

**ASSESSING THE BENEFICIARIES OF THE BROAD-BASED BLACK ECONOMIC
EMPOWERMENT PROGRAMME WITHIN THE NORMATIVE FRAMEWORK OF
INTERNATIONAL LAW AND THE CONSTITUTION**

by

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ABSTRACT

John 12:6

“Now he did not say this because he cared for the poor

but because he was a thief;

and having the bag,

he took for himself what was put into it”.

The Everyday Life Bible

SUMMARY

South Africa's state of inequality in a global context is well researched and reported, with the World Bank, amongst others, labelling South Africa as the most unequal society in the world. Income and wealth data suggests that three decades after the adoption of the Constitution, poverty, unemployment and inequality still manifest along lines of race, gender, disability and youth.

Certain groups and individuals are more susceptible and vulnerable to inequality; for instance, those who face multiple (intersecting) forms of discrimination such as black females or disabled black youth. Various socio-economic factors that contribute to inequality in South Africa have been identified; for example, access to land; lack of education; and geographic location of people such as those living in remote rural areas who find it difficult to access employment and resources. Some of these factors can be attributed to South Africa's history of discrimination stemming from more than three centuries of colonialism, segregation and apartheid.

Past racial discrimination had a profound impact on black people due to socio-economic factors that influence inequality, such as land, labour and education. These factors overlap and are mutually reinforcing, with one impacting the others. The manifestation and persistence of inequality and the historic reasons that gave rise to inequality, support the cause for remedial measures such as the broad-based black economic empowerment (B-BBEE) programme.

Parallel with the history of discrimination and white minority rule prior to 1994, South Africa saw the emergence of the African National Congress (ANC) and the development of African Nationalism which plays a pertinent role in the way the present beneficiaries of the B-BBEE programme are designated. The ANC's ideology is embedded in the notion of African Nationalism, the *Freedom Charter* and the National Democratic Revolution (NDR). The NDR forms the overarching ideology and transformation policy of the ANC. It is a policy premised on the socialist ideology of Marxism-Leninism with its main objective the establishment of a socialist, worker class and classless society under the central control of a totalitarian socialist state. The process of transcending to a socialist state is referred to as "the Revolution" or "transformation". The instruments used to pursue the "transformation of society" include the principle of "representivity" (representativeness) through affirmative action, black economic

empowerment (BEE) and “Cadre Deployment”. Cadre Deployment refers to the ANC’s policy and practice of appointing loyal cadres in senior positions in the public service and private sector to “control all levers of power” and to promote the ANC’s ideology in all spheres of society.

The principle of representativity is enforced through BEE legislation such as the Employment Equity Act (EEA) and B-BBEE Act. Representativity requires all public and private workplaces, businesses and civil society to reflect the race and gender demographic profile of the national population, which is roughly 80% African, 9% Coloured, 8% White and 3% Indian. This would ensure that all minorities conform to one central national majoritarian identity to build “one nation” and a homogenous society.

Although the broader bourgeoisie (the lower, middle and upper-middle classes) is perceived in conventional Marxist-Leninist theory as being counterintuitive to the “struggle” of the working class, the NDR regards the bourgeoisie as an ally of the working class in the transition or “transformation” of a society to a socialist state. The means of production, big corporations and wealth of the land will be “placed under social control” (nationalized) by using BEE programmes to transfer them to the politically dominant black bourgeoisie under the guardianship of the ANC as “vanguard” of the workers until ultimately being placed under the control of a central state. Under control of the state, these assets will then be managed on behalf of the working class. An analysis of whom the beneficiaries of BEE programmes are reveals that these programmes do not benefit the vulnerable and unemployed groups but are designed to largely benefit the African bourgeoisie. The experience of other jurisdictions such as Malaysia and India showed that restitutionary measures which are not designed to account for the social conditions of the vulnerable and poor classes as criteria to benefit from such measures, lead to the “capture” of restitutionary programmes by the dominant political elite. This undermines the ability of these programmes to achieve equality.

International law instruments explicitly provide for “special measures” to be taken to promote the socio-economic position of the most impoverished sections of society. These special measures do not *per se* amount to discrimination but are subject to various requirements to comply with international law. Most importantly, special measures must be based on disassembled evidence of the socio-economic position of beneficiaries and the impact of the measures on the socio-economic conditions of beneficiaries, and must be measurable and should in fact be measured

continuously. South Africa, as one of the State Parties to these international law instruments, has on several occasions been found by the international monitoring bodies as having failed to adhere to these prerequisites.

Apart from international law, remedial and restitutionary programmes such as the B-BBEE programme must also conform to the equality clause of the South African Constitution. To that end, any restitutionary measure must be designed to promote the achievement of equality and, more specifically, substantive equality. Data further suggests that inequality in South Africa is not only persistent but also ever increasing, and presently higher than three decades ago. Data shows an ever-expanding African middle and upper (affluent) class, with increased levels of inequality within the African population. The African middle class has grown exponentially compared to all other race groups, with Africans being the only group in which the poor has regressed further into poverty.

BEE programmes have therefore not succeeded in promoting the achievement of equality and have in fact contributed to new patterns of vertical and class inequality. This can be attributed to the categorisation of the beneficiaries of BEE programmes where the benefits that Africans receive from the representivity principle are eight times more than for other previously disadvantaged minority groups such as Coloureds and Indians.

Based on the evidence emanating from this study, several shortcomings of BEE programmes, and especially the B-BBEE programme, are identified in the context of international law and the South African Constitution. Recommendations are made to align the B-BBEE programme with the prerequisites of international law and the Constitution to specifically promote substantive equality. These recommendations involve: (1) a narrowing down of the existing definition of “black designated groups” to focus primarily on the lower social and poverty classes of black people; (2) focusing on newly established black-owned enterprises; and (3) applying measures to avoid the present abuse of the B-BBEE programme to benefit the political elite.

FOREWORD AND ACKNOWLEDGEMENTS

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DECLARATION OF AUTHENTICITY
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Declaration:

1. I understand what plagiarism is and I am aware of the University's policy in this regard.
2. I declare that this dissertation is my own, original work. Where other people's work (either a printed book, Internet source or any other source) was used, it was properly acknowledged and referred to in accordance with the requirements of the Faculty.
3. I did not make use of another person's work and submit it as my own.

SIGNATURE

ABBREVIATIONS AND ACRONYMS

ACHPR	African Charter on Human and People's Rights
AJ	Acting Judge
AJDS	African Journal of Development Studies
ALJ	Asian Law Journal
ANC	African National Congress
Apr	April
Art	Article
Arts	Articles
Aug	August
AZAPO	Azanian People's Organisation
B-BBEE	Broad-Based Black Economic Empowerment
BCE	Before Christian Era
BEE	Black Economic Empowerment
BEECom	Black Economic Empowerment Commission
BJIL	Brooklyn Journal of International Law
BUSA	Business Unity South Africa
CC	Constitutional Court
CCMA	Commission for Conciliation, Mediation and Arbitration
CDE	Centre for Development and Enterprise
CEDAW	Convention of the Elimination of All Forms of Discrimination Against Woman
CERD	Committee on the Elimination of Racial Discrimination
Ch	Chapter
Chs	Chapters
CIPC	Company's Intellectual Property Commission
CODESA	Convention for a Democratic South Africa
Comintern	Second Congress of the Communist International
CPSU	California Polytechnic State University
CPSA	Communist Party of South Africa
CRPD	Convention of Rights on Persons with Disabilities
CST	Colonialism of a Special Type
DAC	Development and Change
Dec	December
DMA	Disaster Management Act
DTI	Department of Trade, Industry and Competition
EAP	Economic Active Population

