

REPUBLIC OF SOUTH AFRICA

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# NATIONAL SMALL ENTERPRISE AMENDMENT BILL

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*(As introduced in the National Assembly (proposed section 75); explanatory summary of  
Bill and prior notice of its introduction published in Government Gazette No. 48776 of 12  
June 2023)*

*(The English text is the official text of the Bill)*

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(MINISTER OF SMALL BUSINESS DEVELOPMENT)

[B 16—2023]

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- “**Companies Act**” means the Companies Act, 2008 (Act No. 71 of 2008);
- “**complainant**” means a small enterprise or small enterprise organisation;
- “**complaint**” means any complaint lodged, as contemplated in Chapter 3A, by a small enterprise or small enterprise organisation against—
- (a) another small enterprise or small enterprise organisation;
- (b) a large enterprise that does not fall within the meaning of “small enterprise”; or
- (c) an organ of state as defined in section 239 of the Constitution, 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 enterprise, where the complaint is not a complaint that falls under the jurisdiction of an ombud, as defined in section 1(1) of the Financial Sector Regulation Act, 2017 (Act No. 9 of 2017);”;
- (g) by the insertion after the definition of “constitution of the Council” of the following definitions:
- “**co-operative enterprises**” include a co-operative, a co-operative bank and a co-operative financial institution, as defined in the Co-operative Banks Act, 2007 (Act No. 40 of 2007);
- “**development support**” includes both financial and non-financial support;
- “**director**” means the person appointed in terms of section 17N;”;
- (h) by the substitution for the definition of “Director-General” of the following definition:
- “**Director-General**” means the Director-General of the Department [of Trade and Industry, or an officer of that Department designated by that Director-General] responsible for small business development;”;
- (i) by the substitution for the definition of “Minister” of the following definition:
- “**Minister**” means the Minister [of Trade and Industry] responsible for small business development;”;
- (j) by the insertion after the definition of “Ntsika” of the following definitions:
- “**Office**” means the Office of the Small Enterprise Ombud Service established by section 17D;
- “**Ombud**” means the Ombud appointed in terms of section 17F;”;
- (k) by the insertion after the definition of “prescribed” of the following definition:
- “**Public Finance Management Act**” means the Public Finance Management Act, 1999 (Act No. 1 of 1999);”;
- (l) by the substitution for the definition of “small enterprise” of the following definition:
- “**small enterprise**” means a separate and distinct business entity, together with its branches or subsidiaries, if any, including a co-operative, co-operative financial institution, or a co-operative bank, carried on in any sector or sub-sector of the economy classified as a micro, small or medium enterprise which satisfies the prescribed criteria;”;
- (m) by the insertion after the definition of “Trust” of the following definition:
- “**Unfair Trading Practice**” means a practice contemplated in section 17Y;”;
- (n) by the addition of the following subsection:
- “(2) Unless the context indicates otherwise, a word or phrase defined in the Companies Act, the Co-operatives Act, 2005 (Act No. 14 of 2005), the Co-operative Banks Act, 2007 (Act No. 40 of 2007), or the Public Finance Management Act, has the same meaning in this Act.”.

#### Insertion of section 1A in Act 102 of 1996

2. The following section is hereby inserted after section 1 of the principal Act:

**“Application of Act**

**1A.** (1) In the event of a conflict between the provisions of this Act and the Public Finance Management Act, the provisions of the latter Act prevail.

(2) In the event of a conflict between the provisions of this Act and the Companies Act, the Co-operatives Act, 2005 or the Co-operative Banks Act, 2007, the provisions of this Act prevail.”

**Insertion of section 4 in Act 102 of 1996**

3. The following section is hereby inserted after section 3 of the principal Act:

**“Report of Advisory Body**

**4.** (1) The Advisory Body must submit to the Minister an annual report within five months of the end of each financial year which must include—

- (a) particulars of the work of the Advisory Body and of advice provided to the Minister in terms of section 3(2)(b) in furtherance of the objects of the National Small Business Support Strategy;
- (b) financial statements relating to the Advisory Body; and
- (c) such other information as may be prescribed.

(2) The Minister must table a copy of the annual report contemplated in subsection (1) in Parliament.

(3) The Minister may request the Advisory Body to provide any other information as may be necessary.”

**Substitution of Chapter 3 of Act 102 of 1996**

4. The following Chapter is hereby substituted for Chapter 3 of the principal Act:

**“Chapter 3**

**Small Enterprise Development Finance Agency**

**Establishment and shareholder of Agency**

**9.** (1) Upon the coming into effect of this section, the Minister must ensure that the necessary steps are taken for the incorporation of the Agency as a company contemplated in subsection (2).

- (2) The Companies and Intellectual Property Commission must—
- (a) register the Memorandum of Incorporation and incorporate the Agency under the name “Small Enterprise Development Finance Agency SOC Limited” with the State as the shareholder; and
- (b) issue to that entity the necessary documents to enable it to conduct business as a corporate entity.

(3) The Minister is the sole representative of the shareholder.

(4) The Agency acts through its Board.

(5) The Public Finance Management Act and the Companies Act apply to the operations of the Agency.

**Objectives of Agency**

**10.** The objectives of the Agency are to—

- (a) design and implement development support programmes for small enterprises;
- (b) 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;
- (c) support, promote and develop co-operative banks and co-operative financial institutions; and
- (d) generally, strengthen the capacity of—
  - (i) service providers to support small enterprises; and

- (ii) small enterprises to compete successfully domestically and internationally.

### Shareholder powers and duties

- 11.** (1) Subject to this section and section 12, the Minister must exercise all the rights and duties of a shareholder under the Companies Act in relation to the Agency in order to promote and support the functions of the Agency and to report annually on the developmental impact and material risks of its investment in the Agency. 5
- (2) Notwithstanding the Companies Act, the Minister may only—
- (a) subject to subsection (3), appoint the directors to the Board of the Agency in terms of section 68 of the Companies Act on the recommendations of the Board after a transparent appointment process conducted by it; 10
- (b) remove directors in terms of sections 69 and 71 of the Companies Act if the director— 15
- (i) is in breach of the director's fiduciary duties; or
- (ii) is unable to perform the functions of a director adequately or competently; and
- (c) determine the remuneration of directors in accordance with the best market practice and in accordance with applicable guidelines. 20
- (3) Notwithstanding subsection (2)(a), the Minister may, on good grounds, apply to the High Court for an order to appoint a director not recommended by the Board in terms of that subsection.
- (4) The Board must submit an annual corporate plan to the Minister for approval, which includes— 25
- (a) the Agency's strategic objectives, business strategies and outcomes;
- (b) performance measures and key indicators for assessing its performance in delivering the desired objectives, strategies and outcomes;
- (c) the investment and financing programmes, including any borrowing plan, and the underlying assumptions for those programmes; 30
- (d) the strategies for managing financial and non-financial risk;
- (e) particulars relating to financial indicators and forecasts;
- (f) the accounting policies of the Agency; and
- (g) any other relevant information which relates to the financial and non-financial support activities of the Agency. 35
- (5) The Minister must commission an independent assessment of the Board's performance every three years.

### Material or persistent failure to meet objectives and targets

- 12.** (1) If the Agency materially or persistently fails to meet the objectives and targets as contained in its corporate planning instruments and as specified by the Minister in terms of binding shareholder instructions as contained in shareholder compacts, the Minister may call a special general meeting of the Agency to consider the corrective action to be taken. 40
- (2) In the circumstances contemplated in subsection (1), the Minister may— 45
- (a) request any additional information required;
- (b) commission an independent investigation of the Agency, or a subsidiary, in relation to its operations and finances;
- (c) require, in consultation with the Board, that the Agency be restructured with a view to meet the financial and non-financial support objectives of the State in relation to small enterprises or reducing the Agency's costs or increasing its revenue; 50
- (d) review Board membership and provide additional capacity to the Board;
- (e) issue instructions to the Board to remedy the failure; or 55
- (f) apply to the High Court to appoint a curator, on such terms as the Court may determine, to take control of the management of the Agency.

(3) If the Minister exercises any of the powers listed in subsection (2), the powers of the Board and the performance of its functions to manage the business and affairs of the Agency are restricted accordingly, notwithstanding anything to the contrary contained in section 66 of the Companies Act.

(4) If the Minister commissions an independent investigation in terms of subsection (2)(b)—

(a) the Board must ensure that the person carrying out the investigation has access to all relevant information of the Agency; and

(b) the person carrying out the investigation must—

(i) ensure that the information gleaned in the investigation is confidential and may not be communicated to any person other than the Minister, the Board or an applicable law enforcement agency; and

(ii) submit a written report of the findings arising from the investigation to the Minister and the Board.

