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Comments

to the

Department of Small Business Development

on the draft

National Small Enterprise Amendment Bill, 2020

To:

Director: Legislation
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Introduction

The Minister of Small Business Development on 11 December 2020 gazetted for comment a draft 2020 National Small Enterprise Amendment Bill (“the draft Amendment Bill”).¹

Interested parties are invited to submit comments on the draft Bill within 60 days of that date. This means comments must be lodged by Tuesday, 9 February 2021.

The Free Market Foundation² makes the following comments on the draft Bill.

Summary

The National Small Enterprise Act, 1996 mandates the establishing of an Advisory Body to promote the interests of small enterprise, as contemplated in the 1995 Small Business Strategy (which stipulates that there should be a joint vision for big and small business, and the small-business environment should be as market-orientated as possible). The Advisory Body advises the Minister on the impact of legislation on small enterprises.

The draft Amendment Bill would repeal those provisions about the Advisory Body, and insert instead a chapter envisaging the appointing of a Small Enterprise Ombud who would entertain complaints by small enterprises against other enterprises, and investigate alleged unfairness in contracts between small and other enterprises, with power to award the complainants compensation. The Minister may, on the Ombud’s recommendation, prohibit certain practices in relation to small enterprises as being unfair, including transfer of commercial risk to the weaker party.

Abstract values such as fairness cannot constitute substantive rules for tribunals to use to intervene in contracts. A notion that contracts need not be enforced if they offend against fairness would give rise to legal and commercial uncertainty and undermine the Rule of Law. It would be better for persons to refuse to sign allegedly unfair contracts in the first place.

Every contract, no matter how carefully negotiated, would be open to subsequent challenge on the ground that some of its terms were unfair, with inestimable damage to the conduct of business, personal trust, and respect for law. Imposing these notions of fairness would have the unintended consequence of deterring bigger enterprises from dealing with small ones.

¹ Minister of Small Business Development. Publication of draft National Small Enterprise Amendment Bill, 2020 for public comment. Gen N 709 of 2020 (11 Dec, *Gazette* 43981 pp 203–225).

² The Free Market Foundation is an independent public benefit organisation founded in 1975 that promotes and fosters an open society, the rule of law, personal liberty, and economic and press freedom as fundamental components of human rights and democracy.

There are already common-law rules applicable in cases of allegedly unequal bargaining power (including interpreting ambiguous contracts as lightly as possible, and rules about duress, undue influence, and public policy).

A socio-economic impact assessment would identify these shortcomings of the draft Bill. To our knowledge no such assessment was conducted, despite being required in terms of Cabinet policy from 2015.

Consumer statutes recognise that the problem lies with the machinery of the law, rather than the law about unfair contracts. The statutes establish special courts and tribunals, and alternative dispute-resolution agents or ombuds. These statutes' real value lies, not in rules about what is unfair, but rather in the mechanisms which they introduce for more accessible, informal, and inexpensive resolution of disputes.

Advisory Body

As it now stands, the National Small Enterprise Act, 1996³ provides for⁴ the establishing by the Minister of an Advisory Body, to represent and promote the interests of small enterprise as contemplated in the 1995 Small Business Strategy.⁵

(The 1995 Small Business Strategy⁶ stipulates that—

(There should be a joint vision for big, medium and small business;
(the government is committed to keep the small-business environment as market-orientated as practically possible.⁷)

The National Small Enterprise Act states that the Advisory Body's constitution must—

Require the Body to advise the Minister on—

The impact of current and new legislation on small enterprise; and
constraints affecting the viability of the small enterprise community;⁸ and
provide for the Body's interaction with the Department and Parliament.⁹

³ National Small Enterprise Act 102 of 1996. The Act came into operation in June 1997.

⁴ National Small Enterprise Act, 1996 (as amended by Amendment Acts 26 of 2003 and 29 of 2004 and Govt Notice 399 of 15 Mar 2019.)

⁵ National Small Enterprise Act, 1996 s 2 read with s 1 svv "National Small Enterprise Support Strategy".

⁶ *White Paper on National Strategy for Development and Promotion of Small Business, 1995*. Cape Town (tabled in Parliament on 20 Mar 1995 (ref WPA/1995)). Gen N 213 of 1995 (28 Mar, *Gazette* 16317).

⁷ *White Paper on National Strategy for Development and Promotion of Small Business, 1995* (supra) par 4.1.3.

⁸ National Small Enterprise Act, 1996 s 3(2)(b)(ii) and (vii).