ABBREVIATIONS...*continued*

EC	European Council
ECJ	European Court of Justice
EE	Employment Equity
EEA	Employment Equity Act
EFF	Economic Freedom Fighters
EFTA	European Free Trade Association
EME	Exempted Micro Enterprise
ESR	Economics and Social Rights
FATF	Financial Action Task Force
Feb	February
GDP	Gross Domestic Product
GEAR	Growth, Employment and Retribution
HDI	Historically Disadvantaged Individual
HDSA	Historical Disadvantaged South African
HPA	Hitachi Power Africa
HPE	Hitachi Power Europe
ICCPR	International Convention on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICWU	Industrial and Commercial Workers' Union
IDC	Industrial Development Corporation
IJLI	International Journal of Legal Info
ILO	International Labour Organisation
IMF	International Monetary Fund
Inc	Incorporated
INSC	Indian Supreme Court
IPAP	Industrial Policy Action Plan
ISA	Indicator South Africa
ISL	International Socialist League (of South Africa)
J	Judge
Jan	January
JDS	Journal of Development Studies
JMC	(International) Journal on Media and Communications
JSTOR	Journal Storage
JSC	Judicial Service Commission
JSE	Johannesburg Stock Exchange

ABBREVIATIONS...*continued*

Jun	June
Jul	July
Ltd	Limited
LEDF	Local Economic Development Forums
LLD	<i>Legum Doctor</i> (Doctor of Laws)
Mar	March
MDGs	Millenium Development Goals
MEC	Member of Executive Council
MERG	Macro-Economic Research Group
MJES	Malaysian Journal of Economic Studies
MPNP	Multi Party Negotiating Process
MPRDA	Mineral and Petroleum Resources Development Act
MYR	Malaysian Ringgit
NDP	National Development Plan
NDR	National Democratic Revolution
NEC	National Executive Council
NEP	National Economic Plan
NGP	New Growth Path
NIDS	National Income Dynamics Study
NO	Another
No	Number
Nov	November
NPAT	Net Profit After Tax
NPC	Non-Profit Company
NP	National Party
NVP	New Vision Policy
Obo	on behalf of
OBCs	Other Backward Classes
Oct	October
OPP	Outline Perspective Plan
PAC	Pan African Congress of Azania
Para	Paragraph
Paras	Paragraphs
PARI	Public Affairs Research Institute
PEC	Provincial Executive Council
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act

ABBREVIATIONS...*continued*

PER/PELJ	Potchefstroom Electronic Law Journal
PPE	Personal Protective Equipment
PPPFA	Preferential Procurement Policy Framework Act
PPRs	Preferential Procurement Regulations
Pty	Proprietary
QSE	Qualifying Small Enterprise
R	Rand
RDP	Reconstruction and Development Programme
REC	Regional Executive Council
REDI	Research Project on Employment, Income, Distribution and Inclusive Growth
Reg	Regulation
Regs	Regulations
RM	Ringgit Malaysian or Malaysian Ringgit
S	Section
Ss	Sections
SA	South Africa
SAA	South African Airways
SABC	South African Broadcasting Corporation
SACP	South African Communist Party
SAJEJ	South African Judicial Educational Journal
SAJHE	South African Journal of Higher Education
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SANAS	South African National Accreditation Systems
SANNC	South African Native National Congress
SANC	South African Native Convention
SAPS	South African Police Service
SC	Supreme Court
SCs	Scheduled Castes
SCA	Supreme Court of Appeal
SEP	Stellenbosch Economic Project
Sep	September
SDGs	Sustainable Development Goals
SOC	State Owned Company
SOE	State Owned Enterprise
SPV	Special Purpose Vehicle

ABBREVIATIONS...*continued*

STs	Scheduled Tribes
T/a	Trading As
TEI	The Ethics Institute
THRHR	<i>Tydskrif vir Hedendaagse Romeins-Hollandse Reg</i> / Journal of Contemporary Roman-Dutch Law
TMPS	Total Measured Procurement Spend
Trinity CL Rev	Trinity College Law Review
TSAR	<i>Tydskrif vir die Suid-Afrikaanse Reg</i> / Journal of South African Law
UCLR	University of Chicago Law Review
UCT	University of Cape Town
UDM	United Democratic Front
UMNO	United Malays National Organisation
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNTS	United Nations Treaties
US	United States
USA	United States of America
USD	US Dollar
V	Versus
Vol	Volume
YES	Youth Employment Service
ZACC	Republic of South African Constitutional Court
ZAGPJHC	South African Southern Gauteng Johannesburg High Court of South Africa / High Court of South Africa Gauteng Local Division Johannesburg
ZAR	Zuid-Afrikaanse Republiek

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CHAPTER 1

INTRODUCTION

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1.1 BACKGROUND TO RESEARCH

The adoption of the Interim Constitution¹ in 1993 and the present Constitution² in 1996 introduced a new legal order in South Africa. It was a break from a constitutional order based on race³ which had existed for more than three hundred years. The sovereignty of Parliament was replaced by constitutional supremacy.⁴ The Constitution binds government and all organs of state,⁵ while Acts of Parliament and executive action are justiciable by the judiciary.⁶ The Bill of Rights in the Constitution not only binds the state in a vertical relationship (state versus private legal subjects)⁷ but, under certain conditions, also applies horizontally (between private legal subjects *inter se*) in a direct and indirect sense.⁸

Apart from political and civil rights normally contained in state constitutions, the Constitution also includes socio-economic rights.⁹ The socio-economic rights are also justiciable, which distinguishes the South African Constitution from most other constitutions. The Constitution is lauded as one of the world's most admirable¹⁰ for its broad range of fundamental rights, values,

¹ Act 200 of 1993 (hereafter referred to as the Interim Constitution). The use of the capital case "I" in "Interim" is in accordance with Bekink (2016) 161; and *Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (CC) para [10].

² The Constitution of the Republic of South Africa, 1996 (hereafter referred to as the Constitution).

³ As above s 1(b). Non-racialism is entrenched as a value in the Constitution.

⁴ As above ss 1(c) and 2.

⁵ As above s 2.

⁶ As above ss 2 and 165.

⁷ As above s 8(1).

⁸ As above s 8(2).

⁹ As above ss 24-29.

¹⁰ See Cameron *SAJEJ* (2019) 1 in which he states: "In 2012 during an interview on the best model for post-revolutionary Egypt, United States Supreme Court Justice Ruth Bader Ginsburg said: '[I]f I were drafting a Constitution in the year 2012, I might

aspirations and a strong emphasis on dignity, equality and freedom. The post-apartheid Constitutions introduced not only a new constitutional system but also a political transition.¹¹ It is argued that the Constitution also requires socio-economic transformation.

Inequality rooted in South Africa's racially divided past ushers a strong commitment by the Constitution to socio-economic transformation and the promotion of equality.¹² In order to promote equality, the Constitution makes provision for the adoption of measures designed to promote the interests of persons and categories of persons subjected to unfair discrimination in the past.¹³

Apart from several legislative measures adopted to promote equality,¹⁴ the Employment Equity Act (EEA),¹⁵ the Preferential Procurement Policy Framework Act (PPPFA)¹⁶ and the Broad-Based Black Empowerment (B-BBEE) Act¹⁷ were enacted specifically to promote those disadvantaged by unfair discrimination based on race. These three laws stand out as they aim to benefit black people. Each one contains a particular definition of "black people".¹⁸ The EEA and PPPFA also incorporate white women and persons with disabilities as beneficiaries.¹⁹ The B-BBEE Act only benefits black people²⁰ and is the primary focus of this study.

