

COMMITTEE REPORT

(Negotiating mandate stage) Report of the Standing Committee on Finance, Economic Opportunities and Tourism on the National Small Enterprise Amendment Bill [B 16B - 2023] (NCOP)(S76), dated 15 March 2024, as follows:

The Standing Committee on Finance, Economic Opportunities and Tourism having considered the subject of the National Small Enterprise Amendment Bill [B 16B - 2023] (NCOP)(S76) referred to it in terms of Standing Rule 217, confers on the Western Cape's delegation in the NCOP the authority to support the Bill, subject to the consideration of the concerns, and the implementation of the proposed amendments, outlined below.

The National Council of Provinces is requested to note the following:

1. General Comments

- The overall objectives of the Bill are supported, which provide affordable and effective access to justice for small enterprises and improve the ecosystem for their development and growth. However, it is recommended that certain provisions require greater clarity and limitations on the powers of the Minister, especially concerning the declaration of 'unfair trading practices'.
- The Committee acknowledges the valuable inputs from various stakeholders, including the City of Cape Town, the Western Cape Government, Mr. Kennedy Ramatsoa, and George Municipality. These inputs have been crucial in shaping the considerations and proposed amendments to the Bill.
- The Committee notes that small enterprises are the backbone of our economy, but they are also the space with the least amount of capital investment. Small enterprises are important for the creation of jobs, particularly in a country such as South Africa with high unemployment rates. This piece of legislation should have made significant strides in attempting to achieve a stimulus for smaller enterprises. The Bill should also be protecting small enterprises, so they are allowed to flourish and play a bigger role in the country's economy.

2. Procedural concerns

2.1 Language and Drafting Errors:

- The Bill contains various errors that require attention. These include the outdated use of "hereby," particularly in the proposed section 17D(1). Additionally, vague wording in certain provisions, such as the proposed section 17Y, poses risks of unintended consequences. Notably, terms like "unambiguous business contract" and "reasonable payment date" in section 17Y(2) require refinement to ensure clarity and effective implementation. It is recommended to review and refine the language within section 17Y, specifically addressing the precision of these terms and assessing compatibility with existing legislation to prevent overlap and enhance the efficacy of unfair trading practices provisions.

- During the public participation process, there were concerns about the language in which the Bill was presented. The Bill should be presented in the language that the members of the public understand.

2.2 Socio-Economic Impact Assessment System Report (SEIAS):

- Risk Assessment Completeness: The final SEIAS document, dated 17 April 2023, addresses operational and funding risks but lacks a comprehensive assessment of external economic factors. This includes market dynamics, global economic trends, and unforeseen disruptions like pandemics, which could significantly affect the initiatives. A more detailed investigation of these external risks and their impact on proposed measures is necessary for a well-rounded risk assessment.
- Evaluation of Alternatives: While the SEIAS outlines alternative solutions, such as extending the Small Enterprise Development Agency's mandate or equipping local municipalities for support, the depth of evaluation on these alternatives is limited. A comparative analysis exploring the viability, potential outcomes, and drawbacks of these alternatives versus proposed measures would provide a clearer understanding of their relative merits.
- Financial Sustainability: Although the document presents costs associated with the proposal, including setup and operational requirements, a critical evaluation of long-term financial sustainability is absent. This includes exploring diverse funding sources, cost-effectiveness over time, potential for self-sustainability, and strategies for financial resilience in various economic scenarios. An in-depth financial analysis is needed for a sustainable approach, considering the dependency on government funding.

2.3 Insufficient Time Provided for the Legislative Process:

- The turnaround time for the processing of this Bill was very short, given the importance of its content, which put the entire value chain under pressure to process the Bill adequately. The NCOP must be aware that logistics around public participation, such as requesting advertising and securing venues for public hearings, require time. The Committee was, therefore, given a very short time to request information from interested stakeholders.
- National Parliament must look at enhancing public participation in respect of the legislative process, to ensure proper consultation with members of the public that are impacted by the Bill.

3. **Substantive concerns**

3.1 Lack of Representation and Incentives:

- It is noted that small enterprises are not at all represented in bargaining councils, but they are bound by agreements reached at the national level. This makes it extremely difficult for small enterprises to grow and to employ more people.
- The Bill is silent on incentives for small enterprises. The Bill should have addressed and included some form of incentive for small enterprises to provide employment opportunities to the unemployed.

