IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO:43621/17
71147/17

In the matter between:

CHAMBER OF MINES	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
BAKGATLA BA SEFEKILE COMMUNITY	Fifth applicant
LESETHLENG COMMUNITY	Sixth applicant
BABINA PHUTI BA GA MAKOLA COMMUNITY	Seventh applicant
KGATLU COMMUNITY	Eighth applicant
and	
MINISTER OF MINERAL RESOURCES	First respondent
DEPARTMENT OF MINERAL RESOURCES	Second respondent
NATIONAL UNION OF MINEWORKERS	First *amicus curiae*
SOLIDARITY	Second *amicus curiae*

SOLIDARITY'S HEADS OF ARGUMENT

INTRODUCTION

1. In this application, the Chamber of Mines ('**the Chamber**') prays for the review and setting aside of the Reviewed Broad-Based Black Economic Empowerment Charter for the South African Mining and Minerals Industry, 2016, published in Government

Gazette No 40923 of 15 June 2017 ('**the 2017 Charter**').[1] The second to eighth applicants similarly seek review, albeit on different grounds.[2]

2. Solidarity, admitted as *amicus curiae* by virtue of a court order dated 24 November 2017 hereby submits its written argument in accordance with the directive of this Court. In making these submissions, Solidarity is mindful of its role, which is to assist the Court by furnishing information or argument regarding questions of law, because of its expertise on and interest in the matter before the Court.[3]

3. Solidarity agrees with the position adopted by the Chamber in the review. It submits that the 2017 Charter is irrational, discriminatory, arbitrary, capricious, unlawful and unconstitutional and stands to be set aside, and in particular supports and advances the position that:

3.1. the Minister of Mineral Resources ('**the Minister**') is not entitled to use the power under section 100(2) of the Mineral and Petroleum Resources Development Act 28 of 2000 ('**MPRDA**') to legislate, as he seeks to do through the 2017 Charter;

3.2. the 2017 Charter is characterised by ambiguities, contradictions and vagueness to the extent that its adoption must be said to be irrational;

[1] COM NoM prayers 2 – 3 p 2; COM FA para 3 p 20.
[2] Intervention application para 44 and Minister's AA to fifth to eighth applicants para 7.
[3] *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) at 27H–28B.

3.3. the effect and impact of the 2017 Charter on the mining industry in particular, and the South African economy in particular, is counter-productive given its stated objectives, and therefore its adoption is said to be irrational;

3.4. 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 and irreconcilable with the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ('**the Equality Act**');

3.5. the employment equity element of the 2017 Charter is

3.5.1. irreconcilable with certain International Conventions that the Republic of South Africa is bound by (such as the Convention on the Elimination of All Forms of Racial Discrimination ('**CERD**') and International Labour Organisation Convention 1958 (No. 111). ('**ILO Convention 111**')); and

3.5.2. also irreconcilable with the provision of the Employment Equity Act 55 of 1998 ('**the EEA**'), *inter alia* because it sets quotas and subverts the requirement that a designated employer consult with employees and their representatives on the conduct of workplace analysis and the preparation and implementation of an employment equity plan that is suitable to the circumstances of the particular employer.

4. It is submitted that:

4.1. the 2017 Charter constitutes the exercise by the Minister of a power, or the performance by him of a function beyond that conferred on him by law, so that the 2017 Charter falls to be set aside as offending against the constitutionally enshrined principle of legality; and/or

4.2. the 2017 Charter contravenes a law or is not authorised by the empowering provision, and falls to be reviewed and set aside in accordance with section 6(2)(*f*)(i) of the Promotion of Administrative Justice Act 2 of 2000 ('**PAJA**'); and

4.3. the 2017 Charter is unconstitutional or unlawful, and falls to be reviewed and set aside in accordance with section 6(2)(*i*) of PAJA.

5. In order to avoid potentially unnecessary repetition of the submissions of the Chamber,[4] Solidarity presents argument that is limited to consideration of the aspects of the 2017 that have been identified as being inconsistent with the EEA, the Equality Act and/or international instruments that South Africa is bound by. The submissions in respect of the EEA are, in large measure, also applicable to the considerations relevant to the evaluation of the 2017 Charter under the Equality Act and the international conventions, so that the focus of these submissions is on the EEA.

[4] In the present case, the written submissions of Solidarity are due to be filed at the same time as those of the Chamber and Solidarity is not in the ordinary position of an *amicus* that is able to first consider the submissions of the parties to the litigation before presentation of such an *amicus'* written submissions.

CONTEXT AND CHRONOLOGY

6. The MPRDA, which took effect on **1 May 2004**, placed upon the Minister the obligation to develop a broad-based socio-economic charter to set framework-targets and a timetable for effecting the entry of historically disadvantaged South Africans ('**HDSAs**') into the mining industry, to allow such HDSAs to benefit from the exploitation of mining and mineral resources.[5] The purposes of the MPRDA, which the charter was to serve, included -

6.1. promotion of equitable access to the nation's mineral and petroleum resources to all people of South Africa;[6]

6.2. substantial and meaningful expansion of opportunities for historically disadvantaged persons (including women) to enter the mineral and petroleum industries and to benefit from their exploitation;[7]

6.3. promotion of economic growth and mineral and petroleum resource development in South Africa;[8]

6.4. promotion of employment and the advancement of the social and economic welfare of all South Africans;[9]

[5] MPRDA s 100(1).
[6] MPRDA s 2(*c*).
[7] MPRDA s 2(*d*).
[8] MPRDA s 2(*e*).
[9] MPRDA s 2(*f*).

6.5. security of tenure in respect of prospecting, exploration, mining and production operations;[10] and

6.6. to ensure that holders of mining and production rights contribute towards the socio-economic development of the areas in which they are operating.[11]

7. A charter as contemplated under section 100(1) of the MPRDA was published on **13 August 2004** ('**the Original Charter**').[12] It provided *inter alia* for 26% HDSA ownership of mining industry assets within 10 years of its publication.[13]

8. Then, in **September 2010**, a further charter was published ('**the 2010 Charter**').[14]

9. The Minister published a proposed revision of the Charter on **15 April 2016**, and requested representations to be made.

10. On **13 May 2016**, Solidarity made submissions in response. In the submissions, Solidarity -

10.1. challenged the power of the Minister to issue yet a further Charter, in circumstances where section 100(2)(*a*) referred to the development of a charter within six months of the MPRDA coming into effect on 1 May 2009, and did not provide for the issue of a further charter or amendments;

[10] MPRDA s 2 (*g*).
[11] MPRDA section 2(*i*).
[12] COM FA para 33 p 31.
[13] COM FA para 42 p 34.
[14] COM FA para 51 p 35.

10.2. complained of the inconsistency of the draft with South Africa's obligations under CERD;

10.3. pointed to the adverse economic effects and the strain on the mining industry;

10.4. explained that certain provisions of the draft were irreconcilable and/or in conflict with the provisions of the EEA;

10.5. asserted that certain representivity targets set were so set by reference to considerations of race alone, and did not take into account reality;

10.6. referred to the absence of sustainable development elements from the draft;

10.7. objected to the use of quotas;

10.8. expressed general concerns; and

10.9. came to the conclusion that the draft would not lead to the attainment of important objectives such as economic growth, employment growth, investment, sustainability of the mining industry and the retention of critical and core skills.[15]

11. The Minister published the 2017 Charter on **15 June 2017**.[16] In doing so, the Minister invoked his powers under section 100(2) of the MPRDA, and directed that the 2017 Charter would come into operation on the very day of its publication.

[15] Annexure GD5 to Solidarity's FA in the application to be admitted as *amicus*.
[16] COM FA para 57 p 37.

