South African Institute of Race Relations NPC (IRR)
Submission to the
Department of Trade, Industry, and Competition
regarding the
Draft Companies Amendment Bill of 2021
Johannesburg, 31st October 2021

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Introduction

The Department of Trade, Industry and Competition (the Department) has invited interested people and stakeholders to submit written comments, by 31st October 2021, on the Draft Companies Amendment Bill of 2021 (the Bill).

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.

The SEIA system and public consultation

Since September 2015, all new legislation 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.[1]

According to the Guidelines, SEIAS must be applied at various stages in the policy process. Once new legislation 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'.[2]

A 'final impact assessment' must then be developed that 'provides a detailed evaluation of the likely effects of the [proposed law] in terms of implementation and compliance costs as well as the anticipated outcome'. When a measure is published 'for public comment and consultation with stakeholders', this final assessment must be attached to it. [3]

The Bill on which comment is being sought is likely to have considerable negative economic ramifications. For the reasons more fully described in due course, its wage-gap provisions alone (quite apart from various other worrying clauses) will add to the regulatory burden on listed companies while providing yet another barrier to investment, growth, and employment.

This, in turn, will add to inequality, rather than helping to reduce it. It will also make recovery from the Covid-19 lockdown, which has caused unprecedented damage to an already ailing economy, still harder to achieve. Yet no proper SEIA assessment of the Bill has been carried out, while no final SEIA report has been appended to the Bill to help inform the public in formulating their comments.

This has important ramifications for the public consultation in the legislative process that the Constitution requires. Public participation in law making is a vital aspect of South Africa's representative and participatory democracy, as the Constitutional Court has repeatedly reaffirmed in judgments spanning a decade or more. These rulings 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.*[4]

In the *New Clicks* case in the Constitutional Court, Mr Justice Albie Sachs noted that there were many ways in which public participation could be facilitated. He added: 'What matters

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[1] Department of Planning, Monitoring and Evaluation, 'Socio-Economic Impact Assessment System (SEIAS), Revised Impact Assessment: National Health Insurance Bill', 26 June 2019 (2019 SEIAS Assessment); *SEIAS Guidelines*, p3, May 2015
[2] *SEIAS Guidelines* p7
[3] *SEIAS Guidelines*, p11
[4] [2006] ZACC 12; 2007 (1) BCLR 47 (CC); 2006 (6) SA 416 (CC); [2016] ZACC 22

is that…a reasonable opportunity is offered to members of the public and all interested parties *to know about the issues* and to have an adequate say'. This passage was quoted with approval in both *Doctors for Life* and in the *Land Access* case.[5]

The best way for the government to ensure that the public and all interested parties 'know about the issues' raised by a bill and are thus equipped to 'have an adequate say' on its content and its ramifications is for those who put forward new legislation to comply with the state's own SEIA system. However, the Department has failed to comply with this obligation. This is a serious procedural defect – and it undermines much of the value of opportunity for public comment that it has provided.

A complex Bill with three main policy objectives

The Bill was first published for public comment in September 2018 and has since been significantly revised. For this reason – and also to obtain further comment on its new provisions – it has now been published for a second time.[6]

According to the Background Note and Explanatory Memorandum on the Bill, the present proposed amendments have three main policy objectives:[7]

1) to enhance the ease of doing business in South Africa;
2) to help 'achieve equity' as between executives and workers and 'address public concerns regarding high levels of inequalities in society'; and
3) to counter money laundering and terrorism by requiring companies to disclose the 'ultimate beneficial ownership' of their shares.

Given time constraints, the IRR can comment only on the second of these three aims (though it will also deal briefly with the uncertainty created by the Bill's provisions empowering the Companies Tribunal to adjudicate on 'administrative matters' referred to it by the Broad-Based Black Economic Empowerment Commission). According to the Bill, the fulfilment of this second objective requires significantly increased public disclosure and shareholder approval as regards 'the inequity of significant pay gaps between the top and bottom levels of a company'.[8]

Existing statutory requirements

Under s30 of the Companies Act of 2008, public companies (and all other companies obliged to have their annual financial statements audited) must include in their financial statements a comprehensive description of the remuneration and benefits provided to all directors and prescribed officers.[9]

[5] Section 59(1), Constitution of the Republic of South Africa, 1996; *Minister for Health and another* v *New Clicks South Africa (Pty) Ltd and others*, [2005] ZACC 14, at para 630, emphasis supplied by the IRR; *Doctors for Life*, at para 145; *Land Access* judgment, at para 59

[6] Para 1.1, Background Note and Explanatory Memorandum on the Companies Amendment Bill

[7] Para 2, Background Note and Explanatory Memorandum

[8] Para 5.1, Background note and explanatory memorandum

[9] Section 30(4), Companies Act of 2008

‘Remuneration’ is broadly defined to include fees, salaries, bonuses, and ‘performance-related payments’, along with expense allowances, pension contributions, share options, and financial assistance of any kind (preferential interest rates on loans, for example).[10]

Under s27 of the Employment Equity Act of 1998, designated employers (of 50 employees or more) must report to the Employment Conditions Commission established under the Basic Conditions of Employment Act of 1997 on the ‘remuneration and benefits received in each occupational category and level’ of their workforces.[11]

