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

Case number: 57591/23

In the appeal between:

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

APPLICANT'S HEADS OF ARGUMENT

TABLE OF CONTENTS

I. INTRODUCTION

1. This is a constitutional challenge to the far-reaching changes to the Employment Equity Act 55 of 1998 ("**the Employment Equity Act**" or "**the Act**") introduced by the Employment Equity Amendment Act 4 of 2022 ("**the Amendment Act**"). The Amendment Act is not yet in effect.

2. Section 9(2) of the Constitution[1] permits the adoption of affirmative-action measures so as to realise the constitutional promise of substantive equality. But affirmative-action measures must be approached with caution – because they can invade the dignity of those who are not preferred by them. Thus, the Constitution subjects such measures to strict control:

    2.1. First, affirmative-action measures must not go too far: they must not unduly invade the human dignity of those affected by them.

    2.2. Second, whether an affirmative-action measure is constitutionally permissible depends on the context – and so, rigid or one-size-fits-all approaches are generally unconstitutional. This is why the Constitution prohibits quotas and measures which would establish an absolute barrier to employment or promotion by members of non-favoured groups.

3. The changes introduced by the Amendment Act violate these controls, and so are unconstitutional.

[1] Constitution of the Republic of South Africa, 1996.

4. Under the Act in its unamended state, every designated employer (defined as every private-sector employer employing 50 or more people, every municipality, and almost every organ of state) is required *inter alia* to —

   4.1. conduct an analysis of its workforce in order to determine the extent to which people from designated groups (i.e., people of colour, women and people with disabilities) are underrepresented at various occupational levels in the employer's workforce; and

   4.2. prepare and implement an employment equity plan, which must include numerical goals to remedy any underrepresentation identified in the analysis (through the appointment of suitably qualified people from designated groups), the timetable within which this is to be achieved, and the strategies intended to achieve the goals.

5. Currently, and crucially, this obligation is context-sensitive. Every designated employer is required to formulate and implement numerical targets which are responsive to its unique position, including the degree of underrepresentation in its workforce and the availability of suitably qualified people from designated groups to remedy that underrepresentation.

6. The Amendment Act would replace this approach with one that is impermissibly rigid and one-size-fits-all.

7. If the Amendment Act comes into effect, every designated employer would have to follow *"numerical targets"* set by the Minister of Labour ("**the Minister**"), regardless of the degree of underrepresentation it suffers from and its ability to remedy that underrepresentation. If a designated employer fails to make its workforce fit the

particular demographic composition required by the relevant ministerial target, the employer would face the prospect of severe penalties, including the inability to do business with the state, the cancellation of existing state contracts, compelling orders, and fines.

8. This is plainly unconstitutional for the following reasons (by way of summary):

8.1. First, it violates section 9 of the Constitution. It is an affirmative-action measure that violates the constitutional controls on such measures, in that it necessarily creates a system that is (a) blunt and (b) rigid.

8.2. Second, it violates the *Dawood* principle, in that the Minister's power to set general targets is unconstitutionally broad and vague, and thus has the potential to violate constitutional rights (in addition to the necessary violation of section 9 referred to in the previous paragraph).

9. In addition, the Amendment Act in its entirety is invalid because the Bill that became the Act was tagged incorrectly. Bills that substantially affect the provinces must follow the procedure in section 76 of the Constitution. The Bill that became the Act is just such a Bill. But it was passed in accordance with the procedure in section 75 of the Constitution, and so it is invalid.

10. We structure the remainder of these heads of argument as follows:

10.1. first, we set out how the Employment Equity Act currently operates, in its unamended state;

10.2. second, we explain how the Amendment Act would modify the operation of the Employment Equity Act;

10.3. third, we explain how the Bill that became the Amendment Act was tagged incorrectly, and so why the Amendment Act is invalid in its entirety;

10.4. fourth, we explain how the relevant provisions of the Amendment Act violate section 9 of the Constitution;

10.5. fifth, we explain how the relevant provisions of the Amendment Act violate the *Dawood* principle;

10.6. sixth, we set out how the violation of the *Dawood* principle is illustrated by the two sets of draft targets published for comment under the Act as amended; and

10.7. finally, we explain and justify the relief sought.

II. THE EMPLOYMENT EQUITY ACT PRIOR TO AMENDMENT

11. In this section, we summarise the Employment Equity Act as it currently operates (given that the Amendment Act is not yet in effect).

12. In *Barnard*,[2] the Constitutional Court described the objects of the Employment Equity Act as follows:

> "to give effect to the constitutional guarantees of equality; to eliminate unfair discrimination at the workplace; and to ensure implementation of employment equity to redress the effects of past discrimination in order to achieve a diverse workforce representative of our people".[3]

---

[2] *South African Police Service v Solidarity obo Barnard* [2014] ZACC 23; 2014 (6) SA 123 (CC).

[3] *Id* para 40. The Act's preamble provides as follows:

"Recognising —

that as a result of apartheid and other discriminatory laws and practices, there are disparities in employment,

occupation and income within the national labour market; and

13. Chapter II of the Act prohibits unfair discrimination in the workplace. The impugned scheme does not affect Chapter II.

14. Chapter III, entitled AFFIRMATIVE ACTION, is what is changed by the impugned scheme, and so we describe how it currently works in some detail.

15. Chapter III applies to *"designated employers"*,[4] defined to include every employer which employs 50 or more employees, every municipality, and every organ of state (except the army, intelligence and security services).[5]

16. 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"*.[6] People from *"designated groups"* are defined to be *"black people, women and people with disabilities"*,[7] and *"black people"* are defined as *"Africans, Coloureds and Indians"*.[8]

17. *"Affirmative action measures"* are defined to mean *"measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities*

---

that those disparities create such pronounced disadvantages for certain categories of people that they cannot
be redressed simply by repealing discriminatory laws,
Therefore, in order to —
promote the constitutional right of equality and the exercise of true democracy;
eliminate unfair discrimination in employment;
ensure the implementation of employment equity to redress the effects of discrimination;
achieve a diverse workforce broadly representative of our people;
promote economic development and efficiency in the workforce; and
give effect to the obligations of the Republic as a member of the International Labour Organisation".

[4] Employment Equity Act, s 12.

[5] *Id* s 1 (definition of *"designated employer"*).

[6] *Id* s 13(1).

[7] *Id* s 1 (definition of *"designated groups"*).

[8] *Id* s 1 (definition of *"black people"*). We follow the racial nomenclature employed by the Act.

and are equitably represented in all occupational levels in the 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".[9]

18. The Act defines *"suitably qualified"* inclusively: to include not only a 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"*.[10]

---

[9] *Id* s 15(2).

[10] *Id* s 20(3). In *Barnard* above n 2 para 41, the Constitutional Court noted the centrality of this definition of *"suitably qualified"* to a proper understanding of the Act:

> "I pause to underline the requirement that beneficiaries of affirmative action must be equal to the task at hand. They must be suitably qualified people in order not to sacrifice efficiency and competence at the altar of remedial employment. The Act sets itself against the hurtful insinuation that affirmative action measures are a refuge for the mediocre or incompetent. Plainly, a core object of equity at the workplace is to employ and retain people who not only enhance diversity but who are also competent and effective in delivering goods and services to the public."

19. Critically, the Act sets itself against quotas or measures that unduly invade the dignity of members of disfavoured groups:

19.1. section 15(3) provides that the measures referred to in section 15(2)*(d)* *"include preferential treatment and numerical goals, but exclude quotas"* (a proviso described as *"vital"* by the Constitutional Court in *Barnard*);[11] and

19.2. 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"* (a provision described in *Barnard* as *"set[ting] the tone for the flexibility and inclusiveness required to advance employment equity"*).[12]

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

20.1. consult with its employees;[13]

20.2. 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*

[11] *Barnard* above n 2 para 42.

[12] *Id.*

[13] Employment Equity Act, s 16 read with s 13(2)*(a)*.

determine the degree of underrepresentation of people from designated groups in various occupational levels in that employer's workforce";[14]

20.3. 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"*;[15]

20.4. assign one or more senior managers to take responsibility for monitoring and implementing the employment equity plan and give them the necessary authority and means to perform their functions;[16] and

20.5. report to the Director-General of the Department of Labour ("**the DG**") *"on progress made in implementing its employment equity plan"* on an annual basis.[17]

21. Section 20(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"*. We quote the subsection:

> *"(2) An employment equity plan prepared in terms of subsection (1) 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*

[14] *Id* s 19 read with s 13(2)*(b)*.

[15] *Id* s 20(1) read with s 13(2)*(c)*.

[16] *Id* s 24(1)

[17] *Id* s 21 read with s 13(2)*(d)*.

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."

