

REPUBLIC OF SOUTH AFRICA

JUDICIAL MATTERS AMENDMENT BILL

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

(MINISTER OF JUSTICE AND CORRECTIONAL SERVICES)

[B 2B—2015]

ISBN 978-1-4850-0260-4

No. of copies printed 1 800

GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

 Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Magistrates' Courts Act, 1944, so as to further regulate the period of acting appointment of judicial officers; to amend the Criminal Procedure Act, 1955, so as to repeal an obsolete provision; to amend the Prescribed Rate of Interest Act 1975, so as to further regulate the calculation of interest on certain debts; to amend the Magistrates Act, 1993, so as to further regulate the pension benefits of a magistrate who is appointed to the office of judge; to amend the Judicial Service Commission Act, 1994, so as to amend the position regarding accountability for the receipt and payment of money in respect of the administration and functioning of the Judicial Service Commission; to amend the Promotion of Access to Information Act, 2000, the Promotion of Administrative Justice Act, 2000, and the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000, so as to further provide for the training and designation of presiding officers for purposes of court proceedings as contemplated in these Acts; to amend the Judges' Remuneration and Conditions of Employment Act, 2001, so as to substitute references to the Director-General: Justice and Constitutional Development with references to the Secretary-General of the Office of the Chief Justice; to amend the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, so as to further regulate reporting on the implementation and training programmes of the said Act; to amend the South African Judicial Education Institute Act, 2008, so as to amend the position regarding accountability for the receipt and payment of money in respect of the administration and functioning of the South African Judicial Education Institute; to amend the Child Justice Act, 2008, so as to further regulate reporting on the implementation of the said Act and to further regulate the expungement of records of certain convictions and diversion orders in respect of children; to amend the Prevention and Combating of Trafficking in Persons Act, 2013, so as to further regulate protective measures for foreign victims of trafficking, and to further regulate matters in respect of which regulations can be made; and to provide for matters connected therewith.

PARLIAMENT OF THE Republic of South Africa therefore enacts as follows:—

Amendment of section 9 of Act 32 of 1944, as substituted by section 2 of Act 8 of 1967, and amended by section 4 of Act 53 of 1970, section 8 of Act 102 of 1972, section 11 of Act 29 of 1974, section 24 of Act 94 of 1974, section 1 of Act 28 of 1981, section 2 of Act 34 of 1986, section 17 of Act 90 of 1993, section 3 of Act 104 of 1996,

section 3 of Act 66 of 1998, section 1 of Act 62 of 2000, section 1 of Act 28 of 2003, section 1 of Act 22 of 2005, section 3 of Act 31 of 2008 and section 1 of Act 19 of 2010

1. Section 9 of the Magistrates' Courts Act, 1944, is hereby amended—

(a) by the substitution in subsection (5) for subparagraph (i) of the following subparagraph: 5

“(i) holds that office for a period determined by the Minister at the time of the appointment, but the period so determined may not exceed **[three] 12** months and;”;

(b) by the substitution in subsection (5) for paragraph (b) of the following paragraph: 10

“(b) The Minister must cause Parliament and the Magistrates Commission to be informed whenever any vacancy in the office of a magistrate has remained unfilled for a continuous period exceeding **[three] 12** months.”.

Repeal of section 384 of Act 56 of 1955, as amended by section 1 of Act 4 of 1992 15

2. Section 384 of the Criminal Procedure Act, 1955, is hereby repealed.

Substitution of section 1 of Act 55 of 1975

3. The following section is hereby substituted for section 1 of the Prescribed Rate of Interest Act, 1975:

“[Interest on a debt to be calculated at a prescribed rate] Rate at which interest on debt is calculated in certain circumstances” 20

1. (1) If a debt bears interest and the rate at which the interest is to be calculated is not governed by any other law or by an agreement or a trade custom or in any other manner, such interest shall be calculated at the rate **[prescribed under] contemplated** in subsection (2)(a) as at the time when such interest begins to run, unless a court of law, on the ground of special circumstances relating to that debt, orders otherwise. 25

(2) (a) For the purposes of subsection (1), the rate of interest is the repurchase rate as determined from time to time by the South African Reserve Bank, plus 3,5 percent per annum. 30

(b) The Cabinet member responsible for the administration of justice must, whenever the repurchase rate is adjusted by the South African Reserve Bank, publish the amended rate of interest contemplated in paragraph (a) by notice in the *Gazette*.

(c) The interest rate contemplated in paragraph (b) is effective from the first day of the second month following the month in which the repurchase rate is determined by the South African Reserve Bank. 35

(3) For purposes of this section—

(a) “repurchase rate” means the rate at which banks borrow rands from the South African Reserve Bank; and 40

(b) “South African Reserve Bank” means the central bank of the Republic regulated in terms of the South African Reserve Bank Act, 1989 (Act No. 90 of 1989).”.

