**IN THE HIGH COURT OF SOUTH AFRICA**
**(GAUTENG DIVISION, PRETORIA)**

In the matter between:

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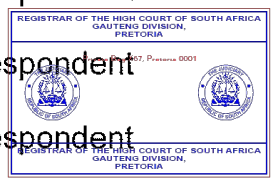
|---|---|
| **DEMOCRATIC ALLIANCE** | Applicant |
| and | |
| **MINISTER OF EMPLOYMENT AND LABOUR** | First Respondent |
| **COMMISSION FOR EMPLOYMENT EQUITY** | Second Respondent |
| **SPEAKER OF THE NATIONAL ASSEMBLY** | Third Respondent |
| **CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES** | Fourth Respondent |
| **PREMIER OF THE WESTERN CAPE** | Fifth Respondent |
| **PREMIER OF THE EASTERN CAPE** | Sixth Respondent |
| **PREMIER OF THE FREE STATE** | Seventh Respondent |
| **PREMIER OF GAUTENG** | Eighth Respondent |
| **PREMIER OF KWAZULU-NATAL** | Ninth Respondent |
| **PREMIER OF MPUMALANGA** | Tenth Respondent |
| **PREMIER OF THE NORTHERN CAPE** | Eleventh Respondent |
| **PREMIER OF THE NORTH WEST** | Twelfth Respondent |
| **PREMIER OF LIMPOPO** | Thirteenth Respondent |

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**FOUNDING AFFIDAVIT**

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## TABLE OF CONTENTS

I, the undersigned,

**JOHN HENRY STEENHUISEN**

declare under oath :

1. I am the leader of the opposition and the federal leader of the Democratic Alliance (**DA**), the applicant in this matter. I am authorised to depose to this affidavit on the applicant's behalf. The applicant has resolved to bring this application.



2. The facts contained in this affidavit are to the best of my belief both true and correct. They fall within my personal knowledge or are apparent from documentation under my control, except where the context indicates otherwise. Where I rely on information provided to me by others, I have obtained confirmatory affidavits.

3. Where I make legal submissions, I do so on the basis of legal advice received from my legal representatives, which I believe to be correct.

**INTRODUCTION**

4. This is a constitutional challenge to what can only be described as the grand social-engineering scheme sought to be created by the Employment Equity Amendment Act 4 of 2022 ('**the Amendment Act**').

5. Under the scheme, the Minister of Employment and Labour would acquire the power to set *'numerical targets'* for the demographic composition of any

1 B

*'designated employer'* – which includes every private-sector employer employing 50 or more people, every municipality, and almost every organ of state.

6. But the term *'numerical target'* is a misnomer, in that what the Minister sets is not a target that a designated employer must aim at. In truth, what he sets are quotas: particular demographic compositions that designated employers must achieve, on pain of severe penalties – including the inability to do business with the state, the cancellation of existing state contracts, compelling orders, and fines.


7. I am advised that this power is plainly unconstitutional for at least the following reasons. By way of summary:

   7.1. first, it is a power to set demographic quotas, which is an unconstitutional violation of section 9 of the Constitution, and contrary to the express provisions of section 15(3) of the Employment Equity Act 55 of 1998 ('**the Employment Equity Act**' or '**the Act**');

   7.2. second, even if it is assumed that the power is not properly characterised as a quota power, it nevertheless is a blunt and entirely disproportionate restitutionary scheme that does not meet the requirements of section 9(2) of the Constitution and which constitutes unfair discrimination in terms of section 9(3) thereof;

   7.3. third, the scheme violates the rights to freedom of residence and of trade, occupation and profession;

7.4. fourth, it is a vague and unrestrained power with the potential to violate rights, falling foul of the principle in *Dawood v Minister of Home Affairs* [2000] ZACC 8; 2000 (3) SA 936 (CC); and

7.5. finally, it was incorrectly tagged as a bill under section 75 of the Constitution when it should have been tagged as a section-76 bill.

