For attention: Esther Tloane / Mantombi Bobani

Department of Employment and Labour

Email: NLMP@labour.gov.za

27 May 2022

Dear Sir/Madam

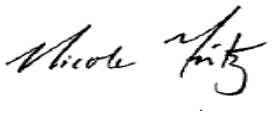
Submission on the Employment Services Amendment Bill

Please find attached to this letter the Helen Suzman Foundation's (HSF) written submission responding to the notice of intention to introduce the Employment Services Amendment Bill.

The HSF would like to confirm our interest in making oral representations at a later convenient date.

Please don't hesitate to contact me should you have any queries (Email: nicole@hsf.org.za).

Yours sincerely



Nicole Fritz

Director

1. Introduction

1.1. This submission is a response to an invitation to interested individuals and organisations to submit written comments on the Employment Services Amendment Bill (**Bill**), by 28 May 2022.

1.2. The Helen Suzman Foundation (**HSF**) is a non-governmental organization whose aim is to promote constitutional democracy and the rule of law. To this end the HSF carries out legal, social, economic and political research, and it litigates from time to time on matters of constitutional significance.

1.3. The HSF is gravely alarmed by the apparent rise in xenophobia in South Africa and increasing reports of vigilante groups targeting foreign nationals for ostensibly 'stealing jobs'. That alarm is heightened in that government's own recent actions, far from dispelling such prejudice, may in fact encourage or validate such sentiment – as with the Minister of Home Affairs' decision to discontinue the Zimbabwean Exemption Permit.

1.4. This submission is animated by an overarching concern that government not bow to political pressure and act unlawfully, irrationally, unreasonably and inhumanely in respect of law-abiding foreign nationals residing in South Africa.

1.5. This is especially so given that the Bill and the Employment Services Act No. 4 of 2014 (**Act**), which it seeks to amend, apply to foreign nationals *who are residing lawfully in South African and have been granted the right to work here.*

1.6. In summary the HSF submits that –

1.6.1. the Bill's proposed section 12A(2)(d) is laudable, because it aims to prevent unequal terms of employment between foreign nationals and South African citizens – which is made an explicit offence by the Bill's incorporation of section 12A contraventions into section 49(2), read with Schedule 3 of the Act.

1.6.2. the penalties for any contravention of the Act should be expressly aimed at employers only. As currently drafted there is the risk that foreign national employees may also attract liability.

1.6.3. the Bill's proposed section 12B, which introduces a quota system that controls the participation of foreign nationals in the labour market (**Ministerial Quota System**) should be deleted;

1.6.4. if retained, the Ministerial Quota System risks tying the Minister of Employment and Labour (**Minister**) up in lengthy litigation regarding the constitutional rights of foreign nationals;

1.6.5. the Ministerial Quota System concentrates far too much power in the Minister, to the exclusion of Parliament and parties that would be directly affected by the introduction of a quota;

1.6.6. the Ministerial Quota System places unnecessary burdens on employers; and

1.6.7. the Bill is in tension with the government's own policy position set out in the Draft National Labour Migration Policy for South Africa (**DNLMP**).

2. What the Bill Gets Right – Section 12A(2)(d) and the Equal Treatment of South African Citizens and Foreign Nationals.

2.1. The HSF is encouraged by the fact that the Bill makes provision for the equal treatment of foreign nationals and South African citizens in the labour market. In this regard, the Bill's proposed 12A(2)(d) laudably provides that employers must –

> *"… employ [a foreign national] on terms and conditions of employment that are not inferior to those which would be provided to a South African citizen, permanent resident or refugee."*

2.2. This provision is clearly aimed at ensuring that foreign nationals are not offered inferior working terms and conditions but it also concomitantly offers South Africans protection in

the labour market by prohibiting an undercutting of wages and working conditions in respect of jobs offered foreign nationals. No further sweeping quota-making powers that the Bill proposes to award the Minister are required in order to ensure the protections which section 12A(2)(d) so strongly underlines.

