

REPUBLIC OF SOUTH AFRICA

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# JUDICIAL MATTERS AMENDMENT BILL

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*(As amended by the Portfolio Committee on Justice and Correctional Services  
(National Assembly))  
(The English text is the official text of the Bill)*

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(MINISTER OF JUSTICE AND CORRECTIONAL SERVICES)

[B 7B—2023]

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- appeared in court in terms of a summons or written notice in respect of an offence contemplated in any regulations that have been made in terms of section 27(2) of the Disaster Management Act, 2002, where it was permissible for the person to admit his or her guilt and who have been convicted and sentenced by the court in respect of the offence in question; and
- further regulate the calling of a witness by the court;
- the Matrimonial Property Act, 1984, so as to repeal an unconstitutional provision;
- the Sheriffs Act, 1986, so as to amend the duration of the term of office of members of the Board for Sheriffs;
- the Intestate Succession Act, 1987, so as to extend the meaning of “spouse”;
- the Maintenance of Surviving Spouses Act, 1990, so as to insert definitions;
- the National Prosecuting Authority Act, 1998, so as to further regulate the due dates of reports by Directors of Public Prosecutions and the National Director of Public Prosecutions;
- the Debt Collectors Act, 1998, so as to further regulate the term of office of members of the Council for Debt Collectors;
- the Domestic Violence Act, 1998, so as to penalise the making of a false declaration;
- the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000, so as to give effect to a judgment of the Constitutional Court;
- the Protected Disclosures Act, 2000, so as to effect a technical amendment;
- the Judges Remuneration and Conditions of Employment Act, 2001, so as to further regulate the conditions of employment of judges of the Constitutional Court, the Supreme Court of Appeal and the High Court;
- the Prevention and Combatting of Corrupt Activities Act, 2004, so as to regulate and strengthen the duty of private sector entities to put in place measures against corrupt activities;
- the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, so as to—
  - regulate the designation of public health establishments for purposes of providing post exposure prophylaxis and carrying out compulsory HIV testing;
  - amend the definition of ‘sexual offence’;
  - regulate the designation of sexual offences courts; and
  - regulate the manner in which child pornography must be dealt with and be disposed of;
- the Superior Courts Act, 2013, so as to further regulate—
  - applications for leave to appeal and appeals;
  - the composition of courts of appeal;
- the South African Human Rights Commission Act, 2013, so as to further regulate the powers of the South African Human Rights Commission with respect to its investigations;
- the Legal Aid South Africa Act, 2014, so as to further regulate the—
  - appointment of the Board;
  - substitution of obsolete provisions;
- the International Arbitration Act, 2017, so as to effect a technical correction; and
- repeal the common law crime of defamation, and to provide for matters connected therewith.

PARLIAMENT of the Republic of South Africa enacts, as follows:—

**Amendment of section 51 of Act 32 of 1944, as amended by section 7 of Act 19 of 1963, substituted by section 9 of Act 80 of 1964, amended by section 5 of Act 91 of 1977 and substituted by section 2 of Act 19 of 1985**

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1. Section 51 of the Magistrates' Courts Act, 1944, is hereby amended by the addition of the following subsections:

“(4) When the court requires information pertaining to court requires information pertaining to an infrastructure related or operational matter that arose at the court which falls within the responsibility of the Department of Justice and Constitutional Development, the court manager of that court must be subpoenaed to give evidence for this purpose and if he or she is unavailable or unable to respond or provide a satisfactory response, the following officials of the Department of Justice and Constitutional Development may be subpoenaed:

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- (a) the provincial Head of the province in which the court is situated;
- (b) the Deputy Director-General responsible for court administration; or
- (c) the Director-General.”.

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**Amendment of section 93ter of Act 32 of 1944, as inserted by section 3 of Act 14 of 1954 and amended by section 2 of Act 16 of 1959, section 10 of Act 91 of 1977, section 1 of Act 118 of 1991, section 62 of Act 120 of 1993 and section 2 of Act 67 of 1998**

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2. Section 93ter of the Magistrates' Courts Act, 1944, is hereby amended by the substitution in subsection (1) for paragraph (b) of the following paragraph:

“(b) in considering a community-based punishment in respect of any person who has been convicted of any offence,

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summon to his or her assistance any one or two persons who, in his or her opinion, may be of assistance at the trial of the case or in the determination of a proper sentence, as the case may be, to sit with him or her as assessor or assessors[: **Provided that if an accused is standing trial in the court of a regional division on a charge of murder, whether together with other charges or accused or not, the judicial officer shall at that trial be assisted by two assessors unless such an accused requests that the trial be proceeded with without assessors, whereupon the judicial officer may in his discretion summon one or two assessors to assist him].”.**

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**Amendment of section 28 of Act 66 of 1965, as substituted by section 3 of Act 79 of 1971 and amended by section 7 of Act 86 of 1983 and section 9 of Act 20 of 2001**

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3. Section 28 of the Administration of Estates Act, 1965, is hereby amended—

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

“(1) An executor or a person appointed in terms of section 18—

- (a) shall, unless the Master otherwise directs, as soon as he or she has in hand moneys in the estate in excess of an amount determined by the Chief Master, by directive, from time to time, open a [cheque] transactional account, or the type of account as directed from time to time by the Chief Master by directive, in the name of the estate with a bank in the Republic and shall deposit therein the moneys which he or she has in hand and such other moneys as he or she may from time to time receive for the estate;
- (b) may open a savings account in the name of the estate with a bank and may transfer [thereto] into that account so much of the moneys deposited in the account referred to in paragraph (a) as is not immediately required for the payment of any claim against the estate; and
- (c) may place so much of the moneys deposited in the account referred to in paragraph (a) as is not immediately required for the payment of any claim against the estate on interest-bearing deposit with a bank in the Republic.”; and

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(b) by the substitution for subsection (4) of the following subsection:

“(4) All payments made from an account referred to in subsection (1)(a) must—

- (a) be made by the executor or his or her duly authorised agent or a person appointed in terms of section 18, as the case may be;
- (b) identify the payee, the amount paid and the cause of payment;
- (c) identify the account of the payee in respect of an electronic transfer of payment; and
- (d) contain relevant information to identify the estate and any such additional information as directed by the Master.”

