IN THE COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION

SOLIDARITY TRADE UNION OBO MEMBERS **COMPLAINANT**

V

REPUBLIC OF SOUTH AFRICA **STATE PARTY**

EXECUTIVE SUMMARY OF INDIVIDUAL COMMUNICATION SUBMITTED UNDER ARTICLE 14 OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

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1. Solidarity, a trade union registered under the applicable labour laws of the Republic of South Africa, raises a complaint against the Republic of South Africa, which is a State Party that has recognised the competence of the Committee on the Elimination of All Forms of Racial Discrimination (CERD) under Article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

2. The complaint relates to the content and application of the Employment Equity Act No 55 of 1998 (EEA), a statute adopted by the South African government to promote equality in the employment sphere.

3. Subsequent to the consideration by CERD of the South African government's fourth to eighth periodical reports, CERD raised certain concerns and made certain recommendations in respect of (i) the use by the South African government of apartheid era race classifications to gather statistical data; (ii) the need for

disaggregated data to be assembled by reference to more exhaustive demographic statistics that include economic and social indicators; and (iii) failure by the South African government to implement recommendations of the South African Human Rights Commission (SAHRC).

4. Solidarity submitted a petition to the SAHRC, seeking a review of the EEA and the Broad-Based Black Economic Empowerment Act 53 of 2003 (B-BBEE Act)

5. In a report of the SAHRC (Equality Report), it identified a number of respects in which the EEA does not comply with the requirements of ICERD, the recommendations of CERD and the Constitution of the Republic of South Africa Act 108 of 1996 (Constitution).

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

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

6. Solidarity agreed with the findings of the SAHRC. The State Party has not implemented the recommendations. Solidarity sought to secure compliance with

the State Party's obligations through an approach to the Labour Court of South Africa. The application was dismissed, and the Labour Appeal Court and Constitutional Court both declined to entertain Solidarity's applications for leave to appeal the judgment of the Labour Court. Solidarity has exhausted all internal remedies to secure implementation of the SAHRC's Equality Report.

7. Solidarity asserts that the matters identified in the Equality Report, together with certain further considerations, evidence violation of:

7.1 Article 1 paragraph 1 and 4 of ICERD, read with General Recommendation 32 of 2009;

7.2 Article 2 paragraph 2 of ICERD, read with General Recommendation 32 of 2009; and

7.3 Article 5(d)(e)(i) of ICERD, read with General Recommendation 20 of 1996.

8. Solidarity approaches CERD to motivate for a finding that the State Party has contravened the provisions of the Convention, and a recommendation that the State Party implement the findings and recommendations of the SAHRC as per the Equality Report, coupled with a requirement that the State Party report to the Committee within one year on the actions taken to implement the findings and recommendation of the Equality Report.

IN THE COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION

SOLIDARITY TRADE UNION OBO MEMBERS **COMPLAINANT**

V

REPUBLIC OF SOUTH AFRICA **STATE PARTY**

INDIVIDUAL COMMUNICATION SUBMITTED UNDER ARTICLE 14 OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

Date of complaint:_____

I, the undersigned,

DIRK JOHANNES HERMANN

hereby make oath and state as follows:

DEPONENT, KNOWLEDGE AND AUTHORITY

1. I am an adult male currently employed by Solidarity Trade Union (Solidarity) as its Chief Executive Officer.

2. I am duly authorised to depose to this affidavit on behalf of the Complainant in accordance with the resolution attached hereto as annexure **DH1**.

3. Save where specifically stated or where the context indicates otherwise:

   3.1 I have personal knowledge of the facts herein stated; or

   3.2 I have ascertained and determined them from the records and information that are under my personal control;

   3.3 I confirm that the facts referred to herein are true and correct;

   3.4 Where I make legal submissions, I do so on the advice of Solidarity's legal representatives.

PART A: PARTIES

<u>Information on the complainant</u>

4. The Complainant is Solidarity, a trade union registered in terms of the provisions of the Labour Relations Act, No 66 of 1995 (LRA), being the primary statute regulating labour relations in the Republic of South Africa. Solidarity has its head office at c/o DF Malan Avenue and Eendraght Street, Kloofsig, Centurion, Pretoria, South Africa. Kindly see attached hereto the registration certificate of Solidarity, marked annexure **DH2.**

5. All correspondence in respect of this complaint can be sent to antonv@solidariteit.co.za or dirk@solidariteit.co.za (e-mail) or P.O Box 11760, Centurion, Gauteng, 0046, South Africa (postal mail).

6. Solidarity was established in 1992 and it has been protecting its members' rights against, *inter alia*, exploitation in the workplace ever since. Solidarity seeks to secure job security for its members and currently offers a dependable service to approximately 200 000 members in all occupational fields, collectively and professionally.

7. Solidarity approaches this Committee, firstly, in the interests of its members generally who as employees are being subjected to unfair discrimination as a consequence of the overtly race-based policies and legislation adopted by the State Party which goes beyond the protected "*special measures*" and/or affirmative action measures supported by the Convention. In consequence, this leads to an unjustifiable preference being afforded to individuals due to their race, and the maintenance of separate rights for separate race groups. Solidarity approaches this Committee on behalf of their members who forms part of the minority groups within South African who are being directly and indirectly discriminated against on the grounds of their race, as will be elaborated upon more fully herein below. As is evident from annexure DH1 a special resolution was passed by the executive committee of Solidarity so to lodge this individual complaint.