⁹ And statutory bodies. National Small Enterprise Act, 1996 s 3(2)(a)(iv).

(The Act refers to the Trade and Industry Minister¹⁰ and Department.¹¹ But the President may appoint another minister,¹² assign exercise of the Act's powers and functions to her,¹³ and create a corresponding Department.¹⁴ In 2014 the President created a ministry,¹⁵ appointed a Minister¹⁶ and established a Department¹⁷ of Small Business Development, and assigned the Act's ministerial powers and functions to the new Minister.¹⁸)

Draft Amendment Bill

The draft Amendment Bill proposes—

The repeal¹⁹ of the National Small Enterprise Act's chapter for the establishing and functioning of the Advisory Body;²⁰ and
the inserting²¹ in the Act of a proposed dispute-resolution chapter,²² which would—
Establish an office of a Small Enterprise Ombud Service;²³ and
provide for the appointing of an Ombud;²⁴

The draft Amendment Bill's proposed dispute-resolution chapter²⁵ would provide that—

¹⁰ National Small Enterprise Act, 1996 sv "Minister".

¹¹ National Small Enterprise Act, 1996 s 3(2)(a)(iv).

¹² From the National Assembly. Constitution s 91(2) and (3)(b).

¹³ The President may by proclamation transfer to a Cabinet member the administration of legislation or powers or functions entrusted by legislation to another member. Constitution, 1996 s 97(a) and (b).

¹⁴ (The public service is structured i.t.o. legislation. Constitution, 1996 s 197(1).

(The interim Constitution authorised the President to integrate existing public services by proclamation.

Constitution, 1993 s 237(3)(a) read with s 236(1).

(The President issued such a proclamation: "Public Service Act, 1994" (Proc 103 of 1994) s 7(1).

(It lists national departments. Public Service Act, 1994 s 7(2)(a) read with Sched 1 col 1.

(The President may, on the Public Service & Administration Minister's advice, establish more departments by proclamation. Public Service Act, 1994 s 7(5)(a) read with s 1 sv "Minister", s 3(4)(a).)

(When administration of a law conferring a power or imposing a duty on or entrusting a function to a Minister has been assigned to another Minister, references in that law to a department administered by the former must be construed as referring to the department administered by the latter Minister. Interpretation Act, 1957 s 10(5)(a).)

¹⁵ *Independent Online (IOL)*, 26 May 2014 "Four new ministries tackle key issues".

¹⁶ *BizNews* 25 May 2014, Alec Hogg "Full List of Jacob Zuma's 2014 cabinet – all the Ministers and Deputies".

¹⁷ Proc 34 of 2014 (8 Jul, *Gazette* 37817), amending the Public Service Act, 1994 (Proc 103 of 1994).

¹⁸ Proc N47 of 15 Jul 2014 (*Gazette* 37839). "Transfer of administration and powers and functions entrusted by legislation to certain cabinet members", Sched, item 1.4 (*small business development related legislation*).
When the President assigns the administration of a law which confers powers or imposes duties on or entrusts functions to a Minister to another Minister, that other Minister may exercise those powers and functions and perform those duties. Interpretation Act 33 of 1957 s 10(5).

¹⁹ Draft National Small Enterprise Amendment Bill, 2020 cl 2.

²⁰ National Small Enterprise Act, 1996 Chap 2 (ss 2, 3).

²¹ Draft National Small Enterprise Amendment Bill, 2020 cl 3.

²² Bill proposed Chap 3A, dispute resolution mechanism (ss 17D–17T).

²³ Bill proposed s 17D(1).

²⁴ And one or more deputy Ombuds. The Ombud and deputies must be qualified in law and possess adequate knowledge of small enterprises, trade, industry, finance or the economy. Bill proposed s 17E(1)(a) and (b).

²⁵ Bill proposed Chap 3A, dispute resolution mechanism (ss 17D–17T).

