



NATIONAL SMALL ENTERPRISE

AMENDMENT BILL, 2023.



**small business
development**

Department:
Small Business Development
REPUBLIC OF SOUTH AFRICA



OBJECTIVE

The National Small Enterprise Amendment Bill, 2023 ("the Bill"), seeks to amend the National Small Enterprise Act, 1996 (Act No. 102 of 1996) ("the Act"), primarily to

- provide for the establishment and registration, in terms of the Companies Act, No. 71 of 2008, of the Small Enterprise Development Finance Agency (SEDFA) and the subsequent incorporation into SEDFA of the Small Enterprise Financing Agency (sefa), the Co-operative Banks Development Agency (CBDA) and the Small Enterprise Development Agency (Seda);
- the establishment of the Office of the Small Enterprise Ombud Service ("the Office")
- enables the Minister to declare certain practices in relation to small enterprises to be prohibited as unfair trading practices;
- proposes an amendment to section 20(2) of the Act to provide clarity on the interpretation of the powers assigned to the Minister in amending the Schedule to the Act as well as the definition for small enterprises, to allow for simplification of the Schedule;
- Amend the definition for small enterprise.

SMALL ENTERPRISE DEVELOPMENT FINANCE AGENCY (SEDFA)

- The establishment of the SEDFA gives effect to a Cabinet decision to enable and provide for integrated government support (both financial and non-financial) to small enterprises, including co-operatives. In addition, the amalgamation of the three entities also contributes to the Cabinet endorsed rationalisation of the number of SOEs.
- The purpose of SEDFA will be to ensure that the small enterprise and co-operative ecosystem is able to offer the most efficient business advice, business development services, investment support, business facilitation and incubator support.
- The vision of the SEDFA is to be a leading business development entity that will drive economic transformation and inclusive growth in the economy through ensuring the provision of customised financial and non-financial support and greater access to finance for SMMEs.
- The Bill provides for SEDFA to be established as a State-Owned Company in terms of the Companies Act and the State to be the sole shareholder with the Minister as the sole representative of the shareholder. SEDFA operations are subject to the PFMA and the Companies Act
- The Bill sets the criteria and composition of the Board and requires the Board to constitute specified board committees including an audit and risk committee and a board nominations committee to assist in the public and transparent board appointment process.

OFFICE OF THE SMALL ENTERPRISE OMBUD SERVICE (THE OFFICE)

- The mischief the Bill aims to remedy is the lack of effective and affordable access to a justice mechanism for small enterprises. Business-to-business disputes and late and non-payments of legitimate invoices are a significant reality in the lives of small enterprises across the world, with very real implications on their growth.
- Section 34 of the Constitution of the Republic of South Africa guarantees that “everyone has right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum”
- The litigation route for resolving disputes, places SMMEs at a significant disadvantage relative to their larger business counterparts, for at least three reasons:
 - i. The financial cost of unresolved disputes is heavily borne by small enterprises.
 - ii. Even where the amount involved is large, going to court is still a prohibitive proposition for small enterprises.
 - iii. The process is cumbersome, time consuming and, of course, expensive.
- The Bill provides for the Office as a juristic person and sets the criteria for the appointment of the Ombud who will be accountable to the Minister and Parliament.
- Provide for the functions of the Office to be performed by an Ombud assisted by any deputy Ombud operating in regional offices, when necessary
- The Office is subject to the PFMA

POWERS, FUNCTIONS AND FUNDING OF THE OMBUDS OFFICE

- The Bill provides for the Office to consider and dispose of complaints in a procedurally fair, informal, economical and expeditious manner and by reference to what is equitable in all the circumstances, with due regard to the contractual arrangement or other legal relationship between the complainant and any other party to the complaint.
- The Ombud service will provide a full suite of services, from complaints handling to investigation, Alternate Dispute Resolution (ADR), adjudication / contracting / practice modelling function to assist small enterprises and draft and sign fair and sound contractual agreements.
- Determinations by the Ombud must be made in writing, must include the reasons for the determination and copies of the determination and complaint must be sent to the clerk or registrar of the Court that would have had jurisdiction in the matter had it been heard by a Court.
- Determinations by the Ombud are mandatory and binding, providing an ADR mechanism with the aim of avoiding litigation which is expensive and time consuming.
- Provision is however made for review specifically on the grounds of i) illegality; ii) procedural unfairness; or irrationality, thus still protecting the constitutional rights of all persons involved.

UNFAIR TRADING PRACTICES

- The Bill enables the Minister to, on recommendation of the Ombud, declare certain trading practices in relation to small enterprises to be prohibited unfair trading practices.
- The Bill set the parameters and procedures in terms of which the Minister by, notice in the Gazette, may declare certain practices in relation to small enterprises to be prohibited unfair trading practices. These procedures, amongst other includes the following:
 - Before issuing a notice contemplating to declare certain practices to be prohibited unfair trading practices, the Minister must first consult with the Minister responsible for trade, industry and competition.
 - Following the publication of the intention to declare certain practices to be unfair trading practices the Minister must consult with Ministers responsible for the national functions that will be affected by such as declaration.
 - The intention and reasons to declare certain practices as prohibited unfair trading practices must be published in the gazette for public comment.

DEFINITION OF SMALL ENTERPRISE

- The definition for small enterprise, amongst others, sets the size categories as well as the criteria and the thresholds determining the different size categories of small enterprises.
- The objective is to reduce the number of size categories as well as criteria to simplify the classification of the different size categories of small enterprises. There are currently 4 size categories, i.e., small, very small, micro and medium and 3 criteria, i.e., number of employees, total turnover and total gross asset value.

I. The size category “very small” to be removed:

- The size category “very small” to be subsumed into the size category “small” because users found it not to be useful. This will allow for simplification and alignment with international best practice. The abbreviation will change from SMME (Small, Very Small, Micro and Medium) to MSME (Micro, Small and Medium)

II. The criteria “asset value” to be removed:

- There is no reliable evidence-based data available to support the criteria of asset value. This will allow for thresholds to be set on evidence-based data.

CLARIFYING POWERS OF THE MINISTER

- The Bill also proposes an amendment to section 20(2) of the Act to provide clarity on the interpretation of the powers assigned to the Minister in amending the Schedule to the Act.
- This amendment is necessary to bring the section in line with a recent Constitutional Court judgement.

