

REPUBLIC OF SOUTH AFRICA

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# EMPLOYMENT SERVICES AMENDMENT BILL

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*(As introduced in the National Assembly (proposed section 75); explanatory summary of  
Bill and prior notice of introduction published in Government Gazette No. 54743 of  
26 May 2026)  
(The English text is the official text of the Bill)*

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(MINISTER OF EMPLOYMENT AND LABOUR)



- (d) by the substitution for the definition of “foreign national” of the following definition:  
 “**foreign national**’ means an individual who is not a South African citizen [or does not have a permanent residence permit issued in terms of the Immigration Act], a permanent resident, a refugee or an asylum seeker;”;
- (e) by the insertion after the definition of “foreign national” of the following definition:  
 “**illegal foreigner**’ means an illegal foreigner as defined in the Immigration Act;”;
- (f) by the insertion after the definition of “Immigration Act” of the following definition:  
 “**labour inspector**’ means a labour inspector appointed in terms of section 63 of the Basic Conditions of Employment Act;”;
- (g) by the substitution for the definition of “Minister” of the following definition:  
 “**Minister**’ means the Minister of Employment and Labour;”;
- (h) by the insertion after the definition of “NEDLAC” of the following definition:  
 “**permanent resident**’ means a person who has been issued with a permanent residence permit in terms of sections 25 to 27 of the Immigration Act;”;
- (i) by the substitution for the definition of “private employment agency” of the following definition:  
 “**private employment agency**’ means any person who provides employment services [for gain], excluding any organ of state as defined in section 239 of the Constitution of the Republic of South Africa, 1996;”;
- (j) by the insertion after the definition of “Public Finance Management Act” of the following definitions:  
 “**refugee**’ means an individual who has been granted asylum in terms of Chapter 3 of the Refugees Act;  
 “**Refugees Act**’ means the Refugees Act, 1998 (Act No. 130 of 1998);”;
- (k) by the insertion after the definition of “registrar” of the following definitions:  
 “**sector**’ means an industry or service or part of an industry or service;  
 “**sectoral determination**’ means a sectoral determination made under Chapter Eight of the Basic Conditions of Employment Act;”;
- (l) by the substitution for the definition of “Supported Employment Enterprises” of the following definition:  
 “**Supported Employment Enterprises**’ means the [national government component] entity established in terms of section 42;”;
- (m) by the insertion after the definition of “Unemployment Insurance Act” of the following definition:  
 “**worker**’ means any person who works for another and who receives, or is entitled to receive, any payment for that work, whether in money or in kind;”;
- (n) by the substitution for the definition of “work seeker” of the following definition:  
 “**work seeker**’ means any person who is looking for work as an employee or worker, whether in South Africa or elsewhere.”.

## Amendment of section 2 of Act 4 of 2014

2. Section 2 of the principal Act is hereby amended—
- (a) by the substitution in subsection (1) for paragraph (h) of the following paragraph:  
 “(h) facilitate and regulate the employment[,] of foreign nationals, who are not illegal foreigners, in the South African economy, where their contribution is needed in a manner—
- (i) that gives effect to the fundamental rights contained in the Constitution, including the right to fair labour practices contemplated in section 23 of the Constitution;
- (ii) that does not impact adversely on existing labour standards or the rights and expectations of South African workers;
- [and]

- (iiA) that promotes the availability of critical skills in the South African labour market; and
- (iii) that promotes work opportunities for and the training of South African citizens and permanent residents.”; and
- (b) by the deletion in subsection (2) of the word “and” at the end of paragraph (d), the deletion of the full stop and the insertion of the expression “; and” at the end of paragraph (e), and the addition of the following paragraph:
  - “(f) providing a framework to—
    - (i) facilitate and regulate the recruitment and employment of foreign nationals with skills in South Africa;
    - (ii) protect and provide assistance to South African citizens seeking employment experience abroad or while temporarily working abroad; and
    - (iii) promote the reintegration and employment of South African citizens, and other persons of South African descent, residing or working abroad into the South African economy.”.

