IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

Case no.: J661 /23

In the matter between:

SOLIDARITY	Applicant
And	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
MINISTER OF EMPLOYMENT AND LABOUR	Second Respondent
THE DEPARTMENT OF EMPLOYMENT AND LABOUR	Third Respondent
THE DIRECTOR-GENERAL OF THE DEPARTMENT OF EMPLOYMENT AND LABOUR	Fourth Respondent
THE COMMISSION FOR EMPLOYMENT EQUITY	Fifth Respondent

NOTICE OF MOTION

KINDLY TAKE NOTICE THAT the applicant intends applying to the above Honourable Court at a date and time fixed by the Registrar for an order in the following terms:

1. declaring that sections 4, 6, 11 and 12 of the Employment Equity Amendment Act, No. 4 of 2022 (the "**Amendment Act**") are unconstitutional to the extent that:

    1.1. section 4 of the Amendment Act inserts section 15A in the Employment Equity Act, No. 55 of 1998 (the "**EEA**") which provides that the second respondent may, after consulting the relevant sectors and with the advice of the third respondent, 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 pursuant to the provisions of section 15A(1) and (2) of the EEA.

    1.2. section 6 of the Amendment Act amends section 20 of the EEA by inserting section 20(2A) which requires that the numerical goals set by an employer in terms of section 20(2) of the EEA must comply with any sectoral target in terms of section 15A of the EAA that applies to that employer.

    1.3. section 11 of the Amendment Act amends section 42 of the EEA by inserting section 42(1)(aA) which requires that in determining whether a designated employer is implementing employment equity in compliance with the EEA, the fourth respondent or any person or body applying the EEA may, in addition to the factors stated in section 15 of the EEA, take into account whether the employer

has complied with a sectoral target as set out in terms of section 15A of the EAA applicable to that employer.

1.4. section 12 of the Amendment Act amends section 53 of the EEA by inserting section 53(6) which provides that the second respondent may only issue a certificate in terms of section 53(2) of the EEA if the second respondent is satisfied that the employer has complied with a numerical target set in terms of section 15A of the EEA that applies to that employer;

2. Costs of the application, in the event of any opposition; and

3. Further and/or alternative relief.

KINDLY TAKE NOTICE FURTHER that the accompanying affidavit of **ANTONIE JASPER VAN DER BIJL** together with the documents referred therein, will be used in support of this application.

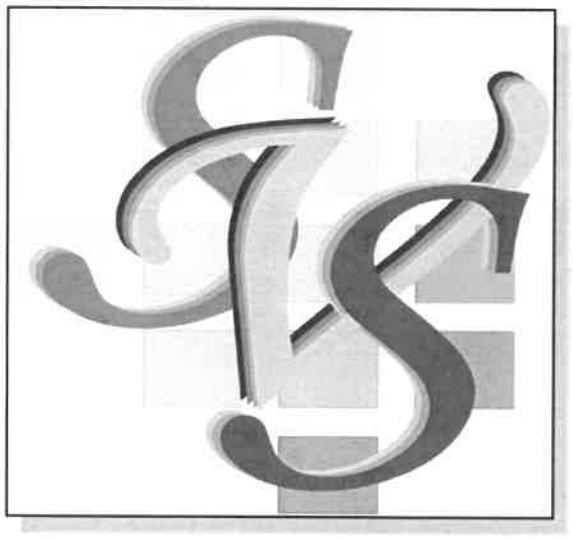
KINDLY TAKE NOTICE FURTHER that the Applicant has appointed **SERFONTEIN VILJOEN & SWART ATTORNEYS**, at the address set out below, as the address at which it will accept notice and service of all process in these proceedings.

TAKE FURTHER NOTICE THAT if you intend opposing this application you are required in terms of rule 7 of the Rules of the above Honourable Court to deliver a notice of opposition and an

answering affidavit within 10 days from the day on which the application is served on the party/ies opposing the application.

TAKE FURTHER NOTICE THAT the Applicant shall, in light of the fact that Constitutional issues are raised, give notice to the Registrar of the above Honourable Court pursuant to the provisions of rule 16A of the Uniform Rules of Court.

DATED AT PRETORIA ON THIS THE 10TH DAY OF MAY 2023.





SERFONTEIN VILJOEN & SWART

Attorneys for the **APPLICANT**

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BROOKLYN

PRETORIA

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REF: MR SWART/ CLAASSEN/VENTER/

db/CS0541

TO: **THE REGISTRAR OF THE ABOVE HONOURABLE COURT**

JOHANNESBURG

AND TO: **THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA**
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AND TO: **THE DIRECTOR-GENERAL OF THE DEPARTMENT OF EMPLOYMENT AND LABOUR**
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AND TO: **THE COMMISSION FOR EMPLOYMENT EQUITY**

FIFTH RESPONDENT

DEPARTMENT OF LABOUR

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

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REF: **MR I CHOWE / NEW MATTER**

IN LABOUR COURT OF SOUTH AFRICA

(JOHANNESBURG)

Case no.: J661/23

In the matter between:

SOLIDARITY	Applicant
And	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First respondent
MINISTER OF EMPLOYMENT AND LABOUR	Second respondent
THE DEPARTMENT OF EMPLOYMENT AND LABOUR	Third respondent
THE DIRECTOR-GENERAL OF THE DEPARTMENT OF EMPLOYMENT AND LABOUR	Fourth respondent
THE COMMISSION FOR EMPLOYMENT EQUITY	Fifth respondent

FOUNDING AFFIDAVIT

I, the undersigned,

ANTONIE JASPER VAN DER BIJL

do hereby state on oath -

INTRODUCTION

1. I am an adult male and the Deputy Chief Executive: Legal of the applicant (Solidarity). I am duly authorised to represent Solidarity in this application, which concerns a challenge to the constitutionality of certain sections of the Employment Equity Amendment Act 4 of 2022 (Amendment Act). I attach the relevant resolution as annexure **FA1**.

2. Save where specifically stated or where the context indicates otherwise, I have personal knowledge of the facts herein stated or I have ascertained and determined them from the records of Solidarity that are under my control. I confirm that the facts referred to are true and correct.

3. Where I rely on submissions and allegations of others, or on newspaper reports, or other hearsay evidence, I request that it be admitted in terms of s 3 of the Law of Evidence Amendment Act No 45 of 1988. In the circumstances of the case, it is simply not possible to obtain confirmatory affidavits from all persons concerned.

4. In this affidavit, I rely on certain legal submissions based on the advice received from Solidarity's legal representatives. I accept that the legal submissions do not constitute evidence, but it is necessary to set them out herein, to provide a proper context for the relief that Solidarity seeks. I am advised that full legal argument in respect of these matters will be advanced at the hearing of this application.

PARTIES

The applicant

5. The applicant is Solidarity, a trade union registered in terms of the Labour Relations Act 66 of 1995 (LRA). Solidarity has its head office at the corner of Eendracht and D F Malan Avenue, Kloofsig, Centurion, 0046.

The respondents

6. **The first respondent**

6.1. The first respondent is the President of the Republic of South Africa (President). The President is the head of State and of the national executive in terms of s 83 of the Constitution of the Republic of South Africa Act 108 of 1996 (Constitution). The President is obliged to uphold, defend, and respect the Constitution as the supreme law of the Republic. He is responsible for assenting to and signing Bills pursuant to s

84(2)(a) of the Constitution. The President is empowered to proclaim the commencement of the relevant sections of the Amendment Act.

6.2. The President's office is situated at Union Buildings, Government Avenue, Pretoria.

6.3. For purposes of this application, the President is represented by the offices of the State Attorney, SALU Building, 316 Thabo Sehume Street, Pretoria.

7. **The second respondent**

7.1. The second respondent is the Minister of Employment and Labour (the Labour Minister), the member of the national executive responsible for the administration of the Employment Equity Act 55 of 1998 (EEA) and accordingly the provisions of the Amendment Act that form the subject-matter of this application.

7.2. The current incumbent of the post is Mr Thulas Nxesi.

7.3. The offices of the Labour Minister are located at Laboria House, 215 Francis Baard, Pretoria. The Labour Minister is also represented by the State Attorney as aforesaid.

8. **The third and fourth respondents**

8.1. The third respondent is the Department of Employment and Labour (Labour Department), and the fifth respondent is the Director-General of the Labour Department (DG). The Labour Department is responsible for the application and enforcement of the EEA, through its DG. The offices of the Labour Department are located at Laboria House, 215 Francis Baard Street Pretoria. The Labour Department and the DG are represented by the State Attorney as aforesaid.

9. **The fifth respondent**

9.1. The fifth respondent is the Commission for Employment Equity (EE Commission), established by and pursuant to s 28 of the EEA, with offices at the Labour Department, Room 103 Laboria House, 215 Francis Baard Street Pretoria.

9.2. In terms of s 30(1) of the EEA, the function of the EE Commission is to advise the Labour Minister on several matters relevant to the implementation of the EEA, including matters regulated under the Amendment Act. The EE Commission is cited for any interest that it may have in the relief sought.

THE APPLICATION IN SUMMARY

10. On 6 April 2023, the President assented to the Amendment Act. The Amendment Act was published in *Government Gazette* No 48418 of 14 April 2023. A copy of the Amendment Act is attached hereto as annexure **FA2**. The effective date of the Amendment Act is yet to be proclaimed by the President. In a media release by the Labour Department, it was previously announced that the amendments to the EEA introduced by way of the Amendment Act would take effect on 1 September 2023, but this date is not certain in the absence of official proclamation.

11. Solidarity challenges the constitutionality of sections 4, 6, 11 and 12 of the Amendment Act, and asks for these sections to be declared invalid. The sections in question introduce amendments to the EEA that empower the Labour Minister to identify and set employment equity numerical "*targets*" for each national economic sector. The "*targets*" will be determined by the Labour Minister in consultation with the EE Commission. An amendment to s 20 of the EEA (which deals with employment equity plans) links the sectoral numerical "*targets*" to the numerical targets set by a designated employer in its employment equity plan. A designated employer will be required to set numerical targets in line with the applicable sectoral targets set by the Labour Minister. An amendment to s 42 aligns the assessment of compliance with the new requirements relating to sectoral numerical "*targets*", and an amendment to s 53 of the EEA dealing with state contracts provides that the Labour Minster may only issue a compliance certificate if the employer

has complied with the sectoral numerical targets set by the Labour Minister for the relevant sector, or has demonstrated a reasonable ground for non-compliance.

12. Solidarity contends that the Amendment Act is subject to constitutional challenge on the basis that it:

12.1. entrenches categorisation of employees and applicants for employment according to race, and reinforces apartheid-era race classification by essentially imposing a quota-based regime for purposes of the EEA;

12.2. confers wide-ranging powers on the Labour Minister that are inconsistent with the notion of a nuanced approach to affirmative action as required under the Constitution; and

12.3. is inconsistent with the Republic's duties under international law.

STANDING

13. Solidarity brings this application on three grounds, namely (i) as an association in its own interests, (ii) as an association acting in the interests of its members and (iii) in the public interest.

14. The trade union has more than 200 000 members in all occupation fields. Solidarity provides workplace assistance to its members at more than 20 offices countrywide.

15. Solidarity is committed to the Constitution, and actively seeks to safeguard the constitutional rights of its members and, more generally, the public. Solidarity, its members, and the public at large have an interest in the appropriate and constitutionally compliant adoption of affirmative action measures, including legislation. Solidarity's representation of members adversely affected by the application of employment equity plans adopted under the EEA is a matter of public record and is most evident from the judgments of the Constitutional Court in *South African Police Service v Solidarity obo Barnard* 2016 (6) SA 123 (CC) (*Barnard*) and *Solidarity and Others v Department of Correctional Services* 2016 (5) SA 594 (CC) (DCS). Directly associated with such interest is the direct and substantial interest in ensuring that the EEA is constitutionally sound.

16. Considering the foregoing, I submit that Solidarity enjoys the necessary standing to seek the relief set out in the notice of motion.

JURISDICTION

17. Section 151 of the LRA establishes the Labour Court as a "*superior court that has authority, inherent powers and standing, in relation to matters under its jurisdiction, equal to that which a court of a provincial division of the High Court has in relation to the matters under its jurisdiction*". The Labour Court enjoys concurrent jurisdiction with the High Court in

respect of any alleged or threatened violation of any fundamental right enshrined in Chapter 2 of the Constitution and arising from *inter alia* (i) employment and from labour relations; (ii) the application of any law for the administration of which the Labour Minister is responsible.

18. In accordance with s 169(1) of the Constitution, the High Court may decide any constitutional matter, subject to exceptions that include matters assigned by an Act of Parliament to another court of a status similar to the High Court.

19. The Labour Court, being a court of status similar to that of a High Court, may in accordance with s 170 of the Constitution enquire into or rule on the constitutionality of any legislation.

20. In consequence of s 172(1) of the Constitution, the Labour Court, when deciding a constitutional matter within its power, must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency, and make a just and equitable order. Any order of constitutional invalidity is subject to confirmation by the Constitutional Court.

21. The Constitutional Court held in *Khosa*[1] that it had jurisdiction to consider a provision which had not yet been brought into operation, on the basis that s 172(2)(a), which empowers

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[1] *Khosa and Others v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Development and Others* 2004 (6) BCLR 569 (CC).

the Court to declare Act of Parliament invalid, does not distinguish between those that have been brought into force and those that have not. In *Doctors for Life International v Speaker of the National Assembly*[2], the Court built on this judgment, asserting that s 80 of the Constitution, which makes provision for abstract review at the instance of members of the National Assembly, "*does not preclude a member of the public from challenging a provision of an Act of Parliament that has been promulgated*".[3] It explained:[4]

"In terms of section 81, '[a] Bill assented to and signed by the President becomes an Act of Parliament'. The fact that the statute may not have been brought into operation cannot deprive this Court of its jurisdiction. There is nothing in the wording of section 80 that precludes this Court or any other court from considering the validity of an Act of Parliament at the instance of the public. Nor is there anything in the scheme for the exercise of jurisdiction by this Court that precludes it from considering the constitutional validity of a statute that has not yet been brought into operation. The legislative process is complete, and there can be no question of interference in such a process. Once a bill is enacted into law, this Court should consider its constitutionality."

22. In all these circumstances, the Labour Court enjoys jurisdiction to consider and pronounce on the constitutionality of the Amendment Act.

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[2] 2006 (12) BCLR 1399 (CC).

[3] *Doctors for Life* at para 63.

[4] *Doctors for Life* at para 64.

BACKGROUND AND CONTEXT

The EEA in context

23. South Africa's history of structural and political exclusion based on race and its negative consequences are well known. The year 1994 saw the advent of a new constitutional dispensation. Our constitutional democracy is founded on explicit values. Chief of these, for present purposes, are human dignity and the achievement of equality in a non-racial, non-sexist society under the rule of law. The foremost provision in our equality guarantee is that everyone is equal before the law and is entitled to equal protection and benefit of the law. At the same time, the Constitution enjoins us to take active steps to achieve substantive equality, particularly for those who were disadvantaged in the past by unfair discrimination.

24. Mohamed J in *S v Makwanyane and Another*[5] vividly described the meaning of the break with the past:

"[the Constitution] retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated

[5] 1995 (3) SA 391 (CC).

in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic. The past institutionalized and legitimized racism. The Constitution expresses in its preamble the need for a 'new order ... in which there is equality between ... people of all races'. Chapter 3 of the Constitution extends the contrast, in every relevant area of endeavour (subject only to the obvious limitations of section 33). The past was redolent with statutes which assaulted the human dignity of persons on the grounds of race and colour alone; section 10 constitutionally protects that dignity. The past accepted, permitted, perpetuated and institutionalized pervasive and manifestly unfair discrimination against women and persons of colour; the preamble, section 8 and the postamble seek to articulate an ethos which not only rejects its rationale but unmistakenly recognises the clear justification for the reversal of the accumulated legacy of such discrimination. The past permitted detention without trial; section 11(1) prohibits it. The past permitted degrading treatment of persons; section 11(2) renders it unconstitutional. The past arbitrarily repressed the freedoms of expression, assembly, association and movement; sections 15, 16, 17 and 18 accord to these freedoms the status of 'fundamental rights'. The past limited the right to vote to a minority; section 21 extends it to every citizen. The past arbitrarily denied to citizens on the grounds of race and colour, the right to hold and acquire property; section 26 expressly secures it."

[Own emphasis]

The EEA

25. Four years into the new constitutional dispensation, the EEA was passed.

26. The EEA is a statute concerned with the intended promotion of the constitutional right to equality generally, and that it has as its aim the implementation of employment equity measures to redress the effects of discrimination. In accordance with its preamble, the EEA is a statute particularly concerned *inter alia* with: (i) disparities in employment, occupation, and income in the national labour market; (ii) the promotion of the constitutional right to equality; (iii) the elimination of unfair discrimination in employment; and (iv) the achievement of a diverse workforce broadly representative of our people. The EEA has as its stated purpose the achievement of equality in the workplace by: (i) "*promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination*" (s 2(a)); and (ii) "*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*" (s 2(b)).

27. According to s 3, the EEA must be interpreted (i) in compliance with the Constitution; (ii) so as to give effect to its purpose; (iii) taking into account any Code of Good Practice issued under it, or under any other employment law; and (iv) in compliance with the international law obligations of the Republic of South Africa, "*in particular those contained in the International Labour Organisation Convention (111) concerning Discrimination in Respect of Employment and Occupation*".

28. Subject to certain limited exceptions, all the provisions of the EEA apply to "*designated employers*", that is essentially all employers who employ more than 50 employees or who meet certain turnover thresholds. Every designated employer must, in order to achieve employment equity, implement affirmative action measures for people from "*designated groups*" in terms of the EEA, that is black people (defined as a generic term referring to Africans, Coloured people and Indians), women and people with disabilities who are citizens of South Africa by birth or descent, or who became citizens before 27 April 1994, or thereafter, but who would have been entitled to acquire citizenship by naturalisation prior to that date but who were precluded by apartheid policies.

29. Section 13 of the EEA compels every employer to (i) consult with its employees as required by s 16 of the statute; (ii) conduct an analysis as required by s 19 of the EEA; (iii) prepare an employment equity plan as required by s 20; and (iv) report to the DG on progress made in implementing its employment equity plan, as required by s 21 of the EEA.

30. According to s 15(1) of the EEA, affirmative action measures are designed to ensure that "*suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational levels in the workforce of a designated employer*". Affirmative action measures implemented by a designated employer must include:

30.1. measures to identify and eliminate employment barriers, including unfair discrimination, which adversely affect people from designated groups (s 15(2)(a));

30.2. measures designed to further diversity in the workplace based on equal dignity and respect of all people (s 15(2)(b));

30.3. making reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce of a designated employer (s 15(2)(c));

30.4. measures to ensure the equitable representation of suitably qualified people from designated groups in all occupational levels in the workforce (s 15(2)(d)(i)); and

30.5. measures to retain and develop people from designated groups and to implement appropriate training measures, including measures in terms of an Act of Parliament providing for skills development (s 15(2)(d)(ii)).

31. Section 15(3) provides specifically that these last two measures (contemplated in s 15(2)(d)) "*include preferential treatment and numerical goals, but exclude quotas*".

[Own emphasis]

32. Furthermore, and subject to s 42 of the EEA, nothing in s 15 is to be read as requiring a designated employer to take any decision concerning an employment policy or practice that would establish an absolute barrier to the prospective or continued employment or advancement of people who are not from designated groups (s 15(4)).

33. As is contemplated in s 13 of the EEA, s 16 of the statute provides for consultation with employees.

34. A designated employer must take reasonable steps to consult and attempt to reach agreement with a representative trade union representing members at the workplace and its employees or representatives nominated by them, or, if no representative trade union represents members at the workplace, with its employees or representatives nominated by them (s 16(1)) on *inter alia* (i) the conduct of the analysis referred to in s 19 (see s 17(a)); and (ii) the preparation and implementation of the employment equity plan referred to in s 20 (see s 17(b)).

35. As foreshadowed by s 13 of the EEA, a designated employer must collect information and conduct an analysis, as prescribed, of its employment policies, practices, procedures and the working environment, in order to identify employment barriers which adversely affect people from designated groups (s 19(1)). The analysis must include a profile, as prescribed, of the designated employer's workforce within each occupational level in order to determine the degree of underrepresentation of people from designated groups in various occupational

levels in that employer's workforce (s 19(2)). Regulations published on 1 August 2014 by way of Government Notice R595 in Government Gazette 37873 (Employment Equity Regulations, 2014) prescribe certain requirements to be met in the collection of information and the conduct of an analysis (Regulation 8). In particular, the employer may refer to a guide on the applicable national and regionally active population and a description of occupational levels as provided (Regulation 6).

36. Section 20(1) is the provision that requires all designated employers to prepare and implement an employment equity plan that will achieve "*reasonable progress towards employment equity in that employer's workforce*". Such an employment equity plan must deal with prescribed matters, including (i) the objectives to be achieved for each year of the plan; (ii) the affirmative action measures to be implemented; (iii) numerical goals to achieve the equitable representation of suitably qualified people from designated groups within each occupational level in the workforce, the timetable within which this is to be achieved, and the strategies intended to achieve those goals; and (iv) the duration of the plan, which may not be shorter than one year or longer than five years.

37. In accordance with Regulation 9 of the Employment Equity Regulations, 2014, an employer must refer to the relevant Codes of Good Practice issued in terms of s 54 of the EEA when preparing an employment equity plan. The Code of Good Practice was published on 12 May 2017 by way of Government Notice 424 in Government Gazette 40840.

38. It provides *inter alia* that employment equity plans must take into account the specific circumstances of an organisation for which they are prepared (clause 1(c)). Detailed provision is made for the process of constructing a plan, and the Code of Good Practice makes plain that what is to be brought into account is amongst others the analysis conducted within the organisation and the national and provincial economically active population. In respect of the numerical goals and targets contemplated in s 20(2)(c), the Code of Good Practice provides that these must be "*informed by the outcome of the analysis and prioritised and weighted more towards the designated groups that are most under-represented in terms of the national and provincial economically active population, in terms of section 42 of the EEA*" (clause 7.4(c)).

39. If a designated employer fails to prepare or implement an employment equity plan, the DG may apply to this court to impose a fine of up to 10% of the annual turnover of such an employer (EEA s 20(7)).

40. Every year, on the first working day of October, a designated employer must submit a report to the DG (s 21(1)). The first report will refer to the initial development of and consultation around an employment equity plan. The subsequent reports will detail the progress made in implementing the employment equity plan. Failure to submit such a report may equally result in a referral for imposition of a fine (s 21(4B)).

41. The EEA contemplates monitoring of compliance with the EEA by the DG or any person or body applying the statute (s 42) and sets out factors which may be considered, namely:

41.1. the factors in s 15 of the EEA (s 42(1));

41.2. the extent to which suitably qualified people from and amongst the different designated groups are equitably represented within each occupational level in that employer's workforce in relation to the demographic profile of the national and regional economically active population (s 42(1)(a));

41.3. reasonable steps taken by a designated employer to train suitably qualified people from the designated groups (s 42(1)(b));

41.4. reasonable steps taken by a designated employer to implement its employment equity plan (s 42(1)(c));

41.5. the extent to which the designated employer has made progress in eliminating employment barriers that adversely affect people from designated groups (s 42(1)(d));

41.6. reasonable steps taken by an employer to appoint and promote suitably qualified people from the designated groups (s 42(1) (d)); and

41.7. any other prescribed factor (s 42(1)(e)).

42. Compliance may also be evaluated by reference to regulation issued under s 55 of the EEA. These are the Employment Equity Regulations, 2014, and s 42(3) of the EEA specifically confirms that the Labour Minister has the power to prescribe in the said regulations which employers' compliance should be determined with reference to the demographic profile of either the national economically active population or the regional economically active population. Legislative provision is therefore made for assessing compliance only with reference to the national economically active population.

43. The aforementioned section and more specifically the factors to be taken into account by, amongst other the DG, in assessing compliance by designated employers, are not mandatory but discretionary. Section 42(1) provides that these factors "*may*" be considered, and as such the DG is not obliged to consider the regional demographics, however in practice compliance with regional and national demographics are the overriding criteria used to determine compliance.

44. Central to the EEA is the definition of designated groups who are to benefit from it, and the assessment of the need for and compliance with affirmative action measures by reference to the designated groups, as defined. No proper consultation can be conducted in preparation for an employment equity plan, similarly no proper workplace analysis can be conducted so to determine the over and underrepresented of persons from the designated groups and no assessment on compliance with such a plan can be conducted without a proper understanding of who is, or ought to be, the beneficiary of the plan as devised.

The proper approach to the EEA

45. In the seminal *Barnard* case, Justice Moseneke for the majority made the point that our *"quest to achieve equality must occur within the discipline of the Constitution. Measures that are directed at remedying past discrimination must be formulated with due care not to invade unduly the dignity of all concerned. We must remain vigilant that remedial measures under the Constitution are not an end in themselves. They are not meant to be punitive or retaliatory. Their ultimate goal is to urge us towards a more equal and fair society that hopefully is non-racial, no sexist and socially inclusive".*[6] In the same vein, the Court held that *"Remedial measures must be implemented in a way that advances the position of people who have suffered past discrimination. Equally, they must not unduly invade the human dignity of those affected by them, if we are truly to achieve a non-racial, non-sexist and socially inclusive society".*[7] In accordance with these observations, the Constitutional Court also made the point that s 15(4) of the EEA *"sets the tone for the flexibility and inclusiveness required to advance employment equity".*[8]

46. The minority judgment penned by Justices Cameron, Froneman and Majiedt developed the point further, observing that *"we should pause to recognise the perils that may beset affirmative action. Remedial measures may exact a cost our racial history demands we recognise. The Constitution permits us to take past disadvantage into account to achieve*

[6] At para 30.
[7] At para 32.
[8] At para 42.

substantive equality. But it does so generous heartedly and ambitiously: it licenses reparative measures designed to protect or advance all persons who have been disadvantaged by any form of unfair discrimination. For reasons of history, racial and gender disadvantage are the most prominent. But they are not the only. They do not exclude other signifiers of disadvantage, like social origin or birth. We must implement affirmative action bearing the breadth of this power in mind".[9] Moreover, *"in planning our future we should bear in mind the risk of concentrating excessively on [race]. To achieve the magnificent breadth of the Constitution's promise of full equality and freedom from disadvantage, we must foresee a time when we can look beyond race".*[10]

[Own emphasis]

47. The minority cautioned that *"we must note with care how these remedial measures often utilise the same racial classifications that were wielded so invidiously in the past. Their motivation is the opposite of what inspired apartheid, for their ultimate goal is to allow everyone to overcome the old divisions and subordinations. But fighting fire with fire gives rise to an inherent tension".*[11]

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[9] At para 79. Emphasis supplied.
[10] At para 81.
[11] At para 93.

The SAHRC Report

48. On 12 July 2018, the South African Human Rights Commission (SAHRC) issued its Equality Report 2017/18 with the sub-title *"Achieving substantive economic equality through rights-based radical socio-economic transformation in South Africa"* (Equality Report). A copy of the Equality Report is attached as annexure **FA3**.

49. The content of the Equality Report may be summarised as follows:

49.1. According to the Equality Report, the SAHRC found that the EEA is not constitutionally compliant, and that it violates the obligations imposed by: (i) the International Convention for the Elimination of All Forms of Racial Discrimination (ICERD); and (ii) the Committee on the Elimination of Racial Discrimination (CERD).

49.2. The executive summary records as one of the key findings of the Equality Report[12] that *'The Employment Equity Act, 55 of 1998's definition of "designated groups" and South Africa's system of data disaggregation is not in compliance with constitutional or international law obligations. Government's failure to measure the impact of various affirmative action measures on the basis of need and disaggregated data,*

[12] At p 5.

especially the extent to which such measures advance indigenous peoples and people with disabilities, likewise violates international law obligations'.

49.3. Another key finding recorded[13] is that '*The implementation of special measures in the employment equity sphere is currently misaligned to the constitutional objective of achieving substantive equality, to the extent that implementation may amount to rigid quotas and absolute barriers as opposed to flexible targets. This practice may inadvertently set the foundation for new patterns of future inequality and economic exclusion within and amongst vulnerable population groups'.*

49.4. In Chapter 1, the Equality Report states[14] that '*special measures are currently misaligned to constitutional objectives. Where special measures are not instituted on the basis of need, and taking into consideration socio-economic factors, they are incapable of achieving substantive equality'.*

49.5. Chapter 6 of the Equality Report is concerned with the '*Key Rights-Based Drivers of Radical Socio-Economic Transformation'.*[15]

49.5.1. It commences with a discussion of the meaning of '*affirmative action*' or '*special measures*' in which it records the Constitutional Court's cautionary guidance for

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[13] At p 5.

[14] At p 8.

[15] See p 28.

the implementation of special measures, namely that measures directed at remedying past discrimination must be formulated with due care not to invade unduly the dignity of all concerned, quoting *Barnard*.[16]

49.5.2. The three-pronged test to determine whether affirmative action measures fall within the bounds of s 9(2) of the Constitution (as developed in *Minister of Finance v Van Heerden*)[17] is also recited.

49.5.3. Moreover, a description of the position in international law is provided, namely that it allows for '*special measures*' to advance persons subject to discrimination, but that such measures may not entail as their consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved. Accordingly, affirmative action measures should be temporary, tailored to the needs of the groups and individuals concerned, and should cease once substantive equality is achieved.

49.5.4. Specifically recorded is the consideration of the CERD that '*Special measures should be appropriate to the situation to be remedied, be legitimate, necessary in a democratic society, respect the principles of fairness and proportionality,*

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[16] 2014 (6) SA 123 (CC) paras 30 – 31, see p 29 of the Equality Report.

[17] 2004 (6) SA 121 (CC).

and be temporary. The measures should be designed and implemented on the basis of need, grounded in a realistic appraisal of the current situation of the individuals and communities concerned'.[18] The Equality Report also points out that '*need must be determined on the basis of data disaggregated by "race, colour, descent and ethnic or national origin and incorporating a gender perspective, on the socio-economic and cultural status and conditions" of the group concerned*'.[19]

49.5.5. In this chapter, the Equality Report pays specific attention to the provisions of the EEA and comes to the conclusion that affirmative action is designed under the statute to provide initial economic opportunities, but also to secure the advancement of persons once appointed. Emphasis is placed on the consideration that numerical goals are required, but that quotas are prohibited and that employers are not entitled to adopt policies that would establish absolute barriers to prospective or continued employment of persons who are not from designated groups.

49.5.6. Under the heading '*Targeted special measures based on need*' it is questioned whether the EEA or its implementation is not leading to new imbalances,[20] and

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[18] At p 30.

[19] See p 30.

[20] At p 33.

noted that indigenous peoples (those whose ethnic descent may be from mixed race marriages) and linguistic or tribal minorities within the designated groups are '*not accommodated by the EEA*'.[21] Government's approach, which objects against greater disaggregation of data, is said to be '*problematic*', because '*Decisions based on insufficiently disaggregated data fail to target persons or categories of persons who have been disadvantaged by unfair discrimination, as required by the three-pronged test for affirmative action*'.[22] The Equality Report notes that '*Without first taking the characteristics of groups into account, varying degrees of disadvantage and the possible intersectionality of multiple forms of discrimination (based on race, ethnicity, gender or social origin) faced by members of vaguely categorized groups, cannot be identified. Moreover, the current classificatory system and disaggregation of data fails to acknowledge multiple forms of discrimination faced within population groups. For example, given that inequality between members of the Black African population group is higher than in any other racial group, it is foreseeable that current practice might result in a job opportunity for a wealthy Black man of Zulu origin, rather than a poor Black woman from an ethnic minority. Special measures accordingly do not account for socio-economic differences within broadly defined population groups. The CERD's requirement for the implementation of special measures on the basis of need, and a related*

[21] At p 34.

[22] At p 34.

"realistic appraisal of the current situation of the individuals and communities" concerned, cannot be met without a more nuanced disaggregation of data'.[23]

49.5.7. In the context of the heading *'Special measures designed to advance vulnerable groups'*, the Equality Report explains that *'Due to the fact that designated groups are bluntly classified and data is insufficiently disaggregated, measures are not capable of being targeted at the most vulnerable groups in society, and can likewise not be designed to respond to new forms of discrimination or compounded discrimination'.*[24]

49.5.8. Although acknowledging the Constitutional Court's attempt to distinguish between rigid quotas and flexible targets, the Equality Report records that the court has been sharply divided on this score. It is also said that *'the Court has inadvertently created the risk that members of designated groups – and especially those who suffer multiple forms of discrimination – may be prejudiced by the rigid implementation of targets, thereby raising the spectre of new imbalances arising'.*[25] In this regard, reference was made to the *Barnard* case[26] where the South African Police Service was held to have been entitled not to promote a white woman, even though white women are from a designated

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[23] See pp 34 – 35.

[24] At p 35.

[25] At pp 35 – 36.

[26] *South African Police Service v Solidarity obo Barnard* 2016 (6) SA 123 (CC).

group under the EEA, and the application of the so-called '*Barnard principle*' to other groups in subsequent litigation in *DCS*. The Equality Report concludes that '*This effectively means that where, for example, African females are sufficiently represented at a certain employment level, a wealthy, heterosexual White man could be granted preferential treatment to the detriment of a poor, African, homosexual woman*'.[27] In the view of the SAHRC:[28]

"The latter application of the Barnard principle therefore conflicts with the CERD's requirement for special measures to be adopted on the basis of a realistic appraisal of need, taking into account the social and economic circumstances of the group or individual concerned. It furthermore stands in opposition to the approach reflected in the National Development Plan, whereby preference should be accorded on the basis of race "for at least the next decade" when defining historical disadvantage. Where special measures may result in new imbalances or exacerbate current inequality viewed in the labour context more broadly, it is doubtful that such measures are "designed to advance people in need of remedial measures. Worryingly, it can lead to perverse consequences and "token" affirmative action where minority status,

[27] See p 36.

[28] At p 36.

or new patterns of discrimination and inequality within designated groups, is not properly considered."

49.5.9. In discussing the topic "*Special measures must promote the achievement of equality*", the authors of the Equality Report note that "*Currently, special measures in the employment equity context raise several concerns in respect of the requirement for affirmative action to promote equality*".[29] It is stated that "*due to challenges in classification and data disaggregation ... equality of outcomes cannot be achieved for marginalized individuals who do not fit comfortably within the crass categories of African, Coloured or Indian population groups. Furthermore, to the extent that measures are targeted at people without assessing need or recognizing intersecting forms of discrimination and disadvantage, special measures will fail to promote substantive equality. In any event, it is not possible to measure the impact of special measures on the most vulnerable persons or groups, if those persons or groups are not identified based on accurate data in the first instance*".[30] Moreover, it is noted that "*due to polycentric consequences that may result from the application of the Barnard principle, existing patterns of disadvantage*

[29] At p 36.

[30] At p 36.

may be exacerbated or new patterns of disadvantage may arise, thereby prejudicing the achievement of substantive equality".[31]

49.5.10. Upon consideration of the conclusion of this court in the *DCS* case, the SAHRC notes that the *"requirement to consider regional demographics makes sense given the uneven distribution of different population groups across South Africa. ... A context-sensitive approach is thus congruent with the CERD's guidance on the interpretation and implementation of the ICERD and its requirement for special measures".*[32] However, as the Equality Report correctly notes, s 42 of the EEA has been amended and it now *"renders the consideration of regional demographics discretionary. A failure to consider regional demographics not only stands in conflict with the CERD's position on context-sensitive implementation of special measures, but may simultaneously severely prejudice members of certain designated groups in provinces where they are more significantly represented. Furthermore, considering the huge problem constituted by unemployment in South Africa, the legislative amendment and consequent implementation of affirmative action measures may provoke urban migration and thereby exacerbate existing special injustices".*[33]

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[31] At p 37.

[32] At p 37.

[33] At pp 37 – 38.

49.6. Based on these observations, the SAHRC found *inter alia* that:

49.6.1. *"the EEA's definition of 'designated groups' and South Africa's system of data disaggregation are not in compliance with constitutional or international obligations imposed by the CERD read in conjunction with the CERD's general recommendations and concluding observations".*[34]

49.6.2. *"It is accordingly recommended that the EEA be amended to target more nuanced groups on the basis of need, and taking into account social and economic indicators' and that the government report to the SAHRC within six months of the release of the Equality Report 'on steps taken or intended to be taken to amend the EEA ...".*[35]

49.6.3. *"It is further found that the EEA and its implementation, as well as the design of special measures, are currently misaligned to the constitutional objective of achieving substantive equality. It is accordingly recommended that in qualitatively assessing the impact of affirmative action measures on vulnerable groups, including indigenous people and people with disabilities, the DOL [Department of Labour], in collaboration with the CEE [Commission for Employment Equity] and in consultation with National Treasury, undertake a*

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[34] At p 39.

[35] At p 39.

representative assessment of the implementation of employment equity plans of designated employers in order to ensure that targets are flexibly pursued and do not amount to rigid quotas".[36]

49.6.4. *"The DOJCD [Department of Justice and Constitutional Development], in consultation with the DOL and CEE, should determine whether and how the EEA can be amended to require a qualitative and context-sensitive assessment of need when employment equity plans are implemented. The EEA should be further amended to revert to the position where the consideration of the regionally economic active population in relation to representational levels is mandatory and not discretionary".*[37] Moreover, the *"DOJCD, DOL and CEE must jointly report to the [SAHRC] within six months of the release of this Report on information considered and steps intended to be taken to address these recommendations".*[38]

Response to the Equality Report

50. The recommendations of the SAHRC were not implemented. Solidarity's efforts through litigation to enforce the recommendations of the SAHRC were unsuccessful.

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[36] At p 39.

[37] At p 40. Emphasis supplied.

[38] At p 40.

51. Rather than being responsive to the recommendations of the SAHRC, the Labour Minister announced on 20 July 2020 that he intended to introduce the Employment Equity Amendment, 2020 Bill (EE Bill) in the National Assembly. The EE Bill was indeed introduced and proceeded through the legislative process before Parliament.

The parliamentary process

52. The Portfolio Committee on Employment and Labour (the Portfolio Committee) invited comments on the EE Bill to be presented by 19 February 2021.

53. Solidarity submitted written comments on the EE Bill, and made oral representations to the Portfolio Committee on 14 April 2021. A copy of the written submissions is attached as annexure **FA4**, and the text of the oral representation is attached as annexure **FA5**. Solidarity cautioned that various sections of the EE Bill would not pass constitutional muster and called for a re-evaluation. The written submissions must be read as if fully incorporated herein.

54. Further to the public participation process, the EE Bill was not amended in any significant way. On 16 November 2021, the EE Bill was passed in the National Assembly and transmitted to the National Council of Provinces (NCOP) for concurrence.

