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Refusing Forced Racialisation at Work

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BEE Overview

South Africans are largely unaware of what has become of BEE. BEE has three main components: race-law in the labour market, public procurement, and capital-related permissions to operate including licencing permits. The former is the focus of this report.

On January 15 at least 7.5 million workers are likely to be reported on by their employers in terms of race-gender pairs and salary rank. This will cover most of the workforce. These workers have no option to select “other” in terms of race, and instead are given only four options: “African”, “Coloured”, “Indian”, and “White”.

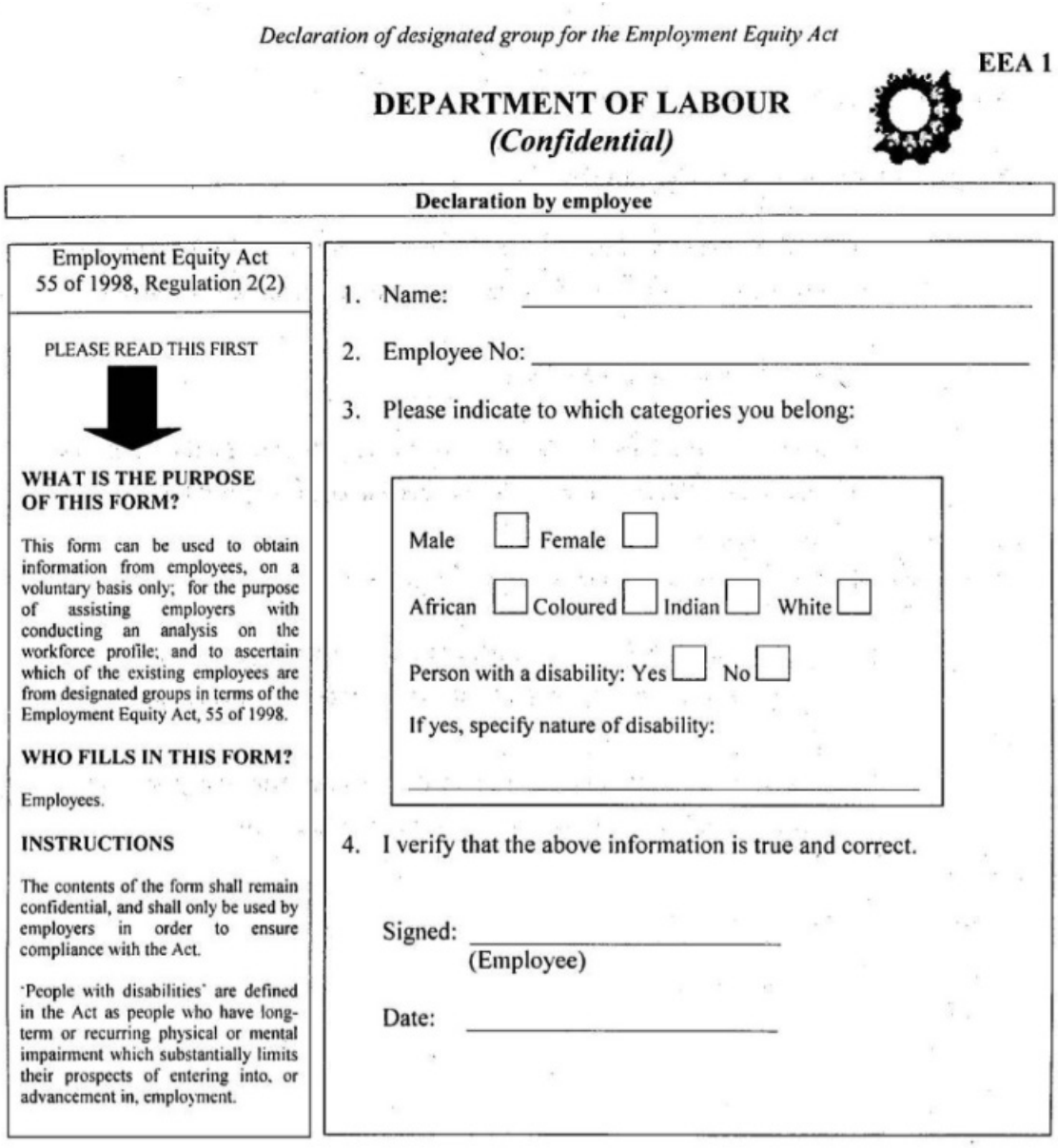
The race-law system these workers have been enlisted into now discriminates against all eight race-gender pairs overtly and directly. This system is objectionable on conscientious and Constitutional grounds. This report unpacks how BEE has become anti-Black, anti-Coloured, anti-Indian, and anti-White – with overt discrimination against all eight race-gender pairs – in ways that are conscientiously objectionable to non-racialists regardless of their race. It also unpacks the precedent and status of conscientious objection in the South African legal system. Important details are analysed regarding what employers can, and cannot do, to employees who refuse to classify.

The overview, however, is that BEE has changed so dramatically in September 2025 that South Africa is now by far the most race-regulated country on the planet[1]. Separately, this system is demonstrably unjust and unsustainable.

The resistance to this racially procrustean system through conscientious objection to race classification at work within the bounds of the Constitution has just begun.

No “Other” option in race classification

BEE in the labour market has been predominantly governed by the Employment Equity Act (EEA) of 1998. The original Employment Equity Act Regulations of 1999 prescribed the EEA1 form to be filled out by employees at all designated employers.



Declaration of designated group for the Employment Equity Act

EEA 1

DEPARTMENT OF LABOUR
(Confidential)

Declaration by employee

Employment Equity Act
55 of 1998, Regulation 2(2)

PLEASE READ THIS FIRST

WHAT IS THE PURPOSE OF THIS FORM?

This form can be used to obtain information from employees, on a voluntary basis only; for the purpose of assisting employers with conducting an analysis on the workforce profile; and to ascertain which of the existing employees are from designated groups in terms of the Employment Equity Act, 55 of 1998.

WHO FILLS IN THIS FORM?

Employees.

INSTRUCTIONS

The contents of the form shall remain confidential, and shall only be used by employers in order to ensure compliance with the Act.

'People with disabilities' are defined in the Act as people who have long-term or recurring physical or mental impairment which substantially limits their prospects of entering into, or advancement in, employment.

1. Name: _____
2. Employee No: _____
3. Please indicate to which categories you belong:

Male ☐ Female ☐

African ☐ Coloured ☐ Indian ☐ White ☐

Person with a disability: Yes ☐ No ☐

If yes, specify nature of disability:

_____

4. I verify that the above information is true and correct.

Signed: _____
(Employee)

Date: _____

Source: EEA Regulations, 23 November 1999, Regulation No. R. 1360, Government Gazette No. 20262

As can be seen above employees are give two choices for gender and four choices for race, namely “African”, “Coloured”, “Indian”, and “White”. No “Other” option was provided.

A new EEA1 forms were prescribed in 2006, 2014, and 2025. In each case, employers had the same four race options, and no other options.

The results are compiled by employers and then reported to the government through EEA2 forms in terms of eight race-gender pairs, and separately by foreign nationality. The relevant part of that form has not changed much in substance over the decades, and now looks like this, as prescribed in 2025. Note, employers report the "workforce profile" in rows that are not in bold, while the new "targets" (discussed below) are in bold.

1. WORKFORCE PROFILE AND NUMERICAL TARGETS

1.1 Please report the total number of **employees** (including employees with disabilities) and annual EE targets in each of the following **occupational levels**: Note: A=Africans, C=Coloureds, I=Indians and W=Whites

Occupational Levels		Male				Female				Foreign Nationals		Total
		A	C	I	W	A	C	I	W	Male	Female	
Top management – Workforce profile	value											
	%											
Top management target – current year	value											
	%											
Senior management – Workforce profile	value											
	%											
Senior management target – current year	value											
	%											
Professionally qualified – Workforce profile	value											
	%											
Professionally qualified target – current year	value											
	%											
Skilled technical – Workforce profile	value											
	%											
Skilled technical target – current year	value											
	%											
Semi-skilled – Workforce Profile	value											
	%											
Semi-skilled target – current year	value											
	%											
Unskilled – Workforce profile	value											
	%											
Unskilled target – current year	value											
	%											
Total employees (excluding temporary employees)	value											
	%											
Temporary employees	value											
	%											
GRAND TOTAL	value											
	%											

Source: EEA Regulations, 15 April 2025, Regulation No. R. 6125, Government Gazette No. 52515.

The Commission for Employment Equity (CEE) publishes annual reports in which this data is collated. This indicates that in 2024 there were 7,537,857 workers identified by race-gender pair. In most instances, this would be a result of self-declaration. However, in some instances employees have refused to classify themselves by race-gender pair and have been classified by their employers. The exact numbers are unknown and under investigation by IRR Legal.

One crucial distinction to draw is between cases where people have never self-classified, and cases where people have self-classified to their employers in the past, but refuse to do so now. This distinction is important because section 8(2) of the 2025 EEA Regulations states the following:

> Where an employee refuses to complete the **EEA1** form or provides inaccurate information, the employer may establish the designation of an employee by using reliable historical and existing data, and persons with disabilities have the right not to declare their disability.

