

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case No. 71147/17

In the matter between:

CHAMBER OF MINES OF SOUTH AFRICA First Applicant

**MINING AFFECTED COMMUNITIES UNITED
IN ACTION** Second Applicant

**WOMEN FROM MINING AFFECTED
COMMUNITIES UNITED IN ACTION** Third Applicant

**MINING AND ENVIRONMENTAL JUSTICE
COMMUNITY NETWORK OF SOUTH AFRICA** Fourth Applicant

SEFIKILE COMMUNITY Fifth Applicant

LESETHLENG COMMUNITY Sixth Applicant

BABINA PHUTHI BA GA-MAKOLA COMMUNITY Seventh Applicant

KGATLU COMMUNITY Eighth Applicant

and

MINISTER OF MINERAL RESOURCES Respondent

and

NATIONAL UNION OF MINeworkERS First *Amicus Curiae*

SOLIDARITY TRADE UNION Second *Amicus Curiae*

**RESPONDENT'S HEADS OF ARGUMENT
IN RESPONSE TO THE SECOND AMICUS CURIAE**

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INTRODUCTION

1. The central issue arising from the submissions of Second *Amicus Curiae* (“**Solidarity**”) is whether the *Reviewed Broad-based Black Economic Empowerment Charter for the South African Mining and Minerals Industry* in Government Gazette No. 40923 on 15 June 2017 (“**2017 Charter**”) unfairly discriminates against categories of employees in the mining sector on the basis of race in conflict with the Constitution of the Republic of South Africa, 1996 (“**Constitution**”), the Employment Equity Act 5 of 1998 (“**EEA**”), the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (“**PEPUDA**”), and international law.

2. Solidarity seemingly posits the following three further submissions:
 - 2.1. The Minister is not entitled to use the power under section 100(2) of the Mineral and Petroleum Resources Development Act 28 of 2002 (“**MPRDA**” or “**the Act**”) to legislate, as he allegedly seeks to do through the Charter.¹

 - 2.2. The 2017 Charter is characterised by ambiguities, contradictions and vagueness to the extent that its adoption must be said to be irrational.²

¹ FA 2779 para 16.1.

² FA 2779 para 16.2.

- 2.3. The effect and impact of the 2017 Charter on the mining industry in particular, and the South African economy in particular, is counterproductive given its stated objectives, and therefore its adoption is said to be irrational.³
3. Independently, Solidarity goes no further in justifying its additional grounds of review, which lack sufficient particularity. Accordingly, the additional grounds of review, which have been dealt with extensively in the Minister's answering affidavit,⁴ are not dealt with further in these submissions, except where they are indirectly relied upon to motivate for the review of the 2017 Charter based on unfair discrimination.
4. As submitted below, Solidarity's contentions fail on the basis that the 2017 Charter and the employment equity targets it sets in section 2.3 constitute a legitimate restitutionary measure for the purposes of section 9(2) of the Constitution. Further, these targets are sufficiently flexible and do not constitute quotas in terms of section 15(3) of the EEA.
5. The allegations made by Solidarity that 2017 Charter unfairly discriminates against categories of workers, including white women and person with disabilities, is misplaced. Accordingly, the application should be dismissed, with no order as to costs.⁵

³ FA 2779 para 16.3.

⁴ AA 2894-9 paras 22-36.

⁵ See **Biowatch Trust v Registrar, Genetic Resources** 2009 (6) SA 232 (CC) at paras 21 and 24, where the Constitutional Court held that the general approach in constitutional litigation is to

BRIEF FACTUAL BACKGROUND

6. The economic, political and social legacy inherited by the democratic South African government in 1994 was one characterized by the racial exclusion of the majority of South Africans from the mainstream economy. There was, and unfortunately still is, a massive disparity in access to, control over and ownership of resources in the economy, and in the mining industry in particular.⁶
7. In this context, Parliament enacted the MPRDA as a measure *inter alia* to introduce historically disadvantaged South Africans (“**HDSA**”) into the mining industry in an incremental, meaningful and sustainable manner.⁷
8. On 23 September 2015, the Minister was appointed and was confronted with requests from various stakeholders for certainty in the relation to the drafting of an amendment to the 2010 Charter. The requests were as a result of uncertainty in the mining industry.⁸
9. In February 2016, the Minister attended his first mining indaba and undertook to bring certainty and finality to question of the drafting of an amendment to the

not award costs against an unsuccessful litigant in proceedings against the state, unless the litigation is frivolous, vexatious, or in any other way manifestly inappropriate.