### Repeal of sections 8 and 9 of Act 4 of 2014

3. Sections 8 and 9 of the principal Act are hereby repealed.

### Insertion of Chapter 3A in Act 4 of 2014

4. The following Chapter is hereby inserted after Chapter 3 of the principal Act:

#### “CHAPTER 3A

#### EMPLOYMENT OF FOREIGN NATIONALS

#### Employment of foreign nationals

- 12A.** (1) No person may employ a foreign national to work within the territory of the Republic of South Africa, unless that foreign national—
- (a) is permitted to be so employed in terms of a visa issued under the Immigration Act or Refugees Act; or
  - (b) is permitted to work within the territory of South Africa in terms of any—
    - (i) other legislation; or
    - (ii) international agreement, which is binding on the Republic in terms of section 231 of the Constitution.
- (2) Any person who employs a foreign national to work within the territory of the Republic of South Africa must—
- (a) ascertain that the foreign national is entitled to work in the Republic and is entitled to perform the work in which they are employed;
  - (b) satisfy themselves in such manner as may be prescribed that there are no persons in the Republic, other than foreign nationals, with the necessary skills to fill the vacancy, before recruiting a foreign national to occupy such vacancy;
  - (c) subject to subsection (3), prepare a skills transfer plan in respect of any position in which a foreign national is employed;
  - (d) employ such foreign national on terms and conditions of employment that are not inferior to those which would be provided to South African citizens; and
  - (e) retain copies of the relevant visa issued in terms of the Immigration Act or Refugees Act, and any other documents that show the foreign national is lawfully entitled to be employed or to work in the Republic.
- (3) The Minister may, if satisfied that it is not practicable for employers to prepare a skills transfer plan, make a determination to exclude the requirement to prepare a skills transfer plan in terms of subsection 2(c) in respect of any category of employers or any category of employees or workers.

- (4) A determination in terms of subsection (3) must—
- (a) be made on the advice of the Board; and
  - (b) be issued by notice in the *Gazette*.

### Quotas for employment of foreign nationals

**12B.** (1) Subject to subsection (5), the Minister, after consulting the Board, may, by notice in the *Gazette*, specify a maximum quota for the employment of foreign nationals by employers in any sector. 5

(2) A quota may apply to the employment of foreign nationals as employees or workers—

- (a) in one or more sectors specified in the notice; 10
- (b) in one or more occupational categories specified in the notice;
- (c) nationally; or
- (d) to one or more regions specified in the sector.

(3) The notice contemplated in subsection (1) must—

- (a) specify the period within which existing employers must comply with the quotas; 15
- (b) specify the period within which newly established employers must comply with the quotas; and
- (c) exclude small employers.

(4) Unless otherwise specified in the notice referred to in subsection (1), a 'small employer', for purposes of subsection 3(c), means any employer that is not within the public sector that employs less than 10 employees: Provided that— 20

- (a) it does not operate more than one business; or
- (b) it was not formed by the division or dissolution of an existing business. 25

(5) Prior to the issuing of the notice contemplated in subsection (1), a draft of the notice must be published in the *Gazette* and interested parties must be permitted at least 30 days to comment thereon.

(6) The Board must—

- (a) consider the comments received in terms of subsection (5); and 30
- (b) advise the Minister on the exercise of the powers and duties set out in this section.

(7) For the purpose of determining a quota under this section, the Minister may take into account any relevant factor and must take into account— 35

- (a) the purpose of the Act, as set out in section 2(1)(h);
- (b) the scope of any sectoral determination or any bargaining council that covers the relevant sector or sectors;
- (c) the availability of the requisite skills, including critical skills, among South Africans, refugees and asylum seekers who are available to work in the sector, area or occupational categories to which the quota is to be applied; and 40
- (d) the Republic's obligations to permit foreign nationals to work in terms of any international agreement, which is binding upon the Republic in terms of section 231 of the Constitution. 45

(8) An employer may not employ a greater percentage of foreign nationals as employees or workers in its workforce or in any occupational category than are permitted in terms of a quota that is applicable to it in terms of this section, unless the employer has been granted an exemption in terms of section 49A. 50

### Regulations on employment of foreign nationals

**12C.** (1) The Minister may, after consulting the Board, make regulations concerning the employment of foreign nationals, which regulations may include the following:

- (a) The measures that employers must take to satisfy themselves that there are no other persons in the Republic with suitable skills to fill a vacancy, before recruiting a foreign national; 55

- (b) requirements for employers to make use of public employment services or private employment agencies to assist employers to recruit suitable employees or workers who are South Africans or refugees;
  - (c) requirements for the preparation of a skills transfer plan by employers in respect of a position in which a foreign national is employed;
  - (d) the criteria and procedure for applying for an exemption by the Minister in respect of any provision of this Chapter; and
  - (e) the records that employers are required to keep in respect of foreign nationals in their employment.
- (2) A regulation made in terms of this section may—
- (a) include any other requirement, which is consistent with the Immigration Act or the Refugees Act, and is necessary to implement the provisions of this Chapter; and
  - (b) differentiate between different categories of visas or permits issued in terms of the Immigration Act or the Refugees Act, different sectors or areas, different categories of employees and different occupational categories.

