

**Committee on the Elimination of Racial Discrimination**

RESPONSE TO THE SHADOW REPORT OF SOLIDARITY TRADE  
UNION'S CENTRE FOR FAIR LABOUR PRACTICES – SEPTEMBER  
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## A. INTRODUCTION

1. These submissions are filed in response to the “*shadow report*” titled **“Constructing a future based on race ‘racial representivity’ through affirmative action and broad-based black economic empowerment in South Africa”** (“*the Shadow Report*”).
2. The Shadow Report was prepared in September 2015 by Solidarity Trade Union’s Centre for Fair Labour Practices (“*Solidarity*”) in response to the fourth to eighth periodic reports of the Republic of South Africa (“*the RSA*”) to the Committee on the Elimination of all Forms of Racial Discrimination (“*the Committee*”) under article 9 of the Convention on the Elimination of Race Discrimination (“*the Convention*”).

## B. INTEREST OF THE POLICE AND CIVIL RIGHTS UNION

3. The Police and Prisons Civil Rights Union (“*POPCRU*”) is an association not for gain and operates as a trade union in the South

African Police Service (“SAPS”), Correctional Service and all traffic departments within the RSA. POPCRU, as a recognised trade union within the bargaining unit of the SAPS and the Department of Correctional Services (“DCS”) is an active role player in the consultative process that culminates in the adoption of Employment Equity Plans envisaged in the Employment Act 55 of 1998 (“*the Employment Equity Act*”).

4. The Employment Equity Act seeks to give effect to the RSA’s constitutional injunction “*to promote the achievement of equality ..[by] advanc[ing] ... categories of persons disadvantaged by unfair discrimination*”<sup>1</sup>.
5. One of the objectives of POPCRU is to engage in all social transformation processes and, to that end, work for the elimination of unfair discrimination.
6. It is POPCRU’s respectful submission that the contentions advanced by Solidarity in its Shadow Report (1) are a frontal attack on the Constitution of the RSA, (2) are at variance with the findings of the

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<sup>1</sup> See section 9(2) of the Constitution of the Republic of South Africa, 1996 (“the Constitution”) the full text of which is provided herewith for the Committee’s convenience.

Constitutional Court of the RSA which is the apex Court in the RSA, and (3) have far-reaching and adverse effects on the constitutional injunction of promoting the achievement of equality by advancing categories of persons who have been disadvantaged by unfair discrimination under apartheid and still endure the pernicious effects of that unfair discrimination.

7. By way of example, Solidarity argues without proof that:

7.1. *“ . . . the South African Government pursues policies that are overtly race-based in order to produce a society that is ‘demographically representative’. 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 . . . The system is not concerned with remedial affirmative action, but with race”<sup>2</sup>;*

7.2. *“ . . . This is nothing less than institutionalised racism. In the face of entrenched rights to equality in the Constitution, these policies are pursued with impunity since the courts, whose*

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<sup>2</sup>

See page 4, last paragraph

*powers have repeatedly been invoked, are either unable or unwilling to take a stand that would give proper effect to the rhetoric of non-racialism they simultaneously employ*<sup>3</sup>;

7.3. *“. . . In supposed pursuit of the Employment Equity Act, enacted to give effect to the constitutional imperative of substantive equality, plans are devised by government departments that universally determine matters of employment and promotion by reference to race. Applicants for employment or promotion are placed into one of the racial categories devised by the apartheid State (to repeat: White, Coloured, Indian and African) and then distributed by gender.”*<sup>4</sup>;

7.4. *“The [Employment Equity] Act’s rejection of quotas shows an acceptance that race and gender based social engineering is constitutionally impermissible . . . But the benign aspects of the statute are undermined by making race and gender parity the determinative goal.”*<sup>5</sup>;

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<sup>3</sup> See page 5, second paragraph

<sup>4</sup> See page 6, second paragraph

<sup>5</sup> See page 11, second paragraph

7.5. “ . . . the achievement of these race quotas can only result in the departure of still more ‘white’ skilled engineers and technicians to the detriment of all South Africans”<sup>6</sup>;

7.6. “The re-racialisation of the post-apartheid state by these means – legislative, executive and judicial – might be justified on grounds of expediency if it were creating a more inclusive society. Tragically, the very opposite is true. Old divisions are being perpetuated and, indeed aggravated as the struggle for resources becomes more acute in this woefully misgoverned country”<sup>7</sup>;

8. POPCRU’s interest lies in ensuring that the constitutional injunction in section 9(2) of the Constitution<sup>8</sup> is not frustrated by, with respect, tangential considerations of the sort on which Solidarity has placed disproportionate emphasis for purposes of its own agenda.