**Amendment of section 34 of Act 66 of 1965, as amended by section 4 of Act 15 of 1978, section 10 of Act 86 of 1983, section 3 of Act 12 of 1984 and section 10 of Act 20 of 2001**

4. Section 34 of the Administration of Estates Act, 1965, is hereby amended by the substitution for subsection (11) of the following subsection:

“(11) When an account has been confirmed by the Master, the executor shall forthwith pay the creditors and distribute the estate among the heirs, if any, in accordance with the account, and lodge with the Master the receipts and acquittances of the creditors and heirs, if any: Provided that [**a cheque purporting to be drawn payable to a creditor or heir in respect of any claim or share due to him and paid by the banker on whom it is drawn,**] an affidavit by the executor in which he or she declares that a creditor was paid or that an heir received his or her share in accordance with the account, may be accepted by the Master in lieu of any such receipt or acquittance.”

**Amendment of section 35 of Act 66 of 1965, as amended by section 5 of Act 15 of 1978, section 11 of Act 86 of 1983 and section 4 of Act 12 of 1984**

5. Section 35 of the Administration of Estates Act, 1965, is hereby amended by the substitution for subsection (12) of the following subsection:

“(12) When an account has lain open for inspection as [**hereinbefore**] provided in this section and—

- (a) no objection has been lodged; or
- (b) an objection has been lodged and the account has been amended in accordance with the Master’s direction and has again lain open for inspection, if necessary, as provided in subsection (11), and no application has been made to the Court within the period referred to in subsection (10) to set aside the Master’s decision; or
- (c) an objection has been lodged but withdrawn, or has not been sustained and no such application has been made to the Court within the said period, the executor shall forthwith pay the creditors and distribute the estate among the heirs in accordance with the account, lodge with the Master the receipts and acquittances of such creditors and heirs and produce to the Master the deeds of registration relating to such distribution, or lodge with the Master a certificate by the registration officer or a conveyancer specifying the registrations which have been effected by the executor: Provided that[—
  - (i) **a cheque purporting to be drawn payable to a creditor or heir in respect of any claim or share due to him and paid by the banker on whom it is drawn; or**
  - (ii) an affidavit by the executor in which he or she declares that a creditor was paid or that an heir received his or her share in accordance with the account, may be accepted by the Master in lieu of any such receipt or acquittance.”

**Amendment of section 95 of Act 66 of 1965**

6. The following section is hereby substituted for section 95 of the Administration of Estates Act, 1965:

**“Review of Master’s appointments etc.**

(1) The Chief Master may review any appointment of an executor, curator or interim curator, and every decision, ruling, order, direction or taxation made by the Master, after taking into consideration representations from an executor, curator, interim curator, beneficiary or any other person whom the Chief Master considers relevant, and the Chief Master may confirm, set aside or vary the appointment, decision, ruling, order, direction or taxation, as the case may be. 5

(2) Representations must be in writing and must include all relevant information pertaining to the matter, including— 10

- (a) the estate number;
- (b) name of the deceased or executor of the estate;
- (c) name of the court in whose jurisdiction the matter falls; and
- (d) a copy of the correspondence from the Master regarding his or her decision on the matter. 15

(3) A decision of the Chief Master taken in terms of subsection (1) shall be subject to appeal or review by the Court upon motion at the instance of any person aggrieved thereby, and the Court may on any such appeal or review confirm, set aside or vary the appointment, decision, ruling, order, direction or taxation, as the case may be. 20

(4) Pursuant to subsection (1), the Chief Master—

- (a) must determine a review and appeal policy and issue policy directives to give effect to the provisions of this section or any other law; and
- (b) may intervene in any stage of the process when policy directives are not complied with.” 25

**Amendment of section 96 of Act 66 of 1965**

7. The following section is hereby substituted for section 96 of the Administration of Estates Act, 1965: 30

**“Proceedings by Master**

**96.** (1) Notwithstanding anything contained in any other law, the Chief Master, acting upon the request of a Master or a person designated by him or her, may— 35

- (a) institute civil proceedings in pursuance of this Act, against any executor, tutor, curator, administrator or interim executor or curator, in the High Court within whose area of jurisdiction the appointment of such executor, tutor, curator, administrator or interim executor or curator was made, whether or not such executor, tutor, curator, administrator or interim executor or curator is resident within that area or otherwise subject to the jurisdiction of that High Court; and
- (b) in any such proceedings, proceed by way of application or motion and report to the Court in writing the facts upon which he or she relies instead of stating them in an affidavit. 40 45

(2) Whenever, in the course of their duties, the Chief Master or a person delegated by him or her, finds it necessary to lay any facts before the Court otherwise than upon formal application or motion, they may do so by way of a report in writing: Provided that the Court may refer any such report back to the Chief Master or the delegated person, and direct them to proceed by way of formal application or motion. 50

(3) Whenever any difference of opinion upon a question of law arises between the Master and an executor in the distribution of an estate and a person under the age of 18 years has an interest in such decision, the Master and the executor may state a case, in writing, for consideration by a judge in chambers. 55

(4) The decision of the judge is binding upon the Master and the executor, without prejudice to the rights of other persons interested in the distribution: Provided that the judge may refer the matter to the Court for argument.”.

**Insertion of section 96A in Act 66 of 1965**

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8. The following section is hereby inserted after section 96 of the Administration of Estates Act, 1965:

**“Powers, duties and functions of Chief Master**

**96A.** The Chief Master, as the head of the Offices of the Master of the High Court, shall have authority over the exercise of all powers, and the performance of all the duties and functions conferred or imposed on or assigned to any Master by this Act or any other law.”.

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**Amendment of section 103 of Act 66 of 1965, as amended by section 46 of Act 97 of 1986, section 1 of Act 1 of 1992, section 18 of Act 20 of 2001 and section 6 of Act 8 of 2017**

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9. Section 103 of the Administration of Estates Act, 1965, is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) The Minister may make regulations—