12. In consequence of an undertaking by the Minister, no effect has been given to the 2017 Charter pending the outcome of this application.[17]

THE 2017 CHARTER[18]

13. The preamble to the 2017 Charter records that:

13.1. the '*systematic marginalization of the majority of South Africans, facilitated by the exclusionary policies of the apartheid regime, prevented Black Persons, as defined herein, from owning the means of production and from meaningful participation in the mainstream economy. To redress these historic inequalities and thus give effect to section 9 (equality clause) of the Constitution of the Republic of South Africa, 1996 (Constitution), the democratic government enacted, inter alia, [the MPRDA]*';[19]

13.2. the '*objective of the MPRDA is to ensure the attainment of Government's objectives of redressing historical, socio-economic inequalities and ensuring broad based and meaningful participation of Black Persons in the mining and minerals industry. In particular, section 100(2) of the MPRDA provides for development of the broad-based black economic empowerment charter for the South African mining and minerals industry as an instrument to effect transformation with specific targets'*.[20]

[17] COM FA para 67 p 40.
[18] See COM FA5 pp 159 – 203.
[19] FA5 at p 162.
[20] FA5 at p 162.

14. According to the preamble, the 2017 Charter constitutes a harmonization with *inter alia* the EEA,[21] and the '*Mission*' of the 2017 Charter is to give effect to section 100(2) of the MPRDA, section 9 of the Constitution and to harmonize Government's transformation policies.[22]

15. Insofar as ownership is concerned, the 2017 Charter provides that a minimum of 8% of the total issued shares of a Holder must be issued to ESOPs or similar employee scheme structures.[23] ESOPs are defined as '*black employee share ownership plans, a vehicle used to empower employees of a mining company who are Black Persons, excluding employees who already hold shares in the same company as a condition of their employment agreement except where such condition is a Mining Charter requirement*'.[24] The 8% shareholding by ESOPs forms part of the more general requirement that the Holder of a new mining right must have a minimum of 30% Black Person shareholding.[25] Existing Holders must top up their Black Person shareholding to a minimum of 30% within 12 months, although the 8% ESOP requirement need not be complied with.[26]

16. Under the heading '*Employment Equity*', the 2017 Charter recognizes that the EEA has as its purpose '*to achieve equity in the workplace by promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and implementing affirmative action measures to redress the disadvantages in employment*

[21] FA5 at p 164.
[22] FA5 at p 165.
[23] FA5 para 2.1.1.3(*a*) p 173.
[24] FA5 p 168.
[25] FA5 para 2.1.1.2 p 172.
[26] FA5 para 2.1.2.4 p 175.

experienced by designated groups, in order to ensure their equitable representation in all occupational levels in the workforce'.[27]

17. It goes on to record that:

'*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% of 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% of 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.

[27] FA5 at p 180.

Employees with disabilities

A minimum of 3% employees with disabilities as a percentage of all employees, reflective of national and/or provincial Demographics.'[28]

18. It is stated that the '*targets*' indicated '*may change in order to address employment equity measures*'.[29]

19. In accordance with the transitional arrangements contained in the 2017 Charter, an existing mining right holder has a maximum of 12 months to comply with the revised targets.[30]

THE INTERPRETATIVE FRAMEWORK

20. Section 9 of the Constitution of the Republic of South Africa Act 108 of 1996 ('**the Constitution**') guarantees the right to equality. Part and parcel of the equality clause is that it provides for legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination. This, in pursuit of the achievement of equality.[31]

21. Over time, various pieces of legislation have been passed to give effect to the equality right generally and in particular spheres of application. These include the Equality Act, the EEA, the Broad-Based Black Economic Empowerment Act 53 of 2003 ('**the BBBEE Act**') and the MPRDA.[32]

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[28] FA5 p 181.
[29] FA5 p 182.
[30] FA5 para 2.11(*a*) p 191.
[31] Constitution s 9(2).
[32] The preamble to the MPRDA specifically notes the intention to eradicate all forms of discriminatory practices in the mineral and petroleum industries, and recognises the obligation of the State to take legislative and other measures to redress the results of past racial discrimination.

22. These statutes, in turn, provide for the adoption of regulations and/or charters and/or plans that may properly be characterised as measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination. In the case of the MPRDA, provision is made in section 100(2) for the development and adoption of a '*broad-based socio-economic empowerment Charter that will set the framework* for *targets and time table for effecting the entry into and active participation of historically disadvantaged South Africans into the mining industry, and allow such South Africans to benefit from the exploitation of the mining and mineral resources and the beneficiation of such mineral resources*'.[33] Under section 100(2)(*b*), a charter as envisaged must set out how certain identified transformational objectives under section 2 of the statute are to be achieved.

23. What the MPRDA contemplates is a transformative instrument, which is provided for under the Constitution. However, the fact that a charter as contemplated in section 100(2) is intended to be a transformational tool does not insulate it from challenge.

23.1. As the Supreme Court of Appeal noted in *Solidarity obo Barnard v South African Police Service*,[34] '*ironically, in order to redress past imbalance with affirmative action measures, race has to be taken into account. We should do so fairly and without losing focus and reminding ourselves that the ultimate objective is to ensure a fully inclusive society – one compliant with all facets of our constitutional project*.' [35]

[33] MPRDA s 100(2)(*a*).
[34] 2014 (2) SA 1 (SCA) at para 80.
[35] *Solidarity obo Barnard v South African Police Service* 2014 (2) SA 1 (SCA) para 80. The Constitutional Court overturned the judgment, but the sentiment expressed in this paragraph remains valid.

23.2. For this reason, even though legislative and other remedial measures are not considered presumptively unfair, [36] they are *not* placed beyond scrutiny.

23.3. In *Van Heerden* it was held that a restitutionary measure '*ought not to impose such undue harm on those excluded from its benefits that our long-term constitutional goal [of a non-racial, non-sexist society in which each person will be recognised and treated as a human being of equal worth and dignity] would be threatened*'.[37] Sachs J, in his separate concurring judgment in *Van Heerden*, made the point that a restitutionary measure would not pass constitutional muster if the advantaged were to '*be treated in an abusive or oppressive way that offends their dignity and tells them and the world that they are of lesser worth than the disadvantaged*';[38] also that '*if the measure at issue is manifestly overbalanced in ignoring or trampling on the interests of members of the advantaged section of the community, and gratuitously and fragrantly imposes disproportionate burdens on them, the courts have the duty to interfere*';[39] and in summation that '*some degree of proportionality, based on the particular context and circumstances of the case, can never be ruled out. That too is what promoting equality (s 9(2)) and fairness (s 9(3)) require*'.[40]

23.4. As the Constitutional Court pointed out in *Premier, Mpumalanga v Executive Committee, Association of State-Aided Schools, Eastern Transvaal,*[41] a '*harmonious balance needs to be found between the urgent need to eradicate*

[36] *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) at paras 32 – 33.
[37] At para 44.
[38] At para 151.
[39] At para 152.
[40] At para 152.
[41] 1999 (2) SA 91 (CC)

unfair discrimination on the one hand, and the obligation to act fairly, on the other. There is no doubt that in the process of transition upon which we have embarked, we need to remain committed to the goal of equality, but that goal must be pursued in a manner consistent with the other constitutional requirements'.[42]

24. Furthermore, in any challenge directed at an instrument such as a charter adopted under section 100(2), it is important to bear in mind the principle of subsidiarity, which entails that an instrument adopted under a power afforded in terms of legislation must, in the first place, be assessed for validity by reference to the legislation under which it has been adopted. The party that seeks to defend the measure (such as a charter) cannot circumvent the legislation that has been enacted to give effect to the equality right by attempting to rely directly on the equality provisions of the Constitution. [43] Absent a direct challenge to the statute under which a measure is adopted (here, the MPRDA), a court assessing the measure must assume that the statute is consistent with the Constitution, and any claims must be decided within the margins of the legislation itself. [44]

25. In the present case, where we are concerned with the latest iteration of a charter as contemplated under section 100(2) of the MPRDA, the touchstone must therefore be

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[42] See para 44 at 1999 (2) SA 91 (CC) p 111E-F.

[43] *MEC for Education: KwaZulu Natal v Pillay* 2008 (1) SA 474 (CC) at para [40]. *Cf* also the judgments cited therein: *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae*) 2006 (2) SA 311 (CC) at paras [96] and [434] – [437]; *South African National Defence Union v Minister of Defence and Others* 2007 (5) SA 400 (CC) at para [51]; *NAPTOSA and Others v Minister of Education, western Cape and Others* 2001 (2) SA 112 (C) at 123I – J.

