IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 107022/2025

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: YES

28 August 2025
DATE

SIGNATURE

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

***Flynotes*: Interdict/suspension of an exercise of a statutory power. The exercise of statutory power had happened – interdict not a suitable remedy. Court lacks powers to suspend the statutory action of another arm of government – principle of separation of powers upheld. Section 172(1)(b) of the Constitution**

not applicable. Interdict *pendente lite* not available as a remedy. The requirements of irreparable harm not established. The available adequate remedy is that of judicial review. Costs – *Biowatch* principle discussed but not applied. Judicious discretion applied. Held: (1) Part A of the application is dismissed. Held: (2) Each party must pay its own costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] This is an opposed urgent application that was launched by the applicants in two parts. In the first part (Part A), the applicants are seeking interdictory reliefs pending the finalisation of declaratory and judicial review remedies (Part B). What came for determination is the Part A relief. Owing to that, this judgment shall direct its attention to the reliefs sought in Part A. The pertinent portions of the notice of motion read thus:

> "2 Pending the final determination of Part B, interdicting and/or suspending the operation and implementation of the following:
>
> 2.1 the sectorial numerical targets published by the first respondent in Government Notice No. 6124 in Government Gazette No. 52514 on 15 April 2025; and
>
> 2.2 Regulations 9(1), 9(2), 9(5), and 9(7) to 9 (14) of the General Administrative Regulations published in Government Notice No. 6125 in Government Gazette No. 5215 on 15 April 2025."

[2] The applicants issued a notice in terms of rule 16A of the Uniform Rules of the High Court suggesting that a constitutional issue had arisen in Part A. Allegedly, such notice prompted Solidarity Union, to launch an application seeking to be admitted as an *amicus curiae* (friends of the Court). The application was opposed by the respondents. At the commencement of the hearing, this Court directed that the *amicus* application be heard first. After hearing it, this Court, in an *ex-tempore* judgment, dismissed the *amicus* application with no order as to costs. Counsel on brief for Solidarity Union remained in attendance on a watching brief instruction. It is

unnecessary to, in this judgment, augment the reasons already advanced *ex tempore* for refusing the *amicus* application.

Pertinent factual matrix

[3] Since this judgment concerns itself with Part A of the application, it is obsolete for this Court to punctiliously narrate all the facts appertaining the entire dispute between the parties. There are two applicants before me. The first applicant is the National Employers' Organisation of South Africa (*NEASA*). As the name suggests, NEASA is an employer's organisation, acting in the present application on behalf of its members, who mainly are employers. The second applicant is SAKELIGA NPC (*Sakeliga*). Sakeliga is a non-profit organisation, acting in the present application in the interests of its members, who mainly are businesses.

[4] The present application is launched against three respondents. Those are, the Minister of Employment and Labour (Minister); the Director-General of the Department of Employment and Labour (DG); and the Commission for Employment Equity (CEE).

[5] Effective 1 January 2025, section 15A of the Employment Equity Act (EEA)[1], became law in South Africa. Pertinent to the present application, section 15A endowed the Minister with certain powers. Amongst others, the Minister is empowered to *identify* and *set* numerical targets for any national economic sector. It is common cause that on 15 April 2025, the Minister identified 18 economic sectors and set numerical targets for them.

[6] Equally common cause is that on 12 May 2023, the Minister published a notice which proposed for the 18 economic sectors certain numerical targets. Again, on 1 February 2024, another draft of a similar nature was published. Although the applicants dispute the adequacy of the consultations held with the relevant sectors, it is common cause that for a period, sector stakeholder engagements had taken place.

[7] It is also common cause that effective from 1 September 2025, as required by section 20 of the EEA, designated employers must prepare and implement an

[1] Act 55 of 1988 as amended.

employment equity plan which will achieve reasonable progress towards employment equity in that employer's workforce. I pause to mention that the legal requirement to prepare and implement the employment equity plan has been there for designated employers for several years. Section 20(2A), which took effect from 1 January 2025, provides that the numerical goals set by an employer in the employment equity plans must comply with any sectorial targets in terms of section 15A that applies to that employer.

[8] For present purposes the designated employers in the 18 economic sectors, when complying with the old legal requirement in section 20(1) and (2) of the EEA, must comply with the numerical targets set in the notice of 15 April 2025. The NEASA and Sakeliga, took a view that the setting of the numerical targets is unlawful and the Minister ought to be interdicted for having set those numerical targets. Some months after the 15th of April 2025, on or about 28 July 2025, the present application was launched.

