IN THE LABOUR COURT OF SOUTH AFRICA

JOHANNESBURG

Case no.:

In the matter between:

SOLIDARITY	**Applicant**
And	
MINISTER OF EMPLOYMENT AND LABOUR	**First respondent**
THE DEPUTY MINISTERS 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**

NOTICE OF MOTION

TAKE NOTICE THAT the applicant (Solidarity) will make application on the _____ day of _____ 2025 at 10h00, or so soon thereafter as counsel may be heard, for an order in the following terms:

1. Reviewing and setting aside the first respondent's decision to publish the General Administrative Regulations 2025, published in Government Notice No 6125 in Government Gazette No. 52515 on 15 April 2025, and dated 10 April 2025.

2. Reviewing and setting aside the decision of the first respondent to publish the '*sectoral numerical targets'*, published in Government Notice No. 6124 in Government Gazette No. 52514 on 15 April and dated 10 April 2025.

3. Declaring such sections of the Regulations as are found to be unlawful and unconstitutional, and Sectoral Targets, to be unlawful, unconstitutional and invalid.

4. That the respondents be ordered to pay the costs of this application, jointly and severally, the one paying the others to be absolved, including the costs of two counsel, where so employed; and

5. Granting further and/or alternative relief.

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

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

TAKE FURTHER NOTE THAT:

(i) The respondents are hereby called upon to dispatch to the registrar within 10 days after receipt of this notice of motion, the complete record of all and any proceedings relevant to the decision referred to in prayer 1 and 2 above , as well as the reasons for that decision, and to notify the applicant that it has done so within 15 (fifteen) days of date of service of this application.

(ii) The applicant may, within 5 days after the Registrar of this Honourable Court has made the records available, amend, add to and/or vary the relief sought in this notice of motion and supplement its founding affidavit.

(iii) Should any of the respondents wish to oppose the granting of the order sought herein, such respondents must, within 10 days of receipt of the notice of amendment or notice that the applicant stands by its notice of motion, deliver an affidavit in answers to the allegations made by the applicant.

Dated at PRETORIA on this the 17 day of JULY 2025.

SERFONTEIN VILJOEN & SWART

Attorneys for the **APPLICANT**

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BROOKLYN

PRETORIA

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REF: MR CLAASSEN // MR VENTER // MJ // CS0541

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

JOHANNESBURG

AND TO: **THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA**

FIRST RESPONDENT

UNION BUILDING

GOVERNMENT AVENUE

PRETORIA

TEL: (012) 300 5200

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AND TO: **THE MINISTER OF EMPLOYMENT AND LABOUR**

SECOND RESPONDENT

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CNR FRANCIS BAARD AND PAUL KRUGER STREETS

PRETORIA

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AND TO: **THE DEPUTY MINISTERS OF EMPLOYEMNT AND LABOUR**

THE THIRD RESPONDENT

215 LABORIA HOUSE

CNR FRANCIS BAARD AND PAUL KRUGER STREETS

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AND TO: **THE DEPARTMENT OF EMPLOYMENT AND LABOUR**

THE FOURTH RESPONDENT

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CNR FRANCIS BAARD AND PAUL KRUGER STREETS

PRETORIA

TEL: (012) 392 9630

AND TO: **THE DIRECTOR-GENERAL OF THE DEPARTMENT OF EMPLOYMENT AND LABOUR**

THE FIFTH RESPONDENT

215 LABORIA HOUSE

CNR FRANCIS BAARD AND PAUL KRUGER STREETS

PRETORIA

TEL: (012) 392 9630

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

316 THABO SEHUME STREET

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

IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)

CASE NO:_____

In the matter between:

SOLIDARITY	Applicant
and	
MINISTER OF EMPLOYMENT AND LABOUR	First respondent
THE DEPARTMENT OF EMPLOYMENT AND LABOUR	Second respondent
THE DIRECTOR-GENERAL OF THE DEPARTMENT OF EMPLOYMENT AND LABOUR	Third respondent
COMMISSION FOR EMPLOYMENT EQUITY	Fourth respondent

FOUNDING AFFIDAVIT

I, **ANTONIE JASPER VAN DER BIJL**, state on oath:

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DEPONENT, KNOWLEDGE AND AUTHORITY

1. I am an adult male and the Deputy Chief Executive: Legal of the applicant (Solidarity). I am duly authorised to depose to this affidavit and to represent Solidarity in this application. I attach the relevant resolution as annexure **AVB1**.

2. Unless specifically stated otherwise or where the context indicates differently, I possess personal knowledge of the facts stated herein or have verified them against the records of Solidarity that are within my control. I confirm that they are true and correct.

3. Where I rely on submissions and allegations of others, newspaper reports, or other hearsay evidence, I request that it be admitted in terms of section 3 of the Law of Evidence Amendment Act No 45 of 1988. In the circumstances of the case, it is 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.

THIS APPLICATION

5. This is an application -

5.1. in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA);

5.2. *alternatively,* under the principle of legality,

to review and set aside:

5.2.1. the "*Employment Equity Regulations, 2025*" attached as annexure **AVB2** (the 2025 EE Regulations); and/or

5.2.2. the "*Determination on Sectoral Targets*", attached as annexure **AVB3** (the Sectoral Targets).

6. The Minister of Labour and Employment (the Labour Minister) published the 2025 EE Regulations and the Sectoral Targets on 15 April 2025.

6.1. The Labour Minister's power to make regulations derives from section 55(1) of the Employment Equity Act 55 of 1998 (EEA). The 2025 EE Regulations were published following the withdrawal of the Employment Equity Regulations, 2014 (the 2014 EE Regulations). Per section 42(2) of the EEA, any regulation issued by the Labour Minister under section

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55 of the EEA must also be considered when assessing whether an employer is implementing employment equity in line with the requirements of the EEA. Such regulations may "*specify the circumstances under which an employer's compliance should be determined with reference to the demographic profile of either the national economically active population or the regional economically active population*" (EEA s 42(3)).

6.2. In setting the Sectoral Targets, the Labour Minister was purportedly invoking her powers under amendments to the EEA that came into effect on 1 January 2025: section 15A of the EEA now empowers the Labour Minister to set numerical targets for "*any national sector*" as identified, and to establish different numerical targets for various occupational levels, sub-sectors, or regions within a sector (EEA s 15A). When a designated employer sets numerical goals as part of its employment equity plan, the employer is obliged to comply with the Sectoral Targets applicable to that employer (EEA s 20(2A)). Moreover, in assessing whether a designated employer is implementing employment equity in accordance with the requirements of the EEA, consideration must be given to whether the employer has adhered to the Sectoral Targets applicable to that employer (EEA s 42(aA)).

7. Solidarity asks this court to declare that the 2025 EE Regulations and the Sectoral Targets are unconstitutional and invalid, and for the court to review them and set them aside.

8. The 2025 EE Regulations disregard agreed-upon mandatory considerations, reintroduce inflexible demographic quotas under the guise of "*sectoral targets*," and effectively nullify a legal compromise that gave rise to an order of this Court.

9. The Sectoral Targets fall to be reviewed and set aside separately and in any event.

9.1. The Labour Minister failed to comply with section 15A(2) and 15A(4) of the EEA when she set them: she set the Sectoral Targets without first publishing draft targets for comments by interested parties as section 15A(4) requires, and she did not conduct proper consultations with the sectors as required by section 15A(2) of the EEA.

9.2. The Sectoral Targets are unlawful and invalid because they are unrealistic and irrational. The Labour Minister did not consider the impact of the Sectoral Targets that aim at compelling the workforce at every occupational level and in every sector to conform to the demographic profile of the economically active population (EAP) in South Africa.

10. That the Sectoral Targets are unrealistic and irrational is evident from the most recent Solidarity impact study attached as annexure **AVB4**, which must be read as if incorporated herein.

10.1. Achieving the targets solely through growth would necessitate extraordinarily high growth rates across most sectors, particularly in agriculture, construction, electricity supply, professional services, and public administration. Many of these sectors would need to more than double in size within five years for the targets to be met.

10.2. Given the lack of actual employment growth in recent years, employers would have to replace existing employees, rather than achieve the intended equity through new hiring. However, in a settlement agreement between Solidarity and the Labour Minister, concluded on 28 June 2023, and made an order of court on 31 October 2023, the Labour Minister agreed that "*No employment termination of any kind may be effected as a consequence of affirmative action*". I attach the order and the settlement agreement as annexure **AVB5**.

10.3. The Sectoral Targets ignore occupational preferences. A large number of females, mostly in education and health, would have to be replaced to align the workforce with the Sectoral Targets.

11. With the Sectoral Targets being as unrealistic as they are, the question arises: how did the Labour Minister establish these Sectoral Targets? We do not know.

11.1. Consultation occurred at a time when the sectors had not been appropriately defined.

11.2. Consultation was superficial.

11.3. Whatever methodology was used does not take into account the nature and circumstances of each of the sectors to which the Sector Targets are intended to apply.

11.4. In these proceedings, Solidarity requests that the record of the Labour Minister's decision to set the specific Sectoral Targets be provided, and Solidarity reserves the right to expand its grounds for review based on the content of the record to be provided.

12. The problem with the Labour Minister's approach is fundamental: overly ambitious or aspirational targets are less likely to be achieved than realistic and achievable targets informed by baseline data. The Sectoral Targets manifest as the latest move closer to a quota system, despite the warnings in the jurisprudence of the Constitutional Court and a report of the South African Human Rights Commission (SAHRC) that we must move towards non-racialism and that we must guard against treating people as numbers. It is also in direct conflict

with a settlement that Solidarity reached with the government in order to address concerns regarding the constitutionality of the EEA and amendments thereto.

