IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT BRAAMFONTEIN)

Case no.:_____

In the matter between:

SOLIDARITY	**Applicant**
And	
SOUTH AFRICAN RUGBY UNION	**First Respondent**
CRICKET SOUTH AFRICA	**Second Respondent**
ATHLETICS SOUTH AFRICA	**Third Respondent**
NETBALL SOUTH AFRICA	**Fourth Respondent**
MINISTER OF SPORTS AND RECREATION	**Fifth Respondent**
SOUTH AFRICAN SPORTS CONFEDERATION AND OLYMPIC COMMITTEE	**Sixth Respondent**

FOUNDING AFFIDAVIT

I, the undersigned,

ANTONIE JASPER VAN DER BIJL

do hereby make oath and say –

PRELIMINARY MATTERS

DEPONENT AND AUTHORITY

1. **My identity and authority**

1.1. I am the Head of the Labour Court Department of Solidarity, which is the applicant in this matter;

1.2. I am duly authorised to represent Solidarity in these proceedings and to depose to this affidavit, as appears from annexure **FA1** hereto.

2. **Knowledge of facts**

2.1. Save where specifically stated or where the context indicates otherwise –

2.1.1. I have personal knowledge of the facts herein stated;

or

2.1.2. I have ascertained and determined them from the records of Solidarity that are under my personal control.

2.2. I confirm that the facts referred to are true and correct.

3. Where I make legal submissions, I do so on the advice of Solidarity's legal representatives.

4. Throughout this affidavit, Solidarity will make reference to the constitution, rules or regulations of a particular sporting body. Given the volume of the various documents, the documents will not be annexed to this affidavit but will be made available to the Court should it so require.

PARTIES

5. **The applicant**

5.1. The applicant is Solidarity ('Solidarity' or 'the applicant'), a trade union registered in terms of the Labour Relations Act 66 of 1995 ('the LRA'). Solidarity has its head office at the corner of Eendracht and D F Malan Avenue, Kloofsig, Centurion, 0046.

5.2. Solidarity brings this application in its own interest. It also brings the application in the interests of its members who, being employees of the first to fourth respondents who in their capacities as the recognised national sporting associations are responsible for the administration and organization of professional and amateur athletes and the coordinators and administrators of all provincial, club and school bodies in that sport, have suffered prejudice and/or might actually or potentially suffer prejudice in the consequence of the selection policies currently being pursued by the respondents.

5.3. Solidarity's primary function is to protect its members in the work environment. Solidarity achieves this through its Labour Services Department which protects individual and collective members in various industries throughout South Africa.

5.4. As an organisation within the broader Solidarity movement, it pursues the protection and promotion of constitutional rights. The application is thus also brought in pursuit of the broader public interest.

6. **The first respondent**

6.1. The first respondent is South African Rugby Union ('SARU' or 'the first respondent'), an association of persons with perpetual succession and juristic personality and has its headquarters at SARU House, Tygerberg Park, 163 Uys Krige Drive, Plattekloof, Cape Town.

6.2. SARU is a member of World Rugby, the international governing body for the sport of rugby and by virtue of its membership, SARU agrees to abide by the laws of the game as well as World Rugby's by-laws, rules and regulations and to accept and enforce all World Rugby decisions in respect of the playing and administration of rugby throughout the Republic.

6.3. SARU is bound by the provisions of its constitution which purports to regulates its affairs and establish its objectives as the national governing body of the sport of rugby within the Republic of South Africa.

6.4. Article 4 of its constitution defines SARU's main object as the promotion, development and support of all levels of rugby in the Republic. Under article 5, it is stipulated that it is an ancillary object of SARU to:

6.4.1. act as the controlling and co-ordinating body of its members (article 5.5);

6.4.2. adopt measures governing the activities of its members and the administration of the game in South Africa, including measures which will promote and develop rugby (article 5.6).

6.5. SARU is cited herein as the national governing body responsible for the organisation and administration of rugby at all levels of the game as well as the body responsible for the control and co-ordination of its members operating at the various playing levels.

6.6. Article 10.1 provides that SARU's membership shall be limited to the fourteen (14) members which members are presently defined in its constitution at article 1.2.16 as certain provincial unions.

6.7. Article 10.7 states that members and associate members of SARU shall be bound by its constitution, rules, regulations, decisions and the agreements entered into by it for the general benefit of the game in the Republic.

7. **The second respondent**

7.1. The second respondent is Cricket South Africa, a non-profit company incorporated as such under the company laws of the Republic of South Africa with registration number 2002/002641/08 and with registered address at Wanderers Club, North Street, Illovo, Gauteng.

7.2. Cricket South Africa ('CSA' or 'the second respondent') is an affiliate of the South African Sports Confederation and Olympic Committee and a full member of the

International Cricket Council ('ICC'), the international governing body for the sport of cricket.

7.3. CSA is the recognised national governing body for the sport of cricket in South Africa and administers all aspects of South African cricket, men and women, both in the professional and amateur spheres. CSA is governed and regulated by its memorandum of incorporation ('MOI') which permits it to adopt and amend such regulations and policies as necessary.

7.4. CSA is cited herein as the national governing body for the sport of cricket as well as the coordinating body of its members which are defined in its MOI as consisting of affiliate members, associate members, ancillary members and life members.

8. **The third respondent**

8.1. The third respondent is Athletics South Africa ('ASA' or 'the third respondent'), a non-profit company incorporated as such under the company laws of the Republic of South Africa under registration number 2006/034767/08 and with its registered address at Unit 3, Boskruin Park, corner of Kelly and Bosbok Streets, Randpark Ridge.

8.2. ASA is the sole organisation administering and controlling athletics in South Africa within the boundaries of South Africa and is the sole South African member federation affiliated to the International Association of Athletics Federation, and as such, controls athletics in the Republic of South Africa.

8.3. ASA is cited herein as the national governing body of athletics and the coordinator and administrator of its members operating at various levels of the sport. Membership of ASA consists of provincial members, associate members, individual members and honorary members.

8.4. Every athlete licensed under any of the ASA member provinces or any of ASA's provincial or associate members shall be bound by all the rules, regulations and provisions of ASA's constitution.

9. **The fourth respondent**

9.1. The fourth respondent is Netball South Africa ('NSA' or 'the fourth respondent'), a non-profit company incorporated as such under the company laws of the Republic of South Africa with its principal place of business situated 846 Park Street, Pretoria.

9.2. The applicant has been unable to source the NSA's constitution, rules or regulations and is therefore unable to ascertain the structure of the NSA with reference to its members and their ensuing obligations.

9.3. However, it is known to the applicant that the NSA is a full member of the International Netball Federation and is accordingly bound by its memorandum and articles of association and various rules and policies.

10. The first to fourth respondents are collectively referred to herein as 'the federations'.

11. **The fifth respondent**

11.1. The fifth respondent is the Minister of Sport and Recreation ('the Minister' or 'the fifth respondent'), who, for the purposes of this application, is represented by the offices of the State Attorney located at 8th floor, Old Mutual Centre, 167 Andries Street, Pretoria 001 and can be served with papers at this address.

11.2. The Minister is cited herein in his official capacity as the executive head of the Department of Sports and Recreation, which is a department of State established and regulated by the National Sports and Recreation Act, No. 110 of 1998 ('the NSRA'), as amended, situated at 66 Regent Place, corner of Queen and Madiba Streets, Pretoria.

11.3. The Minister is empowered by the National Sport and Recreation Act ('the NSRA') to determine general policy to be pursued with regard to sport and recreation which shall be binding on all sport or recreation bodies. The Minister is specifically required by the statute to issue guidelines or policies to promote equity, representivity and redress in sport and recreation.

12. **The sixth respondent**

12.1. The sixth respondent is the South African Sports Confederation and Olympic Committee ('SASCOC'), a non-profit company incorporated as such under the company laws of the Republic of South Africa with registration number

2004/033949/08 and with registered address at Olympic House, James and Ethel Grey Park, Atholl Oaklands Road, Melrose.

