SAKELIGA

SELFSTANDIGE SAKEGEMEENSKAP

*Voorheen bekend as AfriSake*

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**Department of Labour**
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## COMMENT ON THE EMPLOYMENT EQUITY AMENDMENT BILL OF 2018

The following submission has been prepared in response to a request for comment on the draft *Employment Equity Amendment Bill*, 2018 (the EE bill hereafter), which was published in the Government Gazette Notice No. 992 (21 September 2018). Our comment outlines broad economic concerns and considers specific legal issues.

### About Sakeliga

Sakeliga is a not-for-profit organization (NPO) registered in the Republic of South Africa and represents more than 12 500 members in businesses across different sectors of the South African economy. Sakeliga supports constitutional order, free markets and a favourable business climate in the interests of its members, as well as in the interest of communities wherever its members do business.

### SECTION 1: ECONOMIC CONSIDERATIONS

Sakeliga is of the opinion that the EE bill through its proposed implementation of mandatory numerical sectoral employment equity targets and the activation of the requirements for employment equity compliance certificates (Section 53 of the EEA) –

applicable where businesses bid for government contracts – will add to an already unfriendly and restrictive business environment in South Africa.

Such an increasingly restrictive environment, in our estimation, will negatively affect South Africa's economy through an increase in the regulatory burden and compliance costs that most businesses face. This increased compliance burden, on balance, is unlikely to bring about overall positive economic outcomes. It is rather more likely, in our estimation, to manifest in reduced formal employment growth and impediments to output measured in GDP through decreased economic efficiency.

**Restrictive labour environment**

South Africa's labour environment, at present, may be described as difficult and restrictive. To emphasise we briefly point to findings, such as the *Global Competitiveness Survey, 2018*, published by the World Economic Forum, which ranks South Africa low and poorly among 140 countries in the problematic areas such as:

- cooperation in labour-employee relations: 136th of 140;
- flexibility of wage determinations: 133rd of 140;
- hiring and firing practices: rank 111th of 140;
- ease of hiring foreign labour: rank 102nd of 140;
- active labour policies: rank 106th of 140;
- pay and productivity: rank 91st of 140.

We contend that such adverse ratings are outflows of the existing structure of labour regulation. We deem it necessary to emphasise that the toll of regulation, measured in economic opportunity costs, is cumulative. The EE bill will likely add to an existing heavy and cumulative load of anti-market regulation, producing, in our view, further detrimental economic effects.

Specifically, on the margin, the EE Bill, if made law, is likely – other things remaining equal – to reduce the number of potential formal jobs that could have been created without such increases in restrictive and anti-market labour market regulation. We think it is only likely and logical that the EE bill will further bias employer incentives away from the greater employment of labour.

Should our abovementioned concerns materialise it will be highly problematic given the present unemployment rates of more than 37% according to the expanded definition and nearly 28% according to the narrow definition (Figure 1).[1] The dismal growth in employment after the 2008/09 financial crisis (Figure 2) is a serious cause for concern.

[1] Statistics South Africa (2018) Quarterly Labour Force Survey.

Increasingly anti-market labour regulation, in our opinion, will not support private sector job creation and employment dependent poverty alleviation.

Moreover, worsened unemployment and slower employment growth are effects which are detrimental to government's broader policy goals of poverty reduction and private sector employment creation.