PARTIES & SOLIDARITY'S STANDING

The applicant

13. The applicant is Solidarity, a trade union registered in terms of the Labour Relations Act 66 of 1995 (LRA).

13.1. It has its head office at the corner of Eendracht Street and D F Malan Avenue, Kloofsig, Centurion, 0046.

13.2. Solidarity has more than 200 000 members in all occupational fields.

13.3. It provides workplace assistance to members at more than 20 offices nationwide.

14. Solidarity approaches this Court in its interest, in the interests of its members, and the public interest.

14.1. Solidarity counts among its members those who are affected by the 2025 EE Regulations and the Sectoral Targets due to their status as employees, prospective employees, and potential applicants for

promotion. Their future and continued employment are severely prejudiced by the obligations imposed on employers by the 2025 EE Regulations and Sectoral Targets.

14.2. Solidarity's interest includes holding the government and its representatives to account when constitutional and other standards are breached. Solidarity is committed to the principles of democracy, constitutionalism, and the rule of law.

14.2.1. Solidarity has consistently and firmly opposed the adoption and implementation of the 2025 EE Regulations and Sectoral Targets.

14.2.2. Solidarity was actively engaged in the public participation processes concerning the 2025 EE Regulations and Sectoral Targets. In these processes, it expressed several concerns regarding their constitutionality, rationality, and violation of international conventions, as appears in annexure **AVB6.**

14.2.3. Solidarity made oral submissions on the Regulations and Sectoral Targets, both in Parliament during sector-specific meeting sessions.

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14.2.4. Solidarity wrote to President Ramaphosa and the Labour Minister concerning the constitutional invalidity of the Regulations and the Sectoral Targets, as appears from annexure **AVB7**.

14.2.5. The Solidarity Research Institute (SRI) has compiled two reports on the Regulations and the Sectoral Targets. These reports highlight the irrationality of the Regulations and the Sectoral Targets, as well as the unconstitutional and detrimental impact they will have on the people of South Africa. I have already attached the most recent impact study. I attach also the earlier report, marked **AVB8**.

14.3. The public interest being pursued is the upholding of the rule of law, which is essential for a properly functioning constitutional democracy. This matter will significantly impact employees' constitutional right to fair labour practices as well as the socio-economic rights of all citizens.

The respondents

The first respondent

15. The first respondent is the Labour Minister, the member of the National Executive responsible for the administration of the EEA, including the provisions of the EEA

introduced in consequence of the Employment Equity Amendment Act 4 of 2022 (the EE Amendment Act), which came into effect on 1 January 2025.

16. The current incumbent of the post is Ms Nomakhosazana Meth.

17. The offices of the Labour Minister are located at Laboria House, 215 Francis Baard Street, Pretoria.

The second and third respondents

18. The second respondent is the Department of Employment and Labour (Labour Department), and the third respondent is the Director-General of the Labour Department (DG).

19. The Labour Department is responsible for the application and enforcement of the EEA, through its DG.

20. The offices of the Labour Department are located at Laboria House, 215 Francis Baard Street, Pretoria.

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The fourth respondent

21. The fourth respondent is the Commission for Employment Equity (CEE), a statutory body established in terms of section 28 of the EEA, with its head office at Room 103 Laboria House, 215 Francis Baard Street, Pretoria.

21.1. The role of the CEE is to advise the Labour Minister on any matters concerning the EEA, including policy recommendations and matters pertaining to the implementation towards achieving the objectives of the EEA.

21.2. The CEE is also required to submit an annual report to the Labour Minister in terms of section 33 of the EEA to monitor and evaluate progress towards achieving the objectives of the EEA.

Service

22. Service of this application will be effected both on the respondents and on the office of the State Attorney, 316 Salu Building, 255 Francis Baard Street, corner Thabo Sehume Street, Pretoria.

JURISDICTION

23. This court enjoys the necessary jurisdiction to entertain Solidarity's application.

23.1. 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".*

23.2. 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 labour relations; (ii) the application of any law for the administration of which the Labour Minister is responsible.

23.3. Section 49 of the EEA provides that the Labour Court has exclusive jurisdiction to determine any dispute about the interpretation or application of the statute, except where the EEA provides otherwise.

23.4. Section 50 (1)(h) of the EEA specifically grants this court the power to review administrative action under the statute on any grounds that are permissible in law.

THE REVIEW BASIS

24. The decisions to adopt and publish the 2025 EE Regulations and the Sectoral Targets constitute administrative action within the meaning of the PAJA.

24.1. The Constitutional Court and the Supreme Court of Appeal (SCA) have held that the making of delegated legislation constitutes "*administrative action*" within the meaning of PAJA.

24.2. It will be argued more fully at the hearing of this application that:

24.2.1. The decision was taken by an organ of state which exercises public powers and performs public functions;

24.2.2. In publishing the 2025 EE Regulations and Sectoral Targets, the Labour Minister exercised a public power or performed a public function in terms of section the EEA; and

24.2.3. the 2025 EE Regulations and the Sectoral Targets have a "*direct external legal effect*" and they adversely affect rights of persons and enterprises.

25. However, it would make little difference to the outcome if PAJA were found not to apply because the principle of legality would then apply. The principle of legality is sufficiently capacious to accommodate all of Solidarity's review grounds. Any debate regarding the application of PAJA is therefore largely academic.

G.H

CONTEXT AND BACKGROUND

The constitutional context

26. The achievement of equality goes back to the bedrock of our constitutional architecture.

27. The adoption of the Interim Constitution in 1993 marked South Africa's decisive break with a past of oppression. The postamble recognised it as "*a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice and a future founded on the recognition of human rights, democracy and peaceful co-existence and development of opportunities for all South Africans irrespective of colour, race, class, belief or sex. ... The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights ... and a legacy of hatred, fear, guilt and revenge. These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation. ... With this Constitution and these commitments we, the people of South Africa, open a new chapter in the history of our country*".

28. Section 8 of the Interim Constitution guaranteed equality before the law and equal protection of the law. Section 8(3)(a) explicitly permitted "*measures designed to achieve the adequate protection and advancement of persons or groups or*

C.H

categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms", thereby recognising that formal equality is insufficient in a society marked by entrenched socio-economic disparities inherited from apartheid.

29. The final Constitution of the Republic of South Africa Act 108 of 1996 (Constitution) builds on the ideals of the Interim Constitution.

29.1. It requires us to aim for a society founded on the democratic values of human dignity, the realisation of equality, the promotion of human rights, and freedom. Therefore, achieving equality is not only a guaranteed and enforceable right in our Bill of Rights but also a fundamental and core value; a standard that must guide all legislation and against which all laws must be tested for constitutional validity.

29.2. The understanding that affirmative action is not an exception to equality, but a means to realise it, was carried forward into Section 9(2), which provides that:

"*To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.*"

30. There can be no doubt that the relationship between equality and restitutionary measures is a delicate one: the challenge lies in promoting substantive equality (real-world redress and opportunity) without reinforcing the very divisions that the Constitution aims to overcome. In the early equality jurisprudence of the Constitutional Court, this challenge was acknowledged.

"This substantive notion of equality recognises that besides uneven race, class and gender attributes of our society, there are other levels and forms of social differentiation and systematic under-privilege, which still persist. The Constitution enjoins us to dismantle them and to prevent the creation of new patterns of disadvantage. It is therefore incumbent on courts to scrutinise in each equality claim the situation of the complainants in society; their history and vulnerability; the history, nature and purpose of the discriminatory practice and whether it ameliorates or adds to group disadvantage in real life context, in order to determine its fairness or otherwise in the light of the values of our Constitution. In the assessment of fairness or otherwise a flexible but 'situation-sensitive' approach is indispensable because of shifting patterns of hurtful discrimination and stereotypical response in our evolving democratic society."

(*Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) (*Van Heerden*) at para 27. Emphasis supplied)

The EEA pre-amendment

31. The EEA was enacted in 1998 and came into effect in December 1999.

32. The EEA is one of the legislative restitutionary measures envisaged in section 9(2) of the Constitution:

32.1. It is uncontroversial that 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.

32.2. 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"* (section 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*" (section 2(*b*)).

33. According to section 3 of the EEA it must be interpreted:

33.1. in compliance with the Constitution;

33.2. so as to give effect to its purpose;

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

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

34. Under section 2, its purpose is –

"*to achieve equity in the workplace by –*

(a) promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and

(b) 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."

G H

35. Chapter II of the EEA prohibits unfair discrimination in the workplace.

36. Section 6 (2) provides for two instances where an employer can justifiably differentiate between employees and provide preference based on such differentiation, and confirms that it is not unfair discrimination to:

"(a) take affirmative action measures consistent with the purpose of this Act; or

(b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job."

37. Chapter III of the EEA, entitled "*AFFIRMATIVE ACTION*", applies to every "*designated employer*" (EEA s 12), defined to include every employer which employs 50 or more employees, every municipality, and every organ of state (except the army and intelligence services).

37.1. The core of Chapter III is the obligation of every designated employer to "*implement affirmative action measures for people from designated groups in terms of [the EEA]*" so as to "*achieve employment equity*" (EEA s 13(1)). People from "*designated groups*" are defined to be "*black people, women and people with disabilities*", and "*black people*" are defined as "*Africans, Coloureds and Indians*" (EEA s 1).

37.2. "*Affirmative action measures*" are defined to mean "*measures 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*" (EEA s 15(1)); and must under section 15(2) of the EEA include –

"*(a) measures to identify and eliminate employment barriers, including unfair discrimination, which adversely affect people from designated groups;*

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

(c) 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;

(d) subject to subsection (3), measures to –

(i) ensure the equitable representation of suitably qualified people from designated groups in all occupational levels in the workforce; and

C.H

(ii) retain and develop people from designated groups and to implement appropriate training measures, including measures in terms of an Act for Parliament for skills development."