‘Where disproportionate income differentials’ are thus revealed, the designated employer ‘must take measures to progressively reduce such differentials, subject to such guidance’ as may be provided by the minister of employment and labour. These measures may range from collective bargaining and skills development to whatever ‘other measures are appropriate in the circumstances’.[12]

The Employment Conditions Commission is obliged to ‘research and investigate norms and benchmarks for proportionate income differentials’. It must also ‘advise the minister on appropriate measures for reducing disproportionate differentials’.[13]

The wage gap provisions in the Bill

The Bill inserts a new s30A into the 2008 Act. Under this new section, public and state-owned companies must include, in their annual financial statements, comprehensive information about the remuneration provided to their directors and prescribed officers, as well as the gap between their highest paid and lowest paid employees.[14]

According to s30A, every public and state-owned company must draw up ‘a remuneration policy’ for directors and prescribed officers, which must be approved by ordinary resolution (one passed by a 50% plus one majority) of shareholders at the company’s annual general meeting. Once approved, this policy does not require further approval for three years or until a material change is made to it.[15]

This wording indicates that only significant changes to the remuneration policy need shareholder approval. However, this is at odds with another subsection in the new Section 30A which states that ‘any changes to the remuneration policy’ – by implication, irrespective

[10] Section 30(6), Companies Act of 2008
[11] Section 27 (1), Employment Equity Act of 1998
[12] Section 27(2) and (3), Employment Equity Act of 1998
[13] Section 27(4) to (5), Employment Equity Act of 1998]
[14] https://www.cliffedekkerhofmeyr.com/en/news/publications/2021/Corporate/corporate-and-commercial-alert-6-october-companies-amendment-bill-2021-drawing-attention-to-the-remuneration-gap.html
[15] Section 30A(1), (2), Bill

of how minor they might be – 'may be implemented' only after shareholder approval has been obtained by ordinary resolution.[16]

Every public and state-owned company must also draw up an 'implementation report', which must 'give details of the remuneration and benefits received by each director and prescribed officer' in the year under review.[17]

The implementation report forms a crucial part of the overall 'remuneration report'. This report must also include a 'background statement', the remuneration policy of the company, and the following information:[18]

1) the total remuneration (as broadly defined) of 'the employee of the company with the highest total remuneration' in that year;
2) the total remuneration (again, as broadly defined) of the company employee with 'the lowest total remuneration';
3) the average remuneration of all employees and the median remuneration of all employees (the median being the remuneration level that divides employee earnings in half, with half earning more than the median and the other half earning less); and
4) 'the remuneration gap, reflecting the ratio between the total remuneration of the top 5% highest paid employees and the total remuneration of the bottom 5% lowest paid employees'.

This composite remuneration report, with its various elements, must be approved by the company's board and then presented to shareholders at the annual general meeting for their approval. Shareholders must vote on both the remuneration policy and the implementation report 'as separate documents with separate voting requirements'.[19] In both instances, however, an ordinary resolution is required, which means that a 50% plus one majority is needed in favour of the relevant report.[20]

If the remuneration policy is not approved by ordinary resolution, it must be presented to the next annual general meeting, or to a special shareholders' meeting called for this purpose, until the requisite approval is obtained.[21] The Bill is silent, however, as to the legal status of payments that have already been *received* by directors and prescribed officers, in accordance with the remuneration policy's proposals, and as set out in the accompanying implementation report. This creates considerable uncertainty as to what the consequences of non-approval of the remuneration policy will be.

If the implementation report (as opposed to the remuneration policy) is not approved by ordinary resolution, two results must follow, according to the Bill. First, the remuneration

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[16] Section 30A(8), Bill
[17] Section 30A(3), Bill
[18] Section 30A(3)(d) to (f), Bill
[19] Section 30A(4) to (6), Bill
[20] Section 30A(6), Bill
[21] Section 30A(7), Bill

committee must provide an explanation, at the following annual general meeting, of 'the manner in which the shareholders' concerns have been taken into account'. Again, this raises questions as to whether any steps might need to be taken to counter the earlier failure to approve. It also raises the possibility – not spelt out in the Bill – that some claw-back of the remuneration already provided to directors and prescribed offers might in practice be required to meet shareholder concerns.

The second consequence of the non-approval of the implementation report is that 'the non-executive directors' serving on the remuneration committee 'shall be required to stand down for re-election [in] every year of such rejection of the implementation report'.[22]

This wording indicates that the relevant non-executive directors are to be barred from standing for re-election as directors and not merely from appointment to the remuneration committee. Comments law firm CliffeDekkerHofmeyr: 'Voting down an implementation report would be akin to the removal of a director under s71 of the Act and may be self-defeating insofar as it results in a high turnover of non-executive directors or reduces the number of suitably qualified non-executive directors that are willing to serve on a company's remuneration committee.'[23]

Ramifications of the wage gap provisions in the Bill

Increased regulatory burden

According to the Background Note to the Bill, one of its three key objectives is to increase the 'ease of doing business' in South Africa. Towards this end, the Background Note adds, 'it is important that company law should…be clear, user friendly, consistent with well-established principles, and not over-burdensome on the conduct of business. This is important not only for the attraction of foreign investors but also for the efficient and effective conduct of the domestic economy and for the creation of jobs'. The Bill therefore seeks to 'increase legal certainty' where this is needed, 'provide greater flexibility to companies' in certain circumstances, and 'remove unnecessary provisions' from the Act.[24]