(5) If a curator is appointed in terms of subsection (2)(f), the curator assumes all the duties, functions and powers of the Board.

(6) Both the Minister and the Board must disclose any appointment and main findings of an independent investigator in the Minister's annual report and the Agency's annual report.

### **Agency's powers and functions**

**13.** In the exercise of its powers and the performance of its functions to manage the business and affairs of the Agency, the Board must, subject to section 11—

(a) implement the policy of the national government for small enterprise development inclusive of both financial and non-financial support services;

(b) design and implement a standard national delivery network that must uniformly apply throughout the Republic in respect of small enterprise development;

(c) design and implement small enterprise development support programmes in order to—

(i) facilitate the building of sustainable and competitive small enterprises;

(ii) facilitate the promotion of entrepreneurship;

(iii) facilitate the creation of an enabling operating environment for small enterprises;

(iv) facilitate access by small enterprises to financial resources, non-financial resources, capacity-building services, products and services;

(v) promote participation of historically disadvantaged persons in small enterprises;

(vi) facilitate international and national market access for products and services of small enterprises;

(vii) foster partnerships across all spheres of government, the private sector and relevant stakeholders to assist the Agency to achieve its objectives;

(viii) promote a service delivery network to facilitate access and outreach to development support for small enterprises;

(ix) facilitate and co-ordinate research relating to small enterprise support programmes;

(x) provide support in the implementation of the Small Enterprise Development Policy;

(xi) co-operate with, and assist, including through providing information, the Financial Sector Conduct Authority and the Prudential Authority as defined in section 1(1) of the Financial Sector Regulation Act, 2017 (Act No. 9 of 2017), in dealing with matters of mutual interest;

(xii) at the request of the Minister, investigate, advise on and comment on the effect of existing legislation and the impact of proposed legislation on small enterprises; and

- (xiii) improve the understanding of the public regarding the contribution of small enterprises to domestic economic growth, job creation and general welfare;
- (d) establish provincial structures to ensure the effective implementation of its functions; and
- (e) conduct a public and transparent process, through its nominations committee, to make recommendations for appointments to the Board based on a matrix of skills, experience and diversity, which when considered collectively, enables them to attain the Agency's prescribed objectives.

### **Role, functions and duties of Agency Board**

- 14. (1)** The Board must ensure that its business and affairs are conducted in a manner consistent with this Act, the Companies Act, the Co-operatives Act and the Co-operative Banks Act, and in particular, it must—
- (a) develop the annual corporate plan referred to in section 11(4) in respect of the Agency and any of its subsidiaries;
  - (b) prepare and approve an annual budget, including any borrowing plan, if necessary, to give effect to that corporate plan;
  - (c) without delay notify the Minister of any adverse events that may affect the ability of the Agency to meet its performance and comply with this Act, and the reasons therefor;
  - (d) implement an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective in accordance with section 51 of the Public Finance Management Act; and
  - (e) develop a system for properly evaluating all Agency activities, both financial and non-financial.
- (2) Subject to the requirements of this Act, the Board may exercise all its powers under the Companies Act, including the power to borrow money from, issue a guarantee, indemnity or security to, a third party for the purpose of performing its functions and achieving its objectives.

### **Finances of Agency**

- 15. (1)** The funds of the Agency consist of—
- (a) money appropriated by Parliament;
  - (b) grants, donations and bequests made to the Agency;
  - (c) income gained through investment of monies; and
  - (d) money lawfully obtained or raised by the Agency from any other source.
- (2) Any appropriation of funds contemplated in subsection (1)(a) must, prior to being distributed to the Agency, specify criteria for the use of funds and whether the funds are to be used by the Agency for financial or non-financial support services.
- (3) The criteria contemplated in subsection (2) must—
- (a) in the case of financial support services, in relation to any consequent loans made to small enterprises, specify—
    - (i) intended recipients;
    - (ii) categories of each sector;
    - (iii) applicable interest rates;
    - (iv) repayment terms;
    - (v) acceptable impairment levels; and
    - (vi) any other relevant terms; and
  - (b) in the case of non-financial support services, include categories of recipients and the nature of the non-financial support to be provided.
- (4) The procedures to be followed when granting or not granting financial or non-financial support by the Agency must allow for the review of that decision.



- (5) The Agency must include in its reporting to the Minister prescribed information as to—
- (a) the recipients of the financial and non-financial support services envisaged in subsection (3)(a) and (b); and
  - (b) the funds envisaged in subsection (1)(b) to (d).
- (6) All monies received by the Agency must be deposited into a banking account in the name of the Agency with a bank established under the Banks Act, 1990 (Act No. 94 of 1990).

### Composition of Board

- 16.** (1) Subject to section 11, the Minister must appoint all the directors of the Board on grounds of their skill, knowledge and experience, which, when considered collectively, will enable them to fulfil the objectives of the Agency.
- (2) The Board must comprise a minimum of seven and a maximum of 13 directors.
- (3) Non-executive directors serve a term of three years and may not be reappointed for more than two additional terms.
- (4) The CEO and CFO of the Agency are Executive members of the Board.

### Board committees

- 17.** In addition to any other Board committees permitted in terms of section 72 of the Companies Act, the Board must appoint—
- (a) an audit and risk committee;
  - (b) a human resources, remuneration and nominations committee, *inter alia*, to make recommendations of persons to be appointed to the Board in terms of section 11(2)(a);
  - (c) a social and ethics committee; and
  - (d) a credit and investment committee.

### Standards of director conduct

- 17A.** In addition to the standards of director conduct contemplated in section 76 of the Companies Act and governed by the common law, a director of the Agency must act in the best interests of the company taking into account its public service delivery and developmental objectives.

### Reporting

- 17B.** (1) The Board must submit to the Minister an annual report within five months of the end of each financial year in respect of the Agency to include—
- (a) the audited financial statements including, but not limited to, profit and loss statements, statement of financial position and statement of cash flows;
  - (b) the audit reports and any necessary commentaries on those financial statements;
  - (c) detailed performance against targets;
  - (d) material risks;
  - (e) shareholder instructions and achievement of performance against these instructions, including an analysis of factors likely to affect achievement of such performance or create significant risks;
  - (f) significant and material transactions concluded and their respective values;
  - (g) information required under the Companies Act for public companies;
  - (h) a report on corporate governance;
  - (i) a business sustainability report;
  - (j) risk management systems implemented by the Agency; and
  - (k) such other information as may be prescribed.



(2) The Board must submit to the Minister the Agency's un-audited financial statements by no later than 31 May of every year.

(3) The Minister must table a copy of the annual report contemplated in subsection (1) in Parliament.

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### **Audit of Agency**

17C. Despite section 90(1) of the Companies Act, the Auditor-General must, in accordance with the Public Audit Act, 2004 (Act No. 25 of 2004), ensure that the financial statements of the Agency are audited each year."

### **Insertion of Chapter 3A in Act 102 of 1996**

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5. The following Chapter is hereby inserted after Chapter 3 of the principal Act:

### **“Chapter 3A Dispute Resolution Mechanism**

#### **Establishment of Office of Small Enterprise Ombud Service**

17D. (1) The Office is hereby established as a juristic person.

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(2) The Office is accountable to the Minister and Parliament.

(3) The Department responsible for small business development must establish an appropriate administrative structure, including a national head office and, where necessary, regional offices for the Office.

(4) The provisions of the Public Finance Management Act apply to the Office.

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(5) The Office must exercise its functions in terms of this Act—

(a) in the most efficient and cost-effective manner; and

(b) in accordance with the values and principles mentioned in section 195 of the Constitution.

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#### **Objective of Office**

17E. (1) The objective of the Office is to adjudicate and dispose of complaints in terms of this Act in a manner which is procedurally fair, economical, and expeditious and by reference to what is equitable in all the circumstances, with due regard to—

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(a) existing contractual arrangement or other legal relationship between the complainant and any other party to the complaint; and

(b) the provisions of this Act.

(2) The Ombud and any deputy Ombud must act independently and impartially.

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(3) The Office of the ombud must fulfil advocacy functions.

#### **Appointment of Ombud and deputy Ombud**

17F. (1) The Minister must within 90 days of a vacancy appoint, as Ombud, a person—

(a) with legal training and appropriate experience and who possesses knowledge of small enterprises, trade, industry, finance or the economy; and

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(b) resident or ordinarily resident in South Africa.

(2) The person contemplated in subsection (1) is appointed for a term of seven years which may be renewed for one more term.