Analysis

[9] In opposing the present application, the respondents contended that the application falls to be struck off the roll for want of urgency. Urgency is regulated by rule 6(12) of the Uniform Rules of this Court. Two requirements ought to be established before an application could be entertained on an urgent basis. Those are (a) sufficient reasons why an urgent relief is required must exist; and (b) reasons why a substantial redress may not be achieved in due course must be advanced. The respondents submitted that the urgency claimed by the applicants is a self-created one. The applicants waited from 15 April 2025, and only launched the present application three months later, so went the submission. On the other hand, the applicants submitted that on 1 September 2025, which is around the corner, should an interdict not issue, designated employers would be compelled to comply with the unlawful and arbitrary exercise of public powers by the Minister.

[10] Hearing an application as one of urgency involves an exercise of judicial discretion. Having had regard to the circumstances of the present application and the

importance of the matter to these parties, this Court exercised its discretion in favour of hearing the application as one of urgency.

Issues arising out of the present application.

[11] Although the applicants submitted prolix heads of argument, as correctly pointed out by Mr D' Oliveira, appearing for the applicants, the present application fulcrums on three points. Those are (a) the alleged failure of the Minister to publish the proposed draft notice; (b) the alleged failure of the Minister to consult (with particular emphasis on the failure to consult employees) or appropriately consult with the relevant employers; (c) the alleged arbitrariness of the numerical targets set by the Minister (discriminating against women). In my view, these issues propel this Court to an interpretation exercise of section 15A of the EEA. Before attempting an interpretation of the section, it is apposite to deal first with the relief sought by the applicants.

Is an interdictory relief appropriate?

[12] In *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others* (*UDM*)[2], the following was stated by the Constitutional Court:

> "An interdict is an order by a court prohibiting or compelling the doing of a particular act for the purpose of protecting legally enforceable right, which is threatened by continuing or anticipated harm…
>
> In granting an interdict the court must exercise its discretion judicially upon consideration of all the facts and circumstances. An interdict is not a remedy for the past invasion of rights. It is concerned with the present and the future. The past invasion should be addressed by an action of damages. An interdict is appropriate only when future injury is feared."

[13] Counsel for the applicants conceded, correctly so, that the remedy of an interdict may be problematic, in an instance where the Minister has already exercised what the applicants consider to be unlawful exercise of statutory power. Thus, an interdict would necessarily call for the unscrambling of an egg, as it were. The proverbial horse has bolted. It was for that reason that the notice of motion was couched in such ambivalent

[2] (CCT) 39/21) [2022] ZACC 34 (22 September 2022) at para 47 and 48.

terms, by mentioning an interdict and or suspension. Clearly, the Minister has exercised statutory powers, lawfully or unlawfully, in April 2025 already. To my mind, this is a typical case of the past invasion. On the authority of *UDM*, an interdict is not an appropriate remedy. During argument, this Court enquired from counsel for the applicants as to what legally protectable rights are the applicants seeking to protect by way of an interdict. In retort, counsel stated that it is the right to judicial review and the rights allegedly mentioned in section 172(1)(b) of the Constitution.

[14] Regarding the right to judicial review, which I must emphasise is the only adequate and available remedy for the applicants, since the gripe about the exercise of statutory or public power is sharply raised. The Constitutional Court in the famous case of *National Treasury and Others v Opposition to Urban Tolling Alliance and Others*[3], had the following to say:

> "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… It is a right to which if not protected by an interdict irreparable harm will ensue.
>
> …Therefore, the harm that the applicants rely upon will not be caused by the past decisions they impugn in the review. There is a misalignment between the decision they seek to review and the source of the harm they fear.

[15] Since the *Oudekraal*[4] decision, a principle exists in our law that an administrative action remains valid and is adorned with legal consequences until set aside by a Court of competent jurisdiction. Therefore, the administrative action of 15 April 2025 remains valid until set aside by a Court of competent jurisdiction. Complying with the decision of 15 April 2025 does not amount to an unlawful conduct, which is preventable by way of an interdict. In *Gool v Minister of Justice and Another* (*Gool*)[5], the following was stated:

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[3] (CCT 19/22) [2023] ZACC 24; 2023 (10) BCLR 1189 (CC); 2024 (1) SA 21 (CC) (12 July 2023)
[4] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* (41/2003) [2004] ZASCA 48; [2004] 3 All SA 1 (SCA); 2004 (6) SA 222 (SCA) (28 May 2004).
[5] 1955 (2) SA 682 (CPD), which was cited with approval in *OUTA*.

