Comments on the Employment Equity Amendment Bill [B14 – 2020]

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INTRODUCTION

1. The Employment Equity Amendment Bill, 2020 [B14-2020] (the Bill) seeks to amend the Employment Equity Act 55 of 1998 (EEA). The Bill was presented to Parliament by the Department of of Employment and Labour (the Department) and introduced by the Minister of Employment and Labour (the Labour Minister) on 28 October 2020.

2. The Portfolio Committee invited comments to be presented to it by 19 February 2021. This document is submitted in response to the invitation. It constitutes the submissions of Solidarity,[1] a trade union registered in terms of the Labour Relations Act 66 of 1995 (LRA).[2]

3. These comments are structured as follows:

   3.1. At the outset, a summary of central provisions of the EEA is provided. The current provisions of the EEA are relevant to a consideration of (i) aspects of the statute potentially requiring legislative amendment to secure constitutional and international law compliance; and (ii) the internal consistency of the provisions of the EEA in the event that the amendments proposed by way of the Bill are adopted.

   3.2. Thereafter, consideration is given to the (i) constitutional standards and (ii) international law requirements that must govern affirmative action under the EEA. That discussion informs comments concerning the constitutional and

[1] Solidarity has approximately 140 000 members in a variety of occupational fields and sectors. Solidarity is a recognised union at numerous 'designated' employers, and it frequently engages with these and other employers on the implementation of employment equity. It has been actively involved litigation concerning the lawful application of affirmative action under the EEA.

[2] Solidarity also made submissions in response to the request for comments on the amendments to the EEA and the Employment Equity Regulations as contained in Government Notice Nos 992 and 993 in *Government Gazette* Nos 41922 and 41923 of 21 September 2018.

international law compliance of the EEA in the event of the Bill being passed in its current form.

3.3. This is followed by a discussion of a report of the South African Human Rights Commission (SAHRC) that identified certain shortcomings of the EEA and which recommended amendments to the EEA to rectify those shortcomings. Those recommendations have not been addressed by the proposed amendments in the Bill. Indeed, some of the constitutional and international law concerns raised in the report are exacerbated if the proposed amendments are to be adopted.

3.4. In the next section, particular sections proposed to be introduced are dealt with.

3.5. Finally, Solidarity offers certain recommendations for consideration by the Portfolio Committee.

THE BILL IN CONTEXT PART I: THE EMPLOYMENT EQUITY ACT PRIOR TO AMENDMENT AS PROPOSED

Identification of relevant provisions of the EEA

4. 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'[3]; and (ii)

[3] EEA s 2(*a*).

'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'.[4]

5. According to section 3, the EEA must be interpreted:

   5.1. in compliance with the Constitution of the Republic of South Africa Act 108 of 1996 (Constitution);

   5.2. so as to give effect to its purpose;

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

   5.4. 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'.

6. Subject to exceptions in respect of the National Defence Force, the National Intelligence Agency, the South African Secret Service, the South African National Academy of Intelligence and the directors and staff of Comsec, all of the provisions of the EEA apply to 'designated employers', that is essentially all employers who employ more than 50 employees or who meet certain turnover thresholds.

7. Every designated employer must, in order to achieve employment equity, implement affirmative action measures for people from 'designated groups' in terms of the EEA,

[4] EEA s 2(*b*).

that is black people (defined as a generic term referring to Africans, Coloured and Indians), women and people with disabilities who are citizens of South Africa by birth or descent, or who became citizens before 27 April 1994, or thereafter, but who would have been entitled to acquire citizenship by naturalisation prior to that date but who were precluded by apartheid policies.

8. Section 13 of the EEA compels every employer to:

8.1. consult with its employees as required by section 16 of the statute;

8.2. conduct an analysis as required by section 19 of the EEA;

8.3. prepare an employment equity plan as required by section 20; and

8.4. report to the Direcor-General of the Department of Labour (DG) on progress made in implementing its employment equity plan, as required by section 21 of the EEA.

9. According to 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'. Affirmative action measures implemented by a designated employer must include:

9.1. measures to identify and eliminate employment barriers, including unfair discrimination, which adversely affect people from designated groups;[5]

[5] EEA s 15(2)(*a*).

9.2. measures designed to further diversity in the workplace based on equal dignity and respect of all people;[6]

9.3. making reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce of a designated employer;[7]

9.4. measures to ensure the equitable representation of suitably qualified people from designated groups in all occupational levels in the workforce;[8] and

9.5. measures to retain and develop people from designated groups and to implement appropriate training measures, including measures in terms of an Act of Parliament providing for skills development.[9]

10. Section 15(3) provides specifically that these last two measures (contemplated in section 15(2)(*d*)) 'include preferential treatment and numerical goals, but exclude quotas'.

11. Furthermore, and subject to section 42 of the EEA, nothing in section 15 is to be read as requiring a designated employer to take any decision concerning an employment policy or practice that would establish an absolute barrier to the prospective or continued employment or advancement of people who are not from designated groups.[10]

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[6] EEA s 15(2)(*b*).
[7] EEA s 15(2)(*c*).
[8] EEA s 15(2)(*d*)(i).
[9] EEA s 15(2)(*d*)(ii).
[10] EEA s 15(4).

12. As is contemplated in section 13 of the EEA, section 16 of the statute provides for consultation with employees.

12.1. A designated employer must take reasonable steps to consult and attempt to reach agreement with a representative trade union representing members at the workplace and its employees or representatives nominated by them, or, if no representative trade union represents members at the workplace, with its employees or representatives nominated by them[11] on -

12.1.1. the conduct of the analysis referred to in section 19;[12]

12.1.2. the preparation and implementation of the employment equity plan referred to in section 20;[13] and

12.1.3. a report referred to in section 21.[14]

12.2. In accordance with section 18(1), a designated employer must disclose to the consulting employees all relevant information that will allow the employees to consult effectively.

13. Also as foreshadowed by section 13 of the EEA, a designated employer must collect information and conduct an analysis, as prescribed, of its employment policies, practices, procedures and the working environment, in order to identify employment barriers which adversely affect people from designated groups.[15] The analysis must

[11] EEA s 16(1).
[12] EEA s 17(*a*).
[13] EEA s 17(*b*).
[14] EEA s 17(*c*).
[15] EEA s 19(1).

include a profile, as prescribed, of the designated employer's workforce within each occupational level in order to determine the degree of underrepresentation of people from designated groups in various occupational levels in that employer's workforce.[16] Regulations published on 1 August 2014 by way of Government Notice R595 in *Government Gazette* 37873 (Employment Equity Regulations, 2014) prescribe certain requirements to be met in the collection of information and the conduct of an analysis.[17] In particular, the employer may refer to a guide on the applicable national and regionally active population and a description of occupational levels as provided.[18]

14. Section 20(1) is the provision that requires all designated employers to prepare and implement an employment equity plan that will achieve 'reasonable progress towards employment equity in that employer's workforce'. Such an employment equity plan must state:

14.1. the objectives to be achieved for each year of the plan;

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

14.3. 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 the strategies intended to achieve those goals;

[16] EEA s 19(2).
[17] Regulation 8.
[18] Regulation 6.

14.4. the timetable for each year of the plan for the achievement of goals and objectives other than numerical goals;

14.5. the duration of the plan, which may not be shorter than one year or longer than five years;

14.6. 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;

14.7. the internal procedures to resolve any dispute about the interpretation or implementation of the plan; and

14.8. the persons in the workforce, including senior managers, responsible for monitoring and implementing the plan.