The wage gap provisions in the Bill are inconsistent with these policy goals. The provisions are often vaguely phrased and thus add to legal uncertainty – particularly on the consequences of non-approval of the remuneration policy and implementation report (as set out above) and in other spheres as well (whether pre- or post-tax remuneration must be reported, for example, as described below). Far from providing 'greater flexibility', the new clauses reduce the discretion that companies need in deciding on appropriate remuneration for their senior executives. In addition, the new wage gap provisions are unnecessary, as both the Companies Act and the Employment Equity Act already have adequate rules on the disclosure of executive pay and the reduction of 'disproportionate income differentials'

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[22] Section 30A(9)(b), Bill
[23] cliffedekkerhofmeyr, op cit, p5
[24] Para 2.2.1, Background Note

between senior and junior employees. The wage gap clauses thus add to the 'unnecessary provisions' in the Act, instead of helping to reduce them.

The wage gap provisions also increase, rather than reduce, the regulatory burden on business in South Africa. The administrative burden in drawing up and adopting the remuneration report with its different elements is likely to be considerable. More seriously still, in implicitly requiring that the wage gap be narrowed, s30A imposes obligations on companies that will be virtually impossible for them to discharge – especially given the magnitude of the unemployment crisis and the extent of the skills shortage within the country (see *Key factors contributing to inequality*, below).

The wage gap clauses in the Bill effectively require listed companies to overcome societal obstacles to more equal pay that lie beyond the scope of business to tackle. Threatening listed companies with reputational damage and other adverse consequences for failing to achieve what they cannot reasonably be expected to accomplish will significantly *increase* the regulatory burden on the private sector. It will also make South Africa still more hostile to direct investment, whether foreign or domestic. It certainly will not ease the burden of doing business here.

Piet Mouton, CEO of PSG, an asset management company, has criticised the increased regulatory burden the Bill will bring. In his words, 'law-abiding businesses are [already] being swamped as they try to comply with increasingly onerous regulations instead of getting on with trying to make money for shareholders'. The burden on listed – as opposed to other – companies is particularly high, moreover, and will be made worse by the Bill. 'The advantages of being listed are now rapidly disappearing,' he warns. [25]

Already, the number of companies listed on the JSE has declined sharply in the past 30 years, dropping from close on 780 to just over 330 today. This is partly because of a consolidation process found in other countries too, as large numbers of smaller companies have been replaced by a smaller number of much bigger ones. The JSE itself, however, is concerned that the country's macroeconomic environment has deteriorated in the past five years – and that this is already prompting an increase in capital outflows.[26]

The wage comparisons required by the Bill

As earlier noted, the Bill requires listed companies to set out not only the average and median wages paid to their employees but also:[27]

- the gap between the highest and lowest paid single employee, and
- the gap between the highest paid 5% of employees and the lowest paid 5%.

[25] Sunday Times Business Times 24 October 2021

[26] https://businesstech.co.za/news/finance/529244/south-africas-shrinking-jse-investors-explain-whats-going-on/

[27] Section 30A(3)(d) to (f), Bill

However, as Busi Mavuso, CEO of Business Leadership South Africa (BLSA), has warned, information about the wage gap between the top and bottom 5% of employees is meaningless without an understanding of the surrounding circumstances. The gap will be particularly high within a supermarket chain, for instance, as it is likely to have large numbers of tellers and packing staff with relatively low levels of skill. The gap will be far narrower within an investment bank which employs mainly professional staff. But the bigger wage gap within the supermarket chain does not mean that it is unfairly 'exploiting' its lower-paid personnel, as Ms Mavuso points out.[28]

On the contrary, all the bigger wage gap shows is that the supermarket business model requires such enterprises to employ large numbers of people with limited skills. In South Africa, moreover, there are far more people in this category than there are jobs available for them. This 'over-supply' of the relatively poorly skilled also drives down wages within this group.

In addition, the expertise required by the CEO of a listed company (likely to be the best-paid employee) and an office cleaner (likely to be the worst-paid) is so different that no meaningful comparison can be made between their salaries. The CEO needs a complex variety of qualifications and skills, including a capacity for strong leadership and risk-taking entrepreneurship and a broad-ranging knowledge of all facets of the business. A cleaner must be able, in essence, to sweep, vacuum, and dust. That the CEO earns far more is hardly surprising – and especially so in South Africa, where people with high-level skills are scarce and millions of individuals with limited skills are in over-supply.[29]

Superficial wage comparisons overlook other relevant factors too. Among other things:

- executive remuneration commonly includes a performance-based element which is not part of normal pay, becomes due only in specific circumstances, and fluctuates from year to year; while
- executive remuneration is often difficult to quantify, especially where it involves benefits such as share options.

One of the great uncertainties in the Bill, moreover, is its failure to explain whether the salaries to be reported are pre-tax or after-tax. Yet the difference is often great, especially at executive levels. As the Background Note acknowledges, 'the median pre-tax package for a CEO of a listed company was R5.2 million in 2020 and after-tax it was R2.8 million' (as described in a regular survey of executive remuneration carried out by audit firm PwC).[30] The Background Note invites public comment on 'whether ratios should reflect pre-tax or post-tax remuneration',[31] but the relevant issues extend well beyond this.

