

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

Case No. 71147/17

In the matter between:

**CHAMBER OF MINES OF SOUTH AFRICA** First Applicant

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

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

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

**SEFIKILE COMMUNITY** Fifth Applicant

**LESETHLENG COMMUNITY** Sixth Applicant

**BABINA PHUTHI BA GA-MAKOLA COMMUNITY** Seventh Applicant

**KGATLU COMMUNITY** Eighth Applicant

and

**MINISTER OF MINERAL RESOURCES** Respondent

and

**NATIONAL UNION OF MINeworkERS** First *Amicus Curiae*

**SOLIDARITY TRADE UNION** Second *Amicus Curiae*

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

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## CONTENTS

INTRODUCTION.....	3
EQUALITY IN TERMS OF THE CONSTITUTION .....	4
<i>The proper approach to restitutionary measures in section 9(2)</i> .....	7
<i>The 2017 Charter is a legitimate restitutionary measure</i> .....	10
<i>The definition of HDSAs and the MPRDA</i> .....	11
THE EMPLOYMENT EQUITY ACT .....	13
<i>Restitutionary measures in terms of the EEA</i> .....	13
THE PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION ACT .....	14
INTERNATIONAL LAW.....	14
PAJA DOES NOT APPLY TO THIS DISPUTE .....	14
APPROPRIATE RELIEF .....	15
CONCLUSION AND COSTS .....	15
LIST OF AUTHORITIES.....	17

## INTRODUCTION

1. The central issue for consideration arising from the First *Amicus Curiae* (“**NUM**”) submission is whether the inclusion of the term “Black Person” in terms of the *Reviewed Broad-based Black Economic Empowerment Charter for the South African Mining and Minerals Industry* in Government Gazette No. 40923 on 15 June 2017 (“**2017 Charter**”) unfairly discriminates against other historically disadvantaged South Africans (“**HDSA**”) in terms of the Constitution of the Republic of South Africa, 1996 (“**Constitution**”), the Employment Equity Act 5 of 1998 (“**EEA**”), the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (“**PEPUDA**”), and international law.
2. The submission by NUM mirrors that of the Second *Amicus Curiae* (“**Solidarity**”), although it is narrower in its scope. While relying on the same legislation, NUM posits that the 2017 Charter “*may not introduce concepts that contradict the substantive provisions of the [MPRDA]*”.<sup>1</sup> NUM further argues that “*the conception of Black Person does not accord with the legislative definition of HDSA which is an all-inclusive term intended to foster the entry into the mining industry of all people who were excluded from participation.*”<sup>2</sup>
3. As submitted below, NUM’s contentions — like Solidarity’s — fail on the basis that the 2017 Charter and the employment equity targets it sets in section 2.3 constitute a legitimate restitutionary measure for the purposes of section 9(2) of

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<sup>1</sup> NUM FA 2573 para 73.

<sup>2</sup> NUM FA 2573 para 74.

the Constitution. Further, these targets are sufficiently flexible and do not constitute quotas in terms of section 15(3) of the EEA, and the definition of a Black Person permissibly excludes white women. (Importantly, NUMs contention that women in general are excluded by the definition of Black Person is fundamentally incorrect. Section 2.3. of the 2017 Charter makes express reference to *female* Black Persons and person with disabilities.)

4. The allegations made by NUM that definition of a Black Peron 2017 Charter is impermissible is misplaced. Accordingly, the application should be dismissed, with no order as to costs.<sup>3</sup>

## EQUALITY IN TERMS OF THE CONSTITUTION

5. As a point of departure, the authorities correspond directly with those relied on the in the heads of argument filed in response to Solidarity and have been retained, to the extent necessary, for the sake of completeness.
6. Section 9 of the Constitution reads:

“(1) *Everyone is equal before the law and has the right to equal protection and benefit of the law.*

(2) *Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative*

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<sup>3</sup> See **Biowatch Trust v Registrar, Genetic Resources** 2009 (6) SA 232 (CC) at paras 21 and 24, where the Constitutional Court held that the general approach in constitutional litigation is to not award casts against an unsuccessful litigant in proceedings against the state, unless the litigation is frivolous, vexatious, or in any other way manifestly inappropriate.

*and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.*

- (3) *The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.*
- (4) *No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.*
- (5) *Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”*

7. In **South African Police Service v Solidarity obo Barnard (“Barnard”)**,<sup>4</sup> Moseneke DCJ, for a majority of the Constitutional Court in defining South Africa’s constitutional vision in relation to equality, held that:

*“Our constitutional democracy is founded on explicit values. Chief of these, for present purposes, are human dignity and the achievement of equality in a non-racial, non-sexist society under the rule of law. The foremost provision in our equality guarantee is that everyone is equal*

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<sup>4</sup> 2014 (6) SA 123 (CC).

