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Submission to the
Standing Committee on Finance (National Assembly)
regarding the
SOUTH AFRICAN RESERVE BANK AMENDMENT BILL [B26-2018]
Johannesburg, 16 November 2020

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1 Introduction

The Standing Committee on Finance has invited stakeholders and interested parties to submit written submissions on the South African Reserve Bank Amendment Bill [B26-2018] ('the Bill') by 12.00pm on Monday, 16 November 2020.

Mr J Malema MP originally introduced the Bill as a Private Member Bill on 16 August 2018. However, it lapsed on 7 May 2019 in terms of National Assembly Rule 333 (2) and was revived on 29 October 2019.

This submission on the Bill is made by the South African Institute of Race Relations NPC (IRR), a non-profit organisation formed in 1929 to oppose racial discrimination and promote racial goodwill. Its current objects are to promote democracy, human rights, development, and reconciliation between the peoples of South Africa.

2 No proper public participation or SEIAS process

The Constitution requires Parliament to facilitate proper public participation in the legislative process, while the Constitutional Court has repeatedly ruled that proper public participation in the law-making process is a vital aspect of South Africa's democracy.

Relevant rulings here include *Matatiele Municipality and others* v *President of the Republic of South Africa and others*; *Doctors for Life International* v *Speaker of the National Assembly and others*; and *Land Access Movement of South Africa and others* v *Chairperson of the National Council of Provinces and others*.

In these judgments, the Constitutional Court has elaborated on what is needed for proper public consultation. According to the court, citizens must be given 'a meaningful opportunity to be heard in the making of laws that will govern them'. They must also be given 'a reasonable opportunity to know about the issues and to have an adequate say'.

The court has also stressed that adequate time must be allowed for the public consultation process. In the *Land Access* case, for instance, it stated that 'a truncated timeline' for the adoption of legislation may itself be 'inherently unreasonable'. If the period allowed is too short – as it was in the *Land Access* case, when roughly a month was allowed for the Restitution of Land Rights Amendment Bill of 2014 to proceed through the National Council of Provinces (NCOP) – then 'it is simply impossible...to afford the public a meaningful opportunity to participate'.

In the *Doctors for Life* case, where the timeline for the adoption of the relevant Bill was also short, the court made it clear that legislative timetables cannot be allowed to trump constitutional rights. Said the court: 'The timetable must be subordinated to the rights guaranteed in the Constitution, and not the rights to the timetable.'

These rulings by the Constitutional Court apply with equal force to the Bill. The independence of the South African Reserve Bank is vital to the prosperity of all South Africans, particularly at this time of looming economic crisis. The public must be given reasonable time to consider the proposed amendments as well as to provide their comments. The time allowed has simply not been long enough for citizens to apply their minds to the Bill, or make considered comments on its far-reaching ramifications.

Since September 2015, all new legislation and regulation in South Africa has had to be subjected to a 'socio-economic impact assessment' before it is adopted. This must be done in terms of the Guidelines for the Socio-Economic Impact Assessment System (SEIAS) developed by the Department of Planning, Monitoring, and Evaluation in May 2015. The aim of this new system is to ensure that 'the full costs of regulations and especially the impact on the economy' are fully understood before new rules are introduced.[i]

According to the Guidelines, SEIAS must be applied at various stages in the policy process. Once a new bill has been proposed, 'an initial assessment' must be conducted to identify

different 'options for addressing the problem' and making 'a rough evaluation' of their respective costs and benefits. Thereafter, 'appropriate consultation' is needed, along with 'a continual review of the impact assessment as the proposals evolve'.[ii]

A 'final impact assessment' must then be developed that 'provides a detailed evaluation of the likely effects of the bill in terms of implementation and compliance costs as well as the anticipated outcome'. This final assessment, with its comprehensive assessment of likely economic and other costs, must be attached to the bill when it is published 'for public comment and consultation with stakeholders'.[iii]

However, no SEIAS assessment of this Bill has seemingly been carried out. Nor has a final SEIAS report been appended to the Bill to help inform the public and so empower it to 'know about' the issues and have a reasonable opportunity to influence the decisions to be made. This is a fundamental shortcoming which has eroded the constitutional right to appropriate public involvement in the regulatory process.

3 The content of the Bill

In essence, the Bill intends to achieve two major aims. Firstly, it proposes to eliminate private shareholding in the South African Reserve Bank. Instead, the state is to be the only shareholder, with the Minister of Finance as the state's representative.

Secondly, it proposes to modify the governance structure of the Reserve Bank. Whereas currently, the 15 directors of the Board of directors include 7 directors elected by the shareholders, in future those 7 directors would be appointed by the finance minister. The remaining 8 office holders (governor, three deputy governors, four other directors) would continue to be appointed by the President after consulting with the minister.