15. In accordance with Regulation 9 of the Employment Equity Regulations, 2014, an employer must refer to the relevant Codes of Good Practice issued in terms of section 54 of the EEA when preparing an employment equity plan. The Code of Good Practice was published on 12 May 2017 by way of Government Notice 424 in *Government Gazette* 40840 (Code of Good Practice), and provides *inter alia* that employment equity plans must take into account the specific circumstances of an organisation for which they are prepared.[19] Detailed provision is made for the process of constructing a plan, and the Code of Good Practice makes plain that what is to be brought into account is amongst others the analysis conducted within the organisation and the national and

[19] Clause 1(*c*).

provincial economically active population. In respect of the numerical goals and targets contemplated in section 20(2)(*c*), the Code of Good Practice provides that these must be 'informed by the outcome of the analysis and prioritised and weighted more towards the designated groups that are most under-represented in terms of the national and provincial economically active population, in terms of section 42 of the EEA'.[20]

16. The EEA contemplates monitoring of compliance with the EEA by the DG or any person or body applying the statute[21] and sets out factors which may be taken into account, namely:

16.1. the factors in section 15 of the EEA;[22]

16.2. the extent to which suitably qualified people from and amongst the different designated groups are equitably represented within each occupational level in that employer's workforce in relation to the demographic profile of the national and regional economically active population;[23]

16.3. reasonable steps taken by a designated employer to train suitably qualified people from the designated groups;[24]

16.4. reasonable steps taken by a designated employer to implement its employment equity plan;[25]

[20] Clause 7.4(*c*).
[21] EEA s 42.
[22] EEA s 42(1).
[23] EEA s 42(1)(*a*).
[24] EEA s 42(1)(*b*).
[25] EEA s 42(1)(*c*).

16.5. the extent to which the designated employer has made progress in eliminating employment barriers that adversely affect people from designated groups;[26]

16.6. reasonable steps taken by an employer to appoint and promote suitably qualified people from the designated groups;[27] and

16.7. any other prescribed factor.[28]

17. Compliance may also be evaluated by reference to regulation issued under section 55. These are the Employment Equity Regulations, 2014, and section 42(3) of the EEA specifically confirms that the Labour Minister has the power to prescribe in the said regulations which employers' compliance should be determined with reference to the demographic profile of either the national economically active population or the regional economically active population. Legislative provision is therefore made for assessing compliance only with reference to the national economically active population.

18. The aforementioned section and more specifically the factors to be taken into account by, amongst other the DG, in assessing compliance by designated employers, are not mandatory but discretionary. Section 42(1) provides that these factors 'may' be taken into account.

[26] EEA s 42(1)(*d*).
[27] EEA s 42(1)(*dA*).
[28] EEA s 42(1)(*e*).

Discussion

19. The golden thread that runs through the EEA is the requirement of fairness and reasonableness in the adoption and application of affirmative action measures. Employing proper, broad-based criteria in deciding who should receive the nod will sometimes ensure a proper recognition of the talents of a person who has been the subject of past discrimination, but efficiency considerations of this sort cannot always be relied upon to produce a desired result. Sometimes there is a need to bring considerations of equality into play and then, in giving them their proper weight, strike an appropriate balance between the factors, merit not least, that then cry out for recognition. Any suggestion, therefore, that affirmative action measures may be applied mechanically must be rejected out of hand. Sound reason and fairness are the touchstones.

20. So much is clear from an examination of the EEA. According to its long title, the EEA is directed towards the elimination of unfair discrimination in employment and the achievement of a workforce that is 'broadly' representative of the South African people. Section 2 of the EEA, which sets out the purpose of the statute, recognises not only the implementation of affirmative action measures, but also the promotion of equal opportunity and the elimination of unfair discrimination. The purpose of the EEA is to ensure 'equitable' representation, which, when read in the context of the statute as a whole, must mean 'fair' and 'reasonable' representation of previously disadvantaged persons. Implicit in the meaning of 'equitable' is an assessment not only of what is fair

or reasonable when regard is had to the rights and interests of previously disadvantaged persons, but also the interests and rights of those not so disadvantaged.[29]

21. The substantive provisions of the EEA start by prohibiting unfair discrimination outright,[30] but they save affirmative action measures *if* they are consistent with its equal opportunity, fair treatment and the achievement of *equitable* representation of designated groups in the workforce.[31] Expressly discountenancing the notion that these objects are to be attained by the mechanical use of race and gender demographics,[32] section 20(2)(*c*) emphasizes that equitable representation must include an assessment of the availability of 'suitably qualified' people from designated groups[33] for appointment at particular levels and within particular categories in an organization.

22. This conclusion is consistent with the meaning assigned to 'affirmative action measures' in section 15(1) of the EEA:

> 'Affirmative action measures are measures designed to ensure that *suitably qualified people* from designated groups have *equal employment opportunities* and are *equitably* represented in all occupational categories and levels in the workforce of a designated employer.'[34]

23. In the same vein, section 15(2) provides for progress in representivity to be made through various strategies, such as the identification and elimination of employment barriers which adversely affect persons from designated groups, and 'making *reasonable* accommodation for people from designated groups'.

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[29] *Harksen v Lane* 1998 (1) SA 300 (CC) ('*Harksen*') paras 50 and 51. The rights to equality and dignity are inter-woven, as appears from *Hoffmann v South African Airways* [2000] 12 BLLR 1365 (CC) para 27 ('*Hoffmann*') citing *President of the Republic of South Africa and another v Hugo* 1997 (4) SA 1 (CC) ('*Hugo*') para 41.
[30] EEA s 6(1).
[31] EEA s 6(2).
[32] The footnote to the term 'numerical goals' in s 20(2)(c) provides that the factors set out in s 42(a) are relevant to the determination of numerical goals.
[33] EEA s 20(2)(c).
[34] Emphasis supplied.

24. Equally telling is section 15(3), which expressly states that provision for preferential treatment of designated groups and the setting of targets may not amount to quotas.[35] Likewise, section 15(4) provides that the provisions on affirmative action are not to be construed as placing an obligation on an employer to place an absolute barrier to the prospective or continued employment or advancement of people who are not from designated groups.[36] The Explanatory Memorandum to the Employment Equity Bill (1998) made the point that the provision 'stresses the need for [the promotion of a diverse workforce] in ways which do not put in place absolute barriers to the employment or advancement prospects of any individual'.[37] (The absence of absolute barriers is important: the Constitution specifically provides for affirmative action, but this does not mean that the constitutional provision permits the denial of all opportunities of white males in terms of an affirmative action plan. The preferential measures must be reasonable and proportional, and the denial of all opportunities for one group does not comply with this requirement. In terms of the equality provision the creation of an absolute barrier to the employment or advancement of individuals cannot be reasonable.)

25. Finally, in describing the mode of assessing compliance with the requirements of the EEA, section 42 lists a number of factors to be taken into account. Among the other relevant factors are such matters as whether the employer has made 'reasonable efforts' to implement its employment equity plan and the extent to which the designated employer has made progress in eliminating employment barriers that

[35] EEA s 15(3).
[36] EEA s 15(4).

[37] Explanatory Memorandum to the Employment Equity Bill (1998) 19 *ILJ* 1345 at 1351.

adversely affect people from designated groups. The factors must inform the numerical goals that an employer sets itself. [38]

26. The statute states that it is not unfair discrimination to implement affirmative action measures that are consistent with the purpose of the EEA,[39] but in order to qualify as an affirmative action measure of this sort, it must be a measure 'designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer'.[40] Such a measure may not constitute a quota.[41]

THE BILL IN CONTEXT PART II: THE CONSTITUTION

The Constitutional treatment of affirmative action

27. The Constitution provides that neither the state nor any other person may unfairly discriminate on the basis of race[42] but says that, '[in order 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'.[43] Needless to say, the EEA is just such an 'affirmative action' measure'.[44]

28. Section 1 of the Constitution states human dignity, the achievement of equality, the advancement of human rights and freedoms and non-racialism and non-sexism as values upon which South Africa is founded. Section 9 enshrines the equality right and

[38] Footnote 3 to s 20(2)(c), read with s 42(a).
[39] EEA s 6(2)(a)
[40] EEA s 15(1).
[41] EEA s 15(3).
[42] Constitution s 9(3) and s 9(4).
[43] Constitution s 9(2).
[44] The use of the terminology is, in fact, in appropriate. See L Ackermann *Human Dignity: Lodestar for Equality in South Africa* (2013) 342 – 344. The text is hereinafter referred to as 'Ackermann'.

authorises the adoption of measures to redress past patterns of discrimination, while section 10 provides that everyone has inherent dignity and the right to have their dignity respected and protected. In addition, employees are guaranteed the right to fair labour practices.

29. Section 9(2) places a prohibition on unfair discrimination but saves measures designed to promote the interests of people previously subjected to discrimination on one of the enumerated grounds. The category of beneficiaries is not so wide as to include all disadvantaged persons, but is limited to those who have been disadvantaged 'by unfair discrimination'. In other words, the clause operates in favour of those who have been discriminated against without justification. [45] This is because section 9(2) explicitly states that the recipients of the section 9(2) measures must be 'disadvantaged by unfair discrimination'.