### **Employees and workers unlawfully employed**

- 12D.** (1) An employee or worker who is employed in contravention of this Chapter is entitled to enforce any claim that they may have in terms of any law, collective agreement or contract against his or her employer or any liable person.
- (2) A claim contemplated by subsection (1), in so far as it relates to his or her employment, may be enforced on behalf of—
- (a) an employee or worker by a labour inspector in respect of the National Minimum Wage Act, 2018 (Act No. 9 of 2018);
  - (b) an employee by a labour inspector in respect of any employment law as defined in the Basic Conditions of Employment Act; or
  - (c) an employee covered by a bargaining council by an agent of that council in respect of any bargaining council agreement.

### **Prohibited acts in respect of foreign nationals**

- 12E.** An employer may not require or permit a foreign national—
- (a) to perform any work that such foreign national is not authorised to perform in terms of his or her visa or permit; or
  - (b) to engage in work contrary to the terms and conditions of such foreign national's visa or permit, or any law.”.

### **Amendment of section 22 of Act 4 of 2014**

- 5.** Section 22 of the principal Act is hereby amended—
- (a) by the insertion after paragraph (d) of the following paragraph:
    - “(dA) any matter concerning—
      - (i) the recruitment, placement and employment of foreign nationals, excluding illegal foreigners, to work in South Africa;
      - (ii) the identification, recruitment and employment of South Africans residing or working abroad to work in South Africa, and their integration or reintegration into the labour market and promotion of their engagement with South Africa;
      - (iii) the recruitment, placement and employment of and provision of support to South Africans to work in other countries;
      - (iv) the collation and collection of data in respect of any matter contemplated by subparagraphs (i) to (iii);
      - (v) the conclusion of bilateral or multilateral agreements and memoranda of understanding in consultation with the Minister of Home Affairs, to give effect to any of the matters contemplated in this paragraph; and

- (vi) the establishment of a migrant worker welfare program to support South African citizens who are migrant workers abroad;” and
- (b) by the substitution for paragraph (f) of the following paragraph:  
 “(f) the publication of an annual employment services report, which must include a section on the matters dealt with in paragraph (dA); and”.

#### Amendment of section 23 of Act 4 of 2014

6. Section 23 of the principal Act is hereby amended by the substitution in subsection (2) for paragraph (b) of the following paragraph: 10

- “(b) the establishment and functioning of [a committee] committees of the Board, including an executive committee and committees to deal with—
- (i) the provision and regulation of public employment services and the regulation of private employment services; and
- (ii) the facilitation and regulation of work by foreign nationals and any other matter contemplated by section 22(dA);”.

#### Amendment of section 42 of Act 4 of 2014

7. Section 42 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

- “(1) Supported Employment Enterprises is hereby established [as a national government component contemplated in section 7A of the Public Service Act, 1994 (Proclamation No. 103 of 1994),] as an entity within the Department to promote work and employment opportunities for persons with disabilities, and it may be re-established by notice in the Gazette, as a trading entity, upon approval by the National Treasury.”.

#### Amendment of section 43 of Act 4 of 2014

8. Section 43 of the principal Act is hereby amended—

- (a) by the substitution for the words preceding paragraph (a) of the following words:  
 “(1) The functions of Supported Employment Enterprises are to—”; 30  
 and
- (b) by the addition of the following subsection:  
 “(2) Subject to the approval by the National Treasury, Supported Employment Enterprises may perform any of the functions of a trading entity, as contemplated by the Public Finance Management Act.”. 35

#### Substitution of section 44 of Act 4 of 2014

9. The following section is hereby substituted for section 44 of the principal Act:

##### “Appointment of head of Supported Employment Enterprises

44. (1) The Minister must, in accordance with the Public Service Act, 1994 (Proclamation No. 103 of 1994), appoint a head of Supported Employment Enterprises, who is also the Chief Executive Officer [and accounting officer] of Supported Employment Enterprises. 40

(2) The Director-General is the accounting officer of Supported Employment Enterprises.

