

REPUBLIC OF SOUTH AFRICA

AUDITING PROFESSION AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 75); explanatory summary of
the Bill and prior notice published in Government Gazette No. 43009 of 10 February 2020)
(The English text is the official text of the Bill)*

(MINISTER OF FINANCE)

[B 2—2020]

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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.

BILL

To amend the Auditing Profession Act, 2005, so as to insert a definition; to strengthen the governance of the Regulatory Board; to strengthen the investigating and disciplinary processes; to provide for the power to enter and search premises and to subpoena persons with information required for an investigation or disciplinary process; to provide for the power to issue a warrant for purposes of entering and searching of premises; to provide for processes to be followed after an investigation; to provide for a duty to disclose information; to provide for sanctions in admission of guilt process and following a disciplinary hearing; to provide for offences relating to investigation and disciplinary process; to provide for the protection of personal information; to provide for transitional measures; 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 26 of 2005

1. Section 1 of the the Auditing Profession Act, 2005 (hereinafter referred to as the “principal Act”) is hereby amended by the insertion in subsection (1) after the definition of “company” of the following definition: 5

“ ‘**Constitution**’ means the Constitution of the Republic of South Africa, 1996;”.

Amendment of section 4 of Act 26 of 2005

2. Section 4 of the principal Act is hereby amended by the addition of the following subsection: 10

“(3) The Regulatory Board must, with the approval of the Minister, determine a policy framework for performing its functions in terms of subsection (1).”.

Amendment of section 11 of Act 26 of 2005

3. Section 11 of the principal Act is hereby amended—
(a) by the substitution for subsection (2) of the following subsection: 15

“(2) The Minister must appoint competent persons [**who must include registered auditors,**] who are independent of the auditing profession to effectively manage and guide the activities of the Regulatory Board, based on their knowledge and experience.”;

- (b) by the insertion after subsection (2) of the following subsection:
 “(2A) The members appointed in terms of subsection (2) must include—
- (a) a person who was formerly a registered auditor and has at least 10 years’ experience in auditing; and
 - (b) an advocate or attorney who has at least 10 years’ experience in practicing law.”;
- (c) by the substitution for subsection (4) of the following subsection:
 “(4) **[Disregarding any vacancy in its membership, not more than 40% of the members of the Regulatory Board may be registered auditors]** None of the members appointed in terms of this section may be a registered auditor or registered candidate auditor.”;
- (d) by—
- (i) the deletion in subsection (7) of the word “and” at the end of paragraph (b);
 - (ii) the substitution in subsection (7) at the end of paragraph (c) for the expression “.” of the expression “; and”; and
 - (iii) the addition in subsection (7) after paragraph (c) of the following paragraph:
 “(d) the qualifications of every person appointed.”;
- (e) by the addition after subsection (7) of the following subsection:
 “(8) No member may—
- (a) share, directly or indirectly, in any of the profits of a registered auditor or registered candidate auditor; or
 - (b) receive payments from a registered auditor or registered candidate auditor.”.

Amendment of section 12 of Act 26 of 2005

4. Section 12 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:
 “(1) A member of the Regulatory Board appointed in terms of section 11 holds office for such period, but not exceeding **[two] three** years, as the Minister may determine at the time of his or her appointment, but may, on request of the Minister, continue to hold office for a further period not exceeding three months.”.

Amendment of section 20 of Act 26 of 2005

5. Section 20 of the principal Act is hereby amended by the substitution for subsection (5) of the following subsection:
 “(5) Sections 15 and 16 relating to meetings and decisions of the Regulatory Board, respectively, with the necessary changes apply in respect of any committee, except that the committees must meet at least **[four times] twice** a year.”.

Substitution of section 24 of Act 26 of 2005

6. The following section is hereby substituted for section 24 of the principal Act:

“Investigating committee

- 24.** (1) The investigating committee referred to in section 20(2)(e) must be independent of the auditing profession and include—
- (a) two individuals who were registered auditors and each having at least 10 years’ experience in auditing; and
 - (b) an advocate or attorney who has at least 10 years’ experience in practicing law.
- (2) No member of the investigating committee may—
- (a) share, directly or indirectly, in any of the profits of a registered auditor or registered candidate auditor; or
 - (b) receive payments from a registered auditor or registered candidate auditor.”.

Insertion of sections 24A to 24B in Act 26 of 2005

7. The following sections are hereby inserted in the principal Act after section 24:

“Disciplinary committee

24A. (1) The Regulatory Board must appoint a disciplinary committee, referred to in section 20(2)(f), whose members are independent of the auditing profession, consisting of as many competent members as it may determine necessary to deal with disciplinary hearings in terms of this Act. 5

(2) The disciplinary committee must have one third of its members being—

(a) individuals who were registered auditors and each having at least 10 years’ experience in auditing; and 10

(b) advocates or attorneys who each has at least 10 years’ experience in practicing law.