8. Solidarity approaches this Committee, secondly, in its own interest. Solidarity is chiefly concerned about the breach by the State Party of the principles and articles of the Convention. Over the years Solidarity has launched, and joined, several human rights disputes, ranging from the right to equality, language disputes, religious disputes and the like. Solidarity also aims to ensure that the rule of law is upheld, human rights are respected and that State party is held accountable to the Constitution of the Republic of South Africa Act 108 of 1996 and International Conventions such as the

International Convention on the Elimination of All Forms of Discrimination, adopted on 21 December 1965.

9. Solidarity also approaches this Committee in the interest of all South Africans who have suffered actual or potential prejudice, due to their and or their employers' race, in consequence of the measures adopted by the State Party.

State concerned

10. The State Party concerned is the Republic of South Africa, herein represented by the Department of International Relations and Cooperation, with its contact address at OR Tambo Building, 460 Soutpansberg Road, Rietondale, Pretoria, 0084, and contact details as follows: Private Bag X152, Pretoria, 0001, Tel; 012 351 1000; Fax; 012 329 1000.

11. The State Party has made a declaration recognising the competence of the Committee on the Elimination of Racial Discrimination under article 14 of the ICERD to adjudicate this complaint.

PART B: STRUCTURE OF COMMUNICATION

12. This remainder of this communication is structured as follows:

12.1 Part C: Nomenclature

12.2 Part D: Objective of Communication

12.3 Part E: Summary of Articles violated

12.4 Part F: Exhaustion of domestic remedies

12.5 Part G: Facts of complaint

12.6 Part H: Violation of rights

12.7 Part I: Appropriate action

PART C: NOMENCLATURE

13. For ease of reference and easier reading, I adopt the following abbreviations in this affidavit:

13.1 the Constitution of the Republic of South Africa Act 108 of 1996 is referred to as the "**Constitution**";

13.2 the Employment Equity Act No 55 of 1998 is referred to as the "**EEA**";

13.3 the Broad Based Black Economic Empowerment Act 53 of 2003 is referred to as the "**B-BBEE Act**";

13.4 the South African Human Rights Commission is referred to as the "**SAHRC**";

13.5 The International Convention on the Elimination of All Forms of Racial Discrimination is referred to as "**ICERD**";

13.6 The Committee on the Elimination of Racial Discrimination is referred to as "**CERD**" or "**the Committee**";

13.7 the SAHRC's Equality Report 2017/18 with the sub-title "*Achieving substantive economic equality through rights-based radical socio-economic transformation in South Africa",* is referred to as the "**Equality Report**";

13.8 Persons who receive preferential treatment in terms of the EEA is referred to as "**designated group**"

PART D: OBJECT OF THE COMMUNICATION

14. This communication is centrally concerned with the findings of the Equality Report, released by the SAHRC on 12 July 2018. According to the Equality Report, the SAHRC found that the EEA is not constitutionally compliant, and that it violates the obligations imposed by: (i) the ICERD; and (ii) CERD. A copy of the Equality Report is attached as annexure **DH3**. As I discuss more fully below, the Equality Report concludes that the definition of designated groups, which stands centrally in the EEA, and the determination of who is to benefit from affirmative action in the employment sphere, results in constitutional non-compliance and a violation of CERD.

15. Solidarity agrees with these findings. The continued application of a statute that is not constitutionally compliant is an affront to the rule of law, a founding principle

under the Constitution, and constitutes a violation of the State party's obligations in terms of CERD. In consequence, it infringes upon the right to equality and dignity of those who are prejudiced by the application of the said legislation. However, no effect was given to the recommendations by the State Party, and nor have the South African courts supported Solidarity's attempts to ensure that the State Party implement the recommendations of the SAHRC as set out in the Equality Report.

16. Solidarity approached the Labour Court of South Africa for an order to the effect that section 42 of the EEA, read with the definition of "*designated groups*" as contained in the statute ("**the impugned provision**") is unconstitutional. In so doing, Solidarity relied *inter alia* on findings of the SAHRC. It asked the Labour Court to direct suspension of the operation of the EEA pending legislative reform, or the implementation of steps to ameliorate the effect of the application of a statute that has been held to be unconstitutional by the SAHRC. In the alternative, Solidarity sought confirmation of the findings and recommendations of the SAHRC.

17. At the hearing, Solidarity sought to pursue the alternative relief, submitting that the prayer for declaration of unconstitutionality was to be held over. The Labour Court dismissed the application in its entirety, including the prayer for the declaratory order. It held that the Equality Report was not binding. The Labour Court refused leave to appeal. The Labour Appeal Court also dismissed a petition for leave to appeal by Solidarity.

18. As discussed more fully hereinbelow, the Constitutional Court, the highest court in South Africa, dismissed an application by Solidarity for leave to appeal the judgment of the Labour Court, on 3 February 2021.

