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An Analysis of Statutorily Imposed Sectorial Affirmative Action Targets

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AN ANALYSIS OF STATUTORILY IMPOSED SECTORIAL AFFIRMATIVE ACTION TARGETS,

AS APPROVED BY POSTGRADUATE STUDIES COMMITTEE

by

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Abstract

The World Bank has classified South Africa as the world's most unequal country.[1] The circumstances inherited from the Apartheid regime have been noted as contributors to the increase in inequality.[2] While the government has enacted legislative restitutionary measures to address the inequalities caused by the Apartheid regime, the pace at which these measures are addressing inequity has been regrettably slow.

The Employment Equity Act[3] (EEA) was enacted to mitigate the effects of workplace discrimination by prohibiting unfair discrimination and requiring employers to implement affirmative action measures to ensure that their workplaces are representative of the country's demographics.[4] Preferential treatment of people from designated groups and numerical goals set by designated employers to increase the representation of suitably qualified people from designated groups in the workplace are some of the affirmative action measures that designated employers are empowered to implement.[5]

The Employment Equity Amendment Act[6] (EEAA) will introduce a shift in South Africa's approach to transformation of workplaces from a self regulated approach to a statutorily prescribed approach in terms of which the Minister of Employment and Labour will prescribe sectorial targets which each economic sector will be required to comply with.

The acceleration of workplace transformation is crucial to address previous disadvantages. However, the statutorily prescribed approach to affirmative action may not be an appropriate approach for South Africa in circumstances where the EEA has not be utilised to its full potential and the new approach may pose a risk to employees' right to equality.

1 Sulla Victor, Zikhali Precious & Cuevas Pablo Facundo 'Inequality in Southern Africa: An assessment of the Southern African Customs Union' available at *https://documents.worldbank.org/en/publication/documents-reports/documentdetail/099125303072236903/p1649270c02a1f06b0a3ae02e57eadd7a82*, accessed on 20 October 2022.

2 Ibid.

3 Employment Equity Act 55 of 1998 (EEA).

4 S 2 of the EEA.

5 S 15(2)(d) of the EEA.

6 4 of 2023.

CONTENTS

Abstract 2
Declaration 4
Acknowledgements 5
1. Introduction 6
2. Employment Equity in South Africa 9
2.1 *Right to equality* 9
2.2 *Prohibition and elimination of unfair discrimination in workplaces* 10
2.3 *Affirmative action in South Africa* 13
3. Challenges to Employment Equity 16
3.1 *Limitation of the right to equality and unfair discrimination* 16
3.2 *Numerical goals vs quotas* 19
4. Amendments to the Employment Equity Act 22
4.1 *Overview of proposed amendments* 22
4.2 *Possible challenges to the proposed numerical targets* 26
5. Recommendations and Conclusion 30
5.1 *Economic consequences of proposed amendment* 30
5.2 *Quotas* 32
5.3 *Effective enforcement* 32
Bibliography 34

Declaration

I, Kegomoditswe Daphney Willem with student number 545659 declare that this Research Report is my own unaided work. It is submitted in partial fulfilment of the requirements of the degree of Master of Law (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. This Research Report has not been submitted before for any degree or examination in this or any other university.

I have submitted my final Research Report through Turnitin, and I have attached the report to my submission.

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To my late father – I hope I am making you proud.

To my supervisor – Thank you for your direction, prompt responses, and patience with me, from the first draft I sent you to the final draft.

Phera Mofokeng – It is amazing how you can take on all of my stress and still put pressure on me to be the best version of myself.

Thank you, Zandile and Lucky Kgosiemang, for the numerous times we discussed this topic. Those debates fuelled my desire to further this research report.

The transformation of workplaces is one of the obstacles that must be overcome to ensure the economic emancipation of future generations.

"If you are pleased with me, teach me your ways so I may know you and continue to find favor with you. Remember that this nation is your people." The Lord replied, "My Presence will go with you, and I will give you rest." Then Moses said to him, "If your Presence does not go with us, do not send us up from here. How will anyone know that you are pleased with me and with your people unless you go with us? What else will distinguish me and your people from all the other people on the face of the earth?" - *Exodus 33:13 – 16.*

1. Introduction

Apartheid was a system that discriminated against Black, Coloured, and Indian people. While many of the laws that established and enabled the Apartheid system have been repealed, the social and economic consequences of Apartheid continue to be felt many years after it ended.[7] The Legislature has taken active steps to address disparities in employment and economic advancement of previously disadvantaged people by enacting legislation to empower these groups of people as mandated in s 9(2) of the Constitution.

The Employment Equity Act (EEA) was enacted to achieve workplace employment equity.[8] The EEA does not seek retribution for past wrongs but it. However, it requires employers to take steps to eliminate unfair discrimination and provide for the advancement of people from designated groups to provide them with equal employment opportunities and ensure that they are equitably represented in the workplace.[9] Workplace inequality perpetuates itself through the underrepresentation of people from designated groups in workplaces.[10]

1.1 *Problem Statement*

The Commission for Employment Equity (the Commission) has noted the slow pace of transformation in workplaces[11], particularly in the top management, senior management, and qualified professionals occupational levels.[12] The Commission attributes this to *inter alia* employers misusing the self-regulated nature of affirmative action measures by setting numerical goals that are not linked to the economically active population statistics (EAPs).[13] In light of this, the Commission concluded that the self-regulated system was ineffective.[14] The

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7 GN 1840 GG 18481 of 1 December 1997, 5.

8 S 2 of the EEA.

9 S 13(1) of the EEA.

10 Ockert Dupper 'Affirmative action: Who, how and how long' (2008) 24 *SAJHR* 425, 439.

11 Commission for Employment Equity '20th Commission for Employment Equity Annual Report 2019/20' available at https://www.labour.gov.za/DocumentCenter/Pages/Reports.aspx?RootFolder=%2FDocumentCenter%2FReports%2FAnnual%20Reports%2FEmployment%20Equity%2F2019%20%2D2020&FolderCTID=0x012000A8F7CA7B3BF9184F9ABCC50EB27E3A7E&View=%7BF03441FD%2D32C9%2D487B%2D8AA3%2D420FF13703D9%7D accessed on 20 October 2022, 6.

12 Commission for Employment Equity '21st Commission for Employment Equity Annual Report 2020 /2021' available at *https://www.labour.gov.za/DocumentCenter/Pages/Reports.aspx?RootFolder=%2FDocumentCenter%2FReports%2FAnnual%20Reports%2FEmployment%20Equity%2F2020%2D2021&FolderCTID=0x012000A8F7CA7B3BF9184F9ABCC50EB27E3A7E&View=%7BF03441FD%2D32C9%2D487B%2D8AA3%2D420FF13703D9%7D,* accessed on 1 December 2022,1 and 51.

13 GN 992 GG 41922 of 21 September 2018, 5.

14 Commission for Employment Equity op cit note 11 at 6.

Commission recommended that the Minister amends the EEA to empower him to set and regulate sector-specific numerical targets.[15]

The Employment Equity Amendment Act (EEAA) implements the Commission's recommendations and changes South Africa's approach to the achievement of employment equity from a self-regulated approach to a statutorily-imposed approach. The EEAA will become effective on a date to be announced by the President.

The main question that this study seeks to answer is *whether requiring designated employers to comply with statutorily imposed sectoral affirmative action measures (sectorial targets) will achieve or accelerate employment equity in workplaces*?

1.2 *Objectives*

The study's objectives are threefold. First, to comprehend South Africa's contemporary regulatory framework for employment equity. Second, to identify the challenges that employment equity has faced and crystallise the legal principles that have emerged from these challenges. Finally, to determine whether the sectorial targets will successfully overcome the challenges, and if not, to make recommendations on how accelerate workplace transformation.

