

REPUBLIC OF SOUTH AFRICA

SMALL ENTERPRISES OMBUD SERVICE BILL

*(As introduced in the National Assembly (proposed section 75); explanatory summary of Bill published in
Government Gazette No. 41623 of 10 May 2018)
(The English text is the official text of the Bill)*

(MR RWT CHANCE, MP)

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BILL

To provide for the establishment of the Small Enterprises Ombud Service; to provide for its mandate and functions; to provide for a dispute resolution mechanism for small enterprises; and to provide for matters connected therewith.

PREAMBLE

WHEREAS small, medium, and micro enterprises and co-operatives (SMMEs) comprise a large portion of the South African economy;

AND WHEREAS every effort must be made to ensure that SMEs are given the backing and financial support they require in order to thrive and prosper,

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

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Chapter 1

Interpretation

Definitions

1. In this Act, unless the context indicates otherwise—
 - “**adjudicator**” means a person contemplated in section 21(2)(b);
 - “**Board**” means the Board of Service established by section 6;
 - “**chief financial officer**” means the person contemplated to be appointed as the chief financial officer in section 14;
 - “**Chief Ombud**” means the person contemplated to be appointed as the Chief Ombud in section 14;
 - “**conciliator**” means a person contemplated in section 21(2)(c);
 - “**Department**” means the Department responsible for the development of small enterprises;
 - “**deputy Ombud**” means a person contemplated in section 21(2)(a);
 - “**Director-General**” means the Director-General of the Department;
 - “**dispute**” means a dispute lodged by a small enterprise against another enterprise or the state and includes matters pertaining to the interpretation of service agreements and late or non-payment of amounts owed and payable to the small enterprise;
 - “**mandate**” means the mandate of the Service as contemplated in section 5;
 - “**Minister**” means the Minister responsible for the development of small enterprises;
 - “**Ombud**” means a person contemplated in section 21(2)(a);
 - “**practice directive**” means a practice directive issued in terms of section 36;
 - “**prescribe**” means prescribe by regulation as contemplated in section 29;
 - “**Public Finance Management Act**” means the Public Finance Management Act, 1999 (Act No. 1 of 1999);
 - “**regulation**” means a regulation made under section 29;
 - “**Service**” means the Small Enterprises Ombud Service established by section 3;
 - “**small enterprise**” means a small enterprise as contemplated in the National Small Enterprises Act, 1996 (Act No. 102 of 1996); and
 - “**this Act**” includes the regulations.

Chapter 2

Small Enterprises Ombud Service

Objects of Act

2. The objects of this Act are to—
 - (a) establish the Service;
 - (b) determine the functions, operations and governance of the Service; and
 - (c) provide for a dispute resolution mechanism for small enterprises.

Establishment of Service

3. (1) The Small Enterprises Ombud Service is hereby established as a juristic person.
- (2) The Service operates as a national public entity listed in terms of the Public Finance Management Act with its executive authority vested in the Minister.
- (3) The Service must establish a national head office and regional offices.
- (4) The provisions of the Public Finance Management Act apply to the Service.

Functions of Service

4. (1) The Service must—
 - (a) develop and provide a dispute resolution service in terms of this Act;
 - (b) provide training for conciliators, adjudicators and other employees of the Service; and
 - (c) take custody of, preserve and provide public access electronically or by other means to small enterprises documentation and information such as may be determined by the Minister by notice in the *Gazette*.
- (2) In performing its functions the Service—
 - (a) must promote good governance of agreements involving small enterprises;
 - (b) must provide education, information, documentation and such services as may be required to raise awareness to small enterprises of their rights under this Act; and
 - (c) may generally, deal with any such matters as may be necessary to give effect to the objectives of this Act.

- (3) The Service acts through its Board.

Mandate

5. (1) The Minister must conclude a written mandate with the Service as soon as possible, but not later than six months from the date on which section 6 becomes operational.

(2) The mandate must—

- (a) contain the operational and performance indicators against which the performance of the Service is measured;
- (b) contain specific service delivery targets that the Service must attain; and
- (c) contain directions regarding the utilisation of any surplus revenue.

(3) The mandate must deal with any other matter that the Minister and the Service may agree on.

(4) The mandate must be reviewed annually for five years following the establishment of the Service and thereafter, every five years or such shorter period as the Minister may prescribe.

(5) The mandate must be consistent with this Act and other relevant legislation.

Board of Service

6. (1) The Board of the Small Enterprises Ombud Service is hereby established.

(2) The Board is responsible for the management and governance of the Service.

(3) The Board consists of—

- (a) two executive members; and
- (b) seven non-executive members.

(4) The Minister must appoint the chairperson and deputy chairperson of the Board from the non-executive members of the Board.

(5) The Board may designate any other non-executive member of the Board to act as chairperson if both the chairperson and the deputy chairperson are absent or unable to perform their functions.

Appointment of members of Board

7. (1) The Minister must by notice in the *Gazette* and two national newspapers circulating in the Republic invite all interested persons to submit, within the period and in the

manner mentioned in the notice, the names of persons fit to be appointed as non-executive members of the Board.

(2) The Minister must appoint a nomination committee consisting of not more than seven persons, two of whom must be nominated by the relevant parliamentary committees in each House, to make recommendations to the Minister for the appointment of the non-executive members of the Board.

(3) In establishing a nomination committee, the Minister must ensure that the committee is broadly representative.