19. In the present communication, Solidarity contends that this Committee is enjoined to exercise its jurisdiction on the grounds that:

19.1 the State Party has made a declaration in terms of Article 14 of ICERD;

19.2 all local remedies have been exhausted;

19.3 the State Party has violated the provisions of ICERD, by consequence of the application of the EEA; and

19.4 the communication has been submitted within six months after all available domestic remedies have been exhausted.

E. ARTICLES VIOLATED

20. Solidarity submits that the State Party has by their conduct, the enactment and implementation of the EEA, violated the following articles of ICERD;

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

20.1.1 special measures may not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved;

20.1.2 "*special measures*" should be distinguished from unjustifiable preferences;

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

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

participation in the social and economic development of the country; and

20.1.5 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;

20.2 *Article 2 paragraph 2 read with General Recommendation 32 of 2009* , which provides that States 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. <u>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;</u>

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

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

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

(i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against

unemployment, to equal pay for equal work, to just and favourable remuneration;

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

PART F: DOMESTIC REMEDIES EXHAUSTED/APPLICATION TO OTHER INTERNATIONAL PROCEDURES

21. In its concluding observations on the combined fourth to eighth periodic reports of South African, annexed hereto as annexure **DH4A** the Committee, raised concerns and recommendations. They are not quoted herein, in order to avoid prolixity. The Committee is referred to paragraphs 6, 7, 8, , 15 and 15, in particular. CERD raised certain concerns and made certain recommendations in respect of (i) the use by the South African government of apartheid era race classifications to gather statistical data; (ii) the need for disaggregated data to be assembled by reference to more exhaustive demographic statistics that include economic and social indicators; and (iii) failure by the South African government to implement recommendations of the SAHRC.

22. In the media statement released by the Committee after the presentation of the South African report (annexure **DH4B**), the Committee amongst other made the following remarks:

"Experts took note of the rather rigid approach to the application of quotas, which seemed to favour quantitative over qualitative, and urged South Africa to ensure that its affirmative action was aligned to the Convention and the Committee's General Recommendation N° 32 of 2009.

In order to reduce the disparities and inequality between the different population groups, South Africa had adopted a range of temporary special measures under the guise of affirmative action, and the Country Rapporteur urged South Africa to pay attention to the Committee's General Recommendation N° 32 of 2009 on the importance and range of temporary special measures under the Convention

Temporary special measures did not need to be applied forever; otherwise they would not qualify as temporary special measures."

23. As a consequence of these recommendations and comments by CERD, Solidarity submitted a petition to the SAHRC. The State Party has under article 14(2) of ICERD confirmed that "the *South African Human Rights Commission is the body within the Republic's national legal order which shall be competent to receive and consider petitions from individuals or groups of individuals within the Republic's jurisdiction who claim to be victims of any of the rights set forth in the Convention*".

24. The petition was lodged at the SAHRC in May 2017 and is attached hereto as annexure **DH5.** The contents of the petition must be read as if specifically incorporated herein. Solidarity contended in the petition that the EEA and the B-BBEE Act did not comply with ICERD, and comprehensively dealt with the reasons for that position. Essentially, what Solidarity sought from the SAHRC was to, in compliance with the recommendations of this Committee, compel the State Party to (i) review legislation such as the EEA and the B-BBEE, in order to determine whether the said legislation complied with ICERD, and specifically General Recommendation 32 of 2009 ; and (ii) submit a report to the Parliament of the Republic of South Africa in respect of their findings.

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

26. In light of the State Party's failure to comply with the findings and recommendations of the SAHRC, as set out in the Equality Report, Solidarity approach the Labour Court so to compel the State to take action. On 8 October 2019 the Labour Court dismissed Solidarity's application. The judgment is attached hereto as annexure **DH6.** As indicated above, subsequent applications for leave to appeal were dismissed by both the Labour Appeal Court and Constitutional Court. The order by the Constitutional Court dated 3 February 2021 in respect of which leave to appeal was refused is attach hereto as annexure **DH7**.

27. Solidarity has not submitted the same complaint for examination under another procedure of international investigation or settlement.

PART G: RELEVANT FACTS AND INFORMATION

Introduction

28. The petition filed at the SAHRC was based on, and related to, this Committee's concluding observations on the fourth to eighth periodic reports of the government of the Republic of South Africa[1] and the concerns and recommendations made therein in respect of the State Party.

29. Solidarity submitted to the SAHRC that the concerns and recommendations of CERD warranted a formal investigation by the SAHRC and a review of the relevant legislation and practices of the State Party specifically relating to the provisions of EEA.

30. It is at this point appropriate to deal with the provisions of the EEA and the objectives thereof. I attach hereto a copy of the statute as annexure **DH8**.

The EEA

31. The EEA is a statute concerned with the intended promotion of the constitutional right to equality generally, and that it has as its aim the implementation of employment equity measures to redress the effects of discrimination. In accordance with its preamble, the EEA is a statute particularly concerned *inter alia* with: (i) disparities in employment, occupation and income in the national labour market; (ii) the promotion of the constitutional right to equality; (iii) the elimination of unfair discrimination in employment; and (iv) the achievement of a diverse workforce broadly representative of our people. The EEA has as its stated purpose the achievement of equality in the workplace by: (i) "*promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination*" (section 2(a)); and (ii) "*implementing affirmative action measures to redress the*

[1] CERD/C/ZAF/CO/4-8 dated 26 August 2016

disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational levels in the workforce" (section 2(b)).

