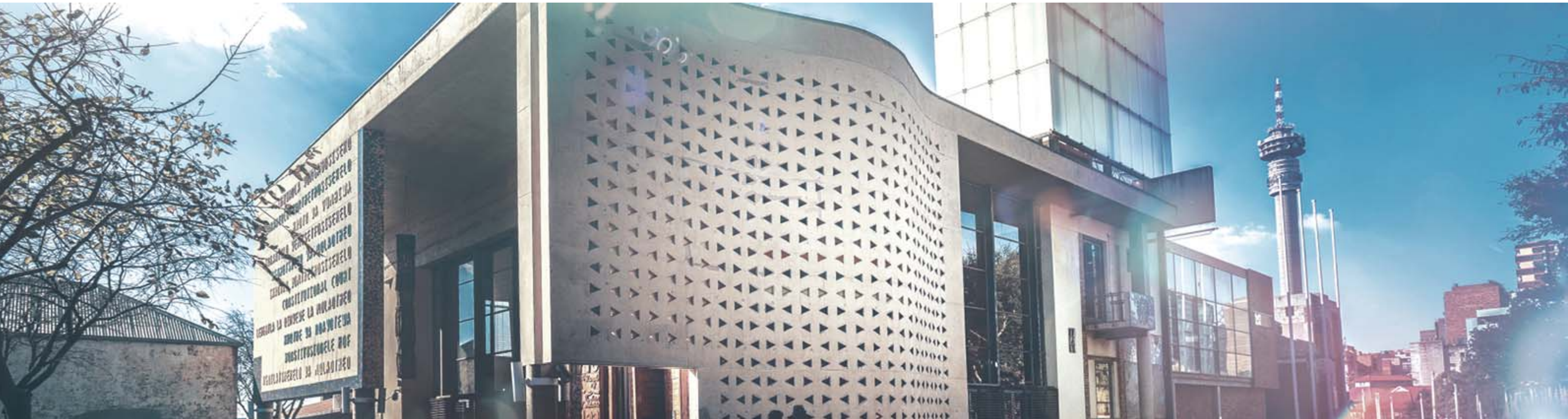

SUBMISSIONS ON
THE EMPLOYMENT EQUITY BILL [B 14B – 2020]

Advocate Riaz Itzkin

22 February 2022

ASISA
ASSOCIATION FOR SAVINGS & INVESTMENT SOUTH AFRICA

SAIA
SOUTH AFRICAN INSURANCE ASSOCIATION

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Overview of presentation

1. Who we represent
2. Support of Transformation and the Bill
3. Sub-sector and regional targets
4. Managing the complexity
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Who we represent

ASISA
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Association for Savings and Investment South Africa

ASISA
ASSOCIATION FOR SAVINGS & INVESTMENT SOUTH AFRICA

- The financial sector is diverse and represented by various industry bodies who represent the different interests of employers within the industry.
- ASISA is a non-profit industry body, which represents 119 members of the savings, investment and insurance industry that contributes trillions of Rands to the South African economy.
- ASISA represents the collective interests of South Africa's asset managers, collective investment scheme management companies, linked investment service providers, multi-managers and life insurance companies.
- ASISA enables the financial services industry, which is the custodian of the nation's savings and investments, to speak with one voice.
- ASISA recognises that to ensure the industry remains relevant and sustainable, it needs to deliver solutions that meet the developmental needs of the country. As such, ASISA is aligned with government's global and local regulatory objectives to facilitate business, reduce inequality, protect consumers and improve investment and savings behaviour.
- ASISA members collectively manage approximately **R7.2 trillion** on behalf of clients and paid **R840 bn** in insurance claims during Covid.
- ASISA members manage a large portion of Government's funding requirements. At 30 September 2021 this amounted to approximately **R1 trillion**.

The South African Insurance Association

SAIA
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- SAIA represents the non-life insurance industry, previously called the short-term insurance industry.
- The non-life insurance industry insures the assets (and other risks) of individuals, businesses and various government assets at different levels.
- A key role of this industry is that it enables access to finance/credit for individuals and businesses by for example providing security through insurance policies on financed assets such as vehicle financing, home loans, etc.
- SAIA's current 56 members include primary insurers, cell captives, captives and reinsurers and represent approximately 90% of the market in terms of premium income.
- Members also include 3 state owned entities: Sasria (special risks such as riots and looting), Landbank Insurance Company and Escap (insures Eskom assets).
- Some industry statistics for the 12 months ending December 2020: Gross premium income: R159 billion (profit of R15 billion); Claims incurred: R58 380 million; Operating profit (including investment income): R15 004 million.
- Risks insured by non-life insurers amount to over R25 trillion. This underscores the need of insurers to have enough funds and reinsurance cover on hand to provide for potential huge claims events.
- SAIA supports ASISA's stance and submissions.

