

REPUBLIC OF SOUTH AFRICA

NATIONAL SMALL ENTERPRISE AMENDMENT BILL, 2020

*(As introduced in the National Assembly (proposed section 75); explanatory
summary of Bill published in Government Gazette No. of 2020)
(The English text is the official text of the Bill)*

(MINISTER OF SMALL BUSINESS DEVELOPMENT)

[B —2020]

GENERAL EXPLANATORY NOTE:

- [] Words in bold type in square brackets indicate omissions from existing enactments
- _____ Words underlined with a solid line indicate insertions in existing enactments
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BILL

To amend the National Small Enterprise Act, 1996, so as to insert certain definitions and to substitute a definition; to provide for the establishment, powers and functions of the Office of Small Enterprise Ombud Service; to empower the Minister to declare certain practices in relation to small enterprises to be prohibited unfair business practices; and to provide for matters connected therewith.

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

Amendment of section 1 of Act 102 of 1996, as amended by section 1 of Act No. 26 of 2003 and section 1 of Act 29 of 2004

1. Section 1 of the National Small Enterprise Act, 1996 (Act No.102 of 1996) (hereinafter referred to as the principal Act), is hereby amended—

- (a) by the insertion after the definition of "Chief Executive Officer", of the following definitions:

" **'complaint'** means any complaint lodged, as contemplated in Chapter 3A, by a small enterprise or small enterprise organisation against—

(a) an enterprise that does not fall within the meaning of "small enterprise";

(b) a state-owned company as defined in section 1 of the Companies Act, 2008 (Act No. 71 of 2008); or

(c) an organ of state as defined in section 239 of the Constitution, in relation to the interpretation of the terms of an agreement for the procurement of goods or services or the late or non-payment of amounts due and payable to the small enterprise;

'complainant' means a small enterprise or small enterprise organisation;

'Director' means the Director of the Office of the Small Enterprise Ombud Service appointed in terms of section 17I;"

(b) by the substitution for the definition of "Minister", of the following definition:

" **'Minister'** means the Minister responsible for small enterprise development;"

(c) by the insertion after the definition of "Ntsika", of the following definitions:

" **'Office'** means the Office of the Small Enterprise Ombud Service established by section 17D;

'Ombud' means the Ombud appointed in terms of section 17E;"

(d) by the insertion after the definition of "prescribed", of the following definition:

" **'rule'** means a rule made under section 17N;" and

- (e) by the substitution for the full stop at the end of the definition of "this Act" of a semi colon, the substitution for the full stop at the end of the definition of "Trust" of "; and" and the insertion after the definition of "Trust", of the following definition:

" **'unfair trading practice'** means a practice contemplated in section 17S."

Repeal of Chapter 2 of Act 102 of 1996

2. Chapter 2 of the principal Act is hereby repealed.

Insertion of Chapter 3A in Act 102 of 1996

3. The following Chapter is hereby inserted after Chapter 3 of the principal Act:

"CHAPTER 3A

DISPUTE RESOLUTION MECHANISM

Office of Small Enterprise Ombud Service

Establishment of Office of Small Enterprise Ombud Service

17D. (1) The Office of the Small Enterprise Ombud Service is hereby established, as a juristic person.

(2) The functions of the Office are performed by the Small Enterprise Ombud.

(3) The Ombud, with the approval of the Minister, must determine the national head office of the Office and, where necessary, may establish regional offices.

(4) A regional office contemplated in subsection (3) must be headed by a deputy Ombud, appointed in terms of section 17E(1)(b), who must exercise the powers of the Ombud in respect of the relevant regional office.

(5) The objective of the Ombud is to consider and dispose of complaints by small enterprises in a procedurally fair, informal, economical and expeditious manner and by reference to what is equitable in all the circumstances, with due regard to—

(a) the contractual arrangement or other legal relationship between the complainant and any other party to the complaint; and

(b) the provisions of this Act.

(6) When dealing with complaints in terms of this Chapter, the Ombud and any deputy Ombud must act independently and impartially.

(7) The provisions of section 10(2) apply to the Office with the necessary changes.