38. The EEA defined "*suitably qualified*" generously to include not only that person's "*formal qualifications*", "*prior learning*", and "*relevant experience*", but also the "*capacity to acquire, within a reasonable time, the ability to do the job*" (EEA s 20(3)).

39. Crucially the EEA (prior to amendment) set itself against naked quotas:

39.1. section 15(3) provides that the measures referred to in section 15(2)(d) "*include preferential treatment and numerical goals, but exclude quotas*"; and

39.2. section 15(4) provides that "*nothing in this section requires a designated employer to take any decision concerning an employment policy of practice that would establish an absolute barrier to the prospective or continued employment of people who are not from designated groups*".

40. In order to fulfil the obligation to implement affirmative action measures, every designated employer must –

40.1. consult with its employees (EEA s 16, read with s 13(2)(a);

40.2. conduct an analysis "*of its employment policies, practices, procedures and the working environment, in order to identify employment barriers which adversely affect people from designated groups", which must include a profile … 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"* (EEA s 19, read with s 13(2)(b));

40.3. based on this consultation and analysis, "*prepare and implement an employment equity plan which will achieve reasonable progress towards employment equity in that employer's workforce"* (EEA s 20(1), read with s 13(2)(b); and

40.4. report for the DG "*on progress made in implementing its employment equity plan"* (EEA s 21, read with s 13(2)(b)).

41. Section 15(2) of the EEA prescribes, in some detail, what an employment equity plan must contain so that its implementation "*will achieve reasonable progress towards employment equity in that employer's workforce".* I quote the subsection:

"*An employment equity plan … must state –*

(a) the objectives to be achieved for each year of the plan;

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

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

(d) the timetable for each year of the plan for the achievement of goals and objectives other than numerical goals;

(e) the duration of the plan, which may not be shorter than one year or longer than five years;

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

(g) the internal procedures to resolve any dispute about the interpretation or implementation of the plan;

(h) the persons in the workforce, including senior managers, responsible for monitoring and implementing the plan; and

G.H

(i) any other prescribed matter".

42. The EEA contains robust enforcement provisions to ensure compliance with Chapter III:

42.1. First, the DG is empowered by section 43 to conduct a review of any employer to determine whether it is complying with any provision of the EEA. If not, he may "*make a recommendation to the employer*" setting out "*steps which the employer must take in connection with is employment equity plan or the implementation of that plan, or in relation to its compliance with any other provision of [the EEA]*", and "*the period within which those steps must be taken*" (EEA s 44(b)).

42.2. If the employer fails to comply with the DG's recommendations, the DG may apply to the Labour Court "*for an order directing the employer to comply with the request or recommendation*" (EEA s 45(1)(a)). If the employer fails to justify its failure to comply, the DG may ask the Labour Court to impose a fine on the employer, which can be up to the greater of R2.7 million or 10% of the employer's turnover (EEA s 45(1)(b), read with Schedule 1).

42.3. Second, if a designated employer fails to comply with Chapter III, such failure permits any organ of state to refuse to contract with that employer

and to cancel any existing contract that it has with the employer (EEA ss 53(1) and (4)).

43. Chapter III of the EEA in its pre-amendment state could be fairly summarised as follows:

43.1. It required every designated employer to conduct a careful, regular and inclusive analysis of where it falls short in terms of employment equity, to prepare a detailed employment equity plan to remedy its shortcomings, and to implement the plan within a reasonable time.

43.2. This scheme was context-sensitive. It acknowledged that each employer is differently situated in respect of employment equity, and required the employer to prepare and implement an employment equity plan tailored to that employer's specific situation.

43.3. While each employment equity plan may include preferential treatment and numerical goals, it cannot include quotas or absolute barriers to the employment or advancement of members of non-designated groups.

43.4. The EEA did not require an employer to appoint people who are not suitably qualified in order to achieve equitable representation of designated groups.

Observations on the EEA

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 performed 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.

45. The EEA, designed as a legislative measure to protect and advance disadvantaged individuals and groups, uses racial classification – Black, Coloured, Indian, and White – as a proxy for historical disadvantage. This, because:

45.1. apartheid discrimination was overtly race-based;

45.2. racial identity still correlates strongly with socio-economic marginalisation; and

45.3. without recognising race, the legacy of racial injustice may persist unchallenged.

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46. However, there can be no doubt that the continued use of these classifications raises significant constitutional and ethical concerns. Affirmative action must be temporary an targeted, not entrenched. Over-reliance on race can:

46.1. reinforce racial essentialism and deepen identity politics;

46.2. marginalise individual merit, risking perceptions of unfairness;

46.3. ignore intra-racial disparities and evolving forms of disadvantage (e.g. rural versus urban, class-based exclusion); and

46.4. create dependency or disincentivise progress beyond racial markers.

Jurisprudence on the EEA

47. In both *Solidarity v Department of Correctional Services* 2016 (5) SA 594 (CC) (*DCS*) and *Solidarity obo Barnard v South African Police Services* 2014 (6) SA 123 (CC) (*Barnard*) before it, the Constitutional Court grappled with the difficult tension between affirmative action as a tool for redress, and the constitutional ideal of non-racialism. While both judgments upheld the legality of affirmative action, they also signalled clear limits and warnings against its rigid or non-critical application, especially where it may entrench race consciousness rather than overcome it.

48. In *Barnard*, the Court's key reasoning included that:

48.1. *Affirmative action must advance substantive equality.* The Court accepted that an equity plan may justifiably result in some individuals being denied advancement. However, such measures must be designed to promote the achievement of equality, not just mechanically enforce demographic targets.

48.2. *No automatic entitlement.* The Court emphasised that no one has a right to promotion, especially where affirmative action measures are in place. But it also warned that equity plans must not result in arbitrary or unfair outcomes.

48.3. *The centrality of non-racialism.* The majority (per Moseneke DCJ) accepted that race-conscious measures are a temporary constitutional tool. However, the ultimate goal is non-racialism. Therefore, affirmative action must not freeze racial identities or become permanent social markers.

48.4. *Proportionality is key.* Justice Cameron (concurring) underscored that the Constitution demands a proportional balance between redress and fairness. When redress unduly harms individuals or hardens racial boundaries, it risks betraying the values it purports to uphold.

49. In *DCS* the Constitutional Court's key reasoning included that:

49.1. *Demographic representivity is not an end in itself*. While demographic targets are a legitimate aspect of affirmative action, rigid numerical quotas are not constitutionally permissible.

49.2. *Contextual application is essential*: as the facts of the case show, relying solely on national demographics unfairly disadvantaged Coloured applicants, undermining substantive equality and the rationale for affirmative action.

49.3. *Affirmative measures must be flexible, context-sensitive, and rationally related to equality*. A "*mechanical*" *or "box-ticking*" approach undermines legitimacy.

49.4. While race may be a proxy for disadvantage, the Court *cautioned against an over-reliance on race*, which may inadvertently perpetuate the divisions that affirmative action seeks to eliminate.

50. In both cases, the Constitutional Court demonstrated a keen awareness of the potential risk that race-based affirmative action could undermine the Constitution's fundamental aim of a non-racial, non-sexist democracy:

50.1. *Race as a temporary proxy:* Race may be used to identify disadvantage, but it should not become the basis for long-term identity politics. Over time, affirmative action should shift focus to class, socio-economic status and structural disadvantage rather than inherited race labels.

50.2. *The danger of race essentialism*: Relying solely on race in employment equity plans can lead to the perpetuation of racial divisions, rather than their dismantling. This undermines both social cohesion and the credibility of redress measures.

50.3. *The need for careful justification*: Affirmative action measures must be rationally connected to achieving equality, tailored to context, and reviewed regularly to ensure that they remain constitutionally compliant and socially just.

51. The Constitutional Court's jurisprudence in *DCS* and *Barnard* reflects a sophisticated understanding of the tensions between transformative equality and the non-racial constitutional vision. The judgments uphold affirmative action as a necessary tool of redress, but issue clear warnings:

51.1. affirmative action must not ossify race as a permanent marker;

51.2. it must remain flexible, contextual, and time-bound; and

51.3. it must serve the purpose of substantive equality, not formal demographic targets

52. Ultimately, affirmative action must help society move beyond race – not lock it in. If applied too rigidly or without nuance, race-based measures risk undermining both equality and non-racialism, the very goals they were designed to achieve.

The 2018 SAHRC Equality Report

53. On 12 July 2018, the 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). According to the Equality Report, the SAHRC expressed the view 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). A copy of the Equality Report is attached as annexure **AVB9**.

54. The Equality Report includes various references to employment equity and the EEA within the context of transformation.

54.1. As appears from the executive summary (at p 4), the Equality Report *"evaluates government's programme of radical socio-economic transformation from a rights-based perspective. It explores government's*

programme of radical socio-economic transformation and establishes its roots in the Freedom Charter. It further shows that radical socio-economic transformation should aim to achieve substantive socio-economic equality. Whereas the majority of equality-related research focuses on horizonal status equality between groups sharing characteristics that render them prone to unfair discrimination, this report responds to international calls to address gross economic inequality."

54.2. The executive summary records as one of the key findings of the Equality Report (at p 5) that "*The Employment Equity Act, 55 of 1998's definition of "designated groups" and South Africa's system of data disaggregation is not in compliance with constitutional or international law obligations. Government's failure to measure the impact of various affirmative action measures on the basis of need and disaggregated data, especially the extent to which such measures advance indigenous peoples and people with disabilities, likewise violates international law obligations"* (emphasis supplied).

54.3. Another key finding recorded (at p 5) 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" (emphasis supplied).

54.4. In Chapter 1, the Equality Report states (at p 8) 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"* (emphasis supplied).

55. Chapter 6 of the Equality Report is concerned with the "*Key Rights-Based Drivers of Radical Socio-Economic Transformation"* (see p 28).

