

## EMPLOYMENT EQUITY BILL

Interested parties are invited to submit written comments on the Employment Equity Bill, 1997 before **16 February 1998** by

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### A NOTE FROM THE MINISTER

Apartheid has left behind a legacy of inequality reflected in disparities in the distribution of jobs, occupations and income. The government is of the view that it is necessary to redress these imbalances and to inculcate within every workplace a culture of nondiscrimination and diversity. When it comes to jobs, training and promotion we want a fair deal for all workers.

This Bill is a product of debate and discussions triggered by the Green Paper on Employment and Occupational Equity published in July 1 996.

We urge you to comment on this Bill to enrich it. We would appreciate your comments by the 15th of February 1998.

We want to build a South Africa with a diverse and representative workforce. We want to abolish discrimination in the workplace. Let this Bill be the subject of debate in every workplace and by all workers and employers.

**T. T. MBOWENI, MP**  
**MINISTER OF LABOUR**

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### INTRODUCTION

Apartheid has left behind a legacy of inequality. In the labour market the disparity in the distribution of jobs, occupations and incomes reveals the effects of discrimination against black people, women and people with disabilities. These disparities are reinforced by social practices which perpetuate discrimination in employment against these disadvantaged groups, as well as by factors outside the labour market, such as the lack of education, housing, medical care and transport. These disparities cannot be remedied simply by eliminating discrimination. Policies, programmes and positive action designed to redress the imbalances of the past are therefore needed.

The Government has decided to introduce the Employment Equity Bill ("the Bill") to address some of these issues. The Bill seeks to eliminate unfair discrimination in employment, and to provide for affirmative action to redress the imbalances of the past and create equality in employment ("employment equity"). This legislation is drafted with a view to advancing those groups who have been disadvantaged as a result of discrimination caused by laws and social practices, and not with a view to seeking retribution for past injustices.

## **THE VISION OF THE BILL**

*As president Mandela has said, "The primary aims of affirmative action must be to redress the imbalances created by apartheid. We are not . . . asking for hand-outs for anyone nor are we saying that just as a white skin was a passport to privilege in the past, so a black skin should be the basis of privilege in the future. Nor . . . is it our aim to do away with qualifications. What we are against is not the upholding of standards as such but the sustaining of barriers to the attainment of standards; the special measures that we envisage to overcome the legacy of past discrimination are not intended to ensure the advancement of unqualified persons, but to see to it that those who have been denied access to qualifications in the past can become qualified now, and that those who have been qualified all along but overlooked because of past discrimination, are at last given their due. The first point to be made is that affirmative action must be rooted in principles of justice and equality." October 1991 .*

## **The legacy of discrimination**

Black people, women and people with disabilities face significant disadvantages in employment. These include occupational segregation, inequalities in pay, lack of access to training and development opportunities, and high levels of unemployment. Black people, in particular, have suffered particular and pernicious disadvantages as a result of job reservation and lack of access to skills and education under apartheid. This discrimination sometimes takes the form of direct and conscious decisions, based on prejudice or stereotypes, to exclude certain groups from jobs or promotions. For instance, some employers, believing that women are not assertive enough to manage or supervise other employees, will not consider employing a woman in any senior position.

Whilst the Bill seeks to address inequalities within the sphere of employment (inside the labour market) it should be noted that these inequalities are reflected outside of the labour market. Extra-labour market inequalities are extreme and they have a direct effect on the quality and nature of labour that is supplied to the labour market. Factors like disparities in ownership of productive assets, the unequal division of household labour and the geographic distribution of population groups under apartheid all contributed to the reinforcement of these inequalities.

Whereas South Africa is not a poor country by international standards, it is infamous for having the most unequal distribution of income in the world. In its 1996 Country Review, the

International Labour Organisation (ILO) concluded that South Africa had the highest levels of inequality of any country in the world for which the ILO had data. The nature and extent of these inequalities are elaborated in the ILO Country Review (1996) as well as in the Labour Market Commission (1996).

The Labour Market Commission notes that our skewed income distribution is reflected in the fact that the bottom 20% of income earners capture a mere 1,5% of national income, while the wealthiest 10% of households receive fully 50% of national income. Further, poverty is overwhelmingly concentrated in the African and coloured population: 95% of the poor are African, and 65% of Africans are poor. The Labour Market Commission notes that roughly 33% of the coloured population live in poverty, compared to 2,5% for Asians and 0,7% for whites. This racial inequality is also reflected in the situation with respect to unemployment in the country. Using an expanded definition of unemployment, among Africans, unemployment stands at roughly 41%, among coloureds it is 23%, whilst among Asians 17% but is only 6,4% amongst whites. There is also a gender element to the inequality, with women having a higher unemployment rate than men.

The Green Paper on Employment and Occupational Equity (1996) pointed out that amongst the employed, a third of Blacks earn below R500 per month, compared to under 5% for whites. The Green Paper also noted that a male white South African was 5 000 times more likely than an African women to be in a top management position. These apartheid-induced inequalities are reflected in the current distortions within the occupational and professional structures of the labour force. A survey of some 107 organisations by the Breakwater Monitor in 1996 indicated that in the top managerial ranks of companies (Paterson F Grade), Africans constituted only 2,99%, coloureds were 0,43%, Asians 0,21%, whilst whites were 96,38%. The same study found that for the lowest grades (Paterson A) whites constituted 1,85%, Africans 89,01%, coloureds 7,94% and Asians 1,20%. There is, in short, little correlation between the composition of the workforce at technical, professional and managerial levels and the overall demographics of our country.

The occupational structure of companies in South Africa, mirrors the distortions that apartheid was so successful at creating and re-enforcing. This situation is not going to redress itself automatically. Indeed a recent survey of affirmative action (FSA Contact) noted in September 1997 that, "There has been a slight drop in the degree of commitment to Affirmative Action programmes from Chief Executive Officers and Senior and Middle Management". The same survey found that in the three-year period to 1997, the number of black senior managers increased by only 2,3%, with a paltry 1,6% increase among middle managers. The ILO Country Review (1996) points out that occupational segregation remains pervasive in South Africa. According to the 1994 October Household Survey, over two in every five employed blacks were in labouring jobs, whereas about one in every fifty whites were in such jobs. The ILO Country review notes that at the top, not only have Africans and other non-whites been chronically under represented in managerial positions but whites have been artificially eased into management without the requisite qualifications. This situation does not just apply to the private sector. The ILO Country Review points out that under apartheid, the public sector was a vehicle for intensifying racial inequalities. However occupational segregation is still a serious problem even within the new public service.

A recent survey of the Public Service (Naidoo, 1997) found that as of June 1997, the public service consisted of 1,18 million persons, 71 percent in the provinces and 29 percent in national Departments. The Survey found that Africans constitute 67 percent of the public

service, Coloureds nine percent, Indians three percent and whites 21 per cent. Whereas Africans constitute two thirds of total employees, they only constitute 31 percent of management. The proportions in management: are an inverse of the racial representation of employees in the general public service. Whites (who are 21 percent of the public service) are 62 percent of management, Coloureds are three percent and Indians are four percent. The Survey found that the percentage of Africans in senior management (47%) is just above that of whites (43%). The female to male ratio in the general employee profile was found to be almost equal (Females were 49,9% and males 50,1%), and yet males were 89% of management. 1-his male-female proportion remained the same for senior management, with males being 88% and females being 12%.

The Survey by Naidoo (1997) also found that of the females in management, there was an equal split between black and white females, both groups constituting 5%. This clearly shows that the issue of racial equity in management has not been addressed. Certainly not to the extent envisaged in the targets of the White Paper on the Transformation of the Public Service (1995). The situation with respect to gender equity also leaves much to be desired, judging by the findings of the Survey.

With respect to people with disabilities, the Survey found that only 236 people with disabilities were employed in the public service Departments, although the numbers might be inaccurate because a number of the Departments surveyed did not have statistics on their employees who have disabilities. Nevertheless, 236 out of 1,18 million employees is still a mere 0,02 per cent, which is one hundredth of the target set by the White Paper (to be attained in 2005). Even if the actual figure were doubled (Twice the one reported in the survey), people with disabilities in the public service would still be 0,04 per cent of the total workforce (as at June 19'37).

The concern is by no means limited to managerial positions. There is a serious problem with respect of occupational segregation in general South Africa. The ILO Country review points out that by 1989, only six per cent of artisans and 14 per cent of apprentices were African, and most of these were in the construction industry. Of the 9,054 indentured apprentices in 1990, 6,709 (74 per cent) were white, 951 (10,5 per cent) were African, 871 (9,6 per cent) were coloured, and 523 (5,8 per cent) were Asian, according to the ILO Country Review (1996). The ILO country review also notes that those Africans that have entered the system have been concentrated at the lower end - of the skill spectrum. Thus, although Africans accounted for about: 10 per cent of all qualified artisans by 1990, they were concentrated in six relatively low-skilled trades, including welding, boiler-making, fitting and sheet metal working; whites continued to predominate in the more high-skill trades in the metal, engineering, electrical and motor sectors.

