THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case No: J3092/18

In the matter between:

SOLIDARITY	**Applicant**
and	
THE MINISTER OF LABOUR	**First respondent**
THE DEPARTMENT OF LABOUR	**Second respondent**
DIRECTOR-GENERAL OF THE DEPARTMENT OF LABOUR	**Third respondent**
THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION	**Fourth respondent**
THE DIRECTOR-GENERAL OF THE DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	**Fifth respondent**
THE COMMISSION FOR EMPLOYMENT EQUITY	**Sixth respondent**

Heard: 18 September 2019

Delivered: 8 October 2019

Summary:

JUDGMENT

VAN NIEKERK.J

Introduction

[1] On 12 July 2018, the South African Human Rights Commission (SAHRC), issued a report entitled 'Achieving substantive economic equality through rights-based radical socio-economic transformation in South Africa' (the Equality Report). The report evaluates government's programme of socio-economic transformation from a rights-based perspective and deals, in part, with transformation in the workplace and the implementation of the Employment Equity Act[1] (EEA). The report concludes, amongst other things, that the definition of 'designated groups' in the EEA (broadly, the categories of persons who are beneficiaries of the affirmative action measures established by the EEA) is not in compliance with constitutional or international law obligations, and recommends that the EEA be amended to target more nuanced groups on the basis of need, and taking into account social and economic indicators.[2]

[2] The applicant (Solidarity) relies on the Equality Report to seek an order declaring that s 42 of the EEA, read with the definition of 'designated groups' in s 1 of the EEA, is unconstitutional because read cumulatively, they do not provide for appropriate classification of designated groups other than on the basis of race, gender and disability, and fail to account for needs-based restitution. In the alternative, Solidarity seeks an order confirming the findings and recommendations made in the Equality Report, in so far as they relate to the EEA.

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[1] Act 55 of 1998.
[2] Equality Report at paragraph 6.1A.

[3] When the matter was called, counsel for Solidarity advised the court that Solidarity did not intend to pursue the main prayer in the notice of motion, i.e. the declaration of unconstitutionality. That prayer would 'stand over', and Solidarity would pursue only the alternative relief of a confirmatory order.

[4] Solidarity's decision not to pursue the declaration of unconstitutionality considerably narrows the scope of a dispute that had been canvassed over some 550 pages. Indeed, the dispute is reduced to the single issue expressed in only two paragraphs of the founding affidavit. They read as follows:

> 53. In the context of the Public Protector, the Constitutional Court considered that recommendations made by a Chapter Nine institution cannot be disregarded, even if there is supposedly a rational reason for doing so. We accept that the recommendations of the SAHRC may be open to judicial scrutiny, that the power is not unfettered and that the legal effect of the recommendations is a matter for interpretation aided by context, nature and language. But for as long as the findings and recommendations are not legal (*sic*) challenged (for example, by way of the review), these findings and recommendations stand….
>
> 54. In the present case, the SAHRC has found that the EEA is not compliant with the constitution and international obligations. That is a finding, and in consequence the SAHRC has recommended that steps be taken to amend the EEA. Solidarity would argue that these findings and recommendations have an effect in law. The conclusion that must be reached is that there is a legally binding finding of constitutional non-compliance or non-compliance with international law that is currently in existence.

[5] In other words, in these proceedings, Solidarity seeks only to have the findings and recommendations of the Equality Report given legal recognition and effect, at least until any reviewing court sets them aside. That being so, the court is not concerned with a direct challenge to the constitutionality of s 42 of the EEA (read with the definition of a 'designated group'), and it is not concerned with a

constitutional challenge to affirmative action in general.[3] At most, the constitutional challenge to s 42 is indirect, riding as it does on the coat-tails of the SAHRC's findings and recommendations, as they are expressed in the Equality Report.

