IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

Case no. J2326/07

In the matter between

DIRECTOR GENERAL OF THE DEPARTMENT OF LABOUR **First Applicant**

(The Respondent in the Counter Application)

MINISTER OF LABOUR **Second Applicant**

and

COMAIR LIMITED **Respondent**

(The Applicant in the Counter Application)

JUDGMENT

AC BASSON, J

Nature of the Application

[1] The application before the Court is a counter application to the main application in terms of which the Applicant (in the main application) intends applying to this Court

for an order declaring, *inter alia,* that the Respondent (in the main application) is in breach of section 20 of the Employment Equity Act 55 of 1998 (hereinafter referred to as "the EEA") by failing to prepare and implement an employment equity plan which would achieve reasonable progress towards employment equity in the Respondent's workplace between the period 2000 to September 2007. The Applicant also intends asking for a declaration that the Respondent is in breach of section 21(2);(3);(4) & (5) of the EEA in that the reports that were submitted were not based on any existing employment equity plan and that the Respondent is in breach of section 21(3) of the EEA in that the Respondent has failed to submit a report to the Director General of Labour (the First Applicant in the main application - hereinafter referred to as "the DG") on the first working day of October 2007. An order is also sought in terms of which the Respondent must pay a fine in the sum of R 900 000.00 (nine-hundred-thousand-rand) as prescribed by schedule 1 of the EEA. The main application is opposed and both parties have filed voluminous papers.

[2] The Respondent in the main application has filed a counter application seeking to dismiss the Applicant's main application. I will return to this application hereinbelow. The main application is not before the Court and has been postponed pending the outcome of the present (counter) application as it may well dispose of the main application.

The parties in the main and counter application

[3] The First Applicant in the main application is the Director General: Department of Labour and the Second Applicant the Minister of Labour. The Respondent in the

main application is Comair Limited and is a company conducting business in the aviation industry. I will, for convenience sake, continue to refer to the parties as the Applicant and the Respondent although the Applicant in the main application is the Respondent in the counter application and *vice verse*.

Issue before this Court

[4] The issue before this Court is of a limited scope. There are in essence, three questions before this Court:

(i) The first is whether the DG is accountable through review proceedings for actions taken in the exercise of the powers vested in the DG under the EEA.

(ii) If this Court finds that this is so, the second question to be considered is whether the DG properly exercised the public power bestowed (and applied to the Respondent) upon him in terms of the EEA.

(iii) Should this Court find that the DG did not properly exercise the public power in question; the final question to consider is whether or not the decision should be set aside.

[5] The parties were *ad idem* that should this application be decided in favour of the Respondent, that will also bring an end to the main application (which was postponed *sine die*). The parties were also *ad idem* that if this application is dismissed, the main application will, in light of the considerable disputes of fact that exist on the papers, be referred to oral evidence.

Background

[6] The Interim Constitution[1] states that it is an historic bridge between *"the past of a deeply divided society… and a future founded on the recognition of human rights [and] democracy"*. The final Constitution[2] signals the successful transition to a constitutional democracy. Both the interim and the final Constitution entrench a commitment to the protection of human rights. Fundamental to this commitment is the recognition of the human dignity of each and every individual and the commitment to protect and recognise the right to equality of each and every human being. Apart from being a core value of the Constitution, equality is also entrenched as a substantive human right. [3]

[7] Inequality on the basis of (particularly) race and gender is deeply entrenched in our society and has permeated all spheres of our economy, the workplace and wider society. There can be no argument about the fact that South Africa is one of the most unequal societies in the world. These injustices of the past are specifically recognised in the Constitution.[4] As a result of the deeply embedded societal inequalities between, especially men and women and between white and black, the dignity of countless South African men and women has been infringed upon and their inherent right to equality denied. The Constitutional Court in *Brink v Kitshoff NO* 1996 (4) SA 197 (CC) recognised the severe effect of past inequalities as follows:

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[1] Act 200 of 1993.
[2] Constitution of the Republic of South Africa, Act 108 of 1996.
[3] Section 9 of the Constitution.
[4] The preamble of the Constitution.

