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

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FILING NOTICE

DOCUMENTS TO BE FILED:

- **APPLICANTS' HEADS OF ARGUMENT**

DATED AT PRETORIA ON 13 AUGUST 2025.

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APPLICANTS' HEADS OF ARGUMENT

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INTRODUCTION AND PRÉCIS OF THE CASE

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The Constitution requires that transformation be achieved lawfully

1. The purpose of the Employment Equity 55 of 1998 ("*the Act*") is to achieve equity in the workplace by "*promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination*" and by "*implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups*".

2. The achievement of the purpose of the Act is important to realising the society envisaged by the Constitution.

3. At the same time, however, the purpose of the Act can only be achieved in a manner that complies the Constitution.[1]

[1] Section 1(c) of the Constitution

Clear unlawfulness

4. Part A of this application has been brought because the Minister has sought to achieve the purpose of the Act in a manner that is unlawful and inconsistent with the Constitution.

5. On 15 April 2025, the Minister published numerical targets in terms of section 15A of the Act, and simultaneously amended the Employment Equity Regulations, 2014 ("*the EE Regulations*") in order to facilitate the implementation of the targets.

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6. The Minister failed, however, to comply with the mandatory requirements of section 15A(2) and 15A(4) before doing so. In particular, the Minister set the targets:

   6.1 without properly consulting with the sectors as required by section 15A(2); and

   6.2 without first publishing the draft targets in the Gazette and allowing at least 30 days for comment by other interested persons as required by section 15A(4).

7. The targets are also unlawful and invalid because they are arbitrary. They were set according to a methodology that does not take into account the nature and circumstances of the sectors to which they are intended to apply.

8. The targets are also unlawful and invalid because they unfairly discriminate against women. In the past, women were discriminated against and were disadvantaged in the workplace relative to men. The Act therefore includes

women in the definition of "*designated groups*"[2] that the Act is designed to advance. The targets set by the Minister, however, require that the number of women be reduced, and for women to be replaced by men, in sectors where women are numerically dominant.

9. Finally, the Minister's decision to set the targets and adopt the impugned regulations was irrational as to process. The Minister is attempting to implement a scheme that makes *every* employment level of *every* sector of the *entire* economy become a mirror of the demographic of the economically active population of the country. The Minister has done so without first obtaining and considering a comprehensive socio-economic impact study into the feasibility and consequences of such an unprecedented scheme.

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Irreparable harm

10. Every designated employer in every sector of the economy, is required by section 22(1)(aA) of the Act to comply with the targets set by the Minister.

11. By 1 September 2025, some 15 000 employers will be required to reassess, re-examine and rewrite their employment equity plans based on the unlawful and invalid targets. The time, cost and resources employed by employers in preparing such plans will be irrecoverable if the targets are declared unlawful and invalid in due course.

12. More importantly, from 1 September 2025, employers, their businesses, employees, and prospective employees will suffer irreparable harm when the

---

2 s 1 of the Act: "'*designated groups' means black people, women and people with disabilities…*" and "'*black people' is a generic term which means Africans, Coloureds and Indians*"

unlawful and invalid targets are implemented. Permanent decisions will be made, based on the unlawful targets, that will potentially affect some 7.3 million employees, and an unknown number of prospective employees, across the country.

13. If the interim relief is not granted under Part A before 1 September 2025, irreparable loss and harm will occur to employers and employees in every sector of the economy. The scale of such irreparable loss and harm will be vast.

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Balance of convenience

14. The balance of convenience favours the granting the interim relief.

15. If the interim relief is granted, the *status quo* will be preserved and the pre-amendment affirmative action provisions in the Act will remain in force and continue to operate and be implemented. The Minister and the Department will continue to perform their constitutional functions under the Act. There will be no *lacuna* in the interim period: employers will continue to submit and implement employment equity plans, tailored to their particular circumstances, as before. The robust enforcement mechanisms contained in the Act will continue to apply. The Minister and the Department will continue to perform their constitutional functions and duties under that scheme.

16. All that will happen in the event that interim relief, but the review ultimately does not succeed, is that the implementation of the targets will be delayed.

17. By contrast, if interim relief is not granted, but the review is ultimately successful, vast irreparable loss and harm to constitutional rights will occur:

17.1 Employees and prospective employees throughout the country will be employed or not employed, and promoted or not promoted, based on unlawful targets.

17.2 Employers will restructure and make other permanent changes to their workforce and corporate structuring, employ new employees and forego opportunities and take on the expense that this involves, all based on unlawful targets.

17.3 The time and expense incurred by employers in preparing employment equity plans based on unlawful targets will be irrecoverably lost.

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18. All of the above harm, by its nature, will be irreparable and irrecoverable for all of the employers and employees affected.

19. This application has been brought on an urgent (or rather, semi-urgent) basis because it was not possible that the application be launched and heard on the ordinary opposed roll prior to 1 September 2025.

20. The application was launched on 8 July 2025 and set down for 12 August 2025. The respondents were afforded 3 weeks to answer. The DJP was approached to case manage the matter in view of the size and importance of the matter and the volume of the papers, which exceeded 500 pages.

21. In a case management meeting held on 1 August 2025, the Acting Deputy Judge President Molopa set the matter down to be heard on Friday 15 August 2025, and set dates for the filing of further affidavits and heads of argument. The respondents ultimately had 5 weeks to answer.

22. The answering affidavit only served to confirm that the targets and the regulations identified in Part A the Notice of Motion are clearly unlawful and invalid, and that a proper case has been made out for the relief sought in Part A to be granted. This is usefully summarised in the first part of the applicants' replying affidavit.[3]

23. In the circumstances, we submit that the Court should grant the order sought in Part A.

STRUCTURE



24. These heads of argument will be structured as follows:

24.1 First, we set out the legal framework and facts giving rise to the application.

24.2 Second, we demonstrate that applicants have met the requirements for urgent interim relief:

24.2.1 there is clear unlawfulness;

24.2.2 irreparable loss and harm will occur if interim relief is not granted on an urgent basis; and

24.2.3 the balance of convenience favours the granting of interim relief.

24.3 Third, we deal further with urgency, and in particular the respondents' claim that the urgency was self-created.

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[3] 10:6 - 10:23, Replying Affidavit para 6-68

LEGAL FRAMEWORK AND FACTS GIVING RISE TO THE APPLICATION

The Employment Equity Act 55 of 1998

25. The Act prohibits discrimination in employment and obliges employers to implement affirmative action measures to redress past disadvantage and ensure equitable representation.[4]

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26. The affirmative action measures include the preparation of employment equity plans, that must be prepared in consultation with employees, and must in certain instances include numerical racial targets and a timetable for the achieving of those targets.[5]

27. The Act provides the Department with a range of robust powers and enforcement mechanisms to compel employers to comply with their affirmative action obligations.[6]

The Employment Equity Amendment Act 4 of 2022

28. The Employment Equity Amendment Act 4 of 2022 ("*the Amendment Act*") introduced a scheme that empowers the Minister to set racial targets that employers must adopt in their own employment equity plans.

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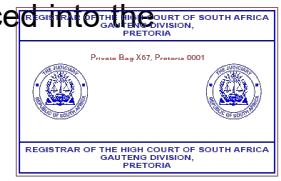
4 01:18 – 01:25, FA para 36-49
5 01:19 – 01:23, FA para 42-47
6 01:23 – 01:25, FA para 48-49

29. In particular, the Amendment Act empowers the Minister to identify national economic sectors and to set numerical racial targets that apply to those sectors. These targets are binding on designated employers.[7]

The Amendment Act presumed to be valid for Part A

30. The Amendment Act and the sections set out below are not challenged in Part A of the current application.

31. For the purposes of Part A, it is presumed that the sections introduced into the Act by the Amendment Act are constitutional and valid.



The amendments to the Act

32. In this section, we summarise the changes made by the Amendment Act to the Act.[8]

33. The sections introduced into the Act by the Amendment Act include sections 15A, 20(2A), 42(1)(aA) and 53(6).

34. Section 15A of the Act provides as follows:

> "*15A. Determination of sectoral numerical targets*
>
> *(1) The Minister may, by notice in the Gazette, identify national economic sectors for the purposes of this Act, having regard to any relevant code contained in the Standard Industrial*

---

7 Section 1 of the Act definition of '**designated employer**' amended to mean: "*(a) an employer who employs 50 or more employees*"

8 01:15 – 01:28, FA para 53-64

Classification of all Economic Activities published by Statistics South Africa.