(3) No member of the disciplinary committee may—

(a) share, directly or indirectly, in any of the profits of a registered auditor or registered candidate auditor; or 15

(b) receive payments from a registered auditor or registered candidate auditor.

(4) The Regulatory Board must appoint a member of the disciplinary committee who is an advocate or attorney as chairperson. 20

(5) The functions of the chairperson of the disciplinary committee are to—

(a) appoint from among the members of the disciplinary committee a disciplinary hearing panel for every hearing; 25

(b) monitor consistency in the application of disciplinary hearing rules by disciplinary hearing panels; and

(c) facilitate efficient disciplinary hearings.

(6) Despite section 20(5), read with section 15(4), when the disciplinary committee convenes a disciplinary hearing under section 50, the hearing must be conducted by a panel of three members including a member referred to in subsection (2)(a) and a member referred to in subsection (2)(b). 30

(7) Members of a disciplinary hearing panel must elect one of the members to chair the proceedings of the disciplinary hearing.

(8) A member of the disciplinary committee may not participate in a panel contemplated in subsection (6) if he or she has an interest in a matter considered by the disciplinary hearing panel. 35

(9) A member of the disciplinary committee holds office for a period of three years or such shorter period as the Regulatory Board may determine, from the date of his or her appointment. 40

(10) A member of the disciplinary committee may be re-appointed at the expiry of a term for a further term not exceeding three years.

(11) A person may resign as a member of the disciplinary committee by giving at least three months’ written notice to the Regulatory Board or a shorter period of notice approved by the Regulatory Board. 45

(12) A member of the disciplinary committee may not use his or her position or any information by virtue of his or her work for the committee to—

(a) improperly benefit himself or herself or another person; 50

(b) impede the committee’s ability to perform its functions.

Subcommittees of Regulatory Board

24B. (1) The Regulatory Board must establish an enforcement committee to deal with disciplinary matters and may establish other subcommittees to assist with the performance of its functions. 55

(2) The Regulatory Board must appoint the members of a subcommittee referred to in subsection (1) from among its members.

(3) The enforcement committee must include—

(a) a person who was formerly a registered auditor and has at least 10 years’ experience in auditing; and

- (b) an advocate or attorney who has at least 10 years' experience in practicing law."

Amendment of section 37 of Act 26 of 2005

8. Section 37 of the principal Act is hereby amended—
- (a) by the insertion after subsection (1) of the following subsection: 5
 “(1A) An individual may only be registered with the Regulatory Board if he or she is a member of a professional body accredited in terms of section 32(2).”; and
- (b) by the substitution in subsection (3) for paragraph (b) of the following paragraph: 10
 “(b) has been convicted, whether in the Republic or elsewhere, of theft, fraud, forgery, uttering a forged document, perjury, an offence under the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004), or any offence involving dishonesty, other than [**theft, fraud or forgery,**] an offence committed prior to 27 April 1994 associated with political objectives[, and has been sentenced to imprisonment without the option of a fine or to a fine exceeding such an amount as may be prescribed by the Minister]” 15

Amendment of section 45 of Act 26 of 2005 20

9. Section 45 of the principal Act is hereby amended by the addition of the following subsection:
- “(7) If an individual registered auditor has reported an irregularity to the Regulatory Board in terms of subsection (1)—
- (a) the individual registered auditor may not be removed; and 25
 (b) the entity may not remove the registered auditor, until subsection (3) is complied with.”

Amendment of section 48 of Act 26 of 2005

10. Section 48 of the principal Act is hereby amended—
- (a) by the substitution in subsection (1) for the words preceding paragraph (a) of the following words: 30
 “The Regulatory Board must refer a matter brought against a registered auditor to the investigating committee appointed under section 20 if the Regulatory Board—”;
- (b) by the insertion after subsection (1) of the following subsection: 35
 “(1A) Despite subsection (1), the enforcement committee referred to in section 24B may, if considered appropriate, refer a non-audit matter brought against a registered auditor to the relevant professional body accredited in terms of section 32(2) for investigation and disciplinary proceedings.”; 40
- (c) by the substitution in subsection (2) for paragraph (c) of the following paragraph:
 “(c) The Regulatory Board must refer to [**an**] the investigation committee any record or report received by it under this subsection.”;
- (d) by the substitution in subsection (3) for paragraph (b) of the following paragraph: 45
 “(b) obtain evidence to determine whether or not in its opinion the registered auditor concerned should be charged and, if so, recommend to the [**Regulatory Board**] enforcement committee the charge or charges that may be preferred against that registered auditor.”; and 50
- (e) by the substitution for subsections (5), (6) and (7) of the following subsections, respectively: 55
 “(5) (a) In investigating a charge of improper conduct the investigating committee may—
 (i) require or, if necessary, subpoena, the registered auditor to whom the charge relates or any other person with specific knowledge of

the matter under investigation to produce to the committee any object or information, including but not limited to any working papers, statements, correspondence, books or other documents, which is in the possession or under the control of that registered auditor or other person and which relates to the subject matter of the charge, including specifically, but without limitation, any working papers of the registered auditor;

- (ii) inspect and, if the investigating committee considers it appropriate, retain any such information for the purposes of its investigations; and
- (iii) make copies of and take extracts from such information.

