

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 OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

[B 11B—2012]

ISBN 978-1-77037-971-8

No. of copies printed 1 800

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 Special Investigating Units and Special Tribunals Act, 1996, so as to further regulate the litigation functions of a Special Investigating Unit; to provide for the secondment of a member of a Special Investigating Unit to another State institution; to empower a Special Investigating Unit to charge and recover fees for performing any of its functions; and to authorise any such fees previously levied; to amend the National Prosecuting Authority Act, 1998, so as to further regulate the remuneration of Deputy Directors and prosecutors; and to regulate the continued employment and conditions of service of persons employed by the National Prosecuting Authority as financial investigators and analysts; and to provide for matters connected therewith.

PARLIAMENT of the Republic of South Africa enacts as follows:—

Amendment of section 2 of Act 74 of 1996, as amended by section 36 of Act 12 of 2004

1. Section 2 of the Special Investigating Units and Special Tribunals Act, 1996, is hereby amended by the substitution in subsection (1)(b) for the words preceding the proviso of the following words:

“establish one or more Special Tribunals to adjudicate upon **[justiciable]** civil **[disputes]** proceedings emanating from any investigation of any particular Special Investigating Unit”.

Amendment of section 3 of Act 74 of 1996, as amended by section 1 of Act 2 of 2001

2. Section 3 of the Special Investigating Units and Special Tribunals Act, 1996, is hereby amended by the addition of the following subsection:

“(6) The Head of a Special Investigating Unit may, on such conditions as he or she may deem fit, second a member, if the member consents, either for a particular task or for a specified period, to the service of a State institution on condition that the rights, privileges and service benefits and conditions of the member are not adversely affected by such secondment.”

Amendment of section 4 of Act 74 of 1996

3. Section 4 of the Special Investigating Units and Special Tribunals Act, 1996, is hereby amended—

- (a) by the substitution in subsection (1) for paragraphs (b) and (c) of the following paragraphs, respectively: 5
- “(b) to collect evidence regarding acts or omissions which are relevant to its investigation **[and, if applicable, to institute proceedings in a Special Tribunal against the parties concerned]**;
- (c) to **[present evidence in]** institute and conduct civil proceedings [brought before] in a Special Tribunal or any court of law for— 10
- (i) any relief to which the State institution concerned is entitled, including the recovery of any damages or losses and the prevention of potential damages or losses which may be suffered by such a State institution;
- (ii) any relief relevant to any investigation; or 15
- (iii) any relief relevant to the interests of a Special Investigating Unit”; and
- (b) by the substitution in subsection (1) for paragraph (f) of the following paragraph:
- “(f) from time to time as directed by the President to report on the progress made in the investigation and matters brought before the Special Tribunal concerned or any court of law”; 20

Amendment of section 5 of Act 74 of 1996, as amended by section 31 of Act 62 of 2000 and section 2 of Act 2 of 2001

4. Section 5 of the Special Investigating Units and Special Tribunals Act, 1996, is hereby amended— 25

- (a) by the substitution for subsection (1) of the following subsection:
- “(1) Subject to this Act and the regulations, the Head of a Special Investigating Unit may—
- (a) determine the procedure to be followed in conducting an investigation; and 30
- (b) charge and recover fees and expenses from a State institution for anything done in terms of this Act in respect of that State institution or a State institution identified by that State institution, together with legal costs relating to the institution and conducting of civil proceedings in terms of this Act, and interest, calculated at the rate prescribed in terms of section 1(2) of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), from the date of demand.”; 35
- (b) by the insertion after subsection (1) of the following subsection:
- “(1A) (a) A State institution which is unable to pay the fees, expenses or legal costs or any part thereof, charged or to be recovered in terms of subsection (1)(b) for a specific financial year or any part thereof, may apply to the National Treasury or, when applicable, the relevant provincial treasury as contemplated in the Public Finance Management Act, 1999 (Act No. 1 of 1999), to be exempted from the payment of such fees, expenses or legal costs or any part thereof. 40
- (b) The National Treasury or relevant provincial treasury, which receives an application in terms of paragraph (a) must, after consultation with the Head of the Special Investigating Unit and after considering the financial position of the State institution— 45
- (i) make a finding regarding the ability of the State institution to pay the fees, expenses or legal costs or any part thereof charged or to be recovered in terms of subsection (1)(b) for a specific financial year or any part thereof; and 50
- (ii) inform the Head of the Special Investigating Unit and the State institution concerned of the outcome of the application. 55
- (c) A State institution which applies for an exemption in terms of paragraph (a), is liable to pay the fees, expenses or legal costs as provided for in terms of subsection (1)(b) to the extent determined by the

