

REPUBLIC OF SOUTH AFRICA

FINANCIAL MATTERS AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 75); explanatory summary of
Bill and prior notice of its introduction published in Government Gazette No. 42160
of 16 January 2019)
(The English text is the official text of the Bill)*

(MINISTER OF FINANCE)

[B 1—2019]

ISBN 978-1-4850-0576-6

No. of copies printed 800

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 provide for a process when a creditor realizes his or her security in terms of a master agreement and for a power for the Master to deal with disputes of the preference by trustees;
- the Military Pensions Act, 1976, so as to provide for all categories of spouses and for life partners of members by amending, inserting and deleting certain definitions; and by providing for both genders throughout the Act and regulating the registration of a spouse to qualify for benefits upon the death of a member;
- the Banks Act, 1990, so as to regard certain state-owned companies as public companies for purposes of the application of the Banks Act; to determine prerequisites for these companies and their holding companies to qualify to apply for establishment as a bank; and to provide for inconsistencies between the Banks Act and certain other legislation with respect to state-owned companies;
- the Government Employees Pension Law, 1996, so as to insert and delete certain definitions; to replace the divorce debt approach with a pensionable service reduction approach to adjust the benefit of a member of the Government Employees Pension Fund following a pension interest assigned to a former spouse of the member as result of a decree of divorce or for the dissolution of a customary marriage; and to provide for a transitional measure; and
- the Auditing Profession Act, 2005, so as to strengthen the governance of the regulatory board; to strengthen the investigating and disciplinary processes; to provide for the power to enter and search premises and to subpoena persons with information required for an investigation or disciplinary process; and to provide for the sharing of information amongst the regulators of the auditing profession.

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

Amendment of section 83 of Act 24 of 1936, as amended by section 24 of Act 16 of 1943, section 27 of Act 99 of 1965, section 30 of Act 54 of 1991 and section 290 of Act 9 of 2017

1. Section 83 of the Insolvency Act, 1936, is hereby amended—

- (a) by the substitution for subsection (5) of the following subsection: 5
- “(5) The creditor shall, as soon as possible after he has realized such property, other than the property held as security in favour of a secured creditor for obligations arising out of a master agreement defined in section 35B(2) (including eligible collateral in terms of the applicable standards made under the Financial Sector Regulation Act, 2017 (Act No. 9 of 2017), or the Financial Markets Act, 2012 (Act No. 19 of 2012)), prove in terms of section [forty-four] 44 the claim thereby secured and he shall attach to the affidavit submitted in proof of his claim a statement of the proceeds of the realization and of the facts on which he relies for his preference.”; 10 15
- (b) by the substitution for subsection (10) of the following subsection: 15
- “(10) Whenever a creditor has realized his security, other than the property held as security in favour of a secured creditor for obligations arising out of a master agreement defined in section 35B(2) (including eligible collateral in terms of the applicable standards made under the Financial Sector Regulation Act, 2017 (Act No. 9 of 2017), or the Financial Markets Act, 2012 (Act No. 19 of 2012)), as hereinbefore provided, he shall forthwith pay the net proceeds of the realization to the trustee, or if there is no trustee, to the Master and thereafter the creditor shall be entitled to payment, out of such proceeds, of his preferment claim if such claim was proved and admitted as provided by section [forty-four] 44 and the trustee or the Master is satisfied that the claim was in fact secured by the property so realized. If the trustee disputes the preference, the creditor may either lay before the Master an objection under section [one hundred and eleven] 111 to the trustee’s account, or apply to court, after notice or motion to the trustee, for an order compelling the trustee to pay him forthwith. Upon such application the court may make such order as to it seems just.”; and 20 25 30
- (c) by the insertion after subsection (10) of the following subsections: 35
- “(10A) (a) Whenever a creditor has realized property held as security in respect of claims arising out of a master agreement defined in section 35B(2) (including eligible collateral in terms of the applicable standards under the Financial Sector Regulation Act, 2017 (Act No. 9 of 2017), or the Financial Markets Act, 2012 (Act No. 19 of 2012)), such creditor may retain the proceeds of the realization for the settlement of the secured claim and must as soon as possible after realization— 40
- (i) give written notice of that fact to the trustee or the Master and provide the trustee or the Master with a signed and authenticated copy of the master agreement and an affidavit confirming— 45
- (aa) that the master agreement had been entered into;
- (bb) the nature and particulars of the claim; and
- (cc) the nature and particulars of the realized security, including the net amount calculated at the date of sequestration as proof of the secured claim;
- (ii) if the net proceeds of the realization exceed the value of the claim, pay to the trustee or the Master the balance, after payment of those claims, and such amount shall be added to the free residue of the estate in question; and 50
- (iii) if the net proceeds of the realization are less than the value of the claim, the creditor shall be entitled to rank against the estate in respect of the excess as an unsecured creditor. 55
- (b) Upon receipt of the notice submitted under subsection (10A)(a)(i), the trustee or the Master shall notify all creditors at the second meeting of creditors of the realization of the collateral security and inform them of their right to lodge an objection. 60

(10B) (a) The trustee or any other creditor may dispute the preference in writing to the Master and shall provide reasons therefor by no later than 14 days of the second meeting of creditors.

(b) The Master must immediately notify the creditor that has realized the property held as security under a master agreement as contemplated in subsection (10A) of the dispute. 5

(c) The creditor that has realized the property may lay before the Master an objection and response to the dispute of the preference within 14 days of receipt of the notification contemplated in paragraph (b).

(d) The Master must make a determination on the dispute of the preference within 21 days of receipt of such objection and may request any material information from the parties to be furnished in connection with the dispute. 10

(e) If the Master is of the opinion that the dispute of the preference in terms of subsection (10B)(a) is well founded, the creditor must immediately pay the net proceeds, including any accruing interest, of the realization of the security to the trustee, and the creditor may thereafter apply to court, after notice of motion to the trustee and the Master, for an order to set aside the Master's decision, and the court may upon such application make any order as to it seems just. 15 20

(f) The creditor that has realized the property held in terms of subsection (10A)(a), whether or not the creditor has proved a claim against the estate in terms of subsection (10A)(a)(i), shall be liable to contribute not less than what the creditor would have had to contribute if such creditor had proved the claim, provided that where the secured creditor relies for the satisfaction of his claim solely on the proceeds of the property which constitutes his security, he shall not be liable for any costs of sequestration other than the costs specified in section 89(1) and costs for which he may be liable under paragraph (a) or (b) of the proviso to section 106." 25 30

Amendment of section 1 of Act 84 of 1976, as amended by section 1 of Act 26 of 1977, section 4 of Act 97 of 1980, section 17 of Act 96 of 1983, section 11 of Act 75 of 1998 and section 8 of Act 21 of 2003

2. Section 1 of the Military Pensions Act, 1976, is hereby amended—

- (a) by the substitution in subsection (1) for the definition of "dependant" of the following definition: 35
 " **'dependant'**, in relation to any member, means his [**wife**] or her spouse or child;"
- (b) by the substitution in subsection (1) for the definition of "Director-General" of the following definition: 40
 " **'Director-General'** means the Director-General: [**Health and Welfare**] National Treasury;"
- (c) by the substitution in subsection (1) for the definition of "Minister" of the following definition: 45
 " **'Minister'** means the Minister [**of Health and Welfare**] responsible for finance;"
- (d) by the insertion in subsection (1) after the definition of "previously pensionable disability" of the following definition: 50
 " **'spouse'**, in relation to any member, means—
- (a) a husband or wife in terms of the Marriage Act, 1961 (Act No. 25 of 1961), or the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998), or the Civil Union Act, 2006 (Act No. 17 of 2006);
- (b) a life partner (including same sex life partner);
- (c) a husband or wife according to the tenets of any religion of the member at the date of the member's death; 55
- (d) a person who is the natural parent of a child under the age of 18 years who is regularly maintained by the member; or
- (e) a person with whom the member lived together as a husband, wife or life partner for a period of at least five years immediately before 60

the commencement of the member's military services within the meaning of section 2(3);";

- (e) by the deletion in subsection (1) of the definition of "widow"; and
- (f) by the deletion in subsection (1) of the definition of "wife".