8. I structure this affidavit as follows:

8.1. first, I cite the parties and deal with standing and jurisdiction;

8.2. second, I explain how the Act worked prior to its amendment by the Amendment Act;

8.3. third, I describe the scheme sought to be introduced by the Amendment Act (which I refer to as '**the impugned scheme**');

8.4. fourth, I explain why the impugned scheme is unconstitutional; and

8.5. finally, I deal briefly with the relief sought – the invalidation of the impugned scheme with costs.



## PARTIES, STANDING AND JURISDICTION

9. The applicant is **THE DEMOCRATIC ALLIANCE**. It is a duly registered political party with its main offices at 2nd Floor, Theba Hosken House, 16 Mill Street, Gardens, Cape Town. Under its federal constitution, the applicant is a body corporate with perpetual succession, capable of suing in its own name.

10. The applicant has standing on at least the following bases:

3

10.1. it has own-interest standing in terms of section 38*(a)* of the Constitution, given that it is a designated employer that would have to comply with the impugned scheme; and

10.2. the applicant acts in the public interest in terms of section 38*(d)*, given that the impugned scheme would require employers across the country to radically re-engineer their workforces to comply with the *'targets'* set in terms of the scheme.

11. The first respondent is **THE MINISTER OF EMPLOYMENT AND LABOUR** ('**the Minister**'). His offices are at Laboria House, 215 Francis Baard Street, Pretoria. He is cited by in his official capacity as the minister responsible for administering the Employment Equity Act (and thus the impugned scheme introduced by the Amendment Act).



12. The second respondent is **THE COMMISSION FOR EMPLOYMENT EQUITY** ('**the Commission**'), an organ of state established by section 28 of the Employment Equity Act. Its offices are also at Laboria House, 215 Francis Baard Street, Pretoria. The Commission is cited by virtue of the fact that it advises the Minister on his promulgation of the *'numerical targets'* introduced by the Amendment Act.

13. The third respondent is **THE SPEAKER OF THE NATIONAL ASSEMBLY**, the head of the National Assembly elected in terms of section 52(1) of the Constitution. Her offices are at Parliament, Plein Street, Cape Town.

14. The fourth respondent is **THE CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES**, the head of the National Council of Provinces elected in terms

of section 64(1) of the Constitution. His offices are at Parliament, Plein Street, Cape Town.

15. The fifth respondent is **THE PREMIER OF THE WESTERN CAPE**, the executive authority of the Western Cape by virtue of section 125(1) of the Constitution. His offices are at Provincial Legislature Building, 1st Floor, 7 Wale Street, Cape Town.

16. The sixth respondent is **THE PREMIER OF THE EASTERN CAPE**, the executive authority of the Eastern Cape by virtue of section 125(1) of the Constitution. His offices are at Office of the Premier Building, Independence Avenue, Bisho.



17. The seventh respondent is **THE PREMIER OF THE FREE STATE**, the executive authority of the Free State by virtue of section 125(1) of the Constitution. His offices are at OR Tambo House, Cnr Markgraaf & St Andrew's Streets, Bloemfontein.

18. The eighth respondent is **THE PREMIER OF GAUTENG**, the executive authority of Gauteng by virtue of section 125(1) of the Constitution. His offices are at 65 Ntemi Piliso Street, Newtown, Johannesburg.

19. The ninth respondent is **THE PREMIER OF KWAZULU-NATAL**, the executive authority of KwaZulu-Natal by virtue of section 125(1) of the Constitution. Her offices are at Moses Mabhida Building, 300 Langalibalele Street, Pietermaritzburg.

20. The tenth respondent is **THE PREMIER OF MPUMALANGA**, the executive authority of Mpumalanga by virtue of section 125(1) of the Constitution. Her

offices are at 7 Government Boulevard, Building 2, Riverside Park, Extension 2, Mbombela.

