

REPUBLIC OF SOUTH AFRICA

JUDICIAL MATTERS AMENDMENT BILL

*(As amended by the Portfolio Committee on Justice and Constitutional Development
(National Assembly)) (The English text is the official text of the Bill)*

(MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

[B 55B—2002]

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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 Magistrates' Courts Act, 1944, so as to further regulate the rescission of judgments; to amend the Stock Theft Act, 1959, so as to repeal certain obsolete provisions; to amend the General Law Further Amendment Act, 1962, so as to make further provision for access to children under custodianship; to amend the South African Law Commission Act, 1973, so as to effect a change of name; to further regulate the appointment of members of the Commission; and to further regulate requirements in respect of the reports of the Commission; to amend the Companies Act, 1973, so as to further regulate the examination of directors and others during and after the winding-up of a company; to amend the Criminal Procedure Act, 1977, so as to bring certain provisions in line with the Mental Health Care Act, 2002; to amend the Attorneys Act, 1979, so as to authorise the Attorneys Fidelity Fund Board of Control to enter into contracts for the provision of professional indemnity insurance cover; and to further regulate payments to and refunds from the Fidelity Fund; to amend the Correctional Services Act, 1998, so as to effect a technical correction; to amend the Mental Health Care Act, 2002, so as to amend a definition; and to provide for matters connected therewith.

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

Substitution of section 36 of Act 32 of 1944

1. The following section is hereby substituted for section 36 of the Magistrates' Courts Act, 1944:

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“What judgments may be rescinded

36. (1) The court may, upon application by any person affected thereby, or, in cases falling under paragraph (c), *suo motu*—

- (a) rescind or vary any judgment granted by it in the absence of the person against whom that judgment was granted;
- (b) rescind or vary any judgment granted by it which was void *ab origine* or was obtained by fraud or by mistake common to the parties;
- (c) correct patent errors in any judgment in respect of which no appeal is pending;
- (d) rescind or vary any judgment in respect of which no appeal lies.

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(2) If a plaintiff in whose favour a default judgment has been granted has agreed in writing that the judgment be rescinded or varied, a court must rescind or vary such judgment on application by any person affected by it.”.

Substitution of section 3 of Act 57 of 1959

2. The following section is hereby substituted for section 3 of the Stock Theft Act, 1959: 5

“Absence of reasonable cause for believing stock or produce properly acquired

3. (1) Any person who in any manner, otherwise than at a public sale, acquires or receives into his or her possession from any other person stolen stock or stolen produce without having reasonable cause [**proof of which shall be on such firstmentioned person,**] for believing, at the time of such acquisition or receipt, that such stock or produce is the property of the person from whom he or she acquires or receives it or that such person has been duly authorized by the owner thereof to deal with it or dispose of it shall be guilty of an offence. 10 15

(2) In the absence of evidence to the contrary which raises a reasonable doubt, proof of possession as contemplated in subsection (1) shall be sufficient evidence of the absence of reasonable cause.”.

Substitution of section 1 of Act 93 of 1962

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3. The following section is hereby substituted for section 1 of the General Law Further Amendment Act, 1962:

“Failure to comply with order of court relating to access to children or to notify change of address of parent having custody of child

1. (1) Any parent having [**the sole**] custody, whether sole custody or not, of his or her minor child in terms of an order of court, who contrary to such order and without reasonable cause refuses the child’s other parent access to such child or prevents such other parent from having such access, shall be guilty of an offence and liable on conviction to a fine [**not exceeding two hundred rand**] or to imprisonment for a period not exceeding one year or to such imprisonment without the option of a fine. 25 30

(2) Any parent having [**the sole**] custody, whether sole custody or not, of his or her minor child in terms of an order of court whereby the other parent is entitled to access to such child shall upon any change in his or her residential address forthwith in writing notify such other parent of such change. 35

(3) Any person who fails to comply with the provisions of subsection (2) shall be guilty of an offence and liable on conviction to a fine [**not exceeding one hundred rand**] or to imprisonment for a period not exceeding three months. 40

[(4) Notwithstanding anything to the contrary contained in any other law, a magistrate’s court shall have jurisdiction to impose any penalty prescribed by this section.]”.