> "The present is however not an ordinary application for an interdict. In the first place, we are in the present case concerned with an application for an interdict restraining the exercise of statutory powers. In the absence of any allegations of *mala fides*, the Court does not readily grant such an interdict..."

[16] In *City of Tshwane Metropolitan Municipality v AfriForum and another* (*AfriForum*)[6], the Constitutional Court expressed itself in the following terms:

> "Before an interim interdict may be granted, one of the most crucial requirements to meet is that the applicant must have a reasonable apprehension of irreparable and imminent harm eventuating should the order not been granted…
>
> Within the context of a restraining order, harm connotes a common-sensical, discernible or intelligible disadvantage or peril that is capable of legal protection… And that disadvantage is capable of being objectively and universally appreciated as a loss worthy of some legal protection…"

[17] There can be no doubt that in the administrative action of 15 April 2025, the Minister did not act unlawfully. The law empowered the Minister to act accordingly as he so did on 15 April 2025. There are no allegations that in taking that action in the exercise of statutory power, the Minister acted with any *mala fides*. Regarding the harm, the applicants allege that from 1 September 2025, there will be untold mayhem, that will see employees in large scales being displaced or dismissed. Even if the alleged mayhem will unfold, such will have been as a direct consequences of the application of the law. Until that law is declared invalid constitutionally, the rule of law demands compliance. Allegedly, the mayhem will ensue when a designated employer sets numerical goals in compliance with the numerical targets already set by the Minister. The alleged mayhem is not only indiscernible or unintelligible, but it is also one that is not capable of legal protection. Generally no one is above the law. Thus, no one may be spared from the application of the law unless that law has been declared invalid. The majority of apartheid legislations were invalid, yet they were applied because they were valid in the eyes of the law at the time.

[6] 2016 (9 BCLR 1148 (CC) at para 55 and 56.

[18] On the applicants' version, the alleged mayhem will be caused by the setting of numerical goals as opposed to the setting of numerical targets. Numerical goals are set by the designated employers and not the Minister. The Minister only set numerical targets. He has already done so and no untold mayhem is alleged to have taken place. It is perspicuous that if any harm will occur, it is one which may be occasioned by the setting of numerical goals. The Minister has nothing to do with the employees of designated employers. The legal position as outlined in section 20(2A) is that an employer must comply with the 15 April 2025 administrative action. It must be so that the alleged untold mayhem harm will be a self-inflicted one. As it shall be demonstrated in due course, the alleged untold mayhem harm is avoidable by the selfsame designated employers. Statutory mechanism to do so exists.

[19] Until section 20(2A) is declared invalid, designated employers have no option but to comply with the action of 15 April 2025. Accordingly, for all the above reasons, an interdict is not an appropriate remedy, and it must be refused.

Is suspension of the administrative action appropriate?

[20] This Court was at a complete loss regarding the powers that the Court has to suspend an exercise of statutory powers. Particularly in an instance where the power was exercised many moons ago. On application of the doctrine of separation of powers, a Court is not empowered to, for the sake of what appears to be the convenience of a party, simply suspend powers lawfully exercised by another arm of the State. A temporary interdict pending the outcome of an action, or review is the only available relief[7]. The purpose of such an interdict is to ensure that pending a full investigation by the Court the wrong complained of should not be committed or continued[8]. The conundrum in the applicants' case is that application of the law is incapable of being considered a legal wrong. It may be a legal wrong in an instance where the law was exercised unlawfully. That stage has not been reached. In part B, the applicant is attempting to make a case of unlawfulness. To my mind, the prospects of success on the judicial review case is extremely weak. Since part B is still pending determination, it will be unwise for this Court to expatiate on why it takes a view that

[7] *Bress Designs (Pty) Ltd v G Y Lounge Suite Manufacturers (Pty) Ltd and Another* 1991 (2) SA 455 (WLD) and *S.A.B Lines (Pty) Ltd v Cape Tex Engineering Works (Pty) Ltd* 1968 (2) SA 535 (CPD).
[8] See *S.A.B* case *supra* at 537E.

the pending judicial review is emaciated prospects wise. The case punted for by the applicants is not one of the clearest cases of unlawfulness. This Court was advised that a decision pends in this Court where the constitutionality of the law applied by the Minister is to be determined. Advisedly, this Court expresses no view on whether there are any prospects of success in the constitutionality challenge.