National Treasury or relevant provincial treasury in terms of paragraph (b)(i).”;

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

“(5) [A] Notwithstanding anything to the contrary in any law and for the performance of any of its functions under this Act, a Special Investigating Unit may institute and conduct civil proceedings in its own name or on behalf of a State institution in a Special Tribunal or any court of law [if, arising from its investigation, it has obtained evidence substantiating any allegation contemplated in section 2(2)].”;

(d) by the substitution for subsection (7) of the following subsection:

“(7) [If] Without limiting the provisions of subsection (5), if, during the course of an investigation, any matter comes to the attention of the Head of the Special Investigating Unit which, in his or her opinion, justifies the institution of [legal] civil proceedings by a State institution against any person, he or she may bring such matter to the attention of the state attorney or the State institution concerned, as the case may be.”;

and

(e) by the substitution for subsection (9) of the following subsection:

“(9) (a) Any member of a Special Investigating Unit who is qualified and admitted as an advocate or an attorney, may perform such work in a Special Tribunal or any court of law on behalf of a Special Investigating Unit or a State institution as is by law, custom or practice performed by advocates and attorneys.

(b) The rights, privileges and duties of any member lawfully performing functions described in paragraph (a), shall, except as is specifically provided for by this Act, include any of the rights, privileges and duties possessed by or imposed on an attorney or an advocate practising in any court of law where such functions are being performed.”.

Amendment of section 8 of Act 74 of 1996, as amended by section 32 of Act 62 of 2000

5. Section 8 of the Special Investigating Units and Special Tribunals Act, 1996, is hereby amended by the substitution in subsection (2) for the words preceding paragraph (a) of the following words:

“A Special Tribunal shall have jurisdiction to adjudicate upon any civil [dispute] proceedings brought before it by a Special Investigating Unit in its own name or on behalf of a State institution or any interested party as defined by the regulations, emanating from the investigation by such Special Investigating Unit, including the power to—”.

Amendment of section 11 of Act 74 of 1996

6. Section 11 of the Special Investigating Units and Special Tribunals Act, 1996, is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) The Minister of Justice may, after consultation with the Heads of such Special Investigating Units and Special Tribunals as may be in existence at that stage, make regulations regarding any matter not in conflict with this Act, which is reasonably necessary in order to promote the efficiency of Special Investigating Units and Special Tribunals established in terms of this Act, including fees and expenses recoverable for services rendered in terms of this Act.”.

Insertion of sections 13A, 13B and 13C in Act 74 of 1996

7. The following sections are hereby inserted in the Special Investigating Units and Special Tribunals Act, 1996, after section 13:

“Funding of Special Investigating Units

- 13A.** (1) The funds of a Special Investigating Unit consist of—
- (a) money appropriated by Parliament;
 - (b) money lawfully accruing from any other source, including fees and expenses recoverable for services rendered;
 - (c) donations or contributions: Provided that—
 - (i) the donation or contribution will not result in a conflict of interests; and
 - (ii) the donation or contribution will be accepted as the Minister of Justice may, in consultation with the Minister of Finance, determine; and
 - (d) money otherwise becoming available to a Special Investigating Unit.
- (2) The Head of a Special Investigating Unit must open an account with a financial institution and deposit into that account money received by the Special Investigating Unit in terms of this Act.
- (3) Anything done in terms of an agreement entered into and concluded between a Special Investigating Unit and a State institution, prior to the commencement of section 4 of the Judicial Matters Amendment Act, 2012, where that agreement provides for a Special Investigating Unit to recover expenses or to charge fees incurred in the course of or in connection with an investigation from a State institution, shall be deemed and dealt with as if—
- (a) section 4 of the Judicial Matters Amendment Act, 2012, had, at the time of that agreement being entered into and concluded, been in operation; and
 - (b) the Minister of Justice had regulated the fees and expenses recoverable for services rendered in terms of section 11, as amended by section 6 of the Judicial Matters Amendment Act, 2012.