The Ombud must consider and dispose of complaints by a “small” enterprise against an enterprise “which is not” a small enterprise;²⁶

the Minister may make rules, i.r.o. different categories of complaints, regarding—

Categories of small enterprises qualifying as complainants;

complaints justiciable by the Ombud;²⁷

the Ombud may investigate—

Alleged “unfairness” i.r.t. to a contract between the complainant and another party;

alleged “unfair or other improper conduct” in performing under a contract;

any alleged act which results in “improper” prejudice to a small enterprise;²⁸

the Ombud may, if the parties do not settle or accept a recommended resolution of the complaint, uphold the complaint and—

Award the complainant “fair” compensation;

direct the other party to take steps the Ombud “deems appropriate” and just;²⁹

the Minister may³⁰—

On the Ombud’s recommendation, declare³¹ certain practices “in relation to small enterprises” (after considering if the practices have or are “likely” to have, directly “or indirectly”, the “effect” of “unreasonably” prejudicing or “unfairly” affecting “any” small enterprise) to be prohibited “unfair” trading practices, including—

Transfer of “commercial risk” to the “weaker” party;

“unfair” exclusionary “compliance requirement”³² practices;³³

make regulations requiring “specified” enterprises to provide prescribed information about their contracting and payment practices “relating to small enterprises”;³⁴

small enterprises have the right to transact “freely”, including the “right” —

To “fair” business contracts; and

to “fair” dealing.³⁵

The FMF proposes that the Advisory Body be retained in addition to the new Ombud Service.

Notions like “unfairness” create uncertainty and deter dealings with small enterprises

An abstract value such as fairness (while performing a controlling function in established rules of the law of contract) cannot constitute an independent substantive rule that a court or tribunal can

²⁶ In relation to interpretation of terms of an agreement for procurement of goods or services. Bill proposed s 17F(1)(a) read with Bill cl 1 proposed definition “complaint”.

²⁷ Bill proposed s 17N(1)(a)(ii), (iii).

²⁸ Bill proposed s 17F(2)(a)(i), (ii), (iii).

²⁹ Bill proposed s 17H(1)(b)(i), (ii), read with proposed s 17G(5)(b), (c).

³⁰ After consulting the Minister for trade, industry and competition.

³¹ By *Gazette* notice.

³² It is unclear what this means.

³³ Bill proposed s 17T(1)(a) read with s 17T(3)(d), (h).

³⁴ Bill proposed s 17T(1)(b)(i).

³⁵ Bill proposed s 17T(2)(a), (d).

use to intervene in contractual relationships. Acceptance of a notion that a contract need not be enforced because it offends the adjudicator's sense of fairness will give rise to legal and commercial uncertainty.³⁶

Making rules of law subject to value judgments is destructive of the Rule of Law.³⁷

If the parties have agreed, the law should not be used to give relief against unfair terms. The reason is clear. To hold otherwise would lead to a paternalistic approach. Every contract, no matter how carefully negotiated, would be open to subsequent challenge on the ground that some of its terms were unreasonable. It is difficult to estimate the extent of the damage that would be done to the conduct of business, personal trust and the ordinary person's respect for the law.³⁸

The common law has evolved techniques that can be applied in circumstances that may fall in the general ground of inequality of bargaining power. These include interpreting ambiguous contractual obligations as lightly as possible and against the other party (*contra proferentem*), and rules about duress, undue influence, and public policy.³⁹

But public policy should not be determined by idiosyncrasies of individual contracting parties, or identical stipulations would be good or bad in a manner that renders whimsical the reasonableness standard of public policy.⁴⁰

The FMF proposes that the clauses related to unfair business practices be removed from the Bill.

Socio-economic impact assessment

A socio-economic impact assessment would identify these shortcomings of the draft Bill.

A socio-economic impact assessment is intended to minimise unintended consequences from policy initiatives and legislation, including unnecessary costs from implementation and compliance as well as from unanticipated outcomes.⁴¹

The FMF proposes that a socio-economic impact assessment be conducted, and published, on the Bill before it is further considered for adoption.

³⁶ *South African Forestry Co Ltd v York Timbers Ltd* [2004] 4 All SA 168 (SCA) par [27].

³⁷ *Bredenkamp v Standard Bank of South Africa Ltd* [2010] 4 All SA 113 (SCA) [39].

³⁸ *Christie's Law of Contract in South Africa*, 7 ed (2016) G B Bradfield, Chap 1.5(c).

³⁹ *Christie's Law of Contract in South Africa*, (supra), Chap 1.5(b).

⁴⁰ *Barkhuizen v Napier* 2007 (7) BCLR 691 (CC) par [98].

⁴¹ Department of Planning, Monitoring and Evaluation. "Socio-Economic Impact Assessment System (SEIAS): Guidelines." (2015). 4.

Problem is with dispute-adjudication machinery, not laws about unfair contracts

Of greater importance is the recognition accorded in consumer statutes⁴² to the reality that, in significant part, the problem lies with the machinery of the law, rather than the law about unfair contracts. Those statutes address this through the establishment of special courts and tribunals, and alternative dispute-resolution agents (including ombuds) and mechanisms.

