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Mr Zolani Rento
Parliament Select Committee on Finance
Parliament of the RSA
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Via e-mail to zrento@parliament.gov.za

Mr Rento

SUBMISSION ON THE SARB AMENDMENT BILL B10-2010

Please refer our submission to the committee.

We comment on the proposed amendments to the South African Reserve Bank Act of 1989 in the following capacities:

Principal of the Afrikan governance ratings agency Ratings Afrika;

Citizen of the Republic of South Africa;

Businessperson on the continent of Afrika.

We have no vested interest in any disputes between the SA Reserve Bank and some of its shareholders, or the Congress of South African Trade Unions; nor do we choose to take sides in any such differences except to the extent specifically stated in this document. We have at no time been requested by any party other than this firm and its leadership, to take any viewpoint, nor have we or are we to receive any remuneration or benefit as a result.

Our comments are to be taken as views in principle.

The writer accepts responsibility for the content of this document and states himself willing to enter into further discussion at an appropriate level and in any appropriate forum on any of the matters raised.

FUNDAMENTAL COMMENTS

1. THE TIMING OF THE AMENDMENTS AND THE PERIOD ALLOWED FOR COMMENT

   Given the overall expressions of the importance attached to the proposed amendments by the management of the South Africa Reserve Bank ("SARB") as reported at different times in the South African press, we find the manner in which the amendments were made available to the South African citizens, and the short period allowed for comment, to be examples of unsound corporate governance

on behalf of the SARB, and unsound governance on behalf of Parliament. We are critical of both aspects and find the combination to be discouraging insofar as this seems to be directly in opposition to sound governance. In essence the National Treasury is in one voice espousing "good corporate governance" (read: sound corporate governance) and at the same time acting counter to that goal.

Sound Governance has since the writings of Adam Smith (The Theory of Moral Sentiments, 1759) been focused on considering the interests of all stakeholders. It is not simply about acting lawfully. It is also not simply about following codified sectional views issued from time to time by parties who have not followed appropriate due process. Lastly it is not legislated and is unlikely to be possible to be legislated.

When considering the mechanisms applied in making these amendments, we suggest that the following parties are at minimum vital stakeholders in the SARB and legislation that underpins it:

All South African citizens

All international counterparties affected by its decisions on interest rates, regulatory aspects of its mandate (that includes foreign exchange rulings and practice, banking regulation and allied aspects)

All businesses within South Africa and the SADC region that transact in and are affected by the ZAR currency

Central banks within the SADC and in the larger Afrika

Within this grouping one of the most important considerations is to preserve the concept of fairness in dealing.

This concept would in all cases require a process of negotiation and the consideration of the opposing view. We find no evidence that there has been negotiation with shareholders whose right to free association is due to be limited by the workings of this Bill; and we find no significant accommodation of opposing views between the draft version and the final version of the Bill.

The way the Bill has been handled speaks of unseemly haste. The lack of a rounded review of the leadership and directoral aspects at the SARB supports this concern.

We find it unacceptable that statements are made in Committee to the effect that the Bill is an “interim” measure or an incomplete review of the Act, and therefore flaws should be accepted. South Africa in our view deserves much better.

2. RIGHTS OF SOUTH AFRICAN CITIZENS

The concern within the SARB at the actions of current shareholders within the provisions of the Act is palpable throughout the Bill. The impression is left that the amendments would serve to improve the soundness of corporate governance. Upon analysis the overall effect is however to limit or remove the rights of shareholders (and by inference, almost all stakeholders other than the SARB staff and the RSA government) without negotiation and public debate. This must easily qualify as one of the most worrying interpretations of appropriate action that we as a firm have come across over the past 25 years. It would not be countenanced in any labour or similar contractual relationship.

In particular we consider that the rights enshrined in paragraphs 16 (Freedom of expression) and 18 (Freedom of association) of our country’s constitution are in-

fringed upon by the amendments. This is caused by the definitions and wording of the limitation of shareholders' rights, specifically because there is now stated to be an "association" (our phrase) between two or more shareholders if there is an agreement between them, and such association renders their vote powerless. An agreement between any persons is a part of the freedom of association, and can range from a similarity of view on any given subject, to a formal "shareholders' agreement". The existing Act of 1989 allows the full spectrum of agreements.

In any grouping of persons one of the most fundamental concepts is some form of agreement; and more specifically, agreement on the merits or demerits of any proposed form of action, as "meetings of the mind". It is these "meetings of the mind" that play an important role in achieving sound governance, because single votes seldom will sway a body, while a large number will achieve a majority and thus carry the day. The amendments will serve to rule out such "meetings of the mind" the moment that they are viewed to be agreements. [It is taken as read that these "meetings of the mind" would have an effect on the voting rights of the individual shareholders.]

Even worse, it is highly possible that such claim may raise its head after a resolution has been taken; thus rendering the actions of an AGM ineffectual or undetermined at best; invalid at worst.

From the perspective of achieving sound corporate governance at the SARB, we believe this approach to be fatally flawed.