9. While affirmative action serves a panacean purpose to some when compared with the limited employment prospects of the past, it is

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<sup>6</sup> See page 12, first paragraph  
<sup>7</sup> See page 15, third paragraph  
<sup>8</sup> Reproduced in paragraph 12 below

considered with foreboding by others who view it as “*reverse discrimination*”. On whichever side of this divide one stands, the arguments advanced by Solidarity are with respect simply constitutionally insupportable.

### C. THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA

10. Addressing the Court from the dock at the conclusion of his treason trial on 20 April 1964, President Nelson Mandela described poignantly the wretched existence of African people in South Africa at that time in the economic context driven by workplace dynamics:

*“The complaint of Africans, however, is not only that they are poor and whites are rich, but that the laws which are made by the whites are designed to preserve this situation. There are two ways to break out of poverty. The first is by formal education, and the second is by the worker acquiring a greater skill at his work and thus higher wages. As far as Africans are concerned, both these avenues of advancement are deliberately curtailed by legislation . . .*

*The present Prime Minister [Verwoerd] said during the debate [o]n the Bantu Education Bill in 1953: ‘When I have control of Native*



*education, I will reform it so that Natives are taught from childhood to realise that equality with Europeans is not for them . . . People who believe in equality are not desirable teachers for Natives . . .*

*The other main obstacle to the economic advancement of the Africans is the industrial colour bar by which all the better jobs of industry are reserved for whites only . . .*<sup>9</sup>

11. This dark portrait of the average African's existence in South Africa did not suddenly disappear in the bright glare of the 1994 euphoria. The effects of the "laws" that were "*designed to preserve this situation*" endured long beyond their repeal, prompting a Constitutional Assembly that was representative of all races in 1996 to adopt a Constitution that enshrined in its Bill of Rights the taking of "*legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination*" with the stated purpose of "*promot[ing] the achievement of equality*"<sup>10</sup> that Verwoerd had so callously despised.

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<sup>9</sup> Nelson Mandela, 20 April 1964, "*An Ideal For Which I Am prepared To Die*" in Speeches That Changed The World, ©1998, HarperCollins, at p 405-6

<sup>10</sup> The Constitution of the Republic of South Africa, 1996, s 9(2)

12. Section 9 of the Constitution of the RSA, 1996 (*“the Constitution”*) provides as follows:

*“9 Equality*

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.*
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.*
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.*
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.*

(5) *Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.*”

(emphasis supplied)

13. Two years later in 1998, section 9(2) of the Constitution paved the way for the first democratic Parliament under the leadership of President Nelson Mandela to recognise, in the pre-ambule to the Employment Equity Act, that

13.1. *“as a result of apartheid and other discriminatory laws and practices, there are disparities in employment, occupation and income within the national labour market”*; and

13.2. *“those disparities create such pronounced disadvantages for certain categories of people that they cannot be redressed simply by repealing discriminatory laws”*.

14. A year later in 1999, the Employment Equity Act – which is the *“legislative measure”* that is foreshadowed in section 9(2) of the Constitution – came into effect with the stated purpose *“to achieve*

*equity in the workplace*<sup>11</sup> and “to ensure . . . equitable representation [of designated groups] in all occupational levels in the workforce”<sup>12</sup> by

14.1. “*promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination*”<sup>13</sup>; and

14.2. “*implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational levels in the workforce*”<sup>14</sup>.

15. The correct approach must therefore of necessity begin and end with a sound appreciation of the **true purpose** for which the Employment Equity Act was enacted.

16. That purpose is recorded in section 2 of the Employment Equity Act and is informed by the Legislature’s recognition of the “*disparities in*

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<sup>11</sup> Employment Equity Act, s 2

<sup>12</sup> Employment Equity Act, s 2(b)

<sup>13</sup> Employment Equity Act, s 2(a)

<sup>14</sup> Employment Equity Act, s 2(b)

*employment, occupation and income” that have come about “as a result of apartheid and other discriminatory laws and practices”<sup>15</sup>.*

17. The Employment Equity Act was not enacted in order to entrench equality in the abstract, thereby treating as equals people who benefited from apartheid on the one hand, and those who were ravaged by it on the other. It was enacted in order to correct (reverse even) the artificial barriers that were constructed by successive governments of apartheid persuasion in workplaces throughout South Africa against, **principally**, black people.
  
18. In the exercise of reversing the pernicious effects of apartheid’s unfair discrimination, **race is therefore the principal consideration**. This is inevitable because race, more than any other factor, was an absolute determinant of one’s status in the employment space in South Africa during apartheid. In the crude hierarchy of races, Africans ranked last, so that even among black people apartheid constructed a perverse hierarchy of privileges. For example:

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<sup>15</sup> Pre-amble to the Employment Equity Act

18.1 Coloured persons<sup>16</sup> had privileges that Africans did not have. They could hold managerial positions and earn higher salaries. African men and women could not.