(2) The Minister may, after consulting the relevant sectors and with the advice of the Commission, for the purpose of ensuring the equitable representation of suitably qualified people from designated groups at all occupational levels in the workforce, by notice in the Gazette set numerical targets for any national economic sector identified in terms of subsection (1).

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(3) A notice issued in terms of subsection (2) may set different numerical targets for different occupational levels, sub-sectors or regions within a sector or on the basis of any other relevant factor.

(4) A draft of any notice that the Minister proposes to issue in terms of subsection (1) or subsection (2) must be published in the Gazette, allowing interested parties at least 30 days to comment thereon."

35. Section 15A(1) empowers the Minister to identify national economic sectors and section 15A(2) empowers the Minister to set numerical targets for the sectors she has identified.

36. Section 20(2A) provides as follows:

"*20(2A) The numerical goals set by an employer in terms of subsection (2) must comply with any sectoral target in terms of section 15A that applies to that employer.*"

37. Section 20(2A) thus binds designated employers to adopt the targets set by the Minister for their sector in their employment equity plans.

38. Section 42(1)(aA) introduces "*whether the employer has complied with a sectoral target as set out in terms of section 15A applicable to that employer*" as a specific factor which may be taken into account by the Director-General "*[i]n determining whether a designated employer is implementing employment equity in incompliance with th[e] Act*".

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39. Section 20(2A) and 42(1)(aA) render compliance with the targets set in terms of section 15A subject to enforcement by means of compliance orders, recommendations by the Director-General, order of the Labour Court, and statutory fines.

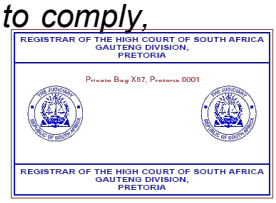
40. Section 53(1) provides that any designated employer who intends to make an offer to conclude an agreement with any organ of state for the furnishing of supplies or services to that organ of state or conclude an agreement for the letting and hiring of anything, must be in possession of a certificate that certifies that such designated employer has complied with Chapters 2 and 3 of the Act.

41. The Amendment Act introduces section 53(6)(a) and 53(6)(b) into the Act, which provide that:

"*The Minister may only issue a certificate of compliance … if the Minister is satisfied that-*

(a) the employer has complied with a numerical target set in terms of section 15A that applies to that employer;

(b) in respect of any target with which the employer has not complied, the employer has raised a reasonable ground to justify its failure to comply, as contemplated by section 42 (4)"



42. A certificate of compliance can now only be obtained by an employer who complies with the targets set in terms of section 15A or provides a reasonable ground to justify the failure to do so.

43. In addition, a failure to comply with the targets set in terms of section 15A now constitutes "*sufficient ground for rejection*" of "*any offer to conclude an agreement*" with the State or for "*cancellation of the agreement*" with the State in terms of section 53(4).

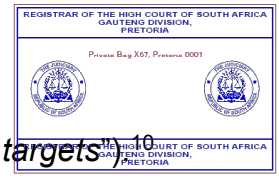
44. Compliance with section 15A is thus now directly tied to public procurement. A designated employer cannot conduct business with the State without complying with the section 15A targets or justifying its failure to do so.

45. The Amendment Act thus supplemented and altered the pre-amendment affirmative action obligations[9] of designated employers under the Act.

TARGETS

The 2023 and 2024 draft targets

46. The Minister published draft targets on two occasions prior to the coming into effect of section 15A.



47. The first draft targets were published on 12 May 2023 ("*the draft 2023 targets*").[10]

48. The draft 2023 targets proposed both national and provincial sectoral targets for four occupation levels, namely top management, senior management, professionally qualified employees, and skilled employees.

49. The proposed targets were divided according to gender, and into five racial groups. The racial groups for which targets were proposed "African", "Coloured", "Indian", "White", and "*BLACK*". "*BLACK*" incorporated African, Coloured and Indian. A 2% target was proposed for persons with disabilities in every proposed sector. [11]

50. Substantially different draft targets were thereafter published on 1 February 2024 ("*the draft 2024 targets*").[12]

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9 01:19 – 01:25, FA para 42 – 49.
10 01:137 – 01:175, "FA3"
11 01:32 – 01:35, FA para 79 – 80
12 01:176 – 01:185, "FA4"

51. The draft 2024 targets, like the draft 2023 targets, proposed targets for 18 sectors. But unlike the draft 2023 targets, the draft 2024 targets contained proposed targets for national sectors only. Provincial targets were omitted.[13]

52. The draft 2024 targets still set targets for male and female genders for the same four occupational levels as the draft 2023 targets. However, the detailed racial division was removed. [14]

53. Targets were only set for "*Designated Groups*" as defined in the Act and no targets were set for white males. The 2% target for people with disability remained the same.



54. Neither set of draft targets was ultimately proceeded with.

The 2025 Targets

55. On 15 April 2025, the Minister set targets in terms of section 15(2) of the Act. The targets were published as Government Notice 6124 in Government Gazette No. 52514 dated 15 April 2025 ("*the 2025 Targets*").[15]

The 2025 Targets are substantially different

56. The 2025 Targets were new and substantially different to the draft 2024 targets, which in turn were different to the draft 2023 targets.[16] Every target for every occupational level for males and females was changed.[17]

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13 01:35, FA para 82
14 01:35 – 01:37, FA para 83 – 86.3
15 01:127 – 01:136, "FA2"
16 01:32 – 01:42, FA para 77-93
17 01:37, FA para 88

57. When the 2025 Targets are compared to the 2024 draft targets:[18]

57.1 The differences in the combined targets for designated groups ranged from **- 1%** (the target for top management in the Agriculture, Forestry and Fishing sector) to **+ 29%** (the target for senior management in the Financial and Insurance Activities sector).

57.2 The differences in the individual targets for gender ranged from **- 6.8%** (male target for top management in the Agriculture, Forestry and Fishing sector) to **+ 23.1%** (female targets for senior management in the Professional, Scientific and Technical Activities and Real Estate Activities sectors).

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57.3 The average change across all sectors and occupational levels was an increase of **11.4%.**

57.4 The 2025 Target for persons with disability in every sector was set at 3%. While the targets for the occupational levels were increased, as a rule, *by* pre-determined percentages, the target for persons with disability was increased *to* a pre-determined percentage.[19]

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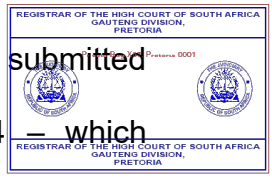
18 01:38 – 01:41, FA para 92; 01:186 – 01:198, "FA5".
19 01:65 – 01:66, FA para 193 – 194

The 2025 Targets are set according to a new methodology

58. The 2025 Targets were also prepared according to a new method.

59. The 2025 Targets were therefore not only substantially different. They were "radically"[20] different.

60. The new and different method according to which the 2025 Targets were determined were as follows:[21]



60.1 The method used data from annual employment equity reports submitted by designated employers to the Department during 2024 – which information came into existence after the draft 2024 Regulations were published.

60.2 The Department aggregated that data to determine the demographic profile of employees in each occupational level in each sector in 2024 ("*the 2024 workforce profile*").

60.3 Fixed percentages were added to the percentage of designated employees in the 2024 workforce profile, provided the fixed percentage increase would not cause the target to exceed the demographic profile of South Africa's economically active population ("*EAP*").[22] For this, the Department used the national EAP as published by Statistics South Africa in the third quarter of 2024.

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20 The word radicle derives from the Latin word "*radix*" meaning "root".
21 01:41 – 01:43, FA para 94 – 96.5
22 01:63 – 01:36, FA para 181 – 185; The national EAP is the portion of the population between the ages of 15 and 64 years of age who are either employed, or are unemployed and are seeking employment, as reported on by Statistics South Africa in the third quarter of 2024.