(3) Subject to section 45, the head of Supported Employment Enterprises is, for purposes of subsection (2), accountable to the Director-General.”. 45

#### Amendment of section 45 of Act 4 of 2014

10. Section 45 of the principal Act is hereby amended by the substitution for subsection (2) of the following subsection:

- “(2) The head of Supported Employment Enterprises is accountable to the [Minister] Director-General and must, when requested to do so, report to the

[Minister] Director-General on the activities of Supported Employment Enterprises.”.

#### Substitution of section 46 of Act 4 of 2014

11. The following section is hereby substituted for section 46 of the principal Act:

#### “Staff of Supported Employment Enterprises 5

**46.** The Minister [may] must, in accordance with the Public Service Act, 1994 (Proclamation No. 103 of 1994), create the post structures necessary for the functioning of Supported Employment Enterprises[, after consultation with the Minister of Finance].”

#### Amendment of section 49 of Act 4 of 2014 10

12. Section 49 of the principal Act is hereby amended—

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

“(1) Chapter 10 of [and Schedule II to] the Basic Conditions of Employment Act [apply] with the necessary changes required by the context to— 15

(a) the monitoring and enforcement of this Act; and

(b) any legal proceedings concerning a contravention of this Act.”;

(b) by the insertion after subsection (1) of the following subsection:

“(1A) Without limiting subsection (1), this Act is monitored and enforced by labour inspectors— 20

(a) appointed by the Minister in terms of section 63(1) of the Basic Conditions of Employment Act; and

(b) who are issued with a certificate in terms of section 63(3) of the Basic Conditions of Employment Act stating that they may monitor and enforce this Act.”; 25

(c) by the substitution for subsection (2) of the following subsection:

“(2) The Labour Court may, on application by the Director-General, impose a fine not exceeding [R50 000] R100 000 on an employer or a private employment agency that contravenes any of the provisions listed in Schedule 3.”; and 30

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

“(2A) The Labour Court may, on application by the Director-General, impose a fine not exceeding the following amounts on an employer that contravenes a provision of section 12A, section 12B(8) or section 12E: 35

(a) R 100 000 in respect of an employer who has not previously failed to comply with the provision;

(b) R 200 000 in respect of an employer who has previously failed to comply with the provision in the previous three years; or

(c) the greater of R 1 000 000 or 10 percent of the employer’s turnover in the previous financial year, in respect of an employer who has previously failed to comply with this provision on two or more occasions provided that a court, when determining a fine that is just and equitable in terms of this provision, must take into consideration any economic benefit that the employer has derived from the contravention.”. 40 45

#### Insertion of section 49A in Act 4 of 2014

13. The following section is hereby inserted after section 49 of the principal Act:

#### “Exemptions

**49A.** (1) An employer, an employers’ organisation registered in terms of section 96 of the Labour Relations Act, acting on behalf of a member, may, in the prescribed form and manner, apply for an exemption contemplated in section 12B(8), which application must be accompanied by— 50

(a) a motivation for the application;

- (b) supporting documents as may be prescribed; and
- (c) such other relevant documents as directed by the Minister.
- (2) An exemption granted in terms of this section—
  - (a) must specify the period for which it is granted;
  - (b) must specify the maximum proportion of foreign nationals that the employer may employ as employees or workers, respectively, in its workforce or in any occupational category specified in the relevant notice; and
  - (c) may be withdrawn on good grounds, including a contravention of this Act or if an employer contravenes any of the conditions that may accompany the exemption.”.

**Amendment of section 50 of Act 4 of 2014**

14. Section 50 of the Principal Act is hereby amended by the deletion of subsections (4) and (5).

**Amendment of section 51 of Act 4 of 2014**

15. Section 51 of the principal Act is hereby amended—
- (a) by the substitution for subsection (1) of the following subsection:
    - “(1) The Minister may delegate to the Director-General any power or duty conferred or imposed on the Minister in terms of this Act, except a power to make regulations and the Minister’s powers in terms of sections 12B, 21, 23, 28, 33(2) and 39.” and
  - (b) by the insertion after subsection (2) of the following subsections, respectively:
    - “(3) The Director-General may delegate any power or duty conferred or imposed on the Director-General in terms of this Act or delegated to the Director-General by the Minister in terms of sub-section (1) to any official with the rank of assistant director or higher.
    - (4) An official must exercise any power or duty that has been delegated in terms of subsection (3), subject to any conditions that the Minister considers necessary.”.