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

22.1. First, labour inspectors are given enforcement powers:

22.1.1. A labour inspector may enter a designated employer's workplace, question employees and call for documents.[18]

22.1.2. A labour inspector may also request and obtain a written undertaking from a designated employer to comply with its employment-equity obligations if the inspector believes on reasonable grounds that the employer has failed to comply with

[18] *Id* s 35 read with ss 65 and 66 of the Basic Conditions of Employment Act 75 of 1997.

them.[19] If the designated employer does not comply with the undertaking, the Labour Court may, on application by the DG, make the undertaking an order of court.[20]

22.1.3. In addition, if a designated employer has failed to comply with various obligations under Chapter III, a labour inspector may issue a compliance notice to the employer,[21] with which the employer must comply.[22] If the employer does not comply, the DG may apply to the Labour Court to make the compliance order an order of court.[23]

22.2. Second, 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 it is not, the DG 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"*.[24]

22.3. 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"*.[25] If the employer fails to justify its failure to

[19] Employment Equity Act, s 36(1).
[20] *Id* s 36(2).
[21] *Id* ss 37(1) and (2).
[22] *Id* s 37(5).
[23] *Id* s 37(6).
[24] *Id* s 44*(b)*.
[25] *Id* s 45(1)*(a)*.

comply, the DG may ask the Labour Court to impose a fine on the employer, which can be up to the greater of R1.5 million or 2% of the employer's turnover for a first contravention.[26]

22.4. Third, under section 53 (which has never been put into force), if a designated employer fails to comply with Chapter III (or Chapter II), such failure would permit any organ of state to refuse to contract with that employer and to cancel any existing contract it has with the employer, in terms of section 53.

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

23.1. It requires 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.

23.2. This scheme is context-sensitive. It acknowledges that every employer is differently situated in respect of employment equity, and requires the employer to prepare and implement an employment equity plan tailored to that employer's specific situation.

23.3. If designated groups are underrepresented in a designated employer's workforce, the employment equity plan must include numerical goals to achieve equitable representation, the timetable within which these goals are to be achieved, and strategies to achieve the goals.

[26] *Id* s 45(1)*(b)* read with Schedule 1.

23.4. These goals cannot, however, amount to quotas or absolute barriers to advancement in respect of members of non-designated groups.

23.5. In implementing its employment equity obligations, an employer is not required 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).

23.6. All of these obligations are enforceable: by labour inspectors and the DG, through obtaining binding orders from the Labour Court if necessary.

III. THE SCHEME THAT WOULD BE INTRODUCED BY THE AMENDMENT ACT

24. The Amendment Act is not yet in effect.[27] It will come into effect on a date fixed by the President in the *Government Gazette*,[28] and no such date has yet been fixed.[29]

25. 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 would be contained in section 15A of the Act as amended, which we quote in relevant part:

---

[27] It is permissible to bring a constitutional challenge to an Act that has been enacted (i.e., signed by the President) but which the President has not yet brought into effect. See *Khosa v Minister of Social Development* [2004] ZACC 11; 2004 (6) SA 505 (CC) para 90 and *Doctors for Life International v Speaker of the National Assembly* [2006] ZACC 11; 2006 (6) SA 416 (CC) paras 60 to 64.

[28] Amendment Act, s 16.

[29] Founding affidavit p 02-14 para 39. Not denied in answering papers.

"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."

(Emphasis supplied)

26. Section 20(2A) of the Act as amended would provide that that the employment equity plan of every designated employer must contain *"numerical goals"* that *"must comply with any sectoral target in terms of section 15A that applies to that employer"* (underlining added).

27. Thus, each designated employer would no longer adopt its own numerical goals, appropriate to its degree of underrepresentation and the particular labour market within which it operates. Rather, it would be forced to adopt the applicable one-size-fits-all sectoral *"target"* imposed by the Minister (hereafter, the applicable "**sectoral target**"). The "*flexibility and inclusiveness required to advance employment equity"*, in the words of the Constitutional Court in *Barnard*,[30] would be gone.

[30] *Barnard* above n 2 para 42.

28. The default position is that compliance with the applicable sectoral target is mandatory:

28.1. As explained above, section 20(1) of the Act (which has not been amended) requires every designated employer to implement its employment equity plan. If the Amendment Act comes into effect and by operation of the amended section 20(2A), every designated employer's employment equity plan would have to include the numerical goals set as the applicable sectoral target. Thus, every designated employer must realise the applicable sectoral target.

28.2. This position would be reinforced by the enforcement provisions in the Act:

28.2.1. The amended section 42(1)*(aA)* would provide 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"*.

28.2.2. It follows that the DG could make a *"recommendation"* to a designated employer that it comply with the applicable sectoral target in terms of section 44*(b)* of the Act – which could 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 sectoral target – and if the employer fails to comply, the DG would be able to approach the Labour Court for an order forcing the employer to comply in

terms of section 45(1)*(a)*, under pain of criminal sanction for non-compliance.

29. A further effect of the Amendment Act would be that designated employers which do not meet the applicable sectoral target would by default be precluded from doing business with the state:

29.1. Section 53(4) of the Act provides that *"[a] failure to comply with the relevant provisions of this Act is sufficient ground for rejection of any offer to conclude an agreement referred to in subsection (1) or for cancellation of the agreement"*.

29.2. Section 53(2) of the Act provides that any employer looking to contract with any organ of state *"may request a certificate from the Minister confirming its compliance with Chapter II, or Chapters II and III, as the case may be"*, and section 53(1)*(b)* provides that *"a certificate in terms of subsection (2) […] is conclusive evidence that the employer complies with the relevant Chapters of this Act"*.

29.3. The Amendment Act adds a new section 53(6), which provides in relevant part as follows:

> *"(6) The Minister may only issue a certificate in terms of subsection (2) if the Minister is satisfied that —*
>
> *(a) the employer has complied with a numerical target set in terms of section 15A that applies to that employer;*
>
> *(b) 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)".*

30. In answer, the Minister confirmed that the intention behind the Amendment Act was to make compliance with the applicable sectoral target a pre-requisite for doing business with the state. In the Minister's words: *"the State cannot continue to financially incentivise organisations that are anti-transformation"*.[31] (Emphasis supplied)

31. So, the section 15A power is a deeply intrusive one. It empowers the Minister to set binding demographic targets for all *"designated employers"* – i.e., employers of more than 50 people, almost all organs of state and all municipalities (in other words, large swathes of the economy). If a designated employer fails to comply with the applicable sectoral target, it faces fines, compelling orders, and the loss of state business. Gone would be the system in terms of which each designated employer sets a target appropriate for its workforce and labour market. It would, rather, have to adopt and implement the applicable sectoral target, regardless of its individual circumstances.

32. In other words, section 15A replaces a system that is flexible and context-specific with one that is blunt and rigid. As we explain in Section V below, this results in section 15A violating section 9 of the Constitution.

33. But section 15A is not only blunt, rigid, and intrusive. It is also exceedingly vague, in that the Act as provides almost no guidance on the permissible content of sectoral targets. We return to the unguided nature of the Minister's discretion in Section VI below, where it is explained that this violates the *Dawood* principle and is an independent basis for the section 15A power being unconstitutional.

[31] Minister answering affidavit p 03-39 para 88.

IV. THE AMENDMENT ACT IS INVALID BECAUSE IT WAS INCORRECTLY TAGGED

34. In Section V and Section VI below, we explain why the section 15A power is unconstitutional. It is, however, strictly not necessary for this Court to reach the constitutionality of the section 15A power. This is because the Bill that became the Amendment Act ("**the Amendment Bill**") was incorrectly tagged, and so the Amendment Act in its entirety falls to be set aside.[32]

The law relating to tagging

35. The Constitution stipulates that *"ordinary bills"* (i.e., bills not amending the Constitution or money bills) must follow one of two legislative processes, depending on the nature of the bill:

    35.1. an ordinary bill not substantially affecting the interests of the provinces must follow the process in section 75; and

    35.2. an ordinary bill substantially affecting the interests of the provinces must follow the process in section 76.

36. The choice between the two processes is called *"tagging"*. At the beginning of the legislative process, Parliament's Joint Tagging Committee decides whether a bill is a section 75 or 76 bill, and *"tags"* it accordingly. The bill then follows the procedure appropriate to how it has been tagged.[33]

---

[32] The tagging ground of challenge is pleaded at founding affidavit pp 02-28 to 02-29 paras 73 to 76.

[33] *Tongoane v Minister of Agriculture and Land Affairs* [2010] ZACC 10; 2010 (6) SA 214 (CC) paras 45 to 47.