[28] Business Day 11 October 2021
[29] Sunday Times Business Times 17 October 2021
[30] Para 5.19, Background Note
[31] Para 5.24, Background Note

Differential tax burdens and benefits
In South Africa, redistribution via the budget has long been substantial, with higher-paid South Africans (mostly white in the apartheid period but increasingly black since 1994) making far greater contributions to tax revenues than the benefits they receive back from the state. This was confirmed in a 1992 study by the International Monetary Fund (IMF) on economic policies for a post-apartheid South Africa, which investigated the possibility of increasing redistributive taxes.

In the words of Dave Steward, chairman of the FW de Klerk Foundation, the IMF study found that 'even at that time, white South Africans paid 32% of their incomes in tax but received back from the state only 8.7% in education, health, and social benefits. This gave them what the IMF called a relative tax burden of 23.2%. This was more than twice as high as the relative tax burden of the next highest country (Canada) and three times the tax burden of countries like France and Germany.'[32]

Since 1994, moreover, the relative tax burden on wealthy South Africans has increased substantially as redistribution via the budget has intensified. According to Econometrix, 5.8% of South Africa's population (both white and black) pays 92% of personal income tax and 85% of Value-Added Tax (VAT), amounting to some R780bn in 2019/20 (the latest year for which this data is available).[33]

If we assume that the relative tax burden on this small group has remained at 23% since 1992 (though it has doubtless in fact increased), then this group – in the 2019/20 tax year alone – contributed some R600bn to the fiscus over and above any benefit it received back from the state. It is also likely to have paid similar amounts, in nominal rands, in most years since the political transition.[34]

Much of the benefit of the taxes paid by this group has gone to the millions who are unemployed (see below), or who earn too little to pay any income tax at all. Many of the employees at the bottom end of the earnings spectrum are thus likely to have benefited from the 'social wage' introduced by the state since 1994. This social wage includes free basic education in public schools, mostly free healthcare in public clinics and hospitals, and free houses for those earning less than R3 500 a month. For many low-earning caregivers, it also includes the child support grant paid out in cash each month to help support some 12.8 million children under the age of 18.[35]

The Background Note makes much of 'the inequity of significant pay gaps between the top and bottom levels of a company'.[36] It also claims that 'inequality in pay contributes as much

[32] Dave Steward, Chasing away the milk cow in the name of social justice, Politicsweb.co.za, 15 October 2021, p3
[33] Steward, ibid; Centre for Risk Analysis, Public Finance March 2021, p7
[34] Dave Steward, ibid
[35] Centre for Risk Analysis, Social Security, July 2021, pp2, 19
[36] Para 5.1, Background Note

to overall income inequality as joblessness'. (This claim is dubious, however, given the small number of high earners in the country and the extent of South Africa's unemployment crisis, as set out below.) Yet both the Bill and the Background Note ignore the extent of redistribution that routinely takes place via the budget and how much this helps to reduce inequality. Both also ignore the main factors contributing to inequality – which go far beyond wage differentials.

Key factors contributing to inequality

South Africa has one of the highest levels of income inequality in the world (63), as measured by the Gini coefficient.[37] Though this Gini score comes down significantly (to 53, according to one recent study)[38] once social grants and the wider social wage are taken into account, inequality in South Africa nevertheless remains disturbingly high. However, this has little to do with the wage gap between the highest and lowest paid employees in listed companies – which number a mere 330 in total[39]– or in the country's 700 or so state-owned enterprises. The key reasons for inequality lie rather in a host of other factors.

High unemployment

The unemployment rate stands at 34% on the official definition, which excludes those too discouraged to keep looking for work, and at 44% on the expanded definition which takes many of those discouraged workers into account. Among youth aged 15 to 24 the official unemployment rate is higher still at 47%, while among youth aged 15 to 34 it stands at 64%. On the expanded definition, a staggering 75% of youths aged 15 to 24 are unemployed.[40]

Given these differences in how unemployment is defined, one of the most telling alternative indicators is the labour absorption rate. This rate measures the proportion of the working-age population (15 to 64) that is employed, and takes account of all those who do any work for pay, profit, or family gain. Assessed on this basis, South Africa's labour absorption rate stands at a dismal 38% overall.[41] It is even lower (35%) among the black majority. These figures reflect some of the worst labour absorption rates in the world – and are mirrored only in failed states and countries that deny women the opportunity to work.[42]

Poor education

The National Treasury has budgeted to spend some R390bn on education in the 2021/22 financial year. Of this total, roughly R270bn (69%) will go to schooling, while the remainder

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[37] World Population Review, Gini Coefficient by Country 2021, https://worldpopulationreview.com/country-rankings/gini-coefficient-by-country

[38] http://webcms.uct.ac.za/sites/default/files/image_tool/images/560/Images/Publications/Working_papers/WP7_Taxes-transfers-poverty-income-distribution-south-africa.pdf

[39] Business Day 11 October 2021; Centre for Risk Analysis, Business, Infrastructure, and Communications, September 2021, p1

[40] Centre for Risk Analysis, 'Assets, Incomes, and the Labour Market', *2021 Socio-Economic Survey of South Africa*, p48

[41] CRA, ibid, p50

[42] IRR, Notes prepared for the chair of the portfolio committee dealing with the Employment Equity Amendment Bill, 15 April 2021

has been allocated to post-school education: mainly at universities and in technical and vocational colleges.[43] Overall spending on education averages an impressive 7% of GDP,[44] yet the country gets little bang for its extensive buck.

