



**Comments on the Employment Equity Act Amendment Bill and the  
Employment Services Bill**

**Furnished by Solidarity Trade Union**



Compiled by the Solidarity Research Institute  
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## **1. Introduction**

- 1.1 These comments are furnished by Solidarity Trade Union (“Solidarity”) following the written invitation for comment on the proposed Employment Equity Amendment Bill (“the EEAB”) and the proposed Employment Services Bill (“the ESB”), issued by the Portfolio Committee on Labour, to the public during November 2012. The aforesaid bills will hereinafter collectively be referred to as “the Bills”.
- 1.2 Solidarity is one of the oldest trade unions in South Africa. Its origins date back to 1902 and the Witwatersrand mines. Since its inception, Solidarity – formerly the Mine Workers Union – has been closely linked to the course of South African history. In the 1990’s a number of other trade unions, including the South African Workers Union, joined the Mine Workers Union and the trade union’s name was changed, first to MWU-Solidarity and subsequently to Solidarity.
- 1.3 Solidarity has members in virtually every industry in South Africa. It also has members in a vast number of companies. The main industries in which Solidarity is organised are metal and engineering, mining, the electrical industry, telecommunications, the chemical industry, agriculture and general industries, including tertiary institutions, aviation and other specialised areas. Solidarity also has a significant number of members in the Temporary Employment Services Industry.
- 1.4 Solidarity is a trade union in the Christian democratic trade union tradition. The organisation supports and actively promotes, among other things, the rights of workers and trade unions; the supremacy of the Constitution and its founding principles; the free market; the rights of minority groups; and limited government.
- 1.5 Solidarity does not support any political party. The organisation is committed to the future of South Africa and firmly believes that the country belongs to all its residents. As such, the trade union supports and promotes debate with all political stakeholders and has no affiliations with any political party.

## **2. Relevant policy considerations**

- 2.1. Consideration and implementation of the relevant sections of the Constitution of the Republic of South Africa<sup>1</sup> is regarded as paramount and non-negotiable.
- 2.2. Solidarity is in favour of attempts to activate legislation whereby the rights of workers are protected and the exploitation and abuse of workers are as far as possible eradicated. At the same time due consideration should be paid to the realities facing South Africa and importance of various relevant factors including:
  - 2.2.1 micro- and macroeconomic principles;
  - 2.2.2 the importance of sustainable investor relations, particularly with foreign investors, which is of vital importance to *inter alia* support our currency valuation;
  - 2.2.3 the sustainability of full-scale economic growth, job creation and the fight against poverty within the Republic of South Africa;
  - 2.2.4 the envious protection of constitutionally entrenched rights of our citizens;
  - 2.2.5 the accountability of national government in respect of balancing competing rights of citizens within the Republic of South Africa.

## **3. Introductory remarks regarding the Bills**

- 3.1 During February 2011, Solidarity furnished the Portfolio Committee on Labour with extensive comments on the proposed four bills put forward towards the end of 2010. Various other organisations also furnished the committee with comments on the proposed bills.

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<sup>1</sup> Act No. 106 of 1996 (as amended)

- 3.2 Solidarity commends the committee on reacting positively to the critique advanced by various parties on the previous four bills by retracting and reworking the same.
- 3.3 A point of concern is that the latest bills put forward by Parliament for comment, have not been subjected to a similar assessment as was done by UCT on the previous bills put forward. This is worrisome, because we deem such an impact assessment as a necessity when bills of this nature are tabled. Having said this, we recommend that these bills still be subjected to a similar process that gave rise to the regulatory impact assessment document on the previous bills furnished by UCT.

#### **4. Method of commentary**

The aim of this document is to focus on those proposed amendments in the Bills which we deem to be worrisome and warranting further attention.

#### **5. The cumulative effect of the ESB, the EEAB, the amended LRA and the amended BCEA (“the proposed new labour legislation”)**

Government’s proclaimed objectives of “More jobs, decent work and sustainable livelihoods” are to be commended. As a trade union, our first and foremost focus is the protection of the rights of our members and as such we share this goal.