An employee who self-classified in the past created "historical data" for the employer. If the employer relied on that data in its previous report, then the data is also *prima facie* reliable. If that employee then decides to refuse to fill in one of the four race boxes in the next EEA1 report they are required to fill out, then the employer has "reliable historical data", which they "may" use to classify the employee.

Some organizations are apparently ignorant of that. A business association called the National Employers' Association of South Africa (NEASA) stated, for example, that "the real issue" is "that employers are expected to racially classify their employees in a complete vacuum"[2].

This kind of rhetoric is appealing to wishful thinkers who are inclined to believe BEE can be knocked down by a mere technicality. However, there are at least 7 million workers for whom reliable historical data on their race-gender pair exists because those people self-classified on EEA1 forms in the past, repeatedly. This is the opposite of a "vacuum". It is a vast and powerful data resource in the hands of the state.

To be sure, the situation is different for those people who never previously classified either because they are only joining the relevant part of the workforce now, or because they refused to classify in the past and were not in any other way reliably classified. There, the term "vacuum" is much closer to being apposite.

Non-racialists who conscientiously object to self-classification must therefore be split into two categories: the never-classified; and the previously classified who know assert a right to be unclassified.

The Stakes: New race-gender targets in private sector

Why is race classification, or the refusal to classify, more important now than at any time since 1994?

On 1 September 2025, South Africa entered a new era as the regulatory race "targets" of the Minister of Labour and Employment, Nomakhosazana Meth, came into force under the EEA. These are called the Employment Equity Regulations, 2025. Regulation 9(10) states:

> *A designated employer must avoid perpetuating the over-representation of any group if their representation exceeds the applicable EAP [Economically Active Population] in a particular occupational level*[3].

This covers "all occupations at all levels of the workforce" at companies with 50 employees or more, which is is estimated to cover between 7.5 and 11 million employees.[4] Employers who repeatedly fail to comply with the racial ratios can be fined up to 10% of revenue annually, an amount that would bankrupt most companies.

There is another set of regulations that came into effect on September 1 2025 titled the Determination of Sectoral Targets.

Each of these will be examined separately, and then together.

The first set of race targets: Primary race targets

Regulation 9(10), as stated above states that employers "must avoid perpetuating the over-representation of any group if their representation exceeds the applicable EAP".

"EAP" means the "Economically Active Population". The same regulations stipulate that this must be calculated using the Quarterly Labour Force Survey "of the third quarter" of the latest year available. The table of EAPs by group is as follows:

Economically Active Population			
	Male	Female	Total
Black African	43.5%	37.5%	81.0%
Coloured	4.6%	4.1%	8.8%
Indian/ Asian	1.7%	1.0%	2.7%
White	4.1%	3.4%	7.5%
Total	53.9%	46.1%	100.0%

Source: Stats SA QLFS, Q3, 2024.

So, under Regulation 9(10) of the EEA, the test is whether "any group" manifests "over-representation" by having a race-gender ratio, or a racial ratio, above the relevant amount in the table above.

For example, if 44% of senior managers at a company are black males, then that group's "representation exceeds the applicable EAP" of 43.5% at that "particular occupational level". That is "over-representation". An employer "must avoid perpetuating" such "over-representation".

Likewise, if 2% of senior managers are Indian / Asian women, then that is "over-representation" because the EAP for that race-gender pair is only 1%. This "over-representation" is also something that "must" be stopped according to the regulations.

Lest there be any doubt about this, the regulations go on. Regulation 9(11) states:

> (11) A designated employer that has exceeded the numerical target set for a particular designated group at an occupational level should continue to set targets that maintain compliance with the EAP.

In other words, a company that has 50% black female top managers might want to set its "targets" going forward as 50% for black female managers. However, it is prohibited from doing so. It must "set targets that maintain compliance with the EAP", which would mean setting the target at 37.5% for black female top managers.

Race-Gender Pairs

The eight race-gender pairs are not the only groups countenances by the EEA, but they are the most fundamental. The administrative record and court precedents indicate that both genders also count separately as "groups", as do each one of the four official races independent of gender. Those groups "must" also not be "over-represented".

For example, if 82% of senior managers at a company are black, then that group's "representation exceeds the EAP" of 81% at that "particular occupational level". That is "over-representation" too.

However, race-gender pairs are the most fundamental. That is because if "over-representation" is avoided at the basic level of race-gender pairs, then it mathematically follows that "over-representation" is avoided at the higher level of races, and genders separately. However, the obverse is not true. Separate race and gender targets can be achieved, while race-gender pairs are missed due to "over-representation" in relation to EAP, and then the "must" of Regulation 9(10) still applies.

To see that the reader is invited to look at the table above and focus on the Totals figures for race (four data points in the column on the right edge) and gender (two data points in the row on the bottom edge). Suppose a company is on target for all six of those data points. It is still possible, for example, that half the race-gender pairs are on target and that the other half are off target as follows – 8.8% coloured female, 0% coloured male, 32.9% black female, 48.1% black male.

In this hypothetical each of the four race totals are on target, and so are both gender targets, but two of the eight race-gender pair targets are missed due to "over-representation", namely, coloured females and black males, and two are under target, namely coloured males and black females.

Under regulation 9(10) the perpetuation of that "over-representation" must actively be stopped by the employer.

In logical terms the race-gender pairs are fundamental because the other groups *supervene on* race-gender pairs.

In practical terms Regulation 9(10) forces companies to ultimately revert to hitting race-gender pair targets no matter what the "over-representation" figures are on higher level groups like races and genders separately.

The second set of race targets: Sectoral targets

The second set of regulations passed by Minister Meth is the Determination of Sectoral Targets. These have attracted more attention and describe a separate set of "targets" that differ by occupational level across 18 sectors of employment, from "Accommodation and food service activities" through the alphabet to "Wholesale…"

These targets only enumerate "designated groups", a category which "excludes white males with no disabilities and foreign nationals"[5]. These targets set a floor, or minimum requirement for people from designated groups. The obverse is that these targets set a ceiling, or maximum, on white males and foreigners without disabilities.

For one example, the "target" for "top management" in "agriculture, forestry, and fishing" for "designated groups" is 34%. If more than 34% of the employees at a company in this sector and at this level are from the "designated groups", that is unproblematic according to these sectoral targets. But if their share is below 34%, the company must take steps to increase their share up to at least 34% over time.

On the obverse, if the balance of top managers at the company are white males without disabilities (66% or less), the company is on "target".

Relation between Regulation 9(10) and Sectoral Targets

The two sets of regulations generate a question: if a company is on "target" under the sectoral targets, but is under target in terms of Regulation 9(10), what is the practical impact?

To answer this question, it is necessary to unpack the relation between the minor sectoral targets and the primary target set by Regulation 9(10).

The EEA Regulations provide a set of targets for each all eight race-gender pairs that "must" be followed even if the sectoral targets have already been met. In other words, even if a company is above the floor, or minimum, on "designated groups", that does not mean its race-target obligations have been satisfied under the EEA. Rather, the EEA requires that the company "must avoid perpetuating" the "over-representation" of "any group", even when the sectoral targets are met.

The earlier example, where an agricultural company has 66% white male top managers, is used to illustrate the point. In that case the sectoral targets for agriculture have been met, however, there is an "over-representation" of white males that "must" be avoided under Regulation 9(10) of the EEA, because 66% is more than the 4.1% of the economically active population shown in the table above.

At any point, if white males are above 4.1%, regulation 9(10) of the EEA requires that this "must" be addressed to "avoid perpetuating the over-representation."

This is not new to the EEA. Government employers have for at least 15 years already employed two sets of overlapping targets, where one set is called "ideal", mapping onto national demographics through the EAP, while another is called "realistic", bridging the current level of racial ratios and the "ideal". Once the "realistic" target is met, the "ideal" target still needs to be met, legally.
This also follows from the way that the "purpose" sections of the EEA have been written. Section 15A(2) gives Minister Meth the power "to set numerical targets" specifically "for the purpose of ensuring the equitable representation" of people's race-gender pairs "at all occupational levels in the workforce". This echoes section 2 of the EEA, which states (with added emphasis):

> *"The purpose of this Act is to achieve equity in the workplace by...(b) implementing affirmative action measures...in order to ensure equitable representation in all occupational levels in the workforce."*

The same meaning is conveyed in section 15 of the EEA, under which both regulations are issued (with added emphasis):

> *(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 levels in the workforce of a designated employer.*

Unfortunately, "equitable representation" has been taken to mean the matching of racial ratios at an occupational level with national demographics in terms of the EAP. Minister Meth's regulations set two sets of superimposed targets to realise that purpose.

In summary, even once the "sectoral targets" are met for "designated groups" as a whole, the race-gender targets of Regulation 9(10) still "must" be met.

Barnard Principle affects all race-gender pairs

What are the stakes that employees might face as employers pursue these "targets" under the EEA? The short answer is that people from all eight race-gender pairs can be blocked from getting jobs pursuant to these "targets".

