

REPUBLIC OF SOUTH AFRICA

DRAFT PUBLIC AUDIT AMENDMENT BILL

(As initiated by the Standing Committee on the Auditor-General, as a Committee Bill, for introduction in the National Assembly (proposed section 75); prior notice of introduction published in Government Gazette No. of)

(The English text is the official text of the Bill)

(STANDING COMMITTEE ON THE AUDITOR-GENERAL)

[B— 2017]

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 Public Audit Act, 2004, so as to insert new definitions; to provide for certainty on the discretion of the Auditor-General with regard to certain audits; to authorise the Auditor-General to provide audit or audit related services to an international association, body, institution or organisation; to provide for the Auditor-General to refer undesirable audit outcomes, arising from an audit performed under the Act, to an appropriate body for investigation; to provide for the Auditor-General to recover losses in certain instances against the responsible persons; to provide for the establishment, powers and functions of a remuneration committee; to provide for consultation between the Independent Commission for the Remuneration of Public Office-bearers and the remuneration committee; to provide for additional reporting requirements; to provide for a maximum amount or percentage of audit fees that can be defrayed from the vote of National Treasury; to revise the provisions relating to the appointment of an audit committee for the Auditor-General; to empower the Auditor-General to make regulations on specific issues; and to provide for matters connected therewith.

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

Amendment of section 1 of Act 25 of 2004, as amended by section 14 of Act 22 of 2014

1. Section 1 of the Public Audit Act, 2004 (Act No. 25 of 2004) (hereinafter referred to as the “principal Act”), is hereby amended—

(a) by the insertion before the definition of “audit” of the following definitions:

“ ‘**accounting authority**’ means a body or person defined as an accounting authority in the Public Finance Management Act, or means any body or person designated as an accounting authority in terms of any other law, as the case may be, and includes former members of an accounting authority, former Chief Executive Officers or other persons formerly appointed as an accounting authority;

‘**accounting entity**’ means an accounting entity referred to in section 188(1)(c) of the Constitution;

‘**accounting officer**’ means a person defined as an accounting officer in the Public Finance Management Act or the Municipal Finance Management Act, or any person designated as an accounting officer in terms of any other law, as the case may be, and includes any former accounting officer;”;

(b) by the deletion of the definition of “accounting entity” after the definition of “audit”;

(c) by the insertion after the definition of “authorised auditor” of the following definition:

“ **‘Constitution’** means the Constitution of the Republic of South Africa, 1996;”;

(d) by the insertion after the definition of “constitutional institution” of the following definitions:

“ **‘debt’** means the amount owed by the debtor as specified in the certificate issued by the Auditor-General in terms of section 5(1B)(b);

‘debtor’ means the —

(a) accounting officer; or

(b) accounting authority or individual members of the accounting authority,

identified in the certificate issued by the Auditor-General in terms of section 5(1B)(b) as liable for the debt either individually or jointly and severally, as the case may be;”;

(e) by the insertion after the definition of "oversight mechanism" of the following definition:

“ **‘prescribed’** means prescribed by regulations;”;

- (f) by the insertion after the definition of “relevant legislature” of the following definition:

“ **‘remuneration committee’** means the remuneration committee established in terms of section 5(2)(bA);” and

- (g) by the substitution for the full stop at the end of the definition of "supreme audit institution" of a semi colon and the insertion after that definition of the following definitions:

" **‘this Act’** includes the regulations;

‘undesirable audit outcome’ means any act or omission identified from an audit performed under this Act that causes, or is likely to cause, a loss of public resources or which resulted in or is likely to result in public resources not being used for its lawful purpose."

Amendment of section 4 of Act 25 of 2004

2. Section 4 of the principal Act is hereby amended—

- (a) by the insertion after subsection (3) of the following subsection:

"(3A) Despite the provisions of any other law, the discretion of the Auditor-General as contemplated in subsection (3) applies to any public entity contemplated in subsection (3)(a) and any other institution contemplated in subsection (3)(b) that meets prescribed criteria."; and

(b) by the substitution for subsection (4) of the following subsection:

"(4) In the event of any conflict between **[a provision of]** this section and any other legislation, **[existing when this section takes effect, the provision of]** this section prevails."