32. According to section 3, the EEA must be interpreted (i) in compliance with the Constitution; (ii) so as to give effect to its purpose; (iii) taking into account any Code of Good Practice issued under it, or under any other employment law; and (iv) 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*".

33. Subject to certain limited exceptions, all of the provisions of the EEA apply to "*designated employers*", that is essentially all employers who employ more than 50 employees or who meet certain turnover thresholds. Every designated employer must, in order to achieve employment equity, implement affirmative action measures for people from "*designated groups*" in terms of the EEA, that is black people (defined as a generic term referring to Africans, Coloured people and Indians), 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.

34. Section 13 of the EEA compels every employer to (i) consult with its employees as required by section 16 of the statute; (ii) conduct an analysis as required by section 19 of the EEA; (iii) prepare an employment equity plan as required by section 20; and (iv) report to the Director-General of Labour on progress made in implementing its employment equity plan, as required by section 21 of the EEA.

35. According to section 15(1) 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 of a designated employer". Affirmative action measures implemented by a designated employer must include:

35.1 measures to identify and eliminate employment barriers, including unfair discrimination, which adversely affect people from designated groups (section 15(2)(a));

35.2 measures designed to further diversity in the workplace based on equal dignity and respect of all people (section 15(2)(b));

35.3 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 (section 15(2)(c));

35.4 measures to ensure the equitable representation of suitably qualified people from designated groups in all occupational levels in the workforce (section 15(2)(d)(i)); and

35.5 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 (15(2)(d)(ii)).

36. 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*".

37. 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 (section 15(4)).

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

39. 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 (section 16(1)) on *inter alia* (i) the conduct of the analysis referred to in section 19 (see section 17(a)); and (ii) the preparation and implementation of the employment equity plan referred to in section 20 (see section 17(b)).

40. 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 (section 19(1)). 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 (section 19(2)). Regulations published on 1 August 2014 by way of Government Notice R595 in Government Gazette 37873 ("**Employment Equity Regulations, 2014**") prescribe certain requirements to be met in the collection of information and the conduct of an analysis (Regulation 8). In particular, the employer may refer to a guide on the applicable national and regionally active population and a description of occupational levels as provided (Regulation 6). A copy of the Employment Equity Regulations, 2014 is attached as annexure **DH9**.

41. Section 20(1) 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*". Such an employment equity plan must deal with prescribed matters., including (i) the objectives to be achieved for each year of the plan; (ii) the affirmative action measures to be implemented; (iii) 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; and (iv) the duration of the plan, which may not be shorter than one year or longer than five years.

42. 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 by way of Government Notice 424 in Government Gazette 40840 A copy of the Code of Good Practice is attached as annexure **DH10**. It provides *inter alia* that employment equity plans must take into account the specific circumstances of an organisation for which they are prepared (clause 1(c)). Detailed provision is made for the process of constructing a plan, 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 and the national and provincial economically active population. 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*" (clause 7.4(c)).

43. If a designated employer fails to prepare or implement an employment equity plan, the DG may apply to this court to impose a fine of up to 10% of the annual turnover of such an employer (EEA section 20(7)).

44. Every year, on the first working day of October, a designated employer must submit a report to the Director-General for Labour (section 21(1). 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. Failure to submit such a report may equally result in a referral for imposition of a fine (section 21(4B)).

45. The EEA contemplates monitoring of compliance with the EEA by the Director-General for Labour or any person or body applying the statute (section 42) and sets out factors which may be taken into account, namely:

45.1 the factors in section 15 of the EEA (section 42(1));

45.2 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 (section 42(1)(a));

45.3 reasonable steps taken by a designated employer to train suitably qualified people from the designated groups (section 42(1)(b));

45.4 reasonable steps taken by a designated employer to implement its employment equity plan (section 42(1)(c));

45.5 the extent to which the designated employer has made progress in eliminating employment barriers that adversely affect people from designated groups (section 42(1)(d));

45.6 reasonable steps taken by an employer to appoint and promote suitably qualified people from the designated groups (42(1)(dA)); and

45.7 any other prescribed factor (section 42(1)(e)).

46. Compliance may also be evaluated by reference to regulation issued under section 55 of the EEA. These are the Employment Equity Regulations, 2014, and section 42(3) of the EEA specifically confirms that the Labour Minister has the power to prescribe in the said regulations which employers' compliance should be determined with reference to the demographic profile of either the national economically active population or the regional economically active population. Legislative provision is

therefore made for assessing compliance only with reference to the national economically active population.

47. The aforementioned section and more specifically the factors to be taken into account by, amongst other the Director-General for Labour, in assessing compliance by designated employers, are not mandatory but discretionary. Section 42(1) provides that these factors "*may*" be taken into account, and as such the Director-General is not obliged to consider the regional demographics, however in practice compliance with regional and national demographics are the overriding criteria used to determine compliance.