Amendment of section 13 of Act 90 of 1993 as amended by section 4 of Act 85 of 1995, section 4 of Act 18 of 1996, section 6 of Act 35 of 1996, section 11 of Act 122 of 1998 and section 4 of Act 28 of 2003 45

4. Section 13 of the Magistrates Act, 1993, is hereby amended by the insertion after subsection (5) of the following subsections:

“(5A) When a magistrate is appointed to the office of a judge he or she shall be entitled to— 50

(a) the payment of his or her actuarial interest, as defined in the rules issued in terms of the Government Employees Pension Law, 1996 (Proclamation No. 21 of 1996), in the Government Employees Pension Fund as on the date of appointment as a judge; and

- (b) the payment of all accumulated leave as on the date of appointment as a judge.
- (5B) (a) A magistrate referred to subsection (5A) may—
- (i) request the Government Employees Pension Fund to transfer the full actuarial interest from the said Fund to a designated preservation fund where the monies remain until the former magistrate attains the age of 55 years, whereafter he or she can buy a monthly pension or take out an annuity with the further option to withdraw one third of the accrued amount in cash; or
- (ii) request the Government Employees Pension Fund to pay the full actuarial interest to him or her and not to transfer the monies to a preservation fund as contemplated in subparagraph (i).
- (b) For purposes of this subsection “preservation fund” means a pension preservation fund or a provident preservation fund, as defined in section 1 of the Income Tax Act, 1962 (Act No. 58 of 1962).”

Amendment of section 36 of Act 9 of 1994, as inserted by section 9 of Act 20 of 2008

5. Section 36 of the Judicial Service Commission Act, 1994, is hereby amended—
- (a) by the substitution for subsection (1) of the following subsection:
- “(1) Expenditure in connection with the administration and functioning of the Commission must be defrayed from monies appropriated by Parliament for this purpose to the **[Department of Justice and Constitutional Development]** Office of the Chief Justice vote (hereinafter referred to as the Departmental vote) in terms of the Public Finance Management Act, 1999 (Act No. 1 of 1999).”;
- (b) by the substitution in subsection (2) for paragraph (b) of the following paragraph:
- “(b) may not be used by the **[Department]** Office of the Chief Justice for any other purpose, without the approval of Treasury and the Chief Justice as Chairperson of the Commission.”; and
- (c) by the substitution in subsection (4) for the words preceding paragraph (a) of the following words:
- “(4) Subject to the Public Finance Management Act, 1999 (Act No. 1 of 1999), the **[Director-General]** Secretary-General of the **[Department]** Office of the Chief Justice—”.

Amendment of section 1 of Act 2 of 2000, as amended by section 21 of Act 42 of 2001 and section 1 of Act 54 of 2002

6. Section 1 of the Promotion of Access to Information Act, 2000, is hereby amended by the substitution in the definition of “**court**” for subparagraph (b)(ii) of the following subparagraph:
- “(ii) a Magistrate’s Court for any district or for any regional division established by the Minister for the purposes of adjudicating civil disputes in terms of section 2 of the Magistrates’ Courts Act, 1944 (Act No. 32 of 1944), either generally or in respect of a specified class of decisions in terms of this Act, designated by the Minister by notice in the *Gazette* and presided over by a magistrate **[or]**, an additional magistrate or a magistrate of a regional division established for the purposes of adjudicating civil disputes, as the case may be, designated in terms of section 91A.”.

Substitution of section 91A of Act 2 of 2000, as inserted by section 2 of Act 54 of 2002

7. The following section is hereby substituted for section 91A of the Promotion of Access to Information Act, 2000:

“Designation and training of presiding officers

91A. (1) (a) The head of an administrative region defined in section 1 of the Magistrates’ Courts Act, 1944 (Act No. 32 of 1944), or the magistrate at the head of a regional division established for the purposes of adjudicating civil disputes in terms of section 2 of the Magistrates’ Courts Act, 1944, must, subject to subsection (2), designate in writing any magistrate **[or]**,

additional magistrate or magistrate of a regional division established for the purposes of adjudicating civil disputes, as the case may be, as a presiding officer of a Magistrate's Court designated by the Minister in terms of section 1 of this Act.

(b) A presiding officer must perform all the functions and duties and exercise the powers assigned to or conferred on him or her under this Act or any other law. 5

(2) Only a magistrate **[or]**, additional magistrate or magistrate of a regional division established for the purposes of adjudicating civil disputes, who has completed a training course— 10

(a) before the commencement of this section; or

(b) **[as contemplated]** referred to in subsection (5), and whose name has been included on the list contemplated in subsection (4)(a), may be designated in terms of subsection (1). 15

(3) The heads of administrative regions or magistrates at the head of regional divisions established for the purposes of adjudicating civil disputes, must— 15

(a) take all reasonable steps within available resources, to designate at least one presiding officer for each magistrate's court within his or her area of jurisdiction which has been designated by the Minister in terms of section 1; and 20

(b) without delay, inform the **[Director-General: Justice and Constitutional Development]** Magistrates Commission of any magistrate **[or]**, additional magistrate or magistrate of a regional division established for the purposes of adjudicating civil disputes, who has completed a training course **[as contemplated in subsections (5) and (6)]** referred to in subsection (5) or who has been designated in terms of subsection (1). 25

(4) The **[Director-General: Justice and Constitutional Development]** Magistrates Commission must compile and keep a list of every magistrate **[or]**, additional magistrate or magistrate of a regional division established for the purposes of adjudicating civil disputes, who has— 30

(a) completed a training course **[as contemplated in subsections (5) and (6)]** referred to in subsection (5); or

(b) been designated as a presiding officer of a magistrate's court as contemplated in subsection (1). 35

(5) The **[Chief Justice must, in consultation with the Judicial Service Commission and the Magistrates Commission, develop the content of training courses]** South African Judicial Education Institute established in terms of section 3 of the South African Judicial Education Institute Act, 2008 (Act No. 14 of 2008), must develop and implement training courses for presiding officers with the view to building a dedicated and experienced pool of trained and specialised presiding officers for purposes of presiding in court proceedings as contemplated in this Act. 40

