THE FW DE KLERK FOUNDATION
Upholding South Africa's National Accord

To:	**The Department of Employment and Labour**
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RE:	**Comments on the Draft Employment Equity Regulations 2023**
Date:	12 June 2023 (**Deadline for comments: Monday, 12 June 2023**)

FW DE KLERK FOUNDATION SUBMISSION ON THE DRAFT EMPLOYMENT EQUITY REGULATIONS 2023

Dear Honourable Minister Thembelani Thulas Nxesi

INTRODUCTION

1. The FW de Klerk Foundation was established in 1999 to protect and promote the Constitution of the Republic of South Africa, as the most important legacy of its founder, former President FW de Klerk.

2. To this end, the Foundation seeks to promote the Constitution and the values, rights and principles enshrined in the Constitution; to monitor developments including legislation and policy that may affect the Constitution or those values, rights and principles; to inform people and organisations of their constitutional rights and to assist them in claiming their rights. The Foundation does so in the interest of everyone in South Africa.

3. As such, the FW de Klerk Foundation welcomes the opportunity to submit its comments on the Draft Employment Equity Regulations 2023 to the Department. We are also available to make a verbal submission if required.

SUMMARY

4. The Foundation's submission focuses firstly, on the broader implications of the Draft Employment Equity Regulations (the Regulations) and secondly on the constitutional and legislative background to the proposed Regulations.

5. The Draft Employment Equity Regulations 2023 ("the Regulations") were published under section 15A of the Employment Equity Amendment Act 4 of 2022 ("the EEA Act"). This provision empowers the Minister of Labour (Minister) to establish sectoral numerical targets to ensure "equitable representation of suitably qualified people from "designated groups" (black people, women and people with disabilities) at all occupational levels in the workforce", [1] and to extend such determination to all employers excluding those

[1] Section 15A in clause 4 of the EEA Act.

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who employ less than 50 employees.

THE BROADER IMPLICATIONS OF THE REGULATIONS

A. Demographic Representivity

6. At the outset, the Foundation wishes to stress that it strongly supports the goal of an economy that is broadly representative of the population of South Africa, that will "improve the quality of life of all citizens and free the potential of each person"; and that, in so doing, will advance human dignity, equality and non-racialism. It believes that such a representative economy is emerging naturally and organically and can be achieved without breaching any of the foundational values in section 1 of the Constitution of the Republic of South Africa 1996 (Constitution), particularly if the government implements policies that will ensure high levels of sustained economic growth.

7. However, the Foundation believes that the Regulations, along with the EEA Act and the practice of demographic representivity (DR) constitute one of the most serious threats to our constitutional order since 1994. In particular, they are irreconcilable with the foundational values of non-racialism, equality, human dignity and the rule of law upon which the entire constitutional order depends.

8. The Regulations and the practice of DR have their origin, not in the Constitution, but in the racially motivated National Democratic Revolution (NDR) ideology of the ruling ANC/South African Communist Party/COSATU Alliance and its latest iteration, Radical Economic Transformation (RET).

9. The chief method for the achievement of RET is the imposition of demographic representivity (DR) in all areas of economic activity and in the ownership, management and control of the economy.

10. The government has already imposed DR in the public service and state-owned enterprises (SOEs). The failure of state institutions, government departments, municipalities and SOEs is increasingly ascribed *inter alia* to the appointment of management and employees on the basis of race and cadre deployment rather than on the basis of merit and qualifications. Nevertheless, the government has long had the intention of imposing DR in the private sector as well.
    - 10.1. In 2012, Minister Rob Davies announced that "*We need to make sure that in the country's economy, control, ownership and leadership are reflective of the demographics of the society in the same way the political space does. "*
    - 10.2. Similarly, Radical Economic Transformation (RET) is defined as a "fundamental change in the structure, systems, institutions and patterns of ownership, management and control of the economy in favour of all South Africans, especially the poor, the majority of whom are African and female…".

B. The Van Heerden Judgement

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11. The Constitution makes no provisions for the imposition of DR in the private sector. The only references to DR are in section 174(2) which states that "*The need for the judiciary to reflect broadly the racial and gender composition of the South Africa must be considered when judicial officers are appointed"* and Section 195(1)(i) which states that "*public administration must be broadly representative of the South African people…"*

12. A matter of such central importance to the constitutional settlement as the extension of DR beyond the public sector and the judiciary, would certainly have required a specific provision in the both the 1993 and 1996 constitutions. But there was no such provision. Instead, the government has relied on the judgment of the Constitutional Court *in Minister of Finance v Van Heerden (2004)* relating to section 9(2) of the Constitution which states that *"to promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination, may be taken*."

13. In its judgment the Court ruled that "*If a measure properly falls within the ambit of section 9(2) it does not constitute unfair discrimination*" and need not therefore be subjected to scrutiny in terms of section 9(3), which prohibits unfair discrimination by the state, and section 9(5) which states that discrimination in terms of section 9(2) is unfair "*unless it is established that the discrimination is fair*". The main judgment elicited a response from Sachs J that *"...it is important to ensure that the process of achieving equity is conducted in such a way that the baby of non-racialism is not thrown out with the bathwater of remedial action. While I fully concur with Moseneke J that it would be illogical to permit a presumption of unfairness derived from section 9(3) (read with section 9(5)), to undermine and vitiate affirmative action programmes clearly authorised by section 9(2), by the same token I believe it would be illogical to say that unfair discrimination by the state is permissible provided that it takes place under section 9(2)."*

14. The only limitations placed on discrimination in terms of section 9(2) were three internal tests that the Court identified as to whether the contemplated remedial measure (1) *"targets persons or categories of persons who have been disadvantaged by unfair discrimination; (2) "is designed to protect or advance such persons or categories of persons;" and (3) "promotes the achievement of equality."*

15. Apart from compliance with these tests, the Court also ruled that *"a (remedial) measure should not constitute an abuse of power or impose such substantial and undue harm on those excluded from its benefits that our long-term constitutional goal (of a non-racial, non-sexist society) would be threatened."*

16. In the Foundation's view, the practice of demographic representivity, the EEA Act, and the Regulations fail all three of the tests in *Van Heerden* and also transgress the limitation on remedial action insofar as they would do catastrophic harm to excluded communities and negate the constitutional goals set out in the Preamble to the Constitution and in section 1.