18.2 White women had access to quality education and could hold high positions in the workplace. African men and women were largely products of the sort of education about which Verwoerd infamously said would ensure that they realise that “*equality with Europeans is not for them*” .<sup>17</sup>

19. To shy away from race as a central thesis of remedial constitutionalism, and relegate it to a status that is subordinate to abstract equality, without regard to the structural disparities resulting from apartheid, would with respect be cowardly and a betrayal of South Africa’s constitutional project of the “achievement of equality” against which Verwoerd campaigned so enthusiastically. It would also be a crass betrayal of the purpose of the Employment Equity Act as recorded in section 2 of the Employment Equity Act.

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<sup>16</sup> Perhaps an equivalent of Hispanics in the USA

<sup>17</sup> Nelson Mandela, 20 April 1964, “*An Ideal For Which I Am prepared To Die*” in Speeches That Changed The World, ©1998, HarperCollins, at p 406

**D. THE EMPLOYMENT EQUITY ACT**

20. The purpose of the Employment Equity Act is captured in section 2 and in section 2 alone. It is impermissible (as Solidarity seeks to do) to look elsewhere for clues on what the purpose of the Employment Equity Act is when its true purpose is expressly and exhaustively stated in section 2.<sup>18</sup>
21. The overarching purpose of the Employment Equity Act is two-fold: (1) a general purpose which aims to achieve equity and (2) a specific and targeted purpose which aims to address the wrongs caused by apartheid.<sup>19</sup> In this way, section 2 of the Employment Equity Act mirrors the scheme of section 9 of the Constitution which in one part prohibits unfair discrimination<sup>20</sup> and in another seeks to address the wrongs of the past<sup>21</sup>.

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<sup>18</sup> *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC) at para [226]

<sup>19</sup> *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC) at para [226]

<sup>20</sup> Constitution, s 9(1), s 9(3), s 9(4), s 9(5)

<sup>21</sup> Constitution, s 9(2). See also the judgment of Van Der Westhuizen J in *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC) at para [135]

21.1. The general purpose is *“to achieve equity in the workplace by promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination”*.<sup>22</sup>

21.2. The specific and more targeted purpose is to *“implement affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational levels in the workforce”*.<sup>23</sup>

22. Distilled to their respective constituent parts, it becomes clear that these are two distinct purposes of the Employment Equity Act with two distinct aims and focal points, while at the same time constituting a composite whole.

22.1. The aim of the general purpose is *“to achieve equity in the workplace”*. Its focal point in order to achieve that purpose is to *“promote equal opportunity and fair treatment in employment through the elimination of unfair discrimination”*.

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<sup>22</sup> Employment Equity Act, s 2(a)  
<sup>23</sup> Employment Equity Act, s 2(b)



22.2. The specific purpose has a different aim and focal point. It aims “to redress the disadvantages in employment experienced by designated groups” and “to ensure their equitable representation in all occupational levels in the workforce”. Its focal point in order to achieve this dual purpose is to “implement affirmative action measures”. It comes about in recognition of the undisputed fact that “as a result of apartheid and other discriminatory laws and practices, there are disparities in employment, occupation and income”<sup>24</sup>.

23. Like section 9(2) of the Constitution in the general context of section 9 as a whole, the specific purpose of the Employment Equity Act as adumbrated in section 2 is not an exception to, or a deviation from, or invasive of, the general purpose. In other words, the element of section 2 of the Employment Equity Act that aims to “redress the disadvantages in employment experienced by designated groups” and “to ensure the equitable representation [of suitably qualified people from designated groups] in all occupational levels in the workplace” is not an exception to, or a deviation from, or invasive of, the “achievement of equity in the workplace” or the “promotion of equal opportunity” or “fair treatment”

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<sup>24</sup>

Pre-amble to the Employment Equity Act

or “*the elimination of unfair discrimination*”. On the contrary, the redress of apartheid disparities in the workplace forms an integral part of the equality or equity project.<sup>25</sup> It must be welcomed rather than viewed with suspicion. It must be understood as equality-driven in its own right, rather than viewed as a carve-out from what is discriminatory.<sup>26</sup>

24. The redress element of section 2 of the Employment Equity Act must of necessity be understood in the context of the dark and enduring legacy of apartheid: the systemic disadvantage that was brought to bear principally on Africans, and about which President Nelson Mandela spoke from the dock in 1964. It is one of the enduring legacies of apartheid that even among designated groups<sup>27</sup> some groups were, by dint only of their race, afforded more advantages than others, with the Africans languishing at the bottom of that crude hierarchy of races.
25. Properly understood in that context, it then becomes clear that