Amendment of section 1 of Act 19 of 1973, as amended by section 1 of Act 49 of 1996

4. Section 1 of the South African Law Commission Act, 1973, is hereby amended by the substitution for the definition of “Commission” of the following definition: 45

“ ‘Commission’ means the South African Law Reform Commission [**established by section 2**] referred to in section 2(2).”.

Substitution of section 2 of Act 19 of 1973

5. The following section is hereby substituted for section 2 of the South African Law Commission Act, 1973:

“Establishment of Commission

2. (1) There is hereby established a body to be known as the South African Law Commission. 5

(2) As from the date of the commencement of the Judicial Matters Amendment Act, 2002, the Commission referred to in subsection (1) shall be known as the South African Law Reform Commission.”.

Amendment of section 3 of Act 19 of 1973, as amended by section 1 of Act 85 of 1984, section 4 of Act 18 of 1996 and section 4 of Act 42 of 2001

6. Section 3 of the South African Law Commission Act, 1973, is hereby amended by the substitution in subsection (1)(a) for subparagraph (ii) of the following subparagraph:

“(ii) [six] not more than eight persons who appear to the President to be fit for appointment on account of the tenure of a judicial office or on account of experience as an advocate or as an attorney or as a professor of law at any university, or on account of any other qualification relating to the objects of the Commission.”. 15

Amendment of section 7 of Act 19 of 1973, as amended by section 3 of Act 85 of 1984

7. Section 7 of the South African Law Commission Act, 1973, is hereby amended by the substitution for subsection (2) of the following subsection: 20

“(2) The Commission shall [annually not later than the first day of March] within five months of the end of a financial year of the Department of Justice and Constitutional Development submit to the Minister a report on all its activities during [the previous] that financial year.”.

Substitution of section 10 of Act 19 of 1973

8. The following section is hereby substituted for section 10 of the South African Law Commission Act, 1973:

“Short title

10. This Act shall be called the South African Law Reform Commission Act, 1973 [, and shall come into operation on a date to be fixed by the State President by proclamation in the Gazette].”.

Substitution of long title of Act 19 of 1973

9. The following long title is hereby substituted for the long title to the South African Law Commission Act, 1973: 35

“To establish a South African Law Reform Commission and to provide for matters incidental thereto.”.

Amendment of section 415 of Act 61 of 1973

10. Section 415 of the Companies Act, 1973, is hereby amended—

(a) by the substitution for subsection (3) of the following subsection: 40

“(3) No person interrogated under subsection (1) shall be entitled at such interrogation to refuse to answer any question upon the ground that the answer would tend to incriminate him or her and shall, if he or she does so refuse on that ground, be obliged to so answer at the instance of the Master or officer presiding at such meeting; Provided that the Master or officer presiding at such meeting may only oblige the person in question to so answer after the Master or officer presiding at such

meeting has consulted with the Director of Public Prosecutions who has jurisdiction.”; and

(b) by the substitution for subsection (5) of the following subsection:

“(5) Any incriminating answer or information directly obtained, or incriminating evidence directly derived from, an interrogation in terms of subsection (1) shall not be admissible as evidence in criminal proceedings in a court of law against the person concerned or the body corporate of which he or she is or was an officer, except in criminal proceedings where the person concerned is charged with an offence relating to—

- (a) the administering or taking of an oath or the administering or making of an affirmation;
- (b) the giving of false evidence;
- (c) the making of a false statement; or
- (d) a failure to answer lawful questions fully or satisfactorily.”.

