COPY

THE CONSTITUTIONAL COURT OF SOUTH AFRICA

REGISTRAR OF THE CONSTITUTIONAL COURT
PRIVATE BAG X1
CONSTITUTIONAL HILL
29 OCT 2025
BRAAMFONTEIN 2017
GRIFFIER VAN DIE KONSTITUSIONELE HOF

Case No: **CCT 287/25**

In the matter between:

NATIONAL EMPLOYERS' ASSOCIATION OF SOUTH AFRICA First Applicant

SAKELIGA NPC Second Applicant

and

MINISTER OF EMPLOYMENT AND LABOUR First Respondent

DIRECTOR-GENERAL OF THE DEPARTMENT OF EMPLOYMENT AND LABOUR Second Respondent

COMMISSION FOR EMPLOYMENT EQUITY Third Respondent

APPLICATION FOR LEAVE TO FILE REPLYING AFFIDAVIT

The applicants hereby make application for an order in the following terms:

1. The applicants are granted leave to file a replying affidavit.

2. No order as to costs, unless opposed.

The replying affidavit of **RONA BEKKER** will be used in support of the application.

DATED AT PRETORIA ON THIS THE 28 DAY OF OCTOBER 2025

KRIEK WASSENAAR & VENTER INC
ATTORNEYS FOR THE APPLICANTS
3rd Floor, HB Forum Building
Stamvrug Street
Val De Grace
Pretoria
Tel: 012 803 4719
E-mail: rohann@kriekprok.co.za
lireze@kriekprok.co.za
Ref: R Eloff/L Day/QB1463
C/O S DU TOIT INC
Regus Constantia Kloof
50 Constantia Boulevard
Quadrum Office Park
Building no 4
Johannesburg
Tel: 011 534 8438
E-mail: sandra@sdtlaw.co.za
lelanie@sdtlaw.co.za
Ref: **MAT2209**

REGISTRAR OF THE CONSTITUTIONAL COURT
PRIVATE BAG X1
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29 OCT 2025
BLOEMFONTEIN 2017
GRIFFIER VAN DIE KONSTITUSIONELE HOF

TO: **THE REGISTRAR**
CONSTITUTIONAL COURT OF SOUTH AFRICA

AND TO: **THE STATE ATTORNEY, PRETORIA**

RESPONDENTS' ATTORNEYS

SALU Building

Ground Floor

316 Thabo Sehume Street

Private Bag X91

Pretoria

Ref: 2592/2025/Z54

Tel: 012 309 1510

Enq: V MULAUDZI

E-mail: vumulaudzi@justice.gov.za

ngphalatse@justice.gov.za

smodiselle@justice.gov.za

STATE ATTORNEY
PRIVATE BAG/PRIVAATSAK X91
2025 -10- 2 8
PRETORIA 0001
STAATSPROUREUR

THE CONSTITUTIONAL COURT OF SOUTH AFRICA

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NATIONAL EMPLOYERS' ASSOCIATION OF SOUTH AFRICA	First Applicant
SAKELIGA NPC	Second Applicant
and	
MINISTER OF EMPLOYMENT AND LABOUR	First Respondent
DIRECTOR-GENERAL OF THE DEPARTMENT OF EMPLOYMENT AND LABOUR	Second Respondent
COMMISSION FOR EMPLOYMENT EQUITY	Third Respondent

APPLICANTS' REPLYING AFFIDAVIT

I, the undersigned,

RONA BEKKER

do hereby make oath and state:

1. I am the Manager: New Business and Sales of the first applicant. I depose to this replying affidavit on behalf of the first and second applicants.

2. The facts in this affidavit are, unless clearly indicated otherwise, within my own knowledge or derived from documents under my control and are true and correct. Legal submissions are based on advice from the applicants' legal representatives.

3. In the answering affidavit, the respondents create incorrect or misleading impressions about the case before the High Court and the intentions of the applicants. These warrant correction. The applicants request that this Court grant leave to file this short replying affidavit in the interests of justice.

THE INFRINGEMENT OF SECTION 9(2) OF THE CONSTITUTION

4. In the answering affidavit in this Court, the respondents argue at length that the targets that disadvantage women are a restitutionary measure.

5. These arguments were not contained in the answering affidavit in the High Court. In the High Court, the respondents gave virtually no explanation.

6. The application of the threefold test set out in *Van Heerden* to the targets shows that they clearly violate section 9(2) of the Constitution.

