

REPUBLIC OF SOUTH AFRICA

**MAGISTRATES' COURTS
AMENDMENT BILL**

(As amended by the Portfolio Committee on Justice (National Assembly))

(MINISTER OF JUSTICE)

[B 33B—98]

REPUBLIEK VAN SUID-AFRIKA

**WYSIGINGSWETSONTWERP OP
LANDDROSHOWE**

(Soos gewysig deur die Portefeuljekomitee oor Justisie (Nasionale Vergadering))

(MINISTER VAN JUSTISIE)

[W 33B—98]

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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 Magistrates' Courts Act, 1944, so as to further regulate the summoning of assessors in civil and criminal proceedings; to further regulate the procedure in the event of death, incapacity, absence or recusal of an assessor; to empower the Minister of Justice to make regulations in connection with matters pertaining to assessors; and to provide for matters connected therewith.

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

Amendment of section 34 of Act 32 of 1944

1. The following section is hereby substituted for section 34 of the Magistrates' Courts Act, 1944 (hereinafter referred to as the principal Act): 5

“Assessors

34. In any action the court may, upon the application of either party, summon to its assistance one or two persons [**of skill and experience in the matter to which the action relates**] who are suitable and available and who may be willing to sit and act as assessors in an advisory capacity.” 10

Substitution of section 93ter of Act 32 of 1944, as substituted by section 10(a) of Act 91 of 1977 and amended by section 1(a) of Act 118 of 1991

2. The following section is hereby substituted for section 93ter of the principal Act:

“Magistrate to be assisted by assessors at certain criminal proceedings

93ter. (1) In this section ‘assessor’ means a person whose name is registered on a roll of assessors, in terms of a regulation referred to in section 93quat. 15

(2) A judicial officer shall be assisted by two assessors at the trial of an accused person in respect of any offence referred to in Schedule 2.

(3) The judicial officer presiding at— 20

(a) any application for bail by an accused person;

- (b) the trial of an accused person, other than a trial contemplated in subsection (2); or
 - (c) proceedings concerning the imposition of a sentence upon a convicted person,
- may, if he or she considers it expedient for the administration of justice—
- (i) in the case of proceedings referred to in paragraphs (a) and (c), summon one or two assessors; and
 - (ii) in the case of a trial referred to in paragraph (b), summon two assessors,
- to assist him or her at the proceedings concerned.
- (4) (a) In considering whether summoning assessors under subsection (3) would be expedient for the administration of justice, the judicial officer shall take into account—
- (i) the cultural and social environment of the accused person;
 - (ii) the educational background of the accused person;
 - (iii) the nature and the seriousness of the offence in respect of which the accused person is applying for bail, or stands accused of, or has been convicted;
 - (iv) the extent or probable extent of the punishment to which the accused person will be exposed upon conviction, or is exposed, as the case may be;
 - (v) the views, if any, of the accused person regarding the summoning of assessors in respect of the proceedings concerned;
 - (vi) any particular interest which the community in general, or any specific community, may have in the adjudication of the matter concerned; or
 - (vii) any other matter or circumstance which he or she may deem to be indicative of the desirability of summoning an assessor or assessors.
- (b) The judicial officer may question the accused person in relation to the matters referred to in paragraph (a), or obtain such information from his or her legal representative.
- (5) Every assessor shall, upon registration on the roll of assessors referred to in subsection (1), in writing take an oath or make an affirmation subscribed by him or her before the magistrate of the district concerned in the form set out below, namely—
- ‘I (full name) do hereby swear/solemnly affirm that whenever I may be called upon to perform the functions of an assessor in terms of section 93*ter* of the Magistrates’ Courts Act, 1944, I shall to the best of my ability make a considered finding or decision, or give a considered opinion, as the case may be, according to the evidence tendered in the matter.’
- (6) Whenever a judicial officer is assisted by assessors at a trial referred to in subsection (2) of (3)(b), the assessors shall only commence with their functions as assessors after the plea in the matter has been recorded.
- (7) An assessor shall be a member of the court, subject to the following provisions:
- (a) An assessor shall, at the consideration of a bail application or in determining an appropriate sentence, assist the judicial officer in an advisory capacity only.
 - (b) At any trial referred to in subsection (2) or (3)(b)—
 - (i) any matter of law arising for decision at the proceedings concerned; and
 - (ii) any question arising thereat as to whether a matter for decision is a matter of fact or a matter of law, shall be decided by the judicial officer.
 - (c) The judicial officer shall adjourn the proceedings regarding any matter or question referred to in paragraph (b) and shall sit alone for the hearing of such proceedings and the decision of such matter or question.
 - (d) Whenever the judicial officer makes a decision in terms of paragraph (b) the judicial officer shall give his or her reasons for that decision.

(e) Upon all matters of fact the finding or decision of the majority of the members of the court shall be the finding or decision of the court.