Appointment of Ombud and deputy Ombud

17E. (1) The Minister—

(a) must appoint, as Ombud, a person qualified in law and who possesses adequate knowledge of small enterprises, trade, industry, finance or the economy;

(b) may appoint one or more persons qualified in law and who possess adequate knowledge of small enterprises, trade, industry, finance or the economy, as deputy Ombud.

(2) The remuneration and other terms of appointment of the Ombud and a deputy Ombud must be determined by the Minister, in consultation with the Minister of Finance.

(3) The Ombud or deputy Ombud may resign by submitting a written notice to the Minister at least three calendar months prior to the intended date of vacation of office, unless the Minister allows a shorter period.

(4) The Minister may, on good cause shown, remove the Ombud or deputy Ombud from office on the ground of misconduct, incapacity or incompetence, after affording the person concerned a reasonable opportunity to be heard.

Powers and functions of Ombud

17F. (1) The Ombud—

- (a) must consider and dispose of complaints by small enterprises in terms of this Chapter;
- (b) must consider and approve the strategic plan of the Office;
- (c) must consider and decide on all major capital acquisitions and transactions that have not been delegated to the Director;
- (d) must prepare reports on any major issues affecting the Office for submission to the Minister; and
- (e) may conduct any business that is required for the proper maintenance and development of the Office.

(2) (a) For the purposes of subsection (1)(a), the Ombud is competent to investigate, on receipt of a complaint by a small enterprise or a small enterprise organisation, any alleged—

- (i) unfairness in relation to a contractual arrangement or other legal relationship between the complainant and any other party to the complaint;

- (ii) abuse or unjustifiable exercise of power or unfair or other improper conduct or undue delay in performing in terms of a contractual arrangement or other legal relationship between the complainant and any other party to the complaint; or
- (iii) practice, act or omission which results in unlawful or improper prejudice to a small enterprise.
- (b) At any time prior to, during, or after an investigation referred to in paragraph (a), the Ombud may if he or she—
- (i) is of the opinion that the facts reveal the commission of an offence by any person, bring the matter to the notice of the relevant authority charged with prosecutions; or
- (ii) deems it advisable, refer any matter which has a bearing on an investigation to the appropriate body or authority affected by it, or make an appropriate recommendation regarding the redress of the prejudice in question or make any other appropriate recommendation that the Ombud deems expedient, to the affected body or authority.
- (3) For the purposes of an investigation, the Ombud may—
- (a) summon any person to furnish any information on the subject of the investigation or who has in his or her possession or under his or her control any book, document or other object relating to the investigation, to appear before the Ombud at a time and place specified in the summons, to be questioned or to produce that book, document or other object; and
- (b) designate a person to question that person, under oath or affirmation, and examine or retain for further examination or for safe custody the book, document or other object in question.
- (4) A summons referred to in subsection (3)(a) must—
- (a) be in the form determined in the rules;
- (b) contain particulars of the matter in connection with which the person concerned is required to appear before the Ombud;

(c) be signed by the Ombud or a person authorised by him or her; and

(d) be served as determined in the rules.

(5) (a) The Ombud may, subject to paragraph (b), in the manner he or she deems fit, make known to any person or body any report, finding, recommendation or determination in respect of a matter investigated by him or her.

(b) The report, finding, recommendation or determination in respect of an investigation by the Ombud must, when he or she deems it fit but as soon as possible, be made available to the complainant and to any person or body implicated thereby.

(c) A report or finding, recommendation or determination in respect of an investigation by the Ombud must be open to the public, unless the Ombud is of the opinion that exceptional circumstances require that the report, finding, recommendation or determination be kept confidential.

Receipt of complaints, prescription, jurisdiction and investigation

17G. (1) On submission of a complaint to the Office, the Ombud must—

(a) determine whether the requirements of the rules contemplated in section 17N have been complied with;

(b) in the case of any non-compliance, act in accordance with the rules made under that section; and

(c) otherwise officially receive the complaint if it qualifies as a complaint.

(2) Official receipt of a complaint by the Ombud suspends the running of prescription in terms of the Prescription Act, 1969 (Act No. 68 of 1969), for the period after such receipt of the complaint until the complaint has either been withdrawn, or determined by the Ombud.