This study is important for determining whether the change in South Africa's approach to affirmative action measures in workplaces will yield the desired outcome. It provides insight into how workplace transformation can be accelerated through methods that require more than mere compliance with targets. It suggests that a collective approach that requires a commitment from employers and promotes diversity and inclusion in the workplace is required.

1.3 *Methodology and limitations of the study*

The study utilises the doctrinal methodology and examines the legal framework governing employment equity in South Africa. The doctrinal methodology is well suited for this study's objectives as it permits a detailed analysis of the law (legislation, regulations and case law) and academic literature, reasoned legal conclusions and recommendations on law reform, where necessary.[16]

The study is limited in three respects. The EEAA had not yet taken effect at the time of the study. As a result, the study is based on the amendments proposed in the EEAA published in April 2023 (which are the same as those proposed in the Employment Equity Amendment Bill[17]

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[15] Ibid at 1.

[16] Mkhululi Nyathi 'Re-asserting the doctrinal legal research methodology in the South African academy: navigating the maze' (2023) 140 SALJ 365 374

[17] GN 798 GG 43535 of 20 July 2020.

(EE Amendment Bill) in July 2020). The second limitation of the study arose during the research of legal questions. The EE Amendment Bill and EEAA have not been the subject of peer-reviewed academic literature. The EE Amendment Bill and the EEAA, on the other hand, have been the subject of legal analysis and literature – a point which the author took into account when preparing this report. Finally, the study does not examine all the amendments proposed by the EEAA, but instead focuses on the sections related to the Minister's imposition of sectorial targets.

The study is divided into five chapters (including this chapter):

Chapter two is a review of the literature on South Africa's regulatory framework for employment equity. The chapter provides an overview of the right to equality. The chapter also examines the two mechanisms the EEA employs to promote employment equity: the prohibition of unfair discrimination and the implementation of affirmative action measures.

Chapter three discusses the challenges that employment equity has faced, based on the contention that affirmative action measures limit the right to equality, amounts to unfair discrimination, and the numerical targets set as part of affirmative action measures amount to quotas in contravention of the EEA.

Chapter four provides an overview of the amendments introduced by EEAA. The chapter explores the effects of the amendments on employers as well as the remaining provisions of the EEA. Finally, the chapter will identify the potential challenges to the sectorial targets.

Chapter five addresses how the EEAA's shortcomings can be addressed. It includes recommendations of alternative methods that can be used to accelerate workplace transformation.

For the reasons fully explained below, the shift from a self-regulated affirmative action approach to a statutorily imposed approach may not accelerate the transformation and could potentially reverse the already slow progress made towards achieving a representative workplace.

2. Employment Equity in South Africa

2.1 *Right to equality*

The Constitution recognises the consequences of the injustices of the Apartheid regime.[18] Section 9 of the Constitution introduces two forms of equality.[19] Section 9(1) of the Constitution confirms formal equality and s 9(2) affirms substantive equality.

Formal equality entails the equal treatment of every person in South Africa before the law.[20] With formal equality, the rules or principles imposed by the law are consistently applied without regard for the recipient's social status, economic disparities, or other disadvantages.[21] Any difference in how the law is applied in relation to this form of equality constitutes discrimination and is presumed to be unfair if it is based on any of the listed grounds in s 9(3) of the Constitution.[22]

Substantive equality is the inverse of formal equality. Substantive equality is concerned with the outcome of the application of the law rather than the consistent application thereof.[23] In contrast to formal equality, substantive equality recognises that some legal subjects have faced discrimination, and imposes positive discrimination to ensure equality.[24] Substantive equality has been hailed as an appropriate means to facilitate redress required to enable South Africa to be an open and equal society.[25] Accordingly, substantive equality contributes to the achievement of and results in transformation.[26] Substantive equality allows for differences in how the law is applied, and such differences do not constitute unfair discrimination, even if they are based on any of the listed grounds. If used to ensure the full and equal enjoyment of all rights and freedoms, affirmative action measures will not amount to unfair discrimination.

The EEA was enacted to regulate unfair discrimination generally and in the employment arena in line with s 9(4) of the Constitution.

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18 Preamble of the Constitution.
19 A van Niekerk, N Smith, MA Christianson, M McGregor & BPS van Eck *Law@Work* 5th ed (2019) 122.
20 Shamima Gaibie 'Employment equity and anti-discrimination law: The Employment Equity Act 12 years on' (2011) 32 *ILJ* 19 21.
21 Ibid.
22 Ibid.
23 Ibid.
24 Maxwell Solomon 'The regulation of affirmative action by the Employment Equity Act 55 of 1998' (1999) 11 *SA Merc LJ* 231 234.
25 *Minister of Finance and Others v F.J Van Heerden* [2004] 12 BLLR 1181 (CC) para 31.
26 Catherine Albertyn 'Substantive equality and transformation in South Africa' (2007) 23 *SAJHR* 253 258.

2.2 *Prohibition and elimination of unfair discrimination in workplaces*

The EEA prohibits unfair discrimination of employees in any employment policy or practise to ensure equal treatment and protection in the workplace.[27] Despite the listed grounds in the EEA replicating those contained in s 9(3) of the Constitution, the EEA lists three additional grounds upon which discriminate is prohibited and these are family responsibility, HIV status, and political opinion.

In 2014, the EEA was amended to introduce an additional category on which unfair discrimination is prohibited: 'any other arbitrary ground'.[28] This amendment was made to align the grounds on which discrimination is prohibited in the EEA to the grounds set out in the Labour Relations Act (LRA).[29] The introduction of the term 'any other arbitrary ground' has resulted in two conflicting interpretations of the term and its application to discrimination laws.

Darcy Du Toit argues that 'any other arbitrary ground' should be interpreted as introducing an additional ground on which unfair discrimination is prohibited.[30] Du Toit relies on the Labour Court's interpretation of the term in *Kadiaka v Amalgamated v Beverages Industries*,[31] where it was held that 'arbitrary ground' meant 'capricious or proceeding merely from whim and not based on reason or principle'.[32] Du Toit acknowledges that jurisprudence has confirmed that discriminatory conduct can be challenged on listed or unlisted grounds.[33] He argues that the Legislature would not add a category that is already regulated in the EEA.[34] Surprisingly, Du Toit disagrees with the purpose of the amendment as set out in the memorandum of objects and maintains that the term was introduced to extend the basis for challenging unfair discrimination.[35] To motivate his argument, Du Toit relies on s 11(2)(*a*) of the EEA, which confirms the rationality of the conduct complained of as one of the elements to be proven by an employee alleging unfair discrimination on an arbitrary ground.[36] Du Toit's view is known as the 'broad approach'. It was endorsed by the Labour Court in *Chitsinde v Sol Plaatje*

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27 S 6(1) of the EEA.
28 S 3 of the Employment Equity Amendment Act, 2013.
29 GN 848 GG 35799 of 19 October 2012, para 3.3.1, p 13. Section 187(1)(f) of the LRA classifies a dismissal based on unfair discrimination on any arbitrary grounds automatically unfair.
30 Darcy Du Toit 'Protection against unfair discrimination: cleaning up the Act?' (2014) 35 *ILJ* 2623 2626.
31 (1999) 20 *ILJ* 373 (LC).
32 Ibid para 42.
33 Du Toit op cit note 30 at 2626.
34 Ibid at 2625.
35 Ibid.
36 Ibid at 2627.

