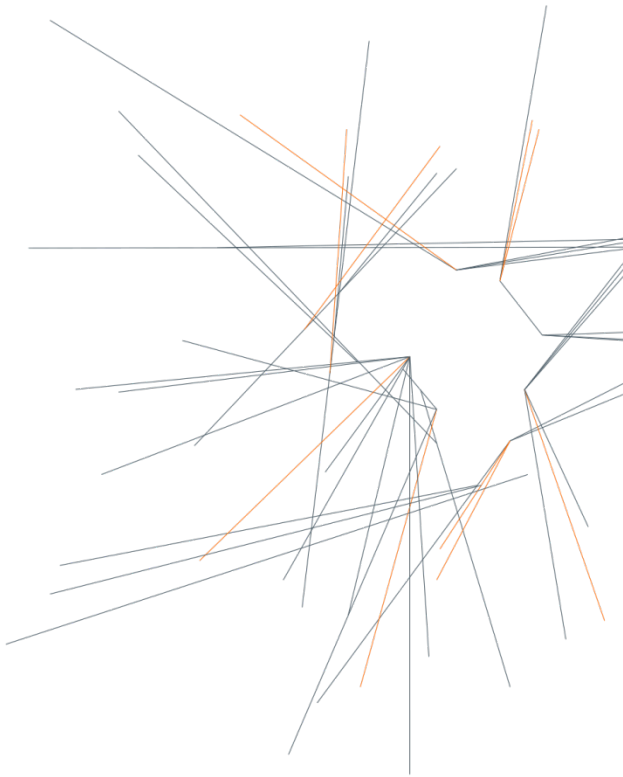

CONCERNS OF THE MINING INDUSTRY

June 2017

POINT OF DEPARTURE

- We respectfully submit that:
  - To create jobs , eradicate poverty and enable South Africans to benefit from mining require mining investment and growth;
  - Parliament's role is to create a mining regulatory framework which will promote investment and growth.
- Our comments and representations are aimed at achieving the aforesaid objectives.
- While we will deal with a number of issues, our focus will be on three key issues:
  - Amendments to **sec 9** – which purports to change the licensing system to a concession regime;
  - Amendments to **sec 26** in respect of mineral beneficiation ; and
  - Amendments to **sec 11** in respect of ministerial consent to transfer rights and interests in rights.
- We will make a practical **recommendation** on how to deal with the issues raised.

MINERAL BENEFICIATION

- The Bill obliges the Minister to "*initiate or promote the **beneficiation of mineral resources** in the Republic*" in order to "*regulate the mining industry to meet national development imperatives and to bring optimal benefit for the Republic*"
- The Bill empowers the Minister to "*designate any **mineral or mineral product** for local beneficiation*".
- The Minister must **publish such conditions required to ensure security of supply** for local beneficiation:
  - in consultation with a Minister of the relevant national departments designate any mineral or mineral product for local beneficiation;
  - after taking into consideration the national developmental imperatives such as macro-economic stability, energy security, industrialisation, food security and infrastructure development; and
  - after considering the advice of the Advisory Council
- The Minister is afforded **wide discretionary powers**, under the Bill, to:
  - determine the "*terms and conditions applicable to **beneficiation of mineral resources** as contemplated in Section 26*", in terms of Section 107; and

MINERAL BENEFICIATION (CONTINUED)

- The Minister now has a **broad discretion** to set the **percentages, quantities, qualities and timelines** for supply to local beneficiators by regulation.

Mine Gate Price

- The price at which designated minerals must be sold either the "***mine gate price*** *or an "agreed price*":
  - "*Mine gate price*" is defined as: "*The price (excluding VAT) of the* ***mineral or mineral product*** *at the time that the mineral or mineral product leaves the area of the mine, and excludes charges such as transport and delivery charges from the mine area or the mine processing site to the local beneficiator*"

Exporting of Minerals

- Any person who may wish to export a mineral or mineral product must first:
  - comply with the Bill's **beneficiation provisions**; and
  - **seek the written approval of** the Minister before such mineral or mineral product(s) may be exported

The Bill creates an export licensing system

MINERAL BENEFICIATION (CONTINUED)