Having said this, Solidarity is of the opinion is that the vehicle that government has in this instance chosen to reach this goal, namely the introduction of the ESB, the EEAB, the amended LRA and the amended BCEA, will negate this goal and will have the opposite effect. Solidarity is concerned that the cumulative effect of the proposed new labour legislation is to a great extent an unwarranted and ill – considered intervention in the labour market. The cumulative effect of the introduction of the proposed new labour legislation will place a further administrative burden on employers and employees, which will increase costs without adding value and will ultimately result in the contraction of the economy.

## **6. Comments on the proposed amendments to the EEAB**

### **6.1 An evaluation of the current EEA**

- 6.1.1 One of the biggest dilemmas that South Africa's young democracy has faced since its inception is redistribution and the enforcement of affirmative action that must inevitably be balanced with the constitutional imperative of nation building and the fundamental rights of every South African citizen. The heated debate that has been raging between the supporters and opponents of the current affirmative action model over the past decade is still mounting in intensity, as increasing emphasis is placed on race and ethnicity as a result of the political and socio-economic effects of the current model.
- 6.1.2 Affirmative action has succeeded in creating a small, black middle class and elite who benefit from both affirmative action and black economic empowerment. The largest part of the black community still lives in abject poverty and has not seen any of the benefits that affirmative action is supposed to deliver. Affirmative action is fuelling racial tension and the polarisation and alienation of groups in South Africa, which the country, given its stormy history, can hardly afford.
- 6.1.3 On the economic front it is evident that in the years since the ANC came to power, a clear black middle class and black elite have come into existence largely owing to affirmative action and black economic empowerment. Prof. Sipho Seepe, formerly of the South African Institute of Race Relations (SAIRR), argues as follows: "Affirmative action will not benefit the underclass, illiterate and rural poor in the far-flung areas. Formulated as it stands, affirmative action can only benefit those with the requisite skills to take advantage of the opportunities offered by the new dispensation."<sup>2</sup> Zoleka Ndayi, lecturer at the University of the Witwatersrand, writes that "affirmative action has certain basic challenges that are of national interest. At the centre of these challenges is the shortage of critical skills, along with population growth, especially among black people."<sup>3</sup> She further argues that the affirmative action policy "has limitations that could hamper the economic and developmental goals of the country". She contends that there is "an urgent need to balance the objectives of affirmative action with labour force growth and the availability of non-affirmative action skills".

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<sup>2</sup> *Mail & Guardian*, 24 April 2007.

<sup>3</sup> *Pretoria News*, 17 February 2009.

6.1.4 One of the consequences of affirmative action is that black communities become dependent on the state and on affirmative action for their economic survival. Communities are consequently unable to uplift themselves, or they even forget how to do it. The responsibility of local communities to uplift themselves and to develop sustainably is undermined by the current model of affirmative action. Another problem with this model of affirmative action, according to Adam Habib, is that it presupposes a level playing field in the black population, which is not the case. The reality is that inequality among blacks has grown over the past two decades and the affluent segments of the black population monopolise the benefits of affirmative action initiatives. Moeletsi Mbeki argues that black economic empowerment is dealing a fatal blow to the development of black entrepreneurship by creating a small class of unproductive, but wealthy capitalists who do not see themselves as entrepreneurs who can set up and run new businesses.<sup>4</sup>

6.1.5 Several lessons can be learned by comparing the South African model of affirmative action with the models followed in the USA, Sri Lanka, India and Malaysia. Malaysia has the most similarities with South Africa, but conditions there are far removed from those in South Africa. Specific trends are visible when the affirmative action models of all these countries are compared with each other.<sup>5</sup> A study by Solidarity has identified a number of lessons that can be borne in mind when assessing the South African model of affirmative action. The lessons are as follows:

- Economic growth makes it possible to redress inequality.
- Successful affirmative action creates a strong middle class.
- Affirmative action that is measured by representivity has a poor success rate.
- The same factors that lead to affirmative action legislation are responsible for demographic change.
- Affirmative action should not distinguish between persons within the designated group.
- The focus of affirmative action shifts from the redress of inequality to the mere pursuit of representivity.
- Affirmative action based on representivity causes tension.
- The elite are still protected in affirmative action processes.

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<sup>4</sup> SAIRR, *Fast Facts* December 2009.

<sup>5</sup> Hermann D, *Die Keiser is kaal* 2007.