[21] In support of this suspension relief, reliance was placed on section 172(1)(b) of the Constitution. This Court disagrees with a submission that section 172(1)(b) finds application herein. In the first instance, the section only applies in an instance where a Court is deciding a constitutional matter. In this application there is no constitutional matter involved. The applicants are seeking an interdictory relief and no more. In terms of section 167(7) of the Constitution, a constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution. Section 172(1)(b) empowers a Court to make any order that is just and equitable. It cannot be just and equitable for a Court to suspend the exercise of statutory power by another arm of the state. In this instance, the Minister is not acting unjustly or inequitably. As it shall be demonstrated in due course, the Minister did not act in breach of section 15A of the EEA. That being the case, a Court is not entitled to use its powers to make a just and equitable order in this instance. Accordingly, for all the above reasons, this Court refuses to exercise suspension powers if it possesses such powers. In terms of section 165(2) of the Constitution, Courts are subject to the Constitution and the law. There is no law that empowers a Court to suspend a lawful exercise of statutory powers. According to section 2 of the Constitution, the Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled. Section 1(c) of the Constitution prescribes that supremacy of the Constitution and the rule of law are values upon which the Republic of South Africa is founded. One of the elements of a rule of law is the respect for the law. The Minister must respect the provisions of section 15A. The question whether section 15A is valid or invalid is *sub judice*. It must be emphasised that section 7(2) of the Constitution imposes a duty on the Minister as a State functionary to protect, promote and fulfil the rights in the Bill of Rights. This Court takes a view that in exercising powers emanating from section 15A the Minister is carrying out an obligation imposed by section 7(2) read with section 8(1) of the Constitution. It must

be remembered that in terms of section 62 of the EEA, the EEA binds the State. The Minister as a State functionary had no option but to comply with section 15A.

[22] In seeking to advance, what respectfully appears to this Court as, a feeble case of this Court allegedly having powers to suspend exercise of statutory powers, counsel for the applicants, placed heavy reliance on the case of *Head of Department, Mpumalanga Department of Education and another v Hoerskool Ermelo and another* (*Ermelo*)[9]. Unfortunately, unlike in the present matter, the *Ermelo* case involved a legality review, where the school and its governing body sought a setting aside of a withdrawal of a function. The present part of the case does not involve a setting aside of the exercise of the statutory powers of the Minister, but the case seeks to suspend such exercise that has already occurred. Counsel for the applicants, drew the attention of this Court to paragraph 97 of *Ermelo*, which read:

> "It is clear that s172(1)(b) confers wide remedial powers on a competent court adjudicating a constitutional matter. The remedial power envisaged in s172(1)(b) is not only available when a court makes an order of constitutional invalidity of a law or conduct under s 172(1)(a). A just and equitable order may be made even in instances where the outcome of a constitutional dispute does not hinge on constitutional invalidity of legislation or conduct. This ample and flexible remedial jurisdiction in constitutional dispute permits a court to forge an order that would place substance over mere form by identifying the actual underlying dispute between the parties and requiring the parties to take steps directed at resolving the dispute in a manner consistent with constitutional requirements…"

[23] What sets this matter apart from *Ermelo*, is that there is no constitutional matter or dispute involved herein. In part B of this case, a constitutional matter or dispute is conspicuously present. Accordingly, what *Ermelo* did was to forge an order after a finding was made that the HoD acted improperly by withdrawing a function. The Court in *Ermelo* had structural interdicts and supervisory orders in mind. Such remedies are clearly impermissible in the present application.

The interpretation of section 15A

[9] 2010 (2) SA 415 (CC).

[24] This section came into operation as law applicable in South Africa on 1 January 2025. Before the section may be referenced, it is apposite to reference other relevant parts of the EEA. The first is the preamble of the Act. It states:

> "Recognising – that as a result of apartheid and other discriminatory laws and practices, there are disparities in employment, occupation and income within the national labour market; and that those disparities create such pronounced disadvantages for certain categories of people that they cannot be redressed simply by repealing discriminatory laws;
>
> Therefore, in order to – promote the constitutional right of equality and the exercise of true democracy; eliminate unfair discrimination in employment; ensure the implementation of employment equity to redress the effects of discrimination; achieve a diverse workforce broadly representative of our people; promote economic development and efficiency in the workforce; and give effect to the obligations of the Republic as a member of the International Labour Organisation."

[25] Regard being had to the above, it cannot be gainsaid that elimination of unfair discrimination in employment is at the forefront of the EEA. The second section to consider is section 2 of the EEA. It states:

> "**Purpose of this Act**
>
> **2**. The purpose of this Act is to achieve equity in the workplace by –
>
> (a) promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and
>
> (b) implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational levels in the workforce."