60.4 The fixed percentages that were added to the 2024 workforce profile were 6% for top management, 7% for senior employees, 8% for professionally qualified and middle management, and 9% for skilled technical.[23]

60.5 The only time when adjustments were made to these pre-determined percentages was if the EAP was exceeded.

60.6 Adjustments to those pre-determined percentages, or the manner in which those pre-determined percentages were allocated between males and females, depended on the EAP.



60.7 The EAP was used to guide the adjustment or setting of the targets for the genders: firstly, where the percentage for designated groups for either males or females exceeded the EAP, the percentage for that gender was reduced and the target for that gender was set at the EAP; secondly, where the 2024 workforce profile for one gender substantially exceeded the other gender, the greater portion of the fixed percentage increase was given to the other gender.[24]

60.8 The final part of the method was the rule that the total target set for designated groups could not be below the 2024 workforce profile.[25]

60.9 In limited instances in several sectors, the downward adjustment to EAP for one of the genders was so dramatic, that even with the addition of the fixed percentage to the other gender, the target would have been below the 2024 workforce profile. In those instances, the other gender would be

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23 01:62, FA para 178 – 179
24 01:64 – 01:65, FA para 186 – 192
25 01:66, FA para 195 – 197

increased in excess of the fixed percentage to ensure the target set was above the 2024 workforce profile.

60.10 The method adopted to set the 2025 Targets for all 18 sectors was the same.[26]

61. The fact that the 2025 Targets are different, and have been prepared according to a new method, is common cause.

THE REQUIREMENTS FOR AN INTERIM INTERDICT

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62. The principles applicable to an application for an interim interdict are well established.[27]

63. In *National Treasury and Others v Opposition to Urban Tolling Alliance and Others*[28] ("*OUTA*"), the Constitutional Court in cases where temporary orders retraining the exercise of a statutory power are sought, the courts will grant restraining orders in exceptional circumstances where a strong case is made out for relief.[29]

64. The Court in *OUTA* set out the proper approach as follows:

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26 01:62, FA para 177
Setlogelo v Setlogelo 1914 AD 221 para [224]; *Webster v Mitchell* 1948 (1) SA 1186 (W). In terms of these principles, the applicants are required to establish: (1) a *prima facie* right, even if it is open to some doubt; (2) a reasonable apprehension of irreparable and imminent harm if an interim relief is not granted and ultimate relief is eventually granted; (3) the balance of convenience favours the granting of the interdict; and (4) the absence of any other satisfactory remedy.

28 2012 (6) SA 223 (CC)

29 *OUTA* para 44

"*The balance of convenience enquiry must now carefully probe whether and to which extent the restraining order will probably intrude into the exclusive terrain of another branch of government. The enquiry must, alongside other relevant harm, have proper regard to what may be called separation of powers harm. A court must keep in mind that a temporary restraint against the exercise of statutory power well ahead of the final adjudication of a claimant's case may be granted only in the clearest of cases and after a careful consideration of separation of powers harm. It is neither prudent nor necessary to define 'clearest of cases'. However, one important consideration would be whether the harm apprehended by the claimant amounts to a breach of one or more fundamental rights warranted by the Bill of Rights.*"

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65. We submit that in this instance the Court will not intrude into the exclusive terrain of the executive when it determines whether the Minister satisfied the requirements of sections 15A(2) and 15A(4) of the Act before setting the 2025 Targets.

66. The determination of whether a state functionary complied with the procedural requirements contained in an empowering provision is a power and duty that falls within the heartland of judiciary.

67. Nonetheless, we submit that the higher threshold laid down in *OUTA* is met in the present application, in view of:

67.1 the clear unlawfulness of the 2025 Targets;

67.2 the irreparable harm and loss that will be suffered by employers, employees and prospective employees;

67.3 the fact that the substantial pre-amendment affirmative action obligations on employers will continue, and the Minister and the Department will continue to exercise their statutory powers and perform their statutory functions in this regard.

PAJA applies

68. We submit that PAJA applies because the setting of targets and the publication of the impugned regulations constitute the making of regulations.

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69. In *Cable City*[30], this Court held that the making of regulations constituted administrative action within the meaning of PAJA.[31]

70. In so doing, it adopted the approach contained in the judgment of Chaskalson CJ in *New Clicks*.[32] Chaskalson CJ held as follows:

70.1 the making of subordinate legislation is "*an essential part of public administration*":[33]

70.2 to "*hold that the making of delegated legislation is not part of the right to just administrative action would be contrary to the Constitution's commitment to open and transparent government*".[34]

70.3 the making of subordinate legislation complied with the definition of administrative action in PAJA.[35]

30 *City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd* 2010 (3) SA 589 (SCA).
31 *Cable City* para 10.
32 *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 (2) SA 311 (CC).
33 *New Clicks* para 113.
34 *New Clicks* para 113.
35 *New Clicks* para 125-128.

71. *Cable City* was followed in *Esau*.[36] In *Esau*, this Court stated that it would continue to follow *Cable City* unless convinced it was clearly wrong.[37]

72. Moreover, the fact that the 2025 Targets and the impugned regulations may be linked to the policy that is embodied in the scheme introduced by the Amendment act, does not render the former executive action.

73. In this regard, in *Ed-U-College*[38] the Constitutional Court identified that even policy that is formulated by the executive when implementing legislation often constituted administrative action:

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> "*Policy may be formulated by the Executive outside of a legislative framework. For example, the Executive may determine a policy on road and rail transportation or on tertiary education. The formulation of such policy involves a political decision and will generally not constitute administrative action. However, policy may also be formulated in a narrower sense where a member of the Executive is implementing legislation. The formulation of policy in the exercise of such powers may often constitute administrative action.*"[39]

74. In the alternative, or in any event, the majority of the grounds of unlawfulness apply even if the setting of the 2025 Targets or the enactment of the impugned regulations constituted executive action.

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36 *Esau* v *Minister of Cooperative Governance and Traditional Affairs* 2021 (3) SA 617 (SCA) para 76-86.
37 *Esau* para 84.
38 *Permanent Secretary of the Department of Education of the Government of the Eastern Cape Province and Another v Ed-U-College* 2001 (2) SA 1 (CC).
39 *Ed-u-College* para 18.

***Prima facie* right established**

75. The applicants must show that on their version, together with the allegations of the Minister that they cannot dispute, that they should obtain the relief sought in Part A.[40]

76. In *South African Informal Traders Forum*,[41] the Constitutional Court held that *a prima facie* right may be established by demonstrating prospects of success in the review.

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77. There are very strong prospects that the applicants will succeed in reviewing the 2025 Targets and impugned regulations.

The failure to publish draft 2025 Targets[42]

78. Sections 15A(2) and 15A(4) prescribe at least three requirements for the valid exercise of the power to set numerical targets. They are:[43]

    78.1 One, the Minister must publish the numerical targets that the Minister proposes to set in the Gazette in draft form, allowing interested parties at least 30 days to comment on them.

40 *Webster v Mitchell* 1948 (1) SA 1186 (W) read with *Gool v Minister of Justice* 1955 (2) SA 682 (C).
41 *South African Informal Traders Forum v City of Johannesburg* 2014 (4) SA 371 (CC) para [25].
42 01:43 – 01:44, FA para 100 – 102.2
43 01:29 – 01:30, FA para 69 – 69.3

78.2 Two, the Minister must consult with the sectors for which numerical targets are set before setting the targets; and

78.3 Three, the Minister must set numerical targets "*with the advice of the Commission*"

79. The 2025 Targets are unlawful and invalid because the Minister failed to publish the 2025 Targets in draft form as required by section 15A(4).

80. There can be no doubt that the requirement to publish the targets in draft form for comment is peremptory.[44] The importance of consultation and fair administrative action has repeatedly been emphasised by the Constitutional Court.[45]



81. In the present matter, there is no dispute that the draft 2025 targets were not published in the Government Gazette so that interested parties were given 30 days to comment thereon.[46]

82. The respondents' contention that the Minister complied with section 15A(4) when she published the draft 2023 targets and the draft 2024 targets[47], is self-evidently without any merit:

82.1 The 2025 Targets are entirely new. The comparative tables illustrate the fact that the 2025 Targets differ substantially from the 2024 targets

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44 *Minister of Environmental Affairs and Tourism v Pepper Bay Fishing (Pty) Ltd; Minister of Environmental Affairs and Tourisv Smith* 2004 (1) SA 308 (SCA) para [32].