(3) The following jurisdictional provisions apply to the Ombud in respect of the investigation of complaints:

- (a) (i) The Ombud must decline to investigate any complaint which relates to an act or omission which occurred on or after the date of commencement of this Act but on a date more than three years before the date of receipt of such complaint by the Office.
- (ii) Where the complainant was unaware of the occurrence of the act or omission contemplated in subparagraph (i), the period of three years commences on the date on which the complainant became aware or ought reasonably to have become aware of such occurrence, whichever occurs first.
- (b) (i) The Ombud must decline to investigate a complaint if, before the date of official receipt of the complaint, proceedings have been instituted by the complainant in any Court in respect of a matter which would constitute the subject of the investigation.
- (ii) Where any proceedings contemplated in subparagraph (i) are instituted during an investigation by the Ombud, such investigation must not be proceeded with.
- (c) The Ombud may, on reasonable grounds, determine that it is more appropriate that the complaint be dealt with by a Court or through any other available dispute resolution process, and decline to entertain the complaint.
- (4) The Ombud must not proceed to investigate a complaint officially received, unless the Ombud—
- (a) has, in writing, informed every other interested party to the complaint of the receipt thereof;
- (b) is satisfied that all interested parties have been provided with such particulars as will enable the parties to respond thereto; and
- (c) has provided all interested parties the opportunity to submit a response to the complaint.

(5) The Ombud—

- (a) may, in investigating or determining an officially received complaint, follow and implement any procedure (including mediation) which the Ombud deems appropriate, and may allow any party the right of legal representation;
- (b) must, in the first instance, explore any reasonable prospect of resolving a complaint by a conciliated settlement acceptable to all parties;
- (c) may, in order to resolve a complaint speedily by conciliation, make a recommendation to the parties, requiring the parties to confirm whether or not they accept the recommendation and, where the recommendation is not accepted by a party, require that party to give reasons for not accepting it: Provided that where the parties accept the recommendation, such recommendation has the effect of a final determination by the Ombud, contemplated in section 17H(1);
- (d) may, in a manner that the Ombud deems appropriate, delineate the functions of investigation and determination between various functionaries of the Office;
- (e) may, on terms specified by the Ombud, mandate any person or tribunal to perform any of the functions referred to in paragraph (d).

(6) For the purposes of any investigation or determination by the Ombud, the provisions of the Commissions Act, 1947 (Act No. 8 of 1947), regarding the summoning and examination of persons and the administering of oaths or affirmations to them, the calling for the production of books, documents and objects, and offences by witnesses, apply with the necessary changes.

Determinations by Ombud

17H. (1) The Ombud must in any case where a matter has not been settled or a recommendation referred to in section 17G(5)(c) has not been accepted by all parties concerned, make a final determination, which may include—

- (a) the dismissal of the complaint; or

(b) the upholding of the complaint, wholly or partially, in which case—

- (i) the complainant may be awarded an amount as fair compensation for any financial prejudice or damage suffered; and
- (ii) a direction may be issued that the other party concerned take such steps in relation to the complaint as the Ombud deems appropriate and just.

(2) (a) A monetary award may provide for the amount payable to bear interest at a rate, and as from a date, determined by the Ombud.

(b) The Minister may by rule determine—

- (i) the maximum monetary award for a particular kind of financial prejudice or damage;
- (ii) different maximum monetary awards for different categories of complaints;
- (iii) the granting of costs, including costs against a complainant in favour of the Office or the respondent if in the opinion of the Ombud—

(aa) the conduct of the complainant was improper or unreasonable;
or

(bb) the complainant was responsible for an unreasonable delay in the finalisation of the relevant investigation: Provided that an amount payable under a cost award bears interest at a rate and as from a date determined by the Ombud.

(3) Any award of interest by the Ombud in terms of subsection (2) may not exceed the rate which a Court would have been entitled to award, had the matter been heard by a Court.

(4) The Ombud must reduce a determination to writing, including the reasons therefor, sign the determination, and send copies thereof to all parties concerned with the complaint and to the clerk or registrar of the court which would have had jurisdiction in the matter had it been heard by a Court.