The B-BBEE programmes have so-called broad-based ideals.²¹ This means that their primary objective is not focused solely on black ownership of enterprises but includes the empowerment of communities, workers and vulnerable black people over a broad range of interventions.²²

look at the Constitution of South Africa. That was a deliberate attempt to have a fundamental instrument of government that embraces human rights, had an independent judiciary ... I really think a great piece of work was done". Also see Sachs *St Louis LJ* (1997) 1257 which refers to the Constitution as "the world's most enlightened Constitution"; and Odendaal (2022) 366 as "the most progressive Constitution in the world".

¹¹ *First Certification* judgement (note 1 above) para [13].

¹² S 9 of the Constitution.

¹³ As above s 9(2).

¹⁴ Restitution of Land Rights Act 22 of 1994; Labour Relations Act 66 of 1995; Extension of Security of Tenure Act 62 of 1997; Basic Conditions of Employment Act 75 of 1997; Competition Act 89 of 1998; Skills Development Act 97 of 1998; Skills Development Levies Act 9 of 1999; and Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

¹⁵ 55 of 1998.

¹⁶ 5 of 2000 together with the Preferential Procurement Regulations (PPRs), which were recently replaced by the Public Procurement Act 28 of 2024.

¹⁷ 53 of 2003 as amended by the B-BBEE Amendment Act 46 of 2013.

¹⁸ S 1 of the EEA; reg 1 of the PPRs, 2017; and s 1 of the B-BBEE Act.

¹⁹ S 1 of the Employment Equity Act; and reg 1 of the PPRs, 2017.

²⁰ S 1 of the B-BBEE Act defines black people as a generic term meaning Africans, Coloureds and Indians.

²¹ Preamble and s 2 of the B-BBEE Act.

²² The Department of Trade and Industry (DTI) *South Africa's Economic Transformation: A Strategy for Broad Based Black Economic Empowerment* (2003) 13 which states the key principles of B-BBEE as: broad based; an inclusive process; associated

These interventions include the training of black people, support for black-owned enterprises and an array of socio-economic upliftment initiatives intended to assist black people and communities to become economically self-sustainable.²³ As far as the ownership of enterprises is concerned, the B-BBEE programme aims to promote the inclusion of employees and so-called “designated groups”, those who would normally not be included such as the youth, black people with low levels of education, and persons and communities from rural and underdeveloped areas through broad-based ownership programmes.²⁴

Despite the B-BBEE programme’s broad-based approach, politically well-connected figures have remained at the apex and forefront as beneficiaries of empowerment deals.²⁵ Consequently, the stated objectives of the B-BBEE Act to, amongst others, broadly increase the ownership of enterprises by workers and communities and to benefit black people in general, seem to remain a hollow dream.

Various ministers, functionaries in government, academics and mainstream political commentators have continuously, but more so recently, mooted the failure of the B-BBEE programme to bring about equitable distribution of wealth, eradicate poverty and promote equality.²⁶ The apparent reluctance of government to ensure that the majority of disadvantaged South Africans benefit from the B-BBEE programme is often ventilated. Some commentators have highlighted the ineffectiveness of the B-BBEE policy in general and challenged its overall implementation. They lamented the fact that the programme, under the pretext of being broad based, exclusively benefits those who are in some or other way associated with those in power. This benefits a few politically connected individuals while excluding the majority who are the intended beneficiaries of the programme but still live in abject poverty.²⁷

with good governance; and as part of a growth strategy.

²³ As above; and s 2 of the B-BBEE Act.

²⁴ Schedule 1 of the Codes of Good Practice of 2015 (B-BBEE Codes), the definition of “Black Designated Groups”; and Jack (2007) 128. Vuyo Jack is a chartered accountant as well as co-founder and chairman of Empowerdex, South Africa’s best-known B-BBEE rating agency that was instrumental in developing a rating index for measuring B-BBEE compliance levels. Jack is also a visiting professor at the School of Management at the University of the Free State. He also served on the Department of Trade and Industry Commission which developed the B-BBEE Codes.

²⁵ Ponte *et al DAC* (2007) 2 and 11; and Mpehle *Administratio Publica* (2011) 140.

²⁶ South African Human Rights Commission *Equality Report 2017/18* (2018) 5; Jeffery (2014) 391; and Phakati *Business Day* (Jul 2019) 4.

²⁷ Jeffery *South African News* (Mar 2011) 9; Du Plessis and Pretorius *THRHR* (2017) 1 and 2; Mbeki *Politics* (Nov 2009) 29; Mpehle *Administratio Publica* (2011) 140 and 145; Southall *Review of African Political Economy* (2003) 1 and 20; and Turok (2015) 146.

Recently, certain senior office-bearers in the national executive called for a re-alignment of the B-BBEE policy. On 4 July 2019, the then Minister on Trade, Industry and Competition, Ebrahim Patel, emphasised the need to “rethink BEE” and move away from the narrow focus on black ownership of companies towards government assisting black-owned entities.²⁸ President Cyril Ramaphosa, on 30 October 2019, echoed Minister Patel’s sentiments but emphasised the importance of not abandoning the B-BBEE programme altogether. The President also raised concerns that the way in which the B-BBEE programme was presently formulated and implemented may actually be detrimental to entrepreneurial innovation.²⁹

In light of South Africa’s poor economic performance and ever-rising unemployment, some economists and industry experts have argued that the B-BBEE programme is directly responsible for the de-industrialisation of the South African economy; loss of competencies; scuppering of South Africans’ ability to compete internationally; and shrinking of the mining industry. They added that disinvestment in the South African economy is a direct result of B-BBEE, permeated in an escalation in unsustainable levels of unemployment, especially youth unemployment.³⁰

The Public Protector³¹ and the Judicial Commission of Inquiry into State Capture³² (the Zondo Commission)³³ were presented with copious amounts of evidence of malfeasance by state officials, those in the proximity of political power and influence, as well as office-bearers operating in the executive sphere of government. More specifically, it was alleged that certain government officials, those politically connected, and their families are illegitimately benefitting from lucrative government procurement contracts under the guise of the B-BBEE programme.

²⁸ Phakati *Business Day* (Jul 2019) 4 reporting on a media briefing by the Minister of Trade, Industry and Competition.

²⁹ Selebano *Beeld* (Oct 2019) 30 reporting on a media briefing by the President.

³⁰ Centre for Development and Enterprise (CDE) *Ten Million and Rising: What it would take to address South Africa’s Job Bloodbath* (Jan 2020) 1-30; Bernstein *Business Day* (Jan 2020) 30; Hogg *BizNews* (Dec 2019) 4; and Hogg *BizNews* (Jan 2020) 3.

³¹ Public Protector *State of Capture Report* (2016). A report on an investigation into alleged improper and unethical conduct by the President and other state functionaries relating to alleged improper relationships and involvement of the Gupta family in the removal and appointment of Ministers and Directors of State-Owned Enterprises resulting in improper and possible corrupt award of state contracts and benefits to the Gupta family’s business.

³² *Proclamation No. 3 of 2018* by the President of the Republic of South Africa appointing a Judicial Commission of Inquiry into allegations of state capture, corruption and fraud in the public sector, including organs of state, published in *Government Gazette* No. 41403 dated 25 Jan 2018. Also see *Judicial Commission of Inquiry into State Capture Report: Parts I-VI* (2022).

³³ Reference to Zondo Commission is generally used to refer to the Judicial Commission named after the chairperson of the Commission, the then Deputy Chief Justice Raymond Zondo, presently the Chief Justice.

