

REPUBLIC OF SOUTH AFRICA

FOREIGN SERVICE BILL

*(As amended by the Portfolio Committee on International Relations and Cooperation
(National Assembly))
(The English text is the official text of the Bill)*

(MINISTER OF INTERNATIONAL RELATIONS AND COOPERATION)

[B 35B—2015]

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BILL

To provide for the management, administration, accountability, and functioning of a professional Foreign Service of the Republic of South Africa; to provide for the operational requirements that are suitable and supportive of the operations of the Foreign Service in a global environment; and to provide for matters incidental thereto.

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

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Definitions 20

- 1.** In this Act, unless the context indicates otherwise—
- “**acquire**” in relation to an immovable asset, means acquisition through construction, purchase, lease, acceptance of a gift outside the Republic or by any other lawful means, for use by the Foreign Service;
 - “**Department**” means the Department of International Relations and Cooperation; 25
 - “**Diplomatic Academy**” means the Diplomatic Academy as contemplated in section 7;
 - “**Director-General**” means the Director-General of the Department;
 - “**disposal**” means to sell, exchange or donate immovable assets in accordance with this Act;” 30
 - “**employee**” means a person appointed to the Department or to any other national department in terms of the Public Service Act, 1994 (Proclamation No. 103 of 1994), or any other legislation, and includes members of the Foreign Service;

- “**foreign representations in the Republic**” means a foreign diplomatic mission, consular mission or liaison office as well as offices of international organisations in the Republic, accredited in terms of the Diplomatic Immunities and Privileges Act, 2001 (Act No. 37 of 2001);
- “**Foreign Service**” means the Foreign Service of the Republic, as contemplated in section 3; 5
- “**GIAMA**” means the Government Immovable Asset Management Act, 2007 (Act No. 19 of 2007)”;.
- “**Head of Mission**” means an Ambassador, High Commissioner, Consul-General, Permanent Representative, and any other person appointed to represent the Republic as such in terms of section 84(2)(i) of the Constitution and as also recognised by the Vienna Convention on Diplomatic Relations, 1961, signed at Vienna on 18 April 1961, the Vienna Convention on Consular Relations, 1963, signed at Vienna on 24 April 1963, the Convention on the Privileges and Immunities of the United Nations, adopted on 13 February 1946, as may be applicable in the Republic in accordance with the reservations made by South Africa upon its accession thereto, as well as the Convention on the Privileges and Immunities of the Specialised Agencies, adopted on 21 November 1947, as may be applicable in the Republic; 10
- “**immovable asset**” means land or an immovable structure on land, or rights in such land or immovable structure; 20
- “**member of the Foreign Service**” means a person who serves as a member of the Foreign Service and who is accredited to a foreign state as contemplated in section 3;
- “**Minister**” means the Minister of International Relations and Cooperation; 25
- “**national department**” means a national department and a national government component as referred to in section 7(2) of the Public Service Act, 1994 (Proclamation No. 103 of 1994), and includes the South African Revenue Service;
- “**prescribed**” means prescribed by regulation in terms of section 14, or by codes or directives made by the Minister in terms of section 11; 30
- “**South African Mission**” means a diplomatic or consular mission of the Republic accredited to the foreign state where it is operating in terms of the Vienna Conventions, and to a liaison office, or to permanent representations of the Republic at international organisations and “mission” shall have a similar meaning; 35
- “**this Act**” includes all its regulations, guidelines, codes and directives.

Application of Act

2. (1) Subject to the provisions of this Act, the conditions of service of members of the Foreign Service must be governed by the law governing that employee’s conditions of service. 40
- (2) Where this Act conflicts with the provisions of the Public Service Act, 1994, (Proclamation No. 103 of 1994), or any other legislation, and it is not possible to read the conflicting provisions as complementary to one another, this Act must prevail.