(b) [The provisions of this subsection apply regardless of whether the registered auditor is of the opinion that such information contains confidential information about a client] The obligation to produce any information under paragraph (a)(i) may not be excused by reason of any alleged confidential information of a client contained therein.

(c) A subpoena issued in terms of paragraph (a)(i) must—

- (i) be in the prescribed form;
- (ii) be signed by an authorised official of the Regulatory Board; and
- (iii) be served on the person concerned.

(d) For purposes of this section, service contemplated in paragraph (c)(iii)—

- (i) at the last known address appearing from the Regulatory Board's records; or
- (ii) effected in any manner agreed upon between the Regulatory Board or the investigating committee and the person or registered auditor being subpoenaed,

constitutes proper service.

(e) A person who has been issued with a subpoena under paragraph (a)(i) may not, without just cause, fail to provide the information, working paper, statement, correspondence, book or other document specified in the subpoena, in his or her possession or custody or control which he or she has been required to produce.

(f) The law relating to privilege, as applicable to a witness subpoenaed to provide a book, document or object in a civil trial before a court applies, with the necessary changes, in relation to the production of any object or information, including but not limited to any working papers, statements, correspondence, books or other documents, to the investigating committee.

(g) A person subpoenaed in terms of this section is not entitled to payment by the Regulatory Board for providing information to the investigating committee.

(6) Nothing in this section limits or affects the right of any professional body to take disciplinary or other action against any of its members in accordance with its constitution and rules after the finalisation of the matter by the Regulatory Board.

(7) The investigating committee must, after the conclusion of the investigation, submit a report stating its recommendations to the **[Regulatory Board] enforcement committee** regarding any matter referred to it in terms of this section.”.

Insertion of sections 48A to 48B in Act 26 of 2005

11. The following sections are hereby inserted in the principal Act after section 48:

“Powers to enter and search premises

48A. (1) The investigating committee referred to in section 20(2)(e) may, for the purposes of conducting an investigation, authorise an official of the Regulatory Board to enter any premises—

- (a) with the prior consent of—

- (i) in the case of a private residence, the person apparently in control of the business reasonably believed to be conducted at the private residence and the occupant of the private residence or the part of the private residence to be entered; or
 - (ii) in the case of any other premises, the person apparently in control of the premises,
- after informing that person that—
- (aa) granting consent will enable the official to enter the premises and for the official to subsequently search the premises and to do anything contemplated in subsection (6); and
 - (bb) he or she is under no obligation to admit the official in the absence of a warrant; or
- (b) without prior consent and without prior notice to any person, if the entry is authorised by a warrant.
- (2) The official authorised in terms of subsection (1)(a) to enter a premises also has the authority to search the premises and to do anything contemplated in subsection (6).
- (3) The official exercising powers in terms of this section must do so with strict regard to—
- (a) an affected person's right to—
 - (i) dignity;
 - (ii) freedom and security;
 - (iii) privacy; and
 - (iv) other constitutional rights; and
 - (b) decency and good order as the circumstances require, in particular by—
 - (i) entering and searching only such areas or objects as are reasonably required for the purposes of the investigation;
 - (ii) conducting the search discreetly and with due decorum;
 - (iii) causing as little disturbance as possible; and
 - (iv) concluding the search as soon as possible.
- (4) An entry or search of premises in terms of this section must be done at a reasonable time and within ordinary business hours—
- (a) unless the warrant authorising it expressly authorises entry at night; or
 - (b) in the case of a search contemplated in subsection (1)(a)(ii), if the official on reasonable grounds believes that the purpose for which the entry and search is sought, is likely to be defeated by a delay, as close to ordinary business hours as the circumstances reasonably permit.
- (5) The official may be accompanied and assisted during the entry and search of any premises for an investigation by a police officer or a member of the investigating committee.
- (6) (a) While on the premises in terms of this section, the official, for the purpose of conducting the investigation, has the right of access to any part of the premises and to any document or item on the premises, and may do any of the following:
- (i) Open or cause to be opened any strongroom, safe, cabinet or other container in which the official reasonably suspects there is a document or item that may afford evidence of the contravention concerned or be relevant to the request;
 - (ii) examine, make extracts from and copy any document on the premises;
 - (iii) question any person on the premises to find out information relevant to the investigation;
 - (iv) require a person on the premises to produce to the official any document or item that is relevant to the investigation and is in the possession or under the control of the person;
 - (v) require a person on the premises to operate any computer or similar system on or available through the premises to—
 - (aa) search any information in or available through that system; and
 - (bb) produce a record of that information in any media that the official reasonably requires;
 - (vi) if it is not practicable or appropriate to make a requirement in terms of subparagraph (v), operate any computer or similar system on or available through the premises for a purpose set out in that subparagraph; and