21. The eleventh respondent is **THE PREMIER OF THE NORTHERN CAPE**, the executive authority of the Northern Cape by virtue of section 125(1) of the Constitution. His offices are at Provincial Legislature Building,JW Sauer Building, Cnr Roper & Quinn Streets, Kimberley.

22. The twelfth respondent is **THE PREMIER OF THE NORTH WEST**, the executive authority of the North West by virtue of section 125(1) of the Constitution. His offices are at Garona Building, South Wing, 3rd Floor, Dr James Moroka Drive, Mmabatho.



23. The thirteenth respondent is **THE PREMIER OF LIMPOPO**, the executive authority of Limpopo by virtue of section 125(1) of the Constitution. His offices are at Mowaneng Building, 40 Hans van Rensburg Street, Polokwane.

24. The third to thirteenth respondents are joined by virtue of any interest they may have in the tagging ground of challenge.

25. This Court has jurisdiction by virtue of the residence of the first, second and eighth respondents.

**THE EMPLOYMENT EQUITY ACT PRIOR TO ITS AMENDMENT**

26. The Employment Equity Act was enacted in 1998 and came into effect in December 1999. Under section 2, its purpose is —

> 'to achieve equity in the workplace by —

6

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

(b) implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational levels in the workforce.'

27. Chapter II of the Act prohibits unfair discrimination in the workplace. The impugned scheme does not touch Chapter II, and so I do not deal any further with it.



28. Chapter III, entitled AFFIRMATIVE ACTION, is what is changed by the impugned scheme, and so I describe how it currently works (i.e., prior to its amendment by the Amendment Act) in some detail.

29. Chapter III applies to every *'designated employer'* (section 12), defined to include every employer which employs 50 or more employees, every municipality, and every organ of state (except the army and intelligence services).

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

31. *'Affirmative action measures'* are defined to mean *'measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational levels in the*

7

B

*workforce of a designated employer'* (section 15(1)); and must under section 15(2) include —

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

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

*(c)* making reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce of a designated employer;

*(d)* subject to subsection (3), measures to —

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

(ii) 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.'



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

33. Crucially, the Act (prior to amendment) set itself against naked quotas:

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

8

B

33.2. section 15(4) provides that *'nothing in this section requires 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'*.

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

34.1. consult with its employees (section 16 read with section 13(2)*(a)*);



34.2. conduct an analysis *'of its employment policies, practices, procedures and the working environment, in order to identify employment barriers which adversely affect people from designated groups'*, which must *'include a profile … of the designated employer's workforce within each occupational level in order to determine the degree of underrepresentation of people from designated groups in various occupational levels in that employer's workforce'* (section 19 read with section 13(2)*(b)*);

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

34.4. report to the Director-General of the Department of Labour ('**the DG**') *'on progress made in implementing its employment equity plan'* (section 21 read with section 13(2)*(d)*).

9

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

> *'An employment equity plan … must state —*
>
> *(a) the objectives to be achieved for each year of the plan;*
>
> *(b) the affirmative action measures to be implemented as required by section 15(2);*
>
> *(c) where underrepresentation of people from designated groups has been identified by the analysis, the numerical goals to achieve the equitable representation of suitably qualified people from designated groups within each occupational level in the workforce, the timetable within which this is to be achieved, and the strategies intended to achieve those goals;*
>
> *(d) the timetable for each year of the plan for the achievement of goals and objectives other than numerical goals;*
>
> *(e) the duration of the plan, which may not be shorter than one year or longer than five years;*
>
> *(f) the procedures that will be used to monitor and evaluate the implementation of the plan and whether reasonable progress is being made towards implementing employment equity;*
>
> *(g) the internal procedures to resolve any dispute about the interpretation or implementation of the plan;*
>
> *(h) the persons in the workforce, including senior managers, responsible for monitoring and implementing the plan; and*
>
> *(i) any other prescribed matter'*.