**Figure 1: South Africa Unemployment Rates**

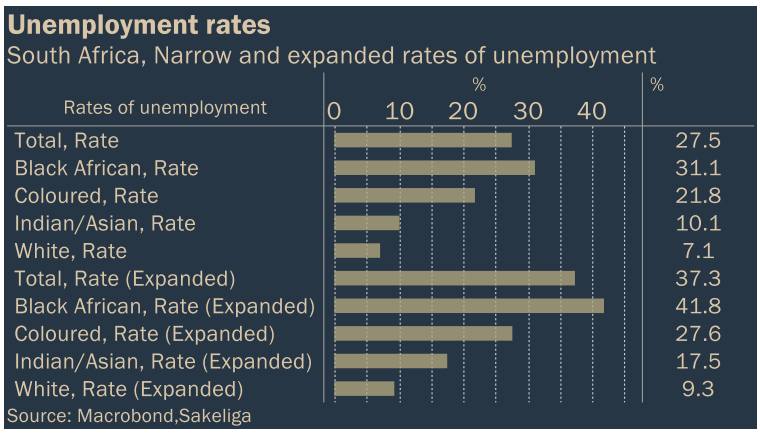
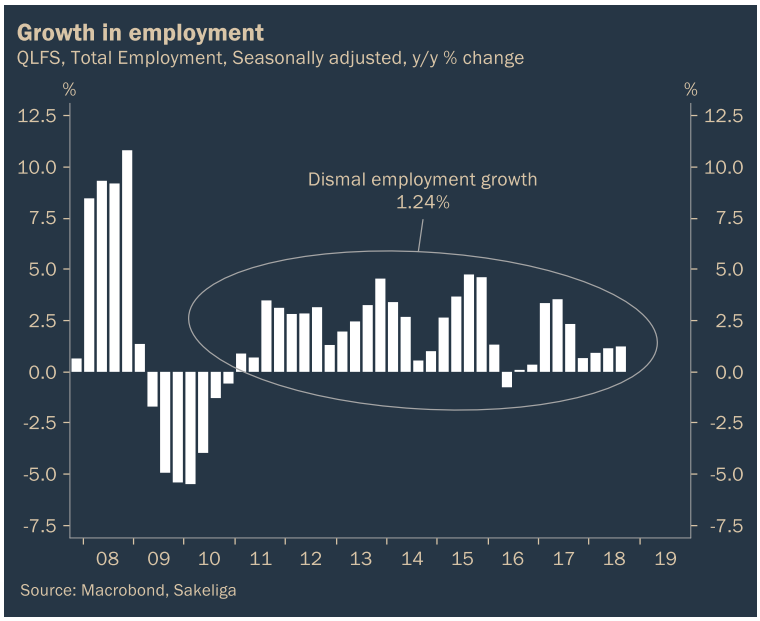



**Figure 2: Dismal employment growth**



## Numerical targets

Sakeliga, together with organisations such as Solidarity Trade Union, is concerned about a strict enforcement of numerical race targets in different sectors. We think it is likely that such targets, to be set through bureaucratic and not market processes, will impose costly economic inefficiencies in different sectors of the economy.

One effect of such efficiencies, as we have alluded to before, is an increase in compliance costs, which will be to the detriment of marginally profitable enterprises.

The reality is that in various industries qualifications are not distributed by race proportionally to the economically active population (EAP). One of the EE bill's key weaknesses, then, is the fact that it ignores the realities occasioned by the actual proportional distribution of educational qualifications according to race. An outcome that, in our view, in the largest part flow from the state's poor education system.

In various fields, such as engineering and chartered accounting for instance, graduates are not proportionally represented by race according to the EAP's percentages.

In such fields, if a strict imposition of unrealistic race-based targets were followed, it will cause severe economic inefficiencies and limit the growth and output of the applicable industries and individual firms, and in the end weaken GDP trend growth.

While the exact effects of such strict regulated sectoral targets are hard to predict, possible effects may include:

- Rising costs of labour – which is likely to be passed on to consumers generally, and the state in particular.
- Fiscal effects arising from government paying more for procurement (see: Fiscal considerations below) which is likely to further increase the tax burden and strain on government's budget.
- Economic inefficiencies arising from labour market rigidities and concomitant knock-on effects on economic growth and development.

## Fiscal considerations

Moreover, the Bill's activation of Section 53 is likely to reduce the pool of suitable suppliers from whom government can buy. A reduced pool of suppliers is likely to increase the cost of state procurement at a time when the national budget is under serious strain.

## SECTION 2: LEGAL CONSIDERATIONS

### Adverse implications for South African labour law as a whole

It is important to note that the EE Act and, more particularly, the amended section 53(6), exists within the general ecosystem of South African labour law. The Department of Labour has, no doubt, taken cognisance of this fact in its drafting of the EE bill. It is, however, unclear what the effects of some provisions may be on the delicate balance which currently reigns in this important sector of South African law.

### Disruption of CCMA functioning

One such key point of uncertainty relates to whether CCMA conciliation-proceedings (in terms of section 115(1)(a) of the Labour Relations Act, Act 66 of 1995) are to be considered decisions in terms of the provisions of the newly added subsection 53(6). Whether or not such proceedings are deemed to be included, however, the Bill – as it is currently drafted – represents a serious threat to not only its stated outcomes, but also to the effective functioning of the CCMA and related bodies.

