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EMPLOYMENT EQUITY ACT: ANOMALIES BETWEEN NATIONAL AND PROVINCIAL EAP TARGETS



This is the final part of our four-part blog series on the application of the amended Employment Equity Act of 1988 (Act No. 55 of 1998) which came into effect on 1 January 2025.

In this article we discuss the challenges posed by pursuing the National Economic Active Population (EAP) targets for employers who conduct business operations in multiple regions with different Economic Active Population (EAP) targets. If you have missed the three previously published articles, kindly follow the below links:

- In Part One we discussed *the compliance requirements for designated and non-designated employers in the context of the amended EEA.*
- In Part Two we discussed *employer duties imposed by the EEA and sanctions for non compliance.*
- Part Three dealt with *affirmative action requirements set by the Employment Equity Act (EEA).*

Introduction to the Employment Equity Act

The Employment Equity Act (EEA) of 1998 (Act No. 55 of 1998) makes provision for affirmative action measures for persons from designated groups to promote equal representation of all demographic race and gender groups.

In order to achieve this goal, the Minister of Employment and Labour has the power to determine economic sectors and set different numerical targets for different occupational levels, subsectors or regions (section 15A(1) to (3) of the EEA).

When an assessment in terms of section 42 of the Act is done of a designated employer's compliance with the Act and numerical targets set by the Minister, one of the factors to be considered is the extent to which suitably qualified people from among the different designated groups are equitably represented at each occupational level in that employer's workforce in relation to the demographic profile of the national and regional economic active population (EAP). A second draft of the numerical targets set by the Minister was published by means of the Draft Employment Equity Regulations, 2024 in *Government Gazette* No. 50058 dated 1 February 2024. It is expected that the final draft will be published before September 2025.

The National EAP targets differ vastly from the Provincial EAP targets. This blog discusses the challenges posed by pursuing the National EAP targets for employers who conduct business operations in multiple regions with different EAP targets.

National and Provincial Economic Active Population targets

Regulation 3.4.8 determines that the National EAP shall apply to designated employers conducting their business / operations nationally, and the respective Provincial EAP shall apply to designated employers conducting their business / operations in a particular province.

Designated employers cannot use the national and provincial demographics (EAP) at the same time. Designated employers must choose only one demographic (that is either national or provincial, based on their geographical presence within provinces) and utilise the chosen demographics for the entire duration of the EE Plan which must be in line with the relevant 5-year sectoral numerical targets published by the Minister.

A designated employer who chooses to use the Provincial EAP and operates in more than one province, may choose the EAP of the province with the majority of employees. A designated employer who operates in more than one sector should choose the economic sector with the majority of employees. Regulation 4.2 further determines that affirmative action shall be applied in a nuanced way and that the EAP statistics shall be but one of many factors taken into account in the compliance analysis of affirmative action in any workplace as required by sections 15 and 42 of the EEA.

The Anomalies in applying National EAP targets versus the Provincial EAP targets

The inconsistencies in applying the National EAP targets and for that matter only one EAP target, for employers operating nationally, and the consequences it may create, were explained by Nugent AJ in a minority judgement in the Constitutional Court case of *Solidarity and Others v Department of Correctional Services and Others [2016] ZACC 18* (referred to as *Correctional Services*).

In this well-published case, several Coloured officials of the Department of Correctional Services (Department) deployed in the Western Cape were overlooked for promotion as the Department's EE Plan makes provision for implementation of the National EAP targets across all occupational levels in all regions, disregarding the Provincial EAP targets. The Provincial EAP targets for the Western Cape allowed for a larger proportion of Coloured people as more Coloured people reside in the Western Cape than in South Africa as a whole.

The main judgement in *Correctional Services* held that the disregard for Provincial EAP targets was contrary to the EEA which at that point required employers to use both National and Provincial EAP targets.

The Act was amended in 2015 to make the use of both EAP targets discretionary. However, the minority judgement delivered by Nugent AJ went further and explained by means of statistics the inconsistencies, irrationality and consequent unlawfulness of disregarding provincial (regional) EAP targets.

Although the current demographic statistics may differ slightly from those referred to by Nugent AJ, the anomalies remain the same.

In order to understand the dangers posed by disregarding regional EAP targets, the explanation of Nugent AJ in this regard is discussed below.

An overview of the Minority Judgement in *Correctional Services*

At the onset, Nugent AJ pointed out that the EEA's primary measure of representivity is the "demographic profile" of the economically active population.

A demographic profile is a statistical analysis of the characteristics of a population constructed upon whatever characteristics one chooses to analyse. For powerful historical reasons, Nugent AJ explained, the EEA has focused on race and gender as markers of employment equity.

But if the demographic profile of the population is to be the measure of employment equity, then all the characteristics of the population that are relevant must be considered and not only some. **To select only one characteristic and ignore others that are relevant will, according to Nugent AJ, produce an irrational result.** It is well established that a rational decision calls for all relevant factors to be taken into account and not only some. The factors that are relevant depend on the purpose of the inquiry.

The nature of the inquiry mandated by the EEA, Nugent AJ explained, makes it clear that the racial characteristics of the demographic profile were primarily what the Legislature had in mind, but said there are many facets to those characteristics. National proportions are but one characteristic of the population's demographic profile. There are others.

To ascribe to the demographic profile of the population no more than the proportion of each racial group in the entire country, is misleading and according to Nugent AJ, violates the objective of the EEA.

There is an important fact that is in any event inherent in the demographic profile of the population as a whole, namely its uneven distribution throughout the country. Without its uneven distribution being brought into account, the racial proportions of the population, as an entirety, are dangerously misleading if applied when compiling an Employment Equity Plan.