[44] *MEC for Education: KwaZulu Natal v Pillay* 2008 (1) SA 474 (CC) at para [40].

whether the charter as published is one that falls within the bounds of a charter as contemplated in the empowering provision.

26. Of course, the interpretation of the statute and particularly the power to adopt a charter, as afforded thereunder, must be interpreted in a manner that gives effect to the equality right and other constitutional provisions, but this does not alter the position that the starting point for the evaluation of lawfulness must be compliance with the provisions of the MPRDA.

27. Moreover, when provisions of a statute such as the MPRDA are being interpreted, the principle as laid down in *Chotobai v Union Government and Another*[45] must be borne in mind, namely that '*the language of every part of a statute should be so construed as to be consistent, so far as possible, with every other part of that statute and with every unrepealed statute enacted by the same Legislature*'. Apparently conflicting statutes must therefore be reconciled so as to avoid a conflict between them.[46]

28. It is also undeniable that a statutory provision cannot be measured against regulations under different legislation to decide whether it is rational or consistent with the Constitution, and that we cannot use regulations or other subordinate legislation and similar instruments to interpret primary legislation. [47]

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[45] 1911 AD 24.

[46] *Tshwete v Minister of Home Affairs (RSA)* 1998 (4) SA 586 (A) at 597A.

[47] *Head of Department, Department of Education, Free State Province v Welkom High School and Others* 2014 (2) SA 228 (CC) para 65; *Sebola and Another v Standard Bank of South Africa Ltd and Another* 2012 (5) SA 142 (CC)para 62; *Rossouw and Another v FirstRand Bank Ltd* 2010 (6) SA 439 (SCA) para 24 and *National Lotteries Board v Bruss NO* 2009 (4) SA 362 (SCA) para 37 and *AB v Minister of Social Development* 2017 (3) SA 570 (CC) at para 286.

29. Given these principles, section 100(2) of the MPRDA must be interpreted in a manner that is consistent with the Constitution, and to allow for consistency between the MPRDA and other legislative instruments such as the EEA and the Equality Act. Moreover, provisions contained in primary legislation such as the EEA and the Equality Act must enjoy preference over a subordinate instrument such as a charter adopted under section 100(2) of the MPRDA. Insofar as provisions contained in a charter adopted under section 100(2) are in conflict with primary legislation such as the EEA, then the primary legislation must prevail and provisions of a charter so adopted must be struck insofar as they are inconsistent with the primary legislation.

INTERPRETATION OF THE POWER TO ADOPT A CHARTER UNDER SECTION 100(2) OF THE MPRDA

30. The first principle of the rule of law is that the exercise of power must be authorised by law. Thus, in *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*[48] the Constitutional Court explained that it is '*central to the conception of our constitutional order that the Legislature and the Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law*'.

31. As a starting point, it is necessary to consider what it is that section 100(2) of the MPRDA envisages.

32. Section 2 of the MPRDA sets out the objects of the statute, which include to:

[48] 1999 (1) SA 374 (CC) at para [58].

32.1. *'promote equitable access to the nation's mineral and petroleum resources to all the people of South Africa'*;[49]

32.2. *'substantially and meaningfully expand opportunities for historically disadvantaged persons, including women and communities, to enter into and actively participate in the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources'*;[50]

32.3. *'promote economic growth and mineral and petroleum resources development in the Republic, particularly development of downstream industries through provision of feedstock, and development of mining and petroleum inputs industries'*;[51]

32.4. *'promote employment and advance the social and economic welfare of all South Africans';*[52] and

32.5. *'ensure that holders of mining and production rights contribute towards the socio-economic development of the areas in which they are operating'*.[53]

33. Section 100(2)(*a*) provides that, to '*ensure the attainment of the Government's objectives of redressing historical, social and economic inequalities as stated in the Constitution*', the Minister must, within six months from the date on which the MPRDA takes effect, '*develop a broad-based socio-economic empowerment Charter that will set the framework for targets and time table for effecting the entry into and active*

[49] MPRDA s 2(*c*).
[50] MPRDA s 2(*d*).
[51] MPRDA s 2(*e*).
[52] MPRDA s 2(*f*).
[53] MPRDA s 2(*i*).

participation of historically disadvantaged South Africans into the mining industry, and allow such South Africans to benefit from the exploitation of the mining and mineral resources and the beneficiation of such mineral resources'. Such a charter must set out, amongst others, how the foregoing objectives contained in section 2 must be achieved.[54]

34. It is immediately apparent that section 100(2) envisages a charter that sets '*targets*' for entry and '*active participation of historically disadvantaged South Africans into the mining industry'*. Nothing in the provision allows for quotas that *must* be met, without provision for deviation therefrom.[55]

35. When regard is had to the objectives in section 2 that are intended to be promoted through the adoption of a charter as envisaged in section 100(2), one observes the following:

35.1. The objective to promote equitable access to the mineral and petroleum resources of South Africa[56] is not one that is concerned with issues of employment in the mining industry. Patently, this is an objective concerned with ownership, since employment in a mining company is not a means of gaining access to mineral and petroleum resources. Historically disadvantaged persons have been employed in the mining industry for decades, without providing such persons access to mineral and petroleum resources.

[54] MPRDA s 100(2)(*b*).
[55] We elaborate on this distinction below.
[56] MPRDA s 2(*c*).

35.2. The objective of substantially and meaningfully expanding opportunities for historically disadvantaged persons, '*including women and communities'* to enter into and actively participate in the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources does not appear to be concerned with employment, particularly since the reference to communities suggests that this provision is aimed at participation in the industry. The reference to '*benefit from the exploitation of the nation's mineral and petroleum resources'* further suggests that this is an objective concerned with ownership, rather than employment.

35.3. The intention expressed in section 2(c) - the promotion of economic growth and development of resources – is equally not an objective concerned with employment.

35.4. Section 2(*i*) is aimed at socio-economic development of '*areas'*, which appears to be concerned with matters such as housing, but it may be accepted that the creation of employment opportunities fall within the ambit of the objective to promote socio-economic improvement, which may include the alleviation of poverty.

35.5. Promotion of employment is particularly contemplated in section 2(*f*).

36. Neither section 2(*f*) nor section 2(*i*) appear to contemplate employment equity considerations directly, since no reference is made to it. In the case of section 2(*f*), there is a particular reference to '*all South Africans'* and not a limitation that refers to

the promotion of employment opportunities only for historically disadvantaged South Africans.

37. We accept that section 100(2) is not an exhaustive list,[57] but the discretion of the Minister to regulate must be interpreted within the context of the MPRDA, and by reference to the legislative landscape more broadly.

38. Of course, the MPRDA was published on 10 October 2002,[58] and commenced on 1 May 2004,[59] well after the publication of the EEA on 19 October 1998,[60] and its commencement over the course of 1999.[61] The Legislature, having introduced the EEA, would have been mindful that the EEA, piece of primary legislation, makes provision for a system for the setting of employment equity targets by reference to relevant considerations provided for under that statute, and would have appreciated that there was no need to provide for the setting of employment equity targets in a charter as contemplated under section 100(2).

38.1. The EEA is a statute particularly concerned *inter alia* with:

38.1.1. '*disparities in employment, occupation and income in the national labour market*';

38.1.2. '*the promotion of the constitutional right to equality*';

[57] Minister AA to Solidarity FA in *amicus* application para 25.5.
[58] *Government Gazette* 23922 of 10 October 2002.
[59] Proclamation R25 in *Government Gazette* 26264 of 23 April 2004.
[60] *Government Gazette* 19370 of 19 October 1998.
[61] Proclamation R55 in *Government Gazette* 20057 of 14 May 1999; Proclamation R83 in *Government Gazette* 20339 of 6 August 1999 and Proclamation R115 in *Government Gazette* 20626 of 23 November 1999.