The ILO Country Review (1996) also refers to the extent of discrimination according to sectors. For instance Africans were to be found mostly in the mining and construction sectors. There were very few Africans in the lucrative financial and services sectors. While whites are one third of formal employment, they constitute about 60 per cent of employees in the financial services. In 1993 only one per cent of Africans were in the Financial sector.

The inequalities also apply to income. The ILO Country Review notes that women's incomes are substantially lower than men's, but that the average income for African men was less than that of white women. The ILO Country Review points out that the problem is a combination of race and gender. White women are not in the same position as black women (white women are better off, salary wise and so forth). In this regard the ILO Country Review calls for specific attention to be paid to the situation of African women.

Clearly the new South African government must introduce measures to effectively address this situation. Measures to outlaw discrimination and to encourage companies to develop a more diverse and representative workforce are necessary, not only to promote equity and justice, but also in the interests of economic growth.

### **Economic growth**

It is common cause that South Africa is weak in this regard. The recent World Competitiveness Yearbook (1997) rates South Africa last out of 46 countries with respect to the competitiveness of its workforce. A skilled labour force increases a country's competitiveness. Racial discrimination in education and access to employment, coupled with the constant denial of opportunities to blacks and women, has led to the very poor overall skills levels to be found in the South African labour market. The ILO Country Review (1996) points out that inequalities lead to market distortions which in turn result in the inadequate utilisation of resources. It follows that the reduction of inequality in society is therefore a way of promoting economic growth. A similar point is made by the Breakwater Monitor (1996) citing several US and UK studies which demonstrate that employment discrimination and poor educational opportunities entail significant economic costs in terms of lower national output, labour market inefficiency, higher inflation, and excessive welfare and penal system costs. At the workplace the level the underutilisation of certain race groups, women and people with disabilities, contributes to job dissatisfaction resulting in excessive rates of absenteeism, employee turn-over and grievances, which in turn lead to lower productivity. Upgrading of skills, improving access to jobs, occupations, training and promotion opportunities advances *all* members of the workforce and makes it possible for them to achieve maximum productivity and efficiency.

On a wider scale, the elimination of discrimination raises economic efficiency throughout the economy by ensuring a more rational allocation of labour resources. Measures to prohibit discrimination in employment stimulate active participation in the labour market by all categories of employees and are therefore an *economic* imperative. By increasing the pool of skilled and qualified employees, and improving labour market mobility, economic efficiency is enhanced.

In short, the promotion of employment equity is therefore desirable on both equity and efficiency grounds. This Bill seeks to take forward the Labour Market Commission's recommendation that employment equity legislation should be promulgated as soon as possible in order to transform the labour market, create labour market security, and maximise economic competitiveness.

### **Constitutional and other requirement.**

The Constitution of South Africa guarantees to everyone the fundamental right of equality. This includes equality in the social, political and economic spheres of all persons and groups in society. The Constitution recognises that measures to ensure freedom from discrimination are necessary to remedy the pervasive inequalities which define South African society.

The elimination of unfair discrimination in employment and the adoption of positive measures to redress social imbalances are important components of this process, and legislation is a necessary step towards the achievement of employment equity.

The Bill makes provision for positive measures to promote a diverse and representative workforce. It however stresses the need for this to be done in ways which do not put in place absolute barriers to the employment or advancement prospects of any individual.

There are employers who have made some great strides in attempting to achieve employment equity. This Bill aims to encourage and generalise such practices. The focus is on encouraging companies towards better employment practices. The regulatory burden, which is imposed, is therefore, relatively light. Government wishes to encourage rather than punish, and the punitive aspects of the Bill will only worry those employers actively resistant to the goals of the Bill.

South Africa has ratified ILO convention No. 111, the Convention concerning discrimination in Respect of Employment and Occupation, which aims to achieve equality of opportunity and treatment in employment through the elimination of discrimination. Convention 111 requires member states to declare and pursue a national policy designed to promote "by method appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof." Article 5 of Convention 111 specifically excludes, Special measures which are designed to meet the particular requirements of persons who, for reasons such as sex, age, disability, family responsibilities or social or cultural status, are generally recognised to require special protection or assistance". These special measures are required to be determined after consultation with representative employers' and employees' organisations.

This Bill will fulfil South Africa's obligations in terms of Convention 111, and is consistent with other international instruments such as the International Convention on the Elimination of All Forms of Racial Discrimination (1965); the Convention on the Elimination of All forms of Discrimination Against Women (1979); and the United Nations Declaration on the Rights of Disabled Persons (1975).

## **KEY FEATURES AND ISSUES**

### **Purpose**

The primary purpose of the Bill is to achieve employment equity through (a) the elimination of unfair discrimination, covered in chapter 11 of the Bill, and (b) the implementation of affirmative action measures to advance black people, women and people with disabilities.

The Bill recognises that the mere removal of discrimination will not lead to the advancement and development of groups that have been previously denied such opportunities. Employment equity measures including affirmative action, are needed to ensure that equality does not just remain a formality but is achieved in a substantive way.

### **Unfair discrimination**

The unfair discrimination provisions of the Labour Relations Act, 1995 (Act No. 66 of 1995) are now covered under this Bill. Chapter II of this Bill deals with the prohibition of unfair discrimination in employment, along the lines prescribed in the Labour Relations Act of 1995. Unfair discrimination in the Bill includes "any distinction, exclusion or preference made on one of more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language and birth". Unfair discrimination against employees in respect

of employment policy or practices is prohibited. These policies and practices include recruitment procedures, advertising and selection criteria, job classification and grading, remuneration, employment benefits and terms and conditions of employment, the working environment and facilities, training and development, performance evaluation systems, promotion, transfer, demotion, disciplinary measures short of dismissal and dismissal. It will not be unfair for employers to discriminate for purposes of affirmative action. Distinctions and exclusions will also be permitted if these are on the basis of the inherent requirements of the job.

## **Scope**

The provisions of the Bill apply to all employers other than members of the National Defence Force, South African Secret Service and National Intelligence Agency. This is consistent with the Labour Relations Act (1995), and the Basic Conditions of Employment Act, 1997, which exclude these members from the definition of employee based on the unique functions they perform. Notwithstanding their exclusion from the labour legislation, the Government still has an obligation to ensure that the rights of members of these agencies not to be unfairly discriminated against are adequately protected, and that appropriate procedures are established for any disputes concerning these rights.

Chapter 111, dealing with the development of employment equity plans, does not apply to employers employing less than 50 employees. This is to ensure that, whilst every employer will be obliged to ensure that there is no discrimination, smaller employers will not have to bear the administrative burden of conducting audits, reviews and submitting reports.

All employers should ideally embark on employment equity. However, the threshold of 50 employees is considered to be a realistic starting point, in particular to ensure effective monitoring and administration of the legislation in its first few years of operation. The Central Statistical Services (1997) estimates the number of companies that employ more than 50 employees at around 10 000. The public sector is included in the Bill. The Bill will also allow for certain employers to be required to comply with Chapter 111 of the Bill, for instance if the Labour Court deems this necessary, even if they employ less than 50 employees. The Bill also encourages private employers who fall below the threshold to comply with the provisions of Chapter 111 voluntarily.

## **Designated group.**

The designated groups are black people, women and people with disabilities. They are referred to in the Bill as "persons from the designated groups. They are the focus of the Bill. A recent survey of affirmative action (September 1997) noted that although African people represent 76% of South Africa's population, in 1996 they accounted for fewer than 5% of managers across the economy. From 1992 to 1996 the number of black senior managers had increased by only 0,4%.

While women constitute 52% of South Africa's population according to the provisional 1996 Census figures, in 1996, they occupied only 12,2% of senior management positions in a sample of companies surveyed by the Breakwater Monitor. The Breakwater Monitor also found that 100% of female senior managers (KU Grade) were white women. There were no coloured or Asian women at this level. A similar situation was found at middle management grades (DU and DL), whereby 88,7% were white women.

With respect to disability the most recent CSS data (1997) estimate that 5% of the population are disabled, although organisations of people with disabilities suggest that the figure might be much higher. Estimates indicate that one in five people with disabilities is economically active, and only one in 100 has a job on the open labour market. The vast majority of people with disabilities are forced to depend entirely on social pensions and family support, as they do not have employment opportunities.

## **Employment Equity and affirmative action**

The approach taken by the Bill is that Employment Equity encompasses both the elimination of discrimination as well as the establishment of specific measures to accelerate the advancement of designated groups. One of the measures to accelerate the advancement of designated groups is affirmative action. The Bill thus takes a broader view of the end result and this is reflected in the reference to Employment Equity and to employment equity plans. Cognisance is however taken of the fact that in most instances there will be a need for more specific plans and efforts that will involve preferential treatment in appointments and promotions, as well as accelerated development and advancement, these are commonly referred to as affirmative action measures. There is more to employment equity than affirmative action however, and there are many other measures that organisations can take which do not necessarily fall under the traditional conceptualisation of "affirmative action", but which have the effect of attaining equity. These measures would be included in the employment equity plans.

