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MEMORANDUM

MEMORANDUM

For attention: Mr Zolani Sakasa

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EMPLOYMENT EQUITY AMENDMENT BILL, 2012

The Western Cape Government's first strategic objective is to make it easier to do business in the Province of the Western Cape so that more employment opportunities may in turn be created. We therefore in general do not support this Bill as it further restricts employment practice in South Africa.

We refer to the above and herewith submit our comments.

Technical comments:

1. The reference to the Equality Bill in paragraph 3.6 of the explanatory memorandum is not the correct citation of the Act referred to. It is proposed that this error is rectified.

General comments:

2. Ad clause 1 of the Bill amending section 1 of the Principal Act:

   The proposed amendment to the definition of "designated groups" is supported.

3. Ad clause 3 of the Bill amending section 6 of the Principal Act:

   3.1 In clause 3(a) of the Bill the insertion of "or on any other arbitrary ground" is added in section 6(1) as an additional ground of discrimination. It is not clear what is meant by this insertion. This wide ground could lead to issues of interpretation. Further, the proposed amendment extends the listed rounds of discrimination in the Principal Act and section 9 of the Constitution of the Republic of South Africa, 1996. Only a constitutional amendment may amend a constitutional provision or a constitutional court judgment may

accord a meaning to constitutional provisions. This clause is neither and therefore the insertion is unconstitutional. The proposed amendment is accordingly not supported.

3.2 The proposed new section 6(5) accords too much power to the Minister to determine work of equal value. Instead mediation or bargaining, where all role players have input as opposed to the unilateral determination of the Minister, is preferred. It is proposed that this provision should include that the Minister may determine work of equal value in consultation with the Commission as opposed to "after" consultation with the Commission.

4. Ad clause 5 of the Bill amending section 10 of the Principal Act:

4.1 This provision now makes it possible for an employee to refer a dispute to the CCMA for arbitration if the employee claims unfair discrimination on the grounds of sexual harassment or where the employee claims that he or she earns less than the amount stated in the Ministerial determination in section 6(3) of the Basic Conditions of Employment Act. This provision also introduces an appeal process in subsection (8).

4.2 Until now, the Labour Court was the sole adjudicator of all claims founded on unfair discrimination. The above provision is supported as the CCMA is now allowed to arbitrate disputes involving sexual harassment. Clarity is sought as to why only the ground of sexual harassment is now included in the jurisdiction of the CCMA. It is proposed that harassment based on all the other grounds of discrimination as contained in section 6 should be included in the jurisdiction of the CCMA.

4.3 It is trite that geographically there are few labour courts and that their court rolls are congested. The new appeal procedure introduced by subsection (8) will place further pressure on the labour courts. It is proposed that if all the forms of harassment based on all the grounds of discrimination as contained in section 6 are included in the jurisdiction of the CCMA, the labour courts' rolls will be less congested and this will result in increased access to justice.

5. Ad clause 6 amending section 11 of the principal Act:

5.1 The distinction created between subsections (1) and (2) does not make sense despite the rationale offered by the explanatory memorandum. The net result of the provisions is that more weight and importance is being placed on the listed grounds of discrimination than on the arbitrary grounds of unfair discrimination. Whether the alleged discrimination is as per the

listed grounds or whether it is arbitrary, the potential effect on an employee is still the same i.e. the employee has allegedly been unfairly discriminated against. It is accordingly proposed that the burden of proof in all cases should be on the employer.

5.2 By creating this distinction, these provisions are in fact discriminating against those employees whose claims are not based on an arbitrary ground of discrimination. In the latter scenario which falls within the ambit of subsection (2), the employee must prove that the conduct was irrational, that the conduct amounts to discrimination and that the discrimination is unfair. Under subsection (1) the employer must prove that the conduct did not happen or that the discrimination is fair or otherwise justifiable. It is submitted that the employee has a much more burdensome onus to discharge under subsection (2) than the employer has under subsection (1) as the employee needs to prove all the requirements of subsection (2) as opposed to the employee who under subsection (1)needs to prove only one of the elements.

