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## THE PRESIDENCY

No. 1361 14 December 2001

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

**No. 62 of 2001: Criminal Procedure Second Amendment Act, 2001**



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Act No. 62, 2001 CRIMINAL PROCEDURE SECOND AMENDMENT ACT, 2001

**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 7 December 2001.)*

**ACT**

**To amend the Criminal Procedure Act, 1977, to allow a prosecutor and an accused to enter into a plea and sentence agreement; and to provide for matters connected therewith.**

**B**E IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

**Substitution of section 105 of Act 51 of 1977**

1. The following section is hereby substituted for section 105 of the Criminal Procedure Act, 1977 (hereinafter referred to as the principal Act):

**“Accused to plead to charge**

**105.** The charge shall be put to the accused by the prosecutor before the trial of the accused is commenced, and the accused shall, subject to the provisions of sections 77, **[and] 85 and 105A**, be required by the court forthwith to plead thereto in accordance with section 106.”

**Insertion of section 105A in Act 51 of 1977**

2. The following section is hereby inserted in the principal Act after section 105:

**“Plea and sentence agreements**

**105A.** (1) (a) A prosecutor authorised thereto in writing by the National Director of Public Prosecutions and an accused who is legally represented may, before the accused pleads to the charge brought against him or her, negotiate and enter into an agreement in respect of—

- (i) a plea of guilty by the accused to the offence charged or to an offence of which he or she may be convicted on the charge; and
- (ii) if the accused is convicted of the offence to which he or she has agreed to plead guilty—
- (aa) a just sentence to be imposed by the court; or
- (bb) the postponement of the passing of sentence in terms of section 297(1)(a); or

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- (cc) a just sentence to be imposed by the court, of which the operation of the whole or any part thereof is to be suspended in terms of section 297(1)(b); and
- (dd) if applicable, an award for compensation as contemplated in section 300. 5
- (b) The prosecutor may enter into an agreement contemplated in paragraph (a)—
- (i) after consultation with the person charged with the investigation of the case;
- (ii) with due regard to, at least, the— 10
- (aa) nature of and circumstances relating to the offence;
- (bb) personal circumstances of the accused;
- (cc) previous convictions of the accused, if any; and
- (dd) interests of the community; and
- (iii) after affording the complainant or his or her representative, where it is reasonable to do so and taking into account the nature of and circumstances relating to the offence and the interests of the complainant, the opportunity to make representations to the prosecutor regarding— 15
- (aa) the contents of the agreement; and
- (bb) the inclusion in the agreement of a condition relating to compensation or the rendering to the complainant of some specific benefit or service in lieu of compensation for damage or pecuniary loss. 20
- (c) The requirements of paragraph (b)(i) may be dispensed with if the prosecutor is satisfied that consultation with the person charged with the investigation of the case will delay the proceedings to such an extent that it could— 25
- (i) cause substantial prejudice to the prosecution, the accused, the complainant or his or her representative; and
- (ii) affect the administration of justice adversely. 30
- (2) An agreement contemplated in subsection (1) shall be in writing and shall at least—
- (a) state that the accused, before entering into the agreement, has been informed that he or she has the right— 35
- (i) to be presumed innocent until proved guilty beyond reasonable doubt;
- (ii) to remain silent and not to testify during the proceedings; and
- (iii) not to be compelled to give self-incriminating evidence; 40
- (b) state fully the terms of the agreement, the substantial facts of the matter, all other facts relevant to the sentence agreement and any admissions made by the accused;
- (c) be signed by the prosecutor, the accused and his or her legal representative; and
- (d) if the accused has negotiated with the prosecutor through an interpreter, contain a certificate by the interpreter to the effect that he or she interpreted accurately during the negotiations and in respect of the contents of the agreement. 45
- (3) The court shall not participate in the negotiations contemplated in subsection (1). 50
- (4) (a) The prosecutor shall, before the accused is required to plead, inform the court that an agreement contemplated in subsection (1) has been entered into and the court shall then—
- (i) require the accused to confirm that such an agreement has been entered into; and
- (ii) satisfy itself that the requirements of subsection (1)(b)(i) and (iii) have been complied with. 55
- (b) If the court is not satisfied that the agreement complies with the requirements of subsection (1)(b)(i) and (iii), the court shall—
- (i) inform the prosecutor and the accused of the reasons for non-compliance; and
- (ii) afford the prosecutor and the accused the opportunity to comply with the requirements concerned. 60

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(5) If the court is satisfied that the agreement complies with the requirements of subsection (1)(b)(i) and (iii), the court shall require the accused to plead to the charge and order that the contents of the agreement be disclosed in court.

(6) (a) After the contents of the agreement have been disclosed, the court shall question the accused to ascertain whether— 5

- (i) he or she confirms the terms of the agreement and the admissions made by him or her in the agreement;
- (ii) with reference to the alleged facts of the case, he or she admits the allegations in the charge to which he or she has agreed to plead guilty; 10  
and
- (iii) the agreement was entered into freely and voluntarily in his or her sound and sober senses and without having been unduly influenced.

