IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No: **2025-107022**

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

APPLICANTS' APPLICATION FOR LEAVE TO APPEAL

TAKE NOTICE that the applicants hereby apply, on a date to be determined by the Registrar, for leave to appeal against the whole of the judgment and order of the Honourable Justice Moshoana dated 28 August 2025.

TAKE NOTICE FURTHER that the application is based on the grounds set out in section 17(1)(a)(i) of the Superior Courts Act 10 of 2013 in that the intended appeal, if allowed, would have a reasonable prospect of success; and on the grounds set out in section 17(1)(a)(ii) of the said Act in that there are compelling reasons why the appeal should be heard.

TAKE NOTICE FURTHER that the grounds upon which the applicants rely for the purposes of this application for leave to appeal, are any one or more or all of the following:

A CONSTITUTIONAL MATTER

1. The Court erred in finding that the application was not a constitutional matter.

    1.1 The applicants applied for interim relief to protect employers, employees and prospective employees from suffering irreparable financial loss and harm to *inter alia* their fundamental rights to freedom of trade, equality and dignity provided for in sections 9, 10, 22 and 33 of the Constitution.

    1.2 The Court was called upon to determine whether these fundamental rights, sourced in the Constitution, are at stake, are currently being threatened, and require protection.

    1.3 The Court was called upon to consider whether to grant the interim interdictory relief sought restraining the operation and implementation of

the 2025 targets and impugned regulations, which in turn required the Court to consider the nature of the statutory powers exercised by a member of the national executive, and the impact that the granting of the relief sought would have on the separation of powers.

1.4 All of the above are constitutional issues.

1.5 The Court's finding is in conflict with section 167 of the Constitution and, amongst others, the decisions of the Constitutional Court in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC), *Economic Freedom Fighters v Gordhan and Others* 2020 (6) SA 325 (CC), and *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC).

THE HIGH COURT'S POWER TO INTERDICT THE OPERATION AND IMPLEMENTATION OF THE 2025 TARGETS AND IMPUGNED REGULATIONS

2. The Court erred in finding that it could not interdict the operation and implementation of the 2025 targets and the impugned regulations when these had already been published by the Minister on 15 April 2025.

2.1 This finding is in conflict with section 8(1)(e) of the Promotion of Administrative Justice Act 3 of 2000 ("*PAJA*"), section 38 of the Constitution, and the decisions of the courts in, amongst others, *Gool v Minister of Justice* 1955 (2) SA 682 (C), *National Treasury and Another v*

Opposition to Urban Tolling Alliance and Others 2012 (6) SA 223 (CC), *Scalabrini Centre of Cape Town v the Minister of Home Affairs & Others* [2024] ZAWCHC 263 and *Fose v Minister of Safety and Security* 1997 (3) 786 (CC).

POWER TO INTERDICT OR SUSPEND OPERATION AND IMPLEMENTATION IN TERMS OF SECTION 172(1)(b) OF THE CONSTITUTION

3. The Court erred in finding that it had no power to interdict or suspend the operation and implementation of the 2025 targets and impugned regulations in terms of section 172(1)(b) of the Constitution.

3.1 The Court's finding is in conflict with, amongst others, the decision of the Constitutional Court in *Economic Freedom Fighters v Gordhan and Others* 2020 (6) SA 325 (CC).

FINDINGS ON THE MERITS

4. The Court erred in finding that the only right relied on was the right to judicial review.

4.1 The applicants applied to protect the rights to equality, dignity, freedom of trade, occupation and profession and administrative justice contained in sections 9, 10, 22 and 33 of the Constitution.

5. The Court consequently erred by examining the applicants' *prima facie* right in isolation and to the exclusion of the other fundamental rights as required by *National Treasury and others v Opposition to Urban Tolling Alliance* 2024 (1) SA 21 (CC).

6. The Court erred in finding that the applicants raised only three grounds of unlawfulness.

6.1 The applicants raised and relied on five grounds of unlawfulness:

6.1.1 First, the targets were set by the Minister without first publishing the targets in draft form for comment, as required by section 15A(4) of the Act.

