

REPUBLIC OF SOUTH AFRICA

EDUCATION LAWS AMENDMENT BILL

(As introduced in the National Council of Provinces as a section 76 Bill; explanatory summary of Bill published in Government Gazette No 22440 of 2 July 2001) (The English text is the official text of the Bill)

(SELECT COMMITTEE ON EDUCATION AND RECREATION ON REQUEST OF MINISTER OF EDUCATION)

[B 55—2001]

ISBN 0 621 31014 X

No. of copies printed 1 800

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 South African Schools Act, 1996, so as to provide for the representative council of learners to be the only recognised learner body at a school; to make further provisions regarding the failure of a governing body to perform its functions; to prohibit public schools from raising money by means of loans or overdrafts or from paying moneys into a trust; to effect textual corrections; to amend the Employment of Educators Act, 1998, so as to effect textual corrections to existing provisions; to amend the Further Education and Training Act, 1998, so as to make further provisions regarding loans and overdrafts; to effect textual corrections to existing provisions; and to provide for matters connected therewith.

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

Amendment of section 11 of Act 84 of 1996, as amended by section 3 of Act 100 of 1997

1. Section 11 of the South African Schools Act, 1996 (hereinafter referred to as the principal Act), is amended by— 5

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

“(1) A representative council of *learners* at the *school* must be established at every *public school* enrolling *learners* in the eighth *grade* or higher, and such council is the only recognised and legitimate *learner* 10
body at the school.”; and

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

“(2) A Member of the Executive Council [**may**] must, by notice in the Provincial Gazette, determine [**guidelines**] the functions and the
procedures for the establishment[,] and election [**and functions**] of 15
representative councils of *learners*.”.

Substitution of section 15 of Act 84 of 1996

2. The following section is substituted for section 15 of the principal Act:

“Status of public schools

15. Every *public school* is a juristic person, with legal capacity to perform [its] only such functions and obligations and exercise only such rights as are provided for in terms of this Act.

Amendment of section 20 of Act 84 of 1996

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3. Section 20 of the principal Act is amended by the substitution for paragraph (i) of subsection (1) of the following paragraph:

- “(i) recommend to the *Head of Department* the appointment of *educators* at the *school*, subject to the **[Educators Employment Act, 1994 (Proclamation No. 138 of 1994)]** Employment of *Educators* Act, 1998 (Act No. 76 of 1998), and the Labour Relations Act, 1995 (Act No. 66 of 1995);”.

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Amendment of section 25 of Act 84 of 1996

4. Section 25 of the principal Act is amended by—

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

“(1) If a *governing body* has ceased altogether to perform [its] functions allocated to it in terms of *this Act* or has failed to perform one or more of such functions, the *Head of Department* must appoint sufficient persons to perform [those] all such functions or one or more of such functions, as the case may be, for a period not exceeding three months.”;

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- (b) the substitution for subsection (3) of the following subsection:

“(3) If a *governing body* has ceased altogether to perform its functions, **[The]** the *Head of Department* must ensure that a *governing body* is elected in terms of *this Act* within a year after the appointment of persons contemplated in subsection (1).”; and

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- (c) the addition of the following subsection:

“(4) If a *governing body* fails to perform any of its functions, the persons contemplated in subsection (1) must build the necessary capacity within the period of their appointment to ensure that the *governing body* performs its functions.”.

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Amendment of section 36 of Act 84 of 1996

5. Section 36 of the principal Act is amended by the numbering of the existing section as subsection (1) and by the addition of the following subsections:

- “(2) Despite subsection (1), a *governing body* may not enter into any loan or overdraft agreement so as to supplement the *school* fund, without the written approval of the *Member of the Executive Council*.

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- (3) If a person lends money or grants an overdraft to a *public school* without the written approval of the *Member of the Executive Council*, the State and the *public school* will not be bound by the contract of lending money or an overdraft agreement.”.

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Amendment of section 37 of Act 84 of 1996

6. Section 37 of the principal Act is amended by—

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

“(3) The *governing body* of a *public school* must open and maintain **[a]** one banking account, but a *governing body* of a *public school* may, with the approval of the *Member of the Executive Council*, invest surplus money in another account.”;

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- (b) the insertion after subsection (6) of the following subsection:

“(7) (a) Money from the *school* fund of a *public school* may not be paid into a trust or be used to establish a trust.