The real value in those statutes can be said to lie, not in legal rules about what terms or arrangements are deemed unfair, but rather in those mechanisms which they have introduced for the relatively more accessible, informal and inexpensive resolution of consumer disputes.⁴³

The FMF proposes that the Ombud Service be established, in addition to the retention of the Advisory Body, to allow small businesses an alternative dispute-resolution mechanism in its dealings with larger enterprises, but sans any arbitrary authority on the part of the Minister, government, or the ombud, to set aside contracts due to their ostensible “unfairness”.

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Supplementary Comments

Introduction

The Minister of Small Business Development on 11 December 2020 gazetted the draft 2020 National Small Enterprise Amendment Bill¹ for public comment.

Interested parties were invited to submit comments on the draft Bill to the Department of Small Business Development within 60 days.²

The Free Market Foundation³ duly submitted comments to the Department in that period.⁴

⁴² Rental Housing Act 50 of 1999, National Credit Act 34 of 2005, Consumer Protection Act 68 of 2008.

⁴³ *Christie’s Law of Contract in South Africa*, (supra), Chap 1.5.4 (consumer legislation) in fin.

¹ Minister of Small Business Development. Publication of draft National Small Enterprise Amendment Bill, 2020 for public comment. Gen N 709 of 2020 (11 Dec, *Gazette* 43981 pp 203–225).

² I.e., by 9 Feb 2021.

³ An independent public benefit organisation that promotes and fosters an open society, the rule of law, personal liberty and economic and press freedom as fundamental components of human rights and democracy

⁴ Free Market Foundation. 9 Feb 2021. *Comments to the Department of Small Business Development on the draft National Small Enterprise Amendment Bill, 2020*.

The Department has graciously consented to the Foundation's submitting supplementary comments on the draft Bill.

The Foundation submits these supplementary comments.

Summary

The draft Bill would give the Ombud and Minister an array of powers which could be used in combination by the Minister and Ombud and by small enterprises to compel in effect larger enterprises to enter into supply and other commercial transactions with small enterprises.

The Bill would vest the Ombud with power to investigate complaints by small enterprises about practices causing them unlawful or improper prejudice, to award them compensation, and to order counterparties to take appropriate steps.

The Minister would be authorised to prohibit as being unfair any trading practices which are indirectly likely to harm the competitiveness of small enterprises or affect them unfairly (including any transfer of risk to weaker parties or imposing of unfair exclusionary compliance requirements), and to issue regulations requiring larger enterprises to make information available about their contract practices regarding small enterprises.

Small enterprises' privileges would include disclosure and accountability by larger enterprises. Small enterprises would have the right to choose, trade and transact freely, including the rights to disclosure of information, fair dealing and accountability from large enterprises.

These proposed "rights" would not be true rights, but privileges. They would go further than merely requiring larger enterprises not to interfere with, diminish or impair the enjoyment of a fundamental right, which is legitimate. The Bill of Rights binds a natural or juristic person if applicable, but this only protects fundamental rights negatively.

It does not impose on a large enterprise or other private natural or juristic person the duties of the state in protecting rights in the Bill of Rights.

These proposed rights to disclosure, fair dealing and accountability from large enterprises purport to go further, and impose positive duties on larger enterprises, but in unduly vague terms.

The doctrine of vagueness is founded on the Rule of Law, and requires that laws be written in a clear and accessible manner. A law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly.

The Minister could prohibit a particular trading practice on the ground of its deemed unfairness to small enterprises (such as a larger enterprise's preferred commercial practice of purchasing from third parties in bulk quantities which may be beyond the capacity of small enterprises to supply), and could make regulations requiring larger enterprises to publish sensitive commercial information about their bulk-purchase preferences. A small enterprise could then complain to the Ombud that this larger enterprise's practice of purchasing in bulk from third parties is prejudicial to that small enterprise.

The purported rights to disclosure, fair dealing and accountability from large enterprises impose positive duties on larger enterprises, albeit in vague terms.

In effect larger businesses will be at the mercy of small enterprises seeking to exact a favourable deal.

Ombud may investigate complaints

The draft Bill proposes the amending of the National Small Enterprise Act, 1996⁵ by the inserting⁶ of a proposed dispute-resolution chapter,⁷ which would provide for the appointing of an Ombud⁸ to consider and dispose of⁹ any "complaint" by a small enterprise.¹⁰

The Ombud would be competent to investigate, on receiving a complaint, any alleged practice, act or omission resulting in unlawful or improper prejudice to a small enterprise.¹¹ This on balance probably extends to any such practice, etc., which does not arise out of a contractual arrangement with the small enterprise concerned.¹²

⁵ National Small Enterprise Act 102 of 1996.