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(3) The Minister may within 90 days of a vacancy appoint as deputy Ombud, one or more persons—

(a) with legal training and appropriate experience and who possess knowledge of small enterprise, trade, industry, finance, or the economy; and

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(b) resident or ordinarily resident in South Africa.

(4) The person contemplated in subsection (3) is appointed for a term of seven years which may be renewed for one more term.

(5) The remuneration and other terms of appointment of the Ombud and a deputy Ombud must be determined by the Minister, in consultation with the Minister of Finance.

(6) The Ombud or deputy Ombud may resign by submitting a written notice to the Minister at least three calendar months prior to the intended date of vacation of office, unless the Minister allows a shorter period.

(7) The Minister may, on good cause shown, remove the Ombud or deputy Ombud from office on the ground of misconduct, incapacity or incompetence or acts contrary to the purpose and principles of this Act, after affording the person concerned a reasonable opportunity to be heard.

(8) The Minister must make the appointments in such a manner that the terms of appointment of the Ombud and deputy Ombud overlap by six months.

### **Powers and functions of Ombud**

#### **17G. (1) The Ombud must—**

(a) consider and adjudicate complaints by small enterprises and small enterprise organisations in terms of this Chapter through alternative dispute resolution mechanisms;

(b) initiate an investigation—

(i) if a small enterprise files a complaint in terms of this chapter;

(ii) concerning any alleged prohibited conduct on its own initiative; or

(iii) when directed to do so by the Minister in terms of section 17L;

(c) consider and approve the strategic plan of the Office;

(d) consider and decide on capital acquisitions and transactions that have not been delegated to the Director;

(e) prepare reports on a quarterly basis on the nature and progress on all complaints and investigations for submission to the Minister and Parliament;

(f) appoint personnel to ensure the efficient management of complaints; and

(g) make recommendations for amendments to the regulations and policy guidelines.

(2) The Ombud may conduct any business that is required for the proper maintenance and development of the Office.

(3) For the purposes of subsection (1)(b), the Ombud is—

(a) competent to investigate, on receipt of a complaint by a complainant, any alleged—

(i) unfairness in relation to a contractual arrangement or other legal relationship between the complainant and any other party to the complaint;

(ii) abuse or unjustifiable exercise of power or unfair or other improper conduct or undue delay in performing in terms of a contractual arrangement or other legal relationship between the complainant and any other party to the complaint; or

(iii) practice, act or omission which results in unlawful or improper prejudice to a small enterprise.

(4) At any time prior to, during, or after an investigation referred to in subsection (3), the Ombud may if he or she—

(a) is of the opinion that the facts reveal the commission of an offence by any person, bring the matter to the notice of the relevant authority charged with prosecutions; or

(b) deems it advisable, refer any matter which has a bearing on an investigation to the appropriate body or authority affected by it, or make an appropriate recommendation regarding the redress of the prejudice in question or make any other appropriate recommendation that the Ombud deems expedient, to the affected body or authority.

- (5) For the purposes of an investigation, the Ombud may—
- (a) summon any person to furnish any information on the subject of the investigation or who has in his or her possession or under his or her control any book, document or other object relating to the investigation, to appear before the Ombud at a time and place specified in the summons, to be questioned or to produce that book, document or other object; and
  - (b) designate a person to question that person, under oath or affirmation, and examine or retain for further examination or for safe custody the book, document or other object in question.
- (6) A summons referred to in subsection (5)(a) must—
- (a) be in the form determined in the regulations;
  - (b) contain particulars of the matter in connection with which the person concerned is required to appear before the Ombud;
  - (c) be signed by the Ombud or a person authorised by him or her; and
  - (d) be served as determined in the regulations.
- (7) (a) The Ombud may, subject to paragraph (b), in the manner he or she deems fit, make known to any person or body any report, finding, recommendation or determination in respect of a matter investigated by him or her.
- (b) The report, finding, recommendation or determination in respect of an investigation by the Ombud must, when he or she deems it fit but as soon as possible, be made available to the complainant and to any person or body implicated thereby.
- (c) A report or finding, recommendation or determination in respect of an investigation by the Ombud must be open to the public, unless the Ombud is of the opinion that exceptional circumstances require that the report, finding, recommendation or determination be kept confidential.

### Receipt of complaints

- 17H.** (1) Upon receipt of a complaint by the Ombud, the Ombud must—
- (a) determine whether the requirements of the regulations contemplated in section 17S have been complied with;
  - (b) in the case of any non-compliance, act in accordance with the regulations made under that section; and
  - (c) otherwise officially receive the complaint.
- (2) Official receipt of a complaint by the Ombud suspends the running of prescription in terms of the Prescription Act, 1969 (Act No. 68 of 1969), for the period after such receipt of the complaint until the complaint has either been withdrawn or determined by the Ombud.

### Prescription of complaints

- 17I.** The following jurisdictional provisions apply to the Ombud in respect of the investigation of complaints:
- (a) The Ombud must decline to investigate any complaint which relates to an act or omission which occurred on or before the date of commencement of this Act;
  - (b) where the complainant was unaware of the occurrence of the act or omission, the period of three years commences on the date on which the complainant became aware or ought reasonably to have become aware of such occurrence, whichever occurs first;
  - (c) the Ombud must decline to investigate a complaint if, before the date of official receipt of the complaint, proceedings have been instituted by the complainant in any Court in respect of a matter which would constitute the subject of the investigation; and
  - (d) where any Court or other proceedings are instituted during an investigation by the Ombud, such investigation must not be proceeded with.

### Jurisdiction for complaints

**17J.** The Ombud may, on reasonable grounds, determine that it is more appropriate that the complaint be dealt with by a Court or through any other available dispute resolution process, and dismiss the complaint.

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### Resolution of complaints

**17K.** (1) The Ombud must not proceed to resolve a complaint officially received, unless the Office—

- (a) has, in writing, informed every other interested party to the complaint of the receipt thereof;
- (b) is satisfied that all interested parties have been provided with such particulars as will enable the parties to respond thereto; and
- (c) has provided all interested parties the opportunity to submit a response to the complaint.

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(2) The Ombud—

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- (a) may, in resolving an officially received complaint, follow and implement any alternative dispute resolution procedure which the Ombud deems appropriate;
- (b) may, delineate the functions of conciliation, mediation and arbitration between various functionaries of the Office;
- (c) must, in the first instance, explore any reasonable prospect of resolving a complaint by conciliation or mediation acceptable to all parties;
- (d) may, in order to resolve a complaint speedily by conciliation or mediation, make a recommendation to the parties, requiring the parties to confirm whether or not they accept the recommendation;
- (e) may, where the recommendation is not accepted by a party, require that party to give reasons for not accepting it and refer the matter for arbitration;
- (f) may, in the event of conciliation and mediation failing to reach resolution, if appropriate, initiate arbitration proceedings to adjudicate the matter in an expeditious manner; and
- (g) may, on terms specified by the Office, mandate any person or persons to form an arbitral forum to perform any of the functions referred to in paragraph (e) or (f).

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(3) Where the parties accept the recommendation contemplated in subsection (2)(d), such recommendation has the effect of a final determination by the Office, contemplated in section 17M(1).

(4) For the purposes of any resolution by the Ombud, the provisions of the Commissions Act, 1947 (Act No. 8 of 1947), regarding the summoning and examination of persons and the administering of oaths or affirmations to them, the calling for the production of books, documents and objects, and offences by witnesses, apply with the necessary changes.

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### Investigation

**17L.** (1) The Ombud may investigate a matter if—

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- (a) the matter is referred to it by the Minister; or
- (b) a significant number of small enterprises are negatively impacted by a business practice.

(2) For the purposes of any investigation by the Ombud, the provisions of the Commissions Act, 1947 (Act No. 8 of 1947), regarding the summoning and examination of persons and the administering of oaths or affirmations to them, the calling for the production of books, documents and objects, and offences by witnesses, apply with the necessary changes.

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**Determinations by Ombud**

**17M.** (1) The Ombud must in any case where a matter has not been settled or a recommendation referred to in section 17K(2)(d) has not been accepted by all parties concerned, make a final determination, which may include—

- (a) the dismissal of the complaint; or
- (b) the upholding of the complaint, wholly or partially, in which case—
  - (i) the complainant may be awarded an amount as fair compensation for any financial prejudice or damage suffered; and
  - (ii) a direction may be issued that the other party concerned take such steps in relation to the complaint as the Ombud deems appropriate and just.

(2) To make a considered monetary award the Ombud may—

- (a) require full disclosure of contractual terms as well as financial dealings between the contractual parties;
- (b) determine the appropriate monetary award as contemplated in subsection (1)(b)(i); and
- (c) determine the amount payable to bear interest at a rate, and as from a date, determined by the Ombud.