- (a) providing for the custody and preservation of any records, moneys or securities in the offices of Masters, the removal from such offices and preservation in any other place of such records and the destruction of such records of an ephemeral nature;
- (b) as to payments out of working balances of the guardian’s fund;
- (c) providing for the good conduct of Master’s offices or prescribing the practice and procedure to be observed therein;
- (d) prescribing the matters in respect of which Master’s fees shall be payable, the tariff of such fees and the manner in which such fees shall be payable;
- (e) prescribing a tariff of remuneration payable to any person performing any act relating to the liquidation or distribution of an estate on behalf of the executor of the estate in question and prohibiting the charging or recovery of remuneration at a higher tariff than the tariff so prescribed;
- [(eA) prescribing a tariff of remuneration payable, either by way of cession or otherwise, to any person concerning the tracing of someone who is entitled to receive money out of the guardian’s fund, and prohibiting the charging or recovery of remuneration at a higher tariff than the tariff so prescribed;**
- (eA) prescribing which persons, including juristic persons, are prohibited from liquidating or distributing a deceased estate;**
- (eB) prescribing any exemptions from the prohibition contemplated in paragraph (eA), which exemptions may be permanent or to the extent specified in each case;**
- (f) as to all matters which by this Act are required or permitted to be prescribed; and**
- (g) generally, as to all matters which he considers it necessary or expedient to prescribe in order that the purposes of this Act may be achieved.]**
- (f) prescribing which persons, including juristic persons, are prohibited from liquidating or distributing a deceased estate;
- (g) prescribing any exemptions from the prohibition contemplated in paragraph (f), which exemptions may be permanent or to the extent specified in each case;
- (h) as to all matters which by this Act are required or permitted to be prescribed; and
- (i) generally, as to all matters which he or she considers it necessary or expedient to prescribe in order that the purposes of this Act may be achieved.”.

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**Addition of section 57B, 57C and 57D in Act 51 of 1977**

10. The following sections are hereby added after section 57A of the Criminal Procedure Act, 1977:

**“Payment of admission of guilt fine without appearance in court and previous conviction**

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**57B.** (1) The Minister may, in consultation with the National Director of Public Prosecutions and after consultation with the Cabinet member responsible for police and subject to subsection (2), by notice in the *Gazette*, declare any offence, category or class of offences, or offence committed in specified circumstances, in respect of which—

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- (a) an accused may pay a fine without appearing in court; and
- (b) which fine is not recorded in the criminal record book for admission of guilt fines,

as an offence or offences, as the case may be, that does not result in a previous conviction of an accused.

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(2) For purposes of subsection (1), the following grounds and criteria must be considered to determine whether or not an offence may be declared as contemplated in subsection (1):

- (a) The offence must be a statutory offence punishable with a fine, without or with an alternative sentence of imprisonment not exceeding six months in default of payment of such a fine;
- (b) the offence must not—
  - (i) contain an element of violence;
  - (ii) involve the infliction of mental, psychological or physical harm on another person;
  - (iii) involve damage to property;
  - (iv) involve an element of dishonesty;
  - (v) involve cruelty to animals;
  - (vi) be an offence against the administration of justice; or
  - (vii) cause pecuniary or economic loss to another person; and
- (c) a criminal record in respect of the offence in question cannot be regarded as an appropriate mechanism to encourage compliance with the law.

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**Expungement of criminal records of persons whose name appears in records of Criminal Record Centre of South African Police Service after having paid an admission of guilt fine for offences determined in terms of section 57B(1)**

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**57C.** (1) Where a person obtained a criminal record which appears in the database of the Criminal Record Centre of the South African Police Service (“CRC”) after having paid an admission of guilt fine for an offence determined in terms of section 57B(1), the criminal record containing the conviction and sentence in question, of that person in respect of that offence must be expunged automatically by the CRC.

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(2) Where the criminal record of a person referred to in subsection (1) has not been expunged automatically as provided for in that subsection, the criminal record of that person must, on his or her written application to the Director-General of the Department of Justice and Constitutional Development, be expunged in terms of the provisions of this Act.

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**Convictions and sentences in respect of admission of guilt fines relating to offences in terms of regulations made in terms of section 27(2) of Disaster Management Act, 2002**

- 57D.** (1) From the date of commencement of this section, the criminal record of a person which contain the conviction and sentence of a person who— 5
- (a) is deemed to have been convicted and sentenced by a court as contemplated in section 57(6) of this Act, in respect of a specified offence; or
- (b) appeared in court in terms of a summons or written notice referred to in section 57(1) of this Act, in respect of a specified offence where it was permissible for that person to admit his or her guilt and who has been convicted and sentenced by the court in respect of the specified offence in question, 10
- is hereby expunged, determined from the date of payment of the admission of guilt fine referred to in paragraph (a), or the sentence referred to in paragraph (b). 15
- (2) Where the criminal record of a person referred to in subsection (1) has not been expunged automatically as provided for in that subsection, the criminal record of that person must, on his or her written application to the Director-General, in the prescribed form and manner, be expunged. 20
- (3) The Director-General must, on receipt of the written application of an applicant referred to in subsection (2), issue a prescribed certificate of expungement, directing that the conviction and sentence of the person be expunged, if the Director-General is satisfied that the person complies with the criteria envisaged in subsection (1). 25
- (4) An applicant to whom a certificate of expungement has been issued as provided in subsection (3) must, in the prescribed manner, submit the certificate to the head of the CRC, to be dealt with in accordance with subsection (5). 30
- (5) (a) The head of the CRC or a senior person or person of the rank of Director or above, employed at the CRC, who has or have been authorised, in writing, by the head of the CRC to do so, must expunge the criminal record of a person if he or she is furnished by the applicant, with a certificate of expungement as provided for in subsection (3). 35
- (b) The head of the CRC must, on the written request of an applicant, in writing, confirm that the criminal record of the person has been expunged.
- (6) Where the Director-General, in terms of subsection (3), has issued a certificate of expungement, and it subsequently appears that the applicant does not meet the requirements for the expungement of his or her criminal record, the Director-General must— 40
- (a) inform the applicant in writing of the information that has come to his or her attention and that he or she intends to revoke the certificate of expungement;
- (b) afford the applicant an opportunity to furnish compelling written reasons to the Director-General within 90 working days after he or she is informed of the intention to revoke, why his or her record should remain expunged; 45
- (c) inform the applicant in writing within 30 working days after a decision is made of— 50
- (i) his or her decision; and
- (ii) the reasons for revoking the certificate of expungement; and
- (d) inform the head of the CRC, in writing, within 14 working days after the decision was made, to revoke the certificate of expungement and to reinstate the convictions and sentences in question. 55
- (7) If the applicant fails to furnish compelling reasons as contemplated in subsection (6)(b), the Director-General may, subject to the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000), revoke the certificate of expungement.
- (8) (a) The Director-General may delegate any power or assign any duty conferred upon or assigned to him or her in terms of subsection (3) or (6) to an appropriately qualified official in the employ of the Department of 60

Justice and Constitutional Development of the rank of Deputy Director-General.