C. Does the Measure Target Persons or Categories of Persons who have been disadvantaged by Unfair Discrimination?

17. 29 years after the advent of our new society there has been a substantial redistribution of wealth and educational qualifications between racial groups in South Africa:

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17.1. By 2017, Black, Coloured and Indian South Africans comprised 79.5% of the Middle Class which, in turn, constituted 22% of the population. They comprised 34.6% of the Elite class that included 4.9% of the population. 960 000 Black, Coloured and Indian South Africans enjoyed a higher socio-economic status than 2,7 million whites (56.5% of the white population).[2][3]

17.2. It can no longer be automatically regarded that Black, Coloured and Indian South Africans in these groups are disadvantaged by unfair discrimination simply because of their race.

18. Since all competition for the employment categories in the Regulations (Top management, Senior Management, Professionally Qualified and Skilled) takes place within the Middle Class and Elite groups it is difficult to see how Black competitors can still claim that, vis-a-vis their white compatriots, they are automatically disadvantaged by unfair discrimination. Apart from the socio-economic progress that has clearly been made and is often reported on, Black South Africans are more politically empowered than any other racial group in the country.

D. Is the Measure Designed to Protect and Advance such Persons (i.e. persons disadvantaged by unfair discrimination)?

19. The answer must be 'no' since, as has been shown above, the great majority of beneficiaries of the kind of remedial action envisaged in the Regulations can no longer be regarded as disadvantaged. The measures contemplated under the EEA Act will do nothing to protect or advance the truly disadvantaged South Africans who comprise almost 74% of the population (and who also include 2.5% of the white population).

20. The measures that the state should have taken to promote the achievement of equality for the great majority of South Africans should have included the allocation to them of disproportionate resources to greatly improve education, housing and social and health services. The state should also have adopted policies to ensure sustained high levels of economic growth with a view to the creation of employment opportunities to address the unsustainable levels of unemployment in South Africa.

E. Does the Measure Promote the Achievement of Equality?

21. Once again, it is clear that the type of DR-based affirmative action envisaged by the EEA Act and the Regulations has done very little to promote the achievement of equality in the broader society. It may have benefited some black South Africans in the top 25% of the economy – but, as has been pointed out above, few beneficiaries can any longer be regarded as having been disadvantaged by unfair discrimination simply due to their race. Indeed, an increasing majority have spent their entire working lives in a new society that quite rightly does not tolerate unfair discrimination against them.

22. It is also difficult to understand how equality is promoted if black South Africans in the top socio-economic

[2] Zizzamia *et al* quoted in Inequality Trends in South Africa, Stats SA, 2019.
[3] Stats SA General Household Survey, 2017.

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strata enjoy an automatic advantage over white South Africans from lower strata. In such circumstances the outcome must inevitably increase inequality.

23. The failure of the government's measures to promote equality is clearly illustrated by the fact that, after 29 years of democratic government, South Africa, with a GINI coefficient of 0.63, is widely regarded as the most unequal country in the world. The inequality divide is no longer between black and white South Africans. It is between the 15,4 million people in the top two strata – comprising 9 million black South Africans; 1,25 million Coloureds; 760 000 Indians and 4.4 million whites – and the 41 million people, 95% of whom are black, in the bottom three strata.

24. This divide is illustrated by the fact that the GINI coefficient for the black population in 2015 was 0.57 - an indication of extreme inequality. The GINI coefficient for the Coloured population was 0.56; for the Indians 0.45 and for white South Africans, 0.41.

25. Demographic representivity-based affirmative may, indeed, have led unwittingly to greater inequality to the degree to which it may have been a major factor in the marked deterioration in the delivery to South African citizens of essential services by the public service, municipalities and SOEs.

F. Does the Remedial Action Measure Impose such Substantial Harm on Excluded Groups that our Long-Term Constitutional Goal Would be Threatened?

26. We must assume that the targets in the Regulations are, in the view of the government, the ideal toward which the private sector should strive. However, in the unlikely event that the targets could be achieved, a great majority of white and Indian South Africans would simply be displaced in all sectors of the economy and in all four categories of employment dealt with by the Regulations. What would become of these South Africans?

27. It would be impermissible to fire or retrench employees who exceed their quotas. However, companies would be under great pressure to show progress in reaching targets – and would inevitably do everything they could to manage down supernumerary personnel – either through voluntary retrenchments; promotion freezes or a ban on the employment of unwanted racial categories.

28. This would send chilling message to excluded minorities – and especially to young members of the excluded communities - that they were no longer wanted in the country of their birth.

29. The policy of demographic representivity, upon which the Regulations are based, would not affect only the employment prospects of South Africa's minorities – *it would pose an existential threat to their future viability.*
    29.1. Almost 40% of South Africans in the over-80 year old age group are white – compared with only 4% of this racial group below the age of five. There are more white South Africans in the 70-74 year old age group than there are in the 0-4 group. At the same time there are more than eight

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times as many black children in the 0-4 group as there are elderly black South Africans in the 70-74 group.