Accountability

- 13B.** Subject to the Public Finance Management Act, 1999 (Act No. 1 of 1999), the Head of a Special Investigating Unit—
- (a) is the accounting authority for that Special Investigating Unit;
 - (b) is charged with the responsibility of accounting for monies received by or payments made by that Special Investigating Unit; and
 - (c) must cause the necessary accounting and other related records to be kept.

Audit

13C. The accounts, financial statements and records of a Special Investigating Unit must be audited annually, as provided for in the Public Audit Act, 2004 (Act No. 25 of 2004).”.

Substitution of long title of Act 74 of 1996 40

8. The following long title is hereby substituted for the long title of the Special Investigating Units and Special Tribunals Act, 1996:

“To provide for the establishment of Special Investigating Units for the purpose of investigating serious malpractices or maladministration in connection with the administration of State institutions, State assets and public money as well as any conduct which may seriously harm the interests of the public[,] and of instituting and conducting civil proceedings in any court of law or a Special Tribunal in its own name or on behalf of State institutions; to provide for the revenue and expenditure of Special Investigating Units; to provide for the establishment of Special Tribunals so as to adjudicate upon civil matters emanating from investigations by Special Investigating Units; and to provide for matters incidental thereto.”.

Amendment of section 18 of Act 32 of 1998

9. Section 18 of the National Prosecuting Authority Act, 1998, is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) (a) Subject to the provisions of this section, any *Deputy Director* or *prosecutor* shall be paid a salary in accordance with the scale determined from time to time for his or her rank and grade by the *Minister* after consultation with the *National Director* and the Minister for the Public Service and Administration, and with the concurrence of the Minister of Finance, by notice in the Gazette: Provided that such determination is not required in respect of any cost-of-living adjustment of such scale. 5

(b) Cost-of-living adjustments of the scale determined by the *Minister* in terms of paragraph (a) shall be effected in accordance with the cost-of-living adjustments determined for legally qualified personnel in the Public Service.”. 10

Insertion of section 43B in Act 32 of 1998

10. The following section is hereby inserted in the National Prosecuting Authority Act, 1998, after section 43A: 15

“Transitional arrangements relating to financial investigators and analysts

43B. (1) In this section *employee* means any person—

(a) appointed in terms of Chapter 3A of this Act prior to the repeal of that Chapter by section 5 of the National Prosecuting Authority Amendment Act, 2008 (Act No. 56 of 2008); and 20

(b) employed in the *Office of the National Director* to perform functions as a financial investigator or analyst in any financial investigation or process relating to the proceeds of unlawful activities or the civil recovery of property contemplated in Chapter 5 or 6 of the Prevention of Organised Crime Act, 1998 (Act No. 121 of 1998). 25

(2) Notwithstanding the repeal of Chapter 3A of this Act by section 5 of the National Prosecuting Authority Amendment Act, 2008 (Act No. 56 of 2008), after the commencement of the National Prosecuting Authority Amendment Act, 2008— 30

(a) an *employee* referred to in subsection (1) shall continue to be so employed and to perform the said functions; and

(b) the remuneration, allowances, service benefits and conditions of service of such *employee* shall continue to apply in respect of such *employee* or a person appointed in terms of subsection (4). 35

(3) Financial investigators or analysts shall exercise the powers and perform the functions—

(a) as may be necessary or expedient for, or incidental to, any financial investigation or process relating to the proceeds of unlawful activities or the civil recovery of property contemplated in— 40

