SAKELIGA

SELFSTANDIGE SAKEGEMEENSKAP

29 October 2021

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| TO: | Department of Trade and Industry |
| ATTENTION: | Department of Trade and Industry |
| DELIVERED: | By email: companiesamendmentact@thedtic.gov.za |

To whom it may concern,

## SUBMISSION: COMPANIES AMENDMENT BILL, 2021

### Overview

Sakeliga NPC takes this opportunity to provide a short comment on the Companies Amendment Bill, 2021.

Sakeliga seeks to offer oral commentary on this submission.

### About Sakeliga

Sakeliga (Business League) is a business group and public benefit organisation with more than 12,000 members in various enterprises from small to big across South Africa. Sakeliga promotes a favourable business environment in the public interest, by means of its support for a market system and a sound constitutional order.

www.sakeliga.co.za

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## Companies Amendment Bill, 2021

A draft Companies Amendment Bill has been proposed and widely commented on. In the midst of a lockdown-induced economic shock on top of decades of ideological policy malaise, the Department of Trade and Industry has, regrettably in our view, seen fit to introduce even more interference and compliance burdens on firms that will further disincentivise value and wealth creation.

Minister Patel has explained that the Bill is not intended to intensify reporting to government, but rather merely require firms to report their remuneration policies to shareholders. But the Bill, in any event, sets out exactly *how* enterprises are to report on these policies and *how* shareholders are to approve them. This means the Bill does not simply empower shareholders, but allows government to micromanage them.

We are aware that the Bill takes much inspiration from the global debate on executive remuneration, and mentions "remuneration gaps." It envisions more paperwork in the form of remuneration reports and listing of wage differentials – another brick in the wall of existing reporting and compliance burdens.

At its core, the Bill takes aim at the phenomenon of inequality, which the Department effectively tell us is a major problem in South Africa requiring State regulation to remedy. A clear intention of the Bill, then, is to cause to be made public the differences in pay between the highest-paid executives and the lowest-paid employees. It is obvious that making public the ratio between the highest and lowest paid staff will be used by government to pressure firms into reducing pay differentials. This is likely to meet with little social resistance, as many regard pay differences as unfairly large and might welcome pressure on firms to reduce them.

But material inequality, we submit, is a complex phenomenon that by itself does not necessarily correspond to so-called "market failure," "injustice," or even real poverty. Pay differences between senior executives and staff likewise reflect multiple complex forces at work, some of which may be necessary market forces for allocating labour skills among firms and some of which may be the result of the already voluminous market distortions embedded in commercial affairs arising from domestic and even foreign monetary, fiscal, and regulatory interventions.

One can think of emigration among South Africa's skilled businesspersons and the growing number of skilled and unskilled unemployed persons. Both of these phenomena are the result of decades of government interference in and distortion of market forces, in particular with restrictive labour policy but recently with COVID-19 lockdowns.

Now the available pool of high-demand senior executives is quickly diminishing, meaning that when shareholders approach such an executive, they know the offer must be handsome due to the executive very likely having available opportunities abroad. Similarly, the supply of labour at the lower and mid-levels is so high that it would not make economic sense to remunerate

staff on par with international levels for the same work. This is not the firms' doing, but a result of policy decisions taken by the Department and its colleagues in government.

And the knock-on effects of labour policy, to immigration, to pay inequality, is but one example. Inflation, threats of property confiscation, and racial ownership requirements, all contribute ultimately to an increasingly smaller group of experienced executives receiving high remuneration and an increasingly larger group of middle management and entry-level staff receiving relatively little.

The Bill follows the global trend of states actively meddling in the affairs of private enterprises, creating a vast web of regulation that increasingly crushes entrepreneurial creativity, stifles growth, and saddles firms with burdensome and unproductive costs.

Shareholders are ultimately sovereign in corporate governance. If they wish for the executives who they appoint to provide more reporting on remuneration packages, they will ask for it. They might even require it by amending their respective firms' memoranda of incorporation. Company management may in turn deem reporting requirements too onerous and may as a result demand even higher compensation for having to deal with the additional compliance standards, or perhaps offer their skills to companies with less onerous requirements. Management may also need to hire additional human resources or compliance staff to comply with reporting requirements, adding to the administrative costs and reducing hiring, remuneration, and bonus flexibility for other employees.