30. Section 9(2) gives no blanket guarantee that *any* 'measure' taken under its provisions will be constitutional, irrespective of the nature of the measure and the nature and extent of its impact on third parties.[46] As the Constitutional Court made clear in *Van Heerden*,[47]

    30.1. it is only legislative and other measures that *properly* fall within the requirements of s 9(2) that are not presumptively unfair; and

    30.2. differentiation aimed at protecting or advancing persons disadvantaged by unfair discrimination is warranted only if the measures concerned conform to the internal test set by section 9(2).[48]

[45] Ackermann 347.
[46] Ackermann 364. See also Ackermann 181 – 254 for a more general discussion in this regard.
[47] *Minister of Finance and Another v Van Heerden* 2004 (6) SA 121 (CC).
[48] *Van Heerden* para 32.

31. Accordingly, consciousness of race and gender must be tempered by the understanding that the prohibition against unfair discrimination –

> 'seeks not only to avoid discrimination against people who are members of the disadvantaged groups. It seeks more than that. At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked'.[49]

32. The achievement of the equality goal must inevitably come at a price for those who were previously advantaged.[50] But it is equally clear that the long-term goal of our society is a non-racial, non-sexist society in which each person will be recognized and treated as a human being of equal worth and dignity. Our Constitution recognizes and celebrates diversity, and our equality as citizens within that diversity. In assessing whether a measure will promote equality in the long run, this *must* be borne in mind. Where remedial measures impose substantial and undue harm on those excluded from its benefits, our long-term constitutional goal is threatened.[51]

    32.1. As the majority judgment recognized in *Van Heerden*, a restitutionary measure under section 9(2) 'ought not to impose such undue harm on those excluded from its benefits that our long-term constitutional goal [of a non-racial, non-sexist society in which each person will be recognised and treated as a human being of equal worth and dignity] would be threatened'.[52] A restitutionary measure 'must

[49] *Hugo* para 41.
[50] *Van Heerden* para 44.
[51] *Van Heerden* para 44.
[52] *Van Heerden* para 44.

be reasonably capable of attaining the desired outcome'[53] and if 'the remedial measures are arbitrary, capricious or display naked preference they could hardly be said to be designed to achieve the constitutionally authorized end'.[54]

32.2. In a similar vein, Sachs J stated in his concurring judgment that a restitutionary measure would not pass constitutional muster if the advantaged were to 'be treated in an abusive or oppressive way that offends their dignity and tells them and the world that they are of lesser worth than the disadvantaged'; [55] also that 'if the measure at issue is manifestly overbalanced in ignoring or trampling on the interests of members of the advantaged section of the community, and gratuitously and flagrantly imposes disproportionate burdens on them, the courts have the duty to interfere';[56] and in summation that 'some degree of proportionality, based on the particular context and circumstances of the case, can never be ruled out. That too is what promoting equality (s 9(2)) and fairness (s 9(3)) require'.[57]

32.3. The measures are not meant to be *punitive* but are *restitutionary* in character.[58] In light of the purpose of the Constitution to 'heal the divisions of the past', its implementation must strive to effect reconciliation between those divided, and therefore section 9(2) must be seen as legitimising fair restitution for benefits unjustifiably acquired without furthering either triumphalism or victimhood.[59] The overarching objective of the second sentence of section 9(2) is to authorise

[53] *Van Heerden* para 41.
[54] *Van Heerden* para 41.
[55] *Van Heerden* para 151.
[56] *Van Heerden* para 152.
[57] *Van Heerden* para 152.
[58] Ackermann 345.
[59] Ackermann 346.

public law and constitutional restitution remedies in favour of those who are still disadvantaged by unfair discrimination that occurred in the past, and which remedies might operate at the expense of those who were unjustifiably enriched by past unfair discrimination.[60]

32.4. The purpose of restitutionary equality is to eradicate past inequality that *continues to survive* despite constitutional provisions outlawing it.[61] Section 9(2) is aimed at restoring or ensuring equality of opportunity for the free unfolding of the personality and self-realisation and self-fulfillment. It does not mandate equality of result by engineering equal outcomes regardless of individual qualities, gifts and talents.[62] Neither the context nor the content of the second sentence of section 9(2) abrogates the prohibitions on discrimination contained in section 9(3) or the dignity or freedom rights of those on whom the burden of making restitution is made. Proper respect must accordingly be paid to the freedom and dignity of those adversely affected. An unmitigated pursuit of equality of result or outcomes would make unacceptable inroads into the freedom of too many people.[63]

33. Since section 9(2) seeks to resolve the tension that inevitably arises when the promotion of one person's equality necessarily trenches on another's equality, the proper outcome can only be achieved by trying to balance competing claims to dignity.[64] The Constitutional Court, in summarizing the relevant considerations to be

[60] Ackermann 345.
[61] Ackermann 358, citing *National Coalition for Gay and Lesbian Equality and Another v The Minister of Justice and Others* 1999 (1) SA 6 (CC) paras 60 – 61.
[62] Ackermann 387.
[63] Ackermann 387.
[64] Ackermann 358.

taken into account in the assessment of unfair discrimination cases, observed in *Hoffmann v South African Airways*:[65]

> 'At the heart of the prohibition against unfair discrimination is the recognition that under our Constitution all human beings*, regardless of their position in society,* must be accorded equal dignity. That dignity is impaired when a person is unfairly discriminated against. *The determining factor regarding the unfairness of the discrimination is its impact on the person discriminated against.* Relevant considerations in this regard include the *position of the victim* of the discrimination in society, the *purpose sought to be achieved by the discrimination*, the extent to which the rights or interests of the victim of the discrimination have been affected, and whether the discrimination has impaired the human dignity of the victim.'[66]

34. Writing within this field, Justice Ackermann argues that the prescribed remedial measures do not obliterate the dignity rights of others, in particular their desire for the free unfolding of their personalities and for self-fulfilment. He is of the view that remedial measures must endeavour to preserve as much of the freedom and dignity rights of others as possible.[67] Ultimately, he comes to the conclusion that:

> 'If the remedial measure does little to advantage the dignity interests of the person disadvantaged by unfair discrimination while, on the other hand, making serious inroads into the dignity interests of the person making or suffering restitution, the measure would not pass muster.'[68]

The EEA and the Constitution

35. In substance, Solidarity submits, the EEA stipulates that considerations of disadvantage flowing from past discrimination can properly be taken into account in determining who should be appointed or promoted to a given position in a workforce. But, we say, the

[65] *Hoffmann* para 27.
[66] Emphasis supplied.
[67] Ackermann 387.
[68] Ackermann 387.

statute makes it impermissible to treat this consideration as the only factor to be taken into account and so be the sole determinant of the issue since it gives a list of factors to be taken into account in relevant decision-making.

36. We accept that, under the EEA, race and gender can, where appropriate, be used as a proxy for the purpose of assessing the degree of past disadvantage likely to have been experienced by an applicant for a job. This is particularly so when a determination of the degree of disadvantage suffered in consequence of past discrimination is complex, costly or imponderable. Solidarity accepts, moreover, that the statute treats representitivity by race and gender as a touchstone of sorts by which to judge the success or otherwise of a programme designed to remedy past disadvantage and that, in consequence, statistics on this issue supply a potential benchmark for the purpose of making the assessment.

37. However, we submit, the statute does not sanction race and gender profiling that seeks to create a demographically representative workforce without regard to past discrimination. A model of this sort is not concerned with restitution, which looks to the past, but with race and gender norming aimed at the future. Revealing a belief that race and gender are concerns that have an intrinsic and *per se* legitimacy, the model is quintessentially race–based (racialist, if one prefers the word) and gender-based (sexist does not capture the idea satisfactorily). The practical effect of such a model is that preference is given *pari passu* and so wholly without regard to disadvantage – to white males when, as a group or class, they are manifestly not the victims of past discrimination. It is likewise given to coloured and Indian males when, at least arguably, they are the victims of a lesser degree of discrimination than their African counterparts.