"*[40] As in other national constitutions, s 8 is the product of our own particular history. Perhaps more than any of the other provisions in chap A 3, its interpretation must be based on the specific language of s 8, as well as our own constitutional context. Our history is of particular relevance to the concept of equality. The policy of apartheid, in law and in fact, systematically discriminated against black people in all aspects of social life. Black people were prevented from becoming owners of property or even residing in areas classified as 'white', which constituted nearly 90% of the landmass of South Africa; senior jobs and access to established schools and universities were denied to them; civic amenities, including transport systems, public parks, libraries and many shops were also closed to black people. Instead, separate and inferior facilities were provided. The deep scars of this appalling programme are still visible in our society. It is in the light of that history and the enduring legacy that it bequeathed that the equality clause needs to be interpreted.*

[41] Although our history is one in which the most visible and most vicious pattern of discrimination has been racial, other systematic motifs of discrimination were and are inscribed on our social fabric. In drafting s 8, the drafters recognised that systematic patterns of discrimination on grounds other than race have caused, and many continue to cause, considerable harm. For this reason, s 8(2) lists a wide, and not exhaustive, list of prohibited grounds of discrimination."

[8] It is against this historical background that the interim and final Constitution[5] commits itself to the core democratic values of dignity and equality. The Constitution strives not only to protect formal equality (which merely requires equal

[5] Chapter 1 of the Constitution sets out the founding provisions of our Constitutional democracy as follows:
"The Republic of South Africa is one, sovereign, democratic state founded on the following values:
(a)Human dignity, the achievement of equality and the advancement of human rights and freedoms.
(b)Non-racialism and non-sexism.
(c)Supremacy of the constitution and the rule of law.
(d)Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

treatment for all irrespective of the barriers faced by an individual and the specific group to which he or she belongs) but, more importantly, substantive equality or equality in outcome. This substantive notion of equality therefore accepts the reality that the protection of formal equality between individuals or groups of individuals (who are members of previously disadvantaged groups) is not sufficient to address the inequalities that are so deeply entrenched in our society and experienced by certain groups of our society. Janet Kentridge "Equality" in Chaskalson *et* al *Constitutional Law of South Africa* 1999 at paragraph 14.4 describes the difference between this two notions of equality as follows:

> *"A formal approach to equality assumes that inequality is aberrant nd that it can be eradicated simply by treating all individuals in exactly the same way. A substantive approach to equality, on the other hand, does not presuppose a just social order. It accepts that past patterns of discrimination have left their scars upon the present. Treating all persons in a formally equal way not is not going to change the patters of the past, for that inequality needs to be redressed and not simply removed, This means that those who were deprived of resources in the past are entitled to an "unequal" share of resources at present."*

[9] This notion of equality thus accepts that true or actual equality can only be attained through legislative (and other) measures designed to actively remove the social barriers encountered by those persons or categories historically disadvantaged by unfair discrimination and to promote the representation of these categories of individuals in all spheres of society.

[10] In order to give effect to the substantive approach of equality, a positive duty is therefore placed upon government to ensure that every individual fully enjoys all rights and freedoms and to promote the achievement of equality though the adoption of measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination in the past.[6] These measures clearly include affirmative action measures.

[11] The EEA was passed to give effect to section 9 of the Constitution and more in particular, to give effect to the constitutional notion of equality which embraces both formal and substantive equality. The EEA recognises the harsh effects of the disparities faced by members of the previously disadvantaged groups in employment, occupation and income within the national labour market and seeks to correct and address these disparities through a process of active interventions. The EEA also seeks to address the historical imbalances created by past discriminatory laws and labour practices. The EEA furthermore sets out to actively promote the constitutional right of equality and the exercise of true democracy, to eliminate unfair discrimination in employment; to ensure the implementation of employment equality to redress the effects of discrimination; to achieve a diverse workforce broadly representative to our people; to promote economic development and efficiency in the workforce; and to give effect to the obligations of the Republic as a

[6] Section 9 of the Constitution embraces equality 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 full 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.
(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."

member of the International Labour Organisation.[7] The EEA thus firmly embraces both notions of equality: The EEA not only prohibits unfair discrimination (formal equality),[8] but also promotes and ensures that designated employers implement affirmative action measures (substantive equality).[9]

[12] In order to promote and ensure adherence to the goal of employment equity, the EEA thus places an obligation on every designated employer to implement affirmative action measures for people from the designated groups.[10] As such the EEA contains a mandatory obligation to implement affirmative action measures for people from the designated groups. These obligations entail the adoption of affirmative action measures as contemplated by section 15 *et seq* of the EEA. A designated employer must submit its first report to the DG within six months[11] after the commencement of this Act. The general duties of designated employers are contained in Chapter III of the EEA. Central to achievement of affirmative action measures as contemplated by the EEA is the adoption of active interventions created through a process of consultation,[12] analysis and the creation of a profile of employees.[13] The construction of an employment equity plan designed to achieve "*reasonable progress towards employment equity in that employer's workforce*",[14] is at the heart of the programme, with support emanating from the generation and publication of a report,[15] and the location of the employers responsibility with a

