

GENERAL EXPLANATORY NOTE:

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

BILL

To amend the Insolvency Act, 1936, so as to regulate agreements providing for termination and netting of unperformed obligations; to amend the Prevention of Counterfeiting of Currency Act, 1965, so as to make further provision regarding the onus of proof on an accused person; to amend the Criminal Procedure Act, 1977, so as to ensure the consideration of a pre -trial services report in respect of bail proceedings; and to make new provision regarding correctional supervision as a sentencing option; to amend the Attorneys Act, 1979, so as to provide for the mandatory attendance of a legal practice management course by certain attorneys; to amend the Divorce Act, 1979, so as to make further provision regarding pension benefits in respect of the division of assets and maintenance of parties; to amend the Sheriffs Act, 1986, so as to effect a change of name; to amend the Maintenance Act, 1998, so as to further regulate proceedings at a maintenance enquiry; to provide for payment of a maintenance benefit by a third party; and to extend maintenance orders to include maintenance orders by High Courts and Divorce Courts in certain circumstances; to amend the Domestic Violence Act, 1998, so as to provide for the consideration by a court of the report and recommendations of a Family Advocate; to amend the Promotion of Access to Information Act, 2000, so as to extend the period within which the South African Human Rights Commission must compile a guide to assist persons who wish to gain access to information; to amend the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000, so as to further regulate the publication of a notice altering the boundaries of an equality court; to amend the Cross-Border Insolvency Act, 2000, so as to regulate the position of legal proceedings when a notice designating a State for the purposes of that Act is withdrawn; and to amend the Judges' Remuneration and Conditions of Employment Act, 2001, so as to make new provision regarding pensions paid to retired judges and to surviving spouses of retired judges; and to provide for matters connected therewith.

**B**E IT ENACTED by the Parliament of the Republic of South Africa, as follows:-

**Substitution of section 35B of Act 24 of 1936, as inserted by section 1 of Act 32 of 1995**

1. The following section is hereby substituted for section 35B of the Insolvency Act, 1936:

**"Agreements providing for termination and netting**

<p><b>35B.</b> (1) In this section subject to subsection (2) -</p> <p>'agreement' means—</p> <p>(a) an agreement which provides that if the estate of a party to the agreement is sequestrated before that party has performed fully in terms of the agreement, or in terms of one or more agreements with the same counterparty—</p> <p>(i) all unperformed obligations of the parties in terms of the agreement or agreements—</p> <p>(aa) terminate or may be terminated; or</p> <p>(bb) become or may become due immediately;</p> <p>(ii) the values of the unperformed obligations are determined or may be determined; and</p> <p>(iii) the values are netted or may be netted, so that only a net amount (whether in the currency of the Republic or any other currency) is payable to or by a party; or</p> <p>(b) any agreement declared by the Minister after consultation with the Minister of Finance, by notice in the <i>Gazette</i> to be an agreement for the purposes of this section;</p> <p>'unperformed obligation' includes an obligation of a party to an agreement to return to the other party assets, whether tangible or intangible, in which ownership has been transferred to the first-mentioned party as security for the latter party's prospective liability under the agreement;</p> <p>'market value' means a value determined without reference to the ability of the debtor to perform.</p> <p>(2) In this section 'agreement' does not include—</p> <p>(a) a transaction contemplated in section 35A;</p> <p>(b) a netting arrangement contemplated in the National Payment System Act, 1998 (Act No. 78 of 1998); or</p> <p>(c) any agreement declared by the Minister after consultation with the Minister of Finance, by notice in the <i>Gazette</i>, not to be an agreement for the purposes of this section.</p> <p>(3) Upon the sequestration of the estate of a party to an agreement, all unperformed obligations arising out of such agreement or all such agreements between the same parties shall, notwithstanding any rule of the common law to the contrary, be automatically terminated as from the date of sequestration and the values shall be calculated at market value as at that date and the net amount shall be payable.</p> <p>(4) Section 341(2) of the Companies Act, 1973 (Act No. 61 of 1973), and sections 26, 29 and 30 of this Act shall not apply to property disposed of in <u>terms of an agreement.</u>"</p>
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**Amendment of section 4 of Act 16 of 1965, as amended by section 4 of Act 18 of 1996**