55. On 17 May 2022, the EE Bill was passed in the NCOP, and sent to the President for assent.

Solidarity's engagement with the President

56. When Solidarity learnt that the EE Bill had been sent to the President for assent, it instructed its attorneys to direct correspondence to the President. They duly did so on 23 August 2022, as appears from annexure **FA6** hereto. In relevant part, the letter reads:

> *"1. We refer to the above matter and confirm that we act herein on behalf of Solidarity, a trade union duly registered in accordance with the relevant provisions of the LRA (Solidarity).*
>
> *2. We understand from Parliament's website that the Employment Equity Amendment Bill, 2020 [B14-2020], which seeks to effect amendments to the Employment Equity Act 55 of 1998 (EEA), has been presented to you for signature. The purpose of this correspondence is to:*
>
> *2.1 Bring to the attention of the President concerns about the constitutionality of the Bill;*
>
> *2.2 emphasise that the President has the authority to challenge the constitutionality of a bill presented to him for signature, consistent with his duty to uphold, defend and respect the Constitution of the Republic of South Africa 108 of 1996 (Constitution); and*

2.3 *urge the President to invoke his powers under section 79 of the Constitution*

3. *Insofar as the constitutionality of the Bill is concerned, we attach submissions that Solidarity presented to Portfolio Committee on Employment and Labour (the Committee) as a precursor to the Committee's deliberation of the Bill. We do not intend to regurgitate the submissions therein, but we request that you seriously engage with the analysis presented.*

4. *The submissions highlight the importance of a balanced approach to affirmative action to survive constitutional scrutiny, and they discuss at some length the problems with the Bill from an international law perspective, and in particular the concerns in respect of South Africa's compliance with the International Convention for the Elimination of All Forms of Racial Discrimination (ICERD), which South Africa ratified on 10 December 1998. In addition, the submissions address a report of the South African Human Rights Commission in which it expressed the view that the EEA is not constitutionally compliant and recommended amendments that are not reflected in the Bill. Indeed, the Bill moves in the opposite direction of that which was proposed for consideration by the SAHRC, as discussed in full in the submissions. The introduction of sectoral "targets" moves the EEA closer to the adoption of quotas, and the proposed section 15A of the EEA appears to confer unfettered power on the Labour Minister, which is constitutionally problematic.*

5. *Solidarity not only made these written submissions, it also made oral presentation to the Portfolio Committee. As far as Solidarity can establish, the submissions have fallen on deaf ears and the Bill has progressed through the parliamentary process without amendment.*

6. *The President is the last port of call. In accordance with section 79 of the Constitution, the President must either assent to and sign a Bill that has been passed, or "if the President has reservations about the constitutionality of the Bill, refer it back to the National Assembly for reconsideration". We urge the President to consider the submissions on the constitutionality of the Bill that are enclosed herewith, and to refer the Bill back for reconsideration considering the concerns raised. To do otherwise, would be to shrug the constitutional duty in section 79(1)."*

57. The President's office acknowledged receipt on 23 August 2022, as is evident from annexure **FA7**. However, the President did not take any further steps. As indicated, the Amendment Act was assented to on 6 April 2023.

SECTIONS 4, 6, 11 AND 12 OF THE AMENDMENT ACT ARE UNCONSTITUTIONAL

<u>The provisions</u>

58. Section 4 of the Amendment Act provides as follows:

"Determination of sectoral numerical targets

15A. (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 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).

(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."

59. Section 6 of the Amendment Act amends the EEA as follows:

"6. Section 20 of the principal Act is hereby amended by the insertion after subsection (2) of the following subsection:

"(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.".

60. Section 11 of the Amendment Act amends the EEA as follows:

"11. Section 42 of the principal Act is hereby amended by the insertion in subsection (1) after paragraph (a) of the following paragraph:

"(aA) whether the employer has complied with a sectoral target as set out in terms of section 15A applicable to that employer;".

61. Section 12 of the EEAA amends the EEA as follows:

"12. Section 53 of the principal Act is hereby amended by the addition of the following subsection:

"(6) The Minister may only issue a certificate in terms of subsection (2) 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);

(c) the employer has submitted a report in terms of section 21;

(d) there has been no finding by the CCMA or a court within the previous 12 months that the employer breached the prohibition on unfair discrimination in Chapter 2; and

(e) the CCMA has not issued an award against the employer in the previous 12 months for failing to pay the minimum wage in terms of the National Minimum Wage Act, 2018 (Act No. 9 of 2018).''

The provisions provide for a quota system

62. As indicated hereinabove, the SAHRC has highlighted the concern that the definition of "*designated groups*" places excessive focus on racial categorisation and ultimately gives an afterlife to apartheid-style classifications. That concern is not one raised by and/or addressed in the Amendment Act. However, the effect of the Amendment Act is to

reinforce and give even greater impetus to the racial classification method and the allocation of employment opportunities based on race.

63. Notably, the EEA, prior to amendment, provided employers with some flexibility in setting their own targets in their employment equity plans. However, the Amendment Act removes this flexibility, because the numerical goals set by an employer must now comply with the targets specified by the Labour Minster. I emphasise that the language used in this regard is obligatory. Moreover, the amendments introduce an enforcement mechanism: the DG is empowered to assess whether a designated employer is implementing employment equity by reference *inter alia* to the question whether the employer has complied with any applicable sectoral target set by the Labour Minister. Of course, non-compliance carries with it the consequence that heavy fines may be imposed. The enforcement of the sectoral targets is most striking in the provision that reserves the issue of a compliance certificate under s 53 of the EEA – a prerequisite for doing business with the State – to those employers that have complied with sectoral targets. It is of little comfort that an employer could yet obtain a certificate if such employer has "*raised a reasonable ground to justify its failure to comply*", since no guidance is given on what might be considered a reasonable ground. The Labour Minister is given a blank cheque to decide what might be reasonable.

64. That the intention with the legislation is to enforce top-down quotas, rather than to implement employment equity targets devised by employers after consultation with their

workforce, is evident from the comments of the Labour Minister, who already in 2021 called for expedition in the adoption of the EE Bill on the basis that "*self-regulation by employers to achieve the objectives of EE legislation has not worked. We now need a more aggressive strategy*". This much appears from the press release attached hereto as annexure **FA8**.[39]

65. It is also clear from the submissions of the proponents of the Amendment Act during parliamentary debate, as appears from a transcript of speeches of 7 December 2021, attached hereto as annexure **FA9**.[40] Ms AS Zuma commented "*The Minister emphasises the point that, indeed, self-regulation is failing the transformation agenda in the labour market. Therefore, in order to turn the tide and expand it, the pace of economic transformation during our lifetime ... This Employment Equity Bill we are debating today should be seen as a well thought, carefully considered intervention by lawmakers to accelerate transformation in the labour market*." The Minster himself, in concluding remarks, explained that "*Self-regulation has not worked. There is a need for decisive intervention by the state...*".

66. Cosatu also understands it in this way. In a statement issued by the trade union on 13 April 2023, attached as annexure **FA10**[41] it described the Amendment Act as providing "*badly*

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[39] Accessible at: https://www.gov.za/speeches/minister-thulas-nxesi-calls-parliament-expedite-ee-amendments-25-jun-2021-0000.

[40] Accessible at: https://www.politicsweb.co.za/documents/the-ee-amendment-bill-the-parliamentary-debate.

[41] Accessible at: http://mediadon.co.za/2023/04/13/cosatu-welcomes-president-ramaphosas-signing-of-the-employment-equity-amendment-bill-into-law/.

needed interventions to strengthen government's ability to hold employers accountable", and the powers afforded to the Labour Minster to set targets as *"enabling more precise targets for sectors, occupations and regions that are notorious for their failures to reflect South Africa's demographics".*

67. Indeed, in an article of 2 May 2023, Lizle Louw (an attorney specialising in labour law), attached as annexure **FA11** [42] makes the point that the Amendment Act *"is a significant piece of legislation that shifts away from aspirational goals to enforceable targets to ensure the equitable representation of suitably-qualified people from designated groups at all levels in the workforce".*

68. What is very clear is that the Amendment Act turns its back on self-regulation, informed by workplace analysis rooted in the realities of particular workplaces. The Labour Minister is stepping into the fray with prescriptive *"targets"* that he proposes to enforce. To conclude differently would be to conclude that the setting of sectoral targets is meaningless - what would their point be other than to force employers to comply with the targets? Referring to the sectoral determinations as *"targets"* in an effort to avoid the criticism against quotas, makes no difference. Nor does it make a difference to conclude that there is some room for employers to provide reasonable explanations for non-compliance, since the Labour Minister is the sole arbiter on that score.

Accessible at: https://www.bbrief.co.za/2023/05/02/employment-equity-amendment-bill-2020-employers-must-act-swiftly/.

69. The simple point is that the sectoral targets are required to be met; they are not simply programme objectives translated into numbers which provide a target to strive for and a vehicle for measuring progress. The sectoral targets have as their purpose to produce immediate end results for the benefitting groups, without addressing the causes of "*under-representation*". Failure to adhere to the "*targets*" results in non-compliance and a penalty, whether in the form of an actual fine or in the form of foreclosure from the opportunity of doing business with the state.

70. Differently put, in circumstances where the Labour Minister's power is not aimed at, for example, merely publishing rates of transformation in particular sectors or industries, so as to allow for comparisons to be made between a particular employer's progress and the sector/industry standard, the Amendment Act imposes a standard that must be met, and not deviated from. Section 42 of the EEA as now amended creates a standard by reference to which compliance with the statute will be measured, and against which compliance may be measured exclusively (given the discretion in the language of s 42 that allows for selective and not cumulative consideration of the factors listed therein). Considering the amendment to s 53, the sectoral "*targets*" become enforceable quotas that have to be met in order to (i) prove compliance; and (ii) qualify for state contracts.

71. When the introduction of s 15A into the EEA is read in the context of the Amendment Act as a whole, the conclusion reached is that the Ministerial intervention is not aimed at identifying the causes of slow transformation in an industry, but simply to engineer an

outcome. In this sense, the Ministerial targets have the quality of a quota rather than a target.

72. The imposition of a quota system, or even a *"target system"* with the qualities of the one provides for in the Amendment Act is an affront to the equality right, and the right to dignity under the Constitution. Under the top-down regulation provided for, the situation sensitive approach to employment decisions must be foregone. The needs and requirements of individuals are ignored in favour of executive decision-making that has nothing to do with the position of an individual or individual employers.

73. Solidarity is not alone in its concern about the import of the provisions. In an article of 14 April 2023, attached as annexure **FA12**,[43] it is reported that Business Unity South Africa (BUSA) expressed the concern of targets being treated as quotas, and the fact that different targets will be set for different sectors, thereby potentially leading to unequal treatment. Moreover, the National Employers' Association of South Africa (NEASA) is reported to have expressed the view that *"Although this amendment is guised under different terminology, the legislation is nothing other than a race-based quota system forced upon employers"*.

Accessible at: https://www.engineeringnews.co.za/article/business-formations-cautious-of-employment-equity-amendment-impact-2023-04-14/rep_id:4136.

The Minister's discretion renders the provisions unconstitutional.

74. This amendment introduces a discretion on the part of the Labour Minster to set numerical targets to ensure "*equitable representation*" in the workplace. The amendment does not set out the parameters within which he must utilise this discretion, or the factors which must be considered, other than consultation with the relevant sectors and the EE Commission.

75. The discretionary power is highly problematic, as it makes the relevant rules uncertain, unpredictable, and subject to rapid change. The grant of the discretionary power undermines the rule of law, which requires that laws be certain and clear.

76. Because the discretion is unfettered, the concern that a quota system is being implemented under the guise of employment equity is heightened. The unfettered discretion of the Labour Minister to decide on what might, or might not, be a reasonable explanation for non-compliance further exacerbates the concern that the rule of law is being undermined.

Non-compliance with international law obligations

77. ICERD, which South Africa ratified on 10 December 1998, has purchase under the Constitution. Article 2 requires signatories to condemns all forms of racial discrimination and to eliminate racial discrimination by "*appropriate means*". Clause 1(4), for its part,

makes plain that affirmative action measures may not lead to the maintenance of separate rights for different racial groups.

78. As the Equality Report illustrates, the EEA prior to amendment was subject to the criticism that it is not compliant with South Africa's obligations under ICERD. The Amendment Act exacerbates the problems, because the sectoral targets to be set by the Labour Minister moves the statute even further away from a concern with *"need"* and relevant socio-economic factors. The sectoral target system does not allow for appropriate consideration in the employment sphere of varying degrees of disadvantage, and the possible intersectionality of multiple forms of discrimination. The introduction of sectoral *"targets"* stands in the way of a realistic appraisal of the current situation of individuals and communities. because designated groups are bluntly classified. Under the system, equality of outcomes cannot be achieved for marginalised individuals who do not fit comfortably within the crass population group categories inherited from the apartheid era.

CONCLUSION AND RELIEF

79. In the circumstances, Solidarity submits that a proper basis exists for the grant of the relief sought in the notice of motion.

80. In the premise, the applicant seeks the following relief, namely that:

80.1. sections 4, 6, 11 and 12 of the Amendment Act be declared unconstitutional to the extent that:

80.1.1. section 4 of the Amendment Act inserts section 15A in the EEA which provides that the Labour Minister may, after consulting the relevant sectors and with the advice of the EE 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 pursuant to the provisions of section 15A(1) and (2) of the EEA;

80.1.2. section 6 of the Amendment Act amends section 20 of the EEA by inserting section 20(2A) which requires that the numerical goals set by an employer in terms of section 20(2) of the EEA must comply with any sectoral target in terms of section 15A of the EEA that applies to that employer; and

80.1.3. section 11 of the Amendment Act amends section 42 of the EEA by inserting section 42(1)(aA) which requires that in determining whether a designated employer is implementing employment equity in compliance with the EEA, the DG or any person or body applying the EEA may, in addition to the factors stated in section 15 of the EEA, take into account whether the employer has complied

with a sectoral target as set out in terms of section 15A of the EAA applicable to that employer;

80.1.4. section 12 of the Amendment Act amends section 53 of the EEA by inserting section 53(6) which provides that the Labour Minister may only issue a certificate in terms of section 53(2) of the EEA if he is satisfied that the employer has complied with a numerical target set in terms of section 15A of the EEA that applies to that employer;

80.2. costs of the application, in the event of any opposition; and

80.3. further and/or alternative relief.

WHEREFORE the applicant prays for relief in the terms set out in the Notice of Motion to which this affidavit is attached.

DEPONENT

I certify that the above-named Deponent has acknowledged that the Deponent knows and understands the contents of this Affidavit which was signed and sworn to before me at PRETORIA on this 09 day of May 2023 and that the provisions of the Regulation contained in Government Notice R.1258 dated the 21st July 1972, as amended, have been complied with.

COMMISSIONER OF OATHS

LOUIS CORNELIUS SNYMAN
COMMISSIONER OF OATHS - KOMMISSARIS VAN EDE
ATTORNEY OF THE HIGH COURT OF SOUTH AFRICA
SECOND FLOOR. BLOCK A. LOFTUS PARK
416 KIRKNESS STREET
ARCADIA. PRETORIA

"FA1"
S7

IT IS HEREBY RESOLVED AND/OR RATIFIED THAT:

In my capacity as Chief Executive Officer, I hereby authorise that:

1. **SOLIDARITY** will launch an application for declarator against the President of the Republic of South Africa, the Minister of Employment and Labour, the Department of Employment and Labour, the Director-General of the Department of Employment and Labour and the Commission for Employment Equity in the following terms:

    1.1. declaring that sections 4, 6, 11 and 12 of the Employment Equity Amendment Act, No. 4 of 2022 (the "EEAA") are unconstitutional to the extent that:

        1.1. section 4 of the EEAA inserts section 15A in the Employment Equity Act, No. 55 of 1998 (the "EEA") which provides that the second respondent may, after consulting the relevant sectors and with the advice of the third respondent, 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 pursuant to the provisions of section 15A(1) and (2) of the EEA;

        1.2. section 6 of the EEAA amends section 20 of the EEA by inserting section 20(2A) which requires that the numerical goals set by an employer in terms of section 20(2) of the EEA must comply with any sectoral target in terms of section 15A of the EAA that applies to that employer;

CERTIFIED A TRUE COPY

DIRK HERMANN
CHIEF EXECUTIVE OFFICER
SIGNED ON THIS THE 9TH DAY OF MAY 2023

1.3. section 11 of the EEAA amends section 42 of the EEA by inserting section 42(1)(aA) which requires that in determining whether a designated employer is implementing employment equity in compliance with the EEA, the Director-General or any person or body applying the EEA may, in addition to the factors stated in section 15 of the EEA, take into account whether the employer has complied with a sectoral target as set out in terms of section 15A of the EAA applicable to that employer;

1.4. section 12 of the EEAA amends section 53 of the EEA by inserting section 53(6) which provides that the second respondent may only issue a certificate in terms of section 53(2) of the EEA if the second respondent is satisfied that the employer has complied with a numerical target set in terms of section 15A of the EEA that applies to that employer;

4. **ANTONIE JASPER VAN DER BIJL** who is employed by Solidarity as Head of the Deputy CEO & Head: Legal Department of Solidarity, is authorised to take all steps necessary, including deposing to any affidavits or signing any documents on behalf of Solidarity and/or any further action required in order to give effect to paragraph 1 above, and to proceed with same until finalisation of all such disputes.

5. **SERFONTEIN VILJOEN & SWART ATTORNEYS** is authorised to act on Solidarity's behalf in the matter and to take all other action required in this regard and to proceed with same until the finalisation thereof.

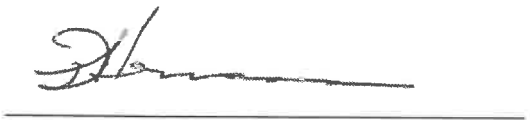
CERTIFIED A TRUE COPY

DIRK HERMANN

CHIEF EXECUTIVE OFFICER

SIGNED ON THIS THE 9TH DAY OF MAY 2023

SIGNED AT CENTURION ON 9 MAY 2023 AT PRETORIA, GAUTENG.



CERTIFIED A TRUE COPY

DIRK HERMANN

CHIEF EXECUTIVE OFFICER

SIGNED ON THIS THE 9TH DAY OF MAY 2023

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Government Gazette

REPUBLIC OF SOUTH AFRICA

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THE PRESIDENCY

No. 3280 **14 April 2023**

It is hereby notified that the President has assented to the following Act, which is hereby published for general information:—

Act No. 04 of 2022: Employment Equity Amendment Act, 2022

HOFISI YA PRESIDENTE

No. 3280 **14 April 2023**

Hi mi tivisa leswaku Presidente u amukerile nawu lowu wu phablixiwke ku andzisa vutivi bya n'wina:—

No. 04 wa 2022: Nawu wa Kuantswisiwa Ka Ndzingano wa Vutholi, 2022

ISSN 1682-5845

9 771682 584003 48418

AIDS HELPLINE: 0800-0123-22 Prevention is the cure

GENERAL EXPLANATORY NOTE:

[ ] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

(English text signed by the President)
(Assented to 6 April 2023)

ACT

To amend the Employment Equity Act, 1998, so as to amend a definition; to insert certain definitions; to substitute a definition and to delete a definition; to provide for the Minister to identify sectoral numerical targets in order to ensure the equitable representation of suitably qualified people from designated groups; to provide criteria for the Minister to issue certificates; and to provide for matters connected therewith.

PARLIAMENT of the Republic of South Africa enacts, as follows:—

Amendment of section 1 of Act 55 of 1998, as amended by section 40 of Act 65 of 2002, section 26 of Act 68 of 2002, sections 23 and 25 of Act 52 of 2003, section 51 of Act 11 of 2013 and sections 1 and 2 of Act 47 of 2013

1. Section 1 of the Employment Equity Act, 1998 (Act No. 55 of 1998) (hereinafter referred to as the principal Act), is hereby amended—

(a) by the deletion of paragraph *(b)* of the definition of "designated employer";

(b) by the insertion, after the definition of "Minister", of the following definition:

"**'National Minimum Wage Commission'** means the Commission established in terms of section 8 of the National Minimum Wage Act, 2018 (Act No. 9 of 2018);";

(c) by the substitution for the definition of "people with disabilities" of the following definition:

"**'people with disabilities' [means]** includes people who have a long-term or recurring physical **[or]**, mental, intellectual or sensory impairment which, in interaction with various barriers, may substantially **[limits]** limit their prospects of entry into, or advancement in, employment, and 'persons with disabilities' has a corresponding meaning;";

(d) by the insertion, after the definition of "Republic", of the following definition:

"**'sector'** means an industry or service or part of any industry or service;"; and

(e) by the deletion of the definition of "serve" or "submit".

RITO RO HLAMUSELA HI KU ANGARHELA:

[ ] Marito yo byihala lama ya nga eka swiangi swa xikwere ya komba leswi swi susiweke eka xinawana leswi swi simekiweke.

Marito lawa ya nga khwatihatiwa hi layini yo koma ya komba leswi nghenisiweke eka swinawana leswi swi simekiweke.

(English text signed by the President)
(Assented to 6 April 2023)

NAWU

Ku antswisa Nawu wa Ndzingano wa Vutholi, 1998, ku endlela ku antswisa nhlamuselo; ku nghenisa tinhlamuselo tin'wana; ku siva nhlamuselo na ku sula nhlamuselo; ku lulamiselo Holobye ku lemuka tinhlayo leti ti lavekaka hikuya hi xiyenge ku kota ku tiyisisa vuyimeri lebyi byi ringanaka bya vanhu lava nga ringanela ku suka eka mitlawa leyi yi vekiweke; ku lulamisela ndlela eka Holobye ku nyika switifikheti, na ku lulamisela timhaka leti fambisanaka na swona ko kwalaho.

PALAMENTE ya Riphabliki ra Afrika-Dzonga yi simeka, hi ndlela leyi yi landzelaka:—

Ku antswisiwa ka xiyenge xa 1 xa Nawu wa 55 lembe ra 1998, tani hi loko xi antswisiwile hi ka xiyenge xa 40 xa Nawu 65 lembe ra 2002, xiyenge xa 26 xa Nawu wa 68 lembe ra 2002, swiyenge swa 23 na 25 swa Nawu wa 52 lembe ra 2003, xiyenge 51 xa Nawu wa 11 lembe ra 2013 na swiyenge swa 1 na 2 Nawu wa 47 lembe ra 2013

1. Xiyenge xa 1 Nawu wa Ndzingano wa Vutholi, 1998 (Nawu wa 55 lembe ra 1998) (laha endzhaku wu kongomisiweke tani hi Nawunkulu), hi lexi xi antswisiweke—

(a) hi ku suliwa ka ndzimana ya *(b)* ka nhlamuselo ya "vathori lava va hlawuriweke";

(b) hi ku nghenisiwa ka, endzhaku ka nhlamuselo ya "Holobye", ka nhlamuselo leyi yi landzelaka:

" **'Khomixini ya Hakelo ya le Hansi ya Tiko'** swivula Khomixini leyi yi tumbuluxiweke hi ku ya hi xiyenge xa 8 xa *National Minimum Wage Act*, 2018 (Nawu wa 9 lembe ra 2018);";

(c) Hi ku siviwa ka nhlamuselo ya "vanhu lava va nga na vutsoniwa" ya nhlamuselo leyi yi landzelaka:

" **'vanhu lava va nga na vutsoniwa' [swivula]** ku katsa vanhu lava vutsoniwa emirhini bya nkarhi wo leha kumbe lebyi byi tshamaka byi karhi byi vuyelela **[kumbe]**, emiehleketweni, ku tsoniwa eka vutlharhi leswi, leswi eka ku tihlanganisa na van'wana swi nga vaka xirhalanga-nya, swi nga **[hunguta]** hunguta ku langutela ka vona ka mali leyi yi hlayisiwaka, na 'vanhu lava va nga na vutsoniwa' van a nhlamuselo leyi yi fanaka;";

(d) Hi ku nghenisiwa, endzhaku ka nhlamuselo ya "Riphabliki", ya nhlamuselo leyi yi landzelaka:

" **'xiyenge'** swivula xiyenge kumbe vukorhokeri kumbe xiphemu xa xiyenge xin'wana na xin'wanakumbe vukorhokeri;": na

(e) hi ku suliwa ka nhlamuselo ya "korhoka" kumbe "rhumela".

Amendment of section 8 of Act 55 of 1998, as amended by section 4 of Act 47 of 2013

2. Section 8 of the principal Act is hereby amended by the insertion of the word "and" at the end of paragraph *(b)*, the substitution for the expression "; and" at the end of paragraph *(c)* of a full stop and the deletion of paragraph *(d)*.

Repeal of section 14 of Act 55 of 1998

3. Section 14 of the principal Act is hereby repealed.

Insertion of section 15A in Act 55 of 1998

4. The following section is hereby inserted after section 15 of the principal Act:

"**Determination of sectoral numerical targets**

15A. (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 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).

(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.".

Amendment of section 16 of Act 55 of 1998, as amended by section 8 of Act 47 of 2013

5. Section 16 of the principal Act is hereby amended by the substitution in subsection (1) for paragraph *(a)* of the following paragraph:

"*(a)* with a representative trade union representing members at the workplace **[and its employees or representatives nominated by them]**; or".

Amendment of section 20 of Act 55 of 1998, as amended by section 10 of Act 47 of 2013

6. Section 20 of the principal Act is hereby amended by the insertion after subsection (2) of the following subsection:

"(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.".

Ku antswisiwa ka xiyenge xa 8 xa Nawu 55 lembe ra 1998, tani hi loko xi antswisiwile hi ka xiyenge xa 4 xa Nawu wa 47 lembe ra 2013

2. Xiyenge xa 8 xa Nawunkulu hi lexi xi antswisiweke hi ku nghenisiwa ka rito "na" emakumu ka ndzimana ya *(b)*, ku siviwa ka nhlamuselo ": na" emakumu ka ndzimana ya *(c)* ka hiko na ku suliwa ka ndzimana ya *(d)*.

Ku herisiwa ka xiyenge xa 14 xa Nawu wa 55 lembe ra 1998

3. Xiyenge xa 14 xa Nawunkulu hi lexi xi antswisiweke.

Ku nghenisiwa ka xiyenge xa 15A eka Nawu wa 55 lembe ra 1998

4. Xiyenge lexi xi landzelaka hi lexi xi nghenisiweke endzhaku ka xiyenge xa 15 xa Nawunkulu:

"**Ku veka tinhlayo leti ti lavekaka hikuya hi xiyenge**

15A. (1) Holobye a nga, hi xitiso eka *Gazete*, lemuka swiyenge swa tiko swa ikhonomi eka xikongomelo xa Nawu lowu, a karhi a tekela ngopfu enhlokweni khodi yin'wana na yin'wana leyi yi nga kona eka Nxaxameto wa Mpimo wa Swavumaki wa Migingiriko hinkwayo ya swa Ikhonomi leyi yi humeleriweke hiyenge xa Tihlayonhlayo xa Tiko.

(2) Holobye a nga, endzhaku ka kutihlanganisa swiyenge leswi swi faneleke na xitsundzuxo xa khomixini, eka xikongomelo xa vuyimeri lebyi byi ringanaka bya vanhu lava va fikelelaka ku suka eka mintlawa leyi yi hlawuliweke eka swiyimo swo hambana swa mintirho, hi xitiviso eka *Gazete* a veka nhlayo leyi yi lavaka ku fikeleliwa eka xiyenge xin'wana na xin'wana lexi xi lemukiweke xa tiko hi ku ya hi xiyengentsongo xa (1).

(3) xitiviso lexi nyikiweke hi ku ya xiyengentsongo xa (2) xi nga veka nhlayo leyi yi lavaka ku fikeleliwa yo hambanana eka swiyimo swa mintirho swo hambana, xiyengentsongo kumbe swifundzhantsongo eka swiyenge kumbe eka swihlawulekisiswin'wana leswi swi faneleke.

(4) Mpfapfarhuto wa xitiviso xin'wana na xin'wana lexi Holobye a humabumelaka ku xi nyika hi ku ya hi xiyengentsongo xa (1) kumbe xiyengentsongo xa (2) xi fanele xi humelerisiwa eka *Gazete*, xi nyika swirho leswi swi khumbhekeke masiku ya 30 ku nyika mavonelo ko kwalaho.".

Ku antswisiwa ka xiyenge xa 16 Nawu wa 55 lembe ra 1998, tani hi loko xi antswisiwile hi ka xiyenge xa 8 Nawu wa 47 lembe ra 2013

5. Xiyenge xa 16 xa Nawunkulu hi lexi xi antswisiweke hi ku siviwa ka xiyengtsongo xa (1) eka ndzimana ya *(a)* ka ndzimana leyi yi landzelaka:

"*(a)* na vuyimeri bya nhlangano wa vatirhi lowu wu yimelaka swirho emitirhweni **[na vatirhi va vona kumbe vayimeri lava va hlawuriweke hi vona]**; kumbe".

Ku antswisiwa ka xiyenge xa 20 xa Nawu wa 55 lembe ra 1998, tani hi loko xi antswisiwile hi ka xiyenge xa 10 xa Nawu wa 47 lembe ra 2013

6. Xiyenge xa 20 xa Nawunkulu hi lexi xi antswisiweke hi ku nghenisiwa endzhaku ka xiyengentsongo xa (2) xa xiyengentsongo lexi xi landzelaka:

"(2A) Nhlayo leyi yi lavaka ku fikeleliwa leyi yi vekiweke hi mutholi hi ku ya xiyengentsongo xa (2) yi fanele yi fambisana na nhlayo leyi yi lavaka ku fikeleliwa ya xiyenge xin'wana na xin'wana hi ku ya hi xiyenge xa 15A lexi xi tirhaka ka mutholi wun'wana na wun'wana.".

Amendment of section 21 of Act 55 of 1998, as substituted by section 11 of Act 47 of 2013

7. Section 21 of the principal Act is hereby amended—

(a) by the substitution for subsection (1) of the following subsection:

"(1) A designated employer must submit a report to the Director-General once every year **[on the first working day of October or]** on such **[other]** date and in such manner as may be prescribed.";

(b) by the deletion of subsections (3) and (4); and

(c) by the substitution for subsection (4A) of the following subsection:

"(4A) An employer that is not able to submit a report to the Director-General **[by the first working day of October]** within the period prescribed in terms of subsection (1) must notify the Director-General **[in writing before the last working day of August in the same year]** in the prescribed manner and period giving reasons for its inability to do so.".

Amendment of section 27 of Act 55 of 1998, as amended by section 12 of Act 47 of 2013

8. (1) Section 27 of the principal Act is hereby amended—

(a) by the substitution for subsection (1) of the following subsection:

"(1) Every designated employer, when reporting in terms of section 21(1), must submit a statement, as prescribed, to the **[Employment Conditions]** National Minimum Wage Commission **[established by section 59 of the Basic Conditions of Employment Act,]** on the remuneration and benefits received in each occupational level of that employer's workforce."; and

(b) by the substitution for subsections (3), (4) and (5) of the following subsections, respectively:

"(3) The measures referred to in subsection (2) may include—

(a) collective bargaining;

(b) compliance with sectoral determinations made by the Minister in terms of section 51 of the Basic Conditions of Employment Act and the national minimum wage set in terms of the National Minimum Wage Act, 2018 (Act No. 9 of 2018);

(c) applying the norms and benchmarks set by the **[Employment Conditions]** National Minimum Wage Commission;

(d) relevant measures contained in skills development legislation; or

(e) other measures that are appropriate in the circumstances.

(4) The **[Employment Conditions]** National Minimum Wage Commission must research and investigate norms and benchmarks for proportionate income differentials and advise the Minister on appropriate measures for reducing disproportional differentials.

(5) The **[Employment Conditions]** National Minimum Wage Commission may not disclose any information pertaining to individual employees or employers.".

Amendment of section 36 of Act 55 of 1998, as substituted by section 13 of Act 47 of 2013

9. Section 36 of the principal Act is hereby amended—

(a) by the substitution in subsection (1) for the words preceding paragraph *(a)* of the following words:

"A labour inspector may request and obtain a written undertaking from a designated employer to comply with paragraph *(a)*, *(b)*, *(c)*, *(f)*, *(h)*, *(i)*

Ku antswisiwa ka xiyenge xa 21 xa Nawu wa 55 lembe ra 1998, tani hi loko xi siviwile hi xiyenge xa 11 xa Nawu wa 47 lembe ra 2013

7. Xiyenge xa 21 xa Nawunkulu hi lexi xi antswisiweke—

(a) hi ku siviwa eka xiyengentsongo xa (1) ka xiyengentsongo lexi xi landzelaka:

"(1) Vathori lava va hlawuriweke va fanele va rhumela xiviko eka Mulawuli Jenerala kan'we lembe rin'wana na rin'wana **[eka siku ro sungula ra Nhlangula kumbe]** eka **[handle ka]** siku na hi ndlela tani hi loko yi ng ava yi vekiwile.";

(b) hi ku suliwa ka swiyengentsongo swa (3) na (4); na

(c) eka ku siviwa eka xiyengentsongo xa (4A) xa xiyengentsongo lexi xi landzelaka:

"(4A) Mutholi loyi a nga kotiki ku rhumela xiviko eka Mulawuli Jenerala **[hi siku ro sungula ra Nhlangula]** exikarhi ka nkarhi lowu wu vekiweke hi ku ya hi xiyengentsongo xa (1) u fanele a tivisa Mulawuli Jenerala **[hi ku tsala ku nga si hela siku ro tirha ro hetelela ra Mhawuri eka lembe rero]** hi ndlela leyi yi vekiweke na nkarhi a nyika swivangelo swa kuva a nga koti ku endla tano.".

Ku antswisiwa ka xiyenge xa 27 xa Nawu wa 55 lembe ra 1998, tani hi loko xi antswisiwile hi ka xiyenge xa 12 xa Nawu wa 47 lembe ra 2013

8. (1) Xiyenge xa 27 xa Nawunkulu hi lexi xi antswisiweke—

(a) hi ku siviwa eka xiyengentsongo xa (1) xa xiyengentsongo lexi xi landzelaka:

"(1) vathori lava va hlawuriweke van'wana na van'wana, loko va nyika xiviko hi ku ya hi xiyenge 21(1), va fanele va rhumela xitatimende, tani hi loko swivekiwile, eka **[Swiyimo swa Vutholi]** Khomixini ya Hakelo ya le Hansi ya Tiko **[leyi yi tumbuluxiweke hi xiyenge xa 59 xa *Basic Conditions of Employment Act*,]** eka muholo na tibenefiti leti ti kumekaka eka xiyimo xin'wana na xin'wana eka ntirho wa mutholi yaloye."; na

(b) hi ku siviwa ka swiyengentsongo Swa (3), (4) na (5) swa swiyengentsongo leswi swi landzelaka, hi ku hlawuleka:

"(3) tindlela leti ti kongomisiweke eka xiyengentsongo xa (2) ti nga katsa—

(a) mintwanano exikarhi ka vatirhi na mutholi;

(b) ku landzelela na leswi swi vekiweke hi Holobye swa xiyenge hi ku ya hi xiyenge xa 51 xa *Basic Conditions of Employment Act* na *national minimum wage Mihoto wa le hansi wa tiko lowu wu vekiweke hi ku ya hi National Minimum Wage Act*, 2018 (Nawu wa 9 lembe ra 2018);

(c) ku tirhisa mitolovelo na leswi swi vekiweke hi **[Swiyimo swa le Mintirhweni]** Khomixini ya Hakelo ya le Hansi ya Tiko;

(d) tindlela leti ti faneleke leti ti nga nawu wa nhluvukiso wa vuswikoti; kumbe;

(e) tindlela tin'wana leti ti nga ringanela eka swiyimo.

(4) **[Swiyimo swa le Mintirhweni]** Khomixini ya Hakelo ya le Hansi ya Tiko yi fanele yi lavisisa mintsengo ya ntolovelo eka mintsengo leyi yi ringanaka ivi yi tsundzuxa Holobye hi magoza lawa ya nga fanela ku hunguta ku hamabana.

(5) **[Swiyimo swa le Mintirhweni]** Khomixini ya Hakelo ya le Hansi ya Tiko yi ng aka yi nga humeseli erivaleni vuxokoxoko mayelana na vatholiwa kumbe vatholi.".

Ku antswisiwa ka xiyenge xa 36 xa Nawu wa 55 lembe ra 1998, tani hi loko ku siviwile hi xiyenge xa 13 xa Nawu wa 47 lembe ra 2013

9. Xiyenge xa 36 xa Nawunkulu hi lexi xi antswisiweke—

(a) Hi ku siviwa eka xiyengentsongo xa (1) for the words preceding paragraph *(a)* of the following words:

"Xipikitere xa vatirhi xi nga kombela na ku kuma xihlambanyo xo tsariwa ku suka eka vathori lava va hlawuriweke ku landzelela na ndzimana ya *(a)*, *(b)*, *(c)*, *(f)*, *(h)*, (i) kumbe *(j)* na nkarhi lowu wu

or *(j)* within a specified period, if the inspector has reasonable grounds to believe that the employer has failed to—"; and

(b) by the insertion in subsection (1) after paragraph *(b)* of the following paragraph:

"*(c)* prepare an employment equity plan as required by section 20;".

Amendment of section 37 of Act 55 of 1998, as amended by section 14 of Act 47 of 2013

10. Section 37 of the principal Act is hereby amended—

(a) by the substitution for subsection 1 of the following subsection:

"(1) A labour inspector may **[issue]** serve a compliance order **[to]** on a designated employer in the prescribed manner if that employer has failed to comply with section 16, 17, 19, 22, 24, 25 or 26 of this Act.".

(b) by the substitution in subsection (2) for the words preceding paragraph *(a)* of the following words:

"A compliance order **[issued]** contemplated in **[terms of]** subsection (1) must be issued by a labour inspector and must set out—".

Amendment of section 42 of Act 55 of 1998, as substituted by section 16 of Act 47 of 2013

11. Section 42 of the principal Act is hereby amended by the insertion in subsection (1) after paragraph *(a)* of the following paragraph:

"*(a*A*)* whether the employer has complied with a sectoral target as set out in terms of section 15A applicable to that employer;".

Amendment of section 53 of Act 55 of 1998, as amended by section 20 of Act 47 of 2013

12. Section 53 of the principal Act is hereby amended by the addition of the following subsection:

"(6) The Minister may only issue a certificate in terms of subsection (2) 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);

(c) the employer has submitted a report in terms of section 21;

(d) there has been no finding by the CCMA or a court within the previous 12 months that the employer breached the prohibition on unfair discrimination in Chapter 2; and

(e) the CCMA has not issued an award against the employer in the previous 12 months for failing to pay the minimum wage in terms of the National Minimum Wage Act, 2018 (Act No. 9 of 2018).".

Repeal of section 64A of Act 55 of 1998

13. Section 64A of the principal Act is hereby repealed.

Repeal of Schedule 4 to Act 55 of 1998

14. Schedule 4 to the principal Act is hereby repealed.

kongomisiweke, loko xipitikere xi ri timhaka leti ti twakalaka ta leswaku mutholi u tsandzekili ku—"; na

(b) Ku nghenisiwa ka xiyengentsongo xa (1) endzaku ka ndzimana ya *(b)* ya ndzimana leyi yi landzelaka:

"*(c)* lulamisa kungu ra ndzingano wa vutholi tani hi loko wu laveka hi xiyenge xa 20:".

Ku antswisiwa ka xiyenge xa 37 xa Nawu wa 55 lembe ra 1998, tani hi loko xi antswisiwile hi ka xiyenge xa 14 xa Nawu wa 47 lembe ra 2013

10. Xiyenge xa 37 xa Nawunkulu hi lexi xi antswisiweke hi—

(a) Hi ku siviwa eka xiyengentsongo xa 1 xa xiyengentsongo lexi xi landzelaka:

"(1) Xipikitere xa vatirhi xi nga **[nyika]** rhumela xileriso xa ndzandzelelo **[eka]** ka vathori lava va hlawuriweke hi ndlela leyi yi vekiweke loko mutholi yaloye a tsandzekili ku landzelela na xiyenge xa 16, 17, 19, 22, 24, 25 kumbe 26 xa Nawu lowu.".

(b) Hi ku siviwa eka xiyengentsongo xa (2) ka marito lawa ya nga ndzhaku ka ndzimana ya *(a)* ya marito lawa ya landzelaka:

"Xileriso xa Ndzandzelelo **[nyikiweke]** kombisiweke eka **[hi ku ya hi]** xiyengentsongo xa (1) xi fanele xi nyikiwa hi xipikitere xa vatirhi nakona xifanele xi humesela erivaleni—".

Ku antswisiwa ka xiyenge xa 42 xa Nawu wa 55 lembe ra 1998, tani hi loko xi antswisiwile hi ka xiyenge xa 16 xa Nawu wa 47 lembe ra 2013

11. Xiyenge xa 42 xa Nawunkulu hi lexi xi antswisiweke hi ku nghenisiwa eka xiyengentsongo xa (1) endzhakuka ndzimana ya *(a)* ya ndzimana leyi yi landzelaka:

"*(aA)* loko mutholi a landzelelili na nhlayo leyi yi lavaka ku fikeleliwa ya xiyenge loko yi vekiwile hi ku ya hi xiyenge xa 15A lexi xi tirhaka eka mutholi yaloye:".