38.1.3. the elimination of '*unfair discrimination in employment'*; and

38.1.4. the achievement of a '*diverse workforce broadly representative of our people'*.[62]

38.2. The EEA has as its stated purpose the achievement of equality in the workplace by:

38.2.1. *'promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination';*[63] and

38.2.2. '*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*'.[64]

39. We submit that this is why nothing in the MPRDA directly contemplates the setting of employment equity targets in the mining industry, even though the preamble to the MPRDA records the commitment to '*eradicating all forms of discriminatory practices in the mineral and petroleum industries',* and the obligation to '*take legislative and other measures to redress the results of past discrimination'.*[65]

39.1. The Legislature would have appreciated that a charter adopted under section 100(2) of the MPRDA (and this not primary legislation) could not alter the

[62] EEA Preamble.
[63] EEA s 2(*a*).
[64] EEA s 2(*b*).
[65] MPRDA Preamble.

provisions of the EEA, or be used to interpret a mining company's obligations under the EEA.

39.2. The Legislature would also have appreciated that the EEA is a piece of specialist legislation that is particularly to be applied in the employment sphere. This understanding is reinforced by the consideration recorded in the preamble that there is a '*need to create an internationally competitive and efficient administrative and regulatory regime*',[66] which would of necessity include the avoidance of unnecessarily confusing and potentially contradictory regulatory schemes relating to employment equity obligations.

39.3. The drafters of the MPRDA would have taken account also of section 63 of the EEA, which provides that in any conflict relating to a matter dealt with the EEA and the provisions of any other law '*other than the Constitution or an Act of Parliament expressly amending'* the provisions of the EEA prevail, so that a charter developed under section 100(2) could never be relied on to impose different obligations than those contemplated under the EEA.

40. Another consideration appears from section 100(2):

40.1. As we discuss more fully below, the EEA provides for the preparation and implementation of an employment equity plan aimed at achieving reasonable progress towards employment equity in an employer's workforce,[67] but it also provides for the preparation of subsequent employment equity plans.[68]

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[66] MPRDA Preamble.
[67] EEA s 20(1).
[68] EEA s 23.

40.2. Section 100(2) of the MPRDA, by contrast, contemplated a once-off charter, published within six months of the date on which the MPRDA took effect, that would set a '*framework for targets'* and a time table for effecting the entry into and active participation of historically disadvantaged South Africans into the mining industry.

40.2.1. The apparent intention was not for the charter to set targets directly, but only to provide the framework within which targets were to be set.

40.2.2. The provision does not contemplate the setting of targets from time to time in a charter adopted under section 100(2), and nor does it appear to allow for a review of targets as set by reference to progress made over time, which is necessary in the employment context.

41. The conclusion that we draw, is that the Legislature did not intend for a charter as contemplated under section 100(2) to set employment equity targets, which is a function afforded to an employer under the EEA, having complied with certain procedural and other requirements, which we discuss more fully below.

42. We submit, further, that even if the Legislature intended for the charter to set a framework by reference to which targets for employment equity would have to be set for purposes of application to the mining industry, such framework could never have been intended to override the obligations and rights of employers under the EEA.

43. Accordingly, we now turn to a consideration of what it is that the EEA requires in the setting of employment equity targets.

THE EEA

Relevant provisions

44. As we indicated above, the EEA concerned with the achievement of equity in the workplace by promoting equal opportunity and fair treatment in employment, and the implementation of affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories in the workforce.[69]

45. According to section 3, the statute must be interpreted:

45.1. In compliance with the Constitution;

45.2. So as to give effect to its purpose;

45.3. Taking into account any Code of Good Practice issued under it, or under any other employment law; and

45.4. In compliance with the international law obligations of the Republic of South Africa, '*in particular those contained in the International Labour Organisation Convention (111) concerning Discrimination in Respect of Employment and Occupation'*.

46. Subject to exceptions in respect of the National Defence Force, the National Intelligence Agency, the South African Secret Service, the South African National Academy of Intelligence and the directors and staff of Comsec,[70] all of the provisions of the EEA

[69] EEA s 2.
[70] EEA s 4(3).

apply to '*designated employers*',[71] that is essentially all employers who employ more than 50 employees or who meet certain turnover thresholds.[72]

47. Every designated employer must, in order to achieve employment equity, implement affirmative action measures for people from '*designated groups*' in terms of the EEA,[73] that is black people, women and people with disabilities who are citizens of South Africa by birth or descent, or who became citizens before 27 April 1994, or thereafter, but who would have been entitled to acquire citizenship by naturalisation prior to that date but who were precluded by apartheid policies.[74]

48. Section 13 of the EEA compels every employer to:

48.1. consult with its employees as required by section 16 of the statute;[75]

48.2. conduct an analysis as required by section 19 of the EEA;[76]

48.3. prepare an employment equity plan as required by section 20;[77] and

48.4. report to the Director-General of Labour on progress made in implementing its employment equity plan, as required by section 21 of the EEA.[78]

49. According to section 15 of the EEA, affirmative action measures are designed to ensure that '*suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational levels in the workforce*

[71] EEA s 4(1) and 4(2). See also EEA s 12.
[72] EEA s 1, definition of '*designated employer*'.
[73] EEA s 13(1).
[74] EEA s 1, definition of '*designated groups*'.
[75] EEA s 13(2)(*a*).
[76] EEA s 13(2)(*b*).
[77] EEA s 13(2)(*c*).
[78] EEA s 13(2)(*d*).

of a designated employer'.[79] Affirmative action measures implemented by a designated employer must include:

49.1. measures to identify and eliminate employment barriers, including unfair discrimination, which adversely affect people from designated groups;[80]

49.2. measures designed to further diversity in the workplace based on equal dignity and respect of all people;[81]

49.3. making reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce of a designated employer;[82]

49.4. measures to ensure the equitable representation of suitably qualified people from designated groups in all occupational levels in the workforce;[83] and

49.5. measures to retain and develop people from designated groups and to implement appropriate training measures, including measures in terms of an Act of Parliament providing for skills development.[84]

50. Section 15(3) provides specifically that these last two measures (contemplated in section 15(2)(*d*)) '*include preferential treatment and numerical goals, but exclude quotas'*.

[79] EEA s 15(1).
[80] EEA s 15(2)(*a*).
[81] EEA s 15(2)(*b*).
[82] EEA s 15(2)(*c*).
[83] EEA s 15(2)(*d*)(i).
[84] EEA s 15(2)(*d*)(ii).

51. Furthermore, and subject to section 42 of the EEA, nothing in section 15 is to be read as requiring a designated employer to take any decision concerning an employment policy or practice that would establish an absolute barrier to the prospective or continued employment or advancement of people who are not from designated groups.[85]

52. As is contemplated in section 13 of the EEA, section 16 of the statute provides for consultation with employees.

52.1. A designated employer must take reasonable steps to consult and attempt to reach agreement with a representative trade union representing members at the workplace and its employees or representatives nominated by them, or, if no representative trade union represents members at the workplace, with its employees or representatives nominated by them[86] on

52.1.1. the conduct of the analysis referred to in section 19;[87]

52.1.2. the preparation and implementation of the employment equity plan referred to in section 20;[88] and

52.1.3. a report referred to in section 21.[89]

52.2. The employees or their nominated representatives with whom an employer must consult are required to reflect the interests of:

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[85] EEA s 15(4).
[86] EEA s 16(1).
[87] EEA s 17(*a*).
[88] EEA s 17(*b*).
[89] EEA s 17(*c*).

52.2.1. employees from across all occupational levels of the employer's workforce;[90]

52.2.2. employees from designated groups;[91] and

52.2.3. employees who are not from designated groups.[92]

52.3. In accordance with section 18(1), a designated employer must disclose to the consulting employees all relevant information that will allow the employees to consult effectively.

