

REPUBLIC OF SOUTH AFRICA

**NATIONAL PAYMENT
SYSTEM BILL**

(As introduced in the National Assembly)

(MINISTER OF FINANCE)

[B 99—98]

REPUBLIEK VAN SUID-AFRIKA

**NASIONALE
BETALINGSTELSELWETSONTWERP**

(Soos ingedien in die Nasionale Vergadering)

(MINISTER VAN FINANSIES)

[W 99—98]

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BILL

To provide for the management, administration, operation, regulation and supervision of payment, clearing and settlement systems in the Republic of South Africa; and to provide for connected matters.

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

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Definitions	20

- 1.** In this Act, unless the context otherwise indicates—
- (i) **“bank”** means a bank as defined in section 1 of the Banks Act; (i)
 - (ii) **“Banks Act”** means the Banks Act, 1990 (Act No. 94 of 1990); (ii)
 - (iii) **“branch of a foreign institution”** means a branch by means of which a foreign institution conducts the business of a bank in the Republic in terms of a written authorisation granted by the Registrar of Banks in terms of section 18A of the Banks Act; (xiv) 25
 - (iv) **“clear”** or **“clearing”** means the exchange of payment instructions; (xviii)
 - (v) **“mutual bank”** means a mutual bank as defined in section 1 of the Mutual Banks Act; (ix) 30
 - (vi) **“Mutual Banks Act”** means the Mutual Banks Act, 1993 (Act No. 124 of 1993); (xx)
 - (vii) **“netting”** means the determination of the nett payment obligations between two or more system participants within a payment clearing house or the determination of the nett settlement obligations between two or more system participants within the payment system; (viii) 35
 - (viii) **“payment clearing house”** means an arrangement between two or more system participants governing the clearing of payment instructions between those system participants; (vii)

- (ix) **“payment instruction”** means an instruction to a system participant to transfer funds or make a payment; (iii)
- (x) **“payment obligation”** means an indebtedness that is owed by one system participant to another as a result of the clearing of one or more payment instructions; (vi) 5
- (xi) **“payment system”** means a system that enables payments to be effected between a payer and a beneficiary; (iv)
- (xii) **“payment system management body”** means a body recognised by the Reserve Bank in terms of section 3(1); (v)
- (xiii) **“person”** includes any partnership; (x) 10
- (xiv) **“Reserve Bank”** means the South African Reserve Bank referred to in section 2 of the South African Reserve Bank Act; (xi)
- (xv) **“settlement instruction”** means an instruction given to the settlement system by a system participant or by a payment clearing house to effect settlement of one or more payment obligations or to discharge any other obligation of one system participant to another system participant; (xv) 15
- (xvi) **“settlement obligation”** means an indebtedness that is owed by one system participant to another as a result of one or more settlement instructions; (xvii)
- (xvii) **“settlement system”** means a system established and operated by the Reserve Bank for the discharge of payment and settlement obligations between system participants; (xvi) 20
- (xviii) **“South African Reserve Bank Act”** means the South African Reserve Bank Act, 1989 (Act No. 90 of 1989); (xix)
- (xix) **“system operator”** means a person authorised by the payment system management body to provide clearing processing services on behalf of two or more system participants or a payment clearing house; (xiii) 25
- (xx) **“system participant”** means a member of the payment system management body. (xii)

Powers and duties of Reserve Bank regarding payment system

2. (1) The Reserve Bank, as contemplated in section 10(1)(c) of the South African Reserve Bank Act, may exercise the powers and must perform the duties conferred and imposed on it by this Act. 30

(2) The board of directors of the Reserve Bank may, in writing and on such conditions as the board considers necessary—

- (a) delegate to any officer of the Reserve Bank any power conferred on the Reserve Bank by this Act; or 35
- (b) authorise any such officer to perform any duty imposed on the Reserve Bank by this Act.

(3) Any delegation of a power or authorisation to perform a duty under subsection (2)— 40

- (a) does not prevent the board of directors of the Reserve Bank from exercising that power or performing that duty; and
- (b) may at any time be withdrawn in writing by that board.