45 *Corruption Watch (RF) NPC v Speaker of the National Assembly* [2025] ZACC 15; *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC).

46 01:29 – 01:30, FA para 69 – 71; 01:43, FA para 100 – 101; 08:46, AA para 46; 08:31, AA para 50.

47 08:15, AA para 34.1- 34.2.1; 08:16, AA para 34.2.3; 08:29, AA para 47.

previously published in February 2024, which were, in turn, different to the 2023 targets.[48]

82.2 The 2025 Targets also employ a new method and uses information and were based on information that did not exist in February 2024.[49]

82.3 Accordingly, interested persons were not provided 30 days to comment on the draft 2025 targets (or the method according to which they were set or the information on which they were based) as required by section 15A(4) of the Act.



83. In *Kouga*[50] the SCA held that a bylaw determining liquor trading hours passed in 2006 was invalid because it had not been published as required by the Local Government: Municipal Systems Act 32 of 2000. The argument of the Municipality was that it had published the bylaw in 2004 for comment. The SCA rejected the argument since the version published for comment in 2004 was "*so markedly different that republication of the revised draft was necessary to meet the legislative requirements of the Constitution and the Systems Act.*"[51]

84. We submit that the same applies here. The Minister's reliance on the publication of the draft 2023 targets and the draft 2024 targets is therefore no answer.

85. The 2025 Targets are thus unlawful and invalid for reasons that:

48 01:39 – 01:42, FA para 92 and 01:186 – 01:198, "FA5"
49 01:41 – 01:43, FA para 94-98
50 *Kouga Municipality v Bellingan* 2012 (2) SA 95 (SCA).
51 *Kouga* para [9].

85.1 The Minister failed to comply with a mandatory and material provision of section 15A prescribed by the Act.[52]

85.2 The publication of the 2025 Targets was procedurally unfair.[53]

The Minister failed to consult with the Sectors[54]

86. The Minister failed to consult with the Sectors before setting the 2025 Targets as required by section 15A(2).

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87. The Minister failed in two clear respects:

87.1 First, the Minister did not consult with employees from the Sectors.

87.2 Second, the Minister failed to consult meaningfully with employers from the Sectors.

88. The importance of meaningful public participation was most recently, re-emphasised by the Constitutional Court in *Corruption Watch:*

> *"The right of members of the public to participate meaningfully in democratic governance is a hallmark of our constitutional democracy. Public involvement in the legislative and other processes of all three spheres of government is not merely a fashionable accessory; it is a thread woven into the fabric of our democracy*."[55]

52 Section 6(2)(b) of PAJA.
53 Section 6(2)(c) of PAJA.
54 01:44 – 01:47, FA para 103 – 112.2; 01:59 – 01:60 , FA para 164 – 166.2
55 *Corruption Watch* para [1].

89. The duty to consult with the Sectors encompasses the obligation to consult with those persons in the Sectors who would be materially affected by the targets set.

90. The Sectors comprised two clear categories of persons that would be materially affected by the setting of targets, namely **(1)** the employers who conduct business within the Sector; and **(2)** the employees within the Sectors.

(1) Minister failed to consult with the employees in the Sectors[56]

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91. Despite that employees are the majority of the persons making up the Sectors, and would be materially affected by the targets set, neither the Minister nor the Department made any attempt to consult with employees prior to setting the 2025 Targets.

92. The respondents only answer to this ground is the claim that in terms of sections 13, 16 and 17 of the Act, it is the employers' duty to consult with employees, and not the Minister's duty.[57]

93. We submit that this is clearly wrong.[58]

94. Section 15A(2) of the Act is clear. The *Minister* is empowered to set targets for the Sectors *after* consulting with the Sectors, which includes employees.

95. Sections 13, 16 and 17 of the Act are 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. These sections contemplate consultation between

56 01:47 – 01:49, FA para 113 – 125.
57 08:20 – 08:22, AA para 38 – 39.
58 010:7 – 010:9, RA para 14 – 15.

employers and employees *after* the targets have already been set by the Minister:

95.1 Section 13(a), impose a duty on a designated employer to " *(a)* consult with its employees as required by section 16"

95.2 Section 16 provides that:

> ***"Consultation with employees***
>
> *(1) A designated employer must take reasonable steps to consult and attempt to reach agreement on the matters referred to in section 17-*
>
> *(a) with a representative trade union representing members at the workplace; or*
>
> *(b) if no representative trade union represents members at the workplace, with its employees or representatives nominated by them.*
>
> *(2) The employees or their nominated representatives with whom an employer consults in terms of subsection (1) (a) and (b), taken as a whole, must reflect the interests of-*
>
> *(a) employees from across all occupational levels of the employer's workforce;*
>
> *(b) employees from designated groups; and*
>
> *(c) employees who are not from designated groups.*
>
> *(3) This section does not affect the obligation of any designated employer in terms of section 86 of the Labour Relations Act to*

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consult and reach consensus with a workplace forum on any of the matters referred to in section 17 of this Act."

95.3 Section 17 provides that:

> ***"Matters for consultation***
>
> *A designated employer must consult the parties referred to in section 16 concerning-*
>
> *(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."*

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95.4 Neither section 19 analysis, nor consultation for the section 20 employment equity plan, nor the consultation for the preparation of the annual report in terms of section 20, have anything to do with the setting of targets by the Minister.

96. It is therefore plain from the above that in the consultations between employers and employees, employees have no ability to comment on, or influence, the targets that will be set by the Minister.

97. Public participation requires decision-makers to involve those who are likely to be affected by the decisions they make.[59] When administrative action materially

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59 *South African Iron and Steel Institute v Speaker of the National Assembly* 2023 (10) BCLR 1232 (CC) para [21].

and adversely affects the rights of any person, their right to procedural fairness is triggered.[60]

98. In *Matatiele*[61] the Constitutional Court held that the more discrete and identifiable a potentially affected group is, and the more intense the possible effect of their interests, the more reasonable it would be to expect Parliament to ensure that the potentially affected group is given a reasonable opportunity to have a say.

99. The setting of targets in terms of section 15A(2) materially affects the rights of employees:

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99.1 The targets set materially affect the prospects of employment of persons from both designated and non-designated groups by other employers within the Sector.

99.2 The targets set for occupational levels will either limit or prevent employees from being able to be employed in higher occupational levels or will facilitate and improve the prospect of employment in higher occupational levels.

99.3 The targets set in favour of designated groups are likely to substantially reduce or nullify the prospect of promotion for those employees who are non-designated. Included in this category are white males and foreign nationals employed within the Sectors.

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60 *Minister of Mineral Resources and Energy and Others v Sustaining the Wild Coast NPC* 2024 (5) SA 38 (SCA) para 19.

61 *Matatiele Municipality v President of the Republic of South Africa* 2007 (6) SA 477 (CC) para [68].

99.4 The targets set also materially affect persons from designated groups who are employed within the Sectors. The targets will either increase the prospects of promotion to higher occupational levels of employment, or they might limit those prospects, depending on what targets are set.

100. Employees and prospective employees from the Sectors have not at any stage had opportunity to consult with the decision-maker, nor have had opportunity to make representations to influence the outcome of the decision that will affect them.

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101. The Minister has clearly failed to comply with the obligation contained in section 15A(2) to consult with the Sectors prior to setting the 2025 Targets.