University,[37] which confirmed that 'any other arbitrary ground' was a self-standing ground of arbitrariness or capriciousness.[38]

Christopher Garbers and Peter le Roux disagree with Du Toit.[39] According to them, 'any other arbitrary ground' does not introduce an additional ground. However, the term should be interpreted to mean a ground analogous to a listed ground.[40] This interpretation is known as the 'narrow approach'. Garbers and Le Roux's contention is based on established jurisprudence on discrimination law, the EEA's text, and interpretation standards. Garbers and Le Roux point out that the Constitution and the EEA do not prohibit differentiation; however, they prohibit unfair discrimination based on the listed grounds or factors connected with possible historical disadvantage.[41]To be permissible and justifiable, discrimination must therefore be based on an identifiable ground. According to Garbers and Le Roux, emphasis should be placed on 'any other ground' and the phrase should not be construed as any arbitrary ground.[42] In s 6(1) of the EEA, the term 'any other ground' precedes the listed grounds, meaning that the term should be interpreted in view of the preceding listed grounds that aim to protect the dignity of persons.[43]

According to Garbers and Le Roux, Du Toit's argument is further undermined by the fact that s 11(2) of the EEA states that rationality alone is insufficient to sustain a unfair discrimination claim.[44] Section 11(2) lists two additional facts that must be proven: the act of discrimination and that the discrimination is unfair. The test for establishing discrimination on unlisted grounds, as confirmed in *Harksen v Lane NO and Others*, remains applicable and requires differentiation based on attributes or characteristics that have the potential to harm fundamental dignity or adversely affect a person adversely in a comparably serious manner.[45] This approach was confirmed by the Labour Court in *Ndudula and Others v Metrorail PRASA (Western Cape)*.[46]

The Labour Appeal Court (LAC) in *K Naidoo & Others v Parliament of the Republic of South Africa*[47] resolved the conflicting interpretation of the term when it endorsed the narrow approach. The LAC held that 'any other arbitrary ground' was not an additional ground on

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37 [2018] 10 BLLR 1012 (LC).
38 Ibid para 31.
39 Christoph Garbers & Peter le Roux 'Employment discrimination law into the future' 2018 (2) *Stell LR* 237.
40 Ibid at 248.
41 Ibid at 257.
42 Ibid at 258.
43 Ibid.
44 Ibid.
45 Ibid. *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) para 46.
46 (2017) 38 *ILJ* 2565 (LC).
47 (2020) 41 *ILJ* 1931 (LAC).

which unfair discrimination is prohibited. The term did not constitute an additional ground as concluding so would result in the EEA being a catch-all for unfair discrimination claims, which would be in violation of s 9 of the Constitution.[48] The LAC in *Minister of Justice and Correctional Services and Others v Ramaila and Others* confirmed the correctness of its judgment in *Naidoo*.[49] The LAC made it clear that the phrase 'any other arbitrary ground' was analogous to the listed grounds and must be treated as a ground regulated similarly to the listed grounds.[50]

Despite the clarity provided by in *Naidoo* and *Ramalia*, Du Toit maintains his position. He criticises the LAC for failing to understand the term 'arbitrary ground' according to its grammatical meaning, instead relying entirely on the context in which the term is used.[51] Du Toit argues that the LAC failed to appreciate the reason for the amendment to the EEA[52] Du Toit's view is supported by Kamalesh Newaj, who submits that the narrow approach renders the term superfluous and leaves employees subjected to differential treatment without any remedies.[53] Muyenga Edward Mugerwa-Sekawabe also supports Du Toit's views[54] and argues that the LAC misinterpreted the Constitutional Court's findings in *President of the Republic of South Africa v Hugo*[55] on the role of a breach of dignity in a discrimination claim based on analogous grounds.[56] He submits that there was no link between unfair discrimination and dignity, as unfair discrimination occurs when conduct benefits or disadvantages others and infringes on their rights or egalitarian principles. [57]

The narrow approach, it is argued, does not leave employees subjected to differential treatment that does not fall under s 6 of the EEA without recourse. Unfair labour practises are prohibited under s 185 of the LRA. The test for an unfair labour practice is whether an employer acted arbitrarily, capriciously or inconsistently, negligently or intentionally.[58] This test aligns with

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48 Ibid para 24.
49 (2021) 42 *ILJ* 339 (LAC).
50 Ibid para 29.
51 Darcy Du Toit 'Discrimination on an 'arbitrary ground' and the right of access to justice' (2021) 42 *ILJ* 1 8.
52 Ibid at 15.
53 Kamalesh Newaj 'Defining discrimination on an arbitrary ground: A discussion of *Minister of Justice & Correctional Services and Others v Ramaila & Others* (2021) 42 *ILJ* 339 (LAC)' (2021) 41 *ILJ* 1405 1413.
54 Muyenga Edward Mugerwa-Sekawabe 'Determining the correct role of the concept of dignity in unfair discrimination claims: A discussion of *Naidoo & Others v Parliament of the Republic of SA* (2020) 4 *ILJ* 1931 (LAC)' (2021) 42 *ILJ* 728.
55 1997 (6) BCLR 708 (CC).
56 Mugerwa-Sekawabe op cit note 54 at 733.
57 Ibid.
58 *Apollo Tyres South Africa (Pty) Ltd v CCMA* [2014] 8 BLLR 748 (LAC) para 52.

the broad approach. If an employee cannot substantiate an unfair discrimination claim on any other arbitrary grounds, they may rely on s 185 of the LRA for relief.

As confirmed by the LAC in *Ramalia*, the right to equality was included in the Constitution to recognise the value of humanity, which is entrenched in being treated the same.[59] Any differential treatment based on attributes that make us unique and are linked to our 'historical experience of South Africa's legacy of oppression,'[60] will result in a breach of human dignity.[61] Considering the purpose of s 9 of the Constitution, it is submitted that dignity cannot be removed from the determination of unfair discrimination claims as is clear from the *Harksen* test.

2.3 *Affirmative action in South Africa*

> 'The primary aim of affirmative action must be to redress the imbalances created by apartheid. We are not… asking for hand-outs for anyone nor are we saying that just as a white skin was a passport to privilege in the past, so a black skin should be the basis of privilege in the future. Nor… is it our aim to do away with qualifications. What we are against is not the upholding of standard as such but the sustaining of barriers to the attainment of standards, the special measures that we envisage to overcome the legacy of past discrimination are not intended to ensure the advancement of unqualified persons, but to see to it that those who have been denied access to qualifications in the past can become qualified now, and that those who have been qualified all along but overlooked because of past discrimination, are at last given their due. The first point to be made is that affirmative action must be rooted in principles of justice and equality'.[62]

These are the words of Nelson Mandela explaining the vision of the EEA. This speech encompasses the purpose of affirmative action in South Africa. The EEA defines affirmative action measures as 'measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational levels in the workforce of a designated employer'.[63] The EEA contains an unexhaustive list of the types of affirmative action measures that designated employers can implement[64] which includes preferential treatment of people from designated groups and numerical goals provided

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59 *Minister of Justice and Correctional Services and Others v Ramaila and Others* op cit note 49 para 24.
60 Ibid.
61 Ibid para 26.
62 GN 1840 GG 18481 op cit note 7 at 5.
63 Ibid.
64 S 15(2) of the EEA.

they do not constitute quotas or create a barrier to prospective or continued employment or advancement of people who are not from designated groups.[65]

The following two categories of designated employers are relevant for this study: employers that employ 50 or more employees and employers that employs less than 50 employees but have an annual turnover equal to or above a prescribed annual turnover threshold for a specific industry set out in schedule 4 of the EEA.[66]

It is not enough for designated employers to simply remove any barriers that impede, prohibit, or limit the employment or career advancement of people from designated groups. Designated employers must take active steps to ensure the appointment or advancement of people from designated groups in the appropriate occupational levels.