Expanded remuneration reporting is not the only example in the Bill of officials thinking they need to hold shareholders (and firms) by the hand and tell them how to run an enterprise in South Africa.

The Bill already empowers the Minister to effectively decide, through so-called "minimum qualification requirements," who may and may not serve on a social and ethics committee. Laws of this nature will give government a stronger foot in the door, allowing it to exert ever more control over the key resource decisions of enterprises. This, we believe, is not an example of good political governance but rather an indication of growing ideological zealotry.

Compliance burdens placed on large corporates also inevitably have to be paid for by consumers and their smaller suppliers. There is, in reality, no such thing as a regulation or law that is exclusively applicable to a certain size of business – the economy is a living, breathing organism, and interference in one part of it is felt throughout.

Incrementally, with each additional regulation, the State is trying to become a substitute for society itself. This goal is, of course, impossible and, in trying to reach it, governments have done and continue to do tremendous damage.

This road does not lead to prosperity or flourishing, in our view. For that, South Africa requires a commercial environment that is conducive to enterprise, one that allows firms to make mistakes, to

experiment, and allows employees to do the same. Each new regulation introduced by government might on its own merit seem innocuous or even harmless, but when one zooms out and considers the developing thicket of regulations together, it becomes easy to see why there is no explosion of small business activity in the South African economy.

The commercial environment also needs to be relieved of burdensome and highly distortionary State interventions that have as one of their chief consequences the skewing of wealth, capital, pay, and remuneration to large firms and top management structures. The Companies Amendment Bill is an example of exactly the kind of interventions South Africa needs to see considerably less of.

We do acknowledge that the Bill does include some substantially positive proposals, for instance requiring diligent responses to the registration applications of companies, and if no response is forthcoming, deeming those applications to have been accepted. The two main negatives of the Bill – reporting requirements and political discretion around ethics committees – however outweigh these positives, and it is for that reason that we oppose the adoption of this Bill.

Prepared by:


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Sakeliga

## Addendum: The right to enterprise

### The Constitution must be read as a whole

Chaskalson J wrote for the majority of the Constitutional Court in *S v Makwanyane* that a provision of the Constitution "must not be construed in isolation, but in its context, which includes the history and background to the adoption of the Constitution, other provisions of the Constitution itself and, in particular" other provisions in the chapter of which it is a part.[1]

This means that no part of the Constitution is left unaffected by other parts of the Constitution, especially the provisions of section 1 of the Constitution, which provide for the broad constitutional basis of South Africa. These provisions are said to permeate the whole Constitution. Per Chaskalson J in *Minister of Home Affairs v NICRO*:

"The values enunciated in section 1 of the Constitution are of fundamental importance. They inform and give substance to all the provisions of the Constitution".[2]

Section 1 of the Constitution provides:

> "Republic of South Africa
>
> 1. The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> (a) Human dignity, the achievement of equality **and the advancement of human rights and freedoms**.
>
> (b) **Non-racialism** and non-sexism.
>
> (c) **Supremacy of the constitution and the rule of law**.
>
> (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness." (our emphasis)

The emphasised portions of section 1 above proscribe racial discrimination absolutely, and makes freedom – the idea that individuals and groups of individuals must have the ability to make decisions for themselves without interference – an imperative in South African public policy.

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[1] *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at para 10.
[2] *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others* 2005 (3) SA 280 (CC) at para 21.

Section 1(a) provides that the "advancement of … freedoms" is a value upon which South Africa is founded. This foundational value has the effect of strengthening every right in the Bill of Rights, as discussed below, which culminates into a right to enterprise. Whether or not South Africans should be free to make their own choices is not a question government gets to ask – it is a founding value and an imperative.