Ku antswisiwa ka xiyenge xa 53 xa Nawu wa 55 lembe ra 1998, tani hi loko xi antswisiwile hi ka xiyenge xa 20 xa Nawu wa 47 lembe ra 2013

12. Xiyenge xa 53 xa Nawunkulu hi lexi xi antswisiweke hi ku engeteriwa ka xiyengentsongo lexix xi landzelaka:

"(6) Holobye a nga nyika xitifikheti hi ku ya hi xiyengentsongo xa (2) loko Holobye a enetekili leswaku—

(a) Mutholi u landzelelini na nhlayo leyi yi lavaka ku fikeleliwa leyi yi vekiweke hi ku ya hi xiyenge xa 15A lexi xi tirhaka eka mutholi:

(b) Hi mayelana na nhlayo leyi yi lavaka ku fikeleliwa lava mutholi a nga fikelelangiki, mutholi u humesile swivangelo leswi swi twakalaka swa ku va a tsandzeki ku landzelela, tani hi loko swi kombisiwile eka xiyenge xa 42(4);

(c) Mutholi u rhumerile xiviko hi ku ya hi xiyenge xa 21;

(d) A ku vanaga na xiboho hi CCMA kumbe khoto ku nga si hela 12 wa tin'hweti laha mutholi a nga tshova xiyila eka xihlawuhlawu xo ka xi nga ri kahle eka Kavanyisa ka 2; na

(e) CCMA a yi tekanga xiboho mayelana na mutholi eka 12 wa tin'hweti eka ku tsandzeka ku hakela ntsengo wa le hansi hi ku ya hi National Minimum Wage Act, 2018 (Nawu wa 9 lembe ra 2018).".

Ku herisiwa ka xiyenge xa 64A eka Nawu wa 55 lembe ra 1998

13. Xiyenge xa 64A xa Nawunkulu hi lexi herisiweke.

Ku herisa Xedulu ya 4 eka Nawu wa 55 lembe ra 1998

14. Xedulu ya 4 eka Nawunkulu hi leyi yi herisiweke.

Deletion of footnotes to Act 55 of 1998

15. Footnotes 4 and 7 to the principal Act are hereby deleted.

Short title and commencement

16. This Act is called the Employment Equity Amendment Act, 2022, and takes effect on a date fixed by the President by proclamation in the *Gazette*.

Ku suliwa ka tifutinoti eka Nawu wa 55 lembe ra 1998

15. Tifutinoti ya 4 na 7 eka Nawunkulu hi leti ti suliweke.

Nhlokomhaka yo koma na ku sungula ku tirha

16. Nawu lowu wu vitaniwa Nawu wa Kuantswisiwa ka Ndzingano wa Vutholi, 2022, na kona wu sungula ku tirha eka siku leri ri nga neiciweki ri vekiweke hi Presidente hi xitiviso eka *Gazete*.

"FA3"
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EQUALITY REPORT
2017/18

Achieving substantive economic equality through rights-based radical socio-economic transformation in South Africa



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EQUALITY REPORT 2017/18

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ABBREVIATIONS AND ACRONYMS

ACHPR	African Charter on Human and Peoples' Rights
ANC	African National Congress
B-BBEEA	Broad-Based Black Economic Empowerment Act, 53 of 2003
BEE	Black Economic Empowerment
CBO	Community-based Organisations
CEDAW	Convention on Elimination of All Forms of Discrimination against Women
CERD	United Nations Committee on the Elimination of Racial Discrimination
CEE	Commission for Employment Equity
CGE	Commission for Gender Equality
CRPD	Convention on the Rights of Persons with Disabilities
DBE	Department of Basic Education
DHET	Department of Higher Education and Training
DOJCD	Department of Justice and Constitutional Development
DOL	Department of Labour
DPME	Department of Planning, Monitoring and Evaluation
DPW	Department of Public Works
DSBD	Department of Small Business Development
DSD	Department of Social Development
DTC	Davis Tax Committee
DTI	Department of Trade and Industry
EDD	Economic Development Department
EEA	Employment Equity Act, 55 of 1998
GDP	Gross Domestic Product
HIV	Human Immunodeficiency Virus
ICERD	United Nations International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
JSE	Johannesburg Stock Exchange
LCC	Land Claims Court
MEC	Member of the Executive Council
MTSF	Medium Term Strategic Framework
NAP	National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance
NDP	National Development Plan
NIDS	National Income Dynamics Study
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000
PFMA	Public Finance Management Act, 1 of 2000
PPPFA	Preferential Procurement Policy Framework Act, 5 of 2000
SAHRC	South African Human Rights Commission
SAPS	South African Police Service
SEFA	Small Enterprise Finance Agency
SMMEs	Small, Medium and Micro enterprises
SPII	Studies in Poverty and Inequality Institute
Stats SA	Statistics South Africa
SDGs	Sustainable Development Goals
UN	United Nations
UNDP	United Nations Development Programme
VAT	Value Added Tax

EXECUTIVE SUMMARY

POVERTY IN SOUTH AFRICA HAS INCREASED IN RECENT YEARS, WHEREAS INCOME AND WEALTH INEQUALITY REMAIN AMONGST THE HIGHEST IN THE WORLD. EXPEDITED TRANSFORMATION THROUGH THE IMPLEMENTATION OF RIGHTS BASED POLICIES IS THEREFORE URGENTLY NEEDED. THE EQUALITY REPORT 2017/18 EVALUATES GOVERNMENT'S PROGRAMME OF RADICAL SOCIO-ECONOMIC TRANSFORMATION FROM A RIGHTS-BASED PERSPECTIVE. IT EXPLORES GOVERNMENT'S PROGRAMME OF RADICAL TRANSFORMATION AND ESTABLISHES ITS ROOTS IN THE FREEDOM CHARTER. IT FURTHER SHOWS THAT RADICAL SOCIO-ECONOMIC TRANSFORMATION SHOULD AIM TO ACHIEVE SUBSTANTIVE SOCIO-ECONOMIC EQUALITY. WHEREAS THE MAJORITY OF EQUALITY-RELATED RESEARCH FOCUSES ON HORIZONTAL STATUS EQUALITY BETWEEN GROUPS SHARING CHARACTERISTICS THAT RENDER THEM PRONE TO UNFAIR DISCRIMINATION, THIS REPORT RESPONDS TO INTERNATIONAL CALLS TO ADDRESS GROSS ECONOMIC INEQUALITY. THE NEED TO EVALUATE GOVERNMENT'S PROGRAMME OF RADICAL TRANSFORMATION FROM AN EQUALITY PERSPECTIVE IS THEREFORE EXPLAINED.

Poverty and economic inequality manifest in patterns that severely prejudice vulnerable individuals and groups based on their race, geographic location, gender and disability status. It is accordingly found that government's programme of radical socio-economic transformation is necessary, and should focus on addressing the extreme concentration of income and wealth in the top deciles of society. Tailored policies should aim to address economic inequality. However, horizontal or status inequality should simultaneously be addressed, since economic inequality results from structural patterns of discrimination in the economy and society more broadly. Redistributive fiscal policy choices should thus respond to vulnerable groups subject to patterns of unfair discrimination, and should not exacerbate inequality. The right to equality, the right to further education, and the right of equitable access to land, are potential key drivers of a process of radical socio-economic transformation. In investigating the potential of the right to equality to be utilised to catalyse radical transformation, the potential of remedial special measures or 'affirmative action' to effect radical change is emphasised.

Government's efforts to institute special measures in the context of the labour market, transformation of the economy more broadly, preferential procurement in particular, and small business development and the creation of work opportunities, are evaluated. Special measures in respect of funding increases in higher education, accessibility and equality in further education, and in the context of land, are further evaluated. It is found that special measures currently fail to respond

to socio-economic need. This may thus give rise to new economic imbalances and patterns of exclusion based on race or ethnic origin, gender and disability. Moreover, institutional-, legislative-, policy- and implementation fragmentation and misalignment are apparent in all contexts where special measures are applied. Finally, it is found that the private sector presently insufficiently contributes to government's programme of radical transformation through the implementation of special measures in various contexts.

Pressing equality related issues that the South African Human Rights Commission has sought to address are highlighted throughout the Report. Much of this work aims to promote horizontal or status equality, which is a necessary precondition for the achievement of substantive economic equality. Whereas emphasis is placed on work of the Commission that took place in 2017, reference is also made to previous work where related recommendations have not been implemented.

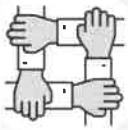
KEY FINDINGS MADE IN THIS REPORT INCLUDE



Government's increase of Value-Added Tax seriously threatens the human rights of the poor, and is not constitutionally justifiable.



The Employment Equity Act, 55 of 1998's definition of 'designated groups' and South Africa's system of data disaggregation is not in compliance with constitutional or international law obligations. Government's failure to measure the impact of various affirmative action measures on the basis of need and disaggregated data, especially the extent to which such measures advance indigenous peoples and people with disabilities, likewise violates international law obligations.



The implementation of special measures in the employment equity sphere is currently misaligned to the constitutional objective of achieving substantive equality, to the extent that implementation may amount to rigid quotas and absolute barriers as opposed to flexible targets. This practice may inadvertently set the foundations for new patterns of future inequality and economic exclusion within and amongst vulnerable population groups.



The concept of special measures is rooted in the right to equality, but can and should be implemented across government's focus areas. Currently, in addition to employment equity special measures, Broad-Based Black Economic Empowerment special measures are instituted in the contexts of, amongst others, preferential procurement, small business development, and land. Special measures should be specifically designed for further education. However, it is found that severe institutional fragmentation exists in that no central coordinating body steers the implementation of special measures across varying contexts. It is accordingly found that there is a misalignment between institutions, legislation, policies and implementation in the broad B-BBEE context generally.



Government policy and conduct consistently neglect persons with disabilities, who constitute approximately 7.5 percent of the population, both in ensuring accessibility for such persons through universal design of goods, services, equipment and facilities, and through the failure to reasonably accommodate people with disabilities in specific contexts.



The private sector is not sufficiently contributing to the transformation of the labour market, transformation of the economy more broadly, further education in particular, or land reform.

Relevant recommendations are made in respect of government's increase in Value-Added Tax, the current legislation and implementation of special measures in the employment equity context, and the misalignment and absence of coordination for special measures through Broad-Based Black Economic Empowerment generally, preferential procurement in particular, and in the sphere of small business development and the creation of work opportunities. In the context of further education, recommendations from previous reports by the South African Human Rights Commission are repeated. It is further noted that whereas recent Constitutional Court jurisprudence has addressed certain language policy-related special measures in further education, government's increased funding of higher education conspicuously omits any reference to students with disabilities. Recommendations in this respect are thus targeted at ensuring accessibility for and reasonable accommodation of students with disabilities in higher education. Finally, although the crucial role of equitable access to land in achieving radical socio-economic transformation is acknowledged, the complexity of this issue implies that further research must be conducted before recommendations are made.

CHAPTER 01
INTRODUCTION

SOUTH AFRICA REMAINS ONE OF THE MOST UNEQUAL COUNTRIES IN THE WORLD, MEASURED IN TERMS OF BOTH INCOME AND WEALTH. POVERTY HAS INCREASED IN RECENT YEARS, WHEREAS ECONOMIC GROWTH HAS GENERALLY SLOWED TO THE POINT WHERE THE ACHIEVEMENT OF THE OBJECTIVES SET OUT IN THE NATIONAL DEVELOPMENT PLAN SEEMS UNLIKELY. FURTHERMORE, INEQUALITY WITHIN POPULATION GROUPS HAS GROWN. THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION (SAHRC OR COMMISSION) HAS SIMULTANEOUSLY OBSERVED ONE OF THE MANIFESTATIONS OF SUCH INEQUALITY IN THE SURGE IN RACISM AND HATE SPEECH. ACCORDING TO CERTAIN SURVEYS, INCOME INEQUALITY – AND NOT RACE – CONSTITUTES THE MOST DIVISIVE FEATURE OF SOUTH AFRICAN SOCIETY.[1] INTERNATIONAL EXPERTS AND SUPRANATIONAL BODIES ACCEPT THAT ECONOMIC INEQUALITY SEVERELY ERODES SOCIAL COHESION, LEADS TO SOCIAL INSTABILITY, AND CONSTITUTES AN AFFRONT TO MEANINGFUL PARTICIPATION THROUGH DEMOCRATIC PROCESSES.[2] WHEREAS HUMAN RIGHTS ORGANISATIONS AND THE COMMISSION HAVE TRADITIONALLY FOCUSED ON THE STATE OF EQUALITY HORIZONTALLY AS BETWEEN DIFFERENT GROUPS SHARING SIMILAR IDENTITY TRAITS, THE URGENT NEED TO FOCUS ON VERTICAL, ECONOMIC INEQUALITY AS BETWEEN INDIVIDUALS AND HOUSEHOLDS, ARISES IN THE SOUTH AFRICAN CONTEXT.

The Equality Report 2017/18 thus evaluates certain rights-based tools at government's disposal to effect radical socio-economic transformation, defined as aiming to achieve substantive socio-economic equality. Certain rights that hold exceptional potential to contribute to radical transformation are identified as the right to equality itself, the right to further education, and the right of equitable access to land. The right to equality, although not explicitly guaranteeing economic equality, empowers government to implement affirmative action, or special measures, in order to advance persons or groups subject to persistent patterns of discrimination. Given that both poverty and economic inequality continue to manifest along racial, gender and disability lines, it is shown that special measures must be instituted in various contexts, and be targeted at these particularly vulnerable groups.[3] Equality-based special measures can thus be expanded and implemented in

1 Institute for Justice and Reconciliation *SA Reconciliation Barometer 2015 Briefing Paper 1: National Reconciliation, Race Relations and Social Inclusion* (8-12-2015) 16.

2 UN Human Rights Council *Report of the Special Rapporteur on extreme poverty and human rights, Philip Alston* A/HRC/29/31 (2015) paras 20, 45.

3 SAHRC *Research Brief on Race and Equality in South Africa 2013-2017* (2017); SAHRC *Research Brief on Gender and Equality in South Africa 2013-2017* (2017); SAHRC *Research Brief on Disability and Equality in South Africa 2013-2017* (2017).

various policy areas that are central to government's programme of radical economic transformation, including in the areas of preferential procurement, small business development, further education, and land.

However, special measures are currently misaligned to constitutional objectives. Where special measures are not instituted on the basis of need, and taking into consideration socio-economic factors, they are incapable of achieving substantive equality. Moreover, there is a lack of coordination of sufficiently targeted special measures across various government departments and organs of state. Related legislation and policy are similarly fragmented. The potential of the rights to equality, further education and land cannot be realised until special measures are coherently coordinated across these areas. Whereas government should act promptly to rationalise and align fragmented legislation, policies and implementation practices in order to promote radical transformation and achieve substantive equality, the private sector must urgently be mobilised to contribute to this project. The full operationalisation of key pieces of legislation may facilitate the crucial involvement of the private sector.

This Report commences by setting out the mandate of the South African Human Rights Commission, the methodology adopted, and challenges encountered in producing this Report. Next, the South African, international and regional legal and policy frameworks governing the subject of radical transformation from an equality perspective are expounded. Thereafter, the meaning of government's strategic programme of radical socio-economic transformation is explored from an equality perspective. Significantly, the Report next demonstrates that poverty and inequality persist based on race, gender and disability. Moreover, inequality within population groups is worsening. After noting the importance of government's overarching fiscal policy choices for its programme of radical transformation, key rights-based drivers of this process are identified. First, the role of the right to equality is elucidated. The concept of remedial or special measures is identified in this context, and its potentially broad sphere of application is highlighted. Thereafter, challenges impeding the potential of the rights to further education and land to contribute to radical socio-economic transformation are highlighted.

CHAPTER 02
MANDATE OF THE SAHRC

THE SAHRC IS MANDATED BY SECTION 184 OF THE CONSTITUTION TO PROMOTE RESPECT FOR HUMAN RIGHTS AND A CULTURE OF HUMAN RIGHTS; TO PROMOTE THE PROTECTION, DEVELOPMENT AND ATTAINMENT OF HUMAN RIGHTS; AND TO MONITOR AND ASSESS THE OBSERVANCE OF HUMAN RIGHTS IN SOUTH AFRICA. THE COMMISSION DOES SO THROUGH A NUMBER OF MEANS, ONE OF WHICH IS BY CONDUCTING RESEARCH.[4]

It should be noted that in respect of gender equality, the mandate of the SAHRC overlaps with that of the Commission for Gender Equality.[5] The important research conducted by Commission for Gender Equality merits attention.[6]

4 S 184(2)(c) of the Constitution.

5 The Commission for Gender Equality is a constitutional body established in terms of s 181 of the Constitution. Its powers and functions are set out in s 187 of the Constitution.

6 See generally <http://www.cge.org.za/research-reports/#>

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CHAPTER 03
METHODOLOGY AND LIMITATIONS

THIS REPORT ADOPTS AN EQUALITY- AND RIGHTS-BASED APPROACH TO EVALUATE THE LEGISLATIVE AND POLICY FRAMEWORK, AS WELL AS IMPLEMENTATION PRACTICES, PERTAINING TO GOVERNMENT'S PROGRAMME OF RADICAL SOCIO-ECONOMIC TRANSFORMATION. THE EQUALITY REPORT USES A METHODOLOGY THAT INCLUDES DESKTOP RESEARCH AND ENGAGEMENT WITH STAKEHOLDERS AND EXPERTS. ALTHOUGH PRIMARILY A QUALITATIVE REPORT, THE EQUALITY REPORT NEVERTHELESS INCLUDES QUANTITATIVE DATA AND ANALYSIS, INCLUDING A CONSIDERATION OF EQUALITY-RELATED INDICATORS. THESE INDICATORS INCLUDE STATISTICS RELATED TO POVERTY AND ECONOMIC INEQUALITY. THIS EQUALITY REPORT SHOULD BE READ IN CONJUNCTION WITH THREE RELATED RESEARCH BRIEFS REGARDING EQUALITY AND RACE, EQUALITY AND GENDER, AND EQUALITY AND DISABILITY, RESPECTIVELY.[7] WHILE ALL THREE RESEARCH BRIEFS PROVIDE AN OVERVIEW OF STATUS AND ECONOMIC INEQUALITY IN RESPECT OF RACE, GENDER AND EQUALITY, THIS EQUALITY REPORT NARROWS ITS FOCUS TO EXPLORE ECONOMIC INEQUALITY IN GREATER DEPTH. NEVERTHELESS, THE NEED TO ADDRESS HORIZONTAL STATUS INEQUALITY AND VERTICAL ECONOMIC INEQUALITY COMPREHENSIVELY, IS ACKNOWLEDGED THROUGHOUT THIS REPORT.

Whereas desktop research suffices to identify some of the key rights-based drivers of radical socio-economic transformation, government's insight is crucial for garnering a comprehensive understanding of strategic strengths and weaknesses. For purposes of this Report, the Commission requested information from the Department of Justice and Constitutional Development (DOJCD) regarding government's compliance with international law obligations in respect of the implementation of special measures.[8] However, the DOJCD only provided a response to the Commission's request for pertinent information, issued in September 2017, in March 2018.[9] At the time that the response was received, this Report had been substantially completed, and follow-up

[7] SAHRC *Research Brief on Race and Equality in South Africa 2013-2017* (2017); SAHRC *Research Brief on Gender and Equality in South Africa 2013-2017* (2017); SAHRC *Research Brief on Disability and Equality in South Africa 2013-2017* (2017).

[8] See further section 4.2 below. This information was requested after the DOJCD appeared before the UN Committee on the Elimination of Racial Discrimination in 2016 and the Commission subsequently received a petition from Solidarity to review government's compliance with the International Convention on the Elimination of All Forms of Racial Discrimination.

[9] SAHRC *Letter to the Deputy Minister of Justice Re: South African Government's Compliance with the International Convention on the Elimination of All Forms of Racial Discrimination* (27-09-2017); Deputy Minister of Justice and Constitutional Development *Response Letter Re: South African Government's Compliance with the International Convention on the Elimination of All Forms of Racial Discrimination* (04-03-2018).

enquiries to different organs of state were no longer possible. Attempts to secure interviews with key public bodies likewise proved only partially successful.[10] These methodological limitations thus created the need to rely on information provided by experts in relevant fields, including in the areas of procurement,[11] higher education[12] and land.[13] The insight provided by these experts substantially contributed to the findings drawn in this Report, and is gratefully acknowledged.

Government non-responsiveness or significantly delayed responses to requests emanating from the Commission are concerning for various reasons. First, failure to cooperate with the Commission violates the constitutional duty incumbent on all organs of state to assist and protect the Commission in order to ensure it effectiveness.[14] A failure to assist the Commission furthermore constitutes a criminal offence.[15] Moreover, government non-responsiveness contradicts the foundational constitutional values of openness, responsiveness and accountability,[16] while negating the essence of the right of access to information.[17]

10 Unfortunately, contact could not be timeously established with the Commission for Employment Equity at the time of drafting this Report. However, an interview was conducted with the Commissioner of the Broad-Based Black Economic Empowerment Commission on 7 February 2018. A further interview was conducted with acting Judge President Meer of the Land Claims Court, on 27 February 2018. The valuable insights provided are gratefully acknowledged.

11 Professor Geo Quinot, Professor of Law and Vice Dean of Law, Stellenbosch University, Director: African Procurement Law Unit. See further <www.africanprocurementlaw.org>.

12 Willene Holness, Lecturer at the University of Kwa-Zulu Natal School of Law, admitted attorney of the High Court of KwaZulu-Natal, board member (director) of the Community Law and Rural Development Centre; Funmilola Adeniyi, Doctoral Researcher, Socio Economic Rights Project (SERP), Dullah Omar Institute, Law Faculty, University of the Western Cape.

13 Professor Juanita Pienaar, Professor in Private Law at Stellenbosch University, Extraordinary Professor at the North West University, acting judge in the Land Claims Court (2006-2007).

14 S 181(3) of the Constitution; ss 4(2) and 13(4) of the South African Human Rights Commission Act, 40 of 2013 (SAHRC Act).

15 S 22(h) of the SAHRC Act.

16 S 1(d) of the Constitution.

17 S 32.

CHAPTER 04
APPLICABLE LEGAL AND POLICY FRAMEWORKS

4.1 South African legal and policy framework

The Constitution makes the achievement of equality a foundational value of the Republic of South Africa, while section 9 of the Constitution guarantees the right to equality. It does so by providing for equality of all before the law, allowing for positive redress measures to advance previously disadvantaged persons, and by prohibiting unfair discrimination by the state and by individuals on several grounds, including race, gender and disability. In addition, the Constitution includes provisions that consider the need for the state to actively advance equitable access to land (section 25(5)); housing (section 26); health care services; food, water and social assistance (section 27); and education (section 29).

Various statutes aim to give effect to the constitutional right to equality. The Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000 (PEPUDA) is the national legislation mandated by section 9(4) of the Constitution, and thus enjoys special constitutional status. Significantly, the Act recognises the need to address systemic discrimination and specifically aims to achieve the 'eradication of social and economic inequalities'.[18] Following a review of PEPUDA, numerous suggestions were made for its improvement. The Promotion of Equality and Prevention of Unfair Discrimination Amendment Bill is, at the time of writing, being drafted by the DOJCD. In the meantime, the urgent need exists to bring the promotional aspects enshrined in Chapter 5 of PEPUDA into commencement by proclamation. This legislative chapter imposes obligations upon the state and all persons to promote equality, and further requires that bodies contracting with the state, as well as all other companies and corporations, develop equality plans in proportion to factors such as size and resources. Importantly, these currently inoperative provisions require the state to submit equality plans to SAHRC for review in consultation with the Commission for Gender Equality (CGE).[19] The

[18] See Preamble to PEPUDA.

[19] Regulations in respect of this currently inoperative chapter have already been issued: GN R 563 in GG No 26316 of 30 April 2004.

operationalisation of these provisions will thus necessitate the allocation of additional resources to the SAHRC and CGE. An appropriate recommendation in this regard is accordingly made below.[20]

Another crucial Act that will be referred to throughout this Report is the Employment Equity Act, 55 of 1998 (EEA). The EEA was passed in order to promote equal opportunity and fair treatment in employment through the elimination of unfair discrimination. The EEA promotes substantive equality through the implementation of affirmative action (or 'special measures') to ensure redress and equitable representation in the workforce. The Broad-Based Black Economic Empowerment Act, 53 of 2003 and the Broad-Based Black Economic Empowerment Amendment Act, 55 of 2013 (B-BBEE Act) complement the EEA and aim to transform ownership patterns, control of and participation in the economy. Important aspects of these laws include the authorisation of special measures to empower marginalised and vulnerable groups, including Black people, women, the youth and people with disabilities, as well as people who live in rural areas.

THE EEA PROMOTES SUBSTANTIVE EQUALITY THROUGH THE IMPLEMENTATION OF AFFIRMATIVE ACTION (OR 'SPECIAL MEASURES') TO ENSURE REDRESS AND EQUITABLE REPRESENTATION IN THE WORKFORCE.

The National Development Plan[21] (NDP) is a key policy initiative which sets out government's plans to eliminate poverty and reduce inequality by 2030. Significantly, inclusive growth of the economy is one of the central objectives of the NDP. The Medium Term Strategic Framework[22] (MTSF) is government's framework for achieving the goals set out in the NDP. According to the MTSF, '[r]adical economic transformation, rapid economic growth and job creation' constitute the primary priority of the 2014-2019 electoral mandate of the ruling party.[23]

4.2 International and regional legal and policy framework

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) defines racial discrimination as including discrimination that causes the unequal enjoyment of rights and freedoms in the economic sphere.[24] The ICERD further establishes the Committee on the Elimination of Racial Discrimination (CERD) and explains that 'special measures' (such as affirmative action) taken to ensure the equal enjoyment of rights are not considered unfair discrimination. However, special measures should not create permanent separate rights for different race groups, and should be discontinued once equality is realised.[25] In November 2014, South Africa deposited its fourth to eighth periodic reports to the CERD Committee, noting that while significant progress had been made in advancing formal equality in South Africa, these had not translated into substantive equality. South Africa's report to the CERD further stated that issues of unfair discrimination intersected

[20] Section 6.1A Recommendation (v) below.
[21] National Planning Commission *National Development Plan* (2012).
[22] Republic of South Africa *Medium Term Strategic Framework 2014-2019* (2014).
[23] Ibid 6.
[24] Art 1 of the ICERD.
[25] Arts 1(4) and 2(2).

considerably with challenges relating to economic and social inequality and land reform, noting that indigenous peoples, sexual minorities and HIV positive individuals were especially vulnerable to discrimination and marginalisation.[26]

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) likewise holds that temporary special measures do not constitute discrimination, but that separate rights should not be maintained where de facto equality between women and men is achieved in a specific context. The Committee on the Elimination of Discrimination Against Women further notes that temporary special measures must address multiple forms of discrimination that many women face.[27]

The Convention on the Rights of Persons with Disabilities (CRPD) similarly provides that 'specific measures' that are necessary to advance or achieve substantive equality for persons with disabilities do not constitute discrimination.[28] Moreover, the CRPD acknowledges the fact that women with disabilities face multiple forms of discrimination, and accordingly obliges States Parties to adopt measures to ensure the equal enjoyment of rights and freedoms for this vulnerable group.[29]

The African Charter on Human and Peoples' Rights (ACHPR) explicitly prohibits unfair discrimination, while equality before the law and equal benefit and protection of the law are provided for in Article 3. For purposes of this Report, it is noteworthy that the ACHPR obliges all States Parties to 'undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources'.[30] Moreover, the right to development specifically includes the right of peoples to enjoy economic development.[31]

At a global policy level, the Sustainable Development Goals (SDGs) seek to build on the Millennium Development Goals, and enshrine the global community's commitment to pursue certain pertinent development goals in an effort to achieve greater socio-economic justice.[32] Significantly, SDG 10 aims to reduce inequalities within and amongst countries, and explicitly recognises the need to address vertical economic inequalities. The inclusion of an SDG that overtly deals with inequality of wealth and income constitutes a remarkable break from previous sustainable development discourse that focused exclusively on the elimination of poverty. However, targets included under SDG 10 continue to focus on the bottom 40 percent of the population,[33] and do little to examine wealth and income inequality as experienced by approximately 90 percent of the population compared to the wealthiest 10 percent, or the excessive concentration of wealth at the top one percent of society.[34]

[26] CERD *Consideration of reports submitted by States parties under article 9 of the Convention - South Africa* CERD/C/ZAF/4-8 (2014) 223-225.

[27] Art 4(1) of the CEDAW. See further Committee on the Elimination of Discrimination against Women *General Recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on Temporary Special Measures* (2004).

[28] Art 5(4) of the CRPD.

[29] Art 6(1).

[30] Art 21(5) of the ACHPR.

[31] Art 22(1).

[32] UN General Assembly *Transforming our* World*: the 2030 Agenda for Sustainable Development* (2015) A/RES/70/1.

[33] SDG 10 Target 10.1 states:
By 2030, progressively achieve and sustain income growth of the bottom 40 per cent of the population at a rate higher than the national average.

[34] G MacNaughton 'Vertical Inequalities: Are the SDGs and Human Rights up to the Challenges?' (2017) 21 *The International Journal of Human Rights* 1050, 1056-1058.

CHAPTER 05
RADICAL SOCIO-ECONOMIC TRANSFORMATION

5.1 Government's programme of radical economic transformation

The unfair discrimination based on race routinely practised by the apartheid government resulted in vertical inequality in the economic, political, social and cultural structures of South African society. As a result, government identified 'radical socio-economic transformation' as a key priority policy area for the period 2014-2019. This programme is encapsulated in Government's MTSF, which reflects the governing party's election manifesto and commitment to implement the NDP. The MTSF defines radical economic transformation as 'placing the economy on a qualitatively different path that ensures more rapid, sustainable growth, higher investment, increased employment, reduced inequality and deracialisation of the economy'.[35]

However, government's policy in this respect is not new. The achievement of substantive equality in terms of wealth has its roots in the Freedom Charter of 1955,[36] which declared, amongst other goals, that:

> **The national wealth of our country, the heritage of South Africans, shall be restored to the people;**
>
> **The mineral wealth beneath the soil, the Banks and monopoly industry shall be transferred to the ownership of the people as a whole;**
>
> **All other industry and trade shall be controlled to assist the wellbeing of the people...**

[35] Government of the Republic of South Africa *Medium Terms Strategic Framework 2014-2019* (2014) 6.

[36] C Ramaphosa 'Radical Economic Transformation has its Roots in the Freedom Charter' (26-06-2017) *ANC Today* <http://anctoday.org.za/radical-economic-transformation-roots-freedom-charter/>.

Since the advent of democracy, transformation has been painstakingly slow, with the redistribution of wealth and job creation not meeting expectations held in 1994.[37] Today, the 'triple challenges' of inequality, unemployment and poverty continue to plague our society. This prompted the governing party to resolve in 2012 to enter a second phase of the transition from apartheid and colonialism to democracy, which was to be characterised by radical socio-economic policies and continued democratic transformation, while rooting out corruption, factionalism and improper conduct.[38] The African National Congress (ANC) accordingly planned to 'transform the structure of the economy through industrialisation, broad-based black economic empowerment, addressing the basic needs of our people, including women and youth, strengthening and expanding the role of the state and the role of state owned enterprises'.[39] The ruling party's strategy is based on fifteen pillars, central to which is the creation of decent work for all, which is in turn predicated on inclusive economic growth. Additional pillars of economic transformation include transforming structures of production and ownership; creating programmes to absorb the unemployed; expanding the social wage; investing in cooperatives and micro-enterprises; investing in priority skills and education; and sustainable macro-economic policies aimed at growth and poverty eradication.[40]

THE RULING PARTY'S STRATEGY IS BASED ON FIFTEEN PILLARS, CENTRAL TO WHICH IS THE CREATION OF DECENT WORK FOR ALL, WHICH IS IN TURN PREDICATED ON INCLUSIVE ECONOMIC GROWTH.

Following incorporation of this programme into government's official policy framework, socio-economic transformation has garnered renewed attention. Radical socio-economic transformation has been linked to inclusive growth.[41] Radical socio-economic transformation is furthermore related to expedited land reform.[42] Recently, the National Assembly adopted a resolution that 'Government would continue the land reform programme that entails expropriation of land without compensation, making use of all mechanisms at the disposal of the State, implemented in a manner that increases agricultural production, improves food security and ensures that the land is returned to those from whom it was taken under colonialism and apartheid and undertake a process of consultation to determine the modalities of the governing party resolution'.[43] This resolution was foreshadowed in the new President's State of the Nation address, where it was further stated that '[r]adical economic transformation requires that we fundamentally improve the position of black women and communities in the economy, ensuring that they are owners, managers, producers and financiers'.[44]

37 ANC *53rd National Conference Resolutions* (2012) 20.

38 Ibid 4-5.

39 Ibid 20.

40 Ibid.

41 Parliamentary Standing Committee on Finance 'Treasury & SARS Annual Performance Plans; Concerns about SARS; with new Minister: 9 May 2017' (09-05-2017) *Parliamentary Monitoring Group* <https://pmg.org.za/page/National%20Treasury%20%26%20SARS%20Annual%20Performance%20Plans%3B%20Concerns%20about%20SARS%3B%20with%20Minister?via=homepage-feature-card>.

42 C Ramaphosa 'Closing Address by ANC President Cyril Ramaphosa to the 54th National Conference of the African National Congress' (20-12-2017) *ANC* <http://www.anc.org.za/content/closing-address-anc-president-cyril-ramaphosa-54th-national-conference-african-national>. The replacement of the 'willing buyer, willing seller' model of land expropriation with the 'just and equitable principle' enshrined in s 25 of the Constitution has long been ANC policy, whereas expropriation without compensation was previously only advocated where land had been acquired through unlawful means or used for illegal purposes. See ANC *53rd National Conference Resolutions* (2012) 25.

43 News24 'NA adopts EFF motion, amended by ANC, on EWC' (27-02-2018) *Politics Web* <http://www.politicsweb.co.za/news-and-analysis/na-adopts-eff-motion-amended-by-anc-on-ewc>.

44 President of the Republic of South Africa *State of the Nation Address* (16-02-2018).

Although there is not complete consensus on the meaning of radical socio-economic transformation, it is clear that government's long-standing strategy is reconcilable with the achievement of various constitutional and international human rights, including the right to work,[45] labour rights,[46] socio-economic rights,[47] property and land rights,[48] and – ultimately – the rights to equality[49] and human dignity.[50] Government's progress in achieving radical transformation can therefore be evaluated through the prism of human rights generally, and the achievement of substantive socio-economic equality, in particular.

5.2 The need for radical socio-economic transformation

Trends in poverty, income inequality and wealth inequality demonstrate that poverty and inequality continue to manifest along the fault lines of race, gender and disability. Patterns of discrimination therefore exclude people from the economy and labour market based on certain identity traits. Moreover, new patterns of inequality *within* these groups point to an urgent need to radically transform the economy, in order to temper the concentration of income and wealth to the benefit of only a small percentage of the South African population.

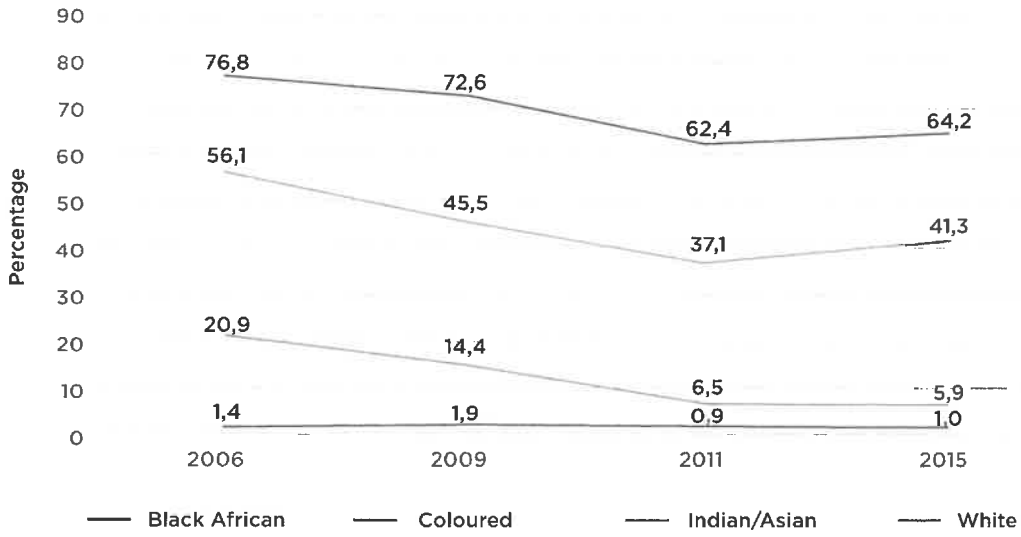
Although poverty has decreased since 2009, the percentage of the population living below the upper bound poverty line of R992 per person per month increased from 53.2 percent in 2011 to 55.5 percent in 2015.[51] Whereas the NDP aims to reduce the percentage of the population living below the lower bound poverty line to 0 percent by 2030, this number has grown from approximately 36 percent in 2011 to 40 percent in 2015.[52]

ACCORDING TO STATS SA, THOSE MOST AFFECTED BY POVERTY ARE GENERALLY BLACK AFRICAN FEMALES; CHILDREN YOUNGER THAN 17 YEARS; THOSE LIVING IN RURAL AREAS, THE EASTERN CAPE AND LIMPOPO; AND THOSE WITHOUT EDUCATION.

Moreover, poverty egregiously affects people based on traditional grounds for unfair discrimination, including race, gender, geographic location, age and disability status. According to Stats SA, those most affected by poverty are generally Black African females; children younger than 17 years; those living in rural areas, the Eastern Cape and Limpopo; and those without education.[53] For example, approximately 64 percent of the Black African population and 40 percent of the Coloured population group are poor, contrasted to a mere six percent of the Indian/Asian population group and just one percent of the White population group:

45 Art 6 of the International Covenant on Economic, Social and Cultural Rights (1966).
46 S 23 of the Constitution.
47 Ss 24-29.
48 S 25.
49 S 9.
50 S 10.
51 Stats SA *Poverty Trends in South Africa: An Examination of Absolute Poverty between 2006 and 2015* (2017) 14.
52 Ibid 17.
53 Ibid 18.

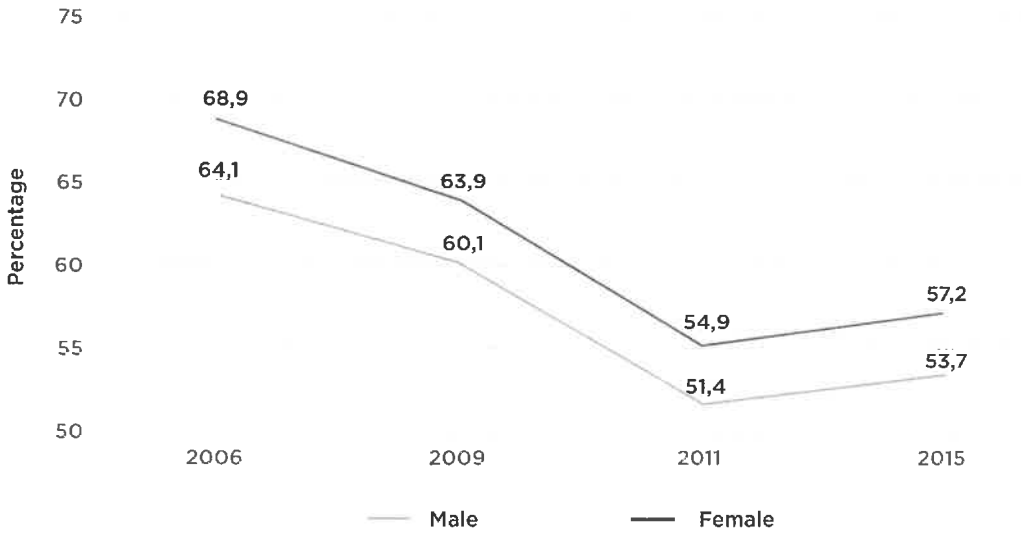
POVERTY HEADCOUNT BY POPULATION GROUP[54]



The disproportionate prevalence of poverty according to racial group underscores the fact that economic inequality manifests along racial lines. These findings accordingly support the need for radical socio-economic transformation to ensure more equal distribution of wealth, income and socio-economic goods such as housing, health care and education amongst different population groups.