(5) A determination is regarded as a civil judgment of a Court, had the matter in question been heard by a Court, and must be so noted by the clerk or registrar, as the case may be, of that Court.

(6) (a) A writ of execution may, in the case of a determination amounting to a monetary award, be issued by the clerk or the registrar referred to in subsection (4) and may be executed by the sheriff of such Court after expiration of a period of two weeks after the date of the determination.

(b) Any other determination must be given effect to in accordance with the applicable procedures of a Court after expiration of a period of two weeks after the date of the determination.

Staff of Office

171. (1) In order to perform the functions of the Office, the Ombud must—

(a) employ a director as the administrative head and chief executive officer of the Office; and

(b) employ such administrative staff as may be necessary.

(2) The Ombud must appoint a director for an agreed term not exceeding five years which may be renewed for one additional term not exceeding five years and on the conditions as the Minister, in consultation with the Minister of Finance, may determine.

(3) The Director is responsible for the general administration of the Office, and must—

(a) manage and direct the activities of the Office, subject to the direction of the Ombud;

(b) appoint and supervise the administrative staff of the Office; and

(c) enter into contracts with service providers and accept liability on behalf of the Office for the expenses incurred as a result of such services being rendered.

(4) The Minister must, after consultation with the Minister of Finance, determine—

(a) the Director's remuneration, allowances, benefits and other terms and conditions of employment; and

(b) the staff establishment of the Office, the remuneration, allowances, benefits, and other terms and conditions of appointment of the members of staff.

Delegation by Ombud, deputy Ombud and Director

17J. (1) The Ombud may delegate any of his or her powers and assign any of his or her duties to a deputy Ombud or the Director.

(2) A deputy Ombud or the Director, as the case may be, may delegate any of his or her powers and assign any of his or her duties to an employee of the Office.

(3) A delegation contemplated in subsection (1) or (2)—

(a) may be made subject to such conditions as the Ombud, a deputy Ombud or the Director, as the case may be, may determine;

(b) must be communicated to the delegatee in writing;

(c) may be amended or withdrawn in writing by the Ombud, a deputy Ombud or the Director, as the case may be.

(4) Despite a delegation or assignment contemplated in subsection (1) or (2), the Ombud, a deputy Ombud or the Director, as the case may be, remains accountable for any power delegated or function assigned, and is not divested of any power or duty so delegated or assigned.

Funding of Office

17K. (1) Expenditure in connection with the administration and functioning of the Office must be defrayed from—

(a) money appropriated by Parliament for this purpose;

(b) any fees payable in terms of this Chapter; and

(c) funds accruing to the Office from any other source.

(2) The Office must deposit all funds in an account opened with a bank registered under the Banks Act, 1990 (Act No. 94 of 1990).

(3) The Office may invest funds which are not required for immediate use—

(a) in a call account or short-term fixed deposit with any registered bank contemplated in subsection (2); or

(b) in an investment account with the Public Investment Corporation established by section 2 of the Public Investment Corporation Act, 2004 (Act No. 23 of 2004).

(4) Funds standing to the credit of the Office in the account mentioned in subsection (2) at the end of the financial year, as well as funds invested under subsection (3), must, subject to section 53(3) of the Public Finance Management Act, 1999 (Act No. 1 of 1999), be carried forward to the next financial year.

(5) The Office must comply with the Public Finance Management Act, 1999.

Accountability

17L. (1) Subject to the Public Finance Management Act, 1999, the Director—

(a) is charged with the responsibility of accounting for money received or paid out for or on account of the administration and functioning of the Office; and

(b) must cause the necessary accounting and other related records to be kept.

(2) The financial year of the Office is the period from 1 April to 31 March, except that the first financial year of the Office begins on the date on which this Chapter comes into operation, and ends on 31 March of the following year.

(3) Within five months after the end of each financial year, the Director must prepare financial statements in accordance with established accounting practice, principles and procedures, comprising—

(a) a statement, with suitable and sufficient particulars, reflecting the income and expenditure of the Office during the preceding financial year; and

(b) a balance sheet showing the state of its assets, liabilities and financial position as at the end of that financial year.

(4) The Auditor-General must, in accordance with the Public Audit Act, 2004 (Act No. 25 of 2004), ensure that the financial statements of the Office are audited each year.