36. The Act contains robust enforcement provisions to ensure compliance with Chapter III:

10

B

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

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



36.3. Second, if a designated employer fails to comply with Chapter III (or Chapter II), such failure permits any organ of state to refuse to contract with that employer and to cancel any existing contract it has with the employer (subsections 53(1) and (4)).

37. So, Chapter III of the Act in its pre-amendment state can fairly be summarised as follows:

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

11

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

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

37.4. An employer was not required by the Act to appoint people who are not suitably qualified in order to achieve equitable representation of designated groups (although *'suitably qualified'* is inclusively defined to include those who, with training, can acquire the necessary competence).



**THE IMPUGNED SCHEME**

38. The Bill that became the Amendment Act was introduced to the National Assembly in July 2020 and was processed through Parliament relatively quickly, receiving presidential assent less than two years later in April 2023.

39. The Amendment Act is not yet in effect. It will come into effect on a date fixed by the President in the Government Gazette (Amendment Act, section 16), and no such date has yet been fixed.

40. It does appear, however, that commencement is imminent, given that the Minister, on 12 May 2023 published draft *'numerical targets'* for public comment, a copy of which is annexed marked '**DA1**' (**'the draft *"targets"*'**). The closing

12

B

date for public comment is 12 June 2023. I deal with the draft *'targets'* in some detail below.

41. The scheme that the Amendment Act would introduce and which is impugned in this application is the power of the Minister to promulgate binding *'numerical targets'* for demographic representation in the workforce of designated employers. This power is contained in section 15A of the Act as amended, which I quote in relevant part:

> '***15A Determination of sectoral numerical targets***
>
> *(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, after consulting the relevant sectors and with the advice of the 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).*
>
> *(3) A notice issued in terms of subsection (2) may set different numerical targets for different occupational levels, subsectors or regions within a sector or on the basis of any other relevant factor.*'



42. While the impugned scheme refers to *'numerical targets'*, they are better described as binding quotas:

42.1. Section 20(2A) of the amended Act provides that the employment equity plan of every designated employer must contain *'numerical goals'* that

13

*'must comply with any sectoral target in terms of section 15A that applies to that employer'* (underlining added).

42.2. So whereas in the past, each designated employer's employment equity plan would contain numerical goals appropriate for that employer's situation, needs, and the specific labour market faced by that employer; under the impugned scheme every employer's employment equity plan must adopt the one-size-fits-all *'target'* prescribed for that employer's sector.



42.3. Moreover, and in a radical, and I say, unconstitutional, departure from the previous position under the Act, where it was left to each designated employer to set its own numerical goals as aforesaid, the amended Act permits the Minister to set what are effectively quotas in respect of each sector.

42.4. Section 42(1)*(aA)* of the amended Act provides that when the DG or any person or body applying the Act determines *'whether a designated employer is implementing employment equity in compliance with [the Act]'* one of the factors to be taken into account is *'whether the employer has complied with a sectoral target as set out in terms of section 15A applicable to that employer'*.

42.5. It follows that the DG can make a *'recommendation'* to a designated employer that it comply with the applicable *'target'* in terms of section 44*(b)* of the Act – which would involve the employer having to re-engineer its workforce by firing and hiring the necessary people so as to achieve the demographic makeup mandated by the applicable *'target'* –

14

B

and if the employer fails to comply, the DG can approach the Labour Court for an order forcing the employer to comply in terms of section 45(1)*(a)* of the Act.

42.6. It follows further that, under section 53(4) of the Act, any failure on the part of an employer to meet the applicable *'target'* is sufficient for the state to refuse to do business with that employer or even to cancel an existing agreement between the state and the employer.

42.7. Of particular importance in this context is section 53(2) of the Act, which provides that a designated employer may request a certificate from the Minister confirming its compliance with Chapters II and III of the Act, which constitutes *'conclusive evidence'* that the employer is so compliant (section 53(1)*(b)*(i)).