Poverty likewise affects women more severely than men, further pointing to the need for socio-economic and cultural transformation where cultural practices marginalise women:

POVERTY HEADCOUNT BASED ON SEX[55]



54 Figure reproduced from Stats SA *Poverty Trends in South Africa: An Examination of Absolute Poverty between 2006 and 2015* (2017) 58. See further SAHRC *Research Brief on Race and Equality in South Africa 2013-2017* (2017) 12.

55 Figure reproduced from Stats SA *Poverty Trends in South Africa: An Examination of Absolute Poverty between 2006 and 2015* (2017) 56. See further SAHRC *Research Brief on Gender and Equality in South Africa 2013-2017* (2017) 14.

Although data is not available regarding the prevalence of poverty amongst people with disabilities, it is accepted that poverty and disability are closely linked.[56] Furthermore, unemployment exacerbates both poverty and inequality, and people with disabilities are grossly underrepresented in the labour market. The employment of persons with disabilities has not reached the two percent mark at any level in the private sector, nor in the public sector. Where people with disabilities are represented at the top and senior management levels, they are predominantly White males, whereas males with disabilities enjoy greater representation than females with disabilities at all levels and across all population groups.[57]

Besides increasing levels of poverty in South Africa, *income inequality* measured according to the Gini coefficient (where a value of 0 represents complete equality and a value of 1 represents complete inequality) stood at 0.68 in 2015.[58] The NDP aims to reduce this exceptionally high rate of income inequality to 0.6 by 2030, which Stats SA regards as unlikely given a mere 0.01 point decrease over a four year period.[59] Radical economic transformation is thus urgently needed in the context of income inequality:

NDP POVERTY AND INEQUALITY-RELATED TARGETS[60]

NDP TARGET	BASELINE	2030 TARGET	MOST RECENT STATUS
1. Reducing the proportion of persons living below the lower-bound poverty line from 39 per cent (in 2009) to zero by 2030	**39,0% (2009)**	**0%**	**40,0% (2015)**
2. Reduce income inequality from 0,7 in 2010 to 0,6 by 2030	**0,70 (2010)**	**0,60**	**0,68 (2015)**
3. The share of income going to the bottom 40 per cent of income earners should rise from 6 per cent to 10 per cent	**6,0% (2010)**	**10,0%**	**8,3% (2015)**
4. Reduce poverty-induced hunger to 0% by 2030	**21,4%**	**0%**	**25,2% (2015)**

[56] SAHRC *Research Brief on Disability and Equality in South Africa 2013-2017* (2017) 13.

[57] Ibid with reference to Commission for Employment Equity *Annual Report 2016-2017* (2017).

[58] Stats SA *Poverty Trends in South Africa: An Examination of Absolute Poverty between 2006 and 2015* (2017) 17.

[59] Ibid 21.

[60] Figure reproduced from Stats SA *Poverty Trends in South Africa: An Examination of Absolute Poverty between 2006 and 2015* (2017) 17.

Furthermore, in addition to the figures representing *income* inequality between population groups and genders cited above, radical *wealth* inequality is similarly apparent amongst and within population groups and genders. Although various methodological challenges exist when measuring wealth inequality,[61] research conducted for the Davis Tax Committee (DTC) that was based on income tax and survey data, shows that 10 percent of South Africans own 90-95 percent of all wealth in the country. Compared with the fact that 60 percent of income is earned by 10 percent of South Africans, these findings support a global trend in that inequality in wealth distribution usually exceeds inequality in income distribution.[62] Moreover, the Gini coefficient for wealth inequality in South Africa is incredibly high at approximately 0.95.[63]

Gross wealth inequality based on race remains prevalent in South Africa due to structural injustices inherited from apartheid-era law and policy. According to National Income Dynamics Study (NIDS) based research, an average Black household holds about four percent of wealth held by an average White household, while an average Coloured household holds about six percent of the wealth held by its White counterparts. Put differently, 'for every R1 held by typical Black, and Coloured households, a typical White household will hold R22.84 and R16.0, respectively'.[64] As a result, many Black households are unable to transmit wealth to future generations, which perpetuates wealth inequality through inequality in inheritance.[65] Furthermore, wealth inequality is greater *within* the Black African population group than in comparison to any other racial group.[66] In terms of gender, income tax-based research includes a greater percentage of men than women (60 percent male and 40 percent female), which suggests that men receive greater investment income than women.[67] Wealth inequality is similarly apparent within age groups, with the most extreme inequality occurring within the youth category most affected by unemployment. Within separate age groups, wealth is concentrated in the top 10 percent with the bottom 50 percent holding almost no wealth.[68] Moreover, wealth inequality appears to be increasing at a much faster rate than income inequality.[69]

WEALTH INEQUALITY IS GREATER *WITHIN* THE BLACK AFRICAN POPULATION GROUP THAN IN COMPARISON TO ANY OTHER RACIAL GROUP.

Based on the statistics and research cited above in respect of poverty, income inequality and wealth inequality, it is clear that an urgent need for radical socio-economic transformation exists in South Africa. However, it is equally important to define the objective of radical transformation as substantive socio-economic equality, and to pursue transformation through rights-based (as opposed to purely economic or utilitarian) means.

61 R Daniels & T Augustine (Southern Africa Labour and Development Research Unit) *The Measurement and Distribution of Household Wealth in South Africa using the National Income Dynamics Study (NIDS) Wave 4* NIDS Discussion Paper 2016/10 (2016) 2; A Orthofer *Wealth Inequality in South Africa: Insights from Survey and Tax Data.* REDI3x3 Working Paper 15 (2016) 3.

62 For example, non-representivity of high net-worth individuals in survey samples or, where data is based on tax filings, non-taxable forms of wealth such as pensions or owner-occupied homes. R Daniels & T Augustine (Southern Africa Labour and Development Research Unit) *The Measurement and Distribution of Household Wealth in South Africa using the National Income Dynamics Study (NIDS) Wave 4* NIDS Discussion Paper 2016/10 (2016) 3.

63 A Orthofer *Wealth Inequality in South Africa: Insights from Survey and Tax Data* REDI3x3 Working Paper 15 (2016) 23.

64 S Mbewe & I Woolard (South African Labour and Development Research Unit) *Cross-Sectional Features of Wealth Inequality in South Africa: Evidence from The National Income Dynamics Study* NIDS Discussion Paper 2016/12 (2016) 12.

65 Ibid 13, referring to the concept of 'patrimonial capitalism' developed in T Piketty *Capital in the 21st Century* (2014), according to which wealth generates more wealth, rendering the wealthy wealthier while the poor remain poor or become worse off.

66 A Orthofer *Wealth Inequality in South Africa: Insights from Survey and Tax Data* REDI3x3 Working Paper 15 (2016) 20.

67 Ibid 21.

68 S Mbewe & I Woolard (South African Labour and Development Research Unit) *Cross-Sectional Features of Wealth Inequality in South Africa: Evidence from The National Income Dynamics Study* NIDS Discussion Paper 2016/12 (2016) 17.

69 Ibid.

5.3 Understanding radical socio-economic transformation from an equality perspective

The South African political discourse calling for radical socio-economic transformation emerges in a context where inequality is increasingly being recognised as a global crisis. According to Oxfam, eight men own wealth equivalent to that possessed by the poorest half of the world, in the next two decades 500 people will transfer over $2 trillion dollars to their heirs, income growth has been miniscule for most of the world's population while ballooning for the wealthiest one percent, and corporate executives enjoy severely disproportionate income compared to workers.[70] In addition, Oxfam estimates that nine out of ten billionaires are men.[71] Furthermore, the Credit Suisse Global Wealth Report starkly shows that one percent of the world population owns 50.1 percent of all household wealth globally.[72]

VERTICAL ECONOMIC INEQUALITY MOREOVER NECESSITATES GOVERNMENT PROGRAMMES THAT REDISTRIBUTE INCOME AND WEALTH.

Regarded as the most unequal country in the world, South Africa represents a microcosm of the injustice posed by a grossly skewed economy and concentrated wealth. In South Africa, White-headed households earn roughly four times that of Black-headed households,[73] whereas the wealthiest 10 percent of the population earns approximately seven times more than the bottom 40 percent.[74] According to the International Labour Organisation, the bottom 50 percent of wage earners in South Africa receive only 12 percent of all wages paid, whereas the top 10 percent receives 49.2 percent of all wages, and the top one percent receives a staggering 20 percent of wages.[75] Moreover, the enjoyment of social goods such as health, education and housing are unequally distributed. These figures represent inequality between households and individuals, termed *vertical inequality*. Vertical economic inequality moreover necessitates government programmes that redistribute income and wealth.

In contrast to vertical, economic inequality between households or individuals, human rights practitioners have traditionally focused on *horizontal inequality* between different groups that share characteristics such as sex, gender, sexual orientation or race. International, regional and South African human rights provisions aim to eliminate status inequality resulting from direct or indirect discrimination. In this context, equality can be thought of in a 'formal' or 'substantive' sense. *Formal equality* refers to laws and policies that appear neutral by treating everyone the same. Such laws and policies may in fact cement existing race-based inequalities since they do not seek to change an unequal status quo. *Structural or systemic inequalities* – in other words,

70 Oxfam *Economy for the 99%* (2017) 2. Oxfam's representation of data was criticised by free-market think tanks such as the Cato Institute, but ultimate findings regarding gross economic inequality are supported by other sources such as Credit Suisse *Global Wealth Report 2017: Where are we Ten Years after the Crisis?* (2017) and C Lakner & B Milanovic (World Bank) *Global Income Distribution: From the Fall of the Berlin Wall to the Great Recession* (2013) 30, which is based on older data, but illustrates that '44% of the increase of global income between 1988 and 2008 went to the top 5% of world population'. See Oxfam 'Oxfam and the Argument around Inequality' (2017) *Oxfam* <http://www.oxfam.org.za/oxfam-and-the-argument-around-inequality/>.

71 Oxfam *Reward Work, Not Wealth* (2018) 8.

72 Credit Suisse *Global Wealth Report 2017: Where are we Ten Years after the Crisis?* (2017) 3.

73 SAHRC *Research Brief on Race and Equality in South Africa 2013-2017* (2017) 14.

74 Development Finance International & Oxfam *The Commitment to Reducing Inequality Index* (2017) 12. Various media reports quote Oxfam South Africa as stating that three billionaires in South Africa hold wealth equivalent to the bottom 50 percent of the country, and that one percent of South Africans own 42 percent of the country's wealth. However, these statistics are not contained in Oxfam *Economy for the 99%* (2017) as purported by the media. See, for example, Business Day 'SA's rich-poor gap is far worse than feared, says Oxfam inequality report' (16-01-2017) *Business Day* <https://www.businesslive.co.za/bd/national/2017-01-16-sas-rich-poor-gap-is-far-worse-than-feared-says-oxfam-inequality-report/>.

75 International Labour Organisation *Global Wage Report 2016/17: Wage Inequality in the Workplace* (2017) xvii, 42.

unequal structures, hierarchies and power relationships that underlie our society and economy – are therefore left unaddressed. As the Constitutional Court has stated, '[a]lthough the long term goal of our constitutional order is equal treatment, insisting upon equal treatment in established inequality may well result in the entrenchment of that inequality'.[76] Formal equality is accordingly incapable of addressing structural inequalities inherited from the apartheid era, which are currently reflected in South Africa's huge income gap and grossly unequal distribution of wealth and land.

Substantive equality partially fills this gap by aiming to achieve *equal outcomes* by treating people and groups differently.[77] Different treatment is justified where some people are discriminated against on the basis of their identities or characteristic. This is reflected in the constitutional endorsement of positive redress measures, or 'affirmative action', in section 9(2), which places an obligation on the state to adopt legislative and other measures aimed at creating equal opportunities and achieving equal outcomes particularly with regard to employment and education.[78] Since fundamental inequalities exist in society and the economy, it is crucial that private actors work together with the state to achieve substantive equality. Finally, the concept of *intersectionality* is important in the context of equality. Intersectionality refers to cases where people face multiple forms of discrimination, based on their identities and character traits. For example, whereas a Black man may face direct and indirect discrimination, a Black woman may be discriminated against on the bases of gender *and* race, whereas a Black homosexual woman faces discrimination based on gender, race and sexual orientation.[79] Horizontal or status inequality usually points to economic vulnerability.

SINCE FUNDAMENTAL INEQUALITIES EXIST IN SOCIETY AND THE ECONOMY, IT IS CRUCIAL THAT PRIVATE ACTORS WORK TOGETHER WITH THE STATE TO ACHIEVE SUBSTANTIVE EQUALITY.

As shown above, radical economic inequality manifests itself along lines of race, gender, disability status, age, and geographic location, amongst others. Vertical economic inequality is thus directly related to patterns of structural discrimination on these grounds. It is therefore imperative to tackle horizontal and vertical inequality comprehensively.[80] Furthermore, just as patterns of discrimination cause economic inequality, economic inequality also causes further discrimination. According to the International Monetary Fund, 'excessive inequality can erode social cohesion, lead to political polarization, and ultimately lower economic growth'.[81] In addition, extreme economic inequality such as that witnessed in South Africa violates the right to equality itself (which 'includes the full and equal enjoyment of all rights and freedoms'),[82] exacerbates extreme poverty and thereby violates various socio-economic rights, and causes social instability that leads to crime and the

[76] *President of the Republic of South Africa v Hugo* 1997 (4) SALR 1 (CC) 41 para 112 (per Justice O'Regan).

[77] This is supported by the definition of 'equality' in PEPUDA: '"equality" includes the full and equal enjoyment of rights and freedoms as contemplated in the Constitution and includes *de jure* and *de facto* equality and also equality in terms of outcomes'.

[78] Closely related to affirmative action is the concept of *reasonable accommodation*. Reasonable accommodation is defined in the EEA as 'any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to or participate or advance in employment'. In terms of PEPUDA, failure to reasonably accommodate vulnerable groups amounts to unfair discrimination on the ground of, amongst others, race, gender or disability.

[79] Regarding equality and gender, the important work of the Commission for Gender Equality merits further attention. See generally <http://www.cge.org.za/research-reports/#>.

[80] D Barrett 'Tackling Economic Inequality with the Right to Non-Discrimination' (2016) *Open Democracy* <https://www.opendemocracy.net/openglobalrights/david-barrett/tackling-economic-inequality-with-right-to-non-discrimination>.

[81] International Monetary Fund *Fiscal Monitoring: Tackling Inequality* (2017) ix.

[82] S 9(2) of the Constitution.

consequent violation of civil and political rights. Given that extreme inequality often correlates to political capture, the equal enjoyment of democratic rights is likewise threatened.[83]

Furthermore, the notion of *distributive justice* means that government must redistribute resources in order to ensure substantive socio-economic equality, which includes substantive equality in *economic outcomes*. Thus, rather than focusing exclusively on the bottom deciles of society, attention must urgently be paid to redistributing extreme wealth accumulated by the very few at the top decile of society.[84] This strategic focus may be the most 'radical' shift in terms of government's socio-economic policy. Moreover, it is a policy shift that is economically justified based on the fact that gross inequality inhibits economic growth. As noted by the United Nations Development Programme (UNDP):

> **If high levels of inequality constrain growth, and limit its pro-poor impacts, then reducing inequality may be a prior and necessary condition for a sustainable decrease in poverty. Going for growth as a means of addressing poverty in the absence of policies to address inequality or the underlying factors through which inequality is reproduced may yield limited returns. Instead, reducing inequality may be a necessary condition for the kinds of growth required for optimal impacts on poverty. This has important implications for policy, casting into doubt the received wisdom of a trade-off between redistributive policies and growth.[85]**

This Report accordingly examines the ability of the rights to equality, further education, and equitable access to land, to catalyse radical socio-economic transformation and thereby achieve substantive economic equality. In doing so, the Report further identifies gaps in legislation, policy, implementation and contribution by the private sector that impede the realisation of this objective. However, these rights-based drivers of radical transformation must be viewed in the context of government's over-arching redistributive fiscal policy choices.

5.4 Redistributive fiscal policy choices

SDG 10 Target 10.4 urges governments to adopt fiscal policies and to progressively reduce inequalities. Despite the limited scope of this Report, macro-economic and fiscal policy choices are central to effecting rights-based radical socio-economic transformation. At a macro-economic level, government has identified its developmental challenges as poverty, inequality and unemployment.[86] Government must therefore use its fiscal policies to redistribute income and wealth in order to realise key rights-based drivers of transformation, and thereby address the triple challenges of poverty,

[83] UN Human Rights Council *Report of the Special Rapporteur on extreme poverty and human rights, Philip Alston* A/HRC/29/31 (2015) paras 17-23, 26-32.

[84] K Donald 'Tackling Inequality: The Potential of the Sustainable Development Goals' (2017) *Open Global Rights* <https://www.openglobalrights.org/tackling-inequality-potential-of-sustainable-development-goals/>.

[85] United Nations Development Programme *The Impact of Socio-economic Inequality on Economic Development in South Africa* (2014) 7.

[86] Government of the Republic of South Africa *Medium Term Strategic Framework 2014-2019* (2014) 4.

inequality and unemployment. The UN Special Rapporteur on Extreme Poverty has congruently noted that 'tax policy is, in many respects, human rights policy'.[87]

However, government faces a significant obstacle in that unemployment, poverty and inequality operate in a complex cycle and often exacerbate each other.[88] This is evidenced by increasing levels of inequality and constrained growth of just 0.6 percent in the 2016/17 financial year,[89] despite the NDP setting growth targets at five percent per year to reach its objectives.[90] Moreover, the former Minister of Finance has observed that the 2017/18 financial year 'was characterised by slow economic growth, recession, ratings downgrades, and heightened concerns regarding the governance and sustainability of key state-owned companies'.[91] Government must thus carefully craft and use various policy tools, including taxation, in an attempt to realise key rights and thereby address radical inequality, promote inclusive growth and spur job creation. However, the misuse of any of these tools – or the mere fact of policy uncertainty – can lead to perverse consequences such as capital flight and disinvestment, which would in turn aggravate inequality, unemployment and poverty.[92]

GOVERNMENT MUST THUS CAREFULLY CRAFT AND USE VARIOUS POLICY TOOLS, INCLUDING TAXATION, IN AN ATTEMPT TO REALISE KEY RIGHTS AND THEREBY ADDRESS RADICAL INEQUALITY, PROMOTE INCLUSIVE GROWTH AND SPUR JOB CREATION.

Given the crucial role that the tax system plays in generating revenue for socio-economic expenditure, the DTC was formed in 2013 to ensure that South Africa's tax system promotes inclusive economic growth, job creation, development and fiscal sustainability, while contributing to the long-term objectives of the NDP. Part of the DTC's mandate is to investigate the feasibility of different forms of wealth taxes, including reform in respect of estate duties and donations tax; and the possible introduction of land taxes, a tax based on the value of property over and above municipal rates, and an annual wealth tax.[93] Currently, wealth taxes only contribute about one percent of tax revenue. The DTC accordingly found that the current estate duty system should be reformed to abolish the current inter-spouse exemption, as this may amount to discrimination based on marital status. The DTC further proposed that estate duty should be increased from 20 percent to 25 percent for estates valued at over R30 million. Whereas the latter reform would contribute roughly R150 million to estate duty revenue, the DTC emphasises that estate duties will never amount to a panacea for South Africa's fiscal needs in a context of radical inequality and massive unemployment.[94] The DTC's recommendation should in any event be subjected to scrutiny. Nevertheless, the DTC's proposal in this regard was taken up in the 2018 Budget Speech.[95] The DTC should furthermore act swiftly to release its report

87 UN Human Rights Council *Report of the Special Rapporteur on extreme poverty and human rights, Philip Alston* A/HRC/29/31 (2015) para 53.

88 United Nations Development Programme *The Impact of Socio-economic Inequality on Economic Development in South Africa* (2014) 6.

89 Economic Development Department *Annual Report 2016/17* (2017) 10.

90 National Planning Commission *National Development Plan 2030* (2012) 39: 'Transforming the economy and creating sustainable expansion for job creation means that the rate of economic growth needs to exceed 5 percent a year on average.'

91 Minister of Finance *2018 Budget Speech* (21-02-2018).

92 United Nations Development Programme *The Impact of Socio-economic Inequality on Economic Development in South Africa* (2014) 67, 70.

93 The DTC regards Capital Gains Tax as a form of income tax, and not a wealth tax. See DTC 'Media Statement: Call on Written Submissions on Possible Wealth Taxes for South Africa' (25-05-2017) *The Davis Tax Committee* <http://www.taxcom.org.za/docs/20170425%20Call%20for%20submissions%20on%20wealth%20taxes.pdf>

94 DTC *Second and Final Report on Estate Duty* (2016) 19, see further 17-19.

95 Minister of Finance *2018 Budget Speech* (21-02-2018).

on wealth taxes, as well as proposals on land and property taxes, since such taxes redistribute wealth from the top decile of society to the rest of the population. Even steeper taxation rates for top earners, as well as the introduction of higher corporate taxes, furthermore merit urgent attention. Redistribution from the top to the majority of the population is congruent with a rights-based approach to radical socio-economic transformation aimed at the achievement of substantive economic equality. Furthermore, empirical evidence does not support the argument that significant tax progressivity at the top deciles inhibits economic growth.[96]

The DTC has also released an interim report on Value Added Tax (VAT), in which it was found that from a macro-economic perspective, an increase in VAT would be less distortionary in terms of gross domestic product (GDP) and unemployment in the long run than increases in personal income tax and corporate tax.[97] However, as the DTC acknowledged, this would have a negative impact on equality and the poor. According to the DTC, additional social grants or the strengthening of school nutrition programmes would need to be investigated as compensatory measures.[98] Given the social assistance gap in South Africa (in that poor, young able-bodied adults without care-giving responsibilities receive no grants) coupled with incredibly high unemployment rates (with severe youth unemployment and a glaring social protection gap in this context),[99] any increase in VAT is highly concerning as the burden thereof would effectively be carried by the poor.

Increased VAT threatens various rights, including the socio-economic rights of access to health care services, sufficient food and water, adequate housing, social assistance, and the right to education. Although government has announced an increase in VAT by one percentage point while adjusting social grants at rates above inflation, effective grant increases will not exceed R100 per month.[100] Furthermore, the basket of tax exempt or 'zero rated' goods will have to be expanded to minimise the effect of this fiscal policy choice on the standard of living of the poor.[101] The feasibility of mitigating the effects of a VAT increase for the poor, including the expansion of zero-rated goods and the expansion of social protection, should have been investigated by all relevant organs of state prior to the announcement of an increase in VAT. Government's conduct in this respect thus points to a failure to perceive fiscal policy choices including taxation as being integral to human rights policy, as opposed to being distinct therefrom. To the extent that proposed increases in VAT are intended to fund the R57 billion rand necessary to provide free tertiary education for the poor, it is a perverse fiscal policy choice. Having the poor carry the cost of free tertiary education in order to promote radical transformation and thereby achieve substantive economic equality, has deep impacts for the human rights of poor people and does not appear to be reasonable.

INCREASED VAT THREATENS VARIOUS RIGHTS, INCLUDING THE SOCIO-ECONOMIC RIGHTS OF ACCESS TO HEALTH CARE SERVICES, SUFFICIENT FOOD AND WATER, ADEQUATE HOUSING, SOCIAL ASSISTANCE, AND THE RIGHT TO EDUCATION.

96 International Monetary Fund *Fiscal Monitoring: Tackling Inequality* (2017) ix-x.

97 DTC *First Interim Report on Value Added Tax* (2015) 10. Subsequent to the finalisation of this Report, the DTC released its final report on VAT. See DTC *Final Report on VAT* (March 2018).

98 Ibid.

99 United Nations Development Programme *The Impact of Socio-economic Inequality on Economic Development in South Africa* (2014) 58.

100 Minister of Finance *2018 Budget Speech* (21-02-2018); National Treasury *Budget Review 2018* (2018) 28.

101 ANC 'Statement of the African National Congress following the Special National Executive Committee held on the 25th February 2018' (25-02-2018) *ANC* <http://www.anc.org.za/content/statement-african-national-congress-following-special-national-executive-committee-held-25th>.



SAHRC REMINDS GOVERNMENT THAT THE NATIONAL BUDGET SHOULD ADVANCE HUMAN RIGHTS, ESPECIALLY FOR THE POOR

On 22 February 2018, the Commission released a media statement regarding the 2018 Budget Speech. The Commission expressed its concern that the Budget Speech indicated that VAT would be increased by 1 percent to 15 percent. This announcement by the Finance Minister constitutes the first such increase since the advent of democracy in 1994. The Commission noted that an increase in VAT most egregiously impacts the poor. The SAHRC furthermore expressed its concern regarding the increase in the fuel price through the introduction of a 52 cents per litre fuel levy. This increase in fuel price particularly impacts on the poor as it affects the price of public transport and the price of goods, since most goods sold to the public are transported on the road. Such increases impact on the poor by limiting their enjoyment of socio-economic rights such as the right to food, water, and education. Price increases limit the enjoyment of social security safety nets, despite the fact that social grants were modestly increased.

The Commission is of the view that a significant portion of the economic challenges currently experienced by South Africa could have been averted if government had demonstrated better management of the economy and greater intolerance of corruption, inefficiency and maladministration. According to the Auditor General (a fellow Chapter 9 Institution), public and private corruption costs the nation billions of Rands on an annual basis. The Commission is deeply disappointed by the fact that these funds have been lost, rather than used in the realisation of rights and services. Nevertheless, the Commission commends government's burgeoning efforts to address looting and corruption.

Ultimately, government must focus fiscal policy efforts at redistributing income and wealth from the top deciles of society to the people of South Africa. The poor cannot be expected to bear the burden of catalysing radical socio-economic transformation. Before regressive measures such as an increase in VAT can be justified, government must demonstrate that it expends its resources proportionately to socio-economic need, effectively and efficiently.[102] Wide-spread findings of irregular and corrupt expenditure at various levels of government[103] render fiscal policy decisions such as an increase in VAT constitutionally suspect.

[102] S van der Berg 'Ensuring Proportionate State Resource Allocation in Socio-economic Rights Cases' (2017) 3 *South African Law Journal* 576-615.

[103] Public Protector *State of Capture* Report No 6 of 2016/17 (2016); Auditor-General *PFMA 2016-17: Consolidated General Report on National and Provincial Audit Outcomes* (2017).

5.4A. FINDINGS AND RECOMMENDATIONS

The proposed increase in VAT seriously threatens the human rights of the poor. It is therefore found that it is unjustifiable to expect the poor to effectively finance radical socio-economic transformation and the achievement of substantive socio-economic equality.

(i) It is accordingly recommended that government continues its review of South Africa's tax. Given government's increase of VAT, it is recommended that the social grant system be further expanded to accommodate able-bodied, poor adults – including unemployed youth – who do not currently qualify for a specific social grant or social security. National Treasury must report to the Commission on measures considered or taken to increase tax revenue in an effort to achieve substantive socio-economic equality, while minimising any detrimental impact on the rights of the poor, within three months of the release of this Report.



CHAPTER 06
KEY RIGHTS-BASED DRIVERS OF RADICAL SOCIO-ECONOMIC TRANSFORMATION

RADICAL SOCIO-ECONOMIC TRANSFORMATION WITH THE PURPOSE OF ACHIEVING GREATER VERTICAL, ECONOMIC EQUALITY IS AN AMBITIOUS AND FAR-REACHING POLICY AGENDA.[104] THIS REPORT IDENTIFIES SOME OF THE KEY RIGHTS-BASED DRIVERS OF RADICAL SOCIO-ECONOMIC TRANSFORMATION, DEFINED AS AIMING TO ACHIEVE SUBSTANTIVE ECONOMIC EQUALITY. SINCE ALL RIGHTS ARE INTERDEPENDENT AND MUTUALLY REINFORCING, THIS REPORT DOES NOT GIVE A COMPREHENSIVE ACCOUNT OF THE CONTRIBUTION THAT EACH RIGHT CAN MAKE TO THE AGENDA OF RADICAL SOCIO-ECONOMIC TRANSFORMATION AND THE CONCOMITANT REDUCTION OF RADICAL INEQUALITY. INSTEAD, FOCUS IS PLACED ON THE RIGHT TO EQUALITY ITSELF, AS WELL AS ON THE IMPLEMENTATION OF EQUALITY-BASED SPECIAL MEASURES IN THE CONTEXT OF THE RIGHTS TO FURTHER EDUCATION AND LAND.

6.1 The right to equality

Equality can be conceptualised as a key *objective* of radical socio-economic transformation. Simultaneously, the constitutional right to equality and related legislative framework can be used to *contribute* to government's programme of radical socio-economic transformation. In what follows, the role of the equality framework in catalysing radical transformation will be examined: First, the crucial concept of 'affirmative action' or 'special measures' will be investigated. Next, the extent to which the EEA can be utilised to provide vulnerable groups with economic opportunities and thereby transform the structure of the labour market along more egalitarian lines will be determined. Thereafter, focus will turn to the potential of Black economic empowerment programmes to transform the control and ownership of the economy, while simultaneously contributing to government's focus

[104] Achieving vertical equality implicates both *pre-distributive* and *redistributive* policies in order to both fundamentally alter socio-economic structures and ensure that the results of just institutions are more equally distributed amongst all members of society. Pre-distributive policies refer to those laws, policies and systems that set market rules, for example labour laws. In contrast, redistributive policies redistribute market gains in policy areas such as taxation, education, health and social assistance. Center for Economic and Social Rights *From Disparity to Dignity: Tackling Economic Inequality through the Sustainable Development Goals* (2016) 15, 20.

on the accelerated rollout of socio-economic infrastructure. Furthermore, it will be emphasised that in cases where the EEA and B-BBEE Act may not apply, it is vital for the promotional aspects of PEPUDA to be brought into operation so as to encourage the realisation of equality by the private sector and all members of society.

6.1.1 The meaning of 'affirmative action' or 'special measures'

South Africa is founded on the values of human dignity, equality and the advancement of fundamental rights and freedoms.[105] Section 9(2) of the Constitution further stipulates that equality includes the full and equal enjoyment of all rights and freedoms, and permits the adoption of affirmative action measures for this purpose. Affirmative action therefore aims to radically transform society in order to achieve substantive equality in all spheres of life, including in terms of the equitable distribution of income, wealth, land, and skills obtained through education. Affirmative action measures should not be viewed as an exception to equality, but instead as an essential component thereof. Inevitably, the adoption of affirmative action will give rise to 'transformative tension' between certain constitutional rights and values.[106] The Constitutional Court has accordingly provided cautionary guidance for the implementation of special measures:

> **Measures that are directed at remedying past discrimination must be formulated with due care not to invade unduly the dignity of all concerned. We must remain vigilant that remedial measures under the Constitution are not an end in themselves. They are not meant to be punitive nor retaliatory. Their ultimate goal is to urge us on towards a more equal and fair society that hopefully is non-racial, non-sexist and socially inclusive... We must be careful that the steps taken to promote substantive equality do not unwittingly infringe the dignity of other individuals – especially those who were themselves previously disadvantaged.[107]**

The Constitutional Court has developed a three-pronged test to determine whether affirmative action measures fall within the bounds of section 9(2) of the Constitution. The test asks whether such measures (i) target persons or categories of persons who have been disadvantaged by unfair discrimination; (ii) are designed to protect or advance such persons or categories of persons; and (iii) promote the achievement of equality.[108] The efficacy of remedial or restitutionary measures fall to be judged on the basis of whether the 'overwhelming majority' of a particular group is subject to unfair discrimination or exclusion.[109] Furthermore, affirmative action or restitutionary measures must be 'reasonably capable' of achieving the desired ends.[110]

105 S 1(a) of the Constitution.

106 *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC) paras 77-81 (separate concurring judgment per Cameron J, Froneman J and Majiedt AJ). Transformative tension exists between the foundational constitutional value of non-racialism and a focus on race to achieve substantive equality through affirmative action. Such tension further arises between the dignity and equality of those benefited by remedial measures, and the dignity of those who are not members of designated groups.

107 *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC) paras 30-31 (majority judgment per Moseneke ACJ).

108 *Minister of Finance and Another v Van Heerden* 2004 (6) SA 121 (CC) para 37.

109 Para 40.

110 Para 41.

As alluded to above,[111] international law allows for 'special measures' to advance persons subject to discrimination, in various contexts including those pertaining to transformation of the labour market and economy, further education, and land distribution.[112] The ICERD explicitly endorses the adoption of special measures 'to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms'. However, the ICERD further specifies that '[t]hese measures shall in no case entail as a consequence the *maintenance* of unequal or separate rights for different racial groups *after* the objectives for which they were taken have been achieved'.[113] Affirmative action measures should therefore be temporary, tailored to the needs of the groups or individuals concerned,[114] and should cease once substantive equality is achieved.

The ICERD should always be interpreted in its context[115] and thus, when implementing special measures, the characteristics of groups must be considered. Anyone implementing special measures must accordingly be able to show an objective and reasonable justification for differential treatment. According to the CERD, '[t]o treat in an equal manner persons or groups whose situations are objectively different will constitute discrimination in effect, as will the unequal treatment of persons whose situations are objectively the same'.[116] The CERD has summarised the meaning of special measures:

> **Special measures should be appropriate to the situation to be remedied, be legitimate, necessary in a democratic society, respect the principles of fairness and *proportionality*, and be *temporary*. The measures should be designed and implemented on the *basis of need*, grounded in a *realistic appraisal of the current situation of the individuals and communities concerned.*[117]**

Importantly, need must be determined on the basis of data disaggregated by 'race, colour, descent and ethnic or national origin and incorporating a gender perspective, on the socio-economic and cultural status and conditions' of the group concerned.[118] Preferably, classification of individuals should take place through a process of self-identification, unless imposed classification can be justified.[119] Finally, in order to ensure that special measures remain temporary, States Parties must engage in a 'continuing system' of monitoring the application and results of such measures.[120]

111 Section 4.2 above.

112 The Convention on the Elimination of All Forms of Discrimination against Women (1979) (CEDAW) stipulates in Art 4(1) that special measures should not be considered to amount to discrimination. Focus will be placed on the concept of special measures as contained in the ICERD, given that the UN CERD recently reviewed South Africa's combined periodic reports and issued concluding observations on South Africa's compliance with the ICERD. See CERD *Concluding Observations on the Combined Fourth to Eighth Periodic Reports of South Africa* (2016) CERD/C/ZAF/CO/4-8. Furthermore, the Commission received a petition from Solidarity to determine government's compliance with certain provisions of the ICERD. See Solidarity 'Affirmative Action – Solidarity's visit to the UN' (19-09-2017) *Solidarity* <https://solidariteit.co.za/en/44004/>.

113 Art 2(2) of the ICERD (emphasis added). The ICERD clarifies that the adoption of special measures does not constitute discrimination. Art 1(4) of the ICERD states:

> Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

114 CERD *General Recommendation No 32: The meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination* CERD/C/GC/32 (2009) para 27.

115 Ibid para 5.

116 Ibid para 8.

117 Ibid para 16 (emphasis added).

118 Ibid para 17.

119 Ibid para 34.

120 Ibid para 35.

6.1.2. Special measures to radically transform an unequal labour market

Recent research by the Commission has demonstrated that the labour market remains segregated in terms of race, gender and disability status – especially at highly skilled management levels.[121] Underrepresentation by vulnerable groups at these levels is a direct consequence of apartheid policy that excluded the Black majority from education and skills development in order to exploit them for cheap labour.[122] Today, the structure of the economy has developed to the point where demand for skilled labour has increased whereas demand for unskilled labour has decreased.[123]

In order to radically change the structure of the economy, structural discrimination based on prohibited grounds[124] of discrimination such as race, gender and disability must be addressed as a matter of priority. Although there has been some transformation of the labour market – especially in the public sector – management levels in the private sector continue to be dominated by White males and those without disabilities.[125] The primary tool for government to achieve its task of radically transforming the labour market is through the use of 'special measures' or 'affirmative action'. Whereas the Constitution explicitly empowers government to adopt legislative and other measures to 'protect or advance persons, or categories of persons, disadvantaged by unfair discrimination',[126] the EEA concretises this obligation in the specific context of the workplace.

The EEA both prohibits unfair discrimination and regulates affirmative action.[127] Both chapters of the Act interact with each other in an attempt to transform the labour market. Specifically, the EEA aims to address patriarchal structures of the labour market by prohibiting discrimination based on, amongst other grounds, 'family responsibility'.[128] This ground expands the prohibited grounds listed in the Constitution and PEPUDA, and can help support those who have caring responsibilities outside of the workplace. Moreover, in prohibiting unfair discrimination, the EEA was amended in 2014 to prohibit unequal terms and conditions of employment for persons performing substantially the same work, where unequal treatment is based on one of the prohibited grounds. This amendment signifies a positive progression in government policy in respect of gender-focused employment equity.

[121] SAHRC *Report: National Hearing on Unfair Discrimination in the Workplace* (2017) 16; SAHRC *Research Brief on Race and Equality in South Africa 2013-2017* (2017); SAHRC *Research Brief on Gender and Equality in South Africa 2013-2017* (2017); SAHRC *Research Brief on Disability and Equality in South Africa 2013-2017* (2017).

[122] United Nations Development Programme *The Impact of Socio-economic Inequality on Economic Development in South Africa* (2014) 21-22, 50-51.

[123] Ibid 32, 51.

[124] S 9(2) and (3) of the Constitution prohibit discrimination by the state and any person on several listed grounds. S 1 of PEPUDA expands the definition of 'prohibited grounds' for discrimination by incorporating a test to determine unfair discrimination, drawn from Constitutional Court jurisprudence:

> 'prohibited grounds' are-
> (a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; or
> (b) any other ground where discrimination based on that other ground-
> (i) causes or perpetuates systemic disadvantage;
> (ii) undermines human dignity; or
> (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a)...

[125] SAHRC *Research Brief on Race and Equality in South Africa 2013-2017* (2017) 13-14; SAHRC *Research Brief on Gender and Equality in South Africa 2013-2017* (2017) 15-16; SAHRC *Research Brief on Disability and Equality in South Africa 2013-2017* (2017) 16 (in the context of disability, the public sector has not achieved its goal of two percent employment of people with disabilities).

[126] S 9(2) of the Constitution.

[127] Chapter 2 of the EEA prohibits discrimination, whereas Chapter 3 deals with affirmative action. Since affirmative action is necessary to address patterns of structural discrimination, these chapters are closely related.

[128] S 6(1) of the EEA.



SAHRC CONTINUES TO PROMOTE THE RIGHTS OF PERSONS WITH DISABILITIES

As noted in this Report, vertical economic equality cannot be achieved without addressing instances of direct and indirect horizontal discrimination. Therefore, the SAHRC continuously endeavours to promote the rights of persons with disabilities. Where people with disabilities are included in society, their inclusion in the workplace and economy will be facilitated.

In 2015, the SAHRC launched a toolkit entitled Promoting the Right to Work of Persons with Disabilities: A Toolkit for the Private Sector along with a Monitoring Framework. The Toolkit is intended to raise awareness of the rights to work in the private sector of persons with disabilities.

In November 2017, the Commission launched its report, entitled Unfair Discrimination in the Workplace, following its National Hearing on this subject in 2016. The Report finds that people with disabilities face disproportionately high levels of unemployment, or are employed in low-status jobs and receiving below average remuneration. It is estimated that on average, eight in ten persons with disabilities are unemployed. The Report further finds that most persons with disabilities in South Africa who have been excluded from engaging fully in the economy are likely to experience severe poverty, deprivation, lack of access to most essential services, social marginalisation, and a high-level vulnerability to HIV/AIDS infection. Black Africans have the highest proportion of people with disability, with disability amongst females more prevalent than amongst men. Furthermore, the SAHRC finds that instances of unfair discrimination on the ground of disability are frequently restricted to a question of reasonable accommodation. Other factors, such as a lack of capacity development or opportunities for progress and the perpetuation of negative stereotypes in the workplace, may therefore be overlooked.