Disestablishment and liquidation of Office

17M. (1) The Office may not be disestablished or liquidated except by an Act of Parliament.

(2) In the event of such disestablishment or liquidation, the surplus assets of the Office, if any, accrue to the Agency.

Rules applicable to Ombud

17N. (1) The Minister may make rules, including different rules in respect of different categories of complaints or investigations by the Ombud, regarding—

- (a) (i) any matter which is required or permitted under this Act to be regulated by rule;
- (ii) the category of small enterprises qualifying as complainants;
- (iii) the types of complaint justiciable by the Ombud;
- (iv) the rights of complainants in connection with complaints, including the manner of submitting a complaint to the Ombud;
- (v) the rights and duties of any other party to the complaint on receipt of a complaint, particularly in connection with the furnishing of replies to the complainant;
- (vi) the rights of a complainant to submit a complaint to the Ombud where the complainant is not satisfied with a reply received from the party concerned;
- (vii) the circumstances under which the Ombud may dismiss a complaint without consideration of its merits;
- (viii) the power of the Ombud to fix a time limit for any aspect of the proceedings before the Ombud and to extend a time limit;
- (b) the payment to the Office by a party involved in a complaint submitted to the Ombud, of case fees in respect of the consideration of the complaint by the Ombud;
- (c) any other administrative or procedural matter necessary or expedient for the better achievement of the objects of this Chapter, but which is not inconsistent with a provision of this Act.

(2) The Minister must—

- (a) ensure that no rule made under subsection (1) undermines or affects the independence of the Ombud in any material way; and
- (b) publish the rules made under subsection (1) in the Gazette.

Record-keeping

17O. (1) The Ombud must keep proper files and records in respect of complaints as well as a record of any determination proceedings conducted in terms of section 17H.

(2) Any interested person may, subject to the discretion of the Ombud and applicable rules of confidentiality, obtain a copy of any record on payment of a fee determined by the Ombud.

Annual Report of Ombud

17P. (1) The Office must prepare and submit to the Minister an annual report, as determined in the rules, within five months after the end of its financial year.

(2) The annual report referred to in subsection (1) must include the following documents:

(a) The audited financial statements prepared in terms of this Chapter;

(b) the report prepared in terms of the Public Audit Act, 2004; and

(c) a report of the activities undertaken in terms of the functions of the Ombud set out in this Chapter.

(3) The Minister must table in Parliament each annual report submitted in terms of this section.

Penalties

17Q. A person who—

(a) commits any act in respect of the Ombud or an investigation by the Ombud which, if committed in respect of a court of law, would have constituted contempt of court, is guilty of an offence and liable on conviction to a penalty which may be imposed on a conviction of contempt of court; or

- (b) (i) anticipates a determination of the Ombud in any manner calculated to influence the determination; or
- (ii) wilfully interrupts proceedings conducted by the Ombud, is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding one year.

Promotion of stakeholder education

17R. The Office may take any steps conducive to stakeholder education and the promotion of awareness of the nature and availability of the Ombud and other enforcement measures established by or in terms of this Chapter, including arrangements with organs of state, representative bodies of business and other stakeholders, to assist in the provision of information to the general public on matters relating to the work of the Ombud.

Promotion of inter-agency co-ordination and collaboration

17S. The Office may take any steps in line with the Intergovernmental Relations Framework Act of 2005 to facilitate, promote and establish inter-agency collaboration and co-ordination measures including institutional arrangements, agreements and joint programmes with similar organisations chief amongst these being the Competition Commission, Consumer Commission and the Companies and Intellectual Property Commission.

Unfair trading practices

- 17T. (1) The Minister—
- (a) may, subject to subsections (2) to (5), on recommendation by the Ombud, by notice in the *Gazette*, declare certain practices in relation to small enterprises to be prohibited unfair trading practices;
- (b) may make regulations requiring specified enterprises—

- (i) to provide in the prescribed manner, prescribed information about their contracting and payment practices and policies relating to small enterprises; and
- (ii) to publish such information in the prescribed manner; and
- (c) must make regulations regarding the application of this section;
- (d) must consult with the Minister responsible for trade, industry and competition before making regulations regarding the application of this section and receive a response within 30 working days thereof.
- (e) must, in the performance of a function in terms of this section, consult with any Minister responsible for a national function affected by the performance of that function.

