

REPUBLIC OF SOUTH AFRICA

AUDITING PROFESSION AMENDMENT BILL

(As amended by the Standing Committee on Finance (National Assembly))
(The English text is the official text of the Bill)

(MINISTER OF FINANCE)

[B 2B—2020]

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GENERAL EXPLANATORY NOTE:

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

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

BILL

To amend the Auditing Profession Act, 2005, so as to insert a definition; to strengthen the governance of the Regulatory Board; to strengthen the investigating and disciplinary processes; to provide for the power to enter and search premises and to subpoena persons with information required for an investigation or disciplinary process; to provide for the power to issue a warrant for purposes of entering and searching of premises; to provide for processes to be followed after an investigation; to provide for sanctions in admission of guilt process and following a disciplinary hearing; to provide for offences relating to investigation and disciplinary process; to provide for the protection and sharing of information; to provide for transitional measures; and to provide for matters connected therewith.

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

Amendment of section 1 of Act 26 of 2005, as amended by section 1 of Act 2 of 2015

1. Section 1 of the the Auditing Profession Act, 2005 (hereinafter referred to as the “principal Act”) is hereby amended by the insertion in subsection (1) after the definition of “company” of the following definition: 5

 “**‘Constitution’** means the Constitution of the Republic of South Africa, 1996;”.

Amendment of section 4 of Act 26 of 2005

2. Section 4 of the principal Act is hereby amended by the addition of the following subsection: 10

 “(3)(a) The Regulatory Board must determine a regulatory strategy for performing its functions in terms of subsection (1). 10

 (b) The Regulatory Board must submit the regulatory strategy to the Minister for approval within three months after the date that the Auditing Profession Amendment Act, 2020, takes effect. 15

 (c) The Minister—

 (i) may, after consulting the Regulatory Board, make amendments to the strategy referred to in paragraph (b); and

 (ii) must publish in the *Gazette* the approved regulatory strategy within six months after the date that the Auditing Profession Amendment Act, 2020, takes effect. 20

(d) The Minister or the Regulatory Board may request an amendment to the regulatory strategy published in terms of paragraph (c) or a new regulatory strategy be determined in accordance with paragraph (c).”.

Amendment of section 11 of Act 26 of 2005

3. Section 11 of the principal Act is hereby amended— 5
- (a) by the substitution for subsection (2) of the following subsection:
- “(2) The Minister must appoint competent persons [**who must include registered auditors,**] who are independent of the auditing profession to effectively manage and guide the activities of the Regulatory Board, based on their knowledge and experience.”; 10
- (b) by the insertion after subsection (2) of the following subsection:
- “(2A) The members appointed in terms of subsection (2) must include—
- (a) two persons with at least 10 years’ experience in auditing who were formerly registered as auditors; and 15
- (b) two advocates or attorneys with at least 10 years’ experience in practicing law.”;
- (c) by the substitution for subsection (4) of the following subsection:
- “(4) [**Disregarding any vacancy in its membership, not more than 40% of the members of the Regulatory Board may be registered auditors**] None of the members appointed in terms of this section may be a registered auditor or registered candidate auditor.”; 20
- (d) by—
- (i) the deletion in subsection (7) of the word “and” at the end of paragraph (b); 25
- (ii) the substitution in subsection (7) at the end of paragraph (c) for the expression “.” of the expression “; and”; and
- (iii) the addition in subsection (7) after paragraph (c) of the following paragraph:
- “(d) the qualifications of every person appointed.”; and 30
- (e) by the addition after subsection (7) of the following subsections:
- “(8) No member may—
- (a) share, directly or indirectly, in any of the profits or interests of a registered auditor or any person related to a registered auditor; or 35
- (b) receive payments, excluding pension benefits, from a registered auditor.
- (9) For purposes of subsection (8)(a), ‘related’ means persons who are connected to one another in any manner contemplated in section 2(1)(a) to (c), read with section 2(2), of the Companies Act, 2008 (Act No. 71 of 2008).”.

Amendment of section 12 of Act 26 of 2005

4. Section 12 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:
- “(1) A member of the Regulatory Board appointed in terms of section 11 holds office for such period, but not exceeding [**two**] three years, as the Minister may determine at the time of his or her appointment.”. 45

Amendment of section 14 of Act 26 of 2005

5. Section 14 of the principal Act is hereby amended by the substitution in subsection (1) for paragraph (b) of the following paragraph:
- “(b) The chairperson and deputy chairperson each hold office for a period of [**two**] three years from the date of their appointment.”. 50

Amendment of section 19 of Act 26 of 2005

6. Section 19 of the principal Act is hereby amended—

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

“(b) in respect of sections 48, 48A, 48B, 49, 50, [and] 51[,] and 51B 5
with due regard to the varying nature and seriousness of matters arising
from these sections, in writing delegate or assign appropriate powers or
duties, and oblige the investigating, enforcement and disciplinary
committees to delegate or assign appropriate powers or duties to the chief
executive officer, any employee or any member of the Regulatory 10
Board.”; and

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

“(3) The powers and duties of the investigating, enforcement and
disciplinary committees referred to in sections 48A, 48B, 49, [and] 50
and 51B are deemed delegated and assigned by the Regulatory Board to 15
the committees and are subject to this section.”.

Amendment of section 20 of Act 36 of 2005

7. Section 20 of the principal Act is hereby amended—

(a) by the substitution in subsection (3) for paragraph (b) of the following paragraph: 20

“(b) The Regulatory Board, subject to sections 21, 22 [and], 24 and
24A and taking into account, amongst other factors, the need for
transparency and representivity within the broader demographics of the
South African population, may appoint any person as a member of a
committee, on such terms and conditions as the Regulatory Board may 25
determine.”; and

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

“(5) Sections 15 and 16 relating to meetings and decisions of the
Regulatory Board, respectively, with the necessary changes apply in
respect of any committee[, **except that the committees must meet at**
least four times a year].” 30

Substitution of section 24 of Act 26 of 2005

8. The following section is hereby substituted for section 24 of the principal Act:

“Investigating committee

24. (1) The investigating committee referred to in section 20(2)(e) 35
must be independent of the auditing profession and include—

(a) two persons with at least 10 years’ experience in auditing who were
formerly registered as auditors; and

(b) an advocate or attorney with at least 10 years’ experience in practicing
law. 40

(2) No member of the investigating committee may—

(a) share, directly or indirectly, in any of the profits or interests of a
registered auditor or any person related to a registered auditor; or

(b) receive payments, excluding pension benefits, from a registered
auditor. 45

(3) For purposes of subsection (2)(a) ‘related’ means persons who are
connected to one another in any manner contemplated in section 2(1)(a) to
(c), read with section 2(2), of the Companies Act, 2008 (Act No. 71 of
2008).”

