

13 February 2021

To: The Portfolio Committee on Employment and Labour

Attention: Mr Zolani Sakasa

By email: zsakasa@parliament.gov.za

RE: WRITTEN SUBMISSION ON THE EMPLOYMENT EQUITY AMENDMENT BILL (B14-2020)

1. BUSINESS UNITY SOUTH AFRICA (“BUSA”)

Business Unity South Africa (BUSA) is a confederation of business organisations including chambers of commerce and industry, professional associations, corporate associations and unisectoral organisations. It represents South African business on macro-economic and high-level issues that affect it at the national and international levels. BUSA’s function is to ensure that business plays a constructive role in the country’s economic growth, development and transformation and to create an environment in which businesses of all sizes and in all sectors, can thrive, expand and be competitive.

As the principal representative of business in South Africa, BUSA represents the views of its members in a number of national structures and bodies, both statutory and non-statutory. BUSA also represents businesses’ interests in the National Economic Development and Labour Council (NEDLAC). Internationally, BUSA is a member of the International Organisation of Employers (IOE), the Pan-African Employers’ Confederation (PEC) the Africa Employers’ Group and the Southern Africa Development Community (SADC) Employers’ Group. BUSA is also the official representative of business at the International Labour Organisation (ILO), the African Union (AU) Social Affairs Commission, B-20, the Organisation for Economic Cooperation and Development (OECD) and World Trade Organisation.

2. INTRODUCTION

2.1 This written submission is made by BUSA to the Portfolio Committee on Employment and Labour in response to its call for comments on the Employment Equity Amendment Bill (“EE Amendment Bill”).

2.2 As a point of departure, BUSA acknowledges, importantly so:

2.2.1 that the pace of transformation in South Africa has been slow; and

2.2.2 the importance of ensuring that workplaces are transformed so as to ensure the equitable representation of suitably qualified people from designated groups

2.3 While BUSA acknowledges the above and is firmly in support of a process which will ensure transformation at every level of a workplace, it is important that any measures to do so are rational and constitutional.

3. BACKGROUND

3.1 On **08 November 2017**, Government tabled the EE Amendment Bill at NEDLAC for engagement by social partners. BUSA represented organised Business during those engagements.

3.2 Although agreement was reached at NEDLAC in some respects of the EE Amendment Bill, there were areas of disagreement recorded by Business. Those areas of disagreement are recorded in the NEDLAC Report, a copy of which is attached to this submission and marked “A”.

3.3 In **September 2018**, the Minister of Employment and Labour (“the Minister”), published, in the Government Gazette, the EE Amendment Bill for public comment (“the 2018 version of the Amendment Bill”).

3.4 In **November 2018**, BUSA, submitted written comments on the 2018 version of the Amendment Bill published in the Government Gazette.

3.5 It was announced, in **February 2020** that Cabinet approved the EE Amendment Bill for tabling in Parliament.

3.6 In **July 2020**, the Minister published, in the Government Gazette, notice that the EE Amendment Bill (Version B14-2020) would be tabled in the National Assembly in order to go through the Parliamentary process.

3.7 It is at this juncture, important to note that the version of the EE Amendment Bill which will be tabled at the National Assembly is **different** to the version of the EE Amendment Bill which was engaged on at NEDLAC and subsequently published in the Gazette in September 2018 for public comment.

3.8 The most significant amendment proposed to the Employment Equity Act, Section 15A is being contemplated in order to empower the Minister of Labour to identify national economic sectors for the purposes of the administration of the Act, in order to determine “*numerical targets for these sectors*”, based on factors / criteria which the Minister may determine.

4. BRIEF OVERVIEW OF THE NEDLAC PROCESS

4.1 During the NEDLAC engagement process, BUSA, representing organised Business considered the following two amendments to be the most significant and to have the most far-reaching consequences (unintended or not) for employers:

4.1.1 **Section 15A:** the provision empowering the Minister to prescribe numerical targets for sectors at all occupational levels to ensure the equitable representation of suitably qualified people from designated groups.

4.1.2 **Section 42:** dealing with assessment of compliance and whether or not an employer has complied with the numerical targets prescribed for its sector.

4.1.3 **Section 53 (6):** a list of five (5) criteria which must be met by an employer in order to obtain a compliance certificate.

4.2 In addition to the above, section 53 of the Employment Equity Act, which has been in the legislation for some time but has not “*yet been operationalized*” will be put into effect. This will mean that State contracts may only be issued to employers that have been certified as being in compliance with their obligations under the Employment Equity Act (one of them being the requirement to achieve the numerical targets prescribed by the Minister).

