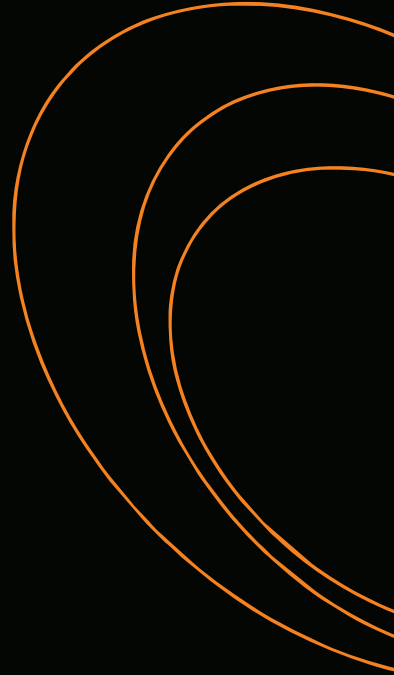




SOLIDARITEIT  
SOLIDARITY

Solidarity's  
**REPORT**  
on South Africa



**Committee on the Elimination of Racial Discrimination**

November 2023

## CONTENTS

<b>NOMENCLATURE</b> .....	<b>3</b>
<b>EXECUTIVE SUMMARY</b> .....	<b>4</b>
<b>OBJECTIVE</b> .....	<b>5</b>
<b>BACKGROUND</b> .....	<b>6</b>
<b>STATUTORY GUIDING PRINCIPLES</b> .....	<b>7</b>
GUIDING PRINCIPLES EMANATING FROM ICERD .....	7
GUIDING PRINCIPLES EMANATING FROM THE EEA .....	8
GUIDING PRINCIPLES EMANATING FROM THE CONSTITUTION.....	10
<b>SOUTH AFRICA'S RACE OBSESSION</b> .....	<b>11</b>
THE EMPLOYMENT EQUITY AMENDMENT ACT (NO. 4 OF 2022) .....	11
SECTORAL TARGETS.....	12
TOURISM RELIEF FUND .....	13
TOURISM EQUITY FUND.....	13
<b>GENERAL SUBMISSIONS</b> .....	<b>14</b>
INDEFINITE PURSUIT OF STATISTICAL REPRESENTATIVITY .....	15
THE SAHRC AND NEED-BASED AFFIRMATIVE ACTION.....	16
<b>PROPOSED NUANCED GUIDING PRINCIPLES</b> .....	<b>17</b>
<b>APPROPRIATE RECOMMENDATIONS</b> .....	<b>17</b>

## NOMENCLATURE

For ease of reference and easier reading, the following abbreviations are used in this report:

- the Constitution of the Republic of South Africa Act, No. 108 of 1996 is referred to as the "Constitution";
- the Employment Equity Act, No. 55 of 1998 is referred to as the "EEA";
- the Broad-based Black Economic Empowerment Act, No. 53 of 2003 is referred to as the "B-BBEE Act";
- the South African Human Rights Commission is referred to as the "SAHRC";
- The International Convention on the Elimination of All Forms of Racial Discrimination is referred to as "ICERD";
- The Committee on the Elimination of Racial Discrimination is referred to as "CERD" or "the Committee";
- the SAHRC's Equality Report 2017/18 with the subtitle "Achieving substantive economic equality through rights-based radical socio-economic transformation in South Africa", is referred to as the "Equality Report";
- Persons who receive preferential treatment in terms of the EEA are referred to as the "designated group"
- The Economically Active Population of South Africa is referred to as "the EAP"
- The National Human Rights Institution is referred to as the "NHRI"

## EXECUTIVE SUMMARY

1. Throughout its report to the Committee, the South African Government proclaims its commitment to what it sees as the development of a society that is non-racial and non-sexist. It says that<sup>1</sup>:

*The achievement of substantive equality requires a much more determined effort. Policy formulation requires the careful balancing of interests, with the goal of enhancing the dignity of all of our people whose everyday lived experiences still in many ways reflect the legacy of apartheid. As Government, all of our work is directed towards redressing the inequalities of the past.*

2. Summarizing its position, it states that:

*This Periodic Report seeks to share with the Committee the extent to which South Africa has implemented the provisions of the CERD. The work that must be done to address the inequalities which have resulted from years of apartheid rule is substantial. Dismantling the edifice of apartheid involves much more than the repeal of apartheid legislation and its replacement with legislation based on equality and the rule of law.<sup>2</sup>*

3. By means of such pronouncements, the South African Government hopes to bring itself within the legitimate scope of the ICERD, which includes race-based discrimination among its prohibitions. However, whether the South African Government appreciates it or not, the stance being adopted is false as can be clearly gleaned from this report.