Amendment of section 417 of Act 61 of 1973, as amended by section 9 of Act 29 of 1985

11. Section 417 of the Companies Act, 1973, is hereby amended—

(a) by the substitution in subsection (2) for paragraph (b) of the following paragraph:

“(b) Any such person may be required to answer any question put to him or her at the examination, notwithstanding that the answer might tend to incriminate him [**and any answer given to any such question may thereafter be used in evidence against him**] or her and shall, if he or she does so refuse on that ground, be obliged to so answer at the instance of the Master or the Court: Provided that the Master or the Court may only oblige the person in question to so answer after the Master or the Court has consulted with the Director of Public Prosecutions who has jurisdiction.”; and

(b) by the addition to subsection (2) of the following paragraph:

“(c) Any incriminating answer or information directly obtained, or incriminating evidence directly derived from, an examination in terms of this section shall not be admissible as evidence in criminal proceedings in a court of law against the person concerned or the body corporate of which he or she is or was an officer, except in criminal proceedings where the person concerned is charged with an offence relating to—

- (i) the administering or taking of an oath or the administering or making of an affirmation;
- (ii) the giving of false evidence;
- (iii) the making of a false statement; or
- (iv) a failure to answer lawful questions fully and satisfactorily.”.

Amendment of section 77 of Act 51 of 1977, as amended by section 10 of Act 33 of 1986, section 9 of Act 51 of 1991, section 42 of Act 129 of 1993 and section 3 of Act 68 of 1998

12. Section 77 of the Criminal Procedure Act, 1977, is hereby amended by the substitution in subsection (6) for paragraph (a) of the following paragraph:

“(a) If the court which has jurisdiction in terms of section 75 to try the case, finds that the accused is not capable of understanding the proceedings so as to make a proper defence, the court may, if it is of the opinion that it is in the interests of the accused, taking into account the nature of the accused’s incapacity contemplated in subsection (1), and unless it can be proved on a balance of probabilities that, on the limited evidence available the accused committed the act in question, order that such information or evidence be placed before the court as it deems fit so as to determine whether the accused has committed the act in question and the court shall direct that the accused—

- (i) in the case of a charge of murder or culpable homicide or rape or a charge involving serious violence or if the court considers it to be necessary in the public interest, where the court finds that the accused has committed the act in question, or any other offence involving serious violence, be detained in a

psychiatric hospital or a prison pending the decision of a judge in chambers in terms of section [29(1)(a)] 47 of the Mental Health Care Act, [1973 (Act No. 18 of 1973)] 2002; or

(ii) where the court finds that the accused has committed an offence other than one contemplated in subparagraph (i) or that he or she has not committed any offence—

(aa) be admitted to[,] and detained [**and treated**] in an institution stated in the order [**in terms of Chapter 3**] as if he or she were an involuntary mental health care user contemplated in section 37 of the Mental Health Care Act, [1973 (Act No. 18 of 1973)] 2002 [; or

(bb) be treated as an outpatient in terms of section 7 of that Act, pending discharge by a hospital board in terms of section 29(4A)(a) of that Act or an order that he or she shall no longer be treated as an outpatient].

and if the court so directs after the accused has pleaded to the charge, the accused shall not be entitled under section 106(4) to be acquitted or to be convicted in respect of the charge in question.”.

Amendment of section 78 of Act 51 of 1977, as amended by section 11 of Act 33 of 1986, section 9 of Act 51 of 1991, section 43 of Act 129 of 1993 and section 5 of Act 68 of 1998

13. Section 78 of the Criminal Procedure Act, 1977, is hereby amended by the substitution for subsection (6) of the following subsection:

“(6) If the court finds that the accused committed the act in question and that he or she at the time of such commission was by reason of mental illness or [**mental defect**] intellectual disability not criminally responsible for such act—

(a) the court shall find the accused not guilty; or

(b) if the court so finds after the accused has been convicted of the offence charged but before sentence is passed, the court shall set the conviction aside and find the accused not guilty.

by reason of mental illness or [**mental defect**] intellectual disability, as the case may be, and direct—

(i) in a case where the accused is charged with murder or culpable homicide or rape or another charge involving serious violence, or if the court considers it to be necessary in the public interest that the accused be—

(aa) detained in a psychiatric hospital or a prison pending the decision of a judge in chambers in terms of section [29(1)(a)] 47 of the Mental Health Care Act, [1973 (Act No. 18 of 1973)] 2002;

