

REPUBLIC OF SOUTH AFRICA

---

# JUDICIAL MATTERS SECOND AMENDMENT BILL

---

*(As submitted by the Portfolio Committee on Justice (National Assembly) in terms of Rule 147(2)(b), after consideration of the Judicial Matters Amendment Bill [B 30—98])*

---

(MINISTER OF JUSTICE)

[B 30B—98]

---

REPUBLIEK VAN SUID-AFRIKA

---

# TWEEDE WYSIGINGSWETS- ONTWERP OP GEREGETELIKE AANGELEENTHEDE

---

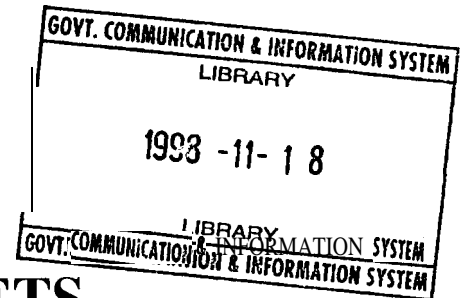
*(Soos voorgelê deur die Portefeeljekomitee oor Justisie (Nasionale Vergadering) ingevolge Reël 147(2)(b), na oorweging van die Wysigingswetsontwerp op Geregetelike Aangeleenthede [W 30—98])*

---

(MINISTER VAN JUSTISIE)

[W 30B—98]

ISBN 0 621289469



(; GENERAL EXPLANATORY NOTE:

- [                            ]      Words in bold type in square brackets indicate omissions from existing enactments.
- Words underlined with a solid line indicate insertions in existing enactments.
- 
- 

## BILL

To amend the Insolvency Act, 1936, so as to make other provision in connection with the salaries or wages of former employees of an insolvent; to amend the Supreme Court Act, 1959, so as to further regulate persons over whom and matters in relation to which High Courts have jurisdiction; to amend the Criminal Procedure Act, 1977, so as to make other provision in connection with the use of force in effecting arrests; to amend the Attorneys Act, 1979, so as to provide for any board of executors or trust company to receive remuneration for the preparation of a will or other testamentary writing; to amend the Co-operatives Act, 1981, so as to effect a consequential amendment; to amend the Magistrates Act, 1993, so as to further regulate the vacation of office by a magistrate; to amend the Special Investigating Units and Special Tribunals Act, 1996, so as to further regulate the appointment of the President of a Special Tribunal; to amend the National Prosecuting Authority Act, 1998, so as to effect a consequential amendment; to provide for the centralisation of certain offences; to repeal an obsolete law; and to provide for matters connected therewith.

**B**E IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

**Amendment of section 96 of Act 24 of 1936, as amended by section 29 of Act 99 of 1965 and section 12 of Act 101 of 1983**

1. Section 96 of the Insolvency Act, 1936, is amended by the substitution for 5 subsection (3) of the following subsection:

“(3) In subsection (2) ‘death-bed expenses’ means expenses incurred for medical attendance, nursing [**otherwise than by a nurse referred to in section one hundred**], medicines and medical necessities, and claims for those expenses shall rank *pari passu* and abate in equal proportion, if necessary.”.

10

**Insertion of section 98A in Act 24 of 1936**

2. (1) The following section is inserted after section 98 of the Insolvency Act, 1936:

**Salaries or wages of former employees of insolvent**

- 98A. (1)** Thereafter any balance of the free residue shall be applied in paying—
- (a) to any employee who was employed by the insolvent—
- (i) any salary or wages, for a period not exceeding three months, due to an employee;
  - (ii) any payment in respect of any period of leave or holiday due to the employee which has accrued as a result of his or her employment by the insolvent in the year of insolvency or the previous year, whether or not payment thereof is due at the date of sequestration;
  - (iii) any payment due in respect of any other form of paid absence for a period not exceeding three months prior to the date of the sequestration of the estate; and
  - (iv) any severance or retrenchment pay due to the employee in terms of any law, agreement, contract or wage-regulating measure; and
- (b) any contributions which were payable by the insolvent, including contributions which were payable in respect of any of his or her employees, and which were, immediately prior to the sequestration of the estate, owing by the insolvent, in his or her capacity as employer, to any pension, provident, medical aid, sick pay, holiday, unemployment or training scheme or fund, or to any similar scheme or fund.
- (2) (a) In order to ensure that the balance of the free residue is applied in an equitable manner, the Minister of Justice may by notice in the *Gazette* determine maximum amounts which shall be paid out in terms of subsection (1) in respect of—
- (i) paragraph (a), any or all the subparagraphs thereof or any single employee; and
  - (ii) paragraph (b) or any single scheme or fund,
- and different maximum amounts may be so determined in respect of different schemes or funds.
- (b) In order to take into account subsequent fluctuations in the value of money, the Minister of Justice may from time to time supplement, amend or withdraw the relevant maximum amounts by like notice in the *Gazette*.
- (c) The Minister of Justice may at any time replace a notice referred to in paragraph (a) with a new notice issued under the said paragraph (a).
- (d) The Minister of Justice shall not exercise the powers conferred upon him or her by paragraph (a) or (c), unless he or she—
- (i) has caused to be published in the *Gazette* a draft of the proposed notice, together with a notice inviting all interested parties to lodge with the Director-General: Justice in writing within a period of 60 days from the date of the publication of the notice any representations that they may wish to make in connection with the proposed notice; and
  - (ii) has caused to be forwarded to the National Economic, Development and Labour Council established by section 2(1) of the National Economic, Development and Labour Council Act, 1994 (Act No. 35 of 1994), a copy of such draft.
- (3) An employee shall be entitled to salary, wages, leave or other payments in terms of subsection (1)(a) even though he or she has not proved his or her claim therefor in terms of section 44, but the trustee may require such employee to submit an affidavit in support of his or her claim for such salary, wages, leave or payment.
- (4) (a) The claim referred to in subsection (1)(a)(i) shall be preferred to the claims referred to in subsections (1)(a)(ii), (iii) and (iv) and (1)(b).
- (b) The claims referred to in subsection (1)(a)(ii), (iii) and (iv) shall be preferred to the claims referred to in subsection (1)(b) and shall rank equally and abate in equal proportions, if necessary.

(c) The claims referred to in subsection (1)(b) shall rank equally and abate in equal proportions, if necessary.

(5) For the purposes of this section—

(a) ‘employee’ means any person, excluding an independent contractor, who works for another person and who—

- (i) receives, or is entitled to receive, any salary or wages; or
- (ii) in any manner assists in carrying on or in conducting the business of an employer;

(b) ‘salary or wages’ includes all cash earnings received by the employee from the employer;

(c) ‘unemployment fund’ does not include the unemployment insurance fund referred to in section 6 of the Unemployment Insurance Act, 1966 (Act No. 30 of 1966).

(6) The Minister of Justice may, after consultation with the National Economic, Development and Labour Council established by section 2(1) of the National Economic, Development and Labour Council Act, 1994, by notice in the *Gazette* exclude from the operation of the provisions of this section a category of employees, schemes or funds specified in the notice—

(a) in the case of employees, by reason of the particular nature of the employment relationship between the employer and the employees;

(b) in the case of employees, schemes or funds, by reason of the fact that there exists any other type of guarantee which affords the employees, schemes or funds protection which is equivalent to the protection as provided in this section; or

(c) in the case of schemes or funds, by reason of the fact that the sequestration of the employer’s estate will make it impossible to achieve the objects of the schemes or funds.”.

(2) The provisions of subsection (1) shall apply in respect of estates which are sequestrated or provisionally sequestrated on or after the date of commencement of (his section.

**Amendment of section 99 of Act 24 of 1936, as substituted by section 5 of Act 6 of 1972 and amended by section 30 of Act 90 of 1972, section 6 of Act 62 of 1973, section 9 of Act 29 of 1974, section 69 of Act 85 of 1974, section 50 of Act 103 of 1978 and section 3 of Act 139 of 1992**

3. Section 99 of the Insolvency Act, 1936, is amended by the deletion of paragraph (f) of subsection (1).

**Repeal of section 100 of Act 24 of 1936, as amended by section 13 of Act 32 of 1952, section 31 of Act 99 of 1965, section 14 of Act 101 of 1983 and section 4 of Act 139 of 1992**

4. Section 100 of the Insolvency Act, 1936, is repealed.

**Amendment of section 104 of Act 24 of 1936, as amended by section 6 of Act 122 of 1993**

5. Section 104 of the Insolvency Act, 1936, is amended by the substitution in subsection (1) for the words preceding the proviso of the following words:

“Subject to the provisions of [sub-section (2) of section *ninety-five*] section 95(2) and [sub-section (3) of section *one hundred*] section 98A(3), a creditor of an insolvent estate who has not proved a claim against that estate before the date upon which the trustee of that estate submitted to the Master a plan of distribution in that estate, shall not be entitled to share in the distribution of assets brought up for distribution in that plan.”.