The Right to Equality and the EEA

[6] The findings and recommendations contained in the Equality Report are best understood with a prior appreciation of the nature of the right to equality as it is expressed in s 9 of the Constitution. Section 9 reads as follows:

> (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
> (2) Equality includes the fill and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

[7] Section 9 goes beyond conferring a right to formal equality; it requires restitutionary measures by the state to achieve substantive equality for all South Africans. The key role of restitutionary or remedial measures in the transformation required by the Constitution was recently affirmed by the Constitutional Court:[4]

> Restitutionary measures are a vital component of our transformative constitutional order. The drafters of our Constitution were alive to the fact that the abolition of discriminatory laws and the guarantee of equal rights alone would not lead to an egalitarian society envisaged in the Constitution. Something more had

[3] In its replying affidavit, Solidarity avers that the application is not concerned with the constitutionality of affirmative action, rather than the question whether s 42 of the EEA read with the definition of 'designated groups' pass constitutional muster.

[4] See: *Minister of Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and others* 2018 (5) SA 349 (CC) at paragraph 1. The conception of substantive (as opposed to formal) equality has a long history in our constitutional jurisprudence. See, for example, *Azapo v President of the Republic of South Africa* 1996 (4) SA 672 (CC), *SA Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC), *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC), *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC).

> to be done in order to dismantle the injustices and inequalities arising from the apartheid legal order. Hence the Bill of Rights, which is a cornerstone of our democratic order, includes the remedial measures.

[8] The EEA gives expression to the constitutional right to equality, in a substantive sense, in South African workplaces. The EEA's stated purpose is to eliminate unfair discrimination through the promotion of equal opportunity and fair treatment in employment, and to implement affirmative action measures to redress the disadvantages experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workforce.[5] 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 the employer'.[6] This objective is to be achieved primarily by the implementation of employment equity plans, which must achieve 'reasonable progress towards employment equity in that employer's workforce'.[7]

[9] Neither party disputes these basic principles, nor does the SAHRC. What they disagree on is how the beneficiaries of restitutionary measures should be determined. Section 1 of the EEA defines designated groups to mean 'black people, women and people with disabilities' who are South African citizens 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'. The term 'black people' is defined generically to mean 'Africans, Coloureds and Indians.'[8]

[10] Section 42 provides that when determining whether a designated employer[9] is complying with its obligations under the EEA, a person applying the Act must take into account various factors, including the extent to which suitably qualified

[5] Section 2 of the EEA.
[6] Section 15(1) of the EEA.
[7] Section 20(1).
[8] Section 1 of the EEA.
[9] Those employers who are subject to Chapter III of the EEA.

people from and amongst the different designated groups are equitably represented in each occupational category and level in the workforce. These factors are listed in s 15 of the EEA. In terms of s 42, various other factors may be taken into account, including the 'demographic profile of the national and regional economically active population…'.

The Equality Report

[11] The Equality Report is comprehensive and wide-ranging. The report assesses how affirmative action can be implemented in various contexts to facilitate radical social-economic transformation to achieve the end of greater substantive equality. Without intending to do any disrespect to the breadth of the study, for present purposes, it is sufficient to record that the Equality Report notes that the transformation of the labour market through the implementation of the EEA has been unacceptably slow, and given that economic inequality between and within population groups in South Africa has worsened. In particular, poverty and inequality continue to manifest on racial and gender lines.

[12] One of the questions that the Equality Report seeks to answer is whether the EEA itself, or its implementation, is leading to new imbalances.[10] It is in this context that the Report seeks to evaluate the EEA against constitutional and international law obligations, the latter established by the United Nations International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).[11]

[13] The Equality Report finds:

> As noted above, the EEA classifies beneficiaries of affirmative action according to 'designated groups' that correspond to the racial classification system used by apartheid government, while expanding its scope to additionally include women

[10] Equality Report at p 33.

[11] The ICERD was adopted by the UN's General Assembly on 21 December 1965 and entered into force on 4 January 1969. South Africa is a signatory to the ICERD, and thus bound by the reporting obligations established by the Convention. Article 1 of the ICERD defines racial discrimination as 'any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin…

and persons with disabilities. Whereas the population is provided with the opportunity to self-classify when statistical data is gathered for the population census, self-classification does not translate into legislation that provides for special measures. Indigenous peoples, those whose ethnic descent may be from mixed-race marriages, and linguistic or tribal minorities within the designated groups are therefore not accommodated by the EEA.