⁶ AA p 2891 para 11.

⁷ AA p 2891 para 12.

⁸ AA p 2891 para 13.

2010 Charter within a year, taking into account all representations made on the issues.⁹

10. In about March 2016, a Mining Industry Growth, Development and Employment Task Team (“**MIGDETT**”) meeting was held between the relevant stakeholders. The Department of Mineral Resources (“**Department**”) presented the content of the draft 2017 Charter at this meeting. In that context, the various stakeholder representatives made their respective submissions¹⁰
11. The draft 2017 Charter took into account the submissions of relevant stakeholders and the *Assessment of the Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry (Mining Charter) May 2016* (“**2015 Assessment**”). Once the preparation of the draft 2017 Charter was concluded internally, the Minister wrote to the key stakeholders in the mining industry in early April 2016 and informed them of his intention to publish the draft 2017 Charter for public comment and input. The draft 2017 Charter was not final in effect and was prepared by the Department through a series of engagements for the purposes of the public participation process.¹¹
12. Following the public participation process which commenced on 15 April 2016 with the publication of the draft 2017 Charter for public comment, and included over 11 months of engagements with stakeholders in the mining industry,

⁹ AA p 2891 para 14.

¹⁰ AA pp 2891-2 para 15.

¹¹ AA pp 2892 para 16.

including Solidarity, on 15 June 2017 the 2017 Mining Charter was published in the Government Gazette.¹²

EQUALITY IN TERMS OF THE CONSTITUTION

13. Solidarity posits that *“the 2017 Charter undermines the values of a non-racial non-sexist society and the promotion of equality by displaying naked racial preference and as such unfairly discriminates; it is therefore unconstitutional”*. Solidarity bases this allegation on the EEA, PEPUDA, and international law, which includes the Convention on the Elimination of All Forms of Racial Discrimination, 1969 (“**CERD**”) and the International Labour Organisation (ILO) Convention concerning Discrimination in Respect of Employment and Occupation (No. 111: Discrimination (Employment and Occupation) Convention, 1958) (“**ILO Convention 111**”).

14. Section 9 of the Constitution reads:

“(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.

¹² AA pp 2892 para 17.

- (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.”*

15. In **South African Police Service v Solidarity obo Barnard (“Barnard”)**,¹³ Moseneke DCJ, for a majority of the Constitutional Court in defining South Africa’s constitutional vision in relation to equality, held that:

“Our constitutional democracy is founded on explicit values. Chief of these, for present purposes, are human dignity and the achievement of equality in a non-racial, non-sexist society under the rule of law. The foremost provision in our equality guarantee is that everyone is equal before the law and is entitled to equal protection and benefit of the law. But, unlike other constitutions, ours was designed to do more than record or confer formal equality.

¹³ 2014 (6) SA 123 (CC).

At the point of transition, two decades ago, our society was divided and unequal along the adamant lines of race, gender and class. Beyond these plain strictures there were indeed other markers of exclusion and oppression, some of which our Constitution lists. So, plainly, it has a transformative mission. It hopes to have us re-imagine power relations within society. In so many words, it enjoins us to take active steps to achieve substantive equality, particularly for those who were disadvantaged by past unfair discrimination. This was and continues to be necessary because, whilst our society has done well to equalise opportunities for social progress, past disadvantage still abounds.

Our quest to achieve equality must occur within the discipline of our Constitution. Measures that are directed at remedying past discrimination must be formulated with due care not to invade unduly the dignity of all concerned. We must remain vigilant that remedial measures under the Constitution are not an end in themselves. They are not meant to be punitive nor retaliatory. Their ultimate goal is to urge us on towards a more equal and fair society that hopefully is non-racial, non-sexist and socially inclusive.”¹⁴

The proper approach to restitutionary measures in section 9(2)

¹⁴ **South African Police Service v Solidarity obo Barnard** 2014 (6) SA 123 (CC) at paras 28-30.

16. As a starting point in **Minister of Finance and Others v Van Heerden** (“**Van Heerden**”),¹⁵ Moseneke DCJ, for a majority of the Constitutional Court held:

“If a measure properly falls within the ambit of section 9(2) it does not constitute unfair discrimination. However, if the measure does not fall within section 9(2), and it constitutes discrimination on a prohibited ground, it will be necessary to resort to the Harken test in order to ascertain whether the measures offend the anti-discrimination prohibition in section 9(3).