3.2 Governance and Oversight:

- Proposed section 11(2)(a) and 11(2)(c): The Bill must clearly define the process for appointing the Small Enterprise Development Finance Agency (SEDFA) board members, including specifics on remuneration, to prevent unilateral ministerial control and ensure parliamentary oversight.
- Proposed section 11(3): The criteria and scenarios necessitating a High Court order for appointing a director not recommended by the Board require clarification.
- Endorsement is given for establishing an Ombud with regional offices, provided employee compensation is budget-conscious and clear definitions of 'regional' offices are established. Provisions for interim Ombud leadership should limit appointments to 90 days to prevent potential misuse.
- Proposed sections 17G(7)(c), 17J, and 17M(1)(b)(ii): The Bill retains an advisory body working alongside the Ombud service. Both are crucial for a supportive business ecosystem yet require careful management of their broad discretionary powers to avoid abuse.
- The Bill must specify the required qualifications for the Ombud and Deputy Ombud, mandating a law degree and significant experience in relevant fields. Clear guidelines on their appointment, emphasising transparency and parliamentary consultation are essential.

3.3 Legal Framework Coherence:

- The Bill should not repeat constitutional rights, such as those in the proposed section 17Y(2) affirming small enterprises' right to trade and transact freely. Instead, it should focus on specific legal frameworks that uniquely empower and protect small enterprises.
- The terms related to 'adjudicate' and 'adjudication' in the Alternative Dispute Resolution (ADR) process require a clearer definition within the Bill. The proposed section 17G(1)(a) should be amended to ensure the language accurately reflects the Ombud's role in resolving disputes amicably, without formal court adjudication, thus removing any potential misunderstandings about their functions.

3.4 Institutional Integrity and Efficiency:

- The Committee has noted the potential issues with consolidating financial and non-financial support functions in the proposed section 9's establishment of the SEDFA. Clear distinctions between different support mechanisms are crucial to avoid overlapping roles and confusion.
- The Committee supports Chapter 3's introduction, creating the Small Enterprise Ombud Service for efficient, fair, and economical adjudication of small enterprise complaints. The Committee particularly appreciates that Ombud's determinations will have the same legal weight as civil court judgments, aiding in enforceability and possibly reducing litigation costs and time. However, we suggest monitoring to ensure these determinations comply with procedural justice and do not burden the court system.
- There are concerns regarding the Ombud's role in capital acquisition decision-making as mentioned in the proposed section 17G(1)(d). It is recommended that the Ombud's role

should be aligned with strategic oversight rather than executive functions. The Bill should be amended to specify that the Ombud approves strategic plans, including capital acquisitions, in line with the Agency's objectives.

- The proposed section 17M(1)(a) and (b) grants the Ombud adjudication powers for final complaint determinations. The Committee recommends amending the Bill to provide clear procedural steps for the Ombud, detailing whether these decisions will be based on oral hearings or document reviews, to ensure transparency and fairness.

3.5 Economic Inclusion and Support:

- The Committee emphasises the importance of the Agency in promoting economic inclusion. This includes both financial and non-financial support for small enterprises, with special attention to those in historically disadvantaged areas.
- The remuneration for both the Ombud and Deputy Ombud should align with civil service levels, not exceeding level 15/Deputy Director-General. This alignment ensures that pay is consistent with public service standards and maintains fiscal responsibility.
- The proposed section 15, especially subsection 15(4), requires setting clear service standards, including timeframes for the Agency to consider and provide financial or non-financial support. Additionally, Section 20 of the National Small Enterprise Act, 1996 (Act 102 of 1996), should be referred to for defining these service standards, ensuring the Agency upholds and reports on them effectively.
- Proposed section 13 should be expanded to include the Agency's role in fostering economic inclusion. This involves promoting the participation and development of small enterprises in areas that are historically disadvantaged or less formal, supporting a wider range of entrepreneurial activities and contributions.