Amendment of section 5 of Act 25 of 2004

3. Section 5 of the principal Act is hereby amended—

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

"(1) The Auditor-General may, at a fee, and without compromising the role of the Auditor-General as an independent auditor**[, provide]—**

(a) provide audit related services to an auditee referred to in section 4(1) or (3) or other body, which is commonly performed by a supreme audit institution on condition that—

(i) no services may be provided in respect of any matter that may subsequently have to be audited by the Auditor-General;

(ii) such service will not directly result in the formulation of policy; and

(iii) there must be full and proper disclosure of such services in terms of section 10(1)(b)**[.];**

- (aA) perform an appropriate audit of any institution referred to in section 4(1) or (3) to determine whether appropriate and adequate measures have been implemented to ensure that resources are procured economically and utilised efficiently and effectively;
- (aB) provide audit and audit related services commonly performed by an independent audit institution to an international association, body, institution or organisation on condition that—
- (i) prior approval of the oversight mechanism is obtained;
 - (ii) such service does not compromise the efficiency, or put an undue strain on the resources, of the Auditor-General; and
 - (iii) there must be full and proper disclosure of such services in terms of section 10(1)(b);
- (b) provide advice and support to a legislature or any of its committees outside the scope of the Auditor-General's normal audit and reporting functions;
- (c) provide comments in a report on any responses by an auditee to reported audit findings, or responses by an auditee to a report of any legislature arising from its review of an audit report; or
- (d) carry out an appropriate investigation or special audit of any institution referred to in section 4(1) or (3), if the Auditor-General considers it to be in the public interest or upon the receipt of a complaint or request.”;

(b) by the insertion after subsection (1) of the following subsections:

"(1A) The Auditor-General may refer any undesirable audit outcome to an appropriate body for investigation, and the relevant body must keep the Auditor-General informed of progress and the final outcome of the investigation.

(1B) (a) The Auditor-General must recover from the responsible accounting officer, accounting officers, accounting authority or accounting authorities, as the case may be, any loss resulting from unauthorised, irregular, fruitless and wasteful expenditure, as defined in any applicable legislation relevant to the auditee, and any other losses suffered by the auditee, including—

(i) money due to the State, which has not been collected; or

(ii) money which has been improperly paid,

if, in his or her opinion, a satisfactory explanation for the failure to recover the loss is not furnished, within the prescribed period, by the relevant accounting officer or accounting authority.

(b) In the absence of a satisfactory explanation contemplated in paragraph (a), the Auditor-General must issue a certificate in the prescribed form to the relevant accounting officer or

accounting authority specifying the amount due and the reason for the recovery.

(c) The amount specified on the certificate referred to in paragraph (b), subject to the provisions of paragraph (g), constitutes a debt due to the State.

(d) The debtor must pay the debt to the Auditor-General within 180 days, or in accordance with any agreed timeframe, after receipt of the certificate referred to in paragraph (b).

(e) Upon receipt of payment by the debtor, the Auditor- General must, as prescribed, deposit the money received into the National Revenue Fund or the Provincial Revenue Fund, as the case may be.

(f) The Auditor- General may —

(i) where the debtor is entitled to a payment, other than remuneration, from an organ of state or an institution funded by public money, subject to any written agreement between the Auditor-General and the debtor, recover the debt by way of a claim against such organ of state or institution;

(ii) where the debtor is entitled to remuneration from his or her employer, subject to any written agreement between the Auditor-General and the debtor and any laws regulating the labour relations between the

debtor and the employer, recover the debt by way of a claim against his or her remuneration in such instalments as agreed; or

(iii) institute civil proceedings to recover the debt from the debtor.