⁶ Draft National Small Enterprise Amendment Bill, 2020 cl 3.

⁷ Bill cl 3 proposed Chap 3A (dispute resolution mechanism) proposed ss 17D–17T.

⁸ And one or more deputy Ombuds. The Ombud and deputies would have to be qualified in law and possess adequate knowledge of small enterprises, trade, industry, finance or the economy. Bill proposed s 17E(1)(a), (b).

⁹ Bill proposed s 17F(1)(a).

¹⁰ Against a larger enterprise i.r.t. interpretation of an agreement's terms for procuring goods or services or late or non-payment of amounts due and payable to the small enterprise. Bill cl 1 proposed s 1 sv "complaint" (a).

¹¹ Bill cl 3 proposed s 17F(2)(a)(iii).

¹² This is the third category of alleged misconduct the Ombud might investigate. Bill proposed s 17F(2)(a)(iii).

The other two categories are both stated as being i.c.w. "a contractual arrangement or other legal relationship between the complainant and any other party to the complaint" (viz., unfairness i.r.t. such an arrangement or relationship; or abuse or unjustifiable exercise of power or unfair or other improper conduct or undue delay in performing i.t.o. such an arrangement or relationship). Bill proposed s 17F(2)(a)(i) and (ii).

As mentioned, a "complaint" would be one i.r.t. interpretation of an agreement or non-payment of amounts due (by agreement, presumably) to the small enterprise. See fn 10.

This might all suggest that the said third category of alleged misconduct (a practice, act or omission resulting in unlawful or improper prejudice to a small enterprise) is likewise be limited to misconduct i.c.w. contractual arrangements involving the complainant.

However, the Bill would authorise the Minister to prohibit as unfair the practices of executing long-term "exclusive agreements aimed at preventing weaker parties from entering" a market and of imposing unfair "exclusionary"

The Ombud would be authorised to uphold the complaint,¹³ award compensation for loss or damage,¹⁴ and direct the other party to take steps the Ombud deems appropriate and just.¹⁵

Minister may prohibit trade practices

The Minister would, if the Ombud recommends, be authorised to declare¹⁶ certain practices i.r.t. small enterprises (including transfer of commercial risk to the weaker party,¹⁷ the executing of long-term exclusive agreements aimed at preventing weaker parties from entering a market,¹⁸ the imposing of unfair exclusionary compliance requirements,¹⁹ or stipulating of unfair contract terms in retail and commercial leases for small enterprises²⁰) to be prohibited unfair trading practices, if²¹—

The practice has, or is likely to have, the effect, even if only indirectly,²² of—
Harming the sustainability and competitiveness of small enterprises²³ or
unreasonably prejudicing or unfairly affecting any small enterprise;²⁴ and
an object of the Act will, or is likely to, be defeated should the practice be allowed to continue.²⁵

The draft Bill would forbid an affected person from carrying on a practice prohibited by such *Gazette* notice.²⁶ The Ombud would be able to direct anyone who carries on the practice in

compliance requirements (if likely to harm small enterprises' competitiveness). See text below between fnn 16 and 22.

This probably extends the Bill's application to large enterprises' contracts with third parties, not just to their contracts with small enterprises.

The "complaint" definition (as being i.r.t. interpretation of an agreement with a complainant small enterprise) applies only "unless the context otherwise indicates". Act s 1.

It arguably follows that, even though the other two misconduct categories the Ombud might investigate are i.c.w. contracts with the small enterprise, the third category (a practice, act or omission resulting in unlawful or improper prejudice to a small enterprise) would not necessarily involve a contract with that small enterprise.

(If based on the context there are compelling reasons to disregard a defined meaning, the ordinary meaning must be used. *Liesching v S* 2017 (4) BCLR 454 (CC) par [33]; *Independent Institute of Education (Pty) Ltd v Kwazulu-Natal Law Society and others* 2020 (4) BCLR 495 (CC) par [17].)

¹³ Bill proposed s 17H(1)(b).

¹⁴ Bill proposed s 17H(1)(b)(i).

¹⁵ Bill proposed s 17H(1)(b)(ii).

¹⁶ By *Gazette* notice.

¹⁷ Bill proposed s 17T(3)(d).