(3) The Minister may by regulation determine—

- (a) the maximum monetary award for a particular kind of financial prejudice or damage;
- (b) different maximum monetary awards for different categories of complaints; or
- (c) the granting of costs, including costs against either party in favour of the Office or the other party if in the opinion of the Ombud—
  - (i) the party's conduct was improper or unreasonable; or
  - (ii) the party was responsible for an unreasonable delay in the finalisation of the relevant investigation: Provided that an amount payable under a cost award bears interest at a rate and as from a date determined by the Ombud.

(4) Any award of interest by the Ombud in terms of subsection (2) may not exceed the rate which a Court would have been entitled to award, had the matter been heard by a Court.

(5) The Office must reduce a determination to writing, including the reasons therefor, sign the determination, and send copies thereof to all parties concerned with the complaint and to the clerk or registrar of the Court which would have had jurisdiction in the matter had it been heard by a Court.

(6) A determination of the Ombud finalised according to subsection (5) may only be taken up on review specifically on the following grounds—

- (a) illegality;
- (b) procedural unfairness; or
- (c) irrationality.

(7) A determination is regarded as a civil judgment of a Court, had the matter in question been heard by a Court, and must be so noted by the clerk or registrar, as the case may be, of that Court.

(8) (a) A writ of execution may, in the case of a determination amounting to a monetary award, be issued by the clerk or the registrar referred to in subsection (5) and may be executed by the sheriff of such Court after expiration of a period of two weeks after the date of the determination.

(b) Any other determination must be given effect to in accordance with the applicable procedures of a Court after expiration of a period of two weeks after the date of the determination.

**Staff of Office**

**17N.** (1) In order to perform the functions of the Office, the Ombud must—

- (a) employ a person as director of the Office who is the administrative head of the Office; and
- (b) employ such administrative staff as may be necessary.

- (2) The Ombud must appoint the person referred to in subsection (1)(a) for an agreed term not exceeding five years which may be renewed for one additional term not exceeding five years and on the conditions as the Minister, in consultation with the Minister of Finance, may determine.
- (3) The director is responsible for the general administration of the Office, and must—
- (a) manage and direct the activities of the Office, subject to the direction of the Ombud;
  - (b) supervise the administrative staff of the Office;
  - (c) enter into contracts with service providers and accept liability on behalf of the Office for the expenses incurred as a result of such services being rendered; and
  - (d) perform any other function necessary in accordance with this Act.
- (4) The Minister must, after consultation with the Minister of Finance, determine—
- (a) the director's remuneration, allowances, benefits and other terms and conditions of employment; and
  - (b) the staff establishment of the Office, the remuneration, allowances, benefits, and other terms and conditions of appointment of the members of staff.

#### **Delegation by Ombud, deputy Ombud and director**

- 17O.** (1) The Ombud may delegate any of his or her powers and assign any of his or her duties to a deputy Ombud or the director.
- (2) A deputy Ombud or the director, as the case may be, may delegate any of his or her powers and assign any of his or her duties to an employee of the Office.
- (3) A delegation contemplated in subsection (1) or (2)—
- (a) may be made subject to such conditions as the Ombud, a deputy Ombud or the director, as the case may be, may determine;
  - (b) must be communicated to the delegatee in writing; and
  - (c) may be amended or withdrawn in writing by the Ombud, a deputy Ombud or the director, as the case may be.
- (4) Despite a delegation or assignment contemplated in subsection (1) or (2), the Ombud, a deputy Ombud or the director, 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.

#### **Funding of Office**

- 17P.** (1) Expenditure in connection with the administration and functioning of the Office must be defrayed from—
- (a) money appropriated by Parliament for this purpose;
  - (b) any fees payable in terms of this Chapter; and
  - (c) funds accruing to the Office from any other source.
- (2) The Office must deposit all funds in an account opened with a bank registered under the Banks Act, 1990 (Act No. 94 of 1990).
- (3) The Office may invest funds which are not required for immediate use—
- (a) in a call account or short-term fixed deposit with any registered bank contemplated in subsection (2); or
  - (b) in an investment account with the Public Investment Corporation established by section 2 of the Public Investment Corporation Act, 2004 (Act No. 23 of 2004).
- (4) Funds standing to the credit of the Office in the account mentioned in subsection (2) at the end of the financial year, as well as funds invested under subsection (3), must, subject to section 53(3) of the Public Finance Management Act, be carried forward to the next financial year.



### Accountability

- 17Q.** (1) Subject to the Public Finance Management Act, the director—
- (a) is charged with the responsibility of accounting for money received or paid out for or on account of the administration and functioning of the Office; and 5
  - (b) must cause the necessary accounting and other related records to be kept.
- (2) The financial year of the Office is the period from 1 April to 31 March, except that the first financial year of the Office begins on the date on which this Chapter comes into operation, and ends on 31 March of the following year. 10
- (3) Within three months after the end of each financial year, the director must prepare financial statements in accordance with established accounting practice, principles and procedures, comprising—
- (a) a statement, with suitable and sufficient particulars, reflecting the income and expenditure of the Office during the preceding financial year; and 15
  - (b) a balance sheet showing the state of its assets, liabilities and financial position as at the end of that financial year.
- (4) The Auditor-General must, in accordance with the Public Audit Act, 2004 (Act No. 25 of 2004), ensure that the financial statements of the Office are audited each year. 20

### Disestablishment and liquidation of Office

- 17R.** (1) The Office may not be disestablished or liquidated, except by an Act of Parliament. 25
- (2) In the event of such disestablishment or liquidation, the surplus assets of the Office, if any, accrue to the Agency.

### Regulations applicable to Ombud

- 17S.** (1) The Minister must make regulations including different regulations in respect of different categories of complaints or investigations by the Ombud, regarding— 30
- (a)
    - (i) any matter which is required or permitted under this Act to be regulated by regulation;
    - (ii) the category of small enterprises qualifying as complainants;
    - (iii) the types of complaints justiciable by the Ombud; 35
    - (iv) the rights of complainants in connection with complaints, including the manner of submitting a complaint to the Ombud;
    - (v) the rights and duties of any other party to the complaint on receipt of a complaint, particularly in connection with the furnishing of replies to the complainant; 40
    - (vi) the rights of a complainant to submit a complaint to the Ombud where the complainant is not satisfied with a reply received from the party concerned;
    - (vii) the circumstances under which the Ombud may dismiss a complaint without consideration of its merits; and 45
    - (viii) the reasonable time limit for any aspect of the proceedings before the Ombud and the extension of any time limit;
  - (b) the payment to the Office by a party involved in a complaint submitted to the Ombud, of case fees in respect of the consideration of the complaint by the Ombud; or 50
  - (c) any other administrative or procedural matter necessary or expedient for the better achievement of the objects of this Chapter, but which is not inconsistent with a provision of this Act.
- (2) The Minister must—
- (a) ensure that no regulation made under subsection (1) undermines or affects the independence of the Ombud in any material way; and 55
  - (b) publish the regulations made under subsection (1) in the *Gazette*.



**Record-keeping**

**17T.** (1) The Ombud must keep proper files and records in respect of complaints as well as a record of any determination proceedings conducted in terms of section 17 and considering the provisions of the Protection of Personal Information Act.

(2) Any interested person may, subject to the discretion of the Ombud and applicable regulations of confidentiality, obtain a copy of any record on payment of a fee determined by the Ombud.

**Annual Report of Ombud**

**17U.** (1) The Office must prepare and submit to the Minister an annual report, as determined in the regulations, within three months after the end of its financial year.

(2) The annual report referred to in subsection (1) must include the following documents:

- (a) The audited financial statements prepared in terms of this Chapter;
- (b) the report prepared in terms of the Public Audit Act, 2004;
- (c) a report of the activities undertaken in terms of the functions of the Ombud set out in this Chapter; and
- (d) such other information as may be prescribed.

(3) The Minister must table in Parliament each annual report submitted in terms of this section.

**Penalties**

**17V.** (1) A person who commits any act in respect of the Ombud or an investigation by the Ombud which, if committed in respect of a Court of law, would have constituted contempt of Court, is guilty of an offence and liable on conviction to a penalty which may be imposed on a conviction of contempt of Court.

- (2) A person who—
- (a) anticipates a determination of the Ombud in any manner calculated to influence the determination; or
  - (b) wilfully interrupts proceedings conducted by the Ombud,
- is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding one year.