2. Section 4 of the Prevention of Counterfeiting of Currency Act, 1965, is hereby amended by the substitution for subsection (2) of the following subsection:

"(2) If in any prosecution for a contravention of paragraph (d), (j) or (l) of section ~~two~~ 2 the question arises whether any person had lawful authority or excuse for possessing or doing any thing referred to in the said paragraphs, **[the onus of proving that such was the case shall be on the accused]** in the absence of evidence to the contrary which raises reasonable doubt, proof of possession or conduct contemplated in the said paragraphs (d),(j) and (l) shall be sufficient evidence of the absence of lawful authority or excuse.".

**Amendment of section 60 of Act 51 of 1977, as substituted by section 3 of Act 75 of 1995 and amended by section 4 of Act 85 of 1997, section 5 of Act 34 of 1998 and section 9 of Act 62 of 2000**

3. Section 60 of the Criminal Procedure Act, 1977, is hereby amended by the addition to subsection (2) of the following paragraph:

"(e) must take into consideration any pre-trial services report regarding the desirability of releasing such person on bail if such a report is available."

**Amendment of section 276 of Act 51 of 1977, as amended by section 3 of Act 107 of 1990, section 41 of Act 122 of 1991, section 18 of Act 139 of 1992, section 20 of Act 116 of 1993, section 2 of Act 33 of 1997 and section 34 of Act 105 of 1997**

4. Section 276 of the Criminal Procedure Act, 1977, is hereby amended –

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

"(3) Notwithstanding anything to the contrary in any law contained, the provisions of subsection (1) shall not be construed as prohibiting the court[–

**(a)] from imposing imprisonment together with correctional supervision[; or**

**(b) from imposing the punishment referred to in subsection (1)(h) or (i) in respect of any offence]."; and**

(b) by the addition of the following subsection:

"(4) A court convicting a person of any offence, other than an offence in respect of which any law prescribes a minimum punishment, may sentence such person to. –

(a) correctional supervision as contemplated in subsection (1)(h); or

(b) imprisonment from which such person may be placed under correctional supervision as contemplated in subsection (1)(i)."

**Insertion of section 13B in Act 53 of 1979**

5. The following section is hereby inserted in the Attorneys Act, 1979, after section 13A:

**"Certain attorneys to complete training in legal practice management**

**13B.** After the commencement of the Judicial Matters Second Amendment Act, 2003, every attorney who, for the first time, practises as a partner in a firm of attorneys or who practises on his or her own account, must–

(a) within the period contemplated in section 74(1)(dA); and

(b) after payment of the fee prescribed in terms of section 80(1)(i), complete a legal practice management course approved by the council of the province in which he or she practices."

**Amendment of section 74 of Act 53 of 1979, as amended by section 26 of Act 87 of 1989 and section 18 of Act 115 of 1993**

6. Section 74 of the Attorneys Act, 1979, is hereby amended by the insertion in subsection (1) after paragraph (d) of the following paragraph:

"(dA) legal practice management courses to be completed by attorneys as contemplated in section 13B and determine the period within which such courses must be completed;"

**Amendment of section 80 of Act 53 of 1979, as amended by section 10 of Act 108 of 1984, section 19 of Act 115 of 1993 and section 12 of Act 104 of 1996**

7. Section 80 of the Attorneys Act, 1979, is hereby amended by the addition to subsection (1) of the following paragraph:

"(i) the completion of legal practice management courses as contemplated in section 13B."