29.2. Indian South Africans currently represent 2.6% of the population but constitute only 1.7% of the population under the age of five. Whites comprise 8% of the EAP but only 4% of the 0-4 year old population. The imposition of demographic representivity means that the "Indian" share of land, property, jobs and wealth would decline by 34% during the coming decades – and that of "White" by 54%. This would be irrespective of their existing rights, their qualifications, their investment in time and resources and their economic and entrepreneurial contribution. The sole criterion would be the size of the racial group to which they belong.

32. The future share of minorities in the South African population will diminish further if laws such as the EEA Act leave them with little option but to emigrate. Their communities' share in jobs, property and land will be ratcheted down further.

33. In terms of the EEA Act and Regulations, South Africans are viewed and treated - not as individuals who are the bearers of constitutional rights – but simply as members of one of South Africa's four racial groups – a category that does not exist in the Constitution. It means, inevitably, that communities that are further along the spectrum of socio-economic development, will have to be brought down to the level of the national average. This cannot be achieved without pervasive racial discrimination – which, in turn, must inevitably impact on the human dignity, right to equality before the law, and an array of rights and freedoms - of the affected individuals.

34. All this would cause irreparable harm not only to excluded groups but also to the vision of South Africa as a non-racial constitutional democracy united in its diversity.

LEGAL FRAMEWORK

35. Section 15A of the EEA Act allows the Minister to "set numerical targets for any national economic sector". A sector is defined as "an industry or service or part of any industry or service".

36. Section 20(2A) states "the numerical goals set by an employer in terms of subsection (2) must comply with any sectoral target in terms of section 15A that applies to that employer." This amendment links the sectoral numerical targets to the numerical targets set by a designated employer in its employment equity plan. A designated employer will thus be required to set numerical targets in line with the applicable sectoral targets set by the Minister.

37. An amendment to section 53 of the Employment Equity Act 55 of 1998 ("the principal Act") dealing with state contracts provides that the Minister may only issue a compliance certificate if the employer has complied with the sectoral numerical targets set by the Minister for the relevant sector, or has demonstrated a reasonable ground for non-compliance.

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38. The Foundation will set out to show that on applying constitutional and international prescripts to the proposed amendments, the measures fail the rationality test and will not pass constitutional muster.

A. The Constitution and the Regulations

Section 1 of the Constitution - Founding values must steer approach

39. The starting point against which the proposed amendments should be viewed is the Constitution, and in particular sections 1 and 9 of the Constitution. The founding values of the Constitution, in section 1, envisage a society built on "human dignity"; "the achievement of equality "; "non-racialism and non-sexism" and an adherence to the "Rule of Law".

40. The Rule of Law embraces the doctrine of legality, which at its core requires that State action must be "capable of being analysed and justified rationally"[4] to safeguard against arbitrary decision-making.

41. The reality is that any measures, such as the proposed Regulations which proposedly aim to remedy past discrimination, create tension in light of the founding values of "non-racialism". Justice Moseneke in the matter of *South African Police Service v Solidarity obo Barnard* (*Barnard* Constitutional Court judgment)[5] attempted to reconcile this tension by cautioning that -

> "We must remain vigilant that remedial measures under the Constitution are not an end in themselves. They are not meant to be punitive nor retaliatory. Their ultimate goal is to urge us towards a more equal and fair society that hopefully is non-racial, non-sexist and socially inclusive".[6] (own emphasis)

42. Justice Sachs in the matter of the *Minister of Finance and Other v Van Heerden*[7] (*Van Heerden* judgment) also provided critical guidance in navigating this friction between remedial measures aiming to address past discrimination and upholding the founding values of "non-racialism" by stating -

> "… it would be illogical to say that unfair discrimination by the State is permissible provided that it takes place under section 9(2)."

43. From the above dictum it is clear that remedial measures, such as the proposed regulations, cannot lose sight of the founding values of achieving a "non-racial" society. It is critical to keep in mind that they are

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[4] See *S v Makwayane and Another* 1995 (3) SA 391 at paragraph 156.
[5] 2014 (6) SA 123 (CC)
[6] Paragraph 30 of above judgment.
[7] 2004 (6) SA 121 (CC).

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not an end in themselves. One must question whether they will lead to the achievement of a "non-racial society", and they must be rationally justifiable in terms of the Constitution.

Section 9 of the Constitution - Proposed amendments must adhere to section 9(2) and give effect to substantive equality

44. The proposed Regulations furthermore must be understood in light of the constitutional right to equality, section 9 of the Constitution, which not only provides for formal equality but also substantive equality. The Constitution recognises that an equal society cannot be achieved by simply requiring identical treatment of all persons in similar circumstances (formal equality). Formal equality does not address the reality of actual social and economic disparities between groups and individuals, entrenched by historic systemic unfair discrimination.[8]

45. Therefore, the Constitution allows preferential treatment between groups and individuals to ensure substantive equality, equality of outcomes in terms of section 9(2) of the Constitution, which provides -

> "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."

46. It is however important to emphasise that substantive equality is not merely about addressing disparities based on race and gender but speaks to deeper social disparities and under-privilege, which should also be addressed by any legislative measures taken in terms of section 9(2) of the Constitution.[9]

47. It is therefore crucial to ask whether these remedial measures as provided for in the proposed amendments will deliver substantive equality. Linked to this is the question whether remedial measures in the principal Act fail to provide for a contextualised approach, taking into account socio-economic indicators and intersectional discrimination, which would effectively ensure substantive equality to become a reality.

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[8] See the Equality chapter, pages 233-234 in the 5th Edition of the "The Bill of Rights Handbook" by I Currie & J de Waal. 2005. Juta & Co.

[9] This was pointed out by Justice Moseneke in the *Van Heerden* judgment at paragraph 7 where he stated that:

> "The substantive notion of equality recognises that besides uneven race, class and gender attributes of our society, there are levels and forms of social differentiation and systemic under-privilege, which still persists. The Constitution enjoins us to dismantle them and to prevent the creation of new patterns of disadvantage."

