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GOVERNMENT NOTICES • GOEWERMENTSKENNISGEWINGS

DEPARTMENT OF SMALL BUSINESS DEVELOPMENT

NO. 3534

12 June 2023

**NOTIFICATION TO INTRODUCE THE NATIONAL SMALL ENTERPRISE
AMENDMENT BILL, 2023 INTO PARLIAMENT AND PUBLICATION OF
EXPLANATORY SUMMARY OF THE BILL**

Minister Stella Ndabeni-Abrahams intends to introduce the National Small Enterprise Amendment Bill, 2023 into Parliament. The annexed Explanatory Summary of the Bill is hereby published in accordance with Rule 276 (1) (c) of the Rules of the National Assembly.

The National Small Enterprise Amendment Bill, 2023 ("the Bill"), seeks to amend the National Small Enterprise Act, 1996 (Act No. 102 of 1996) ("the Act"), to

- (a) provide for the establishment and registration, in terms of the Companies Act, 2008 (Act No. 71 of 2008), of the Small Enterprise Development Finance Agency (SEDFA) and the subsequent disestablishment of the Small Enterprise Financing Agency (Sefa), the Co-operative Banks Development Agency (CBDA) and the Small Enterprise Development Agency (Seda); and
- (b) for the establishment of the Office of the Small Enterprise Ombud Service ("the Office").
- (c) The Bill furthermore enables the Minister to declare certain practices in relation to small enterprises to be prohibited as unfair trading practices and to make regulations with regard thereto.
- (d) The Bill also proposes an amendment to section 20(2) of the Act to bring that section in line with a recent Constitutional Court judgment.

PUBLICATION OF THE EXPLANATORY SUMMARY OF THE NATIONAL SMALL ENTERPRISE AMENDMENT BILL.

1. Establishment of SEDFA

1.1 The establishment of the SEDFA gives effect to a Cabinet decision to enable and provide for integrated government support (both financial and non-financial) to small enterprises, which are defined as including co-operatives. In addition, the inclusion of the roles and functions of the identified three entities into SEDFA contributes to the Cabinet endorsed rationalisation of the number of public entities.

1.2 The purpose of SEDFA will be to ensure that the small enterprise and co-operative ecosystem is able to offer the most efficient business advice, business development services, investment support, business facilitation and incubator support. The vision of the SEDFA is to be a leading business development entity that will drive economic transformation and inclusive growth in the economy through ensuring the provision of customised financial and non-financial support and greater access to finance for small enterprises and co-operatives.

1.3 The Bill provides for SEDFA to be established as a state-owned company in terms of the Companies Act and for the State to be the sole shareholder with the Minister as the sole representative of the shareholder. SEDFA operations are subject to the PFMA and the Companies Act and SEDFA exercises its powers and the performance of its functions through the Board.

1.4 The Bill provides for SEDFA to design and implement financial and non-financial support programmes for small enterprises, promote a service delivery

network that increases the contribution of small enterprises to the South African economy and enhances economic growth, job creation and equity to historically disadvantaged communities and to promote and develop co-operative banks and co-operative financial institutions.

1.5 The Bill provides for bespoke shareholder powers and duties and, in the case of material and persistent failures to meet objectives and targets, contains shareholder intervention mechanisms which can be exercised after due process is followed.

1.6 SEDFA's powers and functions as well as the role, functions and duties of the Board are enunciated in the Bill.

1.7 The Finances for SEDFA will be derived from money appropriated by Parliament, grants, donations and bequests made to the SEDFA, funding raised through investments and money lawfully obtained or raised by SEDFA from any other source. In the instance of money appropriated by Parliament, the Bill sets the criteria of its use and associated reporting requirements.

1.8 The Bill sets the criteria and composition of the Board and requires the Board to constitute specified board committees including an audit and risk committee and a board nominations committee to assist in the public and transparent board appointment process. The Bill also sets standards for the conduct of directors and reporting requirements which are aimed at promoting the transparency of SEDFA's operations, so as to ensure value for money in the use of public funds.

2 Establishment of Ombud Office

2.1 The Bill provides for the establishment of the Office of the Small Enterprise Ombud Service and for the functions of the Office to be performed by an Ombud assisted by any deputy Ombud operating in regional offices, when necessary. The

Ombud is required to consider and dispose of complaints by small enterprises in relation to the interpretation of the terms of an agreement for the procurement of goods or services or the late or non-payment of amounts due and payable to the small enterprises.

2.2 The Bill provides for the Ombud to consider and dispose of complaints in a procedurally fair, economical, and expeditious manner and by reference to what is equitable in all the circumstances, with due regard to—

- (a) the contractual arrangement or other legal relationship between the complainant and any other party to the complaint; and
- (b) the provisions of the Act.

2.3 The Bill enables the Office to make recommendations to the Minister responsible for small business development to by, notice in the *Gazette*, declare certain practices in relation to small enterprises to be prohibited unfair trading practices and to provide for guidelines as to the practices that may be declared to be prohibited unfair practices and the rights of small enterprises. It furthermore empowers the Minister to make regulations relating to unfair trading practices.

2.4 The mischief the Bill aims to remedy is the lack of effective and affordable access to a justice mechanism for small enterprises. Business-to-business disputes and late or non-payment of amounts due and payable to small enterprises, are a significant reality in the lives of small enterprises across the world, with very adverse implications on their growth.

2.5 Therefore, like all businesses, small enterprises need effective mechanisms to resolve their disputes in an efficient and cost-effective manner. In most, if not all, jurisdictions the most prevalent way of resolving business-to-business disputes legally is through the courts, that is, through litigation. The litigation route for resolving disputes, however, places small enterprises at a significant disadvantage relative to their larger business counterparts, for at least three reasons:

- (a) The financial cost of unresolved disputes is heavily borne by small enterprises.
- (b) Even where the amount involved is large, going to court is still a prohibitive proposition for small enterprises.
- (c) The process is cumbersome, time consuming and, of course, expensive.

In either of the above situations, the cost to the small enterprise of an unresolved dispute may not be limited to the actual amount in dispute only but may extend to loss of the business relationship with the customer, which means loss of future revenue for the small enterprises.

2.6 Based on the above, there is a need for legislation establishing a Small Enterprise Ombud Service to consider and dispose of complaints by small enterprises.

2.7 The Bill provides, *inter alia*, for:

- The functions, purpose, staff and funding of the Ombud Service;
- Appointment by the Ombud, of a director as the administrative head and chief executive officer of the Office;
- Application processes for the settling of disputes where one party is a small enterprise, which disputes include matters pertaining to the interpretation of service agreements and late or non-payment of amounts owed and payable;
- The process to resolve disputes and matters related thereto;

- The orders that an adjudicator will be entitled to make upon due consideration of a matter and the right to appeal an adjudicator's order to the High Court on a question of law.

3. Small enterprise definition and Schedule to the Act

The definition of small enterprise, amongst others, envisages the setting out of the criteria to be used to determine the different categories of small enterprises. The objective is to reduce the number of size categories as well as criteria to simplify the classification of small enterprises and to enable the use of evidence-based data. The size category "very small" and criteria "asset value" are to be removed. The size category "very small" to be subsumed into the size category "small" because users found it not to be useful and to allow for alignment with international best practice. There is no reliable and evidence-based data available to support the criteria of asset value.

4. Interested parties are hereby invited to contact Elize Koekemoer at ekoekemoer@dsbd.gov should they require any additional information in this regard.

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