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ATTENTION: SA HUMAN RIGHTS COMMISSION **05 DECEMBER 2023**
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Dear Sir/Madam

RE: SAHRC REPORT TO CERD

1. We confirm that we act and write this letter on behalf of our members in terms of Section 200 of the Labour Relations Act (hereafter the "LRA"), as well as the broader South African public who has a direct interest in our government's interpretation and application of affirmative action in South Africa.

2. We wish to make it clear from the outset that this letter is not intended to be exhaustive of all matters, issues or rights of our members, and we reserve the right to address same at an appropriate time and in an appropriate forum, should it become necessary to do so.

BACKGROUND

3. In its concluding observations on the combined fourth to eighth periodic reports of South Africa, the Committee for the Elimination of Racial Discrimination (hereafter "CERD" or the "Committee") raised concerns and made recommendations. In order to avoid prolixity, they are not quoted herein. You are referred to paragraphs 6, 7, 8 and 15 in particular. CERD

raised certain concerns and made certain recommendations in this report, 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 SAHRC.

4. In the media statement released by the Committee after the presentation of the South African report, the Committee amongst others made the following remarks:

> *Experts took note of the rather rigid approach to the application of quotas, which seemed to favor quantitative over qualitative, and urged South Africa to ensure that its affirmative action was aligned to the Convention and the Committee's General Recommendation N° 32 of 2009. In order to reduce the disparities and inequality between the different population groups, South Africa had adopted a range of temporary special measures under the guise of affirmative action, and the Country Rapporteur urged South Africa to pay attention to the Committee's General Recommendation N° 32 of 2009 on the importance and range of temporary special measures under the Convention. Temporary special measures did not need to be applied forever; otherwise they would not qualify as temporary special measures.*

5. Given these recommendations and comments by CERD, Solidarity submitted a petition to the SAHRC.

6. The petition was lodged with the SAHRC in May 2017. Solidarity contended *inter alia* in the petition that the EEA and the B- BBEE Act did not comply with the International Convention on the Elimination of all forms of Racial Discrimination (hereafter called "ICERD"), and comprehensively dealt with the reasons for that position. Essentially, what Solidarity sought from the

SAHRC was to, in compliance with the recommendations of this Committee, compel the State Party to (i) review legislation such as the EEA and the B-BBEE, in order to determine whether the said legislation complied with ICERD, and specifically General Recommendation 32 of 2009; and (ii) submit a report to the Parliament of the Republic of South Africa in respect of their findings.

7. On 12 July 2018 the SAHRC issued an Equality Report, and it was evident that the SAHRC agreed, to a large extent, with the concerns raised by Solidarity. Footnote 8 of the Equality Report indicates that it was (at least in part) responsive to Solidarity's request that the SAHRC review government's compliance with ICERD.

8. It is critically important to remember that the State Party has under article 14(2) of ICERD confirmed that *"the South African Human Rights Commission is the body within the Republic's national legal order which shall be competent to receive and consider petitions from individuals or groups of individuals within the Republic's jurisdiction who claim to be victims of any of the rights set forth in the Convention"*.

EQUALITY REPORT

9. Thus, as the appointed official compliance agent for compliance with ICERD, it is critical to assess whether the SAHRC is of the view that the South African Government complies with its international obligations. It is emphatically answered in the negative in the SAHRC's Equality Report (own emphasis):

    9.1. As appears from the executive summary (at p. 4), the Equality Report *evaluates government's programme of radical socio-economic transformation from a rights-based perspective. It explores government's programme of radical socio-economic*

transformation and establishes its roots in the Freedom Charter. It further shows that radical socio-economic transformation should aim to achieve substantive socio-economic equality. Whereas the majority of equality-related research focuses on horizonal status equality between groups sharing characteristics that render them prone to unfair discrimination, this report responds to international calls to address gross economic inequality.