## **Process**

Every designated employer (essentially those employing more than 49 employees) is required to take five essential steps towards employment equity--

- a. prepare a profile of its workforce;
- b. review its employment policies and practices;
- c. prepare and implement an employment equity plan;
- d. lodge a summary of its employment equity plan with the Department of Labour; and
- e. report annually to the Department on progress in the implementation of its plan.

These obligations are similar to those generally found in the similar legislation of other countries (e.g. Canada, Australia).

The Bill does not impose quotas for the representation of members of designated groups in the workplace. Rather, the Bill creates a basis for consultation between employers, employees and trade unions so that parties will set numerical goals and put in place measures to achieve equality which are appropriate to their own workplaces and experiences, without undermining the goal of a more representative and diverse workforce.

The success of employment equity in different workplaces depends on whether the consultation process with employees and their trade unions is meaningful. Proper and meaningful consultation will contribute to a joint commitment to workplace transformation. It will also have long-term benefits of fostering workplace democracy and productivity by ensuring that good employment equity plans are prepared which address the issues and meet the needs of members of disadvantaged groups in the workplace.

Given the disparities in access to training in South Africa and the lack of skills, accelerated

training programmes are an important constituent of employment equity plans. Consultation will identify the nature of the training required and enable measures for accelerated training and human resource development: of members of disadvantaged groups to be implemented. Whilst employers do not have to employ new employees in order to fulfil the requirements of the Bill, they have a duty to train and develop existing employees as part of the process of advancement. Training and development accordingly constitute one of the most important positive measures advocated by the Bill.

### **The rights of people with disabilities**

The Green Paper on Employment and Occupational Equity was criticised for failing to give sufficient consideration to the rights and needs of people with disabilities. The Bill accordingly attempts to provide redress for people with disabilities who are unfairly discriminated against, and requires employers to implement positive measures for their employment and advancement in the workplace.

Where a person with disabilities is discriminated against, she/he may declare a dispute and seek its resolution by the Commission for Conciliation, Mediation and Arbitration ("COMA") through conciliation. If the dispute is not resolved through conciliation, it may be referred to the Labour Court. If the dispute proceeds to the Labour Court, the complainant may be assisted by an organisation representing people with disabilities. Those organisations may either join as parties to the dispute, or they may submit supporting briefs to the Labour Court in order to assist the Court to deal with issues pertaining to people with disabilities.

People with disabilities in the workplace have to be consulted by the employer, with a view to reaching agreement, on the preparation and content of employment equity plans. This ensures that their needs and interests will be taken into account in designing appropriate positive measures to advance them in the workplace, to provide training and development, and to reasonably accommodate their needs. Employers will have to consider making structural changes or introducing technical aids to facilitate the employment of people with disabilities. This emerges from an employer's obligation not to discriminate against employees or job applicants in respect of the workplace environment and facilities.

In addition, where an employer fails to consult with people with disabilities in the workplace in preparing employment equity plans, or prepares a plan which does not provide positive measures for people with disabilities, or does not implement a plan which provides positive measures for people with disabilities, these employees or their representatives may declare a dispute. The dispute will be conciliated by the COMA and, if unresolved after conciliation, may proceed to arbitration. The assistance of the Department of Labour can also be invoked by people with disabilities in seeking to ensure that employers prepare proper employment equity plans and implement those plans.

### **Enforcement**

The Bill protects employees who try to enforce their rights from being victimised or discriminated against.

The Bill builds on the role of existing collective bargaining and labour market institutions established under the Labour Relations Act. In this context, trade unions have a significant role to play in the consultation process preceding the development of employment equity plans. In addition, the supervisory and monitoring role of the Department of Labour is reinforced.

Provision is made for disclosure of information to employees and trade unions to give effect to meaningful consultation.

### **Commission for Employment Equity**

A Commission for Employment Equity ("CEE") is established as an advisory body to the Minister. The CEE will consist of persons representing the interests of women, people with disabilities, and representatives of NEDLAC. All members of the CEE will serve on a part-time basis. The CEE will be assisted by a secretariat within the Department of Labour. It will play a role in drafting codes of good practice on various issues, as well as the regulations. Codes will be developed on important issues such as the impact of grading systems and occupational differentials on equity.

An effective monitoring body with credibility and legitimacy is needed to ensure that there is speedy progress in South Africa in this area. International experience in areas that have affirmative action and employment equity measures (such as the USA, Canada and Australia) also points toward the importance of such a structure. In all the latter countries, there is a Commission with far stronger powers and resources than the one envisaged in the Bill. The Bill opted for a smaller Commission because there are already other structures that deal with other aspects of employment, such as the COMA. Other general issues concerning the violation of human rights are also being handled by the Human Rights Commission. The Commission on Gender Equity is also dealing with matters of gender inequity in a very broad sense. The Commission on Employment Equity will be very narrow in its focus in that it will limit itself to the sphere of **employment equity**. This will enable it to develop expertise that will guide the development of Codes of good practice in employment.

### **Dispute resolution**

The Bill adopts the conciliation, arbitration and adjudication model of the Labour Relations Act. It uses the existing mechanisms established under the Labour Relations Act, i.e. the CCMA and Labour Court, to resolve disputes arising under the Bill. Disputes concerning unfair discrimination or protection of rights that are unresolved after conciliation may be referred to the Labour Court. Disputes concerning affirmative action and employment equity measures are resolved through conciliation and failing that, through arbitration. Whilst the Bill builds on existing institutions, the Department of Labour and the CCMA will require additional resources to properly administer it. The CCMA should ideally establish a separate division to deal with disputes arising in terms of the Bill in addition, commissioners of the CCMA will need to receive special training and develop expertise concerning unfair discrimination and affirmative action/employment equity disputes. Judges of the Labour Court will need to be sensitised to issues pertaining to discrimination, in particular, gender discrimination.

### **The drafting process**

This Bill emerged out of an extensive consultation process. This process began with the establishment of the Affirmative Action Policy Development Forum by the Minister in 1995. This Forum represented the major stakeholders in the area of affirmative action and employment equity, viz. The unions, business, community organisations, disabled people's organisations, women's organisations and non-governmental organisations. When it completed its work, a team of experts was appointed to draft the green paper. The team members

included Baroness Amos (formerly Ms Valerie Amos), former CEO of the Equal Opportunities Commission (UK), Ms Urmila Bhoola (Cheadle Thompson and Haysom), Mr Siphon Madhlopha (Madhlopha Attorneys), Ms Thuli Madonsela (Chief Director, Department of Justice), Dr Neva Makgetla (Deputy Director General, Department of Public Service and Administration, formerly Director-Department of Labour), Mr Mpho Makwana (former Director Equal Opportunities, Department of Labour), Ms Lucia Rayner (deputy director of Equal Opportunities, Department of Labour), Jackie Scholtz (State Law Advisor) and Dr Caroline White (University of Natal, Durban, formerly Centre for Policy Studies). This team's efforts led to the publication of the Green Paper on Employment and Occupational Equity on the 1 July 1996.

The Minister then appointed a team of legal experts to draft the Employment Equity Bill. This team began its work in February 1997. Its members were Ms Urmila Bhoola (Cheadle, Thompson & Haysom), Ms Amanda Armstrong (CTH) Mr Siphon Madhlopha (Madhlopha Attorneys) and Mr Mzi Yawa (formerly, Department of Labour).

Professor Julio Fawndez of Warwick University (UK) was seconded to the drafting team by the International Labour Organisation (ILO). The drafters made extensive use of his expertise.

To assist the Legal Drafting Team in its work, a policy reference group was formed to advise the legal drafters on equity policy matters. The group under the leadership of the Director: Equal Opportunities Mr Loyiso Mbabane, consisted of Mr Les Kettledas, Mr Jeremy Baskin, Dr Guy Mhone, Ms Lucia Rayner, Ms Tanya Golden, Ms Nokhanya Moerane, Mr Jesse Maluleka, Mr Terence Chauke and Ms Thuli Madonsela. The team completed its work at the end of August 1997.

During September to November the USAID sponsored inputs from several international experts including Mr Deval Patrick; Mr Kenneth Gage; Ms Ellen Vargyas, Mr Joseph Kennedy and Ms Shirley Wilcher. Professor Harish Jain of Canada also provided extensive input through the financial assistance of USAID. The Department of Labour extends its heartfelt gratitude to all the individuals noted above, without whose hard work and tireless efforts this Bill would not have reached this stage. The Department is indebted to the ILO and USAID for their generous assistance. To them and to all the other people who were involved in this initiative, we say "NINGADINWA NANGOMSO".

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## EMPLOYMENT EQUITY BILL

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## PREAMBLE

The people of South Africa recognise.

That as a result of apartheid and other discriminatory laws and practices, there are disparities in employment, occupation and income within the national labour market.

That those disparities create such pronounced disadvantages for certain categories of people that they cannot be redressed simply by repealing discriminatory laws.

That as a result of unfair discrimination and exclusion from employment, black people, women and people with disabilities are the most disadvantaged groups in our country.