The EEA outlines actions designated employers must take to discharge their obligations. The first is the preparation of an employment equity plan (EE Plan),which records, among other things, identified employment barriers that affect people from designated groups, the affirmative action measures to be implemented to address the barriers, numerical goals to achieve equitable representation of suitably qualified people from designated groups in the workplace and the period within which the goals will be achieved.[67] Designated employers are required to follow a prescribed process in preparing their EE Plans which include determining the degree of underrepresentation of people from designated groups in various occupational levels in that employer's workforce.[68]

Guidance on determining the under-representation of people from designated groups is found in s 42, which deals with assessing compliance with the EEA. Section 42 of the EEA provides the director general of the Department (DG) with the discretion to determine compliance with the EEA by considering the extent to which suitably qualified persons are represented in relation to the demographic profile of the national and regional EAPs.

In setting numerical goals, designated employers must compare the composition of designated groups at each occupational level against the EAPs and set numerical goals to address any underrepresentation. Unlike the Code of Good Practice on the Preparation, Implementation and

65 S 15(3) and 15(4) of the EEA.
66 Definition of designated employer set out in the EEA.
67 S 20 of the EEA.
68 S 19(2) of the EEA.

Monitoring of the Employment Equity Plan of 1999[69], which sets out a list of nine factors[70] that designated employers must consider when setting numerical goals, the latest Code of Good Practice on the Preparation, Implementation and Monitoring of the Employment Equity Plan of 2017 only lists two factors.[71] These factors are planned vacancies and the natural attrition of employees. The wording of the latest Code does not suggest that designated employers are prohibited from considering any other factors that would influence the numerical goals that they set. While the purpose of setting numerical goals is to guarantee that the workforce represents the country's demographics, considering additional factors allows designated employers to set numerical targets that are not identical to the EAPs. The DG does not require complete adherence to the numerical targets. The DG will evaluate any reasonable justification offered by an employer to justify its failure to comply with the EEA.[72]

Designated employers are not forced to set numerical goals that are unrealistic, impossible, or would have a negative impact on their business operations. As a result, the EEA is not unreasonable in its pursuit of employment equity in South Africa.

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69 GN 1360 GG 20626 of 23 November 1999.

70 These factors are a) the degree of under-representation of employees from designated groups in each occupational category and level in the employer's workforce; b) present and planned vacancies; c) the provincial and national economically active population as presented in form EEA 8; d) the pool of suitably qualified persons from designated groups from which the employer may be reasonably expected to draw for recruitment purposes; e) present and anticipated economic and financial factors relevant to the industry in which the employer operates; f) economic and financial circumstances of the employer; g) the anticipated growth or reduction in the employer's workforce during the time period for the goals; h) the expected turnover of employees in the employer's workforce during the time period for the goals; and i) labour turnover trends and underlying reasons, specifically for employees from designated groups.

71 GN 393 GG 40817 of 28 April 2017.

72 S 42 of the EEA.

3. Challenges to Employment Equity

Employment equity has been challenged for various reasons. Some of these reasons are that affirmative action measures limit the right to equality or constitute unfair discrimination and that the numerical targets/goals set by designated employers amount to quotas that contravene the EEA. These challenges are explored below.

3.1 *Limitation of the right to equality and unfair discrimination*

The rights guaranteed by the Bill of Rights form the cornerstone of our constitutional democracy[73] and must be respected, protected, promoted, and fulfilled by the State.[74] Notwithstanding the importance of these rights, they are not absolute and may be limited. The circumstances under which the rights may be limited are prescribed by the right itself, s 36 of the Constitution, or elsewhere in the Bill of Rights.[75]

Section 9 of the Constitution does not set out an express limitation to the right to equality. Instead, the section sets out a defence that may be raised in the face of an unfair discrimination claim.[76] Section 9(2) empowers the Legislature to devise and implement legislative and other measures to protect or advance persons previously disadvantaged by unfair discrimination. These legislative or other measures are known as affirmative action or restitutionary measures, and they are considered part of the right to equality.[77]

In *Minister of Finance and Others v FJ van Heerden*, the Constitutional Court was the first to evaluate whether an affirmative action measure violated or lawfully limited the right to equality. Moseneke J, writing for the majority, held that achieving equality is not only a right in the Bill of Rights but 'is a standard that must inform how all laws must be tested for constitutional muster'.[78] The Court held that the equality assessment should follow a sensitive approach that considers the history, place of complainants in society, and whether the claim adds or removes the advantaged experience in the relevant context.[79] The Court found that the right to equality will not be contravened by affirmative action measures that meet the internal test established by s 9(2) of the Constitution.[80] The court derived a three-stage test that must be

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73 S 7(1) of the Constitution.
74 S 7(2) of the Constitution.
75 S 7(3) of the Constitution.
76 *FJ Van Heerden* case op cite note 25 para 32.
77 Iain Currie & Johan De Waal *The Bill of Rights Handbook* 6th ed (2015) 241.
78 *FJ Van Heerden* case op cite note 25 para 22.
79 Ibid para 27.
80 Ibid para 32.

used to determine whether affirmative action measures pass constitutional muster. This test is as follows:

> 'It seems to me that to determine whether a measure falls within section 9(2) the enquiry is threefold. The first yardstick relates to whether the measure targets persons or categories of persons who have been disadvantaged by unfair discrimination; the second is whether the measure is designed to protect or advance such persons or categories of persons; and the third requirement is whether the measure promotes the achievement of equality'.[81]

An affirmative action measure that complies with s 9(2) will not be considered to be unfair discrimination, even if it is based on a listed ground.[82] A measure that does not comply with the objectives of s 9(2), which is to promote the achievement of equality, and protect and advance the people disadvantaged by unfair discrimination, will have to be evaluated against the prohibition of unfair discrimination.[83] Once it is found that the measure contravenes s 9, the general limitation provision (s 36) will be applied to determine if the contravention can be justified by the limitation of the right to equality.[84]

The Constitutional Court in *SAPS v Solidarity obo Barnard*[85] considered the fairness of affirmative action measures in s 9 of the Constitution and s 6(1) of the EEA. The Court upheld the *Van Heerden* test as the test to use when deciding whether affirmative action measures are in accordance with s 9(2) of the Constitution and s 6(1) of the EEA.[86] The Constitutional Court confirmed that affirmative action measures were not immune to scrutiny and could be challenged based on the legality of how employers implemented and executed them.[87] Interestingly, the Court did not formulate a test that could be used when faced with such challenges. However, it stated that a test different from the *Van Heerden* test should be applied and this is a rationality test.[88]

In the *Barnard* case, two minority judgements agreed with the majority on the relevant test for determining affirmative action measures' compliance with s 9(2) of the Constitution, and that such measures are not exempt from further scrutiny. The minority judgments disagreed with

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81 Ibid para 37.
82 Currie & De Waal op cit note 77 at 242.
83 Ibid.
84 Ibid at 153.
85 (2014) 35 *ILJ* 2981 (CC).
86 Ibid para 36.
87 Ibid para 38.
88 Ibid para 39. The Constitutional Court explained that the principle of legality required affirmation action measure to be rationally related to the terms and objects of the measure.

the majority's proposed rationality test for establishing the lawfulness of the implementation and application.