55.1. It commences with a discussion of the meaning of "*affirmative action"* or "*special measures"* in which the caution of the Constitutional Court that measures directed at remedying past discrimination "*must be formulated with due care not to invade unduly the dignity of all concerned. We must remain vigilant that remedial measures under the Constitution are not an end in themselves. They are not meant to be punitive nor retaliatory. Their ultimate goal is to urge us on towards a more equal and fair society that hopefully is non-racial, non-sexist and socially inclusive … We must be careful that the steps taken to promote substantive equality do not unwittingly infringe the dignity of other individuals – especially those who were themselves disadvantaged'* (*Barnard* paras 30 – 31, see p 29).

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

55.3. 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.

55.4. Specifically recorded is the consideration of the CERD that "*Special measures should be appropriate to the situation to be remedied, be legitimate, necessary in a democratic society, respect the principles of fairness and proportionality, and be temporary. The measures should be designed and implemented on the basis of need, grounded in a realistic appraisal of the current situation of the individuals and communities concerned*" (see p 30). 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*" (see p 30).

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55.5. 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.

55.6. Under the heading "*Targeted special measures based on need*" it is questioned whether the EEA or its implementation is not leading to new imbalances (at p 33), and noted that indigenous peoples (those whose ethnic descent may be from mixed race marriages) and linguistic or tribal minorities within the designated groups are "*not accommodated by the EEA*" (at p 34). 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*" (at p 34). 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*

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(based on race, ethnicity, gender or social origin) faced by members of vaguely categorised 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 'realistic appraisal of the current situation of the individuals and communities' concerned, cannot be met without a more nuanced disaggregation of data" (see pp 34 – 35) (emphasis supplied).

55.7. 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*" (see p 35, emphasis supplied).

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55.8. 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*" (at pp 35 – 36). In this regard, reference was made to the *Barnard* case where SAPS was held to have been entitled not to promote a white woman, even though white women are from a designated group under the EEA, and the application of the so-called "*Barnard principle*" to other groups in the 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*" (see p 36). In the view of the SAHRC (at p 36, emphasis supplied),

"*The latter application of the Barnard principle therefore conflicts with the CERD's requirement for special measures to be adopted on the basis of a realistic appraisal of need, taking into account the social and economic circumstances of the group or individual concerned. It furthermore stands in opposition to the approach reflected in the National*

Development Plan, whereby preference should be accorded on the basis of race 'for at least the next decade' when defining historical disadvantage. Where special measures may result in new imbalances or exacerbate current inequality viewed in the labour context more broadly, it is doubtful that such measures are designed to advance people in need of remedial measures. Worryingly, it can lead to perverse consequences and 'token' affirmative action where minority status, or new patterns of discrimination and inequality within designated groups, is not properly considered."

55.9. 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*" (at p 36). 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" (at p 36, emphasis supplied). Moreover, it is noted that "*due to polycentric consequences that may result from the application of the Barnard principle, existing patterns of disadvantage may be exacerbated or new patterns of disadvantage may arise, thereby prejudicing the achievement of substantive equality"* (at p 37).

55.10. Upon consideration of the conclusion of the Constitutional Court in *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"* (at p 37, emphasis supplied). However, as the Equality Report correctly notes, section 42 of the EEA had been amended, rendering "*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*

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urban migration and thereby exacerbate existing special injustices" (at pp 37 – 38, emphasis supplied).

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

55.11.1. *"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"* (at p 39, emphasis supplied).

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

55.11.3. *"It is further found that the EEA and its implementation, as well as the design of special measures, are currently misaligned to the constitutional objective of achieving substantive equality. It is accordingly recommended that in qualitatively assessing the impact of affirmative action measures on vulnerable groups, including indigenous people and people with disabilities, the*

DOL, in collaboration with the CEE and in consultation with National Treasury, undertake a representative assessment of the implementation of employment equity plans of designated employers in order to ensure that targets are flexibly pursued and do not amount to rigid quotas" (at p 39, emphasis supplied).

55.11.4. *"The DOJCD, in consultation with the DOL and CEE, should determine whether and how the EEA can be amended to require a qualitative and context-sensitive assessment of need when employment equity plans are implemented. The EEA should be further amended to revert to the position where the consideration of the regionally economic active population in relation to representational levels is mandatory and not discretionary"* (at p 40, emphasis supplied). 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"* (at p 40).

Response to the Equality Report

56. Nothing came of these recommendations, and Solidarity's efforts to enforce compliance with them through litigation were unsuccessful.

The EE Amendment Act

57. In July 2020, the then Labour Minister introduced the Bill that would become the EE Amendment Act in the National Assembly.

58. Solidarity submitted written comments on the Bill and also made oral representations to the Portfolio Committee on 14 April 2021. A copy of the written submissions is attached as annexure **AVB10**, and the text of the oral representation is attached as annexure **AVB11**. Solidarity cautioned that various sections of the Bill would not pass constitutional muster, and called for a re-evaluation.

59. 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.

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

61. 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 **AVB12** hereto.

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62. The EE Amendment Act received Presidential assent in April 2023.

63. Solidarity had serious concerns regarding the EE Amendment Act. It would grant the Labour Minister the authority to promulgate binding numerical targets for demographic representation in the workforce of designated employers (EEA s 15A). Solidarity was apprehensive that these "*targets*" would amount to what is better described as quotas, because:

63.1. Section 20(2A) of the amended EEA stipulates that the employment equity plan of every designated employer must include numerical goals that "*must comply*" with the Labour Minister's sectoral targets. While previously, each designated employer's employment equity plan could include numerical goals tailored to that employer's situation, needs, and the specific labour market they faced, the amendment now mandates that an employer adopt the one-size-fits-all "*target*" prescribed for their sector. This marks a radical departure from the pre-amendment EEA, where each designated employer had the autonomy to set their own numerical goals. The EEA Amendment Act has introduced the provision for the Labour Minister to establish what some refer to as "*quotas*" for each sector.

63.2. Section 42(1)(aA) of the amended EEA provides that when the DG or any person applying the statute determines "*whether a designated employer is implementing employment equity in compliance with [the EEA]*", one of

the factors to consider is "*whether the employer has complied with a sectoral target as set out in terms of section 15A applicable to that employer*". It follows that the DG can make a "*recommendation*" to a designated employer to comply with the applicable "*target*" under section 44(b) of the EEA – which would require the employer to re-engineer its workforce by firing and hiring necessary staff to achieve the demographic makeup mandated by the applicable "*target*". Should the employer fail to comply, the DG can approach the Labour Court for an order compelling the employer to comply under section 45(1)(a) of the EEA. Furthermore, under section 53(4) of the EEA, any failure by an employer to meet the applicable "*target*" is sufficient for the state to refuse to do business with that employer or even to cancel an existing agreement between the state and the employer.

63.3. Of particular importance in this context is section 53(2) of the EEA, which states that a designated employer may request a certificate from the Labour Minister confirming its compliance with Chapters II and III of the EEA, which constitutes "*conclusive evidence*" that the employer is so compliant (EEA s 53(1)(b)(i)). However, subsections 53(6)(a) and (b) as amended provide that the Labour Minister may only issue a section 53(2) certificate if he or she is satisfied that "*the employer has complied with a numerical target set in terms of section 15A that applies to that employer*", unless "*in respect of any target with which the employer has not complied,*

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the employer has raised a reasonable ground to justify its failure to comply". The amended EEA does not specify what a *"reasonable ground"* might be.

Solidarity's efforts to address its concerns

64. In 2023, Solidarity launched an application to challenge the constitutionality of the EE Amendment Act.

65. Also in 2023, Solidarity lodged a complaint with the International Labour Organisation under case number HO2-23 (the ILO Complaint). A copy of the ILO Complaint is attached as annexure **AVB13**.

66. The ILO Complaint culminated in a settlement agreement between Solidarity and the Republic of South Africa, which was facilitated by the ILO, Department of Labour and Employment and the Commission for Conciliation, Mediation and Arbitration (CCMA). I have already attached the settlement agreement and order as annexure **AVB5**.

67. The terms of the settlement were as follows:

"Following the Applicant's article 24 representation to the ILO, and the conciliation process as facilitated by the CCMA, the parties are desirous to settle the above-mentioned dispute as follows:

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 targeted group as defined in the Employment Equity Act in the workplace, in order to obtained 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 may 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 requirement 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;*

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- *The rate of turn-over and natural attrition within a workplace;*

- *Recruitment and promotion 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 Order;*

- *Transfer of business;*

- *Mergers/ Acquisitions; and*

- *Impact of Business Economic circumstances.*

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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."*

68. In terms of the settlement agreement, it was further confirmed 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."

69. The dispute referred to in the agreement under case number J661/23 related to Solidarity's application of May 2023, in which it sought to declare sections 4, 6, 11 and 12 of the Amendment Act unconstitutional, on the central basis that (i) the amendments entrenched a rigid, quota-based regime that undermines the nuanced, constitutionally compliant application of affirmative action; and (ii) the conferral of wide-ranging powers on the Labour Minister to set sectoral numerical targets violated the rule of law, the principle of legality and South Africa's obligations under international law, particularly ILO Convention 111.

70. By agreement between the parties, and as stated in the settlement agreement, it was resolved to settle Solidarity's application on the basis that it "*will be deemed*

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a settlement under case number J661/23 where it will be made an order of a Court".

71. The settlement agreement was subsequently made an order of this Court on 31 October 2023.

72. The Court-sanctioned agreement imposed specific obligations on the Government, specifically the Department and the President, including that the implementation of affirmative action measures must adopt a nuanced approach and that the EAP may be one consideration amongst others, but not the sole or determinative one, in assessing compliance. It expressly prohibited the use of rigid demographic quotas and instead mandated consideration of factors such as inherent job requirements, skills availability and turnover trends.