[(6) The Chief Justice must, in consultation with the Judicial Service Commission, the Magistrates Commission and the Minister, implement the training courses referred to in subsection (5).] 45

(7) The Minister must table a report in Parliament, as prescribed, relating to the content and implementation of the training courses referred to in subsections (5) and (6).] 50

(8) The provisions of section 12(6), (7) and (8) of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), are applicable with the necessary changes required by the context." 55

Amendment of section 1 of Act 3 of 2000, as amended by section 1 of Act 53 of 2002 and section 26 of Act 55 of 2003 55

8. Section 1 of the Promotion of Administrative Justice Act, 2000, is hereby amended by the substitution in the definition of "court" for subparagraph (b)(ii) of the following subparagraph:

"(ii) a Magistrate's Court for any district or for any regional division established by the Minister for the purposes of adjudicating civil disputes in terms of section 2 of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), either generally 60

or in respect of a specified class of administrative actions, designated by the Minister by notice in the *Gazette* and presided over by a magistrate [or], an additional magistrate or a magistrate of a regional division established for the purposes of adjudicating civil disputes, as the case may be, designated in terms of section 9A;”.

5

Substitution of section 9A of Act 3 of 2000, as inserted by section 2 of Act 53 of 2002

9. The following section is hereby substituted for section 9A of the Promotion of Administrative Justice Act, 2000:

“Designation and training of presiding officers

9A. (1) (a) The head of an administrative region defined in section 1 of the Magistrates’ Courts Act, 1944 (Act No. 32 of 1944), or the magistrate at the head of a regional division established for the purposes of adjudicating civil disputes in terms of section 2 of the Magistrates’ Courts Act, 1944, must, subject to subsection (2), designate in writing any magistrate [or], additional magistrate or magistrate of a regional division established for the purposes of adjudicating civil disputes, as the case may be, as a presiding officer of the Magistrate’s Court designated by the Minister in terms of section 1 of this Act.

(b) A presiding officer must perform all the functions and duties and exercise the powers assigned to or conferred on him or her under this Act or any other law.

(2) Only a magistrate [or], additional magistrate or magistrate of a regional division established for the purposes of adjudicating civil disputes, who has completed a training course—

(a) before the date of commencement of this section; or

(b) [as contemplated] referred to in subsection (5), and whose name has been included on the list contemplated in subsection (4)(a), may be designated in terms of subsection (1).

(3) The heads of administrative regions or magistrates at the head of regional divisions established for the purposes of adjudicating civil disputes, must—

(a) take all reasonable steps within available resources, to designate at least one presiding officer for each magistrate’s court within his or her area of jurisdiction which has been designated by the Minister in terms of section 1; and

(b) without delay, inform the [Director-General: Justice and Constitutional Development] Magistrates Commission of any magistrate [or], additional magistrate or magistrate of a regional division established for the purposes of adjudicating civil disputes, who has completed a training course [as contemplated in subsections (5) and (6)] referred to in subsection (5) or who has been designated in terms of subsection (1).

(4) The [Director-General: Justice and Constitutional Development] Magistrates Commission must compile and keep a list of every magistrate or additional magistrate or magistrate of a regional division established for the purposes of adjudicating civil disputes, who has—

(a) completed a training course [as contemplated in subsections (5) and (6)] referred to in subsection (5); or

(b) been designated as a presiding officer of a magistrate’s court contemplated in subsection (1).

(5) The [Chief Justice must, in consultation with the Judicial Service Commission and the Magistrates Commission, develop the content of training courses] South African Judicial Education Institute established in terms of section 3 of the South African Judicial Education Institute Act, 2008 (Act No. 14 of 2008), must develop and implement training courses for presiding officers with the view to building a dedicated and experienced pool of trained and specialised presiding officers for purposes of presiding in court proceedings as contemplated in this Act.

[(6) The Chief Justice must, in consultation with the Judicial Service Commission, the Magistrates Commission and the Minister, implement the training courses contemplated in subsection (5).

(7) The Minister must table a report in Parliament, as prescribed, relating to the content and implementation of the training courses referred to in subsections (5) and (6).] 5

(8) The provisions of section 12(6), (7) and (8) of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), are applicable with the necessary changes required by the context."

Amendment of section 16 of Act 4 of 2000, as substituted by section 1 of Act 52 of 2002 and amended by section 28 of Act 55 of 2003 10

10. Section 16 of the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000, is hereby amended—

(a) by the substitution for subsections (1), (2), (3) and (4) of the following subsections, respectively: 15

“(1) For the purposes of this Act, but subject to section 31—

(a) every Division of the High Court or local seat thereof is an equality court for the area of its jurisdiction;

(b) any judge may, subject to subsection (2), be designated in writing by **[the]** a Judge President as a presiding officer of the equality court of the area in respect of which he or she is a judge; 20

(c) the Minister must, after consultation with the head of an administrative region defined in section 1 of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), or the magistrate at the head of a regional division established for the purposes of adjudicating civil disputes, by notice in the *Gazette*— 25

(i) designate one or more magistrates' courts as equality courts for the administrative region or regional division concerned, as the case may be;

(iA) designate any regional division established for the purposes of adjudicating civil disputes, as an equality court; 30

