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OFFICE OF THE PRESIDENT

No. 1545.

27 November 1998

It is hereby notified that the President has assented to the following Act which is hereby published for general information:—

No. 113 of 1998: Public Protector Amendment Act, 1998.

KANTOOR VAN DIE PRESIDENT

No. 1545.

27 November 1998

Hierby word bekend gemaak dat die President sy goedkeuring geheg het aan die onderstaande Wet wat hierby ter algemene inligting gepubliseer word:—

No. 113 van 1998: Wysigingswet op die Openbare Beskermer, 1998.

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.

*(English text signed by the President.)
(Assented to 19 November 1998.)*

ACT

To amend the Public Protector Act, 1994, so as to bring it into line with the Constitution of the Republic of South Africa, 1996; and to provide for matters connected therewith.

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

Substitution of long title of Act 23 of 1994

1. The following long title is hereby substituted for the long title of the Public Protector Act, 1994 (hereinafter referred to as the principal Act):

“To provide for matters incidental to the office of the Public Protector as contemplated in the Constitution of the Republic of South Africa, [1993] 1996; and to provide for matters connected therewith.”

Substitution of Preamble of Act 23 of 1994

2. The following Preamble is hereby substituted for the Preamble of the principal Act:

“Preamble

WHEREAS sections [110 to 114] 181 to 183 of the Constitution of the Republic of South Africa, [1993 (Act 200 of 1993)] 1996 (Act No. 108 of 1996), provide for the establishment of the office of Public Protector [in order] and that the Public Protector has the power, as regulated by national legislation, to investigate [matters and to protect the public against matters such as maladministration in connection with the affairs of government, improper conduct by a person performing a public function, improper acts with respect to public money, improper or unlawful enrichment of a person performing a public function and an act or omission by a person performing a public function resulting in improper prejudice to another person] any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or

suspected to be improper or to have resulted in any impropriety or prejudice, to report on that conduct and to take appropriate remedial action, in order to strengthen and support constitutional democracy in the Republic:

AND WHEREAS sections 193 and 194 of the Constitution provide for a mechanism for the appointment and removal of the Public Protector;

AND WHEREAS the Constitution envisages further legislation to provide for certain ancillary matters pertaining to the office of Public Protector [, including the remuneration and conditions of employment, immunities and privileges, powers and functions and staff of the Public Protector];”.

Amendment of section 1 of Act 23 of 1994, as amended by section 35 of Act 47 of 1997

3. Section 1 of the principal Act is hereby amended—

- (a) by the insertion of the following definition after the definition of “committee”: “ ‘Constitution’ means the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996);”;
- (b) by the substitution for the definition of “investigation” of the following definition:
“ ‘investigation’ means an investigation referred to in section 7, including any preliminary investigation related thereto;”;
- (c) by the deletion of the definition of “joint committee”;
- (d) by the insertion of the following definition after the definition of “member of the office of the Public Protector”:
“ ‘Minister’ means the Minister of Justice;”;
- (e) by the deletion of the definition of “new Constitution”;
- (f) by the deletion of the definition of “Provincial Public Protector”; and
- (g) by the substitution for the definition of “Public Protector” of the following definition:
“ ‘Public Protector’ means any person appointed as such in terms of [section 110(2) of the Constitution] section 1A;”.

Insertion of section 1A in Act 23 of 1994

4. The following section is hereby inserted in the principal Act after section 1:

“Establishment and appointment

1A. (1) There shall be a Public Protector for the Republic.

(2) The President shall, whenever it becomes necessary, appoint a Public Protector in accordance with the provisions of section 193 of the Constitution.

(3) The Public Protector shall be a South African citizen who is a fit and proper person to hold such office, and who—

- (a) is a Judge of a High Court; or
- (b) is qualified to be admitted as an advocate or an attorney and has, for a cumulative period of at least 10 years after having so qualified—
 - (i) practised as an advocate or an attorney; or
 - (ii) lectured in law at a university; or
- (c) has specialised knowledge of or experience, for a period of at least 10 years, in the administration of justice, public administration or public finance.

(4) The Public Protector shall not perform remunerative work outside his or her official duties.”.

