



EMPLOYMENT EQUITY PARLIAMENTARY PRESENTATION

15 APRIL 2021

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INTRODUCTION TO BUSA

1. Apex body, formed in 2003, leveraging on the role that organised business played in a peaceful transition to democracy
2. Confederation of business organisations including chambers of commerce and industry, professional associations, corporate associations and unisectoral organisations.
3. 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).

EXECUTIVE SUMMARY

- As a point of departure, BUSA acknowledges, importantly so:
 - That the pace of transformation in South Africa has been slow; and
 - The importance of ensuring that workplaces are transformed so as to ensure the equitable representation of suitably qualified people from designated groups
- 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.

BACKGROUND

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

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 our submission.

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

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

BACKGROUND

It is important to note that the version of the EE Amendment Bill 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.

The most significant amendment proposed to the Employment Equity Act, Section 15A is being contemplated in order to empower the Minister of Employment and 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.

OVERVIEW OF THE NEDLAC PROCESS

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

- **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.
- **Section 42:** dealing with assessment of compliance and whether or not an employer has complied with the numerical targets prescribed for its sector.
- **Section 53 (6):** a list of five (5) criteria which must be met by an employer in order to obtain a compliance certificate.

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).

OVERVIEW OF THE NEDLAC PROCESS

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).”

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.

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.

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. It was agreed at NEDLAC 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 approach of “joint consensus seeking” is entrenched in various key processes in the Labour Relations Act, and employers and workers are familiar with it. We believe that this same approach should be adopted in setting sector targets if these targets are to be effective.

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.

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

The impact of the amendments on foreign organisations must also be factored into the consultations. The proposed amendments present considerable uncertainty, particularly as some of these organisations may lag in representation of designated persons for justifiable and objective reasons.

The level of complexity from one company to the next is yet another significant factor. As companies may range from small, single owner businesses through to large, multinational entities, 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 fact that labour inspectors have the broad 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 also a serious threat in this context.

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

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”.

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

- 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
- 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.

SECTION 53 OF THE EE AMENDMENT BILL

The proposed new subsection 53 (6) 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 for work with the State).

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

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 portions of section 217(3).

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.

SECTION 53 OF THE EE AMENDMENT BILL

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.

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).

If the numerical targets which are set constitute 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.

The consequences of not meeting the sectoral targets would eliminate organisations from transacting with the State and destroy their revenue lines, resulting in liquidation and job losses. The same consequence would apply to any company exercising its rights to appeal the findings of the Inspector, should they choose to do so, as they will have no Certificate during such appeal period either.

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

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.

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.

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, and consultation with employees would be rendered meaningless. The employer's hands will be tied, regardless of the input from its employees. BUSA does not believe that this disempowering consequence should be allowed to stand, given its potentially disruptive effect on workplace harmony and labour relations.

CONCLUSION

In conclusion, BUSA is grateful to the Committee for the opportunity to present its views to assist the Committee its important work f considering the proposed EE Amendment Bill.

BUSA respectfully submits that, to accept the current Bill as it stands will not only undermine the workings of NEDLAC by unraveling agreements reached by social partners, but will also have unintended consequences on businesses and their ability to grow and to create or sustain employment.

Thank you!