Insertion of sections 24A to 24B in Act 26 of 2005

9. The following sections are hereby inserted in the principal Act after section 24:

“Disciplinary committee

24A. (1) The Regulatory Board must appoint a disciplinary committee, referred to in section 20(2)(f), whose members are independent of the auditing profession, consisting of as many competent members as it may determine necessary to deal with disciplinary hearings in terms of this Act. 5

(2) The disciplinary committee must have one third of its members being—

- (a) persons with at least 10 years’ experience in auditing who were formerly registered as auditors; 10
- (b) advocates or attorneys with at least 10 years’ experience in practicing law; and
- (c) other suitably qualified persons as determined by the Regulatory Board. 15

(3)(a) No member of the disciplinary committee may—

- (i) share, directly or indirectly, in any of the profits or interests of a registered auditor or any person related to a registered auditor; or
- (ii) receive payments, excluding pension benefits, from a registered auditor. 20

(b) For purposes of paragraph (ii) ‘related’ means persons who are connected to one another in any manner contemplated in section 2(1)(a) to (c), read with section 2(2), of the Companies Act, 2008 (Act No. 71 of 2008).

(4) The Regulatory Board must appoint a retired judge or senior counsel as chairperson of the disciplinary committee. 25

(5) The functions of the chairperson of the disciplinary committee are to—

- (a) appoint from among the members of the disciplinary committee a disciplinary hearing panel for every hearing; 30
- (b) monitor consistency in the application of disciplinary hearing rules by disciplinary hearing panels;
- (c) facilitate efficient disciplinary hearings; and
- (d) perform any other function as prescribed by rules by the Regulatory Board. 35

(6) Despite section 20(5), read with section 15(4), when the disciplinary committee convenes a disciplinary hearing under section 50, the hearing must be conducted by a panel of at least three members including a member referred to in subsection (2)(a) and a member referred to in subsection (2)(b). 40

(7)(a) The chairperson of the disciplinary committee must appoint a member referred to subsection (2)(b) to chair the proceedings of the disciplinary hearing.

(b) The power to appoint a member to chair the proceedings of a disciplinary hearing referred to in paragraph (a) may not be delegated in terms of section 19. 45

(8) A member of the disciplinary committee may not participate in a panel contemplated in subsection (6) if he or she has an interest in a matter considered by the disciplinary hearing panel.

(9) A person may resign as a member of the disciplinary committee by giving at least three months’ written notice to the Regulatory Board or a shorter period of notice approved by the Regulatory Board. 50

(10) A member of the disciplinary committee may not use his or her position or any information by virtue of his or her work for the committee to—

- (a) improperly benefit himself or herself or another person;
- (b) impede the committee’s ability to perform its functions. 55

Subcommittees of Regulatory Board

24B. (1) The Regulatory Board—

- (a) must establish an enforcement committee to deal with recommendations made by the investigating committee on matters investigated; and
- (b) may establish other subcommittees to assist with the performance of its functions.
- (2) The Regulatory Board must appoint the members of a subcommittee referred to in subsection (1) from among its members.
- (3) The enforcement committee must include—
- (a) a person with at least 10 years' experience in auditing who was formerly registered as an auditor; and
- (b) an advocate or attorney with at least 10 years' experience in practicing law.

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Amendment of section 36 of Act 26 of 2005, as substituted by section 4 of Act 2 of 2015

10. Section 36 of the principal Act is hereby amended—

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

“(1) Subject to this section, [The] the fact that the accreditation of a professional body has ended in terms of section 35 does not affect the registration under this Act of any registered auditor or registered candidate auditor who was a member of the professional body at the time of the termination.”; and

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- (b) by substitution for subsection (2) of the following subsection:

“(2) Registered auditors or registered candidate auditors referred to in subsection (1) who were members of the professional body referred to in subsection (1) must, within six months of the termination of the accreditation of the professional body or within such other period as may be prescribed by the Regulatory Board, provide written proof to the satisfaction of the Regulatory Board that they[—

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(a)] have become members of another accredited professional body[;

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or

(b) have made arrangements for their continuing professional development as recognised or prescribed by the Regulatory Board].”

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Amendment of section 37 of Act 26 of 2005, as substituted by section 5 of Act 2 of 2015

11. Section 37 of the principal Act is hereby amended—

- (a) by the insertion after subsection (1) of the following subsection:

“(1A) An individual may only be registered with the Regulatory Board if he or she is a member of a professional body accredited in terms of section 32(2).”;

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- (b) by the deletion of paragraph (b) of subsection (2); and

- (c) by the substitution in subsection (3) for paragraph (b) of the following paragraph:

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“(b) has been convicted, whether in the Republic or elsewhere, of theft, fraud, forgery, uttering a forged document, perjury, an offence under the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004), or any offence involving dishonesty, other than **[theft, fraud or forgery,] an offence committed prior to 27 April 1994 associated with political objectives[, and has been sentenced to imprisonment without the option of a fine or to a fine exceeding such an amount as may be prescribed by the Minister]**”.

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Amendment of section 39 of Act 26 of 2005, as substituted by section 7 of Act 2 of 2015

12. Section 39 of the principal Act is hereby amended by the substitution for subsection (2) of the following subsection:

- “(2) Subject to subsection (3), the Regulatory Board may cancel the registration of any registered auditor that is an individual or any registered candidate auditor, and—
- (a) whose estate is sequestrated or provisionally sequestrated or who enters into a compromise with creditors or who has applied for debt review; or
 - (b) who ceases to be a member of an accredited professional body **[and does not within six months of such cessation provide written proof to the satisfaction of the Regulatory Board that such registered auditor or registered candidate auditor has made arrangements for his or her continuing professional development]**.