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48. Section 9(3) of the Constitution clearly prohibits unfair discrimination by the State on certain listed grounds.[10] The relationship between sections 9(2) and 9(3) of the Constitution have been a challenging and contentious aspect, especially for an individual who might find himself or herself being denied an employment opportunity based on one of the listed grounds - such as race in terms of section 9(3) - but the action is being defended as a legitimate measure of redress for a group of people in terms of section 9(2).

49. Justice Moseneke, writing for the majority in the *Van Heerden* judgment, has however held that if a measure of redress falls within the ambit of section 9(2) it does not constitute "unfair discrimination" in terms of sections 9(3) and it boils down to rationality.[11] The judgment specifically provides for a three-step test to determine the rationality of the measure, which was also confirmed in the *Barnard* Constitutional Court judgment:

    (1) The first relates to "whether the measure targets persons or categories of persons who have been disadvantaged by unfair discrimination".[12]
    (2) The second requirement relates to whether the "measure is designed to protect or advance such persons or categories of persons". The Court pointed out that this is directed at a future outcome, which must be reasonably attainable. Important to this submission, is that the Court emphasised with this determination that - "If the remedial measures are arbitrary, capricious or <u>display naked preference</u> they could be hardly said to be designed to achieve the constitutionally authorised end".[13] (own emphasis)
    (3) The last requirement is that the measure "must promote the achievement of equality".[14] This requirement is also arguably very wide, but the Court did indicate it "requires an appreciation of the effect of the measure in the context of our broader society". It can also accordingly come at a "price for those previously advantaged".[15] Critically the Court also warned that the "measure should not constitute an abuse of power or impose such substantial and undue harm on those excluded from its benefits that our long-term constitutional goal would be threatened".[16]

[10] It provides that: "*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.*"
[11] At paragraph 36 of the *Van Heerden* judgment in footnote 6.
[12] At paragraph 38 of the *Van Heerden* judgment in footnote 6.
[13] Paragraph 41 of the *Van Heerden* judgment. It is also important to note that the Constitutional Court has recently confirmed in the matter of *Minister of Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Associations and Others 2018 (5) SA 349 (CC)* this does not mean arbitrariness is part and parcel of this second requirement as arbitrariness is a constitutional standard by itself, which applies in general to the exercise of public power.
[14] Paragraph 37 of *Van Heerden* judgment referred to in footnote 6.
[15] At paragraph 44 of the *Van Heerden* judgment referred to in footnote 6.
[16] See above.

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50.The *Van Heerden* judgment's internal test of section 9(2) of the Constitution (the *Van Heerden* judgment rationality test) can be criticised for failing to question the fairness and proportionality of the remedial measure. However, it has been confirmed by the Constitutional Court in subsequent cases and is currently the yardstick to use in this analysis. [17]

51. Further key guidance on this constitutional analysis relates to the question of numerical targets versus quotas, which is also important in this analysis of the Regulations.

Numerical goals versus quotas in the principal Act

52.The principal Act aims to statutorily eliminate unfair discrimination in employment and at the same time ensure employment equity measures. The Act, unlike the Constitution, refers to "equitable representation". However, if read with section 20 of the Act (relating to employment equity plans) a connection is made between "numerical goals" and "equitable representation".

53.Where there is an "underrepresentation of people from designated groups", numerical goals of "suitably qualified persons of designated groups should be established at all occupational levels setting out the timetables by when to achieve and strategies to achieve them". [18]

54.Furthermore, read with section 42 of the EE Act and the *Code of Good Practice*[19], a line is drawn between "numerical goals", "equitable representation" and the "regional and national demographic profile of the economically active population".[20] It is however important to point out that besides this interpretation, no definition is provided for "equitable representation" and the Preamble of the EE Act states it sets out to "achieve a diverse workforce broadly representative of our people".

55.Further the EEA Act's addition of section 2A requires that "The numerical goals set by an employer in terms of subsection (2) **must** comply with any sectoral target in terms of section 15A that applies to that employer.''

[17] For criticism on the *Van Heerden* judgment's rationality test see Pretorius J "Fairness in transformation: A critique of the Constitutional Court's affirmative action jurisprudence". South African Journal on Human Rights Vol 26(3) (2010) 536-570,

[18] Section 20(1)(c) of the EE Act.

[19] *Code of Good Practice on the Preparation, Implementation and Monitoring of the Employment Equity Plan (EE Plan),* published in *Government Gazette* Notice 424 in *Government Gazette* 40840 of 12 May 2017.

[20] Section 42(1)(a) of the EE Act relating to assessment of compliance, provides "The extent to which suitably qualified people from and amongst the different designated groups are equitably represented within each occupational level in that employer's workforce in relation to the demographic profile of the national and regional economically active population".

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56. In relation to the reference to regional demographics, it must be noted that the Constitutional Court confirmed that regional demographics must be taken into account relating to the setting of equity targets at all occupational levels for members of designated groups.[21] This is a key factor to keep in mind when considering the proposed Regulations.

57. Even though the principal Act, specifically prohibits "quotas" as part of affirmative action measures adopted by a "designated employer", it fails to define it and it has been up to the Courts to give some definition to it. It is critical to determine whether the remedial measures proposed do not inherently amount to "quotas".

58. In the *Barnard* Constitutional Court judgment, Justice Moseneke (writing for the majority) recognised that the principal Act fails to define "quotas" but believed the matter was not the appropriate case to give meaning to it.[22] He did however recognise "flexibility and inclusiveness required to advance employment equity" and that it may not be an "absolute barrier" for people who are not from "designated groups".[23] Flexibility is therefore a key indicator of distinction.