38. Such a model is obviously discriminatory within the conception of the anti-discrimination provisions referred to above – the EEA and the equality provisions of the Constitution. The enactments make it clear that it is permissible to frame affirmative action measures by reference to 'categories of persons', but it must be recognized the words were chosen with great care. 'Categories' of persons are not 'groups' (endowed with legal personality) but individuals with a common denominator as far as their identities or experiences are concerned.[69] The 'protection' or 'advancement' envisaged by section 9(2) is for the benefit of persons as individuals. No 'group' is to be seen as a conglomerate enjoying individual legal personality and entitled as such to constitutional benefits. The idea of an unincorporated group being the bearer of constitutional rights has been rejected by the Constitution.[70]

39. The EEA legitimates targets but outlaws quotas. Commentators on this dichotomy can be forgiven for regarding it as merely semantic, but this is not so. The prohibition on quotas is, we submit, aimed at demonstrating precisely the point made above: namely, that race and gender norming is unlawful. It serves also to demonstrate the obverse proposition that making race and gender a threshold criterion and so determinative is impermissible, for a quota (at least within the present context) is a numerical norm by reference to which a candidate succeeds or fails irrespective of merit.[71]

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[69] Ackermann 357. Ackermann argues that categories of persons 'must surely refer to persons, in their individual capacities, who belong to a particular category' – Ackermann 371.

[70] Ackermann 356 - 357. The author argues that this is the effect of *Chairperson of the National Assembly, Ex parte: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC).

[71] 'In the public service at least, the irrational pursuit of the goal of demographic "representivity" at the expense of the public … renders the discrimination unfair.' Iain Currie & Johan de Waal *The Bill of Rights Handbook* (2013) 504.

THE BILL IN CONTEXT PART III: ICERD

40. As indicated in the first section discussing the EEA, section 3 of the EEA requires that the statute be interpreted to ensure compliance with South Africa's international law obligations. Any proposed amendment to the EEA must be considered to ensure that no aspect of it results in non-compliance with South Africa's international law obligations.

41. The International Convention for the Elimination of All Forms of Racial Discrimination (ICERD), which South Africa ratified on 10 December 1998, has purchase under the Constitution. Article 2 thereof requires signatories to condemn all forms of racial discrimination and to eliminate racial discrimination by 'appropriate means'.

42. In clause 1(4) it pertinently states that '[s]pecial 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.' The clause, which manifestly countenances affirmative action, propounds a conception of substantive equality that is sensitive to past disadvantages and systemic patterns of discrimination. Crucially, however, it contains a proviso which states that affirmative action 'measures [shall] 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.'

43. The proviso is very important. It insists that affirmative action measures, in seeking to bring about equality, must not use extreme or irrelevant distinctions to achieve equality

of outcome objectives, and must be kept under constant scrutiny to ensure that this principle is observed. Not every measure taken in pursuit of affirmative action should be accepted as legitimate merely because the object of the distinction is to improve the situation of the disadvantaged group - a legal rule is not necessarily legitimate because it pursues a legitimate goal. Affirmative action policies are permissible under international instruments only insofar as they do not contravene the principle of non-discrimination.

44. 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.'

45. These obligations must be borne in mind in the evaluation of the proposed amendments to the EEA.

46. In *Glenister II*[72] the Constitutional Court held that international agreements have 'an important place in our law', at the very least as 'interpretive tools to understand and evaluate our Bill of Rights'.[73] It explained:

> 'Our Constitution reveals a clear determination to ensure that the Constitution and South African law are interpreted to comply with international law, in particular international human

[72] *Glenister v President of the Republic of South Africa & Others* [2011] ZACC 6.

[73] *Glenister II* at para 96.

rights law. Firstly, section 233 requires legislation to be interpreted in compliance with international law; secondly, section 39(1)(b) requires courts, when interpreting the Bill of Rights, to consider international law; finally, section 37(4)(b)(i) requires legislation that derogates from the Bill of Rights to be "consistent with the Republic's obligations under international law applicable to states of emergency." These provisions of our Constitution demonstrate that international law has a special place in our law which is carefully defined by the Constitution.'

47. But it went further. The majority upheld Mr Glenister's objections to a statute on the basis of a mixture of the consideration that it infringed the Bill of Rights and South Africa's international treaty obligations.

48. In amending the EEA, South Africa's international treaty obligations cannot be ignored.

AMENDMENTS RECOMMENDED BY SAHRC NOT FORMING PART OF BILL

The SAHRC Report

49. On 12 July 2018, the South African Human Rights Commission (SAHRC) released 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).

50. For the sake of completeness, a copy of the Equality Report is attached hereto as **annexure A**. By way of summary, attention is drawn to the following aspects of the Equality Report.

50.1. According to the Equality Report, the SAHRC found that the EEA is not constitutionally compliant, and that it violates the obligations imposed by: (i) ICERD; and (ii) the Committee on the Elimination of Racial Discrimination (CERD).

50.2. The executive summary records as one of the key findings of the Equality Report[74] 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'.

50.3. Another key finding recorded[75] 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'.

50.4. In Chapter 1, the Equality Report states[76] 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'.

[74] At p 5.

[75] At p 5.

[76] At p 8.

50.5. Chapter 6 of the Equality Report is concerned with the 'Key Rights-Based Drivers of Radical Socio-Economic Transformation'.[77]

50.5.1. It commences with a discussion of the meaning of 'affirmative action' or 'special measures' in which it records 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' (quoting *South African Police Services v Solidarity obo Barnard*).[78]

50.5.2. The three-pronged test to determine whether affirmative action measures fall within the bounds of section 9(2) of the Constitution (as developed in *Minister of Finance v Van Heerden*)[79] is also recited.

50.5.3. Moreover, a description of the position in international law is provided, namely that it allows for 'special measures' to advance persons subject to discrimination, but that such measures may not entail as their

[77] See p 28.

[78] 2014 (6) SA 123 (CC) paras 30 – 31, see p 29 of the Equality Report.

[79] 2004 (6) SA 121 (CC).

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.

50.5.4. Specifically recorded is the consideration of the CERD that 'Special measures should be appropriate to the situation to be remedied, be legitimate, necessary in a democratic society, respect the principles of fairness and proportionality, 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'.[80] 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'.[81]

50.5.5. 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

[80] At p 30.

[81] See p 30.

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.

50.5.6. Under the heading 'Targeted special measures based on need' it is questioned whether the EEA or its implementation is not leading to new imbalances,[82] 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'.[83] 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'.[84] The Equality Report notes that 'Without first taking the characteristics of groups into account, varying degrees of disadvantage and the possible intersectionality of multiple forms of discrimination (based on race, ethnicity, gender or social origin) faced by members of vaguely categorized groups, cannot be identified. Moreover, the current classificatory system and disaggregation of data fails to acknowledge multiple forms of discrimination faced within population groups. For example, given that inequality between members of the Black African

[82] At p 33.

[83] At p 34.

[84] At p 34.

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'.[85]

50.5.7. In the context of the heading 'Special measures designed to advance vulnerable groups', the Equality Report explains that 'Due to the fact that designated groups are bluntly classified and data is insufficiently disaggregated, measures are not capable of being targeted at the most vulnerable groups in society, and can likewise not be designed to respond to new forms of discrimination or compounded discrimination'.[86]

50.5.8. Although acknowledging the Constitutional Court's attempt to distinguish between rigid quotas and flexible targets, the Equality Report records that the court has been sharply divided on this score. It is also said that 'the Court has inadvertently created the risk that members of designated groups – and especially those who suffer multiple forms of discrimination – may be prejudiced by the rigid implementation of

[85] See pp 34 – 35.

[86] At p 35.

targets, thereby raising the spectre of new imbalances arising'.[87] In this regard, reference was made to the *Barnard* case[88] 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 subsequent litigation in *DCS*.[89] 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'.[90] In the view of the SAHRC,[91]

> '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.'

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[87] At pp 35 – 36.

[88] *South African Police Service v Solidarity obo Barnard* 2016 (6) SA 123 (CC).

[89] *Solidarity and Others v Department of Correctional Services* 2016 (5) SA 594 (CC).

[90] See p 36.

[91] At p 36.

50.5.9. In discussing the topic 'Special measures must promote the achievement of equality', the authors of the Equality Report note that 'Currently, special measures in the employment equity context raise several concerns in respect of the requirement for affirmative action to promote equality'.[92] 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'.[93] 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'.[94]

50.5.10. Upon consideration of the conclusion of this court in the so-called *DCS* case, the SAHRC notes that the 'requirement to consider regional demographics makes sense given the uneven distribution of different

[92] At p 36.