Furthermore, socio-economic data is similarly disaggregated according to the apartheid era classification system of population groups. The CERD has on two occasions requested the government to provide more exhaustive statistical demographic data that includes social and economic indicators, and furthermore accounts for indigenous groups and noncitizens…

Government's approach in this regard, as reflected in the EEA, is problematic for several reasons. Affirmative action measures must be targeted at groups and individuals who are subject to unfair discrimination, in order to eventually achieve substantive equality and a society based on non-racialism and non-sexism. 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. 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. Spec[12]ial measures accordingly do not account for socio-economic differences within broadly defined population groups. 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.

[12] Equality Report at pp 34-35, footnotes omitted.

Further:

> 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 equality within designated groups, is not properly considered.

[14] The Equality Report concludes:

> It is therefore found that the EEA's definition of 'designated groups' and South Africa's system of data disaggregation are not in compliance with constitutional and international law obligations imposed by the ICERD read in conjunction with the CERD's general recommendations and concluding observations. Governments 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 the obligations imposed by the ICERD and the CERD.
>
> (i) 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…
>
> (ii) 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…[13]

[15] To be clear, the Equality Report suggests that socio-economic needs be considered within designated, vulnerable groups. In other words, affirmative action should continue to be implemented on the basis of race, gender and disability, given the persistence of current patterns of economic inequality. However, special measures should be targeted at vulnerable groups within apartheid-era classifications so as to recognise multiple forms of disadvantage that they continue to experience. In this context, the report recommends that the

[13] Equality Report at p 39.

EEA be amended to target more nuanced groups on the basis of need, taking into account social and economic indicators.

What is the Equality Report's status?

[16] Central to the dispute between the parties is the status of the Equality Report. As foreshadowed by the founding affidavit, Solidarity accepts that the recommendation of the SAHRC may be open to judicial scrutiny and that the legal effect of any recommendations are a matter of interpretation aided by context, nature and language. But for so long as any findings and recommendations are not legally challenged (for example, by way of judicial review), Solidarity submits that the findings and recommendations made in the Equality Report stand, and are capable of confirmation by this court.

[17] Solidarity relies on a what has come to be described as the '*Oudekraal* principle'[14] which suggests that invalid administrative action may not simply be ignored, and may continue to have legal consequences until set aside by a court.[15] Put another way, Solidarity submits that the Equality Report has binding effect because of its factual existence. To the extent then that the SAHRC, as a Chapter Nine institution, has issued recommendations that require action on the part of the other respondents, that action must be taken.

[18] The *Oudekraal* principle has been confirmed and applied by the Constitutional Court in *MEC for Health EC v Kirland Investments* 2014 (3) SA 481 (CC), *Merafong City v AngloGold Ashanti* 2017 (2) SA 211 (CC), and *Department of Transport v Tasima* 2017 (2) SA 622 (CC). In the latter judgment, the Constitutional Court referred to *Economic Freedom Fighters v Speaker, National Assembly and Others* 2016 (3) SA 580 (CC) (the Nkandla judgment), where Mogoeng CJ said:

> No decision grounded on the constitutional law may be disregarded without recourse to a court of law. To do otherwise would "amount to a licence to self-

[14] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA).
[15] See *MEC for Health, EC v Kirland Investments* 2014 (3) SA 481 (CC) at paragraph 101.

> help". Whether the public protector's decisions amount to administrative action or not, the disregard for remedial action by those adversely affected by it, amounts to taking the law into their own hands and is illegal. No binding and constitutionally or statutorily sourced decision may be disregarded willy-nilly. It has legal consequences and must be complied with all acted upon. To achieve the opposite outcome lawfully, an order of court would have to be obtained. [16]

In other words, Solidarity is not concerned with the question whether the Equality Report is open to challenge – rather, it asserts that the report is not open to be ignored.

[19] The first, second, third and sixth respondents, who oppose the application,[17] contend that there is nothing in the Constitution or the SAHRC Act[18] that empowers the SAHRC to make findings that are binding on government and that the Equality Report is no more than a research report, whose findings and recommendations are intended to do no more than initiate a conversation on critical issues relating to the right to equality and the imperatives of socio-economic transformation. The SAHRC takes a similar view of its report.