Amendment of section 3 of Act 84 of 1976, as amended by section 2 of Act 26 of 1977 and section 5 of Act 97 of 1980 5

3. Section 3 of the Military Pensions Act, 1976, is hereby amended by the substitution for paragraph (b) of the following paragraph:

- “(b) pay pensions to the [widows] spouse, parents or children of deceased members;”.

Amendment of section 4 of Act 84 of 1976, as amended by section 3 of Act 26 of 1977 and section 5 of Act 123 of 1984

4. Section 4 of the Military Pensions Act, 1976, is hereby amended—

- (a) by the substitution for paragraph (c) of the following paragraph:
 - “(c) [the widow] a spouse of a deceased member who, immediately prior to his death, was in receipt of a pension in terms of paragraph (b), shall be entitled to such pension with effect from the first day of the month following immediately on the month in which the member died, and such pension shall with effect from the said date be supplemented—
 - (i) in the case of a [widow] spouse of a deceased member who has died as a result of his pensionable disability, by an amount which shall be equal to half of the amount of the annual pension to which he would have been entitled in terms of paragraph (a) if the degree of his pensionable disability had been determined at one hundred per cent; and
 - (ii) in the case of a [widow] spouse of a deceased member who died of a cause other than pensionable disability, by an amount which shall be equal to half of the amount of the annual pension which was payable to the member in terms of paragraph (a) immediately prior to his death;”;
- (b) by the substitution for paragraph (d) of the following paragraph:
 - “(d) [the widow] a spouse of a deceased member who, on the date of his death, was not in receipt of a pension in terms of paragraph (b), shall be entitled to the pension to which the member would have been entitled in terms of that paragraph if he had not died, and the latter pension shall be supplemented—
 - (i) in the case of a [widow] spouse of a deceased member who has died as a result of his pensionable disability, by an amount which shall be equal to half of the amount of the annual pension to which he would have been entitled in terms of paragraph (a) if the degree of his pensionable disability had been determined at one hundred per cent; and
 - (ii) in the case of a [widow] spouse of a deceased member who has died of a cause other than his pensionable disability, by an amount which shall be equal to half of the amount of the annual pension which was payable to the member in terms of paragraph (a) immediately prior to his death or to which he would have been entitled in terms of that paragraph if he had not died;”;
- (c) by the substitution for paragraph (e) of the following paragraph:
 - “(e) the children of a deceased member who immediately prior to his death was in receipt of a pension in terms of paragraph (a) or who would have been entitled to such pension if he had not died and who is not survived by a [widow] spouse or whose [widow] spouse dies after his death, shall be entitled to an annual pension which shall be calculated in accordance with formula II;”.

Insertion of section 4B in Act 84 of 1976

5. The following section is hereby inserted in the Military Pensions Act, 1976, after section 4A:

“Registration of spouse

- 4B.** (a) A member shall register with the Director-General his or her spouse as determined by the Director-General. 5
- (b) Registration of a person as a spouse shall be *prima facie* evidence of being a spouse.
- (c) A person who is not registered as a spouse may, when bringing a claim under the Act, provide proof to the satisfaction of the Director-General that he or she is a spouse.”. 10

Amendment of section 10 of Act 84 of 1976, as amended by section 5 of Act 26 of 1977 and section 9 of Act 100 of 1979

6. Section 10 of the Military Pensions Act, 1976, is hereby amended—
- (a) by the substitution in subsection (2) for paragraph (b) of the following paragraph: 15
- “*(b)* in the case of a **[widow]** spouse referred to in section 4(d), prior to the first day of the month in which the member concerned died;”;
- and
- (b) by the substitution in subsection (2) for paragraph (c) of the following paragraph: 20
- “*(c)* in the case of the dependants of a deceased member referred to in section 4(e), prior to the first day of the month following immediately on the month in which the member concerned died or prior to the first day of the month following immediately on the month in which the **[widow]** spouse of that member died;”.
- 25

Amendment of section 11 of Act 84 of 1976, as amended by section 9 of Act 97 of 1980 and section 5 of Act 117 of 1990

7. Section 11 of the Military Pensions Act, 1976, is hereby amended by the substitution in subsection (1) for paragraph (b) of the following paragraph: 30
- “*(b)* that, after the pension has been awarded, a change in the **[marital state]** spousal status of the member concerned or of any dependant of him or her or in the number of his or her dependants or, in the case of a **[widow]** spouse, a change in his or her **[marital state]** spousal status has occurred;”.

Amendment of section 12 of Act 84 of 1976, as amended by section 6 of Act 26 of 1977, section 10 of Act 97 of 1980 and section 7 of Act 123 of 1984 35

8. Section 12 of the Military Pensions Act, 1976, is hereby amended by the substitution in subsection (1) for paragraph (b) of the following paragraph:
- “*(b)* in the case of a **[widow]** spouse of a member, up to and including the last day of the month in which he or she dies;”.
- 40

Insertion of certain words in Act 84 of 1976

9. The Military Pension Act, 1976, is hereby amended by the insertion—
- (a) after the word “he” of the words “or she”, wherever it occurs; and
- (b) after the word “him” of the words “or her”, wherever it occurs.

Amendment of section 1 of Act 94 of 1990, as amended by section 1 of Act 44 of 2013 and section 290 of Act 9 of 2017 45

10. Section 1 of the Banks Act, 1990, is hereby amended by the substitution for the definition of “public company” of the following definition:

“ ‘**public company**’ has the meaning ascribed to that expression in section 1 of the Companies Act, and includes a state-owned company as defined in paragraph (a) of the definition of “state-owned company” in section 1 of the Companies Act;”.

Amendment of section 12 of Act 94 of 1990, as amended by section 5 of Act 9 of 1993, section 8 of Act 19 of 2003 and section 6 of Act 20 of 2007 5

11. Section 12 of the Banks Act, 1990, is hereby amended by the addition of the following subsection:

“(4) (a) This subsection only applies to a state-owned company as defined in paragraph (a) of the definition of “state-owned company” in section 1 of the Companies Act. 10

(b) A state-owned company may only with the approval of the Minister, granted with the concurrence of the executive authority, as defined in section 1 of the Public Finance Management Act, 1999 (Act No. 1 of 1999), of the state-owned company, apply for authorisation to establish a bank in terms of subsection (1).

(c) An application in terms of paragraph (b) shall include a declaration by the auditor of the state-owned company, contemplated in section 61, that certifies that for the period of 24 months immediately preceding the date of the application, the assets of— 15

(i) the state-owned company exceeded its liabilities;

(ii) the holding company of the state-owned company exceeded the holding company’s liabilities; and 20

(iii) the holding company of the state-owned company’s holding company exceeded the liabilities of the first-mentioned holding company (if applicable).

(d) For purposes of the application of this Act to state-owned companies, a provision of this Act which is inconsistent with a provision of another Act, other than the Financial Sector Regulation Act, shall prevail.”. 25

Amendment of section 24A of Government Employees Pension Law, 1996, as inserted by section 3 of Act 19 of 2011

12. Section 24A of the Government Employees Pension Law, 1996, is hereby amended by the substitution in subsection (1) for paragraph (d) of the following paragraph: 30

“(d) (i) The benefit that is subsequently payable to the member shall, as provided in the rules, be decreased by reducing the member’s years of pensionable service to take into account the pension interest of the member which was assigned to any former spouse of the member. 35

(ii) The rules referred to in subparagraph (i) shall be made on the advice of an actuary.”.

Transitional measure applicable to Government Employees Pension Law, 1996

13. (1) If the amount of the pension benefit payable to a member is subject to reduction contemplated in section 24A(2)(d) of the Government Employees Pension Law, 1996, before its amendment by section 12 of this Act, the member shall, within 12 months after the commencement of this section, in writing notify the Fund whether the reduction shall be dealt with in terms of section 24A(2)(d) of the Government Employees Pension Law, 1996— 45

(a) before its amendment by section 12 of this Act; or

(b) as amended by section 12 of this Act.

(2) If a member does not notify the Fund as required by subsection (1), the reduction shall be dealt with in terms of section 24(2)(d) of the Government Employees Pension Law, 1996, as amended by section 12 of this Act. 50

Amendment of section 4 of Act 26 of 2005

14. Section 4 of the Auditing Profession Act, 2005, is hereby amended by the insertion after subsection (2) of the following subsection:

“(2A) The Regulatory Board must, with the approval of the Minister, determine a policy framework for performing its functions in terms of subsection (1).”.