- (vii) take possession of and take from the premises, a document or item that may afford evidence of the contravention concerned or be relevant to the request.
- (b) The official must give the person apparently in charge of the premises a written receipt for documents or items taken as mentioned in paragraph (a)(vii). 5
- (c) Subject to paragraph (d), the official must ensure that any document or item taken by the official as mentioned in paragraph (a)(vii) is returned to the person when—
- (i) retention of the document or item is no longer necessary to achieve the object of the investigation; or 10
- (ii) all proceedings arising out of the investigation have been finally disposed of.
- (d) The official does not have to return a document or item to the person who produced it if it is not in the best interest of the public or any member of the public for the documents or items to be returned. 15
- (e) A person from whose premises a document or item was taken as mentioned in paragraph (a)(vii), or an authorised representative, may, during normal office hours and under the supervision of the official, examine, copy and make extracts from the document or item. 20
- (7) The official and any person assisting the official as mentioned in subsection (5), may use reasonable force to exercise any power in terms of this section.

Warrants

- 48B.** (1) (a) A judge or magistrate who has jurisdiction may issue a warrant for the purposes of section 48A on application by an official authorised by the Regulatory Board. 25
- (b) A judge or magistrate may issue a warrant in terms of this section—
- (i) on written application by the official setting out under oath or affirmation why it is necessary to enter and investigate the premises; and 30
- (ii) if it appears to the magistrate or judge from the information under oath or affirmation that—
- (aa) a contravention of this Act has occurred, may be occurring or may be about to occur; and 35
- (bb) entry and investigation of the premises are likely to yield information pertaining to the contravention.
- (2) A warrant issued in terms of this section must be signed by the judge or magistrate issuing it.
- (3) The official of the Regulatory Board who enters premises under the authority of a warrant must— 40
- (a) if there is apparently no one in charge of the premises when the warrant is executed, fix a copy of the warrant on a prominent and accessible place on the premises; and
- (b) on reasonable demand by any person on the premises, produce the warrant or a copy of the warrant. 45

Substitution of sections 49 to 51 of Act 26 of 2005

12. The following sections are hereby substituted for sections 49 to 51 of the principal Act:

“Process following investigation 50

- 49.** (1) After the conclusion of the processes contemplated in section 48, the enforcement committee contemplated in section 24B must, if sufficient grounds exist for a charge of improper conduct to be preferred against a registered auditor—
- (a) follow an admission of guilt process if the enforcement committee believes that the improper conduct of the registered auditor does not warrant a sanction contemplated in section 51B(3)(a)(iv) or (v); or 55

- (b) refer the matter to the disciplinary committee for a disciplinary hearing.
- (2) The enforcement committee must furnish a charge sheet to the registered auditor concerned by electronic means and registered mail.
- (3) A charge sheet must inform the registered auditor charged—
- (a) of the details and nature of the charge;
 - (b) that the registered auditor, in writing, admit or deny the charge;
 - (c) that the registered auditor, together with the admission or denial, submit a written explanation regarding the improper conduct with which charged and, if guilt is admitted, submit factors in mitigation of sentence; and
 - (d) of the period, which must be reasonable but may not exceed 30 days, within which the plea in terms of paragraph (b) must be submitted to the Regulatory Board.
- (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 deal with the matter in accordance with section 51.
- (5) If a registered auditor denies guilt or fails to submit a denial or plea, the enforcement committee must, on the expiry of the period referred to in subsection (3)(d), refer the charge sheet and any plea received to the disciplinary committee to be dealt with in accordance with section 50.
- (6) The acquittal or the conviction of a registered auditor by a court of law on a criminal charge is not a bar to proceedings against the registered auditor under this Act on a charge of improper conduct, even if the facts stated in the charge of improper conduct would, if proved, constitute—
- (a) the offence stated in the criminal charge on which the registered auditor was acquitted or convicted; or
 - (b) any other offence of which the registered auditor might have been acquitted or convicted,
- at the trial on the criminal charge.

Disciplinary hearing

- 50.** (1) Where a matter has been referred to the disciplinary committee as contemplated in section 49(5), the enforcement committee must appoint a person to present the charge to the disciplinary hearing panel.
- (2) A person presenting the charge to the disciplinary hearing panel may at any time prior to the conclusion of a disciplinary hearing apply to the panel to amend the charge on the grounds that an error exists in its formulation or that a charge is not properly articulated in the original charge sheet.
- (3) A hearing before the disciplinary hearing panel is open to the public except where, in the opinion of the chairperson of the panel, any part of the hearing must be held in camera.
- (4) A disciplinary hearing panel may, for the purposes of a disciplinary hearing, subpoena any person to appear before the panel at the time and place specified in the subpoena, to be questioned or to produce any object or information, including but not limited to any working papers, statements, correspondence, books or other documents in his or her possession or control which relate to the charge.
- (5) A subpoena issued in terms of subsection (4) must—
- (a) be in the prescribed form;
 - (b) be signed by an authorised official of the Regulatory Board; and
 - (c) be served on the person concerned.
- (6) For purposes of this section, service contemplated in subsection (5)(c)—
- (a) at the last known address appearing from the Regulatory Board's records; or
 - (b) effected in any manner agreed upon between the Regulatory Board or a disciplinary hearing panel and the person being subpoenaed,
- constitutes proper service.