Analysis

[20] It seems to me that the status of the Equality Report stands to be determined first by reference to the Constitution and the enabling legislation and secondly, by what the report, on the face of it and properly construed, purports to be.

[21] Turning first to the applicable legislation, the SAHRC is established by s 184 of the Constitution as one of the 'Chapter Nine' institutions established to support constitutional democracy. Section 184 reads as follows:

> (1) The South African Human Rights Commission must –
>
> (a) promote respect for human rights and a culture of human rights;
>
> (b) promote the protection, development and attainment of human rights; and
>
> (c) monitor and assess the observance of human rights in the Republic.

[16] At paragraph 74 of the judgment.
[17] The fourth respondent, the SAHRC, abides by the decision of the court.
[18] Act 40 of 2013.

(2) The South African Human Rights Commission has the powers, as regulated by national legislation, necessary to perform its functions, including the power-

(a) to investigate and to report on the observance of human rights;

(b) to take steps to secure appropriate redress where human rights have been violated;

(c) to carry out research; and

(d) to educate.

(3) Each year, the South African Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, healthcare, food, water, social security, education and the environment.

(4) The South African Human Rights Commission has the additional powers and functions prescribed by national legislation.

[22] The national legislation referred to in s 184 (2) and (4) is the South African Human Rights Commission Act, 40 of 2013 (the SAHRC Act). Section 13 of that Act confers additional powers and functions on the SAHRC in order to achieve its objects. Amongst other things, the SAHRC is competent and obliged to make recommendations to organs of state at all levels of government where it considers action advisable for the adoption of progressive measures for the promotion of human rights to be taken,[19] to undertake studies for reporting on or relating to human rights as it considers advisable, and to request any organ of state to supply it with information on any legislative or executive measures adopted by its relating to human rights. In addition, the SAHRC is obliged to develop conduct or manage information and education programs to foster public understanding and awareness of human rights, to review government policies relating to human rights and make recommendations on those policies,[20] and to monitor the implementation of and compliance with international and regional conventions and treaties relating to the objects of the Commission.

[19] Section 13 (1)(a) of the SAHRC Act.
[20] Section 13(1)(b) of the Constitution.

[23] To the extent that Solidarity poses an indirect challenge to the constitutionality of s 42 on the basis of what it contends to be a binding direction addressed to the fifth respondent (the Department of Justice and Constitutional Development) to the effect that the EEA should be amended, the first observation to make is that the SAHRC has no power to order legislative amendments. Only a superior court is empowered to pronounce on the validity of an Act of Parliament. Chapter Nine institutions have no power to direct parliament or any member of the executive to effect legislative amendments.[21] The SAHRC may advise and recommend that legislation be amended, but it may not direct.

[24] Secondly, the SAHRC's own view of the status of its report is significant. The SAHRC records that the Equality Report emanates from the SAHRC's constitutional monitoring and assessment function (in terms of s 184(1)(b) of the Constitution) as opposed its protection function (s 184(1)(b). Further, in compiling the Equality Report, the SAHRC utilised its power to carry out research in terms of s 184(2)(c) of the Constitution, a power to be distinguished from the power to investigate and report on the observance of human rights in terms of s 184(2)(a) of the Constitution, and to take steps to secure appropriate redress for the violation of human rights in terms of s 184(2)(b). This is a significant distinction – the SAHRC has powers to secure appropriate redress where there has been a violation of human rights, in which case it must conduct an investigation to engage the SAHRC's protection mandate. The SAHRC makes clear that the Equality Report emanates from its constitutional monitoring and assessment function, a function that is not shared with the Public Protector. In compiling the report, the SAHRC did not conduct any investigation into any alleged violation of human rights; it utilised its power to carry out research in terms of s 184(1)(c) of the Constitution.