12.2. No substantive relief is sought against SASCOC in these proceedings which is cited on the basis of any interest it may have in the outcome of these proceedings.

THIS APPLICATION

13. On 25 April 2016, the Minister (then in the person of Mr Mbalula) announced that the Ministry of Sport and Recreation had resolved to revoke the privileges of SARU, CSA, ASA and the NSA to host or bid for major and mega international tournaments in South Africa as a consequence of the aforementioned bodies failing to meet certain pre-set transformation targets.

14. Solidarity submits that the transformation targets, whether agreed to out of the respondents' own volition or imposed upon them by the Minister, form the subject matter of discriminatory policies pursued by the respondents in the interests of employment equity and are partly unlawful in concept.

15. Solidarity now seeks to challenge these policies and approaches this Court for relief. In doing so, it relies upon –

15.1. section 157(2) of the LRA, which confers jurisdiction on this Court where alleged or threatened violations of fundamental rights occur in employment and labour relations spheres; and/or

15.2. section 158(1)(a)(iv), which empowers this Court to grant declaratory orders; and/or

15.3. section 49 of the EEA, which confers exclusive jurisdiction upon this Court to determine any dispute about the interpretation or application of that statute.

THE LABOUR RELATIONSHIP

EMPLOYMENT UNDER SARU

16. SARU is the employer of all rugby players selected to play for the national team. In terms of a substantive collective agreement concluded between the South African Rugby Players' Association ('SARPA') and the provincial unions, represented by the South African Rugby Employers Organisation ('SAREO'), all provincial rugby players are employed by the unions in terms of a standard players' contract, the standard terms and conditions of which are negotiated periodically by SARPA and the unions. Copies of the collective agreement between SARPA and SAREO as well as the standard players' contract for 2016 will be made available to the Court should it so require.

17. Similarly, SARU and its members are responsible for the employment of staff in its administrative structure, team selection and management sectors and affiliated or associated support structures.

18. SARU and/or its members, being the provincial unions, are therefore:

18.1. an employer as defined by the LRA that employs, *inter alia*, the affected employees; and

18.2. a designated employer with the meaning of the definition of this phrase in section 1 of the Employment Equity Act 55 of 1998 ('the EEA').

EMPLOYMENT UNDER CSA

19. Professional cricket players are contracted as employees of their respective unions or clubs which are affiliated to the CSA. At a national level, these players are also viewed as employees of the CSA.

19.1. Players who are not selected for international cricket, but who play regular provincial cricket are contracted by the affiliates to the CSA.

20. On an unknown date, a memorandum of understanding was concluded between the South African Cricketers' Association ('SACA'), CSA and the domestic franchises of CSA by which provision was made for a standard national player contract, a standard national match/tour contract and a standard franchise player contract.

21. Additionally, CSA and its members employ persons in its administrative, selection and management and affiliated or associated support structures.

22. CSA and/or its affiliate members are therefore:

22.1. an employer as defined by the LRA that employs, *inter alia*, the affected employees;

22.2. a designated employer with the meaning of the definition of this phrase in section 1 of the EEA.

EMPLOYMENT UNDER ASA

23. The ASA and/or its members are responsible for the employment of people within its administrative, selection and management and affiliated and/or associated support structures. By virtue of this role as employer, the ASA and/or its members are –

23.1. an employer as defined by the LRA that employs, *inter alia*, the affected employees;

23.2. a designated employer with the meaning of the definition of this phrase in section 1 of the EEA.

24. Solidarity understands that ASA employs certain athletes under contract, although Solidarity does not have in its possession such contracts.

EMPLOYMENT UNDER THE NSA

25. The NSA contracts each netball player selected for the national team on a fixed term contract. In addition to this, the NSA and/or its members are responsible for the employment of people within its administrative, selection and management and affiliated and/or associated support structures.

26. The NSA and/or its members are therefore –

26.1. an employer as defined by the LRA that employs, *inter alia*, the affected employees;

26.2. a designated employer with the meaning of the definition of this phrase in section 1 of the EEA.

RELEVANT LEGAL REGIME

THE CONSTITUTION

27. The Constitution of South Africa, Act 108 of 1996 ('the Constitution') is the supreme law of the Republic of South Africa. Section 1 of the Constitution states that the supremacy of the Constitution and the rule of law form part of the founding values. Other founding values include human dignity, the achievement of equality and the advancement of human rights and freedoms; and non-racialism and non-sexism.

28. Section 2 states that any law or conduct inconsistent with the Constitution is invalid.

29. Section 9 of the Constitution enshrines the equality right.

29.1. Section 9(1) provides that everyone is equal before the law, and has the right to equal protection and benefit of the law.

29.2. Section 9(2) explains that equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, this provision foresees legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination.

29.3. Section 9(3) prohibits the State from unfairly discriminating 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.

29.4. Section 9(4) makes the same standard applicable to persons other than the State.

29.5. In accordance with section 9(5), discrimination based on one or more of the grounds listed in section 9(3) is unfair unless it is established that the discrimination is fair.

30. Section 10 of the Constitution provides that everyone has inherent dignity and the right to have their dignity respected and protected.

31. Section 22 provides that every citizen has the right to choose their trade, occupation or profession freely, although the practice of a trade, occupation or profession may be regulated by law.

32. Section 36 provides for the limitation of the rights enshrined in the Bill of Rights, but only in terms of a law of general application and to the extent that the limitation is justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account certain relevant factors, namely: the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose.

33. Section 39(1) provides that, when interpreting the Bill of Rights, a court must promote the values that underlie and open and democratic society based on human dignity, equality and freedom. The court must also consider international law and may consider foreign law. In terms of section 39(2), when interpreting legislation, a court must promote the spirit, purport and objects of the Bill of Rights.

34. The International Convention on the Elimination of All Forms of Racial Discrimination ('ICERD'), which South Africa ratified in 1998, has purchase under the Constitution. Article 2 of ICERD requires signatories to condemn all forms of racial discrimination and

to eliminate racial discrimination by 'appropriate means'. Article 1(4) of ICERD, in turn, states that

> 'Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups' or individuals' equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.'

35. Article 2(2) of ICERD provides:

> 'State Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.'

THE EEA

36. The preamble of the EEA recognises that, as a result of apartheid and other discriminatory laws and practices, there are disparities in employment, occupation and income within the national labour market and that such disparities create such pronounced disadvantages for certain categories of people that they cannot be redressed simply by repealing discriminatory laws. It continues to state that the EEA is concerned with:

36.1. promoting the constitutional right to equality and the exercise of true democracy;

36.2. eliminating unfair discrimination;

36.3. ensuring the implementation of employment equity to redress the effects of discrimination;

36.4. achieving a diverse workforce 'broadly representative' of the South African people;

36.5. promoting economic development and efficiency in the workforce; and

36.6. giving effect to the obligation of the Republic of South Africa as a member of the International Labour Organisation.

37. The purpose of the EEA, as set out in section 2, is 'to achieve equity in the workplace' by:

37.1. 'promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination' (section 2(*a*)); and

37.2. 'implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups in order to ensure their equitable representation in all occupational categories and levels in the workforce' (section 2(*b*)).

38. In accordance with section 3, the EEA must be interpreted in compliance with the Constitution so as to give effect to its purpose, taking into account any relevant Code of Good Practice issued in terms of the statute and other employment law, and in compliance with the international law obligations of the Republic, in particular those contained in the International Labour Organisation Convention (No 111) concerning Discrimination in respect of Employment and Occupation.

39. Under section 5, every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice.

40. Section 6(1) provides that no person may unfairly discriminate, directly or indirectly against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.

41. Section 6(2) states that it is not unfair discrimination to –

41.1. take affirmative action measures consistent with the purpose of the EEA (section 6(2)(a)); or

41.2. distinguish, exclude or prefer any person on the basis of an inherent requirement of a job (section 6(2)(b)).