6.1.2 Second, the targets were set without the Minister properly consulting with the sectors for whom they were set, as required by section 15A(2) of the Act.

6.1.3 Third, the targets and impugned regulations unfairly discriminate against women. According to the targets and impugned regulations, women are not permitted to be in the majority in any occupation level of any business that has more than 50 employees in South Africa, or in any part of public administration. In all sectors and occupation levels, the percentage of employees who are woman is limited to a maximum of 46.1%. In addition, in sectors and occupational levels where women are

numerically dominant, the targets require the percentage of women to be reduced to the maximum of 46.1%, and the percentage of men to be increased, with the result that men will be the majority. The applicants contended that these reductions will seriously disadvantage women of all races, who are recognised by law as a previously disadvantaged group.

6.1.4 Fourth, the targets are arbitrary in that they were set according to a method that fails to take into account the particular circumstances of the sectors for which they were set and the Minister failed to take into account those relevant factors when setting the targets.

6.1.5 Fifth, the targets are unlawful and invalid because the Minister failed to obtain and consider a comprehensive socio-economic impact assessment on the impact of the targets and the impugned regulations prior to publishing them, in circumstances where this was necessary for the exercise of power to be rational.

7. The Court erred by failing to separately consider the prospects of success on review of each of the above grounds in accordance with the decision of the Constitutional Court in *South African Informal Traders Forum v City of Johannesburg* 2014 (4) SA 371 (CC) and *City of Cape Town v South African National Roads Agency Ltd and Others* 2015 (6) SA 535 (WCC).

8. The Court erred by failing to find that the applicants had established strong prospects of success on any of the above grounds.

9. In relation to the first ground, the Court erred in finding that the Minister had complied with her duty to publish draft targets when publishing draft targets in 2023 and 2024.

9.1 The fact that the public had been given opportunity to comment on previous drafts of the targets, did not excuse the Minister from her duty to publish a further set of draft targets in compliance with section 15A(4) when the targets she intended to set were new, and differed materially from the previous drafts.

9.2 The public had never seen targets prepared according to a method in which fixed percentages of 6%, 7%, 8% or 9% were added to the 2024 workforce profile, and adjustments were made based on the EAP. They had not been given any opportunity to comment on whether the method was appropriate, or the resultant targets were reasonable or achievable.

9.3 The respondents failed to provide evidence of any link between the 2023 and 2024 targets or the comments on those drafts, and the 2025 targets.

9.4 The reasoning of the High Court had already been rejected by the courts, amongst others, in the decision of the SCA in *Kouga Municipality v Bellingan* 2012 (2) SA 95 (SCA), and the same approach was followed by

the Constitutional Court in *South African Iron and Steel Institute v Speaker of the National Assembly* 2023 (10) BCLR 1232 (CC), and the Full Bench *Earthlife Africa (Cape Town) v Director-General: DEAT & Another* 2005 (3) SA 156 (C) para 64.

10. In relation to the second ground, the Court erred in finding that the Minister had duly consulted with the sectors in terms of section 15A(2). The Court erred in not finding on the facts before it that:

10.1. The Department had held "*sector engagements*" with isolated industry bodies between June 2019 and November 2022. The Employment Equity Amendment Act 4 of 2022 ("*the Amendment Act"*) (that introduced section 15A) was passed on 17 May 2022. Accordingly, almost all of these "*sector engagements*" were held before the Amendment Act became law.

10.2. There were no targets, in draft form or otherwise, on the table between June 2019 and November 2022. The "*sector engagements*", in any event, were only held with isolated industry stakeholders who could not represent the whole sector.

10.3. The only real attempt by the Department to consult with the sectors on the proposed 2025 targets took place in the form of virtual meetings held on MS Teams between 11 February 2025 and 19 February 2025.

10.4. As to these meetings the following facts contained in the founding affidavit, were not pertinently confronted and contradicted by the respondents (see *Wightman t/a JW Construction v Headfour (Pty) Ltd* 2008 (3) SA 371 (SCA) para 13):

10.4.1 The Department gave notice of the meetings by emailing invitations addressed to "*CEOs & Senior EE Managers*" of employers registered with the Department.