53. Also as foreshadowed by section 13 of the EEA, a designated employer must collect information and conduct an analysis, as prescribed, of its employment policies, practices, procedures and the working environment, in order to identify employment barriers which adversely affect people from designated groups.[93] The analysis must include a profile, as prescribed, of the designated employer's workforce within each occupational level in order to determine the degree of underrepresentation of people from designated groups in various occupational levels in that employer's workforce.[94] Regulations published on 1 August 2014[95] prescribes certain requirements to be met in the collection of information and the conduct of an analysis.[96] In particular, the

[90] EEA s 16(2)(*a*).
[91] EEA s 16(2)(*b*).
[92] EEA s 16(2)(*c*).
[93] EEA s 19(1).
[94] EEA s 19(2).
[95] Government Notice R595 in *Government Gazette* 37873 of 1 August 2014.
[96] Regulation 8.

employer may refer to a guide on the applicable national and regionally active population and a description of occupational levels as provided.[97]

54. Section 20 is the provision that requires all designated employers to prepare and implement an employment equity plan that will achieve '*reasonable progress towards employment equity in that employer's workforce'*.[98] Such an employment equity plan must state:

54.1. the objectives to be achieved for each year of the plan;[99]

54.2. the affirmative action measures to be implemented as required by section 15 (2);[100]

54.3. where underrepresentation of people from designated groups has been identified by the analysis, the numerical goals to achieve the equitable representation of suitably qualified people from designated groups within each occupational level in the workforce, the timetable within which this is to be achieved, and the strategies intended to achieve those goals;[101]

54.4. the timetable for each year of the plan for the achievement of goals and objectives other than numerical goals;[102]

[97] Regulation 6.
[98] EEA s 20(1).
[99] EEA s 20(2)(*a*).
[100] EEA s 20(2)(*b*).
[101] EEA s 20(2)(*c*).
[102] EEA s 20(2)(*d*).

54.5. the duration of the plan, which may not be shorter than one year or longer than five years;[103]

54.6. the procedures that will be used to monitor and evaluate the implementation of the plan and whether reasonable progress is being made towards implementing employment equity;[104]

54.7. the internal procedures to resolve any dispute about the interpretation or implementation of the plan;[105] and

54.8. the persons in the workforce, including senior managers, responsible for monitoring and implementing the plan.[106]

55. In accordance with Regulation 9 of the Employment Equity Regulations, 2014, an employer must refer to the relevant Codes of Good Practice issued in terms of section 54 of the EEA when preparing an employment equity plan. The Code of Good Practice was published on 12 May 2017, [107] and provides *inter alia* that employment equity plans must take into account the specific circumstances of an organisation for which they are prepared.[108] Detailed provision is made for the process of constructing a plan,[109] and the Code of Good Practice makes plain that what is to be brought into account is amongst others the analysis conducted within the organisation[110] and the national and

[103] EEA s 20(2)(*e*).
[104] EEA s 20(2)(*f*).
[105] EEA s 20(2)(*g*).
[106] EEA s 20(2)(*h*).
[107] Government Notice 424 in *Government Gazette* 40840 of 12 May 2017.
[108] Clause 1(*c*).
[109] Clause 6.
[110] Clause 7(*a*).

provincial economically active population.[111] In respect of the numerical goals and targets contemplated in section 20(2)(*c*), the Code of Good Practice provides that these must be '*informed by the outcome of the analysis and prioritised and weighted more towards the designated groups that are most under-represented in terms of the national and provincial economically active population, in terms of section 42 of the EEA*'.[112] Furthermore, planned vacancies and natural attrition (such as resignations, promotions and retirements) must be taken into account when considering numerical goals and targets.[113] It is prescribed for an employer to seek consensus on objectives and measures.[114]

56. Section 20(3) provides that a person may be suitably qualified for a job as a result of that person's formal qualifications, prior learning, relevant experience or the capacity to acquire, within a reasonable time, the ability to do the job. In accordance with section 20(4), where an employer is determining whether a person is suitably qualified for a job, these factors must be reviewed, and the employer must determine whether that person has the ability to do the job in terms of any one of, or any combination of the factors. Lack of relevant experience may not be used to unfairly discriminate against any person.[115]

[111] Clause 7(*b*).
[112] Clause 7.4(*c*).
[113] Clause 7.4(*d*).
[114] Clause 7.6(*a*).
[115] EEA s 20(5).

57. Importantly, if a designated employer fails to prepare or implement an employment equity plan, the Director General of Labour may apply to the Labour Court to impose a fine of up to 10% of the annual turnover of such an employer.[116]

58. An employer is also required to prepare subsequent employment equity plans.[117]

59. Every year, on the first working day of October, a designated employer must submit a report to the Director General of Labour[118] The first report will refer to the initial development of and consultation around an employment equity plan. The subsequent reports will detail the progress made in implementing the employment equity plan.[119] Failure to submit such a report may equally result in a referral for imposition of a fine.[120]

60. The EEA contemplates monitoring for compliance by trade unions and employees[121] and enforcement steps to be taken.[122] In the assessment of compliance, the following must be taken into account:

60.1. the factors in section 15 of the EEA;[123]

60.2. the extent to which suitably qualified people from and amongst the different designated groups are equitably represented within each occupational level in that employer's workforce in relation to the demographic profile of the national and regional economically active population;[124]

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[116] EEA s 20(7).
[117] EEA s 23.
[118] EEA s 21(1).
[119] Footnote 3 to section 21.
[120] EEA s 21(4B).
[121] EEA s 34.
[122] EEA s 35 to s 38.
[123] EEA s 42(1).
[124] EEA s 42(1)(*a*).

60.3. reasonable steps taken by a designated employer to train suitably qualified people from the designated groups;[125]

60.4. reasonable steps taken by a designated employer to implement its employment equity plan;[126]

60.5. the extent to which the designated employer has made progress in eliminating employment barriers that adversely affect people from designated groups;[127]

60.6. reasonable steps taken by an employer to appoint and promote suitably qualified people from the designated groups;[128] and

60.7. any other prescribed factor.[129]

61. Compliance may also be evaluated by reference to regulation issued under section 55.[130] Such regulations were published on 1 August 2014.[131]

62. An employer is also able to raise any reasonable grounds to justify a failure to comply.[132]

63. Of relevance in the present context is also section 6(4), which provides that a difference in terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value that is

[125] EEA s 42(1)(*b*).
[126] EEA s 42(1)(*c*).
[127] EEA s 42(1)(*d*).
[128] EEA s 42(1)(*dA*).
[129] EEA s 42(1)(*e*).
[130] EEA s 42(2) and (3).
[131] Government Notice R595 in *Government Gazette* 37873 of 1 August 2014.
[132] EEA s 42(4).

directly or indirectly based on any one or more of the grounds listed in subsection (1), is unfair discrimination. These grounds include race, gender and sex.[133]

The EEA requires individualised assessment and a situation-sensitive approach to employment equity

64. An evaluation of the provisions of the EEA makes it clear that the statute contemplates an individualised assessment of an employer's circumstances, and a process of consultation to devise an employment equity plan (including numerical goals and targets to be achieved in particular time frames) that is suitable to the circumstances of the *particular employer*. Nothing in the statute provides for the same numerical goals and targets to be applied to an entire industry, and in fact the individualised assessment that is contemplated operates to exclude such a possibility.

65. That an employment equity plan is situation-sensitive and that it must be devised by reference to the realities applicable to a particular employer has been made clear by the Constitutional Court in *Solidarity v Department of Correctional Services,*[134] in which the lawfulness of an employment equity plan of the Department of Correctional Services ('**DCS**'), and employment decisions under it were considered. The Constitutional Court held that '*if a designated employer uses a wrong basis to determine the level of representation of suitably qualified people from and amongst the different designated groups, the numerical goals or targets that it may set for itself to achieve within a given period would be wrong. It is of fundamental importance that the basis used in setting the numerical goals or targets be the one authorised by the statute. A*

[133] EEA s 6(1).
[134] 2016 (5) SA 594 (CC).

wrong basis will lead to wrong targets'.[135] The non-appointment of several employees of DCS was held to be unlawful for constituting unfair discrimination, on the basis that the assessment that the numerical targets set out in the employment equity plan did not have a rational basis.[136] In the particular instance, DCS had failed to bring into account the demographic composition of the economically active population in the Western Cape, together with the national demographic profile. As the Constitutional Court explained in the *DCS* case:

'*[i]n failing to use the demographic profile of both the national and regional economically active population to set the numerical targets, the Department acted in breach of its obligation in terms of section 42(a) and, thus, unlawfully. It had no power to disregard the requirement of also taking into account the demographic profile of the regional economically active population provided for in section 42(a). The Department sought to justify its conduct in this regard on the basis that it is a national Department. The problem with this is that section 42(a) did not exclude national Departments from its application. Accordingly, the fact that it is a national Department in terms of section 1 of the Public Service Act did not exempt it from complying with the requirements of section 42(a).*'