2.3. Moreover, the proposed Ministerial Quota System is to be deprecated in light of government's own statements in the DNLMP regarding quota systems in the context of the labour market.

2.4. Indeed, as will become clear in the next section of this submission, the DNLMP contains only vague reference to studies about the ostensible negative effect of foreign nationals on the South African labour market.[1] There is no detail provided regarding the conclusions of these studies. In contrast, every detailed study referenced in the DNLMP finds that foreign nationals have a broadly positive effect on the South African labour market and the economy in general.

2.5. In such a context, it would serve no legitimate government purpose to go beyond the Bill's proposed section 12A(2)(d) in order to ensure equal working terms and conditions as between South African citizens and foreign nationals.

2.6. In this regard, it is worth bearing in mind that –

2.6.1. the Bill makes a contravention of section 12A(2)(d) – along with any contravention of section 12A – an offence in terms of section 49(2), read with of Schedule 3 of the Act;[2]

2.6.2. other section 12A prohibitions include prohibiting the employment of persons without the requisite right to work granted in terms of the Immigration Act No. 13 of 2002, the Refugees Act No. 130 of 1998 or any other legislation and international agreement;[3] and

2.6.3. the Bill doubles the pre-existing maximum fine for a Schedule 3 contravention from R50 000 to R100 000.[4]

[1] DNLMP at page 16 and 17.
[2] See paragraph 16 of the Bill. For completeness, section 49(2) of the Act currently states that: "The Labour Court may, on application by the Director-General, impose a fine not exceeding R50 000 on an employer that contravenes any of the provisions listed in Schedule 3."
[3] See sections 12A(1)(a)(b) and (c) of the Bill respectively.
[4] See paragraph 13 of the Bill.

2.7. This means that the Bill puts forward a comprehensive system of penalties that protects the South African labour force from any perceived negative effect of foreign labour – without introducing the Ministerial Quota System.

2.8. Indeed, the availability of less restrictive means, like a properly enforced section 12A, will be a crucial factor in determining whether the Ministerial Quota System lawfully limits the constitutional rights of foreign nationals in terms of section 36 of the Constitution.

2.9. The HSF has one significant concern about the penalty system proposed by the Bill, however. Paragraph 13 of the Bill expressly amends section 49(2) of the Act to make the subject of a Schedule 3 penalty "a person" as opposed to "an employer." This, in principle, opens the way for foreign nationals themselves to be the target of Schedule 3 penalties and, in turn, the potential to unjustly target foreign nationals over their employers for section 12A contraventions.

2.10. In this regard, it is worth noting that section 49(3) of the Immigration Act makes employers alone the subject of penalties for the unlawful employment of foreigners. The Bill, therefore, is out of step, and unjustly so, with the penalty provisions of the Immigration Act.

2.11. As such, the HSF submits that paragraph 13 of the Bill should leave section 49(2) to apply to employers alone but retain its increase in the maximum fine.

3. The Lack of a Rational Basis for the Ministerial Quota System.

3.1. The DNLMP makes clear the legal and evidential preconditions for the rational introduction of a quota system. In this regard, it states that since: "… the imposition of quotas may impinge on the constitutional rights of those affected thereby, it needs to take into consideration several qualifications – amongst which [is] the requirement that the imposition of quotas has to be *informed by labour market evidence*."[5]

[5] Draft National Labour Migration Policy for South Africa p86.

3.2. This is echoed in the National Development Plan 2030's call for a more progressive migration policy, which it acknowledges "can only be done if there is sufficient data on the movement of people within the country and on those entering the country."[6]

3.3. Yet the DNLMP is candid in its concession that it lacks the evidential basis for the introduction of a quota system. In fact, the DNLMP admits that a significant body of research has found that foreign nationals have a positive impact on the South African labour market.

