



SOLIDARITEIT
SOLIDARITY

SPECIAL PROCEDURES

COMPLAINT AGAINST THE GOVERNMENT OF SOUTH AFRICA





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South Africa committed to non-racialism during the 1994 transition. Unfortunately, this ideal has not been realised as 30 years later South Africa remains one of the most race-regulated countries in the world. The ANC has implemented three pieces of legislation that use race classification aimed at redressing the effects of apartheid – affirmative action, preferential procurement and black economic empowerment.

In practice, these policies rely solely on the benchmark of never-ending statistical representativity and have led to ever-increasing racialisation of every aspect of South African life. These policies have had no impact on reducing inequality, poverty or unemployment – but have

succeeded in creating a new type of racial rent-seeking through tenderpreneurs and cadre deployment.

At grassroots level, these policies have manifested in absurdities – such as sports teams “losing” games for not being demographically representative enough or the government implementing COVID-19 relief funds that only black business owners are eligible to apply for.

Ultimately, the racial requirements embedded in these policies deter foreign investment and inhibit growth, leading to higher unemployment and poverty amongst South African citizens.



2 THE TEMPORARY NATURE OF AFFIRMATIVE ACTION

*"For the reasons provided above, the Harvard and UNC admissions programs cannot be reconciled with the guarantees of the Equal Protection Clause. Both programs lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points. We have never permitted admissions programs to work in that way, and we will not do so today."*¹

2.1 Section 39, section 232 and section 233 of the Constitution of the Republic of South Africa state that South Africa is bound by international law.²

2.2 The International Labour Organisation (hereinafter referred to as the "ILO") sets out conventions that are legally binding international treaties with the purpose of stipulating basic principles and rights at work. South Africa has, inter alia, ratified ILO Convention C111. Article 5(2) of the Convention introduces affirmative action in the form of special measures—

"Any Member may, after consultation with representative employers' and workers' organisations, where such exist, determine that other special measures designed to meet

the particular requirements of persons who, for reasons such as sex, age, disablement, family responsibilities or social or cultural status, are generally recognised to require special protection or assistance, shall not be deemed to be discrimination."

2.3 To ensure that special measures are legal and rational an ILO Report, released in 2003, states as follows:³

"197. The expression "affirmative action" refers to: a coherent packet of measures, of a temporary character, aimed specifically at correcting the position of members of a target group in one or more aspects of their social life, in order to obtain effective equality"....

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."

¹ Fair Admissions, Inc. v. President and Fellows of Harvard College is 600 U.S. 181 (2023). Own emphasis.

² Constitution of the Republic of South Africa

³ 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. Emphasis added.

2.4 Under the guidance of the Committee on the Elimination of Racial Discrimination (hereinafter referred to as "CERD") the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter referred to as "ICERD"), also ratified by South Africa, states in article 1 paragraphs 1 and 4, read with General Recommendation 32 of 2009 that:

"Special measures may 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."⁴

2.5 International best practices, as evidenced by ILO, CERD and court cases such as *Fair Admissions, Inc.*, underline that affirmative action should be temporary in nature.

2.6 In 2022, Solidarity 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 obligations, more specifically Convention C111.

2.7 Thereupon, Solidarity and the Republic of South Africa entered a mediation process of the ILO, which was facilitated by South Africa's Commission for Conciliation, Mediation and Arbitration (hereinafter referred to as the "CCMA").

2.8 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:

*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.*⁵

2.9 Although the above-mentioned settlement agreement was made an order of court, we submit that the South African government blatantly disregarded its international obligations as well as the settlement agreement, which dictates meaningful end points for affirmative action.



⁴ Own emphasis

⁵ Own emphasis

- 3.1 South Africa has more than 140 laws that still reference race in one form or another. Whilst the self-stated aim of several pieces of this legislation is to undo the economic exclusion of black people by the apartheid government, it is clear that these policies have not achieved their objectives at all when looking at the results rather than the intentions.
- 3.2 Although the intentions behind affirmative action and black economic empowerment may seem noble at face value, the outcomes have diverged significantly from the stated intentions. In the ANC policy document outlining the need for affirmative action, it is expressly stated that South Africa should not “become a nation of groups all walking around with calculators doing head counts”⁶. However, in practice, this is exactly what has happened: in 2025, South Africa has entire departments in government and private sector companies that are devoted to constantly calculating demographic headcounts.
- 3.3 Whilst a raft of examples can be provided, we offer only one of the most recent. The Labour Minister, with the concurrence of the President and relevant State functionaries, proceeded on 15 April 2025 to publish the Employment Equity Regulations (the “EE Regulations”), and the Sectoral Numerical Targets (the “Sector Targets”).
- 3.4 It is evident from the reading of the regulations that the affirmative action appointment and promotion measures put in place are only benchmarked against South Africa's ever-changing economically active population (“EAP”) statistics, as well as sectoral targets determined by the Minister (which, in turn, are also based exclusively on the EAP). These measures are therefore not temporary, and the “goal posts” will be continually shifted.
- 3.5 Whereas international obligations implicitly, and the court order settlement explicitly, establish an obligation to consider a wide array of holistic 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 five-year sectoral targets are the only mandatory factors to be considered.
- 3.5 The regulations are clearly in contravention of South Africa's obligations under international law, as well as the court order settlement agreement concluded between Solidarity and the Government, particularly with regard to the requirement that special measures must be temporary in nature.

⁶<https://www.anc1912.org.za/policy-documents-1994-affirmative-action-and-the-new-constitution/>

4

CONCLUSION

In conclusion, we submit – respectfully – that whilst proportional representation of every population group at every level and in every conceivable field is emphasised 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 composition of the economically active population.

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 considered. This approach unlawfully and unfairly makes affirmative action in South Africa an indefinite pursuit of statistical representativity, which is clearly an affront to the principle that special measures should be temporary.



The conduct of the South African government constitutes, in every material respect, a deliberate and calculated defiance of its international obligations. It is not merely an administrative oversight or a technical divergence; it is a repudiation of the very foundation upon which international obligation regarding special measures is based, which in turn was intended to preserve the integrity of South Africa's constitutional framework concerning affirmative action and employment equity.

We accordingly request the following:

- 5.1 An urgent visit to the country to investigate our complaint specifically, as well as South Africa's broader fixation with never-ending transformation;
- 5.2 That you mediate a process between Solidarity and the South African government in which this complaint is dealt with; and
- 5.3 That you provide advice regarding this complaint specifically, and more generally on the temporary nature of affirmative action in South Africa.





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