Moreover, the SAHRC has engaged in various awareness-raising initiatives regarding the rights of persons with disabilities. In 2017, SAHRC's Provincial Office in Kwa-Zulu Natal hosted two separate awareness-raising initiatives, one of which dealt with albinism in particular, and the other with right of persons with disabilities more generally. Finally, the Commission successfully mediated a public sector employment dispute in 2017. The complainant, who made use of a wheelchair, alleged that the municipality for which he worked failed to reasonably accommodate him due to the absence of a proper wheelchair ramp. A settlement agreement was reached in July 2017.

A comprehensive approach must therefore be adopted by all members of society to ensure that persons of disabilities are included in all aspects of society and the economy.

The EEA defines affirmative action measures as 'measures designed to ensure that suitably qualified employees from designated groups have equal employment opportunities and are equitably represented in all occupational levels of the workforce of a designated employer'.[129] 'Designated groups' means Black people, women or people with disabilities, thereby recognising structural and direct discrimination faced by these groups.[130] Closely related to affirmative action is the obligation of 'reasonable accommodation', which is defined in the EEA as 'any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to or participate or advance in employment'. It is therefore clear that affirmative action and reasonable accommodation are designed to both provide *initial* economic opportunities to disadvantaged groups by prioritising their appointment, but continue to apply once people from such groups have entered the workforce. Thus, the duty to implement affirmative action measures extends to the retention and development of people from designated groups, through the implementation of training measures and skills development programmes.[131]

Importantly, numerical goals are required whereas quotas are prohibited,[132] and employers are not required to adopt policies that would establish an 'absolute barrier' to the prospective or continued employment or advancement of people who are not from the designated groups.[133] After an employer adopts an employment equity plan that will make reasonable progress towards employment equity in the workplace,[134] it may not discriminate against a job candidate solely on the ground of a lack of relevant experience.[135] This provision opens the door to combat widespread youth unemployment in South Africa.[136]

Targeted special measures based on need

As has been noted by the Commission on several occasions, transformation of the labour market at management levels through the implementation of the EEA has been unacceptably slow.[137] Given that economic inequality between and within population groups in South Africa has worsened, the question arises as to whether the EEA itself or its implementation is leading to new imbalances.[138] The EEA accordingly stands to be evaluated against the constitutional and international law obligations implied by the ICERD, read with the CERD's relevant general recommendations and concluding observations in respect of South Africa.

[129] S 15(1), as amended by the Employment Equity Amendment Act 47 of 2013.

[130] 'Designated employers' refers to employers that employ more than 50 employees, or that employ less than 50 employees but that exceed specified turnover thresholds.

[131] S 15(2)(d)(ii) of the EEA.

[132] S 15(3).

[133] S 15(4).

[134] S 20(1).

[135] S 20(5).

[136] According to Stats SA, youth (ages 15-34) unemployment stood at 38.6 percent in the third quarter of 2017, which is 10 points higher than the national average. Stats SA 'Quarterly Labour Force Survey – QLFS Q3:2017' (31-10-2017) *Stats SA* <http://www.statssa.gov.za/?p=10658>.

[137] SAHRC *Research Brief on Race and Equality in South Africa 2013-2017* (2017) 13-14; SAHRC *Research Brief on Gender and Equality in South Africa 2013-2017* (2017) 15-16; SAHRC *Research Brief on Disability and Equality in South Africa 2013-2017* (2017) 16; SAHRC *Report: National Hearing on Unfair Discrimination in the Workplace* (2017) 16; SAHRC *Research Brief on Race and Equality in South Africa 2013-2017* (2017) 31.

[138] CERD *General Recommendation No 32: The meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination* CERD/C/GC/32 (2009) para 22.

Special measures or affirmative action must be targeted at groups and individuals in need of advancement due to persisting patterns of discrimination and disadvantage. According to the CERD, beneficiaries should be classified as belonging to a certain group through a process of self-identification, unless a justification for the contrary exists.[139] As noted above, the EEA classifies beneficiaries of affirmative action according to 'designated groups' that correspond to the racial classification system used by apartheid government,[140] while expanding its scope to additionally include women and persons with disabilities. Whereas the population is provided with the opportunity to self-classify when statistical data is gathered for the population census,[141] self-classification does not translate into legislation that provides for special measures. Indigenous peoples, those whose ethnic descent may be from mixed race marriages, and linguistic or tribal minorities within the designated groups are therefore not accommodated by the EEA.

Furthermore, socio-economic data is similarly disaggregated according to the apartheid-era classification system of population groups. The CERD has on two occasions requested government to provide more exhaustive statistical demographic data that includes social and economic indicators, and furthermore accounts for indigenous groups and non-citizens.[142] As expanded on below, government plans to gather more comprehensive data from various departments before its next periodic review by the CERD in 2020.[143] However, it remains uncertain whether data will be disaggregated based on ethnic origin, since government has stated:

> **South Africa's vision is that of a united people, united in our diversity, and not divided along ethnic and tribal groups. We are thus not in a position to provide disaggregated statistical data regarding ethnic groups.[144]**

Government's approach in this regard, as reflected in the EEA, is problematic for several reasons. Affirmative action measures must be targeted at groups and individuals who are subject to unfair discrimination, in order to eventually achieve substantive equality and a society based on non-racialism and non-sexism.[145] Decisions based on insufficiently disaggregated data fail to target persons or categories of persons who have been disadvantaged by unfair discrimination, as required by the three-pronged test for affirmative action.[146] Without first taking the characteristics of groups into account,[147] varying degrees of disadvantage and the possible intersectionality of multiple forms of discrimination (based on race, ethnicity, gender or social origin) faced by members of vaguely categorised groups, cannot be identified. Moreover, the current classificatory system and

139 Ibid para 34.

140 The EEA defines Black people as 'Africans, Coloureds and Indians'.

141 Deputy Minister of Justice and Constitutional Development *Response Letter Re: South African Government's Compliance with the International Convention on the Elimination of All Forms of Racial Discrimination* (04-03-2018).

142 CERD *Concluding Observations of the Committee on the Elimination of Racial Discrimination: South Africa* (2006) CERD/C/ZAF/CO/3 paras 11, 13, 15; CERD *Concluding Observations on the Combined Fourth to Eighth Periodic Reports of South Africa* (2016) CERD/C/ZAF/CO/4-8 paras 6-7.

143 Deputy Minister of Justice and Constitutional Development *Response Letter Re: South African Government's Compliance with the International Convention on the Elimination of All Forms of Racial Discrimination* (04-03-2018).

144 RSA *National Statement in Introduction of the South African Periodic Report (Combined 4-8 Periodic Reports) to the Committee on the Elimination of Racial Discrimination (CERD)* (09-08-2016) 8.

145 S 1(b) of the Constitution.

146 *Minister of Finance and Another v Van Heerden* 2004 (6) SA 121 (CC) para 37.

147 CERD *General Recommendation No 32: The meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination* CERD/C/GC/32 (2009) para 8.

disaggregation of data fails to acknowledge multiple forms of discrimination faced *within* population groups. For example, given that inequality between members of the Black African population group is higher than in any other racial group, it is foreseeable that current practice might result in a job opportunity for a wealthy Black man of Zulu origin, rather than a poor Black woman from an ethnic minority.[148] Special measures accordingly do not account for socio-economic differences within broadly defined population groups. The CERD's requirement for the implementation of special measures on the basis of need, and a related 'realistic appraisal of the current situation of the individuals and communities' concerned, cannot be met without a more nuanced disaggregation of data.

Special measures designed to advance vulnerable groups

In terms of the EEA, designated employers must adopt affirmative action measures that are designed to ensure the equitable representation of suitably qualified candidates at all levels of the workforce, and to retain and develop employees from designated groups through training initiatives and skills development.[149] Due to the fact that designated groups are bluntly classified and data is insufficiently disaggregated, measures are not capable of being targeted at the most vulnerable groups in society, and can likewise not be designed to respond to new forms of discrimination,[150] or to compounded discrimination.

SPECIAL MEASURES MUST THEREFORE BE FLEXIBLY DESIGNED IN ORDER TO BE REASONABLY LIKELY TO ADVANCE PEOPLE BASED ON NEED, AND THEREBY ACHIEVE THE ULTIMATE OBJECTIVE OF SUBSTANTIVE EQUALITY.

Importantly, such measures may be designed to include preferential treatment and numerical goals or targets, but may not amount to quotas.[151] The Constitutional Court has sought to clarify the distinction between targets and quotas by noting that quotas are rigid, whereas numerical targets should be capable of flexible implementation.[152] Moreover, absolute barriers to employment may not be created for people who are not members of designated groups.[153] Special measures must therefore be flexibly designed in order to be reasonably likely[154] to advance people based on need, and thereby achieve the ultimate objective of substantive equality.

However, the Constitutional Court has been sharply divided in determining whether the implementation of purported numerical targets by certain government departments amounts to rigid quotas.[155] Moreover, the Court has inadvertently created the risk that members of designated groups – and especially those individuals who suffer multiple forms of discrimination – may be prejudiced by the rigid implementation of targets, thereby raising the spectre of new imbalances

148 Ethnicity and language are closely related. The Zulu group constitutes the largest group based on ethnicity in South Africa. Where a dominant cultural group exists, the risk of discrimination against ethnic minorities arises. See SA History 'Race and Ethnicity in South Africa' (23-03-2015) *SA History* <http://www.sahistory.org.za/article/race-and-ethnicity-south-africa>. See further M Baton 'South Africa as a Party to the ICERD: A briefing paper' (2013) 83 *Transformation* 86 92.

149 S 15(2)(d) of the EEA.

150 SAHRC *Report: National Hearing on Unfair Discrimination in the Workplace* (2017) 67.

151 S 15(4) of the EEA.

152 *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC) para 42; *Solidarity and Others v Department of Correctional Services and Others* 2016 (5) SA 594 (CC) paras 50-61.

153 *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC) para 42.

154 *Minister of Finance and Another v Van Heerden* 2004 (6) SA 121 (CC) paras 42-43.

155 See the marked difference in opinion of Zondo J for the majority and Nugent AJ for the minority in *Solidarity and Others v Department of Correctional Services and Others* 2016 (5) SA 594 (CC) paras 50-64 and paras 102-118, respectively.

arising.[156] In *South African Police Service v Solidarity obo Barnard*,[157] the Constitutional Court held that a designated employer was entitled not to promote a White woman given that White women were over-represented at that employment level, despite the fact that women are included in the EEA's definition of designated groups. Subsequently, in *Solidarity and Others v Department of Correctional Services and Others*,[158] the same Court confirmed that the so-called *Barnard* principle applies to African, Coloured and Indian persons and to different genders. This effectively means that where, for example, African females are sufficiently represented at a certain employment level, a wealthy, heterosexual White man could be granted preferential treatment to the detriment of a poor, African, homosexual woman.

The latter application of the *Barnard* principle therefore conflicts with the CERD's requirement for special measures to be adopted on the basis of a realistic appraisal of need, taking into account the social and economic circumstances of the group or individual concerned. It furthermore stands in opposition to the approach reflected in the National Development Plan, whereby preference should be accorded on the basis of race 'for at least the next decade' when defining historical disadvantage.[159] Where special measures may result in new imbalances or exacerbate current inequality viewed in the labour context more broadly, it is doubtful that such measures are 'designed' to advance people in need of remedial measures. Worryingly, it can lead to perverse consequences and 'token' affirmative action where minority status, or new patterns of discrimination and inequality within designated groups, is not properly considered.[160]

Special measures must promote the achievement of equality

Once the objective of affirmative action, namely substantive equality, is achieved, temporary special measures should cease.[161] However, given the persistence of gross inequality in South Africa – and despite policies aimed at radical socio-economic transformation – much remains to be done before this goal is reached. Currently, special measures in the employment equity context raise several concerns in respect of the requirement for affirmative action to promote equality.

First, due to challenges in classification and data disaggregation identified above, equality of outcomes cannot be achieved for marginalised individuals who do not fit comfortably within the crass categories of African, Coloured or Indian population groups. Furthermore, to the extent that measures are targeted at people without assessing need or recognising intersecting forms of discrimination and disadvantage, special measures will fail to promote substantive equality. In any event, it is not possible to measure the impact of special measures on the most vulnerable persons or groups, if those persons or groups are not identified based on accurate data in the first instance. Although government has committed to provide more detailed quantitative and qualitative data to the CERD in its next periodic review of South Africa in 2020, this process

156 CERD *General Recommendation No 32: The meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination* CERD/C/GC/32 (2009) para 22.

157 2014 (6) SA 123 (CC) para 62.

158 2016 (5) SA 594 (CC) para 40.

159 National Planning Commission *National Development Plan* (2012) 467.

160 H Papacostantis & M Mushariwa 'The Impact of Minority Status in the Application Affirmative Action: NAIDOO v MINISTER of SAFETY and SECURITY 2013 5 BLLR 490 (LC)' (2016) 19 *PER* 1 15, 19, 21-22.

161 CERD *General Recommendation No 32: The meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination* CERD/C/GC/32 (2009) para 16.

has not yet begun. Furthermore, whereas government suggests that this data will be gathered from various implementing government departments and collated, more proactive steps are necessary to qualitatively assess both the need for and impact of special measures on vulnerable individuals and groups based on current socio-economic need.[162] For example, the Commission for Employment Equity (CEE) recently announced that it is in the process of qualitatively assessing the impact of special measures in the labour market on vulnerable groups.[163] This is a laudable development, which should be sufficiently resourced, and coordinated amongst various relevant government departments. Second, due to polycentric[164] consequences that may result from the application of the *Barnard* principle, existing patterns of disadvantage may be exacerbated or new patterns of disadvantage may arise, thereby prejudicing the achievement of substantive equality.

PROACTIVE STEPS ARE NECESSARY TO QUALITATIVELY ASSESS BOTH THE NEED FOR AND IMPACT OF SPECIAL MEASURES ON VULNERABLE INDIVIDUALS AND GROUPS BASED ON CURRENT SOCIO-ECONOMIC NEED.

In the context of the need to radically transform the labour market, the objective of affirmative action is for a given workplace to be 'broadly representative' of the people of South Africa.[165] A third pressing issue in relation to the achievement of substantive equality in the workforce is thus the question as to how 'broad representivity' should be measured. In *Solidarity and Others v Department of Correctional Services and Others*, the Constitutional Court held that a government department's implementation of its employment equity plan failed to consider regional demographics, and exclusively focused on representivity as a reflection of the *national* economically active population. As a result, the designated employer's implementation of affirmative action measures to achieve representivity at all levels was based on incorrect demographic data and benchmarks.[166] The requirement to consider regional demographic data in setting representivity targets makes sense given the uneven distribution of different population groups across South Africa. For example, the vast majority of Coloured people live in the Western Cape and Northern Cape, whereas they constitute less than 10 percent in the Eastern Cape and less than one percent in Limpopo.[167] A context-sensitive approach is thus congruent with the CERD's guidance on the interpretation and implementation of the ICERD and its requirement for special measures.

At the time that the *Solidarity* matter was adjudicated, section 42(a)(i) of the EEA mandated anyone implementing the Act to consider representivity in relation to both the national and regional economically active population. Subsequently, section 42 was amended and now renders the consideration of regional demographics discretionary.[168] A failure to consider regional demographics not only stands in conflict with the CERD's position on context-sensitive implementation of special measures, but may simultaneously severely prejudice members of certain designated groups

[162] Deputy Minister of Justice and Constitutional Development *Response Letter Re: South African Government's Compliance with the International Convention on the Elimination of All Forms of Racial Discrimination* (04-03-2018).

[163] Commissioner A Gildenhuys, Commission for Employment Equity *Address at the SAHRC Business and Human Rights Dialogue*, 13-14 March 2018.

[164] L Fuller 'The Forms and Limits of Adjudication' (1978) 92 *Harv LR* 353 394 coined the term 'polycentricity' to describe complex disputes in which a decision on one issue could potentially result in unknown ramifications for myriad interrelated issues.

[165] *Solidarity and Others v Department of Correctional Services and Others* 2016 (5) SA 594 (CC) para 40.

[166] Paras 78-82.

[167] Para 127; H Papacostantis & M Mushariwa 'The Impact of Minority Status in the Application Affirmative Action: NAIDOO v MINISTER of SAFETY and SECURITY 2013 5 BLLR 490 (LC)' (2016) 19 *PER* 20.

[168] Employment Equity Amendment Act, 47 of 2013.

in provinces where they are more significantly represented. Furthermore, considering the huge problem constituted by unemployment in South Africa, the legislative amendment and consequent implementation of affirmative action measures may provoke urban migration and thereby exacerbate existing spatial injustices.

THE INSUFFICIENT CONTRIBUTION OF THE PRIVATE SECTOR TO TRANSFORMATION SERIOUSLY IMPEDES THE ACHIEVEMENT OF SUBSTANTIVE EQUALITY IN THE LABOUR MARKET.

Finally, the insufficient contribution of the private sector to transformation seriously impedes the achievement of substantive equality in the labour market. The private sector continues to employ mostly White men at senior management levels, with Black representation dipping alarmingly to pre-2005 levels in recent years.[169] Painstakingly slow transformation points to a failure by the private sector to understand both South Africa's overarching constitutional project of radically transforming society and the economy to achieve substantive equality, as well as the requirements imposed by the EEA.

The EEA places emphasis on the need to reasonably accommodate, retain and develop members of the designated groups.[170] Designated employers must therefore continuously consult with employees and analyse their skill sets and needs, in order to pursue development and training initiatives in addition to achieving numerical targets. Accurate targeting of skills development initiatives and subsequent promotion would comply with the CERD's requirement for special measures to be implemented on the basis of need. Furthermore, government has indicated that too little resources are spent by employers on the development and training of staff, thereby impeding the transformation of the labour market. As a result, the Economic Development Department (EDD) entered into a skills accord with various business and government stakeholders, in which these actors commit to using existing training facilities more fully.[171] Adequate development programmes will moreover ensure that designated employers do not fall foul of the EEA's prohibition against discrimination based solely on a candidate's lack of experience.[172] However, institutional fragmentation is identified as between the DOL as administrator of the EEA, the Department for Economic Development as a catalyst for the skills accord, and the National Skills Authority, which is undertaking research to determine the impact of the National Skills Development Strategy on beneficiaries, but is institutionally positioned as part of the Department of Higher Education and Training (DHET).

Slow transformation, especially within the private sector, may also indicate the private sector's lack of understanding regarding the importance of achieving a more equal society. Greater equality would spur economic growth, thereby benefiting the private sector at various levels. However, South Africa's transformation project is unlikely to succeed without the collaboration of the private sector, which does bear constitutional obligations in appropriate circumstances.[173] Chapter 5 of PEPUDA, if fully operationalised, might partially address this challenge given the obligation imposed upon bodies contracting with the state, as well as all other companies and corporations, to develop equality plans in proportion to factors such as size and resources.[174]

[169] Commission for Employment Equity *Annual Report 2016/17* (2017) 18; SAHRC *Research Brief on Race and Equality in South Africa 2013-2017* (2017) 13.

[170] Ss 15, 19, 20 of the EEA.

[171] See Economic Development Department *National Skills Accord* (2011) and National Planning Commission *National Development Plan* (2012) 467.

[172] S 20(5) of the EEA.

[173] S 8(2) of the Constitution states:

> A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

[174] Ss 26-27 of PEPUDA.

6.1A. Findings and Recommendations

It is therefore found that the EEA's definition of 'designated groups' and South Africa's system of data disaggregation are not in compliance with constitutional or international law obligations imposed by the ICERD read in conjunction with the CERD's general recommendations and concluding observations. Government's failure to measure the impact of various affirmative action measures on the basis of need and disaggregated data, especially the extent to which such measures advance indigenous peoples and people with disabilities, likewise violates the obligations imposed by the ICERD and the CERD.

(i) It is accordingly recommended that the EEA be amended to target more nuanced groups on the basis of need, and taking into account social and economic indicators. It is further recommended that government – through the DOJCD, the Department of Labour (DOL) and the Department of Planning, Monitoring and Evaluation (DPME) – collaborates with Stats SA to gather data disaggregated by ethnic origin, language, and disability, and that includes social and economic indicators. The DOJCD in consultation with the DOL, CEE, DPME, Department of Basic Education (DBE), DHET and other relevant departments should thereafter proceed to gather 'detailed qualitative and quantitative information ... on the impact of the special measures it has taken in employment, education and public and political affairs'.[175] These departments must jointly report back to the Commission within six months of the release of this Report on steps taken or intended to be taken to amend the EEA, to disaggregate data, and to measure the impact of affirmative action on vulnerable groups, including indigenous peoples and people with disabilities.[176]

(ii) It is further found that the EEA and its implementation, as well as the design of special measures, are currently misaligned to the constitutional objective of achieving substantive equality. It is accordingly recommended that in qualitatively assessing the impact of affirmative action measures on vulnerable groups, including indigenous peoples and people with disabilities, the DOL, in collaboration with the CEE and in consultation with National Treasury, undertakes a representative assessment of the implementation of employment equity plans of designated employers in order to ensure that targets are flexibly pursued and do not amount to rigid quotas.

[175] CERD *Concluding Observations on the Combined Fourth to Eighth Periodic Reports of South Africa* (2016) CERD/C/ZAF/CO/4-8 para 15.

[176] The DOJCD has indicated that steps will be taken to provide detailed statistical data to the CERD in 2020. Deputy Minister of Justice and Constitutional Development *Response Letter Re: South African Government's Compliance with the International Convention on the Elimination of All Forms of Racial Discrimination* (04-03-2018). However, a more detailed action plan should be provided in this regard.

(iii) It is further found that institutional fragmentation exists as between the DOL and CEE, EDD, and the National Skills Authority and DHET, especially in respect of skills development initiatives. It is thus recommended that the DOL, in collaboration with the CEE and the National Skills Authority, includes a representative assessment of development and training initiatives of designated employers, and especially those designated employers in the private sector, when assessing the implementation of employment equity plans. Focus should be placed on training initiatives designed for persons with disabilities, and to what extent people from this group are granted opportunities to progress in the workplace.

(iv) The DOJCD, in consultation with the DOL and CEE, should determine whether and how the EEA can be amended to require a qualitative and context-sensitive assessment of need when employment equity plans are implemented. The EEA should be further amended to revert to the position where the consideration of the regional economically active population in relation to representation levels is mandatory and not discretionary.

The DOJCD, DOL and CEE must jointly report to the Commission within six months of the release of this Report on information considered and steps intended to be taken to address these recommendations.

(v) Finally, it is found that the private sector is not sufficiently contributing to the transformation of the labour market. It is accordingly recommended that the DOJCD expedites the process necessary to bring Chapter 5 of PEPUDA into commencement. The operationalisation of the Chapter must be accompanied by the allocation of additional resources to both the SAHRC and the CGE in order for these institutions to effectively perform their functions in terms of these legislative provisions and accompanying regulations. The DOJCD should report to the Commission within one month of release of this report on steps taken to fully operationalise Chapter 5 of PEPUDA.

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Comments on the Employment Equity Amendment Bill [B14 – 2020]

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INTRODUCTION

1. The Employment Equity Amendment Bill, 2020 [B14-2020] (the Bill) seeks to amend the Employment Equity Act 55 of 1998 (EEA). The Bill was presented to Parliament by the Department of of Employment and Labour (the Department) and introduced by the Minister of Employment and Labour (the Labour Minister) on 28 October 2020.

2. The Portfolio Committee invited comments to be presented to it by 19 February 2021. This document is submitted in response to the invitation. It constitutes the submissions of Solidarity,[1] a trade union registered in terms of the Labour Relations Act 66 of 1995 (LRA).[2]

3. These comments are structured as follows:

   3.1. At the outset, a summary of central provisions of the EEA is provided. The current provisions of the EEA are relevant to a consideration of (i) aspects of the statute potentially requiring legislative amendment to secure constitutional and international law compliance; and (ii) the internal consistency of the provisions of the EEA in the event that the amendments proposed by way of the Bill are adopted.

   3.2. Thereafter, consideration is given to the (i) constitutional standards and (ii) international law requirements that must govern affirmative action under the EEA. That discussion informs comments concerning the constitutional and

[1] Solidarity has approximately 140 000 members in a variety of occupational fields and sectors. Solidarity is a recognised union at numerous 'designated' employers, and it frequently engages with these and other employers on the implementation of employment equity. It has been actively involved litigation concerning the lawful application of affirmative action under the EEA.

[2] Solidarity also made submissions in response to the request for comments on the amendments to the EEA and the Employment Equity Regulations as contained in Government Notice Nos 992 and 993 in *Government Gazette* Nos 41922 and 41923 of 21 September 2018.

international law compliance of the EEA in the event of the Bill being passed in its current form.

3.3. This is followed by a discussion of a report of the South African Human Rights Commission (SAHRC) that identified certain shortcomings of the EEA and which recommended amendments to the EEA to rectify those shortcomings. Those recommendations have not been addressed by the proposed amendments in the Bill. Indeed, some of the constitutional and international law concerns raised in the report are exacerbated if the proposed amendments are to be adopted.

3.4. In the next section, particular sections proposed to be introduced are dealt with.

3.5. Finally, Solidarity offers certain recommendations for consideration by the Portfolio Committee.

THE BILL IN CONTEXT PART I: THE EMPLOYMENT EQUITY ACT PRIOR TO AMENDMENT AS PROPOSED

Identification of relevant provisions of the EEA

4. In accordance with its preamble, the EEA is a statute particularly concerned *inter alia* with: (i) disparities in employment, occupation and income in the national labour market; (ii) the promotion of the constitutional right to equality; (iii) the elimination of unfair discrimination in employment; and (iv) the achievement of a diverse workforce broadly representative of our people. The EEA has as its stated purpose the achievement of equality in the workplace by: (i) 'promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination'[3]; and (ii)

[3] EEA s 2(*a*).

'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'.[4]

5. According to section 3, the EEA must be interpreted:

5.1. in compliance with the Constitution of the Republic of South Africa Act 108 of 1996 (Constitution);

5.2. so as to give effect to its purpose;

5.3. taking into account any Code of Good Practice issued under it, or under any other employment law; and

5.4. in compliance with the international law obligations of the Republic of South Africa, 'in particular those contained in the International Labour Organisation Convention (111) concerning Discrimination in Respect of Employment and Occupation'.

6. Subject to exceptions in respect of the National Defence Force, the National Intelligence Agency, the South African Secret Service, the South African National Academy of Intelligence and the directors and staff of Comsec, all of the provisions of the EEA apply to 'designated employers', that is essentially all employers who employ more than 50 employees or who meet certain turnover thresholds.

7. Every designated employer must, in order to achieve employment equity, implement affirmative action measures for people from 'designated groups' in terms of the EEA,

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[4] EEA s 2(*b*).

that is black people (defined as a generic term referring to Africans, Coloured and Indians), women and people with disabilities who are citizens of South Africa by birth or descent, or who became citizens before 27 April 1994, or thereafter, but who would have been entitled to acquire citizenship by naturalisation prior to that date but who were precluded by apartheid policies.

8. Section 13 of the EEA compels every employer to:

8.1. consult with its employees as required by section 16 of the statute;

8.2. conduct an analysis as required by section 19 of the EEA;

8.3. prepare an employment equity plan as required by section 20; and

8.4. report to the Direcor-General of the Department of Labour (DG) on progress made in implementing its employment equity plan, as required by section 21 of the EEA.

9. According to section 15(1) of the EEA, affirmative action measures are designed to ensure that 'suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational levels in the workforce of a designated employer'. Affirmative action measures implemented by a designated employer must include:

9.1. measures to identify and eliminate employment barriers, including unfair discrimination, which adversely affect people from designated groups;[5]

[5] EEA s 15(2)(*a*).

9.2. measures designed to further diversity in the workplace based on equal dignity and respect of all people;[6]

9.3. making reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce of a designated employer;[7]

9.4. measures to ensure the equitable representation of suitably qualified people from designated groups in all occupational levels in the workforce;[8] and

9.5. measures to retain and develop people from designated groups and to implement appropriate training measures, including measures in terms of an Act of Parliament providing for skills development.[9]

10. Section 15(3) provides specifically that these last two measures (contemplated in section 15(2)(*d*)) 'include preferential treatment and numerical goals, but exclude quotas'.

11. Furthermore, and subject to section 42 of the EEA, nothing in section 15 is to be read as requiring a designated employer to take any decision concerning an employment policy or practice that would establish an absolute barrier to the prospective or continued employment or advancement of people who are not from designated groups.[10]

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[6] EEA s 15(2)(*b*).
[7] EEA s 15(2)(*c*).
[8] EEA s 15(2)(*d*)(i).
[9] EEA s 15(2)(*d*)(ii).
[10] EEA s 15(4).

12. As is contemplated in section 13 of the EEA, section 16 of the statute provides for consultation with employees.

12.1. A designated employer must take reasonable steps to consult and attempt to reach agreement with a representative trade union representing members at the workplace and its employees or representatives nominated by them, or, if no representative trade union represents members at the workplace, with its employees or representatives nominated by them[11] on -

12.1.1. the conduct of the analysis referred to in section 19;[12]

12.1.2. the preparation and implementation of the employment equity plan referred to in section 20;[13] and

12.1.3. a report referred to in section 21.[14]

12.2. In accordance with section 18(1), a designated employer must disclose to the consulting employees all relevant information that will allow the employees to consult effectively.

13. Also as foreshadowed by section 13 of the EEA, a designated employer must collect information and conduct an analysis, as prescribed, of its employment policies, practices, procedures and the working environment, in order to identify employment barriers which adversely affect people from designated groups.[15] The analysis must

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[11] EEA s 16(1).
[12] EEA s 17(*a*).
[13] EEA s 17(*b*).
[14] EEA s 17(*c*).
[15] EEA s 19(1).

include a profile, as prescribed, of the designated employer's workforce within each occupational level in order to determine the degree of underrepresentation of people from designated groups in various occupational levels in that employer's workforce.[16] Regulations published on 1 August 2014 by way of Government Notice R595 in *Government Gazette* 37873 (Employment Equity Regulations, 2014) prescribe certain requirements to be met in the collection of information and the conduct of an analysis.[17] In particular, the employer may refer to a guide on the applicable national and regionally active population and a description of occupational levels as provided.[18]

14. Section 20(1) is the provision that requires all designated employers to prepare and implement an employment equity plan that will achieve 'reasonable progress towards employment equity in that employer's workforce'. Such an employment equity plan must state:

14.1. the objectives to be achieved for each year of the plan;

14.2. the affirmative action measures to be implemented as required by section 15 (2);

14.3. where underrepresentation of people from designated groups has been identified by the analysis, the numerical goals to achieve the equitable representation of suitably qualified people from designated groups within each occupational level in the workforce, the timetable within which this is to be achieved, and the strategies intended to achieve those goals;

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[16] EEA s 19(2).
[17] Regulation 8.
[18] Regulation 6.

14.4. the timetable for each year of the plan for the achievement of goals and objectives other than numerical goals;

14.5. the duration of the plan, which may not be shorter than one year or longer than five years;

14.6. the procedures that will be used to monitor and evaluate the implementation of the plan and whether reasonable progress is being made towards implementing employment equity;

14.7. the internal procedures to resolve any dispute about the interpretation or implementation of the plan; and

14.8. the persons in the workforce, including senior managers, responsible for monitoring and implementing the plan.

15. In accordance with Regulation 9 of the Employment Equity Regulations, 2014, an employer must refer to the relevant Codes of Good Practice issued in terms of section 54 of the EEA when preparing an employment equity plan. The Code of Good Practice was published on 12 May 2017 by way of Government Notice 424 in *Government Gazette* 40840 (Code of Good Practice), and provides *inter alia* that employment equity plans must take into account the specific circumstances of an organisation for which they are prepared.[19] Detailed provision is made for the process of constructing a plan, and the Code of Good Practice makes plain that what is to be brought into account is amongst others the analysis conducted within the organisation and the national and

[19] Clause 1(*c*).

provincial economically active population. In respect of the numerical goals and targets contemplated in section 20(2)(*c*), the Code of Good Practice provides that these must be 'informed by the outcome of the analysis and prioritised and weighted more towards the designated groups that are most under-represented in terms of the national and provincial economically active population, in terms of section 42 of the EEA'.[20]

16. The EEA contemplates monitoring of compliance with the EEA by the DG or any person or body applying the statute[21] and sets out factors which may be taken into account, namely:

16.1. the factors in section 15 of the EEA;[22]

16.2. the extent to which suitably qualified people from and amongst the different designated groups are equitably represented within each occupational level in that employer's workforce in relation to the demographic profile of the national and regional economically active population;[23]

16.3. reasonable steps taken by a designated employer to train suitably qualified people from the designated groups;[24]

16.4. reasonable steps taken by a designated employer to implement its employment equity plan;[25]

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[20] Clause 7.4(*c*).
[21] EEA s 42.
[22] EEA s 42(1).
[23] EEA s 42(1)(*a*).
[24] EEA s 42(1)(*b*).
[25] EEA s 42(1)(*c*).

16.5. the extent to which the designated employer has made progress in eliminating employment barriers that adversely affect people from designated groups;[26]

16.6. reasonable steps taken by an employer to appoint and promote suitably qualified people from the designated groups;[27] and

16.7. any other prescribed factor.[28]

17. Compliance may also be evaluated by reference to regulation issued under section 55. These are the Employment Equity Regulations, 2014, and section 42(3) of the EEA specifically confirms that the Labour Minister has the power to prescribe in the said regulations which employers' compliance should be determined with reference to the demographic profile of either the national economically active population or the regional economically active population. Legislative provision is therefore made for assessing compliance only with reference to the national economically active population.

18. The aforementioned section and more specifically the factors to be taken into account by, amongst other the DG, in assessing compliance by designated employers, are not mandatory but discretionary. Section 42(1) provides that these factors 'may' be taken into account.

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[26] EEA s 42(1)(*d*).
[27] EEA s 42(1)(*dA*).
[28] EEA s 42(1)(*e*).

Discussion

19. The golden thread that runs through the EEA is the requirement of fairness and reasonableness in the adoption and application of affirmative action measures. Employing proper, broad-based criteria in deciding who should receive the nod will sometimes ensure a proper recognition of the talents of a person who has been the subject of past discrimination, but efficiency considerations of this sort cannot always be relied upon to produce a desired result. Sometimes there is a need to bring considerations of equality into play and then, in giving them their proper weight, strike an appropriate balance between the factors, merit not least, that then cry out for recognition. Any suggestion, therefore, that affirmative action measures may be applied mechanically must be rejected out of hand. Sound reason and fairness are the touchstones.

20. So much is clear from an examination of the EEA. According to its long title, the EEA is directed towards the elimination of unfair discrimination in employment and the achievement of a workforce that is 'broadly' representative of the South African people. Section 2 of the EEA, which sets out the purpose of the statute, recognises not only the implementation of affirmative action measures, but also the promotion of equal opportunity and the elimination of unfair discrimination. The purpose of the EEA is to ensure 'equitable' representation, which, when read in the context of the statute as a whole, must mean 'fair' and 'reasonable' representation of previously disadvantaged persons. Implicit in the meaning of 'equitable' is an assessment not only of what is fair

or reasonable when regard is had to the rights and interests of previously disadvantaged persons, but also the interests and rights of those not so disadvantaged.[29]

21. The substantive provisions of the EEA start by prohibiting unfair discrimination outright,[30] but they save affirmative action measures *if* they are consistent with its equal opportunity, fair treatment and the achievement of *equitable* representation of designated groups in the workforce.[31] Expressly discountenancing the notion that these objects are to be attained by the mechanical use of race and gender demographics,[32] section 20(2)(*c*) emphasizes that equitable representation must include an assessment of the availability of 'suitably qualified' people from designated groups[33] for appointment at particular levels and within particular categories in an organization.

22. This conclusion is consistent with the meaning assigned to 'affirmative action measures' in section 15(1) of the EEA:

> 'Affirmative action measures are measures designed to ensure that *suitably qualified people* from designated groups have *equal employment opportunities* and are *equitably* represented in all occupational categories and levels in the workforce of a designated employer.'[34]

23. In the same vein, section 15(2) provides for progress in representivity to be made through various strategies, such as the identification and elimination of employment barriers which adversely affect persons from designated groups, and 'making *reasonable* accommodation for people from designated groups'.

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[29] *Harksen v Lane* 1998 (1) SA 300 (CC) ('*Harksen*') paras 50 and 51. The rights to equality and dignity are inter-woven, as appears from *Hoffmann v South African Airways* [2000] 12 BLLR 1365 (CC) para 27 ('*Hoffmann*') citing *President of the Republic of South Africa and another v Hugo* 1997 (4) SA 1 (CC) ('*Hugo*') para 41.
[30] EEA s 6(1).
[31] EEA s 6(2).
[32] The footnote to the term 'numerical goals' in s 20(2)(c) provides that the factors set out in s 42(a) are relevant to the determination of numerical goals.
[33] EEA s 20(2)(c).
[34] Emphasis supplied.

24. Equally telling is section 15(3), which expressly states that provision for preferential treatment of designated groups and the setting of targets may not amount to quotas.[35] Likewise, section 15(4) provides that the provisions on affirmative action are not to be construed as placing an obligation on an employer to place an absolute barrier to the prospective or continued employment or advancement of people who are not from designated groups.[36] The Explanatory Memorandum to the Employment Equity Bill (1998) made the point that the provision 'stresses the need for [the promotion of a diverse workforce] in ways which do not put in place absolute barriers to the employment or advancement prospects of any individual'.[37] (The absence of absolute barriers is important: the Constitution specifically provides for affirmative action, but this does not mean that the constitutional provision permits the denial of all opportunities of white males in terms of an affirmative action plan. The preferential measures must be reasonable and proportional, and the denial of all opportunities for one group does not comply with this requirement. In terms of the equality provision the creation of an absolute barrier to the employment or advancement of individuals cannot be reasonable.)

25. Finally, in describing the mode of assessing compliance with the requirements of the EEA, section 42 lists a number of factors to be taken into account. Among the other relevant factors are such matters as whether the employer has made 'reasonable efforts' to implement its employment equity plan and the extent to which the designated employer has made progress in eliminating employment barriers that

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[35] EEA s 15(3).
[36] EEA s 15(4).
[37] Explanatory Memorandum to the Employment Equity Bill (1998) 19 *ILJ* 1345 at 1351.

adversely affect people from designated groups. The factors must inform the numerical goals that an employer sets itself. [38]

26. The statute states that it is not unfair discrimination to implement affirmative action measures that are consistent with the purpose of the EEA,[39] but in order to qualify as an affirmative action measure of this sort, it must be a measure 'designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer'.[40] Such a measure may not constitute a quota.[41]

THE BILL IN CONTEXT PART II: THE CONSTITUTION

The Constitutional treatment of affirmative action

27. The Constitution provides that neither the state nor any other person may unfairly discriminate on the basis of race[42] but says that, '[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'.[43] Needless to say, the EEA is just such an 'affirmative action' measure'.[44]

28. Section 1 of the Constitution states human dignity, the achievement of equality, the advancement of human rights and freedoms and non-racialism and non-sexism as values upon which South Africa is founded. Section 9 enshrines the equality right and

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[38] Footnote 3 to s 20(2)(c), read with s 42(a).
[39] EEA s 6(2)(a)
[40] EEA s 15(1).
[41] EEA s 15(3).
[42] Constitution s 9(3) and s 9(4).
[43] Constitution s 9(2).
[44] The use of the terminology is, in fact, in appropriate. See L Ackermann *Human Dignity: Lodestar for Equality in South Africa* (2013) 342 – 344. The text is hereinafter referred to as 'Ackermann'.

authorises the adoption of measures to redress past patterns of discrimination, while section 10 provides that everyone has inherent dignity and the right to have their dignity respected and protected. In addition, employees are guaranteed the right to fair labour practices.

29. Section 9(2) places a prohibition on unfair discrimination but saves measures designed to promote the interests of people previously subjected to discrimination on one of the enumerated grounds. The category of beneficiaries is not so wide as to include all disadvantaged persons, but is limited to those who have been disadvantaged 'by unfair discrimination'. In other words, the clause operates in favour of those who have been discriminated against without justification. [45] This is because section 9(2) explicitly states that the recipients of the section 9(2) measures must be 'disadvantaged by unfair discrimination'.