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(b) If a trust was established from a *school* fund of a *public school* or if such money was paid into a trust prior to 1 January 2002, such trust or payment is invalid and the money must be paid back into the *school* fund.

(c) A governing body of a public school may not collect any money or contributions from parents to establish or fund a trust, and if any money or contributions of parents were paid into a trust prior to 1 January 2002, the trust must pay such money or contributions into the school fund.”.

Amendment of section 38 of Act 84 of 1996

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7. Section 38 of the principal Act is amended by the substitution for subsection (1) of the following subsection:

“(1) (a) *A governing body of a public school must, each year, prepare a budget as prescribed by the Member of the Executive Council and such budget must be published in a Provincial Gazette.*

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(b) *The budget must show the estimated income and expenditure of the school for the following financial year.”.*

Amendment of item 2 of Schedule 2 to Act 76 of 1998

8. Item 2 of Schedule 2 to the Employment of Educators Act, 1998 (hereinafter referred to as the Educators Act), is amended by the substitution for subparagraph (iv) of paragraph (d) of the following subparagraph:

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“(iv) have the right to appeal against **[any decision]** a finding or sanction contemplated in section 25(2);”.

Amendment of item 4 of Schedule 2 to Act 76 of 1998

9. Item 4 of Schedule 2 to the Educators Act is amended by—

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(a) the substitution for paragraph (f) of subitem (4) of the following paragraph:

“(f) If[,] during the six-month period[,] the educator is subject to disciplinary action, the written warning and the written objection or additional information contemplated in paragraph (g), may be taken into account in deciding on an appropriate sanction;”;

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(b) the substitution for paragraph (f) of subitem (5) of the following paragraph:

“(f) If[,] during the six-month period[,] the educator is subject to disciplinary action, the final written warning and the written objection or additional information contemplated in paragraph (g), may be taken into account in deciding on an appropriate sanction;”.

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Amendment of item 5 of Schedule 2 to Act 76 of 1998

10. Item 5 of Schedule 2 to the Educators Act is amended by the substitution for paragraph (e) of subitem (2) of the following paragraph:

“(e) information on the rights of the educator to representation by a legal representative, if the **[employer]** presiding officer so directs; and”.

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Substitution of Forms A, B, C and D of Schedule 2 to Act 76 of 1998

11. Schedule 2 to the Educators Act is amended by:

(a) the substitution for Form A of the following Form:

“Form A

WRITTEN WARNING

40

[DATE]

[NAME OF EMPLOYEE]

[PERSAL NO.]

[PERSONAL DETAILS OF THE EMPLOYEE]

This is a written warning in terms of the disciplinary procedure. Should you engage in further misconduct, this written warning may be taken into account in determining a more serious sanction.

45

The written warning will be placed in your personal file and will remain valid for a period of six months from the date of the written warning.

If you object to the warning or wish to furnish additional information, you may lodge a written objection or additional information which will be filed together with this warning.

The nature of the misconduct is:

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SIGNATURE OF REPRESENTATIVE OF EMPLOYER
DATE

SIGNATURE OF EMPLOYEE
DATE

SIGNATURE OF WITNESS (if applicable)
DATE”;

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(b) the substitution for Form B of the following Form:

“Form B

FINAL WRITTEN WARNING

[DATE]

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[NAME OF EMPLOYEE]

[PERSAL NO.]

[PERSONAL DETAILS OF THE EMPLOYEE]

This is a final written warning in terms of the disciplinary procedure. Should you engage in further **[transgressions]** misconduct it could lead to formal misconduct proceedings being instituted against you.

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This final written warning will be placed in your personal file and will remain valid for a period of six months from the date of the written warning.

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Should you wish to do so, you may lodge a written objection to this final warning, or provide additional information which will be filed together with this final warning.

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The nature of the misconduct is:

SIGNATURE OF REPRESENTATIVE OF EMPLOYER
DATE

35

SIGNATURE OF EMPLOYEE
DATE

SIGNATURE OF WITNESS (if applicable)
DATE”;

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(c) the substitution for Form C of the following Form:

“Form C

NOTICE OF DISCIPLINARY MEETING

[DATE]

45

[NAME OF EMPLOYEE]

[PERSAL NO.]

