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Employment Services Bill

Submission by the Free Market Foundation
17 February 2011

This submission is in two sections, the first of which deals with general principles of law and economics and the second of which deals with specific proposals.

1. General Principles

The discourse on labour law and policy tends to focus on details at the expense of basic truths. Arguably, the only "law" of economics that is incontestable is that "there ain't no such thing as a free lunch" (TANSTAAFL). The implication of this law is of critical importance in South Africa since it is seldom acknowledged, especially in the context of labour. An inescapable fact is that all benefits have costs and that the benefit of improved working conditions, wages and job security is achieved by having fewer jobs, less investment, lower growth, substitution of technology for labour, and worse conditions for all non-formal employment. President Zuma has declared job creation as the leading national priority. Economic theory and the world's experience suggest that all the jobs he envisages can be created with relative ease and certainty. The challenge is not how to increase employment, but whether the government is willing politically to implement measures that will do so.

The measures necessary to increase employment are mercifully straightforward yet lamentably difficult to achieve politically. Laws and policies that increase the cost, risk and difficulty of employing people, as the proposed measures do, necessarily have benefits for a privileged few at the expense of the unemployed and prosperity in general.

Given the priority of job creation, our proposal is that the existing measures should not be considered for implementation in isolation, but that the government should undertake a comprehensive review of laws and policies, and retain only those that will reduce unemployment immediately and improve working conditions, incomes and job security by virtue of increased demand for labour rather than draconian legislation.

Increased demand for labour, namely conditions that promote capital formation, skills, and the desire for hiring more employees, is the only sustainable means of achieving two otherwise irreconcilable objectives: more jobs and improved working conditions. In a static or low growth economy, one of these can be achieved only at the expense of the other and both can be achieved only under conditions of economic prosperity.

It is therefore recommended that the envisaged measures not be proceeded with. Instead they should be included in a comprehensive response to the President's call for "jobs, jobs, jobs". It is recommended that the government include in such a comprehensive policy review, not only all existing and proposed labour law and policy, but all other measures that are of direct relevance. Such other measures include the proposal repeated by the President in his two State of the Nation addresses, by Minister Ebrahim Patel and others, that there should be a review of laws and policies impacting small business so that it is easier for small business to operate and prosper in general and so that small businesses create more jobs in particular. Comprehensive review of measures to increase employment should consider all disincentives to savings and investment, both by local and foreign investors.

There are two broad categories of policy available to government if it wants to create jobs. The first is to discontinue measures that discourage and penalise employment, and the second is to implement new measures that encourage and reward employment, including self-employment.

There are various provisions in this Bill on which no comment is made because they are regarded as positive or of no significant consequence. Comment has been confined to issues of concern.

2. Employment Services Bill

The Employment Services Bill is a compromise between the call for outright prohibition of labour broking and the accommodation of labour broking in existing labour law. There is a flawed tendency to regard compromises of this kind as "the golden mean", the "best of all worlds", and so on. The assumption is that neither of two juxtaposed options is ideal and that something supposedly between the two is preferable. Compromises are more commonly the lesser of two evils rather than a virtue. The lesser of evils is evil albeit less so.

Another fatal flaw in policy analysis tends to be the assumption that there are two juxtaposed options. This is seldom true. More commonly, as in this case, there is a range of plausible options. Existing laws governing labour broking could be scrapped so that labour broking will be governed by the common law of contract. If there is to be an assumption of juxtaposition, that option should be considered as the alternative to the status quo rather than prohibition. If compromise is sought, it could be between liberalisation and existing regulation.

There are, of course, many other alternatives. The practise being considered for introduction in South Africa of Regulatory Impact Assessments (RIAs) in other jurisdictions, such as the UK, requires, for instance, that four alternatives be considered, one of which must be the extent to which the problem can be addressed by repealing or relaxing existing laws and three of which will be alternatives. RIAs in the UK must include an explanation of why the preferred choice of four is recommended.

The RIAs undertaken in respect of the proposed measures are welcome, but fall far short of the state-of-the-art. They do not, for instance, start by quantifying the problem which is to be solved, the extent to which the problem is expected to be ameliorated or substantial indirect costs such as compliance and enforcement costs. Most fundamentally, RIAs should not be undertaken be a department or agency

proposing reform. They should be out-sourced or conducted by a separate government structure or, at least, subject to screening and approval by such a structure.