(7) A disciplinary hearing panel may retain any object or information, including but not limited to any working papers, statements, correspondence, books or other documents produced in terms of subsection (4), for the duration of the hearing.

(8) The chairperson of a disciplinary hearing panel must call upon and administer an oath to, or take an affirmation from, any witness at the hearing.

(9) At a disciplinary hearing the registered auditor charged—

- (a) may be assisted or represented by another person in the proceedings;
- (b) has the right to be heard;
- (c) may call witnesses;
- (d) may cross-examine any person called as a witness in support of the charge; and
- (e) may have access to documents produced in evidence.

(10) A registered auditor charged may—

- (a) at any time before the conclusion of the disciplinary hearing, admit that he or she is guilty of the charge, despite the fact that he or she denied the charge or failed to react in terms of section 49(3)(b); or
- (b) in the case where the registered auditor makes an admission in terms of paragraph (a), be regarded as guilty of improper conduct as charged.

(11) The person referred to in subsection (1) may during a disciplinary hearing—

- (a) lead evidence and advance arguments in support of the charge and cross-examine witnesses;
- (b) question any person who was subpoenaed in terms of subsection (4); and
- (c) call anyone to give evidence or to produce any object or information, including but not limited to any working papers, statements, correspondence, books or other documents in his or her possession or custody or under his or her control, which such person suspects or believes to have a bearing on the subject of the disciplinary hearing.

(12) (a) A witness who has been subpoenaed may not—

- (i) without just cause, fail to attend the disciplinary hearing at the time and place specified in the subpoena;
- (ii) refuse to be sworn in or to be affirmed as a witness;
- (iii) without just cause, fail to answer fully and satisfactorily to the best of his or her knowledge all questions lawfully put to him or her; or
- (iv) fail to produce any object or information, including but not limited to any working papers, statements, correspondence, books or other documents in his or her possession or custody or under his or her control, which he or she has been required to produce.

(b) A witness must remain in attendance until excused by the chairperson of the disciplinary hearing panel from further attendance.

(c) The law relating to privilege, as applicable to a witness subpoenaed to give evidence or to produce a book, document or object in a civil trial before a court of law, with the necessary changes, applies in relation to the examination of any object or information, including but not limited to any working papers, statements, correspondence, books or other documents, or to the production of such information to the disciplinary hearing panel by any person called in terms of this section as a witness.

(d) A witness may not, after having been sworn in or having been affirmed as a witness, give a false statement on any matter, knowing that answer or statement to be false.

(e) A person may not prevent another person from complying with a subpoena or from giving evidence or producing any object or information, including but not limited to any working papers, statements, correspondence, books or other documents, which he or she is in terms of this section required to give or produce.

(f) A person subpoenaed in terms of this section must be reimbursed for incidental costs by the Regulatory Board for providing information and attending the disciplinary hearing.

(13) If the improper conduct with which the registered auditor is charged amounts to an offence of which he or she has been convicted by a court of law, a certified copy of the record of his or her trial and conviction by that court is, on the identification of the registered auditor as the person referred to in the record, sufficient proof of the commission by him or her of that offence, unless the conviction has been set aside by a superior court. 5

(14) If, for any reason, a member of the disciplinary hearing panel is unable to complete proceedings of the disciplinary hearing, the chairperson of the disciplinary committee may—

- (a) direct that the proceedings continue before the remaining disciplinary hearing panel members; or
- (b) if there are less than two remaining disciplinary hearing panel members, constitute a new panel and direct that the proceedings start anew. 10

Sanctions in admission of guilt process 15

51. (1) If a registered auditor admits guilt as contemplated in section 49(4)(a), the enforcement committee must either—

- (a) caution or reprimand the registered auditor;
- (b) impose a fine on the registered auditor not exceeding the amount determined by the Minister from time to time in the *Gazette*; or
- (c) require the registered auditor to attend appropriate training or any other relevant non-monetary sanction or more than one relevant non-monetary sanction. 20

(2) The enforcement committee may impose more than one of the sanctions referred to in subsection (1). 25

(3) A sanction imposed in terms of subsection (1) may be suspended for a specific period or until the occurrence of a specific event or made subject to any conditions.