(ii) define the area of jurisdiction of each equality court referred to in subparagraph (i), which may consist of any number of districts, sub-districts, regional divisions or other areas of jurisdiction created in terms of section 2 of the Magistrates' Courts Act, 1944; 35

(iii) increase or reduce the area of jurisdiction of each equality court referred to in subparagraph (i), when necessary to do so;

(iv) appoint one or more places within the area of jurisdiction of each equality court for the holding of sittings of an equality court [sittings]; and 40

(v) withdraw or vary any notice made under this paragraph:

Provided that any proceedings pending before an equality court which are not finalised at the time of the publication of a notice in the *Gazette* as contemplated in this paragraph, must be finalised by that court, as if such notice **[had]** has not been published; and 45

(d) the head of an administrative region or magistrate at the head of a regional division contemplated in paragraph (c) must, subject to subsection (2), designate in writing any magistrate **[or]**, additional magistrate or magistrate of a regional division established for the purposes of adjudicating civil disputes, as a presiding officer of the equality court. 50

(2) Only a judge, magistrate **[or]**, additional magistrate or magistrate of a regional division established for the purposes of adjudicating civil disputes, who has completed a training course as a presiding officer of an equality court— 55

(a) before the **[date of]** commencement date of section 31; or

(b) **[as contemplated]** referred to in section 31(4),

and whose name has been included on the list contemplated in subsection (4)(a), may be designated as such in terms of subsection (1). 60

(3) The Judges President, **[and the]** heads of administrative regions and magistrates at the head of regional divisions established for the purposes of adjudicating civil disputes, must—

(a) take all reasonable steps within available resources, to designate at least one presiding officer for each equality court within his or her area of jurisdiction; and 5

(b) without delay, inform the **[Director-General of the Department] Office of the Chief Justice** of any judge [,] and the **Magistrates Commission**, as the case may be, of any magistrate **[or]**, additional magistrate or magistrate of a regional division established for the purposes of adjudicating civil disputes, who has completed a training course **[as contemplated]** referred to in section 31(4) **[and (5)]** or who has been designated in terms of subsection (1). 10

(4) The **[Director-General of the Department] Office of the Chief Justice** and the **Magistrates Commission**, as the case may be, must compile and keep a list of every judge, magistrate **[and]**, additional magistrate and magistrate of a regional division established for the purposes of adjudicating civil disputes, who has— 15

(a) completed a training course **[as contemplated]** referred to in section 31(4) **[and (5)]**; or 20

(b) been designated as a presiding officer of an equality court in terms of subsection (1).”; and

(b) by the addition of the following subsection:

“(6) The provisions of section 12(6), (7) and (8) of the **Magistrates’ Courts Act, 1944 (Act No. 32 of 1944)**, are applicable with the necessary changes required by the context.”. 25

Amendment of section 31 of Act 4 of 2000, as substituted by section 3 of Act 52 of 2002

11. Section 31 of the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000, is hereby amended— 30

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

“(a) and in giving effect to subsection (1), judges, magistrates **[or]**, additional magistrates or magistrates of regional divisions established for the purposes of adjudicating civil disputes, as the case may be, and the clerks referred to in subsection (1) may be— 35

(i) designated as presiding officers; and

(ii) appointed or designated as clerks, respectively, for one or more equality courts;”;

(b) by the substitution in subsection (4) for the words preceding paragraph (a) of the following words: 40

“The **[Chief Justice must, in consultation with the Judicial Service Commission and the Magistrates Commission, develop the content of training courses]** South African Judicial Education Institute established in terms of section 3 of the **South African Judicial Education Institute Act, 2008 (Act No. 14 of 2008)**, must develop and implement training courses for presiding officers with a view to building a dedicated and experienced pool of trained and specialised presiding officers, for purposes of presiding in court proceedings as contemplated in this Act, by providing—”; and 45

(c) by the deletion of subsections (5) and (7). 50

Amendment of section 7 of Act 47 of 2001, as amended by section 34 of Act 66 of 2008

12. Section 7 of the Judges’ Remuneration and Conditions of Employment Act, 2001, is hereby amended by the substitution for subsections (4) and (5) of the following subsections, respectively: 55

“(4) The registrar of the Supreme Court of Appeal or a Division of the High Court or a local seat thereof where a Constitutional Court judge or judge performs service in terms of subsection (1), shall notify the **[Director-General: Justice and**

Constitutional Development] Secretary-General of the Office of the Chief Justice immediately of the commencement and duration of the service.

(5) The **[Director-General: Justice and Constitutional Development] Secretary-General of the Office of the Chief Justice** shall keep a register of all service performed by Constitutional Court judges or judges in terms of subsection (1).” 5

Substitution of section 14 of Act 47 of 2001

13. The following section is hereby substituted for section 14 of the Judges’ Remuneration and Conditions of Employment Act, 2001:

“Administration of Act

14. The **[Director-General: Justice and Constitutional Development] Secretary-General of the Office of the Chief Justice** shall, subject to the directions of the Minister, be charged with the general administration of this Act.”. 10

Amendment of section 65 of Act 32 of 2007

14. Section 65 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, is hereby amended— 15

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

“(3) The Minister **[must, after consultation with]** and the Cabinet members responsible for safety and security, correctional services, social development and health **[and the National Director of Public Prosecutions]** must, not later than 30 September of every year— 20

(a) **[within one year]** after the **[implementation]** commencement of section 14 of **[this]** the Judicial Matters Amendment Act, 2015, each submit reports, as prescribed, to Parliament by each Department or institution contemplated in section 63(2) on the implementation of this Act; and 25

(b) **[every year thereafter submit such reports to Parliament]** report thereon to a committee or committees of Parliament sitting jointly or separately as determined by Parliament.”; and 30

(b) by the addition of the following subsection: 30

“(4) The Cabinet members referred to in subsection (3) must, in their individual reports, that are referred to in subsection (3), report on the implementation of the training courses contemplated in section 66.”. 35

Amendment of section 66 of Act 32 of 2007 as amended by by section 33 of Act 42 of 2013 35

15. Section 66 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, is hereby amended by the deletion of subsection (5)(b).