[26] Regard being had to the purpose of the Act, it cannot be doubted that its purpose is to ensure implementation of affirmative action measures. The implementation is purposed to ensure equitable representation in all occupational levels. The third section to consider is section 3 of the EEA. It states:

"**Interpretation of this Act**

3. This Act must be interpreted –

(a) In *compliance with the Constitution*;

(b) So as to *give effect to its purpose*;

(c) Taking into account any relevant code of good practice issued in terms of this Act or any other employment law;

(d) In *compliance with the international law obligations* of the Republic, in particular those contained in the International Labour Organisation Convention (No. 111) concerning Discrimination in Respect of Employment and Occupation.

[27] For completeness sake, section 7(2) of the Constitution, obliges the state to respect, protect, promote and fulfil the rights in the Bill of Rights. Section 8(1) provides that the Bill of Rights binds the legislature as well as the executive. Article 5(2) of the Convention concerning Discrimination in Respect of Employment and Occupation[10] (*Convention No. 111*) specifically provides that:

> "2. Any Member may after consultation with representative employers' and workers' organisations, where such exists, determine that other special measures designed to meet the particular requirements of persons, who, for reasons such as sex, age, disablement, family responsibilities or social or cultural status, are generally recognised to require special protection or assistance, shall not be deemed to be discrimination."

[28] Undoubtedly, affirmative action measures suggested in sections 15 and 15A of the EEA, cannot be considered to be discrimination when compliance with the Convention No. 111 is considered.

[29] Having considered the above statutory provisions, I now turn to the provisions of section 15A of the EEA. Section 15A states the following:

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 of all Economic Activities published by Statistics South Africa.

[10] Convention No.111 Convention concerning Discrimination in Respect of Employment and Occupation, 1958.

(2) The Minister may, after consultation with 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).

(3) A notice issued in terms of subsection (2) may set different numerical targets for different occupational levels, sub-sectors or regions within the 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."

[30] Commencing with subsection (1), the Minister is endowed with a power to *identify* national economic sectors. It is undisputed that the Minister has already exercised this power by identifying 18 sectors. Section 1 of the EEA defines a sector to mean an industry or service or part of any industry or service. The applicants contends that sector must include only an employer and employees. There is no merit in this contention because the legislature afforded the word sector a technical meaning. In *Canca v Mount Frere Municipality* (*Canca*)[11], the erudite Davis J expressed himself in the following sagacious manner:

"The question whether a word in a particular section of a statute should be given its statutory definition or the ordinary meaning has come up for decision in a number of cases… The principle which emerges is that the statutory definition should prevail unless it appears that the Legislature intended otherwise and, in deciding whether the Legislature so intended, the court has generally asked itself whether the application of the statutory definition would result in such injustice or incongruity or absurdity as to lead to the conclusion that the Legislature could never have intended the statutory definition to apply."

[31] Accordingly, in my view, for definitional purposes, reliance ought to be placed onto the statutory definition of the word *sector*. As a noun the word *industry* means an economic activity concerned with the processing of raw materials and manufacture of

[11] 1984 (2) SA 830 (Tk) followed in *Hoban V ABSA Bank Ltd t/a United Bank and others* [1999] 2 All SA 483 (SCA); *ABP 4x4 Motor Dealers (Pty) Ltd v IGI Insurance Co Ltd* 1999 (3) SA 924 (SCA) at paras [17]-[18]; and *University of the North and Others v Ralebipi and Others* [2003] 11 BLLR 1120 (LAC) at para [21].

goods in factories. *Service* means assistance or advice given to customers during and after the sale of goods. When regard is had to the dictionary meaning of the words *industry* and *service*, there is a clear reason why the word sector should not be defined in the manner suggested by the applicants. An industry or service cannot be confined to an employer and an employee only. There are various other stakeholders in an industry and service. Broadly, a sector must include those various stakeholders.

[32] The identification of the national economic sectors cannot happen whimsically. The Minister is impelled to have regard to a code independently developed and published by Statistics South Africa. Howbeit, it is not the case of the applicants that the identification (exercise of statutory power) was done whimsically by the Minister.