(4) The enforcement committee may order a registered auditor who admitted guilt to the charges to pay such reasonable costs as have been incurred in connection with an investigation or such part thereof as the enforcement committee considers just. 30

(5) The enforcement committee may, if considered appropriate, request the Regulatory Board to publish in the Board's website the name of the registered auditor who admitted guilt, the charge and the sanction imposed in terms of subsection (1) or (2) and a cost order in terms of subsection (4). 35

(6) The Regulatory Board must give effect to the decision of the enforcement committee.”.

Substitution of section 51A of Act 26 of 2005

13. The following section is hereby substituted for section 51A of the principal Act: 40

“Application of certain provisions to registered candidate auditors

51A. This Chapter [Sections 48, 49, 50 and 51], except section 47, [apply] applies to registered candidate auditors with the necessary changes.”.

Insertion of section 51B in Act 26 of 2005 45

14. The following section is hereby inserted in the principal Act after section 51A:

“Sanctions in disciplinary hearing process

51B. (1) After the conclusion of a disciplinary hearing contemplated in section 49(1)(b), the disciplinary hearing panel must—

- (a) within 30 days, decide whether or not the registered auditor is guilty as charged and inform the relevant parties in writing of this decision; 50

- (b) within 30 days after the guilty finding, determine the sanction taking into account any aggravating or mitigating circumstances; and
- (c) within five days after determining the sanction, inform the relevant parties in writing of the final outcome of the disciplinary hearing.
- (2) A registered auditor found guilty in terms of subsection (1)(a) may—
- (a) address the disciplinary hearing panel in mitigation of sentence; and
- (b) call witnesses to give evidence on his or her behalf in mitigation of the sentence.
- (3) (a) If the registered auditor charged is found guilty or if the registered auditor admits to the charges, the disciplinary hearing panel must either—
- (i) caution or reprimand the registered auditor;
- (ii) impose a fine not exceeding the amount determined by the Minister from time to time in the *Gazette*;
- (iii) require the registered auditor to attend appropriate training or any other relevant non-monetary sanction or more than one relevant non-monetary sanction;
- (iv) cancel the registration of the registered auditor concerned and remove his or her name from the register referred to in section 6; or
- (v) disqualify the registered auditor from registration as a registered auditor on a temporary or permanent basis.
- (b) The disciplinary hearing panel may impose more than one of the sanctions referred to in paragraph (a).
- (c) A sanction imposed in terms of paragraph (a) may be suspended for a specific period or until the occurrence of a specific event or made subject to any conditions.
- (4) The disciplinary hearing panel may order any registered auditor found guilty or who admitted guilt to pay such reasonable costs as have been incurred in connection with the investigation and the disciplinary hearing or such part thereof as the disciplinary hearing panel considers just.
- (5) The Regulatory Board must publish in the Board's website the name of the registered auditor found guilty, the finding and the sanction imposed in terms of subsection (3) and a cost order in terms of subsection (4).
- (6) The Regulatory Board must give effect to the decision of the disciplinary hearing panel.”.

Substitution of section 53 of Act 26 of 2005 35

15. The following section is hereby substituted for section 53 of the principal Act:

“Offences relating to investigation and disciplinary process

- 53.** (1) A person is guilty of an offence if he or she—
- (a) without just cause, refuses or fails to comply with any reasonable request by an official authorised by the Regulatory Board in connection with the conduct of an investigation;
- (b) interferes with or hinders the conduct of an investigation or a disciplinary process;
- (c) fails, without sufficient cause, to comply with a subpoena in terms of section 48 or 50;
- (d) having been called under section 50, refuses to be sworn in or to be affirmed as a witness or fails without sufficient cause to answer fully and satisfactorily to the best of the person's knowledge and belief all questions lawfully put concerning the subject of the hearing; or
- (e) having been duly sworn in or having made an affirmation under section 50, gives a false answer to any question lawfully put to the witness or makes a false statement on any matter, knowing the answer or statement to be false.
- (2) A person convicted of an offence under this section is liable to a fine or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment.”.

Insertion of sections 57A and 57B in Act 26 of 2005

16. The following sections are hereby inserted in the principal Act after section 57:

“Disclosure of information

57A. Subject to the Constitution and any other law, no person who is or was concerned with the performance of any function under this Act may disclose any information obtained in the performance of that function except— 5

(a) for the purpose of an investigation or a disciplinary process under this Act; 10

(b) if the person of necessity supplies it in the performance of functions under this Act; 10

(c) when required to do so by order of a court of law; 15

(d) at the written request of, and to, any appropriate regulator which requires it for the institution or an investigation with a view to the institution of any disciplinary process or criminal prosecution; or 15

(e) at the written request of, and to, any appropriate international regulator of audits and auditors that requires such information for the purpose of investigation or a disciplinary process. 15

Protection of personal information

57B. (1) The Regulatory Board must ensure that appropriate measures are taken in respect of personal information in its possession or under its control to prevent— 20

(a) loss of, damage to or unauthorised destruction of the information; and 25

(b) unlawful access to or processing of personal information, other than in accordance with this Act and the Protection of Personal Information Act, 2013 (Act No. 4 of 2013). 25