Minister failed to meaningfully consult with employers in the sector[62]

102. The Department's only consultation with employers on the draft 2025 targets were the virtual meetings held on MS Teams between 11 February 2025 and 19 February 2025.[63]

103. We submit that on the undisputed facts, these virtual meetings were inadequate and no meaningful consultation with employers on the targets took place[64]:

103.1 The Department only sent invitations addressed to "*CEOs & Senior EE Managers*" thus inviting only some designated employers to a virtual consultation to discuss the proposed sector numerical targets.[65]

62 01:49 – 01:59, FA para 126 - 163
63 01:52 – 01:53 FA para 135.
64 *Supra* para 50.1 to 50.9 above.
65 01:49 – 01:51, FA para 128 – 130; 01:99 – 01:232, "FA6.1" – "FA6.17"

103.2 There was however no consistency in sending out the invitations to registered employers, many did not receive the invitations.[66]

103.3 The Department only provided employers with the proposed 2025 targets until either one or two days before the meeting, or in the meetings as part of the presentation, or emailed it to them after the meetings.[67]

103.4 Employers were unable to analyse the targets and meaningfully make representations on the targets during the meetings. [68]



103.5 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. [69]

103.6 The meetings were conducted like information sessions, and not consultations.[70]

103.7 The majority of the time was taken up by the Department's presentation and questions of an administrative nature.[71]

103.8 Less than 20 employers out of the hundreds of employers who attended, had opportunity to speak in the meetings.[72]

103.9 The Department avoided answering comments in the "chats" that commented on the substance of the proposed 2025 targets.[73]

66 01:51 – 01:52, FA para 131 – 133.4; 01:233 – 01:266, "FA7.1" – "FA7.4"; 08-32, AA para 53.
67 01:57, FA para 156; 08:32, AA para 54.
68 01:54 – 01:57, FA para 143 – 151; 01:374 – 01:415, "FA9.1" – "FA9.6"; 08:32, AA para 54.
69 01:54 – 01:57, FA para 143 – 151; 01:374 – 01:415, "FA9.1" – "FA9.6"; 08:32, AA para 54.
70 01:55, FA para 144 – 147; 08:32, AA para 54.
71 01:56, FA para 150; AA para 54.
72 01:55, FA para 146; 08:32, AA para 54.
73 01:55, FA para 146; 08:32, AA para 54.

103.10 Between 4 and 8 working days were afforded to those attending the meetings to make submissions in writing.[74]

103.11 The Commission finalised the 2025 Targets on 3 March 2025, which is less than a week from the date when the last submissions were received on 24 February 2025 and the finalisation of the 2025 Targets.[75]

103.12 There is 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 after them.

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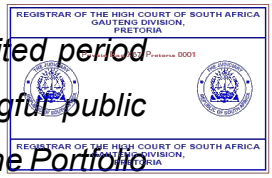
104. In *Scalabrini*[76], Rogers J (as he then was) stated the following regarding the requirement to consult:

> *"First, at a substantive level, consultation entails a genuine invitation to give advice and a genuine receipt of that advice … Consultation is not to be treated perfunctorily or as a mere formality …This means, inter alia, that engagement after the decision-maker has already reached his decision or once his mind has already become 'unduly fixed' is not compatible with true consultation ....*
>
> *Secondly, at the procedural level, consultation may be conducted in any appropriate way determined by the decision-maker, unless a procedure is laid down in the legislation. However, the procedure must be one which enables consultation in the substantive sense to occur. This means that sufficient information must be supplied to the consulted party to enable it to tender helpful advice; sufficient time must be given to the*

74 01:57, FA para 153 - 155
75 08:19 AA para 35.14
76 *Scalabrini Centre & others v Minister of Home Affairs & others* 2013 (3) SA 531 (WCC) par [72].

consulted party to enable it to provide such advice; and sufficient time must be available to allow the advice to be considered …"

105. In *Corruption Watch*, a period of 14 days was offered for public comment. This was motivated by alleged urgency in respect the appointment of Commissioner's based on the expiration period of their terms of office. The Court held that the period offered cannot be considered in isolation.[77] In issue was also the limited and inadequate information made available to the public. The Court held:



"In light of the restricted information made available, the limited period operated as a further impediment to effective and meaningful public involvement. When an extension of time was first requested, the Portfolio Committee ignored the request. It only responded when its appointment procedure had effectively run its course and then it refused the requested extension. This was not explained. The National Assembly did not advance any rationale for its selection of the 14-day comment period."[78]

106. And in *Land Access Movement*,[79] concluded that a notice period of less than seven days was unreasonable. This is because it is highly likely that the short notice deprived people affected by the Bill of the opportunity to meaningfully participate in the hearings or make representations.

107. Applying these principles, the failure of the Department to provide employers with the 2025 targets until one or two days before, or at the meetings, the manner in which the meetings were conducted, and the very short period to submit written

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77 *Corruption Watch* para 963]
78 *Ibid* para [63]
79 *Land Access Movement of South Africa v Chairperson of the National Council of Provinces* 2016 (5) SA 635 (CC) par [77].

submissions thereafter, rendered the consultations with employers meaningless and inadequate.

108. Apart from the virtual consultations on MS Teams in February 2025, the Minister refers to "sector engagements" held by the Department and the EE Commission between June 2019 and November 2022.[80]

109. But there can be no suggestion that the stakeholder engagements held between June 2019 and November 2022 went to satisfy the requirement that the Minister consult with the Sectors for the purposes of sections 15A(2) of the Act when setting the 2025 Targets. This is because:

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109.1 The Amendment Act was only assented to in April 2023. Section 15A(2) did not then exist.

109.2 Between June 2019 and November 2022, the draft 2025 targets did not yet exist (nor did the draft 2023 or 2024 targets).

109.3 There is no evidence demonstrating that the engagements were held with the employers and employees in the Sectors, and only isolated industry bodies or organisations were consulted.[81]

110. In regard to the latter, the following authorities make clear that consultation only with isolated bodies or organisations does not suffice and is no substitute for consulting the Sectors, which consist of all the employers and employees in a Sector:

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80 08:17 – 08:18, AA para 35.4 – 35.5 and 35.7; 08:220, 'TM9'
81 08:220 – 09:224, 'TM9'; 010:9 – 010:10, RA para 18.3 – 19.

110.1 In *Minister of Higher Education & Training & Another v Business Unity SA*[82], the Labour Appeal Court found that on a plain reading of the language used in section 36 of the Skills Development Act namely that '*[t]he Minister may, after consultation with the National Skills Authority, by notice in the Gazette, make regulations*', consultation with the Authority is mandatory. The LAC head that the Authority cannot be substituted with discussions at NEDLAC, a different body which serves a different purpose, to that of the Authority. Neither can consultation in NEDLAC be used to usurp the statutory function of the Authority.

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110.2 In *Sustaining the Wild Coast*[83], the SCA found a consultation process to be inadequate when, a company applying for an exploration right only consulted with the monarchs of chiefs of the communities, adopting the stance that such consultations sufficed. The Court held that the community is separate entity from the Chief.

111. In the circumstances, we submit that Minister clearly failed to consult with the Sectors as required by section 15A(2) before setting the 2025 Targets.

112. Accordingly, the 2025 Targets are unlawful and invalid.[84]

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82 (2018) 39 *ILJ* 160 (LAC).

83 *Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others* 2022 (6) SA 589 (ECMk) para [19] and [90] – [95], confined on appeal *in Minister of Mineral Resources and Energy and Others v Sustaining the Wild Coast NPC and Others* 2024 (5) SA 38 (SCA) para [22] – [26].

84 Section 6(2)(b) and (c) of PAJA, alternatively section 1(c) of the Constitution.

2025 Targets are arbitrary

113. The 2025 Targets are clearly unlawful and invalid because they are arbitrary.[85] This arbitrariness arises from the method adopted by the Minister in determining and setting the targets for each of the 18 Sectors. [86]

114. The 2025 Targets set by the imposition of a pre-determined percentage, adjusted only in limited circumstances with reference to the EAP.

115. There is a disconnect between the targets imposed and the particular circumstances of the sectors on which they are imposed.

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116. Objectively speaking there must be a rational connection between the outcome of the decision and the facts upon which the decision was based.[87]

117. The targets are arbitrary because the pre-determined percentage point is added and adjustments with reference to the national EAP are made, *irrespective of, and without taking into account*:[88]

117.1 the nature of the sector;

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

117.3 the economic status of the sector;

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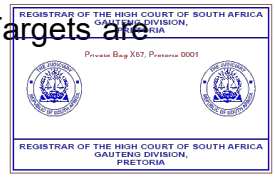
85 Section 6(2)(e)(vi) of PAJA.
86 01:60 – 01:72, FA para 167 -208; 01:88, FA para 256 - 257
87 *Trinity Broadcasting (Ciskei) v Independent Communications Authority of South Africa* 2004 (3) SA 346 (SCA) par [21]
88 01:73, FA para 212 -213

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

117.5 the rate of natural attrition in the sector.

118. The above facts and circumstances are critical to whether the targets set are reasonable, feasible, and achievable for a sector.