Contravention of International Trade Law Obligations

- The mandatory beneficiation provision created under the Bill could potentially breach SA's international trade law obligations.
- The Bill grants the Minister wide discretionary powers. Under the newly inserted section 26(2B) the Minister may prescribe the percentage of a designated mineral or mineral product which must be supplied to the domestic market.
- **General Agreement on Tariffs and Trade**, 1947 and 1994.
  - Article XI:1, read with Article XX: "*no prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas…**export licences** or other measures, shall be instituted or maintained by any contracting party…on the exploration or sale for export of any product destined for the territory of any other contracting party*".
  - This Article accordingly prohibits WTO member states from imposing quantitive restrictions on exports.

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"HISTORIC" TAILINGS

- The Bill brings **tailings** created prior to the commencement of the MPRDA on 1 May 2004 (historic tailings) under the **ambit of the MPRDA**.
- Under the Bill, mining companies are granted an **exclusive right** to apply for the amendment of their mine work programme under section 102 of the MPRDA to include such historic tailings in the event that such tailings fall within the mining area under a **pre-existing mining right**.
- If the historic tailings fall outside the mining area, its owner holds an **exclusive right** to apply for a mining right over such historic tailings.
- This is a **positive development** which will avoid the expropriation of such tailings.
- Regrettably the terminology used is very confusing:
  - The amended definition of "**Residue Stockpile**" includes old dumps;
  - A new definition of "**Historic** (sic) **Residue Stockpile**" have been introduced; and
  - The Bill uses an undefined term of "**Historic** (sic) **Residue Deposit**".

TRANSFERABILITY AND ENCUMBRANCE OF PROSPECTING AND MINING RIGHTS

Section 11(1) as been amended to read as follows: *"A prospecting right or a part of a prospecting right, mining right or a part of a mining right or **an interest** in any such right in an unlisted company or any **controlling interest** in a listed company (which companies hold a prospecting right or mining right or an interest in any such right), may not be ceded, transferred, encumbered, let, sublet, assigned, or alienated without the prior written consent of the Minister, and subject to such conditions as the Minister may determine".*

Currently Ministerial consent is required to transfer a **controlling interest** in an **unlisted company.**

- The need for ministerial consent to transfer rights is well recognised.
- The Minister must have the ability to ensure that the requirements for the holding of rights are complied with.
- However – the requirement to obtain consent should be restricted to what is necessary to serve the purpose.
- The Emended section is **too broad** and is **uncertain.**
- It should be **clear** wen consent is required.

TRANSFERABILITY AND ENCUMBRANCE OF PROSPECTING AND MINING RIGHTS –CONTINUED

- **Cumbersome procedure**
- The Bill requires the proposed transferee of part of a right to lodge an application for a prospecting or mining right, as the case may be, prior to the transfer, for which Ministerial consent is required.
- It is unclear whether the term "***interest***" is broad enough to include an indirect shareholding in a company holding a prospecting or mining right.
- If this is so, the provision will apply to **trading of shares in parent companies** of entities which directly hold or have interest in a particular right, as well as the **shares of subsidiary companies** between the right holder and the parent company.
- It should also be noted that the Minister may **impose conditions** to the transfer.

CONSULTATION WITH INTERESTED AND AFFECTED PARTIES

- Clause 6 of the Bill states that "*within the prescribed period after accepting an application lodged in terms of Section 16, 22, or 27 [of the MPRDA], the Regional Manager and the applicant must in the prescribed manner make known that an application for a prospecting right, mining right or mining permit has been accepted in respect of the land in question*."
- Subsection 10(1)(b) then provides that the Regional Manager and the applicant must in the prescribed "*call upon interested and affected persons and communities to submit their comments and objections regarding the application to the Regional Manager within the prescribed period".*
- Neither the MPRDA nor the Bill contain a definition of the term "*interested and affected persons*".
- the resultant effect being that said persons are not easily identifiable and the notification process is thus subject to delays and in some instances overlooking of persons who should in fact be notified or alternatively, casting the net too wide and consulting with a broad range of persons which is costly and time consuming for applicants.
- The Bill does not stipulate the time periods under which the DMR is to respond to objections raised by interested and affected persons and communities resulting in further uncertainty and possible inconsistencies in application.