4. In fact, the South African Government pursues policies that are overtly race-based in order to produce a society that is “demographically representative”. This is, worryingly, conceded by the Government (own emphasis):<sup>3</sup>

*In order to eradicate disparities in employment, the legislature has chosen to use “equitable representation in all occupational levels in the workforce” as a measure. The numerical targets are used as a measure of representivity and are not inflexible quotas as alluded to in the SAHRC 2017/2018 Equality Report.<sup>1</sup>*

5. In short, its policies are not non-racial; at best they are neo-racial and at worst nakedly racist: society is structured in silos based on race and gender, with baneful effects.

6. The system is not concerned with remedial affirmative action, but with race. The problem permeates every facet of the regulatory framework of South Africa. No statute governing the distribution of societal benefits or privileges is without a structure designed to give preferment to black people, and the executive branch of government uniformly grants licenses and permits on the same basis. This is nothing less than institutionalized racism.

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<sup>1</sup> Par. 173 of the Government's report

<sup>2</sup> Par. 172 of the Government's report

<sup>3</sup> Par. 15 of the Government's report

7. We submit that any restitutionary measures must occur in a manner that does not lead to the creation of new patterns of disadvantage, which would be an affront to our international obligations as set out in ICERD, and the constitutional goal of equality. This calls for a situation and need sensitive approach in the crafting and application of remedial measures.

## **OBJECTIVE**

8. In this shadow report, Solidarity will first give a summation regarding the guiding restitutionary statutes and principles South Africa must comply with. Thereafter, we will show that whilst there is no principled ambiguity in what the statutory principles entail, the Government's race obsession makes a mockery of compliance therewith. We will then make some general remarks in terms of the application of affirmative action in South Africa and conclude with some proposed guiding principles for affirmative action and recommendations sought from the Committee.
9. We herewith hope to draw the Committee's attention to the facts and submissions relevant to the critical evaluation of the South African Government's report.
10. In this report we respectfully submit that the ultimate goal of restitutionary measures, as foreshadowed by ICERD, is temporary, individually proven and need-based nuanced restitution, and that the achievement of that goal is best served through the implementation of measures that are rational, flexible and situation sensitive.
11. Whilst we criticize the South African Government's application of restitutionary measures in this report, we constructively propose international standard-based guidelines that will guide the Government in its pursuit of compliance within the legitimate scope of ICERD.
12. The proposed guidelines set out herein have as their objective the definition of a nuanced approach to the application of affirmative action, having due regard to *inter alia* the consideration that:
  - 12.1 affirmative action measures may not constitute a quota system or absolute barriers and must be temporary;
  - 12.2 uncritical reliance on unsuitable demographic data to set targets for representivity leads to undesirable outcomes;

12.3 equality cannot be achieved through a rigid approach which makes no reasonable accommodation for employers to deviate from numerical targets set in employment equity plans; and

12.4 appropriate distinctions must be drawn between the public and private sectors in the formulation of affirmative action measures and their application.

## BACKGROUND

13. Subsequent to the consideration by CERD of the South African government's Fourth to Eighth Periodic Reports, CERD raised certain concerns and made certain recommendations in respect of (i) the use by the South African government of apartheid era race classifications to gather statistical data; (ii) the need for disaggregated data to be assembled by reference to more exhaustive demographic statistics that include economic and social indicators; and (iii) failure by the South African Government to implement recommendations of the South African Human Rights Commission (SAHRC).
14. Solidarity submitted a petition to the SAHRC, seeking a review of the EEA and the Broad-based Black Economic Empowerment Act No. 53 of 2003 (B-BBEE Act).
15. A report of the SAHRC (Equality Report), which we deem to be a consequence of our petition, identified a number of respects in which the EEA, and its application in South Africa, do not comply with the requirements of ICERD, the recommendations of CERD and the Constitution of the Republic of South Africa. The executive summary records as one of the key findings of the Equality Report that "The Employment Equity Act, No. 55 of 1998's definition of 'designated groups' and South Africa's system of data disaggregation are not in compliance with constitutional or international law obligations.<sup>4</sup>
16. Solidarity agrees with the findings of the SAHRC. The State Party has not implemented the recommendations. Solidarity sought to secure compliance with the State Party's obligations through an approach to the Labour Court of South Africa. However, the application was dismissed, and the Labour Appeal Court and the Constitutional Court both declined to entertain Solidarity's applications for leave to appeal the judgment of the Labour Court. Solidarity exhausted all internal remedies to secure implementation of the SAHRC's Equality Report, and a substantive complaint was lodged with CERD and the ILO.
17. Whilst CERD was of the view that all internal remedies had not been exhausted, and it therefore could not accept our complaint, a complaint lodged with the ILO led to a

