

IFP PRIVATE MEMBERS' BILL

REPUBLIC OF SOUTH AFRICA

EMPLOYMENT SERVICES AMENDMENT BILL

(As introduced in the National Assembly (proposed section 75); Explanatory summary of the Bill and prior notice of its introduction published in Government Gazette No. 43981 of 11 December 2020)

(The English text is the official text of the Bill)

(Ms. Liezl Van der Merwe, MP)

[B 2022]

ISBN No.:

IFP PRIVATE MEMBERS' BILL

GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Employment Services Act, 2014, so as to insert certain new definitions; to provide that employers must comply with certain requirements, rights and obligations when employing foreign nationals; to place an obligation on the Minister to establish numerical targets for certain sectors of the work force for the purpose of ensuring that those sectors are not oversubscribed and saturated with foreign nationals as opposed to South African citizens and permanent residents; to correct the word “permit” to read “visa”; and to provide for matters connected therewith.

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

Amendment of section 1 of Act 4 of 2014

1. Section 1 of the Employment Services Act, 2014 (Act No. 4 of 2014) (hereinafter referred to as the “principal Act”), is hereby amended—

(a) by the insertion after the definition of “Board” of the following definition:

IFP PRIVATE MEMBERS' BILL

“ **‘Commission’** means the Commission for Employment Equity, established by section 28 of the Employment Equity Act, 1998 (Act No. 55 of 1998);”;

(b) by the insertion after the definition of “employee” of the following definition:

“ **‘employer’** means the person contractually bound by the applicable employment contract as an employer or, in the case of a juristic person, its chief executive officer or the person to whom such officer has delegated the final responsibility in respect of personnel matters;”;

(c) by the insertion after the definition of “NEDLAC” of the following definitions:

“ **‘numerical target’** means a goal prescribed by the Minister relating to the number of South African citizens or permanent residents that an employer must recruit in a particular sector, before employing a foreign national;

‘permanent resident’ means a foreign national who has been issued a permanent residence permit in terms of section 26 and 27 of the Immigration Act;”;

(d) by the insertion after the definition of “registrar” of the following definition:

“ **‘sector’** means an industry or service or part of any industry or service in accordance with the Standard Industrial Classification Codes;”;

(e) by the insertion after the definition of “Skills Development Act” of the following definitions:

“ **‘Standard Industrial Classification Codes’** means the statistical classification system as published by Statistics South Africa which is used to group companies by industry or service;”;

‘Statistics South Africa’ means the Department contemplated in section 4(1) of the Statistics Act, 1999 (Act No. 6 of 1999);”;

(h) by the deletion of the word “and” at the end of the definition of “work scheme”;

(i) by the substitution for the full-stop at the end of the definition of “work seeker” of a semicolon;

(i) by the addition of the word “and” at the end of the definition of “work seeker”; and

(j) by the addition after the definition of “work seeker” of the following definition:

“ **‘work visa’** means a visa contemplated in section 19(2) of the Immigration Act.”.

Amendment of section 8 of Act 4 of 2014

2. Section 8 of the principal Act is hereby amended—

IFP PRIVATE MEMBERS' BILL

(a) by the substitution for subsection (1) of the following subsection:

“(1) An employer may not employ a foreign national within the territory of the Republic of South Africa prior to —

(a) such foreign national producing an applicable and valid work **[permit]** visa issued in terms of the Immigration Act[.];

(b) that employer ensuring that the numerical targets prescribed by the Minister has been reached; and

(c) that employer satisfying themselves that there is no other person in the Republic with suitable skills to fill that vacancy.”;

(b) by the deletion of subsection (2);

(c) by the insertion after subsection (2) of the following subsection:

“(2A) An employer —

(a) may make use of public employment services or private employment agencies to assist the employer to recruit a suitable employee who is a South African citizen or permanent resident; and

(b) must prepare a skills transfer plan in respect of any position in which a foreign national is employed.”;

(d) by the substitution for subsection (3) of the following subsection:

“(3)[**A regulation made in terms of this section**]The Minister may, after consulting the Board, make regulations to facilitate the employment of foreign nationals, and may make regulations to—

(a) include any other requirement necessary to implement the provisions of this section which are consistent with the Immigration Act; **[and]**

(b) differentiate between different categories of visas issued in terms of the Immigration Act and different categories of work[.]; or

(c) provide measures on how employers must satisfy the requirements of section 8(1)(c).”;

(e) by the insertion after subsection (3) of the following subsection:

“(3A) The Minister must after consulting the—

(a) Board, publish a notice in the *Government Gazette* identifying sectors where suitably qualified South African citizens and permanent residents as employees are not equitably represented, compared to foreign nationals employed in that sector, having regard to any relevant

IFP PRIVATE MEMBERS' BILL

code contained in the Standard Industrial Classification Codes related to of all economic activities;
and

(b) relevant sectors and with the advice of the Commission, by notice in the *Government Gazette* set numerical targets for any sector identified in section 3A(a), to ensure that suitably qualified South African citizens and permanent residents are equitably represented in these particular sectors.”; and

(f) by the substitution for subsection (4) of the following subsection:

“(4) An employee who is employed without a valid work [permit] visa is entitled to enforce any claim that the employee may have in terms of any statute or employment relationship against his or her employer or any person who is liable in terms of the law.”.

Amendment of section 9 of Act 4 of 2014

3. Section 9 of the principal Act is hereby amended—

(a) by the substitution for paragraphs (a) and (b) of the following paragraphs respectively:

“(a) to perform any work which such foreign national is not authorized to perform in terms of his or her work [permit] visa; or

(b) to engage in work contrary to the terms of their work [permit] visa.”.