(8) Whenever a judicial officer is assisted by assessors at a trial referred to in subsection (2) or (3)(b), the judicial officer shall, after the conclusion of the arguments by the prosecutor and the accused person, but before judgment is passed in the matter, explain to the assessors any specific rule of evidence or any other matter that is relevant in respect of the evidence tendered to the court.

(9) The record of any proceedings where a judicial officer has been assisted by assessors—

(a) regarding the evidence adduced at the proceedings, shall include any explanation or instruction given to the assessors by the judicial officer in respect of any applicable rule of evidence or any other matter; and
(b) regarding the judgment, shall indicate clearly whether the findings in respect of each material aspect of the evidence—

- (i) are the unanimous findings of the members of the court; and
- (ii) in the event of any member of the court making a finding different to that of the other members, set out the reasons for such different finding.

(10) (a) A judicial officer who is assisted by an assessor may, on application by the prosecutor or the accused person, order the recusal of the assessor from the proceedings if the judicial officer is satisfied that—

- (i) the assessor has a personal interest in the proceedings concerned;
- (ii) there are reasonable grounds for believing that there is likely to be a conflict of interests as a result of the assessor's participation in the proceedings concerned; or
- (iii) there are reasonable grounds for believing that there is a likelihood of bias on the part of the assessor.

(b) An assessor may recuse himself or herself from the proceedings for the reasons contemplated in paragraph (a).

(c) The prosecutor and the accused person shall—

- (i) before the recusal of an assessor is ordered in terms of paragraph (a); or
- (ii) in so far as it is practicable, before the recusal of an assessor in terms of paragraph (b),

be given an opportunity to address arguments to the judicial officer on the desirability of such recusal.

(d) The assessor concerned shall be given an opportunity to respond to any arguments referred to in paragraph (c), and the judicial officer may put such questions regarding the matter to the assessor as he or she may deem fit.

(e) The judicial officer shall give reasons for an order referred to in paragraph (a).

(11) (a) If an assessor—

- (i) dies;
- (ii) in the opinion of the presiding officer becomes unable to act as an assessor;
- (iii) is for any reason absent; or
- (iv) has been ordered to recuse himself or herself or has recused himself or herself in terms of subsection (10),

at any stage before the completion of the proceedings concerned, the presiding judicial officer may, in the interests of justice and after due consideration of the arguments put forward by the accused person and the prosecutor—

- (aa) direct that the proceedings continue before the remaining member or members of the court;
- (bb) direct that the proceedings start afresh; or
- (cc) in the circumstances contemplated in subparagraph (iii), postpone the proceedings in order to obtain the assessor's presence:

Provided that if the accused person has legal representation and the prosecutor and the accused person consent thereto, the proceedings shall, in the circumstances contemplated in subparagraphs (i), (ii) or (iv), continue before the remaining member or members of the court.

(b) If, at proceedings which are continued in terms of this subsection, the judicial officer is assisted by the remaining assessor, the finding or decision of the judicial officer shall, in respect of any matter where there is a difference of opinion between the judicial officer and the assessor, be the finding or decision of the court.

(c) The judicial officer shall give reasons for any direction referred to in paragraph (a), and for any finding or decision referred to in paragraph (b).

(12) (a) A judicial officer assisted by assessors at a trial referred to in subsection (2) or (3)(b), where an accused person is convicted and sentenced, shall—

- (i) if the accused person is not assisted by a legal adviser; and
- (ii) if the judicial officer is of the opinion that the assessors concerned have clearly made an incorrect finding in a material respect which probably led to a wrongful conviction of the accused person,

record the reasons for his or her opinion and transmit them, together with the record of the proceedings, to the registrar of the High Court having jurisdiction, and such registrar shall, as soon as is practicable, submit the said reasons and the record to a judge in chambers for review, who shall have the same powers in respect of such proceedings as if the record thereof had been submitted to him or her in terms of section 303 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977).

(b) When a judicial officer acts in terms of paragraph (a), he or she shall inform the accused person accordingly and, if the accused person is in custody, the provisions of the Criminal Procedure Act, 1977, relating to the granting of bail pending an appeal shall be applicable.

(c) The provisions of paragraph (a)—

- (i) shall not be applicable in respect of a matter which is subject to review in terms of section 302 of the Criminal Procedure Act, 1977; and
- (ii) shall be suspended in respect of an accused person who has appealed against a conviction or sentence and has not abandoned the appeal, and shall cease to apply with reference to such an accused person when judgment on appeal is given.

Insertion of section 93quat in Act 32 of 1944

3. The following section is hereby inserted in the principal Act:

“Regulations pertaining to assessors

93quat. (1) The Minister has the power, from time to time, to determine the criteria for the qualification of persons to serve as assessors in terms of section 93ter, including the criteria for the disqualification of persons to serve as such assessors.