Cameron J, writing the first minority judgment, accepted rationality as the bare minimum test; however, noted that this was not the only applicable test.[89] He held that fairness should also be used to determine the lawfulness of the implementation of affirmative action measures.[90] Cameron J found fairness appropriate as it ensured that the affirmative action measures were consistent with the purpose of the EEA and fundamental constitutional values.[91]

In the second minority judgement, Van der Westhuizen J disagreed with both Cameron J and Moseneke J on the appropriate evaluation criterion. Van der Westhuizen J saw no reason to distinguish between the EE Plan and its implementation.[92] He argued that the same test should apply to both.[93] Once the *Van Heerden* test has been used, courts should consider whether the implementation affects other rights, particularly the right to human dignity. Van der Westhuizen J determined that determining the proportionality of the impact on the right would be necessary.[94] It is submitted that rationality and fairness are not the same tests.[95] Rationality requires a decision to be justified by evidence, while fairness involves balancing interests to reach a fair conclusion for the parties involved.[96]

Shamima Gaibie opines that fairness may not be an appropriate standard for determining the lawful implementation of affirmative action measures.[97] Gaibie submits that fairness is a standard predominately found in the LRA and employment relations generally, but not in the context of the right to equality.[98] Using this test can raise a dispute similar to an unfair labour practice which is different from an unfair discrimination dispute.[99] Regarding the proportionality test devised by Van der Westhuizen J, Gaibie argues that it is encompassed in

89 Ibid para 94.
90 Ibid para 97.
91 Ibid para 98.
92 Ibid para 133.
93 Ibid.
94 Ibid para 165 to 166.
95 Emma Fergus 'Towards Unity – Reconciling Fairness and Rationality in Affirmative Action Disputes' 2015 36 *ILJ* 40 56.
96 *SAPS* op cit note 85 para 57.
97 Shamima Gaibie 'The Constitutional Court decision in *Barnard*: A sequel to the *Van Heerden* judgment' (2015) 36 *ILJ* 80 93.
98 Ibid.
99 Ibid.

the *Harksen* test.[100] Accordingly, should the *Van Heerden* test not succeed, the *Harksen* test should be applied, as stated in *Van Heerden*.[101]

The Labour Court in *eThekwini Municipality v Nadesan and Others*[102] resolved this issue by formulating a two-stage test for the lawfulness of restitutionary measures implemented in terms of the EEA.[103] The test combines the rationality and fairness tests. The author examines whether the sectorial targets will pass constitutional muster in the following chapter.

3.2 *Numerical goals vs quotas*

The EEA fails to define numerical goals, quotas, or what constitutes an absolute bar. The uncertainty on what these three concepts has resulted in many people taking the position that affirmative action measures violate the EEA.

The latest Code of Good Practice clarifies numerical goals, defining them as the workforce profile that a designated employer wishes to attain at the end of the EE Plan based on race, gender, and disability composition.[104] This definition does not assist employers in determining whether the numerical goals will also be considered quotas or an absolute bar.

The Constitutional Court has clarified the nature of quotas and numerical goals in *Solidarity obo Barnard* and *Solidarity v Department of Correctional Services and Others.*[105] The Court in *Barnard* held that 'the primary distinction between numerical targets and quotas lies in the flexibility of the standard'.[106] Numerical goals serve as flexible employment guidelines for a designated employer.[107] This finding was confirmed by the court in *Department of Correctional Services,* which reiterated that quotas were rigid and numerical targets were flexible.[108] At the same time, numerical goals allowed employers a greater degree of flexibility in setting and complying with them.[109] The Constitutional Court did not define what amounted to an absolute bar, however, applying the principles to the facts in *Barnard*, the Court held that the fact that Ms Barnard had been promoted to a different role meant that the SAPS' EE Plan did not bar the advancement of white women in its organisation.[110]

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[100] Ibid.
[101] Ibid.
[102] (2021) 42 *ILJ* 1480 (LC).
[103] Ibid para 35.
[104] GN 393 GG 40817 op cit 71 at 7.4(*a*).
[105] (2016) 37 *ILJ* 1995 (CC).
[106] Ibid para 54.
[107] Ibid.
[108] Ibid para 51.
[109] Ibid.
[110] *Solidarity obo Barnard* op cit note 85 para 67.

The minority in *Department of Correctional Services* disagreed with the premise that where an EE Plan allows for exceptions to the execution of numerical goals targets, the numerical goals are flexible. According to Nugent AJ, the assessment of numerical goals' flexibility should not be based on exceptions where the numerical goals do not apply.[111] It should be based on the general application of the numerical goals.[112] In Nugent AJ's view, the SAPS' numerical goals did not apply to exceptional cases and, as such, no discretion was afforded to the employer regarding those exceptional cases.[113] Nugent AJ held that the test for quotas should not be based on the nature and scope of the flexibility afforded by the deviation clause of the plan.[114] However, the flexibility should be based on the general application of the plan and compliance with the goals.[115]

Andre Louw defines numerical goals as 'guidelines used by employers and determined with reference to a specific workplace'.[116] On the other hand, he explains quotas as mandatory targets imposed on or determined by designated employers that must be achieved at any cost.[117] Interestingly, Louw contends that the nature of numerical goals evolves into quotas once they are set and included in an EE Plan.[118] In his view, numerical goals become quotas because non-compliance with the goals will result in non-compliance with equitable representation in the workplace.[119] Louw relies on *Public Service Association v Minister of Justice*[120] to contend that the race of a prospective incumbent of a post for which a numerical goal has been set is elevated to become the decisive factor for employment, thus transforming the numerical goals into a hard policy. [121]

While the author agrees that an applicant's race becomes important during the job application process, it is submitted that race is not elevated to be an inherent job requirement that must be achieved at all costs. Once an employer has established numerical goals, those goals should be flexible, especially since employers are only required to appoint suitably qualified individuals

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111 Ibid para 113.
112 Ibid.
113 Ibid.
114 Ibid para 93.
115 JJ Pretorius 'The limitation of definitional reasoning regarding "quotas" and "absolute barriers" in affirmative action jurisprudence as illustrated by *Solidarity v Department of Correctional Services'* (2017) 28 *Stel LR* 269 280.
116 Andre Louw 'Extrapolating "equality" from the letter of the law: Some thoughts on the limits of affirmative action under the Employment Equity Act 55 of 1998' (2006) 18 *SA Merc LJ* 336 338.
117 Ibid.
118 Ibid at 345.
119 Ibid.
120 [1997] 5 BLLR 577 (T) at 641CD
121 Louw op cit note 116 at 339.

from designated groups. The EEA does not oblige designated employers to appoint people who match the racial standards but do not have the necessary competency for the identified roles. Numerical goals are guidelines, and their flexibility is included into the process of employing suitably qualified individuals. Employers are granted the discretion to evaluate whether a person is suitably qualified for a position and, in accordance with their EE Plans, should prefer people from designated groups in those situations. Assume that a suitably qualified person from a specific racial group is not available, in that case, an employer may be permitted to deviate from the numerical goals depending on the wording of their EE Plan. EE Plans often allow employers to appoint employees from the next underrepresented group or to deviate entirely from the need to ensure equitable representation and appoint a person who is not from a designated group, but who is suitably qualified for the role.

In summation the flexibility granted to employers in setting numerical goals and achieving those goals defines the status of the goals. The substance of the EE Plans is also an essential component in defining the flexibility that employers have in this regard.

4. Amendments to the Employment Equity Act

4.1 *Overview of proposed amendments*

a) Limitation of designated employers

The EEAA will remove two types of designated employers and will only recognise employers who employ 50 or more employees as designated employers.[122] Voluntary compliance with the EEA and compliance by virtue of annual turnover will be removed. The amendment is motivated by the need to reduce the regulatory burden on small employers and to free up some capacity to enable the Department to issue certificates of compliance under s 53 of the EEA.[123] While there may be merit to this argument, the limitation of the definition of designated employer has the potential of regressing transformation in workplaces.