**Amendment of section 7 of Act 70 of 1979, as amended by section 36 of Act 88 of 1984, section 2 of Act 3 of 1988, section 2 of Act 7 of 1989 and section 1 of Act 44 of 1992**

8. Section 7 of the Divorce Act, 1979, is hereby amended by the substitution in subsection (8)(a) for subparagraph (ii) of the following subparagraph:

"(ii) the registrar of the court in question forthwith cause an endorsement to be made in the records of that fund that that part of the pension interest concerned is so payable to that other party;".

**Amendment of section 1 of Act 90 of 1986, as amended by section 1 of Act 74 of 1998**

9. Section 1 of the Sheriffs Act, 1986, is hereby amended by the substitution for the definition of "Board" of the following definition:

" 'Board' means the South African Board for Sheriffs established by section 7, and includes, for the purposes of Chapter IV (excluding section 52), a disciplinary committee;".

**Substitution of section 7 of Act 90 of 1986**

10. The following section is hereby substituted for section 7 of the Sheriffs Act, 1986:

**"Establishment of South African Board for Sheriffs**

7. There is hereby established a board to be known as the South African Board for Sheriffs and which shall be a juristic person.".

**Substitution of long title of Act 90 of 1986**

11. The following long title is hereby substituted for the long title to the Sheriffs Act, 1986:

**"To provide for the appointment of sheriffs, the establishment of a South African Board for Sheriffs and a Fidelity Fund for Sheriffs, the regulation of the conduct of sheriffs, and matters connected therewith."**

**Amendment of section 19 of Act 99 of 1998**

12. Section 10 of the Maintenance Act, 1998, is hereby amended by the insertion after subsection (1) of the following subsection:

"(1A) Where circumstances permit a maintenance court may, at any time during the enquiry, cause an investigation to be carried out by a Family Advocate, contemplated in the Mediation In Certain Divorce Matters Act, 1987 (Act No. 24 of 1987), in whose area of jurisdiction that maintenance court is, with regard to the welfare of any minor or dependent child affected by such enquiry, whereupon the provisions of that Act apply with the changes required by the context."

**Amendment of section 16 of Act 99 of 1998**

13. Section 16 of the Maintenance Act, 1998, is hereby amended by the substitution for paragraph (a) of subsection (2) of the following paragraph:

"(a) Any court-

- (i) that has at any time, whether before or after the commencement of this Act, made a maintenance order under subsection (1)(a)(i) or (b)(i);
- (ii) that makes such a maintenance order; or
- (iii) that convicts any person of an offence referred to in section 31(1),

shall, subject to paragraph (b)(i), make an order directing any person, including any administrator of a pension fund, who is obliged under any contract to pay any sums of money on a periodical basis to the person against whom the maintenance order in question has been or is made, to make on behalf of the latter person such periodical payments from moneys at present or in future owing or accruing to the

latter person as may be required to be made in accordance with that maintenance order if that court is satisfied –

- (aa) in the case of subparagraph (i), after hearing such evidence, either in writing or orally, as that court may consider necessary;
- (bb) in the case of subparagraph (ii), after referring to the evidence adduced at the enquiry or the application for an order by default, as the case may be; or
- (cc) in the case of subparagraph (iii), after referring to the evidence at the trial, that it is not impracticable in the circumstances of the case."

**Amendment of section 26 of Act 99 of 1998, as amended by section 18 of Act 42 of 2001**

**14.** Section 26 of the Maintenance Act, 1998, is hereby amended–

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

"(a) against whom any maintenance order has been made **[under this Act]** has failed to make any particular payment in accordance with that maintenance order; or" ; and

- (b) by the substitution in subsection (2) for paragraph (a) of the following paragraph:

"(a) If any maintenance order **[made under this Act]** or any order made under section 16(1)(a)(ii), 20 or 21(4) has remained unsatisfied for a period of ten days from the day on which the relevant amount became payable or any such order was made, as the case may be, the person in whose favour any such order was made may apply to the maintenance court where that person is resident –

- (i) for the authorisation of the issue of a warrant of execution referred to in section 27(1);
- (ii) for an order for the attachment of emoluments referred to in section 28(1); or
- (iii) for an order for the attachment of any debt referred to in section 30(1)."