[33] Turning to subsection (2), the gripe of the applicants is that the Minister did not consult at all or consulted deficiently. As a departure point, the Minister is required to consult with the relevant sectors. As indicated above, a sector does not, in my view, necessarily include employees. It is, as defined, referring to industry or service. The word consultation has not been afforded any technical meaning in the EEA. Therefore, it must be given its ordinary grammatical meaning. The word *consult* means seek information or advice[12]. The word *consultation* means a process of seeking information or advice. The Constitutional Court in *Electronic Media Network Limited and others v E-TV (Pty) Ltd and others* (*E-TV*)[13], confirmed that a consultation is distinct from negotiations and it is not geared towards reaching an agreement. It is not a consensus seeking exercise. The duty to consult requires no more than that the views of interested persons be obtained. Regard been had to the text of the subsection, the envisaged consultation must precede the exercise of statutory power (setting of numerical targets). The numerical targets involved herein were set on 15 April 2025. Such must imply that a consultation must have happened before 15 April 2025. There was evidence of a consultation process since 2019. All of that preceded the setting of the numerical targets. The section does not prescribe as to when and how the envisaged consultation must happen. Of significance is that the exercise of statutory power (setting of numerical numbers) ought to happen after the consultation process.

[12] South African Concise Oxford Dictionary Oxford University Press 2005.
[13] [2017] ZACC 17 (8 June 2017).

It matters not as to when and how the consultation happens, as long as the exercise of power happens after the consultation process. Then and in that event, the section would have been complied with. The purpose of the consultation is to ensure that the equitable representation of suitably qualified people from designated groups at the occupational levels in the workforce is taken care of.

[34] The purpose of consultation is achieved if the equitable representation of suitably qualified people is realised. Suitably qualified people refer to persons with formal qualifications, prior learning, relevant experience, or capacity to acquire, within reasonable time, the ability to do the job or the combination of these factors (sections 20(3) and (4) of the EEA). It is not the applicants' case that the undisputed consultation process did not achieve its purpose. The applicants have a view that consultation must take the similar form of public participation envisaged in certain provisions of the Constitution and Municipal legislations. It cannot be so. This Court is satisfied that the consultation envisaged in the subsection has happened. The consultation contemplated in this subsection must be considered within the context of subsection (4) as well. The publication contemplated in subsection (4) is another form of consultation[14]. In *E-TV*, it was confirmed that publishing of a draft policy by notice in the Gazette also satisfies the duty to consult.

[35] Given the meaning and purpose of a consultation, it is difficult for a Court to emerge with a finding that a consultation process is not adequate. What a Court is required to determine is whether consultation as a process happened or did not happen. The question of adequacy will be close to equating consultation with negotiations. The subsection did not prescribe the form a consultation with the relevant sectors must take. All that is required is to ensure that voices are heard during a consultation process. This Court takes a view that even if the word sector does not necessarily refer to employers and employees, the process contemplated in subsection (4) provides employees, as interested parties with an opportunity to

[14] See *Maqoma v Sebe NO and Another* 1987 (1) SA 483 (Ck); *Tlouama and others v Speaker of the National Assembly and others* 2016 (1) SA 534 (WCC); and Central African Road Services v The Minister of Transport and Another (62873/2014) [2019] ZAGPPHC 56 (28 February 2019).

comment. The employees as interested parties ought to respond to the invitation to comment or give input by speaking exhaustively when given such an opportunity.[15]

[36] Subsection (3) refers to "a notice" as opposed to "any notice". Clearly it refers to a notice setting the numerical numbers as contemplated in sub-section (2). In the present instance, it refers to the 15 April 2025 notice. The subsection endows the Minister with a wide discretion as to how the setting of numerical targets should happen. Of significance, the Minister may set the numerical targets on the basis of any other relevant factor. This, in my view, puts paid to the nitpicking exercise engaged in by the applicants. Counsel for the applicants was at pains to compare upward, and downward percentages of targets set by the Minister in the various notices. This is unnecessary because the Minister within his or her discretion may set the numerical targets on the basis of any relevant factor. Taking into account that the setting of numerical targets is supported by the advice of the relevant sectors and the Commission for Employment Equity (CEE) before being set by the Minister, it is difficult to accept that the suggested numerical targets would escape the hawk eye of the CEE and all 18 economic sectors. Clearly, in setting the numerical targets, the Minister does not roam freely or have unfettered discretion. First, the Minister must consult. Secondly, the Minister must obtain advice of the CEE. Thirdly, in identifying the sectors regard must be had to the relevant code, not only issued, but published by Statistics South Africa. With all the above statutory safety pins, it is difficult to fathom arbitrariness in the process of setting numerical targets.