42. Section 13 of the EEA provides that every designated employer must, in order to achieve employment equity, implement affirmative action measures for people from designated groups in terms of the EEA.

THE NSRA

43. The purpose of the NSRA is to, *inter alia*, provide for measures aimed at correcting imbalances in sport recreation.

44. Section 2(5) instructs all national federations to develop its sports or recreational activity at club level in accordance with -

44.1. the service level agreement referred to in section 3A;

44.2. the development programmes referred to in section 10(3); and

44.3. the guidelines issued by the Minister in terms of section 13A.

45. Section 3A provides that the sports confederation and national federations must enter into a service level agreement with Sport and Recreation South Africa in respect of any function assigned to them by the NSRA.

46. Section 4(1) provides that the Minister may, after consultation with or after consideration of proposals made by the sports confederation in so far as high performance sport is concerned, from time to time, determine the general policy to be pursued with regard to sport and recreation.

47. Under section 4(2), the Minister may determine policy in relation to the –

47.1. confirming the roles and responsibilities amongst the various role-players in sport and recreation to ensure that all efforts are co-ordinated in an efficient manner (s 4(2)(a));

47.2. instituting necessary affirmative action controls which will ensure that national teams reflect all parties involved in the process (s 4(2)(h)).

48. In terms of section 13(b)(ii), the Minister is prohibited from interfering in matters relating to the selection of teams, administration of sport and appointment or, or termination of the service of, the executive members of the sport or recreation body.

49. Section 13A provides that the Minister must issue guidelines or policies to promote equity, representivity and redress in sport and recreation.

PAJA

50. The Promotion of Administrative Justice Act 3 of 2000 ('PAJA'), enacted to give content to the administrative right contained in the Constitution, includes in its definition of 'administrative action' any decision taken by an organ of state when exercising a power in terms of the Constitution or any legislation when it adversely affects the rights of any person and it has a direct, external legal effect.

51. In section 6, PAJA provides for the judicial review of administrative action, *inter alia*, if -

51.1. the action was materially influenced by an error of law (section 6(2)(d)(i));

51.2. the action was taken:

51.2.1. for a reason not authorized by the empowering provision (section 6(2)(e)(i));

51.2.2. for an ulterior purpose or motive (section 6(2)(e)(ii));

51.2.3. because irrelevant considerations were taken into account or relevant considerations were not considered (section 6(2)(e)(iii)); or

51.2.4. arbitrarily or capriciously (section 6(2)(e)(iv);

51.3. the action itself:

51.3.1. contravenes a law or is not authorized by the empowering provision (section 6(2)(f)(i));

51.3.2. is not rationally connected to the purpose for which it was taken or the purpose of the empowering provision (section 6(2)(f)(ii));

51.4. the exercise of the power or the performance of the function authorized by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function (section 6(2)(h)); or

51.5. the action is otherwise unconstitutional or unlawful (section 6(2)(i)).

SPORT IN AN INTERNATIONAL CONTEXT

52. In order to fully understand why the transformation targets are unlawful, it is necessary to place the creation and implementation of the targets against the context of the international principles to which the federations are bound as well as against the Constitutional norms.

53. It is a fundamental requirement to the autonomy of sport and its surviving independence that government involvement in the organization and the overseeing of sport be prohibited in its entirety.

54. The autonomy of sport has been codified by several international sport governing bodies in their relevant constitutions to the effect that the national governing body of a particular sport is responsible for all of the decision making of that particular sport and the organization thereof in that country to the exclusion of any other body. The national governing body is required to implement the rules of the sport adopted by the international governing body and continental governing body free from external interference. Accordingly, this is an arena which must be void of any political involvement.

55. **Rugby as governed by World Rugby**

55.1. Under its by-laws, World Rugby (formerly known as the International Rugby Board) is defined as the association of unions and/or associations in membership of World Rugby in accordance with the by-laws. A union refers to every national rugby union for the time being in membership of World Rugby.

55.2. Membership of World Rugby is open to national rugby unions based in a country where such unions are solely responsible for governing rugby's sporting, technical and general organisation and implementation of all rugby related matters and which meet the criteria established by World Rugby from time to time.

55.3. A further requirement of membership is that unions must ensure that elections to their governing body(ies) take place pursuant to a free and independent democratic process which conforms with applicable national legislation and the requirements of the constitution approved by the council pursuant to which associations are required to administer and govern their affairs, management and governance.

55.4. Subparagraph (e) of the by-laws allows for the suspension and expulsion of a union from World Rugby membership if state authorities interfere in its affairs in such a manner that:

55.4.1. it may no longer be considered as fully responsible for the organization of rugby related affairs in its territory;

55.4.2. in the opinion of the council or executive committee it is no longer in a position to perform its constitutional and regulatory tasks in an appropriate manner.

55.5. SARU is a member of World Rugby by virtue of its granting of membership in 1949. Such membership shall be effective as an agreement binding SARU (which agreement is similarly binding on its affiliated membership) to abide by the by-laws, regulations and laws of the game and to accept and enforce all the decisions of World Rugby, its council and its executive committee (as the case may be) in respect of the playing and/or administration of the game throughout the country within the jurisdiction of SARU. Any breach of this agreement which may be prejudicial to the interests of World Rugby or the game of rugby shall render SARU liable to disciplinary action in accordance with World Rugby's regulations.

55.6. Moreover, SARU is bound to World Rugby's code of conduct found in Appendix 1 to Regulation 20 which states that all unions, associations, rugby bodies, clubs and persons shall not do anything which is likely to intimidate, offend, insult, humiliate or discriminate against any other person on the ground of their religion, race, sex, sexual orientation, colour or national or ethnic origin.

56. **Cricket as governed by the International Cricket Council**

56.1. The International Cricket Council ('ICC') is defined in its memorandum of association and articles of association (approved in May 2016) as being established to administer, develop, co-ordinate, regulate and promote the game of cricket world-wide in co-operation with its members.

56.2. Article 2.9 of the ICC's articles of association provides for the independence of member boards to the extent that:

56.2.1. where a government interferes in the administration of cricket by a member, including but not limited to, interference in operational matters, the selection and management of teams, the appointment of coaches or support personnel or the activities of a member, the executive board of the ICC shall have the power to suspend or refuse to recognize that member.

56.3. As a member of the ICC and by virtue of its definition in article 9 read with article 1 of the ICC's articles of association, a member is bound to:

56.3.1. the ICC's memorandum of association;

56.3.2. any regulations made or amended from time to time by the executive board of the ICC or members at a conference or special meeting.

56.4. The United Cricket Board of South Africa (UCBSA) is listed as a full member of the ICC having signed the ICC's memorandum of association on 4 August 1997. At this juncture it is pertinent to note that the UCBSA came into being on June 1991

following completion of the unity process between the South African Cricket Union and the South African Cricket Board. It changed its name to CSA in 2005.

56.5. By virtue of its status as a full member of the ICC, CSA is the national body recognised by the ICC council as the governing body responsible for the administration, management and development of cricket in South Africa.

56.6. In 2006, the ICC and its members adopted the ICC Anti-Racism Code in which the ICC and all of its members should not at any time offend, insult, humiliate, intimidate, threaten, disparage, vilify or unlawfully discriminate between persons based on their race, religion, culture, colour, descent, and/or national or ethnic origin.

57. **Athletics as governed by the International Association of Athletics Federations**

57.1. Article 1 of the constitution of the International Association of Athletic Federations ('IAAF') identifies the IAAF as the world governing body for the sport of athletics.

57.2. Article 3 of the IAAF constitution establishes the objects of the IAAF as being:

57.2.1. to encourage participation in athletics at all levels throughout the world, regardless of age, race and gender;

57.2.2. to strive to ensure that no gender, race, religious, political or other kind of unfair discrimination exists, continues to exist, or is allowed to develop in athletics in any form, and that all may participate in athletics regardless of their gender, race, religious or political views or any other irrelevant factor;

57.2.3. to supervise and enforce the obligations of members;

57.2.4. to safeguard the authenticity and integrity of athletics and to take all possible measures to eliminate corrupt conduct which might place the authenticity or integrity of athletics at risk;

57.2.5. to foster and develop links with other international federations, national governments, inter-governmental organisations and international and national non-governmental organisations in order to promote the interests of sport in general, and athletics in particular, at all levels throughout the world.

