



PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

**6th DEMOCRATIC
PARLIAMENT**



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Presentation to the SC: Trade & Industry, Economic Development, Small Business Tourism, Employment & Labour i.e.
Companies Amendment Bill [B 27B- 2023] & Companies Second Amendment Bill [B 26B - 2023]

F Ebrahim 5.03.24

COMPANIES AMENDMENT BILL [B 27 B- 2023]

A. Clause by Clause Response on General Legal Issues

B. Extending the Bill

C. Drafting

A. Clause by Clause Response on Legal Issues

Clause 1 of the Bill: Amendment of S1 (Definitions)

- **Proposal: Insert definition for term 'debenture'**. The term debentures was already part of the definition of 'securities' in the principal act.
- **Proposal: Indirect shareholding to be defined** for purposes of amendments to s118 (Takeover Regs) or to use term 'beneficial interest'. Department to motivate whether term is ordinarily understood or will create confusion. Notably the term 'shareholder' in the Act refers to a registered shareholder who can therefore only have a direct shareholding.
- **Proposal: Remuneration report and remuneration policy as well as prescribed officer to be defined.**
- **NB:** In drafting only terms to which a specific meaning is to be ascribed needs to be defined. Terms that are ordinarily understood need not be defined.

A. Clause by Clause Response on Legal Issues

Clause 4 of the Bill: Amendment of S26 (2) (Grants rights to any person to to inspect and copy AFS of private, personal liability and non-profit companies that are above a certain PI score)

- Extends the right to inspect and copy the annual financial statements of private companies above a certain threshold to **all** persons as opposed to only those persons with a beneficial or legitimate interest.
- Arguably impacts Constitutional right to privacy as it contains, amongst others, competition sensitive information and may prejudice smaller companies. In addition, it was argued that it offends the provisions of the Promotion of Access to Information Act, 2000 (PAIA) which protects commercial and financial information of private bodies where the disclosure of same may cause financial or commercial harm or could reasonably be expected to put a private body at a disadvantage in contractual negotiations or prejudice it in commercial competition. PAIA, in line with the Constitution, provides for the disclosure of these records only to the extent that it is necessary for the exercise or protection of a right.

A. Clause by Clause Response on Legal issues

Clause 4 of the Bill: Amendment of S26 (2) cont.

- S36 of the Constitution provides: *The rights in the Bill of Rights may be limited only in terms of **law of general application** to the extent that the **limitation is reasonable and justifiable** in an **open and democratic society** based on **human dignity, equality and freedom**, taking into account all relevant factors, including:*
 - *a. the nature of the right;*
 - *b. the importance of the purpose of the limitation*
 - *c. the nature and extent of the limitation;*
 - *d. the relation between the limitation and its purpose; and*
 - *e. less restrictive means to achieve the purpose.”*

A. Clause by Clause Response on Legal issues

Clause 4 of the Bill: Amendment of S26 (2) cont.

Question: Is the limitation on the the right to privacy held by a company reasonable and justifiable in an open and democratic society?

Consider:

- The nature of the right to privacy in respect of companies as opposed to individuals. Our courts have acknowledged that private companies impact the public in several ways and that its establishment is not a purely private matter. In addition, the Department argues that there is no real difference between private companies above the threshold and public or state-owned companies.
- How important the limitation to the right to privacy is vis-à-vis other rights and public interest? Is it necessary and what objective does it seek to achieve? In this regard, there is a major difference between private companies, on the one hand, and state-owned or public companies, on the other, being that in the latter there is a clear right of shareholders and tax payers.
- The balance of power between persons seeking information for protection of a right vis-à-vis a company and whether PAIA sufficiently addresses this.
- The impact of these companies on the public at large.
- Are there less restrictive means to achieve the purpose- why is PAIA not sufficient? How is the disclosure of this information justified vis-à-vis the disclosure of other types of company information that can only be accessed for purposes of exercising a right or protecting a right

A. Clause by Clause Response on Legal Issues

Clause 4 of the Bill: Amendment of S26 (2) cont.

Interface with PAIA: Section 5 of PAIA states that it applies to the exclusion of any other legislation that prohibits or restricts the disclosure of a record of a public or private body and is materially inconsistent with an object or specific provision of the Act.

The proposed amendments seek to do the opposite as it compels transparency and as such PAIA will not find application except in relation to private bodies which are not companies, or which do not fall within the threshold for disclosure.