In the court of public opinion, many people who have placed their hopes and aspirations on economic transformation to herald a better life, feel disenchanting. The findings of the Zondo Commission overwhelmingly indicate that B-BBEE and government procurement are presently used within a larger network of political patronage and cadre deployment. This does not benefit the majority of poor and disadvantaged South Africans, but constitutes a veiled scheme devised to benefit mainly those individuals in the proximity of political influence and power.³⁴ In the final section of this research, recommendations are put forward to largely eliminate such abuse.

The South African Human Rights Commission (SAHRC) also raised concerns regarding South Africa's affirmative action initiatives such as the Employment Equity and B-BBEE programmes. It released an Equality Report in which it found that South Africa's affirmative action programmes do not meet the exigencies of a "special measure" set by international law and the normative standard for substantive equality in the Constitution. The findings of the SAHRC are largely predicated on the definition and categorisation of beneficiaries of affirmative action programmes. The SAHRC criticises the broad general terms in which these beneficiaries of restitution programme are categorised. According to the SAHRC, the broad definition of beneficiaries does not consider and provide for specific types of beneficiaries in accordance with their social status and need of protection or for the promotion of equality. Consequently, it does not meet international law requirements.³⁵

The fact that South Africa's B-BBEE programme as a restitutionary measure largely fails in its endeavours to promote equality, is not unique. For instance, Malaysia's redress programme on which the South African B-BBEE model is largely based, was phased out in 1990 after 20 years in operation. This was brought about by the fact that the politically connected ended up as the main beneficiaries of the Malaysian programme at the expense of those in need of economic empowerment. The terms "money politics" and "state capture", which ring familiar in the South African discourse, resonate with the inherent flaws in the Malaysian redress programme. These manifestations of the inherent flaws of the Malaysian redress programme are generally regarded

³⁴ Hogg *BizNews* (Dec 2019) 4; Hogg *BizNews* (Jan 2020) 3; Mbeki *Politics* (Nov 2009) 29; Mpehle *Administrative Publica* (2011) 140-145; Jeffery (2014) 9, 23, 31, 132, 156, 158, 171, 195 and 234; Madi (2016) xxxiii, 27, 29, 30, 35, 64, 65, 66, 111, 126 and 129; and Turok (2015) 146.

³⁵ South African Human Rights Commission *Equality Report 2017/18* (2018) 67. Also see *Solidarity and the Republic of South Africa Settlement Agreement* in the International Labour Organisation (ILO) Conciliation Process Case no. H 02-23 in which the Trade Union Solidarity challenged the International Labour Organisation (ILO) Convention on Discrimination legality of the compulsory demographic targets introduced by the new amended EEA Regulations.

as the main reason for the overall limited success achieved with economic transformation of the corresponding Asian-based blueprint model.³⁶ Unlike South Africa, the limited success experienced with the Asian model in Malaysia was due to a combination of a clear set of goals and policies adopted by the Malaysian government to specifically advance the economic position of previously disadvantaged groups, coupled with rapid growth and poverty alleviation economic policies.³⁷

India's experience in this field is also instructive. The country's economic redress policy to assist disadvantaged groups based on a caste (social order) system was discernibly altered by the High Court of India. The Court excluded the so-called "creamy layer" of rich and already empowered individuals who repeatedly benefitted from the programme.³⁸ They were excluded despite the fact that they fit squarely within a formerly defined category of previously disadvantaged groups. This was done to allow benefits to flow to the broader poor and marginalised masses within these groups in need of economic redress and equality.³⁹

In the South African context, Jack criticised the design of the B-BBEE programme in the sense that certain empowered individuals within the category of black people, as defined in the B-BBEE Act, cannot ultimately graduate out of the "school" (programme) to make room for those actually in need.⁴⁰ According to Jack, the already empowered individuals prevent the empowerment of the other intended beneficiaries in need of the B-BBEE programme. Consequently, those assisted by the B-BBEE programme, and who had become economically empowered as a result of the benefits received from the programme, do not eventually make room (graduate) to benefit those in need of assistance. Therefore, the B-BBEE programme is abused by a certain stratum of political elite who repeatedly and perpetually become beneficiaries.

Current financial indicators to measure economic equality, for example levels of unemployment, income and wealth disparities, suggest that our socio-economic redress policies such as B-BBEE have failed to address inequality. In fact, the present constitutional dispensation has witnessed widening inequality while the structure of the economy has remained largely intact

³⁶ Thillainathan and Cheong *MJES* (2016) 51-68; Mokhtar *et al JMC* (2013) 12-17; and Mills *et al* (2020) 117-119.

³⁷ Ponte *et al DAC* (2007) 938.

³⁸ *Balaji v State of Mysore* AIR 1963 (SC) 649.

³⁹ Chaudhury *Economic and Political Weekly* (May 2004) 1989-1991.

⁴⁰ Jack (2007) 59-60.

since the apartheid era.⁴¹

The importance of the B-BBEE programme to promote equality and the economic inclusion of black people in the economy is indisputable. These objectives are rooted in the founding values of dignity, the achievement of equality and the advancement of human rights and freedoms, as entrenched in the Constitution.⁴² The Constitution contains several provisions enjoining the state to adopt remedial measures to correct previous injustice.⁴³ The most significant of these is the right to equality provided for in section 9 of the Constitution. Section 9(2) makes specific provision for remedial measures, not as an exception to the equality guarantee, but rather as an extension thereof.⁴⁴

The position on the constitutional validity of affirmative action measures, and therefore also the B-BBEE programme, is currently governed by the Constitutional Court's decision in *Minister of Finance and Others v Van Heerden*.⁴⁵ In this case, the Court formulated three criteria (a "threefold" inquiry / "three-pronged" test) for a valid constitutional restitutionary measure.⁴⁶ These constitutional requirements are discussed in Chapter 3 below.

B-BBEE has not succeeded in fulfilling its constitutional objectives to promote equality. In fact, South Africa is experiencing a continued trend and widening gap of inequality. The obvious question that arises is: why has B-BBEE, as the flagship programme of pursuing economic redress, failed to achieve or promote equality? This, despite the B-BBEE programme ostensibly meeting the requirements of the Constitution and the criteria set in *Van Heerden*. Therefore, the inevitable question is: What is the cause of the problem? Is it in the way the provisions of the Constitution are formulated or the criteria set in *Van Heerden*, or the formulation and implementation of the B-BBEE programme as such? Did the exceedingly poor economic policies and the political environment lead to the downfall and failure of the programme to promote and achieve substantive equality? The present study of the beneficiaries of the B-BBEE programme will to a large extent provide the answer to these questions.

⁴¹ World Bank *Overcoming Poverty and Inequality in South Africa* (2018) xvi.

⁴² S 1(a) of the Constitution.

⁴³ As above ss 1-3, 9, 195 and 217.

⁴⁴ *Minister of Finance and Others v Van Heerden* 2004 (6) SA 121 (CC) para [22].

⁴⁵ As above.

⁴⁶ As above para [37].

Black Economic Empowerment (BEE) is a broad term which refers to programmes which benefit black people in particular, such as outlined in the EEA,⁴⁷ PPPFA⁴⁸ and the B-BBEE Act.⁴⁹ This study relates to B-BBEE as a specific programme within the broader ambit of BEE. The EEA, PPPFA and other legislation such as the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA or Equality Act),⁵⁰ will be dealt with only insofar as they relate to socio-economic redress and specifically the beneficiaries of B-BBEE as subject matter of this study (the Research Question).

1.2 RESEARCH QUESTIONS

This research constitutes an appraisal of the question whether the implementation of the B-BBEE programme meets the requirements for substantive equality in terms of the Constitution and the required norms set by international law. In order to answer this question, the following sub-questions need to be considered: (1) What is the present definition or categorisation of the beneficiaries of B-BBEE? (2) What is the appropriate test or normative standard for substantive equality? (3) What insights can be derived from the history of B-BBEE since its commencement and the degree of success in achieving its purpose? (4) What lessons can be learned from international law and foreign jurisdictions?