42.8. But subsections 53(6)*(a)* and *(b)* as amended would provide that the Minister may only issue a section-53(2) certificate if is satisfied that *'the employer has complied with a numerical target set in terms of section 15A that applies to that employer'*; unless *'in respect of any target with which the employer has not complied, the employer has raised a reasonable ground to justify its failure to comply'*. The amended Act does not specify what a *'reasonable ground'* might be.

43. The draft *'targets'* illustrate how radical the impugned scheme is:

43.1. They claim authority over eighteen *'economic sectors'* together covering the full gamut of economic activity in South Africa: agriculture, forestry and fishing; mining and quarrying; manufacturing, construction; financial

15

and insurance activities; transportation and storage; information and communication; water supply, sewerage, waste management and remediation activities; electricity, gas steam and air conditioning supply; human health and social work activities; arts, entertainment and recreation; real estate activities; professional, scientific and technical activities; wholesale and retail trade, repair of motor vehicles and motorcycles; accommodation and food service activities; public administration and defence, compulsory social security; education; and administrative and support activities.



43.2. Compliance with the *'targets'* must take place over five years.

43.3. If a designated employer conducts its business nationally, it must comply with the national *'targets'* for the applicable sector; and if a designated employer conducts its business provincially, it must comply with the provincial *'target'* for the applicable sector.

43.4. In addition, the *'targets'* are divided across —

43.4.1. four employment tiers (in descending order of seniority, *'top management'*, *'senior management'*, *'professionally qualified'* and *'skilled'*);

43.4.2. four race designations (African, Coloured, Indian and White); and

43.4.3. men and women.

16 B

43.5. For each sector, for each geographic region (national or provincial), at each employment tier, at each race group of each sex, a percentage is specified.

43.6. Although this is not expressly stated, it appears that the specified percentages are minimums (given that they generally add up to less than 100%). In other words, every designated employer must ensure that at least the specified percentage of its employees at any given employment tier are African men, Coloured women, Indian men, White women, and so on. The Minister is invited to confirm this understanding in answer.



43.7. Generally, the minimum percentages increase for any given sector and geographic region as one moves down the employment tiers. For example, in the *'agriculture, forestry and fishing'* economic sector in the national region, the sum of the targets for each population group in the *'top management'* tier is 43% (35% together for black people (which is the sum of the targets for African people, coloured people and Indian people, rounded up) plus the 8% minimum for white people). In the *'senior management'* tier the sum of the minimums is 48%, in the *'professionally qualified'* tier it is 68%, and in the *'skilled'* tier it is 86%.

43.8. It follows that as one moves down the employment tiers, the prescribed percentages move away from mere minimums towards *'targets'* that must be hit fairly precisely. By way of illustration, in the *'water supply, sewerage, waste management and remediation activities'* sector in the national region at the (lowest) *'skilled'* tier, the sum of the minimum percentages is 99.2% (91.2% for the three black groups together plus

17

the 8% minimum for white people). This means that in this sector, in this region and at this tier, a designated employer's workforce must be almost exactly 79.3% black, 9.2% coloured, 2.7% Indian and 8.0% white.

43.9. It follows further that in some provinces, in some sectors and at lower employment tiers, a very low ceiling is set on the employment of coloured and Indian people. Again by way of illustration, in the *'public administration and defence; compulsory social security'* sector, in the Limpopo region and at the (second-lowest) *'professionally qualified'* tier, the sum of the minimum percentages for African and white people is 93.1%. Thus, the maximum percentage of coloured and Indian people that may be employed is 6.9%.



44. While the scheme is restricted to *'designated employers'*, this covers much of the formal South African economy: every private-sector employer employing 50 or more people, every municipality, and almost every organ of state. In the 2022 reporting period, the official list of designated employers comprised 27 533 employers. In this regard, I annex marked '**DA2**' a copy of the first two pages of the latest list of designated employers published by the Minister in terms of section 41 of the Act (I leave out the entire list, which runs to almost 600 pages).