(g) A debtor aggrieved by the Auditor-General's decision to recover any loss contemplated in paragraph (a), may approach the High Court for a judicial review of the decision in terms of the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000).

(h) The Rules Board for Courts of Law may, in terms of section 6 of the Rules Board for Courts of Law Act, 1985 (Act No. 107 of 1985), issue rules for purposes of civil proceedings contemplated in paragraph (f)(iii), failing which the existing rules of the relevant court applies.

(i) In any proceedings for the recovery of a debt, the certificate issued in terms of paragraph (b) is prima facie evidence of the facts, the identity of the debtor or debtors and the debt due.

(j) The Auditor-General may not, without the prior approval of the National Assembly, withdraw the certificate issued in terms of paragraph (b)."; and

(c) by the substitution for subsection (2) of the following subsection:

"(2) In addition to subsections (1), (1A) and (1B), the Auditor-General **[may]**—

(a) may co-operate with persons, institutions and associations, nationally and internationally;

(b) may appoint advisory and other structures outside the administration of the Auditor-General to provide specialised advice to the Auditor-General; **[and]**

(bA) must establish a remuneration committee, consisting of not less than three and not more than five members of which the majority may not be in the employ of the Auditor-General, and who must be suitably qualified and experienced in human resource practices, including remuneration practices, to make recommendations to —

(i) the Independent Commission on the salary, allowances and benefits of the Auditor-General; and

(ii) the Auditor-General on the conditions of employment, the remuneration, allowances and benefits of the employees of the Auditor-General contemplated in section 34;

(bB) must appoint a chairperson of the remuneration committee from the members contemplated in paragraph (bA), who must not be in the employ of the Auditor-General; and

- (c) may do any other thing necessary to fulfil the role of Auditor-General effectively."

Amendment of section 7 of Act 25 of 2004, as amended by section 15 of Act 22 of 2014

4. Section 7 of the principal Act is hereby amended by the substitution for subsection (1A) of the following subsection:

"(1A) The Independent Commission must, when investigating or considering the salary, allowances and benefits of the Auditor-General, consult with—

(a) the Cabinet member responsible for finance; and

(b) the remuneration committee contemplated in section 5(2)(bA) and consider any recommendations made by the remuneration committee."

Amendment of section 10 of Act 25 of 2004

5. Section 10 of the principal Act is hereby amended—
- (a) by the substitution in subsection (1) for paragraph (b) of the following paragraph:
- "(b) the categories of services provided in terms of section 5(1)(a), (aA) and (aB);

(b) by the deletion in subsection (1) of the word "and" at the end of paragraph (c);
and

(c) by the insertion in subsection (1) after paragraph (c) of the following paragraphs:

"(cA) any matters referred for investigation in accordance with section

5(1A);

(cB) the certificates issued in terms of section 5(1B)(b);

(cC) the details of the monies recovered and monies deposited into the
National Revenue Fund and the Provincial Revenue Fund in terms
of section 5(1B)(e); and".

Amendment of section 20 of Act 25 of 2004

6. Section 20 of the principal Act is hereby amended by the substitution for subsection (2) of the following subsection:

"(2) An audit report must reflect such opinions and statements as may be required by any legislation applicable to the auditee which is the subject of the audit, but must reflect **[at least]** an opinion, **[or]** conclusion or findings on—

(a) **[whether]** the **[annual]** financial statements of the auditee **[fairly present, in all material respects, the financial position at a specific date and results of its operations and cash flow for the period which ended on that date]** in accordance with the applicable financial reporting framework and legislation;

- (b) **[the auditee's]** compliance with any applicable legislation relating to financial matters, financial management and other related matters; and
- (c) **[the]** reported **[information relating to the]** performance of the auditee against its predetermined objectives."