ENVIRONMENTAL PROVISIONS

- In terms of the 'One Environmental System', all the environmental requirements of the MPRDA will be implemented under the **National Environmental Management Act, 2008** ("**NEMA**").
- This causes a **confusing and apparently irreconcilable overlap in responsibilities** between the Minister and the Minister of Environmental Affairs.
- The Minister is the **responsible authority** for the implementation of environmental provisions under NEMA.
- Current environmental management plans are considered to be environmental authorisations issued under NEMA.
- An application lodged under the MPRDA for an environmental management programme and environmental management plan prior to the coming into effect of National Environmental Management Amendment Act, 2013 ("**NEMAA**") shall be **processed under the MPRDA** as if NEMAA was **not in effect.**

CLOSURE CERTIFICATES

- The Bill envisages that a right holder is **no longer indemnified** from liability for environmental damage after the issue of a closure certificate.
- The liability of mining companies for **unknown, latent or residual environmental damage** is potentially perpetual.
- In addition, the Minister will be **entitled to retain any portion** of a right holder's rehabilitation provision for a period that she may determine.

PENALTIES

- The Bill seeks to increase significantly the **penalties** that may be imposed for, among other things, **non-compliance** with the MPRDA, other relevant law, the terms and conditions of a right, or a social and labour plan.
- The Bill's **financial penalties** were capped at ZAR800 000 where the annual turnover of an offender cannot be established.
- Under Section 99(1A)(v), a fine imposed by the **Director-General** may now be elevated to have the level of a **civil judgment** given by a magistrate.

ASSOCIATED MINERALS

- The Bill allows the **primary holder** of a mining right to mine and dispose of associated minerals discovered in the mining process, provided that the right holder declares that the associated minerals were discovered in the mining process.
- The right holder must within **60 days** from the date of the declaration apply for an amendment of its right to include the declared right.
- There is, however, **no indication** given as to:
  - **whom** such declaration must be made;
  - the **purpose** of such declaration and the consequences of the declaration or failure to declare.
- The provision states in this regard that the right holder must within **60 days** from the date of making the declaration apply for an amendment of its right to include the mineral so declared, failing which **a third party** may apply for such associated mineral.
- The Bill also allows **third parties** to apply for rights, permits or permissions with respect to associated minerals.
- The Bill **does not prohibit** the granting of multiple permits, permissions and rights regarding different minerals evident in one particular mining area.
- The Bill thus **fails to address** the past difficulties regarding associated minerals.

PERMISSION TO REMOVE AND DISPOSE OF MINERALS

- Clause 15 of the Bill which seeks to amend Section 20 of the MPRDA with particular reference to subsection 20(2) stipulates that "*[t]he holder of a prospecting right shall not without the prior written permission of the Minister remove bulk samples of any mineral from a prospecting area for any purpose as prescribed*."
- The Bill effectively **prohibits** the removal of **bulk sampling** for any purpose including, for purposes of testing and for purposes of selling the particular mineral in order to test a specific market.
- The Bill also **fails to stipulate the procedure** for obtaining Ministerial consent as well as the **factors to be considered** by the Minister in determining whether to grant the envisaged consent.
- This creates uncertainty for stakeholders and bestows on the Minster unfettered discretion which undermines the rule of law.

RIGHTS AND OBLIGATIONS OF HOLDERS OF PROSPECTING RIGHT

- Clause 19 of the Bills seeks to amend Section 19 of the MPRDA and stipulates that the holder of a prospecting right has *"…the exclusive right to apply for a renewal of the prospecting right in respect of the mineral and prospecting area in question*."
- The proposed amendment deletes reference to the term "*and be granted*" which has the effect of **undermining the security of the investment** made in respect of the prospecting area which may potentially result in South Africa **violating obligations under bilateral investment treaties**.
- The Bill also **fails to stipulate reasons** (i.e. non-compliance with the provisions of the prospecting right or the MPRDA) for the refusal of the grant of a renewal which may result in the Minister exercising his discretion in an arbitrarily.
- The above similarly applies to Clause 20 which **seeks to amend Section 25 of the MPRDA dealing with the rights of mining rights holders**.