3.6 Regulatory and Procedural Clarity:

- The Committee emphasises the importance of well-defined regulations and procedures in the context of case fee regulations, financial reporting, and staff remuneration.
- The current requirement for financial reporting within three months after the fiscal year's end, as per the proposed section 17Q(3), should be revised. The Committee recommends aligning this timeframe with the two months mandated for national departments under the Public Finance Management Act, 1999 (Act 1 of 1999) (the PFMA). This change aims to enhance consistency and accountability in government financial practices.
- The Committee proposes amendments to Chapter 3A, specifically section 17S(1)(b), to provide detailed guidelines on the types of case fees the Small Enterprise Ombud may impose. Such clarity will ensure transparency in fee structuring and prevent financial barriers for small enterprises seeking assistance.
- Referring to section 17N(4)(a), it's recommended that staff remuneration within the Ombud Service be capped at the level of a Chief Director or level 14. This policy would uphold fiscal responsibility and align with existing public service pay scales, ensuring fair and sustainable compensation practices.

3.7 Compliance and Reporting:

- Proposed section 17Q(3) should be amended to align the financial reporting deadline with the PFMA. This alignment would reduce the current three-month period to two months, enhancing accountability and uniformity across government financial practices.
- For Chapter 3A, especially proposed section 17S(1)(b), the Committee recommends that the Bill should include comprehensive guidance on the types of case fees chargeable by the Small Enterprise Ombud. Clear fee structures are crucial to maintain transparency and to ensure that small enterprises are not financially hindered from seeking necessary assistance.

3.8 Dispute Resolution and Adjudication:

- Noting the proposed sections 17M(1)(a) and (b), the Committee recognises the adjudicatory authority granted to the Ombud for resolving complaints. However, it calls for amendments to provide explicit procedural details, including whether determinations will be made following hearings or based on documentary evidence. The aim is to ensure that the Ombud's adjudication process is both transparent and fair.
- The Committee proposes revising sections 17G(7)(a) to (c) to specify timeframes for actions taken by the Ombud. The current vague wording allows too much discretion, leading to potential delays. A more structured approach, possibly including regulatory timeframes set by the Minister, is recommended for accountability and efficiency.
- The overlapping jurisdiction of the Small Enterprise Ombud Service with other Ombud Services, as outlined in the proposed sections 17I and 17J, requires addressing. The Committee suggests that the Bill integrate other ombud services and appeal mechanisms into its scope. This integration would mean the Small Enterprise Ombud would consider complaints only after other internal redress mechanisms have been exhausted, especially in scenarios where an appeal is court applicable.
- The proposed section 17M(1)(b)(i) raises concerns about the lack of clarity in determining fair compensation. The Committee recommends that the Bill be revised to establish a well-defined framework or guidelines for the Ombud's decision-making process in this regard. Such guidelines are essential to ensure equitable and methodologically sound compensation determinations.

3.9 Wide Discretionary Powers:

- The Bill contains numerous provisions that afford the Ombud and other parties very wide discretionary powers without substantive guidance as to how they should exercise the discretion. See, for example, the proposed sections 17G(7)(c), 17J, 17M(1)(b)(ii).
- Where legislation provides for discretionary powers for a decision-maker, these should be appropriately guided to assist the decision-maker with its functions and to mitigate the risk of abuse of power. Please refer to the principles in *Dawood v Minister of Home Affairs*; *Shalabi v Minister of Home Affairs*; *Thomas v Minister of Home Affairs* 2000 3 SA 936 (CC).

- To the extent that the Bill provides for wide discretionary powers, it is recommended that it be revised to provide guidance to the decision-maker (to the extent that guidance is not provided) to assist with the exercise of discretion.

3.10 Stakeholder Engagement and Accessibility:

- On Clause 5 and the proposed section 17W, the Committee notes the critical importance of comprehensive stakeholder education and awareness of the Ombud's nature and services. It is recommended that this section be elaborated to ensure a targeted and inclusive educational strategy. Emphasis should be placed on reaching unrepresented small businesses, particularly those in rural, township, and remote areas, who are often less informed about available support mechanisms. This could involve a detailed framework for educational outreach to ensure equitable access to Ombud services across all segments of the business community.

