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Employment Equity Act (EEA)

Submission by the Free Market Foundation
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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 Equity Act (EEA)

Clause 2.2 (definitions): Blatantly discriminatory provisions of this kind are widely presumed to be lawful despite the unambiguous prohibition on discrimination in the Constitution. They are presumed to be rendered lawful by Sub-section (2) of Section 9 of the Equality Clause in the Bill of Rights: "… To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken." Various experts have expressed the view that this exemption to the prohibition on discrimination is much more limited than generally presumed. This has not, as far as we know, been tested in courts, but the literal meaning of the words suggest that such expert opinion may be correct.

The following should be noted:

1. The Founding Provisions of the Constitution (Chapter 1) are simple and unambiguous. They include the following: "The Republic of South Africa is … founded on the following values: (a)… (b) non-racialism and non-sexism (c) supremacy of the constitution and the rule of law (d) …". A plausible interpretation of the foundational provisions of the Constitution is that since they are the basis on which the country is founded, anything inconsistent with them, conceivably even clauses in the subsequent chapters of the Constitution, are unconstitutional.

   This could render the exception under 9(2) unconstitutional. Assuming it to be constitutional, which will probably be the finding of the Constitutional Court, the foundational provision will, at the very least, mean that it must be strictly interpreted (see below).

2. Additional provisions that speak to constitutional "values" include:

a. The Citizenship section (3), the relevant part of which provides that all citizens are "equally entitled to the rights, privileges and benefits of citizenship".

b. The limitation clause (36), the relevant parts of which provide that "… rights in the Bill of Rights may be limited only in terms of the law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on … equality and freedom …".

   It is instructive that the limitation clause, despite the context in which it was drafted, makes no reference to the promotion of racial or other forms of equality. Racial discrimination is clearly inconsistent with "an open and democratic society" based on *inter alia* "equality". Statutory discrimination is also obviously inconsistent with a "law of general application", that is a law equally applicable to all.

From these and other provisions in the Constitution it is clear that any form of discrimination is likely to be unconstitutional unless there is unambiguous provision for it. To what extent does section 9(2) permit such discrimination? Notwithstanding explicit provision in the Interim Constitution for discrimination in favour of historically disadvantaged groups and notwithstanding the context in which this Constitution was negotiated, the wording of 9(2) is much more limiting than is generally supposed and it remains to be seen how the Constitutional Court will interpret it in due course.

Meanwhile the following should be noted:

- "Equality" is defined as the "… equal enjoyment of all rights and freedoms". In other words, equality is equality of rights, not circumstances, or stated in jurisprudential terms, "equality at law" and not equality of what economists call "outcomes".

- In the context of equality meaning "equality at law", the clause goes on to allow exceptions to "promote the achievement of equality". Regardless of what the word equality means here, what the section allows is "legislative and other measures". Under the *sui generis* rule "other measures" are probably confined to measures that are similar to legislation such as regulations, policies and guidelines. This clause does not have horizontal application, which means that the exception may be confined to government law and policy. The potentially extraordinary implication of this may be that private measures such as Industry Charters are unconstitutional. That aside, the proposed amendment to the Employment Equity Act and much else in the Act could be unconstitutional.

- The sub-section goes on to allow discriminatory legislative and other measures to "protect or advance" beneficiaries. It remains an open question whether this allows for measures that do so by discriminating against non-beneficiaries (which is the purpose of creating "designated groups").

- Limited discrimination of this kind is allowed for "categories" of persons. Although this is not yet settled law, the Bill (and Act) refers to "groups", which is probably wider than the meaning of "categories". A racial, age, linguistic or religious group, for instance, could include most of the population. The Constitution clearly allows, in various provisions, for discrimination in favour of citizens. Citizens can plausibly be regarded as a "group". It seems unlikely that an entire racial group or women could be regarded as a "category". The term seems appropriately applicable to "people with disabilities".