**Amendment of section 5 of Act 116 of 1998**

**15.** Section 5 of the Domestic Violence Act, 1998, is hereby amended by the insertion after subsection (1) of the following subsection:

"(1A) Where circumstances permit, a court may, when considering an application contemplated in subsection (1), cause an investigation to be carried out by a Family Advocate, contemplated in the Mediation in Certain Divorce Matters Act, 1987 (Act No. 24 of 1987), in whose area of jurisdiction that court is, with regard to the welfare of any minor or dependent child affected by the proceedings in question, whereupon the provisions of that Act apply with the changes required by the context."

**Amendment of section 10 of Act 2 of 2000, as amended by section 24 of Act 42 of 2001**

**16.** Section 10 of the Promotion of Access to Information Act, 2000, is hereby amended by the substitution for subsection (1) of the following subsection:

"(1) The Human Rights Commission must, within **[18]** 30 months after the commencement of this section, compile in each official language a guide containing such information, in an easily comprehensible form and manner, as may reasonably be required by a person who wishes to exercise any right contemplated in this Act."

**Amendment of section 16 of Act 4 of 2000, as substituted by section 1 of Act 52 of 2002**

**17.** Section 16 of the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000, is hereby amended by the addition to subsection (1) of the following paragraph:

"(e) the publication of a notice referred to in paragraph (e) does not affect any proceedings which have been instituted but not yet completed at the time of such publication."

**Amendment of section 2 of Act 42 of 2000**

**18.** Section 2 of the Cross-Border Insolvency Act, 2000. is hereby amended by the addition of the following subsection:

"(5) Where the Minister withdraws a notice in terms of subsection (3), such withdrawal does not affect any pending legal proceedings and such proceedings must continue as if the notice had not been withdrawn."

**Amendment of section 16 of Act 47 of 2001**

**19.** Section 16 of the Judges' Remuneration and Conditions of Employment Act, 2001, is hereby amended –

- (a) by the substitution in subsection (4) for paragraphs (b) and (c) of the following paragraphs, respectively:

"(b) After **[the commencement of this section]** 3 May 2002, any surviving spouse of a retired judge referred to in paragraph (a) shall be paid with effect from the first day of the month immediately succeeding the day on which the retired judge dies or died, an amount equal to **[one half] three quarters** of the amount to which his or her deceased spouse would have been entitled under paragraph (a).

(c) Any surviving spouse of a judge who retired as a judge in terms of the Judges' Pensions Act, 1978, and who, **[at the commencement of this section]** on or after 3 May 2002, receives a pension in terms of the said Act, is, from **[the date of commencement of this section]** 3 May 2002 or any later date from which such surviving spouse is entitled to such a pension, entitled to an amount equal to **[one half] three quarters** of the amount to which his or her deceased spouse would have been entitled under paragraph (a)."; and

- (b) by the addition to subsection (4) of the following paragraphs:

"(d) The amounts payable to a surviving spouse contemplated in paragraphs (b) and (c) shall be payable until the death of such spouse.

(e) The amounts payable to persons in terms of this subsection shall be adjusted whenever the annual salary payable to a Constitutional Court judge or a judge, as the case may be, is increased.

(f) In applying this subsection, no person may be paid an amount which is less than that which he or she received before any adjustment was made under this subsection."

**Short title**

**20.** This Act is called the Judicial Matters Second Amendment Act, 2003.

# **MEMORANDUM ON THE OBJECTS OF THE JUDICIAL MATTERS SECOND AMENDMENT BILL, 2003**

## **1. PURPOSE OF BILL**

The main purpose of the Bill is to encompass in a single Bill a variety of amendments to laws administered by the Department of Justice and Constitutional Development and which amendments do not require individual Amendment Acts. These amendments mainly address certain problems areas which have arisen in practice. The Bill also contains certain amendments which are of a more substantial nature.