(4) The nomination committee, in making a recommendation to the Minister, must consider the—

(a) skills, knowledge and experience of a candidate in areas of—

- (i) business management;
- (ii) economics;
- (iii) dispute resolution process; or
- (iv) law; and

(b) need for representation of historically disadvantaged persons.

(5) If the recommendation of the nomination committee does not contain a suitable person or the required number of suitable persons contemplated by subsection (9), the Minister may call for further nominations in the manner set out in subsection (1).

(6) The Minister must consider each person nominated by the nominated committee and appoint the non-executive members of the Board from the persons so nominated.

(7) The Minister must, within 30 days after such appointment, publish the name of each member so appointed and the date of commencement of his or her term of office in the *Gazette*.

(8) A non-executive member of the Board—

- (a) holds office for a period not exceeding three years and may be reappointed on expiry of his or her term;
- (b) may not serve for more than two consecutive terms of office;
- (c) is appointed according to the terms and conditions determined by the Minister;
- (d) must be paid from the revenue of the Service such remuneration and allowances as may be determined by the Minister in consultation with the Minister of Finance, taking into consideration regulations and guidelines issued by the Minister for the Public Service and Administration and the National Treasury; and
- (e) is appointed on a part-time basis.

(9) The Minister must appoint at least five non-executive members of the first Board for a period not exceeding three years.

(10) Any vacancy occurring in the Board must be filled in the same manner as the vacating member was appointed.

(11) The executive members of the Board are appointed in terms of section 15.

Functions of Board

8. The Board must—

- (a) implement the mandate and any strategic plan of the Service in order to achieve the objectives of the Service;
- (b) make decisions on behalf of the Service and ensure that these decisions are carried out;
- (c) provide guidance to the Chief Ombud in the performance of his or her functions in terms of this Act;
- (d) notify the Minister immediately of any matter that may prevent or materially affect the achievement of the objectives or financial targets of the Service; and
- (e) refer to the Minister any matter concerning the adverse functioning of the Service.

Disqualification from membership of Board

9. A person may not be appointed as or remain as a member of the Board, as the case may be, if that person—

- (a) is an unrehabilitated insolvent or becomes insolvent and the insolvency results in the sequestration of that person's estate;
- (b) has been declared by a competent court to be mentally ill;
- (c) has been convicted, in the Republic or elsewhere, of theft, fraud, forgery, perjury or any other offence involving dishonesty;
- (d) has been convicted of any other offence, whether in the Republic or elsewhere, committed after the Constitution of the Republic of South Africa, 1993, took effect, and sentenced to imprisonment without the option of a fine;
- (e) has been, or is, removed from an office of trust on account of misconduct in respect of fraud or the misappropriation of money;

- (f) is otherwise disqualified from serving as a member of a board in terms of the Companies Act, 2008 (Act No. 71 of 2008); or
- (g) has or acquires an interest in a business or enterprise which may conflict or interfere with the proper performance of his or her functions as a member of the Board.

Resignation and removal from office

- 10.** (1) A member of the Board may resign by giving to the Minister—
- (a) one month's written notice; or
 - (b) less than one month's written notice, with the approval of the Minister.
- (2) The Minister may, subject to the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000), remove a member of the Board from office if such member—
- (a) becomes disqualified in terms of section 9;
 - (b) acted contrary to this Act;
 - (c) has failed to disclose a potential interest that could cause a conflict or withdraw from a meeting as required when disclosing such potential conflict of interest;
 - (d) has failed to perform the functions of his or her office efficiently and effectively;
 - (e) has been found guilty of misconduct, or after an inquiry found to be incapable of or incompetent to perform his or her duties; or
 - (f) if such member is absent from three consecutive meetings without leave of the chairperson.

Fiduciary duty and disclosure

11. (1) A member of the Board must, upon appointment, submit to the Minister and the Board a written statement in which that member declares his or her financial interests including whether or not that member has any direct or indirect financial interest in a small enterprise.

(2) A member of the Board may not be present, or take part in, the discussion of or the taking of a decision on any matter before the Board in which that member or his or her family member, business partner or associate has a direct or indirect financial interest.

(3) If a member of the Board acquires an interest that could reasonably be expected to be an interest contemplated in this section, he or she must immediately, but not later than three months after acquiring that interest in writing declare that fact to the Minister and the Board.

(4) If an organisation or enterprise in which a member of the Board has an interest contemplated in this section is requested to offer its services to the Service, or is in the process of concluding any agreement with the Service, including an agreement in respect of the alienation of land to the Service, the organisation or enterprise must immediately, in writing, declare the interest of such member to the Minister and the Board.

(5) A member of the Board must at all times exercise the utmost good faith, honesty and integrity, care and diligence in performing his or her functions as a member of the Board, unless excused in writing by the chairperson or deputy chairperson of the Board, and, in furtherance of these functions and without limiting their scope, must—

- (a) take reasonable steps to inform himself or herself about the Service, its business and activities and the circumstances in which it operates;
- (b) take reasonable steps, through the processes of the Board, to obtain sufficient information and advice about all matters to be decided by the Board to enable him or her to make conscientious and informed decisions;
- (c) attend all meetings of the Board, unless excused in writing by the chairperson or deputy chairperson of the Board;
- (d) exercise an active and independent opinion with respect to all matters to be decided by the Board;
- (e) exercise due diligence in relation to any business of, and necessary preparation for and attendance at meetings of, the Board or any committee to which such member of the Board is appointed;
- (f) comply with any internal code of conduct that the Service may establish for members of the Board;
- (g) not engage in any activity that may undermine the integrity of the Service;
- (h) not make improper use of his or her position as a member or of information acquired by virtue of his or her position as a member of the Board; and
- (i) treat any confidential matters relating to the Service, that is obtained in his or her capacity as a member of the Board, as strictly confidential and not divulge them to anyone without the authority of the Service or as required as part of that member's official functions as a member of the Board.