Amendment of section 41 of Act 26 of 2005, as amended by section 9 of Act 2 of 2015

13. Section 41 of the principal Act is hereby amended by—

- (a) the substitution for subsection (4) of the following subsection:

“(4) Except with the consent of the Regulatory Board, a registered auditor may not knowingly employ—

 - [(a) any person who is for the time being suspended from public practice under any provision of this Act; or]**
 - (b) any person who is no longer registered as a registered auditor as a result of the termination of his or her registration in terms of section 39(1)(c) or the cancellation of his or her registration in terms of section 51B(3)(a)(iv) or (v); or
 - (c) any person who applied for registration under section 37(3), but whose application the Regulatory Board declined.”; and
- (b) by the substitution in subsection (6) for paragraph (d) of the following paragraph:

“(d) engage in public practice during any period in respect of which the registered auditor has been disqualified from registration **[suspended from public practice]**; or”.

Amendment of section 45 of Act 26 of 2005

14. Section 45 of the principal Act is hereby amended by the addition of the following subsections:

- “(7) If an individual registered auditor has reported an irregularity to the Regulatory Board in terms of subsection (1)—
- (a) the individual registered auditor may not be removed; and
 - (b) the entity may not remove the registered auditor, until subsection (3) is complied with.
- (8) Where an individual registered auditor has reported an irregularity in terms of subsection (1) and resigns from the firm before subsection (3) is complied with, that auditor must do the necessary handover to the incoming auditor regardless of when the resignation takes effect.”.

Amendment of section 48 of Act 26 of 2005

15. Section 48 of the principal Act is hereby amended—

- (a) by the substitution in subsection (1) for the words preceding paragraph (a) of the following words:

“The Regulatory Board must refer a matter brought against a registered auditor to the investigating committee appointed under section 20 if the Regulatory Board—”;
- (b) by the insertion after subsection (1) of the following subsection:

“(1A)(a) Despite subsection (1), the enforcement committee referred to in section 24B may, if considered appropriate, refer a non-audit matter brought against a registered auditor to the relevant professional body accredited in terms of section 32(2) for investigation and disciplinary proceedings.

- (b) The enforcement committee may only refer a non-audit matter in terms of paragraph (a) if it is a matter that falls within the constitution and rules of the professional body.”;
- (c) by the substitution in subsection (2) for paragraph (c) of the following paragraph: 5
“(c) The Regulatory Board must refer to **[an]** the investigation committee any record or report received by it under this subsection.”;
- (d) by the substitution in subsection (3) for paragraph (b) of the following paragraph: 10
“(b) obtain evidence to determine whether or not in its opinion the registered auditor concerned should be charged and, if so, recommend to the **[Regulatory Board]** enforcement committee the charge or charges that may be preferred against that registered auditor.”; and
- (e) by the substitution for subsections (5), (6) and (7) of the following subsections, respectively: 15
“(5) (a) In investigating a charge of improper conduct the investigating committee may—
- (i) require or, if necessary, subpoena, the registered auditor to whom the charge relates or any other person with specific knowledge of the matter under investigation to produce to the committee any object or information, including but not limited to any working papers, statements, correspondence, books or other documents, which is in the possession or under the control of that registered auditor or other person and which relates to the subject matter of the charge, including specifically, but without limitation, any working papers of the registered auditor; 20
 - (ii) inspect and, if the investigating committee considers it appropriate, retain any such information for the purposes of its investigations; and 25
 - (iii) make copies of and take extracts from such information. 30
- (b) **[The provisions of this subsection apply regardless of whether the registered auditor is of the opinion that such information contains confidential information about a client]** The obligation to produce any information under paragraph (a)(i) may not be excused by reason of any alleged confidential information of a client contained therein. 35
- (c) A subpoena issued in terms of paragraph (a)(i) must—
- (i) be in the prescribed form;
 - (ii) be signed by an authorised official of the Regulatory Board; and
 - (iii) be served on the person concerned. 40
- (d) For purposes of this section, service contemplated in paragraph (c)(iii)—
- (i) at the last known address appearing from the Regulatory Board’s records; or
 - (ii) effected in any manner agreed upon between the an employee authorised by or the investigating committee and the person or registered auditor being subpoenaed, 45
- constitutes proper service.
- (e) A person who has been issued with a subpoena under paragraph (a)(i) may not, without just cause, fail to provide the information, working paper, statement, correspondence, book or other document specified in the subpoena, in his or her possession or custody or control which he or she has been required to produce. 50
- (f) The law relating to privilege, as applicable to a witness subpoenaed to provide a book, document or object in a civil trial before a court applies, with the necessary changes, in relation to the production of any object or information, including but not limited to any working papers, statements, correspondence, books or other documents, to the investigating committee. 55
- (g) A person subpoenaed in terms of this section is not entitled to payment by the Regulatory Board for providing information to the investigating committee. 60

(6) Nothing in this section limits or affects the right of any professional body to take disciplinary or other action against any of its members in accordance with its constitution and rules after the finalisation of the matter by the Regulatory Board.

(7) The investigating committee must, after the conclusion of the investigation, submit a report stating its recommendations to the **[Regulatory Board]** enforcement committee regarding any matter referred to it in terms of this section.”.

Insertion of sections 48A to 48B in Act 26 of 2005

16. The following sections are hereby inserted in the principal Act after section 48: 10

“Powers to enter and search premises

- 48A.** (1) The investigating committee, referred to in section 20(2)(e) may, for the purposes of investigating alleged improper conduct, authorise one or more suitably qualified persons (herein referred to as ‘the authorised person’) to enter any premises— 15
- (a) with the prior consent of—
- (i) in the case of a private residence, the person apparently in control of the business reasonably believed to be conducted at the private residence, and the occupant of the private residence or the part of the private residence to be entered; or 20
 - (ii) in the case of any other premises, the person apparently in control of the premises, after informing that person that—
 - (aa) granting consent will enable the authorised person to enter the premises and for the authorised person to subsequently search the premises and to do anything contemplated in subsection (7); and 25
 - (bb) he or she is under no obligation to admit the authorised person in the absence of a warrant; or
- (b) without prior consent and without prior notice to any person if the entry is authorised by a warrant. 30
- (2)(a) The chairperson of the investigating committee must issue the authorised person with a certificate in the prescribed form stating that the person has been authorised in terms of subsection (1).
- (b) When exercising powers in terms of this section, the authorised person must— 35
- (i) be in possession of a certificate of appointment; and
 - (ii) immediately show that certificate to any person who is affected by the authorised person’s actions in terms of this section or who requests to see the certificate.
- (3) The authorised person has the authority to search the premises and to do anything contemplated in subsection (7). 40
- (4) The authorised person exercising powers in terms of this section must do so with strict regard to—
- (a) an affected person’s right to— 45
- (i) dignity;
 - (ii) freedom and security;
 - (iii) privacy; and
 - (iv) other constitutional rights; and
- (b) decency and good order as the circumstances require, in particular by— 50
- (i) entering and searching only such areas or objects as are reasonably required for the purposes of the investigation;
 - (ii) conducting the search discreetly and with due decorum;
 - (iii) causing as little disturbance as possible; and
 - (iv) concluding the search as soon as possible. 55
- (5) An entry or search of premises in terms of this section must be done, at a reasonable time within ordinary business hours—
- (a) unless the warrant authorising it expressly authorises entry at night; or
 - (b) in the case of a search contemplated in subsection (1)(a)(ii), if the authorised person on reasonable grounds believes that the purpose for 60

which the entry and search is sought, is likely to be defeated by a delay, as close to ordinary business hours as the circumstances reasonably permit.