[PERSONAL DETAILS OF THE EMPLOYEE]

You are hereby given notice to attend a disciplinary hearing in terms of item 6 of the Disciplinary Code.

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The alleged misconduct **[and the available evidence]** is based on the following evidence:

[A DETAILED DESCRIPTION OF THE ALLEGED MISCONDUCT MAY BE ATTACHED.]

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The hearing will be held at [PLACE] on [DATE] at [TIME].
If you do not attend and cannot provide reasonable grounds for failing to attend, the hearing will be held in your absence.

A fellow employee or a representative of a recognised union may represent you at the hearing. You may also be represented by a legal representative if the presiding officer so directs. 5

You may give evidence at the hearing and adduce evidence in the form of documents or through witnesses. You are entitled to question any witness called by the employer. 10

If the presiding officer finds that you are guilty of misconduct, you may present any relevant circumstances which you wish to be taken into account by the presiding officer in determining the sanction. 15

SIGNATURE OF REPRESENTATIVE OF EMPLOYER
DATE

ACKNOWLEDGMENT OF RECEIPT BY EMPLOYEE
DATE 20

SIGNATURE OF WITNESS (if applicable)
DATE”; and
(d) the substitution for Form D of the following Form: 25

“Form D

SUMMONS TO APPEAR AT DISCIPLINARY HEARING

DATE:

TO:
(Name and residential address of person summoned) 30

You are hereby summoned to appear personally on the day of..... 20 at (time) at (place) before the presiding officer of a disciplinary hearing in terms of Schedule 2 to the Employment of Educators Act, 1998 (Act No. 76 of 1998), for the purpose of giving evidence regarding the following misconduct: 35

and to submit the following book, document or object in your possession, custody or control, which may have a bearing on the matter;

(specify the book, document or object) 40

.....
SIGNATURE OF REPRESENTATIVE [**OR**] OF EMPLOYER”.

Amendment of section 8 of Act 98 of 1998

12. Section 8 of the Further Education and Training Act, 1998 (hereinafter referred to as the Training Act), is amended by the deletion of subsection (5). 45

Amendment of section 20 of Act 98 of 1998

13. Section 20 of the Training Act, is amended by the numbering of the existing section as subsection (1) and by the addition of the following subsection:

“(2) If a person lends money or grants an overdraft to a public further education and training institution without the approval of the Member of the Executive Council, the State and the institution is not bound by the contract of lending money or an overdraft agreement.” 50

Amendment of section 49 of Act 98 of 1998

14. Section 49 of the Training Act is amended by the addition of the following subsections:

“(4) Institutions contemplated in subsection (1) may not raise money by means of loans or overdrafts without the approval of the Member of the Executive Council.” 5

(5) If a person lends money or grants an overdraft to an institution contemplated in subsection (1), without the approval of the Member of the Executive Council, the State and the institution is not bound by the contract of lending money or an overdraft agreement.” 10

Short title

15. This Act is called the Education Laws Amendment Act, 2001.

EXPLANATORY MEMORANDUM ON THE EDUCATION LAWS AMENDMENT BILL, 2001

1. INTRODUCTION

The Bill provides for the amendment of the South African Schools Act, 1996, the Employment of Educators Act, 1998, and the Further Education and Training Act, 1998.

2. BACKGROUND

The Acts are amended so as to make the necessary technical adjustments and to close loopholes apparent in the Acts.

3. DISCUSSION

3.1 The South African Schools Act, 1996

3.1.1 Section 11 is amended so as to make the representative council of learners the only recognised and legitimate learner body at public schools. The word “guidelines” is omitted because it makes room for alternatives. The amendment gives the Member of the Executive Council concerned the authority to determine the function and the procedures for the establishment of the council and the election of members to the council. This will provide a uniform approach in all public schools in a province. It will also ensure that the council in a school takes its rightful place in the school system.

3.1.2 Section 15 is amended to bring legal certainty by ensuring that the governing body acting on behalf of a public school may only perform the specific functions as prescribed by the Act. The Act is based on the principle of partnership between the State and the school community. However, the approach of the Act is to specify the functions of the governing body of the school and all other functions are to be performed by the provincial education departments. This amendment seeks to bring legal certainty to the role of the governing body in the school system.