(bb) admitted to [,] and detained [**and treated**] in an institution stated in the order [**in terms of Chapter 3**] and treated as if he or she were an involuntary mental care health user contemplated in section 37 of the Mental Health Care Act, [1973 (Act No. 18 of 1973), pending discharge by a hospital board in terms of section 29(4A)(a) of that Act;

(cc) treated as an outpatient in terms of section 7 of that Act pending the certification by the superintendent of that institution stating that he or she need no longer be treated as such;] 2002;

(dd) released subject to such conditions as the court considers appropriate; or

(ee) released unconditionally;

(ii) in any other case than a case contemplated in subparagraph (i), that the accused—

(aa) be admitted to [,] and detained [**and treated**] in an institution stated in the order [**in terms of Chapter 3**] and treated as if he or she were an involuntary mental health care user contemplated in section 37 of the Mental Health Care Act, [1973 (Act No. 18 of 1973), pending discharge by a hospital board in terms of section 29(4A)(a) of that Act;

(bb) be treated as an outpatient in terms of section 7 of that Act pending the certification by the superintendent of that institution stating that he or she need no longer be treated as such;] 2002;

(cc) be released subject to such conditions as the court considers appropriate; or

(dd) be released unconditionally.”.

Insertion of section 40B in Act 53 of 1979

14. The following section is hereby inserted in the Attorneys Act, 1979, after section 40A:

“Insurance contracts for purpose of professional indemnity to practitioners 5

40B. The board of control may enter into a contract with a company or scheme contemplated in section 40A(a) or any company carrying on professional indemnity insurance business in the Republic for the provision of group professional indemnity insurance to practitioners to the extent and in the manner provided for in such contract.” 10

Substitution of section 43 of Act 53 of 1979

15. The following section is hereby substituted for section 43 of the Attorneys Act, 1979:

“Contributions to fund by practitioners

43. (1) (a) Subject to the provisions of this section, every practitioner, practising on his or her own account or in partnership, shall, annually when he or she applies for a fidelity fund certificate, pay [the amount of R20, or such greater amount as may be fixed by the board of control from time to time.] to the fund— 15

(i) such amount as may be fixed by the board of control from time to time in respect of the cost of group professional indemnity insurance arranged by the board of control pursuant to the provisions of section 40B; and 20

(ii) such other non-refundable amount as may be fixed by the board of control from time to time. 25

(b) Any practitioner referred to in paragraph (a) who commences to practise on or after 1 July in any year shall in respect of that year pay half of the contribution which is payable in terms of that paragraph for that year.

[(2) When the board of control or a society on behalf of the board of control gives notice in writing to any practitioner who is liable to pay a contribution referred to in subsection (1), that the amount of the fund, including the investments thereof, and after deduction of the amount of all unpaid claims and other liabilities outstanding against the fund, is R1 000 000, or exceeds that amount, such practitioner shall, subject to the provisions of subsection (3), as from a date determined by the board of control and specified in such notice, no longer be required to pay the annual contribution referred to in subsection (1). 30

(3) When the board of control or a society on behalf of the board of control gives notice in writing to a practitioner referred to in subsection (2) that the amount of the fund, including the investments thereof, and after deduction of the amount of all unpaid claims and other liabilities outstanding against the fund, is less than R1 000 000, the provisions of subsection (1) shall, as from a date determined by the board of control and specified in such notice, again apply in respect of such practitioner, and any notice referred to in subsection (2) shall lapse.] 35 45

(4) A practitioner who applies under section 42 for the first time for a fidelity fund certificate [while the provisions of subsection (1) do not apply to a practitioner referred in subsection (2) by virtue of the provisions of the latter subsection,] shall pay [a single contribution of R50] to the fund[: Provided that the provisions of subsection (3) shall apply *mutatis mutandis* in respect of such practitioner], in addition to any contributions payable in terms of subsection (1), such single non-refundable contribution as the board of control may determine. 50

(5) [Notwithstanding the provisions of subsection (2), the] The board of control may require a practitioner in respect of whom the fund has been applied as a result of any of the circumstances referred to in section 26, to 55

pay [the] an additional annual contribution [referred to in subsection (1)] to the fund of such amount and for such period as the board of control may determine.