(6) The authorised person may be accompanied and assisted during the entry and search of any premises for an investigation by a member of the investigating committee or an employee of the Regulatory Board. 5

(7)(a) While on the premises in terms of this section, the authorised person has access to any part of the premises and to any document or item on the premises, and may do any of the following:

- (i) Open or cause to be opened any strongroom, safe, cabinet or other container in which the authorised person reasonably suspects there is a document or item that may afford evidence of the alleged improper conduct; 10
- (ii) examine, make extracts from and copy any document on the premises;
- (iii) question any person on the premises to find out information relevant to the investigation; 15
- (iv) require a person on the premises to produce to the authorised person any document or item that is relevant to the investigation and is in the possession or under the control of the person;
- (v) require a person on the premises to operate any computer or similar system on or available through the premises to— 20
 - (aa) search any information in or available through that system; and
 - (bb) produce a record of that information in any media that the authorised person reasonably requires— 25
- (vi) if it is not practicable or appropriate to make a requirement in terms of subparagraph (v), operate any computer or similar system on or available through the premises for a purpose set out in that subparagraph; and
- (vii) take possession of, and take from the premises, a document or item that may afford evidence of the contravention concerned or be relevant to the request. 30

(b) The authorised person must, on request, allow the person apparently in charge of the premises a reasonable opportunity to make copies of any document or item before it is taken as mentioned in paragraph (a)(vii). 35

(c) The authorised person must give the person apparently in charge of the premises a written receipt for documents or items taken as mentioned in paragraph (a)(vii).

(d) Subject to paragraph (e), the chairperson of the investigating committee must ensure that any document or item taken by the authorised person as mentioned in paragraph (a)(vii) is returned to the person when— 40

- (i) retention of the document or item is no longer necessary to achieve the object of the investigation; or
- (ii) all proceedings arising out the investigation have been finally disposed of. 45

(e) A document or item need not be returned to the person who produced it if it is not in the best interest of the public or any member or members of the public for the documents or items to be returned.

(f) A person from whose premises a document or item was taken as mentioned in paragraph (a)(vii), or its authorised representative, may, during normal office hours and under the supervision of the chairperson of the investigating committee, examine, copy and make extracts from the document or item. 50

(8) The authorised person or any person assisting that person as provided for in subsection (6), may use reasonable force to exercise any power in terms of this section. 55

(9) The law relating to privilege, as applicable to a witness subpoenaed to provide a book, document or object in a civil trial before a court applies, with the necessary changes, in relation to the production of any information, including but not limited to any working papers, statements, correspondence, books or other documents, to the investigating committee acting in accordance with this section. 60

(10)(a) A person who is questioned, or required to produce a document or information during an investigation in terms of this section, may object to answering the question or to producing the document or the information on the grounds that the answer, the contents of the document or the information may tend to incriminate the person. 5

(b) The authorised person must inform the person of the right to object in terms of this section at the commencement of the investigation.

(c) On such an objection, the authorised person may require the question to be answered or the document or information to be produced, in which case the person must answer the question or produce the document. 10

(d) An answer given or a document or information produced, as required in terms of paragraph (c), may be used for the purposes of an investigation or disciplinary process by the investigating committee or the disciplinary committee in terms of this Act.

(e) An incriminating answer given, and an incriminating document or information produced, as required in terms of paragraph (c), is not admissible as evidence against the person in any criminal proceedings, except in criminal proceedings for perjury or in which that person is tried for a contravention of section 53 based on the false or misleading nature of the answer. 15 20

Warrants

48B.(1)(a) A judge or magistrate who has jurisdiction may issue a warrant for the purposes of section 48A on application by a person authorised in terms of section 48A(1). 25

(b) The judge or magistrate may issue a warrant in terms of this section—

(i) on written application by the person authorised in terms of section 48A(1) setting out under oath or affirmation why it is necessary to enter and investigate the premises; and

(ii) if it appears to the magistrate or judge from the information under oath or affirmation that— 30

(aa) there are reasonable grounds for suspecting that improper conduct has occurred; and

(bb) entry and search of the premises are likely to yield information pertaining to the improper conduct.

(2) A warrant must be signed by the judge or magistrate issuing it. 35

(3) The person authorised in terms of section 48A(1) who enters premises under the authority of a warrant must—

(a) if there is apparently no one in charge of the premises when the warrant is executed, fix a copy of the warrant on a prominent and accessible place on the premises; and 40

(b) on reasonable demand by any person on the premises, produce the warrant or a copy of the warrant.

(4) The warrant must identify the premises that may be entered and searched and specify the parameters within which the person authorised in terms of section 48A(1) may perform an entry, search or seizure. 45

(5) A warrant is valid only until—

(a) the warrant is executed;

(b) the warrant is cancelled by the person who issued it or, in that person's absence, by a person with similar authority;

(c) the purpose of issuing it has lapsed; or 50

(d) the expiry of one month after the date it was issued, whichever occurs first.”

Substitution of sections 49 to 51 of Act 26 of 2005

17. The following sections are hereby substituted for sections 49 to 51 of the principal Act:

“Process following investigation

49. (1) After the conclusion of the processes contemplated in section 48, the enforcement committee contemplated in section 24B must, if sufficient grounds exist for a charge of improper conduct to be preferred against a registered auditor—

- (a) follow an admission of guilt process if the enforcement committee believes that the improper conduct of the registered auditor does not warrant a sanction contemplated in section 51B(3)(a)(iv) or (v); or
- (b) refer the matter to the disciplinary committee for a disciplinary hearing.

(2) The enforcement committee must furnish a charge sheet to the registered auditor concerned by electronic means and registered mail.