**Amendment of section 19 of Act 59 of 1959, as amended by section 6 of Act 15 of 1969, section 2 of Act 41 of 1970 and section 6 of Act 105 of 1982**

6. Section 19 of the Supreme Court Act, 1959, is amended by the addition in subsection (1) of the following paragraph:

“(c) Subject to the provisions of section 28 and the powers granted under section 4 of the Admiralty Jurisdiction Regulation Act, 1983 (Act No. 105 of 1983), any High Court may—

- (i) issue an order for attachment of property or arrest of a person to confirm jurisdiction or order the arrest *suspectus de fuga* also where the property or person concerned is outside its area of jurisdiction but within the Republic: Provided that the cause of action arose within its area of jurisdiction; and
- (ii) where the plaintiff is resident or domiciled within its area of jurisdiction, but the cause of action arose outside its area of jurisdiction and the property or person concerned is outside its area of jurisdiction, issue an order for the attachment of property or arrest of a person to found jurisdiction regardless of where in the Republic the property or person is situated.”

**Substitution of section 49 of Act 51 of 1977**

7. The following section is substituted for section 49 of the Criminal Procedure Act, 1977:

**“Use of force in effecting arrest**

**49. (1)** For the purposes of this section—

- (a) ‘arrestor’ means any person authorised under this Act [o arrest or to assist in arresting a suspect; and
- (b) ‘suspect’ means any person in respect of whom an arrestor has or had a reasonable suspicion [hat such person is committing or has committed an offence.

(2) If any arrestor attempts to arrest a suspect and the suspect resists the attempt, or flees, or resists the attempt and flees, when it is clear that an attempt to arrest him or her is being made, and the suspect cannot be arrested without the use of force, the arrestor may, in order to effect the arrest, use such force as may be reasonably necessary and proportional in the circumstances, to overcome the resistance or to prevent the suspect from fleeing: Provided that an arrestor is justified in terms of this section in using deadly force that is intended or is likely to cause death or grievous bodily harm to a suspect, only if he or she believes on reasonable grounds—

- (a) that the force is immediately necessary for the purposes of protecting the arrestor, any person lawfully assisting the arrestor or any other person from imminent or future death or grievous bodily harm;
- (b) that there is a substantial risk that the suspect will cause imminent or future death or grievous bodily harm if the arrest is delayed; or
- (c) that the offence for which the arrest is sought is in progress and is of a forcible and serious nature and involves the use of life threatening violence or a strong likelihood that it will cause grievous bodily harm.“..

**Amendment of Schedule 1 to Act 51 of 1977, as substituted by section 17 of Act 26 of 1987**

8. Schedule 1 to the Criminal Procedure Act, 1977. is amended by the substitution for the heading thereto of the following heading:

**“Schedule 1**

(Sections 40 and 42 [49])”.

**Amendment of section 83 of Act 53 of 1979, as amended by section 6 of Act 76 of 1980, section 5 of Act 60 of 1982, section 30 of Act 87 of 1989 and section 1 of Act 49 of 1996**

5

9. Section 83 of the Attorneys Act, 1979, is amended by the addition in subsection (12) of the following paragraph:

“(g) any board of executors or trust company which, on 27 October 1967, was licensed as such under the Licences Act, 1962 (Act No. 44 of 1962), and carrying on business of which a substantial part consisted of the liquidation or distribution of the estates of deceased persons, if the person in the service of any such institution, who draws up or prepares or causes to be drawn up or prepared the documents referred to in subsection (8)(a)(ii), satisfies all the academic requirements to be admitted as an advocate or attorney in terms of the Admission of Advocates Act, 1964 (Act No. 74 of 1964), or this Act, as the case may be.”.

10

15

**Amendment of section 219 of Act 91 of 1981, as amended by section 17 of Act 80 of 1987**

10. Section 219 of the Co-operatives Act, 1981, is amended by the substitution for paragraph (b) of the following paragraph:

20

“(b) thereafter in paying any amounts due by the co-operative with respect to the matters referred to in paragraph (b) of section 98A(1), or in paragraphs (a) to and including [(f)](e) of section 99(1), of the insolvency Act, 1936 (Act No. 24 of 1936), which have been admitted or proved in terms of section 215, or, if the balance of the said proceeds is insufficient to pay the said amounts in full, in paying a proportionate share of each;”.