[7] The pre-amble of the EEA.
[8] See Chapter 2, sections 5-11 of the EEA.
[9] See Chapter 3, sections 12-17 of the EEA
[10] Section 13 of the EEA.
[11] 12 months if the designate employer employs fewer than 150 employees (section 21(1) of the EEA).
[12] See sections 16-18 of the EEA.
[13] See section 19 of the EEA.
[14] See section 20 of the EEA.
[15] See section 21 and 22 of the EEA.

member of senior management with duties to inform and keep records.[16] In short, these measures are aimed at identifying and eliminating the employment barriers which adversely affect those members from the designated groups. In order to ensure that designated employers comply with these mandatory provisions and to ensure compliance with the ultimate purpose of the EEA, the EEA, through its labour inspectors and the DG are clothed with monitoring and enforcement powers. As will become clear from the discussion hereinbelow, these monitoring and enforcement officials play a crucial roll in ensuring compliance with the EEA.

[13] Chapter V of the EEA provides for monitoring enforcement and legal proceedings. Chapter V grants labour inspectors who act in terms of the EEA the power to enter, question and inspect as provided for in sections 65 and 66 of the Basic Conditions of Employment Act[17] (hereinafter referred to as "the BCEA").[18]

[14] There is no doubt that the DG (through its inspectors) plays a crucial roll in monitoring and enforcing the instruction to designated employers to implement affirmative action measures as contemplated by the provisions of the EEA. In light of the fact that the value of equality is one of the very cornerstones of our constitutional democracy, it is therefore expected and critical that labour inspectors appreciate and embrace the importance of their functions in terms of the EEA.

[15] In terms of section 43 of the EEA, the DG is entitled to conduct a review of an employer in order to determine whether or not the employer is compliant with the EEA. This power of review is provided for in section 43 of the EEA. Subsequent to

[16] See sections 24-26 of the EEA.
[17] Act 75 of 1997.
[18] Section 35 of the EEA.

the review in terms of section 43 the DG may either approve a designated employer's employment equity plan or make a recommendation to an employer in writing stating the steps that the employer must take in connection with the implementation of the equity plan in order to ensure compliance with the EEA; the period within which those steps must be taken and any other prescribed information.[19] If the DG is not satisfied with the steps that an employer has taken in its endeavors to comply with its obligations in terms of Chapter III of the EEA (either in terms of section 43(2) or the recommendation in terms of section 44(b) of the EEA), the DG may refer the employer's conduct to the Labour Court in terms of section 45 of the EEA which reads as follows:

> *"If an employer fails to comply with a request made by the Director-General in terms of section 44(b), the Director-General may refer the employer's non-compliance to the Labour Court."*

The counter application

[16] In the main application, the Applicant has placed several hundred pages worth of documentation before this Court describing its efforts at chastising Comair for its alleged non-compliance with its obligations in terms of the EEA. Comair in turn responded with its answer. A further reply was received from the Director General which, in Comair's opinion, demonstrated that the DG wrongly lacked a proper appreciation of the system of enforcement created by the EEA. I am in agreement with Mr. Sutherland that these voluminous papers are awash with substantial and material disputes of fact which cannot be resolved on paper and that the dispute (if not disposed of by these proceedings) will have to be referred to oral evidence to

[19] Section 44 of the EEA.

resolve these disputes. I am also in agreement that a hearing, if it becomes necessary, will be a lengthy one.

[17] Comair is of the view that the DG misunderstood its powers in terms of the EEA and as a consequence thereof instituted a counter application to challenge, by way of review, the very lawfulness of the exercise of the powers of the DG under the EEA, including, in the circumstances of this case, the act of referring the dispute to the Labour Court in terms of section 45 of the EEA. It was submitted, correctly in my view, that the counter application is dispositive of the entire matter and should therefore be determined first and separately from the main application. It is clear from Comair's counter application that what it requires is a determination of the powers of the DG and his department as created by the EEA. In order to do so, it is necessary to first determine the powers of this Court in respect of the functions of the DG in terms of the EEA. Once the nature and ambit of the Court's powers have been determined, will reference be made to the specific facts upon which Comair premises its cause of action.

[18] Consequent to the DG's assessment of Comair's compliance, the Applicant has referred the Comair's alleged non-compliance to the Labour Court.