59. Justices Cameron, Froneman and Majiedt in the *Barnard* Constitutional Court judgment however emphasised that "to sanction rigidity", "would convert the numerical targets specified in the plan into impermissible quotas".[24] The key here is rigidity in application. They also highlighted that an overly rigid interpretation of numerical targets, for instance in this case, could have had an adverse effect on Indian and Coloured people, who also suffered past discrimination. In this instance it could have led to the absurdity that because Indian women for instance may not be more than 0.4 employees at a specific level, essentially zero, they could never be appointed at that level.[25]

60. The 2015 High Court judgment of *South African Restructuring and Insolvency Practitioners Association v Minister of Justice and Constitutional Development and Others*[26] (the *Insolvency Practitioners* High Court judgment) provides interpretative guidance on the meaning of "quotas". The Court looked at American jurisprudence which held that -

> "A quota would impose a fixed number or percentage which must be attained, or which cannot be exceeded, and would do so regardless of the number of potential applicants who meet necessary qualifications ...By contrast, a goal is a numerical objective, fixed realistically in terms of the

[21] *Solidarity and Others v Department of Correctional Services and Others 2016 (5) SA 544 (CC)* - specifically at paragraph 129.
[22] At paragraph 42 of the judgment.
[23] See above paragraph in judgment.
[24] Justices Cameron, Froneman and Majiedt felt the matter was squarely in front of the Court. See paragraph 119 of the judgment.
[25] See paragraph 119 of the judgement.
[26] 2015 (2) SA 430 (WCC). The matter was appealed but the Constitutional Court dismissed the appeal with costs.

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> number of vacancies expected, and the number of qualified applicants available in the relevant job."[27]

61. Furthermore, the High Court in the *Insolvency Practitioners* High Court judgment also looked at the view of South African academics, which emphasised that "quotas" have the "effect of reserving all or a fixed percentage of job opportunities for designated groups".[28]

62. Essentially, what we can take as guidance from the *Insolvency Practitioners* High Court judgment is the question of flexibility, rigidity and whether it is implemented in a "mechanical and rigid manner". These are key factors to consider with the proposed amendment of sectoral numerical targets. Do they allow for flexibility, would it amount to job reservation for a member of a designated group and what degree of consideration is afforded to skills, knowledge and experience?

B. International principles relating to affirmative action measures

63. The proposed amendments must generally be understood in light of international standards relating to the concept of "special measures" allowed in terms of *the International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD), which South Africa ratified in 1998 and *the International Convention on the Elimination of Discrimination Against Women,* which South Africa ratified in 1995.[29]

64. Article 1 of the ICERD, allows State parties to apply "special measures" to ensure the adequate advancement of certain racial or ethnic groups or individuals to ensure equal enjoyment or exercise of human rights. This would not constitute racial discrimination on the condition that -

> "…such measures do, not as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved."[30]

65. It is clear from the above that it should not constitute separate rights for different racial groups and it must be temporary in nature.[31] This is an important guiding factor to keep in mind on analysing the proposed amendments.

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[27] At paragraph 211 of the above judgment.
[28] At paragraph 212 of the above judgment.
[29] In terms of section 39 of the Constitution.
[30] Article 1(4) of the ICERD.
[31] Article 2(2) of the ICERD relating to special measures in the social, economic and cultural fields also reiterate the temporary nature and the prohibition against creating separate rights. Article 4 of CEDAW also clearly provides for special measures aimed at accelerating equality, which would not constitute discrimination but again on the condition that it is temporary it should not lead to the "maintenance of unequal or separate standards".

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66. In 1998 the *United Nations Sub-Commission on the Promotion and Protection of Human Rights* appointed a Special Rapporteur to study the concept of affirmative action and the following findings in his report are critical to keep in mind (Special Rapporteur's report).[32]

67. The Special Rapporteur's report noted the issue of the "two-class theory" that may arise from affirmative action measures that see "the most fortunate segments of the groups designated as beneficiaries…get the most out of affirmative action measures" and "this may result in the creation of yet another 'disadvantaged' or 'discriminated against' minority within the majority".[33] The impact of the proposed amendments should consider whether it would not indirectly create discrimination within designated groups.

68. The *United Nations Committee on the Elimination of Racial Discrimination* also published a 2009 General Recommendation on "special measures" referred to in article 1 and 2 of the ICERD to provide interpretative guidance (UN General Recommendation).[34] The UN General Recommendation emphasises that special measures/affirmative action measures "should be appropriate to the situation to be remedied... respect the principles of fairness and proportionality and be temporary".[35] Furthermore it "should be designed and implemented on the basis of need, grounded in a realistic appraisal of the current situation of the individuals and communities concerned".[36] This guideline emphasises the need for carefully designed measures, not broad stroke measures. This is important to the analysis.

69. The issue of accurate data disaggregated by race and incorporating socio-economic conditions informing affirmative action measures is a pertinent issue relating to South Africa's affirmative action measures. This cannot be ignored.

70. South Africa is obligated to submit periodic reports on the country's compliance to the ICERD provisions, which the *United Nations Committee on the Elimination of Racial Discrimination* considers and makes recommendations on. In the 2016 observations by the Committee on *South Africa's combined 4th to 8th periodic reports*,[37] the Committee made the following crucial remarks and recommendations, which speak to a core issue of current affirmative action measures, which the Department must address:

    i. The Committee was concerned about "the lack of comprehensive disaggregated data on the impact of special measures on affected groups, especially on the most

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[32] E/CN 4/Sub2/ 2002/21.
[33] At paragraph 11 of the report.
[34] General Recommendation No 32. *The meaning and scope of special measures in the International Convention on the Elimination of all forms of Racial Discrimination*. CERD/C/GG/32.
[35] At paragraph 16.
[36] See above paragraph in the UN General Recommendation.
[37] Committee on the Elimination of Racial Discrimination - *Concluding Observations on the Combined 4th to 8th periodic reports of South Africa*. CERD/C/ZAF/CO/4-8. 5 October 2016.