It is not the intention of this research to question the B-BBEE project in general or the need to transform and increase the ownership of black people in the economy, in particular. Rather, the aim is to assess the programme's design and implementation, with specific focus on the formulation and categorisation of the beneficiaries of the programme. This will be done in the context of assessing the degree of success of the programme to promote substantive rather than formal equality as provided for in section 9 of the Constitution and circumscribed by well-established international law obligations.

⁴⁷ S 2 of the EEA provides as objective of the EEA the promotion of equity in the workplace.

⁴⁸ S 2(d)(i) of the PPPFA states as objective the contracting by the state with persons or categories of persons historically disadvantaged by unfair discrimination on the basis of race, gender and disability.

⁴⁹ S 2 of the B-BBEE Act provides as objective the meaningful participation of black people, especially communities, workers, cooperatives, collective enterprises and black women in the economy through ownership and management of enterprises, skills development and socio-economic upliftment programmes.

⁵⁰ S2 of PEPUDA which prohibits unfair discrimination by the state, private individuals and organisations.

1.3 SIGNIFICANCE OF STUDY

A preponderance of evidence and statistical data indicates that South Africa's unemployment rate has increased, as have income and wealth disparities between race groups but, importantly, also disparities within race groups.⁵¹

The question posed by government, political and legal commentators, and the public at large is whether B-BBEE has, given its track record since implementation in 2004, succeeded in promoting equality. All the important data figures suggest that South Africa has in fact regressed further in respect of inequality since the Constitution took effect. Renewed calls are ventilated to “rethink BEE” to place the programme on a path of promoting inclusive growth, true transformation and substantive equality. Various government policies, with B-BBEE as the flagship economic redress policy, have endeavoured to change the structure of the South African economy and allow for greater inclusivity. These efforts ring hollow in light of the overwhelming data suggesting an increase in the levels of poverty, unemployment and inequality.

The Zondo Commission's findings also placed the repurposing of state resources for personal interest through government procurement processes (state capture) in the public domain. Government procurement forms an integral part of B-BBEE. These findings, which received wide local and international coverage, coupled with government's inability to date to successfully prosecute any high-profile political individuals behind state capture and government procurement corruption, cast doubt on the legitimacy, justification and public acceptance of the B-BBEE programme.

The central objective of the research is—

- (1) to assess the shortcomings in the B-BBEE programme which cause it not to achieve its objectives as set in the Constitution and relevant legislation and in keeping with international law; and
- (2) to consider ways to improve B-BBEE to allow it to effectively achieve its ultimate goal of ever-increasing levels of substantive equality to the benefit of the whole of South Africa's

⁵¹ Chapter 2 para 2.2 below.

populace.

1.4 RESEARCH METHODOLOGY

The research methodology will involve a rights-based, more specifically an equality-based approach, to evaluate the legislative and policy framework of B-BBEE. This includes desktop research and a study of the relevant legal and legal-sociological literature, including legislative material, case law, academic literature, media releases and reports, international human rights instruments, reports by independent international research and policy institutions, and governmental documents and reports.

Although the research is primarily based on literary materials, it will to some extent also include quantitative data analysis of equality-related indicators such as statistics relating to poverty, income and wealth inequality and disparity, and statistical comparisons in respect of vulnerable groups such as women and people with disabilities.

This study will involve a broad analysis of the design of the B-BBEE Codes and the various directives and clarifications issued by the authorities in this regard. This is necessary to establish the practical operation of B-BBEE, without which no evaluation of its impact on individual entities and the extent to which it is designed to promote equality is possible. Relevant economic policies and concepts within which B-BBEE operates will be assessed, especially as part of the evaluation of the practical application of B-BBEE. The origin and development of the ideologies which drive these policies are assessed. These concepts are dealt with only insofar as they were deemed essential in making a meaningful constitutional evaluation of the impact of B-BBEE.

The study is not primarily comparative. However, in certain instances it was deemed necessary to draw on comparable jurisdictions that have implemented measures which to a lesser or greater extent are similar to the measures which are the primary subject matter of this research. The experience of Malaysia and India will therefore be consulted to elucidate certain aspects of the study.

This study has considered and incorporated all relevant research material until the end of February 2024.

1.5 PROPOSED STRUCTURE

The study will consist of seven chapters. The chapter outline of the study is as follows:

Chapter One – Introduction

This chapter covers contextual background to the research question, the relevance of the study, the objectives of the study, and the scope and research methodology adopted in the research endeavours of the study.

Chapter Two – Manifestation and Causes of Inequality, and Socio-Economic Ideological and Policy Developments

In this chapter the present-day prevalence and causes of inequality are assessed, including the most prominent historical events that gave rise to inequality. The ideology of the ruling⁵² African National Congress (ANC) as well as its historical development and how it applies to the B-BBEE programme, will also be assessed.

Chapter Three – The Constitutional Framework

In this chapter the Preamble, the Bill of Rights and other provisions of the Constitution endorsing the redress of historical imbalances are analysed. The equality provision of section 9 of the Constitution is the focus of the chapter. The principles of equality laid down by the Constitutional Court and the conflicting judgements in respect of the concept of equality are prominent.

Chapter Four – International Law and Comparable Foreign Jurisdictions

This chapter considers South Africa's commitment to certain international law obligations in respect of the dismantling of discrimination and the international normative standards set for special measures to promote equality.

Although not a comparative study, the redress model implemented and eventually phased out in Malaysia will be analysed and assessed. The India model, which empowered certain social groups in terms of the "Caste system" while applying rituals and customs to prevent other

⁵² The ANC received an outright majority in all national elections since 1994 but lost its majority in the May 2024 elections. Since May 2024, the ANC is still the largest political party in a multi-party coalition government.

groups from meaningful participation in the economy, will be evaluated.

Chapter Five – Promotion of Equality Legislation

This chapter analyses various other legislative instruments besides the B-BBEE Act, which also aim to promote socio-economic equality. The EEA, PEPUDA and the PPPFA, which have their roots in the Constitution, are examined, especially insofar as they relate to and interact with B-BBEE. The central focus of this examination is the intended beneficiaries of the legislation, and how they compare with the beneficiaries of the B-BBEE programme.

Chapter Six – The Legislative Framework and Mechanisms of the B-BBEE Programme

This chapter assesses the mechanisms of the B-BBEE model with regard to the legal and regulatory framework within which the programme operates. The shortcomings of the programme in terms of its design and implementation will be considered. The B-BBEE programme will be assessed to determine whether it meets the requirements of international law and the Constitution, with specific focus on the beneficiaries of the B-BBEE programme.

Chapter Seven – Conclusions and Recommendations

This chapter evaluates the B-BBEE programme in respect of shortcomings and the paucity of data used by government to focus on specific individuals and groups based on social status, the duration of the programme, and the impact or success of the programme. Recommendations will be made to align the programme with international legal standards and the constitutional requirements for special “restitutional redress measures” to promote substantive economic equality.