Support of transformation and the Bill

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Transformation and Targets

ASISA and SAIA support the objects and purpose of the Bill and acknowledge the need for the equitable representation of suitably qualified persons from designated groups at all occupational levels in the workforce.

ASISA and SAIA recognize that this is an essential requirement to gain the trust of future clients and for the sustainability of the economy and the financial sector. To this end, ASISA and SAIA (together with BASA) have already agreed to the targets proposed in the Bill with the DoEL.

Such agreement was on the assumptions that:

1) Sub-sectors would be recognised;
2) the targets would not be hard-coded; and
3) fines would be adjusted as a result of (amongst other things) the introduction of targets.

The targets were also agreed at a time when the full extent of the Covid-19 pandemic was not yet known. In this regard, the financial services sector was particularly hard hit by an increase in bad debts, excess mortality and a withdrawal of funds by investors in order to survive. It has brought about the need for automation and online services which changes the employment requirements.

ASISA and SAIA advocate for a balanced approach to targets to ensure there is no systemic risk to a sector or subsector with realistic reward and punishment of role players.

Objective of our Presentation

- The current wording in the Bill (together with the impact of non-compliance with such targets) suggests that these targets are in fact "quotas“, given the way in which they are framed and the non-compliance consequences.
- Fines levied on this basis are overly penal and may present a systemic risk to a large number of companies and potentially the entire sector.
- A "one size fits all" target for an entire sector would be impossible and prejudicial.
- While the EEA should have broad application, nuances in different subsectors need to be catered for:
    - Financial services subsectors are unique in terms of region, suitably qualified skills
    - Being a highly regulated industry, other potentially conflicting supervisory legislation also drives the transformation imperative
    - An overly punitive penalty and fines regime may imperil a financial service providers’ ability to honour a claim or return their investment, which in turn, can impact on their clients
- We therefore seek to constructively propose refinements to the amendments which create certainty, avoid non-compliance with the Constitution, and avoid unintended consequences.

Sub-sector and regional targets

Sub-sector and regional targets

Sub-sectors

- The financial services sector consists of sub-sectors that vary substantially in their make-up, dynamics and requirements.
- Different sub-sectors within the industry represent different interests and are at different levels of compliance.
- For example, sub-sectors (and their specific requirement) may differ according to (i) when the business was established (ii) the nature of its operations and scarce skills requirements and (iii) its rate of growth and workforce mobility.
- It is therefore crucial that proper engagement on sub-sectors and sub-sector targets take place, to ensure that a "one size fits all" approach is not adopted, which cannot address the diverse nature of the industry.
- Examples of sub-sectors and their differing interests include
    - Asset managers — Banks (investment, clearing and settlement, lending) — Client intermediaries and advisors
    - Life insurers — Non-life insurers — Retirement Funds
    - Real estate brokers — Venture Capital and Private Equity Managers

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Sub-sector and regional targets

Regional demographics

- S15A(3) of the EEA Bill however provides for the setting of subsector and regional targets.
- Provinces like KZN and Western Cape requires that regional demographics be taken into account when targets are set.
- An unintended consequence of imposing national targets on regions will be for regional offices to close and move to provinces where national targets are attainable. Job losses could follow.
- It is crucial for regional demographics to be taken into account when targets are set with role players and with the input of provincial government. National government cannot usurp the role of provincial government.

Managing the complexity

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Managing the complexity

Compliance

Compliance has to be considered in respect of:

1) general compliance in terms of section 42; and
2) a certificate of compliance in terms of section 53.

- The financial sector is highly regulated with multiple licenses and significant capital requirements.
- As more funds and attention will be moved to address compliance on this hard-coded requirement, other sections of broad-based transformation will suffer.
- If the majority of companies fail to comply with the targets set out in the EEA, it would be perceived by the public as a governance failure.
- Recognition must be given for the achievement of transformation through a combination of other factors to determine an entities compliance level. Compliance has always been measured in aggregate rather than compulsory performance on every element.
- There needs to be clear assessment guidelines in terms of compliance and a robust appeal process to avoid systemic risk to the industry.
- Any determination of what would constitute compliance will need to take certain industry specific events into consideration (such as a walkout of a senior black manager to start their own business shortly before the measurement date).