Payment system management body

3. (1) Subject to subsection (2), the Reserve Bank may recognise a payment system management body established with the object of organising, managing and regulating the participation of its members in the payment system. 45

(2) The Reserve Bank may recognise a payment system management body as contemplated in subsection (1) if that Bank is satisfied that—

- (a) the payment system management body, as constituted, fairly represents the interests of all banks, mutual banks and branches of foreign institutions participating in the payment system; 50
- (b) the deed of establishment or constitution, as the case may be, and the rules of the payment system management body, including the rules relating to admission as members of that body, are fair, equitable and transparent; and 55
- (c) it will be enabled to adequately oversee the affairs of the payment system management body and its members in the discharge of the Reserve Bank’s responsibilities, specified in section 10(1)(c)(i) of the South African Reserve

Bank Act, regarding the monitoring, regulation and supervision of payment, clearing and settlement systems.

(3) Only—

- (a) the Reserve Bank; and
- (b) a bank, mutual bank or branch of a foreign institution that complies with the entrance and other applicable requirements laid down in the rules of a payment system management body,

may be members of the payment system management body.

(4) No body, member of that body or any other person may participate in the settlement system unless—

- (a) in the case of that body, the body is recognised by the Reserve Bank as a payment system management body in terms of subsection (1); or
- (b) in the case of that other person, the person is a member of a payment system management body recognised by the Reserve Bank as contemplated in paragraph (a).

Objects and rules of payment system management body

4.(1) The objects of the payment system management body are to manage and control all matters affecting payment obligations and the clearing or netting of payment obligations and, in connection with those objects—

- (a) to provide a forum for the consideration of matters of policy and mutual interest concerning its members;
- (b) to act as a medium for communication by its members with the South African Government, the Reserve Bank, the Registrar of Banks, the Registrar of Financial Institutions, any financial or other exchange, other public bodies, authorities and officials, the news media, the general public and other private associations and institutions; and
- (c) to deal with and promote any other matter of interest to its members and to foster co-operation between them.

(2) In addition to any other provisions thereof, the rules of the payment system management body must empower that body—

- (a) to admit members and to regulate, control and terminate membership;
- (b) to constitute, establish or dissolve any body, committee or forum consisting of its members and which has an impact on, interfaces with, has access to or makes use of payment, clearing or settlement systems or operations;
- (c) to—
 - (i) determine the criteria subject to which any person is to be authorised to act as a system operator within the payment system in order to provide specific services to one or more members of the payment system management body or to act on behalf of those members; and
 - (ii) authorise that person as such a system operator in accordance with those criteria; and
- (d) to determine criteria subject to and in accordance with which a member may be authorised to introduce any person to provide payment services.

Settlement provisions

5. (1) In this section “**money**” means a banknote or coin issued by the Reserve Bank in terms of section 10(1)(a)(iii) read with section 14 of the South African Reserve Bank Act.

(2) The discharge of settlement obligations between system participants is effected in money or by means of entries passed through the settlement system.

(3) A settlement that has been effected in money or by means of an entry to the credit of the account maintained by the beneficiary system participant with the Reserve Bank for settlement purposes, is a final and irrevocable settlement.

(4) No settlement in terms of a settlement instruction which has been finally and irrevocably effected in terms of subsection (3) may be reversed or set aside.

(5) When a system participant is wound up, a copy of—

- (a) the application for winding-up, when it is made; and
 - (b) the subsequent winding-up order,
- must be lodged with the Reserve Bank.

(6) When a system participant is wound up, the relevant winding-up order does, despite sections 341(2) and 348 of the Companies Act, 1973 (Act No. 61 of 1973), not affect any settlement that has become final and irrevocable in terms of subsection (3) prior to the lodgement of the copy of that order with the Reserve Bank in terms of subsection (5). 5

(7) The Reserve Bank may, in consultation with the payment system management body, prescribe by notice in the *Gazette* such conditions, rules or procedures as it considers necessary regarding the issue of settlement instructions and discharge of settlement obligations. 10

Clearing provisions

6. (1) No person may clear payment instructions unless that person is a system participant. 15

(2) Any person that contravenes the provisions of subsection (1) is guilty of an offence.