Note: No Constitutional right to this type of information.

A. Clause by Clause response on legal issues

Clause 5 of the Bill: Amendment of S30 (4) (Naming of directors/Prescribed officers in relation to benefits and remuneration)

- Directors and prescribed officers must be named for purposes of remuneration and benefits in the Annual Financial Statements
- Public submissions : infringes on right to privacy and contravenes the Protection of Personal Information Act, 2013 (POPIA).
- **Question- Is it reasonable and justifiable in an open and democratic society to limit the right to privacy for these persons?**

Consider:

- The nature of the right to privacy of the individual. Threshold is higher than compared to a juristic persona.
- How important the limitation to the right to privacy is vis-à-vis other rights and public interest? Is it necessary and what objective does it seek to achieve? i.e. Is disclosure necessary to address the issue of unfair pay gaps and the right to fair labour practices and equality. i.e. does the disclosure assist with socio-economic objectives and therefore is a matter of public interest. Will it assist in tackling inequality? The balance of power between persons seeking information for protection of a right vis-à-vis a company's defence in terms of POPIA and PAIA (i.e the 'formidable substantive and procedural hurdles')
- Are there less restrictive means to achieve the purpose- can the same result be achieved without the disclosure of a name and reference to designations only? Consider possible adverse impact of this requirement, such as safety issues and reluctance of qualified and skilled workers to take up positions where their remuneration is to be made public.

A. Clause by Clause Response on Legal Issues

Clause 5 of the Bill: Amendment of S30 (4) cont.

Interface with Protection of Personal Information Act, 2013

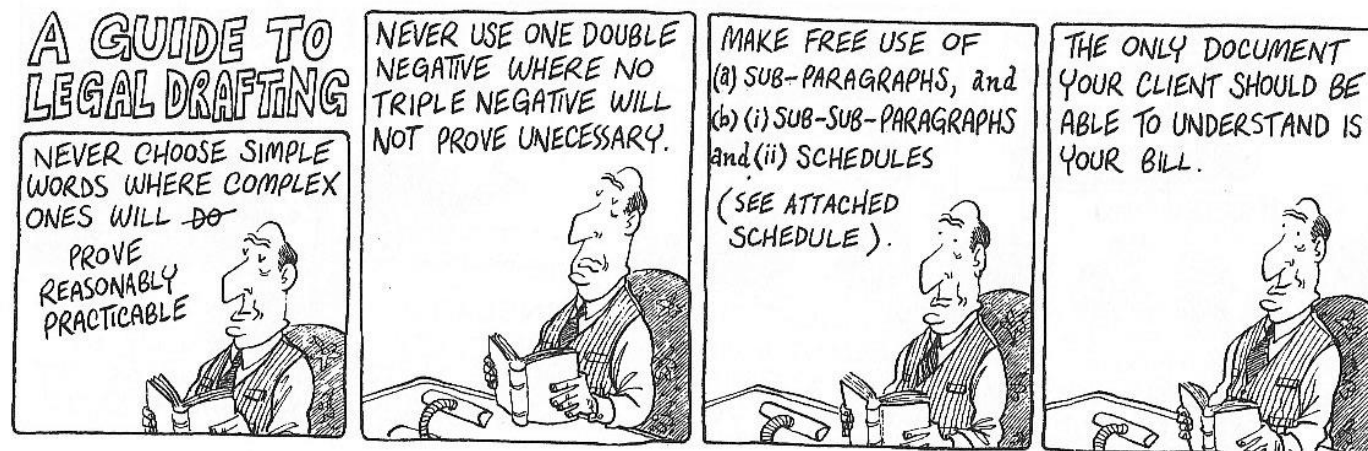
- The nature of the right to privacy of the individual. Personal information includes ‘financial history’ as well as ‘employment history’.
- POPIA, applies to the exclusion of any provision of any other legislation which regulates the processing of personal information and that is materially inconsistent with an object or a specific provision of the Act. The preamble of POPIA recognises the founding Constitutional values of openness and the *‘need for economic and social progress’*. It acknowledges that the right to privacy may be justifiably limited to protect other rights and important interests.
- POPIA does not prevent the enactment of other legislation provided it is not materially inconsistent with an object or specific provision of POPIA. If the Bill is deemed Constitutional a company would thus be able to process this personal information as it is fulfilling an obligation that will be imposed by law.
- Q: does POPIA processing provisions still apply? If so, can the information regulator issue a blanket exemption to eliminate the compliance burden?