[37] Subsection (4) specifically refers to a draft of any notice as opposed to a draft of a notice. The argument that the notice of 15 April 2025, in the final form it took, ought to have been published within the contemplation of this subsection is without merit. It is a submission that is in conflict with the clear language and the purpose of this subsection. It is common cause that in 2023 and 2024, the Minister published notices which contained numerical targets proposed for the 18 sectors already identified after what appears to be a rigorous process. Taking into account the fact that the drafts seek to source comments of interested parties, the notice of 15 April 2025 did not require to still undergo a comment process. After 2023 and 2024, it must axiomatically

[15] *E-TV* para 43.

follow that interested parties were allowed an opportunity to comment. Allow, does not mean compel or even consult *per se*. Allow, means permit to do something. As indicated earlier an employee in the sector qualifies to be an interested party. A comment is a remark expressing an opinion or reaction. Since there is no dispute that in 2023 and 2024 the proposed drafts were published, it must also axiomatically follow that interested parties were permitted to remark or express an opinion or reaction. The 30 days period was, on the uncontested facts, without any doubt permitted by the Minister. The view that the thirty-day period ought to be reckoned from the day the 15 April 2025 notice is published in a draft form, which it is common cause did not happen, is rejected by this Court. It must be reckoned from the 2023/4 publications.

[38] To the extent that the numerical targets set on 15 April 2025 are different from those set out in 2023 and 2024, this Court agrees with the Minister that they are bound to differ. The 2023/24 numbers are proposed and not cast in stone. Logic dictates that the process of permitting remarks and expression of opinion must lead to change of data. This Court is not bemused by the change of numbers after the 2023/4 notices; it was bound to happen. It serves as proof of permitting remarks and expression of opinions. The 2023/4 notices qualify as drafts of any notice within the contemplation of the subsection.

[39] Given the above interpretation, this Court comes to an irresistible conclusion that the Minister did not fail to consult or publish as required by the law set out in section 15A of the EEA. Accordingly, there is no legal basis to interdict nor suspend the actions of the Minister. The application for an interdict or suspension falls to be dismissed. Before this Court concludes, it must pertinently deal with the arbitrariness allegation and the issue of the targets discriminating women. I pause to remark that this issue snugly fits in part B as opposed to part A. However, since it was argued before this Court, it must deal with it despite the preliminary view of its relevance at this stage.

The alleged arbitrariness and discrimination of women

[40] The power of the Minister is to set numerical targets and not numerical goals. Numerical targets are numbers that the Minister aims for in any sector. Numerical goals are numbers that a designated employer aims to achieve. By way of example,

a Minister may aim for the appointment of 10 managers over a period of 5 years in a particular sector. A designated employer may aim to achieve the appointment of 2 of the 10 managers every year for a period of 5 years. Section 20(1) of the EEA obligates a designated employer to prepare and implement an employment equity plan which will achieve reasonable progress towards employment equity. The employment equity plan must state the objectives to be achieved for each year, the affirmative action measures to be implemented, and identify by numerical goals to achieve the equitable representation of suitably qualified people from the designated groups and the timetable within which to achieve the numerical goals set by an employer.

[41] Undoubtedly, numerical goals are set out by an employer in an employment equity plan, which is required to be a product of consultation with employees (section 16, 17 and 20 of the EEA). In developing an employment equity plan, an employer seeks to achieve reasonable progress towards employment equity. The purpose of setting numerical targets is to ensure the equitable representation. Owing to the rigorous process that precedes the setting of numerical targets, this Court rejects the argument of arbitrariness. The numerical targets were not and could not have been whimsically set by the Minister. Something is done arbitrarily, if it is based on random choice or personal whim rather than any reason or system. The relevant code published by Statistics South Africa, informs the setting of numerical targets. The advice of the CEE is factored in when numerical targets are set. Consultation with the relevant sectors also informs the setting of numerical targets.

[42] Regarding the discrimination of women, the case in the founding affidavit is that the arbitrariness of the 2025 targets is shown in a particular way in those sectors in which women will be substantially disadvantaged by the 2025 targets. What appears to be the gripe of the applicants is that in their own interpretation of the numerical targets in particular sectors women will be disadvantaged. For the purpose of part A, what requires determination is whether the Minister acted outside the parameters of the enabling section, to a point that the Minister's action is to be interdicted and or suspended. Discrimination does not necessarily equate disadvantage. Section 9(3) of the Constitution specifically provides that the State may not unfairly discriminate.

Impliedly, the discrimination, even if named disadvantaged in another name, must be one that is unfair[16].