Netting agreements and netting rules

7. (1) The provisions of this section apply despite anything to the contrary in the law relating to insolvency or in the Banks Act or the Mutual Banks Act. 20

(2) If a system participant is wound up or placed under judicial management or a curator is appointed to a system participant, any provision contained in a written netting agreement to which that system participant is a party, or any netting rules and practices applicable to the system participant, is binding upon the liquidator, judicial manager or curator, as the case may be, in respect of any payment or settlement obligation— 25

(a) which has been determined through netting prior to the date of the winding-up order, judicial management order or appointment of the curator, as the case may be; and

(b) which is to be discharged on or after the date of the winding-up order, judicial management order or the appointment of the curator, as the case may be, or the discharge of which was overdue on the date of the winding-up order, judicial management order or the appointment of the curator, as the case may be. 30

Utilisation of assets provided as security to Reserve Bank or payment clearing house

8. Despite anything to the contrary in the law relating to insolvency, any asset of a system participant which was provided prior to the date of any order for that system participant's winding-up, by that participant— 35

(a) to the Reserve Bank as security for a loan in respect of its settlement obligations may be utilised by the Reserve Bank to the extent required for the discharge of those settlement obligations of the system participant; or 40

(b) in terms of a written agreement with any payment clearing house, as security in respect of its payment obligations, may be utilised by the payment clearing house to the extent required for the discharge of those payment obligations.

Information

9. (1) The Reserve Bank has access to any information relating to the volumes or values of payment and settlement instructions or payment and settlement obligations, and system participants must on request provide such information to the Reserve Bank. 45

(2) Subject to subsection (3), any information—

(a) obtained by the Reserve Bank in terms of subsection (1); and

(b) identifying a specific system participant,

is confidential and may not be disclosed by any director or officer of the Reserve Bank to any person, except to an officer of the Reserve Bank who requires that information for purposes of the execution of his or her duties in terms of this Act, the South African Reserve Bank Act, the Banks Act or the Mutual Banks Act. 5

(3) Despite subsection (2) of this section and section 33 of the South African Reserve Bank Act, the Reserve Bank may disclose any information of which the disclosure is necessary to protect the integrity, effectiveness or security of the payment system.

(4) A person that contravenes the provisions of subsection (2) is guilty of an offence. 10

Settlement of disputes

10. (1) In this section “business day” means any day other than a Saturday, Sunday or public holiday.

(2) If any system participant considers itself wronged by a decision taken by the Reserve Bank under a provision of this Act, the matter is deemed to constitute a dispute between that system participant and the Reserve Bank, which dispute must be settled as provided in this section. 15

(3) The system participant concerned must in writing furnish the Reserve Bank with full particulars of its grievance, and thereafter the system participant and the Reserve Bank must attempt to settle the dispute by consensus within seven business days of the receipt by the Reserve Bank of those particulars. 20

(4) If the system participant and the Reserve Bank do not succeed in settling the dispute as contemplated in subsection (3), they may agree to attempt to settle the dispute by mediation within a further period of 10 business days.

(5) Mediation as contemplated in subsection (4) means a process whereby— 25

(a) the system participant concerned and the Reserve Bank agree on a mediator;

(b) the mediator familiarises himself or herself with the position held by the system participant concerned and the Reserve Bank, respectively;

(c) the mediator, the system participant concerned and the Reserve Bank discuss the dispute at a meeting attended by them all; 30

(d) the system participant concerned and the Reserve Bank at or following such meeting attempt to settle the dispute by consensus; and

(e) the system participant concerned and the Reserve Bank share the mediator’s costs equally.

(6) If the system participant concerned and the Reserve Bank are unable to settle the dispute by consensus as contemplated in either subsection (3) or (5), the dispute must be referred— 35

(a) to a single arbitrator to be agreed on between the system participant and the Reserve Bank; or

(b) failing such agreement, to an arbitrator appointed at the request of the system participant and the Reserve Bank by a recognised body concerned with the facilitation and promotion of the resolution of disputes by means of mediation or arbitration. 40

(7) An arbitrator referred to in subsection (6) must, as far as possible, be a person appointed on account of his or her knowledge of the law and the payment system. 45

(8) The provisions of the Arbitration Act, 1965 (Act No. 42 of 1965), apply, with the changes required by the context, to an arbitration contemplated in subsection (6).

(9) The decision of the arbitrator is final and binding on the system participant concerned and the Reserve Bank.