Most of the amendments proposed by the bill follow logically from those two major changes. They involve removing all references to shareholders, elections and elected directors, and reflect the Bill's intention to give the government undiluted control over the Bank, tempered only by the Bank's Constitutional mandate and the independence of mind of the government's appointees.

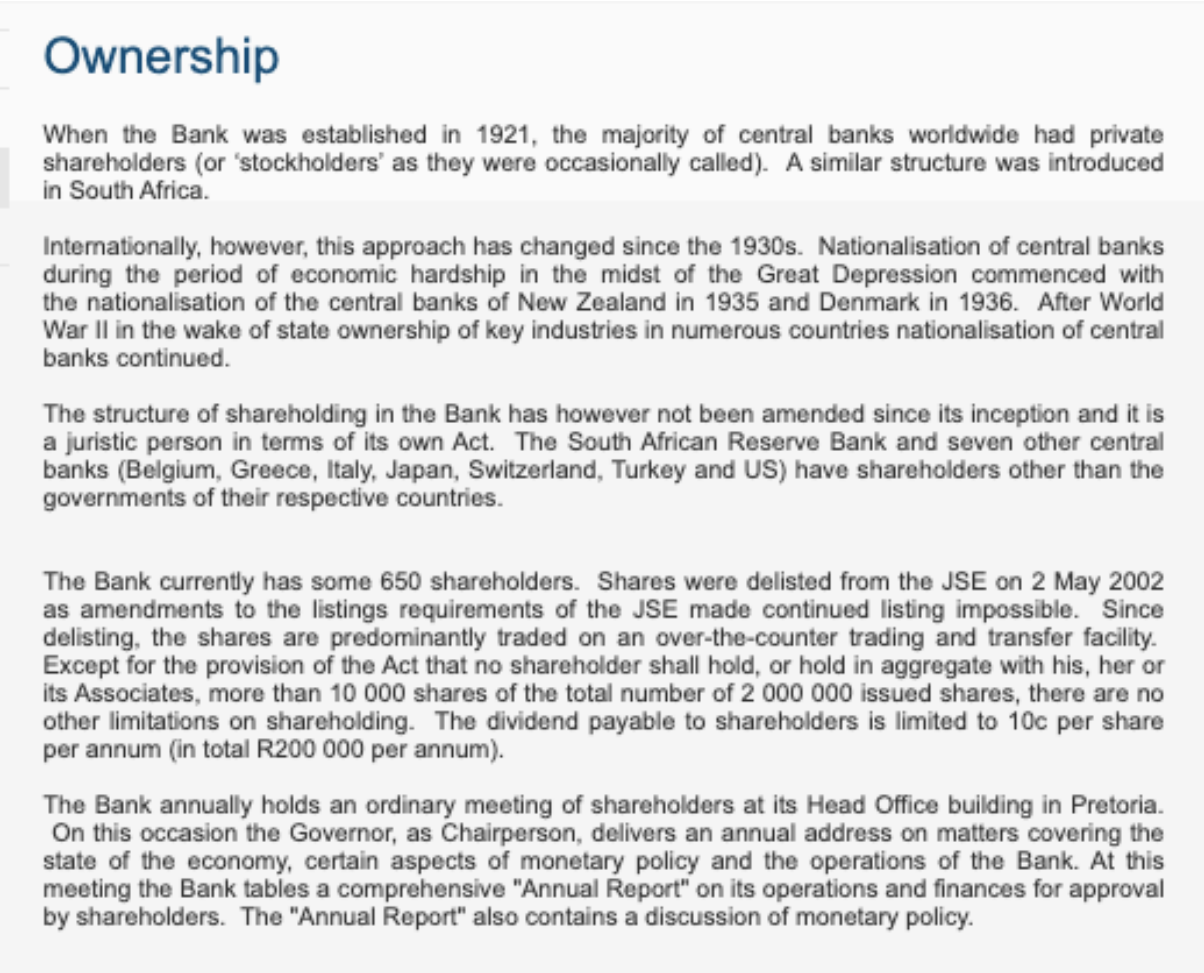
The mooted changes will have an effect on three aspects of the Bank in particular: ownership, control, and oversight. These are addressed in turn in the following.

3.1 Ownership

The South African Reserve Bank Act as it stands provides that the Bank has shareholders, of which there are approximately 650.[iv] In the international context, this is anomalous: there are only 7 (or 8) other central banks that have private shareholders.[v]

The governor of the South African Reserve Bank, Lesetja Kganyago, has been at pains to clarify that shareholding does not mean ownership: "There is no private ownership of the Reserve Bank. There are private shareholders, but they don't own the bank."[vi] However, this

is at odds with the Bank's own website, which mentions only the shareholders and no other owners.[vii]



Ownership

When the Bank was established in 1921, the majority of central banks worldwide had private shareholders (or 'stockholders' as they were occasionally called). A similar structure was introduced in South Africa.