 55

Amendment of section 11 of Act 26 of 2005

15. The following section is hereby substituted for section 11 of the Auditing Profession Act, 2005:

“Appointment of members of Regulatory Board

11. (1) The Regulatory Board consists of not less than six but not more than 10 non-executive members appointed by the Minister. 5

(2) The Minister must appoint competent persons [, **who must include registered auditors,**] who are independent of the auditing profession to effectively manage and guide the activities of the Regulatory Board based on their knowledge and experience. 10

(2A) Two members appointed in terms of subsection (2) must include—

(a) a person who was a registered auditor and has at least 10 years’ experience in auditing; and

(b) an advocate or attorney who has at least 10 years’ experience in practicing law. 15

(3) When making the appointments, the Minister must take into consideration, amongst other factors—

(a) the need for transparency and representivity within the broader demographics of the South African population;

(b) any nominations received in terms of subsection (5); and 20

(c) the availability of persons to serve as members of the Regulatory Board.

(4) **[Disregarding any vacancy in its membership, not more than 40% of the members of the Regulatory Board may be registered auditors]** None of the members appointed in terms of this section may be a registered auditor or registered candidate auditor. 25

(5) Before the Minister makes the appointments, the Regulatory Board must, by notice in the *Gazette* and in any national newspaper, invite nominations from members of the public.

(6) The Minister may appoint an alternate member for every member of the Regulatory Board, and an alternate member may attend and take part in the proceedings at any meeting of the Regulatory Board whenever the member for whom he or she has been appointed as an alternate is absent from that meeting.

(7) The Regulatory Board, as soon as practicable after the appointment of its members, must publish by notice in the *Gazette*— 35

(a) the name of every person appointed;

(b) the date from which the appointment takes effect; **[and]**

(c) the period for which the appointment is made; and

(d) the qualifications of every person appointed. 40

(8) No member may—

(a) share, directly or indirectly, in any of the profits of a registered auditor or registered candidate auditor; or

(b) receive payments from a registered auditor or registered candidate auditor.”. 45

Amendment of section 12 of Act 26 of 2005

16. Section 12 of the Auditing Profession Act, 2005, is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) A member of the Regulatory Board appointed in terms of section 11 holds office for such period, but not exceeding **[two]** three years, as the Minister may determine at the time of his or her appointment, but must on termination of the period for which he or she was appointed, continue to hold office for a further period not exceeding three months until his or her successor has been appointed.” 50

Insertion of section 17A in Act 26 of 2005

17. The following section is hereby inserted in the Auditing Profession Act, 2005, after section 17: 55

“Subcommittees of Regulatory Board

17A. (1) The Regulatory Board must establish an enforcement committee to deal with disciplinary matters, and may establish other subcommittees to assist with the performance of its functions.

(2) The Regulatory Board must appoint the members of a subcommittee from among its members.

(3) The enforcement committee must include—

- (a) a person who was a registered auditor and has at least 10 years’ experience in auditing; and
- (b) an advocate or attorney who has at least 10 years’ experience in practicing law.”.

5

10

Amendment of section 20 of Act 26 of 2005

18. Section 20 of the Auditing Profession Act, 2005, is hereby amended by the substitution for subsection (5) of the following subsection:

“(5) Sections 15 and 16 relating to meetings and decisions of the Regulatory Board, respectively, with the necessary changes apply in respect of any committee, except that the committees must meet at least **[four times]** twice a year.”.

15

Substitution of section 24 of Act 26 of 2005

19. The following section is hereby substituted for section 24 of the Auditing Profession Act, 2005:

20

“Investigating committee

24. (1) The investigating committee referred to in section 20(2)(e) must be independent of the auditing profession and include—

- (a) two individuals who were registered auditors and each having at least 10 years’ experience in auditing; and
- (b) an advocate or attorney who has at least 10 years’ experience in practicing law.

25

(2) No member of the investigating committee may—

- (a) share, directly or indirectly, in any of the profits of a registered auditor or registered candidate auditor; or
- (b) receive payments from a registered auditor or registered candidate auditor.”.

30

Insertion of sections 24A to 24C in Act 26 of 2005

20. The following sections are hereby inserted in the Auditing Profession Act, 2005, after section 24:

35

“Powers to enter and search premises

24A. (1) The investigating committee referred to in section 20(2)(e) may, for the purposes of conducting an investigation, authorise an official of the Regulatory Board to enter any premises—

- (a) with the prior consent of—
 - (i) in the case of a private residence, the person apparently in control of the business reasonably believed to be conducted at the private residence, and the occupant of the private residence or the part of the private residence to be entered; or
 - (ii) in the case of any other premises, the person apparently in control of the premises, after informing that person that—
 - (aa) granting consent will enable the official to enter the premises and for the official to subsequently search the premises and to do anything contemplated in subsection (6); and

40

45

50

- (bb) he or she is under no obligation to admit the official in the absence of a warrant; or
- (b) without prior consent and without prior notice to any person if the entry is authorised by a warrant.
- (2) The official authorised in terms of subsection (1)(a) to enter a premises also has the authority to search the premises and to do anything contemplated in subsection (6). 5
- (3) The official exercising powers in terms of this section must do so with strict regard to—
- (a) an affected person's right to— 10
- (i) dignity;
 - (ii) freedom and security;
 - (iii) privacy; and
 - (iv) other constitutional rights; and
- (b) decency and good order as the circumstances require, in particular by— 15
- (i) entering and searching only such areas or objects as are reasonably required for the purposes of the investigation;
 - (ii) conducting the search discreetly and with due decorum;
 - (iii) causing as little disturbance as possible; and 20
 - (iv) concluding the search as soon as possible.
- (4) An entry or search of premises in terms of this section must be done, at a reasonable time within ordinary business hours—
- (a) unless the warrant authorising it expressly authorises entry at night; or
- (b) in the case of a search contemplated in subsection (1)(a)(ii), if the official on reasonable grounds believes that the purpose for which the entry and search is sought, is likely to be defeated by a delay, as close to ordinary business hours as the circumstances reasonably permit. 25
- (5) The official may be accompanied and assisted during the entry and search of any premises for an investigation by a police officer or a member of the investigating committee. 30
- (6) (a) While on the premises in terms of this section, the official, for the purpose of conducting the investigation, has the right of access to any part of the premises and to any document or item on the premises, and may do any of the following: 35
- (i) Open or cause to be opened any strongroom, safe, cabinet or other container in which the official reasonably suspects there is a document or item that may afford evidence of the contravention concerned or be relevant to the request;
 - (ii) examine, make extracts from and copy any document on the premises; 40
 - (iii) question any person on the premises to find out information relevant to the investigation;
 - (iv) require a person on the premises to produce to the official any document or item that is relevant to the investigation and is in the possession or under the control of the person; 45
 - (v) require a person on the premises to operate any computer or similar system on or available through the premises to—
 - (aa) search any information in or available through that system; and
 - (bb) produce a record of that information in any media that the official reasonably requires; 50
 - (vi) if it is not practicable or appropriate to make a requirement in terms of subparagraph (v), operate any computer or similar system on or available through the premises for a purpose set out in that subparagraph; and
 - (vii) take possession of, and take from the premises, a document or item that may afford evidence of the contravention concerned or be relevant to the request. 55
- (b) The official must give the person apparently in charge of the premises a written receipt for documents or items taken as mentioned in paragraph (a)(vii). 60
- (c) Subject to paragraph (d), the official must ensure that any document or item taken by the official as mentioned in paragraph (a)(vii) is returned to the person when—

- (i) retention of the document or item is no longer necessary to achieve the object of the investigation; or
 - (ii) all proceedings arising out the investigation have been finally disposed of.
- (d) A document or item need not be returned to the person who produced it if it is not in the best interest of the public or any member or members of the public for the documents or items to be returned.
- (e) A person from whose premises a document or item was taken as mentioned in paragraph (a)(vii), or its authorised representative, may, during normal office hours and under the supervision of the official, examine, copy and make extracts from the document or item.
- (7) The official, and any person assisting the official as mentioned in subsection (5), may use reasonable force to exercise any power in terms of this section.