In the past public employers have applied the "Barnard Principle" under the EEA. The Constitutional Court has defined the Barnard Principle in its ruling that an "employee **may be denied appointment** if he or she belongs to a category of persons that is already **adequately represented** at relevant occupational level" [emphasis added].

The Barnard Principle has been applied against people of all race-gender pairs, and in favour of people in all race-gender pairs, as approved by the Constitutional Court. To give one example, quoted by the Constitutional Court, consider the following from an employment equity plan of the Department of Correctional Services:

> "At level 3 only Whites and Indians should be appointed…At level 13 African Males stand at 63…which indicates no African male should be appointed."[6]

Level 3 is the third lowest level on the pay scale. White people are given explicit advantage in applying for such positions by this employment equity plan. Furthermore, at level 13, the third highest level on the pay scale, black males are prohibited from appointment. These are just two examples.

To be clear, the Constitutional Court considered whether the Barnard Principle also "**applies to African, Coloured and Indian** candidates as well as to men, women and people with disabilities". Its answer (except for people with disabilities) was an unambiguous yes [italics in original, emphasis added]:

> "**Black candidates**, whether they are African people, Coloured people or Indian people **are also subject to the *Barnard* principle**"[7].

Justice Raymond Zondo, who wrote the majority opinion, stated the same holds for women.

The upshot is that the legal purpose of the employment equity targets is not to redistribute opportunities from white people to black people. Rather, their legal purpose is to redistribute opportunities from "over-represented" people to "under-represented" people.

This can, has, and will continue to mean that some people from every race-gender pair face increased obstacles while others face increased opportunities as a result of the targets. In anticipation of the new EEA regulatory system a large company, Dischem, introduced and "stuck to" racial moratoria against hiring white males[8].

The private sector never had state-set targets of the kind in question until September 2025, so this matter remains untested in court, but in the public sector such targets have already caused the Barnard Principle to be applied to impose racial moratoria on hiring against all race-gender pairs over many years.

Punishments

What happens if a company perpetuates "over-representation" of any race-gender pair? For example, what if 40% of top managers at a company are black females in 2025, and 2026, and the next top manager appointed is also a black female, because that is the best candidate on a merit analysis? What if the company refuses to apply the Barnard Principle, which in this case means refusing to apply a racial moratorium against hiring black females?

The company faces potentially bankrupting fines.

Regulation 9(7) of the EEA Regulations (2025) states that a "designated employer must

Enforcers: labour inspectors

Administering the "targets" process over so many employees will be onerous. Currently, there are 2,000 labour inspectors who can be deployed for this task. In anticipation that this might not be enough, Minister Meth decided to add "an additional 20,000 Inspector and Enforcement Interns", with the hiring process for the first 10,000 already having taken place, and the next 10,000 to be added in 2026. "We are going to be reinforcing" compliance, she said, "by appointing more than 20,000 interns to be able to access and be able to be available to all those places that we need to get to.[9]"

The monthly stipend for each of these employees is R7,450, which implies an annual expenditure of R1.788 billion for 20,000 employees. That is on top of the cost of the current 2,000 inspectors and the related costs of the B-BBEE Commission. It is also in addition to the costs to the state (and so the taxpayer) of ensuing disputes at the Commission for Conciliation, Mediation and Arbitration (CCMA), the Labour Court, and from there courts of appeal, ultimately including the Constitutional Court.

The total cost of legal race inspection, among other functions associated with the race "targets", is therefore likely to exceed R2 billion annually at the very least.

The powers of "labour inspectors" are extraordinary, and anyone in the public service can be deputised to exercise these powers. Labour inspectors can conduct warrantless race inspections at workplaces without announcing themselves in advance or at the time of inspection. They can also interrogate staff under oath, and copy documents and records, as will be discussed below.

Labour inspectors can enter any workplace unannounced and without a warrant

A final point to emphasise is that Minister Meth's 22,000 "inspectors" have extraordinary powers. Section 65 of the Basic Conditions of Employment Act defines the powers of a deputised labour inspector:

> In order to monitor and enforce compliance with an employment law, a labour inspector may, without warrant or notice, at any reasonable time, enter—
>
> (a) any workplace or any other place where an employer carries on business or keeps employment records, that is not a home;

That is an incredible power. It is all the more impressive that 22,000 such inspectors can show up almost anywhere, at almost any time, to test people's race at work.

How the state enlists private companies in race inspection

A crucial point to note is that the odious task of race inspection has primarily been outsourced to the private sector. Minister Meth stated, in answer to a parliamentary question by DA MP Michael Bagraim, that "the verification process must take place at the workplace level and that is the legal responsibility of the designated employer."[10]

This is grounded in section 19(2) of the EEA, which states that an "analysis" must be done which includes "a profile, as prescribed" of the "employer's workforce". Furthermore, section 24(1) of the EEA states that "(1) Every designated employer must— (a) assign one or more senior managers to take responsibility for monitoring and implementing an employment equity plan".

In other words, employers must designate or appoint their own race inspectors to execute their "legal responsibility" to "monitor" and conduct "analysis" to check whether their employees' self-classification is correct or not.

Minister Meth's 22,000 government "race inspectors" bear the further responsibility of checking up to see whether the race inspectors of private companies have done their job according to the law, as interpreted by the administration.

This is the compulsory outsourcing of race inspection at a scale not seen elsewhere in the 21st century. It does recall, however, the "Jim Crow" policies of outsourcing race classification in the US in the 1890s, as will be discussed below.

Misclassification and disputes

Given the stakes, and the scale, one might expect disputes about race classification. However, there are other reasons to expect an increase in misclassification, or race classification disputes.

No "Other" as a race option

The EEA Regulations 2025 provide a form that "all" employees "must" fill out. Under race the options are "African", "Coloured", "Indian", "White". There are no other options.

DECLARATION BY EMPLOYEE
(Confidential)

PLEASE READ THIS FIRST

PURPOSE OF THIS FORM

This form is used to obtain information from employees for the purpose of assisting employers in conducting an analysis on the workforce profile. Designated employers should use this form to ascertain which employees are from designated groups in terms of the Employment Equity Act, 55 of 1998, as amended.

WHO COMPLETES THIS FORM?
All employees must fill in this form.

INSTRUCTIONS

All designated employers must ensure that the contents of this form remain confidential, and that it is only used to comply with the Employment Equity Act, 55 of 1998, as amended.

PLEASE NOTE:

'Designated groups', mean black people, women and people with disabilities who-
a) Are citizens of the Republic of South Africa by birth or descent; or
b) Became citizens of the Republic of South Africa by naturalization –
(i) before 27 April 1994; or
(ii) after 26 April 1994 and would have been entitled to acquire citizenship by naturalization prior to that date but who were precluded by Apartheid policies.

"People with disabilities" includes people who have a long -term or recurring physical, mental intellectual or sensory impairment, which in interaction with various barriers, may substantially limit their prospects of entry into, or advancement, in employment, and 'persons with disabilities' has a corresponding meaning.

1. Name of employee: ----------

2. Employee workplace No: ----------
(This is the number that an employer /company /organization uses to identify an employee in the workplace).

3. Please indicate to which categories you belong with an '**X**' below:

Male	Female

African	Coloured	Indian	White

People with a disability	YES	
	NO	

Do you require reasonable accommodation: Yes/No

If yes, please specify:

---

4. Please select the applicable option below by referring to the definition of designated groups as defined in Section 1 of the Act:

Foreign Nationals	YES	
	NO	

I declare that the above information is true and correct.

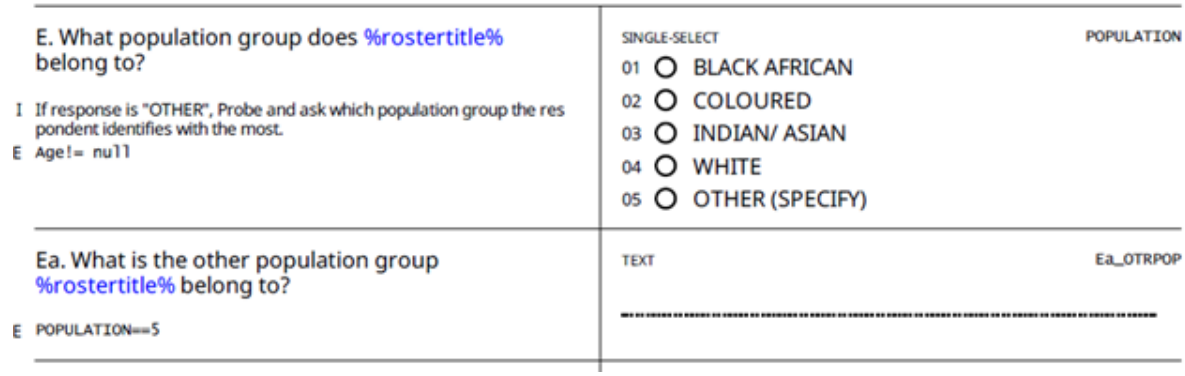
Signed: ----------
Employee

Date: ----------

Source: EEA Regulations, 15 April 2025, Regulation No. R. 6125, Government Gazette No. 52515.