4.3 The amendments being proposed, if passed in their present form, will mean that bidders can be excluded from bidding for government projects unless the prescribed targets have been

met by them. The effect hereof is that achieving the targets as set by the Minister (and obtaining the requisite certificate) will become a threshold / mandatory / minimum requirement for participating in the bid at all, whereas currently BBBEE status is part of the overall evaluation, as to either 10% or 20% of the total score, the balance being for price (functionality / the ability to do the work in question often being the threshold requirement). BUSA's concerns in this regard are dealt with in more detail later on in this submission.

4.4 During the engagements at NEDLAC, it was agreed by all social partners (Government, organised Labour and organised Business), at the request of BUSA, that section 15A be amended to state that the Minister **will consult** the relevant sectors when determining what the numerical targets should be. In this regard, the following wording was agreed to by ALL social partners:

*“The Minister may, after consulting the relevant sectors **and** with the advice of the Commission, for the purpose of ensuring the equitable representation of suitably qualified people from designated groups at all occupational levels in the workforce, by notice in the Gazette set numerical targets for any national economic sector identified in terms of subsection (1).”*

4.5 The above wording (agreed to by all social partners, including Government) appeared in the 2018 version of the Amendment Bill which was the version published in the Government Gazette for public comment in September 2018.

4.6 For reasons unknown to BUSA, the version of the Amendment Bill currently before Parliament (Version B14-2020) has omitted (despite the agreement reached by all social partners at NEDLAC thereon) the requirement for the Minister to consult sectors before setting the targets. This is, for the reasons which follow in this submission, of significant concern to BUSA and its members.

5. SUBMISSION ON SECTION 15A OF THE EE AMENDMENT BILL (Version B14-2020)

Section 15A of the EEA Amendment Bill empowers the Minister of Employment & Labour to set numerical targets for any sector or part of a sector. As already mentioned, at NEDLAC it was agreed by all social partners that before such targets would be set and before the proposed

targets are published in the Gazette for public comment, the Minister would consult the sectors. The version of the Amendment Bill before Parliament does not provide for such consultation process.

BUSA is of the view that the legislation should reflect that the sector target should be set with the respective industry in a joint consensus seeking approach. The basis of the Labour Relations Act has been set up on a joint consensus seeking approach and if these targets are to be effective, that kind of approach should be embarked on. It is essential that all sectors/industries in the country are adequately consulted and that the sector targets should be set with the respective industry bodies who can share meaningful information regarding, amongst others, the composition of the industry, the economic challenges faced in the industry, the state of transformation and the challenges to transformation within the industry.

BUSA further believes that the Act needs to make provision for instances where agreement cannot be reached between the Minister and the relevant sector.

How these amendments will impact foreign organisations must be factored into the consultations and presents considerable uncertainty particularly in that they may be lagging in the representation of designated persons for justifiable and objective reasons.

The level of complexity from one company to the other is significant (range from small single owned business, to large, multinational entities), and as such, the imposition of “a one size fits all” targets on a sector without proper and meaningful consultation will no doubt lead to unintended consequences such as further capital flight and disinvestment.

The impact of the potential flight of foreign investment, skills and service delivery should be a material concern to Government.

The BBBEE Codes recognise that businesses with an annual turnover of less than R50m per annum are Qualifying Small Enterprises (QSE's). They are as a result able to achieve BBBEE credentials without pursuing Management Control/ Employment Equity. Many of these organisations employ more than 50 employees and will, if the amendments are passed, must also comply with EEAB sectoral targets in order to do business.

The fact that labour inspectors have the broad-based powers to determine compliance under section 42 which includes reference to the factors stated in s15, is incomprehensible given that the result thereof could be the very closure of an organisation and contribute to a further decline in economic growth and unemployment levels increasing. The potential for corruption and abuse of power is a serious threat in this context.

The position of Business is that section 42 (1) (aA) (dealing with assessment of compliance) should be amended to read “*whether or not the employer has taken reasonable steps to achieve the applicable sectoral target*”.

While it is acknowledged that the last version of the Draft Regulations seen by BUSA, in terms of Regulation 16 (4) of the Draft EE Regulations makes provision for a designated employer who applies for a certificate of compliance (for the purposes of being permitted to do work for the State) and who has not achieved the applicable targets, to record justifiable reasonable grounds for not doing so, Business is of the view that Regulation 16 (4) on its own is insufficient and that the Employment Equity Act itself should, in so far as assessment of compliance is concerned, expressly state that an employer must have taken reasonable steps to achieve the target, not that it must have achieved the target.