CHAPTER 2

MANIFESTATION AND CAUSES OF INEQUALITY, AND SOCIO-ECONOMIC IDEOLOGICAL AND POLICY DEVELOPMENTS

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2.1 INTRODUCTION

A thorough understanding of the prevalence, causes and ideological aspects of inequality requires firstly an elucidation of the concept of equality. Equality is an ambiguous and controversial concept. Although international law instruments¹ and the South African Constitution² provide for the right to equality, they do not *per se* define or explain the term. However, the Equality Act defines the term “equality” as the full and equal enjoyment of rights and freedoms as contemplated in the Constitution, including *de jure* and *de facto* equality, as well as equality in terms of outcomes.³ This definition of equality also implies the meaning of inequality. “Discrimination” is defined in the Equality Act as, amongst others, any act or omission which directly or indirectly withholds benefits, opportunities and advantages from any person on one or more of the prohibited grounds.⁴ The World Bank refers to inequality as “inequality of opportunity”.⁵ The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) defines racial discrimination as including discrimination that causes the unequal enjoyment of rights and freedoms in the economic sphere.⁶

The term “includes” in the Equality Act’s definition of equality suggests that equality as defined in the Act is in addition to its general meaning. The *Oxford English Dictionary* defines equality as “the state of being equal, especially in status, rights or opportunities”.⁷

Although a certain meaning can be gauged from the rights provided for in international law instruments and the Constitution, the exact meaning of equality remains broad and to some extent vague and uncertain. Lucia Rossi, a Professor in Legal Studies at the University of Bologna, Italy and judge of the European Court of Justice, with reference to equality among

¹ Art 25(c) of the International Covenant on Civil and Political Rights (ICCPR) 999 UNTS 171 states that every citizen shall have the right and the opportunity, without any of the distinctions mentioned in art 2 and without restrictions to have access on general terms of equality, to public service in his or her country; and art 5 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) 660 UNTS 195 provides for the prohibition and elimination of racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour or national or ethnic origin, to equality before the law, notably in the enjoyment of a wide range of civil and political rights, which include economic, social and cultural rights.

² S 9(1) and (2) of the Constitution provide for everyone to be equal before the law and equal protection and benefit of the law and includes the full and equal enjoyment of all rights and freedoms.

³ S 1 of the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA or Equality Act) 4 of 2000.

⁴ As above.

⁵ World Bank *Inequality in Southern Africa: An Assessment of the Southern African Customs Union* (2022) 28.

⁶ Art 1 of the ICERD.

⁷ *Oxford English Dictionary* (2020) 156.

member states in the European Union, for instance, posits that substantive equality in that context means “equality of power relations”.⁸

Nicholas Capaldi, a professor in public policy and political science at the University of New Orleans, United States, explains that equality is both a descriptive and normative concept. As a descriptive concept, equality is, by definition, an adjectival relationship between entities that are identical in some specific respect. No two entities can be identical in all respects, for then they would not be two entities but replicas. The equality may be one of quantity or quality. Equality may be expressed in respect of things, persons or social entities, such as institutions, groups and so on.⁹

Capaldi further explains that as a normative concept, equality is the notion that all human beings are in fact equal in some specific respect but that such factual equality requires that they be treated in a special way. Special treatment may mean identical treatment, or it may mean different treatment to restore them to or aid them in reaching or realising the specific factual state.¹⁰

Capaldi points out that the normative concept of equality is central to modern political and social debate. According to him, all disputes about equality as a normative concept centre around three points: (1) factual claims about the specific sense or senses in which human beings are identical; (2) what constitutes relevant special treatments, namely which specific senses carry normative weight; and (3) factual claims as to which public policies are consistent and coherent with and effective in ensuring the relevant special treatment.¹¹

Based on the various provisions relating to the right to equality and points of view in this regard, I am of the opinion that, for the purpose of this study, equality can be succinctly described as a situation in which men and women, people of different races, religions and so forth, are all treated fairly and have the same political, civil, social and economic opportunities and access to resources. Socio-economic equality is therefore part of the broader meaning of equality. Equality

⁸ Rossi and Casolari (2017) 5.

⁹ Capaldi (2002) 1. Nicholas Capaldi is a professor emeritus and the Legendre – Soulé Chair in Business Ethics at Loyola University New Orleans, USA. He is also the Associate Editor of the *Encyclopedia of Corporate Social Responsibility*.

¹⁰ As above.

¹¹ As above 1 and 2.

is more than the right not to be discriminated against. The terms equality and parity in relation to socio-economic status are used interchangeably in this study. This also applies to the use of the opposite terms, namely inequality, disparity, differentiation and discrimination.

In order to understand the manifestation of the high levels of inequality in South Africa, it is important to consider not only the present-day causes of inequality, but also historic events that gave rise to this phenomenon. Apart from the broad and often politically controversial meaning of equality, the presentation of history in general and that of inequality in particular, is also a controversial exercise. Martin Heidegger, the German philosopher, reminds us that—

“Historizing always takes place in the midst of an endless irreconcilable strife between destiny and fate – between un-chosen circumstances into which our community and generations have been thrown, and the essentially future resoluteness with which we project our inheritance and make it for the moment, our own.”¹²

Dawid Lotto, an American psychohistorian, who studies human behaviour by analysing the unconscious determinants of individual and collective actions, explains that “[A]ll historical accounts are biased: they are filtered through the perceptions and beliefs of the “author”.¹³ Hélène Lewis, a South African psychohistorian who conducted research on the Afrikaner and Afrikaner Nationalism, cautions that there is a collective memory in all of us; as such, the reader “cannot be a distant observer when it concerns his native people”.¹⁴

Thomas Piketty, a French economist, points out that each nation’s political and ideological trajectory can be seen as a vast process of collective learning and historical experimentation. Conflict is inherent in the process because different social and political groups have different interests, aspirations and memories. Thus, he concludes, they interpret past events differently and gauge from them different implications regarding the future. From such learning experiences, national consensus on certain points can nevertheless emerge, at least for a time.¹⁵

¹² Heidegger (1998) 48.

¹³ Lotto (2016) 7. Dr David J Lotto is a Psychology specialist practicing in Attfield, Massachusetts, USA.

¹⁴ Lewis (2016) 7. Hélène Opperman Lewis has for the past 30 years practised as a counselling psychologist in Cape Town and Swellendam, South Africa. During her doctoral studies with doctoral thesis title “The Development of a Social Conscience amongst Afrikaners” she discovered the field of psychohistory as the study of the “psychological why of history in large groups and nations”.

¹⁵ Piketty (2020) 10. Thomas Piketty is a French economist who is a professor of economics at the School for Advanced Studies in the Social Sciences, associate chair at the Paris School of Economics, and Centennial Professor of Economics in the International Inequalities Institute at the London School of Economics.

Despite this inherent or perceived subjectiveness, history remains an important part of the study of inequality, especially given South Africa's controversial history of racial discrimination. Furthermore, the Constitutional Court has held that historical origins are important factors to consider as part of a purposive interpretation to give effect to the Bill of Rights.¹⁶ History is further important for the purpose of this study to appreciate the present categorisation of B-BBEE beneficiaries.

It is not viable within the scope of this study to provide a detailed account of all historical events and conflicting interpretations that had in some way or other influenced equality in South Africa. However, some of the most pertinent historical events that influenced political and civil equality, especially where it impacted socio-economic parity, will be briefly considered and contextualised. In respect of inequality and ideology, Piketty explains that "inequality is neither economic nor technological; it is ideological and political".¹⁷ B-BBEE is a programme aimed at promoting equality and is therefore central to political ideology.

As will be shown in this study, the failure of the B-BBEE programme to promote substantive equality can largely be attributed to the broad statutory definition and categorisation of the beneficiaries of B-BBEE. The political beneficiaries within the broad scope of B-BBEE are at the heart of the ANC's ideology of transformation. The ANC's ideology and its historic roots and development are important elements in explaining the present B-BBEE programme and the manifestation of increased inequality in South Africa. This, despite the vigorous implementation of BEE programmes in all economic spheres which are expected to have the opposite effect.