- While inequality between groups is done away with, inequality within groups is not.
- Affirmative action does not succeed in protecting the legitimate rights of the non-designated group.
- Affirmative action can be costly.
- Affirmative action promotes emigration.
- Affirmative action focuses on the intrinsic differences between people, which may increase racial tension and polarisation.
- Affirmative action usually starts out as a temporary measure and becomes a permanent measure.
- Input-based affirmative action (training and development) has a positive outcome.
- The emphasis of affirmative action should shift from race to the socio-economic level of people.
- An agreement on affirmative action between all groups leads to political stability.
- Affirmative action should recognise and promote people's identity.
- Affirmative action should focus on self-help and the self-reliance of communities.
- For affirmative action to succeed in South Africa, we have to leave behind the model based on the offender-victim approach.

6.1.6 Prof. Terence Gomez of the University of Malaya agreed with many of these lessons from the Malaysian experience when he attended Solidarity's conference on affirmative action in June 2009. He identified the following lessons that should also be noted, especially since Malaysia is generally regarded as a success story when it comes to affirmative action:

- An exorbitant rise in corruption
- The collapse of the public sector as a result of appointments along ethnic lines based on quotas, contributing to –
  - poor public service;
  - the collapse of the public health system; and
  - the collapse of the public education system (both primary and tertiary education).

He furthermore identified a number of lessons to be learned from the Malaysian experience:

- A time limit should be imposed on affirmative action. There are serious consequences if affirmative action is allowed to go on indefinitely.
- The people who need affirmative action the most have no access to opportunities and therefore real redress is not accomplished. The middle class and the elite gain the most from affirmative action.
- The focus should be on education and the development of human resources at an early stage.
- After a short term, affirmative action should be expanded by broadening the definition of the designated groups and extending benefits to individuals on the basis of socio-economic class as well.
- Benefiting the designated groups in business without transparency is not sustainable in the long term, as it undermines economic growth, inhibits entrepreneurship and business development and leads to reliance on the state.

## **6.2 Problems with the EEA in practice**

### **6.2.1 The final goal of demographic representivity**

The EEA states the purpose thereof to include “... *the implementation of affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workforce*”.<sup>6</sup>

According to the government, the final goal of the EEA is to reflect the demographics of the South African economically active population at all job levels. Consequently, South Africa has an outcomes-based affirmative action programme (racial numbers) and not an input-based programme (training and development). The problem lies in the fact that whites are only over-represented at the highest job levels. This means that the EEA only focuses on the top levels of the economy. Employers are so focused on racial output that training input is neglected. Employers must report on the progress made regarding representation and everything possible must be done to reach the racial output, which often results in effectiveness being sacrificed in order to achieve the required racial output.

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<sup>6</sup> Section 2(b) of the EEA



Government's implementation of affirmative action is a number crunching exercise which boils down to nothing but a quota system, which is prohibited by the EEA<sup>7</sup>. This is both unlawful and unfair for, amongst others, the following reasons:

The Constitution only provides for two instances where broad representation is acceptable, namely in sections 195(1)(i) and section 174 (2) of the Constitution.

Section 195(1)(i) states as follows:

*"Public administration must be broadly representative of the South African people with employment and personnel management practices based on ability, objectivity, fairness and the need to redress the imbalances of the past to achieve broad representation."*

Section 174 (2) states as follows:

*"The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed."*

Government's implementation of affirmative action is based on a misguided belief that demographic representation at all costs is allowed and acceptable, is not sanctioned by any provision of the Constitution as it clearly falls outside of the scope of the sections quoted above.

Section 9(2) of the Constitution states as follows:

*"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 and advance persons or categories of persons disadvantaged by unfair discrimination may be taken."*

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<sup>7</sup> Affirmative action include preferential treatment an numerical goals, but exclude quotas (section 15(3) of the EEA).

Insofar as the provisions of EEA are used as a basis for advancing the argument that demographic representation is acceptable and imperative, this argument does not pass the muster. The section of the Constitution quoted above allows for legislative and other measures to promote and protect all persons or categories of persons disadvantaged by unfair discrimination. It does not allow for the absolute measures on the basis of race aimed at excluding persons outside of the non – designated group in order to achieve demographic representation.