THE 2025 EE REGULATIONS AND THE SECTORAL TARGETS

73. The amendments to the EEA came into operation on 1 January 2025.

74. The first draft Regulations were published on 12 May 2023, attached marked **AVB14**. These Regulations simply listed 18 economic sectors, provided the sector targets for each of the identified sectors and, amongst other, confirmed that:

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"The table below contains the proposed 5-year sector targets for the various economic sectors prescribed in the EEA17 form in terms of population groups and gender for the four upper occupational levels (i.e, Top Management, Senior Management, Professionally Qualified and Skilled levels) and for employees with disabilities. The proposed sector EE numerical targets for the various population groups (i.e. African, Coloured, Indian and White) and gender must, where applicable, be proportional to the demographics of the Economically Active Populations (EAP), whether national or provincial. Please note that 'Black' in the table below includes Africans, Coloureds and Indians.

The National EAP shall apply to designated employers conducting their business/ operations nationally, and the respective Provincial EAP shall apply to designated employers conducting their business/ operations in a particular province. Designated employers cannot use the national and provincial demographics (EAP) at the same time. Designated employers must choose only one demographics (i.e either national or provincial) and utilise the chosen demographics for the entire duration of the EE Plan that is in line with the 5- year sector targets.."

75. A further set of draft Regulations was published on 1 February 2024, attached marked **AVB15**. These draft Regulations also included a list of economic sectors, the requirements for setting 5-year sectoral numerical targets, "*guidance*" on the implementation of affirmative action measures, as well as the specific 5-year sectoral numerical targets for each of economic sectors.

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76. Under item 3 of Regulations, it was stated that the following factors were taken into account in setting the proposed 5-year sectoral numerical targets:

"3.1.1 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 this case the Sector Workforce was utilised or was considered) in relation to the demographic profile of the national and regional/ provincial economically active population (EAP) as required by Section 42 (1)(a) of the Employment Equity Act no 55 of 1998 (EEA).

3.1.2 The latest 2022 EE workforce profiles of each economic sector in terms of race, gender and disability as reported by the designated employers in their 2022 EE reports submitted to the Department of Employment and Labour.

3.1.4 The various Sector Codes and the Sector Charters published under the BBBEE Act.

3.1.4 The unique sector dynamics (e.g. Skills availability, economic and market forces, ownership etc.) raised by Sector Stakeholders in their written submissions during the consultation process."

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77. Although the draft regulations included the terms of the settlement agreement, referred to above, at item 4, the Regulations under item 3, regulating the setting of the 5-year Sectoral Numerical Targets, were in stark contradiction with the regulations contained in item 4 of the proposed Regulations which in turn regulated the implementation of affirmative action measures governed by the settlement agreement that was made an order of Court.

78. In the comments provided on the draft Regulations, attached marked **AVB16**, Solidarity pointed out the contradiction as follows:

"The contradiction lie in the fact that the regulations describe 'nuance' as a key aspect and prohibits absolute barriers, but also sets mandatory targets at the same time, which are the opposite of nuanced, flexible measures. The regulations are thus arbitrary or self-defeating, the settlement agreement was bolted on without any attempt to counterbalance the sectoral targets which agreed upon principles it requires to reach a nuanced application of affirmative action measures."

79. The 2025 EE Regulations published on 15 April 2025, already attached, differ significantly from those provided to the public for comment. Sub-regulation 8, which deals with duties of a designated employer to collect information and to conduct an analysis now, amongst other, required that:

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"8(5) When a designated employer conducts the analysis required by section 19 of the Act, the employer may refer to-

(a) EEA8, a guide on the applicable national and regional economically active population (EAP); and

(b) EEA9, which contains a description of occupational levels.

8(6) A designated employer must record on the EEA12 template whether it is using the national or regional EAP as a basis for conducting its analysis in terms of section 19 of the Act."

80. Under regulation 9, dealing with the "*duty to prepare and implement an Employment Equity Plan*" sub-regulation 9(5) states that:

"When developing EE Plans and setting annual numerical targets in their workplaces in terms of Section 20(2) of the EEA, designated employers must take into account-

(a) Their workforce profile,

(b) The relevant 5-year sectoral numerical targets; and

(c) The applicable EAP,

81. Sub-regulation 9(6) further provides that in addition to the factors listed in sub-regulation (5), a designated employer may take into account any of the following to the extent that they consistent with the purpose of the Act-

"(a) the inherent requirements of a particular job;

(b) pool of suitably qualified persons;

(c) the formal qualifications, prior learning, relevant experience or capacity to acquire , within a reasonable time, the ability to do the job, as contemplated in section 20(3) to (5) of the Act;

(d) the rate of turnover and natural attrition within the workplace; and

(e) recruitment and promotion trends within a workplace."

82. Sub-regulation 9(7) further states that a designated employer must:

"(a) comply with the numerical targets set in terms of section 15A(3) for the economic sector in which they operate;

(b) refer to the Ministerial notice issued in terms of section 15A and EEA17 to the regulations to determine the sector they operate in; and

(c) *if it operates in more than one sector, apply the numerical targets for the sector in which the majority of their employees are engaged."*

83. Sub-regulation 9(9) further requires that when determining their Annual EE targets towards achieving the 5-year sectoral numerical targets, a designated employer must set numerical targets for all designated groups in each of the four upper occupational levels in relation to the applicable sector targets and EAP, and for persons with disabilities.

84. Sub-regulation 9(12) also requires that designated employers must set numerical goals and annual EE targets at the semi-skilled and unskilled occupational levels in their EE Plans in terms of Section 20(2) of the EEA, taking into account the applicable EAP.

85. Sub-regulation 9(13) further confirms that designated employers' compliance will be assessed against their annual targets set towards meeting the relevant 5- year sectoral numerical targets.

86. Regulation 16 deals with EE compliance certificates in terms of section 53 and sub-regulation 16(4) confirms that a designated employer must specify in its application on the EEA15 form any grounds that it seeks to rely upon to justify its failure to comply with;

86.1. Any requirement for the issuing of certificate as contemplated by section 42(4) of the Act; or

86.2. In the case of non-compliance with a sectoral target, any grounds contemplated by section 53(6)(b).

87. Sub-regulation 16(5) sets out the justifiable reasonable grounds for not complying with the targets, being the following:

"(a) insufficient recruitment opportunities;

(b) insufficient promotion opportunities;

(c) insufficient target individuals from designated groups with relevant formal qualifications, prior learning, relevant experience or capacity to acquire, within a reasonable time, the ability to do the job, as contemplated by section 20(3) to (5) of the Act;

(d) the impact of a CCMA award or court order;

(e) a transfer of a business;

(f) mergers or acquisitions; and

(g) the impact of economic conditions on the business."

88. The Sectoral Numerical Targets, now published separately, state in terms of paragraph 3, dealing with the implementation of affirmative action measures, the following:

"For purposes of clarity, it is stated that-

3.1 The 5-year sectoral numerical targets set out in the this Notice are not intended to add up to 100%; as the sectoral numerical target excludes white males with no disabilities and foreign nationals as part of the workforce profile.

3.2 The manner in which designated employers must take the targets into account in applying affirmative action measures is specified in the Act, the General Administrative EE Regulations and Codes of Good Practice issued under the Act.

3.3 A designated employer will not incur penalties or any form of disadvantage if in the assessment of compliance of affirmative action in any workplace it shows that there are reasonable grounds for not complying with the EE targets."

89. I point out the following, material, differences/contradictions between the settlement agreement and the Regulations;

89.1. The settlement agreement provided in paragraph (b) that affirmative action shall be applied in a nuanced way, which requires that the economically active population statistics will only be one of many factors that will be taken into account in compliance analysis of affirmative action in any workplace. This has now been rendered nugatory. Evidently the Regulations makes compliance with the EAP obligatory on designated employers in setting numerical goals, to the exclusion of other relevant factors, and further requires a designated employers' assessment of compliance be done with reference to the *"relevant 5- year sectoral numerical targets"*.

89.2. The settlement agreement provided in paragraph (d) 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;*

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- *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."*

89.3. Whereas the settlement agreement and Court order required specific factors which must be taken into account for the purposes of setting numerical targets and in assessing a designated employers' compliance, these factors have now been reduced to being non-obligatory on employers who simply "may" rely on them. The EAP, together with the 5-year sectoral targets are the only obligatory factors to be taken into account.

89.4. Secondly, the factors as stated in paragraph (d) are no longer obligatory in respect of any assessment of an employers' compliance and have been reduced to "justifications" which an employer can raised in the event of non-compliance.

90. Against this backdrop, the Employment Equity Regulations, 2025 (GG No. 52515) and the Sectoral Numerical Targets (GG No. 52514) stand in stark and

irreconcilable conflict with the settlement agreement and the Labour Court Order. The Regulations reintroduce, under the thin veil of linguistic subtlety, the very inflexible demographic quotas the settlement explicitly repudiated. While the agreement required a context-sensitive, multifactorial compliance analysis, the Regulations retain the EAP as a mandatory benchmark and relegate all other factors to a discretionary status, stripping them of any normative force. This amounts to a material departure from the agreed framework and an impermissible dilution of the very protections the settlement was designed to enshrine.

91. The 2025 EE Regulations has now entrenched a measured, race and gender, formula to be applied by each designated employer which will determine both the manner in which they collect information and dictate how they are to develop and implement their employment equity plans. The EAP and sectoral targets are the set objectives to be achieved by all designated employers within five years and consequences for non-compliance with the targets attach, unless an employer can provide a reasonable justification.

91.1. EE Regulation 8(5) envisages that an employer should conduct a workplace analysis to establish "*the degree of underrepresentation of people from designated groups in various occupational levels in that employer's workforce*" (prescribed in EEA s 19(2)) by reference to the national or regional EAP.