(3) A charge sheet must inform the registered auditor charged—

- (a) of the details and nature of the charge;
- (b) that the registered auditor, in writing, admit or deny the charge;
- (c) that the registered auditor, together with the admission or denial, submit a written explanation regarding the improper conduct with which charged and, if guilt is admitted, submit factors in mitigation of sentence; and
- (d) of the period, which must be reasonable but may not exceed 30 days, within which the plea or the amended plea in terms of paragraph (b) must be submitted to the enforcement committee.

(4) If a registered auditor admits guilt to the charge—

- (a) the registered auditor is considered to have been found guilty as charged; and
- (b) the enforcement committee must deal with the matter in accordance with section 51.

(5) If a registered auditor denies guilt or fails to submit a denial or plea or if the enforcement committee made a decision in terms of section 49(1)(b), the enforcement committee must, on the expiry of the period referred to in subsection (3)(d), refer the charge sheet and any plea received to the disciplinary committee to be dealt with in accordance with section 50.

(6) The acquittal or the conviction of a registered auditor by a court of law on a criminal charge is not a bar to proceedings against the registered auditor under this Act on a charge of improper conduct, even if the facts stated in the charge of improper conduct would, if proved, constitute—

- (a) the offence stated in the criminal charge on which the registered auditor was acquitted or convicted; or
- (b) any other offence of which the registered auditor might have been acquitted or convicted,

at the trial on the criminal charge.

Disciplinary hearing

50. (1) Where a matter has been referred to the disciplinary committee as contemplated in section 49(1)(b), the enforcement committee must—

- (a) furnish a charge sheet to the registered auditor concerned;
- (b) appoint a person to present the charge to the disciplinary hearing panel.

(2) A person presenting the charge to the disciplinary hearing panel may at any time prior to the conclusion of a disciplinary hearing apply to the panel to amend the charge on the grounds that an error exists in its formulation or that a charge is not properly articulated in the original charge sheet.

(3) A hearing before the disciplinary hearing panel is open to the public except where, in the opinion of the chairperson of the panel, any part of the hearing must be held in camera.

(4) A disciplinary hearing panel may, for the purposes of a disciplinary hearing, subpoena any person with relevant knowledge to appear before the panel at the time and place specified in the subpoena, to be questioned or to produce any object or information, including but not limited to any working papers, statements, correspondence, books or other documents in his or her possession or control which relate to the charge. 5

(5) A subpoena issued in terms of subsection (4) must—

- (a) be in the prescribed form;
- (b) be signed by an authorised official of the Regulatory Board; and
- (c) be served on the person concerned. 10

(6) For purposes of this section, service contemplated in subsection (5)(c)—

- (a) at the last known address appearing from the Regulatory Board's records; or
- (b) effected in any manner agreed upon between the Regulatory Board or a disciplinary hearing panel and the person being subpoenaed, constitutes proper service. 15

(7) A disciplinary hearing panel may retain any object or information, including but not limited to any working papers, statements, correspondence, books or other documents produced in terms of subsection (4), for the duration of the hearing. 20

(8) The chairperson of a disciplinary hearing panel must call upon and administer an oath to, or take an affirmation from, any witness at the hearing.

(9) At a disciplinary hearing the registered auditor charged— 25

- (a) may be assisted or represented by another person in the proceedings;
- (b) has the right to be heard;
- (c) may call witnesses;
- (d) may cross-examine any person called as a witness in support of the charge; and
- (e) may have access to documents produced in evidence. 30

(10) A registered auditor charged may—

- (a) at any time before the conclusion of the disciplinary hearing, admit that he or she is guilty of the charge, despite the fact that he or she denied the charge or failed to react in terms of section 49(3)(b); or
- (b) in the case where the registered auditor makes an admission in terms of paragraph (a), be regarded as guilty of improper conduct as charged. 35

(11) The person referred to in subsection (1) may during a disciplinary hearing— 40

- (a) lead evidence and advance arguments in support of the charge and cross-examine witnesses;
- (b) question any person who was subpoenaed in terms of subsection (4); and
- (c) call anyone to give evidence or to produce any object or information, including but not limited to any working papers, statements, correspondence, books or other documents in his or her possession or custody or under his or her control, which such person suspects or believes to have a bearing on the subject of the disciplinary hearing. 45

(12) (a) A witness who has been subpoenaed may not— 50

- (i) without just cause, fail to attend the disciplinary hearing at the time and place specified in the subpoena;
- (ii) refuse to be sworn in or to be affirmed as a witness;
- (iii) without just cause, fail to answer fully and satisfactorily to the best of his or her knowledge all questions lawfully put to him or her; or
- (iv) fail to produce any object or information, including but not limited to any working papers, statements, correspondence, books or other documents in his or her possession or custody or under his or her control, which he or she has been required to produce. 55

(b) A witness must remain in attendance until excused by the chairperson of the disciplinary hearing panel from further attendance. 60

(c) The law relating to privilege, as applicable to a witness subpoenaed to give evidence or to produce a book, document or object in a civil trial

before a court of law, with the necessary changes, applies in relation to the examination of any object or information, including but not limited to any working papers, statements, correspondence, books or other documents, or to the production of such information to the disciplinary hearing panel by any person called in terms of this section as a witness.

(d) A witness may not, after having been sworn in or having been affirmed as a witness, give a false statement on any matter, knowing that answer or statement to be false.

(e) A person may not prevent another person from complying with a subpoena or from giving evidence or producing any object or information, including but not limited to any working papers, statements, correspondence, books or other documents, which he or she is in terms of this section required to give or produce.

(f) A person subpoenaed in terms of this section must be reimbursed for incidental costs for providing information and attending the disciplinary hearing by the person who requested the subpoena.

(13) If the improper conduct with which the registered auditor is charged amounts to an offence of which he or she has been convicted by a court of law, a certified copy of the record of his or her trial and conviction by that court is, on the identification of the registered auditor as the person referred to in the record, sufficient proof of the commission by him or her of that offence, unless the conviction has been set aside by a superior court.

(14) If, for any reason, a member of the disciplinary hearing panel is unable to complete proceedings of the disciplinary hearing, the chairperson of the disciplinary committee may—

- (a) direct that the proceedings continue before the remaining disciplinary hearing panel members, two of whom must be members referred to in section 24A(2)(a) and (b); or
- (b) if there are less than two remaining disciplinary hearing panel members, constitute a new panel and direct that the proceedings start anew.