### **6.2.2 The youth and affirmative action**

Young people, both black and white, are negatively affected by affirmative action. The black youth want to feel that they reach their achievements not because of their skin colour, but according to merit. The white youth do not want to feel that race prevents them from performing according to merit. Affirmative action is one of the most important reasons put forward for the emigration of skilled young people.

### **6.2.3 The skills crisis**

South Africa is feeling the burden of a skills shortage. We support the belief that a country's growth ceiling is as high as its skills ceiling. A country cannot afford the luxury of applying affirmative action to its scarce and skilled job categories.

### **6.2.4 Service delivery**

In practice, various government institutions have viewed transformation as a higher priority than service delivery. Consequently, a small portion of the designated groups benefited from affirmative action and the majority of the designated groups were negatively affected by poor service delivery. The countrywide protests against poor service delivery confirm this point. A balance must be found between affirmative action and service delivery.

### **6.2.5 Alienation of the non-designated group**

Owing to the permanent nature of affirmative action, the non-designated group is in a permanent position of disadvantage which has led to a feeling of alienation. This feeling of being powerless, together with low expectations for the future, leads to apathy and emigration.

### **6.2.6 Favouring a small group**

As mentioned earlier, because affirmative action is based on representivity, it favours a small portion of the designated group. There are simply too few white men to discriminate against. Affirmative action is taken to a larger group of the population if a larger group is allowed to participate in the economy. Mass training, down to the lowest level, is the best corrective action. If affirmative action wants to move away from its small-group character, it would have to move from output-based affirmative action (representivity) to input-based affirmative action (training and development).

### **6.2.7 Permanent nature of affirmative action**

Owing to representivity, affirmative action has a permanent character which causes a permanent, unnatural intervention in the economy. The non-designated group is also in a permanent position of disadvantage. The ILO's definition of affirmative action requires it to be temporary. The way in which affirmative action is currently applied is therefore contrary to the ILO's requirements of affirmative action.

## **7. The Solidarity Movement and affirmative action**

- 7.1 Since the introduction of affirmative action in the early 1990s up until the present, it has been evident that the existing affirmative action programme, seen against the background of the ideology of representivity, is unsuccessful in redressing the inequalities in our society. Although it has contributed to the creation of a black middle class and a black elite, the majority of black people still struggle to get by and are even worse off than during the previous political dispensation. Many of them are unemployed and rely on the state for basic necessities.
- 7.2 Affirmative action, the single biggest mechanism implemented and employed by the government to promote equality, has failed. It has contributed to greater inequality in society, with the black middle class and elite reaping the benefits of affirmative action and black economic empowerment. These beneficiaries of affirmative action have merely become absorbed into the middle class who, as a rule, only look after themselves and do not care about their brothers and sisters in need.

## 8 The EEAB

Government's answer to the problems enunciated in the preceding paragraphs is to introduce stricter measures to implement affirmative action. Rather than to admit that the current model of affirmative action is flawed and in dire need of rethinking, government believes that imposing stricter measures to implement affirmative action is the answer. In furtherance of this belief it has recently tabled the proposed EEAB.

It is not our intention to deal with all the proposed amendments in the EEAB. We do however deem it necessary to comment on certain proposed amendments that are particularly problematic.

### **Amendment of section 6(1) of Act 55 of 1998**

Section deals with the prohibition of unfair discrimination. The amendment proposes that the grounds that may constitute unfair discrimination be extended. At the moment, the act provides that *"[n]o person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy..."*. In the amendment bill it is proposed that discrimination on "any other arbitrary ground" would also constitute unfair discrimination. This vague prohibition could open the flood gates for litigation and would greatly increase uncertainty in the workplace.

### **Amendment of section 6(4) of Act 55 of 1998**

This section proposes measures to deal with what is deemed acceptable and unacceptable variations in conditions of employment between employees. It has bearing on "employees performing the same or substantially the same work or work of equal value". The amendment proposes that a difference in the terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value that is directly or indirectly based on any one or more of the grounds listed in subsection (1) or on any other arbitrary ground is unfair discrimination. What is lost in these amendments is an appreciation for workplace specific conditions and employee diversity. Rather, the provisions reduce employees to easily quantifiable factors of production. It will without doubt negatively impact on employment numbers.