**Promotion of stakeholder education**

**17W.** The Office may—

- (a) take any steps conducive to stakeholder education and the promotion of awareness of the nature and availability of the Ombud and other enforcement measures established by or in terms of this Chapter, including arrangements—
  - (i) with organs of state;
  - (ii) representative bodies of business; and
  - (iii) other stakeholders,
 to assist in the provision of information to the general public on matters relating to the work of the Ombud; and
- (b) take steps conducive to stakeholder education and promotion of the awareness of the nature and availability of the Ombud and other enforcement measures established by or in terms of this Chapter, including arrangements to accommodate—
  - (i) rural stakeholders; and
  - (ii) stakeholders found in underserved urban areas.

### Promotion of inter-agency co-ordination and collaboration

**17X.** The Office may take any steps in line with the Intergovernmental Relations Framework Act, 2005 (Act No.13 of 2005), to facilitate, promote and establish inter-agency collaboration and co-ordination measures including institutional arrangements, agreements and joint programmes with bodies or institutions such as the Competition Commission, Consumer Commission, Companies Tribunal and the Companies and Intellectual Property Commission. 5

### Unfair trading practices

- 17Y.** (1) The Minister— 10
- (a) may, by notice in the *Gazette*, declare certain practices in relation to small enterprises to be prohibited unfair trading practices;
  - (b) may, subject to subsections (2) to (5), instruct that a comprehensive investigation be undertaken by the Ombud into an alleged unfair trading practice on recommendation by the Ombud; 15
  - (c) must consult with the Minister responsible for trade, industry and competition before issuing a notice contemplated in paragraph (a); and
  - (d) must, in the performance of a function in terms of this section, consult with any Minister responsible for a national function affected by the performance of that function. 20
- (2) Small enterprises have the right to trade and transact freely, including—
- (a) the right to unambiguous business contract;
  - (b) the right to a reasonable payment date and interest on late payments; 25
  - (c) the right to disclosure of relevant information; and
  - (d) the right to accountability from large enterprises and government entities.
- (3) The practices contemplated in subsection (1)(a) include— 30
- (a) ambiguous contract terms;
  - (b) lack of fair contracts;
  - (c) retrospective unilateral changes to business arrangements;
  - (d) the transfer of full commercial risk to the weaker party;
  - (e) the use of information outside the purpose for which the other party discloses it; 35
  - (f) sudden and unjustified termination of a commercial relationship or termination without reasonable notice;
  - (g) long-term exclusive agreements aimed at preventing weaker parties from entering an existing market;
  - (h) unfair exclusionary compliance requirement practices; or 40
  - (i) unfair contract terms in retail and commercial leases for small enterprises.
- (4) The following principles must guide the Minister and the Ombud in considering whether or not a declaration contemplated in subsection (1) may be made— 45
- (a) that the practice concerned, directly or indirectly, has or is likely to have the effect of—
    - (i) harming the sustainability and competitiveness of small enterprises;
    - (ii) unreasonably prejudicing any small enterprise; 50
    - (iii) deceiving any small enterprise; or
    - (iv) unfairly affecting any small enterprise; and
  - (b) that if the practice is allowed to continue, one or more objects of this Act will, or is likely to be defeated.
- (5) Before making a declaration contemplated in subsection (1), the Minister must— 55
- (a) by notice in the *Gazette*—
    - (i) publish an intention to make the declaration and give reasons therefor;

- (ii) indicate where a copy of the draft declaration may be obtained; and
  - (iii) invite interested persons to make written representations in relation thereto, so as to reach the Minister within the time stipulated in the notice after the date of the publication of that notice; and
- (b) consider any representations received in terms of paragraph (a)(iii).
- (6) An affected party may not, on or after the date of the publication of a notice referred to in subsection (1), carry on the practice concerned.
- (7) The Ombud may direct a party who, on or after the date of the publication of a notice referred to in subsection (1), carries on the practice concerned in contravention of that notice, to rectify, to the satisfaction of the Ombud, any harm which was caused by, or arose out of, the carrying on of the practice concerned.
- (8) Any party who, under subsection (7), is directed to rectify any harm, must do so within 60 business days after such direction is issued.
- (9) The Ombud may, after affording the party concerned a reasonable opportunity to make representations, impose an administrative penalty in the amount prescribed by the Minister for any contravention of subsection (6) or failure by the party concerned to comply with subsection (7), read with subsection (8).”.

**Substitution of section 19 of Act 102 of 1996, as amended by section 6 of Act 26 of 2003 and section 6 of Act 29 of 2004**

6. The following section is hereby substituted for section 19 of the principal Act:

**“National Review of Small Enterprises**

- 19.** (1) The Director-General must, on the request of the Minister, compile a review called the National Review of Small Enterprises which must cover areas defined by the Minister or the Director-General, including—
- (a) particulars of progress achieved in furtherance of the objects of the National Small Business Support Strategy;
  - (b) summaries of any findings or recommendations of the Director-General in respect of legislation, proposed legislation and administrative practices which impact on the small enterprise sector;
  - (c) an outline of new developments and trends with regard to the small enterprise sector in South Africa;
  - (d) reports on the growth and decline of small enterprise according to sector, size and region; and
  - (e) a statistical analysis of the contribution of the small enterprise sector to the economy, to export promotion, to rural development and to the level of inclusion of previously disadvantaged groups into the economy.
- (2) The Director-General may request the assistance of the Advisory Body, the Agency or the Office when compiling the review.
- (3) The Director-General must complete the review timeously and thereafter submit it to the Minister and the Minister must table it in Parliament.”.

**Amendment of section 20 of Act 102 of 1996, as amended by section 6 of Act 29 of 2004**

7. Section 20 of the principal Act is hereby amended by the substitution for subsection (2) of the following subsection:

- “(2) The Minister may, in order to achieve the objects of this Act, by notice in the *Gazette* **[amend the Schedule]** make regulations, setting the criteria to determine the classification of micro, small and medium enterprises, to account for inflation[,] and macro-economic shifts in the economy[, **any legislation affecting small enterprises, and any other matter which could have an effect on the functionality of the Schedule.**”.

**Repeal of Schedule to Act 102 of 1996, as substituted by section 7 of Act 26 of 2003 and amended by section 6 of Act 29 of 2004**

8. The schedule to the principal Act is hereby repealed.

**Amendment of laws**

9. The laws mentioned in the Schedule are hereby amended to the extent set out in the third column of that Schedule. 5

**Transitional arrangements**

10. (1) In this section, unless the context otherwise indicates—

‘CBDA’ means the Co-operative Banks Development Agency as established by Chapter IX of the Co-operative Banks Act, 2007 (Act No. 40 of 2007); 10

‘SEDA’ means the Small Enterprise Development Agency established in terms of Chapter 3 of the National Small Enterprise Act, 1996 (Act No. 102 of 1996), prior to its amendment by this Act; and

‘SEFA’ means the Small Enterprise Finance Agency, a state owned company registered under company registration number 1995/011258/06. 15

(2) With effect from the date of commencement of this section—

(a) the CBDA, SEDA and SEFA are disestablished; and

(b) any board of an entity referred to in paragraph (a), established in terms of its founding legislation or other legal instrument must be dissolved.

(3) A person who is employed by the CBDA, SEDA and SEFA, immediately before the commencement of this section must be transferred to the Agency in accordance with section 197 of the Labour Relations Act, 1995 (Act 66 of 1995). 20

(4) For purposes of the Income Tax Act, 1962 (Act No. 58 of 1962), no change of employer must be regarded as having taken place when a person contemplated in subsection (3) takes up employment at the Agency. 25

(5) On the date of commencement of this section, or on a date determined by the Minister, all assets, liabilities, rights and obligations of the CBDA, SEDA and SEFA, as the case may be, including the unexpended balance of appropriations, authorisations, allocations and other funds employed, held or used in connection with the furtherance of its objectives and functions, pass to the Agency. 30

(6) Anything done by or on behalf of the CBDA, SEDA and SEFA is deemed to have been done by the Agency, subject to this Act.

(7) The Director-General must, in writing, as soon as practicable after the commencement of this section, notify the Boards of the CBDA, SEDA and SEFA, the Companies and Intellectual Property Commission and the Registrar of Deeds of the provisions of this section. 35

(8) On receipt of the notification contemplated in subsection (7) the Companies and Intellectual Property Commission and the Registrar of Deeds must make the necessary entries and endorsements on any register or document in the registration office, or documents submitted to that Commission or Registrar. 40

(9) No transfer duties, stamp duties, fees or taxes will be payable for purposes of subsection (5) or (8).