2.2 THE MANIFESTATION AND CONTEMPORARY CAUSES OF INEQUALITY

Inequality is measured by reference to income, wealth and poverty.¹⁸

Recent research into the South African socio-economic situation suggests that income and wealth inequality manifests along the lines of race, gender and disability.¹⁹

¹⁶ *S v Zuma* 1995 (2) SA 642 (CC) para [17]; and *S v Makwanyane and Another* 1995 (3) SA 391 (CC) paras [9] and [10].

¹⁷ Piketty (2020) 7.

¹⁸ Lakner *et al World Bank Blogs* (Nov 2016) 3; Piketty (2020) 12; and Milanovic (2019) 27-29.

¹⁹ South African Human Rights Commission *Equality Report 2017/18* (2018) 17.

Data released by Statistics SA and other collaborative research data reflect not only the disproportionate prevalence of income and wealth inequality along racial, gender and disability lines but also the disparity in relation to poverty, with women more severely affected by poverty than men.²⁰

Research further suggests that poverty and disability are closely linked.²¹ People with disabilities are greatly under-represented in the labour market. Obviously, unemployment aggravates both poverty and inequality. The employment of persons with disabilities is below the 2% level in the public and private sector. White males dominantly represent disabled persons at senior management levels, while males with disabilities enjoy greater representation than females with disabilities at all occupational levels and across all population groups.²²

The National Development Plan (NDP)²³ of 2012 aims to reduce the percentage of households living below the extreme (food) poverty line of R419 and upper-bound poverty line of R1 227 per person per month, to zero by 2030.²⁴ This number has, despite those aspirations, grown in recent years from approximately 36% in 2011 to 55,5% in 2015.²⁵ According to Statistics SA, approximately 64% of the black African population and 40% of the coloured population group are living below the poverty line, compared to 6% of the Indian/Asian population group and just 1% of the white population group.²⁶

Apart from high and increasing levels of poverty, income inequality measured according to the Gini Coefficient²⁷ stood at 0.68, which is the highest in the world. South Africa is consequently labelled as the most unequal society in the world.²⁸ The World Bank noted:

²⁰ Stats SA *Poverty Trends in South Africa: An Examination of Absolute Poverty between 2006 and 2015* (2017) 14 and 17.

²¹ South African Human Rights Commission *Research Brief on Disability and Equality in South Africa 2013-2017* (2017) 13.

²² Commission for Employment Equity 22nd *Commission for Employment Equity Annual Report 2021-22* (2021-2022) 10.

²³ National Planning Commission *The National Development Plan (NDP) 2012-2030* (2012) 14.

²⁴ National Planning Commission *Economic Progress Towards the National Development Plan's Vision 2030* (Dec 2020) 21. The "extreme poverty line" refers to the amount that an individual needs to afford the minimum required daily energy intake, also referred to as the "food poverty line". The upper poverty line is calculated by adding the average expenditure on non-food items to the value of the food poverty line. These calculations contained in the National Development Plan (NDP) were based on figures in 2009. For 2022, the food poverty line, according to Stats SA's *National Poverty Line in South Africa 2022* (Apr 2022) 3 is R663 and the monthly upper bound poverty line is R1 417.

²⁵ World Bank *Overcoming Poverty and Inequality in South Africa* (2018) 39.

²⁶ Stats SA *Poverty Trends in South Africa: An Examination of Absolute Poverty between 2006 and 2015* (2017) 20 and 21.

²⁷ Where a value of 0 represents complete equality and a value of 1 represents complete inequality.

²⁸ World Bank *Overcoming Poverty and Inequality in South Africa* (2018) xvi.

“South Africa is not only the most unequal country in the world, but inequality has increased since the end of apartheid in 1994. Moreover...between 1993 and 2015, inequality rose in South Africa but fell in each region of the world.”²⁹

The unemployment rate is presently 31,9%.³⁰ Wage inequality is singled out as the most important component of income inequality and the single largest driver of inequality in South Africa.³¹ For instance, the earnings of each director in the top 200 listed companies is equivalent to 494 minimum wage jobs.³² In 2015, the top 10% of full-time South African employees took home on average 82 times more than the bottom 10%, with the average earnings for white workers more than three times higher than for African workers.³³ There are also significant racial pay disparities. In 2016, white males in the formal sector earned a median salary of R21 000 per month, compared to R13 331 for white females, R3 612 for black men and R2 887 for black women.³⁴

Furthermore, the Gini Coefficient for wealth inequality in South Africa is even higher than income inequality at 0.95.³⁵ This supports the global trend that inequality in wealth distribution exceeds inequality in income distribution. The top one percent of households owned 70,9% of the wealth, while the bottom 60% owned 7,0%.³⁶ A study undertaken by the Southern Centre for Inequality Studies in 2020 based on tax data suggests that the top 16% own as much as 85% of wealth and the upper 0,1% at least 25% of all wealth.³⁷ Rich households are almost ten times wealthier than poor households.

Ownership of financial assets is identified as a main contributor to wealth inequality.³⁸ Income data illustrates income and wealth inequality and disparity between genders, with males, for instance, receiving 60% of all income derived from investments, compared to females who receive 40%.³⁹

²⁹ As above xv and xvi.

³⁰ Stats SA *Quarterly Labour Force Survey Quarter 3:2023* (Nov 2023) 4.

³¹ Francis and Massie (2018) 36 state that wage account of 90,65% of total income inequality in South Africa.

³² McGregor (2018) 33.

³³ University of Witwatersrand *A National Minimum Wage for South Africa* (2016) 1-5.

³⁴ Francis and Massie (2018) 40.

³⁵ Turok (2018) 4 and 5 refers to wealth as the ownership of assets and financial assets.

³⁶ Orthofer *REDI* (2016) 23.

³⁷ Southern Centre for Inequality Studies *Estimate the Distribution of Household Wealth in South Africa* (2020) 26.

³⁸ World Bank *Overcoming Poverty and Inequality in South Africa* (2018) xv and xvi.

³⁹ South African Human Rights Commission *Equality Report 2017/18* (2018) 17.

Income-data-based research further suggests that an average black household holds 4% of the wealth held by an average white household, while an average coloured household holds about 6% of the wealth held by their white counterparts. This means that for every R1 held by an average black and coloured household, a white household will hold R22,84 and R16,00 respectively.⁴⁰

Wealth inequality is similarly apparent within age groups, with the most extreme inequality occurring within the youth (working age 15 to 34) category who are most affected by unemployment.⁴¹ In respect of different age groups, wealth is concentrated in the top 10%, with the bottom 50% holding almost no wealth.⁴² Data suggests that wealth inequality increases at a much faster rate than income inequality.

According to these figures, it is evident that many black households are unable to pass wealth on to future generations, which perpetuates wealth inequality along racial lines. It is significant that according to research, wealth inequality is greater within the black African population group than within any other racial group.⁴³

Apart from the fact that wealth inequality is greater within the black population, data also confirms that the poverty gap and inequality in general are higher within the black population and increasing compared to other racial groups. The World Bank's research into overcoming poverty and inequality in South Africa indicates a 3,7% increase in poverty among black South Africans between 2011 and 2015, compared to a decline among white South Africans.⁴⁴ According to Statistics SA, the poverty gaps for black Africans and Coloureds living below the poverty line increased from 16% in 2011 to 18% in 2015. The poverty gap for Indian South Africans for the corresponding period did not show any increase, with a consistent poverty gap rate of 2,2% over the same period. Between 2011 and 2015, the Gini Coefficient as indication of inequality for all population groups on average in South Africa, declined from 0.69 to 0.68. Black Africans are the population group with the highest level of inequality, with a Gini Coefficient of 0.65 in 2011, which

⁴⁰ Mbewe and Woolard *NIDS Discussion Paper* (2016) 12.

