

DRAFT

REPUBLIC OF SOUTH AFRICA

FINANCIAL MATTERS AMENDMENT BILL

(As introduced in the National Assembly (proposed section 75); explanatory summary of Bill and prior notice of its introduction published in Government Gazette No. ... of 2022)
(The English text is the official text of the Bill)

(MINISTER OF FINANCE)

GENERAL EXPLANATORY NOTE:

- [] Words in bold type in square brackets indicate omissions from the existing enactments.
- _____ Words underlined with solid line indicate insertions in existing enactments.
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BILL**To amend—**

- the Associated Institutions Pension Fund Act, 1963 and the Temporary Employees Pension Fund Act, 1979, so as to amend the definition of “Minister”;
- the Military Pension Act, 1976, so as to provide for the benefits for life partners of members retrospectively;
- the Government Employees Pension Law, 1996, so as to amalgamate the Associated Institutions Pension Fund into the Government Employees Pension Fund;
- the Financial and Fiscal Commission Act, 1997, so as to omit the provision for the Chief Executive Officer of the Financial and Fiscal Commission to be its Secretary;
- the Land and Agricultural Development Bank Act, 2002, so as to replace the provision for judicial management with business rescue in terms of the Companies Act, 2008;
- the Auditing Profession Act, 2005, so as to enable the enforcement committee upon admissions of guilt to refer instances of serious improper conduct to the disciplinary committee for sanctioning;
- the Auditing Profession Amendment Act, 2021, so as to provide that acts of improper conduct not dealt with before the effective date of that Amendment Act be dealt with in terms of the Auditing Profession Act, 2005, after its amendment by that Amendment Act, with the exception of sanctions; and
- to provide for matters connected therewith.

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

Amendment of section 1 of Act 41 of 1963, as amended by section 18 of Act 50 of 1973 and section 1 of Act 40 of 1978

1. Section 1 of the Associated Institutions Pension Fund Act, 1963, is hereby amended by the substitution for the definition of “Minister” of the following definition:

“**Minister**” means the Minister of **[Social Welfare and Pensions]** Finance.”.

Amendment of section 1 of Act 75 of 1979

2. Section 1 of the Temporary Employees Pension Fund Act, 1979, is hereby amended by the substitution for the definition of “Minister” of the following definition:

“**Minister**” means the Minister of **[Social Welfare and Pensions] Finance**;

Amendment of section 21 of Act 84 of 1976, as amended by section 10 of Act 26 of 1977 and section 13 of Act 97 of 1980

3. Section 21 of the Military Pensions Act, 1976, is hereby amended by addition of the following subsection:

“(3)(a) The amendment of this Act by sections 2 to 9 of the Financial Matters Amendment Act, 2019 (Act No. 18 of 2019), insofar as it provides for a life partner of a member, is deemed to have come into operation on 27 April 1994.

(b) Any member with a spouse or a deceased spouse or the spouse of a deceased member who, by virtue of paragraph (a), qualifies for a pension, gratuity or allowance in terms of this Act may, within 12 months from the effective date of the Financial Matters Amendment Act, 2021—

(i) register in terms of section 4B of this Act; and

(ii) submit claims for the period 27 April 1994 to the effective date of the Financial Matters Amendment Act, 2021.”.

Amendment of section 1 of Proclamation 21 of 1996, as amended by section 1 of Act 35 of 2003, section 1 of Act 21 of 2004, section 1 of Act 19 of 2011 and section 53 of Act 11 of 2013

4. Section 1 of the Government Employees Pension Law, 1996, is hereby amended by the insertion after the definition of “approved retirement fund” of the following definition:

“**Associated Institutions Pension Fund**’ means the fund referred to in section 2(1)(b) of the Associated Institutions Pension Fund Act, 1963 (Act No. 41 of 1963);”.

Amendment of section 4 of Proclamation 21 of 1996

5. Section 4 of the Government Employees Pension Law, 1996, is hereby amended by the substitution for subsection (4) of the following subsection:

“(4) Every person who on a date determined by the Minister in terms of section 15(1) is **[employed in the service of the employer and who immediately before that date was]** a member of the Temporary Employees Pension Fund or the Associated Institutions Pension Fund, and every person who on that date is a pensioner at that fund **[who at the time of his retirement was employed in the service of the employer]**, shall with effect from that date be a member or pensioner, as the case may be, of the Fund.”.

Amendment of section 5 of Proclamation 21 of 1996

6. Section 5 of the Government Employees Pension Law, 1996, is hereby amended by the substitution for paragraph (c) of the following paragraph:

“(c) who is employed under a contract providing for payment of a pension or similar benefit from a source other than the Fund or a previous fund or the Temporary Employees Pension Fund or the Associated Institutions Pension Fund”.