Amendment of section 2 of Act 23 of 1994**5. Section 2 of the principal Act is hereby amended—****(a) by the substitution for subsection (1) of the following subsection:**

“(1) **[Parliament]** The National Assembly shall, in

accordance with the rules and orders of **[Parliament]** the National Assembly, appoint a committee for the purpose of considering matters referred to it in terms of this Act: Provided that the composition of such committee shall be in accordance with the provisions of section 193 (5)(a) of the Constitution.”;

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

“(2) The remuneration and other terms and conditions of employment of the Public Protector shall [subject to section 110(6) of the Constitution,] from time to time be determined by **[Parliament]** the National Assembly upon the advice of the committee: Provided that such remuneration—

(a) shall not be less than that of a judge of [the Supreme Court of South Africa] a High Court; and

(b) shall not be reduced, nor shall the terms and conditions of employment be adversely altered, during his or her term of office.”;

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

“(3) **[Parliament]** The National Assembly or, if Parliament is not in session, the **[joint]** committee may allow a Public Protector to vacate his or her office—

(a) on account of continued ill-health; or

(b) at his or her request: Provided that such request shall be addressed to [Parliament] the National Assembly or the [joint] committee, as the case may be, at least three calendar months prior to the date on which he or she wishes to vacate such office, unless [Parliament] the National Assembly or the [joint] committee, as the case may be, allows a shorter period in a specific case.”;

(d) by the substitution for subsection (4) of the following subsection:

“(4) If the **[joint]** committee allows a Public Protector to vacate his or her office in terms of subsection (3), the chairperson of the **[joint]** committee shall communicate [the vacation of office] that fact by message to **[Parliament]** the National Assembly: Provided that any decision taken by the committee in terms of this subsection must be ratified by the National Assembly.”;

(e) by the substitution for subsection (5) of the following subsection:

“(5) The Public Protector may, at any time, approach the committee with regard to any matter [in respect of which Parliament has functions] pertaining to the office of the Public Protector.”.

Amendment of section 3 of Act 23 of 1994, as amended by section 35 of Act 47 of 1997**6. Section 3 of the principal Act is hereby amended—****(a) by the substitution for subsection (2) of the following subsection:**

“(2) The Minister shall, after consultation with the Public Protector, appoint one or more persons as Deputy Public Protectors.”;

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

“(3) A Deputy Public Protector and a person referred to in subsection (1)(c) shall have such powers as the Public Protector may delegate to him or her.”;

(c) by the substitution for subsection (5) of the following subsection:

“(5) If a vacancy occurs in the office of the Deputy Public Protector the **[President] Minister** may, subject to the provisions of this section, appoint another person to that office.”;

(d) by the deletion of subsections (6) and (7);**(e) by the substitution for subsection (8) of the following subsection:**

“(8) The remuneration and other terms and conditions of employment of a Deputy Public Protector shall from time to time be determined by **[Parliament upon the advice of the committee]** the Minister, after consultation with the Public Protector”:

- (f) by the substitution for subsection (10) of the following subsection: 5

“(10) The Minister or the Public Protector, as the case may be, shall exercise the powers referred to in subsections (1), (8) and (9), in consultation with the Minister of Finance.”;

- (g) by the substitution for paragraphs (a) and (b) of subsection (11) of the following paragraphs: 10

“(a) A document setting out the remuneration, allowances and other conditions of employment determined by the Minister or the Public Protector, as the case may be, in terms of [subsection (9)] this section, shall be tabled in [Parliament] the National Assembly within 14 days after such determination. 15

(b) If [Parliament] the National Assembly disapproves of any determination such determination shall cease to be of force to the extent to which it is so disapproved.”; and

- (h) by the substitution for subsection (12) of the following subsection: 20

“(12) The Public Protector may, in the performance of the functions contemplated in subsection (1)(b) and (c), at his or her request, be assisted by officers in the Public Service seconded to the service of the Public Protector in terms of any law regulating such secondment.”.