Even worse, when considering why this limitation on voting ability would be regarded as appropriate, we are left with a large number of questions. The shareholders are unable to remove the governors, are unable to increase the size of their dividend and are unable to place the SARB in liquidation. They are currently able to vote on the new directors that they are permitted as "shareholder representatives", but the Act does not grant the shareholders any special rights. As a consequence we are of the view that the simple fact of introducing this limitation raises serious questions about the soundness of governance within the Republic of South Africa.

2. THE PRIVATE NATURE OF THE SOUTH AFRICAN RESERVE BANK

Although the SARB seeks to underscore its private nature, the core of the relationship exhibits an extremely strong governmental nature.

In terms of sound corporate governance the structure and functioning purports to be one character but in operation proves another, especially in the determination of SARB leadership. This is to be expected given the crucial role of a central bank within the monetary system, and within its regulatory responsibilities.

However, there is massive conflict evident currently.

We propose that if the SARB wishes to be seen to be a private entity, that it be structured as one and acts as one without governmental impediment; but if not, that it acknowledges its governmental role fully in all respects and ends the dichotomy.

3. OVERALL ASPECTS OF SOUND CORPORATE GOVERNANCE

There are many aspects of sound corporate governance that are not contained in the amendments, starting with the lack of board oversight over the functions of

the governors and the lack of an independent chairperson of the board of directors.

We propose, instead of the current amendment bill, a thorough review of all corporate governance aspects as regards the SARB, followed by structural changes to ensure integrity of design and function.

We note no improvement in the tiering of supervision at the highest level of the SARB. The governors remain answerable only to themselves, it would seem; the Board has no oversight role and there is no independent chairperson who may from time to time communicate concerns to the governors. The Board is not empowered to replace the governors if such were required.

In effect, the concept that those who may be affected by bad decisions resulting in losses or bad performance should be capable of taking such steps as may be necessary to correct the management actions that have led to these results, is ignored in the tiering at the top level of the SARB.

Conversely, the Board has no right to bring the government to a different viewpoint, were the government to fail to appoint a person who should become a governor, or were it to act in a manner that results in a less than satisfactory result.

The Board is overruled by the Act in the most important decision that a private institution's board has to take, namely the appointment of the chief executive.

We do support the change from the current provision that the Board should “manage” the affairs of the bank; there is no support for such a provision in sound corporate governance. However, the responsibilities of a board should include review of and agreement to the strategies proposed by management.

The Board, as the amendments propose, includes only the three governors as management representatives; modern corporate governance would suggest that the chief financial officer should also be seated on the Board. This provides a check and balance.

The Board, as the amendments propose, has no power to determine the remuneration of the governors; nor do the shareholders have this prerogative. This is unsound in corporate governance terms.

We would further propose that in any consideration of what is regarded to be the most appropriate action in any circumstance, the overriding concern would be the interests of the SARB stakeholders, not the SARB itself. This seems to be a critical oversight in all legislation to date.

4. THE DIRECTOR SELECTION PANEL

The Bill proposes a director selection panel that, but for the presence of the Governor, sits outside the governance structures of the SARB.

We question the composition of the panel; the presence of NEDLAC on the panel is seemingly to ensure greater representativeness, but the success of this involvement is by no means guaranteed. To select (and re-select) able and appropriate directors is an immensely difficult task, made even more difficult by a set of rules that they must originate from specific sectors.

The most fundamental concern about the panel is that there is no risk to any member of the panel (the Governor excluded), should any recommendation of directors prove to be bad.

In private institutions the directors (and eventually the shareholders) determine who sits on the board; although not a perfect arrangement, it at least vests risk (and the ability to correct errors) with the persons most likely to suffer from bad decisions.

There is no clarity in the Bill as to how an unsuitable or inappropriate choice for director, can or should be removed. We refer not to dishonesty or any of the reasons that exist in the Act or Bill, but to those aspects of quality and diligence that sit at the heart of sound corporate governance. It is of particular import when persons are selected for the Board with a specific background, and proceed to act in a way that may well be argued to be in the interest of the SARB, but not in the interests of the stakeholders of the SARB.

4. SUGGESTIONS FOR THE WAY FORWARD

The SARB has been in existence for a long time and its Act as well as the actions of its functionaries are steeped in past practices, only vaguely updated since 1944. We propose that modern principles of accountability and corporate action be applied to the new SARB in a manner calculated to show its consideration for the interests of all stakeholders.

FINAL COMMENTS

Ratings Afrika has made its input to the debate in a manner we gauge to be fair and reasoned. We have sadly seen little or no recognition of this in any responses. We would urge the Select Committee and Parliament to reflect seriously on the opposition to this Bill. We have a constitutional process that is well-designed, but it relies on every component to do its duty in the interests of our country.

Sadly, it is also not possible for us to attend the oral hearings on 25 August 2010 in Cape Town. We trust that our brief submission will be given full consideration, and we remain available for any clarification.

Sincerely

CHARL KOCKS
Agency principal