- The remainder of the sub-section is particularly instructive in that it allows for discriminatory legislative and other measures to protect and advance people who are "disadvantaged by unfair

> discrimination". The provision applies to people who are presently rather than historically disadvantaged and to people who are disadvantaged by unfair discrimination against themselves or against the category in which they fall. To take this out of its racial context, the section would apply, for instance, to mentally retarded people who are victims of unfair discrimination. Measures could be taken to protect and advance them in order to offset such discrimination. It should also be noted that the discrimination must be "unfair". Contrary to popular belief, many forms of discrimination are considered fair, such as having separate toilets for men and women, or an Islamic radio station that does not promote Christianity or atheism, or a German club.

We advance this analysis it in order to encourage awareness amongst policy makers of existing and potential challenges to the constitutionality of such provisions and to exercise due caution in the formulation and implementation of discriminatory laws and policies.

Clause 3 (6 in Act): The proposed amendment is, with respect, unwise and unworkable. It should be scrapped (or suspended pending the comprehensive review suggested above). The notion of "equal value" work has been the subject of substantial analysis and critique. There is, in the real world, no way of determining the value of work other than by observing what people are willing to pay for it. Social science academics, for instance, are notoriously anti-market because they consider themselves to be under-valued. Many resent the fact that substantially less educated and seemingly less intelligent entertainers, sports heroes and computer geeks are multi-millionaires whereas they earn modest civil servant salaries. Is an hour of work by a judge equal to an hour of work by a cleaning lady? What about the incomes of members of parliament and the security guard who lets them in every day? Since there are no possible objective criteria, other than what happens in a freely competitive market, according to which equal value can be established, this section will necessarily lead to needless and convoluted uncertainty and litigation. It is one thing to say, as existing legislation does adequately, that a male and female nurse, or a black and a white taxi driver should have the same income, but it is quite another to say that nurses and taxi drivers should have the same income. There is no plausible theory in economics or law that permits a rational conclusion, other than an observation of the consequences of supply and demand.

Clause 4 (8 in Act): The good intentions of this proposal are appreciated namely the desire for psychometric testing to be scientifically legitimate. What provisions of this kind suggest is a lack of appreciation by policy makers of the obvious fact that there is no one with a greater self-interest in the accuracy of psychometric testing than an employer. To add costs and red tape to the process will achieve nothing other than to increase uncertainty and cost thereby increasing unemployment. This is the kind of measure that should be scrapped (or suspended pending the comprehensive review suggested above) in accordance with the government's desire to cut South Africa's tragic rate of unemployment, and to achieve high rates of economic growth.

Clause 6 (11 in Act): A tendency has been allowed to creep into South African law of reversing or diluting the burden of proof. The tendency is in conflict with constitutional values according to which a person has the right "to be presumed innocent". This is provided for explicitly in Section 35(3)(h) in criminal proceedings. The fact that it is not provided for explicitly in proceedings under the Employment Equity Act should not be regarded as an adequate basis for abrogating the principle.

Considering the Constitution, the UN Declaration of Human Rights and the principles of good law, the amendment should be scrapped and long-established rules of evidence should be relied on – there is no need to compromise them.

The reason for the proposed amendment is readily understandable, namely that some people, such as employees, may not have the skills or resources to discharge the common law burden. This is not a new

challenge in law; it has been addressed for hundreds of years. Whilst solutions may not have been perfect, they have certainly stood the test of time.

The rule of law, natural justice and due process hold as a core value that nobody should be liable or culpable unless culpability is proven, in other words that people should be presumed innocent until proven guilty. What this amendment proposes is the reverse: that a victimised category of people, those who create jobs and wealth, should be presumed guilty until they prove their innocence. It is well known that proving innocence is extremely difficult and frequently impossible. The concept is captured by the old illustrative question: "Have you stopped beating your wife?" It is impossible to prove that you have not committed a murder, that you are not guilty of shoplifting or that you have not told a lie. There are excellent reasons why basic justice has developed over the eons to presume innocence until guilt is proven and a departure from this principle should not be entertained. This does not mean that the plight of impecunious and unsophisticated people can be ignored. It means that other solutions must be found. This is achieved by such measures as providing free legal assistance. In the labour field this is commonly and often heroically provided by trade unions.