Substitution of section 15 of Proclamation No. 21 of 1996

7. The following section is hereby substituted for section 15 of the Government Employees Pension Law, 1996:

“Transfer to Fund of [certain] members and pensioners of [the] Temporary Employees Pension Fund and Associated Institutions Pension Fund”

15.(1) All members and pensioners of the Temporary Employees Pension Fund and the Associated Institutions Pension Fund **[who are employed in the service of the employer and all pensioners of that Fund who at the time of their retirement were employed in such service]** shall with effect from a date determined by the Minister become members or pensioners of the Fund.

(2) The Temporary Employees Pension Fund and the Associated Institutions Pension Fund shall in respect of members and pensioners of that Fund who in terms of subsection (1) become members and pensioners of the Fund, pay to the Fund an amount, whether in cash or specie, equal to the funding percentage of that fund multiplied by the actuarial obligation of that fund in respect of such members or pensioners on the date determined in terms of subsection (1) in respect of them, plus interest thereon calculated at the bank rate from that date until the date on which the amount is paid to the fund.

(3) For purposes of this section—

- (a) ‘actuarial obligation’ means the obligation of the Temporary Employees Pension Fund and the Associated Institutions Pension Fund in respect of the members or pensioners concerned on the date determined in terms of subsection (1), as calculated by an actuary;
- (b) ‘bank rate’ means the rate determined from time to time in terms of section 10(2) of the South African Reserve Bank Act, 1989 (Act No. 90 of 1989); and
- (c) ‘funding percentage’ means the market value of the net assets of the Temporary Employees Pension Fund and the Associated Institutions Pension Fund as on the date determined in terms of subsection (1), expressed as a percentage of the calculated aggregate actuarial obligation.”.

Substitution of section 16 of Proclamation 21 of 1996

8. The following section is hereby substituted for section 16 of the Government Employees Pension Law:

“Certain persons to be released from, and to forfeit certain obligations, rights and privileges when becoming members of Fund

16. In any case where a person who is a member or pensioner of a previous fund, the Temporary Employees Pension Fund, the Associated Institutions Pension Fund or an approved retirement fund, becomes a member of the Fund in terms of section 4(3) or (4), or 15 or the rules, as the case may be, such person shall forfeit all rights and privileges in respect of and shall be released from all obligations towards the fund in question, except an obligation to pay to the fund in question an amount which was due immediately before the date determined by the Minister or relevant authority in terms of section 14(1) or 15(1) or the rules, as the case may be, in respect of the previous fund, the employees concerned of the Temporary Employees Pension Fund, the Associated Institutions Pension Fund or that approved retirement fund, as the case may be.”.

Amendment of section 20 of Proclamation 21 of 1996

9. Section 20 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) Save as is otherwise provided in this Law, no award of a benefit or any increase thereof and no alteration of any condition or condonation of a breach of any condition upon which such benefit is by law earned or to be earned in respect of a pensioner of the Fund, the Temporary Employees Pension Fund, the Associated Institutions Pension Fund or a previous fund, shall be lawful unless the award, increase, alteration or condonation is authorized by an Act of Parliament.”.

Amendment of section 30 of Proclamation 21 of 1996

10. Section 30 of the principal Act is hereby amended by—

(a) the substitution for the heading of the following heading:

“Protection of rights of members of previous funds [and], Temporary Employees Pension Fund and Associated Institutions Pension Fund”; and

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

“(2) The provisions of subsection (1) shall apply mutatis mutandis to a member of the Temporary Employees Pension Fund or the Associated Institutions Pension Fund who becomes a member of the Fund in terms of section 15, and any such application references in subsection (1) to a previous fund and date determined by the Minister in terms of section 14(1) shall be construed as references to the Temporary Employees Pension Fund or the Associated Institutions Pension Fund, as the case may be, and the date determined in terms of section 15(1) respectively.”.

Amendment of section 19 of Act 99 of 1997, as amended by section 12 of Act 4 of 2015

11. Section 19 of the Financial and Fiscal Commission Act, 1997, is hereby amended by the substitution for paragraph (a) of subsection (1) of the following paragraph:

“(a) The Commission must, in accordance with section 4(1)(a) and for a renewable period not exceeding five years at a time, appoint a suitably qualified and experienced person as the chief executive officer, who must also be the accounting officer of **[and the Secretary to]** the Commission.”.

Amendment of section 45 of Act 15 of 2002

12. The following section is hereby substituted for section 45 of the Land and Agricultural Development Bank Act, 2002:

Business rescue of Bank and compromise

45.(1) The business rescue and compromise provisions of Chapter 6 of the Companies Act, 2008 (Act No. 81 of 2008), apply to the Bank, subject to subsection (2).

(2) An order of court for the commencement of business rescue proceedings in terms of section 131 of the Companies Act, 2008, in respect of the Bank may be granted by a competent court only on application by the Minister or the Board.”.