3.11 Inter-Agency and Provincial Collaboration:

- The Bill needs to clearly define “unfair trading practices” to avoid excessive regulation and to provide clear guidelines for the protection of small business growth. Moreover, the Ombud and Minister must collaborate with the Department of Public Service and Administration when establishing national or regional offices, ensuring appropriate resource allocation. The Committee acknowledges the goal of safeguarding small businesses against unfair trading practices as outlined in the proposed section 17Y. However, concerns about jurisdictional overreach into the realms of the Department of Trade, Industry and Competition (DTIC) and the Competition Commission have been raised. Since these entities are already equipped to handle such claims, the Bill should distinguish the roles clearly to prevent redundancy and conflict. The Committee supports the idea that the Small Enterprise Ombud should assist the Competition Commission with inquiries related to small businesses, rather than acting independently on unfair trading practices. This strategy would make better use of existing resources and reinforce support systems for small businesses without encroaching on the mandates of the DTIC and Competition Commission.
- The involvement and insight of provincial governments are crucial for effectively supporting small businesses, especially since issues and needs often emerge at the regional level. It is noted that amendments made to the Bill suggest increased engagement with provincial authorities, aiming for better alignment and coordination across governmental levels. However, these amendments do not fully empower provinces to significantly impact the administration of the Act. The Committee suggests revising these amendments to strengthen the role and influence of provincial authorities, ensuring they can meaningfully contribute to and shape the support framework for small enterprises within their respective regions. This enhancement is vital for a more decentralised and responsive approach to small business support, tailored to the diverse needs and contexts of different provinces.

3.12 Transparency and Accountability:

- The Committee observes that the current language seems to restrict accountability mainly to larger entities, potentially sidelining small and medium enterprises. The recommendation is to revise the Bill to incorporate more inclusive language. This change will broaden the accountability scope, encompassing all levels of trade and enterprise, thus fostering a more equitable and inclusive business environment.
- The Committee identifies a lack of clarity regarding the range of "appropriate" recommendations the Ombud is authorised to make. To ensure effective and consistent decision-making, it is essential to refine this clause to define the scope and nature of such recommendations more precisely. This revision aims to guide the Ombud's decision-making process effectively and to minimise the risk of arbitrary or inconsistent interpretations. The goal is to establish a framework that balances flexibility with the need for clear guidelines, ensuring that the Ombud's actions are both effective and accountable.

3.13 Documentation and Record-Keeping:

- The Committee emphasizes the need for the Ombud's record-keeping practices to be in strict accordance with the Promotion of Access to Information Act, 2000 (Act 2 of 2000) (PAIA). It calls for a thorough review of the relevant clause to prevent any conflicts with PAIA's rules governing access to public and private records. Ensuring that the Ombud's discretion in releasing records adheres to legal standards for information access and confidentiality is crucial. This alignment is not just a matter of legal compliance but also a way to maintain transparency and trust in the Ombud's operations.

4. Recommendations for Amendments Based on Stakeholder Input:

- 4.1 The Office of the Small Enterprise Ombud Service: The functions, staffing, and funding of the Ombud service should be established to ensure an equitable trading environment (Clause 5, section 17(F)(1) and (2)).
- 4.2 Financial and Non-Financial Support for Small Enterprises: SEDFA's design and implementation of support programmes should enhance the economic contributions of small enterprises and avoid overlapping support structures (Clause 4, section 11(2)(a)).
- 4.3 Environmental and Cooperative Development: Proposals for ECG monitoring of big businesses and support for cooperatives (General Comments by Mr. Kennedy Ramatsoa) should be included to foster collective strength and environmental responsibility.
- 4.4 Inter-Agency Collaboration: The recommendation from George Municipality on promoting inter-agency coordination (Promotion of inter-agency coordination and collaboration) must be integrated for the effectiveness of shared efforts.
- 4.5 Wide Discretionary Powers: It is recommended that it be revised to guide the decision-maker (to the extent that guidance is not provided) to assist with the exercise of discretion.
- 4.6 Role of Provinces: The active participation of provincial authorities should be provided to give effect to the Bill's implementation.