5.3 The explanatory memorandum explains that the distinction between the two subsections was created so as to render section 11 consistent with the approach of section 13 of the Promotion of Equality and Prevention of Unfair Discrimination Act, 2006. The rationale is fallacious as section 13 in that Act does not distinguish between the employer and the employee nor does it place differing burdens of proof on any of the parties. It merely differentiates between prohibited (the equivalent of listed) grounds of discrimination and others.

5.4 It is accordingly proposed that these provisions be revisited and that the distinction between listed and arbitrary grounds of distinction be abandoned as well as the different burdens of proof on the parties. It is further proposed that the burden of proof be placed solely on the employer who must discharge it regardless of what the nature of the alleged unfair discrimination is.

6. <u>Ad clause 10 amending section 20 of the principal Act:</u>

This proposed amendment requires a designated employer who employs less than 150 staff members to submit a report to the Director-General annually instead of bi-annually. This additional compliance obligation may lead to undue pressure on small-medium and micro-businesses. It is proposed that the provision be reconsidered.

7. Ad clause 16 amending section 42 of the principal Act:

7.1 The proposed amendment of "must" to "may" makes it discretionary whether to consider some of the factors when assessing compliance. It is submitted that because of the shift from the position in the principal Act to this discretionary one, it has now become easier not to comply. This is because the remaining factors that are left to consider do not make provision for special circumstances such as the Western Cape Province with its unique demographic profile.

7.2 Section 42 of the Act is amended by amending the factors that may be taken into account when compliance with employment equity measures is assessed. The assessment criteria have drastically been narrowed. Previously, rational factors were permitted such as the number of present and planned vacancies and whether suitably qualified people existed from which to draw designated employees. This proposed amendment leaves no room for special circumstances and if applied, it may have a devastating effect on current business, deter investment and should therefore be reviewed.

7.3 The Director-General or any other functionary applying the provisions of the Bill and principal Act when determining whether a designated employer has complied or not may select at their discretion which of the remaining 6 factors will be considered when determining compliance. Previously there was a duty to consider all the factors when determining compliance. This is problematic as the clause does not provide a guideline on how such discretion is to be exercised.

7.4 In section 42(1)(a)(i) the demographic profile of the national and regional economically active population may be taken into consideration when assessing the compliance of a designated employer. This provision is not problematic as both national and regional demographics may be considered.

7.5 However, the proposed section 42(3) is problematic. In this provision the regulation which the Minister may issue in terms of section 42(2) may 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 part of the population. This proposed amendment therefore makes provision for an exception to 42(1)(a)(i) to be established by regulation. This amendment contradicts 42(1)(a) and is not supported.

7.6 If such an envisaged regulation were to result in the application of the national demographic profile of the economically active part of the population on regional designated employers a host of problems would result:

- A demographic profile varies from region to region and applying the national average will seriously detract from employment opportunities for residents of a particular region. No explanation for this proposed amendment is provided in the explanatory memorandum to the draft Bill.
- Designated employers operating regionally and not nationally such as provincial governments will be adversely affected as compliance with the new provision will result in an employer that is not representative of the community it serves.
- Should such a regulation be issued, there could be greater migration of employees between provinces. This in turn may result in a host of social problems that will require government intervention and funds to resolve.
- On a practical level this will result in an increase in the number of unemployed people in provinces such as the Western Cape and KwaZulu-Natal with their unique demographics.

7.7 The proposed section 42(2) is additionally problematic in that it makes provision for an exception (as described in subsection 42(3)) to section 42((1)(a), a substantive provision, to be contained in subordinate legislation. Section 42(1) is a substantive provision and it is therefore contained in the Act. It is submitted that any exception to section 42(1) is accordingly also a substantive provision as it relates to what must be considered in order to determine whether the national or regional demographic profile must be employed in assessing the compliance of an employer. For this reason, section 42(3) incorrectly makes provision for this substantive exception to be created in subordinate legislation when it can be done in this Bill.

8. <u>Ad clauses 24 and 25 amending sections 59 and 61 of the principal Act:</u>

These clauses propose to amend the current fine amount of R10 0000.00. In the explanatory memorandum, the proposed new maximum amount of the fine is R30

000.00 whilst the draft Bill shows it as R30 0000.00. It is proposed that the correct amount be included in the Bill and the error rectified.

ADV B GERBER
DIRECTOR-GENERAL
DATE: 14/2/2012