



MEMORANDUM

TO: Mr M Rayi, MP
Chairperson: Select Committee on Trade and Industry,
Economic Development, Small Business Development, Tourism,
Employment and Labour

COPY: Ms P Tyawa
Acting Secretary to Parliament

FROM: Adv Z Adhikarie
Chief Legal Adviser, Constitutional and Legal Services

DATE: 23 November 2021

REF: 126 /2021

SUBJECT: Opinion on the Department of Employment and Labour's
proposed amendment to section 42(1)(a) of the Employment
Equity Act, 1998 (Act No. 55 of 1998)

MESSAGE: Please find attached the above memorandum for your attention.


Z Adhikarie
Chief Legal Adviser



MEMORANDUM

TO: Mr M Rayi, MP
Chairperson: Select Committee on Trade and Industry,
Economic Development, Small Business Development, Tourism,
Employment and Labour

COPY: Ms P Tyawa
Acting Secretary to Parliament

FROM: Adv Z Adhikarie
Chief Legal Adviser: Constitutional and Legal Services

DATE: 23 November 2021

REF: 126/2021

SUBJECT: Opinion on the Department of Employment and Labour's
proposed amendment to section 42(1)(a) of the Employment
Equity Act, 1998 (Act No. 55 of 1998)

INTRODUCTION

1. Our Office was requested by Mr M Rayi, MP, Chairperson: Select Committee on Trade and Industry, Economic Development, Small Business Development, Tourism, Employment and Labour ("the Committee"), to advise on the process to be followed in considering an amendment proposed by the Department of Employment and Labour ("the Department") to section 42(1)(a) of the Employment Equity Act, 1998 (Act No. 55 of 1998) ("the Act").

BACKGROUND

2. On 16 November 2021, the Committee received a briefing from an official of the Department on the Employment Equity Amendment Bill [B14B of 2020] (“the Bill”). The Bill seeks to amend various provisions in the Act.
3. During the briefing, the official requested that the Committee consider an additional amendment to the Bill. The official indicated that the Department had failed to include the amendment in the introduced Bill.
4. The Department proposes that section 42(1)(a) of the Act be amended to change the phrase “national and regional” to “national or regional”. Currently, section 42(1) of the Act reads as follows:

“(1) In determining whether a designated employer is implementing employment equity in compliance with this Act, the Director-General or any person or body applying this Act may, in addition to the factors stated in section 15, take the following into account:

- (a) The extent to which suitably qualified people from and amongst the different designated groups are equitably represented within each occupational level in that employer’s workforce in relation to the demographic profile of the national and regional economically active population;
- (b) reasonable steps taken by a designated employer to train suitably qualified people from the designated groups;
- (c) reasonable steps taken by a designated employer to implement its employment equity plan;
- (d) the extent to which the designated employer has made progress in eliminating employment barriers that adversely affect people from designated groups;
- (dA) reasonable steps taken by an employer to appoint and promote suitably qualified people from the designated groups; and
- (e) any other prescribed factor.”

5. According to the Memorandum of Objects to the Bill, the Department’s process to amend the Act began in October 2017. The Department published the Bill for public

comment in April 2018 and public hearings were held in all nine provinces in October 2018. The explanatory summary of the Bill and prior notice of its introduction was published in Government Gazette No 43535 of 20 July 2020.

6. The Bill was introduced in the National Assembly on 21 July 2020 and referred to the Portfolio Committee on Employment and Labour (“the Portfolio Committee”). The Department briefed the Portfolio Committee on the Bill on 28 October 2020. The Portfolio Committee called for public comments on 25 January 2021 and submissions were closed on 05 March 2021. The Committee received approximately 23 public submissions. The Portfolio Committee held public hearings on 13, 14 and 15 April 2021. The Committee deliberated on the Bill over a few weeks and finalised its proposed amendments on 25 August 2021. The Department proposed an amendment to section 42(1)(a) very late in the process. The Portfolio Committee did not consider the amendment.

LEGAL QUESTION

7. What process must the Committee follow in considering the amendment proposed by the Department?

LAW

Rules of the National Council of Provinces

8. Rule 210 of the Rules of the National Council of Provinces provides for the Committee’s functions in relation to processing of section 75 Bill as follows:

- “(1) The select committee or other Council committee to which the Bill is referred–
- (a) must enquire into the subject of the Bill; and
 - (b) may, or if ordered by the Chairperson of the Council must, consult any other committee that has a direct interest in the substance of the Bill;
 - (c) may consult the person in charge of the Bill;
 - (d) may require any suitable person to brief the committee on the objects and substance of the Bill;
 - (e) may consult the appropriate Assembly portfolio committee or chairperson of that committee;

- (f) may recommend that the time limit for the Council's consideration of the Bill as may have been set in terms of the Joint Rules, be extended;
- (g) may consult the JTM on whether any amendments to the Bill proposed in the committee -
 - (i) may affect the classification of the Bill;
 - (ii) may render the Bill constitutionally or procedurally out of order within the meaning of joint rule 161;
- (h) may not propose an amendment that may –
 - (i) change the classification of the Bill;
 - (ii) render the Bill constitutionally or procedurally out of order within the meaning of joint rule 161;
- (i) may recommend approval or rejection of the Bill or present an amendment Bill; and
- (j) must report to the Council in accordance with rule 211.”