(2) The Minister may make regulations regarding—

- (a) the procedure to be followed at, and criteria to be applied for, the designation and registration of persons from the community, who are suitable and available to serve as assessors in terms of section 93ter, on a roll of assessors for each district and regional division;
- (b) the method to be followed in respect of the allocation of assessors in respect of proceedings referred to in section 93ter;
- (c) a code of conduct for such assessors, and mechanisms for the enforcement of the code of conduct, including the liability of an assessor if any provision of the code of conduct is contravened by him or her;

- (d) the establishment of a mechanism to deal with any grievance or complaint by or against an assessor;
 - (e) training of assessors;
 - (f) the payment of allowances to assessors;
 - (g) any other matter which the Minister deems expedient to prescribe in order to regulate the service of assessors in the courts. 5
- (3) Any regulation made under this section which may result in expenditure for the State, shall be made in consultation with the Minister of Finance.
- (4) A regulation made under subsection (1)(c) may provide that any person who contravenes a provision thereof or fails to comply therewith shall be guilty of an offence and on conviction be liable to a fine or to imprisonment for a period not exceeding three months. 10
- (5) Any regulation made under this section shall be tabled in Parliament before publication thereof in the *Gazette*.”. 15

Insertion of Schedule 2 in Act 32 of 1944

4. The following Schedule is hereby inserted in the principal Act, the existing Schedule becoming Schedule 1:

“Schedule 2

Offences in respect of which judicial officers must be assisted by two assessors in terms of section 93ter(2): 20

- 1. Murder.
- 2. Rape.
- 3. Robbery, where serious bodily harm has been inflicted on the victim.
- 4. Assault, where serious bodily harm has been inflicted on the victim.
- 5. Indecent assault.” 25

Transitional provision

5. Proceedings in which an assessor or assessors were summoned in terms of section 93ter of the principal Act, and which are pending at the commencement of section 2 of this Act, shall be continued and concluded as if this Act had not been passed: Provided that the provisions of section 93ter (8) to (12) of the principal Act, as amended by this Act, shall at all relevant times be applicable in respect of such pending proceedings. 30

Short title

6. (1) This Act is called the Magistrates’ Courts Amendment Act, 1998, and shall take effect on a date fixed by the President by proclamation in the *Gazette*. 35
- (2) Different dates may be so fixed in respect of—
- (a) different items contained in Schedule 2 to the principal Act; and
 - (b) different areas in the Republic.

MEMORANDUM ON THE OBJECTS OF THE MAGISTRATES' COURTS AMENDMENT BILL

PART 1

OBJECTS AND EXPLANATION

1.1 The objects of the Magistrates' Courts Amendment Bill are to extend community participation in the trial of, especially, criminal matters in the magistrates' courts, through increased involvement of lay assessors, so as to address certain practical concerns regarding such participation.

1.2 In the Department of Justice's *National Strategy for Transforming the Administration of Justice and State Legal Affairs* (Justice Vision 2000) a strong emphasis is placed on community participation in the workings of the justice system. It is important to ensure that the administration of justice stays in touch with actual community experiences, and to reduce the risk of formal justice losing touch with reality.

PART 2

CLAUSE BY CLAUSE ANALYSIS

2.1 Clause 1 seeks to amend section 34 of the Magistrate's Courts Act, 1944, by removing the requirement that the assessor should have skill and experience in the matter to which he or she has been summoned to assist.

2.2 Clause 2 seeks to amend section 93*ter* of the Act by providing that assessors may be summoned to assist the presiding judicial officer at the hearing of any matter i.e. this includes bail applications, determination of sentences, etc.

It further provides for new principles regarding the continuation of proceedings in the absence of assessors.

2.3 Clause 3 prescribes regulations pertaining to assessors.

2.4 Clause 4 provides for the insertion of a schedule.

2.5 Clause 5 makes provision for a transitional provision.

2.6 Clause 6 provides for a short title.

PART 3

PARTIES CONSULTED

3.1 During 1995 the Minister of Justice appointed an Assessors Co-ordinating Committee to oversee pilot projects aimed at encouraging the use of lay assessors in criminal matters in the magistrates' courts.

3.2 This Committee concentrated its efforts on establishing community structures in order to identify potential assessors and to liaise with the magistrates regarding their appointments, duty rosters and related matters. An important function of the Committee was to propose draft legislation aimed at the expansion of the lay assessor system. The Committee consulted extensively with various role players and all inputs were evaluated and submitted to the Department of Justice. Thereupon a draft Bill was prepared which was further refined in accordance with additional representations received from, among others, regional court magistrates. It is envisaged that further comments on the Bill will also be invited by the Portfolio Committee on Justice (National Assembly).

PART 4

PARLIAMENTARY PROCEDURE

In the opinion of the Department and State Law Advisers this Bill should be dealt with in terms of section 75 of the Constitution since it does not contain any provision to which the procedure established by section 74 or 76 applies.