That unfair discrimination has had a negative impact on the economic development of our country.

Therefore-

to promote the constitutional right of equality and the exercise of true democracy;

to eliminate unfair discrimination in employment;

to ensure the implementation of employment equity to redress the effects of discrimination;

to achieve a diverse workforce broadly representative of our people;

to promote economic development and efficiency in the workforce; and

to give effect to the obligations of the Republic as a member of the International Labour Organisation:

**BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:**

## CHAPTER I

### PURPOSE, APPLICATION AND INTERPRETATION

#### 1. Purpose of this Act

The purpose of *this Act*<sup>1</sup> is to achieve equality in the *workplace* by--

- a. promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and
- b. implementing positive measures to redress the disadvantages in employment experienced by *black people*, women and *people with disabilities*, in order to ensure their equitable representation in all occupational categories and levels in the workforce.

#### 2. Interpretation of this Act

*This Act* must be interpreted--

- a. in compliance with the *Constitution*;
- b. so as to give effect to its purpose;
- c. taking into account any relevant code of *good practice* issued in terms of *this Act* or any other *employment law*; and
- d. in compliance with the international law obligations of the *Republic*, in particular those contained in the International Labour Office Convention (No. 111 ) concerning Discrimination in Respect of Employment and Occupation.

### 3. Application of this Act

(1) Chapter 11 of *this Act* applies to all *employees* and employers.

(2) Except where Chapter 111 provides otherwise, Chapter 111 of *this Act* applies only to *designated employers* and *people from designated groups*.

(3) *This Act* does not apply to members of the National Defence Force, the National Intelligence Agency, and the South African Secret Service<sup>2</sup>.

## CHAPTER 11

### PROHIBITION OF UNFAIR DISCRIMINATION

#### 4. Elimination of unfair discrimination

All employers must take steps to promote equal opportunity in the *workplace*, and to this end, to eliminate unfair discrimination in any *employment policy or practice*.

#### 5. Prohibition of unfair discrimination

(1 ) No 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, marital status, *family responsibility*, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language and birth.

(2) It is not unfair discrimination--

- a. to take any positive measure consistent with the purposes of *this Act*;
- b. to distinguish, exclude or prefer any person on the basis of the inherent requirements of a job.

(3) Unfair discrimination includes the harassment of an *employees* <sup>3</sup>

(4) *Testing* of an *employee* for any medical condition is prohibited, unless--

- a. legislation permits or requires the *testing*, or
- b. it is justifiable to do so in the light of medical facts, employment conditions, social policy, the fair distribution of *employee* benefits or the inherent requirements of a job.

(5) For purposes of this section, "*employee*" includes an applicant for employment.

## 6. Disputes about this Chapter

(1) Any party to a *dispute* concerning this Chapter, may refer the *dispute* in writing to the CCMA.<sup>4</sup>

(2) A *dispute* in terms of this Chapter must be referred--

- a. if it is a *dispute* about a *dismissal*, only within 30 days after the date of *dismissal*; or
- b. in any other case, only within 12 months after the act or omission that allegedly constitutes unfair discrimination.

(3) The CCMA may, at any time, permit a party who shows good cause to refer a *dispute* after the relevant time limit set out in subsection (2).

(4) The party who refers a *dispute* must satisfy the CCMA that--

- a. a copy of the referral has been *served* on every other party to the *dispute*; and
- b. the referring party has made a reasonable attempt to resolve the *dispute*.

(5) The CCMA must attempt to resolve the *dispute* through conciliation.

(6) If the *dispute* remains unresolved after conciliation--

- a. any party to the *dispute* may refer it to the Labour Court for adjudication; or
- b. all the parties to the *dispute* may consent to arbitration of the *dispute* by the CCMA.

(7) The relevant provisions of Part C and D of Chapter VII of the *Labour Relations Act*, with the changes required by context, apply in respect of a *dispute* in terms of this Chapter.

## 7. Burden of proof

Discrimination on one or more of the grounds listed in section 5 (1)<sup>5</sup>, is unfair unless it is established that the discrimination is fair.

## CHAPTER 111

### DUTIES OF DESIGNATED EMPLOYERS

## 8. Designated groups

In this Chapter, Designated groups" means *Black people*, women and *people with disabilities*.

## 9. Designated employers

Except where otherwise provided, this Chapter applies only to *designated employers*.

## 10. Duties of designated employers

(1) Every designated *employer* must implement positive measures for *people from designated groups* in terms of *this Act*, in order to achieve employment equity.

(2) A *designated employer* must--

- a. consult with its *employees* as required by section 13;
- b. conduct an analysis as required by section 16;
- c. prepare an employment equity plan as required by section 17; and
- d. annually report to the *Director-General* on progress made in implementing its employment equity plan, as required by section 18.

## 11. Voluntary compliance with this Chapter

An employer that is not a *designated employer* may notify the *Director-General* that it intends to comply with this Chapter as if it were a *designated employer*.

## 12. Positive measures

(1) Positive measures are measures designed to ensure that *people from designated groups* have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a *designated employer*.

(2) Positive measures implemented by *designated employers* must include--

- a. measures to identify and eliminate employment barriers, including unfair discrimination, which adversely affect *people from designated groups*;
- b. measures designed to further diversity in the *workplace* based on the equal dignity and respect of all people;
- c. making *reasonable accommodation* of *people from designated groups* in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce of a *designated employer*;
- d. affirmative action measures, including preferential treatment, to appoint and promote *suitably qualified people from designated groups* to ensure their equitable representation in all occupational categories and levels in the workforce.
- e. measures to retain, train and develop *people from designated groups*.

(3) Nothing in *this Act* requires a *designated employer*, in implementing employment equity, to--

- a. appoint, train or promote a fixed number of *people from designated groups*;
- b. appoint or promote *people from designated groups* who are not *suitably qualified*;
- c. take any decision concerning an *employment policy or practice* that would establish an absolute barrier to the employment prospects of people who are not from the *designated groups*; or
- d. create new positions in its workforce.

## 13. Consultation with employees

(1) A *designated employer* must take reasonable steps to consult and attempt to reach agreement on the matters referred to in section 14 with--

- a. a *workplace forum*<sup>6</sup>;
- b. if *no workplace, forum* exists at the *workplace*, with any *registered trade union* representing members at the *workplace* and its *employees* or representatives nominated by them; or
- c. if *no registered trade union* represents members at the *workplace*, with its , *employees* or representatives nominated by them.

(2) The *employees* or their nominated representatives; with whom an employer consults in terms of subsection (1) (b) and (c), taken as a whole, must reflect the interests of--

- a. *employees* from across all occupational categories and levels of the employer's workforce;
- b. *employees* from the *designated groups*; and
- c. *employees* who are not from the *designated groups*.

#### **14. Matters for consultation**

(1) A *designated employer* must consult the parties referred to in section 13 concerning--

- a. the conduct of the analysis referred to in section 16.
- b. the preparation and implementation of the employment equity plan referred to in section 17; and
- c. a report referred to in section 18.

#### **15. Disclosure of information**

(1) When a *designated employer* engages in consultation in terms of this Chapter, that employer must disclose to the consulting parties all relevant information that will allow those parties to consult effectively.

(2) Unless *this Act* provides otherwise, the provisions of section 16<sup>7</sup> of the *Labour Relations Act*, with the changes required by context, apply to disclosure of information.

#### **16. Analysis**

(a) A *designated employer* must collect information and conduct an analysis, as prescribed<sup>8</sup> of its employment policies, practices, procedures and the working environment, to identify employment barriers which adversely affect *people from designated groups*.

An analysis conducted in terms of subsection (1) must include a profile, as *prescribed*, of the *designated employer's* workforce within each occupational category and level in order to determine the degree of under-representation of *people from designated groups* in various occupational categories and levels in that employer's workforce.

#### **17. Employment equity plan**

(1 ) A *designated employer* must prepare and implement an employment equity plan which will achieve reasonable progress towards employment equity in that employer's workforce.

(2) An employment equity plan prepared in terms of subsection (1 ) must state

- a. the objectives to be achieved for each year of the plan;
- b. the employment barriers identified in the analysis and the steps the employer will take to eliminate those barriers;
- c. the positive measures to be implemented as required by section 12 (2);
- d. where under-representation of *people from designated groups* has been identified by the analysis, the numerical goals <sup>9</sup> to achieve the equitable representation of *people from designated groups* within each occupational category and level in the workforce, the timetable within which this is to be achieved, and the strategies intended to achieve those goals;
- e. the timetable for each year of the plan for the achievement of goals and objectives other than numerical goals;
- f. the duration of the plan, which may not be shorter than one year or longer than five years;
- g. the procedures that will be used to monitor and evaluate the implementation of the plan and whether reasonable progress is being made towards implementing employment equity;
- h. the internal procedures to resolve any *dispute* about the interpretation or implementation of the plan;
- i. the persons in the workforce, including senior managers, responsible for monitoring and implementing the plan; and
- j. any other matter that may be *prescribed*.

