



**MINISTRY: FINANCE  
REPUBLIC OF SOUTH AFRICA**

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Hon MJ Maswanganyi, MP  
Chairperson: Standing Committee on Finance  
Parliament of the Republic of South Africa  
PO Box 15  
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Dear Chairperson

**SUBMISSION ON THE SOUTH AFRICAN RESERVE BANK AMENDMENT [BILL  
26 – 2018]**

Thank you for the opportunity to comment on the South African Reserve Bank Amendment Bill [B26 – 2018] (the Bill), which has been tabled by the Honourable Mr. SJ Malema.

The Government has fundamental objections to the Bill, specifically its constitutionality, its lack of detail on funding and cost implications, and the legal and economic uncertainty it will generate. Furthermore, the Bill does not align with the current policy objectives and funding priorities of Government.

Whilst Government notes the preference of the ruling party for a fully state-owned central bank, this cannot be at the cost of more policy and economic uncertainty, risks to investment and loss of confidence in our country. In addition, the proposals in the Bill would expose the fiscus to punitive costs, particularly from foreign investors under Bilateral Investment Treaties (BITs).

It is also important to note that the Bill needs to clarify how amending the current South African Reserve Bank legislation would be in the public interest and benefits the country economically. And how it will foster economic growth and contribute positively to the creation of jobs in South Africa.

President Ramaphosa has also noted on 6 June 2019, in his capacity as the President of the ANC, that the ANC is committed to its policy position on the independence and role of the central bank as set out in the Constitution. He noted that “It is our desire for the South African Reserve Bank to be publicly owned. However, we recognize that

this will come at a cost, which given our current economic and fiscal situation, is simply not prudent” (refer to M&G 6 June 2019).

Our specific legal and financial concerns are outlined below and form the basis of the Bill not being supported. The National Treasury is happy to provide more detail to the Committee, as it considers the Bill.

### ***Constitutionality***

The Bill provides for state ownership of the South African Reserve Bank shares that are held privately. The Bill effectively proposes a form of acquisition by expropriation, without any compensation for shareholders. Aside from Government’s objection to such policy approach (which is going beyond land to other assets), the Bill does not indicate how the requirements of section 25 of the Constitution are met for such before an expropriation to be achieved via a law of general application.

Section 25(2) of the Constitution requires that a law of general application that appropriates property must be for a public purpose or in the public interest and must be subject to payment for compensation. The Bill does not provide for compensation and therefore does not meet this constitutional requirement under section 25(2)(b) of the Constitution.

Any legislation that provides for the expropriation of private property by the state, without compensation, is bypassing the potential appropriation of money for such expropriation, and is therefore a quasi-money bill. A law that expropriates private property by the state will require a money bill to pay for its financial consequences, should it take effect. Should the bill be deemed to be a money bill, it cannot be introduced by any person except the Minister of Finance, in terms of sections 73(2) and 77 of the Constitution.

### ***Financial Implications***

Shareholders of the South African Reserve Bank comprise domestic and foreign shareholders. The foreign shareholders are citizens of countries that South Africa has entered into bilateral investment treaties (BITs) with. Some of these treaties, for example the German BIT, specifically provide protection to foreign nationals to allow them to claim compensation should there be state deprivation of their property.

The provisions for compensation contained in the BITs pose a risk to the fiscus. It is also a concern that these costs are presently unknown as the provisions of each BIT would have to be assessed to determine the cost implications. Given the current strain under which the public purse is under, it would not be prudent for the state to acquire the South African Reserve Bank shares.

### ***Further legal concerns***

In 2020 the Financial Sector Laws Amendment Bill [B15 – 2020] was introduced in Parliament. The Bill enables the South African Reserve Bank as the Resolution Authority (RA), to resolve systemically important financial institutions in a manner which protects the stability of the financial system.

Clause 5 of the Financial Sector Laws Amendment Bill amends section 10(1)(d) of the South African Reserve Bank Act. This amendment empowers the South African

Reserve Bank, to form a company (i.e. bridge institution) in which it can take up shares.

The purpose of the bridge company is to transfer critical functions of a failing designated institution, which would include a systemically important financial institution (SIFI) or systemically important payment system operator (SIPS).

Clause 7 of the Bill makes amendments to section 10(1)(c) of the South African Reserve Bank Act. This amendment renders the South African Reserve Bank incapable of incorporating or forming a clearing, payment and settlement systems company specifically.

The confusion is created in the event that the RA has to create a bridge company that is a payment system or central securities depository. The South African Reserve Bank would not be able to create such a company due to the unnecessary inhibition introduced in clause 7 of the Amendment Bill. However, as the RA, it would be able to do so.

In addition, there are general legal concerns on the Bill for instance that it lacks a transparent, consultative process through which agreement can be reached on a fair evaluation or market price for the shares in line with section 25(3) of the Constitution.

For the reasons outline above, the Bill is not supported by the Executive.

Yours sincerely



**TT MBOWENI, MP**  
**MINISTER OF FINANCE**  
**Date: 16/11/2020**