(6) This section must be interpreted as adding to, and not deviating from, any law relating to the criminal or civil liability of a member of a governing body, and criminal or civil proceedings that may be instituted in respect of such a liability.

(7) A member who contravenes or fails to comply with subsection (5) may be charged with misconduct.

Committees

12. (1) The Board may establish one or more committees to perform such functions as the Board may determine.

(2) The Board must—

- (a) assign members of the Board to serve on a committee, based on their knowledge and skills; and
- (b) determine the—
 - (i) terms of reference of a committee;
 - (ii) composition of a committee;
 - (iii) tenure of members on a committee;
 - (iv) reporting mechanisms of a committee; and
 - (v) methods and reasons for removal of a member from a committee.

(3) Non-executive members of the Board must make up the majority of the members of a committee.

(4) The Board may appoint one or more specialists to a committee for their technical support.

(5) Unless specially delegated by the Board, a committee has no decision-making powers and can only make recommendations to the Board.

(6) A committee must meet as often as is necessary in order to carry out its functions and may determine its own procedures.

(7) A committee must be chaired by a non-executive member of the Board.

Delegation and assignment of functions by Board

13. (1) The Board may, by a resolution passed by 75 per cent of its members and subject to subsection (4)—

- (a) delegate any of its powers and assign any of its functions to—
 - (i) a member of the Board;
 - (ii) a committee established in terms of section 12;
 - (iii) the Chief Ombud;

- (iv) the chief financial officer; or
 - (v) an employee of the Service; and
 - (b) amend or revoke such delegation or assignment.
- (2) Notwithstanding a delegation or assignment contemplated in subsection (1), the Board remains accountable in respect of any power delegated or function assigned and nothing prevents the Board from exercising or performing any power or duty so delegated or assigned.
- (3) (a) Any delegation or assignment contemplated in subsection (1)—
- (i) may be made subject to such conditions as the Board may determine; and
 - (ii) must be communicated to the delegatee or assignee in writing.
- (b) The written communication contemplated in subsection (a)(ii) must contain full particulars of the matters being delegated or assigned and of the conditions subject to which the power may be exercised or the function must be performed.
- (4) The Board may not delegate—
- (a) the power to appoint the Chief Ombud; or
 - (b) its functions in respect of—
 - (i) the appointment of the chief financial officer;
 - (ii) the implementation of the mandate; or
 - (iii) the implementation of any strategic plan of the Service.

Appointment of Chief Ombud and chief financial officer

14. (1) The Board must, with the approval of the Minister, appoint a Chief Ombud and a chief financial officer to assist the Service in meeting its objectives.
- (2) The Board must invite applications for the posts of Chief Ombud and chief financial officer by publishing advertisements in the media.
- (3) The appointment must be made after following a transparent and competitive process.
- (4) A person appointed as Chief Ombud or chief financial officer must—
- (a) have suitable qualifications and experience relevant to the functions of the Service;
 - (b) have suitable expertise in and understanding of small enterprises; and
 - (c) not be disqualified as contemplated in section 9.

Conditions of appointment of Chief Ombud and chief financial officer

15. (1) The appointment of the Chief Ombud and the chief financial officer must be in accordance with the applicable labour legislation and is subject to the conclusion of an annual performance contract with the Board.

(2) The Chief Ombud and the chief financial officer are appointed for a term of five years and may be reappointed for one or more additional terms of five years, subject to the approval of the Minister.

(3) (a) The Chief Ombud holds office on such terms and conditions as the Board may determine, in consultation with the Minister, the Minister of Finance and the Minister for the Public Service and Administration.

(b) The chief financial officer holds office in accordance with the applicable labour legislation and on such terms and conditions as may be determined by the Chief Ombud within the limits determined by the Board.

(4) The Chief Ombud and the chief financial officer are executive members of the Board.

(5) The Chief Ombud and the chief financial officer are entitled to a remuneration package determined by the Board in consultation with the Minister and the Minister of Finance.

(6) The Chief Ombud and the chief financial officer are accountable to the Board.

Removal of Chief Ombud and chief financial officer from office

16. (1) The Board must, in consultation with the Minister and subject to applicable labour legislation, remove the Chief Ombud and chief financial officer from office—

(a) if found guilty of misconduct;

(b) upon a finding that he or she failed to perform the duties connected with that office diligently; or

(c) if the Chief Ombud or the chief financial officer becomes subject to any disqualification contemplated in section 9.

(2) The Chief Ombud and the chief financial officer may resign on written notice of at least 30 days to the chairperson.

(3) The Board may suspend the Chief Ombud or the chief financial officer during misconduct proceedings against him or her on such terms and conditions as the Board, in consultation with the Minister, may determine.

Acting Chief Ombud and chief financial officer

17. (1) The Board may in writing appoint any senior employee of the Service to act as Chief Ombud or chief financial officer if the Chief Ombud or chief financial officer—

- (a) is temporarily unable to perform his or her duties; or
- (b) has vacated or been removed from office and a new Chief Ombud or chief financial officer, as the case may be, has not yet been appointed.