Sanctions in admission of guilt process

51. (1) If a registered auditor admits guilt as contemplated in section 49(4)(a), the enforcement committee may—

- (a) caution or reprimand the registered auditor;
- (b) impose a fine on the registered auditor not exceeding the amount determined by the Minister in the *Gazette* in terms of subsection (2); or
- (c) require the registered auditor to attend appropriate training or any other relevant non-monetary sanction or more than one relevant non-monetary sanction.

(2) The Minister must determine the amount referred to in subsection (1)(b)—

- (a) on the recommendation of the Regulatory Board; and
- (b) after publishing in the *Gazette* the proposed amount for comment for at least 30 days.

(3) The enforcement committee may impose more than one of the sanctions referred to in subsection (1).

(4) A sanction imposed in terms of subsection (1) may be suspended for a specific period or until the occurrence of a specific event or made subject to any conditions.

(5) The enforcement committee may order a registered auditor who admitted guilt to the charges to pay such reasonable costs as have been incurred in connection with an investigation or such part thereof as the enforcement committee considers just.

(6) The enforcement committee may, if considered appropriate, request the Regulatory Board to publish in the Board's website the name of the registered auditor who admitted guilt, the charge and the sanction imposed in terms of subsection (1), read with subsection (3), and a cost order in terms of subsection (4).

(7) The Regulatory Board must give effect to the decision of the enforcement committee.”

Substitution of section 51A of Act 26 of 2005

18. The following section is hereby substituted for section 51A of the principal Act:

“Application of certain provisions to registered candidate auditors

51A. This Chapter [Sections 48, 49, 50 and 51], except section 47, [apply] applies to registered candidate auditors with the necessary changes.”. 5

Insertion of section 51B in Act 26 of 2005

19. The following section is hereby inserted in the principal Act after section 51A:

“Sanctions in disciplinary hearing process

51B. (1) After the conclusion of a disciplinary hearing contemplated in section 50, the disciplinary hearing panel must— 10

(a) within 30 days, decide whether or not the registered auditor is guilty as charged and inform the relevant parties in writing of this decision;

(b) if the registered auditor is found guilty in terms of subsection (1)(a), within 30 days after the guilty finding, consider mitigating and aggravating factors for the purpose of determining an appropriate sanction; and 15

(c) within five days after considering mitigating and aggravating factors, determine the sanction and inform the relevant parties in writing of the final outcome of the disciplinary hearing. 20

(2) A registered auditor found guilty in terms of subsection (1)(a) may—

(a) address the disciplinary hearing panel in mitigation of sentence; and

(b) call witnesses to give evidence on his or her behalf in mitigation of the sentence. 25

(3) (a) If the registered auditor charged is found guilty or if the registered auditor admits to the charges, the disciplinary hearing panel may— 25

(i) caution or reprimand the registered auditor;

(ii) impose a fine not exceeding the amount determined by the Minister in the *Gazette* in terms of paragraph (b);

(iii) require the registered auditor to attend appropriate training or any other relevant non-monetary sanction or more than one relevant non-monetary sanction; 30

(iv) cancel the registration of the registered auditor concerned and remove his or her name from the register referred to in section 6; or

(v) disqualify the registered auditor from registration as a registered auditor on a temporary or permanent basis. 35

(b) The Minister must determine the amount referred to in paragraph (a)(ii)—

(i) on the recommendation of the Regulatory Board; and

(ii) after publishing in the *Gazette* the proposed amount for comment for at least 30 days. 40

(c) The disciplinary hearing panel may impose more than one of the sanctions referred to in paragraph (a). 45

(d) A sanction imposed in terms of paragraph (a) may be suspended for a specific period or until the occurrence of a specific event or made subject to any conditions.

(4) The disciplinary hearing panel may order any registered auditor found guilty or who admitted guilt to pay such reasonable costs as have been incurred in connection with the investigation and the disciplinary hearing or such part thereof as the disciplinary hearing panel considers just. 50

(5) The Regulatory Board must publish in the Board’s website, and if deemed necessary, in any other appropriate medium, the name of the registered auditor found guilty, a summary of the charges, the finding and the sanction imposed in terms of subsection (3) and a cost order in terms of subsection (4). 55

(6) The Regulatory Board must give effect to the decision of the disciplinary hearing panel.”.

Substitution of section 53 of Act 26 of 2005

20. The following section is hereby substituted for section 53 of the principal Act:

“Offences relating to investigation and disciplinary process 5

53. (1) A person is guilty of an offence if he or she—

- (a) without sufficient cause, refuses or fails to comply with any reasonable request by an official authorised by the Regulatory Board in connection with the conduct of an investigation; 10
- (b) interferes with or hinders the conduct of an investigation or a disciplinary process; 10
- (c) fails, without sufficient cause, to comply with a subpoena in terms of section 48 or 50;
- (d) having been called under section 50, refuses to be sworn in or to be affirmed as a witness or fails without sufficient cause to answer fully and satisfactorily to the best of the person’s knowledge and belief all questions lawfully put concerning the subject of the hearing; or 15
- (e) having been duly sworn in or having made an affirmation under section 50, gives a false answer to any question lawfully put to the witness or makes a false statement on any matter, knowing the answer or statement to be false. 20

(2) A person convicted of an offence under this section is liable to a fine or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment.”.

Insertion of section 57A in Act 26 of 2005 25

21. The following section is inserted in the principal Act after section 57:

“Protection of information

57A.(1)The Regulatory Board must in respect of personal information in its possession or under its control comply with the Protection of Personal Information Act, 2013 (Act No. 4 of 2013). 30

(2) A member of the Regulatory Board, a member of any committee envisaged in this Act, an employee of the Regulatory Board or an authorised person referred to in section 48A(1), may not disclose to any person not in the service of the Regulatory Board any information obtained in the performance of functions under this Act except— 35

- (a) for the purpose of enforcing compliance with this Act or any decision made in terms of this Act;
- (b) when required to do so by a court;
- (c) at the written request of, and to, any appropriate regulator which requires it for the institution or an investigation with a view to the institution of any disciplinary process or criminal prosecution; 40
- (d) at the written request of, and to, any appropriate international regulator of audits and auditors that requires such information for the purpose of investigation or a disciplinary process; or
- (e) for purposes of referring a non-audit matter in terms of section 48(1A).” 45

Amendment of arrangement of sections of Act 26 of 2005

22. The arrangement of sections of the principal Act is amended—

- (a) by the substitution for section 24 of the following sections: 50
 - “24. Investigating **[disciplinary]** committee[s]
 - 24A. Disciplinary committee
 - 24B. Subcommittees of Regulatory Board”;

- (b) by the insertion after section 48 of the following sections:
 “48A. Powers to enter and search premises
 48B. Warrants”;
- (c) by the substitution for section 49 of the following section: 5
 “49. [**Charge of improper conduct**] Process following investigation”;
- (d) by the substitution for section 51 of the following section:
 “51. [**Proceedings after hearing**] Sanctions in admission of guilt process”;
- (e) by the insertion after section 51A of the following section:
 “51B. Sanctions in disciplinary hearing process”;
- (f) by the substitution for section 53 of the following section: 10
 “53. Offences relating to investigation and disciplinary [hearings]
 process”; and
- (g) by the insertion after section 57 of the following section:
 “57A. Protection of information”.