25

**Amendment of section 13 of Act 90 of 1993, as amended by section 4 of Act 85 of 1995 and sections 6 and 8 of Act 35 of 1996**

11. Section 13 of the Magistrates Act, 1993, is amended by the substitution for subsection (1) of the following subsection:

30

“(1) A magistrate shall vacate his or her office on attaining the age of 65 years: Provided that—

(a) the Minister may, after consultation with the Commission, allow a magistrate—

(i) who, on attaining the age of 65 years wishes to continue to serve in such office; and

35

(ii) whose mental and physical health enables him or her to do so,

to continue to hold such office for the period that the Minister may determine; and

(b) if he or she attains the said age after the first day of any month, he or she shall be deemed to attain that age on the first day of the next ensuing month.”.

40

**Amendment of section 7 of Act 74 of 1996**

12. (1) Section 7 of the Special Investigating Units and Special Tribunals Act, 1996, is amended by the substitution for subsection (1) of the following subsection:

“(1) A Special Tribunal established under section 2(1) consists of a judge, including a retired judge, of [the Supreme Court] a High Court, as Tribunal president, and such additional members as may be appointed under subsection (3).”.

45

(2) Subsection (1) shall be deemed to have come into operation on 20 November 1996.

### Substitution of section 45 of Act 32 of 1998

13. The following section is substituted for section 45 of the National Prosecuting Authority Act, 1998:

#### **“Interpretation of certain references in laws**

45. Any reference in any law to— 5  
(a) an attorney-general shall, unless the context indicates otherwise, be construed as a reference to the *National Director*; and  
(b) an attorney-general or deputy attorney-general in respect of the area of jurisdiction of a High Court, shall be construed as a reference to a *Director* or *Deputy Director* appointed in terms of *this Act*, for the area I () of jurisdiction of that Court.”.

### Removal of certain trials to jurisdiction of other Directors of Public Prosecutions

14. Despite the provisions of section 13 of the Justice Laws Rationalisation Act, 1996 (Act No. 18 of 1996), the provisions of section 111 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), as made applicable to certain areas of the national territory of the 15 Republic of South Africa by section 2 of the Justice Laws Rationalisation Act, 1996, shall also be applicable in respect of any offence committed in any such area prior to the commencement of the last-mentioned Act.

### Repeal of law

15. The Bophuthatswana Electricity Act, 1985 (Act No. 34 of 1985), is repealed. 20

### Short title and commencement

16. This Act is called the Judicial Matters Second Amendment Act, 1998, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

**MEMORANDUM ON THE OBJECTS OF THE JUDICIAL MATTERS  
SECOND AMENDMENT BILL, 1998**

**PART 1**

**OBJECTS AND EXPLANATION**

The main object of the Judicial Matters Second Amendment Bill, 1998, is to encompass in a single Bill a variety of amendments to certain laws which do not require individual Amendment Acts.

**PART 2**

**LAWS AMENDED**

**2.1** The Bill amends the following laws:

(a) The Insolvency Act, 1936:

The failure of legal systems to address adequately the position of the employees of an insolvent is an international concern which led to the International Labour Organisation adopting the Protection of Workers' Claims (Employer's Insolvency) Convention, 1992 (Convention No. 173 of 1992). In outline, the said Convention provides that specified claims of workers should have a rank higher than most other preferent claims (and in particular those of the State and the social security system) and that workers' claims may be limited to a prescribed amount, provided the said amount is not set below a socially acceptable level and is adjusted regularly in order to maintain its value. **Clause 2** inserts a new section 98A into the Insolvency Act, 1936, in order to bring the provisions of the said Act into line with the provisions of the said Convention. **Clauses 1, 3, 4 and 5** effect consequential amendments to certain provisions of the said Act.

(b) The Supreme Court Act, 1959:

**Clause 6** amends section 19 so as to provide that in the case where the defendant is a *peregrinus* of the Republic—

- (a) the plaintiff, whether a *peregrinus* of the Republic or of the division where the cause of action arose, will be able to apply to the division in which the cause of action arose for an order for attachment of property or arrest of the defendant to confirm jurisdiction irrespective of where in the Republic the property or defendant happens to be; and
- (b) the plaintiff, who is a local *peregrinus* (an *incola* of the Republic) will be able to apply to the division where he or she resides or is domiciled for an order for an attachment or arrest to found jurisdiction irrespective of where in the Republic the property or defendant happens to be.