3.4. In particular, the HSF would like to draw the Minister's attention to the following findings referenced in the DNLMP:

3.4.1. "Immigrants are well-integrated into the labour market in terms of employment and unemployment rates, and in general do not seem to displace native-born workers."[7]

3.4.2. "The impact of immigration on gross domestic product per capita is positive, and the estimates from an econometric model show that immigrant workers may raise the South African income per capita by up to 5%."[8]

3.4.3. "Immigrants also have a positive net impact on the government's fiscal balance. This is due to the fact that they tend to pay more in taxes, especially in income and value added taxes."[9]

3.4.4. "We must also note the prevalence of self-employment among immigrants: self-employment accounted for 25 percent of total jobs for immigrants, compared to 16 percent for locals. Migrants are more likely to appear in entrepreneurial roles than locals, suggesting that their actions are likely to promote economic growth by enhancing, for instance, the supply of small retail establishments."[10]

3.5. To the extent that the DNLMP is sceptical about the above-mentioned findings, it admits ignorance of the true impact of foreign nationals on the South African labour market.

3.6. In this regard, the DNLMP states explicitly that: "South Africa *does not currently have adequate data* to measure reliable estimates of the stocks and flows of foreign labour in South

[6] National Development Plan 2030 'Our Future, Make it Work' page 97.
[7] Ibid.
[8] Ibid.
[9] Ibid.
[10] Ibid.

Africa. This makes it difficult to measure the impact of migration on the South African labour market."[11]

3.7. In other words, at best, the Bill introduces the Ministerial Quota System in the dark.

4. How the Bill Risks Constitutional Litigation.

4.1. In addition to the above empirical concerns, the HSF is concerned that the Bill will entangle the Minister in unnecessary and costly litigation concerning the constitutional rights of foreign nationals lawfully residing and permitted to work in South Africa.

4.2. The Constitution is based on the values of dignity, freedom and equality. These values form the basis for the recognition of the fundamental human rights entrenched in the Bill of Rights – the cornerstones of our democracy. These fundamental rights, that are intertwined with one another, must be respected and promoted.

4.3. The HSF acknowledges that some of the rights enshrined in the Constitution are reserved for South African citizens. However, it is important that the Minister is aware that this is not always the case – some rights are afforded to all who find themselves within the confines of our country.

4.4. Of particular relevance in this regard are the right to dignity, just administrative action and fair labour practices, which are enshrined, respectively, in section 10, 33 and 23 of the Constitution. These rights apply equally to citizens and foreign nationals and may only be limited in terms of section 36 of the Constitution.

[11] Ibid.

The Right to Dignity

4.5. Regarding the right to dignity, the HSF's submission is based on the decision of the Supreme Court of Appeal in the matter of *Minister of Home Affairs and Others v Watchenuka and Others*.[12] In *Watchenuka*, the Supreme Court of Appeal (**SCA**) considered the validity of a general prohibition imposed on asylum seekers during the first 180 days of their asylum process, which prevented their employment.

4.6. The SCA found that this prohibition unjustifiably limited the right to human dignity of asylum seekers, because it impeded their ability to seek employment and to enjoy the freedoms associated with employment.[13]

4.7. The HSF submits that the Ministerial Quota System runs a very real risk of suffering the same fate before the courts. This is because the Ministerial Quota System will either –

4.7.1. prevent some foreign nationals from entering the labour market for an undetermined period of time – even permanently in some cases;

4.7.2. force foreign nationals to leave the labour force, in the event that their employer is non-compliant with a given quota; or

4.7.3. at best, leave employed foreign nationals to live and work in the knowledge that their employment is permanently at risk of being deprived by Ministerial decree.

4.8. All this, when the Bill and Act apply to foreign nationals *lawfully allowed in the country and who have been granted the right to work.*

4.9. This is a similar, indeed a potentially far more harmful, policy to the temporary prohibition on employment at issue in *Watchenuka.* This means that the legal principles endorsed in *Watchenuka* are likely to apply with even more force to the Ministerial Quota System.