Employers with fewer than 50 employees but whose annual turnover exceeds the statutory threshold make a substantial contribution to the South African economy. Given this, these employers should be charged with ensuring the equitable allocation of opportunities in the workplace. They should not be excluded from complying with the EEA because they do not have the requisite number of employees on their books. The amendment will create an escape for many employers who should be required to comply with the EEA. Employers may reduce to or retain their workforce below 50 employees to avoid compliance with the EEA.

Notwithstanding this escape, the amendment contradicts South Africa's approach to advancing previously disadvantaged people. Management control, which measures the representation of Black people at different occupational levels, is one of the elements that form part of the scorecard in the Code of Good Practice on Broad-Based Black Economic Empowerment (B-BBEE Codes).[124] The B-BBEE Codes set out the measures that must be implemented to achieve the objectives of the B-BBEE Act.[125] The B-BBEE Act is one of the pieces of legislation that was enacted to give effect to s 9 of the Constitution.[126]

While compliance with the B-BBEE Codes is voluntary, once an entity elects to comply with the B-BBEE Codes, its annual turnover is considered to classify the entity and determine its required compliance.[127] The B-BBEE Codes recognise three types of entities. First, an

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[122] Definition of designated employer in the EEA.
[123] GN 798 GG 43535 op cit note 17 at clause 2.3, p 6.
[124] GN 1019 GG 36928 of 11 October 2013.
[125] Broad-Based Black Economic Empowerment Act 53 of 2003.
[126] Thandiwe Matthews and Charmika Samaradiwakera-Wijesundara 'The fiction of transformation: an analysis of the relationship between law, society and the legal profession in South Africa' (2015) 31 *SAJHR* 553 at 564.
[127] GN 1019 GG 36928 op cit note 124 at statement 000: general principles and the generic scorecard, 4, 5 and 6.

exempted micro enterprise (EME) which has an annual turnover less than R10 million.[128] Secondly, a qualifying small enterprise (QSE) which has an annual turnover of between R10 to R50 million.[129] Lastly, a large entity has an annual turnover of R50 million and more.[130] EMEs are exempted from complying with the B-BBEE Codes, while QSEs and large entities are required to comply with the scorecard's compliance targets which are different for the different types of entities. If the EEAA is implemented in its current form, these entities will be required to comply with the management control element but not chapter three of the EEA. The author submits that QSEs and large entities should be at the forefront of driving transformation in South Africa as they have the capacity to train, retain, and promote suitably qualified employees in their workplaces.

By removing these categories, the Department may be able to reduce its regulatory burden. However, it will have a negative impact on employment equity because certain employers would no longer be compelled to ensure that their workplaces match the demographics of the country.

b) Sectorial numerical targets

One of the most significant amendments that the EEAA will introduce is the sectorial targets that designated employers must comply with. The Minister will determine the national economic sectors that the sectorial targets will apply.[131] Before doing so, the Minister must develop and publish a criterion for determining the national economic sector.[132] Section 20(2A) of the EEAA requires the numerical goals set by designated employers to comply with the applicable sectorial targets. Ultimately, designated employers must replace their numerical goals with the sectorial targets.

The distinction between numerical goals and numerical targets is critical in understanding the severity of the impact of the amendments introduced by s 15A of the EEAA. The Code defines numerical targets as 'the entire workforce profile in terms of race, gender and disability, and not the difference between the current and projected workforce profiles the employer seeks to

[128] Ibid at 4.
[129] Ibid at 5.
[130] Ibid at 6.
[131] S 15A(1) of the EEA.
[132] S 15A(2) of the EEA.

achieve by the next reporting period'.[133] The definition of numerical goals has already been set out above.

The EEAA's specific reference to designated employers' numerical goals and not numerical targets is immaterial, as the other provisions of the EEAA confirm the redundancy of the designated employers' numerical targets. Compliance with the sectorial targets is a factor the Minister considers when determining whether to issue the compliance certificate.[134] A compliance certificate will be valid for 12 months.[135] As such, a designated employer's numerical targets will be considered in determining whether the employer will be able to comply with the sectorial targets at the end of the EE Plan for the purposes of issuing a compliance certificate. The Minister strives to influence the achievement of equitable representation in the long and short term.

The EEAA does not specify if the sectorial targets will be reviewed or amended, and if so, how frequently the review will occur and what will determine the amendment. Reviewing the sectorial targets is a critical process that must be included in the EEA. Previously, equitable representation was based on the demographics of the country using the EAPs. The EEAA includes no foundation for sectorial targets, save for a provision for consultation with the National Minimum Wage Commission, which raises the question of how the targets were or will be reviewed. The imposition of the sectorial targets potentially changes the benchmark for equitable workplace representation. Despite the EEA retaining provisions confirming that equitable representation will be assessed with reference to the applicable EAPs, it is unclear whether the sectorial targets will replace the EAPs.[136]

The legal implications of removing designated employers' discretion when setting numerical goals and the rigid nature of the sectorial targets are discussed below.

c) Administration and enforcement of the EEA

Section 53 of the EEA set out the Minister's authority to issue compliance certificates to employers and designated employers who comply with chapters two and three of the EEA.[137] This certificate is a requirement for the conclusion of any contracts with organs of state for the provision of supplies, services, or letting. Failure to provide the certificate of compliance with

[133] GN 393 GG 40817 op cit note 71 at 7.4(*b*).
[134] S 53(6)(*a*) of the EEA.
[135] S 53(3) of the EEA.
[136] Shamima Gaibie & Prinoleen Naidoo 'The Employment Equity Amendment Bill 2018: Grappling with an evaluation of 'equity' 20 years later' (2010) 41 *ILJ* 88 96.
[137] S 53 of the EEA.

any contract will disqualify the employer from the contract or result in the cancellation of the contract. This section is not new; however, it has not been operational since it was introduced to the EEA.

Section 53 captures South Africa's 'carrot-and-stick approach' to employment equity.[138] The carrot is the benefit that employers can enjoy if they have a compliance certificate, while the stick is providing the Minister with authority to prescribe sectorial targets for employers.[139] The second stick refers to the fines imposed on employers who do not comply with the provisions of the EEA.[140] The amendment introduced by the EEAA sets out the factors that the Minister will consider when issuing compliance certificates.[141] The Minister must consider whether, among other things, the employer met the sectorial targets and whether there was no finding by the CCMA or a court within the previous three years that the employer breached the prohibition on unfair discrimination, and whether the CCMA issued an award against the employer during the previous three years for failing to pay the minimum wage in accordance with the National Minimum Wage Act.[142]

The government has concluded a settlement agreement with Solidarity to *inter alia* settle Solidarity's challenge to the constitutionality of the EEAA.[143] The settlement agreement deals with two aspects that are important for the administration and enforcement of the EEA. First, it sets out criteria that employers will consider when preparing and implementing their EE Plans. Some of these factors are like those set out in the old Code and are inherent requirements of the job, pool of suitably qualified persons, turnover and natural attrition of employees. Secondly, it sets out a list of seven grounds that employers can rely on to justify non-compliance with their numerical targets and the sectorial targets. This settlement agreement does not have the status of enforceable law until it is included in any legislation, and as such, it has not been thoroughly explored in this study.

