Submission on the proposed SARB Amendment Bill

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A. Background:

1. The Committee can be assured of the **absolute bona fides** at all times of the shareholder making this submission. The SARB should welcome the questions, contributions and participation of its shareholders as it is 100% owned by its shareholders.

This submission opposed the proposed amendment on the following grounds:

1. Parts of it is contra the Constitution of the Republic
2. Parts of it is contra to corporate governance as defined in the King III report that took effect on 1 March 2010
3. Parts of it is contra the Companies Act's intention
4. Parts of it is completely unnecessary as the SARB Regulations allow the SARB to regulate matters now sought to be changed in the SARB Act

There is no abrogation of SARB shareholders' rights versus normal shareholders rights as the SARB Senior Legal Council claims, save a restriction on quantum and class of shareholding and a set dividend policy. The Bill also alleges abuse of the current Act without ANY proof whatsoever.

The motives of this and other participative are enshrined in the King III Corporate Governance rules. It is indeed the SARB that is acting truculent, un-transparent, un co-operative – all the consolidated powers that King reports warns against and for which it recommends that shareholders oppose. SARB Shareholders should and do act the conscience of the company but instead find themselves smeared, insulted, ignored, vilified – an extreme case of attacking the messenger instead of debating the message

2. Urgent clarification by the Minister is needed whether the SARB is exempted from the new Companies Act 71 of 2008, and if Parliament concedes that it is not so, consideration should be given to include the SARB under the auspices of that Act to ensure accountability.

Modified application with respect to state-owned companies
9. (1) Subject to section 5(4) and (5), any provision of this Act that applies to a public company applies also to a state-owned company, except to the extent that the Minister has granted an exemption in terms of subsection (3).
(2) The member of the Cabinet responsible for—
(a) state-owned companies may request the Minister to grant a total, partial or conditional exemption from one or more provisions of this Act, **applicable to all state-owned companies, any class of state-owned companies, or to one or more particular state-owned company;** or
(b) local government matters may request the Minister to grant a total, partial or conditional exemption from one or more provisions of this Act, applicable to all state-owned companies owned by a municipality, any class of such

(own **emphasis** added)

The SARB is not State owned, but 100% privately owned.

The following State owned Corporations falls under the Companies Acts, present and new:

2.1 The Industrial Development Corporation of South Africa Ltd

2.1 Public Investment Corporation Ltd:

No. 23 of 2004: Public Investment Corporation Act, 2004.

(3) *(a)* Subject to paragraph *(b)*, the provisions of the Companies Act which are not in conflict with this Act apply to the corporation.

(b) A provision of the Companies Act does not apply to the corporation in circumstances where -

(i) such a provision is clearly inappropriate or incapable of being applied because of a special or contrary arrangement by this Act; and

(ii) the Minister declared a particular provision not to be applicable to the corporation.

2.3 Eskom Ltd and others

3. Urgent consideration must be give to shareholders wishing to enact their constitutional and SARB legislated rights of participative democracy without legal and administrative interference, obstruction or negligence by the SARB.

The SARB has and still persists in acting undemocratically and is obstructing the shareholders calling and holding its extraordinary shareholders meeting where issues can be raised, debated and voted on within the mandates of the law.

It does NOT address issues raised concerning its corporate governance or its public Annual Financial Statements and for all intents and purposes, does not indicate a willingness to do this in future. Per the Constitution

33. Just administrative action

1. Everyone has the right to administrative action that is lawful, **reasonable and procedurally fair**.
2. Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
3. National legislation must be enacted to give effect to these rights, and must
    a. provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
    b. impose a duty on the state to give effect to the rights in subsections (1) and (2); and
    c. promote an efficient administration.

(own **emphasis** added)

4. Clarification is needed on the perilous state of the SARB finance. It announced a loss of R1bn in the past financial year, the first loss ever and it is disturbingly large. The future of the SARB could be at stake and shareholder need to urgently know whether this is a trend, what the real business causes are and what the consequences would be.

There is a suspicion that this loss may be on paper only and be a manipulation to diminish shareholder value and this must be dealt with decisively at the earliest opportunity.

Stance on Nationalisation and higher returns for shareholders:

5. The possibility of 'Nationalisation' was raised by the SACP and the ANCYL as *fait accompli* per the ANC implementation of the Freedom Charter:

The People Shall Share in the Country's Wealth!