9.2. The executive summary records as one of the key findings of the Equality Report (on p. 5) that "*The Employment Equity Act, 55 of 1998's definition of 'designated groups' and South Africa's system of data disaggregation is not in compliance with constitutional or international law obligations. Government's failure to measure the impact of various affirmative action measures on the basis of need and disaggregated data, especially the extent to which such measures advance indigenous peoples and people with disabilities, likewise violates international law obligations"*.

9.3. Another key finding recorded (on p. 5) is that "*The implementation of special measures in the employment equity sphere is currently misaligned to the constitutional objective of achieving substantive equality, to the extent that implementation may amount to rigid quotas and absolute barriers as opposed to flexible targets. This practice may inadvertently set the foundation for new patterns of future inequality and economic exclusion within and amongst vulnerable population groups"*.

9.4. In Chapter 1, the Equality Report states (on p. 8) that "*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".*

9.5 Specifically recorded is the consideration of the CERD that *"Special measures should be appropriate to the situation to be remedied, be legitimate, necessary in a democratic society, respect the principles of fairness and proportionality, and be temporary. The measures should be designed and implemented on the basis of need, grounded in a realistic appraisal of the current situation of the individuals and communities concerned" (See p. 30). The Equality Report also points out that "need must be determined on the basis of data disaggregated by 'race, colour, descent and ethnic or national origin and incorporating a gender perspective, on the socio-economic and cultural status and conditions' of the group concerned"* (See p. 30).

9.6. Under the heading "Targeted special measures based on need" it is questioned whether the EEA or its implementation is not leading to new imbalances (on p. 33), and noted that indigenous peoples (those whose ethnic descent may be from mixed race marriages) and linguistic or tribal minorities within the designated groups are "not accommodated by the EEA" (on p. 34). Government's approach, which objects against greater disaggregation of data, is said to be "problematic", because *"Decisions based on insufficiently disaggregated data fail to target persons or categories of persons who have been disadvantaged by unfair discrimination, as required by the three-pronged test for affirmative action".* (on p. 34). The Equality Report notes that *"Without first taking the characteristics of groups into account, varying degrees of disadvantage and the possible intersectionality of multiple forms of discrimination (based on race, ethnicity, gender or social origin) faced by members of vaguely categorised groups, cannot be identified. Moreover the current classificatory system and disaggregation of data fails to acknowledge multiple forms of discrimination faced within*

population groups. For example, given that inequality between members of the Black African population group is higher than in any other racial group, it is foreseeable that current practice might result in a job opportunity for a wealthy Black man of Zulu origin, rather than a poor Black woman from an ethnic minority". Special measures accordingly do not account for socio-economic differences within broadly defined population groups. The SAHRC therefore confirmed that the CERD's requirement for the implementation of special measures on the basis of need, and a related *"realistic appraisal of the current situation of the individuals and communities" concerned, cannot be met without a more nuanced disaggregation of data* (see pp 34 – 35).

9.7. In the context of the heading "Special measures designed to advance vulnerable groups", the Equality Report explains that *"Due to the fact that designated groups are bluntly classified and data is insufficiently disaggregated, measures are not capable of being targeted at the most vulnerable groups in society, and can likewise not be designed to respond to new forms of discrimination or compounded discrimination"* (see p 35, emphasis supplied).

9.8. In the view of the SAHRC (p. 36*): "The latter application of the Barnard principle therefore conflicts with the CERD's requirement for special measures to be adopted on the basis of a realistic appraisal of need, taking into account the social and economic circumstances of the group or individual concerned. It furthermore stands in opposition to the approach reflected in the National Development Plan, whereby preference should be accorded on the basis of race 'for at least the next decade' when defining historical disadvantage. Where special measures may result in new imbalances or exacerbate current inequality viewed in the labour context more broadly, it is doubtful that such measures are*

designed to advance people in need of remedial measures. Worryingly, it can lead to perverse consequences and 'token' affirmative action where minority status, or new patterns of discrimination and inequality within designated groups, is not properly considered."