[19] In terms of the present (counter) application, the Respondent firstly seeks to review and set aside the recommendations issued by the First Applicant (the DG) pursuant to section 44(b) of the EEA. A copy of the recommendations is annexed to the papers and reference thereto will be made hereinbelow. Secondly, the Respondent seeks to review and set aside the decision taken by the DG pursuant to section 45

of the EEA to refer the Respondent's alleged non-compliance with the recommendations in terms of section 44(b) of the EEA to the Labour Court. The Respondent argues that this Court is empowered in terms of section 50(1)(h) of the EEA to review the decisions of the DG as contemplated by the EEA.

The enforcement mechanisms provided for by the EEA

[20] Cursory reference has already been made to the enforcement mechanisms provided for by the EEA. These are threefold in scope:

(i) The first consists of a monitoring by employees and the trade union representatives within the work place and the reporting thereof to any of those persons listed in section 34 of the EEA including but not limited to the DG or a labour inspector.[20]

(ii) The second is the investigative procedures instituted by labour inspectors in terms of section 35 of the LRA. These powers include entering the premises of any workplace and to question and inspect any records and documents.[21]

(iii) The third process envisages the involvement of the Labour Court in terms of section 45 of the EEA.

The functions and powers of labour inspectors

[21] Labour inspectors are not created nor appointed under the EEA. The EEA does, however, rely upon labour inspectors appointed and empowered in terms of sections 63 – 67 of the BCEA. Section 64 of the BCEA provides that a labour

[20] See section 34 (a) – (g) of the EEA.
[21] See section 65 and 66 of the BCEA.

inspector may promote, monitor and enforce compliance with "*an employment law*" by *inter alia,* performing any prescribed function.

[22] For purposes of the counter-application it is necessary to briefly consider what labour inspectors may or must do in terms of the EEA.

Procedure in terms of section 36 of the EEA

[23] In terms of section 36 of the EEA, labour inspectors "*must*" request and obtain a written undertaking from a designated employer to comply with paragraphs (a) – (j)[22] of section 36. This the inspector will only do "*if the inspector has reasonable grounds to believe that the employer has failed to [comply with paragraphs (a) – (j) of section 36]*"

Procedure in terms of section 37 of the EEA

[24] Where the designated employer has refused to give a written undertaking in terms of section 36 or has failed to comply with a written undertaking given in terms of section 36, the labour inspectors then have the power to issue compliance orders.[23] The compliance order "*must", inter alia*, set out those provisions of the EEA which the employer has not complied with, and details of the conduct constituting non-compliance; any written undertaking given by the employer and failure by the

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[22]*" (a)consult with employees as required by section 16;*
(b)conduct an analysis as required by section 19;
(c)prepare an employment equity plan as required by section 20;
(d)implement its employment equity plan;
(e)submit an annual report as required by section 21;
(f)publish its report as required by section 22;
(g)prepare a successive employment equity plan as required by section 23;
(h)assign responsibility to one or more senior managers as required by section 24;
(i)inform its employees as required by section 25; or
(j)keep records as required by section 26."

[23] See section 37 of the EEA.

employer to comply with a written undertaking; what steps the employer must take and the period within which those steps must be taken; the fine which may be imposed on the employer for failing to comply with the order, and any other prescribed information. This order must be served in a particular manner[24] and must be displayed at the workplace.[25] The DG may even approach this Court for an order to make the compliance order an order of court.

[25] An employer may object to a compliance order and if confirmed by the DG, may appeal the compliance order to the Labour Court.[26]

Review by the DG in terms of section 43 of the EEA

[26] Parallel with the process of compliance instituted by labour inspectors, it appears that the DG may also conduct a review to determine whether an employer is complying with the EEA.[27] This form of review is an administrative function performed by the DG. In terms of the powers designated to the DG, the DG may request the employer to submit (to the DG) a copy of its current analysis or employment equity plan. The DG may also have insight into any books, records, correspondence, documents or information that could reasonably be relevant to a review of the employer's compliance with the EEA. The DG may also conduct meetings with the employer to discuss their pursuit of the employment equity plan and any matters relating to compliance with the EEA. This process may also include meetings with any employee or trade union consulted with in terms of section 16 of the EEA.

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[24] See section 37(3) of the EEA.
[25] Section 37(3); (4) & (5) of the EEA.
[26]Section 39 and 40 of the EEA.
[27] See section 43 of the Act

[27] Subsequent to the review by the DG, the DG may approve a designated employment equity plan; or make a recommendation to the employer in writing stating what steps should be taken in connection with an employment equity plan and appropriate time frames in which that must be achieved.[28]

[28] If an employee fails to comply with the DG's recommendations, the DG "*may" refer the matter to the Labour Court.*[29] Implicit therein is the power to decide whether it is appropriate to refer the matter to the Court, or to utilize other enforcement mechanisms contemplated by the EEA.