57.3. Membership of the IAAF is stated as comprising of the national governing bodies for athletics which have been democratically elected in accordance with their constitutions and which agree to abide by the IAAF constitution and its rules and regulations.

57.3.1. A national governing body (including its executive body) which has not so been elected, even on an interim basis, shall not be recognised by the IAAF.

57.3.2. A member may be suspended from membership for a fixed period or until a specified set of circumstances changes or cease to exist if, in the opinion of the Congress, the conduct of the member or the government of the country or territory that the member represents, breaches or remains in breach of the objects of the IAAF.

57.4. ASA identifies itself in its constitution as the sole South African member federation affiliated to the IAAF and as such, subscribes to the constitution of the IAAF and its ancillary rules and regulations.

58. **Netball as governed by the International Netball Federation**

58.1. Article 2.1(b) of the articles of association of the International Netball Federation ('INF') identifies the INF as the sole ultimate governing body for the sport of netball throughout the world, governing and regulating the sport at international level, and recognizing the authority of regional federations and national associations to govern and regulate the sport at a regional/national level in accordance with, and subject to, the INF's ultimate authority over sport.

58.2. Article 2.1 establishes the fundamental purposes of the INF as being –

58.2.1. to promote, improve and develop netball globally, at all levels, in accordance with the ideals and objects of the Olympic and Commonwealth movements, and without any discrimination on the grounds of race, gender, religion, creed, political beliefs, disability, marital status, sexual orientation or trade union activity;

58.2.2. to protect the independence and autonomy of the INF and its regional federations and members to govern and regulate the sport (including exercising the right of democratic elections) free from any outside influence;

58.2.3. to preserve the integrity of the sport, including by adopting rules implementing the World Anti-Doping Code and other appropriate codes of conduct and

regulations, and ensuring that such rules, codes and regulations are enforced at all netball events sanctioned by the INF, a regional federation and/or a member.

58.3. Full membership of the INF is open to one member per country. The sole and exclusive authority of a full member to govern netball at national level will extend as far as the political boundaries of the country it represents (article 3.1.1). Article 3.2.1 requires a national association to satisfy the following requirements in order to be and to remain a full member –

58.3.1. it must be concerned solely and exclusively with the administration, organisation and playing of netball and not with any other sport;

58.3.2. it must claim the exclusive right to govern netball in its country, i.e. it must not recognize any other body's claim to govern netball in its country (other than by the exercise of powers delegated to that other body by the national association);

58.3.3. its constitution must declare its opposition to any discrimination on the grounds of race, gender, religion, creed, political beliefs, disability, marital status, sexual orientation or trade union activity, and its formal undertaking to be bound by and to comply with the obligations placed upon members pursuant to the memorandum of association, the articles of association and the regulations of the INF.

58.4. A member may be suspended or expelled from membership if –

58.4.1. a member no longer satisfies all of the criteria for membership set out in articles 3.2.1 or 3.2.2;

58.4.2. an outside body interferes improperly with the autonomy of the member, in respect of its operations and/or its composition or otherwise.

58.5. Once a member, each member must in terms of article 3.7.2 –

58.5.1. comply with the memorandum of association, articles of association and the regulations of the INF (article 3.7.2(e));

58.5.2. manage its affairs autonomously and without interference from bodies outside the Olympic movement (article 3.7.2(d));

58.5.3. adopt, implement and enforce within its country, statutes and/or regulations that are consistent with the INF's memorandum of association, the articles of association and the regulations (article 3.7.2(f)).

58.6. By virtue of the INF Equality and Diversity Policy, the INF requires all members and regional federations to adopt and/or demonstrate their commitment to the principles and practice of equality as set out in the Equality and Diversity Policy by implementing policies and practices which are consistent with the values contained therein.

58.6.1. By way of this policy, the INF recognizes the following as being unacceptable:

58.6.1.1. unlawful discrimination which can take the following forms:

58.6.1.1.1. direct discrimination;

58.6.1.1.2. indirect discrimination

58.6.1.1.3. harassment;

58.6.1.1.4. bullying;

58.6.1.1.5. victimisation.

58.7. As a member of the INF, NSA is bound to the provisions and obligations deriving from its memorandum and articles of association.

59. **Domestic Legislation**

59.1. The autonomy of sport from government intervention has been domesticated into South African law by way of the NSRA:

59.1.1. Section 13(5)(b) provides that the Minister may not interfere in matters relating to the selection of teams, administration of sport and appointment of, or termination of the service of, the executive members of the sport or recreation body.

THE TRANSFORMATION CHARTER AND ITS IMPLEMENTATION

THE TRANSFORMATION INDABA

60. On 21 and 22 November 2011, 693 delegates from the South African sport and recreation sector attended the National Sport and Recreation Indaba ('the indaba'). Following the indaba, a declaration was prepared and distributed in which it was recorded that –

60.1. through real transformation, South Africa could become a successful active and winning nation in the global arena;

60.2. the National Sport and Recreation Plan of the Department of Sport and Recreation ('SRSA') represents a 'bottom-up' plan for transforming the delivery of sport and recreation in South Africa and was developed 'through an intense and thorough consultation process with robust debates and constructive contributions from all role-players that comprise the sports sector in the country';

60.3. It further recognized that sustainable talent 'identification, nurturing and development programs' are required to contribute to 'holistically transform' the sport and recreation sector.

61. Several resolutions were passed, with both reference to sport in general as well as specifically to transformation. The resolutions passed in respect of the topic of transformation were recorded in annexure B to the declaration:

61.1. it was noted by the indaba that a legacy of apartheid sport has been inherited which legacy permeates across various stratas of society, including gender, race, class, disability and rural, peri-rural and urban divide.

61.2. it was further noted that a quota system was introduced as a 'tool and measure to redress the past historical imbalances'.

61.3. It was recorded that –

61.3.1. the intended objectives of the quota system still have a place in the South African sporting environment, although it being acknowledged that the quota system had contributed to the transformation of sport although not wholly successful.

61.4. It was accordingly resolved:

61.4.1. 'The quota system still has a role to play in the transformation of South African sport. This will be implemented using a developmental approach as contained in the revised Transformation Charter';

61.4.2. 'As time goes, the quota system needs to be reviewed within a purpose of creating an enabling environment for a winning nation that will support merit in the long run.'

61.5. It was finally resolved that the Transformation Charter is adopted as part of the National Sport and Recreation Plan as well as its scorecard as a monitoring and evaluation tool for transformation with SRSA and SASCOC as the responsible parties overseeing transformation.

62. The declaration is annexed hereto marked as annexure **FA2**.

THE TRANSFORMATION CHARTER

63. On 18 May 2012, the South African government at a cabinet meeting adopted the National Sport and Recreation Plan which comprises of the Sport Transformation Charter ('the Charter') and its accompanying scorecard. A copy of the Charter is annexed marked **FA3.**

63.1. Article 1.5 of the Charter provides that the adopted transformation strategy endeavours to be multi-dimensional and focuses on changing demographic profiles on and off the field of play, ensuring equitable access and resource availability, skill and capacity development on and off the field of play, extensive community involvement with a view to provide participation opportunities and to identify potential talent, and building and shaping relationships with its future support and spectator base, future leaders and decision-makers on the basis of broad-based community engagement. This approach will drive and shape sport's future demographic profile.

63.2. In Part 3 of the Charter, the six dimensions of the multi-dimensional strategy are identified:

63.2.1. access to infrastructure and participation opportunities dimension;

63.2.2. a human resource skill and capability development dimension;

63.2.3. a demographic profile dimension;

63.2.4. a performance dimension;

63.2.5. contribution to government priorities;

63.2.6. good governance.