45. Solidarity (a trade union) has conducted an economic analysis of the draft *'targets'*. I call this '**the Solidarity report**'. Its conclusion is that the draft *'targets'* cannot be implemented unless (a) the South African economy grows at an impossible rate for the next five years or (b) designated employers almost completely overhaul the demographic profile of their workforce over the relevant four employment tiers, which would be enormously disruptive to the workers

concerned and to the employers themselves. The Solidarity report shows how the draft *'targets'* illustrate how unbound the powers sought to be introduced by the impugned scheme are, and I ask that the facts and coclusions therein be incorporated as if specifically traversed herein.

46. A confirmatory affidavit from the author of the report with a copy thereof, shall accompany this affidavit.

**THE SCHEME IS UNCONSTITUTIONAL**



47. The impugned scheme is unconstitutional for the reasons set out in paragraph 7 above. I deal with each in turn. This section largely consists of propositions of law, will be expanded upon in written and oral argument, and is provided so as to give the respondents a fair precis of applicant's case.

***Ground 1: the impugned scheme is unconstitutional because it implements a quota***

48. I am advised that —

48.1. any affirmative-action scheme that constitutes a quota is unconstitutional; and

48.2. what sets an impermissible quota apart from a permissible numerical target is primarily its rigidity. Numerical targets are *'inclusive'* and *'flexible employment guidelines'* while quotas are *'rigid'* and amount to *'job reservations'*.

19

B

49. As is explained above, section 15A empowers the Minister to set rigid *'targets'* that must be complied with by all designated employers, on pain of losing state contracts (or the ability to contract with the state). The DG can, moreover, obtain an order from the Labour Court requiring a designated employer to comply with the applicable section-15A target. Thus, the impugned scheme empowers the Minister to set quotas, and so it is unconstitutional.

50. I have already alluded to the fact that the impugned scheme marks a radical departure from the previous regime, which allowed designated employers to set their own numerical goals in their employment equity plans, with one that allows the Minister to replace these by diktat. No explanation or justification is proffered for this departure. The explanatory memorandum that accompanied the Bill that became the Amendment Act is not helpful in this regard.



***Ground 2: the impugned scheme otherwise violates section 9***

51. I am advised that an affirmative-action measure, even if it is not a quota, violates section 9(2) of the Constitution specifically (and section 9 of the Constitution generally) if it is disproportionate: if it imposes harms or costs that are substantial or undue given the envisaged purpose of the measure.

52. Even if the impugned scheme is not a quota, it is nevertheless disproportionate and unconstitutional for the following reasons.

53. First, it replaces a system that required every employer to formulate and implement an employment equity plan tailored for that employer's unique staff complement, operational needs, and the labour market it faces, with a one-size-

20

fits-all set of mandatory targets that are the same for every employer in a particular sector and region, regardless of how differently situated they might be.

54. The reality is that different employers in a particular sector will have different employment needs and face different labour markets. One employer might need electricians. Another might require coders. Another fitters and turners. But section 15A would permit the Minister to lump all of these employers together and force them to hire the same specified ratios of various race and gender combinations.



55. Second, the impugned scheme has the potential to create an absolute barrier to employment or advancement for members of particular racial groups in a particular area.

56. The draft *'targets'* illustrate the point. Posit X, an Indian woman falling within the *'skilled'* category in the *'financial and insurance categories'* sector, living in Gauteng. The draft *'targets'* applicable to designated employers operating in Gauteng would prescribe that a minimum of 82.3% of the workforce of any designated employer must be African, a minimum 2.4% must be Coloured, a minimum of 11% must be white, and a minimum of 1.7% must be Indian men. This adds up to a collective minimum of 97.4% for all of the race and gender groups other than Indian women – and thus an employment ceiling of 2.6% for skilled Indian women in the '*financial and insurance categories'* in Gauteng.