48. Central to the EEA is the definition of designated groups who are to benefit from it, and the assessment of the need for and compliance with affirmative action measures by reference to the designated groups, as defined. No proper consultation can be conducted in preparation for an employment equity plan, similarly no proper workplace analysis can be conducted so to determine the over and underrepresented of persons from the designated groups and no assessment on compliance with such a plan can be conducted without a proper understanding of who is, or ought to be, the beneficiary of the plan as devised.

<u>The Equality Report</u>

49. In the Equity Report the SAHRC made the following finds and recommendations in respect of the EEA.

50. As appears from the executive summary (at p 4), the Equality Report "*evaluates government's programme of radical socio-economic transformation from a rights-based perspective. It explores government's programme of radical socio-economic transformation and establishes its roots in the Freedom Charter. It further shows that radical socio-economic transformation should aim to achieve substantive socio-economic equality. Whereas the majority of equality-related research focuses on horizonal status equality between groups sharing characteristics*

that render them prone to unfair discrimination, this report responds to international calls to address gross economic inequality".

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

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

53. In Chapter 1, the Equality Report states (at p 8) that "*special measures are currently misaligned to constitutional objectives. Where special measures are not instituted on the basis of need, and taking into consideration socio-economic factors, they are incapable of achieving substantive equality*".

54. Chapter 6 of the Equality Report is concerned with the "*Key Rights-Based Drivers of Radical Socio-Economic Transformation*" (see p 28). It commences with a discussion of the meaning of "*affirmative action*" or "*special measures*" recording the caution of the South African Constitutional Court that measures 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 … We must be careful that the steps taken to promote substantive equality do not unwittingly infringe the dignity of other individuals – especially those who were themselves disadvantaged"(quoting *South African Police Services v Solidarity obo Barnard* 2014 (6) SA 123 (CC) paras 30 – 31, see p 29).

55. The three-pronged test to determine whether affirmative action measures fall within the bounds of section 9(2) of the Constitution (as developed in *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC)) is also recited.

56. Moreover, a description of the position in international law is provided, namely that it allows for "*special measures*" to advance persons subject to discrimination, but that such measures may not entail as their consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved. Accordingly, affirmative action measures should be temporary, tailored to the needs of the groups and individuals concerned, and should cease once substantive equality is achieved.

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

58. The Equality Report pays specific attention to the provisions of the EEA, and comes to the conclusion that affirmative action is designed under the statute to provide initial economic opportunities, but also to secure the advancement of persons once

appointed. Emphasis is placed on the consideration that numerical goals are required, but that quotas are prohibited and that employers are not entitled to adopt policies that would establish absolute barriers to prospective or continued employment of persons who are not from designated groups.

59. Under the heading "*Targeted special measures based on need*" it is questioned whether the EEA or its implementation is not leading to new imbalances (at p 33), and noted that indigenous peoples (those whose ethnic descent may be from mixed race marriages) and linguistic or tribal minorities within the designated groups are "*not accommodated by the EEA*" (at p 34). Government's approach, which objects against greater disaggregation of data, is said to be "*problematic*", because "*Decisions based on insufficiently disaggregated data fail to target persons or categories of persons who have been disadvantaged by unfair discrimination, as required by the three-pronged test for affirmative action*" (at p 34). The Equality Report notes that "*Without first taking the characteristics of groups into account, varying degrees of disadvantage and the possible intersectionality of multiple forms of discrimination (based on race, ethnicity, gender or social origin) faced by members of vaguely categorised groups, cannot be identified. Moreover the current classificatory system and disaggregation of data fails to acknowledge multiple forms of discrimination faced within population groups. For example, given that inequality between members of the Black African population group is higher than in any other racial group, it is foreseeable that current practice might result in a job opportunity for a wealthy Black man of Zulu origin, rather than a poor Black woman from an ethnic minority*". Special measures accordingly do not account for socio-economic differences within broadly defined population groups. The SAHRC therefore confirmed that the CERD's requirement for the implementation of special measures on the basis of need, and a related "*realistic appraisal of the current situation of the individuals and communities*" concerned, cannot be met without a more nuanced disaggregation of data (see pp 34 – 35).

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

61. Although acknowledging the Constitutional Court's attempt to distinguish between rigid quotas and flexible targets, the Equality Report records that the Court has been sharply divided on this score. It is also said that "*the Court has inadvertently created the risk that members of designated groups – and especially those who suffer multiple forms of discrimination – may be prejudiced by the rigid implementation of targets, thereby raising the spectre of new imbalances arising*" (at pp 35 – 36). In this regard, reference was made to the *Barnard* case where SAPS was held to have been entitled not to promote a white woman, even though white women are from a designated group under the EEA, and the application of the so-called "*Barnard principle*" to other groups in subsequent litigation concerning the application of employment equity by the Department of Correctional Services. The Equality Report concludes that "*This effectively means that where, for example, African females are sufficiently represented at a certain employment level, a wealthy, heterosexual White man could be granted preferential treatment to the detriment of a poor, African, homosexual woman*" (see p 36). In the view of the SAHRC (at p 36)

"*The latter application of the Barnard principle therefore conflicts with the CERD's requirement for special measures to be adopted on the basis of a realistic appraisal of need, taking into account the social and economic circumstances of the group or individual concerned. It furthermore stands in opposition to the approach reflected in the National Development Plan, whereby preference should be accorded on the basis of race 'for at least the next decade' when defining historical disadvantage. Where special measures may result in new imbalances or exacerbate current*

inequality viewed in the labour context more broadly, it is doubtful that such measures are designed to advance people in need of remedial measures. Worryingly, it can lead to perverse consequences and 'token' affirmative action where minority status, or new patterns of discrimination and inequality within designated groups, is not properly considered."