(2) An acting Chief Ombud or acting chief financial officer may exercise all the powers and must perform all the duties of the Chief Ombud or chief financial officer, as the case may be.

Functions of Chief Ombud

18. (1) The Chief Ombud is the head of the administration of the Service.

(2) The functions of the Chief Ombud are to—

- (a) manage the affairs of the Service;
- (b) implement the policies and decisions of the Board;
- (c) recruit and manage employees; and
- (d) develop efficient, transparent and cost-effective administrative systems.

(3) The Board may issue directives to the Chief Ombud in respect of the functions contemplated in subsection (2).

Functions of chief financial officer

19. The functions of the chief financial officer are to—

- (a) manage the risk of any project of the Service;
- (b) assist the Board with regard to compliance with its duties in terms of the Public Finance Management Act;
- (c) ensure that the Service has adequate income and liquidity to perform its functions;
- (d) ensure that money payable to the Service is properly collected;
- (e) ensure that there is adequate control over the assets acquired, managed or controlled by the Service;

- (f) ensure that the liabilities incurred on behalf of the Service are properly authorised;
- (g) ensure efficiency and economy of operations and avoidance of fruitless and wasteful expenditure;
- (h) ensure that the financial system is in line with generally accepted accounting practices and procedures;
- (i) ensure an adequate budgeting and financial system; and
- (j) provide sound financial control systems for the Service.

Delegation by Chief Ombud and chief financial officer

20. (1) The Chief Ombud and the chief financial officer, as the case may be, may delegate any of their powers and assign any of their duties to an employee of the Service.

(2) Any delegation contemplated in subsection (1)—

- (a) may be made subject to such conditions as the Board may determine;
- (b) must be communicated to the delegatee in writing;
- (c) may be amended or withdrawn in writing by the Chief Ombud or the chief financial officer, as the case may be.

(3) Notwithstanding a delegation or assignment contemplated in subsection (1), the Chief Ombud or the chief financial officer, as the case may be, remains accountable for any power delegated or function assigned, and is not divested of any power or duty so delegated or assigned.

Staff of Service

21. (1) The Board must determine the staff establishment necessary to enable the Service to perform its functions.

(2) As part of the staff establishment contemplated in subsection (1), the Chief Ombud must, for each regional office established, appoint—

- (a) an Ombud and a deputy Ombud with—
 - (i) suitable qualifications and experience necessary to administer that office under the supervision of the Chief Ombud; and
 - (ii) suitable expertise in and understanding of small enterprises and dispute resolution processes;

- (b) full-time and part-time adjudicators—
 - (i) with suitable qualifications and experience necessary to adjudicate disputes under the supervision of an Ombud; and
 - (ii) who are admitted attorneys or advocates; and
 - (c) full-time and part-time conciliators with—
 - (i) suitable qualifications and experience necessary to conciliate disputes under the supervision of an Ombud; and
 - (ii) who are admitted attorneys or advocates.
- (3) The Chief Ombud must develop a human resource policy for approval by the Minister, which policy—
 - (a) must provide financial limits related to the remuneration payable to employees; and
 - (b) may make provision for non-pensionable allowances for employees.
- (4) The employees contemplated in subsections (1) and (2) are appointed subject to the terms and conditions determined by the Chief Ombud within the financial limits determined by the human resource policy contemplated in subsection (3).
- (5) The Chief Ombud must develop a code of conduct, applicable to all members of staff of the Service and justiciable for purposes of disciplinary proceedings, to ensure—
 - (a) compliance with any applicable law;
 - (b) the effective, efficient and economical use of the resources of the Service; and
 - (c) the promotion and maintenance of a high standard of professional ethics.
- (6) A person in the employ of the Service becomes a member of the Government Employees' Pension Fund contemplated in section 2 of the Government Employees Pension Law, 1996 (Proclamation No. 21 of 1996), and is entitled to pension and retirement benefits as if that person were in service in a post classified in a division of the public service.
- (7) Staff from public entities reporting to the Minister may be employed by or seconded to the Service subject to the provisions of the Labour Relations Act, 1995 (Act No. 66 of 1995), and the human resource policy contemplated in subsection (3).
- (8) Staff may also be transferred or seconded to the Service from the public service subject to the provisions of the Public Service Act, 1994 (Proclamation No. 103 of 1994), and the human resource policy contemplated in subsection (3).

Funds of Service

- 22.** (1) The funds of the Service consist of—
- (a) money appropriated by Parliament;
 - (b) levies collected with the approval of the Minister;
 - (c) fees for services rendered based on cost recovery;
 - (d) interest derived from investments of the Service;
 - (e) loans raised by the Service, subject to section 23;
 - (f) donations or contributions received by the Service with the approval of the Minister; and
 - (g) subsidies and grants from organs of state.
- (2) The Service must, subject to section 23, utilise the funds to defray expenses incurred by it in the performance of its functions.

Application of Public Finance Management Act

23. The Service is subject to the Public Finance Management Act and its financial management, preparation and submission of budgets, preparation of financial statements, audits and annual reports, and reporting must be done in accordance with the Public Finance Management Act.