30. Section 9(2) gives no blanket guarantee that *any* 'measure' taken under its provisions will be constitutional, irrespective of the nature of the measure and the nature and extent of its impact on third parties.[46] As the Constitutional Court made clear in *Van Heerden*,[47]

30.1. it is only legislative and other measures that *properly* fall within the requirements of s 9(2) that are not presumptively unfair; and

30.2. differentiation aimed at protecting or advancing persons disadvantaged by unfair discrimination is warranted only if the measures concerned conform to the internal test set by section 9(2).[48]

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[45] Ackermann 347.
[46] Ackermann 364. See also Ackermann 181 – 254 for a more general discussion in this regard.
[47] *Minister of Finance and Another v Van Heerden* 2004 (6) SA 121 (CC).
[48] *Van Heerden* para 32.

31. Accordingly, consciousness of race and gender must be tempered by the understanding that the prohibition against unfair discrimination –

'seeks not only to avoid discrimination against people who are members of the disadvantaged groups. It seeks more than that. At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked'.[49]

32. The achievement of the equality goal must inevitably come at a price for those who were previously advantaged.[50] But it is equally clear that the long-term goal of our society is a non-racial, non-sexist society in which each person will be recognized and treated as a human being of equal worth and dignity. Our Constitution recognizes and celebrates diversity, and our equality as citizens within that diversity. In assessing whether a measure will promote equality in the long run, this *must* be borne in mind. Where remedial measures impose substantial and undue harm on those excluded from its benefits, our long-term constitutional goal is threatened.[51]

32.1. As the majority judgment recognized in *Van Heerden*, a restitutionary measure under section 9(2) 'ought not to impose such undue harm on those excluded from its benefits that our long-term constitutional goal [of a non-racial, non-sexist society in which each person will be recognised and treated as a human being of equal worth and dignity] would be threatened'.[52] A restitutionary measure 'must

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[49] *Hugo* para 41.
[50] *Van Heerden* para 44.
[51] *Van Heerden* para 44.
[52] *Van Heerden* para 44.

be reasonably capable of attaining the desired outcome'[53] and if 'the remedial measures are arbitrary, capricious or display naked preference they could hardly be said to be designed to achieve the constitutionally authorized end'.[54]

32.2. In a similar vein, Sachs J stated in his concurring judgment that a restitutionary measure would not pass constitutional muster if the advantaged were to 'be treated in an abusive or oppressive way that offends their dignity and tells them and the world that they are of lesser worth than the disadvantaged'; [55] also that 'if the measure at issue is manifestly overbalanced in ignoring or trampling on the interests of members of the advantaged section of the community, and gratuitously and flagrantly imposes disproportionate burdens on them, the courts have the duty to interfere';[56] and in summation that 'some degree of proportionality, based on the particular context and circumstances of the case, can never be ruled out. That too is what promoting equality (s 9(2)) and fairness (s 9(3)) require'.[57]

32.3. The measures are not meant to be *punitive* but are *restitutionary* in character.[58] In light of the purpose of the Constitution to 'heal the divisions of the past', its implementation must strive to effect reconciliation between those divided, and therefore section 9(2) must be seen as legitimising fair restitution for benefits unjustifiably acquired without furthering either triumphalism or victimhood.[59] The overarching objective of the second sentence of section 9(2) is to authorise

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[53] *Van Heerden* para 41.
[54] *Van Heerden* para 41.
[55] *Van Heerden* para 151.
[56] *Van Heerden* para 152.
[57] *Van Heerden* para 152.
[58] Ackermann 345.
[59] Ackermann 346.

public law and constitutional restitution remedies in favour of those who are still disadvantaged by unfair discrimination that occurred in the past, and which remedies might operate at the expense of those who were unjustifiably enriched by past unfair discrimination.[60]

32.4. The purpose of restitutionary equality is to eradicate past inequality that *continues to survive* despite constitutional provisions outlawing it.[61] Section 9(2) is aimed at restoring or ensuring equality of opportunity for the free unfolding of the personality and self-realisation and self-fulfillment. It does not mandate equality of result by engineering equal outcomes regardless of individual qualities, gifts and talents.[62] Neither the context nor the content of the second sentence of section 9(2) abrogates the prohibitions on discrimination contained in section 9(3) or the dignity or freedom rights of those on whom the burden of making restitution is made. Proper respect must accordingly be paid to the freedom and dignity of those adversely affected. An unmitigated pursuit of equality of result or outcomes would make unacceptable inroads into the freedom of too many people.[63]

33. Since section 9(2) seeks to resolve the tension that inevitably arises when the promotion of one person's equality necessarily trenches on another's equality, the proper outcome can only be achieved by trying to balance competing claims to dignity.[64] The Constitutional Court, in summarizing the relevant considerations to be

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[60] Ackermann 345.
[61] Ackermann 358, citing *National Coalition for Gay and Lesbian Equality and Another v The Minister of Justice and Others* 1999 (1) SA 6 (CC) paras 60 – 61.
[62] Ackermann 387.
[63] Ackermann 387.
[64] Ackermann 358.

taken into account in the assessment of unfair discrimination cases, observed in *Hoffmann v South African Airways*:[65]

'At the heart of the prohibition against unfair discrimination is the recognition that under our Constitution all human beings, *regardless of their position in society,* must be accorded equal dignity. That dignity is impaired when a person is unfairly discriminated against. *The determining factor regarding the unfairness of the discrimination is its impact on the person discriminated against.* Relevant considerations in this regard include the *position of the victim* of the discrimination in society, the *purpose sought to be achieved by the discrimination*, the extent to which the rights or interests of the victim of the discrimination have been affected, and whether the discrimination has impaired the human dignity of the victim.'[66]

34. Writing within this field, Justice Ackermann argues that the prescribed remedial measures do not obliterate the dignity rights of others, in particular their desire for the free unfolding of their personalities and for self-fulfilment. He is of the view that remedial measures must endeavour to preserve as much of the freedom and dignity rights of others as possible.[67] Ultimately, he comes to the conclusion that:

'If the remedial measure does little to advantage the dignity interests of the person disadvantaged by unfair discrimination while, on the other hand, making serious inroads into the dignity interests of the person making or suffering restitution, the measure would not pass muster.'[68]

The EEA and the Constitution

35. In substance, Solidarity submits, the EEA stipulates that considerations of disadvantage flowing from past discrimination can properly be taken into account in determining who should be appointed or promoted to a given position in a workforce. But, we say, the

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[65] *Hoffmann* para 27.
[66] Emphasis supplied.
[67] Ackermann 387.
[68] Ackermann 387.

statute makes it impermissible to treat this consideration as the only factor to be taken into account and so be the sole determinant of the issue since it gives a list of factors to be taken into account in relevant decision-making.

36. We accept that, under the EEA, race and gender can, where appropriate, be used as a proxy for the purpose of assessing the degree of past disadvantage likely to have been experienced by an applicant for a job. This is particularly so when a determination of the degree of disadvantage suffered in consequence of past discrimination is complex, costly or imponderable. Solidarity accepts, moreover, that the statute treats representitivity by race and gender as a touchstone of sorts by which to judge the success or otherwise of a programme designed to remedy past disadvantage and that, in consequence, statistics on this issue supply a potential benchmark for the purpose of making the assessment.

37. However, we submit, the statute does not sanction race and gender profiling that seeks to create a demographically representative workforce without regard to past discrimination. A model of this sort is not concerned with restitution, which looks to the past, but with race and gender norming aimed at the future. Revealing a belief that race and gender are concerns that have an intrinsic and *per se* legitimacy, the model is quintessentially race–based (racialist, if one prefers the word) and gender-based (sexist does not capture the idea satisfactorily). The practical effect of such a model is that preference is given *pari passu* and so wholly without regard to disadvantage – to white males when, as a group or class, they are manifestly not the victims of past discrimination. It is likewise given to coloured and Indian males when, at least arguably, they are the victims of a lesser degree of discrimination than their African counterparts.

38. Such a model is obviously discriminatory within the conception of the anti-discrimination provisions referred to above – the EEA and the equality provisions of the Constitution. The enactments make it clear that it is permissible to frame affirmative action measures by reference to 'categories of persons', but it must be recognized the words were chosen with great care. 'Categories' of persons are not 'groups' (endowed with legal personality) but individuals with a common denominator as far as their identities or experiences are concerned.[69] The 'protection' or 'advancement' envisaged by section 9(2) is for the benefit of persons as individuals. No 'group' is to be seen as a conglomerate enjoying individual legal personality and entitled as such to constitutional benefits. The idea of an unincorporated group being the bearer of constitutional rights has been rejected by the Constitution.[70]

39. The EEA legitimates targets but outlaws quotas. Commentators on this dichotomy can be forgiven for regarding it as merely semantic, but this is not so. The prohibition on quotas is, we submit, aimed at demonstrating precisely the point made above: namely, that race and gender norming is unlawful. It serves also to demonstrate the obverse proposition that making race and gender a threshold criterion and so determinative is impermissible, for a quota (at least within the present context) is a numerical norm by reference to which a candidate succeeds or fails irrespective of merit.[71]

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[69] Ackermann 357. Ackermann argues that categories of persons 'must surely refer to persons, in their individual capacities, who belong to a particular category' – Ackermann 371.

[70] Ackermann 356 - 357. The author argues that this is the effect of *Chairperson of the National Assembly, Ex parte: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC).

[71] 'In the public service at least, the irrational pursuit of the goal of demographic "representivity" at the expense of the public ... renders the discrimination unfair.' Iain Currie & Johan de Waal *The Bill of Rights Handbook* (2013) 504.

THE BILL IN CONTEXT PART III: ICERD

40. As indicated in the first section discussing the EEA, section 3 of the EEA requires that the statute be interpreted to ensure compliance with South Africa's international law obligations. Any proposed amendment to the EEA must be considered to ensure that no aspect of it results in non-compliance with South Africa's international law obligations.

41. The International Convention for the Elimination of All Forms of Racial Discrimination (ICERD), which South Africa ratified on 10 December 1998, has purchase under the Constitution. Article 2 thereof requires signatories to condemn all forms of racial discrimination and to eliminate racial discrimination by 'appropriate means'.

42. In clause 1(4) it pertinently states that '[s]pecial measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination.' The clause, which manifestly countenances affirmative action, propounds a conception of substantive equality that is sensitive to past disadvantages and systemic patterns of discrimination. Crucially, however, it contains a proviso which states that affirmative action 'measures [shall] not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.'

43. The proviso is very important. It insists that affirmative action measures, in seeking to bring about equality, must not use extreme or irrelevant distinctions to achieve equality

of outcome objectives, and must be kept under constant scrutiny to ensure that this principle is observed. Not every measure taken in pursuit of affirmative action should be accepted as legitimate merely because the object of the distinction is to improve the situation of the disadvantaged group - a legal rule is not necessarily legitimate because it pursues a legitimate goal. Affirmative action policies are permissible under international instruments only insofar as they do not contravene the principle of non-discrimination.

44. Article 2(2) of ICERD provides:

> 'State Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.'

45. These obligations must be borne in mind in the evaluation of the proposed amendments to the EEA.

46. In *Glenister II*[72] the Constitutional Court held that international agreements have 'an important place in our law', at the very least as 'interpretive tools to understand and evaluate our Bill of Rights'.[73] It explained:

> 'Our Constitution reveals a clear determination to ensure that the Constitution and South African law are interpreted to comply with international law, in particular international human

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[72] *Glenister v President of the Republic of South Africa & Others* [2011] ZACC 6.

[73] *Glenister II* at para 96.

rights law. Firstly, section 233 requires legislation to be interpreted in compliance with international law; secondly, section 39(1)(b) requires courts, when interpreting the Bill of Rights, to consider international law; finally, section 37(4)(b)(i) requires legislation that derogates from the Bill of Rights to be "consistent with the Republic's obligations under international law applicable to states of emergency." These provisions of our Constitution demonstrate that international law has a special place in our law which is carefully defined by the Constitution.'

47. But it went further. The majority upheld Mr Glenister's objections to a statute on the basis of a mixture of the consideration that it infringed the Bill of Rights and South Africa's international treaty obligations.

48. In amending the EEA, South Africa's international treaty obligations cannot be ignored.

AMENDMENTS RECOMMENDED BY SAHRC NOT FORMING PART OF BILL

The SAHRC Report

49. On 12 July 2018, the South African Human Rights Commission (SAHRC) released its Equality Report 2017/18 with the sub-title *'Achieving substantive economic equality through rights-based radical socio-economic transformation in South Africa'* (Equality Report).

50. For the sake of completeness, a copy of the Equality Report is attached hereto as **annexure A**. By way of summary, attention is drawn to the following aspects of the Equality Report.

50.1. According to the Equality Report, the SAHRC found that the EEA is not constitutionally compliant, and that it violates the obligations imposed by: (i) ICERD; and (ii) the Committee on the Elimination of Racial Discrimination (CERD).

50.2. The executive summary records as one of the key findings of the Equality Report[74] that 'The Employment Equity Act, 55 of 1998's definition of "designated groups" and South Africa's system of data disaggregation is not in compliance with constitutional or international law obligations. Government's failure to measure the impact of various affirmative action measures on the basis of need and disaggregated data, especially the extent to which such measures advance indigenous peoples and people with disabilities, likewise violates international law obligations'.

50.3. Another key finding recorded[75] is that 'The implementation of special measures in the employment equity sphere is currently misaligned to the constitutional objective of achieving substantive equality, to the extent that implementation may amount to rigid quotas and absolute barriers as opposed to flexible targets. This practice may inadvertently set the foundation for new patterns of future inequality and economic exclusion within and amongst vulnerable population groups'.

50.4. In Chapter 1, the Equality Report states[76] that 'special measures are currently misaligned to constitutional objectives. Where special measures are not instituted on the basis of need, and taking into consideration socio-economic factors, they are incapable of achieving substantive equality'.

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[74] At p 5.

[75] At p 5.

[76] At p 8.

50.5. Chapter 6 of the Equality Report is concerned with the 'Key Rights-Based Drivers of Radical Socio-Economic Transformation'.[77]

50.5.1. It commences with a discussion of the meaning of 'affirmative action' or 'special measures' in which it records the caution of the Constitutional Court that measures directed at remedying past discrimination 'must be formulated with due care not to invade unduly the dignity of all concerned. We must remain vigilant that remedial measures under the Constitution are not an end in themselves. They are not meant to be punitive nor retaliatory. Their ultimate goal is to urge us on towards a more equal and fair society that hopefully is non-racial, non-sexist and socially inclusive ... We must be careful that the steps taken to promote substantive equality do not unwittingly infringe the dignity of other individuals – especially those who were themselves disadvantaged' (quoting *South African Police Services v Solidarity obo Barnard*).[78]

50.5.2. The three-pronged test to determine whether affirmative action measures fall within the bounds of section 9(2) of the Constitution (as developed in *Minister of Finance v Van Heerden*)[79] is also recited.

50.5.3. Moreover, a description of the position in international law is provided, namely that it allows for 'special measures' to advance persons subject to discrimination, but that such measures may not entail as their

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[77] See p 28.

[78] 2014 (6) SA 123 (CC) paras 30 – 31, see p 29 of the Equality Report.

[79] 2004 (6) SA 121 (CC).

consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved. Accordingly, affirmative action measures should be temporary, tailored to the needs of the groups and individuals concerned, and should cease once substantive equality is achieved.

50.5.4. Specifically recorded is the consideration of the CERD that 'Special measures should be appropriate to the situation to be remedied, be legitimate, necessary in a democratic society, respect the principles of fairness and proportionality, and be temporary. The measures should be designed and implemented on the basis of need, grounded in a realistic appraisal of the current situation of the individuals and communities concerned'.[80] The Equality Report also points out that 'need must be determined on the basis of data disaggregated by "race, colour, descent and ethnic or national origin and incorporating a gender perspective, on the socio-economic and cultural status and conditions" of the group concerned'.[81]

50.5.5. The Equality Report pays specific attention to the provisions of the EEA, and comes to the conclusion that affirmative action is designed under the statute to provide initial economic opportunities, but also to secure the advancement of persons once appointed. Emphasis is placed on the consideration that numerical goals are required, but that quotas are

[80] At p 30.

[81] See p 30.

prohibited and that employers are not entitled to adopt policies that would establish absolute barriers to prospective or continued employment of persons who are not from designated groups.

50.5.6. Under the heading 'Targeted special measures based on need' it is questioned whether the EEA or its implementation is not leading to new imbalances,[82] and noted that indigenous peoples (those whose ethnic descent may be from mixed race marriages) and linguistic or tribal minorities within the designated groups are 'not accommodated by the EEA'.[83] Government's approach, which objects against greater disaggregation of data, is said to be 'problematic', because 'Decisions based on insufficiently disaggregated data fail to target persons or categories of persons who have been disadvantaged by unfair discrimination, as required by the three-pronged test for affirmative action'.[84] The Equality Report notes that 'Without first taking the characteristics of groups into account, varying degrees of disadvantage and the possible intersectionality of multiple forms of discrimination (based on race, ethnicity, gender or social origin) faced by members of vaguely categorized groups, cannot be identified. Moreover, the current classificatory system and disaggregation of data fails to acknowledge multiple forms of discrimination faced within population groups. For example, given that inequality between members of the Black African

[82] At p 33.

[83] At p 34.

[84] At p 34.

population group is higher than in any other racial group, it is foreseeable that current practice might result in a job opportunity for a wealthy Black man of Zulu origin, rather than a poor Black woman from an ethnic minority. Special measures accordingly do not account for socio-economic differences within broadly defined population groups. The CERD's requirement for the implementation of special measures on the basis of need, and a related "realistic appraisal of the current situation of the individuals and communities" concerned, cannot be met without a more nuanced disaggregation of data'.[85]

50.5.7. In the context of the heading 'Special measures designed to advance vulnerable groups', the Equality Report explains that 'Due to the fact that designated groups are bluntly classified and data is insufficiently disaggregated, measures are not capable of being targeted at the most vulnerable groups in society, and can likewise not be designed to respond to new forms of discrimination or compounded discrimination'.[86]

50.5.8. Although acknowledging the Constitutional Court's attempt to distinguish between rigid quotas and flexible targets, the Equality Report records that the court has been sharply divided on this score. It is also said that 'the Court has inadvertently created the risk that members of designated groups – and especially those who suffer multiple forms of discrimination – may be prejudiced by the rigid implementation of

[85] See pp 34 – 35.

[86] At p 35.

targets, thereby raising the spectre of new imbalances arising'.[87] In this regard, reference was made to the *Barnard* case[88] where SAPS was held to have been entitled not to promote a white woman, even though white women are from a designated group under the EEA, and the application of the so-called 'Barnard principle' to other groups in subsequent litigation in *DCS*.[89] The Equality Report concludes that 'This effectively means that where, for example, African females are sufficiently represented at a certain employment level, a wealthy, heterosexual White man could be granted preferential treatment to the detriment of a poor, African, homosexual woman'.[90] In the view of the SAHRC,[91]

'The latter application of the *Barnard* principle therefore conflicts with the CERD's requirement for special measures to be adopted on the basis of a realistic appraisal of need, taking into account the social and economic circumstances of the group or individual concerned. It furthermore stands in opposition to the approach reflected in the National Development Plan, whereby preference should be accorded on the basis of race "for at least the next decade" when defining historical disadvantage. Where special measures may result in new imbalances or exacerbate current inequality viewed in the labour context more broadly, it is doubtful that such measures are "designed to advance people in need of remedial measures. Worryingly, it can lead to perverse consequences and "token" affirmative action where minority status, or new patterns of discrimination and inequality within designated groups, is not properly considered.'

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[87] At pp 35 – 36.

[88] *South African Police Service v Solidarity obo Barnard* 2016 (6) SA 123 (CC).

[89] *Solidarity and Others v Department of Correctional Services* 2016 (5) SA 594 (CC).

[90] See p 36.

[91] At p 36.

50.5.9. In discussing the topic 'Special measures must promote the achievement of equality', the authors of the Equality Report note that 'Currently, special measures in the employment equity context raise several concerns in respect of the requirement for affirmative action to promote equality'.[92] It is stated that 'due to challenges in classification and data disaggregation ... equality of outcomes cannot be achieved for marginalized individuals who do not fit comfortably within the crass categories of African, Coloured or Indian population groups. Furthermore, to the extent that measures are targeted at people without assessing need or recognizing intersecting forms of discrimination and disadvantage, special measures will fail to promote substantive equality. In any event, it is not possible to measure the impact of special measures on the most vulnerable persons or groups, if those persons or groups are not identified based on accurate data in the first instance'.[93] Moreover, it is noted that 'due to polycentric consequences that may result from the application of the *Barnard* principle, existing patterns of disadvantage may be exacerbated or new patterns of disadvantage may arise, thereby prejudicing the achievement of substantive equality'.[94]

50.5.10. Upon consideration of the conclusion of this court in the so-called *DCS* case, the SAHRC notes that the 'requirement to consider regional demographics makes sense given the uneven distribution of different

[92] At p 36.

[93] At p 36.

[94] At p 37.

population groups across South Africa. ... A context-sensitive approach is thus congruent with the CERD's guidance on the interpretation and implementation of the ICERD and its requirement for special measures' (at p 37). However, as the Equality Report correctly notes, section 42 of the EEA has been amended and it now 'renders the consideration of regional demographics discretionary. A failure to consider regional demographics not only stands in conflict with the CERD's position on context-sensitive implementation of special measures, but may simultaneously severely prejudice members of certain designated groups in provinces where they are more significantly represented. Furthermore, considering the huge problem constituted by unemployment in South Africa, the legislative amendment and consequent implementation of affirmative action measures may provoke urban migration and thereby exacerbate existing special injustices' (at pp 37 – 38,).

50.6. Based on these observations, the SAHRC found *inter alia* that:

50.6.1. 'the EEA's definition of "designated groups" and South Africa's system of data disaggregation are not in compliance with constitutional or international obligations imposed by the CERD read in conjunction with the CERD's general recommendations and concluding observations'.[95]

[95] At p 39.

50.6.2. 'It is accordingly recommended that the EEA be amended to target more nuanced groups on the basis of need, and taking into account social and economic indicators' and that the government report to the SAHRC within six months of the release of the Equality Report 'on steps taken or intended to be taken to amend the EEA ...' (at p 39).

50.6.3. 'It is further found that the EEA and its implementation, as well as the design of special measures, are currently misaligned to the constitutional objective of achieving substantive equality. It is accordingly recommended that in qualitatively assessing the impact of affirmative action measures on vulnerable groups, including indigenous people and people with disabilities, the DOL, in collaboration with the CEE and in consultation with National Treasury, undertake a representative assessment of the implementation of employment equity plans of designated employers in order to ensure that targets are flexibly pursued and do not amount to rigid quotas'.[96]

50.6.4. 'The DOJCD, in consultation with the DOL and CEE, should determine whether and how the EEA can be amended to require a qualitative and context-sensitive assessment of need when employment equity plans are implemented. The EEA should be further amended to revert to the position where the consideration of the regionally economic active population in relation to representational levels is mandatory and not

[96] At p 39.

discretionary'.[97] Moreover, the 'DOJCD, DOL and CEE must jointly report to the [SAHRC] within six months of the release of this Report on information considered and steps intended to be taken to address these recommendations'.[98]

The amendments are not responsive to the Equality Report

51. The Department and the Minister were not responsive to the recommendations of the SAHRC as set out in the Equality Report.[99]

52. Indeed, the Bill moves in the opposite direction of that which was proposed for consideration by the SAHRC, as discussed more fully hereinbelow:

52.1. Clause 4 of the Bill seeks to insert section 15A to empower the Labour Minister to: (i) identify national economic sectors for the purposes of the administration of the Act; and (ii) determine numerical targets for these sectors. Clause 6, for its part, seeks to amend section 20 of the EEA in order to link the sectoral employment equity targets to the numerical targets set by the designated employers in the employment equity plans of their workplaces.

52.2. Clause 11 of the Bill seeks to amend section 42 of the EEA 'in order to clarify' that a designated employer's compliance with its obligations to implement employment equity may, in addition to being measured against the demographic profile of the national or regional economically active population, be measured

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[97] At p 40.

[98] At p 40.

[99] Solidarity's efforts through the courts to enforce the recommendations of the SAHRC were not met with success. The Labour Court held that the Equality Report was not binding, with the Labour Appeal Court and the Constitutional Court declining to entertain appeals against that finding.

against compliance with the sectoral numerical targets set by the Labour Minister in terms of the proposed section 15A.

52.3. In the circumstances, these amendments place greater emphasis on the introduction of 'quotas' to be complied with (as discussed more fully below).

53. Although the Equality Report has been found not to be binding[100] the recommendations ought not simply be ignored:

53.1. The SAHRC is mandated by section 184 of the Constitution to promote respect for human rights and a culture of human rights; to promote the protection, development and attainment of human rights; and to monitor and assess the observance of human rights in South Africa. It has the power under section 184(2) of the Constitution to: (i) investigate and report on the observance of human rights; (ii) take steps and secure appropriate redress where human rights have been violated; (iii) carry out research; and (iv) educate;

53.2. The South African Human Rights Commission Act 40 of 2013 (the SAHRC Act) provides in section 13(1)(*a*) that the SAHRC *inter alia* 'is competent and is obliged to ... make recommendations to organs of state at all levels of government where it considers such action advisable for the adoption of progressive measures for the promotion of human rights within the framework of the Constitution and the law, as well as appropriate measures for the further observance of such rights'.[101]

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[100] *Solidarity v Minister of Labour and Others* (J3092/18) [2019] ZALCJHB 277; [2020] 1 BLLR 79 (LC); (2020) 41 ILJ 273 (LC) (8 October 2019).

[101] SAHRC Act s 13(1)(*a*)(i).

53.3. In addition, section 13(1)(*b*) empowers and obliges the SAHRC to monitor the implementation of, and compliance with, international and regional conventions and treaties, international and regional covenants and international and regional charters relating to the objects of the SAHRC.[102] The SAHRC may 'recommend to Parliament or any other legislature the adoption of new legislation which will promote respect for human rights and a culture of human rights'[103] and, if the SAHRC is of the opinion that any proposed legislation may might be contrary to Chapter 2 of the Constitution or to norms of international human rights law which form part of South African law or to other relevant norms of international law, it must immediately report that fact to the relevant legislature.[104]

53.4. Finally, the SAHRC is the agent of the CERD that oversees ICERD. It has been specifically declared that for purposes of article 14, paragraph 2 of ICERD, the SAHRC is the body within the Republic of South Africa's legal order that is competent to receive and consider petitions from individuals relating to rights set out in the ICERD.

54. The SAHRC, *qua* Chapter Nine institution, plays a very significant role in our constitutional democracy. Although section 18(4) of the SAHRC Act does not require 'compliance' with the recommendations in the sense that they must be implemented and/or that the actions so recommended be taken, that provision is instructive for providing that the recommendations cannot simply be ignored without a response.

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[102] SAHRC Act s 13(1)(*b*)(vi).

[103] SAHRC Act s 13(2)(*a*).

[104] SAHRC Act s 13(2)(*b*).

55. Accordingly, the parliamentary process of evaluating the proposed amendments to the EEA must include consideration of the SAHRC recommendations and the failure of the Department and the Labour Minister to address these in proposing amendment to the EEA. It must also include consideration of the degree to which concerns raised in the Equality Report are exacerbated through the proposed amendments (as discussed more fully hereinbelow), in circumstances where the SAHRC found that the EEA was not constitutionally compliant.

INSERTION OF SECTIONS 15A

The proposed provision

56. Clause 4 of the Bill proposes to introduce a new section 15A, as follows:

> **'Determination of sectoral numerical targets**
>
> 15A. (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 Classification of all Economic Activities published by Statistics South Africa.
>
> (2) The Minister may prescribe criteria that must be taken into account in identifying sectors and sub-sectors for the purposes of this section.
>
> (3) The Minister may, after consulting the National Minimum Wage 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).
>
> (4) A notice issued in terms of subsection (3) 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.
>
> (5) A draft of any notice that the Minister proposes to issue in terms of subsection (1) or subsection (3) must be published in the Gazette, allowing interested parties at least 30 days to comment thereon.'

57. Clause 4 thus proposes to empower the Minister to (i) identify national economic sectors; and (ii) determine numerical 'targets' for these sectors.

Unfettered power & internal incoherence

58. The doctrine of separation of powers infuses our Constitution. The doctrine recognizes the functional independence of the three branches of government, and the checks and balances associated with the doctrine prevent the branches of government from usurping each other's power.

59. For purposes of this commentary, it is accepted that the 'making of delegated legislation by members of the Executive is an essential part of public administration',[105] and that Parliament may pass legislation delegating legislative functions to other bodies.[106] However, because delegation undermines the doctrine of separation of powers, there are (and must be) important constitutional limitations on the ability to delegate power.

60. Delegation of legislative power that entails the grant of broad discretionary power, without making provision for guidelines for the exercise of the discretionary power, may fall foul of the Constitution.

60.1. In *Dawood v Minister of Home Affairs*[107] the Constitutional Court considered wide powers granted to the Department of Home Affairs to grant or extend residence permits, without providing any criteria to guide the exercise of the discretionary powers. The Court held that the legislature must 'take care when legislation is drafted to limit the risk of an unconstitutional exercise of the discretionary power it confers'.[108] It reasoned that it was not enough to say that there might be

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[105] *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) at para 113.
[106] *Executive Council, Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 (CC) at para 51.
[107] 2000 (3) SA 936 (CC).
[108] At para 48.

opportunities later to challenge the exercise of a wide discretionary power;[109] Parliament has to take steps to reduce the risk of possible abuses of power and give guidance as to when the limitation of rights would be justifiable.

60.2. In *Janse van Rensburg NO v Minister of Trade and Industry NO,*[110] the Constitutional Court considered the wide power conferred on the Minister of Trade and Industry under the Consumer Affairs (Unfair Business Practices) Act[111] to suspend a business or attach or freeze its assets while the business was being investigated. The discretion granted was criticised for being 'unfettered and unguided',[112] and the Court held that the absence of guidance contributed to the power being an unjustifiable limitation on the right to procedurally fair administrative action.[113]

60.3. In *Ambruster v Minister of Finance*[114] the Constitutional Court indicated that it would be prudent to formulate guidelines to encourage the consistent and correct application of power,[115] even where a variety of factors may be relevant to the exercise of power and thus difficult for the legislature to specify.

61. In the present instance, the proposed section 15A(1) appears to provide a guideline on what standard must be used to identify national economic sectors for purposes of the EEA. However, section 15A(2) then grants an unfettered power to the Labour Minister to 'prescribe criteria that must be taken into account in identifying sectors and sub-sectors for the purposes of this section'. Not only are the proposed sections 15A(1) and

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[109] At para 48.
[110] 2001 (1) SA 29 (CC).
[111] Act 71 of 1998.
[112] At para 29.
[113] At para 25.
[114] 2007 (6) SA 550 (CC).
[115] At para 80.

15A(2) internally incoherent, but there is no guidance given to the Minister on what must inform the criteria to be used to make his determination. In addition, it is notable the Minister's identification of sectors in section 15A(1) is required to be published in the Government Gazette, and made subject to the requirement that interested parties be allowed at least 30 days to comment on such determination; however, the section 15A(2) power is not limited in that way. The provision as currently proposed includes no limitation on the power of the Labour Minister to set criteria, and the exercise of the power is not made subject to comment. This is not aligned with the standard set by the Constitutional Court.

62. Section 15A(3), for its part, confers upon the Labour Minister the power to set numerical targets for any national economic sector that the Labour Minister has identified under the section 15A(1) power. No standard is set for the Labour Minister to comply with in setting the numerical targets that may be set.

62.1. This stands in stark contrast to the various requirements of the EEA that demand analysis of the employer's workforce, consideration of the realities facing employers (staff turnaround, the availability of suitable personnel and the like) and consultation with employees in the preparation of employment equity plans that contain employment equity targets suitable to that employer.

62.2. It is noted that the Draft Employment Equity Regulations, 2018[116] (Draft EE Regulations) proposes to introduce regulation 7A.

62.2.1. Under the heading 'Determination of numerical targets for national economic sectors in terms of section 15A', the proposed regulation 7A

[116] Government Notice No 993 in *Government Gazette* No 41923 of 21 September 2018.

prescribes that 'any relevant criteria may be taken into account, including (i) 'the qualification, skills, experience' (*sic*), (ii) the rate of turn-over and natural attrition within a sector; and (iii) recruitment and promotional trends within a sector'.

62.2.2. The effect of the proposed regulation is that the very Minister charged under the EEA with setting the targets is also determining the criteria by reference to which the targets are set. The criteria ought to be set by the legislature, not by way of regulation by the Labour Minister.

62.2.3. Leaving aside the non-sensical content of proposed regulation 7A(1)(a), which does not link qualification, skills and experience to any measurable description (such as 'of employees required within a sector'), the proposed standard for setting criteria is so broad as to be meaningless: The Labour Minister 'may' take into account 'any relevant criteria'. The use of the word 'may', as opposed to 'must' or 'shall' ostensibly affords the Labour Minister a discretion whether or not to take into account the relevant criteria. Moreover, the listed criteria are hardly useful for determination of the appropriate targets to be set.

63. The appropriate course of action would be to provide for criteria in the statute itself (so as not inappropriately to delegate the authority of the legislature to set criteria to the Labour Minister), to make the consideration of the criteria obligatory and to provide more fulsome criteria relevant to the determination of the targets.

<u>Problematic 'consultation' clause</u>

64. The only attempt at placing any limit on the Labour Minister is problematic as well. The text of the Bill states that the numerical targets will be set by the Minister 'after

consulting the National Minimum Wage Commission'. In the explanatory memorandum, it is stated that 'The Minister is required to consult with the Employment Equity Commission on the proposed sectors and sectoral targets'.[117]

65. The text of the Bill at present would create an internally inconsistent position.

65.1. Section 28 of the EEA in its current form established the Commission for Employment Equity. The functions of the Commission for Employment Equity are set out in section 30, being to advise the Minister on (i) codes of good practice issued by the Minister in terms of section 54; (ii) regulations made by the Minister in terms of section 55; and (iii) policy and other matters concerning the EEA. Importantly, section 30(2)(b) provides that the Commission for Employment Equity is empowered 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 the setting of numerical goals in various sectors'.

65.2. The National Minimum Wage Commission, for its part, was established under section 8 of the National Minimum Wage Act No 9 of 2018 (Minimum Wage Act). The functions of the National Minimum Wage Commission as set out in section 11 of that statute are associated with matters concerning the national minimum wage, income differentials, matters concerning basic conditions of employment and the like. Although section 11(h) provides that the National Minimum Wage Commission may 'perform any such function as may be required of the Commission in terms of any other employment law', the National Minimum Wage Commission appears to be ill-suited to the task proposed to be given to it.

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[117] At para 2.4.3.

Moreover, whilst the power in section 11(h) is afforded in general terms, the function of the Commission for Employment Equity (to research and report on appropriate and well-researched benchmarks and norms for the setting of numerical goals in various sectors) is specific.

65.3. In light of the (i) role of the Commission for Employment Equity and (ii) the wording of the explanatory memorandum, the text of the Bill is an error that must be corrected.

66. However, whether the text provides for consultation with the Commission for Employment Equity or the National Minimum Wage Commission, it does not oblige the Labour Minister to take heed of the advices of the body consulted. In *McDonald and Others v Minister of Minerals and Energy and Others*[118] the Court discussed the differences between provisions that require agreement in order for valid recommendations to be made, and those where agreement is not required. It held:

'[17] These differences are not just semantic, but have important consequences: where a functionary is required to act "on recommendation of" another, the law requires that there be agreement between them. Thus, the Minister was not obliged to accept the Regulator's recommendation and she had the discretion to refuse to follow it. But she cannot make regulations that have not been recommended by the NNR. Ultimately it is only if agreement is reached that valid regulations can be made.

[18] Likewise, where the law requires a functionary to act "in consultation with" another functionary, this too means that there must be concurrence between the functionaries, unlike the situation where a statute requires a functionary to act "after consultation with" another functionary, where this requires no more than that the ultimate decision must be taken in good faith, after consulting with and giving serious consideration to the views of the other functionary.'[119]

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[118] 2007 (5) SA 642 (C).

[119] At paras 17 – 18. Footnotes omitted. Emphasis supplied.

67. If the consultation is indeed intended by the Legislature to be with the National Minimum Wage Commission, as currently proposed in the text, it is difficult to imagine what useful information can be supplied to assist with the formulation of appropriate targets. Consultation with the Commission for Employment Equity would be more sensible, but if the Labour Minister is at liberty to set targets without reaching agreement with the Commission for Employment Equity, the possibility for abuse is manifest.

68. Moreover, consultation with either the Commission for Employment Equity of the National Minimum Wage Commission, as provided for, does not include any requirement of consultation with relevant stakeholders to be affected by the 'targets' (in stark contrast to the requirements for consultation by employers with relevant stakeholders when an employment equity plan is prepared). It is difficult to imagine that the Labour Minister can come to a rational decision on appropriate targets for various occupational levels in a variety of sectors (either nationally or regionally) without having the benefit of consultation with stakeholders that are able to provide relevant information concerning the skills required to perform certain functions within a sector, the rates of turnover of employment within an industry, the rates of attrition within an industry and the like.

State interference and limitation of freedom

69. The Bill allows the Minister virtually untrammeled powers to set targets for industries and sectors, in circumstances where the exercise of that power involves state intervention and a limitation of freedom, in the sense that the process of equalization is being achieved by state intervention that reaches into the private sphere.

70. As a general proposition, a problem arises when an excessive amount of state interference leads to the creation of a state controlled society where the amount of freedom continually decreases for the alleged sake of promoting the common good. In the case of employment equity, the 'top-down' approach makes little sense. It has to be accepted that proportional representation of every population group at every level and in every conceivable field is not necessarily 'equitable representation' as envisaged in the EEA. If that were so, the EEA would not have provided for analysis, consultation and the development of employment equity plans, and nor would section 42 have provided for the consideration of the qualifications of suitable persons for employment and progress reported. The determination of what is 'equitable' is not a simple exercise of considering the make-up of the ecomonically active population.

71. A situation where the state (through the Labour Minister) controls the allocation of employment on the basis of race and gender is societal manipulation and not equitable representation. The aim of achieving equitable representation is to ensure that unfair discrimination is eliminated and that every person has the same opportunity regardless of race or gender. The rigid setting of 'targets' aimed at proportional representation in the workforce does not mean that the aim of a just and fair society is achieved.

Interaction with section 42 amendment

72. As is discussed more fully hereinbelow, the proposed introduction of section 15A must be read with the proposed amendment to section 42. The targets set by the Labour Minister become a factor that may be taken into account in determining whether an employer is implementing employment equity in terms of the EEA.

72.1. Section 42 allows for a discretion to be exercised on whether the targets set by the Labour Minister are to be taken into account in the assessment, just as it allows for a discretion to be exercised in taking into account other factors.

72.2. Since section 42 allows for such a wide discretion to be exercised by the person assessing compliance, the threat exists that numerical 'targets' set by the Labour Minister become the only factor taken into account in those cases where sectoral targets are set. This would undermine the structure of the EEA, which makes plain that:

72.2.1. targets are to be set by an employer based on analysis and consultation, as appears *inter alia* from EEA sections 13(2), 16,17, 19 and 20; and

72.2.2. numerical targets from but part of the measures to achieve employment equity (EEA section 15(3)).

72.3. Unless section 42 re-introduces the requirement that all factors listed therein be considered cumulatively (as had been the case in the original version of the EEA, prior to the 2014 amendment), the introduction of section 15A and/or the amendment to section 42 will undermine the entire legislative structure of the EEA.