9.9. In discussing the topic "Special measures must promote the achievement of equality", the authors of the Equality Report note that *"Currently, special measures in the employment equity context raise several concerns in respect of the requirement for affirmative action to promote equality" (on p. 36). It is stated that "due to challenges in classification and data disaggregation … equality of outcomes cannot be achieved for marginalized individuals who do not fit comfortably within the crass categories of African, Coloured or Indian population groups. Furthermore, to the extent that measures are targeted at people without assessing need or recognizing intersecting forms of discrimination and disadvantage, special measures will fail to promote substantive equality. In any event, it is not possible to measure the impact of special measures on the most vulnerable persons or groups, if those persons or groups are not identified based on accurate data in the first instance"* (on p. 36). Moreover, it is noted that *"due to polycentric consequences that may result from the application of the Barnard principle, existing patterns of disadvantage may be exacerbated or new patterns of disadvantage may arise, thereby prejudicing the achievement of substantive equality"* (at p 37).

9.10. Upon consideration of the conclusion of the Constitutional Court in the Department of Correctional Services case, the SAHRC notes that the *"requirement to consider regional demographics makes sense given the uneven distribution of different population groups across South Africa. … A context-sensitive approach is thus congruent with*

the CERD's guidance on the interpretation and implementation of the ICERD and its requirement for special measures" (at p 37). However, as the Equality Report correctly notes, section 42 of the EEA has been amended and it now "*renders the consideration of regional demographics discretionary. A failure to consider regional demographics not only stands in conflict with the CERD's position on context-sensitive implementation of special measures, but may simultaneously severely prejudice members of certain designated groups in provinces where they are more significantly represented. Furthermore, considering the huge problem constituted by unemployment in South Africa, the legislative amendment and consequent implementation of affirmative action measures may provoke urban migration and thereby exacerbate existing special injustices"* (pp 37 – 38).

9.11. Based on these observations, the SAHRC found inter alia that:

9.11.1. *"the EEA's definition of 'designated groups' and South Africa's system of data disaggregation are not in compliance with constitutional or international obligations imposed by the CERD read in conjunction with the CERD's general recommendations and concluding observations"* (on p. 39);

9.11.2. *"It is accordingly recommended that the EEA be amended to target more nuanced groups on the basis of need, and taking into account social and economic indicators and that the government report to the SAHRC within six months of the release of the Equality Report 'on steps taken or intended to be taken to amend the EEA …"* (at p 39);

9.11.3. *"It is further found that the EEA and its implementation, as well as the design of special measures, are currently*

misaligned to the constitutional objective of achieving substantive equality. It is accordingly recommended that in qualitatively assessing the impact of affirmative action measures on vulnerable groups, including indigenous people and people with disabilities, the [Department of Labour], in collaboration with the CEE [Commission for Employment Equity] and in consultation with National Treasury, undertake a representative assessment of the implementation of employment equity plans of designated employers in order to ensure that targets are flexibly pursued and do not amount to rigid quotas" (on p. 39);

9.11.4. *"The [Department of Justice and Constitutional Development], in consultation with the [Department of Labour] and CEE [Commission for Employment Equity], should determine whether and how the EEA can be amended to require a qualitative and context-sensitive assessment of need when employment equity plans are implemented. The EEA should be further amended to revert to the position where the consideration of the regionally economic active population in relation to representational levels is mandatory and not discretionary"*(on p. 40). Moreover, the *"[Department of Justice and Constitutional Development], [Departmemt of Labour] and [the Commission for Employment Equity] must jointly report to the [SAHRC] within six months of the release of this Report on information considered and steps intended to be taken to address these recommendations'*(on p. 40).

GOVERNMENT'S RESPONSE

10. The Employment Equity Amendment Act (No. 4 of 2022) was signed into law on 6 April 2023.

11. This amended Act empowers the Minister to inter alia (i) identify national economic sectors; and (ii) determine numerical demographic "targets" for these sectors.

12. 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.

13. 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).

14. 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.

15. 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.

16. 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 labour market as far as its demographic composition is concerned.

17. 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.

18. It appears that the draft regulations are aimed at excluding minorities from the labour 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 available on request.