- 4.7 Spatial Approach to Business Support: The Committee considers the input on Clause 4 concerning the substitution of Chapter 3 of the principal Act, specifically referring to proposed section 13(b). There is a recommendation that while the standard national delivery network is uniformly applied, it should incorporate a spatial focus to ensure that the Agency's delivery meets the diverse needs of all businesses seeking support. The Agency's functions, as outlined in proposed section 13, must consider the geographic and spatial characteristics of businesses, ensuring that support is not only equitable but also contextually relevant to the prevailing circumstances in each locale. This tailored approach is crucial to avoid undermining the Agency's ability to deliver effective services that are responsive to the unique needs of businesses in varied environments.
- 4.8 Composition of Board and Ministerial Powers: The Committee notes the amendments made to Clause 4, particularly the changes to proposed section 16, which now includes wording to ensure representation of all nine provinces. However, concerns persist regarding the lack of specificity in the personnel composition of the Board. The Committee echoes the need for greater detail in the Bill about the Board's composition, recommending a prescriptive approach that ensures a balance of skills, such as a requisite number of senior enterprise development and enterprise finance specialists. Furthermore, apprehensions regarding the Minister's power, as granted in the proposed section 11(3), to seek a High Court order to appoint a director not recommended by the Board, are substantial and remain unaddressed. The Committee advises that this provision be reconsidered to prevent potential circumvention of the Board's recommendations, thereby ensuring that Board appointments are made transparently and based on merit.
- 4.9 Promotion of Inter-Agency Coordination: Relating to Clause 5 and the proposed section 17X, the Committee emphasises the importance of explicitly defining the scope and nature of inter-agency coordination and collaboration. It is imperative that the Bill clearly outlines how different agencies and departments will work together, ensuring the inter-agency efforts are synergistic and aligned with the principles and objectives of the Bill. This would facilitate the creation of a coherent framework for various institutions listed within the Bill to operate collaboratively, ultimately strengthening the support ecosystem for small enterprises.

5. Additional Specific Amendments

- 5.1 National Review of Small Enterprises: The Bill should mandate the National Review of Small Enterprises to include reports on challenges faced by small businesses and potential solutions (National Review of Small Enterprises, proposed section 19). Clarity is needed concerning the mechanism and regularity of the National Review of Small Enterprises as per Clause 6, section 19 of the principal Act. It is recommended that the Bill specify whether the review is a standing requirement or if it is conducted at the behest of the Minister. To ensure a comprehensive and inclusive review process, the Bill must be amended to mandate scheduled consultations with relevant public and private sector stakeholders and ensure that the results of the national review are published and made accessible to the public. This will facilitate informed decision-making by government and private sector entities and foster a cooperative approach to addressing the needs of Small, Medium and Micro Enterprises (SMMEs) across South Africa.

- 5.2 Enhancement of Small Enterprise Competitiveness: The Bill should explicitly address the red tape challenges and other barriers to competitiveness as suggested by stakeholders, ensuring comprehensive support for small businesses. The Bill should clearly outline and reference red tape reduction and ease of doing business as part of the approaches to supporting businesses.
- 5.3 Language and drafting errors: To improve the text, it is recommended that the legislative drafter review the Bill using generally accepted Commonwealth legislative drafting practices, as well as enlist the support of a language practitioner familiar with these practices.
- 5.4 Structural Provisions for the Ombud Service: In alignment with the objectives of maintaining fiscal responsibility and avoiding wilful political neglect, the Bill should stipulate consultation requirements with the Department of Public Service and Administration and set defined service standards for the establishment of national and regional Ombud offices. It should also outline the process for the appointment of an acting Ombud, ensuring that temporary leadership is capable and limited in duration to prevent prolonged periods of acting positions, which may hamper the effectiveness of the Office.
- 5.5 Consolidation of Functions and Clarity in Roles: It is recommended that the Bill ensures a clear separation between the indicators for financial and non-financial support to effectively monitor and evaluate the Agency's support to businesses. Additionally, the alignment with the principal Act should not impede the distinct functions that foster economic inclusion, particularly for small enterprises in historically disadvantaged and less formal areas, as outlined in the proposed section 10 of the Act. These provisions must be carefully crafted to ensure they complement rather than complicate the existing support framework for small enterprises.

6. Conclusion

The Committee's negotiating mandate, informed by the substantive stakeholder feedback, supports the National Small Enterprise Amendment Bill [B 16B - 2023] if amendments proposed in the negotiating mandate are made in the Bill.

However, the Committee also recommends that, in the next term, the National Parliament should seriously reconsider this piece of legislation and address any omissions found in this Bill as soon as possible.



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