

**DA Proposal to Amend the Insurance Bill [B1B – 2016]**

1. **Introduction**

We propose a number of amendments to the Insurance Bill [B1B-2016] (“Bill”) on the grounds that:

* the legislative process was procedurally flawed;
* promoting, licencing and monitoring financial institutions according to non-prudential criteria, such as transformation, falls outside the scope of the Prudential Authority, which is set out in Section 33 of the Financial Sector Regulation Act (No. 9 of 2017); and
* promoting, licencing and monitoring financial institutions according to non-prudential criteria, such as transformation, risks compromising the independence of not only the Prudential Authority, but also the South African Reserve Bank.

1. **Procedural Flaws**

The provisions surrounding the transformation of the insurance sector were introduced during a meeting of the Standing Committee on Finance (“Committee”) on or about 10 May 2017, more than twelve months after the public hearings on the Insurance Bill [B1-2016], which took place on or about 06 February 2016.

This means:

* the specific provisions surrounding the transformation of the insurance sector, which included an amendment to Clause 3, which traverses the “Objectives of the Act”, amounted to expanding the subject of the Bill, which was done without the permission of the National Assembly, in contravention of Rule 286(4)(b) of the National Assembly; and
* the specific provisions surrounding the transformation of the insurance sector, which were introduced on or about 10 May 2017, more than twelve months after the public hearings on the Bill, were never traversed in public hearings on the Bill, in contravention of Rule 286(6)(c) of the National Assembly.

The public hearings, conducted on or about 06 February 2016, resulted in a number of changes aimed at giving effect to, or complementing, the objectives and/or provisions of the Bill.

However, amending Clause 3, which traverses the “Objectives of the Act”, to include Clause 3(d), which reads, “promotes the transformation of the insurance sector”, amounts to expanding the subject of the Bill, which should have been dealt with in terms of Rule 286(4)(b) of the National Assembly.

National Assembly Rule 286(4)(b) permits the Committee to inquire into extending the subject of a Bill being considered, but this requires the permission of the National Assembly. Should permission be granted, the person in charge of the Bill must be consulted in terms of National Assembly Rule 286(4)(f).

Moreover, the provisions surrounding the transformation of the insurance sector would presumably require further public hearings, because the amendments were introduced more than twelve months after the original public hearings, and were never advertised and/or traversed by stakeholders and members of the public.

The fact is that there were no inputs during the public hearings on the specific clauses, or the implications of the specific clauses, surrounding the transformation of the insurance sector.

The failure of the Committee to conduct adequate due diligence and the risks that arise from the failure were amplified when, for the first time last week, the South African Reserve Bank expressed reservations about the Bill, which were never traversed in the public hearings, and which have never been deliberated upon by the Committee.

We therefore believe that should the Committee decide to proceed and adopt the Bill in its current form, without permission to extend the subject of the Bill, and without further public hearings, it will amount to a procedural flaw and fall foul of Rule 286(4)(b) and Rule 286(6)(c) of the National Assembly.

1. **Prudential Authority**

The objective of the Prudential Authority, which was established in terms of Section 33 of the Financial Sector Regulation Act (No. 9 of 2017), includes promoting and enhancing the safety and soundness of financial institutions that provide financial products and securities services, promoting and enhancing the safety and soundness of market infrastructures, protecting financial customers against the risk that those financial institutions may fail to meet their obligations, andassisting in maintaining financial stability.

The Prudential Authority, therefore, has a very clearly defined and limited mandate, which does not extend to promoting, licencing and monitoring financial institutions according to non-prudential criteria, such as transformation, and which clearly fall outside the scope of the Prudential Authority, as set out in Section 33 of the Financial Sector Regulation Act (No. 9 of 2017).

Moreover, the Prudential Authority would be required, in terms of the definition of the “transformation of the insurance sector”, to regulate the insurance sector according to the Financial Sector Code, which is an instrument that is subject to change by the Financial Sector Council, and ultimately the Minister of Trade and Industry.

To impose an obligation on the Prudential Authority to regulate the insurance sector according to the Financial Sector Code, which is not only vested in the executive, but also in a parallel department, would risk compromising the independence of the Prudential Authority.

In any event, to require the Prudential Authority to promote, licence and monitor financial institutions according to non-prudential criteria, such as transformation, would introduce a parallel objective, not provided for in national legislation, and would presumably require an amendment to the Financial Sector Regulation Act (No. 9 of 2017).

1. **South African Reserve Bank**

Moreover, requiring the Prudential Authority to promote, licence and monitor financial institutions according to non-prudential criteria, such as transformation, would inevitably draw it into politically charged decisions, that would ordinarily be vested in the executive, and which would risk compromising the independence of not only the Prudential Authority, but also the South African Reserve Bank itself.

1. **Conclusion**

We view the removal of the provisions identified below in the Bill as being absolutely necessary if the Bill is to pass and be promulgated without challenge. The Bill, in its current form, is both procedurally out of order and substantively in conflict with the regulatory framework established earlier this year by the Committee. We recommend that the Committee:

* remove the specific provisions surrounding the transformation of the insurance sector if the Bill is to be adopted; or
* apply for permission to extend the subject of the Bill in terms of Rule 286(4)(b) and hold further public hearings in terms of Rule 286(6)(c) of the National Assembly.

