CENTRE FOR CONSTITUTIONAL RIGHTS

Upholding South Africa's Constitutional Accord

Patron: The Hon Mr Justice Ian G Farlam

The Honourable Mr ME Nchabeleng, MP
Chairperson
Portfolio Committee on Labour
Parliament of the Republic of South Africa
Parliament Street
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Attention: Mr Zolani Sakasa
Per email: zsakasa@parliament.gov.za

14 December 2012

Dear Mr Nchabeleng

CONCISE SUBMISSIONS ON THE EMPLOYMENT EQUITY AMENDMENT BILL [31-2012] AND EMPLOYMENT SERVICES BILL [38-2012]

Introduction

1. The Centre for Constitutional Rights (CFCR) is a unit of the FW de Klerk Foundation – a non-profit organisation dedicated to upholding the *Constitution of the Republic of South Africa*, 1996 (the Constitution). To this end, the Centre seeks to promote the values, rights and principles provided for in the Constitution, to monitor developments including policy and draft legislation that might affect the Constitution and the values, rights or principles provided therein, to inform people and organisations of their constitutional rights and to assist them in claiming their rights.

2. The CFCR welcomes the opportunity to make concise submissions to the Committee on the aforementioned Bills in response to your call for submission as published on www.parliament.gov.za.

3. It is not the purpose or intention of this submission to provide comprehensive legal analysis or technical assessment of the Bills, but rather to draw attention to key concerns in relation to the Bills, particularly in so far as it relates to constitutional values, rights and requirements.

4. The CFCR is however, in principle, concerned about the application of the right to equality as provided for in section 9 of the Constitution – especially pertaining to the notion of demographic representation. We are also concerned about certain technical and practical implications which the Bills will create, including the cumulative effect which the Bills may have on job creation and related economic impact.

Background

5. The point of departure for our analysis of the draft Bills is the Constitution, as is required pursuant to the advent of our constitutional democracy, where parliamentary rule made way to constitutional supremacy. The Constitution governs labour relations by means of a number of provisions in the Bill of Rights. These include, in particular, section 9, section 13 as well as sections 22 and 23.

6. Section 9 determines:

> "***9 Equality***
>
> *(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.*
> *(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.*
> *(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.*
> *(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.*
> *(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.*"

7. Section 13 provides as follows:

> "***13 Slavery, servitude and forced labour***
>
> *No one may be subjected to slavery, servitude or forced labour.*"

8. Section 22 expressly guarantees:

"***22 Freedom of trade, occupation and profession***

Every citizen has the right to choose the trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law."

9. Likewise, section 23, which regulates labour relations, provides that:

"***23 Labour relations***

(1) Everyone has the right to fair labour practices.
(2) Every worker has the right-
(a) to form and join a trade union;
(b) to participate in the activities and programmes of a trade union; and
(c) to strike.
(3) Every employer has the right-
(a) to form and join an employers' organisation; and
(b) to participate in the activities and programmes of an employers' organisation.
(4) Every trade union and every employers' organisation has the right-
(a) to determine its own administration, programmes and activities;
(b) to organise; and
(c) to form and join a federation.
(5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).
(6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1)."

10. Historical settings should not cloud the rationality of parliamentary debate, however, the injustice and distortions of the labour market that were caused by government policies before 1994 are still fresh in the memories of the majority of South Africans. Moreover the effects still impact on most South African's lives to this day. This is more so, since the significance of the right to participate in economic activities far exceeds the financial consequences as was expressed by Justice Ngcobo in the Constitutional Court's judgement in *Affordable Medicines Trust and others v Minister of Health and others*, 2006 (3) SA (CC): "*What is at stake is more than one's right to earn a living, important though that is. Freedom to choose a vocation is intrinsic to the nature of a society based on human dignity as contemplated by the Constitution. One's work is part of one's identity and is constitutive of one's dignity.*"

11. As such, the CFCR recognises and fully supports the need for restorative measures aimed at achieving substantive equality. Nonetheless, such measures must adhere to all provisions of section 9 of the Constitution and may not result in the creation of a new racial divide.

Employment Equity Amendment Bill [31 -2012]

12. Although it is well understood that the purpose of the Bill is to provide for redress of South African citizens adversely affected by unjustified discrimination prior to 1994, the principle of exclusion pursued in this amendment is not necessarily in keeping with the constitutional values of equality.