Directives by Reserve Bank 50

11. (1) In this section “systematic risk” means the risk that the failure of one or more system participants, for whatever reason, to meet their payment obligations within the payment system or their settlement obligations within the settlement system, may result in any or all of the other system participants being unable to meet their respective payment or settlement obligations. 55

(2) If reasonable grounds exist to believe that any person is engaging in or is about to engage in any act, omission or course of conduct, with respect to the payment system, that results or is likely to result in systemic risk, or is or will be contrary to the public interest in the integrity, effectiveness or security of the payment system, the Reserve Bank may issue a directive in writing requiring that person— 5

(a) to cease or refrain from engaging in the act, omission or course of conduct or to perform such other acts as are necessary to remedy the situation and are specified in the directive; or

(b) to provide the Reserve Bank with such information and documents, relating to the matter, as are specified in the directive, 10

within the period specified in the directive.

(3) Any person who neglects, refuses or fails to comply with a directive issued under subsection (2)(a) is guilty of an offence.

(4) Irrespective of whether criminal proceedings have been or may be instituted against a person in respect of an offence referred to in subsection (3), the Reserve Bank may apply to a High Court having jurisdiction for an order directing that person to comply with a directive issued under subsection (2). 15

Retention of records

12. (1) Despite anything to the contrary in any legislation relating to the retention of records, the Reserve Bank and system participants must retain all records obtained by them during the course of the operation and administration of the settlement system for a period of five years as from the date of each particular record. 20

(2) The retention of records in terms of subsection (1) may be effected by means of a computer as defined in section 1(1) of the Computer Evidence Act, 1983 (Act No. 57 of 1983). 25

Penalties

13. Any person convicted of an offence referred to in—

(a) section 6(2) or 11(3), is liable to a fine not exceeding R1 million or to imprisonment for a period not exceeding five years, or to both such fine and such imprisonment; or 30

(b) section 9(4), is liable to a fine not exceeding R1 000 or to imprisonment for a period not exceeding six months, or to both such fine and such imprisonment.

Review of Act

14. The Reserve Bank must, with the co-operation of the payment system management body, establish a standing committee— 35

(a) to review this Act from time to time; and

(b) to make recommendations to the Minister of Finance with regard to amendments to this Act which—

(i) in the opinion of that committee, have become advisable owing to changed circumstances; or 40

(ii) the administration of this Act has shown to be advisable.

Short title

15. This Act is called the National Payment System Act, 1998.

MEMORANDUM ON THE OBJECTS OF THE NATIONAL PAYMENT SYSTEM BILL, 1998

1. PURPOSE OF BILL

1.1 The Bill aims to regulate the activities of participants and other role-players within three distinct areas:

- * The payment system in general, which encompasses all payment related activities from end-user to end-user;
- * the clearing system, which will be the sole domain of system participants, albeit with the assistance of system operators as their duly appointed agents; and
- * the settlement system, which will be provided exclusively to system participants by the South African Reserve Bank ("the Reserve Bank").

1.2 The distinction between payment obligations and settlement obligations are also important in order to, *inter alia*, obtain legal certainty with regard to netting agreements in insolvency situations, not only in respect of obligations between system participants within a payment clearing house, but also within the settlement system provided by the Reserve Bank.

2. CONTENTS OF BILL

2.1 Clause 1: Definitions

This clause contains the definitions for expressions used in the Bill.

2.2 Clause 2: Powers and duties of Reserve Bank

The Reserve Bank, as managed by its board of directors, is statutorily entrusted, in section 10(1)(c) of the South African Reserve Bank Act, 1989 (Act No. 90 of 1989), with supervisory and regulatory functions in respect of payment, clearing and settlement systems ("National Payment System").

2.3 Clauses 3 and 4: Payment system management body, and its objectives and rules

System participants obviously have the right to associate themselves in groups as they wish. When it concerns payment system issues, however, the Reserve Bank, in view of its statutory responsibilities referred to above, needs to be statutorily empowered to recognise a body, representative of the majority or all of the system participants and which adheres to the principles of the National Payment System.

2.4 Clause 5: Settlement provisions

The crux of the payment system is the finality and irrevocability of settlement. Due to the cardinal role which a payment system fulfills within the financial system of the country and its economy, it is imperative that settlement obligations between system participants are settled finally and irrevocably. This implies that once settlement has taken place, it should not be possible, in law, to be reversed or set aside. This principle is also an internationally accepted prerequisite for a safe and sound payment system.