66. The minority made the points that:

66.1. '*[a]nomalies will necessarily abound when people are reduced to statistics. This is particularly so if the statistics bear no relation to the purpose for which they are used';*[137] and

66.2. *'The Department has provided no rational explanation for reserving posts to the various race groups with reference alone to their proportions as part of the national population, with no regard to their distribution, and I see none. It seems*

[135] At para 78.
[136] At para 82.
[137] At para 130.

the Department considers the "demographic profile" of the nation to be solely its racial proportions. In that the Department is wrong. The racial proportions of the population are not its demographic profile. They are but one characteristic of the demographic profile, and in themselves they do not provide a coherent basis upon which to measure employment representivity. That is no doubt why the EE Act, and the 1999 Code of Good Practice issued under the EE Act, expressly directs designated employers to take account of the regional profile of the population'.[138]

67. As pointed out above, the *DCS* case was particularly concerned with the failure to take regional demographics into account, but the principles enunciated there apply equally to the failure to take other relevant matters into account. The bottom line is that an employment equity plan is never to be based on a mechanical allocation of opportunity based on one consideration (such as national demographics), but is to be the product of analysis and consultation that brings into account all the relevant factors applicable to a particular employer's situation. The Code of Good Practice, which specifically provides for a consideration of future staff turnover (as explained above), is a good example. Employment equity plans must be devised by reference to the opportunities for employment or promotion that will arise in the period for which they have been devised. If an employer, for example, has 80% representation of white males at management level, it can only improve the equitable representation of others at that level by reference to a consideration of how many posts by become available to be filled by those representing persons from the designated groups. If, for example, eight out

[138] At para 132.

of ten senior managers employed are white males, and only one out of the eight resigns in a year, it would be impossible for an employer to move from 80% representation of white males to 60% representation of Black persons (of whom 30% must be female) within that year.

68. The rationale for taking the relevant considerations applicable to a particular employer into account emanates clearly from the judgment of the Constitutional Court in *South African Police Service v Solidarity obo Barnard*,[139] where the Court explained that *'[w]e must insist that the specific implementation as well as the general formulation of remedial measures be fair*'.[140]

69. Accordingly, and although not concerned with employment equity *per se*, but with a remedial measure aimed at achieving greater demographic representation of insolvency practitioners appointed to wind up estates, the case of *Minister of Justice and Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others*[141] the point was similarly made by the Supreme Court of Appeal that remedial measures '*must not be arbitrary, capricious or display naked preference. If they do they can hardly be said to achieve the constitutionally authorised end. One form of arbitrariness, caprice or naked preference is the implementation of a quota system, or one so rigid as to be substantially indistinguishable from a quota'*.[142]

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[139] 2014 (6) SA 123 (CC).
[140] *At* para 101.
[141] 2017 (3) SA 95 (SCA). The matter is currently the subject of an application for leave to appeal to the Constitutional Court, which was argued on 2 November 2017. The parties are awaiting the judgment of the Constitutional Court.
[142] At para 32.

70. The court considered that the allocation of opportunities to insolvency practitioners on the basis of race and gender considerations was '*capricious because it has been formulated with no reference to its impact when applied in reality. One illustration of how capricious the system is arises from a consideration of the fact that it has no regard to the relative number of insolvency practitioners falling in each category'.*[143] It held that the policy there devised was irrational:

'The real problem is that in the absence of proper information about the basis upon which the policy was formulated, and proper information concerning the current demographics of insolvency practitioners, one cannot say that the policy was formulated, on a rational basis properly directed at the legitimate goal of removing the effects of past discrimination and furthering the advancement of persons from previously disadvantaged groups.' [144]

71. In accordance with the precedent of the Constitutional Court, '*Black persons'* are also not to be considered as one conglomerate block under the EEA. In *DCS* it was held that '*any corrective measure, such as an employment equity plan or an affirmative action programme, cannot succeed in reversing the imbalances of the past if it is based on the notion that Black people would be equitably represented in a workforce or in a particular occupational level if there are enough Coloured people or Indian people even if there are no African people or there are only a few African people*',[145] and therefore *'[t]he result is that all the groups that fall under "Black" must be equitably represented within all occupational levels of the workforce of a designated employer. It will not be enough to have one group or two groups only and to exclude another group or other groups on the basis that the high presence of one or two makes up for the absence or insignificant*

[143] At para 36.
[144] At para 47.
[145] At para 46.

presence of another group or of the other groups'.[146] This means that targets set under the EEA must be set by reference to the various groups falling within the definition of '*Black people'*.

72. Moreover, employment equity plans may not contain quotas and are intended to reflect targets only. This, in order to preserve the requisite flexibility under the EEA. In *DCS*, the employment equity plan was saved from illegality because it was considered not to be rigid, on the basis that it included provision for deviations from the targets set under it.[147] In coming to this conclusion, the Constitutional Court brought into account the considerations in *Barnard*, which emphasized the need to devise situation-sensitive measures:

72.1. Moseneke ACJ[148] stated for the majority that the '*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 to 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*.'[149] Accordingly, he explained, we '*must be careful that the steps taken to promote substantive equality do not*

[146] At para 49.
[147] At paras 53 and 60.
[148] With Skweyiya ADCJ, Dambuza AJ, Jafta J, Khampepe J, Madlanga J and Zondo J concurring.
[149] At para 30, footnotes omitted. See too para 32. In making these observations, the court relied on *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) para 76 and *Van Heerden* para 43.

unwittingly infringe the dignity of other individuals - especially those who were themselves previously disadvantaged'.[150]

72.2. At paragraphs 41 and 42 the majority judgment continues:

> '*I pause to underline the requirement that beneficiaries 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 [EEA] 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.'*
>
> *'[Section 15(4) of the EEA] 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 Plan or practice that would establish an absolute barrier to the future of continued employment or promotion of people who are not from designated groups.*'

72.3. The majority further spelt out that quotas amount to job reservation, that they are '*properly prohibited*' by section 15(3) of the EEA, and that the numerical goals sanctioned under the statute serve as no more than a '*flexible employment guideline to a designated employer*'.[151] At paragraph 66 of the judgment, Moseneke DCJ emphasised that '*implementation of a valid plan may amount to job reservation if applied too rigidly*'.[152]

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[150] At para 31.

[151] Emphasis supplied. This flexible, fact-focussed approach was endorsed by Cameron J, Froneman J and Majiedt AJ pars 80, 81 and 89.

[152] Job reservation may be found if the plan is applied '*too rigidly*' – therefore, the standard does not require absolute compliance with the target before the conclusion is reached that a quota is in operation; accordingly, rigidity that falls short of absolute compliance is still unlawful.

72.4. The EEA thus '*does not sanction affirmative action measures that are overly rigid*' and it '*does not countenance employment decisions that would establish an absolute barrier to the employment or advancement of those not from designated groups'*.[153] For this reason '*a decision-maker cannot simply apply the numerical targets by rote*'.[154]

73. There is an inescapable tension between the entitlement of those seeking restitutionary equality and the right of those adversely affected by it not to be unfairly discriminated against. This tension cannot be wished away. The only way it can be resolved is if the measure in question satisfies a proper application of the proportionality principle. [155] Thus, that which is done in order to achieve equality ought not to travel beyond that which may be justified in the circumstances.

74. We submit that this is one of the main reasons why the EEA prohibits the use of quotas, although it allows for targets that employers set for themselves in the hope of such targets being attained.

75. The distinction between a quota and a target lies in the operative mechanics of the measure - whether it has direct or indirect effect.[156]

[153] *Barnard* par 87.
[154] *Barnard* par 96.
[155] Laurie Ackermann *Human Dignity: Lodestar for Equality in South Africa* Juta 2013 p 388.
[156] George Gerapetritis *Affirmative Action Policies and Judicial Review Worldwide* Springer International Publishing Switzerland 2016 at p 5.