10.4.2 There was, however, no consistency in sending out the invitations to registered employers. Not all registered employers received the invitations. Affidavits of members who did not receive the invitations were attached to the founding affidavit. Employers in the sectors who were not yet registered, were not invited.

10.4.3 The Department provided some employers with the proposed 2025 targets one or two days before the meeting. The remainder saw the proposed 2025 targets for the first time during the meeting.

10.4.4 Employers had insufficient time to consider the proposed targets or meaningfully make representations on the targets during the meetings.

10.4.5 The meetings were rushed and lasted for a limited duration between 1 to 1.5 hours at a time, save the meeting for the Retail Sector. Attendance was limited by the virtual platform to 1000 participants. In the case of the Manufacturing Sector, many employers could not access the platform because the limit had been reached.

10.4.6 The meetings were conducted like information sessions, and not consultations. The majority of the time was taken up by the Department's presentation and questions of an administrative nature. The Department avoided answering comments in the "chats" that commented on the substance of the proposed 2025 targets.

10.4.7 Less than 20 employers out of the hundreds of employers who attended, had opportunity to speak in the meetings, before the meetings were ended. Employers who wished to speak in the meetings were prevented from doing so by the time limit.

10.4.8 Between 4 and 8 working days were afforded to those attending the meetings to make submissions in writing, depending on the sector.

10.4.9 The Minister and the Department made no attempt at any stage to consult with employees from the sectors.

10.5 The answering affidavit supplemented the above facts with the following:

10.5.1 The Commission finalised the 2025 targets on 3 March 2025. This was less than a week from the last day for written submissions by employers. None of the targets proposed to employers in the virtual meetings were changed.

10.5.2 There was no allegation in the answering affidavit to the effect that the Minister, or the Department, of the Commission, considered and took into account the comments or representations made by employers either during the virtual meetings, or in writing afterwards.

11. The Court erred in finding that the mere fact that there had been "*a consultation process*" was sufficient.

12. The Court erred in finding that "*the consultation contemplated in [section 15A(2)] has happened*".

13. The Court failed to find on the facts before it that the process followed by the Minister failed to comply with section 15A(2), was inadequate, and not meaningful.

13.1. The Court's judgment is in conflict with sections 3 and 4 of the Promotion of Administrative Justice Act 3 of 2000, and in conflict with the principles recently affirmed by this Court in *Corruption Watch* (*RF*) *NPC v Speaker* of the *National Assembly* and *Others* [*2025*] *ZACC 15*.

14. The Court erred in finding that the sectors did not include employees.

15. The Court erred in finding that the Minister's duty to consult with employees was satisfied by publication of the draft 2023 and 2024 notices in the Government Gazette:

15.1. First, the 2025 targets were only shown in draft form to employers in the February virtual meetings. They were not published in the *Government Gazette*.

15.2. Second, the Court erroneously relied on *Electronic Media Network Limited and Others v e-tv (Pty) Limited and Others* [2017] ZACC 17. The main judgment considered the rationality of the process followed by the Minister on the assumption that the exercise of public power concerned was executive in nature (see *e.tv (Pty) Limited v Minister of Communications and Digital Technologies and Others; Media Monitoring Africa and Another v e.tv (Pty) Limited and Others* [2022] ZACC 22 para 33). It is not authority for the proposition that in every case in which a notice and comment procedure is followed, the consultation is genuine and meaningful and passes constitutional muster (*Electronic Media Network* para 65-67).

15.3. Third, the Constitutional Court's decision in *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2009 (1) SA 337 (CC) requires that the interpretation of section 15A(2) which places a higher duty on the Minister to consult with employers and employees in the sectors, in addition to

publication for comment by interested persons who may not be part of the sectors in terms of section 15A(4), must be preferred.

16. In relation to ground three, the Court erred in failing to find that the applicants had strong prospects of success.

16.1. The 2025 targets and impugned regulations unfairly discriminated against women by limiting their representation at any occupation level to a maximum of 46.1%, and the State failed to justify such limitation in terms of section 36 of the Constitution.