A problem presented to the payment system by the South African law is that sections 341(2) and 348 of the Companies Act, 1973 (Act No. 61 of 1973), renders the winding-up of a company retrospective to the date of the presentation to court of the application concerned. This means that all business conducted and dispositions made by that company after the date of the winding-up application to court up to the date of the granting of the winding-up order will be subject to the discretion of a liquidator. When one considers that an efficient computerised payment system, such as envisaged by the National Payment System, would facilitate the circulation of large amounts of money almost every minute of the day, it is clear that to unwind payments made by a system participant within a period of just one day would not only negatively affect other system participants, but would have a detrimental effect on the system as a whole. Such a

situation could lead to a systemic crisis which, in turn, could have an adverse effect on the financial system and economy of the country. Since system participants are subject to the Companies Act, 1973, sections 341(2) and 348 of that Act will be applicable to them in the case of one of them being wound up.

In view of the above, clause 5, *inter alia*, proposes that in the case of the winding-up of a system participant, firstly, a copy of the application for winding-up as well as of the subsequent winding-up order be lodged also with the Reserve Bank. Secondly, that clause proposes that all settlements to which that system participant has been a party and which have become final and irrevocable, in terms of clause 5(3), prior to such lodgement of the winding-up order with the Reserve Bank, shall not be subject to the provisions of section 341(2) of the Companies Act, 1973, which prohibits the disposition of its property by a company once the winding-up of such a company has commenced. Such receipt of a copy of the winding-up order will also be the cue for the Reserve Bank to take steps to suspend all payment, clearing and settlement related transactions with regard to the system participant concerned.

This deviation from the normal principles of liquidation is vitally important to ensure a reliable and stable payment system. In weighing up the interests of individual creditors of a liquidated system participant on the one side and the public's interest in having a safe and sound payment system on the other, it is considered that the public interest should weigh heavier than those of individual creditors and that a deviation from the normal rules pertaining to liquidations is justified in the circumstances. Once the deviation becomes law, however, all creditors dealing with system participants will or should be aware that obligations incurred by those system participants within the payment system in the ordinary course of business, will take precedence over any other claims against such system participant up to and until the winding-up order is lodged with the Reserve Bank.

2.5 Clause 6: Clearing provisions

In order to ensure that the clearing process remains the sole domain of system participants, it is imperative that all other persons are prohibited from performing clearing, as defined. System participants should be able to determine their own risk exposures *vis-à-vis* other system participants, and the Reserve Bank, as supervisor of the payment system, should be able to determine the relevant risk exposures of all participants within the payment system. If any other person were permitted to clear payment instructions of system participants and to transmit the netted amount to one system participant for settlement, the risk exposures of the other system participants will not be known, and the total risk within the system could become distorted.

2.6 Clause 7: Netting agreements and netting rules

Netting is a payment system practice and not (yet) a legal term. The legal term that closely resemble netting is the term "set-off". The common law, however, only recognises set-off in a rigid set of circumstances. The common law requirements for set-off are, briefly, that the two debts being set-off should be those of the persons agreeing to the set-off, that the debts being set-off are of the same nature and that the debts should be claimable, liquid or easily proved. Although the question of whether the netting of interbank obligations falls within the abovementioned requirements could be debated, it is submitted that netting as practised by banks within the payment system is not set-off as envisaged or provided for by the common law, but rather is an innovation brought about by payment system practices and further developed as a result of technological advances. There is consequently a need for the law to define the practice of netting and to provide participants in the payment system with legal certainty with regard to such practice.

The potential legal obstacle in this regard is contained in section 46 of the Insolvency Act, 1936 (Act No. 24 of 1936), which essentially affords the trustee of a sequestrated

estate a discretion to abide by or to disregard a set-off agreement entered into by an insolvent. Since netting is not a legal term as yet and since it closely resembles set-off, the danger exists that a liquidator might regard netting as set-off and might disregard netting agreements, which may cause untold problems within the payment system or which may result in lengthy and costly law suits.

It is consequently proposed that the practice of netting, as defined in the Bill, be recognised in law and that the uncertainties prevalent in cases of the insolvency or placing under curatorship of system participants be conclusively resolved. For this purpose it is proposed that a liquidator, judicial manager or curator, that has been duly appointed over a system participant, should be bound by netting agreements between or netting rules applicable to system participants within the settlement system as well as in a payment clearing house.