75.1. Direct effect measures are those producing immediate end results for the benefiting groups (such as quotas where specific positions, or a specific number of positions are reserved for members of a group). The measure is, in a sense, indifferent to the process of selection, because it aims only that producing specific results. Although at first glance quotas may be regarded as more acute and vigorous in their pursuit of equality, they are not truly radical as transformational tools because they do not cater for the roots of the pathology.

75.2. Measures with indirect effect are ones under which a procedure is set up to enhance equality of opportunities as a means of achieving substantive equality, without focus on the outcome of the procedure. Measures that focus on the procedure to enhance opportunity are flexible, because they can adjust to the particularities of each context in order to maximize results. Moreover, they aim at curing the *causes* of underrepresentation instead of providing relief at the end point. Arguably, such measures are more effective as transformational measures in the long run.

76. Gerapetritis argues that:

'Discerning between measures of direct and indirect effect may also contribute significantly to the conceptual clarity of affirmative action. However, the most

expedient linguistic approach would suggest that when the measure is of a direct effect, such as the imposition of rigid quotas or quotas by effect, it is more appropriate to use the terminology of "positive discrimination", whereas if the measure is of an indirect effect, thus encouraging participation of underrepresented groups without establishing quotas, the language of "positive/affirmative" action is more apposite. The above distinction indicates that quotas are by definition a mode of discrimination, since they award automatic end-result benefits, whereas measures providing motives have a mere affirmative nature without immediate implications on social competition.'[157]

77. The United States Supreme Court, as a general rule, assesses measures to identify whether there is a case of impermissible quota or quota by effect through the use of the language of '*set-asides*',[158] or describing the measures as '*insulating each category of applicants with certain desired qualifications from competition with all other applicants*'.[159] In the present case it is quite clear that the Appointments Policy is not concerned with the creation of equality of opportunity. Its only aim is to allocate work on the basis of race and gender. Its effect is direct, placing it firmly in the realms of positive discrimination (for being a quota) as opposed to the realms of affirmative action (for creating the path towards substantive equality). It is a set-aside, where insolvency practitioners do not compete for appointment based on the quality of the service that they render, nor their

[157] *Id* at pp 5 - 6.
[158] *Richmond v Croson* 488 US 469 (1989).
[159] *Regents of the University of California v Bakke* 438 US 265 (1978).

experience, skills or aptitude; they are chosen in each case based on their race and gender and they are insulated from competition from those who fall outside the class.

78. Such a system cannot be constitutionally sanctioned, and not is it sanctioned by the EEA.

THE 2017 CHARTER IS INCONSISTENT WITH AND/OR CONSTITUTES A CONTRAVENTION OF THE EEA AND/OR CONSTITUTES AN ATTEMPT BY THE MINISTER TO USURP FUNCTIONS NOT CONFERRED UPON HIM

79. Despite the recognition in paragraph 2.3 of the 2017 Charter that the EEA is the statute that is applicable to the attainment of employment equity,[160] the 2017 Charter completely ignores the dictates of the EEA in setting percentage quotas for representation of black persons, including black females, at various levels of employment.

80. In setting these percentages unilaterally, and binding employers to compliance with them under paragraphs 2.10 and/or 2.11 thereof,[161] the 2017 Charter:

80.1. impermissibly sets a quota, compliance with which is mandatory, and therefore constitutes a breach of section 15(3) of the EEA;

80.2. ignores that the situation of each employer is different, and that employment equity targets set by an employer must be the consequence of the requisite

[160] FA5 p 180.
[161] FA5 pp 190 – 191.

workplace analysis and consultation that is mandated under the EEA, so that the 2017 Charter constitutes an attempt by the Minister to override the relevant statutory prescriptions, which is unlawful;

80.3. is patently not informed by appropriate analysis of the pool of suitably qualified persons to fill the positions at the various workplaces, since it is admittedly based on the *'demographics of the country'* alone so that it does not constitute a '*target*' that has been determined to be equitable by reference to relevant considerations, as has been held to be required by the Constitutional Court;

80.4. completely disregards the interaction in employment equity targets between the interests of all designated groups, including white women.

81. It is not enough for the Minister to assert that it had engaged in extensive public consultation on the employment '*targets*' said to be contained in the 2017 Charter,[162] because the consultation by the Minister can never constitute the required consultation by an employer with its workforce, by reference to the organisation's own information, for purposes of devising an employment equity plan that is appropriate to the particular firm. The 2017 Charter, in any event, seeks to set targets for the employment of '*Black persons*' without distinguishing between the categories forming part of this group, which is inconsistent with the requirement identified by the Constitutional Court.

82. It is also no answer for the Minister to contend that the '*implementation of the targets is not immediate'*, because an employer is given 12 months within which to implement

[162] Minister's AA to Solidarity's FA in the *amicus* application para 45.

them.[163] This is not flexibility as the Minister seeks to contend.[164] Flexibility requires the possibility for an employer to deviate from the targets set in a plan that has been devised. The Minister appears to suggest that such flexibility is built in, because monitoring includes bringing into account material constraints.[165] However, the provision for bringing material constraints into account does in the *monitoring* process does not alleviate the consideration that the '*targets'* are perforce applicable.[166]

83. Solidarity accepts that there are pools of suitably qualified Black persons that are not employed in the mining industry.[167] This does not alter the fact that an employer that sets an employment equity target is constrained by considerations as the number of available posts to which appointments of such suitably qualified persons may be made. We reiterate that it would be impossible for an employer to achieve the percentages set in the 2017 Charter if a sufficient number of positions do not become available to which these persons with the requisite qualifications may be appointed.

84. Moreover, '*ESOPs*' are defined in the 2017 Charter as '*black employee share ownership plans, a vehicle used to empower employees of a mining company who are Black Persons, excluding employees who already hold shares in the same company as a condition of their employment except where such condition is a Mining Charter requirement*'.[168] In accordance with paragraph 2.1.1.3, a minimum of the total issued shares of a Holder must be issued to ESOPs.[169] Paragraph 2.1 generally provides that

[163] Minister's AA to Solidarity's FA in the *amicus* application para 46.
[164] *Id.*
[165] *Id.*
[166] FA5 para 2.10 p 190.
[167] Minister's AA to Solidarity's FA in the *amicus* application para 48.
[168] FA5 p 168.
[169] FA5 p 173.

financial benefits shall accrue to the beneficiaries of the ESOPs.[170] This requirement presents a conflict with the EEA, and must be struck:

84.1. the objectives contained in the MPRDA cannot be relied upon to escape the prohibition against unfair discrimination contained in s 6 (1) of the EEA;

84.2. measures taken under the MPRDA, insofar as they affect employees, do not axiomatically constitute affirmative action measures under the EEA;

84.3. the MPRDA does not place any obligation on an employer to adopt empowerment measures that result in the unequal treatment of employees on the basis of their race alone;

84.4. regulations, codes and/or charters adopted under the MPRDA, not having the quality of primary legislation cannot trump the provisions of the EEA and, to the extent that such instruments provide the basis for any empowerment scheme that discriminates between employees on the basis of race, such provisions cannot be given effect to;

84.5. in particular, insofar as benefits accrue to black employees in their capacity as such in consequence of their participation in ESOPs to the exclusion of those who are not black employees, this constitutes a preferential term of employment and/or effectively a higher level of remuneration that is prohibited discrimination in contravention of section 6(4) of the EEA.

[170] FA5 pp 172 – 174.

Conclusion

85. As is specifically mandated by the Legislature in the EEA, the EEA must prevail, and the 2017 Charter must be struck down insofar as it is inconsistent with the provisions of the EEA.

THE EQUALITY ACT AND THE 2017 CHARTER

Relevant provisions

86. In terms of section 2, the Equality was enacted to, amongst other, give effect to the letter and spirit of the Constitution, *inter alia*:

86.1. the equal enjoyment of all rights and freedoms by every person;

86.2. the promotion of equality;

86.3. the values of non-racialism and non-sexism contained in section 1 of the Constitution; and

86.4. the prevention of unfair discrimination and protection of human dignity as contemplated by section 9 and 10 of the Constitution.