119. The respondents do not materially dispute the facts contained in the founding affidavit that form the basis of the applicants' claims that the 2025 Targets are arbitrary.[89]



120. The respondents make no attempt at all to explain how the setting of targets by means of the application of the same fixed, pre-determined percentages to every one of the Sectors is permitted. [90]

121. The bald allegations that "*years of work*" were put in to determine the 2025 Targets and that "*the facts and circumstances are taken into account*" are not an answer to the case that the 2025 Targets are arbitrary.[91]

122. The method adopted by the Minister ignored the particular facts and circumstances of the sector for which the targets were set.

123. The method is not saved from arbitrariness by the adjustments made with reference to the national EAP.

89 01:60 – 01:88, FA para 167 – 257; 08:33, AA 56.
90 01:73, FA para 212 – 213; 08:33, AA 56.
91 08:33, AA para 56.

124. The EAP does not distinguish between sectors or skill levels. It is not possible to determine from the EAP what proportion are semi-skilled or unskilled, or what proportion might be suitably qualified for employment within the four occupational levels for which targets have been set.

125. There are numerous examples from the Sectors where the difference in the 2023 workforce profile and the 2024 workforce profile provides an indication that the fixed increases are unachievable for that sector.



126. Without a comprehensive analysis of these sectors, the rate of economic growth, the rate of attrition of employees, the number of persons who are suitably qualified or are in the process of being suitably qualified, there is actually no way of determining whether these percentages are feasible or can be sustained.[92]

127. The respondents also fail to identify what factors were taken into account by the Minister, or explain in any way how they were taken into account in applying the new methodology in each Sector, despite that these facts fall peculiarly within the knowledge of the respondents.[93]

128. The setting of a 3% target for persons with disabilities in every sector is also clearly arbitrary for similar reasons:[94]

    128.1 The reason that the Department gave for the 3% target for persons with disability only serves to confirm that this target was set without regard to

92 01:74 – 01:-77, FA para 217 - 224
93 01:60 – 01:77, FA para 167 – 224; 08:33, AA 56; *Wightman t/a JW Construction v Headfour (Pty) Ltd* 2008 (3) SA 371 (SCA) para [13].
94 01:77 – 01:79, FA para 225 – 230

the particular circumstances of each sector, or whether there were sufficient persons of disability that could be employed within each sector.

128.2 The only reason given by the Department during the consultations was that 3% should be set as a 5-year target because the National Development Plan "*is saying 7%*". The setting of a 3% disability target, heedless of whether there are persons with disability employed or seeking employment within the sector, and heedless of the nature of the sector, is arbitrary.

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129. Evidence of members or supporters illustrate and explain how the setting of arbitrary targets, that ignore the circumstances of the sectors and businesses for which the targets are set, make those targets inappropriate and impossible to achieve.[95] The respondents made no attempt to meaningfully dispute any of these affidavits.

130. Setting the 2025 Targets in relation to the EAP does not take into account facts relevant to the purpose of the power to be exercised.

131. The 2025 Targets are therefore unlawful and invalid because they are arbitrary[96] and irrational.[97]

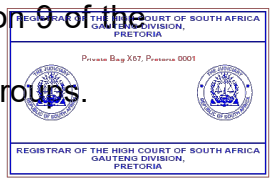
95 01:79, FA para 231; 01:233 – 0:260, "FA7.1" – "FA7.4"; 01:374 – 01:415, "FA9.1" – "FA9.6"
96 S 6(2)(e)(vi) of PAJA
97 *Democratic Alliance v President of the Republic of South Africa and Others* 2013 (1) SA 248 (CC) (better known as "Simelane") par [39].

The 2025 Targets unfairly discriminate against women

132. The Minister mechanistically imposed percentages and adjusted gender targets in setting the 2025 Targets, which substantially disadvantages women relative to men.[98]

133. The respondents do not deny that the 2025 Targets aim at reducing the number of women employed in various employment levels in various Sectors.[99]

134. Substantive equality, as envisaged by section 2 of the Act and section 9 of the Constitution, requires the advancement of persons from designated groups.



135. The 2025 Targets do the opposite:

135.1 Women form part of "*designated groups*" in terms of the definition in section 1 of the EEA.

135.2 The 2025 Targets, however, reduce the number of women in those Sectors that women are numerically dominant, and require the replacement of women with men.

136. Accordingly, the 2025 Targets conflict with section 2 of the Act and unfairly discriminate against women in breach of section 9 of the Constitution in all instances where they reduce the number of women relative to men.

137. The 2025 Targets are unlawful and invalid for this further reason.[100]

98 01:79 – 01:87, FA para 232 – 255
99 01:79 – 01:87, FA para 232 – 255; 08:33 – 08:34, AA para 56 – 56.6.
100 S 6(2)(i) of PAJA

Minister's decision was irrational as to process[101]

138. In *Simelane* the Constitutional Court held that it is both the process by which the decision is made and the decision itself that must be rational.[102]

139. The scheme introduced by the Minister is aimed at conforming the demographic profile of every occupational level in every sector with the demographic profile of South Africa's national EAP.

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140. To that end, the Minister has divided the economy into 18 sectors and has set targets, at this stage, for the upper four of six levels of occupation. The Minister has not set targets at this stage for the semi-skilled and unskilled levels of occupation.

141. During the sectoral consultations, however, the Department made it clear that it remained the obligations of employers to prepare employment equity plans with a view to conforming the semi-skilled and unskilled occupation levels with the EAP.

142. The fact that the scheme introduced by the Minister aims at conforming the workforce to the EAP is also evident from the following regulations contained in the General Administrative Regulations published by the Minister dated 15 April 2025 ("*the EE Regulations*"):[103]

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101 01:88 – 01:97, FA para 259 – 275; 01:97 – 01:98, FA para 276 -281: The documents provided by the Minister and the Department in response to the Sakeliga PAIA request showed that no socio-economic impact assessment had been done or considered by the Minister.

102 *Simelane* par [34[and [36] to [39].

103 Government Notice No. 6125 in Government Gazette No. 52515, dated 15 April 2025.

142.1 Regulation 8 that requires employers to have their employees classify themselves *inter alia* according to race, or, failing that, requires employers to classify their employees, and to analyse their workforce and to classify and record all their employees according to race, having regard to the applicable national or regional EAP. The provisions read as follows:

> *"(5) When a designated employer conducts the analysis required by section 19 of the Act, the employer may refer to –*
>
> *(a) **EEA8**, a guide on the applicable national and regional economically active population (EAP); and*
>
> *(b) **EEA9**, which contains a description of occupational levels.*
>
> *(6) A designated employer must record on the **EEA12** template whether it is using the national or regional EAP as a basis for conducting its analysis in terms of section 19 of the Act."*

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142.2 Regulation 9, in terms of which each employer is compelled to set an employment equity plan that complies with the 5-year sectoral numerical targets, and to conform their workforce to the applicable EAP. The impugned regulations that are of particular relevance in this regard are Regulations 9(5)(b), 9(7)(a), and 9(8) to 9(13):

"*(5) When developing EE Plans and setting annual numerical targets in their workplaces in terms of section 20(2) of the EEA, designated employers must take into account-*

…

(b) the relevant 5-year sectoral numerical targets; …

(7) A designated employer must-

(a) comply with the numerical targets set in terms of section 15A(3) for the economic sector in which they operate; …

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(8) The 5-year sectoral numerical targets set in terms of section 15A(2) of the Act are key milestones towards achieving the equitable representation of the different designated groups within the four upper occupational levels in an employer's workforce in relation to the demographics of the applicable EAP, and for persons with disabilities.

(9) When determining their Annual EE targets towards achieving the 5-year sectoral numerical targets, a designated employer must set numerical targets for all designated groups in each of the four upper occupational levels in relation to the applicable sector targets and EAP, and for persons with disabilities.

(10) A designated employer must avoid perpetuating the over-representation of any group if their representation exceeds the applicable EAP in a particular occupational level.

(11) A designated employer that has exceeded the numerical target set for a particular designated group at an occupational level should continue to set targets that maintain compliance with the EAP.

(12) Designated employers must set numerical goals and annual EE targets at the semi-skilled and unskilled occupational levels in their EE Plans in terms of Section 20(2) of the EEA, taking into account the applicable EAP.