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disadvantaged and vulnerable among them, in the areas of employment, education and representation in public and political affairs".[38] (own emphasis)

ii. The Committee required South Africa to "provide detailed qualitative and quantitative information in its next periodic report on the impact of special measures in employment, education and public and political affairs".[39] (own emphasis)

71. South Africa was obliged to provide the quantitative and qualitative data in its next report, due in 2020. On 21 May 2021, the [Combined ninth to eleventh reports] were submitted to ICERD which made the following submissions:

i. Clause 18 of the report states that "Special measures" do not amount to discrimination when taken for the sole purpose of ensuring equal enjoyment of human rights and fundamental freedoms.

ii. Clause 19 notes the latest unemployment rates that show "the unemployment rate is the highest amongst Black/African South Africans (32,8 %) and the lowest amongst white South Africans (7,4%)", which in Government's view are "in support of the contention that the special measures embodied in the legislation are still necessary."

iii. Clause 20 notes the reports of the Commission for Employment Equity (CEE) which "provide information on the representation of designated groups in South African workplaces. The latest report from the CEE continues to paint a picture of a very slow, but steady pace of transformation especially at the top four occupational levels."

iv. Clause 21 highlights the "National Development Plan (NDP) serves as the country's long-term blueprint for development. The NDP sets two overarching objectives, namely the eradication of poverty below the Lower-bound Poverty Line and the reduction of income inequality as measured by the Gini coefficient. The NDP prioritises reducing inequality as one of its key objectives to tackling South Africa's significantly high inequality challenges. One of the NDP targets is to reduce income inequality (measured by the Gini coefficient) from 0,70 to 0,60 by 2030."

v. Clause 22 states that "Poverty is still race-based" relying on a 2019 report released by Statistics SA measures inequality trends over time (2006, 2009, 2011 and 2015). "The report shows the distribution of real annual mean and median expenditure by sex of household head and population group over time (in 2006, 2009, 2011 and 2015) It shows that the white population group had the highest annual mean and median expenditure compared to other population groups across all four years measured; while black Africans had the least. Black Africans had an annual median expenditure of only R6 009 in 2006 and R9 186 in 2015. The white population group

[38] At paragraph 14 of above report.
[39] At paragraph 15 of above report.

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had their annual median expenditure sitting at R77 308 in 2006 which increased to R100 205 in 2015. The annual median expenditure for whites was more than ten times higher than that of black Africans across all four years. The white population group had more than nine times the annual mean expenditure of black Africans in 2006; although, this ratio declined to more than seven times in 2015."

vi. Government concluded in the ICERD report, that it is "of the view that special measures are indeed still necessary. We view these special measures as integral and essential to the Convention's aim of eliminating racial discrimination and advancing human dignity and effective equality, as well as being vital to our own Constitution's aim of substantive equality. In order to address historical disadvantage our equality clause permits legislative and other measures to achieve equality. Special measures are needed until such time as equality can be said to have been achieved. There is no explicit "sunset clause" in any of the legislative provisions, and it will therefore remain in force and effect until such time as government policy determines that these measures are no longer needed."

72. This same issue was also emphasised by the South African Human Rights Commission in their 2017-18 Equality Report (SAHRC Equality Report). A key finding made in the Report is that -

> "The Employment Equity Act, 55 of 1998's <u>definition of 'designated groups' and South Africa's system of data disaggregation is not in compliance with constitutional or international law obligations</u>. Government's failure to measure the impact of various affirmative action measures on the basis of need and disaggregated data, especially the extent to which such measures advance indigenous peoples and people with disabilities, likewise violates international law obligations".[40] (own emphasis)

73. The SAHRC Equality Report also held that implementation of the special measures in employment equity is "misaligned to the constitutional objective of achieving substantive quality, to the extent that implementation may amount to rigid quotas and absolute barriers as opposed to flexible targets".[41] Critically, the SAHRC Equality Report recognised that this "may inadvertently set the foundation for new patterns of future inequality and economic exclusion within and among vulnerable groups".[42]

74. The SAHRC Equality Report speaks to the same loophole the UN Committee recognised in that the current data, which affirmative action measures are based on, is insufficient and flawed. Current data focuses

[40] SAHRC Equality Report 2017-18. Page 5 of the Equality Report.
[41] Page 5 of the Report.
[42] Page 5 of the Report.

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mainly on racial demographics, without taking into account socio-economic disparities within a group and addressing that need. Within the group there are also intersectional forms of discrimination, which is overlooked by current affirmative action measures and instead of achieving substantive equality, it may ironically create new forms of disadvantage within designated groups.

75. Whilst the 2021 Combined ninth to eleventh reports submitted by South Africa to ICERD did look to the socio-economic disparities between racial groups, it incorrectly points to demographic representivity (the principal Act, EEA Act and all ancillary regulations) as the solution to stimulate the economy and thereby remedy income inequality and poverty. The Foundation submits this a fundamental error that will result in less growth, investment and wealth in the country.

76. The SAHRC Equality Report specifically recommended that the principal Act be amended "to target more nuanced groups on the basis of need, and taking into account social- and economic indicators".[43]

77. A legal analysis of the proposed Regulations will now follow with the above constitutional and international prescripts in mind.