37. There are two primary differences between the section 76 and section 75 processes:

37.1. First, the section 76 process gives the National Council of Provinces ("**the NCOP**") more power relative to the National Assembly in the legislative process. Under the section 76 process, if the National Assembly passes a bill and refers it to the NCOP, and the NCOP rejects the bill, the National Assembly must pass the bill by a two-thirds majority in order for it to go to the President for assent.[34] Under the section 75 process, the National Assembly needs a mere simple majority to override the NCOP's rejection of a bill.[35]

37.2. Second, the NCOP's voting procedure differs. Under the section 76 process, each province exercises a single vote, and a bill passes on five or more votes (out of nine).[36] Under the section 75 process, each of a province's ten[37] delegates exercises one vote individually, and a bill passes on a majority of votes cast.[38]

38. These procedural safeguards *"are designed to give more weight to the voices of the provinces in legislation substantially affecting them"* and *"are fundamental to the role of the NCOP in ensuring* 'that provincial interests are taken into account in the national sphere of government'*, and for* 'providing a national forum for public consideration of issues affecting the provinces' *"*.[39]

39. A bill is one substantially affecting the interests of the provinces, and so one that must be passed under the section 76 process, in two circumstances relevant to this application:

---

[34] Constitution, s 76(1).

[35] *Id* ss 75(1)*(c)* and *(d)*.

[36] *Id* s 65(1).

[37] *Id* s 60(1).

[38] *Id* s 75(2).

[39] *Tongoane* above n 33 para 65.

39.1. First, if it in substantial measure falls within a functional area listed in Schedule 4 of the Constitution,[40] which are functional areas of concurrent national and provincial competence.[41]

39.2. Second, if the bill provides for legislation envisaged in section 195(3) of the Constitution,[42] which is legislation ensuring the promotion of the basic values and principles governing public administration enshrined in section 195(1) of the Constitution. One such principle is that *"[p]ublic administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation"*.[43]

40. If a bill is passed in accordance with the section 75 procedure but was in fact a section 76 bill, then the resulting legislation is invalid.[44]

The Amendment Bill falls within various Schedule 4 functional areas

41. The Amendment Bill was tagged as a section 75 bill and was passed under the section 75 process.[45] This was unlawful, given that the Amendment Bill should have been tagged as a section 76 bill, for the reasons set out in this and the following section.

42. As is explained above, section 15A empowers the Minister to —

---

[40] Constitution, s 76(3).

[41] *Tongoane* above n 33 para 58.

[42] Constitution, s 76(3)*(d)*.

[43] *Id* s 195(1)*(i)*.

[44] *Tongoane* above n 33 para 109.

[45] Founding affidavit p 02-28 para 73 and p 02-29 para 76; Parliament answering affidavit p 04-15 para 27.

42.1. identify national economic sectors for the purposes of the Act, having regard to any relevant code contained in the Standard Industrial Classification of all Economic Activities published by Stats SA ("**the SIC**");[46] and

42.2. set binding demographic numerical targets for any such sector,[47] which may differentiate *inter alia* by region.[48]

43. The SIC, as the name implies, classifies all economic activity in South Africa.[49] It follows that section 15A would empower the Minister to set binding demographic targets for all economic activity in South Africa (insofar as it relates to designated employers). Because sectoral targets are binding, it would permit the Minister to require the remaking of the demography of every economic sector in South Africa.

44. The SIC divides all economic activity in South Africa into the following sectors:

44.1. agriculture, forestry and fishing;

44.2. mining and quarrying;

44.3. manufacturing;

44.4. construction;

44.5. financial and insurance activities;

44.6. transportation and storage;

---

[46] Employment Equity Act (as amended), s 15A(1).

[47] *Id* s 15A(2).

[48] *Id* s 15A(3).

[49] Stats SA Standard *Classification of all Economic Activities in South Africa* (7 ed) p 11 para 1, available at https://www.statssa.gov.za/classifications/codelists/Web_SIC7a/SIC_7_Final_Manual_Errata.pdf.

44.7. information and communication;

44.8. water supply, sewerage, waste management and remediation activities;

44.9. electricity, gas steam and air conditioning supply;

44.10. human health and social work activities;

44.11. arts, entertainment and recreation;

44.12. real estate activities;

44.13. professional, scientific and technical activities;

44.14. wholesale and retail trade, repair of motor vehicles and motorcycles;

44.15. accommodation and food service activities;

44.16. public administration and defence, compulsory social security;

44.17. education; and

44.18. administrative and support activities.[50]

45. The first salient result of the section 15A power being based on the SIC is that section 15A would empower the Minister to directly regulate the demography of the specific sectors listed in the SIC. Many of these sectors are coterminous with, fall within, or overlap with, many of the functional areas in Schedule 4 to the Constitution, as is illustrated by the following table:

[50] Id p 26. The SIC also identifies *"Other service activities"*, *"Activities of households as employers; undifferentiated goods- and services-producing activities of households for own use"* and *"Activities of extraterritorial organisations and bodies, not economically active people, unemployed people etc."*.

Schedule 4 competence	SIC sector / sector covered by s 15A
Administration of indigenous forests	Agriculture, forestry and fishing
Agriculture	Agriculture, forestry and fishing
Cultural matters	Arts, entertainment and recreation
Education at all levels, excluding tertiary education	Education
Health services Municipal health services	Human health and social work activities
Housing	Real estate activities
Media services directly controlled or provided by provincial government	Arts, entertainment and recreation
Public transport Municipal public transport	Transportation and storage
Electricity and gas reticulation	Electricity, gas steam and air conditioning supply
Water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems	Water supply, sewerage, waste management and remediation activities

46. Because section 15A would empower the Minister to directly regulate the demography of sectors that are coterminous with, fall within, or overlap with many of the functional areas listed in Schedule 4, section 15A in substantial measure falls within these functional areas, and so the Amendment Bill should have been processed as a section 76 bill.

47. This is no academic issue. Both sets of draft targets published for comment under section 15A would set targets based on precisely the sectors in the SIC, which are listed in paragraph 44 (inclusive) above. Both sets of draft targets would thus directly regulate

the demography of designated employers within the Schedule 4 competences listed in the table in paragraph 45 above.

48. The second salient result of section 15A empowering the Minister to regulate the demography of all economic activity in South Africa is that the 15A power in substantial measure falls within the functional area of *"trade"* in Schedule 4. In *Liquor Bill*,[51] the Constitutional Court interpreted this functional area broadly:

> "According to *The New Shorter Oxford Dictionary*, *'trade'* in its ordinary signification means the *'(b)uying and selling or exchange of commodities for profit, spec between nations; commerce, trading, orig. conducted by passage or travel between trading parties'*. Nothing in Schedule 4 suggests that the term should be restricted in any way and the Western Cape government [in *Liquor Bill*] did not contend that Parliament's concurrent competence in regard to *'trade'* should be limited to cross-border or inter-provincial trade."[52]

49. Section 15A, by permitting the Minister to remake the demography of all designated employers involved in all economic activity in South Africa (which, at its most basic, involves the buying and selling of goods and services), in substantial measure falls within the Schedule 4 competency of *"trade"*.

The Amendment Bill provides for legislation envisaged in section 195(3) of the Constitution

50. As explained, a bill must be dealt with under section 76 if it *"provides for legislation envisaged in … section 195(3) [of the Constitution]"*.[53] Section 195(3) provides that *"[n]ational legislation must ensure the promotion of the values and principles listed in*

---

[51] *Ex parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* [1999] ZACC 15; 2000 (1) SA 732 (CC).

[52] *Id* para 54 (footnotes omitted).

[53] Constitution, s 76(3)*(d)*.

[section 195(1)]". And one of these principles, listed in section 195(1)*(i)*, is the following:

> *"(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:*
>
> ...
>
> *(i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation."*

51. Section 15A(2) would empower the Minister to regulate the demography of designated employers *"for the purpose of ensuring the equitable representation of suitably qualified people from designated groups at all occupational levels in the workforce"*. Designated employers are defined to include all municipalities and all organs of state except the army and intelligence and security services.[54]

52. It follows that the Amendment Act is legislation aimed at ensuring the principle of representivity in the public service. It is thus legislation envisaged in section 195(3) of the Constitution and so should have been, by virtue of section 76(3)*(d)*, processed in accordance with the section 76 procedure.

Conclusion

53. Because the Amendment Act was processed under section 75 when it should have been processed under section 76, it is invalid in its entirety.

---

[54] Employment Equity Act, s 1 (definition of *"designated employer"*).

54. It is thus not strictly necessary for this Court to reach the applicant's substantive constitutional grounds of challenge. However, in the event that this Court is not with the applicant on the tagging issue, we deal with the applicant's substantive grounds.

V. SECTION 15A VIOLATES SECTION 9 OF THE CONSTITUTION

55. In this section, we explain why the section 15A scheme violates section 9 of the Constitution.

The structure of section 9

56. Section 9 of the Constitution provides as follows:

> *"**9 Equality***
>
> *(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.*
>
> *(2) Equality includes the full and equal enjoyment of all rights and freedoms. 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.*
>
> *(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.*
>
> *(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.*
>
> *(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."*

57. Section 9 is made up of two components:

57.1. First, the prohibition of irrational differentiation and unfair discrimination, in subsections 9(1) and 9(3) to (5).