4.10. In particular, it is worth bearing in mind that the SCA in *Watchenuka* held that –

> *"Human dignity has no nationality. It is inherent in all people – citizens and non-citizens alike – simply because they are human. And while that person happens to be in this*

[12] *Minister of Home Affairs and Others v Watchenuka and Others* [2003] ZASCA 142; [2004] All SA 21 (SCA) (*Watchenuka*).
[13] Ibid at para 33.

country – for whatever reason – it must be respected, and is protected, by s 10 of the Bill of Rights."[14]

4.11. When applying these principles to the ability to work, the SCA held that –

"The freedom to engage in productive work – even where that is not required in order to survive – is indeed an important component of human dignity, as submitted by the respondents' counsel, for mankind is pre-eminently a social species with an instinct for meaningful association. Self-esteem and the sense of self-worth – the fulfilment of what it is to be human – is most often bound up with being accepted as socially useful."[15]

4.12. To be clear, it is not the HSF's submission that migrants of all kinds have an unlimited right to work in South Africa. For instance, it is legitimate for government to ensure that workers have the requisite lawful status in terms of our immigration legislation – as the Bill and Act would do without the imposition of a quota system.

4.13. However, the HSF is in agreement with the SCA that –

"where employment is the only reasonable means for the person's support other considerations arise. What is then in issue is not merely a restriction upon the person's capacity for self-fulfilment, but a restriction upon his or her ability to live without positive humiliation and degradation."[16]

4.14. The HSF submits that this may well be the situation of many foreign nationals that will fall victim to the Ministerial Quota System. Labour markets are incredibly complex and, as will be demonstrated in the next section, the Bill creates no meaningful mechanism to fairly determine the particular circumstances of an individual foreign national's employment situation when instituting a quota.

[14] Ibid at para 26.
[15] Ibid at para 27.
[16] Ibid at para 32.

4.15. Indeed, the SCA in *Watchenuka* set its face against general legal principles that exclude people living in South Africa from the labour market, precisely because of the relevance of individual circumstances in determining the lawfulness of such exclusion. In this regard, the SCA held –

> *"For a general prohibition will inevitably include amongst those that it affects applicants for asylum who have no reasonable means of support other than through employment. A prohibition against employment in those circumstances is a material invasion of human dignity that is not justifiable in terms of s 36."*[17]

4.16. What is particularly notable here is that the SCA's rejection of general prohibitions from participation in the labour market was made with explicit reference to the concerns that non-citizens would displace South Africans from potential employment opportunities.[18]

4.17. Given the SCA's clear statements in *Watchenuka*, the HSF submits that the Minister should be prudent and delete the Ministerial Quota System from the Bill. Indeed, the Bill's own purpose – stated in section 2(1)(h)(i) thereof – seeks to give effect to constitutional rights of foreign nationals and would, thus, be defeated from within by the inclusion of the Ministerial Quota System.

4.18. The Minister should, therefore, pay due regard to the DNLMP's own commitment to a rights-based approach to the protection of all workers employed in South Africa – one that is in line with "South Africa's international obligations, regional and SADC commitments, as well as obligations under its Constitution and national labour legislation which is guided by the principle of equality of treatment, in addition to other legal and policy frameworks."[19]

4.19. If the Minister is concerned with addressing the perceived negative effects of foreign nationals on the labour market, then he should instead rely on a strengthened – and properly enforced – prohibition on the unequal treatment of foreign nationals and South African citizens as proposed in section 12A(2)(d) of the Bill.

[17] Ibid at para 33
[18] Ibid.
[19] The DNLMP at page 12.

The Right to Just Administrative Action

4.20. Another constitutional right that is not limited to South African citizens is the right to just administrative action, which is enshrined in section 33 of the Constitution and given effect to by the Promotion of Administrative Justice Act No. 3 of 2000 (**PAJA**).

4.21. Any quota system introduced under the Bill's proposed section 12B will more than likely count as 'administrative action' and, thereby, fall under PAJA's purview and attract all its protections against unlawful, irrational, unreasonable and procedurally unfair exercises of public power.