**Substitution of long title of Act 102 of 1996**

11. The following long title is hereby substituted for the long title of the principal Act: 45  
**“To provide for the establishment of the Advisory Body and the Small Enterprise Development Finance Agency; to provide for the functioning of the Small Enterprise Development Finance Agency; to ensure the provision of financial and non-financial support services to small enterprises; to promote the development of sustainable and responsible co-operative banking; to provide for the establishment of the Office of the Small Enterprise Ombud Service; to enable an equitable trading environment for small enterprises through the provision of affordable and effective access to justice; to empower the Minister to declare certain practices in relation to small enterprises to be prohibited as unfair trading practices; to provide guidelines for organs of state in order to promote small business in the Republic; and to provide for matters incidental thereto.** 50 55

**Short title and commencement**

**12.** This Act is called the National Small Enterprise Amendment Act, 2023, and comes into operation on a date fixed by the President by Proclamation in the *Gazette*.

## Schedule

## LAWS AMENDED

(Section 9)

No. and year of Act	Short title	Extent of repeal or amendment
Act 40 of 2007	Co-operative Banks Act, 2007	<p><b>Amendment of section 1 of Act 40 of 2007</b></p> <p>1. Section 1 of the Co-operative Banks Act, 2007, is hereby amended—</p> <p>(a) by the deletion of the definition of “Agency”;</p> <p>(b) by the deletion of the definition of “representative body”;</p> <p>(c) by the deletion of the definition of “rule”; and</p> <p>(d) by the deletion of the definition of “support organisation”.</p> <p><b>Amendment of section 1A of Act 40 of 2007</b></p> <p>2. Section 1A of the Co-operative Banks Act, 2007, is hereby amended—</p> <p>(a) by the substitution for subsection (2) of the following subsection:</p> <p>“(2) A reference in this Act to the Authority [<b>or the Agency</b>] determining or publishing a matter by notice in the <i>Gazette</i> must be read as including a reference to the Authority [<b>or the Agency</b>] determining or publishing the matter by notice published in the Register.”</p> <p>(b) by the substitution in subsection (3) for the words preceding paragraph (a) of the following words:</p> <p>“(3) Unless expressly provided otherwise in this Act, or this Act requires a matter to be prescribed by regulation in terms of section 86, [<b>or permits a matter to be prescribed by the Agency, including in a rule in terms of section 57,</b>] a reference in this Act to a matter being—</p> <p>(c) by the deletion in subsection (6) of paragraph (b);</p> <p>(d) by the substitution for subsections (7) to (9) of the following subsections respectively:</p> <p>“(7) (a) A reference in this Act to the Authority [<b>or the Agency</b>] announcing or publishing information or a document on a web site must be read as a reference to the Authority [<b>or the Agency</b>] publishing the information or document in the Register.</p> <p>(b) The Authority [<b>or the Agency</b>] may also publish the information or document on its web site.</p> <p>(8) (a) A reference in this Act to a prescribed fee, [<b>other than a reference to a fee prescribed by the Agency,</b>] must be read as a reference to the relevant fee determined in terms of section 237 and Chapter 16 of the Financial Sector Act.</p> <p>[<b>(b) The Agency, when determining a fee in terms of this Act, must comply with the requirements of section 237 and Chapter 16 of the Financial Sector Regulation Act.</b>].”</p> <p>(9) A reference in this Act to an appeal of a decision of the Authority [<b>or the Agency</b>] must be read as a reference to a reconsideration of the decision by the Tribunal in terms of the Financial Sector Regulation Act.”; and</p> <p>(e) by the deletion in subsection (10) of paragraph (b).</p> <p><b>Amendment of section 2 of Act 40 of 2007</b></p> <p>3. Section 2 of the Co-operative Banks Act, 2007, is hereby amended by the insertion in paragraph (c) of the word “and” at the end of subparagraph (i), the deletion of the word “and” at the end of subparagraph (ii) and the deletion of subparagraph (iii).</p> <p><b>Amendment of section 14 of Act 40 of 2007</b></p> <p>4. Section 14 of the Co-operative Banks Act, 2007, is hereby amended by the substitution in subsection (1) for paragraph (c) of the following paragraph:</p> <p>“(c) borrow money from [<b>the Agency</b>] third parties and members, other than deposits referred to in paragraph (a), up to a percentage of the assets held by it as prescribed by the Minister; .</p> <p><b>Repeal of Chapters VI and VII of Act 40 of 2007</b></p> <p>5. Chapters VI and VII of the Co-operative Banks Act, 2007, are hereby repealed.</p>

No. and year of Act	Short title	Extent of repeal or amendment
		<p><b>Amendment of section 44 of Act 40 of 2007</b></p> <p>6. Section 44 of the Co-operative Banks Act, 2007, is hereby amended—</p> <p>(a) by the substitution for subsection (1) of the following subsection:</p> <p style="padding-left: 40px;">“(1) The Authority may, in writing, delegate or assign any of the powers entrusted to the Authority in terms of this Act and assign any of the duties imposed on the Authority in terms of this Act to any person employed by the Authority or the South African Reserve Bank, or to the Financial Sector Conduct Authority[, <b>or, with the concurrence of the Minister, to the Agency</b>].”;</p> <p>(b) by the deletion in subsection (4) of paragraphs (a) and (c).</p> <p><b>Repeal of Chapter IX of Act 40 of 2007</b></p> <p>7. Chapter IX of the Co-operative Banks Act, 2007, is hereby repealed.</p> <p><b>Amendment of section 80 of Act 40 of 2007</b></p> <p>8. Section 80 of the Co-operative Banks Act, 2007, is hereby amended by the substitution for the words preceding paragraph (a) of the following words:</p> <p style="padding-left: 40px;">“It is an offence for any co-operative bank[, <b>representative body, support organisation</b>] or other person to—”.</p> <p><b>Substitution of section 82 of Act 40 of 2007</b></p> <p>9. The following section is hereby substituted for section 82 of the Co-operative Banks Act, 2007:</p> <p style="padding-left: 40px;"><b>“Fair administrative action</b></p> <p style="padding-left: 40px;">82. Where a decision or other step of an administrative nature taken by the Authority [<b>or the Agency</b>] affects the rights of another person, the Authority [<b>or the Agency</b>] must comply with the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000), unless another fair administrative procedure has been provided for in this Act or in terms of the Financial Sector Regulation Act.”.</p> <p><b>Substitution of section 84 of Act 40 of 2007</b></p> <p>10. The following section is hereby substituted for section 84 of the Co-operative Banks Act, 2007:</p> <p style="padding-left: 40px;"><b>“Access to records, register and other documentation</b></p> <p style="padding-left: 40px;">84. A regulatory authority must, despite the provisions of any other law, at the request of the Authority [<b>or Agency</b>] make information regarding a co-operative bank[, <b>representative body or support organisation</b>] available to the Authority [<b>or Agency</b>].”.</p> <p><b>Substitution of section 85 of Act 40 of 2007</b></p> <p>11. The following section is hereby substituted for section 85 of the Co-operative Banks Act, 2007:</p> <p style="padding-left: 40px;"><b>“Indemnity</b></p> <p style="padding-left: 40px;">85. Neither the Authority [<b>or the Agency, or any board member or employee or managing director thereof, nor a committee of the Agency or any member thereof</b>] , a member of the Prudential Committee, a member of a sub-committee of the Authority, or an employee of the Authority incurs any liability in respect of any act or omission performed in good faith under or by virtue of a provision in this Act, unless that performance was grossly negligent.”.</p> <p><b>Substitution of section 87 of Act 40 of 2007</b></p> <p>12. The following section is hereby substituted for section 87 of the Co-operative Banks Act, 2007:</p> <p style="padding-left: 40px;"><b>“Powers of Minister</b></p> <p style="padding-left: 40px;">87. The Minister may delegate any of the Minister’s powers in terms of this Act, excluding the power to make regulations [<b>and the power to appoint the members of the Agency</b>], to the Director-General or any other official of the National Treasury.”.</p>