Tabling in Parliament

- 24.** The Minister must table the annual report of the Service in Parliament within 14 days—
- (a) after receiving the report, if Parliament is in session; or
 - (b) after the commencement of the next parliamentary session, if Parliament is not in session when the Minister receives the report.

Delegation by Minister

25. (1) The Minister may, subject to subsection (3), delegate to the Director-General any of his or her powers or assign any of his or her functions conferred or imposed on him or her by this Act.

- (2) Any delegation contemplated in subsection (1)—
 - (a) may be made subject to such conditions as the Minister may determine;
 - (b) must be in writing;
 - (c) may be amended or withdrawn by the Minister in writing; and
 - (d) does not prohibit the Minister from exercising that power or performing that duty and the Minister remains accountable for the power delegated or function assigned.
- (3) The Minister may not delegate the power to—
 - (a) make regulations; or
 - (b) appoint a member of the Board.
- (4) (a) The Minister may issue a directive to the Director-General regarding a delegation contemplated in subsection (1).
 - (b) The Director-General must comply with the directive contemplated in paragraph (a).

Additional functions

26. (1) The Minister may, after consultation with the Board, authorise the Service to perform any additional function not inconsistent with this Act.

(2) The authorisation contemplated in subsection (1) must be in writing, detailing the funding arrangements as well as the terms and conditions relating to such additional function.

Provision of information

27. (1) (a) The Minister may direct the Board to submit specific information to him or her.

(b) The Board must comply with any directive contemplated in paragraph (a).

(2) The Service must provide the Minister or a person authorised by the Minister with access to such books, accounts, documents and assets of the Service as the Minister may direct.

(3) The Minister may appoint a person to investigate the affairs or financial position of the Service and compliance by the Service with this Act, and may recover from the Service the fees and disbursements incurred by that person during the investigation.

(4) An individual member of the Board and an employee of the Service, must comply with any directive of the Minister contemplated in subsections (1) and (2) to the extent that they are able to do so.

Intervention by Minister

- 28.** (1) The Minister may direct the Service to take specific action if the Service—
- (a) is in financial difficulty or is otherwise being mismanaged;
 - (b) is unable to perform its functions effectively due to dissension among Board members;
 - (c) has acted unfairly or in a discriminatory or inequitable manner;
 - (d) has failed to comply with any law;
 - (e) has failed to comply with any directive issued by the Minister under this Act; or
 - (f) has obstructed the Minister, or a person authorised by the Minister, in performing a function in terms of this Act.
- (2) A directive contemplated in subsection (1) must state—
- (a) the nature of the deficiency;
 - (b) the steps which must be taken to remedy the situation; and
 - (c) a reasonable period within which the steps contemplated in paragraph (b) must be taken, which period may not exceed six months.
- (3) If the Service fails to remedy the situation within the stated period, the Minister may, after having—
- (a) given the Service a reasonable opportunity to make submissions; and
 - (b) afforded the Service a hearing on any submissions received,
- replace one or more members of the Board and where circumstances so require, appoint an administrator to take over the relevant function of the Service until the member or members of the Board has or have been replaced.
- (4) If the Minister appoints an administrator to take over a function of the Service in terms of subsection (3)—
- (a) the administrator may do anything which the Service might otherwise be empowered or required to do in terms of this Act;
 - (b) the Board may not, while the administrator is responsible for that function, exercise any of its powers or perform any of its duties relating to that function; and

- (c) an employee or a contractor of the Service must comply with any lawful directive issued by an administrator in terms of this Act.
- (5) The Minister must, every six months, review the performance of the Service while it is under administration.
- (6) Once the Minister is satisfied that the Service is once more able to perform its functions effectively, the Minister must terminate the appointment of the administrator.
- (7) The costs associated with the appointment of an administrator is borne by the Service.

Regulations

- 29.** (1) The Minister must, after consultation with the Board, make regulations regarding—
- (a) (i) meetings to be held by the Board;
 - (ii) regularity of meetings;
 - (iii) special meetings;
 - (iv) the taking of decisions at meetings;
 - (v) convening of meetings and notices of meetings;
 - (vi) meetings by telephone or video conference or other means of communication;
 - (vii) quorums at meetings;
 - (viii) adjournment of meetings;
 - (ix) the person presiding at meetings;
 - (x) minutes of meetings;
 - (xi) resolutions signed by members of the Board;
 - (xii) execution of documents; and
 - (xiii) the proceedings of the Board;
 - (b) levies payable by stakeholders to the Service and at what intervals such levies are payable;
 - (c) application, adjudication and fees payable by persons who make use of the Service; and
 - (d) generally, any ancillary or incidental, administrative or procedural matter that it is necessary to prescribe for the proper implementation or administration of this Act.
- (2) The Minister may, after consultation with the Board, make regulations regarding—

- (a) stakeholders which may be entitled to discounts or waivers of fees;
- (b) persons who may be entitled to discounts or waivers of fees;
- (c) rates of interest payable by stakeholders on overdue levies and fees; and
- (d) any matter that this Act requires or permits to be prescribed.

(3) Any regulations made in terms of this section must, before publication in the *Gazette*, be tabled in Parliament.

Judicial management and liquidation

30. The Service may not be placed under judicial management or liquidation except on the authority of an Act of Parliament.

Security of information

31. A person may not disclose any information kept by the Service unless—

- (a) it is done in terms of and subject to any applicable law that compels or authorises the disclosure;
- (b) it is necessary for the proper functioning of the Service; or
- (c) it is legally required for the purpose of monitoring, evaluating, investigating or considering any activity relating to the Service.

