

REPUBLIC OF SOUTH AFRICA

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# CRIMINAL PROCEDURE SECOND AMENDMENT BILL

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*(As introduced in the National Assembly as a section 75 Bill; explanatory summary of Bill  
published in Government Gazette No 22582 of 17 August 2001)  
(The English text is the official text of the Bill)*

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(MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

[B 45—2001]

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REPUBLIEK VAN SUID-AFRIKA

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# TWEEDE STRAFPROSES- WYSIGINGSWETSONTWERP

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*(Soos ingedien in die Nasionale Vergadering as 'n artikel 75-wetsontwerp; verduidelikende  
opsomming van Wetsontwerp in Staatskoerant No 22582 van 17 Augustus 2001  
gepubliseer) (Die Afrikaanse teks is die amptelike vertaling van die Wetsontwerp)*

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(MINISTER VIR JUSTISIE EN STAATKUNDIGE ONTWIKKELING)

[W 45—2001]

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**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.

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## **BILL**

**To amend the Criminal Procedure Act, 1977, to allow a prosecutor and an accused to enter into a plea and sentence agreement; and to provide for matters connected therewith.**

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

**Substitution of section 105 of Act 51 of 1977**

1. The following section is hereby substituted for section 105 of the Criminal Procedure Act, 1977 (hereinafter referred to as the principal Act): 5

**“Accused to plead to charge**

**105.** The charge shall be put to the accused by the prosecutor before the trial of the accused is commenced, and the accused shall, subject to the provisions of sections 77, [and] 85 and 105A, be required by the court forthwith to plead thereto in accordance with section 106.”. 10

**Insertion of section 105A in Act 51 of 1977**

2. The following section is hereby inserted in the principal Act after section 105:

**“Plea and sentence agreements**

**105A.** (1) (a) Subject to the directives issued by the National Director of Public Prosecutions, the prosecutor and an accused or his or her legal representative may before the accused pleads to the charge brought against him or her, negotiate and enter into an agreement in respect of— 15  
(i) a plea of guilty by the accused to the offence charged or to an offence of which he or she may be convicted on the charge; and  
(ii) an appropriate sentence to be imposed by the court if the accused is convicted of the offence to which he or she intends to plead guilty. 20

- (b) The prosecutor may only enter into an agreement contemplated in paragraph (a)—
- (i) after consultation with the police official charged with the investigation of the case; and
  - (ii) with due regard to the nature of and circumstances relating to the offence, the personal circumstances of the accused and the interests of the community; and
  - (iii) if circumstances permit, after affording the complainant or his or her representative the opportunity to make representations to the prosecutor regarding—
    - (aa) the contents of the agreement; and
    - (bb) the inclusion in the agreement of a compensation order referred to in section 300.
- (2) An agreement contemplated in subsection (1) shall be in writing and shall—
- (a) state that the accused, before entering into the agreement, has been informed that he or she has the right—
    - (i) to be presumed innocent until proved guilty beyond reasonable doubt;
    - (ii) to remain silent and not to testify during the proceedings; and
    - (iii) not to be compelled to give self-incriminating evidence;
  - (b) state fully the terms of the agreement, the substantial facts of the matter, all other facts relevant to the agreed sentence and any admissions made by the accused;
  - (c) be signed by the prosecutor and the accused or his or her legal representative and, if a compensation order contemplated in section 300 has been included in the agreement, by the complainant; and
  - (d) if the accused has negotiated with the prosecutor through an interpreter, contain a certificate by the interpreter to the effect that he or she interpreted accurately during the negotiations and in respect of the contents of the agreement.
- (3) The court shall not participate in the negotiations contemplated in subsection (1).
- (4) The prosecutor shall, before the accused is required to plead, inform the court in open court that an agreement contemplated in subsection (1) has been entered into and the court shall then question the accused to confirm that such an agreement has been entered into.
- (5) If the court is satisfied that an agreement has been entered into, the court shall enter such fact on the record and order that the contents of the agreement be disclosed in open court.
- (6) (a) After the contents of the agreement have been disclosed in open court, the court shall question the accused to ascertain whether—
- (i) he or she confirms the terms of the agreement and the admissions made by him or her in the agreement;
  - (ii) with reference to the alleged facts of the case, he or she admits the allegations in the charge to which he or she has agreed to plead guilty; and
  - (iii) the agreement was entered into freely and voluntarily in his or her sound and sober senses and without having been unduly influenced.
- (b) After an inquiry has been conducted in terms of paragraph (a), the court shall, if the court is of the opinion that the accused cannot be found guilty of the offence in respect of which the agreement was entered into or that there has not been compliance with subsection (2)(a), inform the prosecutor and accused of such finding and the reasons therefor. In such event the trial shall start *de novo* before another presiding officer: Provided that the accused may waive his or her right to be tried before another presiding officer.

