SUBMISSION ON

THE COMPANIES AMENDMENT BILL 2021

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AfriForum

Part of the Solidarity Movement

Content

1. Introduction

Ebrahim Patel, Minister of Trade, Industry and Competition, published a call for comments on the Companies Amendment Bill 2021 in the *Government Gazette* Nr. 45250 of 1 October 2021. The public is requested to deliver comments on this amendment by no later than 31 October 2021.

From the outset, AfriForum wishes to state categorically and in the strongest possible terms that it recognises and supports the object of 1) addressing South Africa's extreme societal inequality and the need for greater transparency in public financial affairs, and 2) combatting corruption in all spheres of financial conduct. Nonetheless, AfriForum is discontent with some of the proposals that are set out in the draft amendment. One can, for reasons expounded on *infra*, convincingly argue that, while the objectives cited seem to be noble at first glance, the proposed amendments will not achieve these aims, but will lead to a host of other problems that the legislature did not consider.

In its submission on the Bill, AfriForum will address the following:

1. The newly added definition of a *true owner* sets a dangerous precedent for privacy rights,
2. The proposed section 30A that relate to remuneration reports of state-owned companies is vague.
3. The proposed expansion of the Competition Tribunal's mandate and jurisdiction to hear matters referred from the B-BBEE commission is cause for concern.
4. The Bill attempts to solve inequality but completely neglects to address South Africa's true major economic development concerns, namely poverty and stagnating economic growth.

2. Concerns

Not all the amendments that are proposed by the Bill will be dealt with in this submission. Instead, focus will be directed solely toward provisions that present obvious cause for concern in the opinion of AfriForum. AfriForum identifies four main areas of concern in the content of the Bill:

2.1 Newly added definition of a "true owner" in section 1, and its corresponding relevance to section 56

The Bill defines a *true owner* in section 1(c) as

> … a natural person, who would in all the circumstances be considered to be the ultimate and true owner of the relevant securities, whether by reason of being capable either directly or indirectly (via the intermediation of others in the chain of holders of beneficial interest in the relevant securities) of directing the registered holder with regard to the securities or because of being a person for whose benefit the securities ensure or for any other reason, not limited *ejusdem generis*, which could be the registered holder itself, or if the registered holder is not the true owner or the only true owner, would be the last person in the chain of any holders of beneficial interest in the relevant securities.

The reason for the addition of this definition is explained in section 56. The provisions of this section create a duty on companies – both public and private – to establish and maintain a disclosure register stating all beneficial interest holders of securities issued by the company. Moreover, where the identity of beneficial interest holders or true owners of shares is unknown to the company, section 56 also requires the relevant company to ascertain from the registered holder of the share for whose benefit the shares are being held or who the true owner is. This must be done every quarter of the year on notice or in writing, by asking the holder to confirm within 10 days whether they are in fact the holder. If they are not the beneficial interest holder, they must provide the details of this interest holder or true owner, if known to them, as well as the extent of their shares. Ascertaining the true owner, who is in effect the natural person who ultimately benefits financially or exercises control when following all the sub-holders and proxies to their ultimate end, is a welcomed principle when it is appropriately applied. It may go a long way in cutting through red tape during financial audits and investigations where financial crimes are concerned. The manner of doing so, however, stands to bring with it certain unforeseen consequences that cannot simply be ignored.

An important departure that this section presents – aside from introducing the concept of a *true owner* – is that section 56 applies to all companies; where it previously only applied to public companies, it now applies to private companies as well. This means that private companies will now be compelled to disclose a myriad financial information which they were not required to do before. This could also have an adverse effect on the privacy rights of natural persons, who are specifically targeted in the definition of *true owner*. It is unsure how these provisions will interact with the right to privacy as enshrined in section 14 of the Constitution of the Republic of South Africa 1996. The right to privacy includes the right to financial privacy and is expounded and ensconced in many acts of parliament, including (but not limited to) the Financial Intelligence Centre Act 38 of 2001 (FICA) and the Protection of Personal Information Act 4 of 2013 (POPIA).

