



MASERUMULE

Corporate Employment Law

Where results matter

THE EMPLOYMENT SERVICES ACT

1. INTRODUCTION

The Employment Services Act 4 of 2004 (“the ESA”) came into effect on 9 August 2015. The ESA repeals all the employment services provisions contained in the Skills Development Act 97 of 1998 (“the Skills Development Act”). Section 13 (registration of private employment agencies) of the ESA has been excluded from coming into operation. The promulgation of the ESA will be followed by the development of regulations that will control the operations of private employment agencies and labour brokers in the labour market.

The primary objective of the ESA is to provide a range of measures to promote employment and also to regulate the employment of foreign nationals. The ESA has various mechanisms for improving employment levels in the Republic of South Africa and providing workers with access to training opportunities. However, only time will tell whether these mechanisms will be successful.

The purpose of the ESA, as per provisions thereof, is to promote employment; improve access to the labour market for work seekers; provide opportunities for new entrants to the labour market to gain work experience; improve the employment prospects of work seekers, in particular vulnerable work seekers; improve the employment and re-employment prospects of employees facing retrenchment; facilitate access to education and training for work seekers, in particular vulnerable work seekers; promote employment, growth and workplace productivity; and facilitate the employment of foreign nationals in the South African economy.

In terms of the ESA, the aforesaid purpose is to be achieved by providing comprehensive and integrated free public employment services; coordinating the activities of public sector agencies whose activities impact on the provision of employment services; encouraging partnerships, including in the provision of employment services, to promote employment; establishing schemes and other measures to promote employment; and providing a regulatory framework for the operation of private employment agencies.

This article focuses primarily on the most publicised provisions of the ESA.

2. PUBLIC EMPLOYMENT SERVICES (PES)

The underlying principle behind these Services is to provide the government with support in giving assistance to unemployed work seekers. The ESA empowers the Department of Labour to provide various PES at no cost to members of the public. In terms of the ESA, these services must be offered in a manner that is open and accessible. These services include matching work seekers with available work opportunities; registering work seekers; registering job

vacancies and other work opportunities; advising work seekers on access to education and training etc.; and offering vocational and career counselling and assessment of work seekers to determine suitability.

3. PROMOTION OF EMPLOYMENT OF THE YOUTH AND OTHER VULNERABLE WORK SEEKERS

During a roadshow to explain the recent slew of labour law amendments, the Department of Labour's Director of Public Services, Martin Ratshivhanda, stated that the ESA aims to reduce reliance on social security grants and that the processes established by the ESA are intended to re-route beneficiaries of social grants into full employment. These processes are being supported by focusing on the promotion of employment of the youth and other vulnerable work seekers. The ESA empowers the Minister of Labour ("the Minister") to establish work schemes for the purpose of enabling the youth and other vulnerable work seekers to enter employment, remain in employment or be placed in opportunities for self-employment.

4. JOB RETENTION

The ESA furthermore establishes schemes to minimize the retrenchment of employees. These schemes may provide for turn-around strategies, lay-offs, re-training or alternative employment opportunities.

5. EMPLOYMENT OF FOREIGN NATIONALS

The ESA emphasises that no employer may employ a foreign national within the territory of the Republic of South Africa prior to such foreign national producing an applicable and valid work permit, issued in terms of the Immigration Act 13 of 2002 ("the Immigration Act"). In addition to the latter, the Minister is empowered to make regulations to facilitate the employment of foreign nationals, which regulations may include the following measures: the employer must satisfy themselves that there are no other persons in the Republic with suitable skills to fill a vacancy before recruiting a foreign national; and preparation of a skills transfer plan by employers in respect of any position in which a foreign national is employed.

In order to entrench the aforementioned, the ESA permits an employee who is employed without a valid work permit to enforce any claim that the employee may have in terms of any statute or employment relationship against his or her employer or any person who is liable in terms of the law. Moreover, an employer may not permit a foreign national to perform any work which such foreign national is not authorised to perform in terms of his or her work permit; or to engage in any work contrary to the terms of his or her work permit.

6. REGULATION OF PRIVATE EMPLOYMENT AGENCIES (PEA)

As aforementioned, the provisions relating to the regulation of PEA have not yet come into effect. Nonetheless, these provisions are aimed at bringing the mechanism of temporary employment services ("the TES") back to its original purpose, which has always been to provide a means through which employees could satisfy employers' genuine *short-term* employment needs. For the purpose of this provision, '*private employment agency*' means any person who

provides employment services for gain. This definition is quite similar to that of a TES as defined in section 198 of the Labour Relations Act 66 of 1995 (“the LRA”).