- (b) A delegation or assignment in terms of paragraph (a)—
- (i) is subject to any limitation, condition and direction which the Director-General may impose; 5
  - (ii) must be in writing; and
  - (iii) does not divest the Director-General of the responsibility concerning the exercise of the power or the performance of the duty.
- (c) The Director-General may—
- (i) confirm, vary or revoke any decision taken in consequence of a delegation or assignment in terms of this subsection, subject to any rights that may have accrued to a person as a result of the decision; and 10
  - (ii) at any time withdraw a delegation or assignment.
- (9) For purposes of this section a “**specified offence**” means any offence contemplated in any regulations that have been made in terms of section 27(2) of the Disaster Management Act, 2002 (Act No. 57 of 2002), in respect of the declaration of the national state of disaster in terms of section 27(1) of that Act, as published in terms of Government *Gazette* No. 43096 on 15 March 2020 and extended from time to time.” 15

**Amendment of section 342A of Act 51 of 1977, as inserted by section 13 of Act 86 of 1996** 20

11. Section 342A of the Criminal Procedure Act, 1977 is hereby amended by the substitution for subsection (1) of the following subsection:

- “(1) A court before which criminal proceedings are pending shall investigate any delays in the completion of proceedings which appears to the court to be unreasonable and which could cause substantial prejudice to the prosecution, the accused or his or her legal adviser, the State or a witness: Provided that when the court requires information pertaining to an infrastructure related or operational matter that arose at the court which falls within the responsibility of the Department of Justice and Constitutional Development, the court manager of that court must be subpoenaed to give evidence for this purpose and if he or she is unavailable or unable to respond or provide a satisfactory response, the following officials of the Department of Justice and Constitutional Development may be subpoenaed: 25
- (a) the provincial Head of the province in which the court is situated; 30
  - (b) the Deputy Director-General responsible for court administration; or
  - (c) the Director-General.”. 35

**Amendment of section 21 of Act 88 of 1984, as amended by section 1 of Act 91 of 1986**

12. Section 21 of the Matrimonial Property Act, 1984, is hereby amended by the deletion of paragraph (a) of subsection (2). 40

**Amendment of section 11 of Act 90 of 1986, as amended by section 8 of Act 14 of 2012**

13. Section 11 of the Sheriffs Act, 1986, is hereby amended by the substitution for subsection (1) of the following subsection:

- “(1) Every member of the Board appointed in terms of section 9(2) shall, subject to section 14A, be appointed for a period of [**three**] five years, but shall, after the expiration of the period for which he or she was appointed, continue to hold office for a further period, but not exceeding [**three**] six months, until his or her successor has been appointed.”. 45

**Amendment of section 1 of Act 81 of 1987, as amended by section 14 of Act 43 of 1992 and section 8 of Act 11 of 2009**

14. Section 1 of the Intestate Succession Act, 1987, is hereby amended by the addition of the following subsection:

“(1A) The word ‘spouse’, wherever it appears in this section, includes a partner in a permanent life partnership in which the partners have undertaken reciprocal duties of support.” 5

**Amendment of section 1 of Act 27 of 1990, as amended by section 8 of Act 11 of 2009**

15. Section 1 of the Maintenance of Surviving Spouses Act, 1990, is hereby amended— 10

(a) by the insertion in subsection (1) of the following definition, after the definition of “executor”:

“**‘marriage’** for the purposes of this Act includes a permanent life partnership in which the partners undertook reciprocal duties of support;” 15

(b) by the insertion in subsection (1) of the following definition, after the definition of “own means”:

“**‘spouse’** for the purposes of this Act, includes a person in a permanent life partnership in which the partners undertook reciprocal duties of support;” and 20

(c) by the substitution in subsection (1) for the definition of “survivor” of the following definition:

“**‘survivor’** means the surviving spouse in a marriage dissolved by death, and includes—

(a) the surviving partner of a permanent life partnership terminated by the death of one partner in which the partners undertook reciprocal duties of support and in circumstances where the surviving partner has not received an equitable share in the deceased partner’s estate; and 25

(b) **[includes]** a spouse of a customary marriage which was dissolved by a civil marriage contracted by her husband in the customary marriage to another woman on or after 1 January 1929 (the date of commencement of sections 22 and 23 of the Black Administration Act, 1927 (Act No. 38 of 1927)), but before 2 December 1988 (the date of commencement of the Marriage and Matrimonial Property Law Amendment Act, 1988 (Act No. 3 of 1988)).” 30 35

**Amendment of section 34 of Act 32 of 1998**

16. Section 34 of the National Prosecuting Authority Act, 1998, is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) A Director must annually, not later than the first day of **[March] June**, submit to the National Director a report on all his or her activities during the previous financial year.” 40

**Amendment of section 35 of Act 32 of 1998**

17. Section 35 of the National Prosecuting Authority Act, 1998, is hereby amended by the substitution in subsection (2) for paragraph (a) of the following paragraph: 45

“(a) The National Director must submit annually, not later than the first day of **[June] September**, to the Minister a report referred to in section 22(4)(g), which report must be tabled in Parliament by the Minister within 14 days, if Parliament is then in session, or if Parliament is not then in session, within 14 days after the commencement of its next ensuing session.” 50

**Amendment of section 3 of Act 114 of 1998, as amended by section 23 of Act 66 of 2008**

18. Section 3 of the Debt Collectors Act, 1998, is hereby amended—

- (a) by the substitution in subsection (4) for paragraph (a) of the following paragraph: 5  
 “(a) A member of the Council, subject to paragraphs (b), (c), (d) and (e), holds office for a term, not exceeding **[three]** five years, as determined by the Minister at the time of the member’s appointment.”; and
- (b) by the substitution in subsection (4) for paragraph (c) of the following paragraph: 10  
 “(c) A member of the Council may be re-appointed at the expiry of his or her term of office for one additional term only.”.

**Amendment of section 17 of Act 116 of 1998, as amended by section 22 of Act 14 of 2021**

19. Section 17 of the Domestic Violence Act, 1998, is hereby amended by the substitution in subsection (1) for paragraph (d) of the following paragraph:

- “(d) in an affidavit referred to in section 8(4)(a), or in a declaration relating to any application contemplated in this Act, wilfully makes a false statement in a material respect.”. 20

**Amendment of section 10 of Act 4 of 2000**

20. Section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000, is hereby amended by the substitution for subsection (1) of the following subsection:

- “(1) Subject to the proviso in section 12, no person may publish, propagate, 25  
 advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to[—  
 (a) **be hurtful;**  
 (b)] be harmful or to incite harm]; 30  
 (c)] and to promote or propagate hatred.”.