13. With reference to the *Memorandum on Objects of Employment Equity Amendment Bill*, the first object of the Bill is to give effect to and regulate the fundamental rights conferred by section 9 of the the Constitution. However, we respectfully submit that the approach set out in the Bill is neither constitutional nor effective in promoting the achievement of equality. We agree with the view of Justice Sacks in the Constitutional Court's judgement in *Van Heerden v The Minister of Finance*, that section 9(2) of the Constitution must be read seamlessly together with sections 9(3) and (5):

> "*...it is important to ensure that the process of achieving equity is conducted in such a way that the baby of non-racialism is not thrown out with the bath-water of remedial action. While I fully concur with Moseneke J that it would be illogical to permit a presumption of unfairness derived from section 9(3) (read with section 9(5)), to undermine and vitiate affirmative action programmes clearly authorised by section 9(2), by the same token I believe it would be illogical to say that unfair discrimination by the state is permissible provided that it takes place under section 9(2).*"

14. It follows that any discrimination in terms of section 9(2) must first be subjected to the test in section 9(5) to establish whether it is fair or not, if it is to avoid the prohibition in section 9(3) against unfair discrimination by the state. The Employment Equity Act (and this amendment Bill) fails to do this and instead routinely subjects South Africans, on the grounds of their race, to negative discrimination without establishing in each case whether such discrimination is fair.

15. Discrimination in terms of section 9(2) must also survive the internal tests prescribed by Justice Moseneke in the *Van Heerden*-case regarding the proposed discrimination: "*...targets persons or categories of persons who have been disadvantaged by unfair discrimination;...is designed to protect or advance such persons or categories of persons; and...promotes the achievement of equality.*"

16. It is clear that these tests are seldom applied in practice. In particular, it is now evident that such discrimination has not succeeded in practice in promoting the equality of those who have been most affected by unfair discrimination. South Africa's *GINI Coefficient*, which measures inequality in society, has actually deteriorate since 1994 – not only within the population as a whole but also within its constituent "*designated groups*".

17. The CFCR strongly and unambiguously supports the achievement of equality in terms of section 9(2) but believes that the legislative and other measures that the state has adopted to promote this goal have clearly failed and have, at the same time, unfairly deprived members of non-designated (and sometimes even designated groups) of their right to equality and to protection against unfair discrimination by the state. This has also undermined the founding values of non-racialism and human dignity.

18. The measures that the state should have taken to advance the truly disadvantaged segments of our society should instead have been steps to empower the great majority of disadvantaged South African through the provision of decent education, health and social services and, above all, through the creation of jobs.

19. Equality is, however, not the only foundational right. It is intimately interwoven with human dignity, non-racialism and the advancement of human rights and freedoms. Section 9(2) attempts to balance the need for the advancement of equality with the equally important need to prevent unfair discrimination, because unfair discrimination undermines the human dignity; access to human rights and freedoms and the right to equality of those against whom it is practised.

20. The principle, central to the Employment Equity Act and to this amendment, of dividing South Africa's population into designated and non-designated groups – based both on race and demography – for the purpose of discrimination against some such groups, without first establishing whether such discrimination is fair, is irreconcilable with the founding values of non-racialism and human dignity in Section 1 of the Constitution. It also violates the right to equality in terms of sections 9(1) and (2); the prohibition of unfair racial discrimination by the state in terms of section 9(3); and the requirement in section 9(5) that discrimination is unfair unless it is established that it is fair.

Ad clause 1 – Amendment of Section 1

21. The proposed amendment of the definition of "designated groups" to exclude foreign nationals (including those with permanent residency and/or permission to work in South Africa) or persons, who obtained citizenship after 1994, may in a similar manner violate their right to equality in terms of section 9 of the Constitution.

22. With reference to the *Memorandum on Objects of Employment Equity Amendment Bill*, the intention of this amendment is "*to ensure that beneficiaries of affirmative action in terms of Chapter 3 of the EEA are limited to persons who were citizens of South Africa before the democratic era, or who would have been entitled to citizenship but for the policies of apartheid, and their descendants. This proposal will have the result that employment of persons who are foreign nationals or who have become citizens after April 1994, cannot assist employers to meet their affirmative action targets.*" Conversely, this amendment will result in groups of non-citizens or citizens who attained that status after 1994 to be excluded from redress measures. This proposed change could potentially affect the constitutional rights of foreign nationals and a certain group of naturalised South African citizens – again creating different classes of South African citizens for whatever noble reason.

23. It is contended that this proposed amendment may not meet constitutional muster, especially in relation to sections 9, 22 and 23 of the Constitution read with section 36 of the Constitution and it is therefore submitted that the current definition of "*designated groups*" in the Employment Equity Act should be retained, as it provides a sufficient definition of those groups of people who previously suffered unjustified discrimination.

Ad clause 5 – Amendment of Section 10

24. Reference to clause 5(c), and the use of the word "person" instead of "party" as is the case in clause 5(b), could, unless the meaning of "person" is not limited to natural persons only, deny an employer who is not a natural persons and who may be affected, the right as provided for in clause 5(c).