4.22. However, even if the Ministerial Quota System does not fall within PAJA's purview, the principles of administrative justice that our courts have developed under the principle of legality will apply nevertheless.

4.23. In this regard, the HSF is concerned that the Ministerial Quota System risks lengthy and expensive litigation.

4.23.1. In terms of section 6(2)(f) of PAJA and in terms of the principle of legality,[20] any rational exercise of public power must be related to the information before the Minister.

4.23.2. Following the Constitutional Court's judgment in *Democratic Alliance v President of the Republic of South Africa*, we also know that all public power must be exercised through a rational process – in particular by having considered information that is material to the decision.[21]

4.23.3. Given that the DNLMP is open about the fact that the Ministerial Quota System is being proposed without any data about the effect of foreign nationals on the labour market, quota systems in respect of foreign nationals will run a perennial risk of judicial review in terms of the abovementioned principles of administrative justice.

4.24. The Bill's shortcomings in this regard will be most evident where sectors have not been proven to be overrepresented by foreign nationals. As specified by the DNLMP, the impo-

[20] *Predators Breeding Association v Minister of Environmental Affairs and Tourism* [2011] 2 All SA 529 (SCA).
[21] *Democratic Alliance v President of the Republic of South Africa 2013* (1) SA 248 (CC) at para 37.

sition of quotas should only be done with appropriate data which justifies the need to improve access to certain sectors for South African citizens. In the absence of such data, the Minister risks restrictions on sectors where the proportion of foreign labour is either overstated or where such labour is vital to its functioning – in either case rendering a quota irrational.

Unfair Labour Practices

4.25. Given that one of the Act's many purposes is to give effect to section 23 of the Constitution, the HSF submits that the Ministerial Quota System may well render the Act internally inconsistent, by unjustifiably limiting the right to fair labour practices of foreign nationals.

4.26. This is because the Ministerial Quota System will inevitably force some employers to dismiss foreign workers, in the event that they are non-compliant with a given quota. This may potentially amount to an unfair labour practice in the form of an arbitrary reason for dismissal – and one against which a foreign national will have no recourse in terms of our labour legislation.

5. How the Bill Concentrates too Much Power in the Minister.

5.1. The Bill concentrates immense power in the Minister to manipulate the participation of foreign nationals in the labour market.

5.2. In this regard, the Bill's proposed section 12B(1) empowers the Minister to issue "a maximum quota for the employment of foreign nationals by employers in any sector." This is a wide-ranging power that has the potential to disrupt labour markets and cause significant prejudice to individuals, their employers and the relationship between the two.

5.3. The Bill's proposed section 12B(1) only requires the Minister to consult with the Employment Services Board (**Board**), established in terms of section 20 of the Act. This provides no meaningful check on the Minister's powers, as the Board's members are ministerial appointments in the first place.[22]

[22] See section 21(1) of the Employment Services Act, which empowers the Minister to appoint members of the Board.

5.4. The Bill makes no provision for consultation with role-players in the sectors that will be the object of a quota, let alone individual employers and employees themselves. Section 12B(4) of the Bill provides for a meagre 30-day notice and comment period once the Minister has already formulated a quota in consultation with the Board.

5.5. Furthermore, the Bill makes no explicit provision for consultation with the relevant Portfolio Committee in Parliament – a crucial check on ministerial power.

5.6. Such scant provision made for consultation beyond the office of the Minister, and his appointed Board, leaves the HSF concerned that any exercise of power under the Bill's proposed section 12B(1) is destined to be unmoored from the principles of natural justice and indeed rational decision-making in terms of the principles of administrative justice outlined immediately above.

6. How the Bill Unnecessarily Burdens Employers and Foreign National Employees.

6.1. The Bill's proposed section 12B(1) and (2) provide for a quota system that applies very broadly to 'sectors', and 'occupational categories' on either a national or regional scale. In this way, the Ministerial Quota System is, by design, unconcerned with the individual human resources demands of individual employers – nor with their labour law obligations. As a result, any quota issued by the Minister runs a real risk of placing significant burdens on individual employers and employees.