16.2. The 2025 targets and impugned regulations unfairly discriminated against women by reducing their representation in sectors where they are numerically dominant to a maximum of 46.1%, and the State failed to justify such limitation in terms of section 36 of the Constitution.

16.3. The Court's finding that the harm to women was not caused by the targets but by the numerical goals set by employers is clearly wrong in that section 20(2A) read with Regulations 9(7)(a), and 9(9) to 9(13) compel employers to set annual numerical goals that comply with the targets, and take steps to achieve such goals and targets.

16.4. The Court's finding that the right of employers to raise a reasonable ground to justify non-compliance with the targets renders the targets constitutional, is clearly wrong:

16.4.1. It is inconsistent with section 1(c) and 8(1) of the Constitution. The Minister has no power to set targets and publish regulations that are unconstitutional *per se* or in effect.

16.4.2. Employers are, in any event, only permitted to raise a reasonable ground to justify non-compliance when they are *unable* to implement the targets, not whenever they are *able* but are of the subjective opinion that such implementation will be unlawful.

17. The Court erred by failing to find that the applicants had strong prospects of success on ground four.

17.1. The targets are arbitrary, and fail to take into account relevant considerations, because pre-determined percentage points are added and adjustments with reference to the national EAP are made, *irrespective of, and without taking into account*:

17.1.1. the nature of the sector;

17.1.2. the number of suitably qualified persons from designated groups that are available for employment in the sector;

17.1.3. the economic status of the sector;

17.1.4. the rate of growth in the sector, and whether there is sufficient growth to support new employment or promotion in the sector; and

17.1.5. the rate of natural attrition in the sector.

17.2. The above information is critical to whether the targets are reasonable, feasible, appropriate or achievable for designated employers in a sector. The Minister could not lawfully or reasonably set targets for the sectors without taking these factors into account.

17.3. The Court's finding that the targets were not arbitrary because the Minister had regard to the EAP published by Statistics South Africa, the advice of the Commission and the consultation process is tantamount to saying that where a decision-maker consults or receives advice, or uses some published statistics, the decision cannot be substantively arbitrary, which is incorrect.

17.4. The method applied by the Minister in setting the 2025 targets precluded the Minister from taking into account the particular facts and circumstances of a sector, the availability of suitably qualified persons in a sector, the economic status and growth in a sector, the rate of attrition of employees in a sector, all of which were relevant to the setting of targets that were reasonable, feasible and achievable, contrary to section 6(2)(e)(iii) of PAJA.

18. The Court erred by failing to find that the applicants had strong prospects of success on ground five in circumstances where the Minister had failed to obtain and consider any comprehensive socio-economic report on the impact of the 2025 targets and the impugned regulations, contrary to section 6(2)(i) of PAJA and section 1(c) of the Constitution.

19. The Court erred in failing to find that the circumstances of the application were exceptional in that the targets and impugned regulations read with sections 15A and 20(2A) of the Act require substantial changes to the workforce in the four upper occupation levels of every sector of the economy and public administration over the next 5 years, affecting thousands of employers and hundreds of thousands of employees.

20. The Court erred in not finding that the implementation of the targets and impugned regulations would cause irreparable harm to the rights to equality, dignity, freedom of trade, occupation and profession and administrative justice contained in sections 9, 10, 22 and 33 of the Constitution.

    20.1. The irreparable harm that would result from the implementation of the targets and impugned regulations alleged in the eight affidavits of members and/or supporters of the applicants was not disputed.

    20.2. If the implementation and operation of the targets are not interdicted or suspended pending the review, the result will be that women will find it difficult or impossible to be promoted, or find employment, in all occupation levels in which the targets require the number of women to be reduced.

20.3. Since these occupation levels include professionally qualified persons, and skilled or technical employees, women who are at university or completing their tertiary training, will find it difficult, if not impossible, to find employment.

