

Department of Small Business Development

January 27 2021

SMALL BUSINESS INSTITUTE (SBI) COMMENTS ON THE NATIONAL SMALL ENTERPRISE (NSEA) AMENDMENT BILL, 2020. GAZETTE No. 43981, DECEMBER 11, 2020.

INTRODUCTION:

The SBI, a chamber and business forum organisation and a member of Business Unity South Africa, exists to positively influence the environment for SMEs in South Africa. Small and medium-sized enterprises (SMEs) create jobs and power economies. We stand for a free-market approach to growing SMEs, creating jobs, and providing ethical leadership. We envision a country where SMEs are supported by thoughtful, evidence-based policy that limits obstacles to their success and sustainability and the private sector works to eliminate structural obstacles to competition, access to markets and effective entry into supply chains.

For the past four years, one of SBI's primary campaigns have focused on reducing crippling late payments to SMEs. And yet, when the Democratic Alliance ("the DA") originally introduced an Ombudsman bill, designed to address these practices we opposed it for many of the reasons we question the measure contained in the NSEA Amendment Bill.

We also have serious reservations about the matters addressed below and would like to express surprise and disappointment that, though it lies within the powers of the Minister to require regulatory impact assessments of any regulation, legislation or policy, the Ministry or the Minister has not exercised this obligation contained in the Act in respect of these amendments.

SBI RESPONSE TO THE PROPOSED NSEA AMENDMENT BILL

1. The SBI calls on the Minister to withdraw all provisions contained in Chapter 3A of the proposed NSEA Amendment Bill, which have the potential to encroach on, and override, established civil and contract law in South Africa.
2. The proposed amendments as they are contained in Chapter 3A offer considerable harmful consequences to our country's small enterprises; indeed, to the entire business community in South Africa. For instance, the amount of red tape that will result from arbitrary ministerial decree necessitated by a continual stream of gazette notices that extemporaneously determine an "unfair trading practice"; a potential to cul-de-sac all manner of business-to-business (B2B) engagements for fear of indiscriminate intervention, and potential for a swarm of new ombudpreneurs whose reason for existence will be to extort as nowhere in the proposed amendments is there provision to limit vexatious or frivolous claims brought to the proposed Ombud by any or serial complainants.

3. We believe it is disingenuous for the Department of Small Business Development (the “DSBD” or the “Department”) to confer – as mere insertions to a current (administrative) Act – arbitrary powers to the Minister to prohibit, by gazette, “practices in relation to small enterprises” as “unfair trading practices”, and powers (without limitation) to an Ombud to intervene in “contractual arrangements” or “other legal relationship” between “small enterprises” and “any other party”.
4. Substantive legislative measures such as those contained in Chapter 3A of the NSEA Amendment Bill should be presented in a separate (stand-alone) *draft* Bill accompanied by a publicly available, transparent report that shows that the proposed provisions have been thoroughly, and rigorously analysed and broadly consulted on, most especially with all affected parties.
5. The Department must *publicly show in a transparent report* that in drafting the provisions in the NSEA Amendment Bill it has, at the very least:
 - Thoroughly analysed the problem that it specifically wishes to address and has built a business case for legislative intervention;
 - Conducted fact-based reasoning to back up the proposed interventions contained in Chapter 3A;
 - The analysis shows interventions are proportionate to the problem and minimises consequences;
 - Costs for establishing and maintaining an Ombud have been thoroughly analysed and do not outweigh benefit, if any;
 - Considered and thoroughly analysed alternative options beyond the legislative measures contained in Chapter 3A of the Amendment Bill;
 - Broadly consulted on the proposals, including all affected parties within government and the broad business community, what their responses were to the proposals in the drafting process and how these have been addressed in the gazetting of the NSEA Amendment Bill.
6. Has the DSBD conducted a cost-benefit analysis on the establishment of the Ombud? Surely the costs of imposing yet another Ombud on South Africa’s cluttered legislative landscape must be a primary consideration for a government that is facing so many pressing challenges including paying and rolling out a credible Covid vaccines strategy to all its citizens. In drafting the Amendment Bill, who has the Department consulted, how have they been consulted and how have concerns been addressed? All these procedural matters should be available for public scrutiny.
7. As the big voice for small business, the SBI has not been consulted at any point in the drafting of the amendments to the NSEA. Nor to our knowledge have any of our member chambers.