57. It follows that it would become exceedingly difficult for X to find a job in Gauteng. She must find a designated employer that has not hit its (very low) Indian-women ceiling that needs her particular set of skills within reasonable proximity of where she lives. If she cannot do so she must move somewhere else to find a job.

21

58. But she could only really move to KwaZulu-Natal to improve her chances, given that this is the only province in which the Indian-women ceiling is higher than it is in Gauteng (in every other province it is lower). I do not have to belabour the point that it is an exceedingly odious echo of our history for government policy to effectively require Indian people to move to KwaZulu-Natal to look for work.

59. Finally, it would not help her much to apply to designated employers applying the national list with offices in Gauteng. Under the draft *'targets'* the national ceiling for Indian women is 5.2%.


60. Third, the scheme permits the engineering of an outcome (specified demographic mixes) without requiring the state to fix the underlying problem – which is the unequal distribution of skills and qualification among racial groups.

61. Fourth, the scheme permits wall-to-wall binding standards. It permits the Minister to require every designated employer, across the country to achieve a particular demographic mix. It is an intrusive power that can be almost impossible for an individual job-seeker to escape.

***Ground 3: the scheme violates the right to freedom of residence and of trade, occupation and profession***

62. As illustrated by the draft *'targets'*, the impugned scheme permits a quota system that would make it exceedingly difficult for members of certain racial groups in particular sectors to find work, and in particular provinces. The hypothetical X, for example, might find it almost impossible to pursue her chosen career in the financial sector in Gauteng.

63. This constitutes a limitation of the right to freedom trade, occupation and profession. It also constitutes a limitation of the right to reside anywhere in the Republic.

64. I am advised that the onus rests on the state to justify this violation in answer.

***Ground 4: Section 15A violates the* Dawood *standard***

65. I am advised that in *Dawood* (cited above) the Constitutional Court held that a broad discretionary power is unconstitutional if (a) it can be exercised in a manner that violates human rights and (b) there are insufficient restrictions on the power to prevent such violations.



66. The section-15A power is precisely such a power:

66.1. The power is broad and vague: to *'set [binding] numerical targets for any national economic sector'*. Section 15A provides no further detail.

66.2. The Minister may thus set minimum demographic targets (as he seeks to do under the draft *'targets'*). He may set employment ceilings for specified race-and-gender combinations (as the *'targets'* effectively would do). He may set ranges (for example, that an employer's workforce must be between 60 and 70% African). He may set precise targets (an employer's workforce must be exactly 63% African).

66.3. The Minister may, moreover, set *'targets'* that are differentiated across employment tiers (as he seeks to do under the draft *'targets'*). But he may set a single target for employers in a sector, regardless of tier.

66.4. There are almost no restrictions on how the power should be exercised. All that is required is that the power be exercised *'for the purpose of ensuring the equitable representation of suitably qualified people from designated groups at all occupational levels in the workforce'*. This is a restriction that is so vague so as to be no restriction at all.

66.5. For example, the Minister is permitted to set a target that matches the demographics of the total population in a region, or the demographics of the workforce, or some other figure linked to demographics.

66.6. The power has the potential severely to limit human rights, as set out in the earlier sections.



***Avenues for deviation are insufficient***

67. The respondents, if they oppose, will likely point to two provisions to justify the impugned scheme:

67.1. section 42(4), which provides that *'[i]n 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'*; and

67.2. section 53(6)*(b)*, which provides that the Minister may still issue a section-53(2) certificate even if a designated employer has not *'complied with'* a section-15A *'target'* if *'in respect of any target with which the employer has not complied, the employer has raised a reasonable ground to justify its failure to comply, as contemplated by section 42(4)'*.

68. But these exceptions are not sufficient to render the impugned scheme constitutional. They are little more than a fig leaf, for the following reasons.

69. First, they are vague and themselves violate the *Dawood* standard. The Act as amended provides no detail as to what would rise to a *'reasonable ground'* justifying a failure to hit a *'target'*.