63.3. These dimensions are composed into a scorecard which serves as a framework designing a set of indicators for activities selected as the key drivers for transformation. To implement, manage and monitor a transformation process in

sport, a multi-dimensional 'Transformation Performance Scorecard' is used and which is applicable at various levels of a sporting code's structure.

63.4. Pre-set and agreed performance goals (targets) for each of the six dimensions and their respective indicator sets will contribute to the achievement of the objectives set out in the Charter.

63.5. The demographic profile focuses on the shape of the demographic profiles of sport's structures in key areas on and off the field of play. The long term objective associated with this dimension is defined as demographically transforming all sport's component structures (on and off the field of play) in such a way that it ultimately reflects more equitable population demographic profiles at a local, provincial and national level.

63.6. The Charter states that in setting transformation targets it is important to recognize that certain geographic regions differ substantially from others in terms of population demographics which could result in different representation targets being set for different sports in different regions.

63.6.1. A copy of the demographic dimension scorecard is annexed hereto marked as annexure **FA4**.

63.6.2. The overall transformation scorecard is annexed hereto marked as annexure **FA5**.

64. In May 2012, the Ministry of Sport and Recreation appointed a Sport Transformation Commission called the Eminent Persons Group on Transformation in Sport ('EPG') to

advise the Minister on effective measures to progress transformation. The EPG through its Secretariat also administers the Scorecard as a tool to monitor and assess the program on an annual basis.

65. The function of the EPG is to annually review sport's transformation status on the basis of a mandate to:

65.1. analyse the transformation audit report and advise on appropriate targets;

65.2. monitor and evaluate the implementation of the Charter and its scorecards in sport organisations;

65.3. provide leadership and direction with regard to the quota system;

65.4. provide an annual report on transformation within the sporting fraternity and offer long-term strategic direction on transformation in sport;

65.5. advise the Minister on the design of short-, medium- and long-term transformation strategy (within the context of the 2020 vision of the SRSA);

65.6. advise on the design of a transparent and democratic tool for monitoring and designing a public reporting system for all federations and sporting and recreation bodies, with a view to measure the success or failure for the implementation of transformation targets.

65.7. monitor and advise the Minister on incentives and punitive measures that must be taken in terms of federations and sporting bodies that are not driving transformation to its logical conclusion.

THE EPG PILOT EVALUATION

66. On 25 March 2014, the EPG released its Pilot Evaluation: A Transformation Status Report ('the pilot report') as its first major output pursuant to its appointment. The pilot report purported to establish the baseline parameters of transformation in the five major sporting codes: rugby, cricket, football, athletics and netball. The pilot report is annexed hereto as annexure **FA6**.

67. The pilot report was shaped on the content of the Charter and sought to address the data pertaining to seven quantifiable strategic dimensions, despite the Charter only prescribing six such areas – the additional area being employment equity.

68. The pilot report incorporated a pilot study to establish a baseline study on the five major sporting codes in South Africa – netball, football, cricket, rugby and athletics.

69. This baseline study allowed the EPG to set and recommend targets over a medium term period to be met by the five major sporting federations for transformation in their codes.

70. The pilot report described its use of the (then) experimental scorecard system to measure overall transformation performance as well as performance in each of the component charter dimensions. The scorecard would then be evaluated and improved upon based on the outcome of the pilot for use in 2014.

71. The scorecard system used was said based on the percentage achievement of pre-set targets in each one of the transformation dimensions. The targets would later be reviewed for use in a more detailed evaluation of transformation status involving an increased number of sporting codes in 2014.

72. Performance was categorized into three coded categories:

72.1. Excellent – 100% target achievement;

72.2. Good – 70% to 99.9% target achievement;

72.3. Poor – less than 69.9% target achievement.

73. The first dimension (and which is the only dimension relevant for the purposes of this application) addressed in the pilot report was status of demographic profiles at national level, and on aggregate within provincial structures with respect to administrative structures, national and provincial representative teams and coaches, referees/umpires, and school and club related data.

74. Demographic profiles were evaluated in terms of the percentage achievement of the 50% target set for the percentage generic black (defined as black African, coloured and Indian) and black African representation profile of the structure under review.

THE AGREEMENTS

75. Pursuant to the release of the pilot report, the federations entered into written agreements with SRSA for the purposes of giving effect the recommendations of the EPG -

75.1. On or about 25 May 2015, the first respondent, duly represented by Mr Oregan Hoskins, the SRSA, duly represented by Mr Alec Moemi ('Moemi') and the SASCOC, duly represented by Mr Gideon Sam ('Sam'), entered into a memorandum of agreement purporting to give effect to the pilot report.

75.2. On or about 25 May 2015, the second respondent, duly represented by Mr Chris Nenzani, the SRSA, duly represented by Moemi and SASCOC, duly represented by Sam, entered into a memorandum of agreement purporting to give effect to the pilot report.

75.3. On or about 25 May 2015, the third respondent, duly represented by Mr Aleck Skhosana, the SRSA, duly represented by Moemi, and SASCOC, duly represented by Sam, entered into a memorandum of agreement purporting to give effect to the pilot report.

75.4. On or about 25 May 2015, the fourth respondent, duly represented by Ms Mimi Mthethwa, the SRSA, duly represented by Moemi and SASCOC, duly represented by Sam, entered into a memorandum of agreement purporting to give effect to the pilot report.

75.5. Copies of these agreements (exclusive of their annexures due to the sheer volume of the documentation which will be made available upon the request of the Court) are annexed marked as **FA7**, **FA8**, **FA9** and **FA10**.

76. The express material terms of the agreements entered into between the parties are substantively the same and for the purposes herein will not be repeated insofar as is necessary:

76.1. The agreement is entered into in respect of the overseeing, coordinating and giving effect to the proper implementation and execution of the -

76.1.1. the Eminent Persons Group Report on Transformation in sport; and

76.1.2. the responses, actions, commitments and undertakings of the sporting federation insofar as it has a bearing on the domain of the sporting federation.

76.2. The agreements record that the Minister released the EPG Pilot Study Report which, amongst others, contains an overview, comparative multi-dimensional scorecard, transformation dashboards, observations, summaries, recommendations and example data sheets relative to the mandate of the EPG to the first to fourth respondents as well as the South African Football Association and requested that the federations provide him with concrete interventions and details plans, amongst others, on how these federations are responding to the above-mentioned contents that emanate from the EPG Pilot Study Report.

76.3. The agreements demonstrate the federations' intentions to submit their responses, proposed actions, commitments and undertakings relative to the EPG Pilot Study Report, insofar as it has a bearing on their respective domain, to the Minister and pursuant to same, the Minister is now ready to present these federations with an agreement that will be concluded between SRSA, SASCOC and each of the federations in respect of each federation's satisfactory compliance with the EPG Pilot Study Report and its undertakings in this regard insofar as it has a bearing on their respective domain.

76.4. The essence of the agreement in to secure the compliance of the federation in complying with and giving effect to the EPG Pilot Study Report and the federations undertakings in the above regard insofar as it has a bearing on its domain and which

is in the best interests of the federation in general as endorsed by the federation's undertakings.

76.5. In the event that the federation fails to satisfactorily deliver on any of its undertakings, conform to any or all of the EPG Pilot Study Report insofar as it has a bearing on the federation's domain and perform any of its duties, responsibilities and obligations in terms of the agreement, SRSA may:

76.5.1. suspend or withdraw its funding of the federation in terms of section 10(3)(a) of the NSRA in writing, if applicable;

76.5.2. withdraw its recognition of the federation as a national federation in terms of section 10(3)(b) of the NSRA in writing where after the Minister may publish such decision in the Government Gazette;

76.5.3. revoke the federation's authority to host and bid for major and mega international events in the Republic in writing as a result of not recognizing the federation;

76.5.4. withdraw the federation's opportunity to award national colours via SASCOC to athletes who participate in the relevant federation's sporting code under the auspices of that federation in order to represent the Republic internationally and nationally in writing;

76.5.5. terminate the agreement in writing;

76.5.6. request the Minister to consider issuing a directive in terms of section 13(5)(a) of the NSRA as SRSA deems appropriate.