The amendment to section 42 (1) (Aa) as proposed above in red font serves two purposes:

1. to align the provision with the rest of the provisions in section 42 (which provide for reasonable steps taken by a designated employer in reference to other compliance criteria); and
2. to mitigate against the numerical targets being construed as creating quotas as this is expressly prohibited by section 15 (3) of the Employment Equity Act.

6. SECTION 53 OF THE EE AMENDMENT BILL

6.1 The EE Amendment Bill proposes, as a new subsection – being section 53 (6). This proposed subsection lists five (5) criteria an employer **must** satisfy in order for that employer to be issued with a compliance certificate (which certificate will allow it to bid to do work for the State). The compliance criteria are as follows:

- (a) the employer has complied with a numerical target set in terms of section 15A that applies to that employer;
- (b) if an employer has not complied with any target set, the employer has raised a reasonable ground to justify its failure to comply as contemplated by section 42 (4);
- (c) the employer has submitted a report in terms of section 21;
- (d) there has been no finding by the CCMA or a court within the previous three years that the employer breached the prohibition on unfair discrimination in chapter 2;
and
- (e) the CCMA has not issued an award against the employer in the previous three years for failing to pay the national minimum wage.

6.2 The Constitutional law provision against which these amendments are to be measured is firstly section 217 of the Constitution which deals with procurement and states:

- (1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.
- (2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for—
 - (a) categories of preference in the allocation of contracts; and
 - (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.
- (3) **National legislation** must prescribe a **framework** within which the policy referred to in subsection (2) must be implemented.

- 6.3 The setting of targets by the Minister based on unspecified factors, for a variety of sectors, sub-sectors, regions, etc does not, in BUSA's view, satisfy the underlined portions of section 217(3) above.
- 6.4 Section 15A, if passed, may be part of national legislation, but it sets no framework within which the policy is to be implemented. It simply empowers the Minister to determine targets without reference to any prescribed framework. As such it will in BUSA's view be unconstitutional for being in conflict with section 217(3) of the Constitution if passed in its present form.
- 6.5 For the compliance certificate (which will allow employers to bid for Government work) to pass constitutional muster and serve a rational purpose, the other considerations in section 217(1) are also important, such as being able to obtain the best possible service at the best possible price – something which should lie at the heart of an efficient, fair, equitable, transparent and cost-effective public procurement exercise.
- 6.6 Giving a Minister or one of his or her officials the power to set targets by decree outside of the legislation promulgated specifically to give effect to section 217(3) without setting a similar legislative framework within which this is to be done, will, in those circumstances, conflict with both sections 217(1) and 217(3) of the Constitution, and not be rescued by the proviso in section 217(2), which of itself needs to comply with section 217(3).
- 6.7 If the numerical target which is set constitutes an absolute barrier or quota, which the withholding of a certificate and with that the opportunity to bid for Government work will do, that would fall foul of section 15(3) of the EEA.
- 6.8 The consequences of not meeting the sectoral targets would eliminate organisations from transacting with the State and destroy their revenue resulting in liquidation and job losses.

7. EFFECT OF THE AMENDMENTS ON THE REQUIREMENT FOR EMPLOYERS TO CONSULT WITH EMPLOYMENT EQUITY COMMITTEES

7.1 As already traversed in detail in this submission, the effect of the proposed amendments is that the Minister may impose sectoral numerical targets. These prescribed numerical targets will effectively override the targets contained in a designated employers' employment equity plan.

7.2 However, in terms of section 16, read with section 17, of the current Employment Equity Act, designated employers are legally required to consult with their employees (by way of an employment equity committee) on the content (the targets to be achieved) and implementation of their employment equity plans.

7.3 If the Employment Equity Act is amended, it will mean that an employer will be bound to use the sectoral targets fixed by the Minister in its employment equity plan, consultation with employees would be rendered meaningless. The employer's hands will be tied, regardless of the input from its employees.

8. VERBAL PRESENTATION TO THE PORTFOLIO COMMITTEE

BUSA requests that it be given an opportunity to provide the Portfolio Committee on Employment and Labour a verbal presentation on its submissions contained herein as to elaborate on the submissions and engage with the Committee Members on these matters.

Yours sincerely

Business Unity South Africa



Cas Coovadia
Chief Executive