Amendment of section 5 of Act 23 of 1994

7. Section 5 of the principal Act is hereby amended by the substitution for subsection (2) of the following subsection: 25

“(2) The State Liability Act, 1957 (Act No. 20 of 1957), shall apply *[mutatis mutandis]* with the necessary changes in respect of the office of the Public Protector, and in such application a reference in that Act to ‘the Minister of the department concerned’ shall be construed as a reference to the Public Protector in his or her official capacity.”. 30

Amendment of section 6 of Act 23 of 1994

8. Section 6 of the principal Act is hereby amended—

- (a) by the substitution for paragraph (b) of subsection (3) of the following paragraph: 35

“(b) prejudiced by [an act or omission] conduct referred to in [subsection (4)(d) or section 112(1)(a)(v) of the Constitution] subsections (4) and (5) and has not taken all reasonable steps to exhaust his or her legal remedies in connection with such matter.”; and 40

- (b) by the substitution for subsections (4) and (5) of the following subsections:

(4) The Public Protector shall, be competent—

- (a) to investigate, on his or her own initiative or on receipt of a complaint, any alleged— 45
- (i) maladministration in connection with the affairs of government at any level;
 - (ii) abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a public function; 50
 - (iii) improper or dishonest act, or omission or corruption, with respect to public money;
 - (iv) improper or unlawful enrichment, or receipt of any improper advantage, or promise of such enrichment or advantage, by a person as a result of an act or omission in the public administration or in connection with the affairs of government at any level or of a person performing a public function; or 55
 - (v) act or omission by a person in the employ of government at any

- level, or a person performing a public function, which results in unlawful or improper prejudice to any other person;
- (b) to endeavour, in his or her sole discretion, to resolve any dispute or rectify any act or omission by—
- (i) mediation, conciliation or negotiation;
 - (ii) advising, where necessary, any complainant regarding appropriate remedies; or
 - (iii) any other means that may be expedient in the circumstances;
- (c) at a time prior to, during or after an investigation—
- (i) if he or she is of the opinion that the facts disclose the commission of an offence by any person, to bring the matter to the notice of the relevant authority charged with prosecutions; or
 - (ii) if he or she deems it advisable, to refer any matter which has a bearing on an investigation, to the appropriate public body or authority affected by it or to make an appropriate recommendation regarding the redress of the prejudice resulting therefrom or make any other appropriate recommendation he or she deems expedient to the affected public body or authority.
- (5) In addition to the powers referred to in subsection (4), the Public Protector shall on his or her own initiative or on receipt of a complaint be competent to investigate any alleged—
- (a) maladministration in connection with the affairs of any institution in which the State is the majority or controlling shareholder or of any public entity as defined in section 1 of the Reporting by Public Entities Act, 1992 (Act No. 93 of 1992);
 - (b) abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a function connected with his or her employment by an institution or entity contemplated in paragraph (a);
 - (c) improper or unlawful enrichment or receipt of any improper advantage, or promise of such enrichment or advantage, by a person as a result of an act or omission in connection with the affairs of an institution or entity contemplated in paragraph (a); or
 - (d) act or omission by a person in the employ of an institution or entity contemplated in paragraph (a), which results in unlawful or improper prejudice to any other person.
- (6) Nothing in subsections (4) and (5) shall be construed as empowering the Public Protector to investigate the performance of judicial functions by any court of law.
- (7) The Public Protector shall be competent to investigate, on his or her own initiative or on receipt of a complaint, any alleged attempt to do anything which he or she may investigate under subsections (4) or (5).
- (8) The Public Protector or any member of his or her staff shall be competent but not compellable to answer questions in any proceedings in or before a court of law or any body or institution established by or under any law, in connection with any information relating to the investigation which in the course of his or her investigation has come to his or her knowledge.
- (9) Except where the Public Protector in special circumstances, within his or her discretion, so permits, a complaint or matter referred to the Public Protector shall not be entertained unless it is reported to the Public Protector within two years from the occurrence of the incident or matter concerned.”.