Documents relating to litigation

32. The Service must on request provide the Minister with copies of all pleadings, affidavits and other documents in its possession relating to any legal proceedings brought by or against the Service.

Limitation of liability

33. Neither the Service nor any employee of the Service is liable for any damage or loss caused by—

- (a) the exercise of a power or the performance of a duty under this Act; or
- (b) the failure to exercise a power, or perform a duty under this Act,

unless the exercise of or failure to exercise the power, or performance or failure to perform the duty was unlawful, grossly negligent or in bad faith.

Offences and penalties

- 34.** (1) Any person who—
- (a) fails to provide access to any books, accounts, documents or assets when required to do so under this Act;
 - (b) fails to comply with a directive issued under this Act;
 - (c) fails or refuses to give data or information, or gives false or misleading data or information when required to give information under this Act;
 - (d) intentionally refuses to perform a duty or obstructs any person in the exercise of a power or performance of a duty in terms of this Act;
 - (e) accepts any unauthorised fees or reward, either directly or indirectly as a result of a person's position with the Service;
 - (f) uses the name, logo or design of the Service without authority; or
 - (g) contravenes or fails to comply with section 31,

is guilty of an offence, and is liable, on conviction, to a fine or imprisonment for a period not exceeding five years or to both a fine and such imprisonment.

(2) Where a person is convicted for a second or subsequent conviction for an offence contemplated in subsection (1), he or she is liable to a fine or imprisonment for a period not exceeding ten years or to both a fine and such imprisonment.

Independence of Service

35. (1) All Service employees must act independently and impartially in making decisions with regard to the resolution of disputes.

(2) Once an application is referred to an adjudicator, an Ombud plays no role in relation to the substance of the dispute or the outcome sought by the Applicant.

Practice directives

36. (1) The Chief Ombud may issue practice directives with regard to any matter pertaining to the operation of the Service.

- (2) Practice directives must, subject to this Act and the regulations—
 - (a) direct the performance of any act in the operation of the Service.
 - (b) promote accessibility to the Service for those parties that qualify to lodge an application in terms of Chapter 3.

Privileges, immunities and non-waiver

37. (1) In performing their functions in terms of this Act, the Chief Ombud, an Ombud, a deputy Ombud and an adjudicator have the same privileges and immunities from liability as a judge of the High Court of South Africa.

(2) The privilege in respect of defamation that applies to any proceeding before the High Court of South Africa and to the documents and statements in such proceedings, applies to adjudication in terms of this Act.

(3) A person may not waive or limit the exercise of rights in terms of this Act or act contrary to any provision of this Act.

Chapter 3

Applications

Applications

38. (1) Any person may make an application if such person is a party to a dispute between a small enterprise on the one hand and either another enterprise or the State on the other hand.

- (2) An application must be—
 - (a) made in the prescribed manner and as may be required by practice directives; and
 - (b) lodged with the—
 - (i) Ombud of the relevant regional office directly; or
 - (ii) Small Business Development Agency, as established by the National Small Business Act 102 of 1996.

(3) In the event that an application is lodged in terms of subsection (2)(b)(ii), the Small Business Development Agency must immediately refer such application to the Ombud of the relevant regional office.

(4) The application must include statements setting out—

- (a) the nature of the dispute;
- (b) the supporting evidence that may be relevant to the dispute;
- (c) the relief sought by the applicant, which relief must be within the scope of one or more of the prayers for the relief contemplated in section 39;
- (d) the name and address of each person the applicant considers to be affected materially by the application; and
- (e) the grounds on which the relief is sought.

(5) If the applicant is a large enterprise, the application must be accompanied by the prescribed adjudication fees.

(6) If the applicant is of the view that the application qualifies for a discount or a waiver of adjudication fees as prescribed, the application must substantiate the grounds on which the applicant relies in the prescribed manner.

Prayers for relief

39. An application made in terms of section 38 must include a prayer for one or more of the following orders:

- (a) Payment or repayment of monies owed in terms of a service agreement between the parties;
- (b) specific performance in respect of the execution of the terms of a service agreement between the parties;
- (c) cancellation of a service agreement between the parties; or
- (d) declaratory order clarifying a dispute of rights in terms of a service agreement between the parties.

Further information or material for applications

40. After receiving an application, the Ombud of the relevant regional office may require—

- (a) the applicant to submit further information or documentation in regard to the application;
- (b) information to be verified; or
- (c) the applicant to provide evidence that an internal dispute resolution mechanism has been unsuccessful.

Time limit on certain applications

41. (1) An application for the rescission of an order must be made within 60 days after such a order was granted or rejected.

(2) The Ombud of the relevant regional office may, on good cause shown, condone the late submission of an application contemplated in subsection (1).

Rejection of applications

42. (1) The Ombud of the relevant regional office must reject an application by written notice to the applicant if—

- (a) the relief sought is not within the jurisdiction of the Service;
- (b) the applicant fails to comply with a requirement of the relevant Ombud in terms of section 40;
- (c) the relevant Ombud does not receive written confirmation from the applicant within 14 days after delivery of a notice contemplated in section 44, that the applicant wishes to proceed with the application; or
- (d) the relevant Ombud is satisfied that the dispute should be dealt with in a court of law or other tribunal of competent jurisdiction.