The proposed provisions closely resemble the provisions of sections 35A and 35B which were inserted in the Insolvency Act, 1936, in 1995 to address netting agreements and netting rules between participants in certain defined markets, but which do not extend to netting agreements and netting rules within the payment or settlement systems. Sections 35A and 35B of the Insolvency Act, 1936, were, by way of an amendment to section 69 of the Banks Act, 1990, in 1996, declared to be applicable also to a bank under curatorship, but this extension likewise does not deal with netting agreements and netting rules applicable to participants in the payment and settlement systems.

The overriding interest that is to be served by the abovementioned proposed provisions, is that of the public's interest in a safe and sound payment system. If a liquidator, judicial manager or curator were not bound by the netting agreements or netting rules between system participants within the payment system, it could lead to transactions representing a large amount of money having to be reversed and unwound, which state of affairs could lead to a systemic crisis which, in turn, could have an adverse effect on the economy.

2.7 Clause 8: Utilisation of assets provided as security to Reserve Bank or payment clearing house

System participants are required to either pre-fund their settlement obligations, or to provide adequate security for such settlement. Where security is so provided by a system participant, and such a system participant becomes insolvent, it would adversely affect the settlement system if security so provided prior to the date of any order for the winding-up of such a system participant could not be utilised by either a particular payment clearing house or the Reserve Bank in respect of such a system participant's payment or settlement obligations.

2.8 Clause 9: Information

In order for the Reserve Bank to adequately fulfil its role as supervisor of the payment system and to have a holistic view of the risk exposures of the respective system participants, it is necessary to afford the Reserve Bank the right to information pertaining to the volume or value of payment and settlement instructions or obligations within the payment system. The Reserve Bank's right to disclose information that might identify a specific system participant is, however, limited.

2.9 Clause 10: Settlement of disputes

In the event of a system participant being aggrieved by a decision taken by the Reserve Bank, provision is made for the dispute to be resolved through a process of consensual settlement or mediation or, as a last resort, arbitration. It is intended that this procedure will be used in place of the more costly and time-consuming court procedures.

2.10 Clause 11: Directives by Reserve Bank

As the supervisor of the payment system as a whole, it is imperative that the Reserve Bank be granted the power to issue directives to any person who is engaging or is about to engage in any act, omission or course of conduct relating to the payment system that results or is likely to result in systemic risk or is contrary to the public interest.

2.11 Clause 12: Retention of records

Due to the fact that there are a number of Acts that regulate the retention of records, it is considered that in order to attain legal certainty a provision relating to the retention of records within the settlement system is necessary. A retention period of five years is considered reasonable considering the volumes of information that might be processed by the system.

2.12 Clause 13: Penalties

The Bill creates three offences, namely, in clause 6(2), which prohibits any person other than a system participant from performing clearing, as defined; in clause 11(3), which declares a failure to comply with certain directives from the Reserve Bank to be an offence, and in clause 9(4), which provides that a director or officer of the Reserve Bank may not disclose certain information. Since role-players within the payment system generally have a strong capital base, it is considered necessary, in the case of the first-mentioned two offences, to set the upper limit of a possible fine at R1 million to act as an efficient deterrent against committing the said offences. A conviction of an offence in terms of clause 9(4) will bear a maximum fine of R1 000.

2.13 Clause 14: Review of Act

It is proposed that the Reserve Bank, with the co-operation of the payment system management body recognised in terms of clause 3(1), will establish a standing committee to review the Act from time to time.

3. CONSULTATION

The formulation of the Bill took place in close consultation and collaboration with the banking sector through the intermediation of their representative body, the Banking Council. The Bill was also submitted for comment to the National Economic Development and Labour Council, the Department of Justice, the Companies Act Advisory Board, the Financial Services Board, the Policy Board for Financial Services and Regulation, the General Council of the Bar, the Association of Law Societies and the law faculties of all universities. Finally, the Bill was published for general information and comment in the *Gazette* of 26 March 1998.

4. PARLIAMENTARY PROCEDURE

The State Law Advisers are of the opinion that the Bill must be dealt with by Parliament in accordance with the procedure established by section 75 of the Constitution of the Republic of South Africa, 1996.