C. Legal analysis: *Draft Regulations read with* Section 15A of the EEA Act - Establishment of sectoral targets

78. It is our understanding that the proposed section 15A, the establishment of sectoral targets, would have to be complied with by <u>all designated employers</u> and not necessarily only those who intend to enter into a State contract, in terms of section 53. We make this assumption, due to the fact that all designated employers in terms of section 20 of the principal Act (which provides for the determination of a designated employer's equity plan) would now be required in terms of section 20(2A) to ensure that the numerical goals set in their employment equity plan "…comply with any sectoral target in terms of section 15A...". During assessment of compliance with the EE Act, the achievement of a sectoral target in terms of section 15A is now to be taken into account if one considers the proposed section 42(1) (aA).

79. The question now arises what reason is provided for the introduction of section 15A and what would the consequence <u>be for all designated employers having to comply at all occupational levels</u>. Is the proposal rational; does it correlate with the facts and more importantly is it carefully crafted in compliance with section 9(2) of the Constitution?

80. It is clear that there is unhappiness with the following:

[43] Page 39 of the Report. The SAHRC also recommends a joint departmental approach and collaboration with Statistics South Africa to gather data disaggregated by ethnicity, origin, language and disability, which should include social and economic indicators. These various departments, which include the Department of Labour, have to report back within six months on steps taken to amend the Act, and collection of disaggregated data.

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i) lack of representation - not of all "designated groups" but only with some, namely Africans - and also lack of representation of women;
ii) the unhappiness relating to the above is only relating to the middle-to-upper occupational levels in the private sector.

81. However, section 15A refers to the setting of numerical targets of "all occupation levels" in the workforce for any sector as identified and the Regulations set such targets for "Top Management, Senior Management, Professionally Qualified and Skilled Levels". Does the evidence and results of the CEE reports support this need? This is a critical consideration to determine the rationality of the measure, whether the proposal is rationally related to the objective sought.

82. The 2021/22 CEE report shows that the African population groups remain dominant in the public sector holding a combined (male and female) 79.4% of all top management and senior management positions. However, the same cannot be said of the private sector.

83. If one solely focuses on the Top and Senior Management levels in the private sector, and again only on the representation of African and Coloured population groups, the racial representation is very low.[44] This cannot be disputed. However, on Middle Management level, the "Professionally Qualified level" as referred to in the CEE reports, the results tell a different story. This is important information to provide a holistic view.
    83.1. The African population group holds 73% of all middle management level positions, compared to Coloured (9.1%), Indian (4.6%) and White (12.6%), in the public sector. In the private sector, the White population group holds 42% of all positions compared to African (32.5%), Coloured (10.9%) and Indian (11.7%).
    83.2. It is important to note that the 2016/17 CEE Report specifically held -

> "A positive trend towards equitable representation is noted for the first time at Professionally Qualified/Middle Management Level. The CEE interprets this trend as positive towards reaching an equitable representation at Senior Management level as this level serves as a feeder to Senior Management level."[45]

    83.3. The above observation is important as it acknowledges that logically this would follow through to Senior and arguably later, to Top Management level. Arguably, in 10 years' time, the Top and Senior Management levels (which realistically require experience in years) would reflect this as it draws from this Middle Management pool of candidates.

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[44] The 2017-18 CEE report, does show that at Top Management level, the White population comes in at 67.7%, compared to the African group, which represents only 3.4% and Coloured population at 5.1%. Accordingly, the White population is six times more than the Economic Active Participation (EAP) percentage of this specific group. There is a great disparity if one compares this to Top Management in the public sector, which indicates 72.2% African representation at Top Management level and only 10.9% of the White population. The CEE 2017-18 report also notes that at Senior Management level in the private sector the White population group represents 56.1%, the African population group 22.1% and the Coloured population group 7.7%.

[45] Page 65 of the 2016-17 CEE report.

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83.4. Furthermore, if one considers the other occupation levels such as "Skilled" and "Semi-Skilled", the reports notes that 55.2% in the private sector is represented by the African population group, and at "Skilled level", 77.7%. If one compares this statistic with one of the earliest CEE reports (the 2003-2004 CEE report for instance), which recorded only 32.6% of African males at the "Skilled level" and only 8% of African women at this level, there has been great improvement.

83.5. Therefore, on the facts, the issue of lack of "equitable representation" as understood in terms of the principal Act, is not at all occupational levels. Affirmative action measures applied by designated employers have been shown to work - without introducing strict adherence to statutory sectoral targets as proposed. This is unless one requires an exact numerical mirror image of the national Economic Active Participation (EAP), being 79.4% Africans, 9.1% Coloured, 2.7% Indian and 8.8% White at each occupational level - any number more or less for any group would not suffice.[46]

84. The UN General Recommendation, as discussed earlier, emphasised that special measures must be "grounded on a realistic appraisal of the current situation" - currently it cannot reasonably be said on the CEE reports' results that "all occupational levels" lack "equitable representation", as proposed to be remedied by section 15A. On this aspect alone, on the evidence, the measure is not rationally related to the objective of achieving "equitable representation".

85. It is also worrisome to note that the CEE report specifically highlights across all levels of the workforce, where other previously disadvantaged groups other than Africans (Coloured and Indian) are overrepresented and exceed their EAP.

86. The Indian population group falls under the definition of "black people" in terms of the principal Act and is included under "designated groups". This group also experienced previous unfair discrimination and denial of equal opportunities. But what we however see on reading the Regulations and the Act, is that a differentiation on the mere basis of race is drawn amongst the "designated groups" itself. This ironically might create new levels of discrimination amongst the designated groups, as the Special Rapporteur's report cautioned.

87. In the Labour Court matter of *Naidoo v Minister of Safety and Security*[47] (which incidentally related to an unfair discrimination challenge by an Indian female applicant related to employment equity in the public sector) the honourable Judge noted with concern that:

[46] The National EAP as captured on page 13 of the 2017-18 CEE report.
[47] 2013 (3) SA 486 (LC).