[93] At p 36.

[94] At p 37.

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). However, as the Equality Report correctly notes, section 42 of the EEA has been amended and it now 'renders the consideration of regional demographics discretionary. A failure to consider regional demographics not only stands in conflict with the CERD's position on context-sensitive implementation of special measures, but may simultaneously severely prejudice members of certain designated groups in provinces where they are more significantly represented. Furthermore, considering the huge problem constituted by unemployment in South Africa, the legislative amendment and consequent implementation of affirmative action measures may provoke urban migration and thereby exacerbate existing special injustices' (at pp 37 – 38,).

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

50.6.1. 'the EEA's definition of "designated groups" and South Africa's system of data disaggregation are not in compliance with constitutional or international obligations imposed by the CERD read in conjunction with the CERD's general recommendations and concluding observations'.[95]

[95] At p 39.

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

50.6.3. 'It is further found that the EEA and its implementation, as well as the design of special measures, are currently misaligned to the constitutional objective of achieving substantive equality. It is accordingly recommended that in qualitatively assessing the impact of affirmative action measures on vulnerable groups, including indigenous people and people with disabilities, the DOL, 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'.[96]

50.6.4. '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

[96] At p 39.

discretionary'.[97] 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'.[98]

The amendments are not responsive to the Equality Report

51. The Department and the Minister were not responsive to the recommendations of the SAHRC as set out in the Equality Report.[99]

52. Indeed, the Bill moves in the opposite direction of that which was proposed for consideration by the SAHRC, as discussed more fully hereinbelow:

52.1. Clause 4 of the Bill seeks to insert section 15A to empower the Labour Minister to: (i) identify national economic sectors for the purposes of the administration of the Act; and (ii) determine numerical targets for these sectors. Clause 6, for its part, seeks to amend section 20 of the EEA in order to link the sectoral employment equity targets to the numerical targets set by the designated employers in the employment equity plans of their workplaces.

52.2. Clause 11 of the Bill seeks to amend section 42 of the EEA 'in order to clarify' that a designated employer's compliance with its obligations to implement employment equity may, in addition to being measured against the demographic profile of the national or regional economically active population, be measured

[97] At p 40.

[98] At p 40.

[99] Solidarity's efforts through the courts to enforce the recommendations of the SAHRC were not met with success. The Labour Court held that the Equality Report was not binding, with the Labour Appeal Court and the Constitutional Court declining to entertain appeals against that finding.

against compliance with the sectoral numerical targets set by the Labour Minister in terms of the proposed section 15A.

52.3. In the circumstances, these amendments place greater emphasis on the introduction of 'quotas' to be complied with (as discussed more fully below).

53. Although the Equality Report has been found not to be binding[100] the recommendations ought not simply be ignored:

53.1. The SAHRC is mandated by section 184 of the Constitution to promote respect for human rights and a culture of human rights; to promote the protection, development and attainment of human rights; and to monitor and assess the observance of human rights in South Africa. It has the power under section 184(2) of the Constitution to: (i) investigate and report on the observance of human rights; (ii) take steps and secure appropriate redress where human rights have been violated; (iii) carry out research; and (iv) educate;

53.2. The South African Human Rights Commission Act 40 of 2013 (the SAHRC Act) provides in section 13(1)(*a*) that the SAHRC *inter alia* 'is competent and is obliged to … make recommendations to organs of state at all levels of government where it considers such action advisable for the adoption of progressive measures for the promotion of human rights within the framework of the Constitution and the law, as well as appropriate measures for the further observance of such rights'.[101]

[100] *Solidarity v Minister of Labour and Others* (J3092/18) [2019] ZALCJHB 277; [2020] 1 BLLR 79 (LC); (2020) 41 ILJ 273 (LC) (8 October 2019).

[101] SAHRC Act s 13(1)(*a*)(i).

53.3. In addition, section 13(1)(*b*) empowers and obliges the SAHRC to monitor the implementation of, and compliance with, international and regional conventions and treaties, international and regional covenants and international and regional charters relating to the objects of the SAHRC.[102] The SAHRC may 'recommend to Parliament or any other legislature the adoption of new legislation which will promote respect for human rights and a culture of human rights'[103] and, if the SAHRC is of the opinion that any proposed legislation may might be contrary to Chapter 2 of the Constitution or to norms of international human rights law which form part of South African law or to other relevant norms of international law, it must immediately report that fact to the relevant legislature.[104]

53.4. Finally, the SAHRC is the agent of the CERD that oversees ICERD. It has been specifically declared that for purposes of article 14, paragraph 2 of ICERD, the SAHRC is the body within the Republic of South Africa's legal order that is competent to receive and consider petitions from individuals relating to rights set out in the ICERD.

54. The SAHRC, *qua* Chapter Nine institution, plays a very significant role in our constitutional democracy. Although section 18(4) of the SAHRC Act does not require 'compliance' with the recommendations in the sense that they must be implemented and/or that the actions so recommended be taken, that provision is instructive for providing that the recommendations cannot simply be ignored without a response.

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[102] SAHRC Act s 13(1)(*b*)(vi).

[103] SAHRC Act s 13(2)(*a*).

[104] SAHRC Act s 13(2)(*b*).

55. Accordingly, the parliamentary process of evaluating the proposed amendments to the EEA must include consideration of the SAHRC recommendations and the failure of the Department and the Labour Minister to address these in proposing amendment to the EEA. It must also include consideration of the degree to which concerns raised in the Equality Report are exacerbated through the proposed amendments (as discussed more fully hereinbelow), in circumstances where the SAHRC found that the EEA was not constitutionally compliant.

INSERTION OF SECTIONS 15A

The proposed provision

56. Clause 4 of the Bill proposes to introduce a new section 15A, as follows:

> '**Determination of sectoral numerical targets**
>
> 15A. (1) The Minister may, by notice in the Gazette, identify national economic sectors for the purposes of this Act, having regard to any relevant code contained in the Standard Industrial Classification of all Economic Activities published by Statistics South Africa.
>
> (2) The Minister may prescribe criteria that must be taken into account in identifying sectors and sub-sectors for the purposes of this section.
>
> (3) The Minister may, after consulting the National Minimum Wage Commission, for the purpose of ensuring the equitable representation of suitably qualified people from designated groups at all occupational levels in the workforce, by notice in the Gazette set numerical targets for any national economic sector identified in terms of subsection (1).
>
> (4) A notice issued in terms of subsection (3) may set different numerical targets for different occupational levels, sub-sectors or regions within a sector or on the basis of any other relevant factor.
>
> (5) A draft of any notice that the Minister proposes to issue in terms of subsection (1) or subsection (3) must be published in the Gazette, allowing interested parties at least 30 days to comment thereon.'

57. Clause 4 thus proposes to empower the Minister to (i) identify national economic sectors; and (ii) determine numerical 'targets' for these sectors.

Unfettered power & internal incoherence

58. The doctrine of separation of powers infuses our Constitution. The doctrine recognizes the functional independence of the three branches of government, and the checks and balances associated with the doctrine prevent the branches of government from usurping each other's power.

59. For purposes of this commentary, it is accepted that the 'making of delegated legislation by members of the Executive is an essential part of public administration',[105] and that Parliament may pass legislation delegating legislative functions to other bodies.[106] However, because delegation undermines the doctrine of separation of powers, there are (and must be) important constitutional limitations on the ability to delegate power.

60. Delegation of legislative power that entails the grant of broad discretionary power, without making provision for guidelines for the exercise of the discretionary power, may fall foul of the Constitution.

60.1. In *Dawood v Minister of Home Affairs*[107] the Constitutional Court considered wide powers granted to the Department of Home Affairs to grant or extend residence permits, without providing any criteria to guide the exercise of the discretionary powers. The Court held that the legislature must 'take care when legislation is drafted to limit the risk of an unconstitutional exercise of the discretionary power it confers'.[108] It reasoned that it was not enough to say that there might be

[105] *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) at para 113.
[106] *Executive Council, Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 (CC) at para 51.
[107] 2000 (3) SA 936 (CC).
[108] At para 48.

opportunities later to challenge the exercise of a wide discretionary power;[109] Parliament has to take steps to reduce the risk of possible abuses of power and give guidance as to when the limitation of rights would be justifiable.