School throughput is particularly poor. In 2018, for example, the Grade 10 class of pupils (most of whom would generally be expected to matriculate in three years' time) numbered a little over 1 million. However, so great was the subsequent drop-out rate from schools that fewer than 580 000 of these pupils sat for their matric examinations in 2020. Of those who wrote, only some 440 000 passed, indicating that the real matric pass rate was a mere 43%. Moreover, only 20% of the Grade 10 total passed matric with grades good enough to go to university, while a mere 12% passed mathematics with a mark of 30% or more.[45]

In 2020, thus, almost 600 000 youngsters left school without a matric and hence with little prospect of ever finding work. Nor was this an aberration from the norm. On the contrary, in virtually every year since the political transition, roughly 60% of youngsters have likewise left school without obtaining a matric. This helps explain why South Africa's youth unemployment rate, as earlier described, is so extraordinarily high.[46]

Completion rates at universities and universities of technology are generally dismal too. In 2019, for example, these rates averaged a mere 21% for undergraduate diplomas and 17% for undergraduate degrees. Completion rates were particularly low, moreover, in STEM degree subjects, standing that year at 12% for computer and information sciences, 13% for mathematics and statistics, 17% for physical sciences, and 21% for engineering.[47]

Skills shortages

Poor educational outcomes play a major part in the country's skills shortage. This shortage has been exacerbated, moreover, by strict controls on skilled immigration, coupled with considerable emigration among the relatively few people with high levels of qualification and experience. However, the Bill overlooks these factors too.

Comments law firm CliffeDekkerHofmeyr: 'It is common knowledge that South Africa is a victim of the so-called "brain drain" that sees numerous skilled people leaving the country in pursuit of perceived better opportunities in foreign jurisdictions… [The upshot] is that both public and state-owned companies compete not only with private companies but also with foreign jurisdictions for the services of well-qualified and experienced executives whose expertise is becoming increasingly scarce…and transferable.'[48]

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[43] Centre for Risk Analysis, Education, June 2021, p3
[44] Centre for Risk Analysis, Public Finance, March 2021, p28
[45] CRA, Education, June 2021, p46
[46] CRA, Assets, Incomes, and the Labour Market, 2021 Socio-Economic Survey of South Africa, p48; Quarterly Labour Force Survey, Second Quarter 2021, p48
[47] CRA, Education, June 2021, p72
[48] cliffedekkerhofmeyr.com, ibid

Invalid international comparisons

Inequality in South Africa is of a different order from that found in many Western countries. It also has a complex set of reasons going far beyond remuneration gaps and what the Background Note describes as 'the injustice of excessive pay'.[49] The steps that some Western countries have taken to tackle inequality by exposing wage gaps are therefore largely irrelevant to the challenges that South Africa confronts. But the Bill and its Background Note ignore this reality in pushing for interventions that are inappropriate and likely to be ineffective.

The Background Note makes much of the steps that several countries have taken to publicise executive pay. In the European Union, the United Kingdom (UK), and Australia, the note says, it has become 'common practice…to require disclosure of remuneration for specified senior executive positions'. Though this requirement has been aimed mainly at executive directors, it has recently been expanded in the UK, for example, to include chief executives and their deputies.[50]

The Background Note brushes over the extent to which other countries demand the disclosure of wage gaps too. The only example it provides is a 2015 rule of the United States' Securities and Exchange Commission which requires public companies to 'disclose the ratio of the compensation of its chief executive officer to its employees'.[51]

For the rest, the Background Note speaks in vague and general terms about 'significant shareholder dissatisfaction over pay'. It also mentions 'several' instances in the last year when 'the remuneration policies of large listed companies did not receive 75% shareholder support'. It acknowledges, too, that current laws in other countries generally require nothing more than that company boards should then 'discuss the matter with disgruntled shareholders'. It is only in Australia and the UK, it indicates, that 'successive votes' against a remuneration report may trigger director resignations or changes in the composition of the remuneration committee.[52]

The Background Note is thus vague on the international experience it cites. It also ignores the fact that the inequality challenge in the countries or regions it mentions is entirely different from that found in South Africa. None of the comparator countries it cites has anything like South Africa's problems on unemployment, labour absorption, school and university through-put, and skills shortages. What these other countries have done in requiring disclosure of executive pay is thus unlikely to help against South Africa's far more pervasive and intractable challenges of unemployment, poverty, and resulting inequality.

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[49] Para 5.10, Background Note

[50] Para 5.4, Background Note

[51] Para 5.18, Background Note

[52] Para 5.15, Background Note

The international comparisons on which the Bill seeks to rely have little salience, in short, while the disclosure obligations that might perhaps be helpful in these very different countries could well prove harmful here given the great pressures that business already confronts.