The purpose of the Labour Minister's power to set targets is ill-conceived

73. The text of the Bill proposes the setting of 'targets' by the Labour Minister, with a particular purpose: 'ensuring the equitable representation of suitably qualified people from designated groups at all occupational levels in the workforce'.[120] The language employed entails a measure of obligation on an employer to comply with the Ministerial

[120] Proposed s 15(3).

targets (a conclusion also supported by the proposed amendment to section 42). In this manner, the introduction of the Ministerial power to set 'targets' suggests the creation of a quota. This is inconsistent with the existing text of the EEA, and also contrary to the case precedent of the Constitutional Court: *Barnard*[121] makes plain that flexibility and inclusiveness are non-negotiable qualities of affirmative action measures, and that job reservation (that is, the rigid application of race-based quotas) is 'properly prohibited' under our constitutional dispensation.[122] For this reason 'a decision-maker cannot simply apply the numerical targets by rote'.[123]

74. The difference between targets and quotas is important to bear in mind in the present context:

74.1. Quotas are rigid and exclusionary: they are required to be met, irrespective of circumstance. Goals, or targets, on the other hand, are flexible and inclusive: they are programme objectives translated into numbers, they provide a target to strive for and vehicle for measuring progress.

74.2. Put differently, goals are based on rational considerations, including degrees of under-representation, barriers, and attempts to eliminate them, and the available pool of suitably qualified persons, sometimes within a specific region. Quotas, on the other hand, are a requirement to hire (make use of) a fixed number of persons during a given period, or the reservation of vacancies for designated groups. Not meeting a goal does not result in a penalty, because a number of factors are

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[121] *Supra.*
[122] *Barnard* at para 42.
[123] *Barnard* at para 96. Emphasis supplied.

considered to determine whether reasonable progress has been made.[124] Where penalties are imposed for not meeting the number set, this is indicative of a quota.

75. It may be said that the distinction between a quota and a target lies in the operative mechanics of the measure - whether it has direct or indirect effect.[125]

75.1. Direct effect measures are those producing immediate end results for the benefiting groups (such as quotas where specific positions, or a specific number of positions are reserved for members of a group). The measure is, in a sense, indifferent to the process of selection, because it aims only that producing specific results. Although at first glance quotas may be regarded as more acute and vigorous in their pursuit of equality, they are not truly radical as transformational tools because they do not cater for the roots of the pathology.

75.2. Measures with indirect effect are ones under which a procedure is set up to enhance equality of opportunities as a means of achieving substantive equality, without focus on the outcome of the procedure. Measures that focus on the procedure to enhance opportunity are flexible, because they can adjust to the particularities of each context in order to maximize results. Moreover, they aim at curing the *causes* of underrepresentation instead of providing relief at the end

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[124] JL Pretorius, ME Klinck, CG Ngwena *Employment Equity Law, August 2013 [10-42],* and the authorities there cited.

[125] George Gerapetritis *Affirmative Action Policies and Judicial Review Worldwide* Springer International Publishing Switzerland 2016 at p 5.

point. Arguably, such measures are more effective as transformational measures in the long run.

76. Gerapetritis argues that:

> 'Discerning between measures of direct and indirect effect may also contribute significantly to the conceptual clarity of affirmative action. However, the most expedient linguistic approach would suggest that when the measure is of a direct effect, such as the imposition of rigid quotas or quotas by effect, it is more appropriate to use the terminology of "positive discrimination", whereas if the measure is of an indirect effect, thus encouraging participation of underrepresented groups without establishing quotas, the language of "positive/affirmative" action is more apposite. The above distinction indicates that quotas are by definition a mode of discrimination, since they award automatic end-result benefits, whereas measures providing motives have a mere affirmative nature without immediate implications on social competition.'[126]

77. In circumstances where the Labour Minister's power is not aimed at, for example, merely publishing rates of transformation in particular sectors or industries, so as to allow for comparisons to be made between a particular employer's progress and the sector/industry standard, the Bill proposes the introduction of a standard that must be met, and not deviated from. Section 42 as amended (if the Bill is passed in its current form) will create a standard by reference to which compliance with the statute will be measured, and against which compliance may be measured exclusively (given the discretion in the language of section 42 that allows for selective and not cumulative consideration of the factors listed therein). Notably, the Bill also proposes to introduce an amendment to section 53 of the EEA, which provides that State contracts may only be issued to employers that have been certified as being in compliance with their

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[126] *Id* at pp 5 - 6.

obligations under the EEA. Clause 12 of the Bill seeks to amend section 53 to provide that the Labour Minister may only issue a compliance certificate if the employer has complied with any applicable sectoral targets (or has raised a reasonable ground for non-compliance). The sectoral 'targets' thereby become enforceable quotas that have to be met in order to (i) prove compliance and (ii) qualify for State contracts.

78. When the introduction of section 15A is read in the context of the Bill as a whole, the conclusion reached is that the Ministerial intervention is not aimed at identifying the causes of slow transformation in an industry, but simply to engineer an outcome. In this sense, the Ministerial targets have the quality of a quota rather than a target.

79. Solidarity accepts that there may be a purpose with the Commission for Employment Equity and the Labour Minister publishing sectoral information based on analysis, but that sectoral data ought not be treated as a target. Sectoral data on rates of transformation, rates of staff turnover and the like may potentially be used as a reference point against which employers are able to measure their own transformative project, but such rates ought not to serve as quotas to be met by an employer.

AMENDMENT OF SECTION 20

80. Section 20 obliges an employer to prepare and implement an employment equity plan 'which will achieve reasonable progress towards employment equity in that employer's workforce'.[127] That plan must include a variety of measures, including the setting of targets based on identified underrepresentation in the workforce of that employer. Each employment equity plan is – and must be – unique to the circumstances of that employer.

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[127] Emphasis supplied.

81. The proposed amendment to section 20 would introduce the requirement that '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.

82. The amendment, if effected, would be inconsistent with the existing provisions of the EEA and/or undermine the structure created by the EEA. Section 17 of the EEA obliges an employer to consult with employees on conducting an analysis to identify underrepresentation (as prescribed in section 19) and on the content of an employment equity plan (including numerical targets) (EEA section 20). The question begs, if the numerical goals set by the Labour Minister (with no direct knowledge of a particular employer's circumstances) must inform the numerical goals of that employer, what is the purpose of the consultation with the employees? The introduction of section 20(2A) would result in a situation where the consultation with employees is rendered meaningless, because the numerical targets are not to be set in consequence of the analysis and consultation process followed, but by operation of the Ministerial assessment of the industry.

83. There are grave dangers associated with the setting of targets by the Minister, which creates a potential for setting targets that are unrealistic in a particular workplace. An employer – even one who has taken reasonable steps to appoint and promote suitably qualified people from the designated groups – may have a low staff turnover at senior levels and therefore be unable to appoint staff from the designated groups for a particular period.

84. If an employer sets employment equity targets in accordance with the Minister's determination and without taking into account the factors that affect its own operation, such targets would be unrealistic.

84.1. Notably, in *Robinson & Others v PriceWaterhouseCoopers*[128] Revelas J held that 'Affirmative action is not and never has been a legitimate ground for retrenchment'.[129]

84.2. Moreover, the Code of Good Practice on Dismissal Based on Operational Requirements[130] (Retrenchment Code) recognises, it is 'difficult to define all the circumstances that might legitimately form the basis of a dismissal for this reason,'[131] it must be accepted that an employer cannot shoe-horn compliance with affirmative action obligations into an operational requirement.

84.3. Put simply, it is not open to an employer to assess its workforce and consider that it must embark upon a retrenchment exercise to 'get rid of' employees of a class that is deemed to be 'overrepresented' in the workforce, in order to achieve compliance with its employment equity targets; compliance with employment equity targets cannot be said to be an 'operational requirement'. This view is supported by the content of section 15(4) of the EEA, which makes it clear that there is no obligation on an employer to take decisions concerning employment policy or practices that would establish absolute barriers to the continued employment of persons not from the designated groups under the statute.

84.4. The rate of staff turnover or natural attrition in a sector, or recruitment and promotional trends within a sector is not a useful indicator of whether a particular employer experiences the same trends.

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[128] [2006] 5 BLLR 504 (LC).
[129] At para 22.
[130] GN 1516 in *Government Gazette* 20254 of 16 July 1999.
[131] At para 1.

AMENDMENT OF SECTION 42

85. Prior to the Amendment Act 47 of 2013, section 42 of the EEA read:

> **'Section 42 - Assessment of compliance**
>
> In determining whether a designated employer is implementing employment equity in compliance with this Act, the Director-General or any person or body applying this Act must, in addition to the factors stated in section 15, take into account all of the following:
>
> (a) The extent to which suitably qualified people from and amongst the different designated groups are equitably represented within each occupational category and level in that employer's workforce in relation to the-
>
> (i) demographic profile of the national and regional economically active population;
>
> (ii) pool of suitably qualified people from designated groups from which the employer may reasonably be expected to promote or appoint employees;
>
> (iii) economic and financial factors relevant to the sector in which the employer operates;
>
> (iv) present and anticipated economic and financial circumstances of the employer; and
>
> (v) the number of present and planned vacancies that exist in the various categories and levels, and the employer's labour turnover;
>
> (b) progress made in implementing employment equity by other designated employers operating under comparable circumstances and within the same sector;
>
> (c) reasonable efforts made by a designated employer to implement its employment equity plan;
>
> (d) the extent to which the designated employer has made progress in eliminating employment barriers that adversely affect people from designated groups; and
>
> (e) any other prescribed factor.'

86. With effect from 1 August 2014, section 42 was substituted by section 16 of Act 47 of 2013. It now reads:

> **'42 Assessment of compliance**
>
> (1) In determining whether a designated employer is implementing employment equity in compliance with this Act, the Director-General or any person or body applying this Act may, in addition to the factors stated in section 15, take the following into account:

(a) The extent to which suitably qualified people from and amongst the different designated groups are equitably represented within each occupational level in that employer's workforce in relation to the demographic profile of the national and regional economically active population;

(b) reasonable steps taken by a designated employer to train suitably qualified people from the designated groups;

(c) reasonable steps taken by a designated employer to implement its employment equity plan;

(d) the extent to which the designated employer has made progress in eliminating employment barriers that adversely affect people from designated groups;

(dA) reasonable steps taken by an employer to appoint and promote suitably qualified people from the designated groups; and

(e) any other prescribed factor.

(2) The Minister, after consultation with NEDLAC, may issue a regulation in terms of section 55 which must be taken into account by any person who is required to determine whether a designated employer is implementing employment equity in compliance with this Act.

(3) Without limiting subsection (1) (a), the regulation made in terms of subsection (2) may specify the circumstances under which an employer's compliance should be determined with reference to the demographic profile of either the national economically active population or the regional economically active population.

(4) In any assessment of its compliance with this Act or in any court proceedings, a designated employer may raise any reasonable ground to justify its failure to comply."

87. Section 11 of the Bill now proposes to introduce after subsection (1)(a), the following:

'(aA) whether or not the employer has complied with any sectoral target set in terms of section 15A applicable to that employer;'

88. The first point to be observed is that the proposed amendment would introduce an additional factor that the persons applying the statute 'may' have regard to. The ordinary meaning of the word 'may' suggests that there is a discretion on the person

applying the statute to decide whether or not a particular factor is to be taken into account, including the sectoral targets. It has been said that the word 'may' in legislation, construed in context, could nevertheless be read to signify 'an authorization to exercise power coupled with a duty to use it if the requisite circumstances were present'[132] Read in this way, the person assessing compliance would have a duty to take all the listed factors into account. However, taking the legislative history into account, this does not appear to be the position of the legislature. The original text of section 42 employed the word 'must', which was interpreted by the Labour Court in *Department of Labourt v Comair Ltd*[133] to impose an obligation to take all of the listed considerations into account. The amendment in 2014 then replaced the word 'must' with 'may', introducing the discretion. Arguably, a rational decision-maker would nevertheless be obliged to take all relevant factors into account. However, the use of the word 'may' instead of 'must' introduced a considerable discretion. In the absence of an explicit obligation to bring into account the listed factors on a cumulative basis, the 'targets' set by the Labour Minister may well be treated as the only relevant factor by those assessing compliance.

89. As discussed hereinabove, section 15(3) of the EEA permits numerical goals, but excludes quotas. Although the distinction between quotas and numerical goals is not made clear in the statute (in the absence of a definition of a quota), it must be accepted that the rigid enforcement of a numerical goal is in fact a quota. In other words, if the numerical goals which are set for achieving the equitable representation of designated groups are strictly enforced by means of sanctions then these goals are equivalent to a

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[132] See *SAPS v PSA* [2007] 5 BLLR 383 (CC) at para 15, by reference to *Van Rooyen & Others v The State & others (General Council of the Bar intervening)* 2002 (5) SA 246 (CC); 2002 (8) BCLR 810 (CC).
[133] [2009] BLLR 1063 (LC); [2009] JOL 24060 (LC).

quota as fixed percentages of the designated groups then have to be employed. The provision that quotas are excluded will be hollow, unless strict enforcement of numerical goals is not allowed, because such enforcement turns a numerical goal into a quota.

RECOMMENDATIONS

90. In light of the comments set out herein, Solidarity recommends that:

90.1. the Portfolio Committee consider the comments of the SAHRC in the Equality Report and that it ensure responsiveness to the concerns raised therein;

90.2. no amendment be affected to allow the Ministerial setting of sectoral targets, with the Ministerial role being confined to the publication of sectoral data by reference to which progress can be measured;

90.3. in the event that an amendment is affected to allow for the setting of Ministerial targets:

90.3.1. the proposed provision allows for broader consultation with stakeholders prior to the publication of targets;

90.3.2. the proposed provision provide criteria and guidelines to the Labour Minister on the manner in which the power is to be exercised;

90.3.3. the amendment be coupled with a reversion in section 42 to compulsory and cumulative consideration of all relevant and listed factors to assess compliance;

90.3.4. the amendment not be coupled with an enforcement mechanism (such as the proposed amendment to section 53) that ensures that the 'target' is treated as a quota.

90.4. Quota be defined under the Act's definition as : "*a requirement to hire or promote a fixed number of persons during a given period and or the reservation of a certain number of vacancies for designated groups.*"

"FAS"

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Comments on the Employment Equity Bill

(Chairperson)

- *In in his book Civil Rights: Rhetoric or Reality, Thomas Sowell (American economist, social theorist) said the following:*
- *"The reality of an historic struggle for civil rights has degenerated into the hustling rhetoric of Newspeak. "Equal opportunity" now means preferential treatment. "Voting rights" now include preferential chances to win. School desegregation no longer means the right to attend any public school, regardless of race, but being forced to attend where you are told, according to race. "Equal justice for all" now means compensatory benefits for some—usually the more fortunate of those who share the political label "disadvantaged."*

- It seems that the main thrust of the amendments are:
  - Clause 4 of the Bill seeks to insert section 15A to empower the Labour Minister to: identify national economic sectors; and to determine numerical targets for these sectors. Clause 6, for its part, seeks to amend section 20 of the EEA in order to link the sectoral employment equity targets to the numerical targets set by the designated employers in the employment equity plans of their workplaces.

- Clause 11 of the Bill seeks to amend section 42 of the EEA 'in order to clarify' that a designated employer's compliance with its obligations to implement employment equity may, in addition to being measured against the demographic profile of the national or regional economically active population, be measured against compliance with the sectoral numerical targets set by the Labour Minister in terms of the proposed section 15A.

- When these amendments are measured against respectively international and national yardsticks, we submit that:
  - **In relation to the International yardstick:**
  - On 12 July 2018, the South African Human Rights Commission (SAHRC) released its Equality Report 2017/18 with the sub-title *'Achieving substantive economic equality through rights-based radical socio-economic transformation in South Africa' (Equality Report).*
  - This report was the direct consequence of recommendations from the UN CERD committee made on the 04th of October 2016.
  - The report stated amongst other, and I am going to paraphrase, that the Employment Equity Act be amended to target more nuanced groups on the basis of need, and taking into account social and economic indicators.

Further, employment equity plans should be qualitative and context sensitive, and should be further amended to revert to the position where the consideration of the regionally economic active population in relation to representational levels is mandatory and not discretionary.

- We submit that in the amendments the Department and the Minister are in direct contrast to the recommendations of the SAHRC as set out in the Equality Report, and that the Bill moves in the opposite direction of that which was proposed for consideration by the SAHRC. This is, amongst others, due tot the fact that sectoral determined targets by the Minister will neither be more context sensitive nor nuanced.

- **<u>When measured against the National Yardstick it is clear that</u>**
- The golden thread that runs through the Constitution and the EEA is the requirement of fairness and reasonableness in the adoption and application of affirmative action measures. Any suggestion, therefore, that affirmative action measures may be applied mechanically, with the Minister given virtually untrammelled powers to set targets for industries and sectors, must be rejected out of hand. Sound reason and fairness are the touchstones.

- A situation where the state (through the Labour Minister) controls the allocation of employment on the basis of race and gender is societal manipulation and not equitable representation, and amounts to effectively a quota system. The aim of achieving equitable representation is to ensure that unfair discrimination is eliminated and that every person has the same opportunity regardless of race or gender. The rigid setting of 'targets' aimed at proportional representation in the workforce does not mean that the aim of a just and fair society is achieved.

- We conclude that the proposed amendments will not only be unconstitutional and unlawful, but will be directly opposed the International convention on the Elimination of Racial Discrimination signed by South Africa, and the Human Rights Councils Equality report which flows from it. In a country with an unemployment rate of more than 32%, decentralisation and deregulation might be something worth looking into.

Serfontein Viljoen & Swart

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Our ref : Mr. Claassen/Mr. Venter/fb/CS0541
Date : 23 August 2022

TO: THE PRESIDENCY OF THE REPUBLIC OF SOUTH AFRICA
ATT.: PRESIDENT CYRIL RAMAPHOSA
UNION BUILDINGS
GOVERNMENT AVENUE
PRETORIA

BY EMAIL: malebo@presidency.gov.za

Dear Mr President,

IN RE: CONSIDERTION OF THE EMPLOYMENT EQUITY AMENDMENT BILL [B14 – 2020]

1. We refer to the above matter and confirm that we act herein on behalf of Solidarity, a trade union duly registered in accordance with the relevant provisions of the LRA (Solidarity).

2. We understand from Parliament's website that the Employment Equity Amendment Bill, 2020 [B14-2020] (the Bill), which seeks to effect amendments to the Employment Equity

Act 55 of 1998 (EEA), has been presented to you for signature. The purpose of this correspondence is to:

2.1. bring to the attention of the President concerns about the constitutionality of the Bill;

2.2. emphasise that the President has the authority to challenge the constitutionality of a bill presented to him for signature, consistent with his duty to uphold, defend and respect the Constitution of the Republic of South Africa Act 108 of 1996 (Constitution);and

2.3. urge the President to invoke his powers under section 79 of the Constitution.

3. Insofar as the constitutionality of the Bill is concerned, we attach submissions that Solidarity presented to the Portfolio Committee on Employment and Labour (the Committee) as a precursor to the Committee's deliberations on the Bill. We do not intend to regurgitate the submissions herein, but we request that you seriously engage with the analysis presented.

4. The submissions highlight the importance of a balanced approach to affirmative action to survive constitutional scrutiny, and they discuss at some length the problems with the Bill from an international law perspective, and in particular the concerns in respect of South Africa's compliance with the International Convention for the Elimination of All Forms of Racial Discrimination (ICERD), which South Africa ratified on 10 December 1998. In addition, the submissions address a report of the South African Human Rights Commission

(SAHRC) in which it expressed the view that the EEA is not constitutionally compliant and recommended amendments that are not reflected in the Bill. Indeed, the Bill moves in the opposite direction of that which was proposed for consideration by the SAHRC, as discussed in full in the submissions. The introduction of sectoral "*targets*" moves the EEA closer to the adoption of quotas, and the proposed section 15A of the EEA appears to confer unfettered power on the Labour Minister, which is constitutionally problematic.

5. Solidarity not only made these written submissions, it also made oral presentation to the Portfolio Committee. As far as Solidarity can establish, the submissions have fallen on deaf ears and the Bill has progressed through the parliamentary process without amendment.

6. The President is the last port of call. In accordance with section 79(1) of the Constitution, the President must either assent to and sign a Bill that has been passed, or "*if the President has reservations about the constitutionality of the Bill, refer it back to the National Assembly for reconsideration*". We urge the President to consider the submissions on the constitutionality of the Bill that are enclosed herewith, and to refer the Bill back for reconsideration considering the concerns raised. To do otherwise, would be to shrug the constitutional duty in section 79(1).

7. We trust you will find the above in order.

Yours faithfully
SERFONTEIN, VILJOEN & SWART
Mr. JD Claassen
Email: jd@svslaw.co.za

Partners: Stephanus Gabriël Serfontein Proc (SA) • Marthinus Jakobus Viljoen B Proc • Stephanus Petrus Swart Biur LLB • Lodewyk Serfontein BProc
Professional Assistant: Annette Johanna Louw LLB • Carel Nicolaas Venter LLB
Associates: Conrad Swart Bcom (Law) LLB Hdip (Insolvency)

"FA7"
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Monique Joubert

From: President RSA <PresidentRSA@presidency.gov.za>
Sent: Tuesday, 23 August 2022 15:12
To: Jan-Daniel Claassen
Subject: RE: Solidarity Trade Union: CONSIDERTION OF THE EMPLOYMENT EQUITY AMENDMENT BILL [B14 – 2020]

We acknowledge with thanks, receipt of your correspondence addressed to the President of the Republic of South Africa, His Excellency, President Cyril Ramaphosa

Going forward, the Presidential Hotline (Email: President@presidency.gov.za) will respond to all Service Delivery related issues. The contact number for the Presidential Hotline is 17737.

All other matters referred to PresidentRSA@presidency.gov.za will receive the required attention and a response will be communicated soonest.

Thank you

http://www.thepresidency.gov.za/content/legal-disclaimers

"FA 8"

Republic of South Africa

South African Government

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Minister Thulas Nxesi calls on Parliament to expedite Employment Equity amendments

25 Jun 2021

Minister Thulas Nxesi calls on Parliament to expedite EE amendments as report shows little progress in transformation

It will take at least 50 years to see real transformation in the workplaces if the current pace of employment equity implementation in the top echelons is allowed to persist, according to the Commission for Employment Equity (CEE).

Speaking at the launch of the Commission for Employment Equity, Employment and Labour Minister, Thulas Nxesi said this situation was not acceptable and that South Africa's workplace still remains unequal especially, in the upper echelons.

"The Commission for Employment Equity (CEE) report calls for urgent strategies. It cannot be business as usual. The time has come to re-strategise. Employment equity legislation to date has failed to achieve its intended purpose and objective.

"The CEE report is a wake-up call to government that self-regulation by employers to achieve the objectives of EE legislation has not worked. We now need a more aggressive strategy including a review of legislation. The EE Bill currently in Parliament is a catalyst to expedite transformation in the workplace. We have heard the cries of the vulnerable groups – women and the people living with disability," he said.

With little or largely insignificant progress at top level, Minister Nxesi wondered whether government was doing enough or is there a resistance by employers. He appealed to Parliament to expedite the process of EE Act amendments so as to fast-track the building of an inclusive South Africa.

The report and the Public Register of all designated employers on the status of workplace transformation was launched under the theme: "Transformation makes business sense".

Commission for Employment Equity Chairperson Tabea Kabinde said plans at ensuring equitable demographic representation continues at snail pace. Kabinde said the White population groups continue to dominate the workplace top echelons, despite their minority representation in terms of the Economically Active Population (EAP).

In terms of the National Economically Active by Population Group and Gender the report shows that males accounted for 55,4 percent – with African male accounting for 43,7 percent, Coloured male 4,8 percent, Indian male 1,8 percent and White male 5,1 percent. While women accounted for 44,6 percent of EAP – with African female accounting for 35,6 percent, Coloured female 4,1 percent, Indian female 1,0 percent and White female 3,9 percent.

Kabinde presented the CEE report that covers the period from 1 April 2020 to 31 March 2021. The report analysis covered the six occupational levels of the workforce profile and movements according to population groups, gender and disability for the years 2018, 2019 and 2020. In addition, it provided the status of employment equity in the various economic sectors and business types reported in 2020. Furthermore, an analysis is provided of the workplace barriers and affirmative action measures reported by designated employers for the 2020 reporting period.

The CEE launches the report on the back of EE Amendment Bill currently underway in Parliament.

The primary objectives of amendments are: to provide the Minister with the power, in consultation with the sector stakeholders and on the advice of the Commission for Employment Equity, to:

- Regulate employment equity sector through specific EE numerical targets for designated groups (i.e., Black people, women and persons with disabilities)
- Reduce the regulatory burden on small employers, i.e., those employing between 0-49 employees.
- Regulate criteria for assessment of compliance to complement the promulgation of Section 53 of the EE Act in order to be able to issue Employment Equity Certificate of

Compliance as a precondition for designated employers to access State Contracts and do business with any organ of the state or public entity.

According to Kabinde, at Top Management Level, the White population group representation is (64,7%). Although slowly declining, it continues to dominate at this occupational level – with African group accounting for 15,8%, Indian group 10,6% and Coloured group 5,7%. She said the Commission had observed a one percent drop annually in the representation of White group.

She said proportionally in terms of the respective EAP's, Indians benefitted the most from this decline taking their representation even further above their EAP. Female representation has remained below 25% throughout all the reporting periods, with White and Indian female representation remaining much higher than their EAP at the Top Management Level.

The Commission has observed the high representation of Foreign Nationals, particularly in the Private Sector at Top Management level. It said it was evident that the expected skills transfer by Foreign Nationals to the South African designated groups was not taking place.

The White group also dominate at Senior Level with a representation of 54,5%, African group at 24,7%, Coloured group 8,7% and Indian group 11,6%. At Senior Management Level there was an increasing trend of African and Indian population groups with the White group gradually decreasing. A significant proportion of Senior Management positions are also held by Foreign Nationals at the Senior Management level.

Kabinde said it was at Professional level that there was a critical mass of Africans, however, they are still unable to break through the glass ceiling. At this level Africans account for 46,7% representation, while the While group has a 32,1% representation, with Coloured group having a 9,7% and Indian group a 9,1% representation.

The skilled, semi-skilled and unskilled levels are exclusively dominated by the "army" of African group. The CEE said in its report it was concerned about the trend of employing a large number of Foreign Nationals, even at the lower occupational levels, which may be contrary to employment legislation seeking to govern migrant labour and employment regulations, such as skills transfer programmes.

The report says in terms of the trend analysis of the representation of persons with disabilities across all occupational levels over the three years a relatively slow pace towards creating workplaces that are inclusive of persons with disabilities. The analysis over the three years shows that the representation of persons with disabilities in the total workforce reported on has insignificantly increased from 1% in 2018 to 1,3% in 2020. Kabinde said this was disturbing.

The COVID-19 effect on the economy also affected equity which was reflected in the 1,8 percent drop in the number of reports received and a 3,8 percent drop in the number of employees covered.

In 2020 a total of 26 635 reports were submitted by designated employers.

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DOCUMENTS



The EE Amendment Bill: The parliamentary debate

Hansard |
07 December 2021
Transcript of the speeches by Minister Thulas Mxesi, DA MP Michael Cardo, and others

EMPLOYMENT EQUITY AMENDMENT BILL

(Second Reading Debate)

The MINISTER OF EMPLOYMENT AND LABOUR (Thulas Nxesi): Hon Deputy Speaker, hon members, this Bill represents part of the continuing task to transform the labour market and society still marred by the historical legacy of colonialism, apartheid and patriarchy. In this regard, the adoption of the Constitution of the Republic of South Africa 25 years ago marked a turning point by upholding the values of human dignity, equality, freedom and social justice.

One of the measures intended to implement this vision was the inception of the Employment Equity Act 23 years ago yet the pace of transformation in the labour market has been frustratingly slow. The latest employment equity statistics contained in the 21st Commission for Employment Equity Annual Report 2020-21 indicate that we have not addressed past imbalances to uplift the most vulnerable groups in our economy, that is African women and persons with disabilities.

For example, at top and senior management levels, Africans accounted only accounted for 15,8% and 24,7% of all positions respectively, whereas whites occupied 64,7% and 52,5% of all positions at both top and senior management levels. In relation to women representation, they only accounted for 24,9 % and 35,7% of all positions at top and senior management levels respectively. Of great concern is the representation of people living with disabilities remained at around 1% of the total workforce. It is evident from the data that self-regulation by the employers to achieve the objectives of this Act has simply not worked. They are becoming even more arrogant now, hence the urgent need to review the legislation and the regulations.

The primary objectives of the amendment are; to empower the Minister of Employment and Labour to regulate the sector employment equity targets after consultation with the sector stakeholders and on the advice of the Commission for Employment Equity.

In addition, the amendments are intended to promulgate section 53 of this Employment Equity Act. Section 53 deals with the issuing of the employment equity compliance certificate as the prerequisite for access to state contracts or to conduct business with any organ of the state. The state cannot continue to financially incentivise organisations that are anti-transformation and continue to resist complying with the laws of the country.

Further, the amendments are intended to reduce the regulatory burden on small employers employing between 0 to 49 employees. They will be exempted from complying with the employment equity administrative processes, however, the small employers will still be required to comply with the provisions of the Employment Equity Act dealing with the elimination of all forms of employment discrimination in their employment policies and practices as per chapter 2 of the Employment Equity Act before the compliance certificate is issued to them to conduct business with any organ of the state.

At an operational level, the department is ready to implement these amendments upon approval by Parliament and enactment by the President. We are at an advanced stage in relation to the sector stakeholder engagement for the setting up of the sector-specific employment equity targets. The IT development processes are also underway to enable the automation of the issuing of the employment equity compliance certificates for the convenience of the employers.

In conclusion, the Amendment Bill plays a critical role in transforming the labour market to allow everyone fair and equitable access regardless of race, gender or disability. I hope those who claim that they are for the workers are going to support this but let's hear what they are going to say. Thank you, Chairperson.

Ms H O MKHALIPHI: Hey! Minister, don't start with us.

The DEPUTY SPEAKER: Hon Hlengiwe, the Rules that were adopted in the House say you mustn't do that in the first place. And you are in a leadership position, we plead with you. If it is about politics, wait your turn. Please!

Ms H O MKHALIPHI: Okay, Deputy Speaker, no problem. [Interjections.]

IsiZulu:

USEKELA SOMLOMO: Uyaqhubeka. Awuhlelekile yazi.

The DEPUTY SPEAKER

Ms M L DUNJWA: Deputy Speaker, again, in greeting everybody. But today, in particular, the workforce of this country, those that have been oppressed for a number of years, but who liberated themselves.

I'm standing here to confirm that the Bill was introduced to us on 21 July, briefed by the department on 20 October, advert was sent on 14 and 17 January, closing date was 20 February, extended to 5 March, public hearings were conducted, both written and oral, from 13, 14 and 15 April.

The Employment Equity Act was enacted in 1998 to give effect to a constitutional right, to equality. Section 9(1) of the Constitution say everyone is equal before the law and has the right to equal protection and benefit of the law. Section 9(4) make provision for legislative designed to prevent or prohibit unfair discrimination.

The purpose of this Bill is primarily to empower the Minister of Employment and Labour to identify sectoral numerical targets in order to ensure that equitable representation of sustainable qualified people from designated groups. Most of the amendments are consequential to this primary purpose.

Secondly, the Bill seeks to clarify conditions under which the Minister may issue Certificate of Compliance to Employment Equity Act to employers.

Hon Deputy Speaker and the House, we want to ... I think it is important that ... I did say ... I mentioned this but again this was quite a very difficult, if I may say, debate in the committee because some of the members felt that 'what's the point, we have voted in 1994, apartheid is gone and therefore, so what' not realizing that, in fact, the status quo still remains. And I think the Minister had outlined that ... because I don't want to repeat that.

In some sectors of the labour market majority are still white, males in particular. And unfortunately women, black women, coloureds and Indians are at the bottom.

It was in this debate that hon Bagraim asked us 'what is the devil that you are talking about?' and the devil is that there are some members in this House that are resisting transformation and we think as Members of Parliament we are not going to come here and speak as if ... because you are in this Parliament, which is democratic; at the workplace the labour force, workers are still oppressed and unfair labour practice in terms of race, colour and gender.

It is unfortunate that the people with disabilities are those that are in areas where they are poorly addressed.

IsiXhosa:

... ndifuna ukuthi kubasebenzi nakwinkokheli zabo, singema apha siwamkele lo mmthetho kodwa ukuba bona kwiindawo zabo zokusebenza abaqiniseki ukuba bayabakhangela ...

English:

... what is called the monitor, the implementation of this Act because it will be useless that we come here as Members of Parliament, we pass these legislations and these legislations are not ... there are no people who ensure that they guide them.

That is why I am then saying I want to make an emphasis, our members are going to come and debate, and put politics but for me as a former trade unionist I want to challenge all trade unionists, right across, that they must come together and unite because the struggle is still not over.

Workers of this country, you are on your own if you don't ensure that the workplace is transformed, if you don't ensure that employers skill you, if you don't ensure that you are not treated according to the colour of your skin, your gender and your disability. And we are putting it here as the committee.

Yes, I want to thank you the members of the opposition who, some of them, were very compliant, some of them were progressive ... [Interjections.] ... I ... English is my second language ...[Interjections.] ... yes ... you're not going to correct me here because if you start that it's time that will be against me ... whom those that were supportive, those who understood the struggle with their differences because ours is not to fight as if it is what we want, it's not about what we want, it's about what ... in particular as the ANC and all the progressive trade unions who fought for the liberations of the workers of this country.

On behalf of the portfolio committee I'm putting this report for this House to adopt and thank the department for ensuring that transformation, which is a struggle, and I want to assure the opposition, in particular the DA, that we are not going to fold our arms as the ANC, supported obviously by the IFP, with all their challenges the EFF, but they have been supportive, of all these, the NFP, they've been supportive of the positions and the policies and the views of the ANC.

We are not going to be apologetic in ensuring that we transform our workforce because at the workplace apartheid still exist. I thank you. [Applause.]

Ms M L DUNJWA

Dr M J CARDO: Deputy Speaker, the Employment Equity Amendment Bill is a job destroying jackhammer, it is a blunt and brutal tool handed carelessly to the Minister of Employment and Labour so that he might wield the workforce into a shape the ruling party deems racially acceptable.

The ANC will have you believe this Bill is a weapon of transformation. In truth, it is a weapon of economic mass destruction. Its repercussions will reverberate for generations to come, unwelcome aftershocks to an economy already in upheaval.

There are two fatally flawed clauses in the Employment Equity Amendment Bill. Firstly, there is clause 4, which introduces section 15(a) into the Act. This section empowers the Minister of Employment and Labour to identify national economic sectors and to determine numerical employment equity targets for these sectors. The consultation requirements imposed on the Minister are vague and ill-defined. In this way, the ANC seeks to foist its narrow ideologically-driven goal of demographic representivity from the Minister above onto biddable employers below. This is the warped notion that the workforce should know exactly the racial and gender composition of economically active population.

This new provision confers upon the Minister a set of arbitrary and discretionary powers that are wholly incompatible with the drivers of a market-based economy. There is a simple word for rigid racial targets determined by the Minister, thrust upon employers after a thin veneer of consultation, and backed by punitive measures for noncompliance. In effect, they are quotas.

Secondly, there is section 53 of the Act, which now comes into operation as amended by clause 12 of the Bill. Henceforth, state contracts will only be awarded to employers who are in possession of a compliance certificate issued by the Minister. Of course, in order to obtain the certificate, an employer must have complied with any sectoral target set by the Minister in the first place. All of this is a recipe for malicious ministerial meddling.

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Section 53 concentrates powers in the hands of the Minister which might be used capriciously to benefit selected companies in the allocation of state tenders. This is a textbook ANC manoeuvre. It allows them to manipulate outcomes by rigging tenders or funnelling contracts in the guise of righting past wrongs and redressing racial inequalities. Yet, after more than two decades of employment equity and black economic empowerment, BEE, legislation, we now know beyond any reasonable doubt that these legislative lynchpins of racial transformation are really a fig leaf for crony enrichment.

What is driving this racial mania? The ANC looks at the upper echelons of the private sector as opposed to the public sector and gasps in horror at their complexion. There are too many whites. Able-bodied coloured men are overrepresented here. African women with disabilities are underrepresented there. And the ANC comes to the conclusion that the government should shift workers around as if they were pawns on a chessboard. In fact, the ANC goes one step further. It seeks, through diktat, to conjure an entirely new chessboard into existence. That is not how societies or economies function.

If the ANC wants to level the playing fields, or broaden economic opportunity, let it increase the pool of available skills by putting in place a first-rate education system. Let it foster the conditions conducive to economic growth that allow for opportunities to flourish. But that is not how the ANC thinks.

The Employment Equity Amendment Bill is, to recall Tony Leon speaking on the original legislation is a "pernicious piece of social engineering," pious in intention but destructive in effect. And, make no mistake, this Bill will sew economic destruction ... [Interjections.]

An HON MEMBER: Hon Deputy Speaker, on a point of order.

The DEPUTY SPEAKER: What are you rising on, hon member?

An HON MEMBER: Is the member prepared to take a question?

Dr M J CARDO: I am not, Deputy Speaker. ... That is what happens in a command economy when a politician hauls out a racial abacus and declares how many beans should be in each row and what colour they should be.

As it is, our economy is mangled, damaged and deformed by decades of ANC policy incoherence, state capture and corruption. It has been disfigured further by COVID-19 and the stringent lockdowns. The numbers are well known. In 2020, economic activity slumped by 7%, the biggest fall since 1946. We are still trapped in the longest downward cycle since the Second World War. The economy hasn't grown by more than 3% annually since 2012. Last year, there were over one million job losses. Our unemployment rate sits at 44,4% on the expanded definition. Almost 12 million people do not have a job.

Meanwhile, as I speak, a huge flight of skills and capital is underway. Desperate, anxious middle-class South Africans of all races are rushing for the boarding gates to put daylight and continents between themselves, their families and an ANC government bent on destruction. They can see which way the wind is blowing. They know that ANC policies like expropriation without compensation will bring economic ruin.

The Employment Equity Amendment Bill will hasten that destruction. It will deter investors. It will stunt growth, and it will kill jobs. Why should anyone want to invest in an economy, or create new jobs, when a politician gets to decide what the labour force looks like or how the labour market operates?

The ANC has rammed this Bill onto the Order Paper before we rise for the local government election campaign so that it can lay claim to some conveniently-timed victory for "our people". It is a sham achievement for this Bill will do nothing for the poor, the marginalised, or the rural masses on whose behalf the ANC professes tc speak. Its remedial measures, such as they are, do not target the disadvantaged. They do not advance the disadvantaged, and they do not promote the achievement of equality. As such, this Bill is – to put it lightly – constitutionally suspect. In truth, the Employment Equity Amendment Bill will help only a small, skilled and politically connected elite. It will widen the inequality gap between the small black elite that benefits from employment equity, EE, and broad-based black economic empowerment, BBBEE, and the 10 million black South Africans who are unemployed and unlikely to find a job because of laws like this one that disincentivice job creation.

Our delicate social fabric is frayed. Our economy – if not yet quite in smithereens – lies broken. And now, Deputy Speaker, we propose to give the Minister of Employment and Labour a job-destroying jackhammer. The DA opposes this Bill. [Applause.]

IsiZulu:

Nk C N MKHONTO: Nk C N MKHONTO: Ngiyabonga Sekela Somlomo, ngiyabingelela kuwe, ngiyabingelela namalungu wonke weNdlu, ngibingelele nambasebenzi baseNingizimu Afrika.

English:

Deputy Speaker, for years, women, youth, persons living with disabilities and the black majority have been discriminated against by employers without any form of protection. The colonial and apartheid exploitation continues. They use of all kinds of criteria to set aside employment and promotional opportunities for minorities.

The Employment Equity Amendment Bill was designed to address colonial and apartheid exploitation that continues, especially discrimination of people and exclusior from meaningful participation in the economy.

What is shocking is that, even government departments, entities, state-owned enterprises, SOEs, and local government institutions have failed dismally to comply with some of the requirements of employment equity, particularly failure to employ people living with disabilities. To date, we still have sectors dominated by men and the higher echelons occupied by white males. Women and the youth dominate informal, seasonal and temporary design ... [Inaudible.] ... The patriarchal apartheid designed system continues to keep women at the lowest level of the career ladders.

Whilst the Employment Equity Amendment Bill promises redress and justice, particularly the employment of people living with disabilities, we know that the incompetent rigid ruling party cannot implement any transformational legislation. The Employment Equity Amendment Bill, if administered effectively and efficiently can improve the social economic status of black people, youth, women and people living with disabilities.

