

Employment equity:

National demographics should not trump regional realities

African National Congress, Western Cape



The following is excerpted from the ANC Western Cape's response to the Draft Regulations on Employment Equity published by the department of labour in February for public comment. As we go to press, the department of labour has withdrawn the stipulation regarding national demographics, but the issue still remains relevant.

AFFIRMATIVE ACTION

Colonial and apartheid policies caused mainly Black people (i.e., Black Africans, Coloureds and Indians), women and people with disabilities to be deprived of economic opportunities across the country. The African National Congress in the Western Cape (ANC WC) is therefore committed to ensuring the acceleration of change in improving the quality of life of all people, with special attention to the needs of women, people with disabilities and Black people.

It is also necessary that the constitutional encouragement of employment equity (through section 9(2) of the 1996 Constitution, which is given expression in our Employment Equity Act 55 of 1998 and Employment Equity Amendment Act 47 of 2013) be implemented through regulations.

In particular, the regulations must enable redress regarding employment equity ... by ensuring that those designated groups that have historically been discriminated against are empowered and given opportunities to be employed and promoted.

We take cognisance of the fact that the draft regulations have been developed against the backdrop of amendments to the 1998 Employment Equity Act ("the Act"). Those amendments were made to address some of the shortcomings, challenges and unintended consequences in the implementation of the Act, as well as conflicting and inconsistent policy tensions that arose since the passing of the Act and subsequent court judgments.



SECOND
QUARTER
2014

NEW
AGENDA



UNINTENDED CONSEQUENCES

We, however, also note that the wording of Clause 3 in Section D of the draft regulations, “Enforcement Mechanisms”, may negate some of the redress aims of affirmative action if approved in its current format.

Clause 3, for the “determination of national and regional demographics for equitable representation”, is currently formulated in the following way:

1. In setting numerical goals and targets, employers can use the demographic profile of the national and regional economically active population applicable to them.
2. A designated employer employing 150 or more employees should use the national economically active population (EAP) for the upper three levels (viz. Top Management, Senior Management and Professionally Qualified), and an average of the national and regional economically active population for the lower levels (viz. Skilled Technical, Semi-skilled and Unskilled) as a guide in setting their numerical goals and targets in their employment equity plans.
3. A designated employer with 149 or less employees should use the national economically active population for the upper two levels (viz. Top Management and Senior Management), and the regional economically active population for the

lower levels (viz. Professionally Qualified, Skilled Technical, Semi-skilled and Unskilled) as a guide in setting their numerical goals and targets in their employment equity plans.

It is unfortunate that reactionary forces opposed to employment equity and affirmative action are abusing the abovementioned possible consequence by attempting to fuel fear within the Coloured communities in the Western Cape and Northern Cape.

We submit that, if only national demographics were applied to the top three echelons of management, it may result in members of the Coloured population in the Western Cape being prejudiced, given the demographic profile of this province. While Coloured persons comprise approximately 8.5 percent of the national demographic profile, they are a majority



in the Western Cape, making up 48 percent of the regional demographic profile. (A similar situation applies in the Northern Cape, where the Coloured population is approximately 40 percent of the provincial population.) If employers in the Western Cape used only national demographics, as per the draft regulations, it may result in eligible Coloured persons not being appointed and/or promoted to management positions, as they would be over-represented based on the national demographic profile, although being under-represented based on the regional demographic profile. Consequently, an application of Clause 3 may not achieve the spirit and intention of the Act to empower all historically disadvantaged groups. Black African persons and Coloured persons are currently under-represented in management positions in the Western Cape. Thus, both should benefit from affirmative action measures.

It is unfortunate that reactionary forces opposed to employment equity and affirmative action are abusing the abovementioned possible consequence by attempting to fuel fear within the Coloured communities in the Western Cape and Northern Cape. They mischievously suggest that the implementation of Clause 3 will prioritise Black African persons above Coloured persons for employment equity purposes. They attempt to cast aspersions and doubts on the whole gamut of affirmative action and employment equity policies of this government, while continuing to ensure an over-representation of White people in management in the Western Cape, in both the public and private sectors. What those reactionary forces fail to point out is that they will do whatever they can to reinforce the status quo of the apartheid period by prioritising the appointment of White people above Black people wherever possible.

To prevent such an abusive interpretation and application of the draft regulations, we suggest that Clause 3 of Section D be reformulated. The material and historical conditions of all designated groups that were discriminated against, and which the Act intends to assist through redress, must be taken into account. This includes spatial conditions.

RECOMMENDED CHANGES

The ANC WC suggests that both the national and regional economically active populations (EAPs) be considered in all instances where numerical targets are set in employment equity plans, so that all designated groups may enjoy the benefits of affirmative action. We believe that this will afford employers the necessary flexibility to comply with section 15(1) of the Employment Equity Act 1998 and section 9(2) of the Constitution 1996, and not be



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inconsistent with Section 15(3) of the Employment Equity Act 1998.

We also note the words “can use” and “should use” as they appear in Clause 3 in reference to employers “setting their numerical goals and targets in their employment equity plans”. We do not believe that this language mandates the use of numerical quotas, which is prohibited by Section 15(3) of the Employment Equity Act 1998. However, if the intent is to establish such rigid quotas, we would be opposed to that initiative.

The ANC WC notes further that, if the Labour Court were to assess compliance with the Constitution and the relevant employment equity legislation, it would consider “the reasonable steps taken by an employer to appoint and promote people from designated groups”. This means that, in addition to the proposed guidelines, factors such as the availability of suitably qualified staff and commercial considerations will still be taken into account. Thus, Clause 3 of Section D can only be understood in the context of the flexibility afforded by the Employment Equity Act.

We believe that the regulations, as amended in the manner suggested in this submission, will provide the necessary mechanism to contribute to correcting the injustices of our past.