(3) An employment equity plan may contain any other measures that are consistent with the purposes of *this Act*.

## 18. Report

(1) A *designated employer* must *submit* to the *Director-General* a report on or before 1 October each year, containing the *prescribed* information <sup>10</sup>

(2) The first report by a *designated employer* must be *submitted* 18 months after the date of commencement of *this Act* or to the date on which the employer became a *designated employer*.

(3) A report prepared in terms of subsection (1) or (2) must be signed by the chief executive officer of the *designated employer*.

(4) Every report prepared in terms of this section is a public document.

## 19. Publication of report

(1) Every *designated employer that is* a public company must publish a summary of the report required by section 18 in that employer's annual financial report.

(2) Every *designated employer* in the State that must table the information contained in the report required by section 18, in Parliament.

## 20. Successive employment equity plans

Before the end of the term of its current employment equity plan, a *designated employer* must prepare a subsequent employment equity plan.

## 21. Designated employer must assign manager

(1 ) Every *designated employer* must--

- a. assign one or more senior managers to take responsibility for monitoring and implementing an employment equity plan;
- b. provide the managers with the authority and means to perform their functions; and
- c. take reasonable steps to ensure that the managers perform their functions.

(2) The assignment of responsibility in terms of subsection (1) to a manager does not relieve the *designated employer* of any duty imposed by *this Act* or any other law.

## 22. Duty to inform

(1 ) An employer must display at the *workplace* where it can be read by *employees* a notice in the *prescribed* form, informing them about the provisions of *this Act* [11](#)

(2) A *designated employer* must, in each of its *workplaces*, place in prominent places that are accessible to all *employees*--

- a. the most recent report *submitted* by that employer to the *Director-General*;
- b. any compliance order, arbitration award or order of the Labour Court concerning the provisions of *this Act* in relation to that employer; and
- c. any other document concerning *this Act* as may be *prescribed*.

(3) An employer who has an employment equity plan, must make a copy of the plan available to its *employees* for copying and consultation.

## 23. Duty to keep records

An employer must establish, and for the *prescribed* period, maintain records in respect of its workforce, its employment equity plan, and any other records relevant to its compliance with *this Act*.

## 24. Disputes about this Chapters [12](#)

(1) Any party to a *dispute* about the interpretation or application of any provision of this Chapter may refer the *dispute* in writing to the *CCMA*.

(2) A *dispute* in terms of subsection (1) may be referred only within six months after the act or omission that forms the subject of the *dispute*.

(3) At any time, the *CCMA* may permit a party who shows good cause to refer a *dispute* after the relevant time limit set out in subsection (2).

(4) The party who refers a *dispute* must satisfy the *CCMA* that--

- a. a copy of the referral has been *served* on every other party to the *dispute*; and
- b. the referring party has made a reasonable attempt to resolve the *dispute*.

(5) The *COMA* must attempt to resolve the *dispute* through conciliation.

(6) If the *dispute* remains unresolved after conciliation, any party to the *dispute* may request the *COMA* to resolve the *dispute* by arbitration.

(7) The relevant provisions of Part C of Chapter VII of the *Labour Relations Act*, with the changes required by context, apply in respect of a *dispute* in terms of this Chapter.

## CHAPTER IV

### COMMISSION FOR EMPLOYMENT EQUITY

#### **25. Establishment of Commission for Employment Equity**

The *Commission* for Employment Equity is established.

#### **26. Composition of Commission for Employment Equity**

(1 ) The *Commission* consists of a chairperson and eight other members appointed by the *Minister* to hold office on a part-time basis.

The members of the *Commission* must include

- a. two people nominated by those voting members of *NEDLAC* who represent organised labour;
- b. two people nominated by those voting members of *NEDLAC* who represent organised business;
- c. two people nominated by those voting members of *NEDLAC* who represent the State;
- d. a woman who represents the interests of women and is nominated by those voting members of *NEDLAC* who represent the organisations of community and development interests; and
- e. a person with disabilities, who represents the interests of *people with disabilities* and is nominated by those voting members of *NEDLAC* who represent the organisations of community and development interests.

(3) The Chairperson and the members of the *Commission*--

- a. must have experience and expertise relevant to the functions contemplated in section 27;
- b. must act impartially when performing any function of the *Commission*;
- c. may not engage in any activity that may undermine the integrity of the *Commission*; and
- d. must not participate in forming or communicating any advice on any matter in respect of which they have a direct financial interest or any other conflict of interest.

(4) The *Minister* must appoint a member of the *Commission* to act as chairperson whenever the office of chairperson is vacant.

(5) Whenever the chairperson is absent from the *Republic* or from duty, or for any other reason is temporarily unable to function as chairperson, the members of the *Commission* must choose from among themselves a person to act in the capacity of chairperson during the absence of the chairperson.

(6) The *Minister* may determine--

- a. the term of office for the chairperson and for each member of the *Commission*, but no member's term of office may exceed five years;
- b. in consultation with the Minister of Finance, the *remuneration* and allowances to be paid to members of the *Commission*; and
- c. any other conditions of appointment not provided for in this section. The chairperson and members of the *Commission* may resign by giving at least one month's written notice to the *Minister*.

(8) The *Minister* may remove the chairperson or a member of the *Commission* from office for--

- a. serious misconduct;
- b. permanent incapacity;
- c. that person's absence from three consecutive meetings of the *Commission* without the prior permission of the chairperson, except on good cause shown; or
- d. engaging in any activity that may undermine the integrity of the *Commission*.

## 27. Functions of Commission for Employment Equity

(1) The *Commission* advises the *Minister* on--

- a. *codes of good practice* issued by the *Minister* in terms of section 50;
- b. regulations made by the *Minister* in terms of section 51;
- c. policy and any other matter concerning *this Act*.

(2) In addition to the functions in subsection (1) the *Commission* may--

- a. make awards recognising achievements of employers in furthering the purpose of *this Act*,
- b. research and report to the *Minister* on any matter relating to the application of *this Act*, and
- c. perform any other *prescribed* function.

## 28. Staff and expenses

Subject to the laws governing the *public service*, the *Minister* must provide the *Commission* with the staff that the *Minister* considers necessary for the performance of its functions.

29. **Public hearings** In performing its functions, the *Commission* may--

- a. call for written representations from members of the public; and
- b. hold public hearings at which it may permit members of the public to make oral representations.

## 30. Report by Commission for Employment Equity

The *Commission* must prepare a written annual report to the *Minister*.

## CHAPTER V

## MONITORING, ENFORCEMENT AND LEGAL PROCEEDINGS

## PART A

## MONITORING AND ENFORCEMENT

**31. Monitoring by employees and trade union representatives**

Any *employee* or *trade union representative*, may bring an alleged contravention of *this Act* to the attention of any person, including--

- a. another *employee*;
- b. an employer;
- c. a trade union;
- d. a *workplace forum*;
- e. a labour inspector;
- f. the *Director-General*; or
- g. the *Commission*.

**32. Powers of labour inspectors**

A *labour inspector* acting in terms of *this Act* has the authority to enter, question and inspect as provided for in sections 64 and 65 of the *Basic Conditions of Employment Act*

**33. Undertaking to comply**

A *labour inspector* must request from a *designated employer* a written undertaking to comply within a specified period if the inspector has reasonable grounds to believe that the *employer* has failed to--

- a. consult with *employees* as required by section 13;
- b. conduct an analysis as required by section 16;
- c. prepare an employment equity plan as required by section 17;
- d. implement its employment equity plan;
- e. *submit en* annual report as required by section 18;
- f. publish its report as required by section 19;
- g. prepare a successive employment equity plan as required by section 20;
- h. assign responsibility to one or more senior managers as required by section 21;
- i. inform its *employees* as required by section 22;
- j. keep records as required by section 23; or
- k. comply with a request made by the *Director-General* in terms of section 39 (2).

**34. Compliance order**

(1) A *labour inspector* may issue a compliance order to a *designated employer* if--

- a. that employer has refused to give a written undertaking in terms of section 33, when requested to do so; or
- b. that employer has failed to comply with a written undertaking given in terms of section 33.

(2) A compliance order issued in terms of subsection (1 ) must set out the *prescribed* information, including--

- a. any steps that the employer must take and the period within which those steps must be taken; and
- b. the maximum fine that may be imposed on that employer in terms of Schedule 1 for failing to comply with the order.

(3) A *labour inspector* who issues a compliance order in terms of this section must serve a copy of that order on the *designated employer*.

(4) A *designated employer* who receives a compliance order *served* in terms of subsection (3) must--

- a. display a copy of that order prominently at each of its *workplaces*; and
- b. either--
  - i. comply with that order within the period stated in it; or
  - ii. object to that order in terms of section 35.

(5) If a *designated employer* does not comply with an order within the period stated in it, or does not object to that order in terms of section 35, the *Director-General* may apply to the Labour Court to make the compliance order an order of the Labour Court.

### **35. Objections to compliance order**

(1 ) Within 21 days after receiving a compliance order, a *designated employer* may object to that order by making written representations to the *Director-General*.