(13) Designated employers' compliance will be assessed against their annual targets set towards meeting the relevant 5-year sectoral numerical targets."

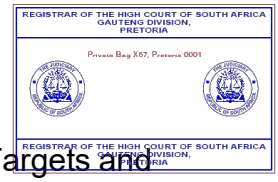
143. The introduction of a scheme that is designed to conform the demographic of the entire workforce, that is, every employment level within every sector of the entire economy, to the demographic profile of the economically active persons within the country, constitutes a radical and dramatic form of social engineering.

144. In order to rationally and lawfully introduce such a scheme, it was necessary for the Minister to first obtain and consider a comprehensive and proper socio-economic impact assessment of the social, economic, financial, cultural and human consequences of compelling an entire economy to conform to the EAP.

145. The respondents claim that this requirement was satisfied by the socio-economic impact assessment conducted in 2019 ("*the 2019 SEIA*").[104]

146. But the respondents fail to provide evidence of an assessment the feasibility and consequences of introducing the 2025 Targets and impugned regulations:

146.1 The 2019 SEIA was clearly conducted as part of the parliamentary process to approve the Employment Equity Amendment Bill. Therefore an assessment of the proposed amendments to the Act which empowered the Minister to set targets.



146.2 The Bill or the Amendment Act are not the same as the 2025 Targets and the impugned regulations. The latter introduced a scheme that aimed at making the demographic of every employment level in every sector of the economy a mirror image of the EAP.

147. The Minister thus introduced the targets together with the impugned regulations set out above without obtaining and considering such an assessment.

148. Accordingly, her setting the 2025 Targets in conjunction with the impugned regulations, was irrational as to process.[105]

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104 01:99, FA para 282; 08:34, AA para 58.

105 *Democratic Alliance v President of the Republic of South Africa and Others* 2013 (1) SA 248 (CC) (better known as "Simelane") par [39].

No consideration of the particular circumstances of the sectors [106]

149. The Minister's decision to set the 2025 Targets was also irrational as to process because she set the targets without first obtaining and taking into account the following information for each sector:

149.1 the nature of the sector;

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

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149.3 the economic status of the sector;

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

149.5 the rate of natural attrition in the sector.

150. As stated, the respondents made no attempt to demonstrate how this information was considered.[107]

Conclusion on irrationality

151. For the above reasons, the 2025 Targets and Regulations 9(5)(b), 9(7)(a) and 9(8) to 9(13) are unlawful and invalid:

151.1 in terms of section 6(2)(e)(iii) and 6(2)(i) of PAJA; alternatively

151.2 in terms of section 1(c) of the Constitution.

106 01:99, FA para 282 – 282.5
107 08:34AA para 58.

Conclusion on *prima facie* right

152. For the aforegoing reasons, we submit that the 2025 Targets and the impugned regulations are clearly unlawful and invalid, and the applicants have satisfied very strong prospects of success in the review.

153. In applying the *Setlogelo* test, the Constitutional Court in *OUTA* states that:

> "*Under the Setlogelo test, the prima facie right a claimant must establish is not merely the right to approach a court in order to review an administrative decision. It is a right to which, if not protected by an interdict, irreparable harm would ensue. …*"[108]

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154. In approaching the Court for relief, the applicants do not only rely on the prospects of success in the review.

155. The applicants approach the Court in this matter because employers, employees and prospective employees are currently at risk of suffering irreparable financial loss and harm, to *inter alia* their fundamental rights to freedom of trade, equality and dignity contained in sections 9, 10 and 22 of the Constitution.[109] These fundamental rights sourced from the Constitution, are at stake, are currently being threatened, and require protection.

156. We submit that the clear unlawfulness of the 2025 Targets and impugned regulations, combined with the vast scale of the financial loss and infringement of fundamental human rights that the implementation of the 2025 Targets will

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108 *OUTA* para [50] (footnotes omitted).
109 01:104 01:105, 01:108 – 01:111, FA para 306-307 & 322-324

entail, place the current application for relief in the category of the "*clearest of cases*".

Employers and Employees will suffer Irreparable Harm

157. If interim relief is not granted, the implementation of the 2025 Targets and the impugned regulations giving effect thereto will result in long-lasting irreversible adverse consequences.

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158. As the Constitutional Court explained in *City of Tshwane v Afriforum*:[110]

> *"Irreparable implies that the effects or consequences cannot be reversed or undone. Irreparable therefore highlights the irreversibility or permanency of the injury or harm. That would mean that a favourable outcome by the court reviewing allegedly objectionable conduct cannot make an order that would effectively undo the harm that would ensue should the interim order not be granted."*

159. Unless interdicted or suspended, from 1 September 2025, employers, their businesses, employees, and prospective employees will suffer irreparable harm when the implementation of an unconstitutionally unsound scheme commences.

160. The apprehended harm includes:[111]

160.1 Employers will have to restructure their business to avoid financial and other sanctions. Permanent decisions will be made whether individual employees and prospective employees will be employed or not

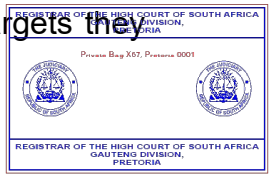
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110 *City of Tshwane Metropolitan Municipality v Afriforum and Another* 2016 (6) SA 279 (CC) para [59].

111 01:108 – 01:112, FA para 326 – 343

employed, and promoted or not promoted, all based on unlawful targets. Significant workforce changes will have to be made by thousands of businesses. The affidavits of the members of the applicants indicates that many employers will downsize, which means employees will be retrenched.

160.2 The 5-year projected changes must be decided on and employment equity plans, based on the 2025 Targets, must be prepared by 1 September 2025. Employers will be measured against the targets they set each year towards achieving the 2025 Targets by 2030.



160.3 In order to comply with the 2025 Targets and impugned regulations, all employers will have to abandon their existing employment equity plans and prepare new plans at great expense and effort. Only employment equity plans that comply with the 2025 Targets will be lawful. All current plans that do not comply with the 2025 Targets, will have to be abandoned.

160.4 The qualitative and quantitative analyses required to be performed, by businesses, employment equity specialists and consultants in restructuring, reassessing and redrafting employment equity plans are information and processing intensive. All of this time, resources and expenses will be spent on achieving compliance with unlawful targets. Because the targets are clearly unlawful, this time will be wasted and all resources spent on them will be permanently lost.

161. The harm and loss that will be suffered by employers, businesses, employees and prospective employees across the country will, by its nature, be irreparable

162. Because the 2025 Targets and impugned regulations apply to every designated employer in every sector of the economy, the scale of that irreparable harm and loss will be vast.

163. There is the further risk that the court hearing the application in Part B would f be urged not to grant any relief because of extent to which the scheme as already been implemented. This would amount to irreparable harm.

164. The respondents do not meaningfully deal with the pertinent allegations of irreparable harm. There is no pertinent and meaningful denial by the respondents to these allegations.[112]

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165. The allegations of irreparable harm are met merely with an allegation the applicants fail to identify who will suffer irreparable harm and that the applicants provide no evidence that the employers whose affidavits are attached to the founding affidavit will suffer harm.[113]

166. This bald response is roundly refuted in the replying affidavit, with reference to the affidavits of members of the applicants.[114] The respondents are unable to gainsay any of these allegations.

Balance of convenience favours the granting of interim relief

167. Given that the applicants have a *prima facie* right to the relief sought, and that there are substantial prospects of success in the application to review and set

112 *Wightman supra* para [13].
113 08:22 – 08:24, AA para 41 -48; 08:35 – 08:36, AA para 63 – 63.3; 010:17 – 010:18, RA para 40 – 40.7.
114 010:16 – 010:17, RA para 38 – 38.6.

aside the 2025 Targets and impugned regulations the principle in *Olympic Passenger*[115] has clear application here:

> *"The stronger the prospects of success, the less need for such balance to favour the applicant: the weaker the prospects of success, the greater the need for the balance of convenience to favour him."*

168. The balance of convenience also favours the grant of the interim relief.

169. Employers and employees stand to be seriously prejudiced if they are not afforded interim relief. The harm to fundamental rights, the wasted expenses that will be incurred by employers, the adverse direct and indirect impacts to employees, the harm to the rule of law, and wasted resources all militate in favour of granting interim relief.