(6) (a) A practitioner who is not in possession of a fidelity fund certificate and who intends to commence to practise on his or her own account or in partnership, shall, before commencing so to practise, give notice of such intention to the secretary of the society of the province in which he or she intends to practise, and he or she shall thereupon become liable to pay to the fund the amount of the contribution referred to in [subsection (1) or (4), as the case may be] subsections (1) and (4).

(b) Any practitioner who is in possession of a fidelity fund certificate but who intends to commence to practise for his or her own account or in partnership in the area of jurisdiction of any provincial division other than that in which he or she usually practises for his or her own account or in partnership, shall give notice of such intention to the secretary of the other society concerned.

(7) All contributions payable under this section shall be paid to the society, and every society shall remit the contributions to the board of control within seven days of receipt thereof.”

Substitution of section 44 of Act 53 of 1979 20

16. The following section is hereby substituted for section 44 of the Attorneys Act, 1979:

“Board of control may refund contributions in certain cases

44. If any practitioner in respect of whom no claim has been made under this Act or in respect of whom such claim has not been sustained, dies or ceases to practise, the board of control may in its discretion, if it is satisfied that no claim is likely to be made, pay to him or her, or to his or her estate, a sum not exceeding the aggregate amount of his or her contributions to the fund made prior to the date of commencement of the Judicial Matters Amendment Act, 2002.”

Amendment of section 45 of Act 53 of 1979, as amended by section 3 of Act 80 of 1985 and section 20 of Act 87 of 1989

17. Section 45 of the Attorneys Act, 1979, is hereby amended—

(a) by the substitution in subsection 1 for paragraph (d) of the following paragraph:

“(d) premiums payable in respect of contracts of insurance entered into by the board of control in terms of [section] sections 40 and 40B”; and

(b) by the substitution in subsection 1 for paragraph (h) of the following paragraph:

“(h) in the discretion of the board of control, the premium or any portion thereof payable in respect of [**a professional indemnity**] any group insurance policy of any kind taken out in favour of practitioners;”.

Amendment of section 81 of Act 111 of 1998, as amended by section 30 of Act 32 of 2001

18. Section 81 of the Correctional Services Act, 1998, is hereby amended by the deletion of subsection (4).

Amendment of section 1 of Act 17 of 2002

19. Section 1 of the Mental Health Care Act, 2002, is hereby amended by the substitution for the definition of “State patient” of the following definition:

“ ‘**State patient**’ means a person so classified by a court directive in terms of section 77(6)(a)(i) or 78(6)(i)(aa) of the Criminal Procedure Act;”.

Short title and commencement

20. (1) This Act is called the Judicial Matters Amendment Act, 2002.

(2) Sections 12, 13 and 19 take effect on a date set by the President by proclamation.

MEMORANDUM ON THE OBJECTS OF THE JUDICIAL MATTERS AMENDMENT BILL, 2002

1. PURPOSE OF BILL

The main object of the Bill is to encompass in a single Bill a variety of amendments which do not require individual amendment Bills. These amendments, mainly, rectify certain provisions and are also aimed at supplementing certain lacunae which have arisen in practice. The Bill also contains certain amendments intended to bring certain provisions into line with certain Constitutional Court judgments.

2. OBJECTS OF BILL

The objects of the clauses of the Bill are briefly explained below.

2.2 **Clause 1** seeks to substitute section 36 of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), by granting the court the power to rescind or vary any judgment if the person in whose favour the judgment was granted has agreed in writing that the judgment be rescinded or varied. Rule 49(5) of the Magistrates' Courts Rules has a similar provision. In the case of **Venter vs Standard Bank of South Africa** 1999(3) SA 278(W), the High Court held that Rule 49(5) is *ultra vires* since it provides for a right of rescission not provided for in the Magistrates' Courts Act, 1944. This amendment will ensure that the benefits of this Rule are still available to the defendants, many of whom are illiterate and who are often subject to exploitation by unscrupulous persons. The amendment will also bring the provisions of Rule 49(5) into line with the judgment in Venter's case.