THE UNDERTAKINGS

77. Pursuant to the conclusion of the agreements, the federations provided the SRSA with their undertakings as contemplated as annexure B by the agreements.

78. The undertakings appear to consist of tabulated forecasts and recordals of predicted transformation targets and the actual performance by the relevant federation in respect of the demographic representivity within the realm of the federation's control.

79. **The Undertakings of SARU**

79.1. On 13 March 2015, SARU furnished the Minister with its undertakings as contemplated by the agreement. A copy of these undertakings are annexed marked as **FA11**.

79.2. The forecasted targets submitted by SARU are projected until 2018. No reference is made to a system of allocation of positions on the basis of racial profiling and it appears that the targets are generated on the basis of strict demographic representation.

80. **The Undertakings of CSA**

80.1. On 25 August 2015, CSA presented its undertakings as per the agreement with the Minister. The undertakings presented reflected a comprehensive strategy to be

adopted by CSA and incorporated a focus on a number of areas, *inter alia*, certain projections on team representivity.

80.2. Certain projections of the compilation of the starting eleven in selected teams were made by CSA for the period of 2014 to 2017. These projections are annexed as **FA12**.

80.3. Subsequently in October 2016, CSA submitted revised forecasts pertaining to its predicted representivity in the period enduring until 2020. These forecasts are annexed marked as **FA13**.

80.4. Both annexures **FA12** and **FA13** were extracted from a document detailing the strategy of CSA pursuant to the conclusion of the agreement with the SRSA. The remainder of this document has not been annexed to these papers but will be made available upon the Court's request.

80.5. From these projections or forecasts, it is clear that CSA intends to implement representivity targets up to the year 2020 which are formulated as the imposition of a percentage of black Africans and generic black participants. These forecasts extend to all employees of CSA.

81. **The Undertakings of ASA**

81.1. On 10 March 2015, ASA submitted its demographic representation forecast to the Minister. A copy of the forecast is annexed as **FA14**.

81.2. As can be seen therefrom, ASA has in certain instances forecast that it will employ 100% black African or 100% generic black employees.

82. **The Undertakings of NSA**

82.1. On 16 April 2015, NSA submitted its demographic representation forecast to the Minister, a copy of which is annexed marked as **FA15**.

THE EPG REPORT 2014/2015

83. On April 2016, the third EPG Transformation Status Report for the 2014/2015 period was released ('the 2014/2015 report'). A copy of the report is annexed hereto marked as **FA16**.

84. The report confirmed that performance in the demographic dimension of the Transformation Charter is measured against the achievement of the 60% generic black (black African, coloured and Indian persons) representation target in different component structures of a federation. The demographic profile of a sporting code's structure, in terms of the Transformation Charter, includes members of its representative teams, administrative structures, team selectors and managers, all coaches and umpires and referees; specialized support structures; and affiliated/associated specialist support structures.

85. **SARU's performance as recorded by the 2014/2015 Report**

85.1. According to the report, SARU performed as follows:

	% Black African	**% Generic Black**

President Demographic Profiles 2014	0	0
President Demographic Profiles 2015	0	100
Board Demographic Profiles 2014	17	58
Full-time Staff Demographic Profiles 2014	23	57
Senior National Male Teams 2014	31	42
Senior National Under-Age Male Teams 2014 (two age groups)	31	42
Senior Female National Team 2014	55	77
All Nationally Active and Accredited Male Coaches 2014	28	50
All Nationally Active and Accredited Female Coaches 2014	15	45
All Nationally Active and Accredited Male Umpires/Referees 2014	28	50
All Nationally Active and Accredited Female Umpires/Referees 2014	27	60
Male Specialist Support to National Teams and Individuals: Medical Practitioners	100	100
Male Specialist Support to National Teams and Individuals: Physiotherapists	0	100
Male Specialist Support to National Teams and Individuals: Sport Psychologists	0	0

Male Specialist Support to National Teams and Individuals: Biokineticist	0	25
Male Specialist Support to National Teams and Individuals: Nutritionists	No data submitted	
Male Specialist Support to National Teams and Individuals: Computer Analysts	30	40
Female Specialist Support to National Teams and Individuals: Medical Practitioners	No data submitted	
Female Specialist Support to National Teams and Individuals: Physiotherapists	0	100
Female Specialist Support to National Teams and Individuals: Sport Psychologists	0	0
Female Specialist Support to National Teams and Individuals: Biokineticist	No data submitted	
Female Specialist Support to National Teams and Individuals: Nutritionist	No data submitted	
Female Specialist Support to National Teams and Individuals: Computer Analysts	No data submitted	
Registered members of national coaching body	0	0
Registered members of national Referee/Umpire Body	25	41
Registered members of National Medical/Scientific Body	0	22

86. **CSA's performance as recorded by the 2014/2015 Report**

86.1. According to the report, CSA performed as follows:

	% Black African	% Generic Black
President Demographic Profiles 2014	0	100
President Demographic Profiles 2015	100	100
Board Demographic Profiles 2014	33	83
Full-time Staff Demographic Profiles 2014	30	53
Senior National Male Teams 2014	9	45
Senior National Under-Age Male Teams 2014 (one age groups)	37	48
Senior Female National Team 2014	23	59
All Nationally Active and Accredited Male Coaches 2014	24	46
All Nationally Active and Accredited Female Coaches 2014	39	58
All Nationally Active and Accredited Male Umpires/Referees 2014	20	44
All Nationally Active and Accredited Female Umpires/Referees 2014	3	24

Male Specialist Support to National Teams and Individuals: Medical Practitioners	0	100
Male Specialist Support to National Teams and Individuals: Physiotherapists	67	100
Male Specialist Support to National Teams and Individuals: Sport Psychologists	No data submitted	
Male Specialist Support to National Teams and Individuals: Biokineticist	No data submitted	
Male Specialist Support to National Teams and Individuals: Nutritionists	No data submitted	
Male Specialist Support to National Teams and Individuals: Computer Analysts	30	40
Female Specialist Support to National Teams and Individuals: Medical Practitioners	No data submitted	
Female Specialist Support to National Teams and Individuals: Physiotherapists	0	100
Female Specialist Support to National Teams and Individuals: Sport Psychologists	No data submitted	
Female Specialist Support to National Teams and Individuals: Biokineticist	No data submitted	
Female Specialist Support to National Teams and Individuals: Nutritionist	No data submitted	
Female Specialist Support to National Teams and Individuals: Computer Analysts	No data submitted	

Registered members of national coaching body	23	52
Registered members of national Referee/Umpire Body	22	47
Registered members of National Medical/Scientific Body	0	0

87. **ASA's performance as recorded by the 2014/2015 Report**

87.1. According to the report, ASA performed as follows:

	% Black African	**% Generic Black**
President Demographic Profiles 2014	0	0
President Demographic Profiles 2015	100	100
Board Demographic Profiles 2014	17	58
Full-time Staff Demographic Profiles 2014	75	83
Senior National Male Teams 2014	23	50
Senior National Under-Age Male Teams 2014 (two age groups)	22	59
Senior Female National Team 2014	11	21
All Nationally Active and Accredited Male	44	59

Coaches 2014		
All Nationally Active and Accredited Female Coaches 2014	30	41
All Nationally Active and Accredited Male Umpires/Referees 2014	33	62
All Nationally Active and Accredited Female Umpires/Referees 2014	45	57
Male Specialist Support to National Teams and Individuals: Medical Practitioners	33	67
Male Specialist Support to National Teams and Individuals: Physiotherapists	No data submitted	
Male Specialist Support to National Teams and Individuals: Sport Psychologists	No data submitted	
Male Specialist Support to National Teams and Individuals: Biokineticist	No data submitted	
Male Specialist Support to National Teams and Individuals: Nutritionists	No data submitted	
Male Specialist Support to National Teams and Individuals: Computer Analysts	No data submitted	
Female Specialist Support to National Teams and Individuals: Medical Practitioners	No data submitted	
Female Specialist Support to National Teams and Individuals: Physiotherapists	100	100
Female Specialist Support to National Teams and	No data submitted	