INFORMATION AND DATA IN RESPECT OF RECONNAISSANCE AND PROSPECTING

- Clause 16 of the Bill seeks to amend Section 21 of the MPRDA and stipulates that "*[t]he holder of a prospecting right or reconnaissance permission must, annually submit progress reports and data contemplated in subsection (1)(b) to both the Regional Manager and the Council for Geoscience in the prescribed manner*."
- This clause has the potential to **infringe** such a holder's **common law intellectual property rights** to such data as the amendment does not stipulate that the Regional Manager or the Council for Geoscience have an obligation to maintain the data **confidential**.

CONCLUSION – MINING AND MINERALS

- Three fundamental principles of the Bill **do NOT support**, in our respectful view, the laudable objectives of the MPRDA namely:
  - To enhance mineral and petroleum resource development
  - To promote economic growth;
  - to promote employment and enhance the social and economic welfare of all south Africans
- Do **NOT promote investment** in our mining industry
- Clause 5 (Amending section 9) and the move from a **licensing** to a **concession** regime
- Clause 8 (amending sec 11) requirements to obtain **ministerial consent** to transfer shares
- Clause 21 (Emending section 26) Minister's powers in respect of **Designated Minerals** and creating an **export licensing system.**
- The NCoP is **empowered** under present circumstances **to amend** the Bill

RECOMMENDATION – MINING CONCERNS

- We strongly recommend that **Clauses 5, 8 and 21 of the Bill be deleted** for present purposes
- It will enable the other amendments to be implemented despite their shortcomings
- It will enable stakeholders to engage further to develop appropriate legislative principles
  - to create an effective application system to promote mining investment
  - to promote mineral beneficiation
  - to create clear and purposeful requirements for ministerial consent for transfer of shares in companies holding rights

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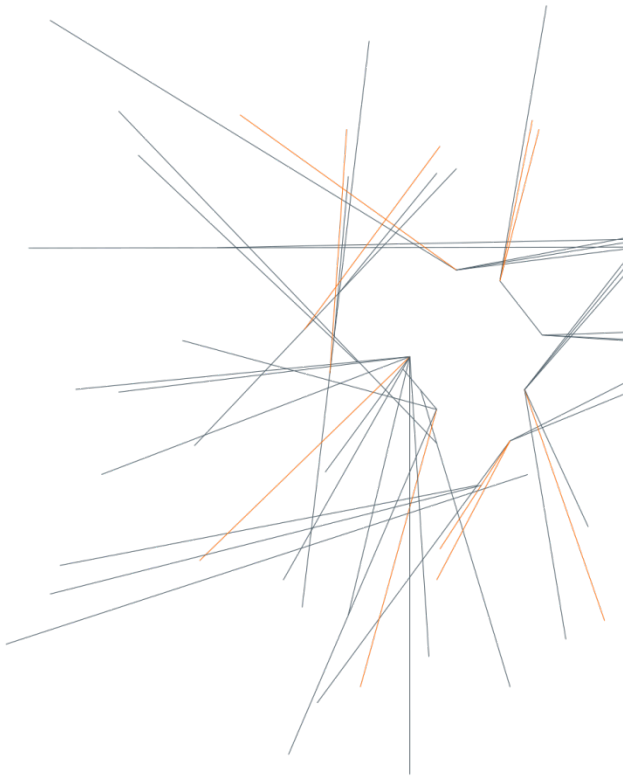

CONCERNS OF THE OIL AND GAS INDUSTRY

June 2017

CONCERNS OF THE UPSTREAM PETROLEUM INDUSTRY

- **Free carried interest**
  - Under section 86A, the State automatically acquires a 20 per cent free carried interest in all new exploration and production rights (including production rights derived from existing exploration rights)
- **State option**
  - The newly inserted section 86A also provides that in addition to the free carried interest, the State may acquire a further unlimited participating interest at an "agreed price" ("**state option**") or in the form of production sharing agreements.
- **Dismantling of PASA**
  - The Bill proposes to eliminate the role of PASA under the MPRDA. In its place, the Bill proposes transferring PASA's functions to the DMR's Regional Managers