Warrants

- 24B.** (1) (a) A judge or magistrate who has jurisdiction may issue a warrant for the purposes of section 24A on application by an official authorised by the Regulatory Board.
- (b) The judge or magistrate may issue a warrant in terms of this section—
- (i) on written application by the official setting out under oath or affirmation why it is necessary to enter and investigate the premises; and
 - (ii) if it appears to the magistrate or judge from the information under oath or affirmation that—
 - (aa) a contravention of this Act has occurred, may be occurring or may be about to occur; and
 - (bb) entry and investigation of the premises are likely to yield information pertaining to the contravention.
- (2) A warrant issued in terms of this section must be signed by the judge or magistrate issuing it.
- (3) The official of the Regulatory Board who enters premises under the authority of a warrant must—
- (a) if there is apparently no one in charge of the premises when the warrant is executed, fix a copy of the warrant on a prominent and accessible place on the premises; and
 - (b) on reasonable demand by any person on the premises, produce the warrant or a copy of the warrant.

Disciplinary committee

- 24C.** (1) The Regulatory Board must appoint a disciplinary committee, whose members are independent of the auditing profession, consisting of as many competent members as it may determine necessary to deal with disciplinary hearings in terms of this Act.
- (2) The disciplinary committee must have one third of its members being—
- (a) individuals who were registered auditors and each having at least 10 years' experience in auditing; and
 - (b) advocates or attorneys who each has at least 10 years' experience in practicing law.
- (3) No member of the disciplinary committee may—
- (a) share, directly or indirectly, in any of the profits of a registered auditor or registered candidate auditor; or
 - (b) receive payments from a registered auditor or registered candidate auditor.
- (4) The Regulatory Board must appoint a member of the disciplinary committee who is an advocate or attorney as chairperson.
- (5) The functions of the chairperson of the disciplinary committee are to—
- (a) appoint a disciplinary hearing panel for each hearing from members of the disciplinary committee;

- (b) monitor consistency in the application of disciplinary hearing rules by disciplinary hearing panels; and
- (c) facilitate efficient disciplinary hearings.
- (6) Despite section 20(5), read with section 15(4), when the disciplinary committee convenes a disciplinary hearing under section 50, the hearing must be conducted by a panel of three members including a member referred to in subsection (2)(a) and a member referred to in subsection (2)(b). 5
- (7) Members of a disciplinary hearing panel must elect one of the members to chair the proceedings of the disciplinary hearing. 10
- (8) A member of the disciplinary committee may not participate in a panel contemplated in subsection (6) if he or she has an interest in a matter considered by the disciplinary hearing panel.
- (9) A member of the disciplinary committee holds office for a period of three years, or such shorter period as the Regulatory Board may determine, from the date of his or her appointment. 15
- (10) A member of the disciplinary committee may be re-appointed at the expiry of a term for a further term not exceeding three years.
- (11) A person may resign as a member of the disciplinary committee by giving at least three months' written notice to the Regulatory Board, or a shorter period of notice approved by the Regulatory Board. 20
- (12) A member of the disciplinary committee may not use his or her position or any information by virtue of his or her work for the committee to—
- (a) improperly benefit himself or herself or another person; 25
- (b) impede the committee's ability to perform its functions."

Amendment of section 37 of Act 26 of 2005

21. Section 37 of the Auditing Profession Act, 2005, is hereby amended—

- (a) by the insertion of the following subsection after subsection (1):
- "(1A) An individual may only be registered with the Regulatory Board if he or she is a member of a professional body accredited in terms of section 32(2)."; and 30
- (b) by the substitution for paragraph (b) of subsection (3) for the following paragraph:
- "(b) has been convicted, whether in the Republic or elsewhere, of theft, fraud, forgery, uttering a forged document, perjury, an offence under the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004), or any offence involving dishonesty, other than [theft, fraud or forgery,] an offence committed prior to 27 April 1994 associated with political objectives[, and has been sentenced to imprisonment without the option of a fine or to a fine exceeding such an amount as may be prescribed by the Minister];". 35 40

Amendment of section 45 of Act 26 of 2005

22. Section 45 of the Auditing Profession Act, 2005, is hereby amended by the addition of the following subsection: 45

- "(7) If an individual registered auditor has reported an irregularity to the Regulatory Board in terms of subsection (1)—
- (a) the individual registered auditor may not be removed; and
- (b) the entity may not remove the registered auditor, until subsection (3) is complied with." 50

Amendment of section 48 of Act 26 of 2005

23. Section 48 of the Auditing Profession Act, 2005, is hereby amended—

- (a) by the insertion after subsection (1) of the following subsection:
- "(1A) Despite subsection (1), the enforcement committee referred to in section 17A may, if considered appropriate, refer a non-audit matter brought against a registered auditor to the relevant professional body 55

- accredited in terms of section 32(2) for investigation and disciplinary proceedings.”;
- (b) by the substitution for paragraph (c) of subsection (2) of the following paragraph:
- “(c) The Regulatory Board must refer to **[an]** the investigating committee any record or report received by it under this subsection.”;
- (c) by the substitution for paragraph (b) of subsection (3) of the following paragraph:
- “(b) obtain evidence to determine whether or not in its opinion the registered auditor concerned should be charged and, if so, recommend to the **[Regulatory Board]** enforcement committee the charge or charges that may be preferred against that registered auditor.”; and
- (d) by the substitution for subsections (5), (6) and (7) of the following subsections:
- “(5) (a) In investigating a charge of improper conduct the investigating committee may—
- (i) require or, if necessary, subpoena, the registered auditor to whom the charge relates or any other person with specific knowledge of the matter under investigation to produce to the committee any information, including but not limited to any working papers, statements, correspondence, books or other documents, which is in the possession or under the control of that registered auditor or other person and which relates to the subject matter of the charge, including specifically, but without limitation, any working papers of the registered auditor;
- (ii) inspect and, if the investigating committee considers it appropriate, retain any such information for the purposes of its investigations; and
- (iii) make copies of and take extracts from such information.
- (b) **[The provisions of this subsection apply regardless of whether the registered auditor is of the opinion that such information contains confidential information about a client]** The obligation to produce any information under subsection (5)(a)(i) may not be excused by reason of any alleged confidential information of a client contained therein.
- (c) A subpoena issued in terms of subsection (5)(a)(i) must—
- (i) be in the prescribed form;
- (ii) be signed by an authorised official of the Regulatory Board;
- (iii) be served on the person concerned in a way that would constitute proper service of a subpoena in the High Court.
- (d) Service contemplated in paragraph (c)(iii)—
- (i) on the last known address appearing from the Regulatory Board’s records; or
- (ii) effected in any manner agreed between the Regulatory Board or the investigating committee and the person or registered auditor being subpoenaed, constitutes proper service for purposes of this section.
- (e) A person who has been issued with a subpoena under subsection (5)(a)(i) may not without just cause fail to provide the information, book or document specified in the subpoena in his or her possession or custody or control which he or she has been required to produce.
- (f) The law relating to privilege, as applicable to a witness subpoenaed to provide a book, document or object in a civil trial before a court applies, with the necessary changes, in relation to the production of any information, including but not limited to any working papers, statements, correspondence, books or other documents, to the investigating committee.
- (g) A person subpoenaed in terms of this section is not entitled to payment by the Regulatory Board for providing information to the investigating committee.
- (6) Nothing in this section limits or affects the right of any professional body to take disciplinary or other action against any of its members in

accordance with its constitution and rules after the finalisation of the matter by the Regulatory Board.