(7) If the court is satisfied that the accused can be found guilty of the offence, the court shall proceed to consider the sentence agreed upon and may direct relevant questions, including questions about the accused's previous convictions, to the prosecutor and the accused.

(8) (a) If the court is satisfied that the sentence is appropriate, the court shall inform the prosecutor and accused that the court is so satisfied, whereupon—

- (i) the agreement shall become binding upon the prosecutor and the accused;
- (ii) the accused shall be requested to plead to the charge; and
- (iii) the court shall find the accused guilty on the charge agreed to and impose the sentence agreed to.

(b) If the court is of the view that the sentence is inappropriate and that the court would have imposed a lesser or heavier sentence than the sentence agreed upon, the court shall inform the prosecutor and accused of such lesser or heavier sentence, as the case may be.

(9) The prosecutor, upon being informed of the lesser sentence, or the accused, upon being informed of the heavier sentence, may—

- (a) abide by the agreement with reference to the charge and inform the court that, subject to the right to lead evidence and to present argument relevant to sentencing, the court may proceed with the proceedings. In such event subsection (8)(a)(i) and (ii) shall apply and the court shall find the accused guilty on the charge agreed to and impose the sentence contemplated in subsection (8)(b); or
- (b) withdraw from the agreement, in which event the trial shall start *de novo* before another presiding officer: Provided that the accused may waive his or her right to be tried before another presiding officer.

(10) Where a trial starts *de novo* as contemplated in subsections (6)(b) or (9)(b)—

- (a) the agreement shall be null and void and no regard shall be had or reference made to the agreement;
- (b) no admissions contained therein or statements relating thereto shall be admissible against the accused;
- (c) the prosecutor and the accused may not enter into a plea and sentence agreement in respect of a charge arising out of the same facts; and
- (d) the prosecutor may proceed on any charge.

### Short title

3. This Act is called the Criminal Procedure Second Amendment Act, 2001.

## **MEMORANDUM ON THE OBJECTS OF THE CRIMINAL PROCEDURE SECOND AMENDMENT BILL, 2001**

### **1. OBJECTS OF BILL**

The South African Law Commission (the Law Commission), as part of its investigation into the simplification of the criminal procedure (Project 73), considered the issue of plea bargaining. The Law Commission came to the conclusion that—

- (a) plea discussions and plea negotiations, although informal, do take place in South Africa and are considered to be legal; and
- (b) the Criminal Procedure Act, 1977 (Act No. 51 of 1977), does not regulate sentence bargaining.

Consequently, in its Report on the investigation, the Law Commission proposes that the Criminal Procedure Act, 1977, be amended so as to regulate sentence agreements in South Africa. The Bill gives effect to the Law Commission's recommendations, by making provision—

- (a) that the prosecuting authority and an accused person may enter into an agreement in terms of which the accused will plead guilty to a specified charge, which will be subject to the imposition of a specified sentence; and
- (b) for the procedures to be followed, and the powers of the court, in respect of such an agreement.

### **2. CONSULTATION PROCESS**

The availability of discussion paper 94, which contained the Law Commission's provisional recommendations and proposed provisions, was announced at a media conference hosted at the Law Commission's offices on 7 December 2000, as well as on the Law Commission's Website on the Internet and in the *Government Gazette*. The discussion paper was also distributed to approximately 850 interested parties and role-players.

### **3. FINANCIAL IMPLICATIONS FOR STATE**

None.

### **4. IMPLICATION FOR PROVINCES**

None.

### **5. PARLIAMENTARY PROCEDURE**

The State Law Advisers and the Department of Justice and Constitutional Development are of the opinion that this Bill must be dealt with in accordance with section 75 of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996), since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.