SPECIFIC CONCERNS

8. There is ambiguity and a conflation of intent inherent in the rationality that the legislative measures seek to address. The catch-all powers provided to the Minister and the ombudsman in Chapter 3A of the Amendment Bill allow for excessive intervention and overreach.
9. The broad scope of the Ombud and his/her office allow for it to broadly interpret and dispose of all manner of complaints that may arise in *business-to-business* engagements. For South Africa, which already has in place an effective legal reparation system in civil

and contractual law, a redress-type of ombudsman office as proposed for “small enterprises” is not justified to the extent that it will result in institutional overlaps with other offices with similar responsibilities; provide for interference in international treaties and protrude into tribunals and many other, and several, ombudsman offices that are already established. For example, the services of the Tax Ombudsman, the Consumer Protection Commission, the Banking Ombudsman – all with a focus on specific themes and in some instances, sectors – are available to every citizen, including small enterprise owners. Thus, the broad scope and powers as contemplated can hardly be performed by one “small enterprise” ombudsman office.

10. Together with these considerations, the catch-all definition of a “small enterprise” conflates all types and sizes of enterprises, operating across all sectors, into one term excepting those enterprises which employ more than 250 employees (as defined in Schedule 1 of the NSEA), an organ of state and a state-owned enterprise. Findings of our research have shown that 98% of all enterprises in South Africa that formally employ less than 250 employees are micro, small and medium enterprises. The recent report released by Statistics SA on data taken from the 2019 Annual Financial Statistics (AFS) survey show that in terms of turnover, small businesses have expanded to 22% in the formal business sector in 2019 (from 16% in 2013) whereas the turnover contribution of large business has waned over the same period, from 75% to 68%.
11. The universality of the proposed ombudsman office in terms of broad scope and range of powers implies costly establishment, costly to maintain and a potential for being overwhelmed with all manner of disputes by enterprises of all sizes and types. A question arises as to whether the proposed ombudsman office aim is to provide for the protection of small enterprises from corporate business as well as government? There are no provisions to narrow the ombudsman office to a type of enterprise it may deal with (for instance, the United Kingdom’s Small Business Commissioner that handles disputes from enterprises with less than 50 staff and only focuses on disputes relating to late payments).
12. There are no limitations on the Ombudsman’s scope, powers and restriction of value of dispute. In addition, there are no provisions to limit vexatious or frivolous disputes that have considerable potential to abuse the office. As contemplated, any small enterprise owner can attribute “unfairness” to any form of engagement or non-engagement. It will be left to the ombudsman office to determine what is equitable for a “small enterprise” in all manner of circumstances, across the whole of government including local and provincial, and across the business community without necessary limitation.
13. The sweeping powers conferred to the Minister by Section 17T to declare unfair trade practices are disturbing. Trade practices are enormously complex in nature and sectorally diverse. There is no clear distinction or determination in the Amendment Bill of what is meant by an “unfair trade practice”, it is left open to arbitrary assessment and determination by the minister. The provisions allow for ideological persuasion of the Minister to arbitrarily intervene in all (formal and informal) commercial relationships that underpin our country’s economic activities. Without provisions for recourse, they deflect government’s constitutional accountability and transparency; at worst, they represent a duplicity in governance where the Minister is not held accountable for any harms s/he may introduce.