We have all called for the employment of 2% and more of people living with disabilities. As much as this is what we all see as necessary, we know it will never happen.

The hopes of the marginalised workers and job seekers are on the Department of Employment and Labour. One department that continue to fail workers in all ways possible. This is the same department that has failed to enforce the National Minimum Wage, has a shortage of labour inspectors and a few employed are incompetent, let alone making meaningful enforcement of employment equity legislation.

We hope this Amendment Bill revitalise work commitment, work ethics of labour inspectors, and will power to change workers' conditions including in government, state-owned entities, and the private sector ... [Interjections.] ... This needs enforcement officers that understands the political and historical background, the effects of income inequality, and the dire need for economic empowerment of the black majority.

However, the only meaningful and sustainable way South Africa will achieve employment equity is when there is economic freedom and equal redistribution of land and the nationalisation of strategic sectors of the economy, when there is state capacity to build and enforce legislation. We will achieve meaningful employment equit by creating the ... [Inaudible.] ...

The DEPUTY SPEAKER: Hon members, we requested you to pay attention to what is in front of you and make sure you switch them off. Otherwise, you are deliberately sabotaging the sitting, and that's bad news. Please, proceed, hon member. Are you done?

Ms C N MKHONTO: No, I am not done, Deputy Speaker. I was muted. Thank you. ... We thank the chairperson of the committee for she was able to rise above the political and socioeconomic diverse backgrounds of the public that make submissions and the members of the committee.

To the Minister, the EFF does not only pay lip service. You are welcome to visit our labour desk at headquarters and you'll see that as the EFF, we are for the workers for real and we practice what we preach. Deputy Speaker, the EFF supports the Employment Equity Amendment Bill. Thank you. [Applause.]

Mr S L NGCOBO: Hon Deputy Speaker, the Employment Equity Amendment Bill represents this Parliament's commitment to ensuring the continuation of employment equity in South Africa. The IFP shares the view that the struggle is still on, where this is concerned. There is still a long way to go.

The Amendment Bill represents our decisive and collective effort for the identification of sectoral numerical targets in order to ensure the equitable representation of suitable qualified people from designated groups. Of course, the Bill deals with other interrelated issues, which are important for advancing employment equity in South Africa.

It is saddening that, although every attempt has been made to accommodate all views and to hear everyone, there is a minority that is of the opinion that this Bill is socially engineering and they will therefore not support it. This attitude is contrary to the spirit of transformation that defines the postapartheid South Africa.

We will recall that the apartheid government was socially engineering this country, using state powers and all legislation. We cannot stoop to the level of the apartheid state, and we have a collective obligation to correct its injustices.

One of those ways is to promote equity through legislation. The process respects the rule of law and we should support it. There is no hope for fully and truly transforming South Africa, if we do not use legislation to bring about employment equity.

Although this Parliament adopted employment equity, we have come to the conclusion that the Act does not fully deliver on the promises of transformation in employment, as we had hoped it would. The employment Equity Amendment Bill is an acknowledgement of the deficiencies of the Employment Equity Act. It is an expression of the majority's desire to correct that which is not right in the main Act, that which needs to be revised and improved.

As such, we all need to really rally behind this Amendment Bill. It will never be emphasised enough that it is important to identify sectoral numerical targets, in order to ensure the equitable representation of suitable qualified people from designated groups.

If this Parliament is elected based on proportional representation, which ensures equitability, then there is no reason and logic why we cannot put the same equity in the employment sector. It will be a dereliction of our duty as Members of Parliament, if we do not use the powers given to this institution to enact, amend and repeal laws, in our attempt to develop the South African society.

We can only build a truly just society that is peaceful in harmony, if we support the transformation agenda. This transformation agenda requires equity. It requires a proper representation of all groups in all political, economic and social sectors of society, including employment. It cannot be delayed because it is bringing equity in the workplace through this Amendment Bill.

The IFP supports the adoption of this Bill. I thank you. [Applause].

Ms H DENNER

Mr S L NGCOBO

Ms H DENNER: House Chair, during a presidential job summit held in October 2018, resolutions were taken that have led to the creation of 275 000 job opportunity per year. It is evident that that has not happened, because we currently have the highest expanded unemployment rate to date of 44,4% and we cannot blame the covid-19 pandemic because the unemployment rate has been rising long before the pandemic and it will continue to do so long after it is over. Why? Because like a fool, the ANC makes the same mistakes over and over again, each time expecting different results.

Yesterday, during the question session, the Minister of Employment and Labour stated that government is refusing to drop their current plan for another plan. That is called being unresponsive, hon Minister, because clearly, the current plan is not working and the product is an unemployment of nearly 45% and an absorption rate of less than 40%, which globally compares to failed states and countries that deny women working opportunities. It is loosely translated into abject failure.

I have said it many times in this House and I will continue to say it: The private sector is the biggest and most important employment creator in the country. We need the private sector to contribute to the economy and employment creation. Private-sector employers need to be supported and empowered so that they in turn can support and empower their employees.

It is not an us-versus-them scenario, hon ANC colleagues on the Portfolio Committee on Labour; it is a scenario of, if the one fails, the other one will fail as well. The one cannot exist without the other.

Afrikaans:

En tog word die privaatsektor as die sonnebok vir ieder en elke mislukking in die arbeidsmark voorgehou. Is dit die privaatsektor se skuld as die regerende party kort voor 'n verkiesing agterkom dat hy nie in sy beloofde transformasie doelwitte geslaag het nie? Dit is die privaatsektor wat aan bande gelê word deur striewende en beperkende arbeidswetgewing soos hierdie Wysigingswetsontwerp, wat weereens dieselfde uitslag tot gevolg sal hê, naamlik 'n stygende werkloosheidskoers, ekonomiese agteruitgang en armoede.

English:

Hon House Chair, hon House Chair!

The HOUSE CHAIRPERSON (Mr C T FROLICK):

Yes, hon member. I can hear you.

Ms H DENNER: Hon House Chair, there is interference from the House or on the virtual platform. Someone is speaking over me. May I please be allowed to continue my speech?

The HOUSE CHAIRPERSON (Mr C T FROLICK): Hon member, I do not hear any interference ... [Interjections.]

Afrikaans:

Me H O MKHALIPI: Praat, madam, praat.

The HOUSE CHAIRPERSON (Mr C T FROLICK): No, hon Mkhalipi, there you now do what the hon member has just talked about. [Interjections.]

Ms H DENNER: I see the NA is muted here.

The HOUSE CHAIRPERSON (Mr C T FROLICK): Order, hon members. You are quite audible if you are on the virtual platform. We can hear you. [Interjections.]

The HOUSE CHAIRPERSON (Mr C T FROLICK): Hon Mkhalipi and the other hon members, please. [Interjections.]

Afrikaans:

Me H DENNER: Ek kan nie praat nie. Niemand luister nie. [Tussenwerpsels.]

English:

I am not sure where I was interrupted, so I will just repeat this again.

Afrikaans:

En tog word die privaatsektor as die sonnebok vir ieder en elke mislukking in die arbeidsmark voorgehou. Is dit die privaatsektor se skuld as die regerende party kort voor 'n verkiesing agterkom dat hy nie in sy beloofde transformasie doelwitte geslaag het nie? Dit is die privaatsektor wat aan bande gelê word deur striewende en beperkende arbeidswetgewing soos hierdie Wysigingswetsontwerp, wat weereens dieselfde uitslag tot gevolg sal hê, naamlik 'n stygende werkloosheidskoers, ekonomiese agteruitgang en armoede.

English:

Overregulation of the labour market is a stumbling block to employment recreation. Legislation like the National Minimum Wage Bill, arbitrary extension of collective bargaining agreements to nonmembers and employment equity legislation like this Amendment Bill are counterproductive constraints to economic growth and job creation.

Sections of the Bill that enable the Minister to determine sectoral numerical targets is another example of gross overregulation and interference by government. These policies, together with other failed government sectors, like our education system will continue to exclude the majority of South Africans from the labour market.

We need to fix our education system so that people have the required skills to be appointed in certain positions and deregulate the labour market, so that those positions can be created.

Afrikaans:

Die Departement van Arbeid se mandaat is onlangs uitgebrei om werkskepping ook in te sluit. Die departement werk egter sy eie mandaat teen deur wetgewing voor te stel en af te dwing wat juis die teenoorgestelde effek sal hê. Die doelwit behoort eerder werkskepping deur middel van volgehoue ekonomiese groei en 'n verbeterde onderwysstelsel te wees.

Slegs as so veel as moontlik werksgeleenthede geskep word en voornemende werkers aanstelbaar is met die nodige onderrig en kwalifikasies sal mense wat voorheen in die arbeidsmark uitgesluit is ook geabsorbeer kan word.

Tykengedrewe wetgewing soos hierdie is soos 'n pleister op 'n gapende kopwond. Dit sal nie die probleem aanspreek nie, maar dit bloot vererger.

English:

The FF Plus does not support this Bill. Thank you.

Mr M J WOLMARANS: Thank you, House Chair, hon members, stakeholders and our communities at large. Hon members, when the National Assembly passes legislation, review legislation, repealing legislation and amending legislation like in this case today, what we are really doing is to put content into the freedom, is to put content into our hard-won democracy. Through this Employment Equity Amendment Bill, we want people in the workplace to experience the content associated with their freedom and their democracy.

Now, here's the problem statement, hon members, as recently as two months ago the hon Minister of Labour decried the slow pace of transformation in the workplace. With regard to employment equity and according to the Commission for Employment Equity, the CEE, it will take at least another 50 years to realise transformation at the current rate and at the current pace of employment equity implementation. 27 years into our democracy, women and people living with disability, the most vulnerable, have experienced very little or no progress at all in the workplace.

From the hon Cardo from the DA, they would like to really see this status quo remain unchanged. Present conditions or circumstances compel us today to look at amending the Employment Equity Act as promulgated in 1998. Ordinarily, we would in good faith have opted as we did before and we currently do for self-regulation by the sector, but the reality is sadly the desired objectives have not been met nor achieved.

Hon members of the FF Plus, just like the DA, would really like the same situation and the status quo also to be entrenched. A number of issues have been exaggerated and blown out of proportions, for example, in some sectors including some in the House, where through this amendment the Minister is given carte blanche cowboy-style dictatorship within the sector especially on targets.

They did not read properly section 15(a), which reads; the Minister after consultation with the relevant sectors and with the advice of the Commission for Employment Equity for the purpose of ensuring that equitable representation of suitably qualified people from designated groups and at all occupation levels in the workplace. I noticed in the Gazette, will set numerical targets for any National economic sector identified in terms of the section. Now, we must underscore after consultation, we must also underscore suitably qualified from designated groups.

Hon members must not make any mistake. There are many suitable qualified people from designated groups. They lament their daily experience of being overlooked and discriminated against. Again, in terms of section 15(a)(4), a notice will be issued in terms of subsection (3). There are different numerical targets for different levels, subsections or regions within a sector on a basis of any other relevant factor. Therefore, it is not a one-size-fits-all application at all.

Let us remind ourselves and reiterate the primary objectives of this Amendment Bill, which is to provide the Minister of Labour with the power to regulate employment equity through specific employment equity numerical targets for designated groups and to reduce regulatory burden on small employers ... [Interjections.] ... for compliance in terms of the promulgated section 53 of the Act. All this will happen in consultation with sector stakeholders and on the advice of the Commission for Employment Equity.

The African National Congress supports the amendments contained in this Bill. We also welcome the progressive contribution especially from our friends, the EFF, in supporting the amendments to the Bill. Thank you, House Chair.

Mr M J WOLMARANS

Ms A S ZUMA: House Chairperson and hon members ...

IsiZulu:

... ngithi angiqale ngokusho ukuthi lo mcimbi esikuwo namhlanje unzima kakhulu, ugcogcomisa ozakwethu, bakhuluma ngezindaba ezingabadingi, bakhohlwe ukukhuluma ngezindaba ezithi, ubaba wami uMdlalose waye nepulazi, lashonaphi? Ubaba wami uMdlalose waye nezinkomo zashonaphi? Bakhuluma ngezindaba zabasebenzi. Sisebenza ezindaweni zasemakhaya, ekuhlaleli la sikhona, Sihlalo Wendlu, sithola ukuthi umuntu uthi ngiyasebenza epulazini elithile ngihola u-R2,50 ngelanga, yilezo izindaba ekufanele ngabe bayazikhuluma.

Kufanele ngabe bayakhuluma ukuthi lama-KFC abawafaka ezindlini zabantu umangabe siya okhethweni yimaphi? Lama-SMS imaphi? Ngiyabonga, Sihlalo Wendlu.

English:

One of the mandates that the ANC is constantly given by voters is that we should ensure that there is an equal South Africa in all respects. When South Africans — in their larger numbers than any other party in Parliament — continue to send us to Parliament, they put their trust in us to change the status quo. They tell us that Parliament is a site of struggle, and this assertion that Parliament is a site of struggle gets amplified by the kind of debates that we have in this august House.

As I listened, particularly to the two parties, the DA and FF Plus, I said to myself, oh gosh, there they go again with their firm antitransformation stance. Once again, they screamed at us to accept the status quo.

IsiZulu:

Njengoba nibezwa nje.

English:

Voters said that we must refuse to accept the status quo. As the ANC, that is our mandate.

When we were deliberating on the Employment Equity Amendment Bill in the committee, and in listening to the DA and FF Plus, it was clear to me that these two parties have a serious problem with the amendments that we were making and the entire Employment Equity Act. You can hear them now as I'm ... Now! They are not fighting this Bill. They are fighting to get the entire Employment Equity Act done away with.

Afrikaans:

'n AGB LID: Presies!

English:

Ms A S ZUMA: They are opposed to the Employment Equity Act because the word transformation was banned in the DA, while in the FF Plus it never existed. [Applause.] In actual fact, both the DA and FF Plus appear to have been shocked to learn that there was an Employment Equity Act which is designed to bring about fairness and justice in the workplace. There are two former DA leaders who were shown the door as they were trying to unban the word, transformation. [Laughter.]

IsiZulu:

Ngisho njalo. [Ihlombe.]

English:

When the young politicians were maturing and gaining knowledge, they began to see the real picture of South Africa outside university books, and said to the DA, perhaps we should have transformation content in our policies, and not only that, we should support pieces of legislation that have transformation as an objective to be achieved. That, hon Chairperson and hon members, led to them being mercilessly kicked out of the DA.

Today, Ms Mazibuko and ... Maimane are no longer members of Parliament and they are also out of the DA because they started to realise that the imbalances of the past do not need to be addressed.

Hon Cardo and hon Bagraim are members of the DA in this Parliament and so they will remain because they are opposed to equity in the workplace. In the committee, when they opposed all issues that speak to justice and fairness, they were always referred to the principle Act. That is what you are opposing ... which you think is in the Bill. It is actually not here in these amendments. It is in the Employment Equity Act, No 55 of 1998. They are doing the very same thing today.

What are we on about here? It is nothing else but fairness, justice and equity. Equity literally means the quality of being fair. And, it is very sad that there can be parties that can oppose that in 2021. These parties should be ashamed of themselves for opposing ... [Inaudible.]

Employers must be developed ... [Inaudible.] ... to identify and eliminate employment barriers, including unfair discrimination ... yay! ... which adversely affect people from designated groups ... states ... section 15, Mazzone. That section also states that ... [Inaudible.] [Interjections.]

The CHIEF WHIP OF THE OPPOSITION: Point of order, House Chair.

The HOUSE CHAIRPERSON (Mr C T Frolick): Order hon member. Hon Zuma, will you take your seat please? Why are you rising, hon member?

The CHIEF WHIP OF THE OPPOSITION: Hon House Chair, I was referred to as Mazzone. I thought I made it perfectly clear yesterday that you can call me Tashie o hon Tashie, but hon or Mrs ... who you will.

The HOUSE CHAIRPERSON (Mr C T Frolick): No, no, I won't allow you to be called Tasha either. You will be called the hon Natasha or the hon Mazzone. Let's leave this thing of Tasha now.

Ms A S ZUMA: Okay thanks, House Chair. Hon Natasha. That section also states that the work ... [Inaudible.] ... must be designed and implemented to further diverse ... based on equality, dignity and respect of all people, Natasha.

IsiZulu:

Kusho wena.

English:

The CHIEF WHIP OF THE OPPOSITION: Point of order.

IsiZulu:

Nk A S ZUMA: Uyena oshilo. [Ubuwelewele.]

English:

The HOUSE CHAIRPERSON (Mr C T Frolick): Hon Zuma. Yes, hon member?

The CHIEF WHIP OF THE OPPOSITION: The hon Zuma needs to realise that I will continue calling points of order until she calls me hon Natasha or Mrs Natasha.

The HOUSE CHAIRPERSON (Mr C T Frolick): Yes, please. Thank you. Thank you. Please refer to the hon member as hon.

An HON MEMBER: You are wasting our time!

Ms A S ZUMA: House Chair, sorry?

The HOUSE CHAIRPERSON (Mr C T Frolick): I said refer to the hon member as hon.

Ms A S ZUMA: Okay. Reasonable accommodation for people from designated groups must be created at the workplace to ensure that they enjoy equal opportunities and are equitably represented. This is what is opposed by parties such as the DA and FF Plus. They are antitransformation parties that fight tooth and nail for the status quo to remain, even going as far as opposing what is entrenched in the supreme law of the country — the Constitution.

Equality is a fundamental human right and a matter of global and public concern. The Constitution of the Republic of South Africa entrenches the need to eradicate social and economic inequalities, particularly those that stem from our history of colonialism, apartheid and patriarchy, which brought pain and suffering to the great majority of South African citizens, in particular black people. Eish!

Despite the fact that the Bill of Rights, in section 9 of the Constitution, provides that everyone is equal before the law and that equality includes the full equal enjoyment of all rights of freedom, discriminatory practices are still rife in the workplace, and may I add, generally in South African society. The resistance of employment equity in the labour market is felt by those who are in workplaces; those who come in to claim their place in the world of work.

The employers, represented by management ... covered ... fight the implementation of employment equity while paying lip service to the need for transformation. The slow pace of transformation in the labour market shows that there is an average of one percentage point per annum in the movement from the white population to the black population at strategic decision-making levels of organisations.

The Minister emphasises the point that, indeed, self-regulation is failing the transformation agenda in the labour market. Therefore, in order to turn the tide and expand it, the pace of economic transformation during our lifetime ... This Employment Equity Bill we are debating today should be seen as a well thought, carefully considered intervention by lawmakers to accelerate transformation in the labour market. We cannot continue to ignore the fact that there is growing unease with the state of transformation in South Africa from employees themselves and the general public as a whole. South Africans are losing patience with the slow pace of economic transformation, and when that patience is completely depleted, consequences will be dire and all of us will not afford ...

Legislation demands transformation but it is powerless in changing the subtle power dynamics around these matters, especially if legislation, like the Employment Equity Act, is premised on the basis of self-regulation. Today, we are changing that. Therefore, unless employers buy into the spirit of the law, economic transformatio of the labour market will take more than a lifetime to be realised by the greater majority of our people. As this House, let's pass this Employment Equity Amendment Bill to ensure that as a legislature we become a mouthpiece of our people who mandated us to represent them with honesty and protect their constitutional rights to equality. Through the passing of these amendments, we would have contributed positively, building a conducive environment where all the people, irrespective of their race, colour, gender, sexual orientation or disability, to mention a few, are able to fully share in the wealth and fruits of our democracy, to create a better life for all, hon Mazzone. I thank you. [Laughter.] [Applause.]

The MINISTER OF EMPLOYMENT AND LABOUR: Chairperson, thank you to the members who have supported the Bill and I've listened carefully to those who d not support. Self-regulation has not worked. There is a need for decisive intervention by the state to leverage transformation of the labour market. Only those who wis to entrench the inequalities of the past and profit off the backs of vulnerable groups of workers, are opposing this Bill.

For those who wish to move forward with the goal of a fair and equitable market, we will always urge you to support all our actions, especially with regard to this Bill.

I've heard a lot coming from hon Cardo and from hon Denner. By the way, studies by international bodies like the Organisation for Economic Co-operation and Development, OECD, the World Bank and the International Labour Organisation, ILO, agree that South Africa's labour market is not particularly rigid. Calls for the deregulation of the labour market are not new. They were there when we started with the Labour Relations Act. The notion that South Africa or the South African labour market is overly rigid is a perception largely felt by the right-wing opposition parties and sections of capital. This comes from employers who never got over their loss of control in 1994, and the implementation of a Constitution and legislation which guaranteed human and labour rights.

In relation to the Employment Equity Amendment Bill, we cannot continue with the apartheid legacy of discrimination against blacks, women and people with disabilities in the labour market. Transformation is fundamental in our Constitution. Gone are those days.

In relation to the Compensation for Occupational Injuries and Diseases Amendment Bill, I must also emphasise — because they go together — that the provision of th basic social security safety net for workers is a basic right which will continue to be rolled out to ... [Inaudible.] ... groups of vulnerable workers. I thank you, Chairperson.

Debate concluded.

Question put: That the Bill be read a second time.

Division demanded.

The House divided.

The HOUSE CHAIRPERSON (Mr C T Frolick): Hon members in the Chamber, will you take up your allocated seats? Please take up your allocated seats, hon members. Hon Mashego, will you take up your allocated seat, please? Thank you.

Hon members, the Speaker has determined that, in accordance with the Rules, a manual voting procedure will be used for this division. Firstly, in order to establish a quorum, I will request the Table to confirm that we have the requisite number of members physically present in the Chamber and on the virtual platform to take this decision. Party Whips will then be given an opportunity to confirm the number of their members present and indicate if they vote for or against the question. A membe who wishes to abstain or vote against the party vote may do so by informing the Chair. We will now firstly establish the quorum.

Hon members, I have been informed by the Table Staff, having checked the number of members in the Chamber and those on the virtual platform, that we do not have a quorum. We only have 188 members present and therefore we cannot proceed to take a decision on this division that has been called. The vote and decision will be deferred. Hon member?

The DEPUTY CHIEF WHIP OF THE MAJORITY PARTY: Hon House Chairperson, I just want to put this on record. There are those parties that supported the Bill. They did it on the platform for the sake of electioneering, and they decided to log out so that we don't pass this Bill which will transform the situation of workers. So, it's quite embarrassing because we had the EFF. We have the ANC which has 168 members plus the number from the EFF and other parties, and the DA had also ... [Inaudible.] I'm still on the platform! I'm still on the platform! [Interjections.]

The HOUSE CHAIRPERSON (Mr C T Frolick): Order, hon members. Just calm down. Calm down.

The DEPUTY CHIEF WHIP OF THE MAJORITY PARTY: The DA and EFF supported ... [Interjections.] ... but they logged out. So, these parties are hypocrites!

An HON MEMBER: Hypocrites!

The HOUSE CHAIRPERSON (Mr C T Frolick): Thank you, hon member. Thank you, hon member.

The CHIEF WHIP OF THE OPPOSITION: On a point of order.

The HOUSE CHAIRPERSON (Mr C T Frolick): Yes, what's the point of order, hon member?

The CHIEF WHIP OF THE OPPOSITION: House Chairperson, thank you very much. It is imperative for Whips to know the Rules of the House and it is certainly not the responsibility of anyone but the governing party to maintain the quorum in the House. If the Whips of the governing party can't do so, then I suggest they look to themselves and ask why they cannot pass a piece of legislation. However, while I'm on my feet, allow me to say categorically and for the record that the DA opposes this piece of legislation.

The HOUSE CHAIRPERSON (Mr C T Frolick): Thank you, hon members from the ANC and the DA. The question is deferred, so there's nothing to debate and discuss any further.

Ms H O MKHALIPHI: Chairperson? Chair, I've also called a point of order. I thought you were going to recognise me.

The HOUSE CHAIRPERSON (Mr C T Frolick): I've recognised you now, hon member. What is your point of order?

Ms H O MKHALIPHI: Thanks, Chair of Chairs. I just want to put it clearly on record that we as the EFF support this Bill and what the Deputy Chief Whip of the ANC is saying is not true. So, she must go back to her drawing board. We are supporting this Bill because we want our workers to have better conditions where they work. However, coming here and claiming that the EFF has logged out from the platform is not really true. She must not talk like that because we are not going to tolerate what she's doing now.

The HOUSE CHAIRPERSON (Mr C T Frolick): Thank you, hon members. Hon members, let's continue to the Sixth Order. The secretary will read the Sixth Order.

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COSATU welcomes President Ramaphosa's signing of the Employment Equity Amendment Bill into law

April 13, 2023

The Congress of South African Trade Unions welcomes President Ramaphosa's signing of the Employment Equity Amendment Act into law.

The Employment Equity Amendment (EEA) Act provides badly needed interventions to strengthen government's ability to hold employers accountable for their role and failures to adhere to the Employment Equity Act. Key progressive provisions in the Bill include:

- Requiring employers to provide confirmation in their EE Annual Reports that they have paid all their workers at or above the National Minimum Wage;
- Expanding the definition of disabilities to include intellectual and sensory impairments, a long overdue correction;
- Empowering the Minister to set economic sectoral, sub-sectoral, regional, sub-regional and occupation specific targets; enabling more precise targets for sectors, occupations and regions that are notorious for their failures to reflect South Africa's demographics;
- Allowing for regional and sub-regional variations, which is critical given the diversity of South Africa's population found in different provinces;
- Requiring employers to consult trade unions on employment equity targets, and thus helping to foster a more inclusive approach to meeting targets and supporting collective bargaining;
- Empowering labour inspectors to inspect and ensure compliance with the EE Act;
- Empowering the Minister to issue compliance certificates to employers in good standing with the EE Act and to require such certificates for companies applying for government contracts.
    - This provision in particular is a welcome step forward requiring employers doing business with the state to be in compliance with labour laws and acting in a way that supports good labour practises. Workers' hard earned taxes should not be used to reward abusive employers.

COSATU urges the Department of Employment and Labour to move with speed to ensure the promulgation and implementation of these long overdue provisions. Organised Business must do its bit to ensure employers are aware of these new requirements. COSATU will working with its Affiliates, endeavour to empower shop stewards and workers on this progressive amendment act.

Issued by COSATU

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Employment Equity Amendment Bill 2020 – employers must act swiftly

By **Lizle Louw** - 2nd May 2023



Like 1

The Employment Equity Amendment Act has been signed into law, which paves the way for setting enforceable numerical targets for employment equity for economic sectors and fining employers who are non-compliant

On 12 April 2023, the President signed the Employment Equity Amendment Bill of 2020 into law. The Employment Equity Amendment Act (Amendment Act), which empowers the Minister of Employment and Labour to set employment equity targets for economic sectors and geographical regions, shifts away from the aspirational goals of the past to create enforceable targets.

The purpose

The admirable purpose of the Amendment Act is to ensure the equitable representation of suitably-qualified people from designated groups at all occupational levels in the

workforce.

Swift action is required by employers and their employment equity committees to achieve sector targets to avoid the consequences of non-compliance. However, a measured approach is just as important, because policies implemented too hastily may give rise to discrimination claims. We discuss below the crucial aspects of these changes that employers need to know.

The minister is empowered to identify national economic sectors and impose numerical targets to ensure the equitable representation of suitably-qualified people from designated groups at all levels in the workplace in terms of section 15A. The minister has identified 18 sectors in this regard.

A one-size-fits-all approach to targets in an entire sector may not always work and could even be prejudicial to employees. With the Amendment Act in place, it remains to be seen if targets will be set for sub-sectors within a sector, as was suggested during the public participation process.

The sector targets will be hard-coded with punitive measures attached to non-compliance. An employer's employment equity targets must comply with the sector targets set by the minister. This means that the goals set by employment equity committees will become irrelevant.

The consequences of non-compliance

An argument was presented to the president that the numerical target will amount to quotas and may be unconstitutional in light of the Constitutional Court's ruling in *South African Police Service v Solidarity obo Barnard*.

The amendments also deal with the consequences of non-compliance with the numerical sector targets. Non-compliance must be considered in the context of general non-compliance in terms of section 42 of the EEA, as well as in relation to the issuing of certificates of compliance by the minister.

Amended section 42 provides that, in determining whether an employer is implementing employment equity in compliance with the EEA, compliance with sectoral targets may be considered.

In determining compliance with the EEA, the steps taken by an employer to comply or any other degree of compliance is not considered. Instead, there is an "all or nothing approach". This means that an employer who is 90% compliant will be penalised in the same way as an employer for 70% compliance, or 5% compliance.

The amendment to section 53 of the EEA provides that employers will only be able to contract with the state if they have complied with the numerical target set out in section 15A or raised a reasonable ground to justify their non-compliance.

The draft Employment Equity Regulations set out justifiable reasons for non-compliance, including:

- insufficient recruitment opportunities;
- insufficient promotion opportunities; and
- insufficient target individuals from designated groups with the relevant qualifications, skill and expertise.

Interestingly, the examples in the draft regulations did not find their way into the Amendment Act itself, which may have given employers more comfort.

Immediate practical steps to comply

The EEA contains a fines schedule which remains unchanged. It is important to know that the fines and penalties set out in the schedule were negotiated at NEDLAC, when targets were aspirational and not hard coded.

In the context of hard-coded targets such as those proposed by section 15A, it is arguable that the fines are no longer appropriate, especially where degrees of compliance are not considered.

The enactment of the Amendment Act requires employers to take immediate practical steps to comply.

Employers are encouraged to:

- evaluate their current employment equity policies and practices, with a view to taking steps to comply with new requirements;
- review the Amendment Act and assess the organisation's current standing in respect of compliance or non-compliance;
- identify any hurdles that may prevent compliance;
- develop a strategy to meet the draft sectoral targets in anticipation of such targets being published in final form;
- provide training and support to employment equity committees, human resources and management on the content of the Amendment Act, necessary changes to existing employment equity policies and plans, and the risks associated with the hasty implementation of policies;
- monitor announcements by the Department of Employment and Labour on sector targets. We will be monitoring reporting requirements and communicate them to clients, as employers will have 30 days to comment once these regulations are issued; and
- foster a culture of inclusivity and diversity within the organisation.

In conclusion

The Employment Equity Amendment Act is a significant piece of legislation that shifts away from aspirational goals to enforceable targets to ensure the equitable representation of suitably-qualified people from designated groups at all levels in the workforce.

Employers need to take a measured approach to ensure compliance with these new requirements and avoid the consequences of non-compliance.

Our involvement in the public consultations on the bill on behalf of various employers puts it in a good position to assist employers to take steps to address any difficulties in the implementation of the Amendment Act.

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Business formations cautious of Employment Equity Amendment impact

14th April 2023

By: Schalk Burger
Creamer Media Senior Deputy Editor

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Following the signing into law of the Employment Equity Amendment Act, various business and labour organisations have voiced their opinions, including urging caution about its impact on businesses and the cost of doing business.

Business lobby Business Unity South Africa (Busa) welcomed the signing into law of the Bill by President **Cyril Ramaphosa**, saying this ended a long period of uncertainty on the proposed changes and impact of transformation laws.

The step was in line with the position the organisation adopted throughout the Bill process from the National Economic Development and Labour Council to Parliament, it noted.

Busa is further pleased that employment equity targets for sectors will be set by the Minister of Employment and Labour only after consultation with the relevant business and employer bodies in the affected sectors.

"In our view, meaningful consultation on sector targets affirms social dialogue and will ensure the relevance of the set targets," said Busa CEO **Cas Coovadia**.

However, Busa is aware that some aspects of the law remain problematic, which the organisation had raised in Parliament during the public hearings process in 2021 and 2022.

For example, it said, measuring compliance and issuing compliance certificates as a licence to do business with the State would depend on

Further, Busa also expressed concerns around the fragmentation of policy objectives and enforcement mechanisms within government, with some companies, because of their sectors, expected to comply with different transformation targets administered by different government departments or entities.

"These complex arrangements increase the compliance burden, which, in turn, may derail transformation, especially at a time when South Africa desperately needs economic growth to generate much-needed employment," Coovadia cautioned.

Busa would continue constructive engagements with the DEL on the implementation arrangements, which would hopefully resolve some of the concerns it raised, he said.

Meanwhile, trade union Solidarity said the amended Act imposed race targets on all sectors, which it believed would have dire consequences for the economy.

"New definitions of 'designated employers' will force small businesses to remain small and will cost thousands of jobs. Also, any promotion opportunities for those fortunate enough to keep their jobs will be completely stopped," said Solidarity CE Dr **Dirk Hermann**.

"This will mean that the skills exodus would merely be accelerated, and South Africa's economy, like its public service, will become increasingly trapped in a spiral of inefficiency, contraction and imminent collapse."

Solidarity believes this legislation grants draconian race-focused powers to the Minister of Employment and Labour.

"The Minister can now do central racial planning at his or her own discretion. This would be the most drastic race-manipulating legislation in the world. It is anticipated that the private sector would have to follow the State's example. Private enterprises will become State-run racial enterprises," Hermann averred.

In its submissions to Parliament, it contended that the amendments were unconstitutional. Solidarity's legal team has, therefore, already started to prepare for litigation and has indicated that it will serve its court papers soon.

Further, Solidarity is of the opinion that this Act is unconstitutional and that it is, moreover, directly contrary to an earlier finding of the South African Human Rights Commission, which indicated that, even

pulling the country into the abyss".

"Although this amendment is guised under different terminology, the legislation is nothing other than a race-based quota system forced upon employers," Neasa CE **Gerhard Papenfus** said.

"This legislation is another step in killing the goose that lays the golden eggs," he averred.

Further, government did not understand that employing the best person for the job, without exception, is critical for a business to succeed, he argued.

"This principle and employment practice dictates that, when employing a person in a position, various critical factors, but not race and gender, have to be considered," emphasised Papenfus.

The government simply does not comprehend that not following this golden rule in employment is causing the failure of all government departments and State-owned enterprises, he added.

"A major difference between the old and new Acts is that the Minister will now determine targets for all designated employers, which are those employing more than 50 employees, within a specific sector, whereas under the old Act, these targets were within the purview of individual employers, taking into account the economically active population," he said.

Employers who fail to comply with employment equity targets will eventually face severe penalties and fines, and will not be issued with a compliance certificate, which is required to tender for government contracts.

"Forcing employers to employ a person from a specific ethnic group will probably deter employers from filling vacancies if the applicant from the designated group is deemed not to be the most suitable candidate."

He suggested that government should rather focus on creating an economic framework that will aid the private sector in growing the economy, increasing employment and, consequently, addressing inequality.

Edited by Chanel de Bruyn

Creamer Media Senior Deputy Editor Online

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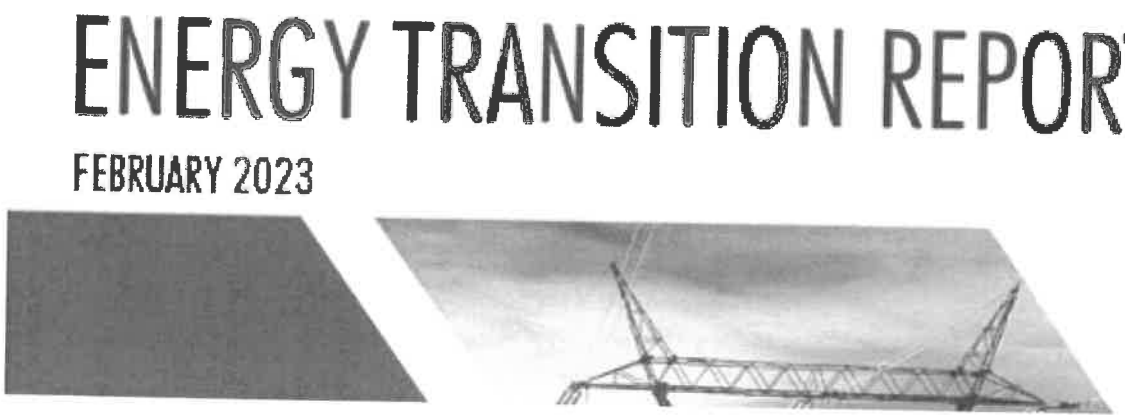
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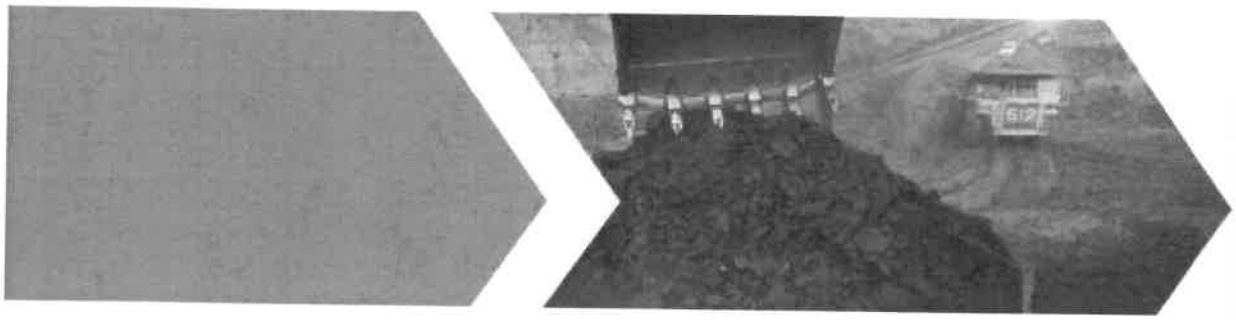
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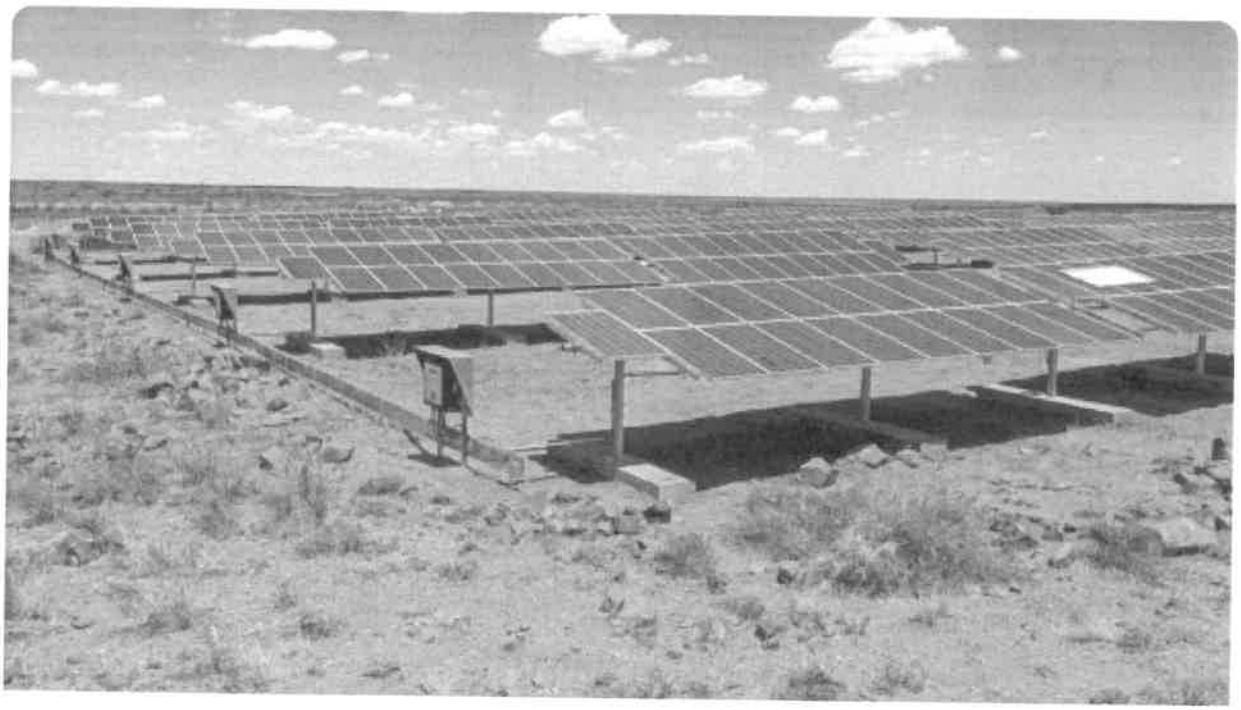
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