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<sup>4</sup> Page 5 of the Equality Report

comprehensive settlement between Solidarity and the South African government, which may change the employment equity landscape in South Africa. The settlement agreement is attached hereto as Annexure "A1".

18. In this shadow report Solidarity approaches CERD to motivate for a finding to the effect that the State Party has contravened the provisions of the ICERD.

## **STATUTORY GUIDING PRINCIPLES**

19. In the assessment of whether the South African Government's application of restitutionary measures brings itself within the legitimate scope of ICERD, as well as the country's Constitution, it is critical to set out the statutory principals that must guide its conduct.

## **GUIDING PRINCIPLES EMANATING FROM ICERD**

20. Solidarity submits that the following articles of ICERD are critical in guiding the State Party's conduct in the enactment and implementation of the EEA:

*20.1 Article 1 paragraphs 1 and 4, read with General Recommendation 32 of 2009 which provides that:*

20.1.1. "Special measures" may 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;

20.1.2. "Special measures" should be distinguished from unjustifiable preferences;

20.1.3. Differential treatment will "constitute" discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim;

20.1.4. Appraisals of the need for special measures should be carried out on the basis of accurate data, disaggregated by race, color, descent and ethnic or national origin and incorporating a gender perspective, on the socio-economic and cultural status and conditions of the various groups in the population and their participation in the social and economic development of the country; and

20.1.5. State Parties should ensure that special measures are designed and implemented on the basis of prior consultation with affected communities and the active participation of such communities.

20.2 *Article 2 paragraph 2, read with General Recommendation 32 of 2009, which provides that State Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved;*

20.3 *Article 5(d)(e)(i), read with General Recommendation 20 of 1996, which provides that:*

20.3.1 In compliance with the fundamental obligations laid down in article 2 of this Convention, State Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, color, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

(e) Economic, social and cultural rights, in particular:

(i) The rights to work, to free choice of employment, to just and favorable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favorable remuneration;

20.3.2 States are obliged to prohibit and eliminate racial discrimination in the enjoyment of such human rights.

## **GUIDING PRINCIPLES EMANATING FROM THE EEA**

21. The EEA, whilst setting out to “*redress the effects of discrimination*”, provides that this aim is coupled with an intention to “*eliminate unfair discrimination in employment*” and to “*promote economic development and efficiency in the workforce*”.<sup>5</sup> The statute seeks to balance considerations of fairness in employment practices, efficiency and the need for redress.

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<sup>5</sup> Preamble EEA



22. The need for balance between fairness in employment practices, efficiency and the need for redress is evident from the substantive provisions of the EEA:
- 22.1 The EEA commences with an outright prohibition of unfair discrimination,<sup>6</sup> but also provides for affirmative action measures that are consistent with equal opportunity, fair treatment and the achievement of equitable representation of designated groups in the workforce.<sup>7</sup>
- 22.2 The EEA discourages the notion that these objects are to be attained by the mechanical use of race and gender demographics. Section 20(2)(c) emphasizes that equitable representation must include an assessment of the availability of "suitably qualified" people from designated groups<sup>8</sup> for appointment at particular levels and within particular categories in an organisation.
- 22.3 This conclusion is consistent with the meaning assigned to "affirmative action measures" in section 15(1) of the EEA:  
*"Affirmative action measures are measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer."*<sup>9</sup>
- 22.4 Section 15(2) provides for progress in representivity to be made through various strategies, such as the identification and elimination of employment barriers which adversely affect persons from designated groups, and "*making reasonable accommodation for people from designated groups*".<sup>10</sup>
- 22.5 Section 15(3) expressly states that provision for preferential treatment of designated groups and the setting of targets may not amount to quotas.<sup>11</sup>
- 22.6 Section 15(4) provides that the provisions on affirmative action are not to be construed as placing an obligation on an employer to place an absolute barrier upon the prospective or continued employment or advancement of people who are not from designated groups.<sup>12</sup>
- 22.7 Section 42 contemplates monitoring of compliance with the EEA by reference to a variety of factors:

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<sup>6</sup> EEA s 6(1)

<sup>7</sup> EEA s 6(2)

<sup>8</sup> EEA s 20(2)(c)

<sup>9</sup> Emphasis supplied

<sup>10</sup> Emphasis supplied

<sup>11</sup> EEA s 15(3)

<sup>12</sup> EEA s 15(4)

- 22.7.1 the factors in section 15 of the EEA;<sup>13</sup>
- 22.7.2 the extent to which suitably qualified people from and amongst the different designated groups are equitably represented within each occupational level in that employer's workforce in relation to the demographic profile of the national and regional economically active population;<sup>14</sup>
- 22.7.3 reasonable steps taken by a designated employer to train suitably qualified people from the designated groups;<sup>15</sup>
- 22.7.4 reasonable steps taken by a designated employer to implement its employment equity plan;<sup>16</sup>
- 22.7.5 the extent to which the designated employer has made progress in eliminating employment barriers that adversely affect people from designated groups;<sup>17</sup>
- 22.7.6 reasonable steps taken by an employer to appoint and promote suitably qualified people from the designated groups;<sup>18</sup> and
- 22.7.8 any other prescribed factor.<sup>19</sup>

## GUIDING PRINCIPLES EMANATING FROM THE CONSTITUTION

- 23. Section 195(1) of the Constitution sets out the principles that must govern public administration.
- 24. The principle that public administration must be "*broadly representative of the South African people*"<sup>20</sup> is but a subset of one of the nine principles enunciated. Within section 195(1)(i), the need to "*redress the imbalances of the past to achieve broad representation*" is coupled with, and therefore subject to balancing against the motion that "*employment and personnel management practices*" ought to be "*based on ability, objectivity [and] fairness*".<sup>21</sup>

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<sup>13</sup> EEA s 42(1)

<sup>14</sup> EEA s 42(1)(a)

<sup>15</sup> EEA s 42(1)(b)

<sup>16</sup> EEA s 42(1)(c)

<sup>17</sup> EEA s 42(1)(d)

<sup>18</sup> EEA s 42(1)(dA)

<sup>19</sup> EEA s 42(1)(e)

<sup>20</sup> Constitution s 195(1)(i)

<sup>21</sup> Constitution s 195(1)(i)

25. In addition to the internal balancing required for the proper understanding and implementation of the principle enshrined in section 195(1)(i), there is the need to take into account, and balance against the aim of broad representivity, at least the following:
- 25.1 public administration "*must be governed by the democratic values and principles enshrined in the Constitution*",<sup>22</sup> which must include human dignity, equality, the advancement of human rights, non-racialism and non-sexism,<sup>23</sup> as well as the right to just administrative action;<sup>24</sup>
- 25.2 the "*efficient, economic and effective use of resources must be promoted*",<sup>25</sup> and where the resources available to a state organ are human resources in the form of persons with particular skills, training or other attributes, such resources must accordingly be properly deployed;
- 25.3 "*good human resource management and career-development practices, to maximise human potential, must be cultivated*";<sup>26</sup> and therefore it is improper to refuse to appoint or promote applicants purely based on imperatives contained in an employment equity plan or a collective agreement to promote representivity, and to overlook constitutional imperatives such as efficiency.

## **SOUTH AFRICA'S RACE OBSESSION**

26. Whilst there is no principled ambiguity in what the aforementioned statutory principles entail, the Government's race obsession is clearly seen in the following examples which make a mockery of compliance therewith. In some cases, Solidarity and/or other parties have been successful in challenging this race obsession in our courts or by other means, but this has, unfortunately, not led to a change in the Government's relentless pursuit of statistical racial representivity in every sphere of South African society.

## **THE EMPLOYMENT EQUITY AMENDMENT ACT (NO. 4 OF 2022)**

27. The Employment Equity Amendment Act (No. 4 of 2022) was signed into law on 6 April 2023.
28. This amended Act empowers the Minister to *inter alia* (i) identify national economic sectors; and (ii) determine numerical demographic "targets" for these sectors.

