



His Excellency
The President of the Republic of South Africa
Union Buildings
Pretoria

21 September 2016

Dear Mr President

THE BLACK BUSINESS COUNCIL'S OBJECTION, FOR THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA, HIS EXCELLENCY PRESIDENT ZUMA NOT TO SIGN THE FICA BILL INTO LAW.

1. The Black Business Council (BBC), the over-arching confederation representing professional and business associations and chambers, of the key purposes being to lobby government on Policy advocacy in order to accelerate Black participation in the mainstream economy. The BBC notes and embraces the sound and critical intentions of the Bill as set out in an endeavour:
 - 1.1. To amend the Financial Intelligence Centre Act, 2001, so as to define or further define certain expressions;
 - 1.2. To extend the objectives of the Centre so as to provide for the additional sharing of information and for the Centre to assist in the implementation of financial sanctions and to administer measures pursuant to resolutions adopted by the Security Council of the United Nations;
 - 1.3. To extend the functions of the Centre so as to provide for the additional sharing of information and to provide for guidance to accountable institutions in respect of the freezing of property and transactions pursuant to resolutions adopted by the Security Council of the United Nations;
 - 1.4. To abolish the Counter Money Laundering Advisory Council;
 - 1.5. To provide for a risk based approach to client identification and verification;
 - 1.6. To provide for the strengthening of customer due diligence measures including with respect to beneficial ownership and persons in prominent positions;
 - 1.7. To provide for the obligation to keep identity and verification and transaction records;
 - 1.8. To set out the procedure in respect of financial sanction control measures pursuant to the notification of persons and entities identified by the Security Council of the United Nations;
 - 1.9. To specify the content of the memorandum of understanding between the Centre and a supervisory body;
 - 1.10. To provide for access to information on suspicious and unusual transactions to specified supervisory bodies during inspections;

Office Bearers

Ndaba Ntsele *President* | Sandile Zungu *Vice President* | Koko Khumalo *Vice President*
George Sebulela *Chairman* | Tshepo Matlala *Head of Policy*
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- 1.11. To provide for Risk Management and Compliance Programmes, governance and training relating to anti-money laundering and counter terrorist financing;
 - 1.12. To provide for a warrant to conduct certain inspections; to provide for a financial penalty to be paid into the National Revenue Fund;
 - 1.13. To provide for further procedural issues in respect of appeals; to make further provision for offences;
 - 1.14. To provide that certain types of non-compliance are subject to administrative sanctions;
 - 1.15. To adjust the regulation-making powers for general matters;
 - 1.16. To increase the maximum penalties that may be imposed in the regulations; and to provide for matters connected therewith.
2. It is, however, our well-considered view that the amendments as proposed violate a number of Constitutional rights of affected South African citizens, the so called **'domestic prominent influential person'** and their immediate families, friends and associates.
- 2.1. The BBC is very concerned that the provision in the Bill of Risk Management and Compliance Program as defined, violates the Constitutional Right to Due Process and effectively pre-authorises violation of the established sacrosanct legal principle of 'Audi Alteram Partem'.
 - 2.2. The provision in the Bill of Risk Management and Compliance furthermore pre-authorises violation of the Rule of Law by transferring judicial authority from law enforcement agencies and the independent judiciary into the hands of banking and financial institutions.
 - 2.3. In addition the BBC is also concerned that other unintended consequences could be the infringement of the Freedom of Choice for careers. How can it be that merely by virtue of being a CEO or CFO that has dealings with Government one becomes a 'suspect'.
 - 2.4. The BBC and its constituent parts are alive to the limitations of the rights as enshrined in the Bill of Rights and articulated in Chapter 2 of the Republic of South Africa Constitution Act 108 of 1996 (herein referred to as the Constitution) section 36.
 - 2.5. The BBC is convinced that the proposed amendments have gone beyond the scope of the limitations which prescribe conditions for which the rights need to accommodate.
3. Herewith is a non-exhaustive list of Constitutional clauses that in our view are being violated:



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- 3.1. Chapter 1, section 2 “This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.”

[These proposed amendments as a package seek to undermine this provision]

- 3.2. Chapter 2 Bill of Rights Section 14 “Everyone has the right to privacy, which includes the right not to have :
- 3.2.1.1. their person or home searched
 - 3.2.1.2. their property searched
 - 3.2.1.3. their possessions seized; or
 - 3.2.1.4. the privacy of their communications infringed.

[Section 10 of the Bill contradicts this provision]

- 3.3. Chapter 2 Bill of Rights section 18, “Everyone has the freedom of association”

[Being associated with the “Domestic Prominent Influential Person” renders an unsuspecting person like a relative a “suspect” in terms of the newly proposed definition.]

- 3.4. Chapter 2 Bill of Rights section 22, “Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law”.

[The listed occupations by virtue of being deemed “suspects” may discourage people from aspiring to play those roles]

4. Recommendations

- 4.1. The Constitutionality of these amendments must be subjected to a constitutional test at the Constitutional Court.
- 4.2. The BBC strongly objects to the President signing off these amendments into law until these proposed amendments pass the constitutional muster.
- 4.3. While accepting and respecting the need for banks as “the first line of defense” to play their part through know your customer [KYC] processes, Government should not surrender/abdicate to the banks its rights to protect the citizens of this country from any illicit financial dealings.
- 4.4. Banks should not be allowed to be Prosecutors, Judges and Executioners at the same time. Banks do not have the moral authority to be entrusted with this responsibility – in the same manner that ministerial discretion is frowned upon



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by the private sector in key pieces of legislation, banks should be subjected to objective criteria and not CEO or desinated party discretion alone.

Conclusion

While we support abd agree that the Bill address important and urgent issues, as submitted, the potential by private sector entities or individuals and state entities or individuals within it, who may abuse the FICA Amendment Bill is our main concern. It is therefore important to put mechanisms in place, to prevent potentially unfounded allegations destroying reputations of individuals or limiting their ability to conduct their businss and also selective reporting, by reporting entities to the Financial Intelligence Centre who are influenced by the prejudices and biases of individuals at reporting entities.

Effectively, FICA would do away with the long standing sacrosanct legal principle of; **Audi alteram partem** (or *audiatur et altera pars*), a Latin phrase meaning "listen to the other side", or "let the other side be heard as well". It is the principle that no person should be judged without a fair hearing in which each party is given the opportunity to respond to the evidence against them.

Mr President, thank you for affording the BBC the opportunity to call upon you as our ultimate custodian, to preserve the good intentions of the bill while protecting the hard won rights of South Africa's citizenry and business persons in general who drive the South African and by extension, wider African economy.

Yours in service,

A handwritten signature in black ink, appearing to be 'Mohale Ralebitso', written over a circular stamp or seal.

Mohale Ralebitso

Chief Executive Officer