**Amendment of section 10 of Act 26 of 2000, as amended by section 11 of Act 5 of 2017**

21. Section 10 of the Protected Disclosures Act, 2000, is hereby amended by the substitution in subsection (1) for paragraph (a) of the following paragraph: 35

- “(a) for the purposes of section 8(1), matters which, in addition to the legislative provisions pertaining to such functionaries, may in the ordinary course be referred to any of the [Public Protector or the Auditor-General] persons or bodies referred to in section 8(1), as the case may be;”.

**Amendment of section 13 of Act 47 of 2001, as amended by section 17 of Act 28 of 2003**

22. Section 13 of the Judges’ Remuneration and Conditions of Employment Act, 2001, is hereby amended by the addition of the following subsection:

- “(3) (a) The President may, on the recommendation of the Minister, from time to time, by notice in the *Gazette*, adjust any amount determined in terms of subsection (1)(c) or (d). 45  
 (b) The Minister must make the recommendations referred to in paragraph (a)—  
 (i) after consultation with the Chief Justice, the President of the Supreme Court of Appeal and the judges president of the High Court of South Africa; 50  
 and  
 (ii) with the concurrence of the Cabinet member responsible for Finance.”.

**Insertion of section 34A in Act 12 of 2004**

23. The following section is hereby inserted after section 34 of the Prevention and Combatting of Corrupt Activities Act, 2004:

**“Failure by members of private sector or incorporated state-owned entities to prevent corrupt activities** 5

**34A.** (1) Any member of the private sector or incorporated state-owned entity is guilty of an offence if a person associated with that member of the private sector or that incorporated state-owned entity gives or agrees, or offers to give any gratification prohibited in terms of Chapter 2 to another person, intending to obtain or retain— 10

- (a) business for that member of the private sector or that incorporated state-owned entity; or
- (b) an advantage in the conduct of business for that member of the private sector or that incorporated state-owned entity: Provided that no offence shall be committed where that member of the private sector or that incorporated state-owned entity had in place adequate procedures designed to prevent persons associated with that member of the private sector or that incorporated state-owned entity from giving, agreeing or offering to give any gratification prohibited in terms of Chapter 2. 15

(2) For the purposes of section 34A(1), a person is associated with a member of the private sector or an incorporated state-owned entity if, disregarding any gratification under consideration, that person performs services for or on behalf of that member of the private sector or that incorporated state-owned entity, irrespective of the capacity in which such person performs services for or on behalf of that member of the private sector or that incorporated state-owned entity.”. 20  
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**Amendment of section 29 of Act 32 of 2007**

24. Section 29 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, is hereby amended—

- (a) by the substitution for subsection (3) of the following subsection: 30

“(3) The Director-General: **[Justice and Constitutional Development] Health** must, within 14 days of publication of each designation or withdrawal thereof contemplated in subsection (1), provide a copy of the notice to—

- (a) the relevant role-players falling under his or her jurisdiction; and 35
- (b) the National Commissioner of the South African Police Service, the National Commissioner of Correctional Services and the **[Director-General of Health] Director-General: Justice and Constitutional Development.**”; and

- (b) by the substitution for subsection (4) of the following subsection: 40

“(4) The National Commissioner of the South African Police Service, National Commissioner of Correctional Services and **[Director-General of Health] Director-General: Justice and Constitutional Development** must distribute the notice referred to in subsection (1) to all relevant role-players falling under his or her jurisdiction.”. 45

**Amendment of section 40 of Act 32 of 2007, as amended by section 36 of Act 8 of 2017 and section 12 of Act 13 of 2021**

25. Section 40 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, is hereby amended by the deletion of subparagraph (iii) in paragraph (b) of the definition of “sexual offence”. 50

**Amendment of section 55A of Act 32 of 2007, as amended by section 2 of Act 43 of 2013 and section 38 of Act 8 of 2017**

26. Section 55A of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, is hereby amended by the substitution for subsection (1) of the following subsection: 5

“(1) Subject to subsection (2), the Minister may by notice in the *Gazette* designate any—

(a) Division of the High Court of South Africa or the main seat or any local seat of a Division referred to in section 6 of the Superior Courts Act, 2013 (Act No. 10 of 2013); or 10

(b) **[Magistrate’s Court, as defined in section 1 of the Superior Courts Act, 2013, at which a sexual offences court must be established.]** places in each regional division appointed for the holding of a court as provided in section 2(1)(i) of the Magistrates’ Court Act, 1944; or

(c) place within each district appointed for the holding of court as provided in section 2(1)(h) of the Magistrates’ Court Act, 1944, at which a sexual offences court must be established.”. 15

**Amendment of section 66 of Act 32 of 2007, as amended by section 33 of Act 42 of 2013, section 3 of Act 43 of 2013 and section 15 of Act 24 of 2015**

27. Section 66 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, is hereby amended— 20

(a) by the addition in subsection (1) after paragraph (c) of the following paragraph:

“(d) The National Commissioner of the South African Police Service must, in consultation with the National Director of Public Prosecutions, issue and publish in the *Gazette* national instructions regarding the manner in which police officials must deal with child pornography in order to ensure the confidentiality of such material.”; and 25

(b) by the addition in subsection (2) after paragraph (c) of the following paragraph: 30

“(d) The National Director of Public Prosecutions must, in consultation with the National Commissioner of the South African Police Service, issue and publish in the *Gazette* directives regarding the manner in which prosecutors and other officials in the national prosecuting authority must deal with child pornography in order to ensure the confidentiality of such material.”. 35

**Amendment of section 17 of Act 10 of 2013**

28. Section 17 of the Superior Courts Act, 2013, is hereby amended by the substitution in subsection (2) for paragraph (f) of the following paragraph: 40

“(f) The decision of the majority of the judges considering an application referred to in paragraph (b), or the decision of the court, as the case may be, to grant or refuse the application shall be final: Provided that the President of the Supreme Court of Appeal may, in **[exceptional]** circumstances[,], where a grave failure of justice would otherwise result or the administration of justice may be brought into disrepute, whether of his or her own accord or on application filed within one month of the decision, refer the decision to the court for reconsideration and, if necessary, variation.”. 45

**Amendment of section 18 of Act 10 of 2013**

29. Section 18 of the Superior Courts Act, 2013, is hereby amended by the substitution for subsection (4) of the following subsection: 50

“(4) (a) If a court orders otherwise, as contemplated in subsection (1)—

(i) the court must immediately record its reasons for doing so;

(ii) the aggrieved party has an automatic right of appeal to the next highest court;

(iii) the court hearing such an appeal must deal with it as a matter of extreme urgency; and 55

- (iv) such order will be automatically suspended, pending the outcome of such appeal.
- (b) ‘**Next highest court**’, for purposes of paragraph (a)(ii), means—
- (i) a full court of that Division, if the appeal is against a decision of a single judge of the Division; or
- (ii) the Supreme Court of Appeal, if the appeal is against a decision of two judges or the full court of the Division.”. 5

#### **Amendment of section 15 of Act 40 of 2013**

30. Section 15 of the South African Human Rights Commission Act, 2013, is hereby amended by the substitution in subsection (2)(b) for subparagraph (i) of the following subparagraph: 10

- “(i) the Commission[, **in consultation with the Director of Public Prosecutions who has jurisdiction,**] issues an order to that effect;”.