(i) Chapter 5 or 6 of the Prevention of Organised Crime Act, 1998; and

(ii) any other law; or

(b) further conferred or imposed upon them by regulations made by the *Minister* in terms of section 40 of the Act as may be necessary or expedient for, or incidental to, the achievement of their objects and functions referred to in paragraph (a). 45

(4) The *National Director* or a member of the prosecuting authority designated for that purpose by the *National Director* may, whenever necessary, appoint any fit and proper person to perform functions as a financial analyst in any financial investigation or process relating to the proceeds of unlawful activities or the civil recovery of property contemplated in Chapter 5 or 6 of the Prevention of Organised Crime Act, 1998. 50

(5) An annual cost-of-living adjustment by the Minister of the Public Service and Administration in respect of employees who are employed in terms of the Public Service Act, 1994 (Proclamation No. 103 of 1994), shall, with the necessary changes, apply to an *employee* referred to in subsection (1) and a person appointed in terms of subsection (4).

(6) All other conditions of service of an *employee* referred to in subsection (1) and a person appointed in terms subsection (4), are governed and regulated by the provisions of the Public Service Act, 1994.”

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Short title

11. This Act is called the Judicial Matters Amendment Act, 2012.

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MEMORANDUM ON THE OBJECTS OF THE JUDICIAL MATTERS AMENDMENT BILL, 2012

1. BACKGROUND

The Judicial Matters Amendment Bill, 2012 (the Bill), seeks to amend the Special Investigating Units and Special Tribunals Act, 1996 (Act No. 74 of 1996) (the SIU Act), in order to—

- further regulate the litigation functions of a Special Investigating Unit (SIU);
- provide for the secondment of a member of an SIU to another State institution; and
- provide for the funding of an SIU, which includes expenses and fees for services rendered in the course of or in connection with the exercise of powers and the performance of functions of the SIU in terms of the SIU Act, and to authorise any such fees or expenses levied or defrayed prior to the amendments proposed in the Bill.

The Bill also seeks to amend the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998) (the NPA Act), in order to—

- do away with the requirement for the Minister of Justice and Constitutional Development to consult with the National Director of Public Prosecutions (the NDPP), the Minister for the Public Service and Administration and the Minister of Finance in the event of ordinary cost-of-living remuneration increases for Deputy Directors of Public Prosecutions and prosecutors; and
- provide for the appointment, continued employment and conditions of service of persons employed in the National Prosecuting Authority as financial investigators and analysts.

2. OBJECTS OF BILL

2.1 Clauses 1, 3, 4 and 5

The amendments proposed by clauses 1, 3, 4 and 5 of the Bill seek to further regulate the litigation functions of an SIU in terms of the SIU Act. The original purpose behind the enactment of the SIU Act was to create a mechanism in terms of which civil litigation flowing from the investigations by an SIU into serious cases of malpractice (including corruption) and maladministration could be dealt with more speedily. The mechanism for this, namely a dedicated Special Tribunal created by sections 2(1)(b) and 7 to 10 of the SIU Act, is intended to adjudicate on matters brought before it by a dedicated SIU which, in turn, was directly involved in the investigation of the matters in question.

This intention manifests itself clearly in the long title and in section 4(1)(b) and (c) of the SIU Act, which provides for—

- the establishment of SIU's for the purpose of investigating serious malpractices or maladministration in connection with the administration of State institutions, State assets and public money as well as any conduct which may seriously harm the interests of the public or any category thereof, and for the establishment of Special Tribunals so as to adjudicate upon civil matters emanating from investigations by any SIU; and
- the functions of an SIU, which are, amongst others, to collect evidence regarding acts or omissions relevant to its investigations and, if applicable, to institute proceedings in a Special Tribunal against

the parties concerned, and to present evidence in proceedings brought before a Special Tribunal.

However, this clear purpose has been affected by some decisions of our courts of law that severely limit the *locus standi in iudicio* of an SIU. The proposed amendments are therefore intended to allow an SIU to litigate on behalf of State institutions.