Amendment of section 7 of Act 23 of 1994**9. Section 7 of the principal Act is hereby amended—**

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

“(1) **[The procedure to be followed in conducting an investigation shall be determined by the Public Protector with due regard to the circumstances of each case, and the Public Protector may direct that any category of persons or all persons whose presence is not desirable, shall not be present at the proceedings during the investigation or any part thereof.]** 5

(a) The Public Protector shall have the power, on his or her own initiative or on receipt of a complaint or an allegation or on the ground of information that has come to his or her knowledge and which points to conduct such as referred to in section 6(4) or (5) of this Act, to conduct a preliminary investigation for the purpose of determining the merits of the complaint, allegation or information and the manner in which the matter concerned should be dealt with. 10 15

(b)(i) The format and the procedure to be followed in conducting any investigation shall be determined by the Public Protector with due regard to the circumstances of each case.

(ii) The Public Protector may direct that any category of persons or all persons whose presence is not desirable, shall not be present at any proceedings pertaining to any investigation or part thereof.”; 20

(b) by the substitution for paragraph (b) of subsection (3) of the following paragraph:

“(b)(i) The Public Protector may designate any person to conduct an investigation or any part thereof on his or her behalf and to report to him or her and for that purpose such a person shall have such powers as the Public Protector may [assign] delegate to him or her [and]. 25

(ii) The provisions of section 9 and of the instructions issued by the Treasury under section 39 of the Exchequer Act, 1975 (Act No. 66 of 1975), in respect of Commissions of Inquiry, shall apply [mutatis mutandis] with the necessary changes in respect of that person.”; 30

(c) by the substitution for subsection (7) of the following subsection:

“(7) The Public Protector or any person authorised by him or her in writing may administer an oath to or accept an affirmation from any such person.”; 35

(d) by the substitution for subsection (9) of the following subsection:

“(9) (a) If it appears to the Public Protector during the course of an investigation that any person is being implicated in the matter being investigated and that such implication may be to the detriment of that person or that an adverse finding pertaining to that person may result, the Public Protector shall afford such person an opportunity to [be heard] respond in connection therewith [by way of the giving of evidence, and], in any manner that may be expedient under the circumstances. 40

(b)(i) If such implication forms part of the evidence submitted to the Public Protector during an appearance in terms of the provisions of subsection (4), such person shall be afforded an opportunity to be heard in connection therewith by way of giving evidence. 45

(ii) Such person or his or her legal representative shall be entitled, through the Public Protector, to question other witnesses, determined by the Public Protector, who have appeared before the Public Protector in terms of this section.”; and 50

(e) by the addition of the following subsection:

“(11) The Public Protector may make rules in respect of any matter referred to in this section which has a bearing on an investigation or in 55

respect of any matter incidental thereto, provided that such rules must be published in the *Government Gazette* and tabled in the National Assembly."

Insertion of section 7A into Act 23 of 1994

10. The following section is hereby inserted into the principal Act:

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"Entering upon premises by the Public Protector

7A. (1) The Public Protector shall be competent to enter, or authorise another person to enter, any building or premises and there to make such investigation or inquiry as he or she may deem necessary, and to seize anything on those premises which in his or her opinion has a bearing on the investigation.

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(2) The premises referred to in subsection (1) may only be entered by virtue of a warrant issued by a magistrate or a judge of the area of jurisdiction within which the premises is situated: Provided that such a warrant may be issued by a judge in respect of premises situated in another area of jurisdiction, if he or she deems it justified.

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(3) A warrant contemplated in subsection (2) may only be issued if it appears to the magistrate, or a judge from information on oath or affirmation, stating—

- (a) the nature of the investigation or inquiry;
- (b) the suspicion which gave rise to the investigation or inquiry; and
- (c) the need, in regard to the investigation, for a search and seizure in terms of this section,

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that there are reasonable grounds for believing that anything referred to in subsection (1) is on or in such premises or suspected to be on or in such premises.

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(4) A warrant issued in terms of this section may be issued on any day and shall be of force until—

- (a) it has been executed;
- (b) it is cancelled by the person who issued it or, if such person is not available, by any person with like authority; or
- (c) the expiry of three months from the day of its issue, whichever may occur first.

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(5) (a) Any person who acts on authority of a warrant issued in terms of this section may use such force as may be reasonably necessary to overcome any resistance against the entry and search of the premises, including the breaking of any door or window of such premises: Provided that such person shall first audibly demand admission to the premises and state the purpose for which he or she seeks to enter such premises.