Powers of the Labour Court in terms of section 50 of the EEA

[29] The Labour Court has exclusive jurisdiction to determine any dispute about the interpretation or application of the EEA.[30] The Labour Court also has the power to order compliance with any provision of the EEA including a request made by the DG to make a compliance order an order of Court. [31]

[30] In terms of section 50(1)(h) of the EEA, the Labour Court has the power to review any function provided for in this Act

> *"Except where this Act provides otherwise, the Labour Court may make any appropriate order including –*

[28] Section 44 of the EEA.
[29] See section 45 of the EEA.
[30] See section 49 of the EEA.
[31] Section 50(1)(a) of the EEA.

(h) reviewing the performance or purported performance of any function provided for in this Act or any act or omission of any person or body in terms of this Act on any grounds that are permissible in law;"

[31] Whether or not this section empowers the Labour Court to review the DG performing his or her functions in terms of the said sections of the EEA is in dispute. I will refer to this issue hereinbelow.

[32] It is thus clear from the aforegoing that the EEA empowers certain state officials (labour inspectors and the DG of Labour) with powers to investigate and ensure compliance with the provisions of the EEA. In exercising its powers and responsibilities in terms of the EEA, these individuals are required to bring value judgments on the degree of compliance as well as the pace at which the objectives of the EEA are being accomplished. This is especially clear from the provisions of section 43 of the EEA. I will return to this section hereinbelow. The EEA also provides for the consequence of non-compliance with the EEA. These consequences include a system of administrative fines and sanctioning by this Court.

Section 42 of the EEA: Assessment of compliance

[33] Section 42 of the EEA provides the framework against which the DG will assess compliance with the EEA in respect of employment equity policies and programmes. At the outset it should be noted that this section clearly places an *obligation* upon the DG to assess certain factors in evaluating compliance. This section reads as follows:

"**42. Assessment of Compliance**

In determining whether a designated employer is implementing employment equity in compliance with this Act, the Director-General or any person or body applying this Act ***must, in addition[32], to the factors stated in section 15****,[33] take into account all of the following:*

(a) The extent to which suitably qualified people from and amongst the different designated groups are equitably represented within each occupational category and level in that employer's workforce in relation to the-

(i) Demographic profile of the national and regional economically active population;

(ii) Pool of suitably qualified people from designated groups from which the employer may reasonably be expected to promote or appoint employees;

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[32] My emphasis.

[33] *"15Affirmative action measures*
(1) Affirmative action measures are measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer.
(2) Affirmative action measures implemented by a designated employer must include-
(a)measures to identify and eliminate employment barriers, including unfair discrimination, which adversely affect people from designated groups;
(b)measures designed to further diversity in the workplace based on equal dignity and respect of all people;
(c)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;
(d) subject to subsection (3), measures to-
(i)ensure the equitable representation of suitably qualified people from designated groups in all occupational categories and levels in the workforce; and
(ii)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.
(3) The measures referred to in subsection (2) (d) include preferential treatment and numerical goals, but exclude quotas.
(4) Subject to section 42, nothing in this section requires 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."

(iii) Economic and financial factors relevant to the sector in which the employer operates;

(iv)Present and anticipated economic and financial circumstances of the employer; and

(v)The number of present and planned vacancies that exist in the various categories and levels, and the employer's labour turnover;

(b) Progress made in implementing equity by other designated employers operating under comparable circumstances and within the same sector;

(c) Reasonable efforts made by a designated employer to implement its employment equity plan;

(d) The extent to which the designated employer to implement its employment barriers that adversely affect people from designated groups; and

(e) Any other prescribed factor".

[34] It is clear from the aforegoing that the EEA instructs the DG to take into consideration a number of factors before arriving at a decision. I am in agreement with the submission that this matrix of considerations allows and in fact forces the official to bring a sound judgment to bear in assessing compliance with the EEA. What is further clear from this section is the fact that the requirements or factors must be weighed cumulatively. In this regard this section specifically states that "*all*" of the factors must be taken into account. A labour inspector or the DG can therefore *not* exercise a discretion *without* taking into account the factors in section 15 of the EEA ***and*** those listed in section 42 of the EEA.