7. The second element of the test requires that the measure "*must be designed to protect or advance*" classes of people who have been susceptible for unfair discrimination.

8. The targets do not protect or advance women. They do the opposite.

9. The targets disadvantage women, including black women, who the courts recognise as being amongst those who have suffered the worst unfair discrimination.

THE ATTAINMENT OF SUBSTANTIVE EQUALITY

10. The respondents suggest that the applicants are remiss because they fail to appreciate that the targets aim to achieve substantive equality.

11. They also suggest that the applicants' application seeks to delay the achievement of substantive equality.

12. Neither is true.

13. Substantive equality in terms of the Constitution cannot be attained by disadvantaging women, nor can it be realised by failing to uphold the rule of law.

14. The applicants apply to interdict and impugn the targets because they are unconstitutional, and they were introduced in a manner that was clearly unlawful.

15. It is not correct that the application for interim relief is designed to delay transformation.

16. The interim relief sought will not prevent the Minister from setting new, constitutionally compliant targets, should she elect to do so while the review is pending.

17. The interim interdict sought does not suspend or curtail the Minister's powers. Rather, it ensures that such powers are exercised lawfully and in conformity with the Constitution.

18. Further, the pre-existing affirmative action and enforcement provisions in the Act will continue to operate and be implemented. Employers will remain obliged to prepare, submit and implement employment equity plans, and the Minister and the Department will retain their full statutory powers of monitoring, compliance, and enforcement under those provisions.

CLEAR UNLAWFULNESS: NON-COMPLIANCE WITH SECTION 15A(2)

19. The respondents' reliance on consultative meetings said to have taken place during 2016 with unidentified "business leaders" purportedly representing

various sectors, and on "sector engagements" held between June 2019 and November 2022, is mistaken:

19.1 There could not have been any consultation for the purposes of section 15A(2) of the Act before 17 May 2022, because that provision did not exist at the time. The Employment Equity Amendment Act, which introduced section 15A(2), was only passed by parliament on 17 May 2022 and thereafter assented to in April 2023.

19.2 There could not have been any consultation on the targets the Minister intended to publish in 2025, because no targets (not even the draft 2023 or 2024 targets) existed in 2016, or between June 2019 and November 2022.

19.3 "TM9" shows why the "sector engagements" between June 2019 to November 2022 were inadequate and cannot be relied on: they were not held with the sectors. They were only held with isolated organisations who were not in a position to represent the sectors as a whole. For example:

19.3.1 In the case of the *Wholesale and Retail Trade; Repair of Motor Vehicles and Motorcycles* sector, only the Consumer Goods Council and the Retail Motor Industry were consulted;

19.3.2 In the case of the *Transportation and Storage* sector, only the Road Freight Association was consulted;

19.3.3 In the case of the *Water Supply, Sewerage, Waste Management and Remediation Activities* sector, only Rand Water, Sedibeng Water, and Johannesburg Water were consulted; and

19.3.4 In the case of the *Arts, Entertainment and Recreation* sector, only the South African Rugby Union, Ster-Kinekor Theatres, Nu Metro, and Virgin Active were consulted.

20. The only consultations that could be relied on by the respondents were the virtual consultations held in February 2025, which were manifestly inadequate on the undisputed facts.

21. The impression created by the respondents that employees were represented by trade unions in the February virtual consultations is misleading.

22. Neither employees nor employee organisations were given notice of the February 2025 virtual consultations. There were only isolated examples of the presence of a trade union in such consultations.

23. The respondents' reliance on sections 13, 16 and 17 of the Act is misplaced:

23.1 In terms of section 17 of the Act, the matters for consultation between employers and employees as contemplated by sections 13 and 16 include:

"(a) the conduct of the analysis referred to in section 19;

(b) the preparation and implementation of the employment equity plan referred to in section 20; and

(c) a report referred to in section 21."

23.2 In the consultations between employers and employees, therefore, employees have no ability to comment on, or influence, the targets that will be set by the Minister.

23.3 The consultation between employers and employees provided for by sections 13, 16 and 17 of the Act is therefore no substitute for the statutory obligation imposed on the Minister to consult employees prior to setting targets in terms of section 15A(2) of the Act.

24. The 2025 Targets are therefore clearly unlawful and invalid because the Minister failed to consult with the sectors before setting them as required by section 15A(2).