Individuals: Sport Psychologists		
Female Specialist Support to National Teams and Individuals: Biokineticist	No data submitted	
Female Specialist Support to National Teams and Individuals: Nutritionist	No data submitted	
Female Specialist Support to National Teams and Individuals: Computer Analysts	No data submitted	
Registered members of national coaching body	0	0
Registered members of national Referee/Umpire Body	0	0
Registered members of National Medical/Scientific Body	0	0

88. **NSA's performance as recorded by the 2014/2015 Report**

88.1. According to the report, NSA performed as follows:

	% Black African	**% Generic Black**
President Demographic Profiles 2014	0	0
President Demographic Profiles 2015	100	100
Board Demographic Profiles 2014	33	33

Full-time Staff Demographic Profiles 2014	57	71
Senior National Female Teams 2014	36	39
Senior National Under-Age Female Teams 2014 (three age groups)	47	50
Senior Male National Team 2014	No data submitted	
All Nationally Active and Accredited Female Coaches 2014	14	25
All Nationally Active and Accredited Male Coaches 2014	41	51
All Nationally Active and Accredited Female Umpires/Referees 2014	41	51
All Nationally Active and Accredited Male Umpires/Referees 2014	77	77
Male Specialist Support to National Teams and Individuals: Medical Practitioners	0	0
Male Specialist Support to National Teams and Individuals: Physiotherapists	0	25
Male Specialist Support to National Teams and Individuals: Sport Psychologists	0	0
Male Specialist Support to National Teams and Individuals: Biokineticist	No data submitted	
Male Specialist Support to National Teams and Individuals: Nutritionists	No data submitted	

Male Specialist Support to National Teams and Individuals: Computer Analysts	No data submitted	
Female Specialist Support to National Teams and Individuals: Medical Practitioners	0	0
Female Specialist Support to National Teams and Individuals: Physiotherapists	14	57
Female Specialist Support to National Teams and Individuals: Sport Psychologists	0	0
Female Specialist Support to National Teams and Individuals: Biokineticist	No data submitted	
Female Specialist Support to National Teams and Individuals: Nutritionist	No data submitted	
Female Specialist Support to National Teams and Individuals: Computer Analysts	No data submitted	
Registered members of national coaching body	16	27
Registered members of national Referee/Umpire Body	45	55
Registered members of National Medical/Scientific Body	0	0

THE MINISTER'S DECISION OF 25 APRIL 2016

89. On 25 April 2016, the Minister announced that he had received the 2014/2015 report and having considered the results reflected in the report, would be implementing the punitive

measures agreed upon in the agreements concluded with the federations as a result of a consequence of the federations not having met 'their own set transformation targets'. The Minister's speech is annexed as **FA17**.

90. The Minister resolved to revoke the privilege of the federations to host and bid for major and mega international tournaments in the Republic which decision would be resolved when considering the results of the 2016/2017 transformation barometer.

THE INVALIDITY OF THE UNDERTAKINGS

THE EFFECT OF THE PREVAILING ENACTMENTS

91. Under the Constitution it is impermissible to discriminate on the grounds of race and gender. The EEA, in outlawing discrimination, echoes this principle. The blind pursuit of demographic representation based on these two factors can, in consequence, never be lawful. The enactments legitimate affirmative action measures in order to redress the inequities of the past, but they positively decline to sanction social engineering mechanically designed to produce racial and gender representation in the future. Witness to this fact is the provision in the EEA (section 15(3)) that states that an affirmative action plan may 'include preferential treatment and numerical goals, but exclude quotas'.

92. This is in line with section 2(b) of the EEA which clearly envisage representivity that is broad and equitable and that is based on reasonable accommodations being made but which is not absolute.

93. Section 42 of the EEA provides for the consideration of factors to determine compliance with employment equity concerns. All of these factors, including but not limited to, the demographic profile of the economically active population and the pool of suitably qualified people and athletes from designated groups, must be taken into account.

94. No basis is laid in the EEA for the employment or selection of a national demographic profile to determine an appropriate composition of the workforce or sports teams.

95. In the pursuit of its constitutionally mandated goals, the EEA classes coloureds, Indians and Africans in a single category – 'black people' as a 'designated group' – and it encourages affirmative action in favour of this class of person. It makes no provision for distinguishing members of this category and, given its underlying policy, would never do so. The three constituents of the category of 'black people' within the 'designated group' were all disadvantaged by apartheid and other forms of race discrimination.

96. The inherent identity of sport itself requires an absolute degree of autonomy to encourage the meritorious and competitive spirit of the game. The precise charisma of sport therefore precludes the use of sport as a political animal and this concept has been enshrined by international sporting bodies by way of their various constitutions and by-laws. Moreover, this feature has been recognised domestically by the enactment of section 13(5)(b) of the NSRA. The NSRA recognises the need to remedy the injustices of the past while still acknowledging the necessity to embolden sport in its purest form.

THE EFFECT OF THE UNDERTAKINGS

97. Since the adoption of the Charter and the conclusion of the agreements with SARU, CSA, ASA and NSA, the bodies together with the Minister have carried out the multi-dimensional transformation strategy subject to the guidance of the EPG annual reports. What is clearly evident is that this strategy has placed a weighted emphasis on the enforcement of demographic representation in all aspects of sport – from team selection to administrative support.

98. The strategy purports to focus on a multi-dimensional approach but falters in the implementation of a numerical assessment by which it quantifies its progress. It is abundantly clear from the Charter read with the mandate of the EPG that the Minister together with the federations seek to impose a quota system on the selection and employment of athletes and staff alike. This conclusion is drawn notwithstanding the obvious terminology used in identifying the transformation targets as what they actually are – 'a quota system'.

99. The transformation strategy unashamedly relies upon the creation of numerical targets by which it purports to quantify its progress. The specific targets which are compiled in the form of the scorecard are considered to be met if they are over a specified percentage and failed to be met if the actual achievement falls under the set target.

100. Regardless of whether the targets to be met are those imposed by SRSA (60% black African representivity in all spheres) or those forecasted by the federations (as per their forecasts in annexure B to the agreements), there is evidently a numerical quota which the federations are obligated to meet. This obligation is demonstrated by the imposition of

punitive measures in the event of an alleged failure of the federations to meet the designated targets.

101. No reference is made in the undertakings to the consideration of the experience, ability and qualification of a prospective applicant or athlete and it appears that an applicant or athlete will be rejected or excluded from appointment or team selection unless he or she falls within the category of coloured, Indian or African. No allowance is made for the possibility that there may be an underrepresentation of that category at the relevant level of appointment or competition.

102. Notwithstanding the prevention of this strategy on both a domestic and international level, the implementation of the transformation targets leads to the outright refusal to appoint or promote suitable staff or athletes to appropriate positions on the grounds that the pursuit of strict demographic representation will be potentially frustrated.

HOW THE UNDERTAKINGS VIOLATE THE ENACTMENTS

103. It is contended by Solidarity that the transformation strategy of imposing transformation targets which amount to the pursuit of unqualified numerical race based representivity as determinative of the composition and selection of athletes and federation employees, is in fundamental conflict with the following enactments:

103.1. section 1 of the Constitution and the Bill of Rights in Chapter 3 of the self-same enactment, which do not, under the rubric of either equality (whether formal or substantive) or affirmative action (which seeks to legitimate measures designed to

redress past discrimination), sanction the social engineering based on naked race profiling contemplated by the transformation targets;

103.2. the EEA, which mandates race as legitimate factors to be taken into account in making appointments and promotions (and which Solidarity contends is equally applicable to team selections), but –

103.2.1. prohibits the profiling referred to (specifically by way of its general terms and its prohibition on quotas in particular);

103.2.2. makes absolutely no provision for dividing the set of persons described as 'designated groups' into the subsets of 'black African' and 'generic black';

103.2.3. does not provide for representation on the basis of the national demographic;

103.2.4. prohibits the use of quotas;

103.2.5. denies employers the entitlement to place absolute barriers to employment (read selection in respect of provincial and national teams) and/or advancement of employees.