Amendment of section 1 of Act 14 of 2008

16. Section 1 of the South African Judicial Education Institute Act, 2008, is hereby amended— 40

(a) by the deletion of the definition of “Director-General”;

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

“**Department**” means the **[Department of Justice and Constitutional Development] Office of the Chief Justice;**” 45

(c) by the insertion after the definition of “Minister” of the following definitions:

“(viii) **‘Office of the Chief Justice’** means the Office of the Chief Justice, proclaimed as a national department in terms of Proclamation No. 44 of 2010 of 23 August 2010;

(ix) **‘Secretary-General’** means the Secretary-General of the Office of the Chief Justice;” 50

(d) by the substitution for the definition of “this Act” of the following definition:

“[(viii)] (x) **‘this Act’** includes any guidelines issued under section 16.”.

Amendment of section 12 of Act 14 of 2008

17. Section 12 of the South African Judicial Education Institute Act, 2008, is hereby amended by the substitution for paragraph (c) in subsection (3) of the following paragraph:

“(c) provide quarterly management reports to the **[Director-General]** Secretary-General.” 5

Amendment of section 13 of Act 14 of 2008

18. Section 13 of the South African Judicial Education Institute Act, 2008, is hereby amended by the substitution in subsection (4) for the words preceding paragraph (a) of the following words: 10

“Subject to the Public Finance Management Act, 1999 (Act No. 1 of 1999), the **[Director-General]**—”.

Amendment of section 96 of Act 75 of 2008

19. Section 96 of the Child Justice Act, 2008, is hereby amended by the substitution for subsection (3) of the following subsection: 15

“(3) The Cabinet **[member]** members responsible for the administration of justice, **[must, after consultation with the Cabinet members responsible for]** safety and security, correctional services, social development, education and health must, not later than 30 September of every year—

(a) **[within one year]** after the commencement of **[this]** section 19 of the Judicial Matters Amendment Act, 2015, each submit reports, as prescribed, to Parliament by each Department or institution referred to in section 94(2) on the implementation of this Act; and

(b) **[every year thereafter submit those reports to Parliament]** report thereon to a committee or committees of Parliament, sitting jointly or separately, as determined by Parliament.” 20 25

Amendment of section 98 of Act 75 of 2008

20. Section 98 of the Child Justice Act, 2008, is hereby amended by the addition of the following subsection:

“(4) Despite the provisions of section 4, a child who, before the commencement of this Act, was convicted of— 30

(a) an offence referred to in Schedule 1 or 2; or

(b) any other offence under the common law or statute which has been repealed by the Acts referred to in— 35

(i) items 2, 13, 14 or 15 of Schedule 1; or

(ii) items 2, 13, 14, 15, 16, 17 or 21 of Schedule 2,

may apply for the expungement of his or her criminal record in terms of section 87 of this Act.”.

Amendment of section 15 of Act 7 of 2013

21. Section 15 of the Prevention and Combating of Trafficking in Persons Act, 2013, is hereby amended by the substitution in subsection (1) for the words preceding paragraph (a) of the following words: 40

“Despite the provisions of the Immigration Act, the Director-General: Home Affairs may, in the prescribed manner and subject to the prescribed conditions, issue, a foreigner who is not in possession of a valid visa or whose visa is about to expire and in respect of whom—” 45

Amendment of section 43 of Act 7 of 2013

22. Section 43 of the Prevention and Combating of Trafficking in Persons Act, 2013, is hereby amended—

(a) by the deletion in subsection (2) of the word “and” at the end of paragraph (c); 50
and

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

“(cA) the manner in which any extension or withdrawal of a visitor’s visa may be granted as provided for in section 16(1)(c); and”.”

Short title and commencement

5

23. This Act is called the Judicial Matters Amendment Act, 2015, and sections 5, 12, 13, 14, 16 and 19 come into operation on a date fixed by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE JUDICIAL MATTERS AMENDMENT BILL, 2015

1. BACKGROUND

The amendments contained in the Judicial Matters Amendment Bill, 2015 (Bill) address practical challenges which have been identified in the application of the Acts being amended. They are mainly technical in nature.