**Amendment of section 52 of Act 4 of 2014**

16. Section 52 of the principal Act is hereby amended—
- (a) by the deletion in subsection (1) of the word “or” at the end of paragraph (f) and the substitution for paragraph (g) of the following paragraph:
    - “(g) any other matter relating to the provision or regulation of public employment services or the regulation of private employment agencies;”;
  - (b) by the addition in subsection (1) after paragraph (g) of the following paragraphs:
    - “(h) the recruitment and placement of South African citizens, and other persons residing outside of South Africa, who have appropriate skills or qualifications to work within the territory of South Africa;
    - (i) any matter concerning the recruitment, and placement and employment, of persons residing in South Africa to work in other countries, including, but not limited to—
      - (i) specifying minimum standards applicable to such recruitment, placement or employment;
      - (ii) requirements to specify the terms and conditions applicable to any recruitment, placement or employment;
      - (iii) prescribing standard forms to be completed in respect of any such recruitment, placement or employment;
      - (iv) prohibiting specified practices in respect of the recruitment, placement or employment of such persons;
      - (v) specifying standards applicable to the return of such persons to South Africa at the end of placement or employment;
      - (vi) prohibiting or restricting the payment by a work seeker of any fees in respect of any such recruitment, placement or employment; or

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|-------|--|----|
| (vii) | procedures for South African citizens who are recruited, placed or employed to work abroad to lodge complaints about any aspect of such recruitment, placement or employment;  | 5  |
| (j)   | measures to promote and regulate the recruitment and integration of South African citizens and persons of South African descent residing or working in other countries into the South African labour market;   | 5  |
| (k)   | a procedure for work seekers and employers to lodge complaints about the operation of public employment services;  | 10 |
| (l)   | any matter necessary for or incidental to the re-establishment of Supported Employment Enterprises as a trading entity in terms of section 42 of the Act;  | 10 |
| (m)   | any matter necessary for the administration, operation and functioning of Supported Employment Enterprises;  | 15 |
| (n)   | any administrative or procedural matters that may be necessary or expedient to achieve the proper and effective administration of this Act, including the referral of any matter to a court of competent jurisdiction;   | 15 |
| (o)   | in consultation with the Minister of Home Affairs, any matter necessary to coordinate the functions of labour inspectors and the Inspectorate contemplated in section 33 of the Immigration Act for the purpose of monitoring or enforcing section 38 of the Immigration Act; or | 20 |
| (p)   | any other matter which may or must be prescribed in terms of this <u>Act</u> .”.   | 25 |

#### **Short title and commencement**

**17.** This Act is called the Employment Services Amendment Act, 2026, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

## MEMORANDUM ON THE OBJECTS OF THE EMPLOYMENT SERVICES AMENDMENT BILL, 2026

### 1. PURPOSE

- 1.1 The Employment Services Amendment Bill, 2026 (“the Bill”), seeks to amend the Employment Services Act, 2014 (Act No. 4 of 2014) (“the Act”).
- 1.2 The purpose of the Bill is to, *inter alia*, promote employment, growth and productivity within South Africa and to facilitate access to work opportunities for work seekers, in particular vulnerable work seekers. The Bill also seeks to facilitate the employment of foreign nationals within South Africa and regulate the operation of private employment services.
- 1.3 The Bill empowers the Minister to make regulations which facilitate the employment of foreign nationals and provides, amongst others, for the making of regulations relating to the use of public employment services or private employment agencies to assist employers to recruit suitable workers who are South African citizens or permanent residents. The current definition of foreign national in the Bill includes both asylum seekers and refugees.
- 1.4 The amendments seek to—
  - (a) provide a legislative framework for the regulation of the employment of foreign nationals in South Africa;
  - (b) create consistency between the provisions of the Act, the Immigration Act, 2002 (Act No. 13 of 2002), and the Refugees Act, 1998 (Act No. 130 of 1998);
  - (c) extend the application of the Act to all persons who are “workers” as defined in the National Minimum Wage Act, 2018 (Act No. 9 of 2018); and
  - (d) empower the Minister to set quotas in respect of the employment of foreign nationals in any economic sector or occupational category.