Transitional provision

4. Affected employers have six months from the effective date of the Employment Services Amendment Act, 2022, to comply with its provisions.

Short title and commencement

5. This Act is called the Employment Services Amendment Act, 2022, and comes into operation on a date determined by the President by proclamation in the *Gazette*.

IFP PRIVATE MEMBERS' BILL

MEMORANDUM ON THE OBJECTS OF THE EMPLOYMENT SERVICES AMENDMENT BILL, 2022

1. INTRODUCTION

The high rate of unemployed South Africans in comparison to the high representation of foreign nationals employed particularly in the unskilled occupational level is a critical concern, which has been noted by the Commission for Employment Equity in their annual reports over the last few years. In its 21st Annual Report (“2021-2021 annual report”), the Commission for Employment Equity noted the preference for, and high representation of foreign nationals at certain other occupational levels (besides the unskilled occupational level) such as in the Mining and Quarrying sector, where foreign nationals represent 12.4% of the workforce at the semi-skilled occupational level, which is the second highest representation. In addition, the Commission of Employment Equity has also noted that considering the representation of foreign nationals employed at senior management level by population group in the 2021-2021 annual report, it is clear that the expected skills transfer by foreign nationals to South Africans is not taking place as required. As per the requirement of the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No. 4 of 2000), there should be deliberate attempts made by the State to control the increasing preference by certain sectors in the workforce to employ foreign nationals as opposed to South African citizens, without justification on the basis of skills. Moreover, the perception by South African citizens that foreign nationals are “taking their jobs”, exacerbates xenophobia. Therefore, it is imperative to regulate the employment of foreign nationals in the Republic, in order to stem the narrative that the ratio of job opportunities between foreign nationals and South African citizens are skewed towards employing foreign nationals. This is necessary in an environment of inadequate enforcement of legislation around the employment of foreign nationals and increasing breaches by unscrupulous employers, which has created excessive vulnerability of foreign nationals, stirred xenophobic sentiments, and closed the door to many South African jobseekers.

2. OBJECTS OF THE BILL

2.1 The purpose of the Employment Services Amendment Bill (“the Bill”) is to amend the Employment Services Act, 2014 (Act No. 4 of 2014), (“principal Act”) so as to regulate the recruitment of foreign nationals in certain economic sectors and to strengthen the current

IFP PRIVATE MEMBERS' BILL

regulatory framework regarding the recruitment of foreign nationals in the Republic. The Bill amends the principal Act to ensure that when recruiting potential employees, an employer must confirm that there are no suitable South African citizens or permanent residents that can be employed in that position, prior to recruiting a foreign national.

2.2 The Bill further proposes that the Minister must publish a notice that identifies certain sectors in the workforce for the purposes of ensuring that suitably qualified South African citizens and permanent residents are equitably represented in those sectors, and furthermore places an obligation on the Minister to set numerical targets for the identified economic sectors on the basis of what would constitute equitable representation.

3. CONTENTS OF THE BILL

3.1 Clause 1 inserts new definitions into section 1 of the principal Act.

3.2 Clause 2 amends section 8 of the principal Act. This clause inserts new subsections, providing that an employer is prevented from recruiting a foreign national prior to that employer satisfying themselves that there are no South African citizens or permanent residents with suitable skills to fill the vacancy. Clause 2 also amends the principal Act by mandating the Minister of Labour to publish a notice identifying certain sectors in the workforce for the purposes of ensuring that suitable qualified South Africans are equitably represented in these particular sectors and mandates the Minister to publish a notice that set numerical targets for these identified sectors. The Minister is also mandated to publish regulations that provide the practical detail on how employers should satisfy themselves that no South African citizen or permanent resident is suitably qualified to occupy the vacancy, how to make use of a public or private employment agency and how the skills transfer plan should be compiled.

3.3 Clause 3 provides for the transitional arrangements from the effective date of the Bill.

3.4 Clause 4 provides for the short title and commencement.

IFP PRIVATE MEMBERS' BILL

4. FINANCIAL IMPLICATIONS FOR THE STATE

The Bill could result in additional costs to the State with regards to enforcement, however the economy will improve as the percentage of unemployment may decrease as employers will be required to employ South African citizens and permanent residents first. Therefore, the additional costs to the State could potentially be offset by the decrease in unemployment.

5. PARLIAMENTARY PROCEDURE

5.1 The Member proposes that the Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution, as the issue of labour is a national competence. In terms of *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others*¹, the “substantial measure” test requires that the provisions of a Bill be considered in relation to their area of impact.² The Bill does not fall within the legislative matters listed in section 76(3)(a)-(f) of the Constitution, and furthermore does not fall within a concurrent and provincial legislative competence as listed in Schedule 4 of the Constitution.

5.2 The Member is of the opinion that it is not necessary to refer this Bill to the National House of Traditional and Khoi-San Leaders in terms of 39(1)(a) of the Traditional and Khoi-San Leadership Act, 2019 (Act No. 3 of 2019), since the principal Act does not directly affect traditional or Khoi-San communities, nor does it contain provisions pertaining to customary law or customs of traditional or Khoi-San communities. Lastly, the Bill does not have to be so referred as it does not contain any provision pertaining to any matter referred to in section 154(2) of the Constitution in accordance with section 39(1)(a) of the Traditional and Khoi-San Leadership Act, 2019 (Act No. 13 of 2019).

¹ 2010 (8) BCLR 741 (CC).

² See *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* 2010 (8) BCLR 741 (CC) at paras 71 - 72.