Nugent AJ further explained that the present purpose of the EEA is equal representation in the workplace. This is achieved by equitable access to employment opportunities, bearing in mind that employment opportunities are accessible to people only where they live.

The objective of the EEA is not to induce “racial migrations to accommodate the statistics”. Its objective is the accessibility of employment opportunities, which can only be achieved if the location of applicants for the posts is taken into account.

Statistics that serve as a tool for such a purpose will be those that reflect the reality of the population, and the reality is that the races are not distributed uniformly throughout the country, which is not reflected in the targets set by the EEA and its regulations.

If racial proportions are to be the measure of a representative workforce, then they must necessarily reflect the distribution of the people making up those proportions. To do otherwise produces irrational anomalies, Nugent AJ held.

Nugent AJ further observed that the vast majority of Coloured people live in the Western and Northern Cape.

The 2011 census revealed that Coloured people comprised 48,8% of the population of the Western Cape, and 40,3% of the population of the Northern Cape. In all other provinces except the Eastern Cape, where they comprised 8,3% of the population, their presence was negligible. In Limpopo they made up a mere 0,3%, while 96,7% of the population of that province were what the census calls “Black Africans”.

Translating those proportions into numbers at the time of the 2011 census, there were some 16 000 Coloured people and some 5,2 million black African people in Limpopo. Approximately 2,8 million Coloured people and 1,9 million black African people lived in the Western Cape.

There is no rationality in restricting almost half the population of the Western Cape to 8,8% of employment opportunities in that province and simultaneously extending 8,8% of employment opportunities in Limpopo to 0,3% of the population. Of every 100 work opportunities in the Western Cape, nine are made accessible to some 2,8 million Coloured people, while in Limpopo nine opportunities are made accessible to roughly 16 000 Coloured people.

And while in Limpopo nine of every 100 posts are made accessible to roughly 16 000 Coloured people, only 73 are made available to 2,8 million black African people, denying some 20% of employment opportunities to almost the whole population. Conversely, in the Western Cape nine of each 100 opportunities are made accessible to some 2,8 million Coloured people while 1,9 million black African people have access to 73.

It can be added that the figures used by Nugent AJ in respect of the 2011 Census, are roughly the same as in the more recent South African National Census of 2022 conducted by Statistics South Africa.

Nugent AJ stated that the same anomalies apply wherever the distribution of the population is ignored^{ed}. Anomalies will necessarily abound when people are reduced to national statistics. This is particularly so if the statistics bear no relation to the purpose for which they are used.

Applying the racial proportions as a whole ensures that every branch, every office, and every nook and cranny of an employer's structure is constructed accordingly, but that does not serve the purpose of equitable employment.

If access to employment is to be allocated in proportions, one might expect it to be allocated relative to the proportions of the potential employees, not relative to overall proportions that lump together people who in fact live a thousand kilometres and more apart.

It is submitted by Nugent AJ that there is no rational explanation for reserving posts for the various race groups with reference solely to their proportions as part of the national population, with no regard to their distribution. He held that it is wrong to base the "demographic profile" of the entire national population solely on its racial proportions.

The racial proportions of the population are not its demographic profile. They are but one characteristic of the demographic profile, and in themselves do not provide a coherent basis upon which to measure employment representivity.

It is important to consider the regional profile of the population as regional distribution is in any event inherent in the country's demographic profile. On that ground, too, Nugent AJ concluded that the EEA is irrational and in consequence unlawful.

While affirmative action measures are directed towards redressing past discrimination against the entire designated group, discrimination within the group is sanctioned if it is in pursuit of equitable representivity.

Nugent AJ emphasised the need to apply employment equity in a nuanced and harmonised way. He explained that reconciling the redress that the Constitution demands with the constitutional protection afforded to the dignity of others, is profoundly difficult.

Such a goal can only be achieved by a “visionary and textured” *employment equity provision (plan)* that incorporates mechanisms enabling thoughtful balance to be brought to a range of interests. He explained that South Africans are a vibrantly diversified people.

Consequently, it does the cause of transformation no good to render them “ciphers reflected in an arid ration having no normative content”.

Conclusion

Although the Draft Regulations make provision for designated employers who conduct operations in more than one province to implement the National EAP targets or one of the Provincial EAP targets across the board, the Draft Regulations also make provision for affirmative action to be applied in a “nuanced way”.

It further provides that “EAP statistics will only be one of many factors that will be taken into account in the compliance analysis of affirmative action”.

There are many anomalies and inconsistencies in the use of EAP targets.

- On the one hand, the Draft Regulations require the National EAP or a chosen Provincial EAP target to be applied, stipulating that designated employers cannot use the National and Provincial EAP at the same time and therefore must choose one demographic.
- On the other hand, the Draft Regulations require a nuanced approach as those demographic targets are but one of the factors.
- Nugent AJ explained that a nuanced way includes considering the appointment of people where they live, and that failure to consider regional EAP targets would lead to consequences which undermine the objective of the Act, which is unlawful.

It is recommended that those designated employers who conduct business activities in more than one region pursue the National EAP targets as far as possible as an overall target, but when regional positions need to be filled, to apply the Provincial EAP targets.

If the number of positions filled in terms of regional EAP targets results in an employer not achieving the overall National EAP targets, such a factor would be a reasonable ground provided for by the EEA and Draft Regulations for not achieving the numerical targets set by the Minister.

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About the Author: *Gideon Gerber* is a director of SERR Synergy and completed his Doctor of Laws (LLD) at the University of Pretoria, with research focusing on B-BBEE in the context of the Constitution and international law. He has published various articles in academic journals on topics such as B-BBEE fronting offences, among others. Gideon is also a regular speaker at B-BBEE seminars and has written articles for Business Day and Landbouweekblad on a broad spectrum of B-BBEE matters.

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