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, <u>but exclude quotas</u>*".

[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]

[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

[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,*

[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

[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

[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]

[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*

[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.

[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).''

<u>The provisions provide for a quota system</u>

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*

[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.

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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 …… day of ..... 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.

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COMMISSIONER OF OATHS