2.3 In the light of the Constitutional Court's judgment in **S vs Manamela** 2000 (3) SA 1 (CC), **clause 2** amends section 3 of the Stock Theft Act, 1959 (Act No. 57 of 1959), in order to bring the provisions thereof into line with the Constitution.

2.4 Various courts have interpreted the provisions of section 1 of the General Law Amendment Act, 1952 (Act No. 93 of 1962), differently. This section provides that a person who has "sole" custody of his or her minor child in terms of an order of court, and who, contrary to such order and without reasonable cause, refuses the child's other parent access to the child or prevents such other parent from gaining access to the child, is guilty of an offence. These provisions also criminalise the failure of a "sole" custodian parent to notify the non-custodian parent of any change in the address of the "sole" custodian parent. **Clause 3** seeks to amend section 1 in order to make it clear that that section applies to any custodian whether sole custodian or not.

2.5 **Clause 5** amends section 2 of the South African Law Commission Act, 1973 (Act No. 19 of 1973), so as to effect a name change. This will reflect that the Commission deals to a large extent with law reform. **Clause 6** amends section 3 of that Act so as to facilitate the appointment of one or two more full-time members to the Commission. **Clause 7** amends section 7 of the Act so as to bring the Commission's reporting obligations into line with those of the Public Finance Management Act, 1999 (Act No. 1 of 1999). **Clauses 4, 8 and 9** effect consequential amendments to the South African Law Commission Act, 1973.

2.6 In **Parbhoo and Others vs Getz NO and Another** 1997(4) SA 1095 (CC), the Constitutional Court found that section 415(3) of the Companies Act, 1973 (Act No. 61 of 1973), read with section 415(5), violated the right not to be compelled to give self-incriminating evidence as entrenched in section 35 of the Constitution. **Clause 10** amends the said section 415 so as to bring the provisions thereof into line with the Constitutional Court's order. The provisions of section 417 of the Act have the same effect as those of section 415. **Clause 11** amends this section in order to bring the provisions thereof into line with the Constitution.

2.7 Sections 77 and 78 of the Criminal Procedure Act, 1977 (Act 51 of 1977), deal with the capacity of an accused person to understand criminal proceedings and mental illness or mental defect and criminal responsibility, respectively. The amendments proposed by **clauses 12 and 13** of the Bill to those sections are consequential in nature and give effect to changes brought about by the new Mental Health Care Act, 2002.

2.8.1 **Clause 14** inserts a new section 40B in the Attorneys Act, 1979 (Act No. 53 of 1979), which allows the Board of Control of the Fidelity Fund to enter into a contract with a company carrying on professional indemnity insurance business for the provision of group professional indemnity insurance to practitioners.

2.8.2 **Clause 15** amends section 43 of the Attorneys Act, 1979, so as to make provision for every attorney to pay an amount determined by the Board, in respect of the cost of group professional indemnity insurance, annually when such attorney applies for a fidelity fund certificate or at a time determined by Board of Control. It also makes provision for a practitioner to pay a non-refundable amount to be fixed by the Board of Control. **Clauses 16 and 17** effect technical changes to that Act.

2.9 The Judicial Matters Amendment Act, 2001 (Act No. 42 of 2001), amended section 63 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), by inserting section 63B. A provision similar to the one in section 63B of the Criminal Procedure Act, 1977, is contained in section 81(4) of the Correctional Services Act, 1998 (Act No. 111 of 1998). The said section 81(4) is therefore deleted by **Clause 18** of the Bill.

3. DEPARTMENTS/BODIES/PERSONS CONSULTED

Due to the nature of the amendments contained in the Bill, no extensive consultation is required.

4. IMPLICATIONS FOR PROVINCES

None.

5. FINANCIAL IMPLICATIONS FOR STATE

The proposed amendments (in clauses 7 and 8) purporting to effect a name change and increase the number of Commissioners of the South African Law Commission will only be applied if and when sufficient funds are available.

6. PARLIAMENTARY PROCEDURE

The Department of Justice and Constitutional Development and the State Law Advisers are of the opinion that this Bill should be dealt with in terms of the procedure established by section 75 of the Constitution, since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.