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<sup>25</sup> *Minister of Finance and Another v Van Heerden* 2004 (6) SA 121 (CC) at paras [30]-[31] & [95]

<sup>26</sup> Cf. *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC) (per van der Westhuizen J) at paras [136]- [137]

<sup>27</sup> Africans, Coloureds, Indians, women and people with disabilities

25.1. when section 2 of the Employment Equity Act talks about the achievement of equity in the workplace, and

25.2. when section 2(a) talks about “*promoting equal opportunity and fair treatment in employment*”, and “*the elimination of unfair discrimination*”, and

25.3. when section 15(2)(a) talks about “*eliminating employment barriers*” and “*unfair discrimination*”, and

25.4. when section 15(2)(b) talks about “*diversity in the workplace based on equal dignity and respect of all people*”, and

25.5. when section 15(2)(c) talks about “*making reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities*”

the Legislature could not have had in mind the proverbial wiping clean of the slate and starting all over again, ignoring the considerable disparities in employment, occupation and income that are the direct result of apartheid and other discriminatory laws and practices.

26. Those disparities are still with us and it is the express purpose of the Employment Equity Act to eradicate them, including the crude hierarchy of disparities among designated groups themselves.

27. As has been said before by our Courts in South Africa:

*“[T]he recognition of substantive equality means . . . that equality is more than mere non-discrimination. When a society, and perhaps the particular role players in a certain situation, come from a long history of discrimination, which took place individually, systemically and systematically, it cannot simply be assumed that people are in equal positions and that measures distinguishing between them amount to unfair discrimination.”<sup>28</sup>*

28. In *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC) at para [60] the Constitutional Court of the RSA (*“the Constitutional Court”*) affirmed

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<sup>28</sup> *Stoman v Minister of Safety and Security and Others* 2002 (3) SA 468 (T) at 477F-H cited with approval by van der Westhuizen J in *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC) at para [137]

the importance of remedial measures to achieve substantive equality. It said:

*“It is insufficient for the Constitution merely to ensure, through its Bill of Rights, that statutory provisions which have caused such unfair discrimination in the past are eliminated. Past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes are eliminated, and unless remedied, may continue for a substantial time and even indefinitely. Like justice, equality delayed is equality denied.”*

29. For purposes of eradicating the disparities in employment, occupation and income, the Legislature has chosen to use *“equitable representation in all occupational levels in the workforce”*<sup>29</sup> as the measure. To that end, the Legislature has prescribed

29.1. the identification, by way of analysis, of the extent by which people from designated groups may be under-represented; and

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<sup>29</sup> Employment Equity Act, s 2(b) and s 15(2)(d)(i)

29.2. the setting of numerical targets<sup>30</sup> with a view to achieving the equitable representation of suitably qualified people from designated groups in each occupational level in the workforce; and

29.3. the timeframe within which this is to be achieved; and

29.4. the strategies intended to achieve those targets.<sup>31</sup>

30. Where decisions or policies have been taken or implemented in a manner that is unlawful or in contravention of the Constitution, then the Courts have a right to interfere.

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<sup>30</sup> Employment Equity Act, s 15(3)

<sup>31</sup> Employment Equity Act, s 20(2)(c)

**E. SOLIDARITY' s PHILOSOPHY ON AFFIRMATIVE ACTION IS REGRESSIVE AND HAS BEEN DISMISSED BY THE CONSTITUTIONAL COURT WHICH IS THE APEX COURT IN RSA**

31. In *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC) (“*SAPS v Solidarity*”) Solidarity claimed that

31.1. the SAPS Employment Equity Plan “*constitutes nothing but a compendium of absolute quotas*”;

31.2. merit is subsumed to operational requirements to meet numerical targets;

31.3. by requiring that appointment decisions must be made by reference to race, the SAPS Employment Equity Plan is unreasonable, irrational, unlawful and is unfairly discriminatory on grounds of race and/or gender;

31.4. personal circumstances of individuals must be taken into account;

31.5. the SAPS Employment Equity Plan “*engages upon race and gender norming*”.

It is necessary to address each of these claims. The Constitutional Court dismissed them all, except the last because Solidarity expressly abandoned it and did not pursue it.