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<sup>22</sup> Constitution s 195(1)

<sup>23</sup> Constitution s 1, read with s 3(2), s 9, s 10

<sup>24</sup> Constitution s 33

<sup>25</sup> Constitution s 195(1)(b)

<sup>26</sup> Constitution s 195(1)(h)

29. In circumstances where the Labor Minister's power is not aimed at, for example, merely publishing rates of transformation in particular sectors or industries, so as to allow for comparisons to be made between a particular employer's progress and the sector/industry standard, the Act now introduces an unfettered power to the Labor Minister to ostensibly set a standard that must be met. Section 42, as amended, creates a standard by reference to which compliance with the statute will be measured, and against which compliance may be measured exclusively (given the discretion in the language of section 42 that allows for selective and not cumulative consideration of the factors listed therein). Notably, the Act now introduces an amended section 53 of the EEA, which provides that State contracts may only be issued to employers that have been certified as being in compliance with their obligations under the EEA.
30. The Act further provides that the Labor Minister may only issue a compliance certificate if the employer has complied with any applicable sectoral targets (or has raised a reasonable ground for non-compliance).
31. When the introduction of section 15A is read in the context of the Act as a whole, the conclusion reached is that the ministerial intervention is not aimed at identifying the causes of slow transformation in an industry, but simply and solely to engineer an outcome based on statistical representivity.
32. Whilst a comprehensive settlement was reached between the South African Government and Solidarity regarding the Employment Equity Amendment Act and the undermentioned regulations which flow from it, Solidarity once again had to resort to litigation to ensure that the Government's race obsession be curbed. The settlement reached is attached hereto as annexure "A1".

## **SECTORAL TARGETS**

33. Exactly a month after the Amendment Act was signed, the Minister of Employment and Labor published draft regulations in terms of section 15A of the new legislation.
34. The targets set in the draft regulations constitute a substantial deviation from the composition of the workforce as it exists today. These draft regulations therefore envisage a radical transformation of the labor market as far as its demographic composition is concerned.
35. What is exceedingly obvious from an in-depth analysis of the draft regulations and targets is that the targets are totally disconnected from reality. While most of the targets by occupational level appear to be relatively close for the black population group, they

mostly are very far from the possible pool of candidates of minorities. In almost all cases as far as minorities are concerned, their representation has to decline to that of the economically active population, with no consideration of experience or training, this despite the fact that these are the two aspects based upon which most posts are decided.

36. It appears that the draft regulations are aimed at excluding minorities from the labor market at certain occupational levels, much more than what they are promoting diversity and equality. This is social engineering by a government that is aimed against several minority groups – purely for political reasons. An impact report by Solidarity is attached hereto as annexure “A2”.

### **TOURISM RELIEF FUND**

37. The effect of COVID-19 on the South African tourism industry was devastating. In recognition of that, the Tourism Relief Fund was created “to support small businesses in the tourism sector”. According to a media statement issued by the Tourism Department on 7 April 2020, it was “*Established as an intervention to mitigate the impact of COVID-19 on the tourism sector ...*”
38. However, the fund was finite, with only R200 million available, and in the face of titanic competition for access to relief, the decision was made to adopt a “scoring system.” Reliance was placed on the B-BBEE Act, and the Tourism Code adopted under it to allow for a scoring system based on black empowerment levels. This, despite the recognition that the Tourism Relief Fund was not an empowerment scheme but was adopted as part of disaster management relief in response to the COVID-19 pandemic.
39. Thus, whilst every tourism enterprise was severely detrimentally impacted by the COVID-19 pandemic and the draconian lockdown measures implemented by the Government, funds allocated to alleviate and mitigate the impact were mostly allocated to black-owned enterprises.

### **TOURISM EQUITY FUND**

40. On 26 January 2021, the South African Department of Tourism announced its so-called “Tourism Equity Fund” (TEF). The TEF was capitalized at R1,2 billion, with R606 million (50,5%) of this to be contributed by a government funding agency and R594 million (49,5%) by an unnamed “strategic bank co-funder”. On the available information it appears that the funding available amounts to between R10 million and R20 million per qualifying applicant, which can take the form of grants and/or loans, which are only available to majority black-owned (minimum 51%) tourism enterprises.