#### **Amendment of section 6 of Act 39 of 2014, as amended by section 41 of Act 8 of 2017**

31. Section 6 of the Legal Aid South Africa Act, 2014, is hereby amended by the substitution for subsection (4) of the following subsection: 15

- “(4) In the case of directors referred to in subsection (1)(b), the Board must, whenever necessary, invite [**nominations**] applications for the appointment of persons as directors in the manner determined by the Minister in consultation with the Board.”. 20

#### **Amendment of section 17 of Act 39 of 2014**

32. Section 17 of the Legal Aid South Africa Act, 2014, is hereby amended by the substitution for paragraphs (a) and (b) of subsection (2) of the following paragraphs: 25

- “(a) Legal Aid South Africa has the right to operate its offices [**and justice centres**] without having to seek accreditation from [**any law society**] the South African Legal Practice Council referred to in the [**Attorneys Act, 1979 (Act No. 53 of 1979)**] Legal Practice Act, 2014 (Act No. 28 of 2014), and is entitled to employ candidate attorneys, subject to the provisions of the [**Attorneys Act, 1979**] Legal Practice Act, 2014.
- (b) For the purposes of paragraph (a), [**“justice centre”**] ‘offices’ means national, provincial, local and satellite offices of Legal Aid South Africa which administer and provide legal aid in the Republic.”. 30

#### **Amendment of Schedule 1 to Act 15 of 2017**

33. Article 17A of Schedule 1 to the International Arbitration Act, 2017, is hereby amended by the substitution for paragraph (2) of the following paragraph: 35

- “(2) With regard to a request for an interim measure under article 17(2)(d), the requirements in paragraphs [(i)](1)(a) and (b) of this article shall apply only to the extent the arbitral tribunal considers appropriate.”.

#### **Repeal of law**

34. (1) The common law relating to the crime of defamation is hereby repealed. 40
- (2) Subsection (1) does not affect civil liability in terms of the common law based on defamation.

#### **Short title and commencement**

35. (1) This Act is called the Judicial Matters Amendment Act, 2023.
- (2) Section 9 comes into operation on a date fixed by the President by proclamation in the *Gazette*. 45

## MEMORANDUM ON THE OBJECTS OF THE JUDICIAL MATTERS AMENDMENT BILL, 2023

### 1. PURPOSE OF BILL

The primary aim of the Judicial Matters Amendment Bill, 2023 (“the Bill”), is to amend numerous Acts which are administered by the Department of Justice and Constitutional Development (“the Department”) and are intended to address practical and technical issues of a non-contentious nature.

### 2. CLAUSE-BY-CLAUSE ANALYSIS

- 2.1 **Clause 1** proposes an amendment to section 51 of the Magistrates’ Courts Act, 1944 (Act No. 32 of 1944) (“Magistrates’ Court Act”). Presiding officers on occasion require information regarding issues and challenges experienced regarding infrastructure and resources at a court. The proposed amendment makes provision for the officials who should be subpoenaed to give evidence in this regard.
- 2.2 The Regional Court President’s Forum recommended that section 93ter of the Magistrates’ Court Act should be repealed, alternatively, that the proviso must be removed. Their motivation is based on the long delays occasioned as a result of not being able to find assessors. At times, due to the absence of assessors, cases are sent on special review and set aside to start *de novo*. In view of the above, **Clause 2** proposes the deletion of the proviso in section 93ter (1)(b).
- 2.3 The Administration of Estates Act, 1965 (Act No. 66 of 1965) (“the Administration of Estates Act”), was enacted in an era before modern methods of electronic transfer of money. As such, the use of cheques has recently fallen into disuse. Although the Office of the Chief Master has issued a directive authorising the use of electronic transfer payments, it is proposed that the Administration of Estates Act be amended to make provision for payments by electronic means.
- 2.4 **Clauses 3 to 7** propose amendments to sections 28, 34, 35, 95 and 96 of the Administration of Estates Act, respectively. The purpose of the proposed amendments is to remove references to cheque accounts and cheques or orders and to allow the executor to open an appropriate account and to make e-payments. With the advancement in technology, the use of cheques has fallen into disuse (see **Clause 3**). In terms of **Clauses 4 and 5**, the amendments make further provision for the review proceedings in the process of winding up an estate. In terms of **Clause 6**, the proposed amendment confers on the Chief Master, the power to review any appointment by the Master of an executor, curator or interim curator, after taking into consideration representations from an executor, curator, interim curator, beneficiary or any other person whom the Chief Master considers relevant. Furthermore, the Chief Master is empowered, in terms of **Clause 7**, acting upon the request of a Master or a person designated by him or her, to institute civil proceedings in pursuance of this Act, against any executor, tutor, curator, administrator or interim executor or curator.
- 2.5 **Clause 8** inserts section 96A in order to provide for the powers, duties and functions of the Chief Master.
- 2.6 Section 103 of the Administration of Estates Act provides that the Minister may make regulations to further regulate the matters provided for in that section. **Clause 9** proposes amendments to section 103 to correct a technical and drafting oversight. Section 103 was amended by the Judicial Matters Amendment Act, 2017 (Act No. 8 of 2017), by inserting subparagraphs (eA) and (eB). It transpired afterwards that section 103 was previously amended by the Estate Affairs Amendment Act, 1992 (Act No. 1 of 1992), which had already inserted a paragraph (eA) in section 103.



