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04 JUNE 2025

TO: **ME C VARGHA**
DIRECTOR OF INTERNATIONAL LABOUR STANDARDS DEPARTMENT
INTERNATIONAL LABOUR ORGANIZATION

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BY EMAIL

Dear Sir/Madam

IN RE: REPUBLIC OF SOUTH AFRICA SETTLEMENT NON-COMPLIANCE

1. Solidarity is a trade union that has more than 200 000 members in all occupation fields and provides workplace assistance to its members at countrywide offices.

2. We are committed to the Constitution and actively seeks to safeguard the constitutional rights of our members and, more generally, the broader South African who has a direct interest in this matter.

3. Solidarity, its members and the public at large have an interest in the appropriate and constitutionally compliant adoption of affirmative action measures, including regulations. Solidarity's representation of members adversely affected by the application of

employment equity plans adopted under the Employment Equity Act 55 of 1998 (hereafter the "EEA") is a matter of public record.

4. As a recognized Union at numerous "designated" employers Solidarity engages with employers on a frequent basis regarding the implementation of affirmative action measures and compliance with the EEA.

THE SETTLEMENT

5. It is trite that South Africa has ratified most, if not all, core ILO Conventions but more specifically has ratified Convention C111 which is ostensibly incorporated in the EEA.

6. Article 1 of the Convention states that the term discrimination includes -

"(a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation."

7. The following are quotes from an ILO Report released during 2003:[1]

"197. The expression "affirmative action" refers to: a coherent packet of measures, of a temporary character, aimed specifically at correcting the

[1] Time for equality at work, Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Right at Work, International Labour Conference,91st session 2003, pp 63-64.

position of members of a target group in one or more aspects of their social life, in order to obtain effective equality" (emphasis added).

and

"199. A common feature of affirmative action measures is their temporary nature. This presupposes a regular and objective evaluation of affirmative action programmes at ascertaining their effectiveness, redefining regularly their scope and content and determining when to bring them to an end. In some countries, however, they may be discontinued, or their effectiveness reduced as a result of cuts in social spending, economic downturns or economic restructuring.

8. It is evident that the ILO underlines that affirmative action should be temporary in nature.

9. Solidarity has made representations in terms of article 24 of the ILO indicating that the Republic of South Africa is in non-adherence with its international law obligation more specifically Convention C111.

10. Thereupon, Solidarity and the Republic of South Africa entered into a mediation process in the ILO and facilitated by the Commission for Conciliation, Mediation and Arbitration (hereinafter referred to as the "CCMA").

11. Solidarity and the Republic of South Africa settled the dispute on numerous grounds; however, we wish to highlight the following salient clause in the settlement agreement under case number: H02-23:[2]

> *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 in the workplace, in order to obtain effective equality:*[3]

12. The settlement agreement also recorded that:

> *"The parties agree that the aforementioned agreement will be gazetted as part of the 2023 Employment Equity regulations, and will be deemed a settlement under case number J661/23 where it will be made an order of a Court."*

13. Subsequently the above-mentioned settlement agreement was made an order of court under case number J 6661/23, and the matter was closed at the ILO specifically since the matter has been settled. In relation to this, we specifically refer to your website entry which reflects the ILO's decision as follows:[4]

> *"The Governing Body, welcoming that agreements had been reached between the parties concerned following conciliation processes, and on*

[2] We attach the settlement hereto for ease of reference
[3] Own emphasis
[4] https://normlex.ilo.org/dyn/nrmlx_en/f?p=NORMLEXPUB:50012:0::NO::P50012_COMPLAINT_PROCEDURE_ID%2CP50012_LANG_CODE:4141207%2Cen

the recommendation of its Officers, decided to close the procedure of the representation alleging non-observance by:

South Africa of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

(GB.349/INS/19, November 2023)"

14. Since the matter has been settled, and the settlement was made an order of Court in South Africa, is seems that the matter cannot be re-opened at the ILO.

SOUTH AFRICA'S CONTEMPT FOR THE SETTLEMENT AGREEMENT AND THE ILO

15. South Africa's Labour Minister, with the concurrence of the relevant State functionaries, proceeded on 15 April 2025 to publish the Employment Equity Regulations (the "EE Regulations") in Government Gazette No 52515, and the Sectoral Numerical Targets (the "Sector Targets") in Government Gazette No 52514.