This resembles Section 5(1) of the Population Registration Act of 1950, which stated: "Every person whose name is included in the register shall be classified by the Secretary as a white person, a coloured person or a Bantu"[11]. There was no "other" option there either.

For a contrast, here is an example of a questionnaire from Stats SA.



E. What population group does %rostertitle% belong to?

I If response is "OTHER", Probe and ask which population group the respondent identifies with the most.

E Age!= null

SINGLE-SELECT POPULATION

01 ○ BLACK AFRICAN
02 ○ COLOURED
03 ○ INDIAN/ ASIAN
04 ○ WHITE
05 ○ OTHER (SPECIFY)

Ea. What is the other population group %rostertitle% belong to?

E POPULATION==5

TEXT Ea_OTRPOP

(2020 Travel Survey, Stats SA)

In the 2022 Census, which was incomplete, 247,353 people self-classified racially as “other”, and 39,188 as “unspecified”, for a total of 286,541 respondents that placed themselves outside the Department of Labour’s four narrow boxes.

So, what will happen when 290,000 people, or whatever portion are employed, face Minister Meth’s new race “targets” form? Furthermore, what will happen when more people answer by classifying themselves to be one race even though their employers – or Minister Meth’s race “inspectors” – disagree?

In answer to a parliamentary question posed by the DA’s Michael Bagraim, Minister Meth stated the following (with added emphasis):

> “Where an employee refuses to complete the EEA1 form or provides inaccurate information, the designated employer may establish the designation of an employee by using reliable historical and existing data to conduct the analysis.”

However, the minister did not spell out what is meant by “reliable historical and existing data” for the purposes of compelled racial classification at all levels of the workforce.

This report will now lay out some reliable, historical, and existing data, which show that the task faced by employers to second-guess the race of employees is an impossible one.

Historical cases of misclassification and data

There are two basic ways in which racial classification disputes have emerged. One shows that looks can be deceiving, meaning that even when everyone agrees in principle about how racial categories ought to be determined, a dispute can still arise because some private information has been hidden from view.

The other kind of controversy shows that even when all the private information is already in view there can still be misclassification due to disagreement about how racial categories ought to be determined in the first place. These kinds of race classification disputes will be taken in turn.

Classification disputes during apartheid

Often classification disputes are not nearly so amusing as the disagreements of the philosopher Kwame Anthony Appiah with taxis drivers about the right answer to the question "what are you?", as recounted further below.

Consider Sandra Laing, born in then Piet Retief (now Mkhondo) in 1955, who was classified as white until age 10, in 1965. At the all-white government school she attended people began to mock her, calling her a k****r:

> "Ten-year-old Sandra Laing slipped unnoticed into the school cloakroom. She made sure she was alone, then picked up a can of white scouring powder and hastily sprinkled her face, arms and hands. Remembering the teasing she had just endured in the schoolyard during recess, she began scrubbing vigorously, trying to wash off the natural brown colour of her skin." [12]

Her racial classification was challenged on the basis of appearance. The challenge was successful, and she was reclassified as "coloured". She was therefore expelled from school, and two policemen escorted her home.

Everyone agreed that her legal parents, National Party supporters Abraham and Sannie, were both white, as were her brothers Adriaan and Leon. Likewise, Sandra was by appearance generally accepted to be coloured. The law, specifically the Population Registration Act, placed a presumption in favour of "appearance".

However, the Population Registration Act was amended in 1967, to state that two biological parents of the same race necessarily produce a child of the same race.[13] As a result, Sandra could be proven to be white through a medical paternity test. This was done, and Sandra was medically reclassified as white.[14]

Before this amendment David Wong was classified as white, despite having two Chinese parents, on the basis of his appearance as white, and sworn affidavits from neighbours that he was accepted as white. After the 1967 amendment social classification still mattered, but it could not overrule biological evidence of parentage.

These are far from an isolated case of reclassification. Race law officials had reclassified people in 18,469 cases by 1956. Of these, 1,182 people had been reclassified as white , 9,642 as coloured , and 7,645 as black.[15] Reclassifications continued until the repeal of the Population Registration Act due to disputes of alleged misclassification.

Sometimes reclassification was voluntary, and reflected a person's decision to move into a different community. Here is a passage from the book *Classification and Its Consequences* by Geoffrey C Bowker and Susan L Star to illustrate the point (internal references omitted):

> In one infamous example, a jazz musician, Vic Wilkinson of Cape Town was born to a Coloured man and a White woman, and originally classified White...he was reclassified as Coloured, and then twice more reclassified as he married women of different races and moved to different neighborhoods. (Note that the remarriages took place outside of South Africa for legal reasons.) Finally, both he and his Asian wife Farina were reclassified Coloured, allowing them and their children to live together. At the age of fifty, Vic actually received a new birth certificate -- and crossed the race lines for the fifth time.

Source: Vic Wilkinson and his Family. Source: Johannesburg Sunday Times, 11/4/84: 21.

Recent misclassification disputes

This possibility of error was notoriously demonstrated in the post-apartheid era on national news when journalist Lindsay Dentlinger was the undeserving subject of controversy in 2021 in relation to her work as a parliamentary reporter for eNCA. Dentlinger was falsely accused of racism for asking some MPs to wear masks during filmed interviews. In the course of the scandal she was widely misclassified as white, based on appearance. This was addressed by disclosing her parentage and racial classification during apartheid under the Population Registration Act, which had been repealed in 1991.

The lead singer of "Mi Casa" has also been misclassified based on appearance, although he identifies as white, born in Portugal. This was harmless.

However, the case of Happy Sindane was not. In 2003 the 16-year-old Happy, also known as Abbey, entered a police station. He claimed that he was white and had been kidnapped when he was 4 years old by a black domestic worker. Appearances were not considered to be reliable. As one newspaper put it: "Skin the colour of toffee and with light brown hair, it was not clear if he was white, black or of mixed race".[16] DNA tests, however, disproved the story, impacting both the legal status of guardianship, and his racial classification.

Of course, race misclassification is not always tragic. Sometimes it is amusing. Kwame Anthony Appiah, arguably the world's leading expert on race and The Ethicist columnist for the New York Times, opens his book on the nature of race with a short account of being misclassified himself in a number of cases that are taken lightly:

> *Over the years and around the world, taxi drivers, putting their expertise to the test, have sized me up. In São Paulo, I've been taken for a Brazilian and addressed in Portuguese; in Cape Town, I've been taken for a "Colo[u]red" person; in Rome, for an Ethiopian; and one London cabbie refused to believe I didn't speak Hindi. The Parisian who thought I was from Belgium perhaps took me for a Maghrebi; and, wearing a caftan, I've faded into a crowd in Tangiers.*[17]

Because of how Appiah looks, people assume to know the answer to what he calls the blunt question, "what are you?", in racial terms. But then people get it wrong in at least seven ways. Two of the racial categories mentioned in this passage – coloured and Indian – are officially distinct races according to Minister Meth's "targets".

So, if Appiah's employer had been News24, rather than the New York Times, and if his employer assumed to know his race just by looking, or a race "inspector" assumed to know it in that way, they may well have gotten it wrong.

On race, appearances can be deceiving

One lesson is that appearances can be deceiving because race has multiple components, as noted by Appiah[18]:

- Personal, subjective self-classification. “What I think I am”.
- Social, community classification. “What the neighbours / colleagues think I am.”
- Political, apartheid-era state classification. “What the government thinks I am.”
- Biological, “parentage” rule, eg. under 1967 Population Registration Amendment Act.

So far, in the cases discussed there have been misclassifications and reclassifications where the source of the dispute was information asymmetry. However, it is not always the case that race classification disputes emerge from a disagreement about facts. Sometimes, they emerge from a disagreement about theory regarding what a race even is.

What is “race”?

Does everyone agree what facts, both private and public, determine what someone’s race is? Evidently not. There are many permutations by which the four factors noted above – personal, social, political, and biological – can be arranged in any number of theories about what makes a race a race. Even when the facts of an individual case are agreed there are still racial disputes regarding the weight that each fact should be granted in what ultimately does, or does not, determine one’s race.

Mixed Race Disputes

Consider Trevor Noah’s recollection of going to a new school post-1994, at the age of 10. He spoke Zulu and Xhosa to black children, where he was challenged about his race.

> *“How come you speak our languages?” they asked.*
> *“Because I’m black,” I said, “like you.”*
> *“You’re not black.”*
> *“Yes, I am.”*
> “No, you’re not. Have you not seen yourself?”

Here two conflicting definitions of “black” played out. Noah classified himself as “black” then, and would go on to do so for the rest of his life, based on social factors. This was embraced in the US. However, the other children at Noah’s school, and many since, considered him to not to be black, based on biologically grounded phenotypical factors. There was no private information to resolve the dispute. On one definition Noah’s white father disqualified him from being “black”, while on the other definition his father’s race did not determine his own. Rather, his language, mannerisms, preferences, and social life determined, on the second theory, that he was black.

Nor were these factors new. Section 2(a) of the Population Registration Act stated that a person's "habits, education and speech and deportment and demeanour in general shall be taken into account" in racial determination.