One of the reasons for affording an SIU this power to litigate on behalf of State institutions is to assist with the recovery of losses suffered by State institutions as a result of serious malpractice (including corruption) and maladministration. Generally, a State institution may recover losses through the Office of the State Attorney. However, in instances where the State institution neglects to recover such losses, an SIU can be used for this purpose.

2.2 Clause 2

Clause 2 seeks to amend section 3 of the SIU Act by adding a new subsection (6) to provide for the secondment of a member of an SIU to another State institution. The reasons for the secondment of members of an SIU to State institutions include the following:

- To assist State institutions with the establishment and enhancing of in-house anti-corruption capacity and procedures;
- to assist other law enforcement agencies, including the Asset Forfeiture Unit, in joint operational projects;
- to enhance the skills of the members of an SIU through practical exposure to the operational methods of other law enforcement agencies or State institutions; and
- to assist State institutions with the planning, directing and conducting of internal forensic investigations.

2.3 Clause 4

Clause 4 further seeks to empower an SIU to charge and recover fees and expenses from a State institution for anything done in terms of the SIU Act in respect of that State institution or a State institution identified by that State institution, together with legal costs relating to the institution and conducting of civil proceedings in terms of the Act, as well as interest in terms of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975).

2.4 Clause 6

Clause 6 seeks to broaden the power of the Minister when he or she makes regulations in terms of the SIU Act, which includes the making of regulations regarding fees and expenses recoverable for services rendered in terms of the SIU Act.

2.5 Clause 7

Clause 7 seeks to insert new sections 13A, 13B and 13C in the SIU Act to provide for the funding, accountability and audit of the SIU's.

Funding in terms of the proposed section 13A includes expenses and fees for services rendered in the course of or in connection with the exercise of powers and the performance of functions of an SIU in terms of the SIU Act, and the authorisation of any such fees or expenses levied or defrayed prior to the amendments proposed in the Bill.

The SIU Act is silent on how an SIU is to be funded. A practice has developed in terms of which an SIU would enter into service level agreements (SLA's) with some of the State institutions in respect of which the President had issued

proclamations mandating investigations by an SIU. The purpose of these SLA's was to provide for a funding contribution by the State institutions to the SIU to supplement its resources. Without such funding contributions, the SIU would not have been able to undertake all these investigations since its base-line budget, received from the National Treasury, is insufficient to fund all the investigations the SIU is required to undertake. The validity of these SLA's is uncertain.

This amendment, together with the amendment discussed under paragraph 2.3, will empower an SIU to charge fees to defray operational costs of that SIU from a State institution concerned in the course of or in connection with an investigation.

2.6 Clause 8

Clause 8 seeks to amend the long title of the SIU Act to bring it in line with the provisions proposed in the aforesaid amendments.

2.7 Clause 9

Clause 9 seeks to do away with the cumbersome and time-consuming consultation process in respect of cost-of-living increases of Deputy Directors of Public Prosecutions and prosecutors in terms of section 18 of the NPA Act, whilst simultaneously retaining the existing consultation process when the Minister determines the salary structures of these personnel, should it become necessary to have such structures reviewed.

Currently, section 18(1) of the NPA Act provides that any Deputy Director of Public Prosecutions or prosecutor must be paid a salary in accordance with the scale determined from time to time for his or her rank and grade by the Minister, after consultation with the NDPP and the Minister for the Public Service and Administration, and with the concurrence of the Minister of Finance, by notice in the *Gazette*.

In turn, section 18(4) provides, amongst others, that a notice containing the Minister's determination contemplated in subsection (1), must be issued if circumstances, including any revision and adjustment of salaries and allowances of the NDPP and magistrates since the latest revision and adjustment of salaries of Deputy Directors of Public Prosecutions or prosecutors, so justify. This provision is clearly peremptory and requires that, whenever the salaries of the NDPP and magistrates are revised, regard must be had to the salaries of Deputy Directors of Public Prosecutions and prosecutors.