57.2. Second, section 9(2), which permits *"legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination"*, provided that they are aimed at *"promot[ing] the achievement of equality"*. Section 9(2) permits, in other words, affirmative-action measures.[55]

58. These two components are in tension with one another. In the words of Cameron, Froneman and Majiedt JJ in *Barnard*:

> *"The Constitution commits us to recognising and redressing the realities of the past. And it is committed to establishing a society that is non-racial, non-sexist and socially inclusive. These two commitments can create tension. And there is a tension between the equality entitlement of an individual and the equality of society as a whole."*[56]

59. So, while the Constitution commits us to *"recognising and redressing the realities of the past"*, it also places limits on what affirmative-action measures can do. Affirmative-action measures that fall within these limits are constitutional. Ones that exceed them are unconstitutional.

---

[55] *Minister of Finance v Van Heerden* [2004] ZACC 3; 2004 (6) SA 121 (CC) para 28.

[56] *Barnard* above n 2 para 77.

The prohibition of irrational differentiation and unfair discrimination

60. In *Harksen v Lane*,[57] the Constitutional Court held that the following test applies to whether subsections 9(1) and (3) to (5) have been violated.

61. A law violates section 9(1) if it (a) differentiates between people or categories of people, and (b) if the differentiation is not rationally connected to a legitimate government purpose.[58]

62. If a law violates section 9(1), it is unconstitutional. If it does not, it may still violate the prohibition on unfair discrimination in subsections 9(3) to (5).[59]

63. As is relevant to present purposes, the enquiry on unfair discrimination runs as follows:

    63.1. Differentiation on a ground listed in section 9(3) (including race, gender, sex, and disability) is discrimination.[60] It is also presumed to be unfair discrimination.[61]

    63.2. Whether discrimination is unfair depends on the impact of the discrimination on the complainants, considering the following factors:

        63.2.1. whether the complainants are presently disadvantaged or whether they suffered from patterns of disadvantage in the past;

---

[57] *Harksen v Lane NO* [1997] ZACC 12; 1998 (1) SA 300 (CC).

[58] *Id* para 43.

[59] *Id*.

[60] *Id* para 47.

[61] Constitution, s 9(5).

63.2.2. the extent to which the impugned law serves a legitimate purpose; and

63.2.3. the extent to which the discrimination has affected the rights or interests of the complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.[62]

Section 9(2) and affirmative-action measures

64. In the absence of a provision like section 9(2) of the Constitution, affirmative action would presumptively be unfair discrimination, given that it would be discrimination on a listed ground (in the South African context, race, gender, sex or disability).

65. Hence section 9(2), which operates as an exception to the prohibition on unfair discrimination.[63] The effect of the subsection is that if an affirmative-action measure complies with its requirements (more on these below), it is *"neither unfair nor presumed to be unfair"* and is lawful.[64]

66. If, however, an affirmative-action measure does not comply with the requirements of section 9(2), then the section 9(2) exception does not apply and the measure constitutes discrimination that is presumptively unfair and unlawful.[65]

67. Section 9(2) does not protect all affirmative-action measures. Affirmative-action measures must take place *"within the discipline of our Constitution"*.[66] In *Van Heerden*,

---

[62] *Harksen v Lane* above n 57 para 52.

[63] *Barnard* above n 2 para 93.

[64] *Id* para 37; Van *Heerden* above n 55 para 33 and 36.

[65] *Van Heerden* above n 55 para 36.

[66] *Id* para 30.

the Constitutional Court held that a measure only enjoys the protection of section 9(2) if it complies with three requirements:

67.1. first, it must be designed to protect and advance a disadvantaged class;[67] and

67.2. second, it must be *"reasonably likely to achieve the end of advancing or benefiting the interests of those who have been disadvantaged by unfair discrimination"*;[68] and

67.3. third, the measure must, in the long run, promote the achievement of equality, which requires *"an appreciation of the effect of the measure in the context of our broader society"*.[69]

68. In application, this test entails a proportionality analysis. The expected benefits to those favoured by the scheme (who must be previously and/or presently disadvantaged) must be balanced against the severity of the harm to those who are disfavoured, bearing in mind that the ultimate goal is an equal, non-racial society. The case-law has crystallised the following elements as being relevant:

68.1. First, an affirmative-action measure that is blunt and/or rigid, or put differently, one that is not sensitive to context, is likely to fail the *Van Heerden* test. This is because (a) whether affirmative action passes the *Van Heerden* test will always depend on context, and (b) a rigid, blunt affirmative-action measure is likely to treat people as means to ends and so to violate their dignity.[70]

---

[67] *Van Heerden* above n 55 paras 38 to 40.

[68] *Id* paras 41 to 43.

[69] *Id* para 44.

[70] *Van Heerden* above n 55 para 27; *Barnard* above n 2 para 42; *Minister of Justice and Constitutional Development v South African Restructuring and Insolvency Practitioners Association* [2016] ZASCA 196; 2017

68.2. Second, if an affirmative-action scheme has a severely negative impact on members of the disfavoured group, it is likely to fail the *Van Heerden* test.[71] An affirmative action scheme must not, in other words, *"invade unduly the dignity"* of the disfavoured group.[72]

68.3. An example of a measure that would fail the *Van Heerden* test for having an unduly severe impact on a member of the disfavoured group is one which establishes a rigid barrier to the future or continued employment or promotion of members of the disfavoured group.[73]

68.4. Third, because an affirmative-action scheme cannot unduly invade the dignity of the disfavoured group, a scheme that treats its subjects as mere means to an end and not as individuals is likely to fail the *Van Heerden* test (given that the right to dignity means that *"[h]uman beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end"*).[74]

68.5. Fourth, the *"long-term goal of our society is a non-racial, non-sexist society in which each person will be recognised and treated as a human being of equal worth and dignity"*.[75] Thus, the racial and gender discrimination permitted by section 9(2) measures are necessarily instrumental – they are aimed at

(3) SA 95 (SCA) ("***SARIPA SCA***") para 32; *Solidarity v Department of Correctional Services* [2016] ZACC 18; 2016 (5) SA 594 (CC) ("***Solidarity***") paras 102, 133 and 134 (concurring judgment of Nugent AJ); *Magistrates Commission v Lawrence* [2021] ZASCA 165; 2022 (4) SA 107 (SCA) para 27.

[71] *Van Heerden* above 55 paras 46, 53 and 54.

[72] *Barnard* above n 2 para 30.

[73] *Id* para 42.

[74] *S v Dodo* [2001] ZACC 16; 2001 (3) SA 382 (CC) para 38.

[75] *Van Heerden* above n 55 para 44. This flows inter alia from section 1*(b)* of the Constitution, which specifies that one of the founding values of the Constitution is *"[n]on-racialism and non-sexism"*.

eliminating racial or gender disadvantage so that the constitutional vision of a non-racist, non-sexist society can be achieved, one in which every person is judged as an individual. In assessing affirmative-action measures for constitutional compliance, we must *"foresee a time when we can look beyond race"* (and gender, etc),[76] and we must *"remain vigilant that remedial measures under the Constitution are not an end in themselves"*.[77]

68.6. Fifth, in assessing affirmative-action measures, it must be remembered that *"restitution measures, important as they are, cannot do all the work to advance social equity"*, and that substantive equality is only possible *"through governance that is effective, transparent, accountable and responsive"*.[78] If the point of departure is (incorrectly) that affirmative-action measures are the only means to equality, then one may incorrectly uphold measures that invade the dignity of disfavoured groups to a greater degree than is permitted by the Constitution.

Section 15A violates section 9 because it replaces a nuanced, flexible system with one that is blunt and rigid

69. While almost everything else about section 15A is exceedingly (and unconstitutionally) vague, the one thing that is clear is that it replaces a flexible, nuanced, context-sensitive system with one that is (a) blunt and (b) rigid:

69.1. Currently, the Act requires each designated employer to set its own demographic targets sensitive to all relevant factors, including (a) its degree of

[76] *Barnard* above n 2 para 81.

[77] *Id* para 30.

[78] *Id* para 33.

underrepresentation and (b) its ability to remedy it given the availability of suitably qualified people in the labour market, its capacity to train people, and so on.

69.2. This is appropriate, given that every designated employer is different – operating in different industries and locations, of different sizes, and facing different labour markets.[79]

69.3. Section 15A would replace this system with one that is both (a) blunt and (b) rigid. Blunt, because all designated employers would have to follow the applicable sectoral target, regardless of the differences between them. And rigid, because compliance with the mandated target would be compulsory.