When a measure is challenged as violating the equality provision, its defender may meet the claim by showing that the measure is contemplated by section 9(2) in that it promotes the achievement of equality and is designed to protect and advance persons disadvantaged by unfair discrimination. It seems to me that to determine whether a measure falls within section 9(2) the enquiry is threefold. The first yardstick relates to whether the measure targets persons or categories of persons who have been disadvantaged by unfair discrimination; the second is whether the measure is designed to protect or advance such persons or categories of persons; and the third requirement is whether the measure promotes the achievement of equality.”¹⁶

¹⁵ 2004 (6) SA 121 (CC).

¹⁶ **Van Heerden** at paras 36-7.

17. In restating what constitutes a restitutionary measure for the purposes of section 9(2) of the Constitution, the Court in **Barnard** held that:

“The test whether a restitution measure falls within the ambit of section 9(2) is threefold. The measure must—

(a) target a particular class of people who have been susceptible to unfair discrimination;

(b) be designed to protect or advance those classes of persons;
and

(c) promote the achievement of equality.

Once the measure in question passes the test, it is neither unfair nor presumed to be unfair. This is so because the Constitution says so. It says measures of this order may be taken. Section 6(2) of the [EEA], whose object is to echo section 9(2) of the Constitution, is quite explicit that affirmative action measures are not unfair. This however, does not oust the court’s power to interrogate whether the measure is a legitimate restitution measure within the scope of the empowering section 9(2).”¹⁷

18. The Court held further that:

¹⁷ **South African Police Service v Solidarity obo Barnard** 2014 (6) SA 123 (CC) at paras 36-7.

“As a bare minimum, the principle of legality would require that the implementation of a legitimate restitution measure must be rationally related to the terms and objects of the measure. It must be applied to advance its legitimate purpose and nothing else. Ordinarily, irrational conduct in implementing a lawful project attracts unlawfulness. Therefore, implementation of corrective measures must be rational. Although these are the minimum requirements, it is not necessary to define the standard finally.”¹⁸

19. The 2017 Charter is a clearly a restitutionary measure. It’s enabling provision, section 100(2) makes that clear. In terms of its employment equity targets detailed in section 2.3,¹⁹ the 2017 Charter seeks “to create a conducive

¹⁸ **South African Police Service v Solidarity obo Barnard** 2014 (6) SA 123 (CC) at para 39.

¹⁹ *“Consistent with the [EEA], workplace diversity and equitable representation at all levels are catalysts for social cohesion, transformation and competitiveness within the mining and minerals industry. In order to create a conducive environment to ensure diversity as well as participation of Black Persons at all decision-making positions and core occupational categories in the mining and minerals industry, a Holder must employ a minimum threshold of Black Persons which is reflective of the Demographics of the country as follows:*

Board

A minimum of 50% Black Persons with exercisable voting rights, 25% of which must be female Black Persons.

Executive/Top Management

A minimum of 50% Black Persons at the executive directors' level as a percentage of all executive directors, 25% of which must be female Black Persons.

Senior Management

A minimum of 60% Black Persons in senior management, 30% of which must be female Black Persons.

Middle Management level

A minimum of 75% of Black Persons in middle management, 38% of which must be female Black Persons.

Junior Management level

A minimum of 88% Black employees in junior management, 44% of which must be female Black Persons.

Employees with disabilities

environment to ensure diversity as well as participation of Black Persons²⁰ at all decision-making positions and core occupational categories in the mining and minerals industry”.

The 2017 Charter is a legitimate restitutionary measure

20. As a result, the 2017 Charter clearly falls within the section 9(2) inquiry outlined in **Van Heerden** and restated in **Barnard**:

20.1. it targets a particular class of people who have been susceptible to unfair discrimination, in this instance Black People: the 2017 Charter seeks in its employment equity targets to foster workplace diversity and equitable representation in the mining industry, particularly in relation to Black Persons, including female Black Persons;

A minimum of 3% employees with disabilities as a percentage of all employees, reflective of national and/or provincial Demographics.

Core and Critical skills

A Holder must ensure that a minimum of 60% Black Persons are represented in the Holder's Core and Critical Skills by diversifying its existing pools. Core and Critical Skills must include technical representation across all organisational levels. To achieve this, the Holder must identify and implement its existing pools in line with the approved SLP and such implementation must be reflective of the Demographics of the Republic.”