91.1.1. EEA8, to which reference is made in this Regulation, provides that:

"Statistics South Africa provides demographic data using Quarterly Labour Force Surveys (QLFS) from time to time. The Quarterly Labour Force Surveys provide statistics on the national and provincial Economically Active Population (EAP) in terms of race and gender. Designated employers are required to use the Labour Force Survey of the third quarter for employment equity (EE) purposes when conducting an analysis (Section 19), preparing and implementing and EE plan (Section 20) and when reporting (section 21) to the Department in terms of the EE Act, 1998 as amended.

Designated employers operating in more than one province must consider the nature and geographical area of their operations and adopt either the national or regional EAP for conducting an analysis, preparing an EE plan and reporting to the Department.

Designated employers who operate in more than one but whose operations are predominantly in one province may choose the EAP of the province where their operations are dominant.

Employers using the national EAP, or the EAP of a province in which the major part of its operations are, must nevertheless have regard to variations between the EAPs of different provinces when setting targets to achieve equitable representation of employees from designated groups in all occupational levels."

91.2. EEA12, equally referred to, provides in paragraph 6 (under the heading "*IMPORTANT INFORMATION*") that an "*analysis of the workforce profile should provide a comparison of designated groups using up-to-date demographic data in terms of their Economically Active Population (EAP) and their representation at the various occupational levels. The EAP is contained in the latest published Commission for Employment Equity (CEE) Annual Report ...*".

91.3. When developing employment equity plans, designated employers are *obliged* to take into account the sectoral numerical targets (EE Regulation 9(5)(b)) and the "*applicable EAP*" (EE Regulation 9(5)(c)). They *may* also take into account factors that include inherent requirements of the job (EE Regulation 9(6)(a)) and the pool of suitably qualified persons (EE Regulation 9(6)(b)).

91.4. However, EE Regulation 9(7) dictates that a designated employer *must* "*comply with the numerical targets set in terms of section 15A(3) for the*

economic sector in which they operate". Where an employer operates in more than one sector, it must apply the sectoral targets "*for the sector in which the majority of their employees are engaged"* (EE Regulation 9(7)(c)).

91.5. According to EE Regulation 9(8), the sectoral targets "*are key milestones towards achieving the equitable representation of the different designated groups within the four upper occupational levels in an employer's workforce in relation to the demographics of the applicable EAP, and for persons with disabilities"*. Accordingly, EE Regulation 9(9) provides that, when determining their annual employment equity targets, a designated employer "*must set numerical targets for all designated groups … in relation to the applicable sector targets and EAP"*.

91.6. For its part, EE Regulation 9(11) provides that a designated employer that has exceeded the numerical target set for a particular designated group at an occupational level should still set targets that "*maintain compliance with the EAP"*. EE Regulation 9(12) envisages the setting of numerical goals by reference to the "*applicable EAP"*.

91.7. In circumstances where section 42(4) of the EEA provides that "*a designated employer may raise any reasonable grounds to justify its failure to comply"* with the duty to implement its employment equity plan, EE Regulation 9(14) says that a "*designated employer will incur no*

penalty or any form of disadvantage if there are reasonable grounds to justify its failure to comply with any target

91.8. EEA17 to the EE Regulations identifies "*ECONOMIC SECTORS AND SUB-SECTORS IN LINE WITH THE STANDARD INDUSTRIAL CLASSIFICATION (SIC) CODES*" , listing 18 main sectors: (i) accommodation and food service activities; (ii) administrative and support activities; (iii) agriculture, forestry & fishing; (iv) arte, entertainment and recreation; (v) construction; (vi) education; (vii) electricity, gas, steam and air condition supply; (viii) financial and insurance activities; (ix) human health and social work activities; (x) information and communication; (xi) manufacturing; (xii) mining and quarrying; (xiii) professional, scientific and technical activities; (xiv) public administration and defence; compulsory social security; (xv) real estate activities; (xvi) transportation and storage; (xvii) water supply, sewerage, waste management and remediation activities; and (xviii) wholesale and retail trade; repair of motor vehicles and motor cycles.

GROUNDS FOR RELIEF SOUGHT

92. It is submitted that the 2025 EE Regulations and Sectoral Targets stand to be reviewed and set aside on one or a combination of the grounds raised herein. Solidarity reserves the right to supplement these grounds for review upon receipt of the record.

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Mandatory and material conditions set out in Settlement Agreement were not complied with (PAJA s 6(2)(b))

93. The 2025 EE Regulations and Sectoral Targets depart from and contradict the settlement agreement concluded between Solidarity and the Republic of South Africa.

94. The respondents committed themselves to a legislative scheme where affirmative action shall be applied in a nuanced way and where the EAP statistics will only be one of many factors that will be taken into account in the compliance analysis of affirmative action in any workplace.

95. Those factors which it was agreed must be taken into account when implementing an employment equity plan and in reporting, as set out in paragraph (d) of the settlement agreement, have now simply become grounds for justification for not complying with the imposed Sectoral Targets.

96. Notwithstanding the fact that the parties agreed that the settlement agreement would be gazetted as part of the regulations, the Labour Minister failed to comply with the agreement and issued the 2025 EE Regulations and Sectoral Targets in contradiction and in violation of the settlement agreement.

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Decision to publish the 2025 EE Regulations and Sectoral Targets was arbitrary and capricious (PAJA s 6(2)(e)(vi)

97. The Constitution proscribes arbitrary action and requires that every action taken in the exercise of public power must be underpinned by plausible reasons. Such reasons must justify the action taken. If action is taken for no reason or no justifiable reason, it is arbitrary. It is further capricious because it has been formulated with no reference to its impact when applied in reality.

98. The fact that the Regulations and Sectoral Targets are both arbitrary and capricious is best illustrated with reference to the SRI reports to which I have already made reference.

99. The latest report evaluates the Sectoral Targets and whether they are capable of being achieved either by means of economic growth or replacement of individuals in the workplace. I highlight just some of the findings and pray that the contents of the report be incorporated as if specifically pleaded.

100. The SRI explains the evaluation conducted as follows:

"First, the growth each sector would have to show in order to meet the sectoral target without having to replace anyone is calculated. This is done by taking the existing employment of the designated group and the non-designated group in the sector, as obtained from the CEE's 24th annual report. Then the number of

employees in other groups in the sector and job level who would have to be added for the sector and job level to represent the minister's percentage, is calculated. Where it would be necessary for growth to be negative, it is simply replaced with a 0% growth. This indicates that the group in question is already underrepresented at that specific job level in the sector – therefore, growth in the other groups will not be able to increase representation.

Replacement is calculated in a similar manner to how growth is calculated per sector. Existing employment of the designated group and the non designated group is first obtained from the Commission for Employment Equity (CEE's) 24th annual report. Then the number of existing employees in the sector and job level who will need to be replaced so that the sector and job level represent the minister's percentage, is calculated."

101. In respect of the growth the SRI provides the following conclusion:

"When considering the average growth per sector across all job levels and all sectors, then an average growth of 38% is required to bring the representation of the non-designated group (white males) in line with the minister's figures. Especially at the professionally trained and skilled job levels at least a doubling in sectors such as electricity, gas, steam and air conditioning supply, construction, professional, scientific and technical as well as agriculture would be required. In practice, this implies that most sectors and job levels in South Africa will not be able to achieve the minister's figures through growth alone."

102. It is submitted that it is simply irrational to think that there exists any possibility that we will experience the necessary economic growth required to achieve the sectoral targets within the next five years.

103. In respect of replacing the "*overrepresented*" race and gender groups the SRI makes the following observations:

103.1. According to the CEE's 24th Report, there has been virtually no growth in employment over the past decade.

103.2. The total number of employees reported on the CEE 24th Report is in fact below the 2018 levels.

103.3. The implication is that growth in the workforce, to enable employers to comply with the minister's figures, is something that has simply not happened during the past decade.

104. In respect of top management, the report confirms the following:

"When looking at replacement at top management level, it is clear that considerable replacement needs to take place to align with the minister's figures. Although only 3 036 in the non-designated group (white males) have to be replaced, it should be taken into account that top management only comprises 0,8% of the total employees. What should rather be looked at is by what

percentage replacement needs to take place. Then it can be seen that more than 43% of the non-designated group (white males) in Public Administration, as well as 40% in Water must be replaced in order to align the sectors with the minister's figures."

105. With reference to senior management, the report also highlights the fact that individuals from the designated group, the actual beneficiaries of affirmative action, stand to be negatively affected by the Sectoral Targets.

"At senior management level, it can be noticed that greater change is increasingly needed to meet the minister's figures. Sectors in which about a third of the members of the non-designated group (white males) will need to be replaced are Public Administration (-63,52%), Water (-37,45%), Electricity (-32,68%) and in the Arts (-32,29%). One out of five females in senior management in Health (-22,01%) and one out of ten females in senior management in Education (-10,94%) would also need to be replaced in order to meet the minister's figures."

106. In respect of the professionally trained category of employees, even greater change is required to meet the Sectoral Targets.

"The professionally trained job level must show substantial change in both the non-designated group (white males) and of females in order to meet the minister's figures. In total, 26 022 people in the non-designated group (white males) must be replaced. This involves large reductions of about 3 out of 4 in Electricity (-

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75,2%), as well as 3 out of 5 in Public Administration (-64,81%), Administrative Support (-59,27%) and Water (-55,1%). At the same time, 24 749 professionally trained females must be replaced in order to meet the minister's figures. Just over 1 out of 3 professionally trained females in Health (-35,54%), or 24 072, must be replaced in accordance with the minister's figures."

107. The greatest shift in the workforce profile is however at the skilled job level. The SRI points out the following:

"It is at the skilled job level where the minister's figures want to achieve the greatest shift in the workforce. In order to achieve the minister's figures, 33 289 persons in the non-designated group (white males) must be replaced. This means that about 6 out of 10 non designated persons (white males) in Construction (-62,11%), Electricity (-62,31%) and in the Professional sector (-57,29%) need to be replaced. In addition, about half of the skilled non-designated group (white males) must be replaced in Agriculture (-54,87%) and in Information (-47,54%). At the same time, 92 261 skilled females must be replaced in order to meet the minister's figures.