60.2. In *Janse van Rensburg NO v Minister of Trade and Industry NO,*[110] the Constitutional Court considered the wide power conferred on the Minister of Trade and Industry under the Consumer Affairs (Unfair Business Practices) Act[111] to suspend a business or attach or freeze its assets while the business was being investigated. The discretion granted was criticised for being 'unfettered and unguided',[112] and the Court held that the absence of guidance contributed to the power being an unjustifiable limitation on the right to procedurally fair administrative action.[113]

60.3. In *Ambruster v Minister of Finance*[114] the Constitutional Court indicated that it would be prudent to formulate guidelines to encourage the consistent and correct application of power,[115] even where a variety of factors may be relevant to the exercise of power and thus difficult for the legislature to specify.

61. In the present instance, the proposed section 15A(1) appears to provide a guideline on what standard must be used to identify national economic sectors for purposes of the EEA. However, section 15A(2) then grants an unfettered power to the Labour Minister to 'prescribe criteria that must be taken into account in identifying sectors and sub-sectors for the purposes of this section'. Not only are the proposed sections 15A(1) and

[109] At para 48.
[110] 2001 (1) SA 29 (CC).
[111] Act 71 of 1998.
[112] At para 29.
[113] At para 25.
[114] 2007 (6) SA 550 (CC).
[115] At para 80.

15A(2) internally incoherent, but there is no guidance given to the Minister on what must inform the criteria to be used to make his determination. In addition, it is notable the Minister's identification of sectors in section 15A(1) is required to be published in the Government Gazette, and made subject to the requirement that interested parties be allowed at least 30 days to comment on such determination; however, the section 15A(2) power is not limited in that way. The provision as currently proposed includes no limitation on the power of the Labour Minister to set criteria, and the exercise of the power is not made subject to comment. This is not aligned with the standard set by the Constitutional Court.

62. Section 15A(3), for its part, confers upon the Labour Minister the power to set numerical targets for any national economic sector that the Labour Minister has identified under the section 15A(1) power. No standard is set for the Labour Minister to comply with in setting the numerical targets that may be set.

62.1. This stands in stark contrast to the various requirements of the EEA that demand analysis of the employer's workforce, consideration of the realities facing employers (staff turnaround, the availability of suitable personnel and the like) and consultation with employees in the preparation of employment equity plans that contain employment equity targets suitable to that employer.

62.2. It is noted that the Draft Employment Equity Regulations, 2018[116] (Draft EE Regulations) proposes to introduce regulation 7A.

62.2.1. Under the heading 'Determination of numerical targets for national economic sectors in terms of section 15A', the proposed regulation 7A

[116] Government Notice No 993 in *Government Gazette* No 41923 of 21 September 2018.

prescribes that 'any relevant criteria may be taken into account, including (i) 'the qualification, skills, experience' (*sic*), (ii) the rate of turn-over and natural attrition within a sector; and (iii) recruitment and promotional trends within a sector'.

62.2.2. The effect of the proposed regulation is that the very Minister charged under the EEA with setting the targets is also determining the criteria by reference to which the targets are set. The criteria ought to be set by the legislature, not by way of regulation by the Labour Minister.

62.2.3. Leaving aside the non-sensical content of proposed regulation 7A(1)(a), which does not link qualification, skills and experience to any measurable description (such as 'of employees required within a sector'), the proposed standard for setting criteria is so broad as to be meaningless: The Labour Minister 'may' take into account 'any relevant criteria'. The use of the word 'may', as opposed to 'must' or 'shall' ostensibly affords the Labour Minister a discretion whether or not to take into account the relevant criteria. Moreover, the listed criteria are hardly useful for determination of the appropriate targets to be set.

63. The appropriate course of action would be to provide for criteria in the statute itself (so as not inappropriately to delegate the authority of the legislature to set criteria to the Labour Minister), to make the consideration of the criteria obligatory and to provide more fulsome criteria relevant to the determination of the targets.

<u>Problematic 'consultation' clause</u>

64. The only attempt at placing any limit on the Labour Minister is problematic as well. The text of the Bill states that the numerical targets will be set by the Minister 'after

consulting the National Minimum Wage Commission'. In the explanatory memorandum, it is stated that 'The Minister is required to consult with the Employment Equity Commission on the proposed sectors and sectoral targets'.[117]

65. The text of the Bill at present would create an internally inconsistent position.

65.1. Section 28 of the EEA in its current form established the Commission for Employment Equity. The functions of the Commission for Employment Equity are set out in section 30, being to advise the Minister on (i) codes of good practice issued by the Minister in terms of section 54; (ii) regulations made by the Minister in terms of section 55; and (iii) policy and other matters concerning the EEA. Importantly, section 30(2)(b) provides that the Commission for Employment Equity is empowered to 'research and report to the Minister on any matter relating to the application of this Act, including appropriate and well-researched norms and benchmarks for the setting of numerical goals in various sectors'.

65.2. The National Minimum Wage Commission, for its part, was established under section 8 of the National Minimum Wage Act No 9 of 2018 (Minimum Wage Act). The functions of the National Minimum Wage Commission as set out in section 11 of that statute are associated with matters concerning the national minimum wage, income differentials, matters concerning basic conditions of employment and the like. Although section 11(h) provides that the National Minimum Wage Commission may 'perform any such function as may be required of the Commission in terms of any other employment law', the National Minimum Wage Commission appears to be ill-suited to the task proposed to be given to it.

[117] At para 2.4.3.

Moreover, whilst the power in section 11(h) is afforded in general terms, the function of the Commission for Employment Equity (to research and report on appropriate and well-researched benchmarks and norms for the setting of numerical goals in various sectors) is specific.

65.3. In light of the (i) role of the Commission for Employment Equity and (ii) the wording of the explanatory memorandum, the text of the Bill is an error that must be corrected.

66. However, whether the text provides for consultation with the Commission for Employment Equity or the National Minimum Wage Commission, it does not oblige the Labour Minister to take heed of the advices of the body consulted. In *McDonald and Others v Minister of Minerals and Energy and Others*[118] the Court discussed the differences between provisions that require agreement in order for valid recommendations to be made, and those where agreement is not required. It held:

'[17] These differences are not just semantic, but have important consequences: where a functionary is required to act "on recommendation of" another, the law requires that there be agreement between them. Thus, the Minister was not obliged to accept the Regulator's recommendation and she had the discretion to refuse to follow it. But she cannot make regulations that have not been recommended by the NNR. Ultimately it is only if agreement is reached that valid regulations can be made.

[18] Likewise, where the law requires a functionary to act "in consultation with" another functionary, this too means that there must be concurrence between the functionaries, unlike the situation where a statute requires a functionary to act "after consultation with" another functionary, where this requires no more than that the ultimate decision must be taken in good faith, after consulting with and giving serious consideration to the views of the other functionary.'[119]

[118] 2007 (5) SA 642 (C).
[119] At paras 17 – 18. Footnotes omitted. Emphasis supplied.

67. If the consultation is indeed intended by the Legislature to be with the National Minimum Wage Commission, as currently proposed in the text, it is difficult to imagine what useful information can be supplied to assist with the formulation of appropriate targets. Consultation with the Commission for Employment Equity would be more sensible, but if the Labour Minister is at liberty to set targets without reaching agreement with the Commission for Employment Equity, the possibility for abuse is manifest.

68. Moreover, consultation with either the Commission for Employment Equity of the National Minimum Wage Commission, as provided for, does not include any requirement of consultation with relevant stakeholders to be affected by the 'targets' (in stark contrast to the requirements for consultation by employers with relevant stakeholders when an employment equity plan is prepared). It is difficult to imagine that the Labour Minister can come to a rational decision on appropriate targets for various occupational levels in a variety of sectors (either nationally or regionally) without having the benefit of consultation with stakeholders that are able to provide relevant information concerning the skills required to perform certain functions within a sector, the rates of turnover of employment within an industry, the rates of attrition within an industry and the like.

<u>State interference and limitation of freedom</u>

69. The Bill allows the Minister virtually untrammeled powers to set targets for industries and sectors, in circumstances where the exercise of that power involves state intervention and a limitation of freedom, in the sense that the process of equalization is being achieved by state intervention that reaches into the private sphere.