(2) At any time, the *Director-General* may permit a *designated employer* to object after the 21-day time limit has expired, if that employer shows good cause for failing to object within that time limit.

(3) The *Director-General*, after considering the *designated employer's* representations, the steps taken by the employer to ensure compliance with the relevant provisions of *this Act*, and any other relevant matter--

- a. may confirm, vary or cancel all or any part of the order to which the employer objected; and
- b. must specify the time period within which that employer must comply with any part of the order that is confirmed or varied.

(4) The *Director-General*, after making a decision in terms of subsection (3), and within 60 days after receiving the employer's representations, must *serve* a copy of that decision on that employer.

(5) A *designated employer* who receives an order of the *Director-General* must either--

- a. comply with that order within the time period stated in it; or
- b. appeal against that order to the Labour Court.

(6) If a *designated employer* does not comply with an order of the *Director-General*, or does not appeal against that order to the Labour Court, the *Director-General* may apply to the Labour Court for that order to be made an order of the Labour Court.

### 36. Appeal from compliance order

(1) Within 21 days after receiving a compliance order in terms of section 35 (4), a *designated employer* may appeal against that order to the Labour Court.

(2) At any time, the Labour Court may permit the *designated employer* to appeal after the 21 day time limit has expired, if that employer shows good cause for failing to appeal within that time limit.

(3) If an employer has appealed from an order of the *Director-General*, that order is suspended until the later of--

- a. the final determination of the appeal by the Labour Court; or
- b. the final determination of any appeal from the decision of the Labour Court in that matter.

### 37. Register of designated employers

(1) The *Minister* must keep a register of *designated employers* that have *submitted* the reports required by section 18.

(2) The register referred to in subsection (1) is a public document.

### 38. State contracts

(1) Every employer that makes an offer to conclude an agreement with any *organ of State* for the furnishing of supplies or services to that *organ of State* or for the hiring or letting of anything, must--

- a. if it is a *designated employer*, comply with Chapters II and III of *this act*; or
- b. if it is not a *designated employer*, comply with Chapter II (and the relevant provisions of Chapter III) of *this Act*.

(2) The employer referred to in subsection (1) may request a certificate from the *Minister* confirming its compliance with Chapter II, or Chapters II and III, as the case may be.

(3) A failure to comply with the relevant provisions of *this Act* is sufficient ground for rejection of any offer to conclude an agreement referred to in subsection (1) or for cancellation of the agreements [13](#)

### 39. Review by Director-General

(1) The *Director-General* may conduct a review to determine whether an employer is complying with *this Act*.

(2) In order to conduct the review the *Director-General* may--

- a. request an employer to *submit* to the *Director-General* a copy of its current analysis or employment equity plan;
- b. request an employer to *submit* to the *Director-General* any book, record, correspondence, document or information that the *Director-General* believes could reasonably be relevant to the review of the employer's compliance with *this act*;
- c. request a meeting with an employer to discuss its employment equity plan, the implementation of its plan and any matters related to its compliance with *this Act*; and
- d. request a meeting with any *employee, workplace forum* or *trade union* consulted in terms of section 13 or any other person who may have information relevant to the review.

#### 40. Assessment of compliance

In determining whether a *designated employer* is implementing employment equity in compliance with *this act*, the *Director-General*, in addition to the factors stated in section 12 [14](#), must take into account--

- a. the extent to which *people from designated groups* are equitably represented within each occupational category and level in that employer's workforce in relation to the --
  - i. national demographics;
  - ii. pool of *suitably qualified people* from *designated groups* from which the employer may reasonably be expected to appoint or promote *employees*;
  - iii. regional demographics;
  - iv. economic and financial factors relevant to the sector in which the employer operates; and
  - v. present and anticipated financial circumstances of the employer;
- f. progress made in implementing employment equity by other *designated employers* operating under comparable circumstances and within the same sector;
- g. reasonable efforts made by a *designated employer* to implement its employment equity plan;
- h. the extent to which the *designated employer* has made progress in eliminating employment barriers that adversely affect *people from designated groups*; and
- i. any other factor that may be prescribed.

#### 41. Outcome of Director-General's review

Subsequent to a review in terms of section 39, the *Director-General* may--

- a. approve a *designated employer's* employment equity plan; or
- b. make a recommendation to an employer, in writing, stating--
  - i. steps which the employer must take in connection with its employment equity plan or the implementation of that plan, or in relation to its compliance with any other provision of *this act*; and
  - ii. the period within which those steps must be taken; and
  - iii. any other *prescribed* information.

#### 42. Failure to comply with Director-General's recommendation

(1) If an employer fails to comply with a recommendation made by the *Director-General* in terms of section 41 (b) the *Director-General* may refer the employer's non-compliance to the Labour Court.

## **PART B**

### **LEGAL PROCEEDINGS**

#### **43. Conflict of proceedings**

(1) If a *dispute* has been referred to the *CCMA* by a party in terms of Chapter II or III, and the issue to which the *dispute* relates also forms the subject of a referral to the Labour Court in terms of section 42, the *CCMA* proceedings must be stayed until the Labour Court makes a decision on the referral in terms of section 42.

(2) If a *dispute* has been referred by **any party** in terms of Chapter II or III against at, employer being reviewed by **the *Director-General*** in terms of section 39, the *dispute* may not be conciliated or adjudicated until the review has been completed and the employer has been informed of the outcome.

#### **44. Consolidation of proceedings**

*Disputes* concerning contraventions of *this Act* by the same employer may be consolidated.

#### **45. Powers of commissioner in arbitration proceeding**

In any arbitration proceedings in terms of *this Act*, a commissioner of the *CCMA* may make any appropriate arbitration award that gives effect to a provision of *this Act*.

#### **46. Jurisdiction of Labour Court**

The Labour Court has exclusive jurisdiction to determine any *dispute* about the interpretation or application of *this Act*, except where *this Act* provides otherwise.

#### **47. Powers of Labour Court**

(1) Except where *this Act* provides otherwise, the Labour Court may make any appropriate order or request, including--

- a. on application by the *Director-General* in terms of section 34 (5) or 35 (6) making a compliance order an order of the Labour Court;
- b. subject to the provisions of *this Act*, condoning the late filing of any document with, or the late referral of any *dispute* to the Labour Court;
- c. requesting the *CCMA* to conduct an investigation to assist the Court and to *submit* a report to the Court;
- d. awarding compensation in any circumstances contemplated in *this Act*;
- e. awarding damages in any circumstances contemplated in *this Act*;
- f. ordering compliance with any provision of *this Act*;
- g. imposing a fine in accordance with Schedule 1 for a contravention of certain provisions

of *this Act*;

- h. reviewing the performance or purported performance of any function provided for in *this Act* or any act or omission of any person or body in terms of *this Act* on any grounds that are permissible in law; and
- i. dealing with any matter necessary or incidental to performing its functions in terms of *this Act*.

(2) If the Labour Court decides that an employer has unfairly discriminated against any *employee*, the Court may make any appropriate order including--

- a. payment of compensation that is just and equitable in all the circumstances, by the employer to that *employee*;
- b. payment of punitive damages by the employer;
- c. an order directing the employer to take steps to prevent the same unfair discrimination or a similar practice occurring in the future in respect of other *employees*;
- d. an order directing an employer, other than a *designated employer*, to comply with Chapter 111 as if it were a *designated employer*;
- e. an order directing the removal of the employer's name from the register referred to in section 37; or
- f. the publication of the Court's order.

(3) If the Labour Court decides that an employer, in dismissing an *employee*, unfairly discriminated against that *employee*, the Court may make any order that it considers appropriate in the circumstances, but the Court--

- a. must order the employer to reinstate the *employee* from any date not earlier than the date of *dismissal* unless the circumstances surrounding the *dismissal* are such that a continued employment relationship would be intolerable; or
- b. if the circumstances contemplated in subsection (3) (a) apply, must order the employer to pay--
  - i. compensation to that *employee* that is just and equitable in all the circumstances and is in addition to, and not a substitute for, any other amount to which the *employee is* entitled in terms of any law, *collective agreement* or contract of employment; or
  - ii. punitive damages.

The Labour Court, in making any order, may take into account any delay on the part of the party who seeks relief in processing the *dispute* in terms of *this Act*.

If the Labour Court declares that the medical *testing* of an *employee* as contemplated in section 5 (4) is justifiable, the court may make any order that it considers appropriate in the circumstances, including imposing conditions relating to--

- a. the provision of counselling;
- b. the maintenance of confidentiality;
- c. the period during which the authorisation for any *testing* applies; and
- d. the category or categories of jobs or *employees* in respect of which the authorisation for *testing* applies.

## PROTECTION OF EMPLOYEE RIGHTS

### 48. Protection of employee rights

(1) No person may discriminate against an *employee* who exercises any right conferred by *this Act*.