(c) The Criminal Procedure Act, 1977:

In declaring capital punishment to be unconstitutional, the Constitutional Court in *S v Makwanyane and Another* 1995(6) BCLR 665 (CC) in par. 140 made the following comments regarding section 49(2) of the said Act:

“Greater restriction on the use of lethal force may be one of the consequences of the establishment of a constitutional state which respects every person's right to life. Shooting at a fleeing criminal in the heat of the moment, is not necessarily to be equated with the execution of a captured criminal. But, if one of the consequences of this judgment might be to render the provisions of section 49(2) unconstitutional, the legislature will have to modify the provisions of the section in order to bring it into line with the Constitution.”

Despite the sanctity of life being enshrined in the Constitution, legal systems recognize world-wide that occasions will arise where a choice has to be made between the lives of two or more persons. According to the said Court, one such occasion presents itself in the case of self-defence, where, at common



law, the law permits [be use of lethal force by a person whose life, bodily integrity, property or other legitimate interests are threatened, provided the lethal force meets the requirements of the doctrine of proportionality (see Makwanyane's case, supra, in par. 138). **Clause 7** substitutes section 49 of the said Act, which provides for the use of force in effecting an arrest. in order to bring it into line with the Constitution. **Clause 8** contains a consequential amendment.

- (d) The Attorneys Act, 1979:  
**Clause 9** amends section 83(12) of the Attorneys Act, 1979 (Act No. 53 of 1979), so as to empower boards of executors and trust companies to receive remuneration for wills or other testamentary writings which are prepared by such boards and companies.
- (e) The Co-operatives Act, 1981:  
**Clause 10** amends section 219 by effecting certain consequential amendments.
- (f) The Magistrates Act, 1993:  
**Clause 11** amends section 13 in order to provide that a magistrate may voluntarily continue in office after attaining the age of 65 years, if his or her mental and physical health enables him or her to so continue and the Magistrates Commission recommends such continuation in office.
- (g) The Special Investigating Units and Special Tribunals Act, 1996:  
In terms of section 7 of the said Act, only a judge of a High Court may be appointed to the office of President of a Special Tribunal. However, in practice the secondment of serving judges of the High Courts to the office of Tribunal President places a severe burden on the Benches of these Courts. **Clause 12** amends section 7 so as to provide for the appointment of retired judges to the office of Tribunal President.
- (h) The National Prosecuting Act, 1998:  
Section 45 of the said Act provides that “[a]ny reference in any law to an attorney-general or deputy attorney-general in respect of the area of jurisdiction of a High Court, shall be construed as a reference to a *Director* or *Deputy Director* appointed in terms of *this Act*, for the area of jurisdiction of that Court”. **Clause 13** amends section 45 in order to provide that in certain instances a reference to an attorney-general includes a reference to the “National Director of Public Prosecutions”, who is the head of the national prosecuting authority in the Republic.

2.2 The Bill contains the following substantive provisions:

- (a) **Clause 14** provides that the provisions of section 111 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), as extended to the former TBVC states, will be applicable in respect of any offence, whether or not it was committed prior to or after the commencement of the Justice Laws Rationalisation Act, 1996 (Act No. 18 of 1996), and irrespective of within which area it was committed.
- (b) **Clause 15** repeals an obsolete law of the former Republic of Bophuthatswana.

### PART 3

#### PARTIES CONSULTED

The following interested parties were consulted:

- \* The Chief Justice, Judiciary and Judicial Service Commission
- \* The Attorneys-General
- \* The Regional Court Presidents and Chief Magistrates
- \* The Regional Heads of the Department of Justice
- \* The organised legal professions
- \* The Magistrates Commission
- \* The Magistrates' Association of South Africa
- \* The Association of Regional Magistrates of South Africa
- \* The Human Rights Committee of South Africa
- \* The Chief Master of the Supreme Court
- \* The Independent Complaints Directorate
- \* The Rules Board for Courts of Law

- \* The Association of Trust Companies
- \* The National Economic, Development and Labour Council
- \* Relevant Government Departments

**PART 4**

**PARLIAMENTARY PROCEDURE**

In the opinion of the Department of Justice and the State Law Advisers this Bill should be dealt with in terms of section 75 of the Constitution of the Republic of South Africa, 1996.