(2) Small enterprises have the right to choose, trade and transact freely, including—

- (a) the right to fair and unambiguous business contract;
- (b) the right to a reasonable payment date and interest on late payments;
- (c) the right to disclosure of information;
- (d) the right to fair and honest dealing; and
- (e) the right to accountability from large enterprises and organizations.

(3) The practices contemplated in subsection (1)(a) include—

- (a) ambiguous contract terms;
- (b) lack of written contracts;
- (c) retrospective changes to arrangements;
- (d) the transfer of commercial risk to the weaker party.
- (e) the use of information outside the purpose for which the other party discloses it;

- (f) sudden and unjustified termination of a commercial relationship or termination without reasonable notice;
- (g) long-term exclusive agreements aimed at preventing weaker parties from entering an existing market;
- (h) unfair exclusionary compliance requirement practices; or
- (i) unfair contract terms in retail and commercial leases for small enterprises.

(4) The following principles must guide the Minister and the Ombud in considering whether or not a declaration contemplated in subsection (1) may be made:

- (a) That the practice concerned, directly or indirectly, has or is likely to have the effect of—
 - (i) harming the sustainability and competitiveness of small enterprises;
 - (ii) unreasonably prejudicing any small enterprise;
 - (iii) deceiving any small enterprise; or
 - (iv) unfairly affecting any small enterprise; and
- (b) that if the practice is allowed to continue, one or more objects of this Act will, or is likely to be defeated.

(5) Before making a declaration or regulations contemplated in subsection (1), the Minister must—

- (a) by notice in the Gazette—
 - (i) publish an intention to make—
 - (aa) the declaration and give reasons therefor; or
 - (bb) the regulations, indicating where a copy of the regulations may be obtained; and

(ii) invite interested persons to make written representations in relation thereto, so as to reach the Minister within 21 days after the date of publication of that notice; and

(b) consider any representations received in terms of paragraph (a)(ii).

(6) An affected party may not, on or after the date of the publication of a notice referred to in subsection (1), carry on the practice concerned.

(7) The Ombud may direct a party who, on or after the date of the publication of a notice referred to in subsection (1), carries on the practice concerned in contravention of that notice, to rectify, to the satisfaction of the Ombud, any harm which was caused by, or arose out of, the carrying on of the practice concerned.

(8) Any party who, under subsection (7), is directed to rectify any harm, must do so within 60 days after such direction is issued.

(9) The Ombud may, after affording the party concerned a reasonable opportunity to make representations, impose an administrative penalty in the amount prescribed by the Minister for any contravention of subsection (6) or failure by the party concerned to comply with subsection (7), read with subsection (8)."

Amendment of section 19 of Act 102 of 1996, as substituted by section 6 of Act 26 of 2003

4. Section 19 of the principal Act is hereby amended—

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

"(1) (a) As soon as practicable after the end of every financial year **[the Advisory Body and]** the Agency must **[each]** compile a report on **[their respective]** its activities during that year.

(b) **[These reports, the respective constitutions]** The report, constitution, as well as the **[respective]** audited annual financial

statements of the Agency, must be submitted to the Minister, who must table them in Parliament.";

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

"(2) The **[Advisory Body and the]** Agency must furnish the Minister with any such other reports as the Minister may request."; and

(c) by the substitution in subsection 3 for paragraph (a) of the following paragraph:

"(a) particulars of the work performed by the Agency **[and Advisory Body]** and of progress achieved in furtherance of the objects of the National Small Enterprise Support Strategy;".

Amendment of the long title to Act 102 of 1996

5. The following long title is substituted for the long title of the principal Act:

"To provide for the establishment of [the Advisory Body and] the Small Enterprise Development Agency; to provide for the establishment of the Office of the Small Enterprise Ombud Service; to provide guidelines for organs of state in order to promote small enterprise in the Republic; and to provide for matters incidental thereto."

Short title and commencement

6. This Act is called the National Small Enterprise Amendment Act, 2020, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.