(b) After an inquiry has been conducted in terms of paragraph (a), the court shall, if— 15

- (i) the court is not satisfied that the accused is guilty of the offence in respect of which the agreement was entered into; or
- (ii) it appears to the court that the accused does not admit an allegation in the charge or that the accused has incorrectly admitted any such allegation or that the accused has a valid defence to the charge; or 20
- (iii) for any other reason, the court is of the opinion that the plea of guilty by the accused should not stand,

record a plea of not guilty and inform the prosecutor and the accused of the reasons therefor.

(c) If the court has recorded a plea of not guilty, the trial shall start *de novo* before another presiding officer: Provided that the accused may waive his or her right to be tried before another presiding officer. 25

(7) (a) If the court is satisfied that the accused admits the allegations in the charge and that he or she is guilty of the offence in respect of which the agreement was entered into, the court shall proceed to consider the sentence agreement. 30

(b) For purposes of paragraph (a), the court—

- (i) may—
  - (aa) direct relevant questions, including questions about the previous convictions of the accused, to the prosecutor and the accused; and 35
  - (bb) hear evidence, including evidence or a statement by or on behalf of the accused or the complainant; and
- (ii) must, if the offence concerned is an offence— 40
  - (aa) referred to in the Schedule to the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997); or
  - (bb) for which a minimum penalty is prescribed in the law creating the offence,

have due regard to the provisions of that Act or law.

(8) If the court is satisfied that the sentence agreement is just, the court shall inform the prosecutor and the accused that the court is so satisfied, whereupon the court shall convict the accused of the offence charged and sentence the accused in accordance with the sentence agreement. 45

(9) (a) If the court is of the opinion that the sentence agreement is unjust, the court shall inform the prosecutor and the accused of the sentence which it considers just. 50

(b) Upon being informed of the sentence which the court considers just, the prosecutor and the accused may—

- (i) abide by the agreement with reference to the charge and inform the court that, subject to the right to lead evidence and to present argument relevant to sentencing, the court may proceed with the imposition of sentence; or 55
- (ii) withdraw from the agreement.

(c) If the prosecutor and the accused abide by the agreement as contemplated in paragraph (b)(i), the court shall convict the accused of the offence charged and impose the sentence which it considers just. 60

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(d) If the prosecutor or the accused withdraws from the agreement as contemplated in paragraph (b)(ii), the trial shall start *de novo* before another presiding officer: Provided that the accused may waive his or her right to be tried before another presiding officer.

(10) Where a trial starts *de novo* as contemplated in subsection (6)(c) or (9)(d)—

(a) the agreement shall be null and void and no regard shall be had or reference made to—

- (i) any negotiations which preceded the entering into the agreement;
- (ii) the agreement; or
- (iii) any record of the agreement in any proceedings relating thereto, unless the accused consents to the recording of all or certain admissions made by him or her in the agreement or during any proceedings relating thereto and any admission so recorded shall stand as proof of such admission;

(b) the prosecutor and the accused may not enter into a plea and sentence agreement in respect of a charge arising out of the same facts; and

(c) the prosecutor may proceed on any charge.

(11) (a) The National Director of Public Prosecutions, in consultation with the Minister, shall issue directives regarding all matters which are reasonably necessary or expedient to be prescribed in order to achieve the objects of this section and any directive so issued shall be observed in the application of this section.

(b) The directives contemplated in paragraph (a)—

(i) must prescribe the procedures to be followed in the application of this section relating to—

- (aa) any offence referred to in the Schedule to the Criminal Law Amendment Act, 1997, or any other offence for which a minimum penalty is prescribed in the law creating the offence;
- (bb) any offence in respect of which a court has the power or is required to conduct a specific enquiry, whether before or after convicting or sentencing the accused; and
- (cc) any offence in respect of which a court has the power or is required to make a specific order upon conviction of the accused;

(ii) may prescribe the procedures to be followed in the application of this section relating to any other offence in respect of which the National Director of Public Prosecutions deems it necessary or expedient to prescribe specific procedures;

(iii) must ensure that adequate disciplinary steps shall be taken against a prosecutor who fails to comply with any directive; and

(iv) must ensure that comprehensive records and statistics relating to the implementation and application of this section are kept by the prosecuting authority.

(c) The National Director of Public Prosecutions shall submit directives issued under this subsection to Parliament before those directives take effect, and the first directives so issued, must be submitted to Parliament within four months of the commencement of this section.

(d) Any directive issued under this subsection may be amended or withdrawn in like manner.

(12) The National Director of Public Prosecutions shall at least once every year submit the records and statistics referred to in subsection (11)(b)(iv) to Parliament.

(13) In this section “sentence agreement” means an agreement contemplated in subsection (1)(a)(ii).”

### Short title

3. This Act is called the Criminal Procedure Second Amendment Act, 2001.