

08 March 2019

Mr Charel De Beer, MP
Chairperson of the Select Committee on Finance

For Attention: Zolani Rento
Per email: zrento@parliament.gov.za

Dear Mr De Beer

WRITTEN SUBMISSION ON THE PUBLIC INVESTMENT CORPORATION AMENDMENT BILL

PERSONAL BACKGROUND

I, **Mabotha Arthur Moloto**, hereby submit my keys concerns regarding the Public Investment Corporation Amendment Bill [B4-2019] (referred to as 'the Bill' hereafter) as a member of society in my personal capacity and makes no claim whatsoever of representing any organization referred to in my submission.

I have served as a Whip of the Portfolio of Finance from approximately 2001 to mid 2009. I have also served as Chairperson of the Government Employees Pension Fund from approximately mid 2009 to early to 2014.

The PIC founding legislation was passed in 2004 during my term as Whip of the Portfolio Committee on Finance.

KEY CONCERNS ABOUT CERTAIN CLAUSES OF THE BILL

1. COMPOSITION OF THE BOARD

Clause 2(c) of the Bill directs the Minister to appoint a board consisting of representatives of depositors, department and registered unions.

Comment: For all intents and purpose, the bill establishes a stakeholder board for an asset management. Such a proposal is unprecedented in the

asset management field and fails to take into consideration the role of an asset management company versus a board of trustees of a Pension Fund. The Board Trustees of a pension must have equal representation of members from both the employer and employees for obvious reasons. The Pension Fund has to determine the investment policy of the Fund, benefits and rights of the beneficiaries of the Fund.

Imposition of a similar arrangement on an asset management corporation employed to execute the decisions of the Board of Trustees of Pension Fund and other depositors is unheard of and poses serious corporate governance challenges and potentially violates the principle of a Principal - Agent relationship. The Principal, which in this instance are the depositors, give an investment mandate to the Agent being the PIC to use its expertise to achieve the objectives of the depositors.

It is key requirement of the Financial Advisory and Intermediary Services Act that the key individuals and representatives of the asset management company must be fit and proper as defined in the act and subsequent amendments thereof.

The imposition of a stakeholder board, as structured in the Bill, inadvertently places fetters on the Minister's powers to remove such a board in the event of non-performance. A removal of such a board will most likely only occur after protracted negotiations with the depositors and trade unions represented on the PIC board and will consequently impede the smooth functioning of the Corporation.

I humbly submit that the current process relating to the appointment of the board members of the PIC be maintained and supplemented by a requirement that the Minister furnishes a full report to Parliament on whether the appointed board members meet the fit and proper test stipulated by the FAIS Act.

2. Investment Policy

Clause 3 (a) (1) of the Bill reads as follows "*The corporation may, subject to subsections (3) and (4), invest every deposit or portions of a deposit on behalf of depositors in accordance with the investment policy of the corporation*". (emphasis mine)

Clause 3(b) (4) also reads as follows “*For the purposes of subsection (3), the corporation must act in accordance with the instructions of the depositors, and in so doing, the corporation must, as far as possible, seek to-*

- (a) ensure its security and financial sustainability*
- (b) create and protect jobs*
- (c) industrialise the economy of the Republic, by building the manufacturing sector and boosting exports;*
- (d) promote sustainable development*
- (e) be in line with the Republic’s development objectives*
- (f) strive to build a capacitated developmental state*
- (g) transform the economy and society*
- (h) prioritise investments in the Republic*

Comments: There is a contradiction in the manner that these above cited clauses are drafted. The first section refers to the corporation investing the depositor’s money in accordance with the investment policy of the corporation. That section violates the Principal – Agent relationship. The Agent (PIC) cannot impose any invest policy on the Principals (Depositors). The PIC can only have investment and governance processes within the parameters of the mandate given by depositors. Therefore, the PIC, as an agent, can only invest in accordance with the investment mandate given by the Principals (Depositors) and cannot have its own invest policy. Violation of that principle will certainly put the PIC in conflict with the Financial Advisory and Intermediary Services Act and might lead to the PIC losing its license as a regulated entity in terms of the FAIS Act.

Section 6 (7) of the Government Employees Pension Law states as follows: “*The Board, acting in consultation with the Minister, shall determine the investment policy of the Fund*”. The investment policy determined by the Board of the GEPF acting in consultation with the Minister forms the basis of the investment mandate given to the PIC. The Investment Mandate would indicate the strategic asset allocation ranges for cash and money markets, domestic bonds, domestic equities, domestic property, Africa equity, Africa bonds, global equity, global bonds.

I humbly submit that Subsection 3 (a)(1) be deleted in its entirety to avoid any confusion with regards who is responsible for the the determination of investment policy.

The second clause correctly underlines the importance of the instructions given by the principal (depositors) however, the clause ventures into other areas oblivious to the fact that certain depositors have adopted a Developmental Investment Policy setting aside 5% of the total portfolio for developments investments that deliver both financial and social returns. The critical question to be answered is what then takes precedence between the Developmental Investment Policy of such depositors and sub-clauses (a) to (h) of subsection 3 (b). **I humbly submit that the committee explore this matter further before endorsing the provisions of the Bill.**

3. Directives by Minister

Section 2(e) reads a follows: *by the addition after subsection (4) of the following subsection: “(5) A directive contemplated in subsection (4) must be-*
(a) based on the investment criteria set out in section 10.

Section 6 (4) of the PIC Act of 2004 reads as follows:

The Minister may issue directives to the board regarding the management of the corporation if -

- (a) it is in the public interest; or*
- (b) it is reasonably necessary to do so.*

Comment: I need to state from the outset that I was vehemently opposed to Section (6) (4) of the 2004 Act when we processed that legislation for fear of encountering what I am now in reading in the proposed section 2 (e) of the proposed bill. I maintained then that the directive might undermine the authority assigned to the Board and violates good corporate governance. I held a strong view that no shareholder should be allowed to undermine the authority of the board. I still hold a view that the Minister, as shareholder representative, has sufficient legal powers assigned to him by the PFMA, Companies Act and

Memorandum of Incorporation to deal with key governance issues related to the PIC without the need to resort to directives. Moreover, the PIC is also regulated by the FAIS Act. The inclusion of the '*public interest and reasonably necessary to do so words*' in relation to the directive was included to address my concerns then. The Committee held a view that the Courts could then test the public interest nature and reasonableness of the directive issued by the Minister.

The investment policies of the various depositors serve as the basis of the investment mandate given to the PIC and therefore the Minister will be acting contrary to such an arrangement by issuing directives related to investments. The Government Employees Pension Law, as cited previously, clearly stipulates that the investment policy of the Government Employees Pension Fund is determined in consultation with the Board of the Government Employees Pension Fund. Therefore, the Minister will be in acting contravention of Section 6(7) of the GEP Law by issuing a directive based on the proposed investment criteria set out in Section 10. The PIC will in turn be in acting violation of investment mandate issued by the GEPF if it carries out such an instruction issued by the Minister. The PIC shall also be in contravention of the FAIS Act if carries out such an instruction from the Minister.

I therefore humbly submit that the proposed section 2(e) be deleted.

Wishing the Committee the best in its deliberations

Regards

Mabotha Arthur Moloto