The tendency of presuming guilt by employers and imposing increasingly spectacular penalties is a derivative of the notion that employers are wealthy and have a "deep pocket". The principal means of creating jobs in South Africa envisaged by President Zuma in his State of the Nation address is small and medium businesses. They do not, by definition, have a deep pocket. Most lack legal sophistication and resources, and many or most are marginal. The high rate of enterprise failure shows that businesses are more vulnerable than generally suspected and imposing additional costs and risks, such as this clause will do, means that more are forced below the margin.

Not only is the assumption that employers are sophisticated and wealthy mistaken, but the degree to which the opposite is common should be recognised. Typically in labour disputes, employers have meagre resources and minimal expertise. They find themselves up against employees who are represented by large and sophisticated trade unions with lots of experience in the field and in courts or tribunals that are conversant with the rights in law afforded to employees. If anyone needs the playing field tilted in their favour it is, arguably, small employers. Many encounter a labour dispute only once, and then it may be for them a traumatic experience. It is often so costly as to push marginal business into insolvency.

Clause 8 (21 in Act): This provision imposes an enormous amount of red tape and bureaucracy on the economy. It is doubtful whether the Department of Labour has or will ever have the ability to process reports effectively. As with all costs, there are victims and the principal victims in this case will be employees for whom there will be fewer jobs and less pay. There is simply no free lunch despite the tendency to ignore this fact when costs are imposed.

Clause 9 (27 in Act): Since there are no objective criteria according to which an "income differential" can be established, this clause is vague and its application retroactive in violation of the rule of law. It reflects a lack of appreciation of the power of competition to eliminate discriminatory differentials and the lack of a coherent theory by which differentials can be considered "disproportionate". There is adequate law in other contexts to address unlawful discrimination and the measure should therefore be scrapped.

Clause 10 (33 in Act): The proposed repeal of Section 33 is apparently due to the view that some designated employers deliberately delay or frustrate compliance. The solution is not to repeal the measure, which is an essential requirement for fairness to employers and through them employees, but to police compliance more effectively. Administrative inefficiency provides grounds for reforming administrative practice not for adopting dubious law. This clause should be scrapped.

The view that differentials should be uniform, or determined by "bands", is appropriate only in certain contexts and should therefore be left to determination in employment negotiations.

Clauses 11 & 12 (37, 39 & 40 in Act): The unavoidable impact of these proposals will be to increase the cost, risk and uncertainty of employing people and therefore reduce employment and resources available for remuneration and improved conditions of employment.

Clause 13 (42 in Act): The proposal is to replace legal certainty with arbitrary discretion in conflict with the rule of law and therefore the Constitution. It should therefore be scrapped. Furthermore, consequences for employers are extreme which means additional costs and risks at the expense, ultimately, of employees and job seekers, and the country as a whole.

Clause 14 (45 in Act): The effect of the proposal is that an employer would be unable to object to a request or recommendation until the matter is in the Labour Court. This would be unreasonable and impose further costs and risks.

Clause 17 (Schedule 1: Penalties in Act): The proposal envisages a substantial increase in fines. It reflects another dangerous tendency in South African law, which is to increase fines out of all proportion with criminal law convention. There is a myth according to which if fines are called "penalties", and if they are not criminalised, they are somehow not to be regarded as excessive. In the interests of justice and the rule of law, the legislature should restore adjudication to where it belongs: the judiciary, uphold the independence of the judiciary, and provide no more than guidelines for penalties that are an indication to the judiciary of how seriously the matter is regarded by the legislature.

A curious fashion has arisen whereby 10 per cent of turnover is regarded as appropriate. Such a rule is manifestly inappropriate and unjust since turnover is no indication of the gravity of the offence or transgression, the profitability of the enterprise or its wealth in terms of assets, its sustainability and viability, or propensity to pay.

In short, the trend or fad of penalties being a percentage of turnover means that fines are imposed that bear no relationship to anything relevant.

As a matter of simple business economics, enterprises with low margins and mark-ups would go out of business immediately if faced with a fine based on turnover. Conversely, highly geared businesses with high mark-ups could find a percentage of turnover fine to be relatively inconsequential.

The laudable tradition in South African law and in most modern economies, is that the "punishment must fit the crime". Turnover as a criterion delinks the two.

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