A delay is preferable to a disaster, especially when it comes to matters relating to the South African Reserve Bank.

**Appendix 1**

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Words in **[bold type in square brackets]** indicate omissions from existing enactments.

Words underlined with a solid line indicate insertions in existing enactments.

1. **Section 1 – Definitions**

**Definitions**

1. (1) In this Act, unless the context indicates otherwise—

**[“transformation of the insurance sector” means transformation as envisaged by the Financial Sector Code for Broad-Based Black Economic Empowerment issued in terms of section 9(1) of the Broad-Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003);]**

1. **Section 3 – Objectives of Act**

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| 3. Objective of Act The objective of this Act is to, in a manner consistent with the Constitution of the Republic of South Africa, 1996, promote the maintenance of a fair, safe and stable insurance market for the benefit and protection of policyholders, by establishing a legal framework for the prudential regulation and supervision of insurers and insurance groups that—   * 1. facilitates the monitoring and the preservation of the safety and soundness of insurers;   2. enhances the protection of policyholders and potential policyholders;   3. increases access to insurance for all South Africans; and   4. **[promotes transformation of the insurance sector;]** |

1. **Section 22 – Requirements for Licence**

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| 22. Requirements for licence (1) In order to qualify for licensing as an insurer—   * 1. a person—      1. that intends to conduct microinsurance business only, must be a profit company or a non-profit company registered under the Companies Act, or a co-operative registered under the Co-operatives Act;      2. that intends to conduct reinsurance business only, must be a public company or state-owned company registered under the Companies Act, a co-operative registered under the Co-operatives Act or a branch of a foreign reinsurer; and      3. in any other case, subject to section 70, must be a public company or state-owned company registered under the Companies Act, or a co-operative registered under the Co-operatives Act;   2. a person’s primary business activity must be the conducting of insurance business and operations arising directly therefrom;   3. a person must demonstrate that—      1. its key persons and significant owners meet the prescribed fit and proper requirements;      2. it has a sound business plan;      3. **[it has a plan to meet its stated commitments in terms of transformation of the insurance sector;]**   **(iv)** (iii) it has adequate operational management capabilities to conduct the classes and sub-classes of insurance business set out in Schedule 2 that it wishes to conduct;  **(v)** (iv) if it is a branch of a foreign reinsurer and the requirements imposed by the foreign jurisdiction in which the institution is authorised and supervised have not been determined as equivalent to this Act under section 65, the laws of the country under which the institution is authorised and supervised establish a regulatory framework equivalent to that established by this Act;  **(vi)** (v) if it is part of an insurance group, that its controlling company will be able to meet the requirements for insurance groups as set out in this Act; and  **(vii)** (vi) it will be able to comply with the governance framework requirements, financial soundness requirements and reporting and public disclosure requirements of this Act;   * 1. that person’s licensing must not be contrary to the **[interests of prospective policyholders or the]** public interest **[, including transformation of the insurance sector]**; and   2. in the case of a state-owned company, an Act of Parliament authorises that company to conduct insurance business and the Minister has approved that the company may apply for a license under this Act. |

1. **Section 26 – Variation of Licence Conditions**

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| 26. Variation of licence conditions (1) The Prudential Authority may amend, delete, replace or vary any licensing conditions or impose other or additional licensing conditions—   * 1. on application by an insurer or controlling company;   2. when it is in the public interest **[, including transformation of the insurance sector]**;   3. when, in the case of an insurer, it is in the interests of the policyholders or potential policyholders of the insurer, or   4. when, in the case of a controlling company, it is in the interests of maintaining the financial soundness of any insurer that is part of the insurance group;   5. when revoking a suspension of a licence;   6. in the circumstances referred to in section 48; or   7. in the case of an insurer, if an insurer has ceased to enter into insurance policies relating to a class or sub-class of insurance business, to the extent that its licence for that class or sub-class of insurance business is no longer justified. |

1. **Section 66 – Exemptions**

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| 66. Exemptions (1) The Prudential Authority may exempt any insurer or a controlling company from, or in respect of, a provision of this Act for a period and on conditions determined by the Prudential Authority—  *(a)* if practicalities impede the strict application of a specific provision of this Act;  *(b)* if a strict application of a specific provision of this Act is not proportional to the nature, scale and complexity of the business of an insurer or an insurance group;  *(c)* **[for developmental, financial inclusion and transformation objectives]** if necessary to facilitate the progressive or incremental compliance of this Act by a specific insurer where no better alternative than exemption exists for achieving such compliance; and  *(d)* if the granting of the exemption will not—  (i) conflict with the public interest; or  (ii) frustrate the achievement of the objective of this Act.  (2) Any exemption may apply to insurers or controlling companies generally or be limited in its application to particular kinds or types of insurers or controlling companies, which may be defined either in relation to a category, kind, size or in any other manner.  (3) Any exemption may be granted subject to any conditions specified by the Prudential Authority.  (4) Any exemption in respect of which an insurer or controlling company has to comply with conditions, lapses whenever the insurer or controlling company contravenes or fails to comply with any such conditions.  (6) The Prudential Authority—  *(a)* must publish an exemption on the official web site;  (b) may, at any time, by notice to the insurer or controlling company and on the official web site withdraw any exemption, wholly or in part and on any ground which the Prudential Authority determines sufficient. |