No. and year of Act	Short title	Extent of repeal or amendment
		<p><b>Amendment of long title of Act 40 of 2007</b></p> <p>13. The long title of the principal Act is hereby amended by the substitution of the following long title:</p> <p><b>“To promote and advance the social and economic welfare of all South Africans by enhancing access to banking services and sustainable conditions; to promote the development of sustainable and responsible co-operative banks and co-operative financial institutions; to establish an appropriate regulatory framework and regulatory institutions for co-operative banks and co-operative financial institutions that protect members of co-operative banks and co-operative financial institutions; to provide for the registration of deposit-taking financial services co-operatives as co-operative banks and co-operative financial institutions; to provide for the regulation and supervision of co-operative banks and co-operative financial institutions; [and to provide for the establishment of a development agency for co-operative banks]; and to provide for matters connected therewith.”.</b></p> <p><b>Amendment of Arrangement of Sections of Act 40 of 2007</b></p> <p>14. The Arrangement of Sections of the Co-operative Banks Act, 2007, is hereby amended—</p> <p>(a) by the deletion of the items for Chapters VI and VII, items 31 to 40; and</p> <p>(b) by the deletion of the items for Chapter IX and items 54 to 74.</p> <p><b>Amendment of section 49 of Act 14 of 2005</b></p> <p>15. Section 49 of the Co-operatives Act, 2005 (hereinafter referred to as “the principal Act”), is hereby amended by the substitution in paragraph (a) of subsection (1) for subparagraph (ii) of the following subparagraph:</p> <p>“(ii) in the case of an auditor, is not registered with the South African Institute for Chartered Accountants or does not satisfy the requirements for registration as an auditor as contemplated in Chapter III of the Auditing Profession Act; or”.</p> <p><b>Amendment of section 91B</b></p> <p>16. Section 91B of the principal Act is hereby amended by the substitution for paragraph (b) of the following paragraph:</p> <p>“(b) provide financial and non-financial assistance to co-operatives to enable the development of co-operatives [provided that deposit-taking financial co-operatives will not be eligible for financial support, but will be eligible for non-financial support];”.</p>
Act No. 14 of 2005	Co-operatives Act, 2005	<p><b>Amendment of section 91GG of Act 14 of 2005</b></p> <p>17. Section 91GG of the principal Act is hereby amended—</p> <p>(a) by the substitution for the heading of the following heading: <b>“Establishment, composition and functions of National Interdepartmental Co-ordination Committee on Co-operatives and Inter-Provincial [Coordination] Co-ordination Committee on Co-operatives”.</b></p> <p>(b) by the substitution for subsection (1) of the following subsection:</p> <p>“(1) The National Interdepartmental Co-ordination Committee on Co-operatives and [The] the Inter-Provincial Co-ordination Committee on Co-operatives [is] are hereby established.”.</p> <p>(c) by the insertion of the following subsection after subsection (1), the subsequent subsections becoming subsection (3), (4), (5), (6), (7) and (8) respectively:</p> <p>“(2) The National Interdepartmental Co-ordination Committee on Co-operatives consists of the following members appointed by the Minister:</p> <p>(a) One person to represent the Minister; and</p> <p>(b) one person in the full-time employment of—</p> <p>(i) the Department; and</p> <p>(ii) such other national departments of state as identified by the Minister.”.</p>

No. and year of Act	Short title	Extent of repeal or amendment
		<p>(d) by the substitution for subsection (3) of the following subsection:  “(3) The Minister must appoint from among the members of the <u>National Interdepartmental Co-ordination Committee on Co-operatives and the Inter-Provincial Co-ordination Committee on Co-operatives</u> a chairperson and a deputy chairperson <u>for each Committee respectively</u>.”. and</p> <p>(e) by the substitution for subsection (5) of the following subsection:  “(5) A member of the <u>National Interdepartmental Co-ordination Committee on Co-operatives or the Inter-Provincial Co-ordination Committee on Co-operatives</u> may designate an alternate to attend a meeting of the <b>[Inter-Provincial Coordination]</b> Committee <b>[on Co-operatives in his or her place]</b> <u>on his or her behalf</u>.”.</p>

## **MEMORANDUM ON THE OBJECTS OF THE NATIONAL SMALL ENTERPRISE AMENDMENT BILL**

### **1. PURPOSE**

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”), primarily to 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 for the establishment of the Office of the Small Enterprise Ombud Service (“the Office”). The Bill furthermore enables the Minister to declare certain practices in relation to small enterprises to be prohibited as unfair trading practices and make regulations with regard thereto. 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.

#### **1.1 Establishment of SEDFA**

- 1.1.1 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.
- 1.1.2 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.
- 1.1.3 The Bill provides for SEDFA to be established as a state-owned company in terms of the Companies Act and 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.
- 1.1.4 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.
- 1.1.5 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 has been followed.
- 1.1.6 SEDFA’s powers and functions as well as the role, functions and duties of the Board are enunciated in the Bill.
- 1.1.7 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.

- 1.1.8 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.

## 1.2 Establishment of Ombud Office

- 1.2.1 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.
- 1.2.2 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.
- 1.2.3 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.
- 1.2.4 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.
- 1.2.5 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; and
  - (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.

1.2.6 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.

1.2.7 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; and
- 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.

### 1.3 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.

## 2. CLAUSE BY CLAUSE ANALYSIS

- 2.1 Clause 1 of the Bill seeks to amend section 1 of the Act in order to amend, delete, insert and substitute certain definitions.
- 2.2 Clause 2 seeks to insert a new section 1A in the Act to provide for the application of the Act.
- 2.3 Clause 3 seeks to insert section 4 in the Act to provide for the report of the Advisory Body.
- 2.4 Clause 4 seeks to substitute Chapter 3 of the Act in order to provide for, amongst others, the establishment and functions of the Small Enterprise Development Finance Agency.
- 2.5 Clause 5 seeks to insert a new Chapter 3A into the Act. The provisions of the proposed Chapter provide, amongst others, for the establishment of the Office, the appointment of the Ombud and any necessary deputy Ombud, the powers and functions of the Ombud, the manner of dealing with complaints, determinations by the Ombud, staff of the Office, delegation of powers, funding of the Office and the making of regulations applicable to the Ombud. The proposed Chapter further provides for matters such as the application of the provisions of the Public Finance Management Act, 1999 (Act No. 1 of 1999), to the Office and the accountability of the director of the Office, the annual report of the Office, penalties for offences in relation to disrupting investigations by the Ombud and wilfully interrupting the proceedings conducted by the Ombud, the promotion of stakeholder education and empowering the Minister responsible for small enterprise development to declare certain practices in relation to small enterprises to be prohibited unfair trading practices. In terms of the proposed section 17Y under the new Chapter 3A, the Minister responsible for small business development may, on recommendation of the Ombud, by notice in the *Gazette*, declare certain practices in relation to small enterprises to be prohibited unfair trading

practices. The proposed section further gives guidance as to the practices that may be declared to be prohibited unfair trading practices by the Minister and lists the rights of small enterprises.

- 2.6 Clause 6 seeks to substitute section 19 of the Act to provide for the Director-General responsible for small business development to conduct a national review of small enterprises.
- 2.7 Clause 7 seeks to amend section 20 of the Act in order to empower the Minister responsible for small business development to make regulations setting the criteria to determine the classification of micro, small and medium enterprises. This amendment is meant to bring the provisions of the Act in line with the decision in *Smit v Minister of Justice and Correctional Services and Others*,\* where the Constitutional Court declared section 63 of the Drugs and Drug Trafficking Act, 1992 (Act No. 140 of 1992) to be inconsistent with the Constitution of the Republic of South Africa, 1996 (“the Constitution”), and invalid to the extent that it purports to delegate plenary legislative power to amend Schedules 1 and 2 to the Drugs and Drug Trafficking Act to the Minister of Justice and Correctional Services.
- 2.8 Clause 8 seeks to repeal the Schedule to the Act as a consequence of the amendment effected in terms of clause 7 above.
- 2.9 Clause 9 seeks to provide for the amendment of certain laws as a consequence of the establishment of the Small Enterprise Development Finance Agency.
- 2.10 Clause 10 seeks to provide for transitional arrangements necessitated by the establishment of the Agency.
- 2.11 Clause 11 seeks to provide for the amendment of the long title of the Act to highlight the major amendments noted above.
- 2.12 Clause 12 provides for the short title and commencement of the Act.

### 3. CONSULTATION

- 3.1 Initial consultations were undertaken with five regulatory institutions, namely the Companies Tribunal, the Competition Tribunal, the National Consumer Tribunal, the Tax Ombud and the B-BBEE Commission. These consultations had two objectives: (1) To learn from the experiences of these institutions in delivering ADR services within their areas of mandate and to seek input towards the set up and future operations of the envisaged ADR mechanism for small enterprises; and (2) to scope options such as whether there was any scope to incorporate the envisaged small enterprise ADR mechanism within an existing institution, in order to avoid duplication or if a small enterprise ADR mechanism would need to be a separate entity.

In addition, five stakeholder engagement workshops were held in Cape Town, Durban, Johannesburg, Mangaung and Polokwane. The purpose of these workshops was threefold: (1) to present and seek feedback on the position paper and the overall small enterprise ADR initiative; (2) to learn from stakeholders about the nature of business to business disputes experienced by small enterprises and how they currently deal with them; (3) to seek input on the modalities of the establishment of the envisaged small enterprise ADR mechanism. Participants at these workshops represented a range of actors in small business development, including law academics and legal practitioners, business organisations, provincial and local government, and small enterprises themselves.