(2) In order to give effect to subsection (1) the Regulatory Board must take reasonable measures to— 30

(a) identify all reasonable and foreseeable internal and external risks to personal information in its possession or under its control; 30

(b) establish and maintain appropriate safeguards against the risks identified; 30

(c) regularly verify that the safeguards are effectively implemented; and 35

(d) ensure that the safeguards are continually updated in response to new risks or deficiencies in previously implemented safeguards.” 35

Transitional measures

17. If a registered auditor or registered candidate auditor— 40

(a) has been charged with improper conduct before the commencement of this Act, the matter must be dealt with in terms of the principal Act, before its amendment by this Act; or 40

(b) committed an act of improper conduct but has 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. 40

Short title

18. This Act is called the Auditing Profession Amendment Act, 2020. 45

MEMORANDUM ON THE OBJECTS OF THE AUDITING PROFESSION AMENDMENT BILL, 2020

1. PURPOSE OF BILL

The Auditing Profession Amendment Bill, 2020 (the “Bill”), proposes amendments to the Auditing Profession Act, 2005 (Act No. 26 of 2005) (the “Act”).

2. SUMMARY OF BILL

- 2.1 The Bill provides for, among others, amendments to—
- (a) strengthen the governance of the Independent Regulatory Board for Auditors (“IRBA”);
 - (b) strengthen the investigating and disciplinary processes;
 - (c) provide for the power to enter and search premises and to subpoena persons with information required for an investigation or disciplinary process;
 - (d) provide for the power to issue a warrant for purposes of entering and searching of premises;
 - (e) provide for processes to be followed after an investigation;
 - (f) provide for a duty to disclose information;
 - (g) provide for sanctions in admission of guilt process and following a disciplinary hearing;
 - (h) provide for offences relating to investigation and disciplinary process; and
 - (i) provide for protection personal information.
- 2.2 To strengthen the independence of the IRBA and address issues of conflict of interest by members of the IRBA, the proposed amendments prohibit—
- (a) registered auditors and candidate auditors from being appointed as members of the IRBA; and
 - (b) members of the IRBA from sharing directly or indirectly in any of the profits of a registered auditor or registered candidate auditor or receiving payments from a registered auditor or registered candidate auditor.
- 2.3 To address the challenges faced by the IRBA due to non-cooperation by auditing firms during investigations into improper conduct by registered auditors, the proposed amendment empowers the investigating committee to authorise an official of the IRBA to enter and search premises or subpoena any person with information required to complete an investigation. The Bill also authorises a disciplinary panel to subpoena a person to appear before it for the purposes of a disciplinary hearing.
- 2.4 The disciplinary committee of the IRBA is overburdened by the amount of disciplinary cases it has to deal with due to the limited number of members appointed in the disciplinary committee. To address this challenge, an amendment is proposed to allow the IRBA to appoint as many members of the disciplinary committee as it may determine. The proposed amendment also provides for the appointment of a panel from among the members of the disciplinary committee to deal with disciplinary cases. Therefore, a panel will be appointed for each case instead of the disciplinary committee having to deal with all the cases. Importantly, it is proposed that the decision of a panel is regarded as a decision of the disciplinary committee. The proposed amendment is also aimed at ensuring that disciplinary cases are expedited.
- 2.5 A further amendment empowers the IRBA to, if considered appropriate, refer a matter brought against a registered auditor to an accredited professional body for investigation.
- 2.6 As a regulator, it is important that the IRBA maintains processes to deal with personal information. An amendment is proposed to require the IRBA to take appropriate measures to ensure the protection of personal information in its possession or under its control.

3. OBJECTS OF BILL

3.1 Clause 1—Amendment of section 1

Section 1 is proposed to be amended by inserting the definition of Constitution.

3.2 Clause 2—Amendment of section 4

The proposed amendment requires the IBRA to determine a policy framework, with the approval of the Minister, for performing its functions.

3.3 Clause 3—Amendment of section 11

The proposed amendment prohibits registered auditors and registered candidate auditors from being appointed as members of the IRBA. The proposed amendment also prohibits members of the IRBA from—

- (a) sharing directly or indirectly, in any of the profits of a registered auditor; or registered candidate auditor; or
- (b) receiving payments from a registered auditor or registered candidate auditor.

3.4 Clause 4—Amendment of section 12

The proposed amendment allows members of the IRBA whose term of office is terminating, to continue to hold office for a further period not exceeding three months.

3.5 Clause 5—Amendment of section 20

The proposed amendment changes the limit on the number of meetings that must be held by committees established by the IRBA from four per year to at least two per year.

3.6 Clause 6—Amendment of section 24

The proposed amendment provides for the IRBA to establish an investigating committee and to appoint its members. The amendment also regulates the conduct of members of the investigating committee.