Managing the complexity

- The current wording in the Bill (together with the impact of non-compliance with such targets) suggests that these targets are in fact "quotas" and are too strict for the non-compliance consequences.
- To avoid the targets being akin to quotas, justifiable reasons for non-compliance should be set in the EEA based on the draft 2018 Regulations.
- A "one size fits all" target for an entire sector would be impossible and prejudicial.
- Specific scare skills are required in different subsectors which would require the “suitably qualified persons” consideration requiring individualized numerical targets
- If the targets are rigid, the timeframes in which each sector needs to achieve them needs to be extended.
- It is not mathematically possible to achieve the target in each race, gender and occupational band at a fixed future measurement point.
- A sudden resignation of a few individuals shortly before a measurement date, may jeopardise compliance.
- The shortage in suitably skilled employees may imperil black owned small businesses who are highly concerned that their employees will be enticed by companies with deeper pockets.

Managing the complexity

Skills shortage

- The Financial Sector through its various sub-sectors, require that many of its positions be filled with highly qualified and experienced technical skills – often a regulatory requirement.
- Unfortunately there are not enough of these skills coming through the university system to adequately meet demographics as per the Economically Active Population.
- In the insurance industry in particular, reporting requirements are complex and the services of chartered accountants and actuaries are required.
- There simply are not enough qualified African skills available.
- For example, roughly 460 black chartered accountants and actuaries qualify each year, while the number of charted accountants and actuaries required across the Financial Services sector is 4300. It is not only the Financial Services Sector who competes for them, but all other sectors where they can be employed.
- In addition, while individual companies may aim to achieve their demographic targets, due to the shortage of African skills, this is often achieved at the expense of another who have invested in transformation but whose African employees are in high demand to meet targets.

Fines

Fines in Schedule 1 to the Act

Fines and Penalties

- Fines in schedule 1 were negotiated at Nedlac when targets were not hard coded but were aspirational. The fines are therefore not relevant or realistic in the context of the current proposed sector and subsector targets where targets are unilaterally imposed.
- The fines are penal and equivalent to Competition Commission fines and disproportionate to failure to meet transformation targets.
- The nature of the targets can lead to multi year fines.
- The quantum of fines will impact capital adequacy reserves and lead to a systemic risk as businesses may fail as a result. This may result in policy holders not having their claims honoured or reduce clients' cover and investment growth.
- High fines will impact consumer and investment confidence which could result in a withdrawal of business.

Fines in Schedule 1 to the Act

Fines and Penalties (continued)

- In most instances, turnover is not our money. Due to its fiduciary role, ASISA and SAIA members' turnover consists of its clients' money and capital adequacy reserves, not only of its own profits, which it holds on their behalf. Accordingly, "turnover" as it applies to other businesses not in the financial industry, cannot be equated to "turnover" as it relates to ASISA's and SAIA's members.
- If fines are calculated on turnover (as opposed to profit) it essentially has the effect that a fine on 10% of turnover could often be in excess net profit reducing capital adequacy.
- Any fines based on turnover (even if only 1%) will have a significant impact on the stability of a financial services provider, which will in turn, lead to systemic risk by depleting the solvency capital.

Other concerns

Other concerns

Other applicable legislation

- The financial sector performs critical custodian and distributive functions in respect of resources within the economy. It is essential that the skills, knowledge and experience of its labour force be retained and increased.
- A sound financial sector underpins economic growth, and the development and transformation of all sectors of the economy. Inefficiency in the financial sector results in detrimental consequences for growth, employment, and therefore transformation, in the economy as a whole.
- The Minister, in performing his functions in terms of section 15A of the Employment Equity Act as amended, is to act in accordance with all financial sector legislation, specifically including section 28 and 78 of the Financial Sector Regulation Act.
- Section 28 provides that an organ of state (such as the Minister) must in performing its functions (such as identifying economic sectors, prescribing criteria for the identification of sectors and setting numerical targets for the purposes of the Employment Equity Act) 'have regard' to the implications of his activities on financial stability. Section 78 further provides that the Minister, in performing his regulatory or supervisory function in relation to employment and labour at financial institutions, must, to the extent practicable, consult with the financial sector regulators and the Reserve Bank in relation to the performance of that function.

Other concerns

Constitutionality considerations

South African Police Service v Solidarity obo Barnard 2014 (6) SA 123 (CC)

"[41] Section 15 describes the permissible character of affirmative action measures. They must be designed to ensure that "suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupation categories and levels". I pause to underline the requirement that beneficiaries of affirmative action must be equal to the task at hand. They must be suitably qualified people in order not to sacrifice efficiency and competence at the altar of remedial employment. The Act sets itself against the hurtful insinuation that affirmative action measures are a refuge for the mediocre or incompetent. Plainly, a core object of equity at the workplace is to employ and retain people who not only enhance diversity but who are also competent and effective in delivering goods and services to the public."

In the context of ASISA and SAIA's members, the Constitutional Court's emphasis of the fact that only suitably qualified individuals must be the beneficiaries of AA, creates unique challenges given the shortage of African actuaries, accountants, asset managers, risk underwriters and other qualified individuals. The amendments must take this reality into account.