(7) The investigating committee must, after the conclusion of the investigation, submit a report stating its recommendations to the **[Regulatory Board]** enforcement committee regarding any matter referred to it in terms of this section.” 5

Substitution of sections 49 to 51 of Act 26 of 2005

24. The following sections are hereby substituted for sections 49 to 51 of the Auditing Profession Act, 2005:

“Process following investigation 10

49. (1) After the conclusion of the processes contemplated in section 48, the enforcement committee contemplated in section 17A must, if sufficient grounds exist for a charge of improper conduct to be preferred against a registered auditor—

- (a) follow an admission of guilt process if the enforcement committee believes that the improper conduct of the registered auditor does not warrant a sanction contemplated in section 51B(3)(a)(iv) or (v); or 15
- (b) refer the matter to the disciplinary committee for a disciplinary hearing. 20

(2) The enforcement committee must furnish a charge sheet to the registered auditor concerned by electronic means and registered mail. 20

(3) A charge sheet must inform the registered auditor charged—

- (a) of the details and nature of the charge; 25
- (b) that the registered auditor, in writing, admit or deny the charge;
- (c) that the registered auditor, together with the admission or denial, submit a written explanation regarding the improper conduct with which charged; and 30
- (d) of the period, which must be reasonable but may not exceed 30 days, within which the plea in terms of paragraph (b) must be submitted to the Regulatory Board. 30

(4) If a registered auditor admits guilt to the charge—

- (a) the registered auditor is considered to have been found guilty as charged; and 35
- (b) the enforcement committee must immediately refer the matter to be dealt with in accordance with section 51. 35

(5) If a registered auditor denies guilt or fails to submit a denial or plea, the enforcement committee must, on the expiry of the period referred to in subsection (3)(d), refer the charge sheet and any plea received to the disciplinary committee to be dealt with in accordance with section 50. 40

(6) The acquittal or the conviction of a registered auditor by a court of law on a criminal charge is not a bar to proceedings against the registered auditor under this Act on a charge of improper conduct, even if the facts stated in the charge of improper conduct would, if proved, constitute the offence stated in the criminal charge on which the registered auditor was acquitted or convicted or any other offence of which the registered auditor might have been acquitted or convicted at the trial on the criminal charge. 45

Disciplinary hearing

50. (1) Where a matter has been referred to the disciplinary committee as contemplated in section 49, the enforcement committee must appoint a person to present the charge to the disciplinary hearing panel. 50

(2) A person presenting the charge to the disciplinary hearing panel may at any time prior to the conclusion of a disciplinary hearing apply to the panel to amend the charge on the grounds that an error exists in its formulation or that a charge is not properly articulated in the original charge sheet. 55

(3) A hearing before the disciplinary hearing panel is open to the public, except where in the opinion of the chairperson of the panel any part of the hearing must be held in camera.

(4) A disciplinary hearing panel may, for the purposes of a disciplinary hearing, subpoena any person to appear before the panel at the time and place specified in the subpoena, to be questioned or to produce any information, including but not limited to any working papers, statements, correspondence, books or other documents in his or her possession or control which relate to the charge.

(5) A subpoena issued in terms of subsection (4) must—

- (a) be in the prescribed form;
- (b) be signed by an authorised official of the Regulatory Board; and
- (c) be served on the person concerned in a manner that constitutes proper service of a subpoena in the High Court.

(6) Service contemplated in subsection (5)(c)—

- (a) on the last known address appearing from the Regulatory Board's records; or
- (b) effected in any manner agreed between the Regulatory Board or a disciplinary hearing panel and the person being subpoenaed, constitutes proper service for purposes of this section.

(7) A disciplinary hearing panel may retain any information, including but not limited to any working papers, statements, correspondence, books or other documents produced in terms of subsection (4), for the duration of the hearing.

(8) The chairperson of a disciplinary hearing panel must call upon and administer an oath to, or take an affirmation from, any witness at the hearing.

(9) At a disciplinary hearing the registered auditor charged—

- (a) may be assisted or represented by another person in conducting the proceedings;
- (b) has the right to be heard;
- (c) may call witnesses;
- (d) may cross-examine any person called as a witness in support of the charge; and
- (e) may have access to documents produced in evidence.

(10) A registered auditor charged may—

- (a) at any time before the conclusion of the disciplinary hearing, admit that he or she is guilty of the charge despite the fact that he or she denied the charge or failed to react in terms of section 49(3)(b) or (c); or
- (b) in the case where the registered auditor makes an admission in terms of paragraph (a), be regarded as guilty of improper conduct as charged.

(11) The person referred to in subsection (1) may during a disciplinary hearing—

- (a) lead evidence and advance arguments in support of the charge and cross-examine witnesses;
- (b) question any person who was subpoenaed in terms of subsection (4); and
- (c) call anyone to give evidence or to produce any information, including but not limited to any working papers, statements, correspondence, books or other documents in his or her possession or custody or under his or her control, which such person suspects or believes to have a bearing on the subject of the disciplinary hearing.

(12) (a) A witness who has been subpoenaed may not—

- (i) without just cause, fail to attend the disciplinary hearing at the time and place specified in the subpoena;
- (ii) refuse to be sworn in or to be affirmed as a witness;
- (iii) without just cause, fail to answer fully and satisfactorily to the best of his or her knowledge all questions lawfully put to him or her; or
- (iv) fail to produce any information, including but not limited to any working papers, statements, correspondence, books or other docu-

ments in his or her possession or custody or under his or her control, which he or she has been required to produce.

(b) A witness must remain in attendance until excused by the chairperson of the disciplinary hearing panel from further attendance.

(c) A witness may request that the names of the members of the disciplinary hearing panel be made available to him or her. 5

(d) The law relating to privilege as applicable to a witness subpoenaed to give evidence or to produce a book, document or object in a civil trial before a court of law applies, with the necessary changes, in relation to the examination of any information, including but not limited to any working papers, statements, correspondence, books or other documents, or to the production of such information to the disciplinary hearing panel by any person called in terms of this section as a witness. 10

(e) A witness may not, after having been sworn in or having been affirmed as a witness, give a false statement on any matter, knowing that answer or statement to be false. 15

(f) A person may not prevent another person from complying with a subpoena or from giving evidence or producing any information, including but not limited to any working papers, statements, correspondence, books or other documents, which he or she is in terms of this section required to give or produce. 20

(g) A person subpoenaed in terms of this section is not entitled to payment by the Regulatory Board for providing information and attending the disciplinary hearing.

(13) If the improper conduct with which the registered auditor is charged amounts to an offence of which he or she has been convicted by a court of law, a certified copy of the record of his or her trial and conviction by that court is, on the identification of the registered auditor as the person referred to in the record, sufficient proof of the commission by him or her of that offence, unless the conviction has been set aside by a superior court. 25 30

(14) If, for any reason, a member of the disciplinary hearing panel is unable to complete proceedings of the disciplinary hearing, the chairperson of the disciplinary committee may—

(a) direct that the proceedings continue before the remaining disciplinary hearing panel members; or 35

(b) if there are less than two remaining disciplinary hearing panel members, constitute a new panel and direct that the proceedings start anew.

Disclosure of information

50A. Subject to the Constitution and any other law, no person who is or was concerned with the performance of any function under this section may disclose any information obtained in the performance of that function except— 40

(a) for the purpose of an investigation or a disciplinary process under this Chapter; 45

(b) if the person of necessity supplies it in the performance of functions under this Act;

(c) when required to do so by order of a court of law;

(d) at the written request of, and to, any appropriate regulator which requires it for the institution, or an investigation with a view to the institution, of any disciplinary process or criminal prosecution; or 50

(e) at the written request of, and to, any appropriate international regulator of audits and auditors, that requires such for the purpose of investigation or a disciplinary process.

Sanctions in admission of guilt process

 55

51. (1) If a registered auditor admits guilt as contemplated in section 49(4)(a), the enforcement committee must either—

(a) caution or reprimand the registered auditor;

- (b) impose a fine on the registered auditor not exceeding the amount determined by the Minister from time to time; or
 - (c) require the registered auditor to attend appropriate training or any other relevant non-monetary sanction or more than one relevant non-monetary sanction. 5
- (2) The enforcement committee may impose more than one of the sanctions referred to in subsection (1).
- (3) A sanction in terms of subsection (1) may be suspended for a specific period or until the occurrence of a specific event, or made subject to any conditions. 10
- (4) The enforcement committee may order a registered auditor who admitted guilt to the charges to pay such reasonable costs as have been incurred in connection with an investigation, or such part thereof as the enforcement committee considers just.
- (5) The enforcement committee may, if considered appropriate, request the Regulatory Board to publish the name of the registered auditor who admitted guilt, the charge and the sanction imposed in terms of subsection (1) or (2) and a cost order in terms of subsection (4). 15
- (6) (a) The Regulatory Board must give effect to the decision of the enforcement committee. 20
- (b) Where an order as to a fine or costs has been made under subsection (1), (2) or (4), the amount thereof is recoverable by the Regulatory Board from the person concerned, and any amount so recovered must be paid into the funds of the Regulatory Board.”.