(2) Without limiting the general protection conferred by subsection (1), no person may threaten to do, or do any of the following--

- a. prevent an *employee* from exercising any right conferred by *this Act* or from participating in any proceedings in terms of *this Act*; and
- b. prejudice an *employee* because of past, present or anticipated--
  - i. disclosure of information that the *employee is* lawfully entitled or required to give to another person;
  - ii. exercise of any right conferred by *this Act*; or
  - iii. participation in any proceedings in terms of *this Act*.

(3) No person may advantage, or promise to advantage, an *employee* in exchange for that *employee* not exercising any right conferred by *this Act* or not participating in any proceedings in terms of *this Act*.

(4) Nothing in this section precludes the parties to a *dispute* arising out of an alleged breach of any right conferred by this Part, from concluding an agreement to settle the *dispute*.

(5) For the purposes of this section *employee*" includes a former *employee* or an applicant for employment.

### 49. Procedure for disputes

(1) If there is a *dispute* about the interpretation or application of this Part, any party to the *dispute* may refer it in writing to the *CCMA*.

(2) The *CCMA* must attempt to resolve a *dispute* referred to it in terms of this Part through conciliation.

(3) If the *dispute* remains unresolved after conciliation--

- a. any party to the *dispute* may refer it to the Labour Court for adjudication; or
- b. all the parties to the *dispute* may consent to arbitration of the *dispute* by the *CCMA*.

(4) In respect of a *dispute* in terms of this Part, the relevant provisions of Part C and D of Chapter VII of the *Labour Relations Act* apply, read with the changes required by the context.

## CHAPTER VI

### GENERAL PROVISIONS

## 50. Codes of good practice

(1) The *Minister*, after consultation with the *Commission*, may--

- a. issue any *code of good practice*; <sup>15</sup> and
- b. change or replace any *code of good practice*.

(2) Any *code of good practice*, or any change to, or replacement of, a *code of good practice* must be published in the *Gazette*.

## 51. Regulations

The *Minister*, may, by notice in the *Gazette*, make any regulation consistent with *this Act* regarding--

- a. any matter that *this Act* requires or permits to be *prescribed*; and
- b. any administrative or procedural matters that may be necessary or expedient to achieve the proper and effective administration of *this Act*.

## 52. Minister empowered to add to and change Schedules

The *Minister*, may, by notice in the *Gazette*, at any time add to, change or replace any Schedule to *this Act*.

## 53. Delegations

(1) The *Minister* may delegate any power conferred, or duty imposed, upon the *Minister* in terms of *this Act*, except the powers and duties contemplated in sections 26 (1), 26 (4), 26 (6), 26 (7), 50, 51, 52, 55 (4) and 57 (4).

(2) A delegation must be in writing and may be subject to any conditions or restrictions determined by the *Minister*.

(3) The *Minister* may at any time--

- a. withdraw a delegation made in terms of subsection (1); and
- b. withdraw or amend any decision made by a person exercising a power of performing a duty delegated in terms of subsection (1).

## 54. Designation of Organs of State

Within six months after the commencement of *this Act*, the President, after consultation with the Minister responsible for the Public Service and Administration, must publish a notice in the *Gazette* listing every *designated employer* within any *organ of State*.

## 55. Breach of confidence

(1) Any person who discloses any confidential information acquired in the performance of a function in terms of *this Act*, commits an offence.

(2) Subsection (1) does not apply if the information--

- a. is disclosed to enable a person to perform a function in terms of *this Act*; or
- b. must be disclosed in terms of *this Act*, any other law or an order of court.

(3) A person convicted of an offence in terms of this section may be sentenced to a fine not exceeding R10 000.

(4) The *Minister*, in consultation with the Minister of Justice and by notice in the *Gazette*, may amend the maximum amount of the fine referred to in subsection (3)

## **56. Liability of employers**

(1) If it is proved that an *employee*, while at work, contravened a provision of *this Act*, or engaged in any conduct that, if engaged in by that *employee's* employer, would constitute a contravention of a provision of *this Act*, both the *employee* and the employer must be taken to have contravened the provision.

(2) Despite subsection (1), an employer is not liable for the conduct of an *employee* if that employer is able to prove that it did all that was reasonably practicable to ensure that the *employee* would not act in contravention of *this Act*.

## **57. Obstruction, undue influence and fraud**

(1) No person may--

- a. hinder, oppose, obstruct or attempt to improperly influence any person who is exercising a power or performing a function in terms of *this Act*; and
- b. knowingly give false information in any document or information provided to the *Director-General* or a *labour inspector* in terms of *this Act*.

(2) No employer may knowingly take any measure to avoid becoming a *designated employer*.

(3) Any person who contravenes a provision of this section commits an offence and may be sentenced to a fine not exceeding R10 000.

(4) The *Minister*, in consultation with the Minister of Justice and by notice in the *Gazette*, may amend the maximum amount of the fine referred to in subsection(3)

## **58. This Act binds the State**

This Act binds the State.

## **59. Application of Act when in conflict with other laws**

If any conflict relating to a matter dealt with in *this Act* arises between *this Act* and the provisions of any other law other than the *Constitution* or an Act expressly amending *this Act*, the provisions of *this Act* prevail.

## **60. Repeal of laws and transitional arrangements**

Each of the laws referred to in the first two columns of Schedule 3 is repealed to the extent specified opposite that law in the third column of that Schedule.

## 61. Definitions

In *this act*, unless the context otherwise indicates--

**"bargaining council"** means a *bargaining council* registered in terms of the *Labour Relations Act* and includes, in relation to the public service, the bargaining councils referred to in section 35 of the *Labour Relations Act*.

**"Basic Conditions of Employment Act"** means the Basic Conditions of Employment Act, 1997;

**"black people"** is a generic term which means Africans, Coloureds and Indians.

**"CCMA"** means the Commission for Conciliation, Mediation and Arbitration established by section 112 of the *Labour Relations Act*;

**"code of good practice"** means a document issued by the *Minister* in terms of section 50;

**"collective agreement"** means a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more *registered trade unions*, on the one hand and, on the other hand--

- a. one or more employers;
- b. one or more *registered employers' organisations*; or
- c. one or more employers and one or more *registered employers' organisations*;

**"Commission"** means the *Commission* established in terms of section 25;

**"Council"** means a *bargaining council* and a *statutory council*;

**"Constitution"** means the Constitution of the Republic of South Africa, 1996 (Act No. 188 of 1996);

**"Director-General"** means the Director-General: Labour;

**"designated employer"** means--

- a. a person who employs 50 or more *employees*; <sup>16</sup>
- b. a person who employs less than 50 *employees* but has notified the *Director-General* in terms of section 11 that it intends to comply with Chapter 111;
- c. municipalities, as referred to in Chapter 7 of the *Constitution*; and
- d. an *organ of State* as defined in section 239 of the *Constitution*, but excluding local spheres of government, and excluding the National Defence Force, the National Intelligence Agency and the South African Secret Service;

**"dismissal"** has the meaning assigned in section 186 of the *Labour Relations Act*;

**"dispute"** includes an alleged *dispute*;

**"employee"** means any person other than an independent contractor--

- a. who works for another person or for the State and who receives, or is entitled to receive, any *remuneration*; or
- b. who in any manner assists in carrying on or conducting the business of an employer,

and Employed" and "employment" have meanings corresponding to that of *employee*;

**"employment law"** means any provision of *this Act* or any of the following Acts:

- a. *Labour Relations Act*, 1995 (Act No. 66 of 1995);
- b. Unemployment Insurance Act, 1996 (Act No. 30 of 1996);
- c. Manpower Training Act, 1981 (Act No. 56 of 1981);
- d. Guidance and Placement Act, 1981 (Act No. 62 of 1981);
- e. Compensation for Occupational Injuries and Diseases Act, 1993 (Act No. 130 of 1993);
- f. Occupational Health and Safety Act, 1993 (Act No. 85 of 1993);
- g. *Basic Conditions of Employment Act*, 1997;
- h. any other Act, the administration of which has been assigned to the *Minister*,

**"employment policy or practice"** includes, but is not limited to--

- a. recruitment procedures, advertising and selection criteria;
- b. appointments and the appointment process;
- c. job classification and grading;
- d. *remuneration*, employment benefits and terms and conditions of employment;
- e. job assignments;
- f. the working environment and facilities;
- g. training and development; (h) performance evaluation systems; (l) promotion; (o) transfer; (k) demotion; (l) disciplinary measures short of *dismissal*; and (m) *dismissal*;

**"family responsibility"** means the responsibility of *employees* in relation to their dependent children, or in relation to other members of their immediate family who need their care or support;

**"labour inspector"** means a person appointed in terms of section 65 of the *Basic Conditions of Employment Act*, 1997;

**"Labour Relations Act"** means the Labour Relations Act, 1995 (Act No. 66 of 1995);

**"Minister"** means the Minister of Labour;

**"NEDLAC"** means the National Economic, Development and Labour Council **established by section 2** of the National Economic, Development and Labour Council Act, 1994 (Act No. 35 of 1994);

**"organ of State"** means an organ of State as defined in section 239 of the *Constitution*;

**"people from designated groups"** or **"designated groups"** means *black people*, women and *people with disabilities*;