²⁰ In terms of the 2017 Charter, a “**Black Person**” is a generic term which means Africans, Coloureds and Indians—

- (a) Who are citizens of the Republic of South Africa by birth or descent; or
- (b) Who became citizens of the Republic of South Africa by naturalisation:
 - (i) before 27 April 1994; or
 - (ii) on or after 27 April 1994 and who would have been entitled to acquire citizenship by naturalisation prior to that date;
- (c) A juristic person which is managed and controlled by person/s contemplated in paragraph (a) and/or (b) and the person/s collectively or as a group own and control all issued share capital or members' interest, and are able to control the majority of the members' vote.’

- 20.2. it is designed to protect or advance those classes of persons by promoting the participation of Black Persons in the mining sector; and
- 20.3. it promotes the achievement of equality by setting a target for employment opportunities for Black Persons in the mining sector.
21. Accordingly, the 2017 Charter is neither unfair nor can it be presumed to be unfair. It is a legitimate restitutionary measure.
22. In relation to the exclusion of white women from the targets detailed in section 2.3 and in section 2.1 which deals with “ESOPs”, the Court in **Van Heerden** stated:
- “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.”*²¹
23. Solidarity has accordingly failed to make out a case that the 2017 Charter constitutes unfair discrimination against white women in terms of section 9(2) of the Constitution. Its charge that people with disabilities are similarly excluded if

²¹ **Minister of Finance and Others v Van Heerden** 2004 (6) SA 121 (CC) at 39.

factually inaccurate: people with disabilities are specifically included in section 2.3 of 2017 Charter.²²

THE EMPLOYMENT EQUITY ACT

Restitutionary measures in terms of the EEA

24. Section 6(2)(a) of the EEA mirrors section 9(2) of the Constitution providing “*[i]t is not unfair discrimination to take affirmative action measures consistent with the purpose of the Act*”. Section 2(b) provides “*[t]he purpose of this Act is to achieve equity in the workplace by implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups,²³ in order to ensure their equitable representation in all occupational categories and levels in the workforce.*”
25. Notwithstanding the definition of designated groups, the Constitutional Court in **Van Heerden** has acknowledged that there are ‘exceptional or “hard cases”’. In this instance, white women are excluded from the targets set in 2017 Charter. This does not render the 2017 Charter unconstitutional or in conflict with the EEA. To the contrary, it is constitutionally permissible.

The 2017 Charter sets targets

²² See above n 19.

²³ In terms of section 1 of the EEA: “*designated groups*” means black people, women and people with disabilities.

26. In **Barnard**, the Court succinctly determined the distinction between targets and quotas:

“Let it suffice to observe that the primary distinction between numerical targets and quotas lies in the flexibility of the standard. Quotas amount to job reservation and are properly prohibited by section 15(3) of the [EEA]. The same section endorses numerical goals in pursuit of workplace representivity and equity. They serve as a flexible employment guideline to a designated employer.”²⁴ (Own emphasis.)

27. Solidarity relies primarily of the allegation that the targets detailed in section 2.3 of the 2017 Charter constitute quotas, prohibited in terms of section 15(3). This is not the case. The measure adopted in section 2.3 of the 2017 Charter comply with the dictates of section 15(2) of the EEA.
28. As detailed in the Minister’s answering affidavit: *“as one of its objectives, the 2017 Charter seeks to advance “employment and diversifying the workforce in order to achieve competitiveness and productivity in the mining and minerals industry”*.²⁵ In section 2.3, the 2017 Charter lists a series of targets, consistent with section 100(2)(a), which the mining industry must seek to achieve.

29. The Minister states further:

²⁴ **South African Police Service v Solidarity obo Barnard** 2014 (6) SA 123 (CC) at para 42.

²⁵ AA p 2901 para 43.

- 29.1. The targets “are a baseline set for the transformation of the mining industry at a particular point in time and for a particular period of time, until such time that the Minister deems it prudent to revisit them.”²⁶
- 29.2. Mining charters were intended by the legislature “to constitute a flexible measure . . . that was to be incrementally built as and when the occasion arose.”²⁷
- 29.3. As a matter of practice, “the Department has always applied Mining Charters in a flexible and sensitive manner that takes in to account the individual circumstances of each employee, including appropriate workplace analysis and consultation in the realisation of their targets”.²⁸
- 29.4. The “implementation of targets is not immediate. . . The mining industry has 12 months within which to implement the employment targets.”²⁹
30. Far from being quotas, the targets outlined in section 2.3 meet the flexibility standard outlined by the Constitutional Court in **Barnard**. On this ground of review, the application must fail.