Foreign Service

3. (1) (a) There is a Foreign Service that shall promote and advance the international relations and cooperation of the Republic by representing the Republic in an effective, coherent and comprehensive manner abroad. 45
- (b) The Department is responsible for conducting and coordinating the international relations and cooperation of the Republic at bilateral, regional and multilateral levels through the Foreign Service abroad and through interactions with foreign representatives in the Republic, in accordance with the foreign policy of the Republic. 50
- (2) The Foreign Service consists of all South African Missions and those persons who serve in a position in the South African Missions, including Heads of Mission, and who are accredited to a foreign state for the period of time that they hold that position, regardless of whether they are ordinarily employed by the Department or by any other national department or appointed on a contractual basis for a fixed period. 55
- (3) The Foreign Service is managed and administered by the Department and to this end the Department must—
- (a) administer all foreign representations in the Republic;

- (b) lead the coordination and alignment of the Republic's international relations between all spheres of government;
- (c) render protocol services to designated foreign and national dignitaries as prescribed;
- (d) render consular services in line with the Guidelines for the Provision of Consular Services; 5
- (e) act as the custodian of international agreements to which the Republic is a party, as well as of the national reports submitted in accordance with international obligations and render legal advice to government on all matters related to international law; 10
- (f) conduct all diplomatic communications between the Republic and foreign states, international organisations or entities; and
- (g) perform any other functions required for the effective management and administration of the Foreign Service.

Requirements for members of Foreign Service 15

4. (1) Except for the appointment of locally recruited personnel to serve at a South African Mission, only citizens of the Republic, employed by the Department or by another national department, or appointed on a contractual basis for a fixed period, who meet the prescribed requirements, are eligible to become a member of the Foreign Service. 20

(2) The head of a national department must, in writing, notify the Director-General of an employee who has approval from that national department to be transferred to a South African Mission.

(3) A member of the Foreign Service may not take up a position at a South African Mission until such time— 25

- (a) as he or she has successfully completed the prescribed mandatory training requirements;
- (b) as he or she has met the prescribed requirements for such transfer;
- (c) as he or she has obtained a security clearance as issued by a competent authority; and 30
- (d) that the approval for the transfer has been granted by the Director-General.

Head of Mission

5. (1) The Head of Mission is responsible for the management and administration of the Mission and all members of the Foreign Service located at the Mission, including the locally recruited personnel in the Mission. 35

(2) The Head of Mission must act on the instructions and under the authority of the Director-General.

(3) All Heads of Mission—

- (a) must be fit and proper persons;
- (b) may have relevant knowledge, skills and experience; and 40
- (c) must reflect broadly the diversity of South Africa.

Recall of member of Foreign Service

6. (1) A member of the Foreign Service may be recalled to the Republic by the Director-General if, after an inquiry in the prescribed manner, such a member is found guilty of misconduct in terms of the disciplinary code applicable to that member. 45

(2) A member of the Foreign Service under investigation for misconduct in terms of subsection (1) may be recalled to the Republic by the Director-General pending the finalisation of such inquiry.

(3) An act constituting misconduct and which is committed outside the Republic by a member of the Foreign Service must be deemed to have been committed in the Republic. 50

(4) The inquiry contemplated in subsection (1) may be held in the Republic or where the member of the Foreign Service concerned was transferred.

(5) (a) A member of the Foreign Service must be recalled to the Republic by the Director-General—

- (i) when the Republic ceases to have diplomatic or consular representation in the foreign State where the member was transferred; 55

- (ii) if the member is declared *persona non grata* by the State where that member was transferred; or
- (iii) at the request of the State where that member was transferred.

(b) A member of the Foreign Service may be recalled to the Republic, where such circumstances arise that would warrant the recall of that member, in the interest of the Republic. 5

(6) A member of the Foreign Service may be recalled to the Republic at the request of that member.

(7) With the exception of subsection (5), the Director-General may only recall a member of the Foreign Service that is employed by a national department other than the Department on written request from the head of the national department where that member is employed. 10

Diplomatic Academy

7. (1) The Diplomatic Academy, under the control and management of the Department, is responsible for— 15

- (a) providing the prescribed mandatory training for members of the Foreign Service as contemplated in section 4(3);
- (b) providing any training, or causing such training to be provided to employees and to members of the Foreign Service;
- (c) conducting such tests and examinations, or causing such tests and examinations to be conducted, as the Minister may prescribe; and 20
- (d) issuing of diplomas or certificates or cause diplomas or certificates to be issued to persons who have passed such examinations.

(2) The Diplomatic Academy may cooperate with any institution of higher learning and other experts in the Republic or elsewhere to achieve its objectives. 25

(3) The Diplomatic Academy may assist with training requirements of foreign states as may be agreed to by the Department and the foreign state involved in accordance with its international programmes.