Transitional measures 15

- 23.** If a registered auditor or registered candidate auditor—
- (a) has been charged with improper conduct before the commencement of this Act, the matter must be dealt with in terms of the principal Act, before its amendment by this Act; or
 - (b) committed an act of improper conduct but has not been charged before the commencement of this Act, the matter must be dealt with in terms of the principal Act, after its amendment by this Act, except that the sanctions applicable at the time of the act of improper conduct must be applied. 20

Short title

- 24.** This Act is called the Auditing Profession Amendment Act, 2020. 25

MEMORANDUM ON THE OBJECTS OF THE AUDITING PROFESSION AMENDMENT BILL, 2020

1. PURPOSE OF BILL

The Auditing Profession Amendment Bill, 2020 (the “Bill”), proposes amendments to the Auditing Profession Act, 2005 (Act No. 26 of 2005) (the “Act”).

2. SUMMARY OF BILL

- 2.1 The Bill provides for, among others, amendments to—
- (a) strengthen the governance of the Independent Regulatory Board for Auditors (“IRBA”);
 - (b) strengthen the investigating and disciplinary processes;
 - (c) provide for the power to enter and search premises and to subpoena persons with information required for an investigation or disciplinary process;
 - (d) provide for the power to issue a warrant for purposes of entering and searching of premises;
 - (e) provide for processes to be followed after an investigation;
 - (f) provide for sanctions in admission of guilt process and following a disciplinary hearing;
 - (g) provide for offences relating to investigation and disciplinary process; and
 - (h) provide for protection and the sharing of information.
- 2.2 To strengthen the independence of the IRBA and also to deal with issues of conflict of interest by members of the IRBA, the proposed amendment prohibits registered auditors and registered candidate auditors from being appointed as members of the IRBA; and further prohibits members of the IRBA from—
- (a) sharing directly or indirectly, in any of the profits or interests of a registered auditor or any person related to a registered auditor; or
 - (b) receiving payments, excluding pension benefits, from a registered auditor.
- 2.3 To address the challenges faced by the IRBA due to non-cooperation by auditing firms during investigations into improper conduct by registered auditors, the proposed amendment empowers the investigating committee to authorise a person to enter and search premises or subpoena any person with information required to complete an investigation. The Bill also authorises a disciplinary panel to subpoena a person to appear before it for the purposes of a disciplinary hearing.
- 2.4 The disciplinary committee of the IRBA is overburdened by the amount of disciplinary cases it has to deal with due to the limited number of members appointed in the disciplinary committee. To address this challenge, an amendment is proposed to allow the IRBA to appoint as many members of the disciplinary committee as it may determine. The proposed amendment also provides for the appointment of a panel from among the members of the disciplinary committee to deal with disciplinary cases. Therefore, a panel will be appointed for each case instead of the disciplinary committee having to deal with all the cases. Importantly, it is proposed that the decision of a panel is regarded as a decision of the disciplinary committee. The proposed amendment is also aimed at ensuring that disciplinary cases are expedited.
- 2.5 A further amendment empowers the IRBA to, if considered appropriate, refer a non-audit matter brought against a registered auditor to an accredited professional body for investigation.
- 2.6 As a regulator, it is important that the IRBA maintains processes to deal with personal information. The proposed amendment requires the IRBA to take appropriate measures to ensure the protection of personal information in its

possession or under its control and also enables the IRBA to share information.

3. OBJECTS OF BILL

3.1 Clause 1—Amendment of section 1

Section 1 is proposed to be amended by inserting the definition of Constitution.

3.2 Clause 2—Amendment of section 4

The proposed amendment requires the IBRA to determine a regulatory strategy with the approval of the Minister.

3.3 Clause 3—Amendment of section 11

3.3.1 The proposed amendment prohibits registered auditors and registered candidate auditors from being appointed as members of the IRBA. The proposed amendment also prohibits members of the IRBA from—

- (a) sharing directly or indirectly, in any of the profits or interests of a registered auditor or any person related to a registered auditor; or
- (b) receiving payments, excluding pension benefits, from a registered auditor.

3.3.2 The proposed amendment provides for an increase in the Board, of representation of formerly registered auditors and legally qualified persons, from one to two.

3.4 Clause 4—Amendment of section 12

The proposed amendment provides for members of the IRBA to hold office for a period not exceeding three years.

3.5 Clause 5—Amendment of section 14

The proposed amendment increases the term of office for the chairperson and deputy chairperson of the disciplinary committee from two to three years.

3.6 Clause 6—Amendment of section 19

The proposed amendment seeks to correct cross references and insert references to the enforcement committee where appropriate.

3.7 Clause 7—Amendment of section 20

The proposed amendment deletes an unnecessary reference to the number of times committees must meet.

3.8 Clause 8—Amendment of section 24

The proposed amendment provides for the IRBA to establish an investigating committee and to appoint its members. The amendment also regulates the conduct of members of the investigating committee.

3.9 Clause 9—Insertion of sections 24A to 24B

The proposed amendment provides a power for the IRBA to appoint as many members of the disciplinary committee as it may determine. The amendment further regulates the conduct of members of the disciplinary committee by prohibiting a member from using his or her position to improperly benefit himself or herself or another person or to impede the work of the committee.

The proposed amendment allows the IRBA to establish subcommittees, including an enforcement committee, which has the power to deal with certain categories of disciplinary matters of improper conduct by a registered auditor.

3.10 **Clause 10—Amendment of section 36**

The proposed amendment deletes a paragraph which has become obsolete.