[21] See *South African Reserve Bank v Public Protector and Others* 2017 (6) SA 198 (GP), where Murphy J said at paragraphs 42 and 43 of the judgment that a report by the Public Protector that instructed the chair of a parliamentary portfolio committee to take amend the Constitution 'trenches unconstitutionally and irrationally on Parliament's exclusive authority':

> The Public Protector is a creature of the Constitution, her remedial powers are derived from the constitution, and hence she operates under the Constitution and not over it. She has no power to order an amendment of the Constitution. Section 74 of the Constitution prescribes the conditions for its own amendment.

[25] Recommendations made in the context of research conducted in terms of the SAHRC's monitoring and assessment mandate are by definition advisory in nature, a position supported by the statutory provisions empowering the SAHRC to make recommendations that it deems 'advisable' for the promotion of human rights.[22] When the SAHRC exercises its monitoring and assessment powers, it is not issuing 'remedial action' or recommending 'appropriate relief' in the same manner as the Public Protector. The SAHRC is simply fulfilling its education and research functions. The SAHRC accepts that it does not enjoy the power to make any declarations of constitutional invalidity, nor did it purport to exercise any such power in respect of the EEA.

[26] Solidarity urged me to disregard the SAHRC's classification of the Equality Report as one issued in terms of its monitoring and assessment functions, and to read the report as one issued in terms of the SAHRC's powers to take steps to secure appropriate redress where human rights have been violated (i.e. in terms of s 184 (2) (b) of the Constitution). In my view, there is no merit in this submission. First, the best indicator of the SAHRC's intention in issuing the Equality Report is its own *ipse dixit*. The SAHRC confirms that in compiling the Report, it utilised its power to carry out research (in terms of s 184 (2)(c) of the Constitution), within its constitutional monitoring and assessment function. Secondly, the manner in which the Equality Report was compiled is not insignificant. The report was prepared by means of desktop research. At the time that the present application was lodged, the SAHRC had not consulted with affected parties, including the Department of Labour, the Director-General of Labour, and the Commission for Employment Equity. The fact that none of the primary legal custodians of the EEA were informed or consulted by the SAHRC during the preparation of the Equality Report suggests that the report is not the product of any investigation conducted by the SAHRC, and that it is intended to be educative and advisory only. Finally, the language of the Report itself is cast in terms that do not suggest that the findings and recommendations are binding,

[22] Section 13 (1)(a)(i) of the SAHRC Act.

or that they were issued under the SAHRC's powers to take steps to secure redress where human rights have been violated.

[27] In summary: There is no statutory or other regulatory provision that renders the Equality Report binding on government or any other party. The SAHRC itself does not intend the Report to be binding; it is a research report intended to contribute to the public discourse and to provide advice and guidance to government in fulfilling its constitutional obligations. Since the Equality Report is not binding on government or any other party, it follows that there is no basis on which this court is empowered to confirm or otherwise enforce the report's findings and recommendations for the purpose sought by Solidarity, or for any other purpose.

[28] Solidarity has not sought to postpone that part of the application in which it seeks to declare s 42 of the EEA unconstitutional– the court (and the respondents) were simply advised on the morning of the hearing that the main prayer would 'stand over' and that only the alternative relief sought would be pursued. In these circumstances, the application must stand or fall in its entirety. For the above reasons, the application stands to be dismissed.

Costs

[29] The respondents accepted that the nature of these proceedings, being a constitutional challenge brought in circumstances where there is no frivolous or vexatious intent on the part of the applicant, triggered the convention that costs ought not ordinarily to be granted. For the purposes of s162 of the LRA[23], which confers a discretion on the court to make orders for costs according to the requirements of the law and fairness, those interests are best satisfied by the same result. I do not intend therefore to make any order as to costs.

[23] Act 66 of 1995.

[30] I make the following order:

Order:

1. The application is dismissed.

André van Niekerk

Judge

Appearances:

For the applicant:	Adv. G Hulley SC, with him Adv. D Groenewald
Instructed by:	Serfontein, Viljoen and Swart Attorneys
For the first, second, third and sixth respondents:	Adv. T Ngcukaitobi SC, with him Adv. L Zikalala and Adv. T Ramogale,
Instructed by:	The state attorney.