19. Whilst a comprehensive settlement was reached between the South African Government and Solidarity regarding the Employment Equity Amendment Act; which in effect give credence to the views and recommendations of the SAHRC Equality Report in relation to a nuanced socio-economic need approach to affirmative action, which must be temporary and have a definitive end date; Solidarity once again had to resort to litigation to ensure

that the Government's race obsession be curbed. The settlement agreement was subsequently made an order of Court.

SAHRC ICERD REPORT

20. We submit that it is common cause that the Employment Equity Amendment Act and its regulations promulgates employment equity policies that are diametrically opposite to the nuanced approach proposed by the Equality Report of 2017/2018.

21. Not only is the Act and proposed regulations not in line with the Equality Report, but also movement further away from accepted principals as set out in our settlement agreement, in international obligations as well as global views of affirmative action.

22. In line with the aforementioned, logic, rationality as well as ethical accountability would dictate that the SAHRC would reject the Act as well as the regulations.

23. However, it is with great concern that Solidarity has taken note of the fact in the SAHRC's *Report on the South African Government's combined Ninth to Eleventh Periodic Country Report under the International Convention on the Elimination of All Forms of Racial Discrimination* it in effect welcomes the quota system as set out in then Act and regulations, and asks for stricter application requirements:

    23.1. *The Commission is of the view that there remains a need for increased transformation in several sub-sectors which continue to marginalise previously disadvantaged groups, particularly at senior levels. The proposed method of instituting targets is welcomed as it allows for specific focus on sub-sectors, or regions that have made slow strides in transformation [par 15].*

23.2. *The SAHRC notes that the Amendment Act deleted the annual turnover criteria in the definition of 'designated employer'. The amended definition means employers with staffing of less than 50 people, whether they generate the same or more revenue than employers with over 50 staff members, are not obligated to comply with "designated employer" obligations such as, inter alia, developing and implementing employment equity plans in alignment with affirmative action objectives. The SAHRC views this deletion as a setback for the socio-economic transformation objective as it allows some employers with means to implement affirmative action to ignore the national socio-economic transformation needs merely because they employ less than 50 people [par 16].*

CONCLUSION

24. Considering the above we request that you provide us with answers to the following questions:

24.1. Whether the Equality Report 2017/2018 specifically Chapter 6 has been reviewed and/or set aside;

24.2. If it has not been reviewed and/or set aside, whether the SAHRC still accepts itself bound by its recommendations;

24.3. Whether and how the State have complied with its recommendations as contained in chapter 6;

24.4. What has been done by the SAHRC to ensure compliance of the State by the recommendations as set out in chapter 6;

24.5. If nothing has been done by the SAHRC to ensure compliance, why nothing has been done;

24.6. If there has been compliance by the State of the recommendations as set out in chapter 6, please furnish us with proof of such compliance;

24.7. If there has been non-compliance by the State of the recommendations as set out in chapter 6, whether the SAHRC is still of the view that South Africa's application of affirmative action is not in compliance with constitutional or international obligations;

24.8. If there has been non-compliance by the State of the recommendations as set out in chapter 6, has the SARC informed CERD and/or other human rights bodies of such non-compliance;

24.9. Considering the views as set out in chapter 6, on what basis the SAHRC can welcome the proposed method of instituting targets;

24.10. How such proposed method of instituting targets takes into account:

- 24.10.1 A context-sensitive approach;
- 24.10.2 Socio-Economic needs (based on social and economic indicators) as opposed to race;
- 24.10.3 Disaggregated data; and
- 24.10.4 The temporary nature of affirmative action;

24.11 Whether the SAHRC still views itself as the ICERD mandated authority to monitor the implementation of, and compliance with international and regional human rights instruments, and how it complies with such a responsibility.

25. Take note that irrespective of the aforementioned, we reserve the right to institute legal proceedings on any basis or cause of action we deem fit, and does this letter not attempt to be exhaustive of all matters.

26. Kindly take further note that we are also willing to meet with you to discuss the answers to the aforementioned questions.

Regards,

DIRK HERMANN
CEO: SOLIDARITY