70. As a general proposition, a problem arises when an excessive amount of state interference leads to the creation of a state controlled society where the amount of freedom continually decreases for the alleged sake of promoting the common good. In the case of employment equity, the 'top-down' approach makes little sense. It has to be accepted that proportional representation of every population group at every level and in every conceivable field is not necessarily 'equitable representation' as envisaged in the EEA. If that were so, the EEA would not have provided for analysis, consultation and the development of employment equity plans, and nor would section 42 have provided for the consideration of the qualifications of suitable persons for employment and progress reported. The determination of what is 'equitable' is not a simple exercise of considering the make-up of the ecomonically active population.

71. A situation where the state (through the Labour Minister) controls the allocation of employment on the basis of race and gender is societal manipulation and not equitable representation. The aim of achieving equitable representation is to ensure that unfair discrimination is eliminated and that every person has the same opportunity regardless of race or gender. The rigid setting of 'targets' aimed at proportional representation in the workforce does not mean that the aim of a just and fair society is achieved.

<u>Interaction with section 42 amendment</u>

72. As is discussed more fully hereinbelow, the proposed introduction of section 15A must be read with the proposed amendment to section 42. The targets set by the Labour Minister become a factor that may be taken into account in determining whether an employer is implementing employment equity in terms of the EEA.

72.1. Section 42 allows for a discretion to be exercised on whether the targets set by the Labour Minister are to be taken into account in the assessment, just as it allows for a discretion to be exercised in taking into account other factors.

72.2. Since section 42 allows for such a wide discretion to be exercised by the person assessing compliance, the threat exists that numerical 'targets' set by the Labour Minister become the only factor taken into account in those cases where sectoral targets are set. This would undermine the structure of the EEA, which makes plain that:

72.2.1. targets are to be set by an employer based on analysis and consultation, as appears *inter alia* from EEA sections 13(2), 16,17, 19 and 20; and

72.2.2. numerical targets from but part of the measures to achieve employment equity (EEA section 15(3)).

72.3. Unless section 42 re-introduces the requirement that all factors listed therein be considered cumulatively (as had been the case in the original version of the EEA, prior to the 2014 amendment), the introduction of section 15A and/or the amendment to section 42 will undermine the entire legislative structure of the EEA.

<u>The purpose of the Labour Minister's power to set targets is ill-conceived</u>

73. The text of the Bill proposes the setting of 'targets' by the Labour Minister, with a particular purpose: 'ensuring the equitable representation of suitably qualified people from designated groups at all occupational levels in the workforce'.[120] The language employed entails a measure of obligation on an employer to comply with the Ministerial

[120] Proposed s 15(3).

targets (a conclusion also supported by the proposed amendment to section 42). In this manner, the introduction of the Ministerial power to set 'targets' suggests the creation of a quota. This is inconsistent with the existing text of the EEA, and also contrary to the case precedent of the Constitutional Court: *Barnard*[121] makes plain that flexibility and inclusiveness are non-negotiable qualities of affirmative action measures, and that job reservation (that is, the rigid application of race-based quotas) is 'properly prohibited' under our constitutional dispensation.[122] For this reason 'a decision-maker cannot simply apply the numerical targets by rote'.[123]

74. The difference between targets and quotas is important to bear in mind in the present context:

74.1. Quotas are rigid and exclusionary: they are required to be met, irrespective of circumstance. Goals, or targets, on the other hand, are flexible and inclusive: they are programme objectives translated into numbers, they provide a target to strive for and vehicle for measuring progress.

74.2. Put differently, goals are based on rational considerations, including degrees of under-representation, barriers, and attempts to eliminate them, and the available pool of suitably qualified persons, sometimes within a specific region. Quotas, on the other hand, are a requirement to hire (make use of) a fixed number of persons during a given period, or the reservation of vacancies for designated groups. Not meeting a goal does not result in a penalty, because a number of factors are

[121] *Supra.*
[122] *Barnard* at para 42.
[123] *Barnard* at para 96. Emphasis supplied.

considered to determine whether reasonable progress has been made.[124] Where penalties are imposed for not meeting the number set, this is indicative of a quota.

75. It may be said that the distinction between a quota and a target lies in the operative mechanics of the measure - whether it has direct or indirect effect.[125]

75.1. Direct effect measures are those producing immediate end results for the benefiting groups (such as quotas where specific positions, or a specific number of positions are reserved for members of a group). The measure is, in a sense, indifferent to the process of selection, because it aims only that producing specific results. Although at first glance quotas may be regarded as more acute and vigorous in their pursuit of equality, they are not truly radical as transformational tools because they do not cater for the roots of the pathology.

75.2. Measures with indirect effect are ones under which a procedure is set up to enhance equality of opportunities as a means of achieving substantive equality, without focus on the outcome of the procedure. Measures that focus on the procedure to enhance opportunity are flexible, because they can adjust to the particularities of each context in order to maximize results. Moreover, they aim at curing the *causes* of underrepresentation instead of providing relief at the end

[124] JL Pretorius, ME Klinck, CG Ngwena *Employment Equity Law, August 2013 [10-42],* and the authorities there cited.

[125] George Gerapetritis *Affirmative Action Policies and Judicial Review Worldwide* Springer International Publishing Switzerland 2016 at p 5.

point. Arguably, such measures are more effective as transformational measures in the long run.

76. Gerapetritis argues that:

> 'Discerning between measures of direct and indirect effect may also contribute significantly to the conceptual clarity of affirmative action. However, the most expedient linguistic approach would suggest that when the measure is of a direct effect, such as the imposition of rigid quotas or quotas by effect, it is more appropriate to use the terminology of "positive discrimination", whereas if the measure is of an indirect effect, thus encouraging participation of underrepresented groups without establishing quotas, the language of "positive/affirmative" action is more apposite. The above distinction indicates that quotas are by definition a mode of discrimination, since they award automatic end-result benefits, whereas measures providing motives have a mere affirmative nature without immediate implications on social competition.'[126]

77. In circumstances where the Labour Minister's power is not aimed at, for example, merely publishing rates of transformation in particular sectors or industries, so as to allow for comparisons to be made between a particular employer's progress and the sector/industry standard, the Bill proposes the introduction of a standard that must be met, and not deviated from. Section 42 as amended (if the Bill is passed in its current form) will create a standard by reference to which compliance with the statute will be measured, and against which compliance may be measured exclusively (given the discretion in the language of section 42 that allows for selective and not cumulative consideration of the factors listed therein). Notably, the Bill also proposes to introduce an amendment to section 53 of the EEA, which provides that State contracts may only be issued to employers that have been certified as being in compliance with their

[126] *Id* at pp 5 - 6.

obligations under the EEA. Clause 12 of the Bill seeks to amend section 53 to provide that the Labour Minister may only issue a compliance certificate if the employer has complied with any applicable sectoral targets (or has raised a reasonable ground for non-compliance). The sectoral 'targets' thereby become enforceable quotas that have to be met in order to (i) prove compliance and (ii) qualify for State contracts.

78. When the introduction of section 15A is read in the context of the Bill as a whole, the conclusion reached is that the Ministerial intervention is not aimed at identifying the causes of slow transformation in an industry, but simply to engineer an outcome. In this sense, the Ministerial targets have the quality of a quota rather than a target.

79. Solidarity accepts that there may be a purpose with the Commission for Employment Equity and the Labour Minister publishing sectoral information based on analysis, but that sectoral data ought not be treated as a target. Sectoral data on rates of transformation, rates of staff turnover and the like may potentially be used as a reference point against which employers are able to measure their own transformative project, but such rates ought not to serve as quotas to be met by an employer.

AMENDMENT OF SECTION 20

80. Section 20 obliges an employer to prepare and implement an employment equity plan 'which will achieve reasonable progress towards employment equity <u>in that employer's workforce</u>'.[127] That plan must include a variety of measures, including the setting of targets based on identified underrepresentation in the workforce of that employer. Each employment equity plan is – and must be – unique to the circumstances of that employer.

[127] Emphasis supplied.

81. The proposed amendment to section 20 would introduce the requirement that 'The numerical goals set by an employer in terms of subsection (2) must comply with any sectoral target in terms of section 15A that applies to that employer.