6.2. The Bill's proposed section 12A(2)(b) requires any person who employs a foreign national to work within South Africa to "satisfy themselves that there are no persons in the Republic, other than foreign nationals, with the requisite skills to fill the vacancy, before recruiting a foreign national to occupy such vacancy." Yet the Bill contains no detail as to how this is to be done. Indeed, it is obviously impossible for a prospective employer to undertake a detailed nationwide study to make sure that there are no South Africans with the required skills to fill the vacancy.

6.3. The Bill's proposed section 12B(3)(b) prescribes that any Ministerial notice must specify the period within which employers must comply with quotas specified in the notice. However,

the period during which an employer is able to comply will differ widely, given individual circumstances.

6.4. Moreover, despite the DNLMP expressly stating that any quota system should be reviewable,[23] the Bill makes no provision for such a review. This suggests that quotas, once imposed, will be permanent until later changed by the Minister or challenged in court. This will only serve to negatively employers – indeed the economy as a whole – where dynamics in the labour market shift. This could happen in the instance of a lack of skills or sudden demand spikes in a certain sector which has been regulated by a stringent quota requirement.

6.5. The Bill, therefore, runs a significant risk of placing unreasonable burdens on employers and the abovementioned sections should, in the first instance be deleted from the Bill.

6.6. However, if the Bill must retain these sections they should be modified in the following ways:

6.6.1. Section 12B(1) and (2) should provide that sector or occupational quotas will not apply strictly to individual employers, whose needs should be considered by the Minister on a case-by-case basis.

6.6.2. The Bill should be amended to require quotas to be reviewable on a regular basis – one that would be suitable to address any changes in labour market dynamics.

6.6.3. Section 12A(2)(b) should be replaced with a workable alternative mechanism which, for example, places an obligation on a prospective employer to properly advertise a vacancy to enable such an employer to be able to prove that reasonable efforts were undertaken to fill the vacancy with a South African citizen.

6.6.4. Section 12B(3)(b) should be replaced with a provision that gives employers flexibility, taking into account their own unique circumstances, regarding the time allowed to comply with a quota.

6.7. In addition to unduly burdening employers, the Ministerial Quota System risks creating a chilling effect on hiring foreign nationals, who prospective employers may view as a perennial legal risk.

6.8. Although the Bill provides for a waiver in the case of a foreign national employed to fill a position in respect of which critical skills are required, some employers may find the process

[23] The DNLMP at page 86.

of proving this too onerous, leading to a generalised caution against employing foreign nationals.

6.9. It is, therefore, crucial that the Minister be aware that any quota will likely exclude more foreign nationals from the labour force that he may intend.

7. Conclusion

7.1. In sum, the HSF submits that the Bill represents an unworkable and, in all likelihood, unlawful interference in South African labour markets and in the lives of foreign nationals lawfully residing in South Africa and who have been granted the right to work here.

7.2. We have endeavoured to highlight that government is candid, in the pages of its own DNLMP, that it has no evidential basis to claim that foreign nationals have a deleterious effect on South Africa labour markets.

7.3. This not only reveals that the Ministerial Quota System lacks a rational basis for its introduction in the first place, but in all likelihood means that its application in practice will fall foul of our principles of administrative justice under PAJA and the principle of legality.

7.4. More than this, the HSF is gravely concerned that the irrationality and unworkability of the Ministerial Quota System suggests that government is using it, primarily, to signal its support for rising xenophobic sentiment in South Africa. This will only add legitimacy to that sentiment and embolden vigilante groups who have been targeting foreign nationals with impunity as it is.

7.5. Given theses glaring problems with the Ministerial Quota System, the HSF has submitted that the Bill should instead rely on a properly enforced penalty system for contraventions of the Bill's proposed section 12A, aimed solely at employers, as the only lawful option offered by the Bill to ensure equal treatment of South Africans and foreign nationals in the labour market.