The principal problem with this Bill is that it imposes costs that are unlikely to be matched by benefits especially not for society's most vulnerable, namely the unemployed, unskilled and small businesses. The measure makes it more difficult, costly and risky to employ people and will therefore unavoidably have the opposite effect to the increased employment that the President has declared to be our national priority.

Clause 5 provides for the Department of Labour to establish a massive bureaucratic empire that would be costly and unwieldy. It would place an obstacle between work-seekers and employers. It would impose enormous costs on the fiscus and on the economy as a whole. We point out that the department is presently free to provide such services, but the question has to be asked why it has not done so. The clause makes it mandatory.

In contrast, **sub-clause (2)** is a superfluous provision declaring that the department "may" provide additional services. It is presently free to do so, and the provision serves no purpose.

The same is true of **Clause 6**, which again is a statement of the obvious except that it refers to the "Minister" as opposed to the "department".

The clause envisages that the Minister may "establish work schemes" on conditions less onerous than those applicable to other employment. With respect, it makes no sense to suggest that it is desirable for the Minister to employ intended beneficiaries under such conditions, but not for others to do so.

The implementation of this measure will not be a law of general application equally applicable to all as required by the Constitution and may therefore be unconstitutional.

If it is desirable to employ people under conditions envisaged by the provision, it is desirable for all to create such employment and precisely the same conditions as envisaged for the private sector should apply to government departments and agencies.

Clause 7 also envisages special conditions of employment for people with disabilities. We assume that the drafters mean "people" as opposed to "persons", since "persons" includes juristic and fictitious *personae* such as companies, co-ops, clubs or churches. Disabled though they might be, we assume it is not intended to create jobs for them (companies, etc).

As we have observed regarding Clause 6, it should be clear that something desirable when done by government is also desirable for precisely the same reasons when done privately apart from the fact that it is a constitutional imperative.

Clause 8 is short but has potentially dramatic implications. Unless it is clearly confined to the protection of threatened jobs, it should be scrapped (or suspended pending the comprehensive review suggested above) since it envisages the Department of Labour doing things for which it is conspicuously unsuited and which are in any event the responsibility of other government departments such as the DTI under Company law and the Department of Finance. To empower the labour Minister to "respond to economic recession" and to regulate "turn around strategies" is an extraordinary and inappropriate concept.

Clause 9 is a xenophobic measure inappropriate in official government policy and in direct conflict with efforts by the government to combat xenophobia including prominent notices in all police stations. The clause envisages costly red tape and delays of the kind the President said need to be critically reviewed

and scrapped in order to promote small business on one hand, and employment on the other. This measure has nothing to do with illegal immigrants for which there are adequate provision in other laws and other government departments. It applies to foreigners who are lawfully resident in South Africa. On grounds of common sense and natural justice they should enjoy the same rights and opportunities as South Africans. This is particularly true if South Africa wants to be considered a credible and competitive participant in the world economy and a member of BRICSA. In a globalised world, the tendency is towards making it easier not more difficult for skills to be mobile. The clause envisages bureaucratic screening of an employer's motives for wanting to employ a foreigner or a local. There is no need for such screening. Apart from the waste of time and money involved, it is obviously in the self-interest of employers to apply appropriate weight to all relevant factors. Only employers are in a position to consider such matters rationally.

Clause 10 envisages additional, needless and extremely costly red tape, which will have the direct result of reducing employment and increasing delays. There is no stated objective. In the absence of clarity in the legislation regarding the purpose of this enormous burden on the economy, it fails the "rationality" test found by the Constitutional Court to be a requirement of the rule of law and therefore constitutionality. There must according to the Constitutional Court be a rational connection between a law and its objective. If the objective is not known, there can obviously be no rational connection. That the objective can be implied by reference to, for instance, Clause 5, is insufficient.

One of our biggest concerns with recent tendencies in legislation is for direct and indirect costs to be ignored. Measures that are likely to have little or no benefit – or even be counter-productive – are implemented regardless of administration, compliance and enforcement costs.