*before the law and is entitled to equal protection and benefit of the law. But, unlike other constitutions, ours was designed to do more than record or confer formal equality.*

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

*Our quest to achieve equality must occur within the discipline of our Constitution. Measures that are directed at remedying past discrimination must be formulated with due care not to invade unduly the dignity of all concerned. We must remain vigilant that remedial measures under the Constitution are not an end in themselves. They are not meant to be punitive nor retaliatory. Their ultimate goal is to urge us on towards a more equal and fair society that hopefully is non-racial, non-sexist and socially inclusive.”<sup>5</sup>*

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<sup>5</sup> **South African Police Service v Solidarity obo Barnard** 2014 (6) SA 123 (CC) at paras 28-30.

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

8. As a starting point in **Minister of Finance and Others v Van Heerden** (“**Van Heerden**”),<sup>6</sup> Moseneke DCJ, for a majority of the Constitutional Court held:

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

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

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<sup>6</sup> 2004 (6) SA 121 (CC).

*requirement is whether the measure promotes the achievement of equality.”<sup>7</sup>*

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

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

- (a) target a particular class of people who have been susceptible to unfair discrimination;*
- (b) be designed to protect or advance those classes of persons;*  
*and*
- (c) promote the achievement of equality.*

*Once the measure in question passes the test, it is neither unfair nor presumed to be unfair. This is so because the Constitution says so. It says measures of this order may be taken. Section 6(2) of the [EEA], whose object is to echo section 9(2) of the Constitution, is quite explicit that affirmative action measures are not unfair. This however, does not oust the court’s power to interrogate whether the measure is a legitimate restitution measure within the scope of the empowering section 9(2).”<sup>8</sup>*

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<sup>7</sup> **Minister of Finance and Others v Van Heerden** 2004 (6) SA 121 (CC) at paras 36-7.

<sup>8</sup> **South African Police Service v Solidarity obo Barnard** 2014 (6) SA 123 (CC) at paras 36-7.



10. The Court held further that:

*“As a bare minimum, the principle of legality would require that the implementation of a legitimate restitution measure must be rationally related to the terms and objects of the measure. It must be applied to advance its legitimate purpose and nothing else. Ordinarily, irrational conduct in implementing a lawful project attracts unlawfulness. Therefore, implementation of corrective measures must be rational. Although these are the minimum requirements, it is not necessary to define the standard finally.”<sup>9</sup>*

11. The 2017 Charter is a clearly a restitutionary measure. It’s enabling provision, section 100(2), makes that clear. In terms of its employment equity targets detailed in section 2.3,<sup>10</sup> the 2017 Charter seeks *“to create a conducive*

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<sup>9</sup> **South African Police Service v Solidarity obo Barnard** 2014 (6) SA 123 (CC) at para 39.

<sup>10</sup> *“Consistent with the [EEA], workplace diversity and equitable representation at all levels are catalysts for social cohesion, transformation and competitiveness within the mining and minerals industry. In order to create a conducive environment to ensure diversity as well as participation of Black Persons at all decision-making positions and core occupational categories in the mining and minerals industry, a Holder must employ a minimum threshold of Black Persons which is reflective of the Demographics of the country as follows:*

**Board**

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

**Executive/Top Management**

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

**Senior Management**

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

**Middle Management level**

*environment to ensure diversity as well as participation of Black Persons<sup>11</sup> at all decision-making positions and core occupational categories in the mining and minerals industry”.*

### **The 2017 Charter is a legitimate restitutionary measure**

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

12.1. it targets a particular class of people who have been susceptible to unfair discrimination, in this instance Black People: the 2017 Charter seeks in its employment equity targets to foster workplace diversity and equitable

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

#### **Junior Management level**

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

#### **Employees with disabilities**

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

#### **Core and Critical skills**

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

<sup>11</sup> In terms of the 2017 Charter, a “**Black Person**” is a generic term which means Africans, Coloureds and Indians—

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

representation in the mining industry, particularly in relation to Black Persons, including female Black Persons;

12.2. it is designed to protect or advance those classes of persons by promoting the participation of Black Persons in the mining sector; and

12.3. it promotes the achievement of equality by setting a target for employment opportunities for Black Persons in the mining sector.

13. Accordingly, the 2017 Charter is neither unfair nor can it be presumed to be unfair. It is a legitimate restitutionary measure.

14. In relation to the exclusion of white women from the targets detailed in section 2.3 and in section 2.1 which deals with “ESOPs”, the Court in **Van Heerden** stated:

*“Within each class, favoured or otherwise, there may indeed be exceptional or “hard cases” or windfall beneficiaries. That however is not sufficient to undermine the legal efficacy of the scheme. The distinction must be measured against the majority and not the exceptional and difficult minority of people to which it applies.”<sup>12</sup>*

### ***The definition of HDSAs and the MPRDA***

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<sup>12</sup> **Minister of Finance and Others v Van Heerden** 2004 (6) SA 121 (CC) at para 39.