16. The EE Regulations and the Sector Targets violate the express terms of the settlement, as I will indicate more fully herein below. The impugned regulations disregard the agreed-upon mandatory considerations, reintroduce inflexible demographic quotas under the guise of "sectoral targets," and effectively nullify the legal compromise that gave rise to the settlement. Solidarity formed the view that these actions constitute a deliberate and unlawful defiance of the settlement, amounting to contempt of the ILO, its procedures and the settlement.

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17. The EE Regulations are inconsistent with the agreed-upon settlement as follows:

17.1. Paragraph (b) of the settlement stipulates that affirmative action should be implemented in a nuanced manner and requires that the statistics of the economically active population will only be one of many factors considered in the compliance analysis of affirmative action in any workplace. Evidently, the EE Regulations make compliance with the economically active population standard mandatory when designated employers establish numerical goals—this excludes other relevant factors. The EE Regulations also require a designated employer's assessment of compliance to be conducted with reference to the "relevant 5-year sectoral numerical targets".

17.2. Paragraph (d) of the settlement requires that 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 promotion trends within a workplace."*

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17.3. Although the parties explicitly agreed that *'no employment termination of any kind may be effected as a consequence of affirmative action',* this has been omitted from the EE Regulations in totality. The only rational conclusion for the omission being that the South African republic envisages, in our current labour legislation scheme, a situation where dismissal based on race or gender, and in the pursuit of affirmative action measures, can be justified.

18. Whereas the settlement established an obligation to consider specific factors when setting numerical targets and assessing a designated employer's compliance, these factors have been rendered non-obligatory in the EE Regulations. The economically active population standard and the 5-year sectoral targets are the only mandatory factors to be considered, contrary to the requirements of the settlement.

19. Moreover, the factors stated in paragraph (d) (hereabove) are no longer obligatory for assessing an employer's compliance and have been reduced to "justifications" that an employer can raise for their non-compliance.

20. These differences are not mere semantic "adjustments", rather, they constitute substantive deviations from the settlement agreement.

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CONCLUSION – SOUTH AFRICA'S FIXATION WITH PERMANENT REPRESENTATIVENESS

21. In conclusion we submit, respectfully, that whilst proportional representation of every population group at every level and in every conceivable field is emphasized and enforced in South Africa as the only purpose of employment equity, it is not necessarily "equitable representation" as envisaged in international conventions. The determination of what is "equitable" ought not to be a simple exercise of considering the make-up of the economically active population.

22. Currently the South African government measures affirmative action compliance and target-setting against the EAP. Thus, the EAP is used in isolation; no factor other than the percentage of race is utilised. This unlawfully and unfairly makes affirmative action in South Africa an indefinite permanent pursuit of statistical representivity, which is clearly an affront to the principle that special measures should be temporary.

23. In summary, the South African government's actions and EE Regulations represent not only a legal affront to the settlement but also a substantive betrayal of the painstakingly achieved negotiated consensus.

24. The South African Government cannot now disavow the very obligations it undertook in terms of the ILO conventions, nor can it sidestep rationality, and the settlement agreement terms by sleight of hand. It is respectfully submitted that the Government

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must yield to the binding force of the settlement, and that its conduct in this regard constitutes a flagrant repudiation of its undertakings.

REQUEST

25. We respectfully request, as a matter of utmost importance, that:

25.1. You request the South African Government to respect, comply with, and implement the settlement agreement;

25.2. We be afforded an opportunity to an address to the ad hoc committee and/or governing body, for us to expand on the contents of this letter. Said request is lodged since the contents of this letter are a mere summation of arguments to be proffered as to why our government is in gross contravention of the settlement agreement;

25.3. An urgent country visit to investigate the contents of our letter specifically, but South Africa's fixation with never-ending transformation generally; and

25.4. Provide advice in terms of the complaints as set in our letter specifically, but also regarding the temporary nature of affirmative action in South Africa generally.

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26. We sincerely hope that this matter, and the contents and request as set out in this letter, is dealt with as a matter of urgency, and look forward to your response.

Kind Regards,

ANTON VAN DER BIJL
DEPUTY CEO: SOLIDARITY

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