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

63. Upon consideration of the conclusion of the Constitutional Court in Department of Correctional Services case, the SAHRC notes that the "*requirement to consider regional demographics makes sense given the uneven distribution of different population groups across South Africa. … A context-sensitive approach is thus congruent with the CERD's guidance on the interpretation and implementation of the ICERD and its requirement for special measures*" (at p 37). However, as the Equality Report correctly notes, section 42 of the EEA has been amended and it now "*renders*

the consideration of regional demographics discretionary. A failure to consider regional demographics not only stands in conflict with the CERD's position on context-sensitive implementation of special measures, but may simultaneously severely prejudice members of certain designated groups in provinces where they are more significantly represented. Furthermore, considering the huge problem constituted by unemployment in South Africa, the legislative amendment and consequent implementation of affirmative action measures may provoke urban migration and thereby exacerbate existing special injustices" (at pp 37 – 38).

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

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

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

64.3 "*It is further found that the EEA and its implementation, as well as the design of special measures, are currently misaligned to the constitutional objective of achieving substantive equality. It is accordingly recommended that in qualitatively assessing the impact of affirmative action measures on vulnerable groups, including indigenous people and people with disabilities, the [Department of Labour], in collaboration with the CEE [Commission for Employment Equity] and in consultation with National Treasury, undertake a representative assessment of the implementation of employment equity*

plans of designated employers in order to ensure that targets are flexibly pursued and do not amount to rigid quotas" (at p 39);

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

65. Solidarity adopts the reasoning of the SAHRC in support of its finding that section 42 of the EEA, as read with the definition of "*designated groups*" is not constitutionally compliant, and in contravention of ICERD.

66. In addition, Solidarity relies on the following in support of the submission that the impugned provision violates ICERD

<u>Additional considerations</u>

67. *Definition of "designated group"*

67.1 There can be no doubt that a "*flexible*" and "*situation-sensitive*" approach is required by ICERD. As the Equality Report points out, to the extent that measures are targeted at people without assessing need or recognizing intersecting forms of discrimination and disadvantage, special measures will fail to promote substantive equality. In any event, it is not possible to measure the impact of special measures on the most vulnerable persons or

groups, if those persons or groups are not identified based on accurate data in the first instance.

67.2 Due to the lack of data and a proper assessment of the "*needs*" and social and economic factors so to determine the impact of the "*special measures*" it is submitted that no argument can be persuasively advanced that the majority of the members of the "*favoured class*" are persons designated as disadvantaged by unfair exclusion as envisaged by ICERD. Put differently, no proper comparison between affected classes can be made.

67.3 What is required by ICERD is that "*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*" which, if regard is had to the definition of "*designated groups*" in terms of the EEA, has not been done.

67.4 Evident from the definition of "*designated groups*" is that it displays naked preference based solely on race and gender and irrespective of the "*needs*" and social and economic factors of the individuals who stands to benefit from the provisions of the EEA. The reality is that the definition of "*designated group*" is effectively not concerned with the achievement of equality but simply the achievement of representivity often at the expense, it should be added, of those most in need of protection and advancement.

67.5 The "*Barnard principle*" as developed by the Constitutional Court has further exacerbated the problem seeing that further differentiation between persons from the "*designated group*" has been endorsed where, for instance, "*African*" persons can receive preferential treatment over "Coloured" persons solely due to the fact that "*Africans*" are the majority within the national racial demographics of South Africa.

68. *The use of national racial demographics as yardstick*

68.1 As indicated herein above, section 42 of the EEA requires that a Court of law and/or the Director-General of Labour, when called upon to determine an employer's compliance with the provisions of the EEA should have regard to 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*".

68.2 Moreover, the Labour Minister is empowered to issue regulations in respect of which employers can be compelled to pursue either regional and or national racial demographics. I wish to point out that current an amendment Bill has been table which shall allow the Minister to set specific "*targets*" for each sector.

68.3 The objective of the section is therefore to achieve "*representivity*" of persons of the designated group, however as already stated, such representivity must be equal and or responsive to the representivity of that specific race group within in the national and or regional demographics as per the "*Barnard principle*".