2. OBJECTS OF BILL

The main object of the Bill is to amend the following pieces of legislation:

- Magistrates' Courts Act, 1944 (Act No. 32 of 1944) — to further regulate the appointment of judicial officers;
- Criminal Procedure Act, 1955 (Act No. 56 of 1955)—to repeal an obsolete provision;
- Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975) — to further regulate the calculation of interest on a debt;
- Magistrates Act, 1993 (Act No. 90 of 1993) — to regulate the pension benefits of a magistrate when he or she assumes office as a judge;
- Judicial Service Commission Act, 1994 (Act No. 9 of 1994) — to replace the functionary accountable for the receipt and payment of money in respect of the administration and functioning of the Judicial Service Commission;
- Promotion of Access to Information Act, 2000 (Act No. 2 of 2000)—to further regulate the training of designated presiding officers (*magistrates*) for purposes of court proceedings arising out of the application of the said Act;
- Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000)—to further regulate the training of designated presiding officers (*magistrates*) for purposes of court proceedings arising out of the application of the said Act;
- Promotion of Equality and Prevention of unfair Discrimination Act, 2000 (Act No. 4 of 2000)—to further regulate the training of designated presiding officers (judges and magistrates) for purposes of court proceedings arising out of the application of the said Act;
- Judges' Remuneration and Conditions of Employment Act, 2001 (Act No. 47 of 2001) — to substitute references to the Director-General: Justice and Constitutional Development with references to the Secretary-General in the Office of the Chief Justice;
- Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007) - to further regulate the reporting to Parliament by role-playing Ministers in respect of the implementation of that Act and their reports on training;
- South African Judicial Education Institute Act, 2008 (Act No. 14 of 2008)—to replace the functionary accountable for the receipt and payment of money in respect of the administration and functioning of the South African Judicial Education Institute;
- Child Justice Act, 2008 (Act No. 75 of 2008) — to further regulate the reporting to Parliament by roleplaying Ministers in respect of the implementation of that Act and to further regulate the expungement of records of certain convictions and diversion orders in respect of children; and

- Prevention and Combating of Trafficking in Persons Act, 2013 (Act No. 7 of 2013) — to further regulate protective measures for foreign victims of trafficking in persons, and to further regulate matters in respect of which regulations can be made.

3. CLAUSE-BY-CLAUSE ANALYSIS

3.1 Clause 1

Currently section 9(5) of the Magistrates' Courts Act, 1944, provides for the appointment of acting magistrates for a period not exceeding three months. The proposed amendment in clause 1 of the Bill seeks to extend the period of appointment to 12 months. The proposed amendment is intended to address practical challenges currently being experienced by the Magistrates Commission in filling a vacant post of a magistrate within three months.

3.2 Clause 2

Clause 2 of the Bill seeks to repeal section 384 of the Criminal Procedure Act, 1955, which has become obsolete. Section 384 deals with binding over of persons to keep the peace. It has fallen into disuse in many parts of the Republic and has largely been superseded by the provisions of the Protection from Harassment Act, 2011 and the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000.

3.3 Clause 3

Clause 3 of the Bill seeks to substitute section 1 of the Prescribed Rate of Interest Act, 1975. Currently section 1 provides that if a debt bears interest and the rate at which the interest is to be calculated is not governed by any other law or by an agreement or a trade custom or in any other manner, such interest shall be calculated at the rate prescribed by the Minister of Justice, after consultation with the Minister of Finance. The proposed amendment seeks to ensure that there is uniformity and that the prescribed rate reflects prevailing market conditions by providing that the rate of interest is in line with the repo rate determined by the South African Reserve Bank, from time to time.

3.4 Clause 4

- 3.4.1 Clause 4 of the Bill seeks to amend section 13 of the Magistrates Act, 1993, in order to provide for the situation when a magistrate vacates his or her office on account of his or her appointment as a judge.
- 3.4.2 Currently, when a magistrate is appointed as a judge, section 13(5)(c)(ii) of the Magistrates Act is applied, which provides that if a magistrate is allowed to vacate his or her office, he or she shall be deemed to have been retired in accordance with section 16(4) of the Public Service Act, 1994. That being the case the magistrate will be entitled to pension benefits as if he or she had retired. This means that the State must make a contribution to the pension fund. It should also be borne in mind that, in practice, the former magistrate, having been appointed as a judge, will receive a judge's salary for life in terms of the Judges' Remuneration and Conditions of Employment Act, 2001. The proposed amendments are intended to prevent unintended and undue financial implications that may be imposed on the State in the event of a magistrate, who has not reached the age of retirement as provided for in section 19 of the Government Employees Pension Law, 1996, being appointed to the office of a judge.
- 3.4.3 In terms of the proposed new provision the magistrate will have one of two choices: The first option is to request the Government Employees Pension Fund (GEPF) to transfer the full actuarial interest from the GEPF to a designated preservation fund. The effect of this is that the

monies will be paid to the preservation fund with the same reduced taxable implications to which the magistrate would have been entitled if he or she retired in the normal manner. The monies must remain in the designated preservation fund until the former magistrate attains the age of 55 years, whereafter he or she can buy a monthly pension (take out an annuity) with the further option of withdrawing one third of the accrued amount in cash. The second option is to request the GEPF to pay the full actuarial interest to the former magistrate and not to transfer the monies to a preservation fund. The negative implication of this option is that no reduced tax benefit will be applicable and the lump sum will be taxed, based on the former magistrate's marginal tax rate. (Based on provisional indications Government will soon implement new legislation to do away with the second option to ensure that all monies are paid into a preservation fund until a specific future age of the beneficiary.)

3.5 Clause 5

Clause 5 of the Bill seeks to amend section 36 of the Judicial Service Commission Act, 1994, by making the Secretary-General of the Office of the Chief Justice the accounting officer for purposes of the Judicial Service Commission, in the place of the Director-General: Justice and Constitutional Development.