The national wealth of our country, the heritage of South Africans, shall be restored to the people;

The mineral wealth beneath the soil, **the Banks** and monopoly industry **shall be transferred to the ownership of the people as a whole**;

(own **emphasis** added)

The question arose and was put to certain shareholders by various media organizations on the 'value' that would accrue to the shareholders. There are as divergent views on this 'value' is or should be. There are shareholders who are for and against nationalisation for different reasons. This shareholder is on record that he is against nationalization. 'Nationalisation' is an agenda point on the proposed shareholders meeting. Shareholders cannot legislate for or against such an act.

5 SARB was founded in 1921 with 100% private funds. The 10% of the initial £1,000,000 share capital's dividend is now worth 97,5% less due to the decrease in value of the currency – the exact thing the SARB is tasked NOT to happen. The ONLY mission of the SARB, according to its Act 90 of 1989 is:

3 Primary objective of Bank

The primary objective of the Bank shall be to **protect the value of the currency** of the Republic in the interest of balanced and sustainable economic growth in the Republic.

(own **emphasis** added)

In 2005 the AGM passed a motion to increase shareholders returns modestly, a binding directive the SARB chose to ignore on the technicality that the proposal referred to 'dividends' and the SARB Act limits the same.

24 Allocation of surplus

Of the surplus (if any) remaining at the end of a financial year of the Bank after provision has been made for-

(a) bad and doubtful debts;

(b) depreciation in assets;

(c) gratuities or other pension benefits for its officers and employees;

(d) all such items as are usually provided for by bankers; and

(e) the payment to the shareholders, out of net profits, of a dividend at the rate of **ten per cent per annum on the paid up share capital of the Bank,**

one tenth shall be allocated to the reserve fund of the Bank and nine-tenths shall be paid to the Government.

(own **emphasis** added)

The reality today is that the 640+ shareholders receive as much dividends per year as the Governor earns per month.

B. <u>On the proposed Amendment:</u>

The extreme and unseemly hurry with which this amendment is tabled and the very short time allocated to public participation is cause for concern. Not only are the proposed changes NOT urgent, but also an extraordinary over reaction to the explosive situation that is of the SARB own making but blamed on participative shareholders.

This shareholder finds it disconcerting that instead of debate, legislation changes are offered to questions and proposal, that instead of engagement on his rights as enshrined in the SARB Act and the Constitution, Parliament is recalled to ostensibly stop his participation.

36. Limitation of rights

1. 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.
2. Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

(own **emphasis** added)

If anything, the SARB is self-destructing its dignity and gravitas by embarking on this very public course of action by insulting and belittling shareholders and their right and this shareholder fears that unintended consequences of these actions may impact heavily on the citizens of the Republic.

6. The proposed amendments to the SARB Act contravenes, on the face of it, 4 important rights in the Constitution

2. Supremacy of Constitution

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.

7. Firstly, in the proposed **sec22 (b) bis to (23) amendment** prohibiting voting rights for certain new 'classes; of people namely 'close relative' and 'associates' diminishes the value of the shares as property rights and without any compensation for its loss. Per the <u>Constitution</u>:

25. Property

1. No one may be deprived of property except in terms of law of general application, and no law may permit **arbitrary deprivation of property**.
2. Property may be expropriated only in terms of law of general application
    a. for a public purpose or in the public interest; and

b. subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

3. **The amount of the compensation and the time and manner of payment must be just and equitable**, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including
    a. the current use of the property;
    b. the history of the acquisition and use of the property;
    c. the market value of the property;
    d. the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
    e. the purpose of the expropriation.

(own **emphasis** added)

8. Secondly, the proposed **sec22 (b) bis to (23) of the amendment** limits the right to participative democracy by citizen shareholders per the Constitution:

15. Freedom of religion, belief and opinion

1. Everyone has the right to freedom of conscience, religion, thought, belief and opinion.

16. Freedom of expression

1. Everyone has the right to freedom of expression, which includes
    a. freedom of the press and other media;
    b. **freedom to receive or impart information or ideas**;
    c. freedom of artistic creativity; and
    d. academic freedom and freedom of scientific research.

39. Interpretation of Bill of Rights

1. When interpreting the Bill of Rights, a court, tribunal or forum
    a. must promote **the values that underlie an open and democratic society** based on human dignity, equality and freedom;
    b. must consider international law; and
    c. may consider foreign law.
2. When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must **promote the spirit, purport and objects of the Bill of Rights**.