A total of 30 324 skilled females must be replaced in the Arts, 58 040 in Education, 31 557 in Finance and 51 659 in Health. About 4 out of 10 skilled females in Health (-40,37%) and about 1 out of 3 skilled females in the Arts (-33,08%), Education (-34,34%) and Finance (-28,54%) must be replaced to meet the minister's figures. Likewise, more than 1 out of 10 skilled men in the designated

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group must be replaced in Administrative Support (-10,54%), Construction (-18,4%), Mining (-15,69%), Public Administration (-13,08%), as well as in Transport (-13,77%)."

108. The SRI points out further that non-designated group (white males) is not the group where most replacement is needed, being a total of 69 796, but rather females where a total of 111 568 need to be replaced at all job levels and in all sectors. In the Health sector 76 388 females needs to be replaced and in Education 65 004 which is a huge number.

109. The SRI further confirms that:

"To understand the impact – if every single member of the non-designated group (white men) is replaced by an unemployed black person, then black unemployment drops from 36,98% to 36,64% according to the narrow definition thereof."

110. There is absolutely no evidence that the Labour Minister has considered, firstly, whether the Sectoral Targets are capable of being achieved and secondly, what the impact or consequence would be if it is achieved. The Sectoral Targets are capricious because they have been formulated with no reference to their impact when applied in reality.

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111. The Sectoral Targets seek to achieve representivity that reflects the national EAP. With reference to the provisions of section 15A(2) of the EEA the purpose of setting numerical targets is to ensure *'the equitable representation of suitably qualified people from designated groups'.* The targets now imposed is irreconcilable with the purpose, and the empowering provision, in that it is unrelated to whether these individuals from the designated group are suitably qualified. The EAP is not reflective of any qualification or suitability to perform any specific job.

112. To the extent that Sectoral Targets is not precisely aligned to the EAP, it is unclear on what basis the Labour Minister arrived at the set targets or what informed the Minister to decided on the specific targets.

113. The problem is this: in order to ask for exemption, each employer will have to provide the Labour Minister with detailed information as to (a) its business, (b) its labour needs, (c) its efforts to meet applicable targets, (d) the labour market it faces, and so on. Given the number of designated employers there are and the likelihood that many of them will fail to meet their targets, the Labour Minister's office will be inundated with detailed exemption applications. The Labour Minister will require a permanent, large office of bureaucrats processing these detailed applications and significant resources in order to decide them within a reasonable time and with sufficient attention. It is highly likely that many designated employers, even those with reasonable grounds for non-compliance, will simply

not receive section 53(2) certificates, and so will be precluded from doing business with the state.

114. The Regulations and Sectoral Targets are evidently arbitrary and capricious.

The Regulations and Sectoral Targets in contravenes the EEA (PAJA s 6(2)(f) (i))

115. The 2025 EE Regulations and Sectoral Targets, to the extent that they impose fixed numerical targets to be taken into account by designated employers, further contravenes the following provisions of the EEA;

115.1. As already indicated herein above the purpose of the EEA, set out in section 2, is the implementation of affirmative action measures with the aim of establishing "equitable" representation. Affirmative action measures in terms of the EEA were never intended to achieve representation which is reflective or proportionate to the EAP.

115.2. With reference to the provisions of section 6(2)(a) of the EEA it is only affirmative action measures which are *'consistent with the purpose'* of the EEA which will not be regarded as unfair discrimination/

115.3. In terms of section 15(1) of the EEA, affirmative action measures are designed to ensure that "*suitably qualified people*" from designated groups have equal employment opportunities and are equitably

represented in all occupational levels in the workforce of a designated employer. As already indicated above, the Sectoral Targets are not based on any consideration of what the pool of suitably qualified individuals, from which employers can expect to appoint or promote, looks like. Put plainly, the Sectoral Targets are not aimed at achieving representativeness of people who are suitably qualified; it is aimed at achieving representativeness in line with the national EAP.

115.4. Section 15(2) is of specific importance in that it requires from a designated employer to provide "reasonable" accommodation for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented.

115.5. Section 15(3) further confirms that the measures implemented by a designated employer include preferential treatment and numerical goals but exclude quotas. The Sectoral Targets are nothing other than a quota. As Solidarity pointed out when it commented on the regulations, 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. Failure to adhere to the "*targets*" result 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. The fact that the Sectoral

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Targets are quotas is further evidenced by the fact that the 2025 EE Regulations require that *"where a designated employer has exceeded the set numerical target of a particular racial/ gender group at an occupational level, such an employer may not refers in that particular racial/gender group but should set targets towards the EAP".*

115.6. Section 16 of the EEA requires a designated employer to consult a representative trade union or employees on the issues referred to in section 17. Among those issues which require consultation are (i) the conduct of the analysis referred to in section 19 and (ii) the preparation and implementation of the employment equity plan referred to in section 20. It is submitted that among those issues which require consultation is the numerical targets which an employer intends to set in terms of its employment equity plan. By virtue of the fact that the 2025 EE Regulations and Sectoral Targets have now set the specific numerical targets which employers are required to achieve, the mandatory consultation process has now been rendered nugatory.

115.7. The consultation clause in the EEA should be interpreted in accordance with *inter alia*, Article 5 of the International Labour Organisation Convention (111) concerning Discrimination in Respect of Employment and Occupation, relating to special measures, including but not limited to numerical targets, and which states:

"2. 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"

115.8. The importance of consultation is emphasized in R113 - Consultation (Industrial and National Levels) Recommendation, 1960 (No. 113):

"5. Such consultation and co-operation should aim, in particular—

(a) at joint consideration by employers' and workers' organisations of matters of mutual concern with a view to arriving, to the fullest possible extent, at agreed solutions; and

(b) at ensuring that the competent public authorities seek the views, advice and assistance of employers' and workers' organisations in an appropriate manner, in respect of such matters as—

(i) the preparation and implementation of laws and regulations affecting their interests.

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(ii) the establishment and functioning of national bodies, such as those responsible for organisation of employment, vocational training and retraining, labour protection, industrial health and safety, productivity, social security and welfare; and

(iii) the elaboration and implementation of plans of economic and social development."

115.9. The Sectoral Targets set by the Minister negates the prescriptive consultation process regulated by section 13,16, 17 and 20 of the EEA, it diminishes the purpose consultation serves in a process where parties are obligated to attempt to reach consensus.

The 2025 EE Regulations and Sectoral Targets are irrational (PAJA s 6(2)(f)(ii))

116. I am advised and state that all public powers must be exercised rationally, failing which they are invalid and are liable to be set aside.

117. The test for rationality has three main components:

117.1. Firstly, the power must be exercised in pursuit of a legitimate government purpose;

117.2. Secondly, there must be a rational connection between the exercise of the power and the purpose for which the power is given; and

117.3. Thirdly, the action of the decision-maker must bear a rational connection to the facts and information before the decision-maker.

118. To be added to the aforementioned is a failure to show that the Sectoral Targets are reasonably likely to be achieved. There are a number of factors which clearly suggest that it is incapable of being achieved, as the report by SRI makes this clear.

119. The irrationality of the Sectoral Targets cannot be saved by simply placing reliance on the fact that employers are entitled to raise justifiable reasonable grounds for not complying with the targets. Designated employers are required to set irrational targets and although they can justify why they have not achieved these irrational targets their failure to justify the non-achievement of irrational targets can lead to penalties being imposed. If the Sectoral Targets are irrational, which they are, they fall to be reviewed and set aside.

120. The fact that the Sectoral Targets are irrational is further evidenced by the reasonable justifiable grounds which employers can raise for not complying with the targets, as set out in sub-regulation 16(5), which include the following:

120.1. Insufficient recruitment opportunities;

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120.2. Insufficient promotion opportunities;

120.3. Insufficient target individuals from designated groups with relevant formal qualifications, prior learning, relevant experience or capacity to acquire, within a reasonable time, the ability to do the job, as contemplated by section 20(3) to (5) of the Act;

120.4. The impact of a CCMA award or court order;

120.5. A transfer of business;

120.6. Mergers or acquisitions; and

120.7. The impact of economic conditions on the business;

121. In circumstances where these justifications ought to be factors which designated employers take into consideration in setting their numerical targets and which ought to form part of the consultation process, they have now been reduced to justifying the non-achievement of the irrationally imposed sectoral targets and EAP. The justifications further confirm the fact that the sectoral targets are incapable of being achieved. To add to the aforementioned is the fact that neither of the respondents can show that the sectoral targets are capable of being achieved.

122. Having regard to the current economic conditions, the fact that there has effectively been no growth in employment over the last decade and the fact that the Sectoral Targets is not informed by the actual pool of suitably qualified people from which employers can expect to appoint or promote, the Sectoral Targets and the requirement that employers should set numerical targets in accordance with the EAP is simply irrational.

123. This should further be viewed in light of the fact that the regional economically active population has not been considered in setting the Sectoral Targets. The consequence of the aforementioned is that racial groups, even those from the designated group, who are more concentrated in certain provinces, will be required to move to other provinces where they are more "*underrepresented*" with reference to the national EAP.

124. The Minister has established national economic sectors, designated employers who operate in these sectors are required to comply with the Sectoral Targets imposed which ultimately aims to achieve representivity in line with the national EAP. An employer which falls within a listed sector but whose operations are limited to a specific provincial region are required to apply and implement numerical targets which are not reflective or proportionate to the demographics of the region from which such an employer can expect to appoint employees. This is simply irrational.

The 2025 EE Regulations and Sectoral Targets are unreasonable to the extent that no reasonable person could have published it (PAJA s 6(2)(h))

125. It is submitted that the facts presented herein above makes it clear that the 2025 EE Regulations and Sectoral Targets are unreasonable.