But these factors are obviously in tension with the biological factors on parentage noted above.

The question of whether a person with one white parent and one black parent can or should be classified as "black", or "coloured", or "white", or something else like "mixed race", is far from settled in 21st century South Africa.

Political race dispute

This is not the only kind of controversy. For another, recall that in 2007 then-Western Cape Premier Ebrahim Rasool argued that the rugby player Luke Watson was legally "black" for employment purposes, and should be selected on the South African rugby team to satisfy black race targets.[19] This was not just academic. Watson was selected as a black player to represent the country, possibly the only player to be explicitly included in the team based on his (legally) black status.

As recorded by the London Sunday Times: "The rulers of rugby, who are black, argued that because of his [white] family's unusual background Watson should be regarded as black."[20] Rasool explained why Watson was not legally "white" for employment purposes:

> "*Given where he comes from, and where his father deliberately chose to play his rugby, on the dusty, potholed fields of the Eastern Cape's townships, Luke comes from a historically disadvantaged community. Jake White shouldn't be looking at Watson as a white player.*"

Again, this was controversial, though there was no dispute about private information. Everyone knew who Watson's parents were, what his DNA lineage was, what the relevant legal race classifications were under apartheid law: white. Rather, there was a dispute about what factors are, or are not, supposed to be determinative of race in employment. Specifically, could disadvantage due to struggle against apartheid render someone legally black?

Personal reclassification disputes

There have been more recent controversies. For example, in 2018 the Minister of Mining, Gwede Mantashe, claimed that "coloureds are marginalising themselves by not classifying themselves as blacks."

This presupposes that self-classification is determinative, at least insofar as coloured people are able to classify themselves as black people. However, not everyone agrees with that notion.

Some find the idea that coloured people should be reclassified as black offensive, at least if the suggestion comes from a black person. Eusebius McKaizer made this claim in his article titled "Don't tell me who I am, black man" as follows: "It is not the place of Mantashe, or any person who is black African, to prescribe to coloured communities how they should self-identify."

McKaizer presupposed that one of the requirements for fair classification is that the classifier should belong to the same race as the classified. This idea mirrors the common notion that in security contexts it is preferable for people to be searched by others of the same gender, rather than across genders.

But when it comes to race not everyone agrees that only members of an in-group can contribute intelligent information about the determinants of that in-group. For example, Appiah, who is not coloured, makes observations that are relevant to understanding coloured identity in both descriptive and normative terms. This falls within the larger point, that McKaizer and Mantashe earnestly disagreed on how to think about reclassifying coloured people as black.

In another example, after Wayde van Niekerk won a gold medal representing South Africa at the Summer Olympic Games of 2016 the headline "Coloured is a state of mind" opened with the question: "What does it mean to be Coloured?"

The answer was: "No one can say what group you should or should not belong to. So, if you choose to be Coloured, then you are; and if you don't, then you're not! It's that simple."

On that view, Luke Watson and Gwede Mantashe could both "choose to be Coloured". But others have a different view. The contest goes on.

Academically recorded disputes

One notable, recent academic study is titled*: Self-identification in post-Apartheid South Africa: The case of Coloured people in Johannesburg, South Africa.*[21]

This recorded a number of ethnographies. Some people self-classified as coloured, but others would prefer not to do so. "While some subscribed to the Apartheid-created *Coloured* classification, other participants identified as *multiracial South African*, *South African*, *South African and Coloured*, *half-Black*, *mixed-race South African*, and *so-called Coloured*."

It is important to note that "the ways in which some of the present study's participants self-defined in non-racial terms such as 'South African' connect with" established arguments "for transcending race."

International dispute

There are also international disputes. For example, Grammy award winning musician Tyla Luara Seethal, known as Tyla, has said "I'm a Coloured South African". But in the US, she has received backlash from those who think this is a category error by those who deny the existence of "coloured" as a genuine race. Tyla has classified herself as "coloured" in South Africa, and "black" more broadly.[22]

Legal disputes

> In 2008 the High Court ordered:
> (1) THAT it is declared that South African Chinese people:
> (a) fall within the ambit of the definition of "black people" in section 1 of the Employment Equity Act 55 of 1998;
> (b) fall within the ambit of the definition of "black people" in section 1 of the Broad-Based Black Economic Empowerment Act 53 of 2003;

This was the result of a "battle" in political lobbying that lasted eight years. However, the actual court case was unopposed by the government. So, there is no reasoning to the judgment, just an order. This makes it impossible to know what exactly the *ratio decidendi* (rationale) is of the decision.

In another case, Glen Snyman applied to be a headmaster of a public school and received the job appointment. He indicated that he was black, but was alleged to be coloured. This led to an acrimonious dispute that was settled out of court. Again, that means that no light has been shone into the shadowy corners of doubt about how the legal definition of race is supposed to function. Snyman is now a leader of People Against Racial Classification (PARC) and has petitioned Parliament to rethink its classification scheme.

Employers' doubly impossible task

The inescapable difficulty with racial classification under the EEA is that on the one hand the stakes could be very high for employees, or employment candidates, especially considering the Barnard Principle and the possibility of facing racial moratoria on hiring. On the other hand, since the repeal of the Population Registration Act in 1991 the legal basis of racial classification in South Africa has not been clearly established. There are live disputes on the meaning of race. Employers face the impossible task of acting as if they know what qualifies as "reliable historical and existing data to conduct the analysis" of their employees' race without knowing how to weigh up the personal, social, political, and biological factors. As one example, during apartheid a person could legally reclassify by changing their "habits, education, speech, deportment, demeanour" and social life; but is this currently possible under the legal theory of race underlying Minister Meth's "targets"?

No one knows.

This is a failure of the Rule of Law, which is inter alia the principle that legal rules should be legible, predictable, and understandable. Without those features the "law" is arbitrary, and its meaning turns on nothing more than the say-so of whoever occupies the relevant position of power.

But this is only the first legal impossibility. The second is that if an employer conducts an analysis that is capable of determining the race of an employee that is inconsistent with the employee's own classification (including non-classification), then that means the employer has committed itself to a theory of race in which the social, political, and biological factors of race can trump self-classification. But to do this requires an unconscionable intrusion into the employee's privacy, and a trampling of their conscience, as will be shown below.

Conscientious objection to race classification

Conscientious objection is grounded in the rainbow republic's Constitution, case law, and culture. These will be discussed in turn.

Under section 15(1) of the Constitution:

> Everyone has the right to freedom of conscience, religion, thought, belief and opinion.

Conscience refers to normative attitudes, a sense of right and wrong.

As pertains to racialism it is fair to say that just as some people have racialised consciences, others have non-racial consciences. For the latter, one's conscience dictates that first-person indexicals – I, me, myself, etc. – refer to an essentially non-racial unit, neither black, coloured, white, Indian, mixed race, or any other racial category. In some circumstances this kind of person would conscientiously object to being racially classified.

All groups negatively impacted, implication for conscientious objection

Some groups are legally disadvantaged by the state on purpose. Criminal convicts are one primary example. Members of that group might wish to conscientiously object to their status, or designation, in that group, and so to avoid the related disadvantage. However, there is no right of "conscientious objection" to being classified as a criminal, or similar innately negative group.

That raises the question: does BEE create any race groups that are analogous to criminals in that they are treated negatively by the law? If the answer were yes then this would weaken, or exterminate, any claim to conscientious objection. It is true that many uninformed commentators believe that BEE is anti-white. Others claim that it is anti-minority. If that were so, this would weaken the claim to conscientious objection.

On the other hand, if BEE was really anti-white or anti-minority, then white or minority South Africans would have a Constitutional objection in terms of the equality clause of the Bill of Rights, section 9(3).

However, because BEE directly discriminates against all eight race-gender pairs, it cannot be accurately said to be anti-white only, or anti-minority only. Likewise, it cannot be accurately said that BEE designates any group exclusively as worthy of lesser treatment in an analogue to criminal convicts.

All groups positively impacted, implication for conscientious objection

Any person from any race-gender pair can benefit from BEE under the EEA's "equitable representation" rule, which now governs over 7.5 million workers under Regulation 9(10). That is evident from the meaning of the words in the EEA and Regulation 9(10), as well as previous and current applications of "equitable representation" that have blocked black males, and black females from getting jobs, as well as individuals from all eight race-gender pairs, due to their being "over-represented".

This has the direct implication that non-racialists may conscientiously object to racially classifying, because they wish to avoid the reasonable expectation of advantage that will likely come at some point in their career where they will compete with someone for a job who is better suited for the appointment, but who will be blocked off due to that competitor belonging to an "over-represented" race-gender pair in that role.

Put another way, anyone can now benefit from BEE directly. However, people who wish not to benefit from BEE may conscientiously object to racial classification of themselves, because they want to avoid winning a job due to BEE.

Using myself as an example: I would rather go unemployed than get a job because other people identify me as a white male. To avoid this outcome, I refuse to be racially classified now, or at any future time that the EEA "equitable representation" rule applies.