Enormous pressures on business in South Africa already

The private sector in South Africa is already under enormous *regulatory pressure* from a host of onerous laws. These include black economic empowerment (BEE) rules requiring the fulfilment of unrealistic racial targets that amount to quotas in all but name. Companies also confront coercive labour laws that push up employment costs, worsen unemployment, undermine competitiveness, and add to social instability. Increasingly, the private sector also confronts damaging trade and price controls supposed aimed at increased 'localisation' and 're-industrialisation'. Particularly serious are accelerating threats to the property rights vital to a market economy and the maintenance of political and economic freedoms. These threats include pending constitutional and other amendment laws likely to allow the uncompensated expropriation or confiscation not only of land but also of buildings, shares, patents, and other assets.

The private sector also confronts a very difficult *operating environment*. This includes anaemic growth and a steady decline in GDP per capita over the past seven years. Electricity supply is also increasingly costly and remains erratic. Essential transport logistics are deteriorating too, with state-run ports and rail services becoming ever more expensive and unreliable. In recent years, road transport has been plagued by violent protests, arson attacks, and the killing of many truck drivers. Law and order is visibly crumbling – as was particularly evident in the July 2021 riots that cost some 350 lives and R50bn's worth of property damage. Corruption remains rampant, while governance at all tiers is increasingly dysfunctional. Public debt has risen exponentially since 2008, prompting all global ratings agencies to downgrade the country to 'junk' or sub-investment status.

In these circumstances, South Africa's policy priority should be to improve the operating environment for business and lighten the regulatory load. Wide-ranging structural reforms are what is urgently needed – not additional regulatory obligations likely to worsen the country's core unemployment problem.

Likely negative consequences of the Bill

According to the Background Note, the Bill will have a 'shrinking effect' in that it will 'induce the boards of companies and senior executives to refrain from awarding and receiving excessive remuneration for fear of the adverse reputational consequences'.[53] This 'shrinking effect', the Bill assumes, will reduce wage gaps at listed and state-owned companies and so help overcome pervasive income inequality across the country.

[53] Para 5.1(ii), Background Note

In the real world, however, the consequences are likely to be very different. As Mouton warns, the compulsory disclosure of executive pay introduced by the Companies Act of 2008 seems to have generated not a 'shrinking effect' but rather a 'race to the top'.[54]

Says Mouton: 'The average bank CEO currently earns a guaranteed and short-term incentive package of just more than R30m a year, whereas in 2002 that same executive would have earned about R7m. This represents an increase of over 9% a year, while inflation was approximately 5%. This excessive growth in pay can mostly be ascribed to benchmarking, which can be performed only if remuneration is disclosed to the public.'[55]

At the same time, as Mouton points out too, 'remuneration is an important tool to incentivise CEOs and their management teams to outperform their peers'.[56] In private companies, moreover – whether these are listed on the JSE or not – executive remuneration should be decided by company owners, without excessive regulatory intervention, as the owners are the ones who will suffer losses if executives are overpaid and this affects the company's bottom line.

The Bill might also be an intermediate measure aimed at preparing the way for executive pay caps. In time, new rules could prohibit, for example, the top-paid 5% of employees from earning more than 10 or 20 times the salaries paid to the lowest 5%. This would be an arbitrary and excessive state intervention in the ability of company owners to decide for themselves on executive remuneration.

In addition, the Bill is likely to deter capable candidates from taking up senior posts because its rules are calculated to foment hostility and resentment towards highly paid executives. It will exacerbate the brain drain by encouraging more executives to emigrate. It will also deter international managers from applying for South African jobs, further shrinking the available talent pool.

Worse still, the Bill will promote division and polarisation in the workplace. It will encourage unrealistic wage demands, particularly from lower-paid employees. It may also spark more stoppages and strikes, so undermining productivity and competitiveness, leading to wage losses among striking staff, and putting companies under so much additional pressure that retrenchments and even closures become more difficult to avoid – especially in the current low-growth environment.

The Bill could also encourage companies to mechanise (supermarket tellers are already at risk of being replaced by self-service options, for instance) or to out-source low-paid jobs wherever possible. This will diminish already scarce employment opportunities for poorly skilled and inexperienced people and add to the crisis of youth unemployment. This, in turn,

[54] Sunday Times Business Times 24 October 2021
[55] Ibid
[56] Sunday Times Business Times 24 October 2021

will help spark more violent protests, so undermining stability, further eroding business confidence, and deterring the direct investment vital to growth and rising prosperity.

Using the Bill to advance the National Democratic Revolution

The African National Congress (ANC) and its allies in the South African Communist Party (SACP) and the Congress of South African Trade Unions (Cosatu) have long been committed to a Soviet-inspired national democratic revolution (NDR) aimed at taking South Africa by incremental steps from a predominantly capitalist economy to a socialist and then communist one.

In the present and more 'radical' phase of the NDR, one of the key objectives of the revolutionary alliance is to increase societal pressure for a shift from the recently introduced national minimum wage to a 'living wage'.[57]

A 'living wage' will require a 'freeze' on executive pay, as the SACP puts it.[58] It will also demand increased wages and benefits at lower levels, irrespective of how damaging these might be in eroding competitiveness and pushing more poorly skilled people right out of the labour market. Such outcomes will further reduce business autonomy, while adding to joblessness, instability, and revolutionary potential. It is these NDR objectives that the wage-gap clauses in the Bill are primarily intended to help achieve.