Public Participation

9. Section 72(1)(a) of the Constitution provides that, “[t]he National Council of Provinces must facilitate public involvement in the legislative and other processes of the Council and its committees.” The Constitutional Court has repeatedly held that “the obligation to facilitate public participation is a material part of the law-making process, and the failure to comply with this requirement renders the resulting legislation invalid.”¹
10. The matter of *South African Veterinary Association v Speaker of the National Assembly and Others* is relevant to the issue under consideration. In this matter, the Portfolio Committee on Health accepted an amendment to the Medicines and Related Substances Amendment Bill stemming from public submissions. When the Bill was enacted, the effect of the amendment was that veterinarians became subject to the Medicines and Related Substances Act. This was not the case prior to the amendment. The Portfolio Committee on Health accepted the amendment without seeking further public comment including the comments of veterinarians who were directly affected by the amendment.

¹ *South African Veterinary Association v Speaker of the National Assembly and Others* [2018] ZACC 49, para 23.

11. The Constitutional Court held that:²

“The amendment made at the Committee stage constituted a material amendment to the Bill and will have lasting effects on the professional operations of veterinarians. It is clear that there was no public participation facilitated by the NA with respect to this aspect of the Bill.... it is obvious that the standard by which public participation must be measured is reasonableness. The content of this standard will vary from case to case. However, a complete failure to take any steps to involve the public in a material amendment to a Bill cannot be reasonable by any measure. Therefore, we find that the NA failed in its section 59(1)(a) duty and the validity of the insertion of the word “veterinarian” is consequently tainted.”

ANALYSIS OF LAW

12. NCOP rule 210(1)(i) provides that the Committee “may recommend approval or rejection of the Bill or present an amendment Bill”. Our office is of the view that in respect of a section 75 amendment Bill, the NCOP Rules do not limit the Committee from proposing amendments to other sections of a principal Act. However, we have consulted with the procedural staff of the NCOP who have indicated that the NCOP has adopted a narrow interpretation of rule 210(1)(i). The Rulings of the Presiding Officers of the NCOP (4th edition) indicate that the Chairperson of the NCOP has ruled that in a section 75 Bill, the NCOP and its Committees may only propose amendments to the clauses in the amendment Bill but may not propose amendments to the principal Act. It is therefore appropriate that the Committee seeks procedural advice from the NCOP Table to determine if the Department’s proposed amendment is procedurally in order.

13. In the event that it is procedurally sound, the Committee must decide if it should consider the proposed amendment. In this regard, the Committee may note that the Department only proposed the amendment to the Portfolio Committee when it was finalising its deliberations on the Bill. The Chairperson of the Portfolio Committee decided not to consider the matter. NCOP rule 210(1)(b) provides that the Committee “may consult the appropriate Assembly portfolio committee or chairperson of that committee.” It may therefore be appropriate for the Committee to consult with the

² *South African Veterinary Association*. para 32.

Chairperson of the Portfolio Committee about her reasons for not considering the proposed amendment.

14. The Committee may note that the proposed amendment was not included in the Bill despite the Department undertaking a lengthy process prior to the introduction of the Bill, starting from October 2017 to July 2020. Therefore, the proposed amendment was not subjected to the Department's own internal consultation process including consultation at NEDLAC.
15. The Constitution requires that the NCOP facilitate public involvement in its law making process. If the Committee is of the view that it should consider the Department's proposed amendment, it must be advertised for public comment. It must be noted that the proposed amendment has not been subjected to any form of public scrutiny and the public is not even aware of the proposal. The issue of employment equity is of great public importance. As this will be the first time this issue is in the public domain, the proposed amendment must therefore be advertised in a similar manner to the Bill to ensure widespread public coverage.

CONCLUSION

16. The Committee must seek the advice of the NCOP Table to determine if the proposed amendment is procedurally in order in terms of the NCOP Rules.
17. If the amendment is procedurally in order, the Committee must decide whether it should consider the proposed amendment. It is recommended that the Committee consult with the Chairperson of the Portfolio Committee on Labour before it makes this decision.
18. If the Committee is of the view that it should proceed with considering the amendment, the proposed amendment must be advertised for public comment as required by the Constitution.



Adv Z Adhikarie
Chief Legal Adviser