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[138] Debbie Collier 'The Employment Equity Amendment Bill B14B – 2020: Innovating towards equality or kicking the can down the road?' (2023) 44 *ILJ* 1 3.
[139] Ibid.
[140] John Grogan *Employment Rights* 3rd ed (2019) 373.
[141] S 53(6) of the EEA.
[142] Ibid.
[143] *Solidarity v The Republic of South Africa* Settlement Agreement, available at *https://www.webberwentzel.com/News/Documents/2023/Settlement-agreement-28-June-2023.pdf,* accessed on 15 July 2023.

4.2 *Possible challenges to the proposed numerical targets*

Section 15A of the EEAA encompasses South Africa's shift from a self-regulated affirmative action approach to a statutorily prescribed approach. This new approach has a few shortcomings that may be the subject of further litigation.

The Minister provides himself with the authority to determine the criteria that he will use to identify the national economic sectors to which the EEA will apply. The Constitution prescribes that there must be a separation of powers in the drafting, application, and monitoring of legal principles in South Africa.[144] It is submitted that a department cannot provide its Minister authority to use a certain power while also developing criteria to be utilised by the same Minister to exercise the same authority. It is anticipated that the EEAA will be challenged on this ground.

There are three further possible grounds for challenging the statutorily-imposed affirmative action approach . These are that the sectorial targets amount to quotas, the statutorily-imposed affirmative action approach contravene s 9 of the Constitution, or that its application is not fair, resulting in it being an unfair affirmative action measure. Alternatively, the application of prescribed affirmative action measures can be argued to amount to unfair discrimination.

a) Do the sectorial targets amount to quotas by virtue of being imposed by the Minister?

The amendments to s 20 make sectorial targets the goal for any numerical targets set by designated employers. Even though numerical goals are linked with flexibility and discretion, the numerical goals that designated employers will set will not be based on flexibility or their discretion.

Designated employers' numerical goals are required to comply with the sectorial targets, and employers are not provided with any discretion to decide otherwise. The only reprieve seems to be that the sectorial targets must be achieved within five years. There is a stark difference between compliance under the new approach and equitable representation of people from designated groups. Currently, the standard of complying with numerical goals is the extent to which the designated employer has ensured equitable representation of designated groups based on the EAPs. Using the new approach, the DG will consider whether a designated employer has complied with the sectorial targets to determine whether they have implemented employment equity in their workplaces. When deciding whether to issue a compliance

[144] S 44(1) of the Constitution confers the power to pass or amend any legislation on the National Assembly. Section 85 of the Constitution confirms that members of cabinet are responsible for implementing national legislation.

certificate to such employers, the Minister will consider the same factors. Compliance with the sectorial targets lacks a benchmark, therefore full compliance is regarded as the standard.

The Minister has proposed this amendment to ensure equitable representation of suitably qualified people from designated groups at each occupational level. Yet, compliance with the sectorial targets is not considered part of that investigation. Instead, compliance with the sectorial targets is a stand-alone factor that is determined separately. Making compliance with these targets a stand-alone factor elevates the importance of compliance with the targets and the consequences of non-compliance.

It is submitted that the sectorial targets that the Minister will set amount to quotas. While a designated employer will have the right to provide the DG, and now the Minister, with reasonable grounds to justify failure to comply with the sectorial numerical goals, there is no discretion provided to a designated employer in respect of setting or complying with the numerical targets. Other than ensuring compliance with the goals, a designated employer can do nothing. The justification for a failure to comply with the sectorial targets is not the exercise of discretion or enforcing a flexible target. It considers acts beyond the designated employer's control that resulted in the non-compliance and are reasonably justifiable.

The criteria set out in the settlement agreement on the setting and implementing of sectorial targets has the potential of providing employers with the necessary discretion when setting their numerical targets. However, it is unclear how this discretion will work with the current wording of s 20 which requires a designated employer's numerical goals be aligned with the sectorial targets. The discretion and he flexibility may be of no effect.

The DG has been quoted as saying that the sectorial targets are not quotas as they provide designated employers with the discretion not to comply if they have practical reasons.[145] The Department has also based this view on the fact that employers retain the power to determine their own numerical targets.[146] The author maintains that the wording of the EEAA does not support this view. The sectorial targets will not be considered a guideline for the desired composition of a workplace but they are what the Minister requires workplaces to comprise of. The sectorial targets fall squarely within the definition of quotas.

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[145] Staff Writer 'Quotas vs targets – what South Africa's planned 'transformation' laws will change', available at *https://businesstech.co.za/news/business/494005/quotas-vs-targets-what-south-africas-planned-transformation-laws-will-change/*, accessed on 15 July 2023.

[146] Department of Employment and Labour 'Employment and Labour highlights EE amendments and proposed sector EE targets', available at *https://www.gov.za/speeches/employment-and-labour-highlights-ee-amendments-and-proposed-sector-ee-targets-16-may-2023*, accessed on 15 July 2023

b) Contravention of the right to equality

The move to statutorily imposed numerical targets will comply with the first two steps of the *Van Heerden* test. However, an argument can be made that the move may not withstand the last step of the van Heerden test. The final step requires an analysis of whether the restitutionary measure promotes equality. When discussing this step, Moseneke J emphasises that the impact of the restitutionary measure on the broader society should be appreciated.[147] Restitutionary measures should also not constitute an abuse of power or impose substantial and undue harm on those excluded.[148] Restitutionary measures will therefore threaten the constitutional goal of an open and equal democratic state if they amount to an abuse of power.[149]

As Gaibie has stated, this assessment cannot be done prospectively, it must be considered in the circumstances of each case.[150] The only difference, in this case, is that the circumstances of each designated employer will depend on the sectorial targets. The rationality of the means selected to advance equitable representation plays a significant role in determining whether the imposition of the target amounts to an abuse of power. While the sectorial targets will promote workplace equality, they may not be the most appropriate means to achieve the end. Moving from self-regulation to statutorily-imposed affirmative action measures may not be the most appropriate approach to achieve equity without adversely affecting non-designated groups and business operations.

The issue, in the author's opinion, is not that transformative goals are not being established or are not capable of being set. The challenge is compliance with those goals to ensure equitable representation in workplaces. Employers presently have the freedom to create their own goals in accordance with the EAPs and explain why they have not been met. The Minister should establish a strategy or plan to encourage employers to comply with their numerical goals. Where adequate alternative options are available, the Minister's decision to impose stringent requirements on designated employers may be regarded an abuse of power.

c) Unfair affirmative action

Should the sectorial targets withstand a constitutional challenge, they would not be excused. The fairness and rationality of their implementation will be the subject of the test devised in

147 *FJ Van Heerden* case op cit note 25 para 44.
148 Ibid.
149 Ibid.
150 Shamima Gaibie 'Affirmative action – concepts and controversies' (2014) 35 *ILJ* 2655 2267.

eThekwini Municipality.[151] This test considers internal and external factors influencing the finding that affirmative action measures are not rational.

The sectorial targets may fail the rationality test when considering two factors: the correctness of the demographic statistics they are based on and whether equitable representation has been met. As stated above, it is unclear how the Minister has determined the sectorial targets. However, there is no indication that they will be linked to the EAPs. If the targets do not reflect the national or regional demographics, they will defeat the entire purpose of equitable representation in workplaces. Therefore, the basis of the sectorial targets will be very important in determining their rationality. The extent to which the targets deviate from the EAPs will also be considered. If designated employers achieved equitable representation through their EE Plans, any sectorial targets that seek to introduce targets that differ from the results that have already been achieved will amount to moving the goalposts and may be considered irrational.

Except for the two factors mentioned, there is no countervailing evidence that may, despite the rational application (if the sectorial targets are found to be rational), establish greater external harm to affected parties than the redress the measure would provide to designated groups until the sectorial targets are finalised, applied, and possibly challenged.

