Employment Law

ALERT

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INCORPORATING
KIETI LAW LLP, KENYA

IN THIS ISSUE

Achieving equitable workforce representation: The settlement agreement on employment equity and affirmative action between the Government and Solidarity

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Achieving equitable workforce representation: The settlement agreement on employment equity and affirmative action between the Government and Solidarity

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In May 2023, the Minister of Employment and Labour (Minister) published draft numerical targets for national economic sectors, providing a 30-day window for interested parties to submit their comments. These amendments and the power afforded to the Minister are a notable development and a strong intervention in the state's right to set targets within the existing employment equity regulatory framework.

Solidarity, a trade union, filed an application in the Labour Court challenging the relevant provisions of the EEA Amendment that pertain to the identification and implementation of numerical targets by designated employers. Solidarity argues that these amendments are unconstitutional as they impose racial categorisation and a quota-based system on designated employers, amounting to rigid quotas and absolute barriers based on race. Additionally, Solidarity contests the extensive powers granted to the Minister to set the targets, which it believes is beyond the scope of the Constitution. It also asserts that the amendments violate international law.

Settlement agreement

Prior to the above, in 2021, Solidarity filed a complaint with the International Labour Organisation (ILO) objecting to the employment equity interventions by the Government. As a member of the ILO, South Africa has undertaken, in terms of an ILO convention, to pursue a national policy promoting equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in this respect, including, but not limited to, discrimination based on race.

A mediation process facilitated by the Commission for Conciliation, Mediation, and Arbitration (CCMA) ensued under the supervision of the ILO. The mediation process lasted for nine months. On 28 June 2023, subsequent to the President assenting to the amendments earlier this year and Solidarity's application in the Labour Court, the parties reached a settlement and entered into a settlement agreement, part of which provides for it to be published as a regulation and enforced as a court order.

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The parties essentially settled on the following:

a) *"Affirmative action is a coherent packet of measures, of a temporary nature in line with the Constitution, aimed specifically at correcting the position of members of a target group as defined in the Employment Equity Act [55 of 1998 (EEA)] in the workplace, in order to obtain effective equality.*

b) *Affirmative action shall be applied in a nuanced way, as embodied in this agreement, and the economically active population statistics will only be one of many factors that will be taken into account in the compliance analysis of affirmative action in any workplace.*

c) *No absolute barrier may be placed upon any employment practices affecting any persons from any group.*

d) *For the purpose of preparing and implementing an employment equity plan and reporting and compliance analysis of affirmative action in any workplace, the following criteria must be taken into account:*

- *inherent requirements of the job;*
- *the pool of suitably qualified persons;*
- *the qualification, skills, experience and the capacity to acquire, within a reasonable timeframe, the ability to do the job;*
- *the rate of turn-over and natural attrition within a workplace;*
- *recruitment and promotional trends within a workplace.*

e) *In the compliance analysis of affirmative action in any workplace justifiable/reasonable grounds for not complying with the targets as set by the employer and/or any other targets set by any other party, may include:*

- *insufficient recruitment opportunities;*
- *insufficient promotion opportunities;*
- *insufficient target individuals from the designated groups with the relevant qualification, skills and experience;*
- *CCMA awards/court orders;*
- *transfer of business;*
- *mergers/acquisitions; and*
- *impact on business economic circumstances.*

f) *No penalties or any form of disadvantage will be incurred by the employer if in the compliance analysis of affirmative action in any workplace, there are justifiable/reasonable grounds for not complying with the targets.*

g) *No employment termination of any kind may be effected as a consequence of affirmative action."*

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Noteworthy points from the agreement

Upon reviewing the settlement agreement, several noteworthy points emerge. First, the agreement does not raise a specific objection to the targets and effectively acknowledges the need for affirmative action.

Clause (a) of the settlement agreement refers to affirmative action measures as "*temporary*" in nature. However, it is worth noting that the EEA Amendment does not contain a sunset clause, raising doubts about the enforceability of this particular aspect of the settlement agreement. In addition, it is too vague to be enforceable, particularly in terms of expecting a specific timeline for the end of affirmative action policies by the Government. Theoretically, if the transformation aims of the employment equity legislation are achieved, the need for its continued existence may be challenged, but it is difficult to apply a definitive prospective date that can be envisaged as a time by when these aims would be achieved. The remainder of the clause contains nothing new in terms of the law.

Furthermore, clause (b) states that affirmative action should be applied in a nuanced manner, as outlined in the agreement. It is arguable that this provision would not be applicable if it were to contravene the provisions of the EEA Amendment, as it would render it ultra vires. Additionally, the use of the term "*nuanced*" in clause (b) lacks clarity, as it does not specify whether it pertains to subtlety, delicateness, refinement or meticulousness. Currently section 15 of the EEA states that a designated employer is not required 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 and the EEA Amendment provides a non-compliant employer with an opportunity to demonstrate a reasonable ground for non-compliance.

With respect to clause (d) of the agreement, it is contended that there exist additional factors that must be taken into account. These factors are in any event currently possible under the EEA.

It is evident that certain clauses in the settlement agreement are directly derived from the EEA. It is important to also note that the parties do not have the necessary locus standi to bypass the regulatory framework of the EEA, including the process of issuing regulations in terms of the EEA.

These factors should be carefully considered when analysing the content of this settlement agreement together with the existing regime set out by the EEA.

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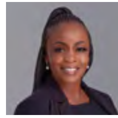

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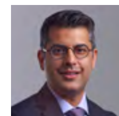

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BBBEE STATUS: LEVEL ONE CONTRIBUTOR
Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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