70. This is unconstitutional. Our courts have repeatedly held that an affirmative-action measure that is rigid, and which fails to take into account all relevant circumstances (i.e., one that is blunt), is not protected by section 9(2) and violates section 9 more broadly:

70.1. In *SARIPA SCA*, the Supreme Court of Appeal set aside the affirmative-action measure at issue because it constituted *"the implementation of a quota system, or one so rigid as to be substantially indistinguishable from a quota"*.[80]

70.2. In *Solidarity*, Nugent AJ, in a concurring judgment, supported the setting aside of the affirmative-action measure at issue because it was inflexible,[81] because it

[79] Founding affidavit pp 02-22 to 02-23 paras 53 to 54.

[80] *SARIPA SCA* above n 70 paras 32 to 35. On further appeal to the Constitutional Court (*Minister of Constitutional Development v South African Restructuring and Insolvency Practitioners Association* [2018] ZACC 20; 2018 (5) SA 349 (CC)), the majority dismissed the appeal and did not make a finding on the quota issue.

[81] *Solidarity* above n 70 paras 108 to 118.

was not *"textured"* and because it did not *"incorporate mechanisms enabling thoughtful balance to be brought to a range of interests"*.[82]

70.3. In *Lawrence*, the Supreme Court of Appeal set aside a decision not to appoint an eminently qualified white male candidate for magistrate because it was based on a process that was *"rigid, inflexible and quota driven"*, which the court held *"does not meet the threshold set by our courts and cannot be countenanced"*.[83] In a concurring judgment, Ponnan JA held that *"restitutionary measures ... should be approached in a nuanced, flexible and balanced manner"*.[84]

71. It the DA's case that the section 15A scheme is sufficiently blunt and rigid so as to constitute a quota,[85] given that, in *Solidarity*, the Constitutional Court held that *"one of the distinctions between a quota and a numerical target is that a quota is rigid whereas a numerical target is flexible"*.[86] Quotas are unconstitutional.[87] But the DA's case does not necessarily rest on this Court finding that the section 15A scheme rises to the level of a quota. Section 9 eschews not only quotas, but all affirmative action measures that are blunt and rigid, and which fail to take into account relevant circumstances. Even if the section 15A scheme does not rise to the level of a quota, it remains one that is rigid and blunt and so is one that violates section 9.

72. Because section 15A is a restitutionary scheme that does not enjoy the protection of section 9(2), it is one that is presumptively unfair and unlawful under section 9(3). The

---

[82] *Id* para 133.

[83] *Lawrence* above n 70 para 34.

[84] *Id* para 105.

[85] Founding affidavit p 02-21 para 48 to 02-22 para 50.

[86] *Solidarity* above n 70 para 51.

[87] See *SARIPA SCA* above n 70 para 32.

onus rests on the state to rebut this presumption, and it has not attempted to do so in its answering papers. Thus, the section 15A scheme is unconstitutional.

The Minister's counter-arguments are bad

73. The Minister raises various counter-arguments to this ground of challenge. All are bad.

74. First, the Minister argues that section 15A is not rigid because —

74.1. section 42(4) 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

74.2. section 53(6)*(b)* as amended would provide that that the Minister may still issue a section 53(2) certificate even if a designated employer has not *"complied with"* the applicable sectoral 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)"*.[88]

75. This argument is invalid for the following reasons:

75.1. One, the *"reasonable ground"* exception is vague. The Act provides no specificity as to what a *"reasonable ground"* could be. The Minister's 46-page answering affidavit similarly fails to provide any indication as to what the exception could mean. The Minister contents herself simply to state that *"[t]he*

[88] See Minister answering affidavit p 03-33 para 60; p 03-37 para 74; p 03-44 para 113.

facts of each case will be determinative of whether the failure to comply is justifiable or not".[89] This silence speaks volumes.

75.2. This vagueness means that the *"reasonable ground"* exception is no exception at all:

75.2.1. First, designated employers would have no idea whether any departure from the applicable sectoral target would satisfy the Minister. Given the severe potential sanctions for non-compliance (including being prohibited from doing business with the state and having existing state contracts cancelled), employers are likely to play it safe and follow the applicable sectoral target.

75.2.2. Second, it is entirely open to the Minister to make it very difficult for a designated employer to depart from the applicable sectoral target. This appears to be her intention. In answer, the Minister states, under oath, that the sectoral targets exist *"to make sure that transformation does happen"*.[90] This would only be possible if they are strictly applied.

75.3. Two, the *"reasonable ground"* exception is only available to the designated employer. It is the employer that raises a *"reasonable ground"* under section 42(4), and it is the employer that would do so when seeking a section 53(2) certificate. The exception cannot be invoked by an employee

[89] Minister answering affidavit p 03-44 para 113.

[90] Minister answering affidavit p 03-43 para 110. She characterises those who do not comply as "*anti-transformation"*. See paragraph 30 above.

prejudiced by the applicable sectoral target. It follows that if an employer chooses to comply entirely with the applicable target, and so stops hiring – for example – Coloured men entirely, a Coloured man looking for work as a result has no recourse.

75.4. Three, save if court proceedings ensue, the assessment of whether a ground for non-compliance raised by an employer is *"reasonable"* rests entirely in the hands of the Minister or the DG. Practically, they would be unable to exercise this discretion properly:

75.4.1. In 2022, there were 27 533 designated employers. This number will increase every year.[91]

75.4.2. It is likely that many designated employers would struggle to comply with the applicable sectoral targets and thus would have to justify their failure to comply in order to obtain a section 53(2) certificate.[92] In order to do so, a designated employer would 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

[91] Founding affidavit p 02-27 para 71.1. Not denied at Minister answering affidavit pp 03-47 to 03-48 paras 127 to 132.

[92] Founding affidavit p 02-27 para 71.2. Not denied at Minister answering affidavit pp 03-47 to 03-48 paras 127 to 132.

many of them will fail to meet their targets, the Minister's office will be inundated with detailed exemption applications.[93]

75.4.3. The Minister would require a large, permanent staff 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 clearly insufficient.[94]

75.5. Four, the *"reasonable ground"* exception is only capable of addressing (in a vague, limited sense) the rigidity of the section 15A scheme. It does not address the fact that it is blunt – i.e., that it involves the imposition of a one-size-fits-all sectoral target on thousands of businesses that are in very different circumstances. It still replaces a system that is nuanced and flexible (each employer sets its own targets, appropriate to its unique circumstances), with one which is blunt and rigid (every employer must follow the applicable sectoral target, regardless of its situation). The section 15A scheme still fails the requirement that *"restitutionary measures ... be approached in a nuanced, flexible and balanced manner"*.[95]

76. The Minister's second counter-argument is that *"the pace of transformation in the labour market has been frustratingly slow"*,[96] that *"self-regulation by the employers ... has*

[93] Founding affidavit pp 02-27 to 02-28 para 71.3. Not denied at Minister answering affidavit pp 03-47 to 03-48 paras 127 to 132.

[94] Founding affidavit p 02-28 para 71.4. Not denied at Minister answering affidavit pp 03-47 to 03-48 paras 127 to 132.

[95] *Lawrence* above n 70 para 105.

[96] Minister answering affidavit p 03-38 para 84.

simply not worked",[97] and so that it is necessary for the Ministry to impose blunt targets on employers from above. This argument too is bad:

76.1. One, the claim that self-regulation by employers *"has simply not worked"* is a factual claim that the Minister must prove with evidence, rather than with bald claims. She has failed to do so.

76.2. Indeed, the specific evidence that she has put up indicates the opposite – that of progress. The Minister annexes to her affidavit the 2021 Annual Report of the Commission for Employment Equity ("**the Commission**" and "**the 2021 Report**").[98] In the 2021 Report, the Commission concludes that, while challenges remain and there is much work still to do, between 2018 and 2020 —

76.2.1. White representation at the *"Top Management Level"* has been *"slowly declining"*;

76.2.2. there *"is an increasing trend of African and Indian population groups at Senior Management Level"*;

76.2.3. there has been a *"positive move towards equitable representation across all population groups and gender in relation to the EAP distribution at the Skilled Technical level"*;[99] and

76.2.4. the representation of people with disabilities across the entire workforce has increased by 30%, from 1% to 1.3%. The

[97] Minister answering affidavit p 03-39 para 86.

[98] Answering affidavit annexure TM3 pp 03-53 to 03-117.

[99] 2021 Report p 03-116.

Commission calls this *"insignificant"* but, with respect, a 30% increase over two years is not insignificant.[100]

76.3. This progress, made during the *status quo* (i.e., of each designated employer setting its own target) refutes the Minister's bald claim that *"self-regulation by the employers … has simply not worked"*.

76.4. Two, to the extent that the pace of change is too slow, the Minister puts up no evidence whatsoever that that this is attributable to the policy of designated employers setting their own targets. It is entirely possible that the slow pace of change is due to the government's failures in education,[101] or to government failing to enforce the existing Employment Equity Act properly, as the Department of Planning, Monitoring and Evaluation appears to accept in its impact assessment for the Amendment Bill.[102] The Act as it is grants the state extensive powers to (a) require designated employers to set appropriately stringent targets and (b) require them to implement those targets. It should use those powers, rather than jettison the appropriately nuanced, context-sensitive and constitutionally-compliant existing system.