82. The amendment, if effected, would be inconsistent with the existing provisions of the EEA and/or undermine the structure created by the EEA. Section 17 of the EEA obliges an employer to consult with employees on conducting an analysis to identify underrepresentation (as prescribed in section 19) and on the content of an employment equity plan (including numerical targets) (EEA section 20). The question begs, if the numerical goals set by the Labour Minister (with no direct knowledge of a particular employer's circumstances) must inform the numerical goals of that employer, what is the purpose of the consultation with the employees? The introduction of section 20(2A) would result in a situation where the consultation with employees is rendered meaningless, because the numerical targets are not to be set in consequence of the analysis and consultation process followed, but by operation of the Ministerial assessment of the industry.

83. There are grave dangers associated with the setting of targets by the Minister, which creates a potential for setting targets that are unrealistic in a particular workplace. An employer – even one who has taken reasonable steps to appoint and promote suitably qualified people from the designated groups – may have a low staff turnover at senior levels and therefore be unable to appoint staff from the designated groups for a particular period.

84. If an employer sets employment equity targets in accordance with the Minister's determination and without taking into account the factors that affect its own operation, such targets would be unrealistic.

84.1. Notably, in *Robinson & Others v PriceWaterhouseCoopers*[128] Revelas J held that 'Affirmative action is not and never has been a legitimate ground for retrenchment'.[129]

84.2. Moreover, the Code of Good Practice on Dismissal Based on Operational Requirements[130] (Retrenchment Code) recognises, it is 'difficult to define all the circumstances that might legitimately form the basis of a dismissal for this reason,'[131] it must be accepted that an employer cannot shoe-horn compliance with affirmative action obligations into an operational requirement.

84.3. Put simply, it is not open to an employer to assess its workforce and consider that it must embark upon a retrenchment exercise to 'get rid of' employees of a class that is deemed to be 'overrepresented' in the workforce, in order to achieve compliance with its employment equity targets; compliance with employment equity targets cannot be said to be an 'operational requirement'. This view is supported by the content of section 15(4) of the EEA, which makes it clear that there is no obligation on an employer to take decisions concerning employment policy or practices that would establish absolute barriers to the continued employment of persons not from the designated groups under the statute.

84.4. The rate of staff turnover or natural attrition in a sector, or recruitment and promotional trends within a sector is not a useful indicator of whether a particular employer experiences the same trends.

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[128] [2006] 5 BLLR 504 (LC).
[129] At para 22.
[130] GN 1516 in *Government Gazette* 20254 of 16 July 1999.
[131] At para 1.

AMENDMENT OF SECTION 42

85. Prior to the Amendment Act 47 of 2013, section 42 of the EEA read:

'**Section 42 - Assessment of compliance**

In determining whether a designated employer is implementing employment equity in compliance with this Act, the Director-General or any person or body applying this Act must, in addition to the factors stated in section 15, take into account all of the following:

(a) The extent to which suitably qualified people from and amongst the different designated groups are equitably represented within each occupational category and level in that employer's workforce in relation to the-

(i) demographic profile of the national and regional economically active population;

(ii) pool of suitably qualified people from designated groups from which the employer may reasonably be expected to promote or appoint employees;

(iii) economic and financial factors relevant to the sector in which the employer operates;

(iv) present and anticipated economic and financial circumstances of the employer; and

(v) the number of present and planned vacancies that exist in the various categories and levels, and the employer's labour turnover;

(b) progress made in implementing employment equity by other designated employers operating under comparable circumstances and within the same sector;

(c) reasonable efforts made by a designated employer to implement its employment equity plan;

(d) the extent to which the designated employer has made progress in eliminating employment barriers that adversely affect people from designated groups; and

(e) any other prescribed factor.'

86. With effect from 1 August 2014, section 42 was substituted by section 16 of Act 47 of 2013. It now reads:

'**42 Assessment of compliance**

(1) In determining whether a designated employer is implementing employment equity in compliance with this Act, the Director-General or any person or body applying this Act may, in addition to the factors stated in section 15, take the following into account:

(a) The extent to which suitably qualified people from and amongst the different designated groups are equitably represented within each occupational level in that employer's workforce in relation to the demographic profile of the national and regional economically active population;

(b) reasonable steps taken by a designated employer to train suitably qualified people from the designated groups;

(c) reasonable steps taken by a designated employer to implement its employment equity plan;

(d) the extent to which the designated employer has made progress in eliminating employment barriers that adversely affect people from designated groups;

(dA) reasonable steps taken by an employer to appoint and promote suitably qualified people from the designated groups; and

(e) any other prescribed factor.

(2) The Minister, after consultation with NEDLAC, may issue a regulation in terms of section 55 which must be taken into account by any person who is required to determine whether a designated employer is implementing employment equity in compliance with this Act.

(3) Without limiting subsection (1) (a), the regulation made in terms of subsection (2) 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.

(4) In any assessment of its compliance with this Act or in any court proceedings, a designated employer may raise any reasonable ground to justify its failure to comply."

87. Section 11 of the Bill now proposes to introduce after subsection (1)(a), the following:

'(aA) whether or not the employer has complied with any sectoral target set in terms of section 15A applicable to that employer;'

88. The first point to be observed is that the proposed amendment would introduce an additional factor that the persons applying the statute 'may' have regard to. The ordinary meaning of the word 'may' suggests that there is a discretion on the person

applying the statute to decide whether or not a particular factor is to be taken into account, including the sectoral targets. It has been said that the word 'may' in legislation, construed in context, could nevertheless be read to signify 'an authorization to exercise power coupled with a duty to use it if the requisite circumstances were present'[132] Read in this way, the person assessing compliance would have a duty to take all the listed factors into account. However, taking the legislative history into account, this does not appear to be the position of the legislature. The original text of section 42 employed the word 'must', which was interpreted by the Labour Court in *Department of Labourt v Comair Ltd*[133] to impose an obligation to take all of the listed considerations into account. The amendment in 2014 then replaced the word 'must' with 'may', introducing the discretion. Arguably, a rational decision-maker would nevertheless be obliged to take all relevant factors into account. However, the use of the word 'may' instead of 'must' introduced a considerable discretion. In the absence of an explicit obligation to bring into account the listed factors on a cumulative basis, the 'targets' set by the Labour Minister may well be treated as the only relevant factor by those assessing compliance.

89. As discussed hereinabove, section 15(3) of the EEA permits numerical goals, but excludes quotas. Although the distinction between quotas and numerical goals is not made clear in the statute (in the absence of a definition of a quota), it must be accepted that the rigid enforcement of a numerical goal is in fact a quota. In other words, if the numerical goals which are set for achieving the equitable representation of designated groups are strictly enforced by means of sanctions then these goals are equivalent to a

[132] See *SAPS v PSA* [2007] 5 BLLR 383 (CC) at para 15, by reference to *Van Rooyen & Others v The State & others (General Council of the Bar intervening)* 2002 (5) SA 246 (CC); 2002 (8) BCLR 810 (CC).
[133] [2009] BLLR 1063 (LC); [2009] JOL 24060 (LC).

quota as fixed percentages of the designated groups then have to be employed. The provision that quotas are excluded will be hollow, unless strict enforcement of numerical goals is not allowed, because such enforcement turns a numerical goal into a quota.

RECOMMENDATIONS

90. In light of the comments set out herein, Solidarity recommends that:

90.1. the Portfolio Committee consider the comments of the SAHRC in the Equality Report and that it ensure responsiveness to the concerns raised therein;

90.2. no amendment be affected to allow the Ministerial setting of sectoral targets, with the Ministerial role being confined to the publication of sectoral data by reference to which progress can be measured;

90.3. in the event that an amendment is affected to allow for the setting of Ministerial targets:

90.3.1. the proposed provision allows for broader consultation with stakeholders prior to the publication of targets;

90.3.2. the proposed provision provide criteria and guidelines to the Labour Minister on the manner in which the power is to be exercised;

90.3.3. the amendment be coupled with a reversion in section 42 to compulsory and cumulative consideration of all relevant and listed factors to assess compliance;

90.3.4. the amendment not be coupled with an enforcement mechanism (such as the proposed amendment to section 53) that ensures that the 'target' is treated as a quota.

90.4. Quota be defined under the Act's definition as : "*a requirement to hire or promote a fixed number of persons during a given period and or the reservation of a certain number of vacancies for designated groups."*