Internationally, however, this approach has changed since the 1930s. Nationalisation of central banks during the period of economic hardship in the midst of the Great Depression commenced with the nationalisation of the central banks of New Zealand in 1935 and Denmark in 1936. After World War II in the wake of state ownership of key industries in numerous countries nationalisation of central banks continued.

The structure of shareholding in the Bank has however not been amended since its inception and it is a juristic person in terms of its own Act. The South African Reserve Bank and seven other central banks (Belgium, Greece, Italy, Japan, Switzerland, Turkey and US) have shareholders other than the governments of their respective countries.

The Bank currently has some 650 shareholders. Shares were delisted from the JSE on 2 May 2002 as amendments to the listings requirements of the JSE made continued listing impossible. Since delisting, the shares are predominantly traded on an over-the-counter trading and transfer facility. Except for the provision of the Act that no shareholder shall hold, or hold in aggregate with his, her or its Associates, more than 10 000 shares of the total number of 2 000 000 issued shares, there are no other limitations on shareholding. The dividend payable to shareholders is limited to 10c per share per annum (in total R200 000 per annum).

The Bank annually holds an ordinary meeting of shareholders at its Head Office building in Pretoria. On this occasion the Governor, as Chairperson, delivers an annual address on matters covering the state of the economy, certain aspects of monetary policy and the operations of the Bank. At this meeting the Bank tables a comprehensive "Annual Report" on its operations and finances for approval by shareholders. The "Annual Report" also contains a discussion of monetary policy.

Figure 1 - Note on the South African Reserve Bank's ownership, source: the Bank's website

From a historical perspective, while private shareholdings were more common in the first half of the 20th century, with about half of all central banks having private shareholders, this became much less common in the latter half of the 20th century, as most of the central banks established in post-colonial states were established fully state-owned.[viii] In the past 40 years only two central banks have been nationalised: those of Tuvalu (1995) and of Austria (2010).[ix] Clearly, this is no longer a common occurrence.

Despite these nationalisations, academic research indicates that the question of who owns a central bank is of marginal importance because it seems to have little impact on financial stability.[x] One may therefore ask what the motivation is for the change in ownership proposed by the Bill.

It is likely that the reason is ideological rather than financial in nature: the change being sought is consistent with the desire of populist politics "to remove […] checks and balances, generally applied in a democratic state, in order to achieve the objectives upon which [a politician] was originally elected; in other words, an elected politician who then seeks autocratic powers."[xi]

Lesetja Kganyago, the Reserve Bank governor, has raised his concerns about the risks of populist politics on many occasions. Such politics introduce volatility and unintended consequences into economies and usually negatively affect economies and societies. As he put it in 2018: "Macroeconomic stability is like oxygen. You don't miss it until you haven't got it, and then it's all you can think about."[xii] The intention to make the state the sole owner of the Reserve Bank without a convincing reason is a threat to macroeconomic stability and should be taken seriously – and opposed – for that reason.

A further point of concern related to ownership is how the shareholders would be compensated for being deprived of their ownership. It appears that some shareholders are holding shares in anticipation of a huge payout, and have in fact been involved in trying to get the ANC to promote the nationalisation of the Reserve Bank for this very reason.[xiii]

It is unlikely that their hopes will be fulfilled. There is a legal precedent for the rate at which shareholders can expect to be compensated *(South African Reserve Bank* v *Barit et al.)*. That rate is based on the dividend yields of SARB shares rather than the Bank's net asset value, which is what speculative investors would hope for. It means that the compensation per share might be around R1.50-R2.00 per share – hardly enough to form the basis of a vast fortune, if the maximum number of shares held by any one shareholder is limited to 10,000 (a limit set by the SARB Amendment Act of 2010).[xiv]

In this sense, and contrary to the Item 4 of the Memorandum on the Objects of the South African Reserve Bank Amendment Bill (2018),[xv] there would in fact be a financial implication for the state resulting from the nationalisation of the Reserve Bank. But that implication would be comparatively minor – if compensation were determined to be R2 per share, for example, the total cost to the state would be R4m, while the most any single shareholder could expect to receive would be R20,000.