## **2. OBJECTS OF BILL**

The objects of the respective clauses of the Bill are briefly explained below.

2.1 Clause 1 substitutes section 35B of the Insolvency Act, 1936 (Act No. 24 of 1936), which deals with agreements on informal markets. Section 35B allows for post-insolvency netting or set-off in respect of the obligations of parties arising from agreements which fall within the definition of "agreement" for purposes of section 35B(1). Netting involves the setting off of obligations under transactions, one obligation against another so that payments between the relevant parties are made on a net rather than a gross basis. A concern was raised that the provisions of section 35B fall short of expectations and that many of the international banks and securities firms operating in South Africa are still constrained in the taking on of larger exposures because of legal concerns regarding the ambit and effectiveness of the current section 35B. The proposed amendment will allow for agreements that provide for termination and netting of unperformed obligations.

2.2 The Bill seeks to amend section 4 of the Prevention of Counterfeiting of Currency Act, 1965 (Act No. 16 of 1965), by addressing the reverse onus that is placed on accused persons, to bring it in line with constitutional jurisprudence.

2.3 Section 60(2) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), provides for the powers a court has in bail proceedings. It is proposed that the section be amended to compel the court to take a pre-trial services report into account during bail proceedings, if such a report is available. The purpose of the pre-trial services report is to assist the court in making a decision regarding the release of a person on bail.

2.4 Subsection (3) was inserted in section 276 of the Criminal Procedure Act, 1977, by the General Law Amendment Act, 1992 (Act No. 139 of 1992), to confirm that correctional supervision may be imposed for statutory offences. Although the Supreme Court of Appeal has stated authoritatively that correctional supervision is a competent sentencing option in the case of statutory offences, there are examples where section 276 has been interpreted in the High Courts to exclude correctional supervision as a sentencing option where the relevant statutory provisions do not expressly provide for correctional supervision as a sentencing option. The amendment aims to establish legal certainty regarding correctional supervision as a sentencing option in respect of statutory offences.

2.5 The proposed amendments to the Attorneys Act, 1979 (Act No. 53 of 1979), will make it compulsory for all newly admitted attorneys, whether they are practising as a partner in an existing firm of attorneys or whether they are practising on their own account, to complete a legal practice management course. The aim is to reduce the number of claims against attorneys which arise as a result of a lack of management and administrative skills.

2.6 Section 7(8) of the Divorce Act, 1979 (Act No. 70 of 1979), allows a court when granting a decree of divorce to make an order that any part of a pension interest which is due to the other party, be paid to such person when the pension benefits accrue in respect of that member. This subsection presently empowers a court, when making such an order, to make an order that an endorsement is to be made in the records of that fund that that part of the pension interest concerned is so payable to that other party. The proposed amendment places a duty on the registrar of the divorce court to ensure that the

endorsement takes place as soon as possible since the Act is at present silent on this aspect and it has happened in practice at times that no endorsement has ever taken place, to the detriment of the other party.

2.7 Certain amendments to the Sheriff's Act, 1986 (Act No. 90 of 1986), are proposed to reflect the change in name of the Board for Sheriffs in order to accord the Board its national status.

2.8 It is proposed that a maintenance court, where circumstances permit, e.g. the availability of a Family Advocate, may request a Family Advocate to investigate and report on the welfare of any minor or dependent child affected by a maintenance inquiry. The proposed amendment extends the current role of the Family Advocate as provided for in the Mediation in Certain Divorce Matters Act, 1987 (Act No. 24 of 1987). The main role of the Family Advocate at present is to inquire into and report and make recommendations to the court on any matter concerning the welfare of children in divorce-related proceedings and, where requested by the court, to adduce evidence in court and to cross-examine witnesses. The amendment contained in this clause extends the current functions of Family Advocates to maintenance inquiries. In similar vein, an amendment to the Domestic Violence Act, 1998 (Act No. 116 of 1998), extends the present role of Family Advocates to domestic violence proceedings.