Undoubtedly, the legislatively mandated compilation and maintenance of a register that contains the detailed personal and financial information of the "true owner" of shares will violate the privacy of these owners. It will cause the financial affairs, ownings and position to become part of the public domain, even the personal information of persons who hold private shares. Moreover, from a company-wide perspective, it amounts to no less than the corporate veil being pierced – or rather completely lifted. While this is not new in our law, the stance of our courts has been to only pierce the corporate veil when it is abused. The effect of such a register and of forcing security holders to divulge all known information of another person without their consent, whether in a public or even private company, abrades personal privacy and all but demolishes the corporate veil.

The principle of separate juristic personality of companies is well entrenched in our company law, even being foundational thereto, and for good reason. Even if a natural person were to exercise control over shares or derive some financial benefit therefrom, the property of the company remains the property of the company. Thus, if shares in company A are held by company B, the separate legal personality and corresponding right of ownership of company B must be acknowledged and respected. It should also be kept in mind that company B is in itself a separate, dynamic entity that may have many directors and shareholders, and also has its own legal personality. This is in line with the *de facto* reality of company law, as well as the prevailing legal principles on which company law is based. Legislation that keeps this in mind is to be preferred to a tortuous exercise that attempts to oversimplify ownership and assign all ultimate ownership to one person, when in reality it is much more complex. It is also impractical and excessively burdensome to assign companies the duty of ascertaining ownership every quarter, since shares often change hands daily, at every link in the chain. We submit that forcing companies to play detective at their own cost while this should be the duty of law enforcement, is contrary to good governance and indolent at best. In any event, this should only become the duty of law enforcement or financial regulatory authorities when the need arises, instead of being policed constantly.

2.2 Presentation of a company's remuneration report envisioned in section 30A

The construction of section 30A is somewhat convoluted and provides for a remuneration policy, an implementation report and a remuneration report. Under the newly inserted section, public companies and state-owned corporations (SOCs) will be required to prepare and present a remuneration policy and implementation report, collectively referred to as *the remuneration report*, which must all be approved by a majority vote of board members and shareholders at an annual general meeting.

The provisions of section 30A prescribe that a vote must be held and reheld *ad infinitum* until the requisite approval is obtained, and that any changes to the remuneration policy must be accepted by the majority of shareholders before it may be implemented. The consequences of a report that fails to obtain the required shareholder approval are also set out in this section, although in a vague and uncertain way. This includes directors having to step down as directors year after year until a report is accepted. In effect, what section 30A will do is replace now-expendable directors until a sea of compliant people draft a remuneration policy with which the majority is appeased. This would inevitably entail lowballing highly skilled employees and inflating the income of lower skilled employees. No protection is granted to directors, and no mention is made of any veto rights or avenues of recourse for these directors.

Under section 30A, public companies and SOCs will henceforth also be required to publish the details and exact earnings of all directors, their highest-paid employee, their lowest-paid employee, their average remuneration, their median remuneration and the gap between the top 5% highest-paid and the bottom 5% lowest-paid employees.

We submitted that cherry-picking the most widely differing remunerations and juxtaposing these baldly with no regard to qualifying or justifying factors (such as seniority in tenure and management level, responsibility and workload, income generated for the company, incentives and performance-based rewards, qualification discrepancies etc.) will always paint a skewed picture and will look much worse than it would if the proper contextual background is provided. All relevant factors should be considered in the calculation, which is not the case with the Bill in its current form. Disclosure and transparency of income levels and income disparity is to be encouraged, but not in such a simplistic – even crude – way where apples are compared with oranges.

This will undoubtedly lead to outrage among the lower earning employees and will likely lead to the remuneration policy facing continuous rejection until it reaches a point where highly skilled and experienced heads of companies start looking elsewhere to be properly compensated for their efforts. It is important at this point to emphasise that these high-skilled people, who are effectively voted out of their positions, are unlikely to seek employment at rival companies in the country. Because the law would bind all companies in South Africa, they are much likelier to seek employment abroad, where their skills are more highly valued and remunerated. This will undoubtedly expedite the further loss of skilled labour in the so-called brain drain, which is already of great concern to the country.[1]

2.3 Additional powers granted to the Companies Tribunal

The Bill grants the Companies Tribunal additional powers to –

> conciliate, mediate, arbitrate or adjudicate on any administrative matters affecting any person in terms of this Act as may be referred to it in the prescribed manner by the B-BBEE Commission in terms of the Broad-Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003).