15. NUMs primary contention that the definition of Black Person irrationally excludes certain HDSAs and is thus irrational is premised on an incorrect interpretation of the section 100(2) of the MPRDA, read with section 9(2) of the Constitution.
16. A “*historically disadvantaged person*” is defined in the MPRDA as “*any person, category or person or community, disadvantaged by unfair discrimination before the Constitution took effect*”. In terms of section 100(2) the Minister is enjoined to develop a Charter “*that will set the framework, targets and timetable for effecting the entry of historically disadvantaged South Africans in to the mining industry.*” The MPRDA does not specify which HDSAs should be assisted in entering the mining industry.
17. As detailed in the Ministers answering affidavit to Solidarity, the targets set in mining charters “*are a baseline set for the transformation of the mining industry at a particular point in time and for a particular period of time, until such time that the Minister deems it prudent to revisit them.*”<sup>13</sup> The Minister provides further that Mining charters were intended by the legislature “*to constitute a flexible measure . . . that was to be incrementally built as and when the occasion arose.*”<sup>14</sup>
18. The current iteration of the mining charter excludes only white women from the definition of an HDSAs based on the need to facilitate the entry of Black

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<sup>13</sup> Minister’s response to Solidarity: AA 2901 para 44.

<sup>14</sup> Minister’s response to Solidarity: AA 2902 para 44.1.

Persons in the mining sector, at this time. As with all mining charters, it is not permanent but subject to constant review. Further, it is a permissible measure designed to advance a specific categories of person: Black Persons, which is not in conflict with the Constitution of the MPRDA.

19. NUM has accordingly failed to make out a case that the definition of Black Person is irrational or constitutes unfair discrimination.

## THE EMPLOYMENT EQUITY ACT

### *Restitutionary measures in terms of the EEA*

20. Section 6(2)(a) of the EEA mirrors section 9(2) of the Constitution providing “[i]t is not unfair discrimination to take affirmative action measures consistent with the purpose of the Act”. Section 2(b) provides “[t]he purpose of this Act is to achieve equity in the workplace by implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups,<sup>15</sup> in order to ensure their equitable representation in all occupational categories and levels in the workforce.”
21. Notwithstanding the definition of designated groups, the Constitutional Court in **Van Heerden** has acknowledged that there are ‘exceptional or “hard cases”’. In this instance, white women are excluded from the targets set in 2017 Charter.

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<sup>15</sup> In terms of section 1 of the EEA: “*designated groups*” means black people, women and people with disabilities.

This does not render the 2017 Charter unconstitutional or in conflict with the EEA. To the contrary, it is constitutionally permissible.

## **THE PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION ACT**

22. PEPUDA, as with the Constitution and the EEA, recognises in section 14(1) that “[i]t is not unfair discrimination to take measures designed to protect or advance person or categories of person disadvantaged by unfair discrimination or the members of such groups or categories of persons”.
23. For all of the reasons stated above, particularly that the 2017 Charter constitutes a legitimate restitutionary measure, this ground of review is misconceived and incorrect in law.

## **INTERNATIONAL LAW**

24. Section 39(1)(b) of the Constitution enjoins courts to consider international law when interpreting the Bill of Rights. Notwithstanding this duty, NUMs reliance on CERD falls to be dismissed on the same grounds as its arguments in terms of the EEA and PEPUDA.

## **PAJA DOES NOT APPLY TO THIS DISPUTE**

25. The applicability of the Promotion of Administrative Justice Act 3 of 2000 (“**PAJA**”) to this dispute has been dealt with in detail in the heads of argument in response to the First Applicant and need not be repeated here, save that like the First Applicant, NUM fails to identify the decision which it seeks to challenge. For the purpose of a judicial review in terms of PAJA, the definition of “*administrative action*” expressly requires there to be a decision under review, as defined in section 1 of PAJA.
26. The import of this failing is that NUM’s grounds of review must be determined in terms of the principle of legality which permits only three possible grounds of review: lawfulness; reasonableness; and procedural fairness. As a result, the grounds of review on which NUM relies is significantly reduced.

### **APPROPRIATE RELIEF**

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

### **CONCLUSION AND COSTS**

28. The 2017 Charter a legitimate restitutionary measure aimed at addressing the injustices of South Africa’s past. In the result, the application should be dismissed with no order as to costs.<sup>16</sup>

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<sup>16</sup> **Biowatch Trust v Registrar, Genetic Resources** 2009 (6) SA 232 (CC) at paras 21 and 24.

**A Subel SC**

**AE Bham SC**

**F Ismail**

Chambers, Sandton

15 December 2017



## LIST OF AUTHORITIES

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

Constitution of the Republic of South Africa, 1996

Employment Equity Act 5 of 1998

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

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

Mineral and Petroleum Resources Development Act 28 of 2002

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

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

Promotion of Administrative Justice Act 3 of 2000

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

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