### **Amendment of section 6(5) of Act 55 of 1998**

This section grants the minister of labour the discretionary power to “issue a regulation setting out the criteria and the methodology for assessing work of equal value” in terms of section 6(4). Granting a minister discretionary power to set out “the criteria and the methodology” for such far-reaching regulations is ill-advised. Centralised decision making along these lines constitute an infringement on the prerogative of unions, employees and employers to negotiate such workplace specific arrangements.

### **The amendment of section 10(4) of Act 55 of 1998**

This section extends certain dispute resolution regulations to provide for qualified referral to the CCMA. Previously, disputes could, after unsuccessful conciliation, could unilaterally be referred to the Labour Court by either employee or employer. Disputes referred to the CCMA were dependent on the consent of all parties. However, under the amendments, employees earning below a threshold determined by the minister would be able to unilaterally refer disputes to the CCMA. Amongst other objectionable aspects of this, the bill here possibly falls foul of section 195(1) of the Constitution, which governs public administration. 195(1)(d) specifies: “Services must be provided impartially, fairly, equitably and without bias.” By precluding certain citizens from public administrative processes based on their income, quite possibly falls foul of this constitutional provision.

### **Amendment of section 42 (1) of Act 55 of 1998**

Important factors that may currently be taken into account when assessing whether a designated employer is implementing affirmative action in compliance with the Act are scrapped. Factors that must currently be taken into account are:

- pool of suitably qualified people from designated groups from which the employer may reasonably be expected to promote or appoint employees;
- economic and financial factors relevant to the sector in which the employer operates;
- present and anticipated economic and financial circumstances of the employer; and

- the number of present and planned vacancies that exist in the various categories and levels, and the employer's labour turnover;
- Progress made in implementing employment equity by other designated employers operating under comparable circumstances and within the same sector.

Despite fierce criticism of the previous amendment bill's attempts to remove these factors, the EEAB still negates these provisions. Where it was previously mandatory to consider all the factors to determine if an employer adheres to the law, the factors that have not been removed lose status and only serve as guidelines. This opens the door for dramatically increased enforcement of race-based employment formulas. The current provisions must remain in the EEA as well as the imperative that these factors must be taken into account when assessing compliance.

#### **Amendment of section 42 (2) and (3) of Act 55 of 1998**

These proposed amendments to the EEA will empower the Minister of Labour to issue regulations forcing companies to apply the national demographics in regions. Subsections 2 and 3 of section 42 of the new bill empower the Labour Minister to issue regulations whereby any designated employer could be forced to make its labour force on every level and in every workplace a reflection of the national racial demographics. These amendments will empower the state to impose the national racial demographics, and disregard unique regional differences. It is clear from the government's application of affirmative action that it favours the ideology of absolute racial representation. This raises concerns over the content of regulations that the minister will issue should the amendments be adopted by parliament in their current form. These proposed amendments will expand the Labour Minister's power to impose absolute representation on employees in the state and the private sector. These proposed amendments should be retracted.

## **9. Comments on the proposed ESB**

- 9.1 We have resolved not to comment exhaustively on the proposed ESB because we deem it unworkable and unrealistic in its current format. The stated purposes of the act are lofty and laudable. The notion that the remainder of the EAB will ensure that the purpose of the act is realised is a far cry from reality.
- 9.2 The ESB is an unnecessary piece of proposed legislation with aimed at establishing state control through unwarranted state intervention in the labour market.
- 9.3 Through the proposed section 10 of the EABB the government wants to force people to use its employment services instead of leaving it to the free choice between employers and employees. The ESSA - scheme has failed miserably in its purpose and could not succeed in making a meaningful dent in the unemployment crisis in South Africa despite being funded by government. Regulations sanctioned by law to the effect that an employer should report vacancies or new positions in their establishment (section 10(1)(a) will do little to improve a system which has proven itself as unable to fulfil its proposed aim. This will place a further administrative burden on employers and employees, which will increase costs without adding value. Instead of protecting employees, this legislation will be to their detriment.
- 9.4. The government cannot legislate South Africa into productivity and equality.

## **10. Request**

Solidarity would be pleased to make verbal representations to the Honourable Portfolio Committee on Labour at the date of the public hearings to be conducted on a future date or when otherwise requested.