69. It is submitted that the provisions of the EEA is in violation of the ICERD and for the following reasons;

69.1 from paragraph 7 and 8 of General Recommendation 32 of 2009, three main principles can be identified:

69.1.1 discrimination is constituted not simply by an unjustifiable "*distinction, exclusion or restriction*" but also by an unjustifiable "*preference*":

69.1.2 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"; and

69.1.3 the application of the principle of non-discrimination requires that the characteristics of groups be taken into consideration;

69.2 paragraphs 11, 16, 17 and 18 (dealing the "C*oncept of Special Measures*") make plain that "*special measures*" should be:

69.2.1 temporary in nature;

69.2.2 appropriate to the situation to be remedied;

69.2.3 legitimate and necessary in a democratic society;

69.2.4 based on the need and a realistic appraisal of the current situation of the individuals communities concerned; and

69.2.5 carried out on the basis of accurate date;

69.3 section IV (*Convention Provisions on Special Measures*) provides that –

69.3.1 measures should not lead to the maintenance of separate rights for different racial groupds; and

69.3.2 that they should not be continued after the objectives for which they have been taken have been achieved; and

69.4 in defining the povisions of Article 2, paragraph 2 of the Recommendation, it is stated that "*The advancement and protection of communities through special measures is a legitimate objective to be pursued in tandem with respect for the rights and interests of individuals. <u>The identification of an individual as belonging to a group should be based on self-identification by the individual concerned, unless a justification exists to the contrary</u>".*

70. None of these obligations and/or prescripts have been met.

Further relevant developments

71. In amplification of the foregoing submission that the State Party has not met its obligations, I emphasize two developments:

71.1 First, the content of the Employment Equity Amendment Bill, 2020 [B14-2020] (the Bill), which seeks to amend the EEA. The Bill was presented to the South African Parliament by the Department of of Employment and Labour and introduced by the Minister of Employment and Labour on 28 October 2020. It is currently the subject of consideration before the relevant Portfolio Committee.

71.2 Second, the South African government's pre-occupation with race (rather than need) was illustrated in its approach to the allocation of relief funding to participants in the Tourism Industry in the context of the Covid-19 pandemic, and more generally.

72. These matters have not been addressed to completeness through mechanisms locally available, and are raised herein merely by way of illustration. Solidarity continues with participation in local processes and litigation to address these matters.

73. *The Bill*

73.1 A copy of the Bill is attached as annexure **DH11**

73.2 Solidarity's commentary on the Bill is attached as annexure **DH12.**

73.3 Clause 4 of the Bill proposes to introduce a new section 15A, as follows:

"***Determination of sectoral numerical targets***

15A. (1) The Minister may, by notice in the Gazette, identify national economic sectors for the purposes of this Act, having regard to any relevant code contained in the Standard Industrial Classification of all Economic Activities published by Statistics South Africa.

(2) The Minister may prescribe criteria that must be taken into account in identifying sectors and sub-sectors for the purposes of this section.

(3) The Minister may, after consulting the National Minimum Wage Commission, for the purpose of ensuring the equitable representation of suitably qualified people from designated groups at all occupational levels in the workforce, by notice in the Gazette set numerical targets for any national economic sector identified in terms of subsection (1).

(4) A notice issued in terms of subsection (3) may set different numerical targets for different occupational levels, sub-sectors or regions within a sector or on the basis of any other relevant factor.

(5) A draft of any notice that the Minister proposes to issue in terms of subsection (1) or subsection (3) must be published in the Gazette, allowing interested parties at least 30 days to comment thereon."

73.4 Clause 4 thus proposes to empower the Minister to (i) identify national economic sectors; and (ii) determine numerical "*targets*" for these sectors.

73.5 In circumstances where the Labour Minister's power is not aimed at, for example, merely publishing rates of transformation in particular sectors or industries, so as to allow for comparisons to be made between a particular employer's progress and the sector/industry standard, the Bill proposes the introduction of a standard that must be met, and not deviated from. Section 42 as amended (if the Bill is passed in its current form) will create a standard by reference to which compliance with the statute will be measured, and against which compliance may be measured exclusively (given the discretion in the language of section 42 that allows for selective and not cumulative consideration of the factors listed therein). Notably, the Bill also proposes to introduce an amendment to section 53 of the EEA, which provides that State contracts may only be issued to employers that have been certified as being in compliance with their obligations under the EEA. Clause 12 of the Bill seeks to amend section 53 to provide that the Labour Minister may only issue a compliance certificate if the employer has complied with any applicable sectoral targets (or has raised a reasonable

ground for non-compliance). The sectoral "*targets*" thereby become enforceable quotas that have to be met in order to (i) prove compliance and (ii) qualify for State contracts.

73.6 When the introduction of section 15A is read in the context of the Bill as a whole, the conclusion reached is that the Ministerial intervention is not aimed at identifying the causes of slow transformation in an industry, but simply to engineer an outcome. In this sense, the proposed Ministerial targets have the quality of a quota rather than a target.

74. *Tourism Relief Fund*

74.1 The effect of COVID-19 on the South African tourism industry is devastating. In recognition of that the Tourism Relief Fund was created "*to support small businesses in the tourism sector*". According to a media statement issued by the Tourism Department on 7 April 2020 (annexure **DH13**), it was "*Established as an intervention to mitigate the impact of COVID-19 on the tourism sector, the R200 million Tourism Relief Fund provides once-off capped grant assistance to Small Micro and Mediums Sized Enterprises (SMMEs) to ensure sustainability during and post the implementation of government measures to curb the spread of Covid-19 in South Africa. … We hope the support offered through the Tourism Relief Fund will assure the continued survival of SMMEs beyond the COVID-19 pandemic*".