77. Third, the fact that there is some distance left to go on representivity cannot justify an unconstitutional affirmative-action initiative. As the Constitutional Court held in Barnard: *"restitution measures, important as they are, cannot do all the work to advance social equity"*.[103]

---

[100] 2021 report o 03-117.

[101] See replying affidavit p 05-9 para 32.

[102] See Minister answering affidavit TM5 p 03-162, where reference is made to *"[l]ow levels of compliance"* and *"[a]bsence of real financial consequences for non-compliant organisations"*.

[103] *Barnard* above n 2para 33.

VI. SECTION 15A VIOLATES THE *DAWOOD* PRINCIPLE

The Dawood principle and the breadth of the section 15A power

78. In *Dawood*, 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.[104]

79. The section 15A power is just such a power. It is broad, unguided, and has great capacity to violate rights.

80. We begin with the breadth of the power given to the Minister, and the lack of guidance:

    80.1. The section 15A process would begin by the Minister identifying, in the *Gazette*, *"national economic sectors for the purposes of this Act"* (section 15A(1)). The subsection does not define *"national economic sectors"*. The only limit to this power is the obligation on the Minister to *"[have] regard to any relevant code contained in the Standard Industrial Classification of all Economic Activities published by Statistics South Africa"*.

    80.2. Once the Minister has identified the relevant national economic sectors, section 15A(2) grants her the power to *"set numerical targets"* for any such sector.

    80.3. The only guidance that section 15A gives as to the nature of these targets is in section 15A(2): that they must serve *"the purpose of ensuring the equitable*

[104] *Dawood v Minister of Home Affairs* [2000] ZACC 8; 2000 (3) SA 936 (CC) paras 45 to 58. See also *Janse van Rensburg NO v Minister of Trade and Industry NO* [2000] ZACC 18; 2001 (1) SA 29 (CC).

representation of suitably qualified people from designated groups at all occupational levels in the workforce". Nothing else.

80.4. Section 15A(3) then broadens the Minister's discretion, providing that she *"may set different numerical targets for different occupational levels, subsectors or regions within a sector or on the basis of any other relevant factor"*.

81. As a practical matter, the section 15A power is unrestrained in the following respects:

81.1. First, in respect of the demographic groups to which sectoral targets can apply. The Minister may set targets that apply to people from designated groups as a single category (for example, that 80% of every designated employer's workforce be African, Indian, Coloured, women, or disabled people). Or she may divide the designated groups into separate categories (20% African men, 20% African women, 10% Coloured men, and so on). She may leave some designated groups out entirely (she may, for example, choose not to set targets for disabled people).

81.2. Second, in respect of the nature of the targets. The Minister may set minimum targets (at least 70% African). Or she may set employment ceilings for specified race-and-gender combinations (no more than 10% white senior management). Or she may set ranges (between 70% and 80% African). Or she may set precise targets (exactly 73% African).

81.3. Third, in respect of the regions to which the targets apply. She may set only national targets that must be complied with by all designated employers. Or she may set only regional targets. Or she may set regional and national targets, with rules as to which a given employer must comply with.

81.4. Fourth, section 15A does not specify the basis for the targets. They could, for example, be derived from national demographic ratios of the total population, or from the national demographic ratios of the economically active population, or from the regional demographic ratios.

81.5. Fifth, section 15A does not specify how onerous the targets are permitted to be. The targets may, for example, require designated employers to re-engineer their workforces within a relatively short period of time.

Section 15A can be exercised in a manner that violates rights

82. Because of the breadth and unguided nature of the section 15A power, it can easily be exercised in a manner that violates the Bill of Rights – specifically, section 9 of the Constitution and the right to freedom of trade, occupation and profession in section 22.

83. First, the Minister can set sectoral targets at a level that is so high that it becomes impossible for members of disfavoured groups to obtain a job or a promotion. This would be unconstitutional, because (a) it would unduly invade the dignity of the members of those groups, and so be disproportionate and in violation of section 9,[105] and (b) because it would violate their freedom of trade, occupation and profession.[106]

---

[105] See *Barnard* above n 2para 42.

[106] Given that the core purpose of section 22, given our past, was to prevent the reservation of jobs for particular race groups. See *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2006 (3) SA 247 (CC) para 58:

> "In broad terms [section 22] has to be understood as both repudiating past exclusionary practices and affirming the entitlements appropriate for our new open and democratic society. Thus, in the light of our history of job reservation, restrictions on employment imposed by the pass laws and the exclusion of women from many occupations, to mention just a few of the arbitrary laws and practices used to maintain privilege, it is understandable why this aspect of economic activity was singled out for constitutional protection."

See also Iain Currie and Johan de Wall *The Bill of Rights Handbook* 6 ed (2013) 466.

84. What is particularly dangerous about the section 15A power is that it permits the setting of wall-to-wall targets – i.e., targets that bind every designated employer in a particular sector, and then every sector in the South African economy. This could leave members of disfavoured groups with nowhere to go. Under the current system, if one designated employer has set its target at an unjustifiably exclusionary level, or if it is applying such a target rigidly, a member of a disfavoured group can go to other employers. If the new system is permitted to come into effect, there could be no other employers to go to.

85. It is notable that one of the bases on which Madlanga J (dissenting) in *SARIPA* in the Constitutional Court would have upheld the policy impugned in that case was that the policy governed only provisional sequestrations, and so members of the disfavoured group could still obtain work in conducting final sequestrations.[107] Section 15A permits wall-to-wall targets which would not have this saving attribute.

86. Second, section 15A can permit the sectoral targets to be derived from inappropriate demographic bases:

86.1. The Minister can set targets with respect to national demographics, and require these to be enforced in a regional or provincial setting where the demographics are entirely different. This is what was fatal to the policy considered in *Solidarity*.[108]

86.2. The Minister can derive targets from the demographics of the total population, rather than the demographics of the economically active population, or the demographics of the economically active population in a particular sector or

[107] *SARIPA* CC above n 80 para 80.

[108] *Solidarity* above n 70 paras 65 to 82 and 133.

profession. In *Solidarity*, Nugent AJ (concurring) criticised the policy at issue in that case for being derived from the demographics of the total population rather than the economically active population.[109]

87. Third, the Minister can set targets that leave out some disadvantaged groups entirely. The Minister can set targets for only African people, or can set targets that leave out disabled people. The restitutionary policy at issue in *SARIPA CC* was set aside on precisely this basis – for leaving out all insolvency practitioners of colour that were born after 1994.[110]

88. We emphasise that whether the sectoral targets violate sections 9 and 22 as set out above depends on how they are set; but that regardless of how they are set, the section 15A power in any event violates section 9 because it necessarily involves a restitutionary system that is blunt and rigid, as explained in paragraphs 69 to 72 above.

VII. THE TWO SETS OF DRAFT TARGETS ILLUSTRATE HOW SECTION 15A IS UNCONSTITUTIONAL

89. The Minister has published two sets of draft targets in terms of section 15A for comment (despite the fact that it is not yet in effect).[111] Both illustrate (a) how section 15A necessarily violates section 9 as set out in Section V above and (b) how it can be applied in a manner that violates constitutional rights, as set out in Section VI.

[109] *Id* para 104.

[110] *SARIPA CC* above n 80 paras 41 to 44.

[111] This is permitted by section 14 of the Interpretation Act 33 of 1957.

The first draft targets

90. The first set of draft *"numerical targets"* were published for public comment on 12 May 2023 ("**the first draft targets**"), and are annexed to the founding affidavit.[112]

91. The first draft targets, it will be remembered, would apply to each economic sector listed in the SIC (which are listed in paragraph 44 above).[113]

92. Compliance with the first draft targets would be required over five years.[114]

93. The first draft targets would set both national and provincial sectoral targets. If a designated employer conducts its business nationally, it would have to comply with the national targets for the applicable sector; and if a designated employer conducts its business provincially, it would have to comply with the provincial target for the applicable sector.[115]

94. The first draft targets are in addition divided across —

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

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

    94.3. men and women.[116]

[112] Founding affidavit pp 02-31 to 02-69 annexure DA1.

[113] First draft targets p 02-32.

[114] First draft targets p 02-33.

[115] First draft targets p 02-33.

[116] First draft targets pp 02-34 to 02-69.

95. The first draft targets left out disabled people, despite the fact that they are included in the definition of *"designated groups"* in the Act.

96. 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, leading to a long and exceedingly granular set of targets.

97. 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 would have to 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.[117]

98. 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%.[118]

99. It follows that as one moves down the employment tiers, the prescribed percentages move away from mere minimums towards targets that would have to be hit fairly precisely. By way of illustration, in the *"water supply, sewerage, waste management and remediation*

[117] The Minister was requested to confirm this understanding in answer (founding affidavit p 02-19 para 43.6). This request was ignored in the Minister's answering affidavit.