3.6 Clauses 6 and 7

3.6.1 Clause 6 amends the definition of court in section 1 of the Promotion of Access to Information Act, 2000 (PAIA) in order to extend the ambit of the Act to include courts of regional divisions (regional courts) so that they can also deal with matters arising from its application. Regional courts have, since the enactment of PAIA, obtained jurisdiction to deal with civil matters, by virtue of the Jurisdiction of Regional Courts Amendment Act, 2008 (Act 31 of 2008). Other reasons to extend the application of the Act to include regional courts are the following:

- (a) Many magistrates who received training in PAIA have since been appointed in the regional courts;
- (b) the workload of the High Court will be reduced if the jurisdiction of PAIA is extended to the regional courts; and
- (c) the extension of the application of PAIA to regional courts will enhance access to justice and will be less costly than litigation in the High Court.

3.6.2 Clause 7 of the Bill substitutes section 91A of the Promotion of Access to Information Act, 2000, in order to provide—

- (a) for the Magistrates Commission, instead of the Director-General: Justice and Constitutional Development, to compile a list of magistrates who have been designated as presiding officers for purposes of the Act and who have completed a training course; and
- (b) for the development and implementation of training courses for presiding officers by the South African Judicial Education Institute, instead of the Chief Justice. It also contains consequential amendments arising from clause 6.

3.6.3 At present the responsibilities referred to in paragraph (a) above reside with the Director-General: Justice and Constitutional Development and the responsibilities referred to in paragraph (b) above reside with the Chief Justice, the Judicial Service Commission and the Magistrates Commission. The proposed amendments are intended to ensure that the more appropriate structure within the judiciary itself takes responsibility for the designation of presiding officers to deal with matters arising out of the application of this Act and that the South

African Judicial Education Institute takes responsibility for the training of judicial officers.

3.7 Clauses 8 and 9

Clauses 8 and 9 of the Bill amend sections 1 and 9A of the Promotion of Administrative Justice Act, 2000, in the same manner as clauses 6 and 7 and for the same reasons, in respect of the PAIA.

3.8 Clauses 10 and 11

Clauses 10 and 11 of the Bill amend sections 16 and 31 of the Promotion of Equality and the Prevention of Unfair Discrimination Act, 2000, in the same manner as clauses 6 and 7 and for the same reasons.

3.9 Clauses 12 and 13

Clauses 12 and 13 of the Bill seek to amend the Judges' Remuneration and Conditions of Employment Act, 2001, by making the Secretary-General of the Office of the Chief Justice responsible for the general administration of this Act in the place of the Director-General: Justice and Constitutional Development.

3.10 Clauses 14 and 15

3.10.1 Clause 14 of the Bill amends the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, to further regulate the reporting to Parliament by the roleplaying Ministers in respect of the implementation of this Act.

3.10.2 Clause 14 requires the roleplaying Ministers (the Cabinet members responsible for the administration of justice, safety and security, correctional services, social development and health) to submit separate reports to Parliament by no later than 30 September of each year on the implementation of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, by the Departments or institutions that fall within their portfolios. Clause 14 also requires the Ministers in question to report on the implementation of this Act to a committee or committees of Parliament, sitting jointly or separately as determined by Parliament.

3.10.3 At present, in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, the Minister of Justice and Correctional Services (in practice his or her Director-General: Justice and Constitutional Development) is responsible for collating the reports of all the roleplaying Departments and institutions. The amendment is sought to facilitate the submission of the individual reports by the roleplaying Ministers in this regard.

3.10.4 Section 66 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act places an obligation on the Department of Health, the NPA and SAPS to develop training manuals. In terms of section 66(5)(b) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, the relevant Cabinet members must every 12 months table a report in Parliament relating to the implementation of the training courses. In practice the annual reports also include reports on training. Therefore, to avoid an unproductive duplication of reporting, clause 15 seeks to delete section 66(5)(b). Clause 14(b), however, adds a new section 65(4) that stipulates that the individual reports of the Ministers referred to in section 65(3) of the Act must report on the implementation of training courses.

3.11 Clauses 16, 17 and 18

Clauses 16, 17 and 18 of the Bill seek to amend the South African Judicial Education Institute Act, 2008, by making the Office of the Chief Justice responsible for the South African Judicial Education Institute, and also making the Secretary-General of the Office of the Chief Justice the accounting officer of the South African Judicial Education Institute, in the place of the Director-General: Justice and Constitutional Development.

3.12 Clause 19

- 3.12.1 Clause 19 of the Bill amends section 96 of the Child Justice Act, 2008, to further regulate the reporting to Parliament by the various roleplaying Departments and institutions regarding the implementation of the said Act.
- 3.12.2 Clause 19 requires the roleplaying Ministers (the Cabinet members responsible for the administration of justice, safety and security, correctional services, social development, education and health) to submit separate reports to Parliament by no later than 30 September of each year on the implementation of the Child Justice Act, 2008, by the Departments or institutions that fall within their portfolios. Clause 19 also requires the Ministers in question to report on the implementation of this Act to a committee or committees of Parliament, sitting jointly or separately as determined by Parliament.
- 3.12.3 At present, in terms of the Child Justice Act, 2008, the Minister of Justice and Correctional Services (in practice his or her Director-General: Justice and Constitutional Development) is responsible for collating the reports of all the roleplaying Departments and institutions. The amendment is sought to facilitate the submission of the individual reports by the roleplaying Ministers in this regard.