REMEDIES

- **Free Carried Interest v. Carried Interest**
  - The State should hold a "carried interest" in exploration and production rights which should be limited to between 10 and 20 per cent.
  - A "Carried Interest" differs from a "Free Carried Interest" in that the exploration costs shall be borne by the non-state holder but such costs will be recoverable by such holder from the proceeds generated from the production right, on terms and conditions which are enshrined in the exploration and/or production right, as the case may be.
  - All exploration right issued or applied for prior to the commencement of the Bill ("**existing exploration rights**"), in respect of which terms and conditions for a production right have been agreed to and attached to the exploration right, should not be effected by the proposed amendments in the Bill as they relate to the State Carried Interests and the participation of HDSAs.
  - Where an existing exploration right in respect of which terms and conditions for a production right have not been agreed to and attached to such exploration right, the holder must make application and representations to Minister for a determination on the State participating interest when a production right is issued.

REMEDIES

- **Limited State Option**

  - The State and the non-State holder must negotiate and agree on the acquisition price for the State Option on commercial terms.
  - The State Option must be a "Carried Interest" as described above.
  - In respect of existing exploration rights, the State should be afforded a right of pre-emption, exercisable within a very short period that is clearly stipulated, to acquire all or a portion of the participating interest which the holder of an exploration or production right may wish to dispose of.
  - Such right of pre-emption should allow the State to match or better an offer received from any third parties.

REMEDIES

- **Dismantling of PASA**
  - The dismantling of PASA is probably driven by the fact that PASA was constituted as a subsidiary of the Central Energy Fund when the Departments of Energy and Mineral Resources functioned together as the Department of Mineral and Energy.
  - Subsequent to the splitting of these departments, it appears that the DMR's view is that the PASA function would need to be brought under the auspices of the DMR.
  - To the extent that the DMR remains the steward of upstream legislation and regulation, we would propose the creation of two new regional managers for the:
    - (i) upstream offshore petroleum industry; and
    - (ii) upstream onshore petroleum industry given the unique nature of each sub-sector.
  - PASA's staff should simply be redeployed to these newly constituted region managers and PASA should remain intact as an institution. Alternatively, PASA should remain as is with the status quo being preserved.

THE WAY FORWARD

We understand that Chapter 6 to the MPRDA is currently being substantially redrafted. However, we detail our recommendations below.

- **Step 1:** PASA must be sufficiently mandated (by way of legislation or instruction) to negotiate the terms of exploration and production rights.
- **Step 2:** Industry bodies and the government should negotiate and agree on amended text to be inserted into the Bill.
- **Step 3:** Bespoke "stand-alone" oil & gas legislation which governs the upstream petroleum sector should be developed. This will involve a comprehensive consultation process with all industry stakeholders.
- We anticipate that this would take between 18 and 24 months and the processes should commence only once an appropriate period has passed since the current Bill has been passed and brought into full force and effect enabling investment to proceed while the "stand-alone" oil & gas legislation is developed and progressed.

RELEVANT PROVISIONS OF THE CONSTITUTION

- The President, in his letter of referral, addressed to the Speaker of the National Assemble, raised, inter alia, the following constitutional reservations with the Bill:
  - the National Council of Provinces ("**the NCOP**") and the provincial legislatures did not facilitate sufficient public participation during the Parliamentary processes as required by sections 72 and 118 of the Constitution ("**the Public Participation Reservation**").
- Section 79(2) of the Constitution requires the legislature to ensure that the "joint rules and orders" of Parliament provide a procedure for the reconsideration of a bill by the NA and the participation of the NCOP.
- Under section 79(3) of the Constitution, the NCOP must participate in the reconsideration of a bill that the President has referred back to the NA if:
  - the President's reservations about the constitutionality of a bill relate to a procedural matter that involves the NCOP; or
  - sections 74(1), (2) or (3)(b) or 76 were applicable to the passing of the bill.
- The Bill was tagged under section 76 of the Constitution as a bill affecting the provinces and, as such, **the NCOP must participate in its reconsideration**.