- 2.7 **Clause 10** proposes the insertion of a new section 57B, 57C and 57D into the Criminal Procedure Act, (Act No. 51 of 1977) (“Criminal Procedure Act”). According to the proposed new section 57B, the Minister may declare that certain categories of offences do not result in a previous conviction against an accused and provides for the expungement of minor offences, as well as certain offences committed in terms of the Disaster Management Act, 2002 (Act No. 57 of 2002). The proposed amendment also seeks, in section 57C, to provide for the expungement of the criminal records of persons whose names appear in the records of the Criminal Record Centre of the South African Police Service (“CRC”) after having paid an admission of guilt fine for offences as envisaged in the proposed new section 57B(1). The objective of the amendment is also to provide for the automatic expungement of the criminal record. In the event that that is not the case, the amendment provides for the submission of a written application to assist any person in achieving the automatic expungement by the CRC.
- 2.8 **Clause 11** proposes an amendment to section 342A of the Criminal Procedure Act. As indicated in Clause 1, the proposed amendment makes provision for the officials who should be subpoenaed to give evidence.
- 2.9 **Clause 12** proposes the repeal of section 21(2)(a) of the Matrimonial Property Act, 1984 (Act No. 88 of 1984), so as to comply with the Constitutional Court (“CC”) judgment in *Sithole and Another v Sithole and Another* [2021] ZACC 7, which found that section 22(6) of the Black Administration Act No. 38 of 1927 perpetuates the discrimination created in section 22(6) of the Black Administration Act No. 38 of 1927, in that marriages of black couples, entered into in terms of the said Act, are automatically out of community of property.
- 2.10 **Clause 13** proposes an amendment to section 11 of the Sheriffs Act, in order to extend the duration of the term of office of members of the Board for Sheriffs.
- 2.11 **Clause 14** proposes an amendment to section 1 of the Intestate Succession Act, 1987 (Act No. 81 of 1987), so as to align that section with the judgment in *Bwanya v Master of the High Court, Cape Town and Others* [2021] ZACC 51. The High Court ruled that the omission of a surviving life partner in a permanent heterosexual life partnership in which the parties have undertaken reciprocal duties of support from benefiting in terms of the said Act, is invalid and unconstitutional.
- 2.12 **Clause 15** proposes an amendment to section 1 of the Maintenance of Surviving Spouses Act, 1990 (Act No. 27 of 1990), in order to comply with the judgment in *Bwanya v Master of the High Court, Cape Town and Others* [2021] ZACC 51.
- 2.13 **Clause 16** proposes an amendment to section 34 of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998) (“NPA Act”), in order to align the due dates of annual reports that must be submitted by all Directors of Public Prosecutions (“DPPs”) to the National Director of Public Prosecutions (“NDPP”) on their activities during the previous year in terms of section 34(1) of the NPA Act, with the financial year reporting period and not the calendar year.
- 2.14 **Clause 17** proposes an amendment to section 35 of the NPA Act in order to change the date envisaged in section 35(2), on which the NDPP must submit to the Minister the annual report referred to in section 22(4)(g) of the NPA Act, which report must be tabled in Parliament by the Minister. The proposed amendment seeks to change the date of 1 June to 1 September, which corresponds with section 40 of the Public Finance Management Act, 1999 (Act No.1 of 1999). This would be within three months after receiving the reports from the DPPs.

- 2.15 **Clause 18** seeks to amend section 3 of the Debt Collectors Act, 1998 (Act No. 114 of 1998), so as to increase the term of office of members of the Council for Debt Collectors from three years to five years and also to provide that such member is eligible for reappointment for one additional term only. There is currently no term limit.
- 2.16 **Clause 19** seeks to amend section 17 of the Domestic Violence Act, 1998 (Act No. 116 of 1998), so as to penalise the making of a false declaration.
- 2.17 **Clause 20** seeks to amend section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No. 4 of 2000) (“PEPUDA”) so as to comply with the judgment in *Qwelane v the South African Human Rights Commission and Another* [2021] ZACC 22. The CC in the above case, declared section 10(1)(a) of PEPUDA unconstitutional.
- 2.18 **Clause 21** seeks to amend section 10(1)(a) of the Protected Disclosures Act, 2000 (Act No. 26 of 2000) (“the Protected Disclosures Act”). Section 8(1) of the Protected Disclosures Act, prior to the amendment thereof by the Protected Disclosures Amendment Act, 2017 (Act No. 5 of 2017) (“the Amendment Act”), provided, among others, that any disclosure made in good faith to the Public Protector or Auditor-General, is a protected disclosure.
- 2.19 Section 8 of the Amendment Act amended section 8(1) of the Protected Disclosures Act, by making reference to the South African Human Rights Commission, the Commission for Gender Equality, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities and the Public Service Commission, to which a protected disclosure may be made. Section 10(1), dealing with regulations, on the other hand, still refers to the Public Protector and Auditor-General only. **Clause 21** proposes an amendment to section 10(1)(a) of the Protected Disclosures Act, by including the afore-mentioned institutions.
- 2.20 There is a need to regularly adjust the amounts referred to in section 13 of the Judges’ Remuneration and Conditions of Employment Act, 2001 (Act No. 47 of 2001) (“the Judges’ Remuneration and Conditions of Employment Act”). Since the process to amend regulations is lengthy, the result is that the implementation of adjustments are delayed. In order to ensure that these amounts are adjusted timeously. **Clause 22** proposes the insertion of a new subsection (3).
- 2.21 **Clause 23** proposes the insertion of a new section 34A in the Prevention and Combatting of Corrupt Activities Act, 2004 (Act No. 12 of 2004), so as to make provision for the failure of members of the private sector or incorporated state-owned entities to prevent corrupt activities. The proposed amendment emanates from a recommendation by the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud.
- 2.22 **Clause 24** seeks to amend section 29(3) and (4) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007) (“Sexual Offences Amendment Act”), which requires that the Minister of Health must, on a periodic basis, designate public health establishments by notice in the *Gazette* for purposes of providing post exposure prophylaxis to victims of sexual offences and carry out compulsory HIV testing. The Director-General: Justice and Constitutional Development is, in terms of section 29(3) of the Sexual Offences Amendment Act, required to distribute the notices amongst other role-players, including the Director-General of Health. Section 29(4) does not make provision for the distribution of any notice as referred to in section 29(3) by the Director-General: Justice and Constitutional Development to the relevant role-players falling under his or her jurisdiction.