Absolute and strenuous choice: Constitutional precedent

In *Christian Education v Minister of Education* (2000) the Constitutional Court faced a case where Parliament's passage of the Schools Act of 1996, which, in Section 10(1) forbids corporal punishment at school, was tested. Specifically, parents claimed the right to conscientiously object, on religious grounds, to being prohibited from being able to delegate corporal punishment authority to teachers. As such, the parents sought an exemption from the requirements of the Schools Act.

The Constitutional Court noted that the right is clear, and important:

> There can be no doubt that the right to freedom of religion, belief and opinion in the open and democratic society contemplated by the Constitution is important. The right to believe or not to believe, and to act or not to act according to his or her beliefs or non-beliefs, is one of the key ingredients of any person's dignity...the inviolability of the individual conscience[23].

However, the court appears to have established a number of tests that applicants must pass to assert that right.

First, it was clear that for the applicants in that case:

> what is at stake is not merely a question of convenience or comfort, but an intensely held sense about what constitutes the good and proper life and their place in creation[24].

Second, applicants need to show that they face a strenuous choice between adhering to conscience and obeying the law. The applicants failed this test:

> The parents are not being obliged to make an absolute and strenuous choice between obeying a law of the land or following their conscience. They can do both simultaneously[25].

In effect the court found that the section 15 right was not assertable to get an exemption from the prohibition on corporal punishment at school because the parents could stick to their religion or conscience (at home) and the law could be obeyed (at school).

However, this issue was revisited nearly twenty years later, when the Constitutional Court took it upon itself to face the question of whether *de facto* corporal punishment at home, by parents, was prohibited by the Constitution. As a point of background, parents accused of physical abuse could try to use the defence of showing that they performed "reasonable and moderate chastisement". In the case that the Constitutional Court took up the parent who severely beat his child and wife failed to show that defence, since his conduct was clearly unreasonable and immoderate[26]. Principles of constitutional avoidance did not, however, prevent the court from deciding the principle of whether the inapplicable defence is constitutional or not.

Here, the court found that even though parents face "an absolute and strenuous choice between obeying the law of the land or following their conscience", passing this test, and the mere convenience test, is insufficient to trump the rights of children.

> The invalidation of the defence of moderate and reasonable chastisement in Gauteng thus means that the chastisement aspect of their religiously or culturally ordained way of raising, guiding and disciplining their children is no longer available to them.

Still, the court invalidated that defence and removed that freedom of conscience for parents to moderately and reasonably chastise their own children.

That is because the court found that the parent's conscience right under section 15(1) conflicted directly with the child's right to be free from violence under 12(1)(c) of the Constitution, "(1) Everyone has the right. . . (c) to be free from all forms of violence from either public or private sources."

With two rights clashing, the court engaged the third (generally applicable) test, of a constitutional section 36(1) analysis on the reasonable and just limitation of rights.

Saliently, a child's best interest trumps an adult's. Section 28(2) of the Constitution states: "A child's best interests are of paramount importance in every matter concerning the child."

The only remaining question was whether it is in the "best interest of the child" to be moderately and reasonably chastised[27]. The court found strong evidence against this, and "a paucity of clear or satisfactory empirical evidence that supports chastisement as a beneficial means of instilling discipline"[28]. The court also found less restrictive alternatives to violently disciplining children were reasonably available[29]. As such, the child's right prevailed[30].

Summary: the apex court found that even though the criminal law unambiguously held that moderate violence against a child by a parent would be a crime, there was a reasonable prospect that parents could assert that the common law chastisement defence would be constitutionally compliant due to section 15(1) of the Constitution. This shows yet again how powerful the freedom of conscience is. However, parents failed to pass all the relevant tests to assert freedom of conscience to hit their children as protected conduct.

The tests to assert freedom to conscience include:

- not mere convenience, but rather sincerely held belief about what one is in creation and how to live, even when it hurts;
- an absolute and strenuous choice between obeying the law and holding to one's conscience; and then (once those two tests are passed)
- the freedom of conscience right must be balanced against any conflicting right under a section 36(1) analysis that attends inter alia to evidence, and less restrictive means of achieving the same end.

Constitutional tests applied to conscientious objection to race classification at work.

First test, convenience

As noted above, anyone can benefit from the BEE system as it has become. Therefore, refusing to racially self-classify and asserting the right not to be classified is not merely convenient, it might even be highly inconvenient as it might result in forgoing a chance to get a job for being a white male, or any other race-gender pair.

The first test also includes a sincerely held and serious viewpoint basis, which will be established below.

Second test, absolute choice

The second test is whether there is an absolute and strenuous choice to obey the law, or one's conscience. The answer is clear. If one's conscience dictates never to opt into a racial system from which one can personally benefit, then one is stuck with this impossible choice under the EEA1 form's format.

Third test, limiting rights under 36(1)

The third test is a section 36(1) analysis. Here it is worth noting that there is no clear loss to anyone else if an individual refuses to racially self-classify, or to be classified by others racially at work. *A fortiori* there is no "paramount" or trumping right of others.

Furthermore, even if hundreds of thousands of people refuse racial classification, others will still benefit from the BEE system under Regulation 9(10).

The less restrictive alternative to forced racial classification is to just let the non-classified be in their own pool, while the majority swim in racially divided streams at work.

To see how this would work, suppose an employer interprets the EEA2 forms as requiring reporting and target setting only for those employees that opt into the race-gender ratio system. For the rest, those who refuse to self-classify, an employer considers them inapplicable to the EEA record and target setting system.

The effect would be that if a person refuses to classify, then they will always be less attractive than a person from an "under-represented group", and more attractive than a person from an "over-represented group" to the employer in terms of meeting its duties under the EEP, *ceteris paribus*.

Crucially, people from under-EAP groups would still have an advantage. So, imagine there are two equally suitable black females applying to be a top manager at a firm where black females are under EAP at that level. However, one of those people refuses to self-classify. The other will have an advantage in the selection process and get the job. Refusing to self-classify does not block the system from working to the latter person's benefit.

So, if the state, or an employer, insists on forcefully imposing a racial classification on the former black woman, then it cannot do so on the pretext that this is necessary to give the latter an advantage. Rather, it must be on some other basis. But there is no other basis. Hence, refusing to racially self-classify, or to be classified against one's will by others, prevails under a section 36(1) analysis since respecting this right to conscientious objection is a less restrictive to keep helping those who want more rapid advancement due to their race-gender pairs.

Bases for conscientious objection

Here follows a brief survey of grounds for conscientious objection under the first constitutional test.

Non-racial moral tradition

To classical liberals the refusal to "represent" a race at work is based on an historic, moral tradition of non-racialism that goes far beyond the workplace. Leo Marquard expressed this norm regarding the IRR's domain in 1957 as follows:

> A place where people can meet – not as guardian and ward, not as master and servant, *not as Black and White*, but quite simply *as free men and women who love freedom and will never surrender it*.

Any person who is strongly committed to such a tradition, to sustaining and growing such spaces to *meet as free people,* is conscientiously bound to refuse racial classification at work.

Work is where people meet most often, and non-racial liberals have a profound commitment to making those spaces free from racial classification.

This tradition is also notable for its practical effect. The IRR was the world's leading anti-apartheid think tank, playing an exemplary role in contributing to the defeat of apartheid, and birthing the rainbow republic, which grew the spaces within which it has become possible to meet as free people. That task is incomplete, and those who refuse to represent any race at work carry the fire of that task forward through this generation and to the next.

Trade union solidarity

Those who are deeply committed to a form of solidarity at work that transcends racial divides might consider racial classification that splinters, or obscures, their primary loyalties within the workforce to be insufferable. Consider any trade union's workers intend to bind together primarily "as workers" in a racially indivisible manner. Their conscience will prohibit them from racial self-classification.

Company-first pride

Consider those who have a deep-rooted commitment to their company at work first and foremost, under the sincere belief that racial representation at work would splinter that company ethos. It is especially crucial to note South Africa's history, including the evil and counter-productive system of apartheid, which has made racial cleavages particularly difficult to manage at work. Those who believe that the best way to band together as a team at work and therefore to refuse to classify themselves as representing any races therefore have much to draw on. This is only augmented by more recent experiences of public expressions of racism that are divisive and threaten workforce collaboration.

Patriots

A further reason one might object to racial classification at work is patriotism, when the workplace is especially connected to representing South Africa. This conscientious commitment is exemplified by sports champions who say "we don't play as black, or white, but as Springboks / Proteas / South African champions."

This conscientious commitment is also expressed by fans in high numbers who endorse slogans like:

Hulle Weet Nie Wat Ons Weet Nie[31]*!*
No DNA, Just RSA!
Our Blood is Green!

Such patriotism would also be expressed by soldiers, and police, who refuse to serve in the armed forces of South Africa as representatives of races, derogating from the significance of their uniform, rank, and ultimate commitment to the rainbow republic; and insist, rather, on serving without racial self-classification as a matter of conscience.

One might even imagine Members of Parliament, the judiciary, and the diplomatic corps conscientiously objecting to identifying themselves racially in the name of patriotism.