The proposed amendment undoubtedly creates additional bureaucratic red tape and in essence duplicates the powers of the B-BBEE Commission. This duplication adds to the already burdensome bureaucracy that faces South African companies.[2]

2.4 Failure to identify true economic issues

AfriForum submits that the Bill sadly fails to accurately identify the true economic issues that continue to plague the country, namely the pandemic of poverty that has gripped South Africans for decades.

The Bill's background note and explanatory memorandum sets out the three impetuses of the proposed amendments: 1) to improve the ease of doing business; 2) to achieve equity between directors and senior management on the one hand and shareholders and workers on the other; and 3) to strengthen the ability to fight money laundering and terrorism. Although these are lofty ideals, they fail to recognise that although South Africa faces considerable challenges regarding inequality,[3] our main challenge as a country remains poverty rather than inequality.

Although COVID-19 impacts the South African economy severely, it should be borne in mind that South Africa entered the pandemic after several years of low growth. In 2019, the economy grew by 0,2% (in 2018 it was 0,8%).[4] The World Bank estimates that the economy contracted by 7% in 2020, as the pandemic weighed heavily on both external demand and domestic activity because government implemented lockdown measures.

It is against these four concerns that the Bill must be viewed and scrutinised. As elaborated above, the Bill would in fact achieve the opposite of improving the ease of doing business and addressing the serious poverty challenges that face South Africa.[5] If promulgated, the amended Act will lead to capital drain and reluctance from foreign investors, and will burden existing companies who are already spending a considerable amount of time on bureaucratic

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1 *BusinessTech*. 2021. Skilled people in their 30s and 40s are leaving South Africa. 10 February. Available at https://businesstech.co.za/news/business/467097/skilled-people-in-their-30s-and-40s-are-leaving-south-africa/. Accessed on 21 October 2021.

2 Miller, T & Wongsaroj, S. 2017. *Sweating the small stuff: The impact of the bureaucracy burden*. London: Plum Consulting, p. 9. Available at https://www.sage.com/investors/-/media/files/investors/documents/pdf/needs%20to%20be%20reorganized/files/sweating%20the%20small%20stuff.pdf?la=en-gb&hash=FE486F8E4CA235657A2E84958230675B. Accessed on 21 October 2021.

3 South Africa ranks as the country with the lowest level of income equality in the world, thanks to a Gini coefficient of 63,0 when last measured in 2014. See: OECD. 2021. *Economic policy reforms 2021: Going for growth*. Available at https://www.oecd.org/economy/growth/South-Africa-country-note-going-for-growth-2021.pdf. Accessed on 24 October 2021.

4 The World Bank. 2021. *GDP growth (annual %) – South Africa*. Available at https://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG?end=2020&locations=ZA&start=1961&view=chart. Accessed on 24 October 2021.

5 Mavuso, B. 2021. *Policy needs to enable businesses to flourish*. Available at https://hub.blsa.org.za/smallbusiness/policy-needs-to-enable-businesses-to-flourish/. Accessed on 21 October 2021.

administration. It is estimated that South African companies suffer annual loses of R7,3 billion due to an implied loss of productivity as a result of burdensome bureaucracy.[6]

3. Conclusion

AfriForum urges the Minister of Trade, Industry and Competition to reconsider the potentially far-reaching effects that the amendments seek to bring about, particularly the four areas of concern detailed above. No bill should be adopted if it disregards the separate legal personality of companies by unduly piercing the corporate veil. Furthermore, amendments should be avoided if they exacerbate the growing unease in directors and managers of companies that are keeping the economy of the country afloat, or if they embarrass functional and profitable business models by making inaccurate comparisons, even if it is well intentioned. This will serve only to compel investors to reconsider the viability and sustainability of their financial position in South Africa, and highly skilled workers to reconsider their future employment prospects in the country compared to other countries.

[6] Miller, T & Wongsaroj, S. 2017. *Sweating the small stuff: The impact of the bureaucracy burden*. London: Plum Consulting, p. 2. Available at https://www.sage.com/investors/-/media/files/investors/documents/pdf/needs%20to%20be%20reorganized/files/sweating%20the%20small%20stuff.pdf?la=en-gb&hash=FE486F8E4CA235657A2E84958230675B. Accessed on 21 October 2021.