(a) The “quota” argument

32. The Constitutional Court rejected Solidarity’s “*compendium of absolute quotas*” argument. It found as follows:

32.1. “*I do not think that the National Commissioner pursued the targets so rigidly as to amount to quotas. First, over-representation of white women at salary level 9 was indeed pronounced. That plainly meant that the Police Service had not pursued racial targets at the expense of other relevant considerations. It had appointed white female employees despite equity targets. Had the Police Service not done so, white female employees would not have been predominant in any of the levels*



*including salary level 9 nor would they have been able to retain their posts.*<sup>32</sup>

32.2. *“[T]he decision not to promote Ms Barnard did not bar her from future promotions. She was at the time of the hearing in this Court a Lieutenant-Colonel. If her progress through the ranks of the Police Service was subject to strict equity considerations alone, she would have never been promoted past salary level 9 to a level 10 or higher post. Her stellar rise through the ranks needed more than racial representivity alone to preclude it. Clearly, the National Commissioner’s decision was nowhere near an absolute bar to her advancement.”*<sup>33</sup>

35.3 *“Ms Barnard’s eventual promotion to Lieutenant-Colonel shows that the National Commissioner’s decision not to promote her to salary level 9 in this instance did not constitute an absolute bar to her continued advancement in the SAPS . . . [T]he National Commissioner was interpreting the numerical targets as permissible goals and not as impermissible quotas.”*<sup>34</sup>

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<sup>32</sup> *SAPS v Solidarity* at para [66] per Moseneke ACJ

<sup>33</sup> *SAPS v Solidarity* at para [67] per Moseneke ACJ

<sup>34</sup> *SAPS v Solidarity* at para [123] per Cameron J, Froneman J and Majiedt AJ

(b) The merits argument

33. The Constitutional Court also dismissed this argument. It held that:

33.1. “[B]eneficiaries of affirmative action must be equal to the task at hand. They must be suitably qualified people in order not to sacrifice efficiency and competence at the altar of remedial employment. The [Employment Equity] Act sets itself against the hurtful insinuation that affirmative action measures are a refuge for the mediocre or incompetent. Plainly, a core object of equity at the workplace is to employ and retain people who not only enhance diversity but who are also competent and effective in delivering goods and services to the public.”<sup>35</sup>

33.2. To suggest that persons who have been chosen on affirmative action grounds are not as capable as those who have not been chosen “is to create a false impression”<sup>36</sup>

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<sup>35</sup> *SAPS v Solidarity* at para [41] per Moseneke ACJ

<sup>36</sup> *SAPS v Solidarity* at para [110] per Cameron J, Froneman J and Majiedt AJ

(c) Consideration of the individual

34. The Constitutional Court dismissed the argument that focusses on the individual in remedial measure cases. In *Minister of Finance and Another v Van Heerden* 2004 (6) SA 121 (CC), the Constitutional Court made it clear that the focus is on the group and not on exceptions within the group. Moseneke J (as he then was) had the following to say in this regard:

*“The starting point of equality analysis is almost always a comparison between affected classes. However, often it is difficult, impractical or undesirable to devise a legislative scheme with ‘pure’ differentiation demarcating precisely the affected classes. Within each class, favoured or otherwise, there may indeed be exceptional or hard cases or windfall beneficiaries. That however is not sufficient to undermine the legal efficacy of the scheme. The distinction must be measured against the majority and not the exceptional and difficult minority of people to which it applies. In this regard I am in respectful agreement, with the following observation of Gonthier J, in *Thibaudeau v Canada*:*

*‘The fact that it may create a disadvantage in certain exceptional cases while benefiting a legitimate group as a whole does not justify the conclusion that it is prejudicial’.*<sup>37</sup>

35. The approach for which Solidarity contends has no place in the implementation of a remedial measure. It has soundly been rejected by the Constitutional Court.

(d) The “race and gender norming” argument

36. This argument was raised by Solidarity in its written submissions in the Constitutional Court in *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC). POPCRU addressed it in its written submissions. Solidarity then elected not to pursue it in argument when it was directly raised with its Counsel by the Deputy Chief Justice of the Constitutional Court.

37. It appears to be a concept of American extraction otherwise known as “*within group norming*”. It has been defined as

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<sup>37</sup> *Minister of Finance and Another v Van Heerden* 2004 (6) SA 121 (CC) at para [39]

*“the process of statistically adjusting the scores of minority job applicants on job qualification tests by rating each test taker’s score against the results of others in his or her racial or ethnic [or gender] group”*.<sup>38</sup>

38. In the United States, an illustration of “*race norming*” is said to be

*“a system in which a white man gets a score of eighty on a test, an Hispanic gets a score of seventy and a Negro a sixty, but after “Norming”, the white man has the lowest score and the Negro the highest, so he gets the job.”*<sup>39</sup>

39. “*Gender norming*” has been defined in the United States as

*“translat[ing] into a man having to carry fifty pounds to qualify for the job, while a woman only needs to carry twenty-five.”*<sup>40</sup>

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<sup>38</sup> <http://dictionary.reference.com/browse/race+norming>

<sup>39</sup> Deceived: Corrupt Leadership and the American Empire, Marlin Creasote, books.google.co.za/books?isbn=0971093806, at chapter 1 page 5

