



HELENSUZMAN FOUNDATION

For attention: Mr Allen Wicomb and Ms Teboho Sepanya

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Standing Committee on Finance

National Assembly

15 November 2020

Dear Mr Allen Wicomb and Ms Teboho Sepanya

Submission in response to the South African Reserve Bank Amendment Bill [B26-2018]

We attach our written submission in response to the South African Reserve Bank Amendment Bill [B26-2018].

Should you have any queries, it would be appreciated if you could contact Catherine Kruyer (Email: catherine@hsf.org.za).

Yours sincerely

Francis Antonie

Director



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1. Introduction

The Helen Suzman Foundation (“HSF”) welcomes the opportunity to make submissions to the Standing Committee on Finance (“Committee”) on the South African Reserve Bank Amendment Bill [B26-2018] (“Bill”).

The HSF is a non-governmental organisation whose main objective is to promote and defend the values of our constitutional democracy in South Africa, with a focus on the rule of law, transparency and accountability. Given the importance of the South African Reserve Bank (“Bank”) to the South African financial system, and the economy in general, the HSF wishes to submit its comments to Parliament on the text of the Bill.

The Bill seeks to amend the South African Reserve Bank Act 90 of 1989 (“Act”) to make the State the sole holder of the shares in the Bank and confer on the Minister of Finance (“Minister”) the rights attached to the shares in the Bank.

The HSF has two principle and immediate concerns related to the Bill, which will be discussed in detail below. First, nationalisation of the Bank serves no apparent purpose. Secondly, the Bill, as presently formulated, unjustifiably infringes the constitutional right to property in that it proposes expropriation of shares without compensation.

2. No apparent purpose is served by nationalisation

Clause 9 of the Bill seeks to repeal section 21 of the Act, entitled “share capital of the Bank”, and substitute it with provisions that make the State the sole holder of the shares in the Bank and empower the Minister to exercise the rights attached to the shares in the Bank on behalf of the State.

The HSF has concerns about what is being sought by nationalising the Bank. In the explanatory memorandum accompanying the Bill, concern is expressed that “[t]he provision of share capital of the Bank, and the increase of the share capital by issuing shares, enable private individuals including foreign nationals to buy and own shares in the Bank.” Thus expressed, the worry appears to be that private shareholders should not have any say in important government entities. However, this is misguided since the private shareholders in the Bank have no rights in respect of the actual business of the Bank.

The Bank’s mandate “to protect the value of the currency in the interest of balanced and sustainable economic growth in the Republic” is established in the Constitution.¹ Moreover, the Constitution requires that the Bank perform its functions “independently and without fear, favour or prejudice”.² The shareholders of the Bank have no influence on the Bank’s mandate or its independent operations and functions.

While the Bank’s share capital is divided into 2 million ordinary shares,³ the Act places restrictions on the right to hold or acquire shares in the Bank.⁴ In particular, the Act provides that no shareholder may hold more than 10 000 shares in the Bank.⁵

Moreover, it is clear in terms of the Act that shareholders have extremely limited powers in connection with the business of the Bank. The most significant power conferred on shareholders in the Act is the power to elect seven non-executive directors who comprise part of the Board of the Bank.⁶ While the Bank has wide-ranging powers in connection with

¹ Section 224(1) of the Constitution.

² Section 224(2) of the Constitution.

³ Section 21(1) of the Act.

⁴ Section 22 of the Act.

⁵ Section 22(1)(a) of the Act.

⁶ Section 4(1)(b) of the Act. The Board is comprised of 15 directors (section 4(1) of the Act). This includes the Governor, 3 Deputy Governors and 4 non-executive directors who are appointed by the President (section

the protection of the value of the South African currency, these powers vest in and are exercised exclusively by the executive directors of the Bank – the Governor and Deputy Governors of the Bank,⁷ who are appointed by the President.⁸ The Board's functions and powers are limited to those connected with the corporate governance of the Bank.⁹ Thus, while shareholders have the power to elect 7 non-executive directors of the Board, the directors elected by the shareholders have limited functions and powers. In addition, the Act provides that a shareholder who is not ordinarily resident in the Republic is not entitled to any vote at any meeting of the shareholders.¹⁰

It follows that removing the possibility of private individuals holding shares in the Bank and, instead, conferring the power to appoint directors to the Board on the Minister, as the Bill seeks to do,¹¹ accomplishes nothing of any practical consequence (and, at worst, conferring these extensive powers on the Minister may be antithetical to the independence of the Bank). The motivation for the Bill therefore seems to be purely of a cosmetic nature. Moreover, this may be a costly pyrrhic victory, as the Constitution requires that shareholders be paid compensation for the expropriation of their shares.¹² Simply put, the question is: why should government use state money to enrich private shareholders in a company where they have no rights of any consequence?

3. Expropriation without compensation

By seeking to make the State the sole holder of shares in clause 9, the Bill would, in effect, result in expropriation of the shares held by private individuals by the State. However, the Bill makes no provision for compensation to be paid for the shares.

4(1)(a) of the Act), and 7 non-executive directors who are elected by the shareholders from candidates approved by a panel established by the Governor (section 4(1)(b) of the Act).

⁷ Section 10 read with section 4A(2) of the Act.

⁸ Section 4(1)(a) of the Act.

⁹ Section 4A of the Act.

¹⁰ Section 23(3) of the Act.

¹¹ Clause 2 of the Bill.

¹² Section 25(2) of the Constitution.

Section 25(1) of the Constitution enshrines the right not to be arbitrarily deprived of property. The Constitutional Court has made it clear that the right to property must be understood generously.¹³ Shares, therefore, appear to fall within the ambit of constitutionally protected property.

Any expropriation must meet the requirements set out in section 25(2) of the Constitution to pass constitutional muster.¹⁴ Section 25(2) of the Constitution provides that property may be expropriated “subject to compensation”. The Constitution, furthermore, requires that the amount of compensation and the time and manner of payment “be just and equitable”.¹⁵ The Bill, in failing to make any provision for the payment of compensation, clearly limits the right to property in section 25 of the Constitution.

Moreover, the HSF contends that the Bill’s proposed limitation of the right to property is not reasonable and justifiable in terms of section 36 of the Constitution. This is, quite simply, because the nationalisation of the Bank does not appear to serve any purpose (as discussed above). In addition, the limitation of the right to property contemplated in the Bill is severe. There is no flexibility since there is no provision made for compensation at all.

4. Conclusion

The Bill, as presently formulated, does not pass constitutional muster. The expropriation of the shares held by private shareholders without compensation contemplated in the Bill unjustifiably infringes the right to property. And even if compensation were to be given it is

¹³ *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC) (FNB) at para 51; and *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) (Shoprite Checkers) at para 46.

¹⁴ Section 25(2) of the Constitution provides:

Property may be expropriated only in terms of law of general application—

(a) for a public purpose or in the public interest; and

(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

¹⁵ Section 25(3) of the Constitution. The Constitution further provides a non-exhaustive list of circumstances that must be considered, including (a) the current use of the property; (b) the history of the acquisition and use of the property; (c) the market value of the property; (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and (e) the purpose of the expropriation.”

not at all clear that this would enhance the independence of the Bank or have any beneficial consequence whatsoever.

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