### 2. CLAUSE BY CLAUSE ANALYSIS

#### 2.1 Clause 1: Amendment of section 1

Clause 1 seeks to—

- (a) insert a definition of an “asylum seeker”, as provided for in the Refugees Act, 1998;
- (b) insert a definition of “bargaining council”, as provided for in the Labour Relations Act, 1995 (Act No. 66 of 1995);
- (c) insert a definition of “critical skills” to create consistency with the use of the term in the provisions of the Immigration Act, 2002;
- (d) insert a definition of “employer” to mean a person who remunerates or is liable to remunerate an “employee” or “worker”;
- (e) insert a definition of “employment” to mean employment as an “employee” or as a “worker”;
- (f) insert definition of “employment law” to mean any law the administration of which has been assigned to the Minister;
- (g) amend the definition of “foreign national” to exclude persons who have been granted recognition as refugees in terms of the Refugees Act, 1998. The effect of this is that persons who are applying for, or have been awarded, refugee status in terms of the Refugees Act, 1998 (Act No. 130 of 1998), will have the same status in respect of employment as citizens and permanent residents;
- (h) insert definition of “illegal foreigner” to mean an illegal foreigner as defined in the Immigration Act;
- (i) insert a definition of “labour inspector” to expand the powers of a labour inspector appointed in terms of the Basic Conditions of Employment Act, 1997 (Act No. 75 of 1997) to include the enforcement of the Act;
- (j) amend the definition of “Minister” to mean “the Minister of Employment and Labour”;
- (k) insert a definition of “permanent resident” to clarify the interaction between the Act and the Immigration Act, 2002;

- (l) amend the definition of “private employment agency” to include private sector agencies who provide employment services not for gain;
- (m) insert a definition of “refugee” to create consistency between the Act and the Refugees Act, 1998 and to insert a definition of the Refugees Act, 1998;
- (n) insert a definition of “sector” for the purpose of setting thresholds for the employment of foreign nationals;
- (o) insert a definition of “sectoral determination” as provided for under Chapter Eight of the Basic Conditions of Employment Act, 1997;
- (p) amend the definition of “Supported Employment Enterprises” to remove the requirement that it must function as a national government component;
- (q) insert a definition of “worker” to make the scope of the Act consistent with that of the National Minimum Wage Act, 2018; and
- (r) amend the definition of “work seeker” to cover employees and workers and cover South Africans seeking work abroad.

## 2.2 Clause 2: Amendment of section 2

Clause 2 seeks to amend section 2 of the Act by—

- (a) providing for the regulation of the employment of foreign nationals in the South African economy in section 2(1)(h) to provide a basis for the introduction of quotas in Chapter 3A;
- (b) inserting into section 2(1)(h)(i) that the purpose of the Act includes to facilitate and regulate the employment of foreign nationals in South Africa where their contribution is needed in a manner that gives effect to the fundamental rights contained in the Constitution, including the right to fair labour practices;
- (c) inserting into section 2(1)(h)(iii) that the purpose of the Act includes to facilitate and regulate the employment of foreign nationals in South Africa where their contribution is needed in a manner that does not impact adversely on the availability of critical skills in the South African labour market; and
- (d) inserting section 2(2)(f) that the purpose of the Act is to be achieved by providing a framework to facilitate and regulate the employment of foreign nationals in South Africa, the employment of South Africans abroad and the reintegration and employment of South Africans residing abroad into the South African economy.

## 2.3 Clause 3: Repeal of sections 8 and 9

This clause will repeal the provisions under these two sections of the Act, which currently regulate the employment of foreign nationals in South Africa. The repeal will cause the provisions contained in sections 8 and 9 to be included in the new Chapter 3A, which the Bill seeks to insert in the Act.