A living wage, as Cosatu stresses, also requires, among other things:[59]

- 'the implementation of National Health Insurance' (which will bring private healthcare under comprehensive state control and greatly increase dependency on the government);
- the provision of adequate funding for 'Free Education for poor and working class students' (which will add to public debt while expanding the number of radicalised student drop-outs and graduates unable to find work in a struggling economy); and
- the introduction of 'comprehensive social security' (which will bring private pensions under state control and usher in a universal basic income grant which will be so unaffordable – and so impossible to withdraw – that the South African Reserve Bank will come under enormous pressure to embrace 'modern monetary theory' with its emphasis on the unconstrained printing and other creation of fiat money).

Interventions of this kind will help cripple the capitalist economy – which will then also be stigmatised and blamed for its supposed inability to serve 'the interests of the majority of South Africans'.[60] They will also entrench dependency on the state, as people will have little choice but to rely on an ineffective and corrupt government for the fulfilment of their key

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[57] SACP, Closing address by general secretary Dr Blade Nzimande to the 14th National Congress, July 2017; Cosatu, 13th National Congress Declarations, September 2018

[58] Nzimande, closing address to SACP 14th National Congress, July 2017

[59] Cosatu, 13th National Congress Declarations, September 2018

[60] Nzimande, closing address to SACP 14th National Congress, July 2017

needs. At the same time, these interventions will increase the state's capacity to 'discipline' capital and ensure that its enormous resources are harnessed towards NDR objectives.

The overall result will be to help move the country closer to what the SACP describes as a 'socialised society'. Such a society has 'a mixed economy' in which 'capitalism is still present', but 'the socialised component of the economy is dominant and hegemonic. The socialised economy is that part of the economy premised on meeting social needs and not private profits'.[61]

This NDR analysis implicitly condemns private sector profits as damaging and inherently immoral. In fact, however, it is businesses' need to ensure that income exceeds expenditure that keeps salaries in check at all levels, promotes efficiency and innovation, stimulates competition, and keeps companies attuned to meeting customer needs and wants.

Many governments, by contrast – and particularly those in one-party dominant states with little prospect of being voted out of power – are largely indifferent to citizen needs. This, in turn (as 28 years of ANC rule have conclusively shown) promotes inefficiency, wastefulness, and corruption. It also leads to declining standards of delivery in all important spheres: from education, healthcare, and policing to housing, transport, electricity, water, and sanitation.

The Bill's wage-gap provisions may constitute a relatively small part of the NDR, but they nevertheless have the capacity to do significant harm. With the economy already badly damaged by successive NDR interventions over almost three decades, it is time to call a halt to the revolution – not intensify its interventions in any sphere.

Uncertainty in the new 'BEE' powers of the Companies Tribunal

The Companies Act of 2008 establishes a Companies Tribunal (the Tribunal) as a juristic person with jurisdiction throughout the country. The Tribunal consists of a chairperson and 'not less than ten other women or men', all of whom are appointed by the minister of trade, industry, and competition (the minister). This method of appointment is enough to undermine the separation of powers required by the Constitution – and to rob the Tribunal of the institutional independence and impartiality the Companies Act purports to give it. [62]

The Tribunal may 'adjudicate' on any application made to it and 'perform any other function assigned to it' by the Companies Act. It may also 'make any order provided for' in the Companies Act, while its orders may be 'filed in the High Court as an order of the court, in accordance with its rules'.[63]

The Bill proposes various changes to the powers and functions of the Tribunal. Under these clauses, for example, the Tribunal is to have increased scope for compulsory arbitration and

[61] The South African Road to Socialism, SACP Political Programme 2012 to 2017
[62] Sections 193(1), 194(4), 194(1), Companies Act
[63] Section 195(1), (8), ibid

the issuing of binding arbitration awards. (According to the Bill, if a matter is referred to the Tribunal for mediation or conciliation and the Tribunal concludes that 'there is no reasonable probability' of a dispute being resolved in this way, then the Tribunal may issue a certificate of 'non-resolution'. This in turn empowers any 'affected person' to refer the matter to the Tribunal for arbitration and the issuing of an arbitrator's award which 'shall be final and binding on the parties'.) [64]

Particularly disturbing is a provision in the Bill giving the Tribunal the power to 'conciliate mediate, arbitrate, or adjudicate an any administrative matters affecting any person in terms of this Act as may be referred to it…by the B-BBEE Commission [the BEE Commission] in terms of the Broad-Based Black Economic Empowerment Act of 2003 [the BEE Act] and make an appropriate order'.[65]

The BEE Commission was established under the 2013 amendments to the BEE Act. Like the Companies Tribunal, the BEE Commission is a creature of the executive, for its head is a 'commissioner' who is appointed by the minister, is subject to his 'directives', and is entitled to such 'remuneration' and other benefits as the minister may decide. [Section 13B, 13C, BEE Act][66]

The Commission's functions are, among other things, to 'promote adherence' to the BEE Act, 'receive complaints' under it, 'investigate' any BEE matter, maintain a registry of 'major' BEE transactions, and 'receive and analyse' the BEE compliance reports that all organs of state and listed companies must submit to it. [67]