Substitution of section 51A of Act 26 of 2005 25

25. The following section is hereby substituted for section 51A of the Auditing Profession Act, 2005:

“Application of certain provisions to registered candidate auditors

51A. Sections 48, 49, 50, [and] 51 and 51B apply to registered candidate auditors with the necessary changes.”. 30

Insertion of section 51B in Act 26 of 2005

26. The following section is hereby inserted in the Auditing Profession Act, 2005, after section 51A:

“Sanctions in disciplinary hearing process

- 51B.** (1) After the conclusion of a disciplinary hearing contemplated in section 49(1)(b), the disciplinary hearing panel must— 35
- (a) within 30 days decide whether or not the registered auditor is guilty as charged and inform the relevant parties in writing of this decision;
 - (b) within 30 days after the guilty finding determine the sanction taking into account any aggravating or mitigating circumstances; and 40
 - (c) within five days after determining the sanction inform the relevant parties in writing of the final outcome of the disciplinary hearing.
- (2) A registered auditor found guilty in terms of subsection (1)(a) may—
- (a) address the disciplinary hearing panel in mitigation of sentence; and
 - (b) call witnesses to give evidence on his or her behalf in mitigation of the sentence. 45
- (3) (a) If the registered auditor charged is found guilty, or if the registered auditor admits to the charges, the disciplinary hearing panel must either—
- (i) caution or reprimand the registered auditor;
 - (ii) impose a fine not exceeding the amount determined by the Minister from time to time; 50
 - (iii) require the registered auditor to attend appropriate training or any other relevant non-monetary sanction or more than one relevant non-monetary sanction;

- (iv) cancel the registration of the registered auditor concerned and remove his or her name from the register referred to in section 6; or
 - (v) disqualify the registered auditor from registration as a registered auditor on a temporary or permanent basis.
- (b) The disciplinary hearing panel may impose more than one of the sanctions referred to in paragraph (a). 5
- (c) A sanction in terms of paragraph (a) may be suspended for a specific period or until the occurrence of a specific event, or made subject to any conditions.
- (4) The disciplinary hearing panel may order any registered auditor found guilty or who admitted guilt to pay such reasonable costs as have been incurred in connection with the investigation and the disciplinary hearing, or such part thereof as the disciplinary hearing panel considers just. 10
- (5) The Regulatory Board must publish the name of the registered auditor found guilty, the finding and the sanction imposed in terms of subsection (3) and a cost order in terms of subsection (4). 15
- (6) (a) The Regulatory Board must give effect to the decision of the disciplinary hearing panel.
- (b) Where an order as to a fine or costs has been made under subsection (3)(a)(ii) or (4), the amount thereof is recoverable by the Regulatory Board from the person concerned, and any amount so recovered must be paid into the funds of the Regulatory Board.”. 20

Substitution of section 53 of Act 26 of 2005

27. The following section is hereby substituted for section 53 of the Auditing Profession Act, 2005: 25

“Offences relating to investigation and disciplinary process

- 53.** (1) A person is guilty of an offence if he or she—
- (a) without just cause, refuses or fails to comply with any reasonable request by an official authorised by the Regulatory Board in connection with the conduct of an investigation; 30
 - (b) interferes with or hinders the conduct of an investigation or a disciplinary process;
 - (c) fails, without sufficient cause, to comply with a subpoena in terms of section 48 or 50;
 - (d) having been called under section 50, refuses to be sworn or to affirm as a witness or fails without sufficient cause to answer fully and satisfactorily to the best of the person’s knowledge and belief all questions lawfully put concerning the subject of the hearing; or 35
 - (e) having been duly sworn or having made an affirmation under section 50, gives a false answer to any question lawfully put to the witness or makes a false statement on any matter, knowing the answer or statement to be false. 40
- (2) A person convicted of an offence under this section is liable to a fine or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment.”. 45

Insertion of section 57A in Act 26 of 2005

28. The following section is hereby inserted in the Auditing Profession Act, 2005, after section 57:

“Protection of personal information

- 57A.** (1) The Regulatory Board must ensure that appropriate measures are taken in respect of personal information in its possession or under its control to prevent— 50
- (a) loss of, damage to or unauthorised destruction of the information; and

- (b) unlawful access to or processing of personal information, other than in accordance with this Act and the Protection of Personal Information Act, 2013 (Act No. 4 of 2013).
- (2) In order to give effect to subsection (1) the Regulatory Board must take reasonable measures to—
- (a) identify all reasonable and foreseeable internal and external risks to personal information in its possession or under its control;
 - (b) establish and maintain appropriate safeguards against the risks identified;
 - (c) regularly verify that the safeguards are effectively implemented; and
 - (d) ensure that the safeguards are continually updated in response to new risks or deficiencies in previously implemented safeguards.”

Transitional measure applicable to Auditing Profession Act, 2005

- 29.** If a registered auditor or registered candidate auditor—
- (a) has been charged with improper conduct before the commencement of this Act, the matter must be dealt with in terms of the Auditing Profession Act, 2005, before its amendment by this Act;
 - (b) committed an act of improper conduct but has not been charged before the commencement of this Act, the matter must be dealt with in terms of the Auditing Profession Act, 2005, after its amendment by this Act, except that the sanctions applicable at the time of the act of improper conduct must be applied.

Short title

- 30.** This Act is called the Financial Matters Amendment Act, 2019.

MEMORANDUM ON THE OBJECTS OF THE FINANCIAL MATTERS AMENDMENT BILL

1. PURPOSE OF BILL

The Financial Matters Amendment Bill proposes amendments to the Insolvency Act, 1936, (Act No. 24 of 1936—“the Insolvency Act”), the Military Pensions Act, 1976 (Act No. 84 of 1976—“the Military Pensions Act”), the Banks Act, 1990 (Act No. 94 of 1990—“the Banks Act”), the Government Employees Pension Law, 1996 (“Proclamation No. 21 of 1996—“the GEP Law”) and the Auditing Profession Act, 2005 (Act No. 26 of 2005—“the Auditing Profession Act”).

2. AMENDMENTS TO INSOLVENCY ACT

The Insolvency Act is to be amended to provide for a process to be followed when a creditor realizes his or her security and also to provide for a power for the Master of the High Court to deal with disputes regarding preference by trustees.

3. AMENDMENTS TO MILITARY PENSIONS ACT

3.1 Section 9(1) of the Constitution of the Republic of South Africa Act, 1996 (“the Constitution”), provides that everyone is equal before the law and has the right to equal protection and benefit of the law. In terms of section 9(3) of the Constitution the State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

3.2 The Military Pensions Act provides for, among others, pensions and gratuities for certain persons in respect of disability caused or aggravated by military service. The Military Pensions Act recognises certain marriages and the male gender, for purposes of benefits, in a manner that is contrary to section 9 of the Constitution. For example, section 1 of the Military Pensions Act defines “dependant” in relation to a member, to be his wife or child. This definition assumes that members are only husbands in heterosexual relationships and furthermore perpetuates the discriminatory stereotypes that a heterosexual relationship is the only relationship which is acceptable. The Military Pensions Act disregards the fact that the military service comprises of both men and women who are in different types of relationships which are treated equally in terms of the Constitution and recognised in other laws, such as the Marriages Act, 1961, and the Civil Union Act, 2006. The Bill proposes, among others, the insertion of the definition of “spouse” which includes members in different types of relationships and the deletion of the definition of “wife” and “widow”. To ensure gender neutrality, the Bill also proposes the substitution of the word “widow” for the word “spouse” wherever it exists.

4. AMENDMENTS TO BANKS ACT

4.1 Under the Companies Act, 2008 (Act No. 71 of 2008), state-owned companies are no longer classified as public companies. Currently, the Banks Act only allows for public companies to establish a bank. As a result, state-owned companies meeting the prudential and other requirements of the Banks Act are unable to apply for authorisation to establish a bank.