Non-material foundations

Importantly, the interests highlighted above in refusing to be an ambassador, envoy, deputy, emissary, legate, soldier for, or representative of one's race, can all be parsed from narrow, material self-interest. Given the depths of passion, and the heights of intellectual and generations of practical commitment bestowed on these non-material principles, it is also clearly possible for these interests to be primary, whereas any material self-interest is only ancillary, in the decision to refuse racial classification for at least some people.

Good faith refusals v loopholes

It is pivotal to note that not all refusals to self-classify are done in good faith. It is conceivable, and even expected, that some would try to use the rights of privacy, and the concomitant right to conscientiously object to disclosing one's own race, as a mere loophole to avoid material harm, or to pursue narrow material gain. Likewise, not all race "inspectors" in Minister Meth's department can be relied upon to act in good faith, nor the race "monitors" in big businesses. Bad faith actors of all kinds are looked at next.

Where conscientious objection does not apply

It is important to draw the distinction between a conscientious objector, who bears a weighty constitutional right, and various less reputable types of people.

Racial nihilists

"Nihilists" are people who do not believe in something. "Racial nihilists" are people who do not believe that races exist. This disreputable belief is often argued for by claiming that races are social constructs, and therefore do not exist.

The absurdity of this argument is noticed the moment one realises that "money" including the "South African Rand" is a social construct, as are schools, universities, languages, companies, and countries, including South Africa. Social constructs of many kinds patently exist. There is no tradition, whether religious, moral, or ethical, grounded on race *nihilism*.

While non-racialists want to annihilate race as an operative social construct, consigning it to the museum as an historic point of interest next to social constructs like *Thor* and *phlogiston*, non-racialists can obviously still recognise other people's racial categories where there is no dispute about their willing self-classification. For example, MP Mmusi Maimane has repeatedly said "I am proud to be black", while former Springbok AJ Venter encourages white pride. Race nihilists have to pretend to not know what that means. They deny that Maimane is black, and that AJ Venter is white in the first place.

By contrast, a non-racialist has no commitment to that ridiculous denial of plain fact about someone else. Rather, a non-racialist differs from anyone who takes pride or shame in their race, since a non-racialist refuses esteem service to themselves based on race, while recognising that others might yearn for racially indexed praise or shame.

Racial opportunists

These are people who classify themselves one way or another, or refuse to classify, not as a matter of conscience, but rather out of opportunism. Both foreign, and domestic jurisprudence is well developed on the distinction between genuine conscientious objectors, and dissemblers.

It is trite that conscientious objectors, whether in military, medical, or professional contexts, have objections that are based on moral, ethical, or religious grounds that are sincerely held. Notably, conscientious objectors do not object based on fear of personal material harm, or in the expectation that such objection will bring material gain. Such expected harm, or gain, must be ancillary, if it is relevant at all. That means in this context that if someone sincerely says, "I object to classifying myself racially, because I think this will make it harder for me to get a job" that reason would not qualify them as a conscientious objector by any legal definition.

By contrast, consider someone who sincerely says, “I object to classifying myself racially even if that were to help me get promoted. I don’t want to be promoted because of my race, nor do I want to be demoted because of my race, nor kept in place due to my race. I don’t want my race to have any impact on my job opportunities at all, since this violates my conscience, and that is why I refuse to classify.”

That would be a classical basis for a conscientious objection.

Trevor Noah, who gained fame in New York City by presenting an opinion show on current affairs, made demonstrably false statements in his break-out memoir *Born a Crime*, so his words should be taken with caution, but there is no reason to doubt his account of pretending to be coloured.

“In South Africa, everyone knows that colored gangsters are the most ruthless, the most savage” Noah wrote, before explaining, once again, that in his opinion he is not coloured, but black. He says that police and security officers abused him “because I looked coloured” even though “I was black”.

He then recounts going to a club with black friends who were ushered in by the bouncer, while he was stopped and searched for a knife because he was misclassified as coloured, and because the bouncer “profiled” him as therefore being likely to carry a knife.

Noah used this to his advantage when he was jailed for stealing a car, when for the first time he identified as “coloured” “I played it up. I put on this character; I played the stereotype. Anytime the cops asked me questions I started speaking in broken Afrikaans with a thick colored accent.”

Religious racialists

Some religious sects insist on different races being divine constructs. The model of apartheid, for example, was provided by a few self-described Christian churches that turned racialism into a religious doctrine, which was given state sponsorship to support apartheid once the time came. Likewise, a few forms of self-described Judaism are explicitly committed to the claim that a single race is divinely separated from, and spiritually superior to, the rest. To avoid any potential confusion, it is worth stating the obvious, namely that Christianity and Judaism are readily understandable as essentially non-racial religions based on holistic readings of their sacred texts, as is true of Islam, Buddhism, Hinduism, and other major religions.

The exceptions are notable in light of the fact that any individual’s religious conviction in the distinct divinity of different races conflicts with a conscientious objection to racial classification on religious grounds. Crucially, conscientious objection is adjudicated, in South African law, on a case-by-case basis. So even if an objector belongs to a religion that has some form that is sometimes related to religious racism, they have the right to be judged distinctly, on the merits of their own case.

However, the courts have gone further to make clear that while "culture" may be inherently "associative", religion as protected by the constitution, is especially "personal". As Justice O'Regan noted in a minority opinion: "Religion however need not be associative at all. A religious belief can be entirely personal. The importance of a personal religious belief is more often than not based on a particular relationship with a deity or deities that may have little bearing on community or associative practices. Where one is dealing with personal and individualised belief, religion is to be considered differently to culture, as the Constitution makes clear. In such circumstances, it is appropriate for a court to ask whether the belief is sincerely held in order to decide whether a litigant has established that it falls within the scope of section 15."

Racialised trade unions

At present some trade unions are racialised, meaning that workers identify primarily "as white" or "as black" or "as coloured" or "as Indian". Members of such a trade union also could not consistently claim to be conscientious objectors to racial classification at work.

The right to privacy

Under section 14 of the Constitution of the Republic of South Africa:

> Everyone has the right to privacy, which includes the right not to have –...

What follows is an open-ended list of privacy interests. It is commonly accepted in open democracies that the right to privacy includes protections against the compelled disclosure of some forms of private information at work.

The Protection of Personal Information Act (POPIA) gives statutory effect to this right. It states, in section 26(1), that "A responsible party may, subject to section 27, not process personal information concerning—the religious or philosophical beliefs, race or ethnic origin, trade union membership, political persuasion, health or sex life or biometric information of a data subject".

That would place one's race off-limits, unless the proviso in section 27 of POPIA applies. That section states:

> The prohibition on processing personal information, as referred to in section 26, does not apply if the—
> a. processing is carried out with the consent of a data subject referred to in section 26;
> a. processing is necessary for the establishment, exercise or defence of a right or obligation in law;...
> c. ...
> d. ...
> e. Information has deliberately been made public by the data subject; or
> f. provisions of sections 28 to 33 are, as the case may be, complied with.

Under 26(a) a person can voluntarily self-classify, waiving their privacy right. Under 26(e) deliberately issued public data can have the effect of waiving the right. For example, Mmusi Maimane, a member of Parliament and the leader of Build One South Africa, repeatedly states publicly that he is "proud to be black". Likewise, former Springbok AJ Venter has asked others to join him to "be proud to be white". Such persons waive their privacy rights with regards to race by seeking racial esteem services in public based on their race, ie. racially bragging.

The next questions are whether 26(b) means that the requirements of the EEA overwhelm the privacy right. To understand this, one must also look at 26(f) which refers to the further provisos in sections 28 to 33.

Section 28 of POPIA regards privacy based on "religious or philosophical beliefs". This will be discussed in the next section on conscientious objection.

Section 29 of POPIA focusses on "race and ethnicity" specifically, stating that:

> The prohibition on processing personal information concerning a data subject's race or ethnic origin, as referred to in section 26, does not apply if the processing is carried out to—
> a. identify data subjects and only when this is essential for that purpose; and
> b. comply with laws and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination.

29(a) is inapplicable, since employees are already identifiable by name, etc.
29(b) raises the same question raised under 26(b), namely whether the affirmative action purpose of the EEA overwhelms the privacy interest.

Why EEA does not defeat privacy in racial classification

There are several reasons that the EEA does not defeat the privacy interest, as follows.

The EEA is Fake Transformation

The EEA is designed to neglect and impede persons, or categories of persons, disadvantaged by unfair discrimination. This is borne out by evidence of its design: nominally it aims at "equitable representation", meaning specific race-gender ratios, which is distinct from the nominal aim of protecting or advancing disadvantaged people; evidently, it results in disadvantaged people being blocked from job appointments when their race-gender pairs are already "over-represented"; demonstrably, it results in second-order effects that add to unemployment, which is disproportionately harmful to people stuck in the shadow of apartheid's legacy.

Furthermore, when Minister Meth was asked, in a parliamentary question posed by MP Michael Bagraim, whether she could provide any evidence that the EEA helps protect or advance disadvantaged persons she said, in effect, no.[32]

That means while there is a lot of evidence against the proposition that the EEA targets and helps poor black people, there is literally no evidence for it.