41. The TEF excluded businesses that are not 51% black-owned (irrespective of the composition of their workforce, and their efforts to develop skills and empower) from access to funding. Solidarity obtained an expert report from a development economist that reaches the conclusion that the TEF is ill-suited for the purpose it seeks to achieve. A copy of the report is attached as annexure "A3". The report illustrates that the preoccupation with the race of owners leads to a frustration of true development goals.
42. What these examples tend to show is that the State Party is unconcerned with "need" and remains focused on the allocation of opportunities and relief based on considerations of race.

### **GENERAL SUBMISSIONS**

43. The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which South Africa ratified on 10 December 1998, has purchase on the Constitution.
44. Article 2 of ICERD requires signatories to condemn all forms of racial discrimination and to eliminate racial discrimination by "appropriate means". In clause 1(4) it pertinently states that "[s]pecial measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups' or individuals' equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination." The clause, which manifestly countenances affirmative action, propounds a conception of substantive equality that is sensitive to past disadvantages and systemic patterns of discrimination.
45. Crucially, however, it contains a proviso which states that affirmative action "*measures [shall] not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.*" The proviso is very important. It insists that affirmative action measures, in seeking to bring about equality, must not use extreme or irrelevant distinctions to achieve equality of outcome objectives, and must be kept under constant scrutiny to ensure that this principle is observed.
46. These obligations must be borne in mind in the evaluation of the EEA. Affirmative action measures must be applied in a fair and rational manner by designated employers to ensure that affirmative action is seen to bear fruit and is effective.<sup>27</sup> The route of

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<sup>27</sup> Solidarity obo Barnard v SAPS 2010 5 BLLR 561 (LC) 25.3

inequality is addressed by focusing on the categories of persons who are disadvantaged by socio-economic needs and vulnerabilities, and should be temporary.

47. In South Africa's combined Ninth to Eleventh Periodic Reports on the implementation of the specific rights provided for under Articles 1 to 7 of the ICERD, South Africa seeks to address the measures put in place to address the suggestions and recommendations made by the Committee in its concluding observations<sup>28</sup> following the consideration of South Africa's combined Fourth to Eighth Periodic Reports in August 2016.
48. Solidarity submits that South Africa's report does not sufficiently illustrate the impact of special measures on affected groups, especially the most disadvantaged and vulnerable amongst them. Furthermore, the report also fails to mention the fact that the EAP is applied in isolation for target-setting, which is severely flawed in reflecting the true status of equitable representation, as envisaged by the EEA. Solidarity proposes a nuanced approach (that includes *inter alia* the use of income and other indicators of socio-economic status to identify those in need of empowerment), which is discussed in more detail below.

#### INDEFINITE PURSUIT OF STATISTICAL REPRESENTATIVITY

49. We submit that whilst proportional representation of every population group at every level and in every conceivable field is emphasized and enforced in South Africa as the only purpose of employment equity, it is not necessarily "equitable representation" as envisaged in the EEA. The determination of what is "equitable" is not a simple exercise of considering the make-up of the economically active population.
50. The State, through the EEA, measures compliance and target-setting against the EAP. Thus, the EAP is used in isolation; no factor other than the percentage of race is utilized. This unlawfully and unfairly makes affirmative action in South Africa an indefinite pursuit of statistical representativity, which is clearly an affront to the ICERD principle that restitutionary measures should be temporary.
51. We submit that this is not only an affront to ICERD but is also an affront to the global view of affirmative action which emphasizes that affirmative action must be temporary and have an identified end term. In this regard, the landmark 2023 US Supreme Court decision in the matter of *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*<sup>29</sup> confirms its previous view in *Grutter*<sup>30</sup> by deciding that "For the reasons

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<sup>28</sup> CERD/C/ZAF/CO/4-8

<sup>29</sup> *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. \_\_\_\_ (2023)

<sup>30</sup> *Grutter v. Bollinger*, 539 U.S. 306 (2003) - "To manage these concerns, *Grutter* imposed one final limit on race-based admissions programs. At some point, the Court held, they must end. *Id.*, at 342. This requirement was critical, and *Grutter* emphasized it repeatedly. "[A]ll race-conscious admissions programs [must] have a termination point"; they "must have reasonable durational limits"; they "must be

provided above, the Harvard and UNC admissions programs cannot be reconciled with the guarantees of the Equal Protection Clause. Both programs lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points.<sup>31</sup> We have never permitted admissions programs to work in that way, and we will not do so today."