[35] As already pointed out, Comair, in the present application, seeks to review the exercise by the DG of his powers in terms of which compliance of Comair was reviewed and in terms of which the DG had decided to refer the alleged failure to comply to the Labour Court in terms of section 45 of the EEA. In a nutshell it is argued on behalf of Comair that the DG has patently not taken into account *all* of the considerations as set out in and required by section 42 of the EEA.

[36] I have already briefly referred to the vexing issue in dispute and that is whether or not the Labour Court may review the functions of the DG in terms of the EEA. On behalf of the Respondent it was argued that it is not clear from the papers whether or not Comair relies on the grounds contained in section 6 of the Promotion of Administrative Justice Act 3 of 2000 (hereinafter referred to as "PAJA") or whether it relies on the grounds in section 145 of the Labour Relations Act 66 of 1995 (hereinafter referred to as "the LRA") or whether Comair is relying on common law grounds. The Applicant argued that the application should be dismissed on either of these grounds: It was submitted that no case has been made out for a review on common law grounds. In respect of PAJA it was submitted that these grounds do not find application in reviews adjudicated by the Labour Court. Lastly, because no case has been made out in respect of which law it relies on, the application for review should be refused.

[37] The Applicant further submitted that it is clear from the EEA that the DG is empowered in terms of section 43 to conduct a review to determine whether or not the employer is complying with the provisions of the EEA and that there can

therefore be no doubt that the law empowers the DG to conduct such a review. I did not understand Mr. Sutherland to dispute this. What is, however, disputed by the Respondent is whether or not the DG properly exercised its powers in terms of section 43 of the EEA.

[38] The Applicant further submitted that the DG *is* entitled to bring an application to the Labour Court in circumstances where he is satisfied that there has been no compliance with the provisions of the EEA by the employer. Again, I did not understand Mr. Sutherland to dispute that the DG may do this. It is thererore not in dispute that the DG has certain powers in terms of the EEA. What is disputed, as already pointed out, is *how* the DG exercised his powers and whether this Court has the power to review.

[39] In the heads of argument on behalf of the Applicant, Mr. Mokhare stated that the DG has taken into account all other relevant factors including those set out in section 42 of the EEA. Whether or not this is so will be discussed hereinbelow and will only be considered if I am satisfied that this Court does indeed have the jurisdiction to review the DG's discretion which he has exercised in terms of the EEA. On behalf of the DG it was submitted that the review *"the review is bad in law and that the recommendations of the Director-General are not susceptible to review*." This allegation (as already pointed out) is strongly denied by Comair.

[40] In my view it is not necessary to decide whether or not a review is competent in terms of section 145 of the LRA, PAJA or even the common law. Section 50(1) (h) of the EEA makes it, in my view, clear that is the Labour Court may make any

appropriate order including "*reviewing the performance or purported performance of any function provided for in the Act or any act or omission of any person or body in terms of the Act on any grounds that are permissible in law*". I am also in agreement with Mr. Sutherland that the similarity between the provisions of section 50(1)(h) of the EEA and section 158(1)(g) & (h) of the LRA are apparent. The texts of both statutes are virtually indistinguishable and both have as their aim the clothing of the Labour Court with jurisdictional competence. In the context of the EEA, it clothes the Labour Court with reviewing powers which includes reviewing *any function* provided for in the EEA *by any person* in terms of the EEA. What is also apparent from section 49 of the EEA is that the Labour Court has *exclusive jurisdiction* to determine any dispute about the interpretation of EEA except where the EEA provides otherwise. I am in agreement with Mr. Sutherland that no provision is to be found in the EEA that stipulates that the exercise of the DG's powers and directions are immune from review. If that was so one would have expected the legislature to have expressly stated that the Labour Court may not review the exercise of the DG's powers. Accordingly, the Labour Court has exclusive jurisdiction to resolve any dispute about the interpretation or application of the EEA including whether or not the DG has applied section 42 when he considered whether or not Comair has complied with the EEA.