Amendment of section 23 of Act 25 of 2004

7. Section 23 of the principal Act is hereby amended by the substitution for subsection (6) of the following subsection:

"(6) If —

(a) the audit fee of an auditee, other than a department as defined in section 1 of the Public Finance Management Act, exceeds one percent of the total current and capital expenditure of such auditee for the relevant financial year [,]; and

(b) the National Treasury is of the opinion that the auditee has financial difficulty to pay such excess,

such excess must be defrayed from the National Treasury's vote [,

provided that the National Treasury is of the view that the auditee

has financial difficulty to settle the cost. This excludes national and

provincial departments] up to an amount not exceeding such amount or

percentage as the National Treasury and the Auditor-General agree

annually."

Amendment of section 34 of Act 25 of 2004

8. Section 34 of the principal Act is hereby amended by the substitution for subsection (3) of the following subsection:

"(3) (a) Persons appointed **[as employees]** in terms of this section are employed subject to the terms and conditions of employment determined by the Auditor-General, and must be paid the remuneration, allowances and benefits determined by the Auditor-General, subject to section 35 and after considering the recommendations of the remuneration committee.

(b) Terms and conditions of employment contemplated in paragraph (a) must be consistent with the basic values and principles set out in section 195 of the Constitution."

Amendment of section 40 of Act 25 of 2004

9. Section 40 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

"(1) The **[Deputy]** Auditor-General must—

(a) establish an audit committee contemplated in section 43(3)(b)(ii);

and

(b) appoint the members of the audit committee **[in consultation with the Auditor-General]**."

Amendment of section 52 of Act 25 of 2004

10. Section 52 of the principal Act is hereby amended—

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

“(1) The Auditor-General may make regulations pertaining to any matter to facilitate the application of this Act including, but not limited to, regulations—

(a) setting out the criteria to be considered in determining how to exercise his or her discretion contemplated in section 4(3);

(b) regarding the nature and category of matters in respect of which an investigation or special audit contemplated in section 5(1)(d) may be carried out and the manner in which decisions relating to such matters are made; and

(c) on the manner in which the referral of matters contemplated in section 5(1A) must be carried out.”; and

(b) by the insertion after subsection (1) of the following subsection:

“(1A) The Auditor- General must make regulations regarding —

(a) the manner and time-frames within which a satisfactory explanation contemplated in section 5(1B)(a) must be provided;

(b) the format and content of the certificate issued in terms of section 5(1B)(b); and

(c) the process and timeframes within which any payments recovered must be deposited into the National Revenue Fund, or the Provincial Revenue Fund, as the case may be.”.

Short title and commencement

11. This Act is called the Public Audit Amendment Act, 2018, and comes into operation on 1 April 2019.

MEMORANDUM ON THE OBJECTS OF THE PUBLIC AUDIT AMENDMENT BILL, 2018

1. INTRODUCTION

1.1 The Public Audit Act, 2004 (Act No. 25 of 2004) (hereinafter referred to as the “principal Act”), gives effect to section 188 and 189 of the Constitution of the Republic of South Africa, 1996 (the “Constitution”) by establishing and assigning supreme auditing functions to the Auditor-General. Considering the provisions contained in the Constitution, read with the principal Act, the Auditor-General enjoys a large degree of independence, which allows for freedom to select the most effective ways to execute its constitutional mandate.

1.2 However, the principal Act does not give the Auditor-General the authority to implement its recommendations to investigate undesirable audit outcomes or to recover any losses suffered by the State. In this regard, the Auditor-General depends on the executive to implement these recommendations.

1.3 During the past 13 years since the commencement of the principal Act, the Auditor-General’s efforts to assign consequences for poor financial and performance management through its audit reports had yielded mixed results. Year on year the Auditor-General reports astronomical amounts of unauthorised, irregular and fruitless and wasteful expenditure.