(2) The Ombud of the relevant regional office must consider an application for a discount or waiver of adjudication fees and if the application does not, in the opinion of the relevant Ombud, qualify for the discount or waiver of adjudication fees applied for, that Ombud must by written notice to the applicant confirm that the application for a discount or waiver for adjudication fees was rejected.

Notice to affected persons

43. (1) Unless an application is rejected, the Ombud of the relevant regional office must serve notice on—

- (a) the respondent as identified in the application; and
- (b) each person that Ombud considers to be affected materially by the application.

(2) The notice contemplated in subsection (1) must—

- (a) include details of the parties to the dispute and the relief sought in terms of the application;
- (b) include details of the place and times where the documentation relating to the application can be inspected;
- (c) confirm whether or not the application qualifies for a discount or waiver of adjudication fees;
- (d) invite written submissions with regard to the application; and
- (e) draw attention in the prescribed form to the right to legal representation as contemplated in section 52 and the rules pertaining thereto.

Notice to applicant

44. The Ombud of the relevant regional office must give an applicant notice of any submissions received and give the applicant an opportunity to—

- (a) inspect the submissions;
- (b) make a written response relating only to issues raised in the submissions; and
- (c) confirm whether he or she wishes to proceed with the application.

Amendment or withdrawal of application

45. (1) The Ombud of the relevant regional office has a discretion to grant or deny permission to amend the application or to grant permission subject to specified conditions at any time before that Ombud refers the application to an adjudicator.

(2) The applicant may withdraw the application at any time before that Ombud refers the application to an adjudicator.

Inspection of documentation

46. The Ombud of the relevant regional office must, on application by an affected person, allow such person to inspect and obtain copies of—

- (a) the application;
- (b) submissions made in regard to the application;
- (c) responses to the submissions; or
- (d) the current list of adjudicators in the relevant regional office.

Conciliation

47. On acceptance of an application and after receipt of any submissions from affected persons or responses from the applicant, if the Ombud of the relevant regional office considers that there is a reasonable prospect of a negotiated settlement of the disputes set out in the application, that Ombud must refer the matter to conciliation.

Referral to adjudicator for arbitration

48. (1) If the conciliation contemplated in section 47 fails, the relevant Ombud must refer the application together with any submissions and responses thereto for arbitration, the date of which may not be later than 10 days or such a period as may be prescribed, from the date on which the conciliation process was deemed to have failed.

(2) The Ombud of the relevant regional office must give the applicant and all affected parties notice of the referral in the prescribed format.

Chapter 4

Investigation and representation

Adjudication fees

49. An adjudicator must not proceed to investigate an application until the prescribed adjudication fees, if applicable, have been paid or secured to the satisfaction of the Ombud of the relevant regional office.

Investigation by adjudicator

50. The adjudicator must investigate an application to decide whether it would be appropriate to make an order, and in this process the adjudicator must—

- (a) observe the principles of due process of law;
- (b) act quickly, and with as little formality and technicality as is consistent with a proper consideration of the application; and
- (c) consider the relevance of all evidence, but is not obliged to apply the exclusionary rules of evidence as they are applied in civil courts.

Investigative powers of adjudicator

51. (1) When considering the application, the adjudicator may—

- (a) require the applicant, respondent or other relevant person—
 - (i) to submit further information or documentation;
 - (ii) to submit information in the form of an affidavit or statement; or
 - (iii) subject to reasonable notice being given of the time and place, to come to the office of the adjudicator for an interview; and
- (b) invite persons, whom the adjudicator considers able to assist in the resolution of issues raised in the application, to make written submissions to the adjudicator in the prescribed manner and within a specified time.

(2) The respondent or any other person who is in possession of records must, if required by an adjudicator and without payment of a fee—

- (a) allow the adjudicator access to the records within 24 hours after being notified in writing of the adjudicator's requirement; and
- (b) provide the adjudicator with copies of the records.

Legal representation

52. The parties to an application referred to in terms of this Chapter are not entitled to legal representation during the adjudication process unless—

- (a) the adjudicator and all other parties consent; or
- (b) the adjudicator, after considering—

- (i) the nature of the questions of law raised by the dispute;
- (ii) the relative complexity and importance of the dispute; and
- (iii) the comparative ability of the parties to represent themselves in the adjudication,

concludes that it would be unreasonable to expect the party to deal with the adjudication without legal representation.

Chapter 5

Adjudicator's orders

Order dismissing application

53. (1) The adjudicator may make an order dismissing the application if, after investigation—

- (a) the adjudicator considers that the application is frivolous, vexatious, misconceived or without substance; or
- (b) the applicant fails to comply with a requirement in terms of section 51.

(2) If the adjudicator makes an order in terms of subsection (1)(a), the adjudicator—

- (a) may order costs against the applicant to compensate any affected person for loss resulting from the application; and
- (b) in considering the costs, must have regard to any previous applications made by the applicant.

(3) The amount of costs ordered in terms of subsection (2) must not be more than the maximum amount prescribed.

Order dealing with application

54. (1) If the application is not dismissed, the adjudicator must make an order—

- (a) granting or refusing each part of the relief sought by the applicant;
- (b) in the case of an application which does not qualify for a waiver of adjudication fees, apportioning liability for costs;
- (c) including a statement of the adjudicator's reasons for the order; and
- (d) drawing attention in the prescribed form to the right of appeal.

(2) An order may require a person to act, or refrain from acting, in a specified way.