²⁶ AA p 2901 para 44.

²⁷ AA p 2902 para 44.1.

²⁸ AA p 2902 para 45.

²⁹ AA p 2902 para 46.

THE PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION ACT

31. Allied to the purported grounds of review based on the EEA, Solidarity seeks to, in the main, restate its arguments with reliance on PEPUDA. As with its charges in terms of the EEA, its charges under PEPDUA must fail.
32. PEPUDA, as with the Constitution and the EEA, recognises in section 14(1) that “[i]t is not unfair discrimination to take measures designed to protect or advance person or categories of person disadvantaged by unfair discrimination or the members of such groups or categories of persons”.
33. For all of the reasons stated above, particularly that the 2017 Charter constitutes a legitimate restitutionary measure, this ground of review is misconceived and incorrect in law.

INTERNATIONAL LAW

34. Section 39(1)(b) of the Constitution enjoins courts to consider international law when interpreting the Bill of Rights. Notwithstanding this duty, Solidarity’s reliance on CERD and the ILO Convention 111 fall to be dismissed on the same grounds as its arguments in terms of the EEA and PEPUDA.
35. South Africa has ratified the CERD and ILO Convention 111. Article 1(4) of the CERD provides:

*“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.”*³⁰

36. As detailed in the Ministers answering affidavit, Article 1(4) of the CERD is given expression to in *General Recommendation No 32: The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination* (2009) which, at para 16, states:

*“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.”*³¹

³⁰ AA p 2905 para 55.

³¹ AA p 2906 para 56.

37. In the light of the CERD and General Recommendation 32, the 2017 Charter, and all previous Charters, constitute a special measure which seeks to allow for the effective entry of HDSAs into the mining industry, it is legitimate in that it seeks to realise the dictates of section 100(2) of the MPRDA, and it is clearly necessary and proportional to the dictates of South Africa's democratic society.
38. Similarly, article 5(2) of the ILO Convention 111 recognises special measures based on "*social or cultural status*" shall not be deemed to be discrimination.
39. As with Solidarity's arguments in relation to PEPUDA, this ground of review must fail.

PAJA DOES NOT APPLY TO THIS DISPUTE

40. The applicability of the Promotion of Administrative Justice Act 3 of 2000 ("**PAJA**") to this dispute has been dealt with in detail in the heads of argument in response to the First Applicant and need not be repeated here, save that like the First Applicant, Solidarity fails to identify the decision which it seeks to challenge. For the purpose of a judicial review in terms of PAJA, the definition of "*administrative action*" expressly requires there to be a decision under review, as defined in section 1 of PAJA.
41. The import of this failing is that Solidarity's grounds of review must be determined in terms of the principle of legality which permits only three possible

grounds of review: lawfulness; reasonableness; and procedural fairness. As a result, the grounds of review on which Solidarity relies is significantly reduced.

APPROPRIATE RELIEF

42. As displayed above, Solidarity's contentions that the 2017 unfairly discriminates against categories of persons is misplaced and it incorrect in law. Accordingly, the application falls to be dismissed in its entirety.

CONCLUSION AND COSTS

43. The 2017 Charter a legitimate restitutionary measure aimed at addressing the injustices of South Africa's past. In the result, the application should be dismissed with no order as to costs.³²

A Subel SC

AE Bham SC

F Ismail

Chambers, Sandton

15 December 2017

³² **Biowatch Trust v Registrar, Genetic Resources** 2009 (6) SA 232 (CC) at paras 21 and 24.

LIST OF AUTHORITIES

Convention on the Elimination of All Forms of Racial Discrimination, 1969

Constitution of the Republic of South Africa, 1996

Employment Equity Act 5 of 1998

General Recommendation No 32: The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination (2009)

International Labour Organisation (ILO) Convention concerning Discrimination in Respect of Employment and Occupation (No. 111: Discrimination (Employment and Occupation) Convention, 1958)

Mineral and Petroleum Resources Development Act 28 of 2002

Minister of Finance and Others v Van Heerden [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC).

Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

Promotion of Administrative Justice Act 3 of 2000

Reviewed Broad-based Black Economic Empowerment Charter for the South African Mining and Minerals Industry in Government Gazette No. 40923 (15 June 2017)

South African Police Service v Solidarity obo Barnard [2014] ZACC 23; 2014 (6) SA 123 (CC); 2014 (10) BCLR 1195 (CC)