3.7 Clause 7—Insertion of sections 24A to 24B

The proposed amendment provides a power for the IRBA to appoint as many members of the disciplinary committee as it may determine. The amendment further regulates the conduct of members of the disciplinary committee by prohibiting a member from using his or her position to improperly benefit himself or herself or another person or to impede the work of the committee. The proposed amendment allows the IRBA to establish subcommittees, including an enforcement committee, which has the power to deal with certain categories of disciplinary matters of improper conduct by a registered auditor.

3.8 Clause 8—Amendment of section 37

The proposed amendment prohibits the registration of an individual as an auditor or candidate auditor if the person has been convicted of an offence.

3.9 Clause 9—Amendment of section 45

The proposed amendment prohibits the removal of a registered auditor before the auditor completes the process of reporting irregularities to the IRBA as envisaged in section 45.

3.10 **Clause 10—Amendment of section 48**

The proposed amendments—

- (a) allow the enforcement committee to refer a matter brought to the IRBA against a registered auditor to an accredited professional body for investigation and disciplinary proceedings;
- (b) empowers the investigating committee to subpoena a registered auditor who has been charged for improper conduct or any other person to produce to the committee any object or information, including but not limited to, any working papers, statements, correspondence, books or other documents, which is in the possession or under the control of that registered auditor or other person and which relates to the subject matter of the charge.

3.11 **Clause 11— Insertion of sections 48A to 48B**

The proposed amendment also provides a power to issue a warrant for the purposes of entering and searching premises during an investigation of alleged misconduct.

3.12 **Clause 12— Substitution of sections 49 to 51**

- 3.12.1 The proposed amendment provides for a process to be followed after an investigation, which is to charge a registered auditor for improper conduct if sufficient grounds exist, by following an admission of guilt process or referring the matter to the disciplinary committee for a disciplinary hearing. Where a matter is referred to the disciplinary committee, a panel will be appointed for each case, instead of the disciplinary committee having to deal with all the cases.
- 3.12.2 The proposed amendment further authorises a panel to, for the purposes of a disciplinary hearing, subpoena any person to appear before it at the time and place specified in the subpoena, to be questioned or to produce any object or information, including but not limited to, any working papers, statements, correspondence, books or other documents in his or her possession or control which relate to the charge. The amendment is also aimed at ensuring that disciplinary cases are expedited.
- 3.12.3 The proposed amendment provides for sanctions which may be imposed following an admission of guilt process, including the imposition of a fine, based on the maximum amount determined by the Minister. The Act currently empowers the disciplinary committee to impose a fine not exceeding the amount calculated according to the ratio for five year's imprisonment, prescribed in terms of the Adjustment of Fines Act, 1991 (Act No. 101 of 1991), on a registered auditor who is found guilty following a disciplinary hearing. The fines which have been determined in terms of the Adjustment of Fines Act, 1991, are too low and do not make the required impact as a deterrent.

3.13 **Clause 13—Amendment of section 51A**

Section 51A is proposed to be amended to include a cross-reference to the inserted section 51B.

3.14 **Clause 14—Insertion of section 51B**

The proposed amendment provides for sanctions to be imposed following a disciplinary hearing, including the imposition of a fine based on the maximum amount determined by the Minister. The amendment further allows for a registered auditor found guilty to address the panel in mitigation of sentence and to call witnesses to give evidence on his or her behalf in mitigation of the sentence.

3.15 Clause 15 — Substitution of section 53

The proposed amendment makes it an offence to fail to comply with a subpoena or to interfere with or hinder the conduct of an investigation. In terms of the proposed amendment, a person found guilty of this offence may be liable on conviction to a fine or imprisonment for a period not exceeding five years or to both such fine and imprisonment.

3.16 Clause 16—Insertion of sections 57A and 57B

3.16.1 The proposed amendment requires a person to, under certain circumstances, disclose information obtained in the performance of a function.

3.16.2 The proposed amendment also requires the IRBA to take appropriate measures in respect of the protection of personal information in its possession or under its control.

3.17 Clause 17 — Transitional measures (for amendments to Auditing Profession Act, 2005)

The proposed amendment provides for transitional measures in respect of a registered auditor charged for improper conduct committed before the commencement of the envisaged Act and further provides for instances where a registered auditor committed an act of improper conduct, but has not been charged at the time of the commencement of the envisaged Act.

4. ORGANISATIONS AND INSTITUTIONS CONSULTED

Independent Regulatory Board for Auditors.

5. FINANCIAL IMPLICATIONS FOR STATE

Increasing the number of members of the disciplinary committee to constitute panels to conduct disciplinary hearings proposed in the amendments to the Act may have financial implications for the State since the IRBA may require additional funding.

6. PARLIAMENTARY PROCEDURE

6.1 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.

6.2. 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.

- 6.3. 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 section 74 and section 77 of the Constitution.
- 6.4. The Office of the Chief State Law Adviser 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.
- 6.5. The Office of the Chief State Law Adviser is of the opinion that it is not necessary to refer the Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it contains no provision pertaining to customary law or customs of traditional communities.

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