<sup>40</sup> Deceived: Corrupt Leadership and the American Empire, Marlin Creasote, books.google.co.za/books?isbn=0971093806, at chapter 1 page 5

40. There is no suggestion in Solidarity's shadow report that this has happened in any instance. There is no allegation that test scores are manipulated to suit a particular race group. There is also no allegation that the odds are heavily stacked physically against one gender to favour another.
41. It is always tempting to import foreign equality jurisprudence into South African law on affirmative action. But the Constitutional Court has (with respect rightly) cautioned against such an approach in the context of South African equality jurisprudence. It said, poignantly:

*“Section 9(1) provides: ‘Everyone is equal before the law and has the right to equal protection and benefit of the law.’ Of course, the phrase ‘equal protection of the law’ also appears in the 14<sup>th</sup> Amendment of the US Constitution. The American jurisprudence has, generally speaking, rendered a particularly limited and formal account of the reach of the equal protection right. The US anti-discrimination approach regards affirmative action measures as a suspect category which must pass strict judicial scrutiny. The test requires that it be demonstrated that differentiation on the grounds of race is a necessary means to the promotion of a compelling or*

overriding State interest. A rational relationship between the differentiation and a State interest would be inadequate. Our equality jurisprudence differs substantively from the US approach to equality. Our respective histories, social context and constitutional design differ markedly. Even so, the terminology of ‘affirmative action’ has found its way into general use and into a number of our statutes directed at prohibiting unfair discrimination and promoting equality, such as the Employment Equity Act 55 of 1998 and the Promotion of Equality and the Prevention of Unfair Discrimination Act 4 of 2000. But in our context, this terminology may create more conceptual and other difficulties than it resolves. We must therefore exercise great caution not to import, through this route, inapt foreign equality jurisprudence which may inflict on our nascent equality jurisprudence American notions of ‘suspect categories of State action’, and of ‘strict scrutiny’. The Afrikaans equivalent ‘regstellende aksie’ is perhaps juridically more consonant with the remedial or restitutionary component of our equality jurisprudence.<sup>41</sup>

(emphasis supplied)

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<sup>41</sup>

*Minister of Finance and Another v Van Heerden* 2004 (6) SA 121 (CC) at para [29]

42. South Africa's equality jurisprudence differs markedly from that of the United States. The US Constitution has no provision (such as in our Constitution's section 9(2)) that provides for the taking of legislative and other measures designed to protect or advance persons who were disadvantaged by unfair discrimination. Their 14<sup>th</sup> Amendment does not go that far, and the Supreme Court requires that affirmative action measures pass strict judicial scrutiny, such as a "*compelling state interest*". There is no such extra-constitutional judicial stricture in our equality jurisprudence.

43. In 1991, opponents of affirmative action lobbied successfully to remove the practice of "*gender and race norming*" in the workplace by triggering the amendment of section 703 of the US Civil Rights Act, 1964 (dealing with "*Unlawful Employment Practices*"), by the inclusion of the following provision through section 106 of the Civil Rights Act, 1991:

*“(l) Prohibition of discriminatory use of scores*

*It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of,*



*use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.”*

44. In any event, even the United States Supreme Court which places the kind of strictures on affirmative action frowned upon by the Constitutional Court of the Republic of South Africa,<sup>42</sup> has approved of the same sort of remedial or restitutionary measures. In *Johnson v Transportation Agency*<sup>43</sup> the Transportation Agency of Santa Clara County, California created an affirmative action plan to bring about fair representation in its work force of women, minorities, and disabled people. The plan was intended to achieve a statistically measurable annual improvement in hiring and promoting minorities and women in job classifications where they were under-represented, and the long-term goal was to attain a workforce whose composition reflects the proportion of minorities and women in the area workforce.

44.1. The agency gave notice of a vacancy for the job of road dispatcher. This was a craft-worker position, a high-level and skilled job category. None of the 238 jobs in the agency's craft-

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<sup>42</sup> *Minister of Finance and Another v Van Heerden* 2004 (6) SA 121 (CC) at para [29]  
<sup>43</sup> 480 U.S. 616 (1987)

worker category was held by a woman. Paul Johnson and Diana Joyce were the leading candidates, among 12 applicants, for the vacant position. The interviewers rated both Johnson (a male) and Joyce (a female) as well qualified. Johnson had obtained a higher job interview score than Joyce, and so the selection panel recommended him for the position. Nevertheless, Joyce got the job.

- 44.2. Johnson complained under the Federal Civil Rights Act of 1964. He claimed that he was denied the job because of his gender as a male. The US Supreme Court upheld the agency's affirmative action plan. Justice William Brennan (writing for the majority) found nothing wrong under Title VII of the 1964 Civil Rights Act to remedy imbalances of female and male representation in a skilled job category. This affirmative action plan was legal, Justice Brennan wrote, because it merely set goals but did not establish quotas for hiring female employees. He found further that the plan recognized gender as only one of several factors in decisions about hiring and promotion. He found that the plan was acceptable because it was only a temporary means to overcome past discrimination against workers based on gender.