The ESA empowers the Minister to prescribe criteria for the registration of PEA. The criteria for registering private employment agencies will differentiate between private employment agencies that are registered as a TES; and those that only seek to perform other employment services as contemplated in the ESA. Employment services in terms of the ESA vary from advising or counselling of workers on career choices, either by provision of information or other approaches; assessment of work seekers for entry or re-entry into the labour market, or education and training.

Furthermore, the Minister is empowered to designate an official of the Department of Labour as the registrar of private employment agencies. Any person wishing to provide employment services will have to apply to the aforementioned registrar. The registrar will issue a PEA (within 60 days of the application) with a certificate of registration or a temporary certificate of registration; or a letter containing reasons notifying the PEA that it has not been granted registration.

The registration certificate must specify whether or not the PEA is permitted to perform the functions of a TES. The PEA will have the duty to display its certificate of registration in a conspicuous place at the premises from where it operates.

In addition to the aforementioned, a PEA may not provide false employment service information; provide any employment service that it is not authorised to perform in terms of its certificate of registration; counterfeit, alter or transfer its registration certificate; or retain the original identity documents or original qualification certificates of work seekers. Furthermore, no person may charge a fee to any work seeker for providing employment services to that work seeker. There is an exception to the latter, provided that the Minister, by notice in the Government Gazette, permits private employment agencies to charge fees in terms of a specified fee to specified categories of employees or for the provision of specialised services.

7. CONFIDENTIALITY OF INFORMATION COLLECTED

The ESA also regulates the processing of work seekers’ personal information, which is in line with the Protection of Personal Information Act. In terms of the ESA, the processing of personal information of work seekers by a PEA must be done in a manner that protects the information and ensures respect for the privacy of the work seeker; and be limited to matters related to the qualifications and professional experience of the work seeker concerned or any other relevant information. A PEA may however provide information to a prospective employer concerning a work seeker in accordance with the aforementioned criteria. The ESA makes provision for additional exceptions pertaining to information requested by the Department of Labour or an organ of state in terms of legislation.

All information pertaining to work seekers, placements and particulars of the employer must be retained in an electronic manual for a minimum period of three years.

8. GENERAL

The Labour Appeal Court and the Labour Court, unless otherwise provided for in the ESA, will have exclusive jurisdiction to hear all matters arising from the ESA. Only criminal offences will not be dealt with by the aforementioned Courts.

The ESA also re-establishes Productivity South Africa, a body which was previously established under the Skills Development Act. The functions of Productivity South Africa are, among others, to:

- promote a culture of productivity in the workplace;
- develop relevant productivity competencies;
- facilitate and evaluate productivity improvement and competitiveness in workplaces; and
- to implement and oversee related strategies and regulatory matters.

Finally, Chapter 6 provides for the promotion of employment for persons with disabilities through the establishment of so-called “Supported Employment Enterprises”. Their mandate is, among others, to facilitate supported employment and to provide work opportunities for persons with disabilities.

9. CONCLUSION

The Labour Court may, on application by the Director-General, impose a fine not exceeding an amount of R50 000.00 on an employer that contravenes any provisions listed in Schedule 3. Contraventions pertaining to Schedule 3 relate to failing to display a certificate of registration in a conspicuous place on the premises; contravention of the provision dealing with prohibited acts in respect of private employment agencies (section 14); charging a fee to any individual work seeker for employment services; deducting any amount from an employee’s remuneration in respect of the placing of that employee in employment; requiring or permitting an employee to pay an amount in respect of the placement of that employee; failing to keep up to date records and compromising the confidentiality of information.

A person who employs a foreign national within the territory of the Republic prior to that foreign national producing an applicable and valid work permit, shall be guilty of an offence and liable on conviction to a fine or imprisonment as contemplated in section 49(3) of the Immigration Act, as amended. The relevant section of the Immigration Act holds that anyone who knowingly employs an illegal foreigner or a foreigner in violation of the Immigration Act, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding one year; provided that such person's second conviction on such an offence shall be punishable by imprisonment not exceeding two years or a fine, and the third or subsequent convictions on such offences by imprisonment not exceeding five years without the option of a fine.

Owing to the aforementioned offences and penalties, it is of utmost importance that all parties to whom the ESA applies act in accordance with the provisions of the ESA and Immigration Act, as amended.

Author: Ali Ncume
October 2015
www.masconsulting.co.za