In the first case, i.e. if the outcomes of conciliation-proceedings were to be considered rulings, this provision would serve to unduly prolong CCMA-procedure, undermining the effective functioning the CCMA's operations. As an adverse finding by the CCMA would necessarily result trigger the 12-month trade ban occasioned by the operation of section 53(6)(c), employers will now have a powerful incentive to take all available measures to avoid these kinds of adverse findings in CCMA and court proceedings instituted against them. Such measures could include, but are not limited to, escalating the procedure up through the regulatory hierarchy to arbitration proceedings - and even to court review. Under the previous regime, employers who believed themselves to have only a remote chance of a favourable outcome in higher fora would have been willing to concede the point at the CCMA, as risk/reward considerations would dictate this to be the optimal outcome. Employees would, then, have a favourable outcome at relatively low cost and in an expedient manner. If an employer, however, should run the risk of losing their capacity to trade with the state for a full twelve months (which, in some sectors, would necessarily be fatal to the firms involved), they will be motivated to pursue even remote chances of victory to avoid this outcome. Increasing the risk to employers would, accordingly, ultimately harm workers who may have had fewer costs and higher chances of success without the legislative amendment.

If conciliation is not to be considered decisions in terms of section 53(6)(c), as amended, this would have the effect of incentivising early (and premature) concessions of wrongdoing by employers, as even negligible risk of an adverse finding in arbitration would constitute an unacceptable risk to their capacity to provide services and products to the state. While this would result in favourable outcomes for some employees, it would be unlikely to pass constitutional muster, due to the injustice of these outcomes when considering employer interests. This drastic increase in employees' bargaining power would likely not be countenanced by the vision of fair labour practices entrenched in section 23 of the South African Constitution.

The ultimate effects of Section 53, as amended, would therefore include the disruption of the operations of the CCMA.

## Undue expansion of the CCMA's competencies

In addition to the above effects, it is also likely that the proposed addition of section 53(6)(c) would necessarily constitute an undue expansion of the CCMA's competencies – and in a manner wholly incompatible with its role as low-risk arbiter of labour disputes.

It seems clear that the operation of section 53(6)(c) *de facto* empowers the CCMA to make a finding which promises to severely limit (in most cases) or entirely stop (in some cases) an employer's commercial activity. This is particularly drastic in the case of companies which may depend largely or wholly on business with the state, where there may be little or no civilian market for their products or services.

The severity of this sanction is wholly inappropriate for a body constituted in the manner of the CCMA. Given the vastly different nature of arbitration proceedings (in comparison to more circumspect proceedings in a court of law), in terms of matters of procedure, representation and legal precedent, this represents an unacceptable imposition of risk.

This is especially the case considering the fact that mention is only made of a violation of Chapter II of the EE Act. Chapter II, apart from prohibiting unfair discrimination (in section 6), also includes provisions concerning prohibited medical and psychological assessment of employees or job-applicants (in sections 7 and 8, read together with section 9). It is not clear that the sanction imposed by section 53(6)(c) would be justified by these violations, particularly considering the deleterious effect an adverse finding will have on firms – and their capacity to employ their extant staff.

A questionable decision relating to one employment dispute, while unfortunate, represents an acceptable risk to employers, especially when considering the advantages associated with quicker, less-stringent procedure. In this arena, the CCMA (and its procedures) could have a justifiable role. Having that same procedure applied to adverse consequences on the scale the Bill contemplates, far exceeds acceptable levels of risk to the employer.

## Policy recommendations

Sakeliga considers the EE bill problematic in a number of respects. Firstly, we think that the bill, through its evident aim of more interventionist and anti-free market labour regulation will be an impediment to economic efficiency, GDP trend growth, and employment growth. Such adverse effects would go against government's policy aims of employment growth to alleviate unemployment and job-dependent poverty reduction. Secondly, we are of opinion that the Bill is likely to disrupt the CCMA's functioning and, moreover, to unduly expand the CCMA's competencies beyond its proper mandate.

For these reasons we cannot support the applicable EE bill. We urge government rather to seriously consider labour market deregulation and policies that are friendlier toward businesses and free markets as a solution to unemployment and poverty in South Africa.

Yours truly,

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