45. *Johnson*'s case is about alleged gender discrimination. In another case dealing with alleged race discrimination, *United Steelworkers v Weber*<sup>44</sup>, the US Supreme Court upheld an employer's affirmative action programme that reserved 50% of the openings in a training programme for black craft workers. The court pointed out that the plan did not thereby unnecessarily trammel the interests of the white employees. The plan did not require the discharge of white workers and their replacement with new black workers. Nor did the plan create an absolute bar to the advancement of white employees as half of those trained in the program would be white. Moreover, the plan was a temporary measure and was not intended to maintain racial balance but simply to eliminate a manifest racial imbalance. The court held that preferential selection of craft trainees at the Gramercy plant would end as soon as the percentage of black skilled craft workers in the Gramercy plant approximates the percentage of blacks in the local labour force.

45.1. In that case the adoption of the plan had been prompted by the fact that only 5 of 273 (or 1.83%) of skilled craftworkers at the plant were black, even though the workforce in the area was

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<sup>44</sup> 443 U.S. 193 (1979)

approximately 39% black. Because of the historical exclusion of blacks from craft positions, the employer had regarded its former policy of hiring trained outsiders as inadequate to redress the imbalance in its workforce.

45.2. The US Supreme Court upheld the employer's decision to select less senior black applicants over their white counterparts. It found that taking race into account was consistent with the Civil Rights Act objective of "*break[ing] down old patterns of racial segregation and hierarchy.*" It observed that "*[i]t would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had been excluded from the American dream for so long*" constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy".

46. The "*race and gender norming*" argument therefore does not assist Solidarity at all. It is, with respect, a hollow argument.

(e) Solidarity's demographics argument

47. We touch briefly on this demographics argument because it is, with respect, a red herring. The demographics argument was decided in Solidarity's favour by the Labour Appeal Court in the case of *Solidarity and Others v Department of Correctional Services and Others* 2015 (4) SA 277 (LAC). The judgment has however been taken on appeal to the Constitutional Court by Solidarity since the court dismissed the balance of Solidarity's application.
48. POPCRU maintains its view that there is nothing in section 2 of the Employment Equity Act that requires continued balkanisation of South Africa in the manner suggested by Solidarity. There is no peremptory requirement to take into account national and regional demographic profile of the economically active population. That decision is now left to the discretion of the person applying the Employment Equity Act.
49. Section 2 of the Employment Equity Act is clear as regards the purpose of affirmative action and how that is to be achieved. It is wrong to

import extraneous factors in order to construe a perfectly clear purpose of the Act as exhaustively set out in section 2.<sup>45</sup>

(f) A philosophical challenge

50. Solidarity's approach seems to be to attack affirmative action in principle even though it professes to accept it.

51. This raises an existential debate about the desirability of affirmative action. That debate was put to bed when the Constitution came into effect on 4 February 1997, containing among its provisions section 9(2) pursuant to which the Employment Equity Act was introduced to root out the systematic and institutionalised inequality in the workplace on grounds of race, gender and physiological abilities.

52. Thus, to the extent that Solidarity's attack on affirmative action is launched at such a philosophical level (that is, whether or not affirmative action as a remedial measure is in principle desirable), it falls to be dismissed outright especially since Solidarity has neither

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<sup>45</sup>

**South African Police Service v Solidarity obo Barnard 2014 (6) SA 123 (CC) at para [226]**

attacked the Constitution nor the Employment Equity Act of South Africa.

(g) Exclusion

53. In our respectful submission, South African equality jurisprudence does not countenance exclusion of one group in order to advance another. The Constitutional Court has also said in *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC) that “section 15(4) [of the Employment Equity Act] sets the tone for the flexibility and inclusiveness required to advance employment equity. It makes it quite clear that a designated employer may not adopt an Employment Equity Policy or practice that would establish an absolute barrier to the future or continued employment or promotion of people who are not from designated groups.”<sup>46</sup>

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*South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC) at para [42]

**F. TRANSFORMATION IS A BITTER BUT CURATIVE MEDICINE THAT SOCIETY DESPERATELY NEEDS IN A QUEST TO ACHIEVING EQUALITY AND REDRESSING APARTHEID DISPARITIES**

54. The Constitutional Court in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*<sup>47</sup> expresses this eloquently:

*“[75] The commitment to achieving equality and remedying the consequences of past discrimination is immediately apparent in section 9(2) of the Constitution. That provision makes it clear that under our Constitution ‘[e]quality includes the full and equal enjoyment of all rights and freedoms’. And more importantly for present purposes, it permits ‘legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination’. These measures may be taken ‘[t]o promote the achievement of equality’.*

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<sup>47</sup> 2004 (4) SA 490 (CC) at paras [75]-[76]



[76] *But transformation is a process. There are profound difficulties that will be confronted in giving effect to the constitutional commitment of achieving equality. We must not underestimate them. The measures that bring about transformation will inevitably affect some members of the society adversely, particularly those coming from the previously advantaged communities. It may well be that other considerations may have to yield in favour of achieving the goals we fashioned for ourselves in the Constitution. What is required, though, is that the process of transformation must be carried out in accordance with the Constitution.”*

(emphasis supplied)

55. An argument that dismisses as “*perverse*” or “*unfairly discriminatory*” the remedial measures that are intended to eradicate those barriers and root out the systematic and institutionalised under-privilege must, in our respectful submission, be dismissed as untenable and cynical.

**G. SPECIAL MEASURES TAKEN BY THE REPUBLIC OF SOUTH AFRICA COMPLIES WITH THE CONVENTION**

56. Article 1, paragraph 4 of the Convention provides as follows:

*“4. Special 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, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.”*

57. The meaning and scope of “*special measures*” was clarified by the Committee in General Recommendation No. 32 which was issued in August 2009.

58. The Recommendation provides, among other things, the following:

58.1. By employing the phrase “*shall not be deemed racial discrimination*”, Article 1, paragraph 4 of the Convention makes

it clear that special measures taken by State parties under the terms of the Convention do not constitute discrimination;

58.2. That “*special measures*” are not an exception to the principle of non-discrimination but are integral to its meaning and essential to the Convention project of eliminating racial discrimination and advancing human dignity and effective equality.<sup>48</sup>

58.3. That in order to conform to the Convention “*special measures*” does not amount to discrimination when taken for the “*sole purpose*” of ensuring equal enjoyment of human rights and fundamental freedoms. Such a motivation should be made apparent from the nature of the measures themselves, the arguments used by the authorities to justify the measures, and the instruments designed to put the measures into effect.

58.4. That the notion of “*adequate advancement*” in Article 1, paragraph 4, implies goal-directed programmes which have the objective of alleviating and remedying disparities in the enjoyment of human rights and fundamental freedoms affecting particular

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<sup>48</sup> The Constitutional Court of South Africa follows the same approach. See *Minister of Finance and Another v Van Heerden* 2004 (6) SA 121 (CC) at paras [30]-[31] & [95]

groups and individuals, protecting them from discrimination. Such disparities include but are not confined to persistent or structural disparities and *de facto* inequalities resulting from the circumstances of history that continue to deny to vulnerable groups and individuals the advantages essential for the full development of the human personality.

58.5. Article 1, paragraph 4 provides for limitations on the employment of special measures by States parties.

(1) The first limitation is that the measures “*should not lead to the maintenance of separate rights for different racial groups*”. This provision is narrowly drawn to refer to “*racial groups*” and calls to mind the practice of apartheid referred to in Article 3 of the Convention which was imposed by the authorities of the State, and to practices of segregation referred to in that article and in the preamble to the Convention.

(2) The second limitation on special measures is that “*they shall not be continued after the objectives for which they*

*have been taken have been achieved*". This limitation is essentially functional and goal-related: the measures should cease to be applied when the objectives for which they were employed – the equality goals – have been sustainably achieved. The length of time permitted for the duration of the measures will vary in light of their objectives, the means utilised to achieve them, and the results of their application. South Africa is a long way from achieving the objectives of the special measures envisaged by the Employment Equity Act and other remedial measures. Part of the cause for that is resistance of the sort now displayed by Solidarity in its numerous court challenges and now in this committee.

58.6. "*Measures*" includes the full span of legislative, executive, administrative, budgetary and regulatory instruments, at every level in the State apparatus, as well as plans, policies, programmes and preferential regimes in areas such as employment, housing, education, culture, and participation in public life for disfavoured groups, devised and implemented on the basis of such instruments. States parties should include as

required in order to fulfil their obligations under the Convention, provisions on special measures in their legal systems, whether through general legislation or legislation directed at specific sectors in light of the range of human rights referred to in Article 5 of the Convention, as well as through plans, programmes and other policy initiatives at national, regional and local levels.

**H. CONCLUSION**

59. The Republic of South Africa's constitutional injunction is not the advancement of categories of persons previously disadvantaged by unfair discrimination as an end in itself. Rather, the advancement is intended as a means to the achievement of a greater constitutional purpose. That greater purpose is equality or equitable representation of all categories of persons.
60. In the result, we submit that Solidarity's objections have no merit.

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