- 2.23 **Clause 24** further seeks to amend section 29(3) and (4) of the Sexual Offences Amendment Act, so as to—
- (a) provide that the Director-General of Health is responsible for the distribution of notices contemplated in section 29(3), which include the distribution thereof to role-players falling under his or her jurisdiction and not the Director-General: Justice and Constitutional Development; and
  - (b) substitute the reference to the “Director-General of Health” in section 29(4) with “Director-General: Justice and Constitutional Development”, who will then be the responsible functionary to distribute notices as envisaged in section 29(3) to role-players falling within his or her jurisdiction.
- 2.24 **Clause 25** seeks to amend section 40 of the Sexual Offences Amendment Act, by the deletion of subparagraph (iii) in paragraph (b) of the definition of “sexual offence”. Section 24B of the Film and Publications Act, 1996 (Act No. 65 of 1996), was repealed by the Cybercrime Act, 2020 (Act No. 19 of 2020) which came into operation on 1 December 2021, making the reference obsolete.
- 2.25 **Clause 26** seeks to amend section 55A of the Sexual Offences Amendment Act. The proposed amendment makes provision for the designation of a place in each regional division and district, as the case may be, for the holding of a court as envisaged in section 2(1)(i) and (h) of the Magistrates’ Court Act, respectively.
- 2.26 **Clause 27** seeks to amend section 66 of the Sexual Offences Amendment Act in order to regulate the provisions dealing with the confidentiality and destruction of child pornography. Chapter 3 of the Criminal Procedure Act which deals with the disposal of an article after seizure and forfeiture to the State, does not adequately address access to, disclosure of, or disposal of child pornography.
- 2.27 The need to regulate and provide clarity in relation to access to, disclosure of, or disposal of child pornography emanates from the High Court judgment in *Du Toit v The Magistrate and Others* 2016 (2) SACR 112 (SCA). According to the judgment, specific measures must be put in place to ensure that child pornography is adequately disposed of, after the finalisation of criminal proceedings.
- 2.28 **Clause 28** seeks to amend section 17 of the Superior Courts Act, 2013 (Act No. 10 of 2013) (“the Superior Courts Act”), which deals with leave to appeal in order to revise the reason for referral of the matter by the President of the Supreme Court of Appeal for reconsideration in circumstances where a grave failure or injustice would otherwise result, or the administration of justice may be brought into disrepute, instead of the current provision which makes reference to the term, “exceptional circumstances”.
- 2.29 **Clause 29** proposes an amendment to section 18(4) of the Superior Courts Act in order to clarify the phrase “next highest court” in relation to an automatic right of appeal granted to an aggrieved party to legal proceedings, to mean a full court of that Division, if the appeal is against a decision of a single judge of the Division; or the Supreme Court of Appeal, if the appeal is against a decision of two judges or the full court of the Division.
- 2.30 **Clause 30** seeks to amend section 15 of the South African Human Rights Commission Act, 2013 (Act No. 40 of 2013), which regulates the powers of the South African Human Rights Commission (“the SAHRC”) during its investigations. The qualification in section 15(2)(b)(i), that the order must be issued in consultation with the DPP who has jurisdiction, is not provided in the legislation of other Chapter 9 Institutions. In view of the aforementioned statement, **Clause 31** proposes the removal of this qualification.

- 2.31 **Clause 31** proposes an amendment to section 6(4) of the Legal Aid South Africa Act, 2014 (Act No. 39 of 2014) (“LASA Act”), in order to replace the system of nominations, with a call for individuals to apply to serve as Board members. The consequence of a call for nominations is a cumbersome process.
- 2.32 **Clause 32** further proposes amendments to section 17(2) of the LASA Act so as to substitute obsolete provisions.
- 2.33 **Clause 33** proposes an amendment to Article 17A(2) of Schedule 1 to the International Arbitration Act, 2017 (Act No. 15 of 2017), so as to rectify an error in drafting.
- 2.34.1 **Clause 34(1)** of the Bill seeks to repeal the common law relating to the crime of defamation.
- 2.34.2 In terms of **Clause 34(2)**, the repeal of the common law relating to the crime of defamation does not affect civil liability in terms of the common law based on defamation. Defamation is currently a criminal offence in the Republic and also forms the basis of delictual liability. The United Nations, as well as foreign authorities, have expressed concerns about the “chilling effect” of such offences, especially on journalists, and advocate for the abolition of such laws. There are well established civil remedies based on delict, in addition to the offence of *crimen iniuria*.
- 2.35 **Clause 35** contains the short title and commencement of the Act.

### 3. CONSULTATION

The amendments are technical in nature and no broad public consultation is needed.

### 4. IMPLICATIONS FOR PROVINCES

There are no implications for the provinces.

### 5. FINANCIAL IMPLICATIONS FOR STATE

There are no financial implications for the State.

### 6. PARLIAMENTARY PROCEDURE

- 6.1 In *Tongoane and Others v Minister of Agriculture and Land Affairs and Others*<sup>1</sup>, (“Tongoane”) the CC confirmed the test formulated in order to determine the classification of a Bill (“tagging test”). According to the CC, what matters for the purposes of tagging, is not the substance or purpose of the Bill, but rather whether the provisions of the Bill in “substantial measure” fall within a functional area listed in Schedule 4.
- 6.2 In commenting on the “substantial measure test”, the CC made the following remarks:

“[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 should be considered by the provinces and in the NCOP, and how a Bill must be considered by the provincial legislatures depends on

1. 2010 (6) SA 214 (CC).

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.

[71] On the other hand, the “substantial measure” test permits a consideration of the provisions of the Bill and their impact on matters that substantially affect the provinces. This test ensures that legislation that affects the provinces will be enacted in accordance with a procedure that allows the provinces to fully and effectively play their role in the law-making process. This test must therefore be endorsed.

[72] 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. 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 emphasis]

- 6.3 As stated above, a Bill, the provisions of which in substantial measure fall within a functional area listed in Schedule 4 to the Constitution of the Republic of South Africa, 1996 (“Constitution”), must be classified as a section 76 Bill. In order to test whether the provisions of a Bill fall within a functional area listed in Schedule 4, the cumulative effect of all the provisions of the Bill must be taken into account in order to determine its impact on the provinces.
- 6.4 The Bill proposes amendments to a number of statutes and is intended to address practical and technical issues relating to the administration of justice and court processes. The Department and State Law Advisers are of the view that the subject matter of the Bill does not fall within any of the functional areas listed in Schedule 4 to the Constitution. In view of the above discussion, the State Law Advisers and the Department are of the opinion that the Bill must be dealt with in terms of section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.
- 6.5 The State Law Advisers are of the opinion that it is not necessary to refer the Bill to the National House of Traditional and Khoi-San Leaders in terms of section 39(1)(a)(i) of the Traditional and Khoi-San Leadership Act, 2019 (Act No. 3 of 2019), since the Bill does not contain any provisions which directly affect customary law or the customs of traditional or Khoi-San communities.