3.11 **Clause 11—Amendment of section 37**

The proposed amendment prohibits the registration of an individual as an auditor or candidate auditor if the person has been convicted of an offence.

3.12 **Clause 12—Amendment of section 39**

The proposed amendment deletes part of a paragraph which has become obsolete.

3.13 **Clause 13—Amendment of section 41**

The proposed amendment deletes a paragraph which has become obsolete.

3.14 **Clause 13—Amendment of section 45**

The proposed amendment prohibits the removal of a registered auditor before the auditor completes the process of reporting irregularities to the IRBA as envisaged in section 45. The amendment further proposes that where an individual registered auditor has reported an irregularity and resigns from the firm before completing the reporting, that auditor must do the necessary handover to the incoming auditor regardless of when the resignation takes effect.

3.15 **Clause 14—Amendment of section 48**

The proposed amendments—

- (a) allow the enforcement committee to refer a non-audit matter brought to the IRBA against a registered auditor to an accredited professional body for investigation and disciplinary proceedings;
- (b) empowers the investigating committee to subpoena a registered auditor who has been charged for improper conduct or any other person to produce to the committee any object or information, including but not limited to, any working papers, statements, correspondence, books or other documents, which is in the possession or under the control of that registered auditor or other person and which relates to the subject matter of the charge.

3.16 **Clause 15—Insertion of sections 48A to 48B**

The proposed amendment provides a power to enter and search premises without a warrant for purposes of an investigation. The proposed amendment further provides for the issue of a warrant for the purposes of entering and searching premises during an investigation of alleged misconduct, if consent is not obtained.

3.17 **Clause 16—Substitution of sections 49 to 51**

3.17.1 The proposed amendment provides for a process to be followed after an investigation, which is to charge a registered auditor for improper conduct if sufficient grounds exist, by following an admission of guilt process or referring the matter to the disciplinary committee for a disciplinary hearing. Where a matter is referred to the disciplinary committee, a panel will be appointed for each case, instead of the disciplinary committee having to deal with all the cases.

3.17.2 The proposed amendment further authorises a panel to, for the purposes of a disciplinary hearing, subpoena any person to appear before it at the time and place specified in the subpoena, to be questioned or to produce any object or information, including but not limited to, any working papers, statements, correspondence, books or other documents in his or her possession or control which relate to the charge. The amendment is also aimed at ensuring that disciplinary cases are expedited.

3.17.3 The proposed amendment provides for sanctions which may be imposed following an admission of guilt process, including the imposition of a fine, based on the maximum amount determined by the Minister. The Act currently empowers the disciplinary committee to impose a fine not exceeding the amount calculated according to the ratio for five year's imprisonment, prescribed in terms of the Adjustment of Fines Act, 1991 (Act No. 101 of 1991), on a registered auditor who is found guilty following a disciplinary hearing. The fines which have been determined in terms of the Adjustment of Fines Act, 1991, are too low and do not make the required impact as a deterrent.

3.18 Clause 17—Amendment of section 51A

Section 51A is proposed to be amended to include a cross-reference to the inserted section 51B.

3.19 Clause 18—Insertion of section 51B

The proposed amendment provides for sanctions to be imposed following a disciplinary hearing, including the imposition of a fine based on the maximum amount determined by the Minister. The amendment further allows for a registered auditor found guilty to address the panel in mitigation of sentence and to call witnesses to give evidence on his or her behalf in mitigation of the sentence.

3.20 Clause 19—Substitution of section 53

The proposed amendment makes it an offence to fail to comply with a subpoena or to interfere with or hinder the conduct of an investigation. In terms of the proposed amendment, a person found guilty of this offence may be liable on conviction to a fine or imprisonment for a period not exceeding five years or to both such fine and imprisonment.

3.21 Clause 20—Insertion of section 57A

The proposed amendment requires the IRBA to comply with the Protection of Personal Information Act when dealing with personal information under its control. The proposed amendment also provides for the protection and sharing of information.

3.22 Clause 21—Transitional measures

The proposed amendment provides for transitional measures in respect of a registered auditor charged for improper conduct committed before the commencement of the envisaged Act and further provides for instances where a registered auditor committed an act of improper conduct, but has not been charged at the time of the commencement of the envisaged Act.

4. ORGANISATIONS AND INSTITUTIONS CONSULTED

- (a) Independent Regulatory Board for Auditors
- (b) The amendments proposed in the Bill as introduced were also published for public comment in 2018 as part of the Financial Matters Amendment Bill.

5. FINANCIAL IMPLICATIONS FOR STATE

Increasing the number of members of the disciplinary committee to constitute panels to conduct disciplinary hearings proposed in the amendments to the Act may have financial implications for the State since the IRBA may require additional funding.

6. PARLIAMENTARY PROCEDURE

- 6.1 The Constitution of the Republic of South Africa, 1996 (the “Constitution”) regulates the manner in which legislation may be enacted by the legislature and thus prescribes the different procedures to be followed for such enactment. The national legislative process is governed by sections 73 to 77 of the Constitution.
- 6.2 The test for tagging is not concerned with determining the sphere of government that has competence to legislate on a matter, nor the process concerned with preventing interference in the legislative competence of another sphere of government. In *Tongane v Minister of Agriculture and Land Affairs* 2010 (6) SA 214 (CC), the Constitutional Court ruled on the test to be used when tagging a Bill. The Court held, in paragraph 70, that the “*test for determining how a Bill is to be tagged must be broader than that for determining legislative competence*”. Whether a Bill is a section 76 Bill is determined in two ways. First by the explicit list of legislative matters in section 76(3), and second by whether the provisions of a Bill in substantial measure fall within a concurrent legislative competence (see paragraphs 70-72 of the judgment). The Court held that the tagging test focuses on all provisions of the Bill in order to determine the extent to which they substantially affect functional areas listed in Schedule 4, and not on whether any of its provisions are incidental to its substance.
- 6.3 We have considered all the provisions in the Bill in light of Schedules 4 and 5 to the Constitution and found that the Bill does not provide for the amendment of the Constitution or money matters, as stated in section 77 of the Constitution and therefore we do not regard it necessary, to consider section 74 and section 77 of the Constitution.
- 6.4 The Office of the Chief State Law Adviser and the National Treasury are of the opinion that this Bill must be dealt with in accordance with the procedure established by 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 Office of the Chief State Law Adviser is of the opinion that it is not necessary to refer the 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 contains no provision pertaining to customary law or customs of traditional communities.

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