(4) The Diplomatic Academy may provide training or cause training to be provided, to any other person, on the written request by a head of an organ of state. 30

(5) The accreditation and recognition of the Diplomatic Academy's qualifications must be done in accordance with the provisions of the National Qualifications Framework Act, 2008 (Act No. 67 of 2008), and the Skills Development Act, 1998 (Act No. 97 of 1998), or any other applicable legislation intended to enhance skills and qualifications in the public service. 35

Establishment of coordination and other mechanisms

8. (1) The Minister may establish such consultative, coordination and other mechanisms as may be necessary for the effective execution of this Act.

(2) The Consultative Forum for International Relations is the national intergovernmental forum, as contemplated in section 9(1) of the Intergovernmental Relations Framework Act, 2005 (Act No. 13 of 2005), through which international relations for the Republic is coordinated. 40

(3) The Minister may, by notice in the *Gazette*, issue guidelines regarding the coordination and alignment of activities relating to international relations between all spheres of government. 45

Immovable assets

9. (1) Notwithstanding the provisions of section 4(1)(a) of GIAMA, the Minister is the custodian of all immovable assets outside the Republic which was acquired for use by the Foreign Service.

(2) The Minister must act as caretaker of the immovable assets under his or her custodianship and must acquire and manage such immovable assets as contemplated in section 13(1) and (2) of GIAMA, in accordance with the Public Finance Management Act, 1999 (Act No. 1 of 1999), and any other applicable law. 50

(3) Notwithstanding the provisions of sections 4(2)(b)(i) and 13(3)(b) of GIAMA, the Minister may dispose of immovable assets under his or her custodianship in accordance with this Act and any other applicable law, after consultation with the Minister of Public Works and the Minister of Finance. 55

- (4) A decision to dispose of any immovable asset must—
- (a) be in the interest of the effective management of the Foreign Service;
 - (b) be to the benefit of the Republic in order to achieve the best functional, financial, economic and social return or benefit from the disposal of the immovable asset; and
 - (c) take into account the value of the immovable asset.

Locally recruited personnel

10. Any person, including South African citizens, who are authorised to work in terms of the laws of a foreign state may be employed as locally recruited personnel at a South African Mission in that foreign state.

Codes and directives

11. (1) Subject to any collective agreement applicable to the Foreign Service, the Minister may make any code or prescribe any ancillary or incidental administrative, management or procedural matter that is necessary to prescribe for the proper administration and management of the Foreign Service and its members which is consistent with this Act after consultation with any other relevant national department: Provided that a determination involving expenditure from revenue shall be made in consultation with the Minister of Finance.

(2) The Minister may issue directives which are consistent with this Act, to elucidate or supplement any regulation.

(3) A code or directive contemplated in subsections (1) and (2) may be included in codes to be called the Foreign Service Administration Manual and the Code of Conduct for the Foreign Service or any other code that may be adopted.

(4) The codes and directives contemplated in this section are binding upon the Foreign Service and its members.

Delegation of powers

12. (1) The Minister may—

- (a) delegate to the Director-General any power conferred on the Minister by this Act, except the powers contemplated in section 14; or
- (b) authorise the Director-General to perform any duty imposed on the Minister by this Act.

(2) The Director-General may delegate any power conferred upon or duty assigned to him or her in terms of this Act to any member of the Foreign Service excluding any power or duty delegated under subsection (1).

(3) A person to whom a power has been delegated or who has been authorised to perform a duty under this section must exercise that power or perform that duty subject to the conditions the person who made the delegation or granted the authorisation considers appropriate.

(4) A delegation of a power or authorisation to perform a duty in terms of this section—

- (a) must be in writing;
- (b) does not prevent the person who made the delegation or granted the authorisation from exercising that power or performing that duty himself or herself; and
- (c) may at any time be withdrawn in writing by that person.

Offences

13. (1) A member of the Foreign Service may be prosecuted in the Republic for the offence committed in the territory of a foreign state in accordance with section 110A of the Criminal Procedure Act, 1977 (Act No. 51 of 1977).

(2) Any person who, under the false pretense of being a member of the Foreign Service, engages in any activity that a member of the Foreign Service would engage in their ordinary course of duty on behalf of the Republic is guilty of an offence and liable on conviction to a fine or to imprisonment.