Ad clause 16 – Section 42

25. The Bill, among other, seeks to "*provide afresh for the assessment of compliance by designated employers with employment equity and the failure of those employers to comply with requests and recommendations made by the Director-General*." In terms of paragraph 3.9.1 of the *Memorandum on Objects of Employment Equity Amendment Bill*, the Bill "*seeks to simplify the enforcement provisions of the EEA by eliminating unnecessary mandatory steps as well as mandatory criteria that must be taken into account in assessing compliance with the EEA. The proposed amendments will promote effective enforcement and prevent the tactical use of reviews as a mechanism for delaying the enforcement process. It will not prevent employers aggrieved by decisions from challenging these decisions at an appropriate juncture*."

26. A material change is proposed in the amended section 42(1) where the word "*must*" is to be substituted with the word "*may*" with the former being mandatory and the latter discretionary.

27. Currently, section 42 provides that in determining whether a designated employer is implementing employment equity in compliance with the Act, the Director-General *must* take into account all other factors mentioned in section 42 (section 42(a)(i) - (v)), including the "*demographic profile of the national and regional economically active population*" and the "*pool of suitably qualified people from designated groups from which the employer may reasonably be expected to promote or appoint employees*". It is evident that in terms of the existing section 42, the word "*must*" indicates that when assessing compliance with equity or redress measures, the factors listed in section 42(a)(i) - (v) must be taken into account.

28. The Bill, however, now only requires the Director-General to take into account, if he so chooses, the demographic profile of the national and regional economically active population. This opens the way to the imposition of the national demographic profile in respect of the operations of business entities in the various regions of South Africa. Due to the uneven dispersal of designated and non-designated groups throughout the country, this could detrimentally affect certain population groups – particularly

"*Coloureds*" in the Western Cape and "*Indians*" in KwaZulu-Natal – in a manner that would constitute unfair racial discrimination by the state and thus violate both the founding value of non-racialism in section 1*(b)* of the Constitution and section 9(3), which prohibits such discrimination by the state.

29. Furthermore, the excision of section 42*(a)(ii)* which, at present, requires the Director-General to take into account "*the pool of suitably qualified people from designated groups from which the employer may reasonably be expected to promote or appoint employees*" may create an impossible situation for many employers and may violate section 33 of the Constitution that assures for everyone "*the right to administrative action that is lawful, reasonable and procedurally fair*". For example, a firm of chartered accountants might find it impossible to meet equity targets based simply on the demographic profile of the national population because the national profile might bear no relationship whatsoever to the pool of suitably qualified accountants.

30. Similarly, the excision of sections 42(a)(ii) - (v) might also present employers with insurmountable operational problems that would also violate section 33 of the Constitution. It should be borne in mind that the primary objective of any business entity is to survive in business by making reasonable profits. The effective management of labour resources is a critical factor in this process and requires employers constantly to take into consideration the "*economic and financial factors relevant to the sector in which the employer operates; the present and anticipated economic and financial circumstances of the employer; the number of present and planned vacancies that exist in the various categories and levels and the employer's labour turnover.*" Clearly, any failure by the employer to take into account these factors in his or her efforts to comply with the requirements of the Act might lead to irreversible losses and possibly the bankruptcy of the business.

31. In addition, we are of the view that the proposed amendment of section 42(2) will give the Minister excessive powers to regulate the factors that must be taken into account when determining whether a designated employer is implementing employment equity in compliance with the Act. This is particularly the case with regard to her ability to specify the circumstances under which an employer's compliance should be determined with reference to the demographic profile of either the national economically active population or the regional economically active population. There is concern that this power of regulation might be used to impose the principle of demographic representivity, based on national demography, in the private sector in the same manner in which it is at present being imposed in the public sector.

32. In our view, there is no constitutional basis for the imposition of demographic representivity in any area other than public administration and the composition of the judiciary. Even in these areas, other requirements such as employment and personnel management practices based on ability, objectivity and fairness must also be taken into consideration.

33. The CFCR welcomes the assurance in the amended section 42(4) that "*in any assessment of its compliance with this Act or in any court proceedings, a designated employer may raise any reasonable ground to justify its failure to comply.*" Nevertheless, this is a right that employers have in any event in terms of the Constitution and do not compensate for the excision of the reasonable factors listed in sections 42(a)(ii) - (v) of the Act.

34. It is submitted that this proposed amendment will have a materially detrimental effect on employees, potential employees and employers alike as the employer can no longer take into consideration an accessible pool of candidates, economic factors of the industry and the employer itself, and the progress of other employers.