103.3. The NSRA which prohibits the interference of the Minister and his department in the matters of the selection of teams, administration of sports and the appointment or, or termination of the service of, the executive members of the sport or recreation body.

103.4. Section 6 of PAJA which subjects the administrative action to review if it is produced by an error or law, is in contravention of the enabling provisions, pursues

an ulterior purpose, is actuated by irrational, extraneous, unreasonable, arbitrary or capricious considerations or fails to take proper considerations into account.

104. An examination of the transformation strategy in respect of the demographic dimension reveals certain fatal flaws. Notwithstanding the inclusion of certain unrealistic forecasts (particularly by the ASA in its endeavours to achieve 100% black African and 100% generic black representation in the same year), the realistic figures fail to reflect the real disposition of the South African demographic. Whilst the Charter acknowledges the difficulties faced by the reality of geographical considerations, regional differences in racial demographics are not taken account with the effect that the representation of coloured people is made to depend on national demographics despite the preponderance of such persons in the Western Cape. Similarly, no account is taken of the athletically able or economically active people in the country. A stock standard figure is simply imposed on the various sporting bodies across the country.

105. It is accepted that due to a number of socio-economic and historical factors, a disproportionate number of blacks may be unable to enter any of the categories of available employment (athletic or otherwise) by the federations. However, this does not provide a basis on which to mandate a demographic representation in instances where merit cannot justify the appointment or selection of those candidates.

EVENTS LEADING UP TO THESE PROCEEDINGS

106. Solidarity is committed to a proper evaluation of transformation measures (whether self-imposed or imposed externally). In pursuit of their effort to ensure constitutional

compliance in the adoption and implementation of measures loosely referred to as 'affirmative action measures' or 'transformation measures', Solidarity routinely seek and gain access to, for example, employment equity plans adopted by employers under the EEA. Solidarity engages employers on the content of their employment equity plans and other affirmative action measures and it has litigated against employers whose plans have been considered to be unlawful under the EEA and/or the Constitution.

107. In the present instances, having learnt of the alleged non-compliance with transformation targets, Solidarity sought access to the agreements in which the targets relied upon by the Minister had been agreed to. Solidarity called for the production of the agreements as well as any related relevant documents in accordance with the provisions of Promotion of Access to Information Act.

108. On 30 June 2016, Solidarity submitted a request to the information officer of the SRSA in terms of section 18(1) of the Promotion of Access to Information Act 2 of 2000 ('PAIA') by which it sought:

108.1. the various agreements concluded between the SRSA and the federations;

108.2. the agenda and minutes of meetings where the Minister and the representatives of the federations concluded the agreements;

108.3. the transformation plans of the sporting bodies.

109. On 29 July 2016, Solidarity's legal representatives received an email from a Mr Manase Makwela ('Makwela") who advised that the information officer may extend the period of thirty days referred to in section 25(1) of PAIA once for a further period of not more than

thirty days. Solidarity was notified that the information officer accordingly wished to extend the thirty day period for a further period of not more than thirty days. Solidarity was finally advised of its right to challenge the extension in accordance with the provisions of sections 74 to 82 of PAIA.

110. An internal appeal was lodged by Solidarity on 4 August 2016 but no response was received to this internal appeal and it was accepted by Solidarity that the internal appeal was refused in accordance with section 77(7) of PAIA.

111. On 1 September 2016, Makwela responded to Solidarity's request indicating that the federations were not in favour of releasing the requested information to Solidarity on the basis that the federations were bound by the confidentiality clause contained in the agreements. However, Makwela was of the view that further engagement was required with the federations in order to give effect to the true spirit of the promotion of access to information. Only after this engagement would the information officer be in a position to provide a final response to Solidarity's request.

112. Notwithstanding this undertaking, the thirty day extended period lapsed and no further response was received from Makwela on behalf of the SRSA's information officer.

113. Accordingly, on 2 October 2016 Solidarity accepted that its request in terms of section 18 had been refused as contemplated by the provisions of section 27 of PAIA and accordingly lodged an internal appeal against this deemed refusal. Again, no response was received to the internal appeal and Solidarity accepted that its appeal had been refused in accordance with section 77(7) of PAIA.

114. Solidarity instructed its legal representatives to prepare the necessary application contemplated by the provisions of section 78. This application was instituted on 3 November 2016.

115. On 28 November 2016, correspondence was received from the State Attorney on behalf of the Minister and SRSA. It was indicated to Solidarity that the State Attorney held instructions to 'in principle' provide the following documents:

115.1. Unsigned copies of the 'transformation agreements' with SARU, CSA, ASA and NSA, exclusive of their annexures;

115.2. The media statement of the Minister dated 25 April 2016.

116. It was advised that the transformation plans of the federations were already within the public domain and would therefore not be made available to Solidarity.

117. A perusal of the documents without their annexures evidenced the provision of only the skeleton of the agreement between the SRSA and the federations. Solidarity accordingly instructed that the application in terms of PAIA persist which instruction was communicated to the State Attorney's office.

118. The application as enrolled for hearing on 1 March 2017, however, immediately prior to this date, on 27 February 2017, the State Attorney reverted to Solidarity with instructions to release further documents. As a result, the hearing on 1 March 2017 was removed from the roll. A consideration of the provided documents resulted in the present application.

RELIEF SOUGHT

119. Solidarity approaches this Court under section 157(2) of the LRA and/or section 49 of the EEA and/or section 158(1)(a)(iv) of the LRA for an order:

119.1. declaring that the provisions of the Transformation Charter insofar as they pertain to demographic profiling are invalid and of no force and effect by reason of the fact that it is in contravention of –

119.1.1. section 15(3) and/or 42 of the EEA;

119.1.2. section 13(5)(b) of the NSRA; and/or

119.1.3. sections 1 and/or 9 of the Constitution;

119.2. setting aside the provisions of the Charter which pertain directly or indirectly to the imposition of transformation targets and demographic profiling;

119.3. declaring that the provisions of the agreements entered into between the first to fourth respondents with the fifth and sixth respondents insofar as they pertain to demographic profiling and the imposition of a quota system are invalid and of no force and effect by reason of the fact that the agreements are in contravention of –

119.3.1. section 15(3) and/or 42 of the EEA;

119.3.2. section 13(5)(b) of the NSRA; and/or

119.3.3. sections 1 and/or 9 of the Constitution.

119.4. setting aside the provisions of the agreements which pertain directly to the imposition of transformation targets and demographic profiling;

119.5. interdicting and restraining the respondents from implementing the Charter and the agreements or otherwise giving effect to their provisions by –

119.5.1. applying quotas in determining team selection at a national, provincial, club or schools level;

119.5.2. applying quotas in determining appointments or declining to make appointments to posts or positions within the administration, management and specialised support structures of the first to fourth respondents based purely on such criteria on such quotas.

CONCLUSION

120. It is accordingly submitted that the applicant is entitled to relief as set out in the Notice of Motion.

WHEREFORE the applicant prays for relief in the terms set out in the Notice of Motion to which this affidavit is attached.

DEPONENT

I certify that the above named Deponent has acknowledged that he knows and understands the contents of this Affidavit which was signed and sworn to before me at PRETORIA on this 2nd day of May 2017 and that the provisions of the Regulation contained in Government Notice R.1258 dated the 21st July 1972, as amended, have been complied with.

COMMISSIONER OF OATHS

LOUIS FRANCOIS TALJARD
Kommissaris van Ede · Commissioner of Oaths
Praktiserende Prokureur RSA
Practising Attorney RSA
H/V D.F Malanrylaan & Unionlaan
Kloofsig Centurion