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> "The very purpose of employment equity is to redress the effects of past discrimination suffered by members of the designated group. Its purpose is not to create new de facto barriers to employment. The fact that the barrier is created and results in a person from a designated group suffering discrimination, both on the grounds of her race and gender, is perverse."[48] (own emphasis)

88. The above judgment, which found in favour of the applicant, was overturned in the Labour Appeal Court. It is however our view that the above finding correctly describes the absurdity of insisting on strict adherence to numerical targets in the public sector that mirror the population groups' EAP.

89. If one applies the three-pronged rationality test set out in the *Van Heerden* judgment to section 15A, it is on the second and third requirement that section 15A comes undone. The second requirement states that the measure must be "designed to protect or advance such persons or categories of persons" and it is directed at a future outcome. In this regard, as discussed earlier, the facts do not support such measures to be introduced at all occupational levels nor that such measures would create jobs. Which future outcome is it predicting? It is arguable that in normal due course Top and Senior management levels, which will draw from the Middle Management pool (which has only recently achieved a "positive trend towards equitable representation"), would reflect the same.

90. Furthermore, the *Van Heerden* judgment has warned against a "display of naked preference" and it is clear from the Regulations that what we in effect would see, is preference for certain racial groups amongst the "designated groups" on the mere basis of race. This cannot be reconciled with the Constitution's founding values of building a "non-racial" society.

91. The third requirement of the *Van Heerden* judgment's rationality test states vaguely that the "measure must promote the achievement of equality". The Court reminded us that one has to consider it in the "context of the broader society" and it may come at a price for the "previously advantaged". The reality is that in this instance, strict adherence to sectoral targets will come at a price - also to those who have been previously disadvantaged but do not have the numbers in society. In this instance, regardless of previous vulnerabilities and denial of rights, it becomes a numbers game. In the "context of the broader society" it will not achieve substantive equality, as it is not a nuanced approach but is merely a question of racial representation and numbers and it is indirectly punitive in nature.

92. Lastly, in relation to the *Van Heerden* judgment's rationality test, it cannot be reasonably said that there is no consideration for fairness and proportionality at all. Justice Moseneke emphasised that "it should not impose such substantial and undue harm on those excluded from its benefits that our long-term constitutional goal would be threatened." The measures proposed would not only arguably infringe on

[48] At paragraph 158 of the judgment.

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the dignity of those from the previously advantaged group, but more importantly, it provides a barrier for those within the "designated group" itself, whose representation is considered too high for their EAP. This cannot be what our Constitution strives to achieve and goes against achieving a "non-racial "society.

93. Therefore, the Regulations under section 15A in our view will not pass the constitutional rationality test, as per section 9(2) of the Constitution.

REMEDIES

94. We believe the proposed sectoral numerical targets contained in the Regulations have all the ingredients to become rigid quotas, which is contrary to the achievement of equality and non-racialism. They should be reviewed, alongside the EEA Act and principal act, in line with the three-prong test laid out in the *Van Heerden* judgment above.

95. The Draft Regulations should be scrapped in their entirety. The Regulations read with section 20(2A) require rigid compliance with is against the Constitution and international law. Racial representation and alignment with a population group's EAP would inadvertently become the dominant factor to employment- even though it is not spelled out in the Regulations.

96. Section 20(2A) require an employers employment equity plan "comply with any sectoral target", enforcing further rigidity for all employers- not only those tendering for state contracts- without any consideration of any relevant factors other than race. Should the Regulations pass, they should be accompanied by further criteria an employer may take into account when imposing any envisaged numerical targets such as qualification, skills, experience and the capacity to acquire, within a reasonable timeframe, the ability to do so; rate of turn-over and natural attrition within a sector; and recruitment and promotional trends within a sector.

CONCLUSION

97. The proposed numerical sectoral targets as proposed in section 15A of the EEA Act, read with the draft Regulations, would not pass constitutional muster as it is not a carefully crafted redress measure in terms of section 9(2) of the Constitution and it fails the *Van Heerden* judgment's rationality test.

98. The need to introduce numerical sectoral targets for <u>all occupational levels</u> is not supported by the CEE reports. It is clear that the Department and CEE are only particularly unhappy with the Senior and Top Management levels in the private sector. However, the 2016 -17 CEE report itself recognised that a "positive" trend of "equitable representation" is seen in Middle Management level, it would reach Senior and arguably Top Management levels, as these levels feed from Middle Management

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99. Therefore, logically in the future we will see "equitable representation" on these levels as well, drawn from experienced "suitable candidates" from the Middle Management level of a company's own candidates who have also proven themselves to the company.

100. Furthermore, as analysed, the setting of such numerical sectoral targets might be to the disadvantage of certain racial populations within the "designated groups" who are being punished indirectly on the basis that their EAP does not support their high representation at Top and Senior Management levels in the private sector. This will inevitably create discrimination within the "designated groups" based simply on race.

101. The Department should consult with "designated employers" and determine what critical skills development could be applied in the Middle Management level to accelerate the trend towards Senior and Top Management levels.

102. Lastly, above all, we submit that the Department has failed to take into account the urgent need to amend the principal Act to provide for a more nuanced approach in applying affirmative action measures. In line with the SAHRC Equality Report, socio-economic indicators and intersectional discrimination should be taken into account. There is an urgent need for a new manner of collecting information on the population profile, which not only captures the economic participation of racial groups but speaks to the true disparities experienced, with specific reference to socio-economic indicators. These disparities should be addressed with remedial measures to ensure substantive equality.

103. It is essential that the economy must be open to all South Africans at all levels - but this can be achieved far more effectively through natural economic evolution and by prohibiting unfair discrimination than by imposing a system in which appointments, promotions and tenders are based on race rather than on individual merit and effort.

Kind Regards,

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