

RETAIL MOTOR INDUSTRY ORGANISATION (RMI) POSITION – Employment Equity Amendment Bill and the Determination of Sector Targets Employment Equity Proposed Sub-Sector Targets Submission

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INTRODUCTION

On 11 July 2022, the Department of Employment and Labour (DoEL) invited members of the RMI and CGCSA (Consumer Goods Council of South Africa) to attend a consultation session. The meeting related to the identification and setting of employment equity targets for the Wholesale and Retail Trade and the Repair of Motor Vehicles and Motorcycles Sector in respect of the Employment Equity Amendment Bill. The DoEL presented their final targets after having reviewed and assessed all proposed targets previously submitted by the Sector.

RMI POSITION

The RMI supports and subscribes to Economic Transformation to be achieved through sustainable interventions in order to accelerate quality education and skills development for black people, employment creation (particularly among the black youth) and large-scale black enterprise development.

The RMI fully endorses the transformational intent of broad-based black economic empowerment (“B-BBEE”), Employment Equity and Skills Development legislation and encourages all its members to be fully compliant. Skills development is integral to the redressing of past discrimination and the implementation of Workplace Skills Plans should be integrated with employment equity activities.

In amending the existing Employment Equity Act and as a consequence, developing and determining Employment Equity Sector targets, the RMI believes that the existence of a sector structure or process to focus on transformation is clearly beneficial.

Accordingly, transformation efforts must be customised to specific industry and business dynamics. Therefore, the RMI submits that in order for the Employment Equity Sector targets to be equitable they need to be fair, achievable and realistic in regard to all its members.

INDUSTRY DYNAMICS AND COMPLEXITIES

Industry statistics – Currently 8500+ businesses are registered with the RMI. Approximately 19% of businesses are owned by listed or corporate groups of companies. The majority of the remaining businesses are owned by independent entrepreneurs with representation within a single district or region. Based on the RMI's database many of its members would either fall outside of the requirement to report or given their flat operating structure, don't have staff allocated across the 4 levels of management. 660 member businesses have more than 50 employees, and therefore, qualify in terms of the designated employer definition – this is 7,7% of the RMI membership database.

The retail sector represents approximately 3.2% of GDP and employs 290,000 people out of a total of about 400,000 in the automotive value chain. From 01 February 2020 to 31 May 2022 we have seen an employer total decline of 290, and a decline of 9780 in the employee total within the Automotive Sector (Stats obtained from Motor Industry Bargaining Council).

The RMI wishes to highlight the fact that the impact of COVID-19 is still unfolding with forecasts and industry projections determining that the majority of its' members are still recovering from the ripple effects caused by COVID-19.

COMMENTS ON THE EMPLOYMENT EQUITY AMENDMENT BILL

As a point of departure, the RMI acknowledges, importantly so:

- i. that the pace of transformation in South Africa has been slow; and
- ii. the importance of ensuring that workplaces are transformed to ensure the equitable representation of suitably qualified people from designated groups.

While the RMI acknowledges the above and is firmly in support of a process which will ensure transformation at every level of a workplace, it is important that any measures to do so are rational, constitutional and do not place jobs or businesses at risk.

The most significant amendment proposed to the Employment Equity Act, Section 15A is being contemplated in order to empower the Minister of Labour to identify national economic sectors for the purposes of the administration of the Act, in order to determine “*numerical targets for these sectors*”, based on factors / criteria which the Minister may determine.

The RMI considers the following amendments to the Employment Equity Act to be the most significant and to have the most far-reaching consequences (unintended or not) for employers:

- i. **Section 15A:** the provision empowering the Minister to prescribe numerical targets for sectors at all occupational levels to ensure the equitable representation of suitably qualified people from designated groups.

- ii. **Section 42:** dealing with assessment of compliance and whether or not an employer has complied with the numerical targets prescribed for its sector.
- iii. **Section 53 (6):** a list of five (5) criteria which must be met by an employer in order to obtain a compliance certificate.

The most significant amendment proposed, Section 15A, is being contemplated to empower the Minister of Employment and Labour to identify national economic sectors for the purposes of the administration of the Act, in order to determine “*numerical targets for these sectors*”, based on factors / criteria which the Minister may determine.

In addition to the above, section 53 of the Employment Equity Act, which has been in the legislation for some time but has not “*yet been operationalised*” will be put into effect. This will mean that State contracts may only be issued to employers that have been certified as being in compliance with their obligations under the Employment Equity Act (one of them being the requirement to achieve the numerical targets prescribed by the Minister).