3.1.3 Section 20 is amended for technical adjustment. It refers to the Educators Employment Act, 1994, an Act which has been repealed by the Employment of Educators Act, 1998.

3.1.4 Section 25 has been amended so as to allow the intervention of the Head of Department not only in cases where the governing body is unable to perform all its functions, but also in cases where it is unable to perform one or more of its functions. Furthermore, persons who are appointed to perform such functions of the governing body are also required to build the necessary capacity to ensure that the governing body is able to perform its functions.

3.1.5 Section 36 is amended so as to prohibit the governing body from applying for overdrafts or from raising money by means of loans without obtaining prior written approval from the Member of the Executive Council. The intention of the Public Finance Management Act, 1999, is that all statutory bodies must perform their functions within their budgets and that there can be no deficit balances in such budgets. Loans or overdrafts must be limited as far as possible. Despite the fact that public schools are not listed as public entities in that Act, the principles contained in the Act are sound and must apply to public schools. It is further to be noted that if a public school cannot comply with its obligations or liabilities, the State will be liable to compensate claims against the public school (see section 60 of the South African Schools Act).

3.1.6 Section 37 is amended to make it clear that a public school should maintain one bank account. A tendency has developed where public schools have various accounts, some of which are in the name of structures without any legal personality. This has the potential of stashing money away, an act which may mislead parents about the real financial position of the school when compulsory school fees are determined. Section 37 is further amended so as to prohibit the governing body from establishing a trust from school funds or from paying school fees into a trust. The intention of the South African Schools Act, 1996, by establishing a public school as a juristic entity with a protected school fund, was to create an entity similar to that of a trust. A tendency has developed where public schools establish trusts, which falls outside the ambit of the South African Schools Act, 1996. This has the potential of diverting away potential compulsory school fees into that trust. A trust deed can be amended by the trustees at any stage, including the beneficiary. There is no control by the State on any of such trusts as the trustees are

appointed by the persons or bodies who established the trust. Therefore, such trust may lead to abuse.

3.1.7 Section 38 is amended so as to omit the word “guidelines” because governing bodies may follow the guidelines at their own discretion which may not always be consistent with the Act. It is crucial that the budget of a public school must conform to the standards set by the State to all public schools. This will ensure that budgets reflect specific budget items which will be in the format which all parents can understand when approving the budget of the school. It will also ensure that all the income and the sources of income of the school are reflected in the budget. The budget will indicate the number of posts and the way they are to be funded as required by section 20(9) of the South African Schools Act. This amendment seeks to ensure that there is uniformity of budget standards in a province.

3.2 The Employment of Educators Act, 1998

3.2.1 Item 2 of Schedule 2 is amended because an educator does not have the right to appeal against any decision but only to a finding or sanction made by a presiding officer in a disciplinary hearing. There is no right for appeal against any finding and sanction in the informal disciplinary process. This amendment addresses the ambiguity apparent in the current legislation.

3.2.2 Item 4 of Schedule 2 is amended so as to allow the presiding officer to consider a written objection or additional information by the educator to the written warning or final written warning by the supervisor of the educator.

3.2.3 Item 5 of Schedule 2 is amended to make a technical adjustment because it is the presiding officer who must decide whether or not the accused educator should have a legal representative and not the employer. This is consistent with the provisions of the Promotion of Administrative Justice Act, 2000.

3.2.4 Forms A to D have been amended so as to indicate the authority that must sign the forms.

3.3 The Further Education and Training Act, 1998

3.3.1 Section 20 is amended so as to prohibit public institutions from raising overdrafts or loans without the approval of the Member of the Executive Council. If a person grants such an overdraft or loan without the said approval, the institution or State will not be bound by the agreement.

3.3.2 Section 49 is amended so as to prohibit existing public institutions such as technical colleges from raising money by means of loans or overdrafts without the approval of the Member of the Executive Council. The same reasons which are mentioned in paragraph (3.1.5) apply to the further education and training institutions.

4. FINANCIAL IMPLICATIONS FOR STATE

None.

5. PARLIAMENTARY PROCEDURE

The Department of Education and the State Law Advisers are of the opinion that the procedures contemplated in sections 73 and 76 of the Constitution should be followed since this Bill falls within the ambit of Schedule 4 of the Constitution.

Printed by Creda Communications

ISBN 0 621 31014 X