(own **emphasis** added)

9. Thirdly **sec22 (b) bis to (23) of the amendment** discriminates against equal citizens, being either spouses, husbands, children ('close family') by virtue of birth; by association and like-mindedness and by 'non-resident' as if any of these definitions are valid discriminating criteria which they are most certainly not.

It is intolerable for an institution like the SARB to act in this cavalier manner and demand 'protection' via curtailment of Constitutional rights rather than set an example for all other institutions to follow. The Constitution:

9. Equality

1. Everyone is equal before the law and has the right to **equal protection and benefit of the law**.
2. Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to **protect** or advance persons, or **categories of persons**, disadvantaged by unfair discrimination may be taken.
3. The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
4. **No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection** (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
5. Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

(own **emphasis** added)

The SARB shares are freely traded (this shareholder uses the term advisedly) and anyone in the world may purchase and hold the shares with the corresponding rights and obligations.
There are *legio* ways to legally dilute and diminish a shareholders' rights under the Companies Act which could and ought to have been followed if the intent is to curtail voting power, including dilution by new issue etc.

This proposed amendment sets the worst possible example of lawmaking – that of catering for a special interest to the detriment of the general citizenry. Instead of upholding the fine tradition of Parliamentary lawmaking, this amendment shames the lawmakers for it callous and seemingly cowardly demand of creating a new type of citizen – the 'close family' with diminished property rights, all in the name of the SARB.

10. Fourthly **Sec 4 (a) and (b) the amendment** breaches the independence of the SARB by proposing that Government appointed Directors have a majority of votes on the SARB Board.
At best, the Government should have no representation of the SARB Board, nor appoint any of its office bearers, least of all the Governor, if the spirit of the Constitution is executed under the 'independent, without fear or favour' demand of Sec 224 (2) that set up the Republic's Central Bank:

224. Primary object

1. The primary object of the South African Reserve Bank is to protect the value of the currency in the interest of balanced and sustainable economic growth in the Republic.
2. The South African Reserve Bank, in pursuit of its primary object, must **perform its functions independently and without fear, favour or prejudice**, but there must be regular consultation between the Bank and the Cabinet member responsible for national financial matters.

(own **emphasis** added)

The blatant move of stacking the votes in favour of the Government by appoint the majority of Directors clearly and unambiguously destroys the independence of the SARB, if ever it functioned so before under its current Act.

The sham of such 'independence' becomes intolerable, unless the conscience of the lawmakers in Parliament has no reference for or of these type of principles and can live with the deception the amendment proposes.

11. Moreover, the proposed amendment breaches the right to a fair hearing by unilaterally devising a 'panel' to judge the fitness of a person to act as a Director without stipulating any criteria by which to judge nor establish a method of mechanism by which to quantitatively or qualitatively judge any person wishing to stand, other that merely declaring certain persons unfit to apply.

The very subjective nature of deeming a person fit or not for standing for election as a Director without an objective set of relevant and measurable criteria nor feedback is an act of not only curtailing participative democracy, but smacking of favouritism, and the establishment of a closed circle of cronies.

The severely curtailed participative rights of elected Directors as envisaged, excludes them from all but a small number of menial decision making makes a mockery of not only the legal title 'Director' but also of the screening-by-panel process.

No JSE listed company has such a limitation and JSE elected Directors carry the full and uncurtailed brunt of personal accountability as set out in the Companies Act. No such onus can be set on the SARB 'Directors' as envisaged in the current and especially not in this Amendment.

There seem to be no onus on having these hearings in public and expectation is that such hearing will be held behind firmly closed doors.

The **Financial Services Authority** in the UK ("FSA") conducts 'approvals' of particular individuals in firms who carry out particular functions ('controlled functions'). The FSA require firms so regulated to ensure that their staff is competent to carry out the functions for which they are employed.

This serves as an excellent example that should be legislatively considered in South Africa, the authority of which should lie with an institution like the Financial Services Board.

Proposed:

1. That Parliament consider legislation requiring that ALL Directors of ALL Financial Institutions in SA <u>including appointed and elected Directors of the SA Reserve Bank</u> be vetted by the 'Bank Directors Panel" before each one may be appointed a Director and that this process be repeated every 3 years or before every election of such Directors;

2. That the proposed Panel hold annual hearings for FSB vetted SARB Directors in public under the auspices of Parliament;

3. That an objective set of criteria be established for measuring the competence and suitability of each candidate;

4. That the result of the performance of each candidate be made public after such hearings.

In terms of the proposed amendment, it is proposed that candidates for appointment by Government also be vetted by the SARB panel.