[118] First draft targets pp 02-34 to 02-35.

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 the 8% minimum for white people). This means that in this sector, in this region and at this tier, a designated employer's workforce would have to be almost exactly 79.3% African, 9.2% Coloured, 2.7% Indian and 8.0% White.[119]

100. 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%.[120] Thus, the maximum percentage of Coloured and Indian people that could be employed under the first draft targets in this sector, region and tier is 6.9%.

101. The applicant filed, in its founding papers, an economic analysis of the first draft targets ("**the Solidarity Report**"). Its conclusion is that the first draft targets could not be implemented unless (a) the South African economy grows at an impossible rate for the next five years or (b) designated employers, over a mere five years, 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.[121] The Minister did not contest this analysis.[122]

---

[119] First draft targets pp 02-48 to 02-49.

[120] First draft targets p 02-65.

[121] The report is at pp 02-87 to 02-163. The confirmatory affidavit from the author of the report is at pp 02-84 to 02-86.

[122] The economic analysis is referred to at founding affidavit pp 02-20 to 02-21 paras 45 to 46. The Minister did not respond to this analysis (see Minister answering affidavit pp 03-41 to 03-45 paras 97 to 118). At Minister answering affidavit p 03-46, it was stated that *"[s]hould the Applicant still persist with the factual scenarios of the sought [sic], the first and second respondents will file an expert report with the leave of the court"*. Before

102. The first draft targets are a vivid illustration of how section 15A targets can be set in a manner that is wholly unconstitutional (and so how section 15A violates the *Dawood* principle):

102.1. First, in some sectors and in some management levels, targets for African workers are set so high that it could become impossible for workers of other races (including Indian and Coloured workers) to find work.

102.2. For example: In the *"skilled"* category in the *"financial and insurance categories"* sector, the provincial target that would be applicable 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.[123] 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.

102.3. It follows that, were the first draft targets to become law, it would become exceedingly difficult for a skilled Indian woman in the finance industry to find a job in Gauteng (where many of the jobs in the finance industry are). She would have to find a designated employer that had not hit its (very low) Indian-women ceiling that needed her particular set of skills within reasonable proximity of where she lives. If she could not do so she would have to move somewhere else to find a job.

---

filing its replying affidavit, the applicant wrote to the Minister, inviting the filing of such an expert report. The Minister chose not to do so (replying affidavit pp 05-4 to 05-6 paras 12 to 17).

[123] First draft targets p 02-43.

102.4. 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 would be higher than it is in Gauteng[124] (in every other province, and nationally, it is lower). We do not have to belabour the point that it would be an exceedingly odious echo of our history for government policy to effectively require Indian people to move to KwaZulu-Natal to find work.

102.5. It is notable that the policy at issue in *SARIPA CC* was set aside on precisely this basis – that it discriminated against members of historically disadvantaged groups.[125] The first draft targets would do the same.

102.6. Second, the first draft targets would require designated employers operating nationally to comply with the national target for the relevant sector. This is plainly unconstitutional, given that the provinces have different demographic profiles, and the application of national demographics to each province would make it difficult for certain historically disadvantaged race groups in certain provinces to find work (particularly, Indian people in KwaZulu-Natal and Coloured people in the Western Cape and Northern Cape, given that they are concentrated in those provinces).

102.7. It is again notable that this is precisely why the policy at issue in *Solidarity* was set aside – it required the application of national demographic targets to the Department of Correctional Services in all provinces. This is how Nugent AJ put the point in his concurring judgment:

---

[124] First draft targets p 02-43.

[125] *SARIPA CC* above n 80 paras 41 to 44.

> *"If racial proportions are to be the measure of a representative workforce then they must necessarily reflect the distribution of the people making up those proportions. To do otherwise produces irrational anomalies, as is evident in this case.*
>
> *The great majority of Coloured people live in the Western and Northern Cape. The 2011 census revealed that Coloured people comprised 48,8% of the population of the Western Cape, and 40,3% of the population of the Northern Cape. In all other provinces except the Eastern Cape, where they comprised 8,3% of the population, their presence was negligible. In Limpopo they made up a mere 0,3%, while 96,7% of the population of that province were what the census calls 'Black Africans'.*
>
> *…*
>
> *I see no rationality in restricting almost half the population of the Western Cape to 8,8% of employment opportunities in that province, and simultaneously extending 8,8% of employment opportunities in Limpopo to 0,3% of the population."*[126]

102.8. Third, the first draft targets leave out people with disabilities entirely. This, again, was the basis on which the policy in *SARIPA* was set aside – that it failed in important respects to favour members of disfavoured groups.[127]

102.9. Fourth, as explained in the Solidarity Report (which, we repeat, is uncontested), the first draft targets would require designated employers almost completely to overhaul the demographic profile of their workforce over the relevant four employment tiers over five years, which would be enormously disruptive to the workers concerned and their employers.

---

[126] *Solidarity* above n 70 paras 126 to 129 (paragraph numbers and footnotes removed).

[127] *SARIPA CC* above n 80 paras 41 to 44.

102.10. Fifth, the first draft targets are guilty of the *"fundamental malaise"* warned of by Nugent AJ in *Solidarity*: that of treating people *"as ciphers reflected in an arid ratio having no normative content"*.[128] We can do no better than refer to a page, picked at random, from the first draft targets (which is typical of the first draft targets):[129]

17. EDUCATION

A. TOP MANAGEMENT

NATIONAL & PROVINCE	GENDER	POPULATION GROUP				
		A	C	I	W	BLACK
National	Male	28,7%	3,3%	1,0%	4,5%	33,0%
	Female	21,7%	2,5%	0,7%	3,5%	25,0%
	Total	50,4%	5,9%	1,7%	8,0%	58,0%
SECTOR TARGETS FOR PROVINCES						
Eastern Cape	Male	28,5%	4,2%	0,3%	2,8%	33,0%
	Female	21,6%	3,2%	0,2%	2,2%	25,0%
	Total	50,1%	7,3%	0,5%	5,0%	58,0%
Free State	Male	31,4%	1,0%	0,6%	3,7%	33,0%
	Female	23,8%	0,7%	0,5%	3,6%	25,0%
	Total	55,2%	1,7%	1,1%	7,3%	58,0%
Gauteng	Male	30,8%	0,9%	1,3%	6,4%	33,0%
	Female	23,3%	0,7%	1,0%	4,6%	25,0%
	Total	54,1%	1,6%	2,3%	11,0%	58,0%
KwaZulu-Natal	Male	30,1%	0,4%	2,5%	2,2%	33,0%
	Female	22,8%	0,3%	1,9%	1,9%	25,0%
	Total	52,9%	0,7%	4,4%	4,1%	58,0%
Limpopo	Male	32,8%	0,0%	0,1%	1,2%	33,0%
	Female	24,9%	0,0%	0,1%	1,2%	25,0%
	Total	57,7%	0,1%	0,2%	2,4%	58,0%
Mpumalanga	Male	32,8%	0,1%	0,1%	4,0%	33,0%
	Female	24,8%	0,1%	0,1%	3,2%	25,0%
	Total	57,6%	0,2%	0,2%	7,2%	58,0%
North West	Male	32,3%	0,4%	0,3%	2,8%	33,0%
	Female	24,5%	0,3%	0,2%	1,6%	25,0%
	Total	56,7%	0,7%	0,5%	4,4%	58,0%
Northern Cape	Male	20,9%	12,0%	0,1%	6,4%	33,0%
	Female	15,8%	9,1%	0,1%	4,5%	25,0%
	Total	36,7%	21,0%	0,3%	10,9%	58,0%
Western Cape	Male	15,0%	17,7%	0,3%	7,2%	33,0%
	Female	11,4%	13,4%	0,2%	6,1%	25,0%
	Total	26,4%	31,0%	0,5%	13,3%	58,0%
Workforce Profile 2022 (All employers)	Male	12,2%	3,3%	5,1%	29,1%	20,6%
	Female	8,9%	4,0%	4,1%	30,2%	17,0%
	Total	21,1%	7,3%	9,2%	59,3%	37,6%