86.5. the prohibition of advocacy of hatred, based on race, ethnicity, gender or religion, that constitutes incitement to cause harm as contemplated in section 16(2)(c) of the Constitution and section 12 of the Act;

87. Under section 7 of the Equality Act no person may unfairly discriminate against any person on the ground of race, including the engagement of any activity which is

intended to promote or has the effect of promoting, exclusivity, based on race (subsection (*b*)); and the denial of access to opportunities (subsection (*e*)).

88. Section 5(2) of the Equality Act provides that if any conflict relating to a matter dealt with in the statute arises between the statute and the provisions of any other law, other than the Constitution or an Act of Parliament expressly amending it, the provisions of the Equality Act will prevail.

<u>The 2017 Charter is inconsistent with and/or constitutes a contravention of the Equality Act</u>

89. The 2017 Charter, evaluated as a whole, provides for various quotas (euphemistically referred to as '*targets'*, despite their binding nature) in ownership and employment for participants in the mining industry.

90. Of course, section 14(1) of the Equality Act provides that measures designed to protect and advance persons, or categories of persons, disadvantaged by unfair discrimination do not constitute unfair discrimination as contemplated in the statute. In doing so, the statute echoes section 9 of the Constitution.

91. But, as we have explained more fully above in the context of employment equity, in order to qualify as an affirmative action measure, such a measure must meet the requirements for lawful affirmative action as enunciated by the Constitutional Court. The 2017 Charter does not, and therefore it provides for unfair discrimination on the basis of race and/or gender in contravention of the Equality Act.

92. The reasons why the 2017 Charter does not meet the requirements are many, and include that:

92.1. the '*measure'* displays naked preference;

92.2. it does not have the capacity to serve the interests that are intended to promoted, because the adverse effects on the mining industry generally[171] will have a general negative effect on the economy and will stand in the way of advancement of those who were previously disadvantaged by unfair discrimination;

92.3. the '*measure'* constitutes an affront to the long-term constitutional goal of a non-racial, non-sexist society;

92.4. it is manifestly overbalanced in ignoring or trampling on the interests of the advantaged community, and gratuitously and flagrantly imposes disproportionate burdens on them; and

92.5. the non-negotiable attributes of flexibleness and inclusiveness that affirmative action measures must possess are not evident from the content of the 2017 Charter.

Conclusion

93. The 2017 Charter falls to be struck for its failure to comply with the requirements of a legitimate affirmative action measure. The unfair discrimination under it is not constitutionally tolerated, and it constitutes a contravention of the Equality Act. The 2017 Charter cannot override the provisions of the Equality Act, much less the Constitution.

[171] Elaborated upon in *inter alia* in the SRI Report (annexure GD6 to FA in Solidarity's application to be admitted as *amicus*) and in Solidarity's 13 May 2016 submissions on the draft (annexure GD5 to FA in Solidarity's application to be admitted as *amicus*).

THE 2017 CHARTER'S NON-COMPLIANCE WITH SOUTH AFRICA'S OBLIGATIONS UNDER INTERNATIONAL LAW

Relevant instruments

94. Both the EEA and the Equality Act recognise South Africa's obligations to comply with international treaties such as ILO Convention 111 and the CERD. CERD was ratified by the Republic of South Africa in 1998, and ILO Convention 111 in 1997.

95. Under CERD, all forms of racial discrimination are condemned. Article 1(4) of the CERD provides that special measures may be taken to secure the advancement or protection of certain groups, but it is clear that such measures should '*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.'*

96. In accordance with Article 2(2) of the CERD:[172]

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

97. General Recommendation 32 of 2009, for its part makes clear that such special measures are properly to be distinguished from unjustifiable preference:[173]

[172] Emphasis supplied.
[173] Emphasis supplied.

'B) Direct and Indirect Discrimination

7. The principle of enjoyment of human rights on an equal footing is integral to the Convention's prohibition of discrimination on grounds of race, colour, descent, and national or ethnic origin. The 'grounds' of discrimination are extended in practice by the notion of 'intersectionality' whereby the Committee addresses situations of double or multiple discrimination - such as discrimination on grounds of gender or religion – when discrimination on such a ground appears to exist in combination with a ground or grounds listed in Article 1 of the Convention. Discrimination under the Convention includes purposive or intentional discrimination and discrimination in effect. Discrimination is constituted not simply by an unjustifiable 'distinction, exclusion or restriction' but also by an unjustifiable 'preference', making it especially important that States parties distinguish 'special measures' from unjustifiable preferences.

8*. On the core notion of discrimination, General Recommendation 30 of the Committee observed that differential treatment will 'constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.' As a logical corollary of this principle, General Recommendation 14 observes that 'differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate'. The term 'non-discrimination' does not signify the necessity of uniform treatment when there are significant differences in situation between one person or group and another, or, in other words, if there is an objective and reasonable justification for differential treatment. To treat in an equal manner persons or groups whose situations are objectively different will constitute discrimination in effect, as will the unequal treatment of persons whose situations are objectively the same. The Committee has also observed that the application of the principle of non-discrimination requires that the characteristics of groups be taken into consideration.*

…

D) Conditions for the Adoption and Implementation of Special Measures

16. 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.

17. Appraisals of the need for special measures should be carried out on the basis of accurate data, disaggregated by race, colour, descent and ethnic or national origin and incorporating a gender perspective, on the socio-economic and cultural [174]*status and conditions of the various groups in the population and their participation in the social and economic development of the country'.*

18. States parties should ensure that special measures are designed and implemented on the basis of prior consultation with affected communities and the active participation of such communities.

…

26. Article 1, paragraph 4 provides for limitations on the employment of special measures by States parties. 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. The notion of inadmissible 'separate rights' must be distinguished from rights accepted and recognised by the international community to secure the existence and identity of groups such as minorities, indigenous peoples and other categories of person whose rights are similarly accepted and recognised within the framework of universal human rights'

98. ILO Convention 111 similarly prohibits discrimination and allows for special measures, but subject to the overarching equality requirements.[175]

Import of the provisions

99. Consistently with the Constitution and the EEA, these international instruments recognise that there is a space for measures to ensure that the effects of past discrimination are addressed. The international instruments expressly foresee a

[175] Articles 1 and 5.

limitation to special measures undertaken to achieve this, to secure the balance between the interests of those who are sought to be advanced and those who had previously been the beneficiaries of preferential treatment. What is not foreseen, is a perpetuation of special measures without consideration of whether objectives pursued under them have been achieved.

Non-compliance with requirements

100. The 2017 Charter fails meet the requirements for affirmative action measures under the international treaties to which South Africa is bound. It falls to be set aside on this basis as well.

101. The 2017 Charter creates ownership opportunities and employment opportunities in a third iteration of a charter that is now issued under section 100(2) of the MPRDA. There is no sunset clause that brings an end to the measures by the time that the targets are met. Rather, it is evident that the Minister has, from time to time, and again in the 2017 Charter sought to increase the obligations of those in the mining industry. The obligation under the 2017 Charter to retain the ownership quotas at all times makes plain that the Minister is not complying with the obligation to bring an end to a '*special measure*' once its objective has been attained. Quite simply, the goal posts are being moved upon the attainment of the goals that have been set.

102. Because the Minister does not accept the '*once empowered, always empowered*' principle, the objective may be achieved and yet revisited when an empowerment partner elects to exit its investment.

Conclusion

103. Even if the Minister were empowered to issue further charters after the one contemplated in section 100(2) of the MPRDA (which is denied), the progressively more onerous obligations being placed on those in the mining industry falls to be condemned under the CERD and/or ILO Convention 111. For this reason, the 2017 Charter falls to be set aside.

CONLUSION

104. Solidarity agrees with the Chamber that the 2017 Charter falls to be reviewed and set aside for the various reasons covered in the Chamber's application, and which are not covered herein, in order to avoid duplication.

105. Solidarity submits, further, that the 2017 Charter falls to be reviewed and set aside on the basis of the considerations dealt with in these written submissions. At the very least, those aspects of the 2017 Charter that impermissibly seek to usurp the functions of employers under the EEA and/or that dictate employment targets that are not based on rational considerations applicable to particular entities fall to be set aside.

MJ ENGELBRECHT

DJ GROENEWALD

Chambers, Sandton and Pretoria

7 December 2017