Amendment of section 49 of Act 26 of 2005, as substituted by section 17 of Act 5 of 2021

13. Section 49 of the Auditing Profession Act, 2005, is hereby amended by the substitution for—

(a) subsection (2) of the following subsection:

“(2) The enforcement committee must furnish a charge sheet to the registered auditor concerned by electronic means **[and]** or registered mail.”;
and

(b) subsection (4) of the following subsection:

“(4) If a registered auditor admits guilt to the charge—
(a) the registered auditor is considered to have been found guilty as charged; and
(b) the enforcement committee must, if it believes that the improper conduct of the registered auditor—
(i) does not warrant a sanction contemplated in section 51B(3)(a)(iv) or (v), deal with the matter in accordance with section 51; or
(ii) warrants a sanction contemplated in section 51B(3)(a)(iv) or (v), refer the matter to the disciplinary committee for a hearing on the sanction.”.

Substitution of section 23 of Act 5 of 2021

14. The following section is hereby substituted for section 23 of the Auditing Profession Amendment Act, 2021:

“Transitional measures

23.(1) If a registered auditor or registered candidate auditor has committed an act of improper conduct before the commencement of this Act and has—

(a) been charged but the matter has not been concluded before the commencement of this Act; or

(b) not been charged before the commencement of this Act, the matter must be dealt with in terms of the principal Act, after its amendment by this Act, except that the sanctions applicable at the time of the act of improper conduct must be applied in the case of a guilty finding.

(2) For purposes of subsection (1), when an admission of guilt process as provided for in section 49(1)(a) of the principal Act, after its amendment by this Act, is followed, the sanctions referred to in section 51(3)(a)(iii) or (iv) of the principal Act, before its amendment by this Act, are not applicable.”.

Short title and commencement

15.(1) This Act is called the Financial Matters Amendment Act, 2022.

(2) This Act takes effect on a date determined by notice in *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE FINANCIAL MATTERS AMENDMENT BILL, 2022

1. PURPOSE OF BILL

The Financial Matters Amendment Bill proposes amendments to the following Acts:

- The Associated Institutions Pension Fund Act, 1963 (Act No. 41 of 1963);
- the Temporary Employees Pension Fund Act, 1979 (Act No. Act 75 of 1979);
- the Military Pension Act, 1976 (Act No. 84 of 1976);
- the Government Employees Pension Law, 1996 (Proclamation No. 21 of 1996);
- the Financial and Fiscal Commission Act, 1997 (Act No. 99 of 1997);
- the Land and Agricultural Development Bank Act, 2002 (Act No. 15 of 2002);
- the Auditing Profession Act, 2005 (Act No. 26 of 2005); and
- the Auditing Profession Amendment Act, 2021 (Act No. 5 of 2021).

2. SUMMARY OF AMENDMENTS

2.1 Associated Institutions Pension Fund Act and Temporary Employees Pension Fund Act (clauses 1 and 2 of Bill)

The proposed amendments in clauses 1 and 2 of the Bill to section 1 of both the Associated Institutions Pension Fund Act, 1963, and the Temporary Employees Pension Fund Act, 1979, are to change the definition of “Minister” to refer to the Minister responsible for finance since these Acts are administered by that Minister.

2.2 Military Pension Act (clause 3 of Bill)

Section 21 of the Military Pension Act, 1976, is proposed, in clause 3 of the Bill, to be amended to provide for the benefits for life partners of members retrospectively, namely from 27 April 1994, when the interim Constitution of 1993 took effect. This will eliminate the discrimination against members in life partner relationships.

2.3 Government Employees Pension Law (clauses 4-10 of Bill)

The proposed amendments in clauses 4 to 10 of the Bill to sections 1, 4, 5, 15, 16, 20 and 30 of the Government Employees Pension Law, 1996, is to provide for the amalgamation of the Associated Institutions Pension Fund (AIPF) into the Government Employees Pension Fund (GEPF). This will among others entail that the so-called clean break principle applicable to GEPF members also applies to (former) members of the AIPF. The latter allows a spouse of a member to realise their pension interest immediately upon divorce or dissolution of a customary marriage and not to await the member becoming entitled to his or her pension. The Government Employees Pension Law was amended to provide for the clean break principle following a High Court judgment.

2.4 Financial and Fiscal Commission Act (clause 11 of Bill)

Clause 11 of the Bill proposes to amend section 19 of the Financial and Fiscal Commission Act, 1997, by omitting the provision for the Chief Executive Officer (CEO) of the Financial and Fiscal Commission to be its Secretary. Excluding this as a function of the CEO who is also the accounting officer of the Commission will enhance good corporate governance. Provision for a secretary for the Commission should be discretionary and may be implemented through an appropriate staffing arrangement. Its regulation in legislation is therefore not necessary.