Therefore, the EEA is not a law or other measure "designed to protect or advance... categories of persons, disadvantaged by unfair discrimination".

Legally, that means the EEA does not trigger the proviso in section 29(b) of POPIA, which only allows processing racial information in order to "comply with laws" that are "designed" to protect and advance disadvantaged people.

In short, the EEA does not puncture the privacy guarantee of POPIA through the proviso of 29(b) that allows for racial data processing for laws designed to achieve real transformation.

Refusing race classification serves non-racialism

Even if one assumed, *arguendo*, that the EEA really protects and advances poor black people, this would still fail to puncture the privacy interest. That is because it is not necessary to classify someone by race within the EEA scheme, if those who refuse classification are exempted from racial preferences, and if employers exclude them from the denominators of racial ratio calculations under Regulation 9(10), and under the Designated Targets Regulations too.

Therefore, asserting the privacy interest could have both a cost- and benefit-impact from the point of view of the person asserting privacy. While that is not a necessary feature of privacy claims, it goes some way to showing the distinct value of privacy does not collapse into mere materialistic opportunism (which will be discussed further below).

What is also noteworthy under this consideration is that the privacy interest does not directly conflict with the EEA. Persons from under-represented groups who choose to disclose their race will always remain more highly preferred, *ceteris paribus*, than non-racially private competitors.

But what is most important to note is that someone who keeps their race private at work is serving the interest of non-racialism, which protects and advances persons disadvantaged by discrimination, by toning down the importance of race at the workplace. This fact will be substantiated on six axes, but the key legal point is that insofar as non-racialism is consistent with affirmative action, maintaining a non-racial posture through privacy about racial facts *is an affirmative action to genuinely transform South Africa.*

The privacy interest is greater

But even if one assumed both the previous arguments were wrong, the privacy interest would still clearly be greater than the employer, or state's interest, in piercing the inner sanctum of personal information. This is obvious by analogy.

Consider an amendment to the EEA that facilitates affirmative action for homosexual and other non-heterosexual people on the basis of sexuality. That group certainly qualifies as disadvantaged due to past discrimination, if the relevant groups under the EEA qualify.

In that case the analogous question is: could an employer compel an employee to disclose their sexuality at work as part of a sexuality "analysis" to be followed up by sexuality "inspectors" in order to pursue "sexuality targets" that achieve ratios of heterosexuality to other forms of sexuality across the workplace?

Recall that under this assumption the ultimate goal, pursuing such "targets", is assumed to be legitimate, just like the race "targets" are assumed to be legitimate when the first two arguments listed above are dismissed. The question is whether piercing an employee's privacy would be justified in such a case?

The answer is an obvious no. There is no open democracy in which it is conceivable that employees could be compelled to reveal private information about their sexuality pursuant to affirmative action "targets".

Likewise, an individual's privacy interest in race is greater than the public interest in pursuing "targets". That is partly because the public interest can be pursued even if some private individuals opt out. It is also partly because the private interest is so weighty.

The right to bodily integrity

Under section 12(2) of the Constitution:

> Everyone has the right to bodily and psychological integrity, which includes the right—...(b) to security in and control over their body.

This right is implicated whenever an employer requires that an employee undergoes some form of medical examination, including blood tests and DNA tests. As shown above, such tests have been used to resolve racial classification disputes in the past. Furthermore, any theory of racial classification that is parasitic on apartheid-era classification depends on DNA doubly. People born after the repeal of classification law in 1991 can only be classified in connection to that law through some biological rule of parentage, which is DNA-dependent; and the original apartheid rule was DNA-dependent too.

The right to bodily integrity has been interpreted by the courts to relate to section 7 of the EEA, which covers "medical testing". This section states that:

> Medical testing of an employee is prohibited, unless—
> (a) legislation permits or requires the testing; or
> (b) it is justifiable in the light of medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of a job.

That means there is a defeatable presumption against testing. Under the EEA race "targets" the question an employer therefore faces is whether cases reminiscent of Sandra Laing make it "justifiable" to test employees medically as one factor in a racial "analysis" in "the light of...employment conditions, social policy" or "fair distribution" for the purpose of "affirmative action" as defined by the EEA, the B-BBEE Act, and others.

There are four reasons to say no.

First, the interest in bodily integrity is paramount.

Second, a person's refusal to undergo testing on the basis of credible social constructivist theories that deny the probative value of medical examination is unassailable *given the facts of the day on the mythological nature of races.*[33]

Third, even if the EEA were an effective form of affirmative action, the fact that most high-income earners are now black indicates that the compelling interest in affirmative action is attenuated to the point that personal bodily integrity of an individual is not violable for the sake of a negligible benefit to affirmative action.

Fourth, the EEA is not affirmative action, it is fake transformation.

Summary

The new racial "targets" regime under the Employment Equity Act exposes employees and employers alike to a series of irreconcilable contradictions. On the one hand, companies face severe penalties if they do not classify and adjust their workforce according to racial ratios. On the other hand, the law offers no clear or consistent definition of race, forcing employers to rely on appearance, parentage, social convention, or political decree – all of which have historically produced error, injustice, and controversy – according to an unknown balance, in mysterious ways, that can only amount to arbitrariness.

Employees are not unprotected in this process. The Constitution guarantees their rights to privacy, bodily integrity, and conscience. These rights make it unlawful to compel individuals to disclose their race against their will, to subject them to medical or genetic testing, or to force them to represent themselves – or their colleagues – in racial terms at work. To the contrary, refusing forced racialisation can itself be a conscientious, patriotic act, grounded in South Africa's non-racial moral tradition and consistent with the constitutional order.

Endnotes

1. This was communicated to Solidarity by Gabriel Crouse on October 8, though doubtless many people have made the observation. Solidarity subsequently ran 36 billboards across Joburg during the G20 stating: “Welcome to the most race-regulated country in the world”.
2. December 1, 2025, NEASA Newsletter: https://www.neasa.co.za/newsletters/employment-equity-department-cannot-answer-questions-on-race-classificatione0e8d8b8ae1
3. Employment Equity Regulations, 2025; R. No. 6125; Gazette No. 52515.
4. The lower-bound is derived from the 2024-25 Commission for Employment Equity Report, which stated that 7,699,665 employees were reported by designated employers. However, this does not include companies that did not report. The upper-bound Crouse GD, Mdluli M, derived from an independent business study in 2016, as discussed here: https://dailyfriend.co.za/2023/05/21/the-great-eea-exemption-myth/.
5. Determination of Sectoral Numerical Targets, 15 April 2025, R. No. 6124, Gazette No. 52514
6. Davids et al v Dept of Correctional Services, Case CCT 78/15, Judgment of the Constitutional Court, paragraph 105.
7. Ibid. paragraph 40.
8. https://www.news24.com/business/companies/dis-chem-sticks-to-moratorium-on-hiring-of-whites-20221014
9. https://www.dailymaverick.co.za/opinionista/2024-09-30-will-sas-20000-new-race-inspectors-have-to-reinvent-the-pencil-test/
10.
11. Indians were legally considered to be a subcategory of “coloured”. Today Han Chinese are legally considered to be a subcategory of “Indian”.
12. https://www.theguardian.com/theguardian/2003/mar/17/features11.g2
13. https://en.wikisource.org/wiki/Population_Registration_Act,_1950/1967-05-19
14. https://www.theguardian.com/theguardian/2003/mar/17/features11.g2
15. Sorting Things Out: Classification and Its Consequences Geoffrey C. Bowker and Susan Leigh Star
16. https://www.theguardian.com/world/2003/jul/16/southafrica.rorycarroll
17. Lies that Bind...
18. Lies that Bind..
19. https://iol.co.za/capeargus/sport/2007-05-15-luke-watson-is-black-rasool/
20. https://www.thetimes.com/travel/destinations/africa-travel/south-africa/cape-town/the-white-springbok-who-can-play-only-if-he-is-called-black-vjwmfk7bstm
21. https://www.sciencedirect.com/science/article/pii/S2590291124000639
22. https://www.theguardian.com/world/article/2024/aug/10/tyla-racial-identity-south-africans-coloured
23. https://www.theguardian.com/world/article/2024/aug/10/tyla-racial-identity-south-africans-coloured
24. Paragraph 36, Christian Education South Africa v Minister of Education (CCT4/00) [2000] ZACC 11; 2000 (4) SA 757 (CC); 2000 (10) BCLR 1051 (CC) (18 August 2000).
25. Ibid. paragraph 37.
26. Ibid. paragraph 51.
27. Ibid. paragraph 5.
28. Ibid. paragraph 61.
29. Ibid. paragraph 64.

30. Ibid. paragraph 68 – 71.
31. Ibid. paragraph 73.
32. This phrase first came up when Dricus du Plessis was accused of racism for calling himself an African. It then went mainstream when English rugby players accused Springbok Bongi Mbonambi of racism for saying “wit kant”. The phrase indicated that “hulle”, meaning foreigners, do not know what we know, namely that we are not generally racist.
33. https://pmg.org.za/committee-question/30244/
34. Appiah, As If, The Lies that Bind.

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