The amendments being proposed, if passed in their present form, will mean that bidders can be excluded from bidding for government projects unless the prescribed targets have been met by them. The effect hereof is that achieving the targets as set by the Minister (and obtaining the requisite certificate) will become a threshold / mandatory / minimum requirement for participating in the bid at all, whereas currently BBBEE status is part of the overall evaluation, as to either 10% or 20% of the total score, the balance being on price (functionality / the ability to do the work in question often being the threshold requirement).

a. Submission on section 15A of the EE Amendment Bill

Section 15A of the EEA Amendment Bill empowers the Minister of Employment & Labour to set numerical targets for any sector or part of a sector.

The RMI is of the view that the legislation should reflect that the sector targets should be set with the respective industry in a joint consensus seeking approach. The basis of the Labour Relations Act has been set up on a joint consensus seeking approach and if these targets are to be effective, that kind of approach should be embarked upon. It is essential that all sectors/industries in the country are adequately consulted and that the sector targets should be set with the respective industry bodies who can share meaningful information regarding, amongst others, the composition of the industry, the economic challenges faced in the industry, the state of transformation and the challenges transformation faces within the industry.

It is the RMI's considered view that the clustering of all economic sectors that have retail and wholesale trade as a common denominator, despite very specifically identified peculiarities associated with such differences in economic sectors, is irrational and fails to provide for meaningful consultation and the eventual identification of sector targets. The RMI further believes that the Act

needs to make provision for instances where agreement cannot be reached between the Minister and the relevant sector.

How these amendments will impact foreign owned organisations must be factored into the consultations which can present considerable uncertainty particularly in that they may be lagging in the representation of designated persons for justifiable and objective reasons.

The level of complexity from one company to the other is significant (range from small, single owned business, to large, multinational entities), and as such, the imposition of “a one size fits all” targets on a sector without proper and meaningful consultation will no doubt lead to unintended consequences such as further capital flight and disinvestment.

The impact of the potential flight of foreign investment, skills and service delivery should be a material concern to Government. The BBBEE Codes recognise that businesses with an annual turnover of less than R50m per annum are Qualifying Small Enterprises (QSE’s). They are as a result able to achieve BBBEE credentials without pursuing Management Control/ Employment Equity. Many of these organisations employ more than 50 employees and will, if the amendments are passed, be required to comply with EEA sectoral targets in order to do business with the state.

The fact that labour inspectors have the broad-based powers to determine compliance under section 42 which includes reference to the factors stated in section 15, is incomprehensible given that the result thereof could be the very closure of an organisation and contribute to a further decline in economic growth and see unemployment levels increasing. The potential for corruption and abuse of power is a serious threat in this context.

The position of the RMI is that section 42 (1) (Aa) (dealing with assessment of compliance) should be amended to read “**whether or not the employer has taken reasonable steps to achieve the applicable sectoral target**”.

The amendment to section 42 (1) (Aa) as proposed above in bold font, serves two purposes:

- i. to align the provision with the rest of the provisions in section 42 (which provide for reasonable steps taken by a designated employer in reference to other compliance criteria); and
- ii. to mitigate against the numerical targets being construed as creating quotas as this is expressly prohibited by section 15 (3) of the Employment Equity Act.

b. Section 53 of the EE Amendment Bill

The EEA Amendment Bill proposes, as a new subsection – being section 53 (6) - five (5) criteria an employer **must** satisfy in order for that employer to be

issued with a compliance certificate (the certificate will allow an employer to bid to do work for the State). The compliance criteria are as follows:

- i. the employer has complied with a numerical target set in terms of section 15A that applies to that employer;
- ii. if an employer has not complied with any target set, the employer has raised a reasonable ground to justify its failure to comply as contemplated by section 42 (4);
- iii. the employer has submitted a report in terms of section 21;
- iv. there has been no finding by the CCMA or a court within the previous three years that the employer breached the prohibition on unfair discrimination in chapter 2; **and**
- v. the CCMA has not issued an award against the employer in the previous three years for failing to pay the national minimum wage.

The Constitutional law provision against which these amendments are to be measured is firstly section 217 of the Constitution which deals with procurement and states:

When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

Subsection 1 does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for:

- a) categories of preference in the allocation of contracts; and
- b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.

National legislation must prescribe a **framework** within which the policy referred to in subsection (2) must be implemented.

The setting of targets by the Minister based on unspecified factors, for a variety of sectors, sub-sectors, regions, etc. does not, in the RMI's view, satisfy the underlined portions of section 217(3) above.