2.5 Land and Agricultural Development Bank Act (clause 12 of Bill)

2.5.1 Clause 12 of the Bill proposes an amendment to section 45 of the Land and Agricultural Development Bank Act, 2002 (the Land Bank Act), so as to replace the provision for judicial management for the Land and Agriculture Development Bank (Land Bank) with business rescue in terms of the Companies Act, 2008.

2.5.2 The Land Bank was established by section 3 of the Land Bank Act and is not incorporated as a company. However, section 45 of the Land Bank Act provides for judicial management of the Land Bank in terms of the Companies Act, 1973. Such judicial management may only be granted by a court on application by the Minister of Finance or the Board of Directors of the Land Bank.

2.5.3 The Companies Act, 2008 repealed most of the Companies Act, 1973, including the provisions relating to judicial management and replaced it with business rescue. Business rescue as contained in Chapter 6 of the Companies Act, 2008 did not replace, by implication, judicial management as referenced in section 45 of the Land Bank Act. Therefore, to provide for the application of business rescue provisions of the Companies Act, 2008, section 45 of the Land Bank Act should be amended accordingly.

2.6 Auditing Profession Act (clause 13 of Bill)

Section 49 of the Auditing Profession Act, 2005, is proposed to be amended, in clause 13 of the Bill, to adjust the powers of the enforcement committee where an auditor admits guilt. Clause 13 of the Bill proposes that if the enforcement committee is of the view that the conduct does—

- (a) not warrant a sanction of deregistration or disqualification from registration as an auditor, it must follow an admission of guilt process; or
- (b) warrant such a sanction, it must refer the matter to the disciplinary committee for sanctioning.

2.7 Auditing Profession Amendment Act (clause 14 of Bill)

Clause 14 of the Bill proposes an amendment to section 23 of the Auditing Profession Amendment Act, 2021 (the Amendment Act), to provide that acts of alleged improper conduct not dealt with before the effective date of the Amendment Act be dealt with in terms of the Auditing Profession Act, 2005 (the principal Act), after its amendment by

that Amendment Act, with the exception of sanctions. This will entail that the relevant committees, dealing with alleged improper conduct of auditors, are constituted under the principal Act as amended and not as prior to its amendment by the Amendment Act. The sanctions that may be imposed will still remain those permissible before the amendment of the principal Act by the Amendment Act.

2.8 Clause 15 of the Bill contains the short title and the commencement.

3. ORGANISATIONS AND INSTITUTIONS CONSULTED

- Financial and Fiscal Commission
- Government Pensions Administration Agency
- Land and Agriculture Development Bank
- Independent Regulatory Board for Auditors

4. FINANCIAL IMPLICATIONS FOR STATE

4.1 The amendments to the Military Pensions Act will result in additional costs to the State since the benefits of life partners of members will be included under the scope of the Act, effective 1 April 1994. The financial implications will only be known after affected members have submitted claims in respect of life partners.

4.2 The amendments to other Acts in the Bill are not envisaged to have any material financial implications.

5. PARLIAMENTARY PROCEDURE

5.1 The Constitution of the Republic of South Africa, 1996 (the "Constitution") regulates the manner in which legislation may be enacted by the legislature and thus prescribes the different procedures to be followed for such enactment. The national legislative process is governed by sections 73 to 77 of the Constitution.

5.2 The test for tagging is not concerned with determining the sphere of government that has competence to legislate on a matter, nor the process concerned with preventing interference in the legislative competence of another sphere of government. In *Tongane v Minister of Agriculture and Land Affairs* 2010 (6) SA 214 (CC), the Constitutional Court ruled on the test to be used when tagging a Bill. The Court held, in paragraph 70, that the "*test for determining how a Bill is to be tagged must be broader than that for determining legislative competence*". Whether a Bill is a section 76 Bill is determined in two ways. First by the explicit list of legislative matters in section 76(3), and second by whether the provisions of a Bill in substantial measure fall within a concurrent legislative competence (see paragraphs 70-72 of the judgment). The Court held that the tagging test focuses on all provisions of the Bill in order to determine the extent to which they substantially affect functional areas listed in Schedule 4, and not on whether any of its provisions are incidental to its substance.

- 5.3 We have considered all the provisions in the Bill in light of Schedules 4 and 5 to the Constitution and found that the Bill does not provide for the amendment of the Constitution or money matters, as stated in section 77 of the Constitution and therefore we do not regard it necessary, to consider sections 74 and 77 of the Constitution.
- 5.4 The State Law Advisers and the National Treasury are of the opinion that this 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.
- 5.5 The State Law Advisers and the National Treasury are of the opinion that it is not necessary to refer the Bill to the National House of Traditional and Khoi-San Leaders in terms of section 39(1)(a) of the Traditional and Khoi-San Leadership Act, 2019 (Act No. 3 of 2019), since it does not contain provisions pertaining to customary law or customs of traditional communities.

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