12. The proposed amendment is in shrill, startling and shocking contrast with the provisions of the King III that took effect on 1 March 2010 which "**applies to all entities regardless of the manner and form of incorporation or establishment**"

The proposed Amendments, taken together with the SARB top managements action at the last 3 AGM's and its subsequent actions and correspondence, paints a picture of an organization not only completely out of touch with the spirit and directives of Corporate Governance, but actually calling for legislation to circumvent it. Some examples of the principles so circumvented:

12.1The Board is not independent
12.2 Shareholder approval of remuneration policies is not sought
12.3 Directors' performance evaluation is not independent nor mandated
12.4 The memorandum of incorporation of the company does not allow the board to remove any director from the board, including executive directors, without shareholder approval being necessary.
12.5 The chairman of the board is not an independent non-executive director.
12.6 All Audit committee members should are not independent non-executive directors etc.

It would be far more effective, acceptable, workable and exemplary if the composition of the Board of the SARB was overhauled to give true and meaningful implementation to King III as is mandatory on JSE listed companies of which the SARB was one until scant 5 years ago.

Instead of playing the role model for not only the financial sector but to all corporates, the amendment takes a huge backward leap into protectionism with disdain for Corporate Governance – hardly the example expected form the most august of institutions in the Republic.

Proposed: That the SARB Act be modified to compose its Board of
Executives: Governor and 3 Deputy Governors plus 3 senior Executives;
Non-Executives: 8 shareholder elected Directors from the FSB vetted list, SARB panel screened candidates, from whom a non-Executive Chairman of the SARB Board is elected by the full Board;
Else the SARB should remove any reference in its correspondence to 'complying to the KING II (and King III) Corporate Governance Act(s)' and face legal sanction for its Board composition.

It is ironic that the proposed amendment actually tasks the SARB Directors with implementing the non-existing Corporate Governance – without any teeth to compel the SARB:

"4A. (1) The Board shall be responsible for the corporate governance of the Bank by—
ensuring compliance with principles of good corporate governance"

13. It seems that the real intention of the proposed amendment of **Section 4 (a) and the insertions** is to further curtail the powers and authority of Directors on the SARB board. The 'Directors' are effectively sterilized of any effective authority and responsibility – a direct and troublesome departure of the proposals of the new Companies Act that specifically places a larger onus on Directors.

The SARB will be effectively run by a 4 appointed functionaries whose accountability is OUTSIDE of the Companies Act as proposed:

"2) All other powers and duties of the Bank under this Act **shall vest in and be exercised** by the Governor and Deputy Governors.".

(own **emphasis** added)

Personal liability of Directors is one of the key issues of the new Companies Act. The SARB Act and regulations do NOT provide for accountability and sanctions regarding the actions and decisions of the Governor and Deputy Governors.

The SARB is playing loose and fast with the requirements and obligations of Directors under the Act. Specifically, the liability of corporate decision making would be borne by all Directors equally. In light of the SARB's reported R1Billion loss for F2010, this becomes particularly important as the proposed structure,

If the SARB is unwilling to trust and accord its 'Directors' with these duties, it should either ask for exemption from the Companies Act else change the SARB Act to reflect such positions as 'Representatives' instead of the obligatory 'Director' designation under the Companies Act.

14. In terms of procedure, it would have been far more effective if the SARB Governor had requested the Minister to follow the conventions of Article 36 of the SARB Act which do NOT require Parliamentary approval for some of the changes:

36 Regulations
The Minister may make regulations relating to-
(a) the **election of directors** by shareholders;
(b) the conditions (other than those relating to remuneration) of appointment of directors, and the circumstances in which a director shall vacate his office;
(c) meetings of the Board and the procedure thereat, including the minutes to be kept thereof;
(d) meetings of shareholders, the matters to be dealt with thereat and the procedure thereat, including the quorum necessary therefor and the minutes to be kept thereof;
*(d*A*)* **any matter which is required or permitted to be prescribed by regulation under this Act**;
[Para. *(d*A*)* inserted by s. 8 *(b)* of Act 10 of 1993.]
(e) generally, all matters which he considers it necessary or expedient to prescribe in order that the purposes of this Act may be achieved.