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170. On the other hand, there will be no little to no prejudice to the Minister should the relief be granted.

171. The respondents claim that if interim relief is granted, "*measures intended to transform the labour market and address the past imbalances to uplift the most vulnerable groups*" will be delayed.[116] But this is not entirely true.

172. The affirmative action measures provided for in Chapter 3 of the Act that are designed to address past imbalances and uplift vulnerable groups will continue to operate. Designated employers will remain obligated to prepare and

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115 *Olympic Passenger Services v Ramlagan* 1957 (2) SA 382 (D) at 383 D-G, cited with approval in *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton* 1973 (3) SA 685 (A) at 691F-G. See, also, *Simon NO v Air Operations of Europe AB* 1999 (1) SA 217 (SCA) at 231G.

116 08:24 – 08:25, AA para 49 – 51.

implement employment equity plans, which must include numerical goals in terms of section 20(2)(c) as well as timetables for the achieving of such goals.[117]

173. While it is important for the Court to tread carefully in cases where other branches of government are restrained on an interim basis, respect for the separation of powers does not justify judicial passivity or undue deference.

174. In appropriate cases, the separation of powers will require courts to grant interim relief to prevent violations of the Constitution and to protect against unlawful invasions of rights. In *Doctors for Life*, the Constitutional Court explained that the separation of powers often *requires* judicial intervention:

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> *"While the doctrine of separation of powers is an important one in our constitutional democracy, it cannot be used to avoid the obligation of a court to prevent the violation of the Constitution. The right and the duty of this Court to protect the Constitution are derived from the Constitution, and this Court cannot shirk from that duty."*[118]

175. This is a case where the separation of powers requires the Court to intervene.

176. If the review application succeeds in Part B in the absence of interim relief then this is likely to cause far greater expense and disruption.

177. Sustaining the interim relief would cause no irreparable harm to the Minister, but not doing so would cause thousands of employers and millions of employees and prospective employees to suffer irreparable harm and loss. The balance of convenience favours the granting of interim relief.

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117 01:19– 01:23, FA para 42 - 47
118 *Doctors for Life* para [200].

No other satisfactory remedy

178. In *Hotz v University of Cape Town*, the Supreme Court of Appeal held:

> *"the alternative remedy must be a legal remedy, that is, a remedy that a court may grant and, if need be, enforce, either by the process of execution or by way of proceedings for contempt of court."*[119]

179. There is no alternative remedy available to the applicants.

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STANDING

180. The respondents seemingly dispute the applicants' standing. The respondents' primary contention is that "*there is no public interest as alleged in this matter*."[120]

181. We submit that the Minister's introduction of an unprecedented scheme designed to conform the demographic of the entire workforce, on every employment level within every sector of the entire economy, to the demographic profile of the EAP within the country, is self-evidently a public interest matter.

182. It has already been explained why the 2025 Targets and impugned regulations infringe and violates section 9, section 10, section 22 and section 33 of the Constitution.

183. In this regard, it is submitted that the applicants have the necessary standing contemplated by section 38(d) of the Constitution.

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119 *Hotz v University of Cape Town* 2017 (2) SA 485 (SCA) para [35].
120 08:6 – 08:7, AA para 12 – 16.

184. The applicants' respective standing has been fully explained. NEASA and Sakeliga bring this application in the interests of their members and supporters, in the interests of employers and employees who will be affected by the legislation and regulations referred to in this application, and in the public interest.[121] Employers' and employees will suffer irreparable harm.

185. The applicants bring this application not only in its own interests but also, but on behalf of its members. Section 38 of the Constitution has considerably extended the common law's recognition of standing. Section 38*(e)* of the Constitution permits an association, acting in the interests of its members, to approach a competent court to seek appropriate relief, on the basis that members' rights in the Bill of Rights are threatened. The scheme introduced by the Minister bear upon the rights of members. That is precisely what s 38*(e)* recognises.[122]

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186. There is accordingly no want of standing on the part of the applicants.

URGENCY

187. The test for urgency is whether or not an applicant will obtain substantial redress at a hearing in due course.[123] The test is two-fold: first, the court has to consider whether the applicant brought the application with the requisite degree of urgency; and second, whether not hearing the application on the basis of urgency will deny the applicant substantial redress in due course.

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121 01:13, FA para 6, 8 -9.

122 *Forestry South Africa v Minister of Human Settlements, Water and Sanitation and Others* 2024 (3) SA 400 (SCA) para [19] – [22].

123 *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* 2011 JDR 1832 (GSJ) para [6] and [7].

188. We submit that the urgency of the determination of Part A application is inherent and glaring.

189. The respondents contend that the urgency of the application is self-created, and that the application is an abuse of process.[124]

190. The applicants have provided a detailed explanation of the time that lapsed between the publication of the 2025 Targets and EE Regulations to the launch of this application.[125]

191. Nothing contained in that account is disputed by the respondents.[126]



192. Nothing that occurred in that period caused the matter to *become* urgent.

193. The applicants did not create their own urgency by simply waiting till the normal rules can no longer be applied. The urgency stems from the obligation placed on employers by regulation 9(1) to prepare and implement employment equity plans complying with the 2025 Targets from 1 September 2025.

194. No delay or dragging of the applicants' feet caused the matter to become urgent.

195. A matter is urgent when an applicant cannot obtain adequate relief in a hearing in the ordinary course.[127] There are only 4 and-a-half months between 15 April 2025 and 1 September 2025. There is no reasonable prospect of opposed motion being launched, ripened, and heard on the ordinary opposed roll within that period of time.

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124 08:10 – 08:11, FA para 20 – 25.
125 01:114 – 01:115, FA para 356 – 361; 01:116 – 01:117, FA para 365 – 367
126 08:36, AA para 65.
127 *Mogalakwena Local Municipality v Provincial Executive Council, Limpopo* 2014 JDR 1312 (GP), para [64] – [65].

196. The degree of relaxation of the rules and of the ordinary practice of the court depends upon the degree of urgency of a case. The degree of urgency and the relaxation of the rules should not be greater than the exigencies of the case demand.[128]

197. The time periods set for the filing of affidavits were aligned with the urgency and size of the matter.

198. The respondents were originally afforded from 8 July 2025 to 28 July 2025 to answer Part A, a period of approximately three weeks. The respondents ultimately took approximately five weeks to prepare their answering affidavit. They filed their answering affidavit on Friday 8 August 2025 at 15:29. The respondents do not state that they were unable to properly prepare their answering affidavit because 5 weeks was too little time.

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199. The applicants also sought an undertaking from the Minister to suspend the operation of the Target Regulations and the impugned regulations. The Minister failed to give the undertaking and did not respond to the letter of demand at all.[129]

200. The clear unlawfulness of the 2025 Targets and impugned regulations, and the vast extent of the loss and harm that will be suffered by thousands of designated employers and millions of employees as a result, warrant the Court's urgent intervention.

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128 *Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makin's Furniture Manufacturers)* 1977 (4) SA 135 (W) at 137E – F.

129 01:116, FA para 362 -364

201. It is well established that in pronouncing on the issue of urgency, the court exercises a wide discretion.[130]

202. We submit that, if this application is not heard and determined on an urgent basis, the applicants will be denied substantive redress in due course. The harm to be prevented in the circumstances is the continued implementation of a constitutionally unlawful scheme.

203. Granting the interim relief will preserve the practical effect of the just and equitable relief that the reviewing court may award.

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COSTS

204. The applicants approached this Court to vindicate constitutional rights and to ensure that public power is exercised lawfully, rationally, and in accordance with the Constitution.

205. This litigation is not frivolous or vexatious. It engages issues of manifest importance.

206. It is submitted that the *Biowatch*-principle[131] should apply. If the applicants are successful in obtaining *interim* relief, costs should be awarded to them.

207. Should the applicants be unsuccessful, it is respectfully contended that costs should not be granted against the applicants.

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130 *Cornerstone Logistics (Pty) Ltd v Zacpak Cape Town Depot (Pty) Ltd* [2022] 2 All SA 13 (SCA) at para [30].

131 *Biowatch Trust v Registrar, Genetic Resources and Others* 2009 (6) SA 232 (CC).

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13 August 2025

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