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(b) The proviso to paragraph (a) shall not apply where the person concerned is on reasonable grounds of the opinion that any object, book or document which is the subject of the search may be destroyed, tampered with or disposed of if the provisions of the said proviso are first complied with.

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(6) A warrant issued in terms of this section shall be executed by day unless the person who issues the warrant authorises the execution thereof by night at times which shall be reasonable in the circumstances.

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(7) Any person executing a warrant in terms of this section shall immediately before commencing with the execution—

- (a) identify himself or herself to the person in control of the premises, if such person is present, and hand to such person a copy of the warrant or, if such person is not present, affix such copy to a prominent place on the premises; and
- (b) supply such person at his or her request with particulars regarding his or her authority to execute such a warrant.

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(8) If during the execution of a warrant or the conducting of a search in

terms of this section, a person claims that any item found on or in the premises concerned contains privileged information and for that reason refuses the inspection or removal of such item, the person executing the warrant or conducting the search shall, if he or she is of the opinion that the item contains information which is relevant to the investigation or inquiry and that such information is necessary for the investigation or inquiry, request the registrar of the High Court which has jurisdiction or his or her delegate, to seize and remove that item for safe custody until a court of law has made a ruling on the question whether the information concerned is privileged or not.”.

Amendment of section 8 of Act 23 of 1994

11. Section 8 of the principal Act is hereby amended—

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

“(2) (a) The Public Protector shall report in writing on the activities of his or her office to the National Assembly at least once every year. Provided that any report shall also be tabled in the National Council of Provinces.

(b) The Public Protector [shall submit, to Parliament half-yearly reports on the findings in respect of investigations of a serious nature, which were conducted during the half-year concerned: Provided that the Public Protector] shall, at any time, submit a report to [Parliament] the National Assembly on the findings of a particular investigation if—

[(a)] (i) he or she deems it necessary;

[(b)] (ii) he or she deems it in the public interest;

[(c)] (iii) it requires the urgent attention of, or an intervention by, [Parliament] the National Assembly;

[(d)] (iv) he or she is requested to do so by the Speaker of the National Assembly; or

[(e)] (v) he or she is requested to do so by the [President of the Senate] Chairperson of the National Council of Provinces.”; and

(b) by the insertion after subsection (2) of the following subsection:

“(2A) (a) Any report issued by the Public Protector shall be open to the public, unless the Public Protector is of the opinion that exceptional circumstances require that the report be kept confidential.

(b) If the Public Protector is of the opinion that exceptional circumstances require that a report be kept confidential, the committee must be furnished with the reasons therefor and, if the committee concurs, such report shall be dealt with as a confidential document in terms of the rules of Parliament.

(c) For the purposes of this section, ‘exceptional circumstances’ shall exist if the publication of the report concerned is likely—

(i) to endanger the security of the citizens of the Republic;

(ii) to prejudice any other investigation or pending investigation;

(iii) disturb the public order or undermine the public peace or security of the Republic;

(iv) to be prejudicial to the interests of the Republic; or

(v) in the opinion of the Public Protector to have a bearing on the effective functioning of his or her office.”.

Amendment of section 11 of Act 23 of 1994

12. Section 11 of the principal Act is hereby amended—

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

“(1) Any person who contravenes the provisions of sections 3(14), 7(2) and 9 of this Act, or interferes with the functioning of the office of the Public Protector as contemplated in section [11(3)] 181(4) of the Constitution, shall be guilty of an offence.”; and

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

“(3) Any person who, without just cause, refuses or fails to comply with a direction or request under [section 112(3) (a) of the Constitution or] section 7(4) [(a) of this Act] or refuses to answer any question put to him or her under [those paragraphs] that section or gives to such question an answer which to his or her knowledge is false, or refuses to 5 take the oath or to make an affirmation at the request of the Public Protector in terms of section 7(6), shall be guilty of an offence.”.

Repeal of section 12 of Act 23 of 1994

13. Section 12 of the principal Act is hereby repealed.

Short title

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14. This Act shall be called the Public Protector Amendment Act, 1998.