(3) Any person who by means of a false certificate or any false representation purports to comply with the requirements of section 4 of this Act and is transferred to a South

African Mission is guilty of an offence and liable on conviction to a fine or to imprisonment.

(4) A member of the Foreign Service who, by virtue of being a member of the Foreign Service, uses resources of the Republic for their own financial benefit, is guilty of an offence and liable on conviction to a fine or to imprisonment. 5

(5) Any member of the Foreign Service whose verbal or physical conduct brings the Republic into disrepute is guilty of an offence and liable on conviction to a fine or imprisonment.

Regulations

14. (1) The Minister may make regulations regarding— 10

- (a) the transfer of a member of the Foreign Service, conditions of service applicable to the members of the Foreign Service, categories of members of the Foreign Service, disciplinary matters, adjustment of allowances of members of the Foreign Service transferred to South African Missions;
- (b) the prescribed mandatory training for members of the Foreign Service as contemplated in section 4(3); 15
- (c) the training requirements of employees and members of the Foreign Service;
- (d) the prescribed oath that members of the Foreign Service are required to take before taking up their positions abroad;
- (e) the security requirements of the Foreign Service, in consultation with the Minister of State Security; 20
- (f) the management and administration of the Foreign Service by the Department;
- (g) the secondment of an employee to the service of a foreign state or entity, establishment, institution or organisation outside the Republic; or 25
- (h) any ancillary or incidental administrative or procedural matter that it is necessary to prescribe for the proper implementation or administration of this Act.

(2) A regulation made in terms of this section with reference to members of the Foreign Service must be published in the *Gazette*, except regulations relating to security matters which must be notified to all to whom it applies in such a manner as the Minister may determine. 30

(3) The Minister may by regulation provide for any matter relevant to the Foreign Service, taking into account the difficulties and hazards of life in the Foreign Service, the special circumstances abroad and to suit the varying requirements of the operation of the Foreign Service around the globe. 35

Short title and commencement

15. (1) This Act is called the Foreign Service Act, 2015, and comes into operation on a date determined by the President by proclamation in the *Gazette*.

(2) The date of coming into force and effect of section 4(3) shall be determined by the President by proclamation in the *Gazette*. 40

MEMORANDUM ON THE OBJECTS OF THE FOREIGN SERVICE BILL, 2015

1. BACKGROUND

- 1.1 One of the planned policy initiatives in the Strategic Plan 2012-2017 of DIRCO is to develop and table the Foreign Service Bill to provide for a single Foreign Service system for the Republic of South Africa. As South Africa's democracy is maturing and its international relations footprint is found across the globe, especially on the African continent, the difficulties in the management and administration of the current fragmented Foreign Service system became evident. International relations are conducted in an increasingly complex world and the Foreign Service has to be able to respond appropriately and adequately to the ever changing environment.
- 1.2 The realities of the operations of South Africa's representations in foreign jurisdictions and the unique challenges that it creates on a daily basis for the proper management and administration of the missions and personnel abroad highlighted the need to pay attention to South Africa's current Foreign Service system.
- 1.3 In preparing the Bill, extensive research was done in respect of the Foreign Services of comparable countries. Specific attention was also given to the current legislation governing the public service sector and the security services in South Africa. International practice shows that for the effective execution of international relations a foreign service needs to be supported by an appropriate legislative framework that is flexible enough to address the challenges posed at an operational level in a global environment which is different from the domestic context.

2. OBJECTS OF BILL

- 2.1 The Bill creates an enabling administrative and management framework through which the Foreign Service will be managed and regulated in a consolidated and coherent manner by the Department of International Relations and Cooperation.
- 2.2 At present the management of officials from various departments serving abroad are fragmented, not consistent and in many cases not optimal. It was decided that legislation should be developed that can address these concerns.
- 2.3 The Bill will be operationalised within the existing legislative framework governing the public service sector and the security services in South Africa and the Constitution of the Republic of South Africa, 1996.

3. SUMMARY OF BILL

- 3.1 Clause 1 contains the definitions in order to assist with the interpretation of the provisions of the Bill.
- 3.2 Clause 2 provides for the application of the Act.
- 3.3 Clause 3 sets out how the Foreign Service is made up and who are the members of the Foreign Service. In terms of this clause the Foreign Service is managed and administered by the Department of International Relations and Cooperation and sets out the manner in which this must be done.
- 3.4 Clause 4 provides for the requirements for members of the Foreign Service. This clause provides for the minimum requirements a person must meet to qualify for transfer to a South African Mission and the conditions of transfer.