2. OBJECTS OF THE BILL

Hence, the purpose of the Public Audit Amendment Bill, 2018 (hereinafter referred to as the “Bill”), seeks to amend the principal Act so as to, *inter alia*, provide for additional functions for the Auditor-General to recover losses suffered by the State as well as to refer undesirable audit outcomes for

investigation; to clarify the mandate of the Auditor-General to perform international audit work and to conduct performance audits; and to align the Auditor-General's governance arrangements to current best practice.

3. CONTENTS OF THE BILL

- 3.1 Clause 1 of the Bill inserts new definitions into the principal Act.
- 3.2 Clause 2 of the Bill inserts a new subsection (3A) into section 4 of the principal Act which empowers the Auditor-General to prescribe criteria on how to exercise his discretion when performing discretionary audits referred to in section 4(3) of the principal Act. Clause 2 of the Bill also amends section 4(4) of the principal Act to provide that the Auditor-General' discretion applies notwithstanding any other contrary law.
- 3.3 Clause 3 of the Bill amends section 5 by providing for additional functions for the Auditor-General.

Clause 3 amends section 5(1) of the principal Act by inserting provisions which mandates the Auditor-General to conduct performance audits and to provide audit and audit related services to international associations, bodies, institutions or organisations provided that certain conditions are met.

Clause 3 also inserts new subsections (1A) and (1B) into section 5 of the principal Act. The new subsection (1A) empowers the Auditor-General to refer any undesirable audit outcome to an appropriate body for investigation. The new subsection (1B) empowers the Auditor-General to recover from the responsible accounting officer, accounting officers, accounting authority or accounting authorities, as the case may be, any losses suffered by the State in the absence of a satisfactory explanation as to why such loss was not recovered.

Furthermore, clause 3 amends section 5(2) of the principal Act by providing for the establishment and functions of a remuneration committee.

- 3.4 Clause 4 of the Bill amends section 7(1A) of the principal Act by providing that the Independent Commission, when considering the remuneration of the Auditor-General, must also consult the newly established remuneration committee.
- 3.5 Clause 5 of the Bill amends section 10 of the principal Act by providing that the Auditor-General must now also submit reports on performance audits and international audits, which may now be conducted, submit reports on any matters referred to an appropriate body for investigation, submit reports on the certificates issued to recover losses and also on the details of the monies recovered and the monies deposited into the National Revenue Fund and Provincial Revenue Fund.
- 3.6 Clause 6 of the Bill amends section 20(2) of the principal Act to revise the content of the audit report in relation to financial statements.
- 3.7 Clause 7 of the Bill amends section 23 of the principal Act by providing for agreement on the maximum amount or percentage of the audit fees to be defrayed from the vote of National Treasury.
- 3.8 Clause 8 of the Bill amends section 34 of the principal Act to provide that the Auditor-General must, in determining the remuneration, allowances and benefits of employees, consider the recommendations of the remuneration committee.
- 3.9 Clause 9 of the Bill amends section 40(1) of the principal Act by providing that the Auditor-General, instead of the Deputy Auditor-General, must establish and appoint the members of the audit committee.

3.10 Clause 10 of the Bill amends section 52 of the principal Act by specifying the categories of regulations that must or may be made by the Auditor-General.

3.11 Clause 11 provides for the short title and the commencement date.

4. ORGANISATIONAL AND PERSONNEL IMPLICATIONS

It is projected that three additional staff members would need to be appointed in order to implement the additional functions.

5. FINANCIAL IMPLICATIONS FOR THE STATE

The estimated cost to implement the additional powers of the Auditor-General is estimated at R33 956 979 million per annum for the first three financial years following the commencement of the Bill. This figure will be adjusted as the new processes mature over time. The remaining amendments will not have a cost implication for the State.

6. DEPARTMENTS, BODIES OR PERSONS CONSULTED

The following stakeholders were consulted:

- The Auditor-General;
- National Treasury

7. PARLIAMENTARY PROCEDURE

- 7.1 The Committee proposes that the Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provisions to which the procedures set out in section 74 or 76 of the Constitution apply.
- 7.2 The Committee is 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.