(3) The order may contain such ancillary and ensuing provisions as the adjudicator considers necessary or appropriate.

(4) The order must set the time—

(a) when the order takes effect; or

(b) within which the order must be complied with.

Notice of order

55. (1) An Ombud must cause a copy of an order made in terms of this Act to be served in the prescribed manner on—

(a) the applicant;

(b) the respondent; and

(c) any other affected person.

Enforcement of order

56. (1) If an adjudicator's order is for the payment of an amount of money or any other relief which is within the jurisdiction of a magistrate's court, the order must be enforced as if it were a judgment of the magistrate's court and a clerk of the magistrate's court must, on lodgement of a copy of the order, register it as an order of the magistrate's court.

(2) If an adjudicator's order is for the payment of an amount of money or any other relief which is beyond the jurisdiction of the magistrate's court, the order may be enforced as if it were a judgment of the High Court, and a registrar of the High Court must, on lodgement of a copy of the order, register it as an order of the High Court.

Right of appeal

57. (1) An affected person may appeal an adjudicator's order to the High Court, but only on a question of law.

(2) An appeal against an order must be lodged within 30 days after the date of delivery of the order of the adjudicator.

(3) A person who appeals against an order, may also apply to the High Court to stay the operation of the order appealed against to secure the effectiveness of the appeal.

Chapter 6

General

Public access to orders

58. (1) An order made under this Act may, unless an order was granted under subsection (2), be made available to the public.

(2) An Applicant or Respondent to an application contemplated in section 38, may in the prescribed form and manner apply to the relevant Ombud to request that the order be declared confidential.

(3) (a) A person who is a party to an application contemplated in section 38, may in the prescribed manner and form and subject to payment of the prescribed fee, request the relevant Ombud to provide him or her with a statement indicating whether an order has been made under this Act during a period no longer than three years prior to the request, with regard to any person who is a party to that application, and, if so, a copy of such order or orders.

(b) Where an order contemplated in subsection (2) was previously granted in respect of a party to that application, the relevant Ombud may disclose that an order was granted in respect of the affected party, but may not provide the applicant with a copy of that order.

Short title and commencement

59. This Act is called the Small Enterprises Ombud Service Act, 2018, and comes into operation on a date to be determined by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE SMALL ENTERPRISES OMBUD SERVICE BILL, 2018

1. INTRODUCTION

- 1.1. Small, medium, and micro enterprises and co-operatives (SMMEs) comprise a large portion of the South African economy. These smaller companies, ranging from street hawkers to small factories, are the heartbeat of our economy and can be considered as the most accessible sector for entrepreneurs and those seeking to establish their product, brand or business. It is estimated that SMMEs generate half of gross domestic product (GDP) and nearly 60% of employment in SA. 90% of all new jobs will be created by SMMEs by 2030, according to the National Development Plan. With more than 9.3 million people unemployed, supporting these SMMEs is critical.
- 1.2. Every effort must be made to ensure that SMEs are given the backing and financial support they require in order to thrive and prosper. One of the key components in this regard is ensuring that SMMEs are paid swiftly and timeously. Without cash flow, SMMEs will struggle and eventually collapse. Furthermore, the current environment in which SMMEs operate is not conducive to the speedy resolution of disputes. SMMEs may not have the necessary financial- and human resources infrastructure to sustain the protracted resolution of a dispute.
- 1.3. It is to this end that it is proposed that an Ombud Service be established that will have jurisdiction over those matters pertaining to agreements to which SMMEs are a party. Such an Ombud Service will provide an alternative dispute resolution mechanism to SMMEs, thus removing these enterprises from delays and extensive costs occasioned by formal legal processes. Furthermore, this service will allow the Minister responsible for SMMEs to provide targeted interventions to assist SMMEs through the Ombud Service.

2. OBJECTS OF THE BILL

- 2.1. The Bill provides for the establishment of the Small Enterprises Ombud Service (Ombud Service) as a juristic person and for its day to day functioning. It also provides for the application process and the process to resolve disputes.

3. CONTENTS OF THE BILL

- 3.1. Chapter 1 deals with definitions used in the Bill;

- 3.2. Chapter 2 deals with the establishment of an independent Small Enterprises Ombud Service, its mandate, functions and powers, the establishment of its Board, the functioning of the Board, its staff component, funding, dissolution of the Ombud and matters relation to its day to day functioning. In addition it specifically provides for:
- Appointment of Chief Ombud and chief financial officer, conditions of appointment, functions;
 - Application of Public Finance Management Act;
 - Reporting;
 - Delegations;
 - Role of the Minister;
 - Regulations; and
 - Offences and penalties.
- 3.3 Chapter 3 deals with applications to the Ombud and the processing thereof;
- 3.4. Chapter 4 deals with investigations by the Ombud and representation before the Ombud;
- 3.5. Chapter 5 deals with the orders that can be made by the Ombud; and
- 3.6. Chapter 6 deals with public access to orders and the short title and commencement of the Act.

4. FINANCIAL IMPLICATIONS FOR THE STATE

- 4.1. The appointment of staff, development of systems and procurement of physical structures will be funded by an appropriation from the Department's annual budget.

5. DEPARTMENTS, BODIES OR PERSONS CONSULTED

- 5.1. None

6. PARLIAMENTARY PROCEDURE

- 6.1. The Member proposes that the Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provisions to which the procedures set out in section 74 or 76 of the Constitution apply.
- 6.2. The Member is 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.