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\* CCT 100/09 [2010] ZACC 10.

3.2 Stakeholder consultations, specifically aimed at resolving business-to-business disputes and unfair trading practices, were also undertaken.

#### 4. IMPLICATIONS FOR PROVINCES

None.

#### 5. FINANCIAL IMPLICATIONS FOR STATE

##### 5.1 SEDFA

The PFMA prescribed business case for the establishment of SEDFA provides detailed financial information as to the initial level of funding that the new entity should receive based on which of three proposed scenarios are ultimately endorsed by the State.

Funding for the merged entity will comprise of a mix of initial capitalisation, annual transfers, strategic investment income, donor funding, CSI and ESG funds, fund management fees and property income. Significant funding from fiscus is required for business development and related services as well as eco-system development.

Taking note of the proposed external reporting framework, three scenarios have been proposed with regards to the initial level of funding that the new entity should receive. These are:

- **Scenario 1:** The Baseline Scenario which assumes that the merged entity's headcount, branch network, performance indicators, and efficiencies will be as provided for each entity's 2023 MTEC submission.
- **Scenario 2:** A refuelled entity which provides for the recapitalising of the financial support activities of the merged entity, as well as increasing funding for the merged entity's incubator, technology transfer assistance, supplier development partnership, informal micro-enterprise development, township and rural entrepreneurship programmes and expanding the number of access points. The additional funding for this scenario over and above the baseline scenario is as shown in the table below.

**Table 1: Additional annual funding needed for the scenario 2 — refuelled entity compared to the baseline scenario**

Support Area	Year 1 R'000'	Year 2 R'000'	Year 3 R'000'	MTEF R'000
Additional funding needed for non-financial support activities	2 448 000	2 788 450	3 032 273	8 268 723
Additional funding needed for financial support activities	7 150 000	8 104 350	9 145 650	24 400 000
<b>Total Additional Funding</b>	<b>9 598 000</b>	<b>10 892 800</b>	<b>12 177 923</b>	<b>32 668 723</b>

Source: DSBF MTEF bilateral discussion document

- **Scenario 3:** A super-refuelled entity which assesses the funding needed by the merged entity to increase its market penetration to 40% of the number of formal small enterprises. This model assumes that the growth will be driven by the same product profile as scenario 2 and that the resultant increase in non-financial support will trigger a similar growth in demand for financial support. The resultant additional funding is as shown in the table below.



**Table 2: Additional annual funding needed for the scenario 3 — refuelled entity compared to the baseline scenario**

Support Area	Year 1 R'000'	Year 2 R'000'	Year 3 R'000'	MTEF R'000
Additional funding needed for non-financial support activities compared to baseline scenario	7 105 761	8 859 661	10 408 948	26 374 370
Additional funding needed for financial support activities compared to baseline scenario	13 604 164	17 645 364	22 248 816	53 498 345
<b>Total additional funding compared to baseline scenario</b>	<b>20 709 926</b>	<b>26 505 025</b>	<b>32 657 764</b>	<b>79 872 714</b>

Source: DSBDB MTEF bilateral discussion document and team analysis

Although scenario 1 requires the least funding, it scores the lowest in terms of overall developmental impact and financial position. Scenario 3, whilst requiring the highest level of funding, scores the highest in terms of developmental impact and financial position.

## 5.2 The Office

- 5.2.1 An initial estimated amount of R3 500 000,00 (Three Million Five Hundred Thousand Rand) has been allocated for the implementation in FY 2024/25. This budget provides for the costs of setting up the Ombud Office and systems, as well as recruiting staff, with full operations commencing in year 2, R20 million per annum to operate as summarized below:

**Table 3: Estimated Total Costs (Setup and Annual)**

MTEF Budget	2024/25 (Setup)	2025/26	2026/27	2026/27	Notes
Personnel		8,491,833	8,661,669	8,834,903	2% annual escalation
Goods & services	1,000,000	1,698,367	1,783,285	1,872,449	5% annual escalation
Capital Expenditure	2,500,000	500,000	500,000	500,000	Estimate for ICT (Case M&E System)
Total	3,500,000	20,690,199	22,944,954	25,607,352	20% annual escalation
SMME's assisted	0	200	240	288	

- 5.2.2 To mitigate against this cost without compromising on the quality, skill, and expertise of the Ombud, it will be for the Minister to appoint a retired judge which will mean that the personnel costs of the Ombud will not form part of the budget. It is envisioned that the cost estimates in the detailed business case and more so the implementation plan will provide the information for populating the financial management systems for the Ombud Service once established. It should therefore also support the transfer payments to be made from the DSBDB to the Ombud Service per the effective date of establishment (previously foreseen as 1 April 2021).
- 5.2.3 The cost to establish the Ombud Service is based on available information at the time of preparation. It should be noted that because the detailed business case has yet to be completed, it should be considered that the budget is prepared in a dynamic environment, and as such is prepared at a high level, with a degree of flexibility built into it.

**Table 2: Staff complement and cost**

Position	Grade	Salary	No	Cost (Rand)
Ombud		2,183,364	1	2,183,364
Chief Director	14	1,649,292	1	1,649,292
Director: Complaints Management	13	1,373,160	1	1,373,160
Assistant Director: Complaints	9	514,502	1	514,502
Director: Case Management	13	1,373,160	1	1,373,160
Investigator	10	642,171	1	642,171
Case Management Administrator	7	351,811	1	351,811
<b>Total</b>		<b>7</b>		<b>8,087,460</b>

## 6. PARLIAMENTARY PROCEDURE

- 6.1 The State Law Advisers and the Department of Small Business Development are of the opinion that the Bill should be dealt with in accordance with the procedure set out in section 75 of the Constitution of the Republic of South Africa, 1996 (“the Constitution”), since it contains no provisions to which the procedure set out in section 74 or 76 of the Constitution applies.
- 6.2 The Constitution distinguishes between four categories of Bills as follows: Bills amending the Constitution (section 74); Ordinary Bills not affecting provinces (section 75); Ordinary Bills affecting provinces (section 76); and Money Bills (section 77). A Bill must be correctly classified or tagged, otherwise it would be constitutionally invalid.
- 6.3 The Bill has been considered against the provisions of the Constitution relating to the tagging of Bills, and against the functional areas listed in Schedule 4\* to the Constitution.
- 6.4 The crux of tagging has been explained by the courts, especially the Constitutional Court in the case of *Tongoane and Others v Minister of Agriculture and Land Affairs and Others 2010 (8) BCLR 741 (CC)*. The court in its judgment stated as follows:

“[58] What matters for the purpose of tagging is not the substance or the true purpose and effect of the Bill, rather, what matters is whether the provisions of the Bill “in substantial measure fall within a functional area listed in schedule 4”. This statement refers to the test to be adopted when tagging Bills. This test for classification or tagging is different from that used by this court to characterise a Bill in order to determine legislative competence. This “involves the determination of the subject matter or the substance of the legislation, its essence, or true purpose and effect, that is, what the [legislation] is about”. (footnote omitted)

[59] . . .

[60] The test for tagging must be informed by its purpose. Tagging is not concerned with determining the sphere of government that has the competence to legislate on a matter. Nor is the process concerned with preventing interference in the legislative competence of another sphere of government. The process is concerned with the question of how the Bill should be considered by the provinces and in the NCOP, and how a Bill must be considered by the provincial legislatures, depends on whether it affects the provinces. The more it affects the interests, concerns and capacities of the provinces, the more say the provinces should have on its content.”

\* Tongoane at paragraph 59.

- 6.5 In light of what the Constitutional Court stated in the abovementioned case, the test essentially entails that “any Bill whose provisions in substantial measure” affect the provinces must be classified to follow the section 76 procedure.
- 6.6 The Bill seeks to amend the principal Act in order to deal with the matters detailed under paragraphs 1 and 2, above. In the final analysis, it is our view that the provisions of the Bill do not fall within any of the functional areas listed in Schedule 4 to the Constitution. Consequently, we are of the opinion that this Bill is an ordinary Bill not affecting provinces and that it must be dealt with in accordance with the procedure set out in section 75 of the Constitution.

**7. REFERRAL TO NATIONAL HOUSE OF TRADITIONAL AND KHOI-SAN LEADERS**

The opinion is held that it is not necessary to refer this Bill to the National House of Traditional and Khoi-San Leaders in terms of section 39(1)(a) of the Traditional and Khoi-San Leadership Act, 2019 (Act No. 3 of 2019), since the Bill does not contain any provisions which directly affect customary law or the customs of traditional or Khoi-San communities or pertain to matters referred to in section 154(2) of the Constitution.