There is also a possibility that the nationalisation of the Reserve Bank may be used as a test case for the new Expropriation Bill and the Constitutional amendment that aims to make expropriation without compensation legal. Here, proponents of the nationalisation might argue that nil compensation would be just and equitable. Were this to happen, the negative impact on prospective investors would be considerable. This in turn would undermine the already limited prospects for success of the government's growth and recovery strategy. As stated in a recent column, "Foreigners who invest in emerging markets are particularly neurotic about governments that are unconventionally imprudent. They wish to avoid investing in a country that will become the next Zimbabwe, Venezuela or Argentina."[xvi]

It is worth emphasising the importance of perceptions. Mr Kganyago has strongly opposed nationalisation because he fears it will lead to increased pressure to adopt destructive macro-economic policies. Prospective/current investors will be watching the issue keenly. If South Africa proceeds with nationalising the Reserve Bank, it will signal to investors that negative changes to macro-economic policy are likely to follow. Nationalisation might not have immediate consequences in itself, but it is a harbinger of things to come, like the canary in the

coalmine. Those perceptions of pending change could in themselves make it more difficult to find buyers for South African debt. Which in turn will raise the interest we have to pay on our debt and increase the impetus for the Bank to embark on quantitative easing, with disastrous results. South Africa stands on the brink of a sovereign debt crisis and must retain confidence in the soundness of its macroeconomic and fiscal management if it is to avoid this.

3.2 Oversight and control

As noted above, the Bill proposes that the South African Reserve Bank should have only one shareholder, namely the State. All rights and responsibilities associated with ownership would be exercised by the minister, acting as the State's representative, rather than by a group of shareholders in conjunction with the minister.

The proposal to transfer the distributed power currently placed in the hands of several hundred shareholders into the hands of a single person, the Minister of Finance, has the effect of reducing the number of checks and balances currently restraining executive power. This is true even though the shareholders do not have particularly many powers.

Shareholders elect 7 of the 15 Board members; they have the right to attend the annual "ordinary meeting of shareholders"; to approve the annual report on the state of the economy; and to appoint external auditors. Each shareholder may own no more than 10,000 of the Bank's 2m shares, and can earn a prescribed maximum dividend of 10 cents per share, i.e. a total of R1,000 per year.[xvii]

Shareholders do not have the power to influence monetary policy (this role is performed by the Monetary Policy Committee), interfere in the Bank's day-to-day management (this is the responsibility of the Bank's governors) or appoint executive Board members (a role reserved for the South African president).[xviii]

Nonetheless, eliminating private shareholding is a concern because it makes it slightly less likely that the Bank will obey its constitutional prescripts, namely:

> 224. (2) The South African Reserve Bank, in pursuit of its primary object, must perform its functions **independently and without fear, favour or prejudice**, but there must be regular consultation between the Bank and the Cabinet member responsible for national financial matters. (emphasis added)

If the president and the minister of finance have the power to appoint the entire Board as well as the external auditors, and no longer have to account to an annual meeting of shareholders, this casts doubts on the Board's ability to ensure that the Bank performs its functions independently.

Here, it is worth recalling the *Glenister II* case regarding the independence of the Directorate of Priority Crime Investigation (the "Hawks"). Here, the Constitutional Court raised the

concern that if the responsible minister were able to appoint, renew, suspend and remove the head of the Hawks, this would mean that the unit did not enjoy sufficient independence.[xix]

The case of the South African Reserve Bank shares certain similarities. The Bank, too, needs to have its independence protected through institutional and legal safeguards. Currently, those safeguards include the fact that not the entire Board is appointed by the government. Instead, almost half of the directors of the Board hold office not by the grace of the minister, but because they are elected by independent shareholders. These safeguards should be retained, and the Bill therefore retracted.

3.3 Failure to compute or disclose relevant costs for the state

The Memorandum on the Bill appended at its end states that the Bill has no financial implications for the State. It is not clear how this can be the case, because the existing shareholders would presumably have to be bought out, or have their shares expropriated in return for just and equitable compensation, as Section 25 of the Constitution requires.

In addition, as set out in section 3.1 above, the Bill poses real risks to the economy and the fiscus, which must be acknowledged and canvassed in full. This further underscores the need for a comprehensive SEIAS report which fully examines all these risks, and provides convincing reasons for changing the status quo. Doing so is clearly not the prudent option – and the risks of proceeding in this way are particularly acute at this point in time.

4 Constitutionality of the Bill

The fact that the Bill makes no provision for the compensation of shareholders raises constitutional concerns, as does the fact that the elimination of private shareholders is likely to reduce the Reserve Bank's independence rather than strengthen it. To be clear: if the Bill does not provide for compensation for the shareholders, then this is unconstitutional, as confirmed by Parliament's legal advisers.[xx] And Parliament is obliged to uphold the Constitution at all times. It cannot simply adopt a bill it knows is unconstitutional in the vague expectation that someone else will rectify the matter in due course. That is an irresponsible approach. It also puts Parliament in breach of its own constitutional obligations.

5 The way forward

This Bill should be retracted. It should be replaced by a revised Bill that retains private shareholding in the Bank and uses the shareholders as a resource in support of the Bank's independence. The new Bill should include provisions enhancing the Bank's independence and should be accompanied by a SEIAS assessment, the final report of which should be appended to the revised bill when it is released for public comment.

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