52. See annexure "A4" in support of the abovementioned submissions.

## THE SAHRC AND NEED-BASED AFFIRMATIVE ACTION

53. It is submitted that section 13(1)(b)(vi) of the South African Human Rights Commission Act (No. 40 of 2013) (Human Rights Commission Act) specifically mandates the South African Human Rights Commission (SAHRC) to monitor the implementation of, and compliance with international and regional human rights instruments.
54. In compliance with the aforementioned obligation, the SAHRC issued a report that *inter alia* assessed South Africa's interpretation and implementation of affirmative action in relation to international standards.<sup>32</sup> Solidarity adopts the reasoning of the SAHRC in support of its finding that section 42 of the EEA, as read with the definition of "designated groups," is not constitutionally compliant, and is in contravention of ICERD. It further adopts and emphasizes the following conclusion of the SAHRC in relation to socio-economic need as a proxy for receiving affirmative action benefits: "*... special measures are currently misaligned to constitutional objectives. Where special measures are not instituted on the basis of need, and taking into consideration socio-economic factors, they are incapable of achieving substantive equality.*"<sup>33</sup>
55. Subsequent to the SAHRC report, several developments took place which amplify the foregoing submission that the State Party has not met its ICERD obligations and is in fact moving further away from compliance.
56. Annexure "A7", as a summary of the findings of the SAHRC report, is attached hereto in support of Solidarity's submission regarding the State Party's non-compliance with its ICERD obligations.

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*limited in time"; they must have "sunset provisions"; they "must have a logical end point"; their "deviation from the norm of equal treatment" must be "a temporary matter."*

<sup>31</sup> Own emphasis

<sup>32</sup> SAHRC's Equality Report 2017/18

<sup>33</sup> Chapter 1, the Equality Report (at p 8)



## **PROPOSED NUANCED GUIDING PRINCIPLES**

57. The following principles, which would go some way in ensuring compliance in a nuanced and sustainable manner, are not taken into account in the preparation, implementation, application, reporting and compliance analysis/reporting of affirmative action in South Africa:
- a. Employers must develop employment equity plans that focus primarily on promoting and empowering the disadvantaged, and use income and other indicators of socio-economic status to identify those in need of empowerment.
  - b. The primary focus of employment equity and the employment equity plan must be on empowerment through skills development and education.
  - c. In evaluating who to appoint, a balance must be struck between considerations of the contextual realities of the employer, reasonableness, fairness, training, skills, competence, knowledge, merit and affirmative action to achieve broad equality.
  - d. Reasonable accommodation should be made for people from designated groups without precluding others from opportunity. No absolute barrier should be placed upon any employment practices affecting any persons from any group or class.
  - e. The economically active population cannot be used in isolation, and the national as well as regional demographic representation of the economically active population must be taken into account in conjunction with all other factors such as the inherent requirement of a position in relation to the pool and availability of suitably qualified candidates for appointment.
  - f. Statutory obligations and rights such as efficient service delivery by the public service must be taken into account.
  - g. Affirmative action in the public sector must be discontinued, and those born after 1994 must be exempted from application of employment equity.
  - h. When broad-ranged equality, as defined by the employer and having taken into account all reasonable factors, has been achieved, and reasonable barrier removal and prevention strategies have been implemented, target-setting must not take place and affirmative action must be ceased by the employer.

## **APPROPRIATE RECOMMENDATIONS**

58. In the circumstances Solidarity submits that the following recommendations ought to be appropriate:
- 58.1 That it is found that the State Party has contravened the provisions of the Convention;
  - 58.2 That it is recommended that the State Party implement the proposed nuanced guiding principles as set out here above;

- 58.3 That it is recommended that the State Party implement the employment equity findings and recommendations of the SAHRC as per its Equality Report;
- 58.4 That it is recommended that the State Party give a clear indication and definition as to how they will ensure that affirmative action is only implemented temporarily;
- 58.5 That it is recommended that the State Party ensure that socio-economic need, rather than race, is used as a proxy for receiving benefits under affirmative action in South Africa; and
- 58.6 That the State Party is required to report to CERD within one year on the actions taken so as to implement the findings and recommendations in respect of this Report.