74.2 But the fund was finite, with only R200 million available, and in the face of titanic competition for access to relief, the decision was made to adopt a "*scoring system*". In the aforesaid media statement it was explained that "*capped at R50 000 per entity, the grant funding can be utilised to subsidise expenses towards fixed costs, operational costs, supplies and other pressure cost items.* ***Preference will be given to enterprises with the highest score in terms of the criteria, which serve as a pre-qualification***. *A*

panel of experts will conduct the final evaluation in terms of functionality". Reliance was placed on the B-BBEE Act, and the Tourism Code adopted under it to allow for a scoring system based on empowerment levels. This, despite the recognition that the Tourism Relief Fund was not an empowerment scheme, but was adopted as part of the disaster management relief in response to the Covid-19 pandemic.

75. *Tourism Equity Fund*

75.1 On 26 January 2021, the South African Department of Tourism announced its so-called "*Tourism Equity Fund*" (TEF). The TEF has been capitalised at R1.2 billion, with R 606 million (50.5%) of this is to be contributed by a government funding agency and R594 million (49.5%) by an unnamed "*strategic bank co-funder*". On the available information it appears that the funding available amounts to between R10 million and R20 million per qualifying applicant, which can take the form of grants and/or loans, which is only available to majority black owned (minimum 51%) tourism enterprises. The TEF excludes businesses that are not 51% black owned (irrespective of the composition of their workforce, and their efforts to develop skills and empower) from access to funding. I attach hereto the TEF brochure, marked annexure **DH14**. Solidarity obtained an expert report from a development economist that comes to the conclusion that the TEF is ill-suited to the purpose that it seeks to achieve. I attach a copy of the report as annexure **DH15**. The report illustrates that the pre-occupation with the race of owners leads to a frustration of true development goals.

76. What these examples tend to show, is that the State Party is unconcerned with "*need*" and remains focused on the allocation of opportunities and relief based on considerations of race.

PART H: VIOLATION OF RIGHTS.

77. Solidarity accepts that ICERD condones, and in facts requires from, State Parties to implement "*special measures*". However, Solidarity submits that the measures complained of amounts to unjustifiable preference and by consequence leads to separate rights for separate race groups. As also pointed out the by the SAHRC the impact of these measures and the rationale therefore is not premised on accurate data. These measures unfairly discriminates on the basis of race either directly or indirectly.

78. Judged in the light of the objectives and purposes of the Convention, these measures are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.

79. As is evident from the legislation attached hereto it has no specific and or realistic goal, the State Party is by law entitled to be pursue the objectives of the legislation until the State, subjectively, finds it to have been satisfied.

80. In summary then Solidarity submits that the EEA contravenes the provisions of the Convention and the General Recommendation 32 of 2009 in the following respects:

80.1 affirmative action in terms of the EEA is based on system of racial classification designed by the Apartheid Government and does not provide for a system of self-classification which the Convention supports and demands;

80.2 affirmative action in terms of the EEA is not based on a realistic appraisal of the current situation of the individuals and communities concerned but is solely concerned with achieving representation of these specific groups in line with the national racial demographics. The rationality and proportionality of the EEA is therefore left wanting seeing that it does not take into consideration the preference of employment which might exist within racial groups, the level of education and qualification per race group and the

composition of specific racial groups within the borders of the Republic of South Africa;

80.3 the measures are not temporary and not goal orientated seeing that (i) in terms of the EEA the implementation of affirmative action is for an indefinite period; and (ii) the goal which the EEA is set out to achieve is not fixed or certain, but shifts in tandem with the statistics of the population;

80.4 affirmative action as it is currently implemented clearly leads to the maintenance of separate rights for separate racial groups. The reasoning of the Constitutional Court in the Department of Correctional Services matter referred to in Equality Report clearly illustrates the aforementioned. The fact remains that racial groups are afforded rights and preference based on the same system of racial classification which the world has condemned;

80.5 there can never be a point where affirmative action in South Africa has reached its goal and as such be discontinued, seeing that the goal is not fixed and or certain but depends on racial statistics which changes each quarter;

80.6 the State has never considered what the impact of the legislation is on the affected and or vulnerable groups.

PART I: APPROPRIATE RECOMMENDATIONS

81. In the circumstances Solidarity submits that the following recommendations ought to be appropriate:

81.1 That it is found that the State Party has contravened the provisions of the Convention;

81.2 Recommending that the State Party implement the findings and recommendations of the SAHRC as per the Equality Report;

81.3 Requiring from the State Party to report to CERD within one year on the actions taken so to implement the findings and recommendations in respect of the Report;

_____

DJ HERMANN

I CERTIFY the Deponent has acknowledged that he knows and understands the contents of the aforegoing Affidavit and that he has no objection to taking the prescribed oath and that he considers the oath to be binding on his conscience, and that accordingly the requirements have been complied with as set out in Reg. No. 1258 of Government Gazette No. 3619, 21 July 1972, as amended, which affidavit was signed and sworn to before me at _____ on this the ____ day of _____ 2021.

_____

COMMISSIONER OF OATHS