Significantly, the Commission also has the power to investigate and 'make a finding as to whether any BEE initiative involves a fronting practice'.[68] The BEE Act defines a 'fronting practice' as any 'transaction, arrangement, act, or conduct that directly or indirectly undermines or frustrates the achievement of the objectives' of the BEE Act. This definition is extraordinarily wide-ranging – and goes far beyond the government's oft-repeated depiction of fronting as 'a form of fraud'. [69]

Under the BEE Act, a person is 'guilty of an offence' if he knowingly 'engages in a fronting practice'. Potential penalties are severe, for any person convicted of this offence is punishable by a fine, imprisonment for up to ten years, or both. If the person convicted is 'not a natural person', then 'a fine not exceeding 10 per cent of its annual turnover' may be imposed. [70]

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[64] Sections 166(2) and (2A), Bill
[65] Section 195(d),(e), Bill
[66] Sections 13B, 13C, Broad-Based Black Economic Empowerment Act of 2003, as amended (BEE Act)
[67] Sections 13F, 13G, BEE Act
[68] Section 13J(1), (3), BEE Act
[69] Anthea Jeffery, *BEE: Helping or Hurting?* Tafelberg, Johannesburg and Cape Town, 2014, pp188-189
[70] Section 13O, BEE Act

The BEE Act allows jail terms and extremely heavy fines to be imposed on executives and companies for failures to meet BEE targets that shortages of skills, capital, and business experience among black South Africans make difficult to fulfil. Yet the government seems indifferent to the adverse consequences on investment, growth, and employment these draconian penalties are likely to have. Instead, its attitude seems to be summed up in the words of Sandile Zungu, a member of the BEE presidential advisory council, who said in 2013 (when these provisions were being written into the BEE Act): 'We want to see culprits behind bars. Fronting penalties should include imprisonment of both shareholders and directors.'[71]

Against this background, what then is the significance of the provisions in the Bill giving the Tribunal the power to 'adjudicate' on 'any administrative matters affecting any person in terms of this Act as may be referred to it by the BEE Commission in terms of the BEE Act' and then 'make an appropriate order'? [72]

Does this wording mean that the Tribunal will be empowered to find companies guilty of 'fronting practices' and then impose massive fines on them or even send their directors to jail? Or does the reference in the Bill to 'any administrative matters' mean that the Tribunal will be confined to ruling on more 'administrative' issues: whether listed companies have complied with their BEE reporting obligations, for example, or whether they have notified the BEE Commission of any 'major' BEE transaction they have concluded? [73]

The wording in the Bill fails to provide a clear answer. It is thus so inherently uncertain that it cannot pass constitutional muster. Instead, it contradicts the doctrine against vagueness of laws (as described by the Constitutional Court in various rulings) and undermines the rule of law. Yet 'the supremacy of the rule of law' is a founding value of South Africa's democracy and is especially protected and entrenched in the founding provisions of the Constitution. In addition, the Constitution is 'the supreme law of the Republic', while any 'law…inconsistent with it is invalid'. [74]

The Bill's proposed amendments to Section 195 of the Companies Act are thus unconstitutional and cannot lawfully be written into the Act. Instead, they must be removed from the Bill.

The way forward

Both the proposed 'wage-gap' and 'BEE' amendments to the Bill, as earlier described, should be removed from the measure.

71 The Citizen 4 October 2013

72 Sections 195(1)(d)(e), Bill

73 Sections 13F, 13G, BEE Act

74 Sections 1(c), 2, Constitution of the Republic of South Africa, 1996

The BEE provisions are so vague and uncertain as to be unconstitutional. As for the wage gap clauses, there is no need to buttress the existing executive pay disclosure provisions in the Companies Act, which already go quite far enough. There is likewise little to be gained and much to be lost from adding to the existing pressure on business (under the Employment Equity Act) to narrow what the state regards as 'disproportionate' income differentials. Salaries are an issue for company owners to decide, not government bureaucrats.

There are also great risks, as earlier described, in reducing the executive talent pool and giving companies yet more reason to mechanise or outsource. Companies will also come under pressure to raise entry level wages – even though the main consequence of this will be to price even more people with poor skills and limited experience right out of the labour market. This in turn will add to the unemployment crisis, even though this is the predominant reason for persistent poverty and rising inequality.

If the government wants to increase salaries at lower income levels, the only realistic and sustainable way of doing so lies in vastly increasing the demand for people with limited skills. That will increase the price of their labour and lead to higher wages.

A rapidly growing economy with a strong demand for additional goods and services needs a great deal of labour and will pay more to secure it. This was evident in the US prior to the Covid-19 pandemic, when the unemployment rate dropped to 3.5% and lower-level salaries rose particularly strongly. The same phenomenon is now evident not only in the US but also in the UK and much of Europe, as economies re-open.

If South Africa wants more and better paying lower-level jobs, what it needs more than anything else is a single-minded focus on growth-enhancing policies. It must therefore jettison all provisions in the Bill, including the wage-gap ones, that are calculated to deter investment, curtail growth, add to unemployment – and which will inevitably worsen the inequality problem the measure is (supposedly) intended to help cure.

South African Institute of Race Relations NPC **31st October 2021**