35. It is hence submitted that the existing provisions of section 42 – especially in relation to section 42(a) – should be retained.

Ad clause 17 – Substitution of Section 45

36. The original access and recourse provided for in terms of sections 39 and 40 (to be repealed in terms of clause 10 of the Bill), deals with a designated employer's right to appeal against a compliance order. This right will now be infringed by the limitation of the proposed amendment in section 45(4) as any challenge to the validity of the Director-General's request or recommendation, may only be made in the proceedings contemplated in the inserted section 45(1). In this regard, it is important to note that in terms of the amended section 45(1), only the Director-General may apply. This amendment hence effectively denies an employer the right to access the Court except and only when the Director-General has applied to the Labour Court in terms of this amended section.

Ad clause 27 – Substituting Schedule 1

37. The CFCR is of the opinion that the maximum permissible fines proposed in this clause are excessive and could in the case of fines determined by percentages of turnover lead to the bankruptcy of business entities and the consequent loss of employment for all the employees involved.

Employment Services Bill [38 – 2012]

38. The CFCR welcomes provisions in the Bill that will effectively provide for public employment services; promote the employment of young work seekers and other vulnerable persons; assist employees in Protected Employment and promote economic productivity.

Ad clause 1 – Definitions

39. It is submitted that in order to ensure legal certainty in relation to interpretation of the Bill, "*Vulnerable Work Seekers*" should be properly defined.

Ad clause 8 – Employment of Foreign Nationals

40. It is submitted that section 8(2)(a) and regulations in terms of this section may lead to the unjustified and possibly unconstitutional preferential treatment of South African workers at the expense of foreign

nationals who are legally in South Africa and who are entitled to work in South Africa legally after having obtained the necessary documents in terms of South African immigration legislation.

41. Although the CFCR supports the need for a coherent system to protect South African citizens in the labour market against competition from illegal migrants and undocumented foreign workers – it would caution against precipitate action. There is little reliable information regarding the number and condition of documented and/or undocumented foreign workers in the formal and informal labour markets. Estimates vary from hundreds of thousands to millions. The situation is further complicated by the fact that many such foreign workers may be in possession of forged documentation or documentation that has been illegally obtained. Strict and immediate implementation of the proposed measures might cause significant disruption to employers who might not in the short to medium term be able to replace illegal workers with suitably qualified South African workers. The government would have to consider how it would best be able to maintain, house and feed hundreds of thousands of undocumented foreigners and their families while their cases are processed – bearing in mind the requirement that it would have to do so in a manner that would be consistent with South Africa's obligations in terms of the relevant international conventions on migration and refugees. It is perhaps, apposite to point out the recent serious unrest among farm workers in De Doorns in the Western Cape, allegedly had some of its origins in the dismissal of undocumented workers from Lesotho while workers from Zimbabwe maintained their jobs because of the current amnesty. It is also crucial to consider that the application and implementation of the Immigration Act and insufficient border management measures, rather than labour legislation, are possibly the key systemic weaknesses in regulating undocumented workers and illegal migrants (and consequently employment of such workers). Ineffective border management and immigration control should not be addressed by means of more restrictive labour legislation.

Ad clause 10 – Reporting on Vacancies and Filling of Positions

42. In terms of this proposed clause, the Minister may, after consulting the Board, make regulations requiring employers to notify the Department of:

    (a) any vacancy or new position in their establishment in a manner and within such period as the Minister may determine;
    (b) the employment of any work seeker referred by a labour centre; and
    (c) any matter necessary to promote the provision of efficient matching services.

43. The CFCR is of the opinion that mandatory reporting of all employment vacancies would create an impossible burden for both the proposed Board and for employers. It would seriously add to the regulatory burden of employers and would interfere with their fundamental function of appointing appropriate people to vacant posts as quickly and effectively as possible. The reporting requirement and the requirement to provide reasons for not accepting candidates proposed by the Board would create delays and distortions for business entities that would breach their right to just administrative action in terms of section 33 of the Constitution.

44. The CFCR accordingly recommends that employers should be able to decide voluntarily whether or not they wish to make use of the services provided by the Board.

Conclusion

45. CFCR would like to contribute positively to the promotion and protection of our constitutional democracy by ensuring that real and substantive equality is achieved in our labour market. In this regard and if required, the CFCR will be available to engage in oral submissions to the Committee in order to elaborate on this submission, whether during public hearings or at any such time as the Committee may see it fit.

46. We trust that our submission will be of assistance in guiding the Committee's deliberations on the Employment Equity Amendment Bill [31 – 2012] and the Employment Services Bill [38 – 2012].

Yours sincerely

Adv Johan Kruger
Director