B. SENIOR MANAGEMENT

NATIONAL & PROVINCE	GENDER	POPULATION GROUP				
		A	C	I	W	BLACK
National	Male	27,4%	3,2%	0,9%	4,5%	31,5%
	Female	25,7%	3,0%	0,9%	3,5%	29,5%
	Total	53,0%	6,2%	1,8%	8,0%	61,0%
SECTOR TARGETS FOR PROVINCES						
Eastern Cape	Male	27,2%	4,0%	0,3%	2,8%	31,5%
	Female	25,5%	3,7%	0,3%	2,2%	29,5%
	Total	52,7%	7,7%	0,6%	5,0%	61,0%
Free State	Male	30,0%	0,9%	0,6%	3,7%	31,5%
	Female	28,1%	0,9%	0,5%	3,6%	29,5%
	Total	58,1%	1,8%	1,1%	7,3%	61,0%
Gauteng	Male	29,4%	0,8%	1,3%	6,4%	31,5%
	Female	27,5%	0,8%	1,2%	4,6%	29,5%
	Total	56,9%	1,6%	2,5%	11,0%	61,0%
KwaZulu-Natal	Male	28,7%	0,4%	2,4%	2,2%	31,5%
	Female	26,9%	0,3%	2,2%	1,9%	29,5%
	Total	55,7%	0,7%	4,6%	4,1%	61,0%
Limpopo	Male	31,3%	0,0%	0,1%	1,2%	31,5%
	Female	29,3%	0,0%	0,1%	1,2%	29,5%
	Total	60,7%	0,1%	0,3%	2,4%	61,0%
Mpumalanga	Male	31,3%	0,1%	0,1%	4,0%	31,5%
	Female	29,3%	0,1%	0,1%	3,2%	29,5%
	Total	60,6%	0,2%	0,2%	7,2%	61,0%
North West	Male	30,8%	0,4%	0,3%	2,8%	31,5%
	Female	28,9%	0,4%	0,3%	1,6%	29,5%
	Total	59,7%	0,8%	0,6%	4,4%	61,0%
Northern Cape	Male	19,9%	11,4%	0,1%	6,4%	31,5%
	Female	18,7%	10,7%	0,1%	4,5%	29,5%
	Total	38,6%	22,1%	0,3%	10,9%	61,0%
Western Cape	Male	14,4%	16,9%	0,3%	7,2%	31,5%
	Female	13,4%	15,8%	0,3%	6,1%	29,5%
	Total	27,8%	32,6%	0,6%	13,3%	61,0%
Workforce Profile 2022 (All employers)	Male	14,0%	3,4%	3,4%	21,2%	20,8%
	Female	11,1%	3,8%	4,5%	32,5%	19,4%
	Total	25,1%	7,2%	7,9%	53,7%	40,2%

[128] *Solidarity* above n 70 para 133.

[129] First draft targets p 02-66.

The second draft targets

103. This application was launched in June 2023. Thereafter, on 1 February 2024, the Minister published a second set of draft targets for public comment ("**the second draft targets**"). A copy has been uploaded to Caselines.[130]

104. Like the first draft targets, the second draft targets —

104.1. would apply to the same economic sectors[131] (listed in paragraph 44 above);

104.2. set minimum targets[132] for representation of persons from designated groups across the same four tiers (*"top management"*, *"senior management"*, *"professionally qualified"* and *"skilled"*) and divided across men and women;[133] and

104.3. would require compliance within five years.[134]

105. But unlike the first draft targets, the second draft targets do not set individual targets for each race group. Rather, they appear to set targets for all designated groups together, excluding disabled people (so, non-disabled African, Indian and Coloured people, and women of all races) split between men and women; and then a separate target for disabled people of all races and both sexes.

---

[130] At pp 10-1 to 10-1. They can also be accessed at https://www.gov.za/sites/default/files/gcis_document/202402/50058rg11662gon4295.pdf.

[131] Second draft targets p 10-2 para 2.

[132] Second draft targets p 10-3 para 3.2.

[133] Second draft targets pp 10-6 to 10-10.

[134] Second draft targets p 10-3 para 3.

106. The second draft targets set different national and provincial targets, derived from the national and provincial economically active populations ("**EAP**").[135] A business would be required to apply either the national target or one provincial target, choosing as follows:

106.1. A business *"conduct[ing] [its] business / operations nationally"* would be obliged to utilise the national target.[136]

106.2. A business *"conduct[ing] [its] business / operations in a particular province"* would be obliged to use the relevant provincial target.[137]

106.3. A non-national business which *"operates in more than one Province, may choose the EAP of the Province with the majority of the employees"*.[138]

107. Like the first draft targets, the second draft targets would be plainly unconstitutional:

107.1. First, because they are (unavoidably, given the nature of section 15A) blunt and rigid.

107.2. Second, because they would require the application of national demographic targets provincially (for designated employers conducting their businesses nationally), or the application of the demographic target of one province to another province (for businesses which operate in more than one province).

[135] Second draft targets p 10-3 para 3.1.1.

[136] Second draft targets p 10-4 para 3.4.8.

[137] Second draft targets p 10-4 para 3.4.8.

[138] Second draft targets p 10-4 para 3.4.8.

108. Both sets of draft targets illustrate the propensity of the section 15A scheme to violate rights. Both are entirely permissible under section 15A. Both are unconstitutional. This illustrates how section 15A is unconstitutional for violating the *Dawood* principle.

VIII. CONCLUSION AND RELIEF

109. Given that the Amendment Act was incorrectly tagged, it is invalid in its entirety and a declaration to that effect would be just and equitable. The result would be that the Employment Equity Act would revert to its pre-amendment position.[139]

110. If this Court is against the applicant on the tagging issue, then the provisions of the Employment Equity Act as amended which implement the section 15A scheme fall to be declared unconstitutional and invalid.[140]

111. Either way, if any sectoral targets have been enacted by the time this application is decided, they would fall to be set aside by virtue of the section 15A power being declared invalid.[141]

112. This is constitutional litigation. Should the applicant be successful, it is entitled to its costs. Should it not be successful, it is insulated from an adverse costs order by the *Biowatch* principle.[142]

---

[139] This relief is not specifically sought in the notice of motion, but incorrect tagging is clearly pleaded in the founding affidavit and so this relief can be granted under prayer 4 of the notice of motion (*"[f]urther and/or alternative relief"*) (notice of motion p 01-4).

[140] Notice of motion p 01-4 prayer 1. The default position is that legislation that is unconstitutional falls to be declared invalid (Constitution, s 172(1)*(a)*; *Van der Merwe v Road Accident Fund* [2006] ZACC 4; 2006 (4) SA 230 (CC) para 71).

[141] Notice of motion p 01-4 prayer 2. Where an initial act is set aside, subsequent acts that depend on the initial act for their validity also fall to be set aside (see *Seale v Van Rooyen NO* [2008] ZASCA 28; 2008 (4) SA 43 (SCA)).

[142] *Biowatch Trust v Registrar Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC).

ISMAIL JAMIE SC
PIET OLIVIER

Applicant's counsel

Chambers, Cape Town
Monday, 4 November 2024

TABLE OF AUTHORITIES

Statutes

1. Basic Conditions of Employment Act 75 of 1997
2. Constitution of the Republic of South Africa, 1996
3. Employment Equity Act 55 of 1998
4. Employment Equity Amendment Act 4 of 2022
5. Interpretation Act 33 of 1957

Case-law

6. *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2006 (3) SA 247 (CC)
7. *Biowatch Trust v Registrar Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC)
8. *Dawood v Minister of Home Affairs* [2000] ZACC 8; 2000 (3) SA 936 (CC)
9. *Doctors for Life International v Speaker of the National Assembly* [2006] ZACC 11; 2006 (6) SA 416 (CC)
10. *Ex parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* [1999] ZACC 15; 2000 (1) SA 732 (CC)
11. *Harksen v Lane NO* [1997] ZACC 12; 1998 (1) SA 300 (CC)
12. *Janse van Rensburg NO v Minister of Trade and Industry NO* [2000] ZACC 18; 2001 (1) SA 29 (CC)
13. *Khosa v Minister of Social Development* [2004] ZACC 11; 2004 (6) SA 505 (CC)
14. *Magistrates Commission v Lawrence* [2021] ZASCA 165; 2022 (4) SA 107 (SCA)
15. *Minister of Constitutional Development v South African Restructuring and Insolvency Practitioners Association* [2018] ZACC 20; 2018 (5) SA 349 (CC)
16. *Minister of Finance v Van Heerden* [2004] ZACC 3; 2004 (6) SA 121 (CC)
17. *Minister of Justice and Constitutional Development v South African Restructuring and Insolvency Practitioners Association* [2016] ZASCA 196; 2017 (3) SA 95 (SCA)

18. *Seale v Van Rooyen NO* [2008] ZASCA 28; 2008 (4) SA 43 (SCA)

19. *Solidarity v Department of Correctional Services* [2016] ZACC 18; 2016 (5) SA 594 (CC)

20. *South African Police Service v Solidarity obo Barnard* [2014] ZACC 23; 2014 (6) SA 123 (CC)

21. *Tongoane v Minister of Agriculture and Land Affairs* [2010] ZACC 10; 2010 (6) SA 214 (CC)

22. *Van der Merwe v Road Accident Fund* [2006] ZACC 4; 2006 (4) SA 230 (CC)

Books and articles

23. Iain Currie and Johan de Wall *The Bill of Rights Handbook* 6 ed (2013)