## 2.4 Clause 4: Insertion of Chapter 3A

This clause seeks to insert a new Chapter 3A in the Act to regulate the employment of foreign nationals by—

- (a) inserting a new section 12A(1), which will provide the instances under which the employer may employ foreign nationals;
- (b) inserting a new section 12A(2) setting out the requirements that an employer must comply with before employing a foreign national;
- (c) inserting a new section 12A(3), which sets out that the Minister, if it is consistent with the purpose of the Act, may make a determination to exclude the requirement to prepare a skills transfer plan in terms of subsection 2(c) in respect of any category of employers or any category of employees or workers;
- (d) inserting a new section 12A(4), which provides that a determination in terms of subsection (3) must be made on the advice of the Employment Services Board and be issued by a notice in the *Gazette*;

- (e) inserting a new section 12B, which empowers the Minister, after consultation with the Board, to issue notices in the *Gazette* setting a maximum quota for the employment of foreign nationals by an employer in respect of any sector, occupational category or area specified in the notice;
- (f) inserting a new section 12C, which empowers the Minister to make regulations concerning the employment of foreign nationals, including regulations on the procedure for applying for an exemption from any provision of this chapter and the records that employers are required to keep in respect of foreign nationals in their employment. Equivalent provisions are presently contained in sections 8(2) and (3) of the Act;
- (g) inserting a new section 12D, which provides that foreign nationals hired in contravention of South African law are entitled to enforce claims against their employer. This provision, which is currently contained in section 8(4) of the Act, seeks to prevent unscrupulous employers from employing foreign nationals on terms and conditions of employment that are inferior to those provided for by labour legislation and collective agreements. Labour inspectors and bargaining council agents are empowered to bring claims on behalf of these workers in circumstances where these workers are unable to personally enforce such claims; and
- (h) inserting a new section 12E, which prohibits employers from requiring foreign nationals from performing work that is not authorized in terms of the foreign national's visa, permit or by any statute.

#### 2.5 **Clause 5: Amendment of section 22**

This clause will insert a new paragraph (*dA*), expanding the powers of the Employment Services Board to advise the Minister. This amendment further seeks to amend paragraph (*f*) by enabling the Board to advise the Minister on the publication of the annual employment services report, which includes a section on the matters dealt with in the new paragraph (*dA*) to be inserted.

#### 2.6 **Clause 6: Amendment of section 23**

This clause seeks to amend section 23 by substituting paragraph (*b*) with a paragraph expanding the provision for the establishment of committees of the Employment Services Board to extend to the establishment of committees to deal with the provision of public employment services, the regulation of private employment services and the facilitation and regulation of work by foreign nationals and other matters contemplated by section 22(*dA*).

#### 2.7 **Clause 7: Amendment of section 42(1)**

This clause will enable the Supported Employment Enterprises to operate within the Department as the amendment provides for it to be established as an entity within the Department and no longer as a national government component.

#### 2.8 **Clause 8: Amendment of section 43**

This clause will insert a new subsection empowering the Supported Employment Enterprises to perform any of the functions of a trading entity, as contemplated by the Public Finance Management Act, 1999 (Act No. 1 of 1999), subject to the approval of the National Treasury.

#### 2.9 **Clause 9 and 10: Amendment of sections 44 and 45**

These clauses will be substituting the provisions of sections 44 and 45 of the principal Act.

**2.10 Clause 11: Amendment of section 46**

This clause places an obligation on the Minister to comply with the Public Service Act, 1994 (Proclamation No. 103 of 1994), in the creation of post structures necessary for the functioning of Supported Employment Enterprises. The amendment replaces the creation of post structures by Minister, after consultation with the Minister of Finance.

**2.11 Clause 12: Amendment of section 49**

2.11.1 This clause will delete the previous maximum fine and introduce the new maximum fines that may, on application by the Director-General to the Labour Court, be imposed on an employer for contravening any provisions listed in Schedule 3.

2.11.2 The clause will provide the inspectors appointed by the Minister in terms of section 63 of the Basic Conditions of Employment Act, 1997, with a mandate to monitor and enforce compliance with the Act. This clarifies the current legal position.

2.11.3 The clause authorises the Ministers of Home Affairs and Employment and Labour to enter into an agreement enabling designated labour inspectors to enforce section 38 of the Immigration Act, 2002, and, for that purpose, exercise such powers in terms of the Immigration Act, 2002, as are identified in that agreement.

**2.12 Clause 12: Insertion of section 49A**

2.12.1 This clause will insert a new section providing that employers, an employers' organization registered in terms of section 96 of the Labour Relations Act, 1995, acting on behalf of a member, or a private employment agency with an opportunity to apply for an exemption from any provision of this Act. This amendment will further regulate the application for such exemption.

2.12.2 This clause will also allow the Minister to delegate or assign the powers or duties in respect of the evaluation of exemption applications to an official of the department in accordance with the provisions of section 85 of the Basic Conditions of Employment Act, 1997.