In order to appreciate the import of the provisions of section 18(1) and (4), it is important to point out the following:

- Section 18(1) requires that the consultation process prescribed must also be followed in instances where cost-of-living increases are to be implemented. It is not only limited to salary restructuring.
- Section 18(4) expressly compels the Minister of Justice and Constitutional Development to revise the salaries of prosecutors from time to time and, specifically, to take into account new salary determinations and adjustments made in respect of the NDPP and magistrates.

The purpose of these provisions is to ensure that the Minister maintains the link between the salaries of prosecutors, on the one hand, and the NDPP, Deputy Directors of Public Prosecutions and magistrates, on the other, and to prevent experienced prosecutors from applying for magistrates' posts as a result of better salary dispensations linked to such posts. Furthermore, experience has shown that cost-of-living increases for Deputy Directors of

Public Prosecutions and prosecutors have followed this trend in the Public Service.

Therefore, although the Minister and the Ministers for the Public Service and Administration and of Finance may agree to the proposed salary determinations in terms of sections 18(1) of the NPA Act, the process of consultation required in terms of the Act takes time and results in prosecutors receiving their increases long after the increases for public servants have been implemented. The consultation process is cumbersome and every year there is great concern, uncertainty and unhappiness regarding the situation.

Furthermore, the Occupational Specific Dispensation for Legally Qualified Personnel in the Public Service was recently introduced and was determined by the Minister, in terms of section 18(1) of the NPA Act, to be applicable to Deputy Directors of Public Prosecutions and prosecutors. As a result, Deputy Directors of Public Prosecutions and prosecutors are now on the same scales that apply to legally qualified personnel in the Public Service.

2.8 Clause 10

Clause 10 seeks to amend the NPA Act in order to further regulate the appointment, remuneration and conditions of service of financial investigators or analysts who are used by the Asset Forfeiture Unit (AFU) in financial investigations or processes relating to the proceeds of unlawful activities or the civil recovery of property contemplated in the Prevention of Organised Crime Act, 1998 (Act No. 121 of 1998).

These financial investigators or analysts were appointed as special investigators in terms of Chapter 3A of the NPA Act. Section 5 of the National Prosecuting Authority Amendment Act, 2008 (Act No. 56 of 2008) (the NPA Amendment Act), which regulated the transfer of the investigating capacity of the Directorate of Special Operations to the South African Police Service, repealed Chapter 3A of the NPA Act. The unintended consequence of the repeal of Chapter 3A is that the appointment, remuneration and conditions of service of financial investigators and analysts are now not regulated by statute. The amendment proposed by this clause seeks to rectify this oversight.

2.9 Clause 11

Clause 11 contains the short title.

3. DEPARTMENTS/BODIES/PERSONS CONSULTED

3.1 The majority of the clauses of the Bill formed part of a separate Judicial Matters Amendment Bill, which was submitted, amongst others, to the Chief Justice, the respective Judges President, magistrates, the Magistrates Commission, the legal profession, the Special Investigating Unit, the South African Police Service and the NDPP for comment. Consultation in respect of clauses 3(a), in so far as it inserts paragraph (ii) in section 4(1)(c) of the SIU Act, 3(b), 4(a) and (d), 6, 7, 9 and 10 took place with the SIU and the NPA.

3.2 Comments received were accommodated, where possible.

4. FINANCIAL IMPLICATIONS FOR STATE

The implementation of the Act will not have financial implications for the State. However, if a matter is referred to an SIU for investigation in terms of section 2(1) of the SIU Act, it may, in terms of the proposed section 5(1)(b), have financial implications for the State institution that is being investigated, since the Head of the SIU concerned may charge and recover fees and expenses from that State institution for anything done in terms of the SIU Act.

5. PARLIAMENTARY PROCEDURE

- 5.1 The Department of Justice and Constitutional Development and the State Law Advisers are of the opinion that this Bill must be dealt with in accordance with 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.
- 5.2 The State Law Advisers are of the opinion that it is not necessary to refer this 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 does not contain provisions pertaining to customary law or customs of traditional communities.