FURTHER GROUNDS OF UNLAWFULNESS

25. Apart from the arguments to justify the unfair discrimination against women, the answering affidavit of the respondents in this Court largely copies and

pastes the answering affidavit before the High Court. Even the voluminous annexures are attached.

26. When this Court assesses the merits of the current application for leave to appeal, this Court can accept that it has seen the high-water mark of the respondents' case in answer to the grounds of unlawfulness raised by the applicant.

THE HARM THAT WARRANTS THIS COURT'S INTERVENTION

27. The respondents claim that the applicants' case for harm is that from 1 September 2025 there will be "*untold mayhem*" that will see employees in large scales being displaced or dismissed. That is not the applicants' case.

28. The respondents fail, as the High Court did, to acknowledge and confront the actual case of the applicants which justifies the granting of interim relief even on the *OUTA* threshold:

28.1 First, women of all races will suffer irreparable harm. In the sectors identified in the founding affidavit in this application, they will find it difficult, if not impossible, to be employed or promoted over the next five years because the targets and impugned regulations require their reduction. Employers will therefore be compelled to prefer men over women in recruitment and promotion, affecting both current employees and women entering the labour market, including recent

graduates. This harm will extend to households dependent on women's income, particularly single-female households. It will impact on the ability of women to provide for their, and their dependents', basic needs. This harm is serious and its scale will be vast. It cannot be remedied by a Court in due course.

28.2 Second, similar irreparable harm will be suffered by all persons who are denied employment or promotion as a result of the implementation of the unlawful and invalid targets. The scale of such harm will again be vast because the targets apply to every sector of the economy.

28.3 Third, every designated employer in every sector of the economy, will suffer permanent and irreparable harm, as they will be forced to make workforce changes - through new appointments, promotions, or retrenchments - all in an effort to comply with the impugned targets. Once implemented, such changes cannot practically be undone, and no subsequent remedy granted by a Court will be able to reverse the resulting losses.

28.4 Fourth, irreparable harm will also be caused to the right to administrative justice. The implementation of the impugned targets over a substantial period of time pending the review will prejudice the review proceedings and prevent the Court from granting effective relief.

28.5 Urgent, interim relief interdicting the implementation of the targets is therefore necessary to prevent irreparable harm to sections 9, 10 and 22 and 33 of the Constitution.

CONCLUSION

29. The respondents are delaying the review. Despite repeated demands and the delivery of a notice in terms of Rule 30A, the respondents have still not filed the Rule 53 record in a review that was launched on 8 July 2025. The applicants must now apply to compel the delivery of the record. The trajectory of the review, given its magnitude and the probable further delays signalled by the conduct of the respondents, is that it will not be heard before mid-2027.

30. The applicants respectfully request that this Court grant leave to appeal to it on an expedited basis to stop such harm from occurring.

RONA BEKKER

I hereby certify that the deponent has acknowledged that she:

(a) knows and understands the contents of this affidavit;

(b) has no objection to taking the oath;

(c) considers the oath to be binding on her conscience.

THUS signed and sworn to before me, at Pretoria on 27 October 2025, the Regulations contained in Government Notice No. R1258 of 21 July 1972 (as amended), having been fully complied with.

COMMISSIONER OF OATHS

ANRICH MALAN OTTO
Commissioner of Oaths
HB Forum
13 Stamvrug Street
Val De Grace
Ex Officio Practising Attorney
Republic of South Africa

From:	Rohann Eloff
Date:	2025/10/28 13:41:00
To:	Mulaudzi Vuledzani; Modiselle Suzan (DoJ&CD Contact); Phalatse Ngakana
CC:	Lireze Day
Subject:	APPLICATION FOR LEAVE TO APPEAL: NEASA & Sakeliga / Minister of Employment and Labour & Others. CASE NO: 287/2025 - R ELOFF/L DAY/QB1533
Attachments:	Application for leave to file Replying Affidavit 2025-10-28.pdf;
Size:	1528,81 KB

Good day

We refer to the above matter and deliver herewith the following:

- Application for leave to file Replying Affidavit

Kindly confirm receipt of same in writing. A physical copy will also be delivered in due course.

Yours faithfully

ROHANN ELOFF
rohann@kriekprok.co.za

Senior Associate / Senior Assosiaat

Kriek Wassenaar & Venter Inc
2012/030418/21
(+27) 12 803 4719
Third Floor, HB Forum Building,
13 Stamvrug Street, Val de Grace, Pretoria