- 3.5 Clause 5 regulates the appointment of Heads of Mission and the requirements that a person should have in order to be appointed as Head of Mission at a South African Mission.
- 3.6 Clause 6 deals with the recall of members of the Foreign Service. This clause also provides that a member of the Foreign Service who commits any act outside the Republic and such act constitutes misconduct, the member of the Foreign Service will be deemed to have committed such act within the Republic.
- 3.7 Clause 7 deals with the responsibilities of the Diplomatic Academy in respect of the training of South African diplomats and foreign diplomats.
- 3.8 Clause 8 provides for the establishment of consultative, coordination and other mechanisms as the Minister may deem necessary for the effective execution of this Act. The Minister may issue regulations or guidelines for co-ordinating and aligning activities relating to international relations between all spheres of government.
- 3.9 Clause 9 provides the Minister with the powers to acquire, dispose, lease or rent the immovable assets of the Department within or outside the Republic.
- 3.10 Clause 10 provides for persons to be employed as locally recruited personnel at a South African Mission in a foreign state.
- 3.11 Clause 11 provides for the codes and directives. This clause gives the Minister the power to make policies to assist with the proper administration or implementation of the Foreign Service.
- 3.12 Clause 12 provides that the Minister may delegate any powers to the Director-General except the power to make regulations. In addition, this clause provides that the Director-General may also delegate any power to any other employee and the manner in which such power may be delegated.
- 3.13 Clause 13 sets out the offences under the Bill.
- 3.14 Clause 14 empowers the Minister to make regulations for the proper implementation or administration of the Bill.
- 3.15 Clause 15 contains the short title and commencement provision.

4. ORGANISATIONS AND INSTITUTIONS CONSULTED

The Department of Communications, the Department of Cooperative Governance, the Department of Correctional Services, the Department of Home Affairs, the Department of Justice and Constitutional Development, the National School of Government, the Public Service Commission, the National Treasury, the Department of Performance Monitoring & Evaluation, the Department of Public Service & Administration, Statistics South Africa, the Department of Traditional Affairs, the Department of Defence, the Department of Energy, the Department of Environmental Affairs, the Department of Military Veterans, the Department of State Security, the National Intelligence Coordinating Committee, the Department of Telecommunications and Postal Services, the Department of Tourism, the Department of Trade and Industry, the South African Revenue Services, the Department of Agriculture, the Department of Health, the Department of Labour, the Department of Science and Technology, the Department of Transport, the South African Police Service, the Department of Public Works and the Department of Higher Education and Training.

5. FINANCIAL IMPLICATIONS FOR STATE

None

6. PARLIAMENTARY PROCEDURE

- 6.1 The Department of International Relations and Cooperation 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 does not deal with any of the matters to which the provisions of section 76 or 74 of the Constitution applies.
- 6.2 We have considered the tagging of the Bill in light of Chapter 4 of the Constitution of the Republic of South Africa, 1996 (“the Constitution”), which provides for procedures that Bills must follow in Parliament. Section 75 deals with ordinary Bills not affecting provinces.
- 6.3 The Constitutional Court judgement in the case of Stephen Segopotso Tongoane and Others v Minister for Agriculture and Land Affairs and Others CCT 100/9 [2010] ZACC 10 at paragraphs 70 and 72, stated that—
“the test for determining how a Bill is to be tagged must be broader than that for determining legislative competence. Whether a Bill is a section 76 Bill is determined in two ways. First by the explicit list of legislative matters in section 76(3), and second by whether the provisions of a Bill in substantial measure fall within a concurrent legislative competence.”
- 6.4 This test compels us to consider the substance, purpose and effect of the subject matter of the proposed Bill. This Bill seeks to provide for the management, administration and functioning of the Foreign Service of the Republic of South Africa. These matters do not fall within any of the matters listed in section 76(3) of, or Schedule to, the Constitution. In our view this Bill is therefore an ordinary Bill not affecting the provinces as envisaged in section 75 of the Constitution.
- 6.5 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 the provisions 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.

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