[151] *eThekwini Municipality v Nadesan and others* [2021] 6 BLLR 598 (LC).

5. Recommendations and Conclusion

5.1 *Economic consequences of proposed amendment*

Achieving workplace transformation is more complex than simply requiring employers to meet sectorial targets. Transformation necessitates hiring employees from designated groups, the creation of new roles, training, and the promotion of suitably qualified individuals. It also necessitates training current staff members to enable them to become suitably qualified for roles other than the lower roles, which people from designated groups predominately occupy. Employers must pay to advance any employee within their organisation. A socio-economic impact assessment of the EE Amendment Bill was conducted.[152] Unfortunately, this report focuses only on the monitoring, evaluation, and enforcement systems required for the implementation of the amendments. The report provides that there will be no additional costs for the implementation of the amendments on businesses as employers already have the necessary systems and HR personnel to ensure compliance with the EEAA.[153]

Many employers associate the implementation of employment equity with an adverse financial impact on their business rather than the commitment to promote equality in workplaces.[154] A commitment to the implementation of employment equity is required from designated employers.[155] This commitment should shift the perception of employment equity from a regulatory requirement to a component of business strategy.[156] Individual accountability for this commitment will be required for a change in attitudes in the workplace.[157] It is submitted that senior management's commitment will trickle down to all levels of management who are in charge of recruiting employees.[158].

While the new approach has the potential to produce results, it also has the potential to undermine the slow but steady progress towards employment equity that has already been made. The quotas may be met, but at the expense of internal career advancement and the development of an inclusive, diversity-affirming culture.[159]

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[153] Ibid at 19.
[154] Linda Human, 'Cost or catalyst? Some comments on the business case and conditions for effective employment equity' (2002) 14 *SA Merc LJ* 293 295.
[155] Ibid.
[156] Ibid at 300.
[157] Matilda Lasseko-Phooko and Safia Mahammed 'The challenges to gender equality in the legal profession in South Africa: A case of substantive equality as a means for achieving gender transformation' (2021) 21 *AHRLJ* 494 519 and 520.
[158] Ibid.
[159] Human op cit note 154 at 295.

The Department should consider introducing incentives to encourage EEA compliance. The use of compliance certificates is part of a strategy to encourage designated employers to comply with the EEA. Unlike in the B-BBEE arena, where indirect economic activities with the State are covered, s 53 only applies to employers who conclude contracts with the State. It is inappropriate to limit the application of s 53 to direct interaction with the State. Not all designated employers perform direct business with the State. The Department should make having a compliance certificate mandatory for all designated employers who do business with the State, whether directly or indirectly. Additionally, suppliers and subcontractors of designated employers who have direct contracts with the State must also have a certificate of compliance. This is the same strategy used in the implementation of the B-BBEE Codes. This approach has been successful in the procurement of goods and services from entities with favourable B-BBEE status. This has prompted businesses to improve their B-BBEE status. In these cases, the incentive is increased competitiveness and growth because of increased business transactions. If this or a similar approach is taken in terms of employment equity, designated employers may be committed to meeting the EEA's objectives.

One of the concerns with the statutorily-imposed affirmative action approach is tokenism.[160] However, this can be alleviated by integrating mechanisms used in B-BBEE to rule out any possible tokenism when determining compliance with the numerical sectorial targets. When assessing an employer's compliance with the sectorial targets, a labour inspector can use the same principles used by verification agencies (outlined in the verification manual[161]) to determine whether a black person has the authority associated with the role they occupy and is able to execute the functions of such a role. In cases where there is an indication or suspicion of tokenism, labour inspectors may interview the identified person to determine their authority.

While applying principles from the B-BBEE arena may appear attractive, their application to employment equity will result in duplication of tasks. In other words, verification of compliance with the EEA done by the Department will also be done by a verification agency when determining compliance with the management control element. Compliance with the EEA should be made a qualification criterion for assessment against management control for those entities that elect to comply with the B-BBEE Codes. The qualification requirement should be the compliance certificate. This will establish a link between compliance with the EEA and the B-BBEE Codes. This approach is not new, and it is currently being used in the

[160] Ibid at 338.

B-BBEE Codes' skills development element. Submitting a workplace skills plan, annual training report, and pivotal report in accordance with the Skills Development Act[162] is a qualification requirement for assessment against the B-BBEE Codes' skills development element.[163]

5.2 *Quotas*

Implementing quotas will have an impact on progress towards equitable workplace representation. Affirmative action, understandably, necessitates the use of numbers to track progress towards the EEA's goals. Assigning specific numbers that employers must follow will not result in more equitable representation.[164] This is because meeting those targets does not take into account economic realities, operational requirements, or any other factors.

The author disagrees with the need for sectorial targets; however, if the targets are implemented, compliance with them should not be considered independent of the EEA's goal. The EEA's goals are to ensure equitable representation of suitably qualified individuals from designated groups. This should be the standard used to determine EEA compliance. Compliance with numerical targets, whether statutorily mandated or not, should be a factor in determining equitable representation of suitably qualified people from designated groups. Given the current economic climate, any reasonable progress towards achieving this goal should be recognised, provided that reasonable grounds for noncompliance are advanced. However, the Department should take a firm stance against employers who have not made any progress, especially when the opportunity to achieve the objectives has presented itself.[165]

5.3 *Effective enforcement*

The enforcement of the EEA is important for the achievement of its objectives. Rycroft correctly maintains that enforcement will contribute to determining whether the changes introduced by the EEA are effective.[166] It is submitted that employers will underestimate the consequences of failing to comply with the EEA in the absence of effective enforcement of its provisions. Enforcement should include an assessment of the reasonableness of the numerical targets set by employers considering the economic climate and the operational needs of the

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[163] GN 1019 GG 36928 op cit note 124 at statement 300: the general principles for measuring skills development, 3.1.

[164] J Faundez 'Promoting affirmative action' (1994) 15 *ILJ* 1187 1192.

[165] Ibid at 1193.

[166] Marié McGregor 'Blowing the whistle on affirmative action: The future of affirmative action in South Africa (Part 2)' (2014) 26 *SA MERC LJ* 282 291.

employers. This is necessary to prevent employers from setting low goals that do not contribute to achieving equitable representation in the workplace. Inspectors would be required to scrutinise EE Plans submitted by designated employers, as well as the numerical targets they have set.

It is noteworthy that the Department wishes to take decisive steps towards achieving equitable workplace representation. However, the shift in approach is significant and will have far-reaching consequences for equitable representation in general. The limitation of the definition of designated employers, as well as the imposition of sectorial targets, will have a negative impact on the achievement of the objectives of the EEA. The Department introduces amendments to the EEA in circumstances where the EEA has not been utilised to its full potential. Section 53 has always been a part of the EEA, but its operation has been suspended. According to Gaibie and Naidoo, the effect of s 53 was to give employers enough time to comply with the EEA.[167] It is further submitted that the Department should have made s 53 effective and used it in conjunction with the current self-regulated approach to employment equity to determine whether penalising employers by not issuing the compliance certificate would achieve the desired result. This was the original basis for the carrot approach envisaged in the Green Paper on Employment and Occupational Equity in South Africa which formed the basis of drafting the EEA and contained government's employment equity strategy.[168]

Finally, the author contends that the Department should only have taken such a drastic step if the full operation of the EEA did not improve equitable representation, which, as previously stated, will not be without challenges.

[167] Gaibie & Naidoo op cit note 136 at 96.
[168] GN 804 GG 17303 of 1 July 1996.

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