Late Payments

14. The provisions contained in the Amendment Bill for intervention on late payments to “small enterprises” are not explicit. Rather, they are implied. Again, it is left to the ombudsman’s office, and the Minister, to determine what may constitute a late payment.
15. As in the case of umbrella terms, “late payment” is not one-size fits-all phenomenon. Dependent on multi-faceted and complex circumstances, the occurrence of late payment can be attributed to a number of factors including standard business cycles, an imbalance of power in the market and end product of industry structures and norms. Forces affecting late payments are not random in their occurrence but consist of the interaction of many facets of a working business environment. The UK Department of Business and Innovation for instance defines “late payment” as that which occurs when a business has been supplied with goods or services on credit but fails to pay within the agreed term. Whereas in Australia, late payment is defined as the practice of getting paid beyond the agreed time stipulated in a contract.
16. There could be a case for intervention to reduce “late payment” to small businesses. However, government (across all spheres) are the biggest transgressors of late payments to small business suppliers with an average delay in payment ranging from 90 to 181 days and more (Department of Performance Monitoring and Evaluation or the “DPME” 2020).
17. In a survey conducted for the DPME in 2020 to study late payment by government to small business, and in which the DSBD itself participated, small business owners surveyed rejected the proposal for legislative measures to be inserted in the NSEA for late payments.
18. Instead, small business owners surveyed attributed problems relating to late payments by government as a causal chain that includes:
 - a lack of proper administration in government;
 - a lack of implementation and enforcement of current policies in government to pay on time;
 - a lack of qualified staff in government;
 - a non-payment due to budget constraints in government departments that request their small business suppliers to wait until new budget cycles are introduced, irrespective of whether the work was contracted and completed under the previous budget cycle timeframe;
 - invoices being misplaced by relevant government departments;
 - high staff turnover at departments resulting in delayed processing of invoices.
19. Government has instituted many measures to improve payments to small business suppliers. Section 38 of the Public Finance Management Act (PFMA) of 1999, as amended requires all accounting officers in government to settle invoices within 30 days of receipt. The Cabinet took further measures in 2009 and 2010 instructing departments to implement mechanisms to ensure 30-day payments. In 2010, National Treasury issued a communiqué that non-compliance with the PFMA and Treasury regulations constitute grounds for financial misconduct. In 2011, National Treasury issued an instruction note to enforce monitoring of the payment of suppliers. In 2012, The Public Sector SMME Late Payment Hotline was moved from the Small Enterprise Development Agency to the Presidency. Since 2011, all Director-Generals are required to report to the Forum of South African Directors General (FOSAD) on the timeous payment of service providers. As of 2015, a special unit was established within DPME in a collaborative effort with National Treasury and the Department of Public Service and Administration. The unit is mandated

to investigate cases where there is late or non-payment of legitimate invoices within 30 days, identify the cause for delays and non-payment, facilitate the process for instituting misconduct proceedings to ensure there are consequences for late and non-payment of legitimate invoices, and support (or intervene) in cases of continuous non-compliance. The DPME unit has however experienced a number of constraints, above all being the issue of capacity due to being under-resourced in terms of staff and budget.

20. It is questionable whether either the small business minister or an ombudsman could affect any change to late payments by government by the provisions outlined in Chapter 3A of the Amendment Bill, particularly since late payments by government are not due to a lack of policy and legislative guidance but are a result of administrative failure. Establishing an ombudsman office shifts the administrative responsibilities of government to an “umpire” and expects the “umpire” to oversee accountability.

ALTERNATIVE OPTIONS TO LEGISLATIVE MEASURES

21. The SBI submits that there are a number of alternative options that can be considered other than legislative intervention by the DSBD as prescribed in Chapter 3A of the Amendment Bill, particularly to improve late payment to small business and to provide for dispute mechanisms. These include, but are not limited to:

- Consider increasing the R15 000 threshold for the Small Claims Court (SCC) and allow for juristic persons to approach the court. The SCC presents a viable option for dispute resolution for small business owners;
- Strengthen the DPME Special Unit and provide it with sufficient resources to achieve more in assisting small businesses on payment of their invoices;
- Strengthen monitoring processes and better enforcement of payment policies within government and develop a system value chain across government departments to improve efficiency and accountability. At the very least, a login system for invoices should be available to track payments in government, benefiting both government departments and small business suppliers.
- Government should consider finding ways to partner with business in voluntary campaigns such as #Payin30 to institutionalise a culture of 30-day payment to small businesses amongst the broader business community. Already, 50 of South Africa’s major companies committed to paying SMEs within 30 days in November 2020. Regrettably, government and state-owned enterprises were not part of the signatories. We believe it is not too late.

CONCLUSION:

22. The SBI stands ready to work with government on a viable plan with fit-for-purpose solutions to advance and accelerate the growth our country’s micro, small and medium enterprises.
23. The SBI is available to engage with the DSBD in relation to our submission should this be required.