3.13 Clause 20

- 3.13.1 Clause 20 amends the transitional arrangements contained in section 98 of the Child Justice Act, 2008. The amendment is intended to make it clear that the provisions of section 87 of the Child Justice Act, 2008, dealing with the expungement of certain criminal records of children, apply retrospectively. The general rule is that statutes regulate future events and conduct and are construed as applying only on cases or facts that came into existence after they were passed. In other words, there is a presumption against retrospectivity. If a statute or provision thereof is to apply retrospectively, this intention must be expressed clearly in the statute or provision.
- 3.13.2 Section 87 of the Child Justice Act, 2008, is intended to allow children who have committed less serious offences to have their criminal records expunged if a period of five years, in the case of offences referred to in Schedule 1 to the Child Justice Act, 2008, or a period of ten years, in the cases of offences referred to in Schedule 2 to the Child Justice Act, 2008, has elapsed and the child has not been convicted of a similar or more serious offence during that period. The intention of this provision is give persons who were children when they committed offences of a less serious nature, an opportunity to wipe the slate clean and rid themselves of the negative implications of having a criminal record.
- 3.13.3 It has been argued that this provision only applies prospectively because there is no clear indication that it applies retrospectively. This means section 87 of the Child Justice Act, 2008, can only be used for the expungement of criminal convictions and records of children whose convictions occurred after 1 April 2010, that is the date when

the Child Justice Act, 2008, came into operation. This, in turn, means that children who committed offences before that date do not qualify to have their records expunged in terms of the Child Justice Act, 2008. This was not the intention of the Legislature and it is recommended that the Child Justice Act, 2008, be amended to broaden the ambit of the provision in question, in the best interests of children.

3.14 Clause 21

Clause 21 of the Bill amends section 15(1) of the Prevention and Combating of Trafficking in Persons Act, 2013, in order to make it clear that a visitor's visa only needs to be granted to a foreign victim of trafficking in persons if that victim is not in possession of a valid visa or if the visa is about to expire and also if such person is cooperating with the authorities in respect of trafficking in persons.

3.15 Clause 22

Clause 22 of the Bill amends section 43(2) of the Prevention and Combating of Trafficking in Persons Act, 2013, by adding a new provision that the Minister of Home Affairs must make regulations regarding the manner in which a visitor's visa may be extended or withdrawn. The new provision is aligned to, and enhances, section 16(1)(c) of the said Act, which stipulates that the Director-General: Home Affairs may extend or withdraw a visitor's visa if requested to do so by the National Commissioner of the SAPS or the National Director of Public Prosecutions.

4. CONSULTATION

The following persons/organisations have been consulted:

- The Chief Magistrates and Regional Court Presidents in respect of clause 1;
- The Magistrates Commission in respect of clause 2;
- The National Treasury in respect of clause 3;
- The Magistrates Commission and Government Employees Pension Fund in respect of clause 4;
- The Office of the Chief Justice in respect of clauses 5, 16, 17 and 18, which clauses emanate from proposals by the National Treasury;
- The Office of the Chief Justice, the Magistrates Commission, Regional Court Presidents and Chief Magistrates in respect of clauses 6 to 11;
- The National Treasury in respect of clauses 14 and 19; and
- The Intersectoral Committee for the Management of Sexual Offences Matters established in terms of section 63 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, in respect of clauses 14 and 15.

5. FINANCIAL IMPLICATIONS

None.

6. PARLIAMENTARY PROCEDURE

- 6.1 The Constitution prescribes the procedure for the classification of Bills. Therefore a Bill must be correctly classified otherwise it will be constitutionally out of order.
- 6.2 The State Law Advisers have considered the Bill against the provisions of the

Constitution relating to the tagging of Bills and against the functional areas listed in Schedule 4 (functional areas of concurrent national and provincial legislative competence) and Schedule 5 (functional areas of exclusive provincial legislative competence) to the Constitution.

- 6.3 The established test for the classification of a Bill is that any Bill whose provisions in substantial measure fall within a functional area listed in Schedule 4 to the Constitution must be classified in terms of that Schedule. The process is concerned with the question of how the Bill should be considered by the provinces and in the National Council of Provinces, and how a Bill must be considered by the provincial legislatures depends on whether it affects the provinces. The more it affects the interests, concerns and capacities of the provinces, the more say the provinces should have on its content.
- 6.4 Therefore the issue to be determined is whether the proposed amendments of the various Acts of Parliament, contained in the Bill, in substantial measure, fall within a functional area listed in schedule 4 to the Constitution.
- 6.5 The stated general purpose of the Bill is to address practical challenges which have been identified in the application of the various Acts that are sought to be amended. Each of the proposed amendments reflected have been carefully examined to establish whether, in substantial measure, they fall within any of the functional areas listed in Schedule 4 to the Constitution.
- 6.6 The State Law Advisers are of the view that the subject matter of the proposed amendments does not fall within any of the functional areas listed in Schedule 4 to the Constitution and it does not affect provinces whereby the procedure set out in section 76 of the Constitution would be applicable.
- 6.7 The State Law Advisers are therefore of the opinion that since this Bill does not deal with any of the matters listed in Schedule 4 to the Constitution, it must be dealt with in accordance with the procedure set out in section 75 of the Constitution.
- 6.8 The State Law Advisers are also of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.

Printed by Creda Communications

ISBN 978-1-4850-0260-4