2.9 Section 16(2) of the Maintenance Act, 1998 (Act No. 99 of 1998), envisages a maintenance court making an order, in appropriate cases, against any person who is under a contractual obligation to pay money on a periodical basis to any person who has a maintenance obligation, to pay such money to the maintenance beneficiary on behalf of the person who has such maintenance obligation. The proposed amendment eliminates any uncertainty about whether pension funds can be ordered to make payments in terms of section 16(2) of the Maintenance Act, 1998.

2.10 Section 26 of the Maintenance Act, 1998, provides, among other things, for circumstances where a person against whom a maintenance order has been granted fails to make any particular payment in accordance with that maintenance order, that such order would be enforceable in respect of the arrear amount by execution. The amendments are necessary to ensure that these provisions are also applicable in respect of maintenance orders made by the High Courts and Divorce Courts.

2.11 Section 10 of the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000), provides that the South African Human Rights Commission must, within 18 months after the commencement of that section, compile, in each official language, a guide containing such information as may be required by a person who wishes to exercise any right contemplated in that Act. The time frames for public and private bodies to publish their manuals have been extended on two occasions, making it impossible for the SA Human Rights Commission to compile its guide within 18 months after the commencement of section 10. It is proposed that this section be amended to extend the period in which the SA Human Rights Commission must compile a guide.

2.12 The proposed amendment to the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No. 4 of 2000), provides that the publication of a notice by the Minister, altering the boundaries of an equality court does not affect any legal proceedings which have been instituted but not yet completed at the time of such publication.

2.13 The Department was requested to investigate the possibility of creating a mechanism in the Cross-Border Insolvency Act, 2000 (Act No. 42 of 2000), to regulate legal proceedings which are pending at the time when the Minister withdraws a notice in terms of which a State has been designated as a country for purposes of this Act. The proposed amendment gives effect to this request.

2.14 The proposed amendment to the Judges' Remuneration and Conditions of Employment Act, 2001 (Act No. 47 of 2001), addresses the application of section 16(4). Section 16(4) of this Act deals with the position of retired judges and surviving spouses of judges who retired under the provisions of the Judges' Pensions Act, 1978 (Act No. 90 of 1978). The pensions payable to these retired judges or to surviving spouses of such retired judges deteriorated over time to such an extent that these pensioners are in a very unfavourable position when compared to judges and surviving spouses of retired judges who fall under the scope of the 1989 legislation and the new Act. When attempting to



apply these provisions in practice, the National Treasury experienced difficulties since some of the surviving spouses would have received less than what they are currently receiving. The proposed amendment intends to address this difficulty.

### **3. DEPARTMENTS/BODIES/PERSONS CONSULTED**

The following persons were consulted in respect of particular amendments:

- The Banking Council of South Africa;
- The Law Society of South Africa;
- The Office of the Family Advocate; and
- The National Treasury.

### **4. IMPLICATIONS FOR PROVINCES**

None.

### **5. FINANCIAL IMPLICATIONS FOR STATE**

An additional amount of R4,4 million has been allocated by the Family Court Project for the current financial year for the Office of the Family Advocate to carry out substantive legal services in existing Family Court pilot sites, including those which will emanate from the extension of the role of the Family Advocate. It is estimated that the implementation of the proposed amendments relating to the payment of pensions will be approximately R2 million, considerably less than the R4 million originally set aside when the Judges' Remuneration and Conditions of Employment Act, 2002, was enacted.

### **6. PARLIAMENTARY PROCEDURE**

The State Law Advisers and the Department of Justice and Constitutional Development are of the opinion that the 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.