4.2 To limit the fiscal risks of state-owned banks which may, in terms of its founding legislation, be able continue to operate despite being not a going concern, it is proposed that only qualifying state-owned companies that are financially sound may apply for authorisation to establish a bank. For this purpose, the Bill proposes that—

- (a) a state-owned company must first obtain the approval of the Minister of Finance, acting with the concurrence of the Minister responsible for the state-owned company to apply for authorisation to establish a bank; and

- (b) the assets of the company, its holding company and, if applicable, the holding company of its holding company, must exceed its liabilities.

5. AMENDMENTS TO GEP LAW

- 5.1 Amendment to the Law regulating the Government Employees Pension Fund (GEPF). Non-member spouses were denied the enjoyment of their share of the pension benefit immediately upon divorce or on dissolution of a customary marriage. Instead, they had to wait until their former spouses became entitled to their own benefit, whereas the Pension Funds Act, 1956 (Act No. 24 of 1956), entitled non-members spouses to immediate enjoyment of their pension interest in other funds, governed by the Pension Funds Act, upon divorce or dissolution of a customary marriage.
- 5.2 In the matter of *Mathilda Louisa Wiese v GEPF and others* an application was brought before the Western Cape High Court by a former spouse of a member of the GEPF who was unable to realise her pension interest since the GEP Law only allowed for the realisation of such interest as and when an exit takes place in relation to the former spouse, such as resignation, termination of employment or death, and no such event had occurred. The applicant requested the court to declare GEP Law inconsistent with section 9(1) of the Constitution to the extent that it did not allow spouses of former members to realise their pension interest immediately upon divorce or dissolution of a customary marriage.
- 5.3 The Court declared that—
 - (a) the GEP Law is inconsistent with section 9(1) of the Constitution in so far as it fails to afford to former spouses of members of the GEPF the same rights and advantages as are afforded to former spouses of members of funds subject to the Pension Funds Act, more particularly those contained in section 37D(1)(d), (3), (4) and (5), and is invalid to the extent of that inconsistency; and
 - (b) the invalidity is suspended for 12 months to allow Parliament to correct the defect.
- 5.4 The order granted by the Western Cape High Court paved the way for the implementation of a ‘clean break’ principle on divorce which allows division of a pension interest on divorce and not later, only when an exit event occurs. The High Court’s declaration of invalidity was referred to the Constitutional Court for confirmation. While proceedings at the Constitutional Court were pending, Parliament amended the GEP Law by enacting the GEP Law Amendment Act which cured the defect. The parties agreed that the GEP Law Amendment Act disposed of the main issues before the Constitutional Court and submitted that the matter had become moot.
- 5.5 The insertion of section 24A to the GEP Law provided for the payment of pension interest of a member of the GEPF to a former spouse (the non-member spouse) upon divorce or dissolution of a customary marriage (“clean-break principle”). The portion of the member’s pension interest assigned to a non-member spouse is deemed to accrue to the member on the date on which the decree of divorce or for the dissolution of a customary marriage is granted.
- 5.6 The amount paid to the non-member spouse in giving effect to the clean-break principle is regarded by the GEPF rules as a debt due by the member (“the divorce debt approach”) to the GEPF.
- 5.7 The rules of the GEPF (rule 14.10.9) require that a divorce debt be created at the time a member is divorced from his or her spouse or at the dissolution of a customary marriage in respect of the amount paid to the former spouse. Members have the opportunity to settle a portion or all of that debt over their period of membership should they so wish, but if there remains an unsettled amount at the time the member exits the Fund, the debt is deducted from the

benefit payable. On retirement of a member, in terms of the current rules of the GEPPF, the divorce debt is offset against the member's gratuity entitlement. Should the gratuity be less than the outstanding divorce debt, the balance of the debt is recovered by a reduction in the annual pension. In the above scenario, the member will then retire and not receive any cash.

- 5.8 Due to the prejudice suffered by the members as a result of the divorce debt approach, it is proposed that the divorce debt approach be replaced with the reduction of a member's year of pensionable service ("the service reduction approach").

6. AMENDMENTS TO AUDITING PROFESSION ACT

- 6.1 The Auditing Profession Act provides for, among others, the establishment of the Independent Regulatory Board for Auditors ("IRBA"), the education, training and professional development of registered auditors and registered candidate auditors, and regulation of the conduct of registered auditors and registered candidate auditors.
- 6.2 Section 4 of the Auditing Profession Act provides for general functions of IRBA. This requires IRBA to take steps to promote the integrity of the auditing profession by, among others, investigating alleged improper conduct, conducting disciplinary hearings and imposing sanctions for improper conduct. The proposed amendment is for IRBA to determine a policy framework, with the approval of the Minister, for performing its functions.
- 6.3 The Auditing Profession Act currently empowers the disciplinary committee to impose a fine not exceeding the amount calculated according to the ratio for five year's imprisonment prescribed in terms of the Adjustment of Fines Act, 1991, on a registered auditor who is found guilty following a disciplinary hearing. The proposed amendment provides a power for the Minister to determine the maximum amount which can be imposed on a registered auditor as a sanction following a guilty finding in a disciplinary hearing.
- 6.4 To strengthen the independence of IRBA and also to deal with issues of conflict of interest by members of IRBA, the proposed amendment prohibits registered auditors and registered candidate auditors from being appointed as members of IRBA, and further prohibit members of IRBA from—
- (a) sharing directly or indirectly in any of the profits of a registered auditor or registered candidate auditor; or
 - (b) receiving payments from a registered auditor or registered candidate auditor.
- 6.5 To address the challenges faced by IRBA due to non-cooperation by auditing firms during investigations into improper conduct by registered auditors, the amendment provides for a power for the investigating committee to authorise an official of IRBA to enter and search premises or subpoena any person with information required to complete an investigation. The Bill also provides for a power for a disciplinary panel to subpoena a person to appear before it for the purposes of a disciplinary hearing.
- 6.6 The disciplinary committee of IRBA is overburdened by the number of disciplinary cases it has to deal with due to the limited number of members appointed in the disciplinary committee. To address this challenge, provision is made to allow IRBA to appoint as many members of the disciplinary committee as it may determine. The amendment also provides for the appointment of a panel from members of the disciplinary committee to deal with disciplinary cases. Therefore, a panel will be appointed for each case instead of the disciplinary committee having to deal with all the cases. Importantly, the decision of a panel is regarded as a decision of the disciplinary committee. The amendment is also aimed at ensuring that disciplinary cases are expedited.

- 6.7 The amendment also empowers IRBA, if it deems it appropriate, to refer a matter brought against a registered auditor to an accredited professional body for investigation.
- 6.8 As a regulator it is important that IRBA maintains a process to deal with personal information. The amendment requires IRBA to take appropriate measures in respect of personal information in its possession or under its control.

7. SUMMARY OF BILL

7.1 INSOLVENCY ACT, 1936: Clause 1- Amendment of section 83

The proposed amendment—

- (a) excludes collateral security held in terms of a master agreement contemplated in section 35B(2) of the Insolvency Act, including eligible collateral in terms of the standards or rules made under the Financial Sector Regulation Act, 2017, whenever a creditor realizes his security;
- (b) allows a creditor who has realized his collateral security to retain the proceeds of the realization for the settlement of the secured claim;
- (c) empowers the Master of the High Court, if the trustees dispute the preference, to direct the creditor to pay the proceeds of the realization to the trustees.

7.2 MILITARY PENSIONS ACT, 1976

7.2.1 Clause 2—Amendment of section 1

The proposed amendment provides for—

- (a) the amendment of the definition of “dependent” so that instead of “his wife”, it refers to “his or her spouse”;
- (b) the amendment of the definition of “Director-General” by replacing the words “Health and Welfare” with the words “National Treasury”;
- (c) the amendment of the definition of “Minister” by replacing the words “of Health and Welfare” with the words “responsible for finance”;
- (d) the insertion of a definition of “spouse” to recognise members of the military in various types of relationships that are provided for in law;
- (e) the deletion of the definitions of “widow” and “wife” in view of proposed change elsewhere in the Act to use the gender neutral term “spouse”; and
- (f) the registration of spouses by members.

7.2.2 Clauses 3 to 9—Amendment of sections 1, 3, 4, 10, 11 and 12 and all provisions of the Act

The proposed amendments provide for—

- (a) the substitution of the word “widow” for the word “spouse” wherever it occurs and inserting a reference to the female gender, where necessary;
- (b) references to both genders throughout the Act; and
- (c) the registration of a spouse by a member with the Director-General.