Section 15A, if passed, may be part of national legislation, but it sets no framework within which the policy is to be implemented. It simply empowers the Minister to determine targets without reference to any prescribed framework. As such it will in RMI's view be unconstitutional for being in conflict with section 217(3) of the Constitution if passed in its present form.

For the compliance certificate (which will allow employers to bid for Government work) to pass constitutional muster and serve a rational purpose, the other considerations in section 217(1) are also important, such as being able to obtain the best possible service at the best possible price – something which

should lie at the heart of an efficient, fair, equitable, transparent and cost-effective public procurement exercise.

Giving a Minister or one of his or her officials the power to set targets by decree outside of the legislation promulgated specifically to give effect to section 217(3) without setting a similar legislative framework within which this is to be done, will, in those circumstances, conflict with both sections 217(1) and 217(3) of the Constitution, and not be rescued by the proviso in section 217(2), which of itself needs to comply with section 217(3).

If the numerical target which is set constitutes an absolute barrier or quota, which the withholding of a certificate and with that the opportunity to bid for Government work will do, that would fall foul of section 15(3) of the EEA.

The consequences of not meeting the sectoral targets would eliminate organisations from transacting with the State and destroy their revenue resulting in liquidation and job losses.

c. Effect of the amendments on the requirement for employers to consult with employment equity committees

The effect of the proposed amendments is that the Minister may impose sectoral numerical targets. These prescribed numerical targets will effectively override the targets contained in a designated employers' employment equity plan.

However, in terms of section 16, read with section 17, of the current Employment Equity Act, designated employers are legally required to consult with their employees (by way of an employment equity committee) on the content (the targets to be achieved) and implementation of their employment equity plans.

If the Employment Equity Act is amended, it will mean that an employer will be bound to use the sectoral targets fixed by the Minister in its employment equity plan, consultation with employees would be rendered meaningless. The employer's hands will be tied, regardless of the input from its employees.

In conclusion, the RMI is grateful to the Department for the opportunity to present its views to assist the Department in its important work of considering the proposed EE Amendment Bill, including the proposed sector targets.

The RMI respectfully submits that, to accept the current Bill as it stands will likely lead to constitutional challenges and endless disputes; cause disharmony in the workplace and undermine policy coherence, even within the same government department.

CONCERNS REGARDING THE DOEL'S PROPOSED TARGETS

a. The RMI has been clustered with other sectors - SECTOR IDENTIFICATION CODES

It is imperative to highlight that although both (Retail Motor Industry Organisation and Consumer Good Council of South Africa) organisations operate under the wholesale and retail trade, the repair of motor vehicle and motorcycle businesses, which fall under SIC 45-47, are very diverse and complex in nature. The RMI urges the Department to be very mindful of the fact that SIC 45-47 can be expanded to separate the motor industry from other retail and trade sectors.

This categorisation supports the request to the DoEL to consider differentiated targets for each of the separate SIC Codes that falls under Divisions 45-47. In doing so the targets set for SIC 45 will only be informed by businesses who participate economically in this sector.

A "one size fits all" approach should be avoided for this important exercise.

b. Highest Targets Used

In the DoEL's presentation, it was indicated that the proposed targets are informed/influenced by the highest targets submitted by the RMI Associations and the Consumer Goods Counsel of South Africa.

Forming the basis of setting sectoral targets by using the highest targets from the submissions is unjust, as it disregards the uniqueness and complexities of the sub-sectors involved.

In developing a process to ensure fair and responsible targets, it is imperative that only motor industry related businesses are included in the statistics currently monitored by the DoEL.

More so the differentiation within RMI Associations should also be taken into consideration when setting the targets.

The DoEL should avoid a blanket approach when setting the targets for the sector.

c. The Sector Skills Plan

For transformation of the automotive industry to be more inclusive and deepen in value, the RMI acknowledges that skills development should be used as a vehicle to drive and achieve Employment Equity targets within the workplace.

As a result, the RMI refers to the Skills Sector Plan 2021 – 2022 as this is a comprehensive report which is derived from extensive research about the sector.

The results contained in the Sector Skills Plan can be used as an indicator of where the industry is, regarding skills development and provide direction and guidance to which improvements must be made to ensure that the Employment Equity Targets are met and complied with.

The RMI respectfully urges the DoEL to consider the Sector Skills Plan as a valuable document as skills deficiencies are outlined by the plan. This will avoid putting pressure on the employers to achieve unreasonable targets, which may result in appointing employees who do not have the correct skills, therefore setting them up for failure.