**"people with disabilities"** means people who have a long term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment;

**"public service"** means the public service referred to in section 1 (1) of the Public Service Act, 1994 (promulgated by Proclamation No. 103 of 1994), and includes any organisational component contemplated in section 7 (4) of that Act, and specified in the first column of Schedule 2 to that Act, but excluding--

- a. the members of the National Defence Force;
- b. the National Intelligence Agency; and
- c. the South African Secret Service;

**"pregnancy"** includes any medical circumstances related to *pregnancy*;

**"prescribed"** means established by a regulation made in terms of section 51;

**"reasonable accommodation"** means any modification or adjustment to a job or to the working environment that will enable a person with a disability to have access to, participate or advance in employment;

**"registered employers' organisation"** means an employers' organisation as defined in section 213 of the *Labour Relations Act* and registered in terms of section 96 of that Act;

**"registered trade union"** means a trade union as defined in section 213 of the *Labour Relations Act* and registered in terms of section 96 of that Act;

**"remuneration"** means any payment in money or in kind, or both in money and in kind, made or owing to any person in return for that person working for any other person, including the State;

**"Republic"** means the Republic of South Africa as defined in the *Constitution*;

**"serve" or "submit"** in relation to any communication, means either--

- a. to send it in writing delivered by hand or registered post; or
- b. to transmit it using any electronic mechanism as a result of which the recipient is capable of printing the communication;

**"statutory council"** means a council established in terms of Part E of Chapter 111 of the *Labour Relations Act*;

**"suitably qualified person"** means a person who has the abilities, formal qualifications or relevant experience necessary to perform a particular job;

**"testing"** includes any test, question, inquiry or other means designed to ascertain, or which has the effect of enabling the employer to ascertain, whether an *employee* has any medical condition;

**"this Act"** includes any regulations made in terms of section 51, but does not include Schedule 2;

**"trade union representative"** means a member of a *registered trade union* who is elected to represent *employees* in a *workplace*;

**"workplace"** means a place where *employees* work; and

"workplace forum" means a workplace forum established in terms of Chapter V of the *Labour Relations Act*.

## 62. Short title and commencement

(1) This Act is called the Employment Equity Act, 1997.

(2) *This Act* takes effect on a date to be determined by the President by proclamation in the *Gazette*. The President may determine different dates in respect of different provisions of *this Act*.

(3) If, in terms of subsection (2), different dates are determined for particular provisions of *this Act*--

- a. Schedule 3 must take effect at the same time as section 5 (1 ) takes effect; and
- b. a reference in a provision of *this Act* to a time when this Act took effect must be construed as a reference to the time when that provision takes effect.

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## FOOTNOTES

1: Italicized words or phrases are defined in section 61.

2: These persons are not defined as "employees" under the Labour Relations Act. However, they could bring unfair discrimination matters before the Constitutional Court, or lodge complaints with the Human Rights Commission.

3: A Code of Practice will be issued defining the various forms of workplace harassment, in particular, racial and sexual harassment.

4: See flow diagram 1 in Schedule 2.

5: Section 5 (1) lists the following as prohibited grounds of discrimination:

"race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language and birth"

6: Section 86 (1 ) © of the Labour Relations Act, should be amended as follows:

"an employment equity plan as contemplated in section 17 of the Employment Equity Act, 1 997. Section 84 (1 ) of the Labour Relations Act, should be amended by the addition of subsection (e) as follows: ~(e) any matter referred to in section 14 of the Employment Equity Act, 1997".

7: Section 16 of the LRA contains detailed provisions about disclosure of information, and disputes concerning disclosure.

8: The Minister will issue Regulations concerning the conduct of an analysis. However, the employment policies and practices defined in section 61 are an indication of the potential areas of both direct and indirect discrimination that should be subject to analysis.

9: Guidelines regarding the factors to be taken into account in determining numerical goals will be included in a Code of Good Practice. However, the factors listed in section 40 (Director-General's assessment of compliance) are relevant to setting numerical goals in each organisation.

10: For instance, the first report will relate to the initial development of and consultation around an employment equity plan. The subsequent reports will detail the progress made in implementation of the employment equity plan.

11: The Minister will issue regulations containing a standard notice, in all official languages

12: See Flow Diagram in Schedule 2.

13: The State Tender Board Act, No. 86 of 1968 should be amended by the insertion of a new paragraph before paragraph (h) as follows:

"(h) require an employer that is a designated employer under the Employment Equity Act, 1997, to submit to the Board a certificate issued by the Minister pursuant to section 38 of the Employment Equity Act, as a condition of eligibility for entering into any agreement referred to in paragraph (a);"

14: Section 12 states that positive measures must include measures to eliminate employment barriers; diversity measures; reasonable accommodation; affirmative action measures and training and development.

15: This is an enabling Act. The codes of good practice are intended to provide employers with information that may assist them in implementing this Act, particularly Chapter Iilt Issues that are likely to be the subject of codes include the following:

The preparation of employment equity plans;  
advertising, recruitment procedures and selection criteria;  
special measures to be taken in relation to persons with disabilities including benefit schemes;  
special measures to be taken in relation to persons with family responsibilities;  
sexual harassment and racial harassment;  
internal procedures to resolve disputes about the interpretation or application of this Act; and  
sector-specific issues.

16: Regulations will be issued prescribing the manner of calculating the number of employees employed by a designated employer for the purpose of determining when the employer is considered to employ 50 or more employees.

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## SCHEDULE 1

### MAXIMUM PERMISSIBLE FINES THAT MAY BE IMPOSED FOR CONTRAVENING THIS ACT

This Schedule sets out the maximum fine that may be imposed in terms of *this Act* for the contravention of certain provisions of *this Act*.

PREVIOUS CONTRAVENTION	CONTRAVENTION OF ANY PROVISION OF SECTIONS 13, 14, 16, 17, 18, 19, 20, 21, 22, 23 AND 39 (2)
No previous contravention	R500 000
A previous contravention in respect of the same provision	R600 000
A previous contravention within the previous 12 months or two previous contraventions in respect of the same provision within three years	R700 000
Three previous contraventions in respect of the same provision within three years	R800 000
Four previous contraventions in respect of the same provision within three	R900 000

## SCHEDULE 2

### DISPUTE RESOLUTION: FLOW DIAGRAMS

This Schedule contains flow diagrams that provide guidelines to the procedures for the resolution of some of the more important *disputes* that may arise under *this Act*. This Schedule is not part of *this Act*. It does not have the force of law. The flow diagrams are intended only to provide assistance to those parties who may become involved in a *dispute*.

The flow diagrams do not indicate the rights that parties may have to seek urgent relief, nor do they indicate the right of review or appeal that parties have to the Labour Court, the Labour Appeal Court or the Constitutional Court in certain cases. *This Act* sets out the circumstances in which these rights may be exercised.

## SCHEDULE 3

### LAWS REPEALED

Number and year of	Short title	Extent of repeal
Act No. 66 of 1995	Labour Relations Act, 1995	Section 187 (1) (e) and (f) and (2) Item 2 (1) (a), (2) and (4) (a) of Schedule 7

## SCHEDULE 4

### TRANSITIONAL ARRANGEMENTS

#### DISPUTES ARISING BEFORE COMMENCEMENT OF THIS ACT

##### 1. Definitions

In this Schedule, unless the context indicates otherwise

**"pending"** means existing immediately before *this Act* came into operation; and

**"Repealed provisions of the Labour Relations Act"** means the provisions of the *Labour Relations Act* repealed in terms of Schedule 3.

##### 2. Disputes arising before commencement of this Act

Any *dispute* contemplated in section 187 (1) (e) or (f) or item (2) (1) (a) of Schedule 7 of the *Labour Relations Act* that arose before the commencement of *this Act*, must be dealt with as if the repealed provisions of the *Labour Relations Act* had not been repealed.

##### 3. Courts

(1) In any pending *dispute* contemplated in section 187 (1) (e) or (f) or item (2) (1) (a) of Schedule 7 of the *Labour Relations Act* in respect of which the Labour Court or the Labour Appeal Court had jurisdiction and in respect of which proceedings had not been instituted before the commencement of *this Act*, proceedings must be instituted in the Labour Court or Labour Appeal Court (as the case may be) and dealt with as if the repealed provisions of the *Labour Relations Act* had not been repealed.

(2) Any *dispute* contemplated in section 187 (1) (e) or (f) or item (2) (1) (a) of Schedule 7 of the *Labour Relations Act* in respect of which proceedings were pending in the Labour Court or Labour Appeal Court must be proceeded with as if the repealed provisions of the *Labour Relations Act* had not been repealed.

(3) Any pending appeal before the Labour Appeal Court must be dealt with by the Labour Appeal Court as if the repealed provisions of the *Labour Relations Act* had not been repealed.

(4) When acting in terms of subsections (1 ) to (3), the Labour Court or Labour Appeal Court may perform or exercise any function or power that it had in terms of the repealed provisions of the *Labour Relations Act*.