[41] The focus of this review is whether or not there are grounds "*permissible in law*" to review the decision by the Director-General to issue the recommendations and to refer the matter to the Labour Court. In exercising this power the DG is exercising public power which is susceptible to control by the courts in accordance with fundamental principles of constitutionalism and administrative law. I am in

agreement with the submission that this proposition is not controversial.[34] I am further in agreement with the submission that a decision to conduct a review, the decision to make and issue recommendations and to refer a matter to the Labour Court all involves the exercise of public power. These powers are specifically bestowed on certain public officials in terms of legislation. The exercise of these (public) powers has also undoubtedly direct and far reaching consequences for those individuals who are affected by the exercise of the powers bestowed on public officials in terms of the EEA. Having thus accepted that the DG's conduct constitutes the exercise of public power it follows that a Court may review such conduct for lawfulness and compliance with the requirements set out in a particular statute. Included in this review is a review of the facts and considerations taken into account by the public official in coming to a decision contemplated by the Act.[35]

Recommendation by the DG

[42] The recommendation issued by the DG briefly states what the obligation of the employer is in terms of the EEA. This is followed by a cryptic outcome and a recommendation. The recommendation, for the best part, merely relies on the relevant provisions of the EEA. I cite two examples from the recommendation:

Example 1

Duties of designated employers	**Outcomes**	**Recommendations**	**Due date**

[34] See: *Pharmaceutical manufacturers Association of* SA *in re Ex Parte President of* RSA 2000 (2) SA 674 (CC) at [85] and *President, RSA v SARFU* 2000 (1) SA (CC) at [44].

[35] For examples of cases of review for failures by public officials exercising public power see *Hira v Booysen* 1992 (4) SA 69 (A) at 93 A – B; *Pepkor Retirement Fund v FSB* 2003 (3) SA 38 (SCA) at [47] –[49]; *Gamavest (Pty) Ltd v Regional Commissioner, Northern Province & Mpumalanga* 2003 (1) SA 373 (SCA) at [12] and *SAJBD v Sutherland N.O*. 2004 (4) SA 368 9W) at [27] – [30].

Analysis (Sect 19)	There was no analysis conducted	●When a designated employer collects information about individual employees for the purpose of compiling a workforce profile to determine the degree to which employees from designated groups might be underrepresented, the employer must request each employee in the workforce to complete a declaration using the EEA1 form. Employees must at any time be able to add information to the EEA1 form. ●Where an employee refuses to complete the EEA1 form or provides inaccurate information, the employer may establish the degination of an employee by using reliable historical and existing data.	

		●A designated employer must use section B of the EEA2 form to develop the workforce profile of employees as required by section 19(2) of the Act, the employer may refer to: a) Annexure 1 for demografic data; b) Annexure 2 which contains the definitions of occupational levels; and c) Annexure 3. which contains the definitions of occupational categories ●A designated employer must refer to the Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans as a guide when collecting information and conducting the analaysis required by section 19 of the Act.	

		●The analysis must involve reviewing all policies, procedures, practices and the work environment in order to eliminate unfair discrimination and prmote employment equity in the workplace, including when commencing employment during employement and ending employment.	

Example 2

Duties of designated employers	**Outcomes**	**Recommendations**	**Due date**
Report (section 21)	The Report does not comply with the requirements of the Act because it is not based on an EE plan	Prepare and submit a complete and accurate report based on your employment equity plan	

Merits of the review

[43] I am in agreement with Comair that the recommendation by the DG does not reflect that there has been an application of mind to the matter. Even more supportive of

the argument that the DG did not apply his mind is the fact that there is no indication from the recommendation that the DG complied with the mandatory instruction contained in section 42 of the EEA. There is no indication that the DG even considered the factors which the DG is obliged to consider in terms of section 42 of the EEA. There is, for example, no indication that the DG requested Comair to submit (to the DG) a copy of its current analysis or employment equity plan (section 43(2) of the EEA). I am also in agreement with the submission made by Mr. Sutherland that there is no indication from the recommendation that an effort was made to determine the number of suitably qualified people amongst the different designated groups within each occupational category in Comair's workforce; no measurement has been made against the demographic profile of the national and regional economically active population (section 42(a)(i) of the EEA. There also appears to have been no consideration of the pool of suitably qualified people (section 42(a)(ii) of the EEA). No allowance was made for the economic and financial factors relevant to the sector or the financial circumstances of this particular employer nor is any reference made to the number of vacancies that exist in the various categories and levels within Comair, nor the employer's labour turnover. No recognition or reference is made to any progress that may have been made by Comair towards implementing the plan. The recommendation also does not show that the DG has considered whether this employer has made any progress in eliminating employment barriers that adversely affect people from the designated groups.

[44] It must also be pointed out that the DG has filed a record consisting of some 234 pages pursuant to the filing of the counter application. Comair thereafter filed its

supplementary affidavit dealing with the documentation that was filed, or rather with the fact that certain documents were *not* filed namely those documents or information which was relied upon by the DG for purposes of arriving at the decisions contained in the recommendation. The attorneys for the Respondent upon receipt of the documents specifically requested the DG to confirm whether all documents upon which were relied were received. The State Attorney on behalf of the Applicant confirmed that the documents were complete.