Clause 14 envisages the Minister prescribing criteria for employment agencies. The first section of South Africa's constitution has its foundational provisions, one of which is the rule of law, which has been declared by the Constitutional Court to be binding and justiciable. A component of the rule of law is that there must be a separation of powers, which means that the legislature should legislate, the executive execute and the judiciary adjudicate. Another requirement is that there should not be discretionary power (the rule of man as opposed to the rule of law), and that where, for good reason, there is discretionary power, it should be accompanied by (1) the purpose for which power is created (clearly stated objective) and (2) objective criteria that are universally applicable, known in advance and not retroactive.

What this means for Clause 14 is that the legislature rather than the Minister should be determining criteria and objectives.

The more fundamental question is what the purpose of such registration would be. Again there appears to be needless and costly red tape. All the government needs do is provide for law according to which employment agencies operate regardless of whether or not they are registered. Laws governing supermarkets, for instance, do not require them to be registered, but provide in great detail for such issues as safety, labelling, and guarantees. The new Consumer Protection Act has extensive controls without the need for registration.

Clause 15 is confusing and to some extent superfluous. Though this might not be the intention it has the effect of preventing an employment agency from engaging in any other kind of business which may be unrelated to its activity as an employment agency, such as running a canteen for its employees, providing secretarial services, or letting part of its premises to tenants. One of the curious provisions is the prohibition on providing false information. Doing so would in any event be fraud and in most cases breach of contract. Including such measures in legislation plunges South African jurisprudence into needless confusion and uncertainty. A requirement of South Africa law is that our courts have to assume

parliament does not waste its time by passing superfluous laws. South Africa law assumes that parliament intended changing the law and the questions with such measures – there are others in the Bill – is what change is intended; what are the courts to assume has changed? Is this a new kind of fraud or breach of contract? Legislation that does not envisage change should leave good law alone.

Clause 16 envisages a counterproductive denial of rights not so much to employment agencies as to work-seekers. The measure would disempowers work-seekers and erode their rights and opportunities.

Clause 20 is another example of a departure from the constitutional requirement of a separation of powers. There has been a systematic erosion of the judiciary in South Africa by the transfer of judicial functions from the judiciary to the executive. There has also been an erosion of the right of appeal by replacing it with the limited and usually ineffective right of review. Clause 20 should be replaced by an unambiguous right of appeal on the merits to a court within the judiciary. There are all sorts of reasons why courts within the judiciary are preferable. They are truly independent, presiding officers have tenure, they are physically set up to function as courts, they follow judicial due process, etc.

The creation of the Employment Services Board under **Chapter 4** is an additional cost with potentially inadequate benefits to justify it. Productivity South Africa to be established under **Chapter 5** is another costly entity. It is as if the solution to problems facing the country is considered to be the establishment of limitless numbers of costly government entities and empires whereas the opposite is true. Every rand spent and every hour of expertise allocated to such entities has to be taken out of the productive sector of the economy. In the process, jobs and skills are lost, not gained. The world's experience provides ample proof that such entities do not achieve their objectives and that all that is required for employment, growth and productivity is the adoption and implementation of proven policies. It is possible, of course, that Productivity South Africa will contribute something effective to policy formulation, but it is extremely unlikely especially within the Department of Labour. This measure like others in the four bills under consideration envisages the Department of Labour performing policy functions for which it has no mandate or obvious competence. The sort of comprehensive review envisaged is strongly recommended but should be undertaken as an inter-departmental exercise within the presidency. South Africa already has entire government departments with senior ministers in various structures within the presidency and elsewhere intended to perform the functions envisaged for Productivity South Africa. The more appropriate approach is for such functions to be performed by existing structures more suited to the task and not the endless creation of new and costly bodies working at cross purposes with each other under sub-optimal conditions.

Clause 35 is, as explained above, another section that envisages repetition of existing law that will create needless legal uncertainty. It too repeats the existing prohibition on fraud under common law.

Clause 37 envisages people to whom powers are granted delegating those powers. Another jurisprudentially dubious practice that has crept into South Africa law is the delegation of powers and functions, starting with the legislature delegating legislative powers to the executive. There is a long-established principle in jurisprudence that delegated powers should not, for good reason, themselves be delegated. The legislature should decide who the appropriate person is to exercise powers and functions and that is where the matter should rest. Such people are free to seek assistance and advice but should not be allowed to divest themselves of responsibility of national importance with which they are entrusted.

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