The sector still requires reasonable time to undertake meaningful work in developing the youth in a manner that gives them opportunities for future employment and reduce persons that are Not in Education, Employment and Training (NEET's).

The effect of unreasonable targets will result in a loss of jobs, therefore undermining sustainability in a battered industry, lack of ability to fund employment, taxes and growth.

Hard to fill vacancies

The Sector Skills Plan makes reference to hard to fill vacancies which are vacancies in the sector that are unable to be filled within a reasonable time. The main reasons for such difficulty in filling vacancies are a lack of specific skills and a lack of experience and qualifications – please refer to Figure 32: Reasons for HTFVs by Occupational Category of the Sector skills plan:

For example: Automotive Technicians - vehicles are highly complex and need people who have a mathematical ability and scientific skills to work on vehicles but despite massive moves to recruit, artisans are seen as second-class citizens and attracting people is exceptionally difficult. Those who do apply, often need to have their maths and science bolstered through processes such as the GTTP so that they can enter the field.

- Equity considerations makes it difficult to find candidates;
- Vacancy situated in remote/difficult to access locations;
- Candidates do not have the right personal characteristics/attitudes; and
- Poor remuneration.

Skills Gaps

Skills gaps refer to “skills deficiencies in employees or lack of specific competencies by employees to undertake job tasks successfully to required industry standards. Skills gaps may arise due to lack of training, new job tasks, technological changes, or new production processes to list a few.

Skills gaps create a serious barrier which impacts future growth of the economy and the implementation of interventions aligned with national strategies, including transformation by affecting employment equity resulting in the under representation of designated groups.

Future skills have been noted in light of globalisation and competitiveness, re-industrialisation and skills for 4IR. The COVID-19 pandemic has tended to exacerbate the 4IR in that companies had to adopt new technologies rapidly to ensure continued production under social distancing regulations.

In order for workers to keep pace and remain viable over time, they need to possess key skills that will allow them to be more successful in their work and more marketable to relevant sectors.

Barriers / Challenges

The following is a sample of some of the barriers / challenges being faced by the industry:

The industry is not seen as a first-choice career for school and /or tertiary intuitions leavers. This is particularly relevant when it comes to females. The industry, therefore, has a significant shortage of females;

The industry is male-dominated;

Finding suitably qualified persons that are compliant and committed in the workplace remains a challenge;

Due to shortage of skills and the competition in the industry, it is sometimes difficult to retain skilled employees;

The cost of the skills development is beyond the budgets of employers in the sector, consequently there is a desperate need for government help and funding.

d. The Consultation with DoEL

From the onset the RMI has indicated to the DoEL that its' intention and desire is to consult meaningfully with the Department in ensuring that the sector targets agreed to ultimately are not only realistic, but achievable. It is critical to ensure meaningful industry transformation whilst maintaining high levels of regulatory compliance. The RMI is of the view that on-going consultation is required to achieve this objective.

The RMI's Proposal to the Department

The RMI is of the considered opinion that the final, proposed sector targets for the Wholesale and Retail Trade and the Repair of Motor Vehicles and Motorcycles Sector, are unrealistic and therefore unachievable by the majority of the sub-sectors in the retail

automotive trade. In addition, the period for which compliance with these targets have been set, are unrealistically short. The RMI urges the DoEL to reconsider these targets, adjust them downwards and significantly extend the period associated with specific compliance.

The RMI further proposes very specific legislative provision to the effect that no penalties, as prescribed in the existing legislation (Employment Equity Act), be applicable to any designated employer in the event of non-compliance with proportional targets during the currency of the compliance period. Assessment of compliance can and must only take place at the conclusion of the compliance period, (which the RMI proposes as per the above) to be a significantly longer period.

Commitment to promoting inclusion

Notwithstanding the numerical targets and acknowledged barriers / challenges, our sector of the industry is committed to transformation. This sector will continue to strive to attract qualified individuals who would not have necessarily chosen a career in the retail motor industry by creating new opportunities in the form of workplace experience programs, graduate internships, whilst also aligning recruitment practices with EE goals and targets.

CONCLUSION

The RMI would like to invite the department to a further engagement to ensure that the department understands the RMI's proposal fully, and to also present the Sector Skills plan to the department.

This will allow the department an opportunity to inform the RMI whether they agree with the proposal, and also provide the RMI with further recommendations to arrive at the desired outcome for all the parties involved.