[45] Mr. Mokhare on behalf of the Applicant submitted that it does not matter whether or not the DG was right or wrong in arriving at its decision. According to the submission it is "irrelevant" and the only avenue open for the Respondent is to come and defend itself before this Court in the main application. Mr. Mokhare also argued that the factors listed in section 42 of the EEA is merely an assessment tool and not decisive. It was further argued that even if those factors (contained in section 42) were not taken into account that does not mean that the recommendation must be set aside. In further advancing this argument, it was argued that this Court should not follow a formalistic approach but that this Court should follow a holistic approach.

[46] I have several difficulties with this argument. The first is the plain language used in section 42 namely that the DG in "*applying this Act,* ***must***,[36] *in addition to the factors stated in section 15, take into account all of the following [section 42(a) – (e) of the EEA]".* There is no doubt from a plain reading of this section that there is a mandatory duty upon the DG to consider these factors. It is clear from the documents filed by the state attorney that these factors were not considered. The

[36] My emphasis.

only question that therefore remains is whether or not this Court has the power to review the exercises of the functions of the DG. This is not a question of being formalistic or following a holistic approach. The DG either exercised his functions properly or he did not. Whether this Court can review the exercise of this function is a legal question and not a policy consideration. I have already indicated that I am of the view that the Labour Court can review.

Conclusion

[47] I have carefully considered the documents that were placed before the DG (and disclosed as part of these proceedings). I am not persuaded that the DG has properly exercised his discretion as contemplated by section 42 of the LRA. It is clear from the recommendation that it, to a large extent, merely paraphrases extracts from the relevant sections. Moreover, no attempt has been made to properly consider the factors set out in section 42 of the EEA.

[48] I am therefore firstly of the view that the decision of the DG is reviewable in terms of section 50(1)(h) of the EEA and that it should be set aside. I am further in agreement that the decision of the DG to refer the matter to the Labour Court should be reviewed and set aside. Clearly the latter decision was influenced by the outcome of the original recommendation.

[49] Mr. Sutherland has also argued that there is a further basis upon which this Court should review the referral and that is because the EEA provides for other mechanisms to deal with these kinds of complaints. I do not intend to deal with this

submission in light of my conclusion that the decision should be reviewed and set aside.

Condonation applications

[50] On last aspect should briefly be dealt with and that is the two condonation applications before this Court. The Applicant applied for condonation for the late filing of its answering affidavit. This was not opposed by Comair who wishes to ventilate the merits of the dispute. The Applicant, however, argued that Comair's dispute has been referred out of time and that no condonation has been sought. No provision in the EEA stipulates the time period within which the review should be instituted. The review process instituted in terms of the EEA is, however, similar to the one instituted in terms of section 158(1)(g) of the LRA which requires that the review must be instituted within a reasonable time. A reasonable time is considered in terms of the LRA (to review) to be 6 weeks. Comair concedes that with the benefit of hindsight the review could conceivably have been instituted immediately upon the receipt of the recommendations. This was, however, not done. In its defense, it was argued by Comair that it should be taken into account that the DG did not issue any reasons for the recommendations that were issued and that it was only when the specific complaints relating to the absence of compliance with section 42 of the EEA were pertinently raised in the answering affidavit to which the DG did not respond in its replying affidavit that Comair's suspicions were confirmed and the review application could be initiated. I accept this explanation and therefore grant condonation in so far as it is necessary to do so. I am also of the view that this is such an important matter that it is necessary for this Court to consider the many legal issues that were raised in this application.

Order

[51] In the event, the following order is made:

1. The Application for condonation for the late filing of the counter review is granted.
2. The Application for condonation for the late filing of the answering affidavit is granted.
3. The recommendation by the First Applicant dated 15 March 2007 in terms of section 44(b) of the Employment Equity Act 55 of 1998 is reviewed and set aside.
4. The decision by the First Applicant in terms of section 45 of the Employment Equity Act 55 of 1998 to refer the Respondent's alleged non compliance with the recommendations dated 15 March 2007 to the Labour Court is reviewed and set aside.
5. The Applicant is ordered to pay the costs including the costs of two counsel.

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AC BASSON, J

DATE OF JUDGMENT: 11 August 2009

DATE OF APPLICATION: 22 MAY 2009

FOR THE APPLICANT

Adv WR Mokhare

Instructed by the State Attorney

FOR THE RESPONDENT

R Sutherland SC

Adv D Vetten

Instructed by Edward, Nathan Sonnenbergs