B. Extending the Bill

- ❑ In terms of the Rules of the NA, a committee:
 - a) *may seek the permission of the Assembly to inquire into extending the subject of a Bill;*
 - b) *if the Bill amends provisions of legislation, must, if it intends to propose amendments to other provisions of that legislation, seek the permission of the Council to do so.*
- ❑ Proposals to include a requirement to report on the gender pay gap do not fall within the limitations expressed in the NA Rules above and therefore the NA Committee does not need to seek the permission of the NA to include same. However, cognizance to be taken of the fact that public participation will still be necessary as the inclusion is material.
- ❑ Proposal to include amendments to board composition, nomination and selection and requirements for director competency and qualifications; director training and development; provision for electronic communication would all require permission of the NA to be sought from the PC and further public participation.
- ❑ The SC may make these recommendations to the NA bearing in mind that it has determined that the issue of the gender pay gap should stand over.

C. DRAFTING CONVENTIONS

- *Affordable Medicines Trust and Others v Minister of Health and Others* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) par 108:
- “The doctrine of vagueness is founded on the rule of law, which . . . is a foundational value of our constitutional democracy. It requires that laws must be written in a **clear and accessible** manner. What is required is **reasonable certainty** and not perfect lucidity. The doctrine of vagueness does not require absolute certainty of laws. The law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly.”



C. DRAFTING cont.

- Consistency of words – proposal to amend “as stipulated in” (clause 4(b) to “as contemplated in” as the latter appears numerous times in the Principal Act.
- Numbering of new 10A and 10B to be renumbered as subsection (11) and (12) respectively.
- Correction of spelling error in clause 4 (Contemplated instead of Comtemplated)
- **Minor cleaning up i.e. spelling errors; numbering etc is done internally prior to a bill serving before the Council. Anything else however will need to be referred to the PC as a proposal for adoption.**

COMPANIES SECOND AMENDMENT BILL [B 26 - 2023]

A. Clause by Clause response on legal issues

A. Clause by clause response on legal issues

Clause 1 of the Bill: Amendment of s77 (Extending time bar to hold a director responsible for losses, damages or costs – applies retrospectively)

- **Proposal:** The clause currently excludes the application of the prescription act which provides that debts expire within 3 years of arising unless such period is interrupted. It would make more sense to redraft the section to make it subject to the Prescription Act to remove the onus on the claimant to make a court application in circumstances where the Prescription Act provides for an interruption or stay of prescription
- Such circumstances would include judicial interruption i.e. service of court documents in relation to a debt or the express or tacit acknowledgement of the debtor .
- In this case the Prescription Act is excluded in its entirety to dispense with any risk of it being raised as a defense and to eliminate confusion. It is submitted that where a process to commence with a debt collection has begun prior to the three years the question of prescription or extension does not arise in any event. If a director were to acknowledge a debt without the company acting on such acknowledgement for 3 years, they would need to approach a court to explain the reason for same.

A. Clause by clause response on legal issues

Clause 2 of the Bill: Amendment of s162 (2) and (3) (Extending time bar from 24 to 60 months in respect of declaring a director delinquent or under probation and allowing a court to extend the time-bar- retrospective)

Concern: Retrospective application (also in respect of clause 1)

- Pienaar Brothers v SARS (strong retrospectivity: a Tax Act made operational from a date preceding its promulgation date – found **Constitutional**)
 - [par 85]- The Constitution does not prohibit retrospective legislation in civil law.”
 - laws should be reasonably clear, accessible and prospective in their operation, unless the statute provides otherwise or its language clearly shows such a meaning.
 - constitutional validity of retrospective legislation should be judged by applying
 1. the “rationality” test (is it connected to a legitimate purpose) and
 2. “reasonableness” or “proportionality” - “reasonable and justifiable in an open and democratic society”.

RATIONAL-REASONABLE-PROPORTIONATE

CONCLUDING REMARKS

- Submissions raised several concerns in respect of the policy matters and the practical implementation of the Companies Amendment Bill in particular. The Committee must satisfy itself that the Department has responded to these in full and that it is satisfied with the explanations and rationale for the amendments in its current form.
- Proposed amendments if any will be returned to the PC for further consideration. Consideration will be had at that stage as to whether to accept the proposed amendments and if further public participation is required.

Thank You