7.3 BANKS ACT, 1990

7.3.1 Clause 10—Amendment of section 1

An amendment to the definition of “public company” is proposed to include a state-owned company as defined in the Companies Act, 2008

(Act No. 71 of 2008), read with section 12(4) of the Banks Act (as proposed to be amended).

7.3.2 Clause 11—Amendment of section 12—proposed subsection (4)

- (a) The amendment stipulates that a state-owned company must first obtain the approval of the Minister of Finance acting with the concurrence of the Minister responsible for the state-owned company to apply for authorisation to establish a bank. Furthermore, it may only apply for such ministerial approval if the Prudential Authority certifies that the company's assets exceed its liabilities and its holding company's assets exceeds the holding company's liabilities. If the holding company of the state-owned company has a holding company, the same applies.
- (b) Since conflict may arise between the provisions of—
 - (i) the Banks Act and the Companies Act for companies that are banks; and
 - (ii) the Banks Act and the Public Finance Management Act, 1999 (Act No. 1 of 1999), for state-owned companies that are banks and public entities falling under the Public Finance Management Act,
 the proposed subsection (4)(c) provides that in such event, the provisions of the Banks Act prevail.

7.4 GOVERNMENT EMPLOYEES PENSION LAW, 1996

7.4.1 Clause 12—Amendment of section 24A

The proposed amendment provides for the benefit that is payable to the member, following a divorce or dissolution of a customary marriage, to be decreased by the member's years of pensionable service taking into account the pension interest of the member which was assigned to any former member. The amendment requires the benefit payable to the member, to be provided for in the rules of the GEPF. These rules are to be made on the advice of an actuary.

7.4.2 Clause 13—Transitional measure for amendment to GEP Law

The Bill proposes a transitional measure to allow members whose amount of the pension benefit payable is subject to section 24A(2)(d) before its amendment as intended in this Bill, to choose whether the reduction must be dealt with in terms of—

- (a) the divorce debt approach (i.e. section 24A(2)(d) before its amendment by this Bill); or
 - (b) the service reduction approach (i.e. section 24A(2)(d) as amended by this Bill).
- 7.4.3 A member must notify the GEPF of his or her choice within 12 months after this amendment takes effect. If a member does not so notify the GEPF, the service reduction approach will be applied.

7.5 AUDITING PROFESSION ACT, 2005

7.5.1 Clause 14—Amendment of section 4

The proposed amendment requires IRBA to determine a policy framework, with the approval of the Minister, for performing its functions.

7.5.2 Clause 15—Amendment of section 11

The proposed amendment prohibits registered auditors and registered candidate auditors from being appointed as members of IRBA. The proposed amendment also prohibits members of IRBA from—

- (a) sharing directly or indirectly, in any of the profits of a registered auditor or registered candidate auditor; or
- (b) receiving payments from a registered auditor or registered candidate auditor.

7.5.3 Clause 16—Amendment of section 12

The proposed amendment allows members of IRBA whose term of office is terminating, to continue to hold office for a further period not exceeding three months until the member's successor has been appointed.

7.5.4 Clause 17—Insertion of section 17A

The proposed amendment allows IRBA board to establish subcommittees, including an enforcement committee which has the power to deal with certain categories of disciplinary matters of improper conduct by registered auditors.

7.5.5 Clause 18—Amendment of section 20

The proposed amendment changes the limit on the number of meetings that must be held by committees established by IRBA from four per year to at least two per year.

7.5.6 Clause 19—Amendment of section 24

The proposed amendment makes provision for IRBA to establish an investigating committee and appoint its members. The amendment also regulates the conduct of members of the investigating committee.

7.5.7 Clause 20—Insertion of sections 24A to 24C

The proposed amendment makes provision for a power for the investigating committee to authorise an official of IRBA to enter and search premises for purposes of an investigation. The proposed amendment also makes provision for IRBA to appoint as many members of the disciplinary committee as it may determine. The amendment also regulates the conduct of members of the disciplinary committee by prohibiting a member from using his or her position to improperly benefit himself or herself or another person or impede the work of the committee.

7.5.8 Clause 21—Amendment of section 37

The proposed amendment prohibits the registration of an individual as an auditor or candidate auditor if the person has been convicted of an offence.

7.5.9 Clause 22—Amendment of section 45

The proposed amendment prohibits removal of a registered auditor before the auditor completes the process of reporting irregularities to IRBA as envisaged in section 45.

7.5.10 Clause 23—Amendment of section 48

The proposed amendments—

- (a) allow the enforcement committee to refer a matter brought to IRBA against a registered auditor to an accredited professional body for investigation and disciplinary proceedings;
- (b) provide for a power for the investigating committee to subpoena a registered auditor who has been charged for improper conduct

or any other person to produce to the committee any information, including but not limited to any working papers, statements, correspondence, books, or other documents, which is in the possession or under the control of that registered auditor or other person and which relates to the subject matter of the charge.

7.5.11 Clause 24—Substitution of sections 49 to 51

The proposed amendment provides for a process to be followed after an investigation, which is to charge a registered auditor for improper conduct if sufficient grounds exist, by following an admission guilt process or refer the matter to the disciplinary committee for a disciplinary hearing. Where a matter is referred to the disciplinary committee, a panel will be appointed for each case instead of the disciplinary committee having to deal with all the cases. The amendment is also aimed at ensuring that disciplinary cases are expedited. The proposed amendment also provides for sanctions which may be imposed following an admission of guilt process.

7.5.12 Clause 25—Amendment of section 51A

Section 51A is to be amended to include a reference to the inserted section 51B.

7.5.13 Clause 26—Insertion of section 51B

The proposed amendment provides for sanctions to be imposed following a disciplinary hearing. The amendment allows for an opportunity for a registered auditor found guilty to address the panel in mitigation of sentence and call witnesses to give evidence on his or her behalf in mitigation of the sentence.

7.5.14 Clause 27—Substitution of section 53

The proposed amendment makes it an offence to fail to comply with a subpoena or interfere with or hinder the conduct of an investigation, and a person found guilty may be liable on conviction to a fine or imprisonment for a period not exceeding five years or to both the fine and imprisonment.

7.5.15 Clause 28—Insertion of section 57A

The proposed amendment requires IRBA to take appropriate measures in respect of personal information in its possession or under its control.

7.5.16 Clause 29—Transitional measure for amendments to Auditing Profession Act

The proposed amendment provides for a transitional measure in respect of a registered auditor charged for an improper act committed before the commencement of this Act and where a registered auditor committed an act of improper conduct but has not been charged at the commencement of this Act.

8. ORGANISATIONS AND INSTITUTIONS CONSULTED

- Department of Telecommunications and Postal Services
- Department of Justice and Constitutional Development
- Government Pensions Administration Agency
- Government Employees Pension Fund

- Financial Sector Conduct Authority
- South African Post Office (SOC) Limited
- KZN Department of Economic Development, Tourism and Environmental Affairs
- Ithala (SOC) Limited
- South African Reserve Bank

9. FINANCIAL IMPLICATIONS FOR STATE

- 9.1 The amendments to the Insolvency Act will not have financial implications for the State.
- 9.2 The amendments to the Military Pensions Act will result in additional costs to the State since life partners will be included under the scope of the Act.
- 9.3 The amendments to the Banks Act will not have financial implications for the State.
- 9.4 As to the amendments to the Government Pension Employee Law, the Government Employee Pension Fund will carry additional cost in respect of the change in the determination of a member's benefit affected by a decree of divorce or dissolution of customary marriage, and also the cost of the actuary advising on the rules to be made in this regard.
- 9.5 The appointment of members of the panel to conduct disciplinary hearings proposed in the amendments to the Auditing Profession Act may have financial implications for the State.

10. PARLIAMENTARY PROCEDURE

- 10.1 The Office of the Chief State Law Adviser and the National Treasury are of the opinion that this Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution of the Republic of South Africa, 1996, since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.
- 10.2 The Office of the Chief State Law Adviser is of the opinion that it is not necessary to refer the Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it contains no provision pertaining to customary law or customs of traditional communities.

Printed by Creda Communications

ISBN 978-1-4850-0576-6