**2.13 Clause 14: Amendment of section 50**

This clause will delete subsections (4) and (5), which refer to the repealed provisions of sections 8 and 9.

**2.14 Clause 15: Amendment of section 51**

This clause will add to the list of Ministerial powers that may not be delegated to the Director-General. The Minister's powers to set quotas in terms of the new section 12B, to be inserted in the Act, must be exercised by the Minister.

**2.15 Clause 16: Amendment of section 52**

This amendment will expand the Minister's powers to make regulations to include matters relating to—

- (a) any matter relating to the provision or regulation of public employment services or the regulation of private employment agencies (section 52(1)(g));
- (b) the criteria and procedure for applying for an exemption from any provision of this Act or its regulations (section 52(1)(h));
- (c) the recruitment and placement of persons residing outside of South Africa to work within the territory of South Africa (section 52(1)(i));

- (d) the recruitment and placement of persons residing in South Africa to work in other countries (section 52(1)(j));
- (e) measures to promote and regulate the recruitment and reintegration of South Africans residing or working in other countries into the South African labour market (section 52(1)(k));
- (f) a procedure for work seekers and employers to lodge complaints about the operation of public employment services (section 52(1)(l));
- (g) any matter necessary for the establishment and approval of Supported Employment Enterprises as a trading entity in terms of the Public Finance Management Act, 1999 (section 52(1)(m));
- (h) any matter necessary for the administration, operation and functioning of Supported Employment Enterprises (section 52(1)(n)); or
- (i) any other matter which may or must be prescribed in terms of this Act (section 52(1)(o)).

#### 2.16 Clause 17: Short title and commencement

This clause makes provision for the short title and commencement.

### 3. DEPARTMENTS / BODIES / PERSONS CONSULTED

- 3.1 The draft Bill was gazetted for a period of 90 days to allow for the public comment process after Cabinet's approval. The Department conducted 34 face to face contact sessions throughout the country. There were radio and TV interviews and 662 written comments were received on the Bill by the end of May 2022.
- 3.2 The Bill was presented internally to the Senior Management, the Executive and the Employment Services Board. The Bill was also subjected to National Economic Development Labour Council negotiations in accordance with the National Economic, Development and Labour Council Act, 1994 (Act No. 35 of 1994).
- 3.3. Consultations with external stakeholders were extensively done through public hearings or stakeholder consultations. The external groups which participated were international organisations (such as African Continental Free Trade Area (AFCTA) and the International Labour Organization (ILO)), Trade Unions and Employers' representatives.
- 3.4. Various government departments and institutions were also consulted. These government departments and institutions include the Director General Cluster, the Inter-Ministerial Committee, consisting of all Ministers relevant to migration issues (Home Affairs, Trade and Industry, Safety and Security, Agriculture, Transport, International Relations and Corporation, Mineral Resource, Educational Social Development and Small Business).

### 4. IMPLICATIONS FOR PROVINCES

The Bill has no effect on the provinces.

### 5. FINANCIAL IMPLICATIONS FOR STATE

The Bill does create financial liabilities for the State. There are cost factors associated with the implementation of the Bill, which are directly linked to the Department. The amendment of section 46 of the Act will vest the Minister with the power to create post structures necessary for the functioning of Supported Employment Enterprises.

The cost factors associated with the implementation of the Bill specifically concern resources related to existing Head Office ("HQ") human capacity, resources related to the ideal HQ structure (*needed*) human capacity, and resources related to the ideal provincial office structure (*needed*) human capacity.

**6. PARLIAMENTARY PROCEDURE**

- 6.1 The Department of Employment and Labour and the Office of the Chief State Law Adviser are of the opinion that the Bill must be dealt with in accordance with the legislative procedure outlined in section 75 of the Constitution as it contains no provisions to which the procedure set out in section 74 or 76 of the Constitution applies.
- 6.2 The Department of Employment and Labour and the Office of the Chief State Law Adviser are of the opinion that it is not necessary to refer the Bill to the National House of Traditional and Khoi-San Leaders in terms of section 39(1)(a)(i) of the Traditional and Khoi-San Leadership Act, 2019 (Act No. 3 of 2019), as it does not contain any provisions which directly affect traditional or Khoi-San communities or provisions which pertain to customary law or customs of traditional or Khoi-San communities.