Non-racialism is, similarly, a Founding Provision and not a right in the Bill of Rights. Its absence from the Bill of Rights means that it is not available to limitation under section 36 of the Constitution, which enables the section 9 right to equal protection of the law to be limited. Thus, while equality between South Africans can be limited, **racial** equality is a constitutional imperative insofar as public policy relates.

This point is further reinforced by section 1(c), which provides for the co-equal supremacy of the Constitution and the Rule of Law.

The Rule of Law as a "meta-legal doctrine"[3] means in part that everyone subject to the law shall be governed by the same law, and not separate laws for separate people. If the latter occurs, the 'rule of man' reigns at the order of the day, whereby politicians and bureaucrats arbitrarily assign legal advantages to themselves and their constituencies at the expense of other citizens. The Rule of Law does not exist in such a state of affairs. Thus, there are two founding values which prohibit racial and sexist discrimination, *in addition* to section 9 of the Constitution, which theoretically allows for discrimination on *other* grounds.

## The cumulative 'right to enterprise' in terms of the Constitution

There exists a cumulative right to enterprise in the Constitution that becomes clear once the principle enunciated by Chaskalson J is truly appreciated – that the Constitution must be read as a whole. The right to enterprise means that South Africans may, free from the interference of government and other actors, voluntarily go about their own business. This right to enterprise consists of various rights in the Bill of Rights (informed by the section 1(a) commitment to the advancement of freedoms):

Section 10 – the right to human dignity. In *Ferreira v Levin*, Ackermann J opined:

> "Human dignity has little value without freedom; for without freedom personal development and fulfilment are not possible. **Without freedom, human dignity is little more than an abstraction. Freedom and dignity are inseparably linked.** To deny people their freedom is to deny them their dignity".[4] (our emphasis)

[3] Von Hayek FA. *The Constitution of Liberty*. (1960). Chicago: University of Chicago Press. 311.
[4] *Ferreira v Levin* 1996 (1) SA 984 (CC) at para 49

Section 12 – freedom and security of the person – especially sections 12(1)(a) and (c). These provisions provide that nobody may be deprived of freedom without just cause and that everyone has the right to be free from violence from both public and private sources. Violence must be understood as including the threat of violence, which underlies any new law or regulation such as the provisions of the present intervention.

Section 13 – freedom from slavery, servitude and forced labour. If South Africans are guaranteed the right to be free from slavery – forced employment – the converse is also logically true: South Africans are to be free from forced *un*employment as well, which is often the result of well-intended government policy.

Section 14 – the right to privacy. The right to privacy implies that persons or groups of persons may go about their businesses without the interference or surveillance of others – including and especially government – if they do so without violating others' rights. Such interference could include obliging the divulging of intimate personal or commercial details that a government ordinarily has no interest in knowing.

Section 18 – freedom of association. This right entitles everyone to associate (or disassociate) with whoever or whatever they wish on whatever basis. The provision was formulated without any provisos or qualifications and is therefore absolute insofar as it is not limited by section 36. South Africans may freely associate or disassociate as long as they do not violate the same right of others or any of the other rights in the Bill of Rights. Economic policy has a tendency to violate the freedom of association of enterprises, in South Africa often providing for forced racial association and disassociation.

Section 21(1) – freedom of movement. The freedom to move – leave, return, roam – is a vital element of enterprise.

Section 22 – freedom of trade, occupation and profession. The freedom to choose one's trade, occupation, and profession is, along with the property rights provision, the core of the right to enterprise. Section 22 provides that government may *regulate* (not *prohibit*) the practice (not the choice) of a profession. The regulation of practicing a particular profession cannot be so severe as to prohibit it.

Section 23 – labour relations. The Constitution guarantees the right of employees and employers to associate with trade unions and employers' organisations.

Section 25 – the right to property. There can be no right to enterprise, and no enterprise *per se*, without private property rights. Section 25, along with the freedom of trade, occupation and profession, forms the core of the right to enterprise and is a *conditio sine qua non* for South Africa's prosperity. A right to property supposes that the owners of the property in question may do with that property as they see fit, insofar as they do not violate the rights of others.