70. Second, exemptions are sought by a designated employer, not by an employee that has been prejudiced by the impugned scheme. If an employer chooses to comply entirely with all applicable *'targets'* and, for example, stops hiring Coloured men entirely, a Coloured man that is out of work as a result has no recourse. He faces a quota, plain and simple.



71. Third, except in court proceedings, the assessment of whether a ground for non-compliance raised by an employer is *'reasonable'* rests in the hands of the Minister or the DG. Practically, the Minister or the DG will be unable to exercise this discretion properly:

71.1. As pointed out above, in 2022 there are 27 533 designated employers. This number will increase every year.

71.2. As is indicated by the draft *'targets'* and the Solidarity report, many of these employers that wish to do business with the state will struggle to comply with the applicable *'targets'* and thus will have to justify their failure to comply in order to obtain a section-53(2) certificate.

71.3. In order to do so, presumably, each such employer will have to provide the Minister with detailed information as to (a) its business, (b) its labour needs, (c) its efforts to meet applicable targets, (d) the labour market it

faces, and so on. Given the number of designated employers there are and the likelihood that many of them will fail to meet their targets, the Minister's office will be inundated with detailed exemption applications.

71.4. The Minister will require a permanent, large office of bureaucrats processing these detailed applications and significant resources in order to decide them within a reasonable time and with sufficient attention. But, the Minister has only allocated R1.2 million for the implementation of the Amendment Act. This is insufficient. In this regard, I annex marked "**DA3**" a copy of the explanatory memorandum for the Bill that became the Amendment Act and refer this Court to paragraph 5 thereof.



72. It is thus likely that many designated employers, even those with a reasonable ground for non-compliance, will simply not receive section-53(2) certificates, and so will be precluded from doing business with the state.

***Ground 5: Incorrect tagging***

73. The fifth reason that the Amendment Act is unconstitutional is that it was incorrectly tagged as a Bill in terms of section 75 of the Constitution when it should have been tagged as a section-76 Bill.

74. I am advised that a Bill must be tagged as a section-76 Bill and follow the procedure in section 76 of the Constitution if it affects, in substantial measure, any of the functional areas in Schedule 4 of the Constitution. If a Bill that should have been tagged as a section-76 Bill follows the section-75 procedure, it is unconstitutional and invalid.

75. Given how broad and instrusive the impugned scheme is in respect of the economy of each province, the Amendment Act affects, in substantial measure, at least the following functional areas in Schedule 4 of the Constitution: agriculture; airports other than international and national airports; casinos, racing, gambling and wagering; health services; industrial promotion; media services directly controlled or provided by the provincial government; provincial police; population development; provincial public enterprises; public transport; provincial public works; tourism; trade; urban and rural development; child-care facilities; firefighting services; local tourism; municipal airports; municipal health services; municipal public transport; and pontoons, ferries, jetties, piers and harbours.



76. Given that the Amendment Act was tagged as a section-75 Bill when it should have been tagged as a section-76 Bill, it is unconstitutional and invalid.

**CONCLUSION**

77. Given that the impugned scheme is unconstitutional, I submit that the default remedy is appropriate: the provisions implementing the impugned scheme in the Act as amended fall to be declared unconstitutional and invalid. Given that this would do no more than reinstate what is currently the status quo, no interim relief or reading-in is necessary.

78. The application should thus succeed with costs. I am advised that if the application fails, each party should pay its own costs by operation of the *Biowatch* principle.

**WHEREFORE** I pray for the relief sought in the notice of motion.

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JOHN HENRY STEENHUISEN

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Signed and sworn before me at CAPE TOWN on Tuesday, 13 June 2023, the deponent having acknowledged that he knows and understands the contents of the affidavit, that he has no objection to taking the prescribed oath and that he considers it binding on his conscience.

COMMISSIONER OF OATHS

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