20.4. Similarly, women who have commenced employment at lower occupation levels will practically not have any prospects of promotion, despite that they may otherwise have become eligible on account of long service. The targets and impugned regulations will oblige employers to promote men over women.

20.5. The harm suffered by the women who lose out on employment or promotion would be irreparable. Those who rely on women to support them will, in turn, be negatively impacted. The consequences will be most severe for households supported by single women. No remedy that may be granted by a Court in due course will remedy the above loss.

20.6. The above is true for all persons, whatever their gender, who will not be employed or passed over for promotion as a result of the implementation of unlawful and invalid targets.

20.7. The harm suffered by employers who will be obliged to make changes to their workforce in order to implement the above discriminatory targets will also be permanent and irreparable. After new employees are taken on, or certain employees are promoted over other employees, or employees are

retrenched, there is no going back. No remedy that may be granted by a Court in due course will remedy their loss either.

20.8. Irreparable harm will also be caused to the right to administrative justice and to review administrative action that is unlawful and invalid. The implementation of the targets for months or years pending the review and subsequent appeals will prejudice the review and prevent the Court from granting effective relief.

21. The Court erred in finding that the harm is "*self-inflicted*" or can be avoided by the raising of a reasonable ground.

21.1. Paragraphs 16.3 to 16.4.2 above are repeated *mutatis mutandis*.

21.2. Irreparable harm will be caused to the constitutional rights of employees and prospective employees by employers who comply with and implement the targets and impugned regulations.

21.3. Irreparable harm will be suffered by employers who need to make changes to their workforce, restructure their business, and employ persons, based on the targets and impugned regulations.

22. The Court erred in not finding that the balance of convenience favoured the granting of interim relief.

23. The Court erred in not finding that:

23.1. The Minister and the Department would still be able to perform their statutory functions in accordance with the pre-amendment affirmative action provisions in the Act. Those provisions require employers to prepare and implement employment equity plans. All of the robust enforcement provisions contained in the Act, and the powers that may be exercised by the Minister and the Department in terms of those provisions, would remain.

23.2. The Minister and the Department would also be able to perform their statutory functions in terms of post-amendment affirmative action provisions in the Act. Nothing prevents them from withdrawing the 2025 targets and impugned regulations and setting new targets that are consistent with the Constitution in a constitutionally compliant manner if they choose to do so before the review is finalised.

24. The Court erred in not finding that the granting of interim relief would not harm the separation of powers.

25. The Court erred in not finding that a proper case had been made out for the interim relief sought, pending the determination of Part B.

COMPELLING REASONS

26. The decision to be appealed involves the threat to, and infringement of, constitutional rights of thousands of employers and hundreds of thousands of employees.

27. The Court's findings that where administrative action has already occurred, the Court has no power to interdict the consequence or implementation of such administrative action, has far-reaching legal consequences for the administration of justice. To the extent that the finding is in conflict with the decisions referred to in paragraphs 2.1 and 3.1 above, it is of utmost importance to the administration of justice that the position is clarified by the Supreme Court of Appeal.

28. The Court's interpretation of section 15A(2) to the effect that the Minister has no duty to consult with employees when consulting with the sectors has far-reaching consequences for the proper administration and implementation of the Act and for the rights of employees. To the extent that section 15A(2) permits a reasonable alternative interpretation of section 15A(2) that better promotes the spirit, purport and object of the Bill of Rights, it is of utmost importance to the administration of justice that the position is clarified by the Supreme Court of Appeal.

TAKE NOTICE FURTHER that the applicants apply for leave to appeal to the Supreme Court of Appeal, alternatively the Full Bench.

TAKE NOTICE FURTHER that the application will be heard on a date to be arranged with the Registrar.

AND TAKE NOTICE FURTHER that the applicants have made a parallel application for leave to appeal directly to the Constitutional Court. The current application for leave

to appeal, or the contemplated appeals to the Supreme Court of Appeal or the Full Bench, will be persisted with unless and until the Constitutional Court grants leave to appeal to that Court.

SIGNED AND DATED AT PRETORIA ON THIS 18th DAY OF SEPTEMBER 2025.



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