Other concerns

Constitutionality considerations

South African Police Service v Solidarity obo Barnard 2014 (6) SA 123 (CC)

"[42] A designated employer is required to implement several measures in pursuit of affirmative action. They must identify and eliminate employment barriers, further diversify the workforce "based on equal dignity and respect of all people" and "retain and develop people" as well as "implement appropriate training measures". <u>Section 15(3) contains a vital proviso that the measures directed at affirmative action may include preferential treatment and numerical goals but must exclude "quotas".</u> Curiously, the statute does not furnish a definition of "quotas". This not being an appropriate case, it would be unwise to give meaning to the term. Let it suffice to observe that section 15(4) sets the tone for <u>the flexibility and inclusiveness required to advance employment equity</u>. It makes it quite clear that <u>a designated employer may not adopt an Employment Equity Policy or practice that would establish an absolute barrier to the future or continued employment or promotion of people who are not from designated groups.</u>"

The impermissibility of imposing quotas is an important factor which should inform the formulation of the bill.

Package of proposals

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Package of Proposals

Targets

ASISA and SAIA propose the following amendments to section 15A:

"15A(2) *The Minister may, ~~after consulting~~* ***in consultation with*** *the relevant sectors* ***including Regulators where applicable,*** *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)."*

15A(3) *A notice issued in terms of subsection (2) may set different numerical targets for different occupational levels, sub-sectors or regions within a sector or on the basis of any other relevant factor.* ***Where a sector or its Regulator(s) provide(s) sufficient reasons for such a distinction, such as a difference in skills requirements, the Minister must set different numerical targets per sub-sector or region.****''*

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Package of Proposals

Targets (continued)

"15A(4)** A draft of any notice that the Minister proposes to issue in terms of subsection (1) or subsection (2) must be published in the Gazette, allowing interested parties at least* ***~~30~~ 90 *days to comment* ***and engage with the Minister*** *thereon"*

To the extent that the decision to issue a notice in terms of subsection (1) or subsection (2) constitutes administrative action, it would also facilitate compliance with a fair procedure (thus minimising scope for litigation regarding procedural shortcomings in respect of refusals to issue certificates).

Package of Proposals

Targets (continued)

ASISA and SAIA propose the following amendment to section 20(2A):

"(2A) The numerical goals set by an employer in terms of subsection (2) must comply with any ~~sectoral~~ target in terms of section 15A that applies to that employer."

Package of Proposals

Managing complexity

Section 42(1) of the EEA provides that the Director General, or any person or body applying the EEA may, in determining whether a designated employer is implementing employment equity in compliance with the EEA, take certain factors into account.

The Bill proposes that compliance with sectoral targets be included as one such factor.

ASISA and SAIA propose that the wording of section 42(1)(aA) be amended as follows:

*"(aA) whether **or not** the employer has complied with a sectoral target **or taken reasonable steps to achieve the applicable target** as set out in terms of section 15A applicable to that employer."*

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Package of Proposals

Managing complexity (continued)

The proposed amendment to section 53 provides that the Minister may only issue a certificate of compliance if the Minister is satisfied, *inter alia* that:

- the employer has complied with a numerical target set in terms of section 15A; or
- in respect of any target with which the employer has not complied, the employer has raised a reasonable ground to justify its failure to comply, as contemplated by section 42(4)

State contracts may only be issued to employers that have been certified as being in compliance with their obligations under the EEA.

Given the nature of the financial services industry, such a penalty is akin to severely limiting the license of a financial services provider.

Package of Proposals

Managing complexity (continued)

ASISA and SAIA recommend that section 53 be amended as follows:

‘‘(6) The Minister may only issue a certificate in terms of subsection (2) if the Minister is satisfied that—
(a) the employer has complied with a numerical target set in terms of section 15A
that applies to that employer ***or has taken reasonable steps to comply with those targets***;***”***

In relation to section 53(6)(b), the Bill must set out the factors that are to be considered in determining whether an entity has a reasonable ground which justifies non-compliance, and that these factors should be included in the Bill itself. ASISA and SAIA suggest that the grounds contained in the draft 2018 regulations should be used for this purpose, with the inclusion of *"level of progress made towards achieving the targets"* and "*any other relevant factor*".

To the extent that the decision regarding issuing a certificate constitutes administrative action, it would also facilitate compliance with a fair procedure (thus minimising scope for litigation regarding procedural shortcomings in respect of refusals to issue certificates).

Package of Proposals

Fines and Penalties

ASISA and SAIA recommend that the current fine regime not be applicable to non-compliance with targets set in terms of section 15A, and that this is a matter to be considered for inclusion as a topic for further consultation once the Bill has been promulgated, and prior to publication of notices in terms of section 15A.