The 2025 EE Regulations and Sectoral Targets are unconstitutional and unlawful (PAJA s 6(2)(i))

126. The scheme is unconstitutional because it unjustifiably infringes at least the following constitutional rights:

Equality

127. Non-racialism and non-sexism are founding values recognised in section 1 of Constitution. Section 9(1) of the Constitution provides that everyone is equal before the law and has the right to equal protection and benefit of the law.

128. In accordance with section 9(3), the State may not unfairly discriminate directly or indirectly against anyone on one or more grounds including race, gender, colour and/or age. Section 9(2) of the Constitution provides that "*legislative and other measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination may be taken*". Generally, three requirements must be met for a restitutionary measure not to constitute unfair

discrimination: (1) it must target people or a category of people who had been disadvantaged by unfair discrimination; (2) the measure must be designed to protect and advance such people and (3) the measure must promote the achievement of equality.

129. Overall, for a measure to be sanctioned under the Constitution, it must be reasonably capable of attaining the desired outcome. If remedial measures are arbitrary, capricious or display naked preference they could hardly be said to achieve the constitutionally authorised end.

130. In order for measures contemplated in section 9(2) to withstand scrutiny, there must be a rational link between the measure and the purpose sought to be achieved: the means chosen to achieve the particular purpose must be reasonably capable of achieving the purpose. Moreover, any exercise of public power must meet the rationality standard and therefore it must be underpinned by plausible reasons that justify the action taken. In our constitutional state, action must be such that it's capable of being analysed and justified, rationally.

131. The idea of the constitutional state presupposes a system whose operation can be rationally tested against or in terms of the law. If action is taken for no reason or no justifiable reason, it is arbitrary. Arbitrariness is dissonant with the core concepts of our constitutional order.

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132. The 2025 Regulations and Sectoral Targets infringe on the right to equality and do not pass muster as restitutionary measures, since they display naked preference, are rigid and (as I already indicated herein above) it cannot be said that they are likely to achieve the objective for which they have been put in place.

133. The fact that 69 796 white males are to be "replaced" within the next five years and a further 111 568 females, whom I point out forms part of the designated group, cannot be justified.

Human dignity

134. Section 10 of the Constitution declares that every person has human dignity and has the right to have their human dignity respected. The right to human dignity is the right to be treated with inherent and infinite worth, which includes each person's right to be treated as an individual capable of setting and pursuing their own goals and ambitions. The right also safeguards a person's reputation built upon his or her own individual achievements. The obligation of the state is to respect the decisions that each person has made for themselves. The state must treat each person as ends in themselves and not merely as a means to an end.

135. The 2025 EE Regulations and Sectoral Targets impair the human dignity of individuals who are employed or seek employment. Their race rather than ability will become a determinative factor for promotion or appointment in circumstance where the targets are irrational and unjustifiable.

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136. Qualified individuals who have spent years to become experts in a certain field and who have achieved such a reputation is now limited not by his or her ability to perform the work, but the racial and gender demographics to which he or she belongs and the extent to which his or her employer has achieved the Sector Targets.

The right to choose a trade, occupation and profession

137. Section 22 of the Constitution guarantees the right of every citizen to choose their trade, occupation or profession freely. While the State is permitted to regulate the practice of an occupation or a profession, the constitutional right is impaired when the State takes measures that restrict (i) access to an occupation, profession and trade and (ii) the choices that person/s can make in the fulfilment of their occupation, profession and trade.

138. The 2025 EE Regulations and Sectoral Targets will materially restrict individuals' ability to obtain work, seeing that it seeks to distribute work on a racial and gender basis, which is a factor or restriction which no individual can change.

139. The right to trade, profession and occupation is closely linked to the right to human dignity. This is because section 22 not only encompasses the right to make a living. Section 22 includes the freedom to choose to pursue a vocation that every person believes themselves prepared to undertake as a profession and to make that vocation the basis of their life and personal existence.

140. In the circumstances, the right is infringed to the extent that people may only practice their chosen trade, occupation or profession to the extent permitted by Sectoral Targets.

The 2025 Regulations and Sectoral Targets contravene Internation Law obligations

ICERD

141. South Africa ratified the Convention in 1998, and it has purchase under the Constitution. Article 2 of ICERD requires signatories to condemn all forms of racial discrimination and to eliminate racial discrimination by "*appropriate means*". Article 1(4) of ICERD, in turn, states that:

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

142. Article 2(2) of ICERD provides:

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

143. General Recommendation No 32 (2009) provides practical guidance on the meaning of special measures under the Convention in order to assist State parties in the discharge of their obligations under the Convention. The recommendation, amongst other, confirm that:

143.1. Discrimination is constituted not simply by an unjustifiable 'distinction, exclusion or restriction' but also by an unjustifiable 'preference', making it especially important that States parties distinguish 'special measures' from unjustifiable preferences; (par B 7)

143.2. Special measures should be appropriate to the situation to be remedied, be legitimate, necessary in a democratic society, respect the principles of fairness and proportionality, and be temporary. The measures should be designed and implemented on the basis of need, grounded in a

realistic appraisal of the current situation of the individuals and communities concerned; (par D 16)

144. I am advised that legal argument shall be presented at the hearing of this matter that the Regulations and Sectoral Targets do not pass master under the Convention, it is not based on a legitimate purpose, is unfair and disproportionate, not temporary and constitutes unjustified preference which is not based on a realistic appraisal of the current situation of the individuals and community concerned.

The International Covenant on Economic, Social and Cultural Rights

108 South Africa has ratified the Convention in 2015, and it has purchase under the Constitution. Article 1, amongst other states that:

"Article 1

1. *All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*

2. *All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence."*

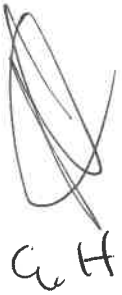
109 Article 2(2) further states that:

"2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

110 Article 6(1) confirms that State parties to the Covenant recognize the right to work, which includes the right to everyone to the opportunity to gain his living by work which he freely chooses or accepts and that State parties will take appropriate steps to safeguard this right.

111 As a Trade Union the applicant finds solace in Article 7 of the Covenant which confirms that:

"The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:



(a) Remuneration which provides all workers, as a minimum, with:

(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;

(b) Safe and healthy working conditions;

(c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;

(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays."

112 Solidarity submits that Regulations and Sectoral Targets infringe the aforementioned Convention by limiting individuals right to choose a trade and profession and by limiting an individuals' right to exercise the profession of choice based on the considerations of race and gender.

Discrimination (Employment and Occupation) Convention, 1958 (No. 111) (ILO Convention)

150. Section 3 of the EEA deals with the interpretation of the Act and subsection 3(d) specifically provides that the Act must be interpreted '*in compliance with the international law obligations of the Republic, in particular those contained in the International Labour Organisation Convention (No. 111) concerning Discrimination in Respect of Employment and Occupation'.*

151. Article 1 of the Convention confirms that:

"For the purpose of this Convention 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;

(b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies.

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

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."

153. I have already herein above indicated how the Regulations and Sectoral Targets further infringes upon the obligation to consult and repeat what I have stated.

154. The Regulations and Sectoral Targets do not pass muster under the Convention and stands to be set aside.

[1] ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and recommendations/lang--en/index.htm

THE RECORD TO BE FILED

155. I am advised that a record is an invaluable tool in the review process and assists in shedding light on what happened and why and to prevent an *ex post facto* justification for a decision under review.

156. The provisions of section 15A(2) are the basis upon which the applicant contends that a record ought to be provided. In terms of the section the Minister is only empowered to publish numerical targets for any national economic sector identified after consulting the relevant sectors and with the advice of the Commission.

157. It remains a mystery how the Minister arrived at the Sectoral Targets, what informed the Minister to set these specific targets and what exactly the advice was, if any which the Minister received from the Commission. The record can, and ought to shed light on the aforementioned and the applicant submits will most likely present additional grounds for the review and setting aside of the Regulations and Sectoral Targets.

158. I need to point out already that it is the applicant's position that no meaningful consultation took place. Solidarity attended the "consultation" session for the manufacturing sector. The "new" targets for this sector were only provided to the consulting parties on the day of the meeting, so also the Regulations.

159. On the day of the meeting, held virtually on 19 February 2025, Solidarity and other parties questioned how the numerical targets were formulated and arrived at and we were simply informed that it was the result of a calculation whereby the workforce profile was deducted from the EAP and then a five-year target was set which is "not to low" but also "ambitious".

160. Solidarity already objected to this, with respect, "thumb suck" exercise and indicated that affirmative action measures ought to based on proper aggregated data which is nuanced, and which considers the realities within the workplaces and sub-sectors. I attach hereto as annexure **"AB16"** the email correspondence which I addressed to the respondents on 20 February 2025.

161. In light of the aforementioned it is submitted that a record would be indispensable and of value to this Court in adjudicating the application.

CONCLUSION

113 The 2025 Regulations and Sectoral Targets do not only fail to comply with our constitutional values, they further contravene both domestic and international law. They stand to be reviewed and set aside for the reasons stated above and those grounds which will further be elaborated upon in the supplementary affidavit which Solidarity will file once the record has been obtained.

WHEREFORE Solidarity prays for an order in the terms set out in the notice of motion to which this affidavit is attached.

DEPONENT

I certify that the above named Deponent has acknowledged that the Deponent knows and understands the contents of this Affidavit which was signed and sworn to before me at PRETORIA on this ..18th... day of ..JULY..... 2025 and that the provisions of the Regulation contained in Government Notice R.1258 dated the 21st July 1972, as amended, have been complied with.

COMMISSIONER OF OATHS

GAVAZA NYAKANE
COMMISSIONER OF OATHS
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