¹⁸ Bill proposed s 17T(3)(g).

¹⁹ Bill proposed s 17T(3)(h).

²⁰ Bill proposed s 17T(3)(i).

²¹ Bill proposed s 17T(1)(a).

²² Bill proposed s 17T(4)(a).

²³ Bill proposed s 17T(4)(a)(i).

²⁴ Bill proposed s 17T(4)(a)(ii), (iv).

²⁵ Bill proposed s 17T(4)(b).

²⁶ Bill proposed s 17T(6).

contravention of the notice to rectify, to the Ombud's satisfaction, any harm caused by or arising out of the carrying on of the practice.²⁷ The Ombud could, after affording an opportunity to make representations, impose an administrative penalty in an amount prescribed²⁸ by the Minister for carrying on the practice or failing to comply with a direction by the Ombud to rectify such harm.²⁹

The Minister would be authorised to make regulations which require specified enterprises to provide and publish³⁰ prescribed³¹ information about their contracting practices and policies relating to small enterprises.³²

Rights to disclosure, fair dealing and accountability from large enterprises

The draft Bill proposes that small enterprises would have the right to choose, trade and transact freely,³³ including the rights to —

- disclosure of information;³⁴
- fair dealing;³⁵ and
- accountability from large enterprises.³⁶

It is submitted that the draft Bill's proposed "rights" to disclosure of information, fair dealing, and accountability from large enterprises, would not be true rights, but privileges:

These proposed rights, to "disclosure", "fair dealing" and "accountability from large enterprises", would go further than requiring larger enterprises not to interfere with, diminish or impair the enjoyment of a fundamental right, which is legitimate.

A provision of the Bill of Rights binds a natural or juristic person if, and to the extent that, it is applicable.³⁷ This merely protects fundamental rights negatively.³⁸

²⁷ Bill proposed s 17T(7).

²⁸ By regulation. Act s 1 sv "prescribed".

²⁹ Bill proposed s 17T(9).

³⁰ In the manner prescribed by regulation. Bill proposed s 17T(1)(b)(i), (ii) read with Act s 1 svv "prescribed".

³¹ By regulation. Act s 1 sv "prescribed".

³² Bill proposed s 17T(1)(b)(i).

³³ Bill proposed s 17T(2).

³⁴ Bill proposed s 17T(2)(c).

³⁵ Bill proposed s 17T(2)(d).

³⁶ Bill proposed s 17T(2)(e).

³⁷ Taking into account the nature of the right and of any duty imposed by the right. Constitution 1996 s 8(2).

³⁸ Socio-economic rights may be negatively protected from improper invasion. *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of Constitution* 1996 (10) BCLR 1253 (CC) par [78].

It does not impose on a large enterprise or other private natural or juristic person the duties of the state in protecting rights in the Bill of Rights.³⁹

These proposed rights to disclosure, fair dealing and accountability from large enterprises purport to go further, and impose positive duties on larger enterprises, but in unduly vague terms.

The doctrine of vagueness is founded on the Rule of Law, which is a foundational value of our constitutional democracy. The doctrine of vagueness⁴⁰ requires that laws must be written in a clear and accessible manner. The law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly.⁴¹

Conclusion

In short, the Ombud would be authorised to investigate complaints by small enterprises about any practices causing them unlawful or improper prejudice, award them compensation, and order counterparties to take appropriate steps.

The Minister would be authorised to prohibit as being unfair any trading practices which are indirectly likely to harm the competitiveness of small enterprises or affect them unfairly, and to make regulations requiring enterprises to make information available about their contract practices regarding small enterprises.

Small enterprises would enjoy vague privileges of disclosure and accountability by larger enterprises.

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³⁹ *Governing Body of Juma Masjid Primary School and others v Essay NO and others (Centre for Child Law and another as Amici Curiae)* 2011 (8) BCLR 761 (CC) par [58] per Nkabinde J, with Ngcobo CJ, Moseneke DCJ, Cameron, Froneman, Jafta, Khampepe, Mogoeng, Skweyiya JJ and Brand AJ concurring.

⁴⁰ While it must recognise the role of government to further legitimate social and economic objectives.

⁴¹ *Affordable Medicines Trust v Min of Health*, 2005 (6) BCLR 529 (CC) par [108] per Ngcobo J, with Langa DCJ, Madala, Mokgoro, Moseneke, O'Regan, Sachs, Skweyiya, Van der Westhuizen and Yacoob JJ concurring.