[43] Of greater significance, section 9(2) provides that equality includes the full and equal enjoyment of all rights and freedoms. In order to promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. In disputing the allegations of arbitrariness, the respondents testified that the setting of sectoral numerical targets was not a mere thumbsuck as the applicants seem to suggest. This Court agrees with the contention by the respondents that this Court cannot be called upon to make a determination as to whether the calculations so employed by the Minister are arbitrary. More importantly, owing to the fact that the legislature chose the Minister as a functionary to set the numerical targets, this Court cannot determine a specific sectoral numerical target that should apply. Such would equate judicial overreach and a disrespect of the separation of powers doctrine.

[44] This argument of arbitrariness that disadvantages women clearly ignores the fact that what the Minister is statutorily empowered to do is to set numerical targets as opposed to goals. It will be the setting of numerical goals, which is the statutory function of an employer, that may lead to a disadvantage of women. It is for that reason that section 15(3) of the EEA, specifically permits numerical goals and exclude quotas. It can only be in the process of setting numerical goals that a designated employer may include consciously or unconsciously quotas[17]. Another aspect that seems to escape the contentions made with regard to arbitrariness is that section 30(2)(b) of the EEA empowers the CEE to research and report to the Minister on any matter relating to the application of this Act, including appropriate and well-researched norms and benchmarks for setting of numerical goals in the various sectors. The provisions of section 30(2)(b) underscore the need of an advice from the CEE when the Minister sets numerical targets. Clearly, it must be accepted that the CEE would advise the Minister accordingly, if the numerical targets to be set by the Minister disadvantages women to a point of unfair discrimination. It is not the case of the applicants that the

[16] *Harsken v Lane NO and others* 1997 (11) BCLR 1489 (CC) at para 43.
[17] *South African Police Services v Solidarity obo Barnard* (2014) ILJ 2981 (CC).

CEE did not dispense with an advice or dispensed with a deficient one. Thus, this Court must accept that, as an expert in the field, the CEE provided an appropriate advice.

[45] Last but not least, section 42(1)(aA) of the EEA, provides that in determining whether a designated employer is implementing employment equity in compliance with the Act, a factor as to whether the employer has complied with a sectoral target set out in terms of section 15A applicable to that employer, may be taken into account. In turn, section 42(4) specifically provides that in any assessment of its compliance with this Act, a designated employer may raise any reasonable ground to justify its failure to comply. In terms of section 53(6)(b), a Minister will issue a certificate of compliance to any employer who has raised a reasonable ground to justify its failure to comply as contemplated by section 42(4).

[46] Where an employer, in setting numerical goals choses not to comply with the numerical targets set by the Minister in terms of section 15A because such will discriminate against women, such a ground is reasonable to justify failure to comply. Therefore, with such valid alternative remedy, this Court cannot exercise its powers to issue a discretionary remedy of an interdict. There is simply no basis for an irreparable harm to be suffered by employers in the circumstances where a justification may be hoisted to save it from the non-compliance wrath by the Minister.

The issue of costs

[47] When it comes to costs, a Court possesses a very wide discretion. Counsel for the applicants argued that when deciding the issue of costs this Court must apply the *Biowatch*[18] principle. A debate ensued as to whether the principle of *Biowatch* finds application or not. Counsel for the respondents submitted that the present application does not seek to enforce a constitutional right guaranteed in the BoR, therefore the principle must not be applied, and its application is being abused by the applicants. I chose not to resolve that dispute but apply my judicious discretion in deciding the issue of costs. Given the importance of this matter, particularly because the same parties

[18] *Biowatch Trust v Registrar Genetic Resources and Others* (CCT 80/08) [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (3 June 2009).

may lock horns in due course when dealing with part B of this matter, I take a view that an appropriate order to make is for each party to pay its own costs.

Conclusions

[48] In summary, this Court concludes that an interdictory relief is not appropriate in the circumstances of the present case. A suspension of the exercise of statutory powers is inappropriate and the provisions of section 172(1)(b) of the Constitution finds no application. This Court is not in a position to examine whether the numerical targets set by the Minister (exercise of statutory power) are lawful or not. A Court of review is better placed to conduct such an examination, when considering the rationality or otherwise of the exercise of the statutory powers. This Court disagrees with a contention that the numerical targets set by the Minister are arbitrary and discriminatory of women. Regarding costs, the appropriate order is that of each party paying its own costs.

Order

[49] Because of all the above reasons, I make the following order:

1. **The application is heard as one of urgency.**
2. **Part A of the present application is dismissed.**
3. **Each party must bear its own costs.**



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GN MOSHOANA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Delivered: *This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 28 August 2025.*

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Instructed by:	State Attorney, Pretoria
Date of Hearing	15 August 2025
Date of judgment:	28 August 2025