⁴¹ Stats SA *Quarterly Labour Force Survey: Quarter 3: 2023* (Nov 2023). The "employment rate of age groups 15-24 years is 58% and for 25-34 years, 38,3%.

⁴² Mbewe and Woolard *NIDS Discussion Paper* (2016) 17.

⁴³ Orthofer *REDI* (2016) 41.

⁴⁴ World Bank *Overcoming Poverty and Inequality in South Africa* (2018) 14.

remained the same until 2016 and did not decline in line with other population groups.⁴⁵ The late Ben Turok, an anti-apartheid activist, politician and economics professor, observed that the emergence of some “rich black personnel” as “social group explains the fact that inequality among Black Africans is now greater than in the population as a whole”.⁴⁶

South Africa’s African middle class, in particular, has shown substantial growth over the past three decades. In 1993, the African middle class was 2,2 million people, which grew to 5,4 million in 2008 and to 7 million in 2022.⁴⁷ A comparison of the middle and upper classes for all race groups for the period 2008 to 2014, illustrates the disproportionate growth of especially the African upper and middle classes compared to other race groups.⁴⁸ In 2008, Africans represented 42% of the middle class, Whites 36%, Coloureds 16% and Indians 6%, while in 2014 Africans represented 50% of the middle class, Whites 28%, Coloureds 14% and Indians 7%.⁴⁹ The elite (upper middle class) in 2008 consisted of 17% Africans, 66% White, 7% Coloured and 11% Indian, while in 2014, the elite comprised 24% Africans, 57% Whites, 7% Coloureds and 11% Indians.⁵⁰ The African poor, transient poor and vulnerable groups had in the same period (2008 to 2014) grown by approximately 10%, while the other race groups had seen a decline in poor, transient and vulnerable poor groups of approximately 5% in the corresponding period.⁵¹ Thus, the size of the African middle class and elite had outgrown the other race groups but so did the size of the African poor classes. Consequently, this widening gap between rich and poor continues to increase the inequality levels within the African population group compared to other race groups. In other words, the African upper and middle classes have grown at the expense of the African poor classes. Statistics also show that while the gross income of the top 10% of black earners has tripled, that of the bottom 50% has declined. Looking at the ratio of white earners to the bottom 90% of black earners, the racial gap has increased since the end of white rule.⁵²

The late Sampie Terreblanche, who was a Professor of Economics at the Stellenbosch

⁴⁵ Stats SA *Poverty Trends in South Africa: An Examination of Absolute Poverty between 2006 and 2015* (2017) 20 and 21.

⁴⁶ Turok (2018) 6. Turok passed away on 9 Dec 2019.

⁴⁷ UCT Liberty Institute of Strategic Marketing *Black Middle-Class Report* (2022) 5.

⁴⁸ Stats SA *Poverty Trends in South Africa: An Examination of Absolute Poverty between 2006 and 2015* (2017) 20 and 21.

⁴⁹ World Bank *Overcoming Poverty and Inequality in South Africa* (2018) 39.

⁵⁰ As above.

⁵¹ As above. The poor were classified according to Stats SA’s upper-band poverty line (UBPL) of R992 (in Jan 2015 prices) per person per month.

⁵² The Economist *Economist.com* (Sep 2021) 23.

University, noted that the country had been transformed from “a rigid racially divided South Africa into a highly stratified class society”.⁵³ He pointed out that while the income of the top 20% of African households (approximately 6 million people) increased by 60% from 1975 to 2002, the income of the bottom 40% declined by almost 60% over the same period. The income of the top 20% of African households in 2002 was 40 times higher than that of the bottom 40% of African households.⁵⁴

The increase in inequality within groups gives rise to a new form or pattern of inequality, namely class inequality.⁵⁵ Provisions in international law and the South African equality jurisprudence aim to address not only inequality emanating from direct or indirect forms of discrimination related to race or gender, but also class inequality. This is discussed in chapter 3, paragraph 3.5 and chapter 4, paragraph 4.2 respectively.

The enjoyment of social rights such as the right to health, education and housing, is extremely unequally distributed in South Africa. This unequal access, distribution and enjoyment among groups are often termed “vertical inequality”. In contrast to vertical inequality between groups with distinct characteristics, “horizontal inequality” focuses on inequality within different groups that share similar characteristics and traits, such as race, sex, gender and sexual orientation.⁵⁶

The concept of “intersectionality” is important in the context of equality. Intersectionality refers to instances where certain people and groups face multiple forms of discrimination based on their identities. For example, where a black male may face direct and indirect discrimination, a black female may be discriminated against on more than one ground, for instance gender and race. A black homosexual female may be subject to discrimination based on gender, race and sexual orientation.⁵⁷

The SAHRC states that due to the incredibly high levels of poverty and income and wealth inequality, transformation policies should be “radical in their approach and pursue transformation through rights-based means as opposed to purely economic or utilitarian based approaches”.

⁵³ Terreblanche (2002) 33 and 132. Terreblanche passed away on 17 Feb 2018.

⁵⁴ As above.

⁵⁵ Seekings and Nattrass (2006) 340.

⁵⁶ South African Human Rights Commission *Equality Report 2017/18* (2018) 21.

⁵⁷ As above.

The human rights-based approach proposed by the SAHRC suggests turning human rights from purely legal instruments into effective policies, practices and practical realities. It emphasises how human rights should be achieved, contrary to a utilitarian approach which strives to achieve the greatest good for the greatest number while causing the least amount of harm. According to the SAHRC, the objective of economic transformation should rather be the achievement or promotion of substantive socio-economic equality by targeting those within groups based on the social and economic needs of such individuals.⁵⁸ This statement of the SAHRC coincides with international law requirements for measures to promote equality based on data of the social conditions of targeted groups, rather than a rights-based approach.⁵⁹ In this regard the World Bank suggests that “[i]nterventions that simultaneously stimulate growth and reduce inequalities are likely to have much more impact than interventions that only stimulate growth or only reduce inequalities”.⁶⁰

According to the International Monetary Fund (IMF), low growth and rising unemployment are the main reasons for persistent inequality levels in South Africa. It observed that inequality manifests itself through skewed income distribution, unequal access to opportunities, and disparities among various regions in South Africa. Being close to urban centres such as Johannesburg and Pretoria increases job and income prospects as opposed to rural areas situated far away from urban industrial centres with far fewer employment opportunities.⁶¹ The IMF also noted that South Africa’s inequality has increased since the early 2000s while peer emerging market countries had made inroads towards reducing inequality.⁶²

The IMF expressed concerns regarding the South African government’s ability to leverage fiscal policy as a redistributive tool due to its high debt levels.⁶³ It suggested that more low-skilled jobs be created to improve labour force participation as a spur to inclusion, especially in the poorest provinces.⁶⁴ The IMF pointed out that an improvement in the quality of education and the facilitation of affordable transportation would improve employment prospects.⁶⁵

⁵⁸ As above.

⁵⁹ See ch 4, para 4.2 below.

⁶⁰ World Bank *Overcoming Poverty and Inequality in South Africa* (2018) xxvi.

⁶¹ International Monetary Fund *IMF Country Focus* (2020) 1.

⁶² As above 3.

⁶³ As above 6.

⁶⁴ As above 4.

⁶⁵ As above 5.

According to Stats SA, those most affected by poverty are generally African females; children younger than 17 years; those living in rural areas of the Eastern Cape and Limpopo; and people without an education.⁶⁶

The World Bank, in a 2022 study regarding inequalities in Southern Africa, examined the process of household income generation to identify the sources of inequality in the region.⁶⁷ It found that the Southern African Customs Union (SACU) member states of Botswana, Eswatini, Lesotho, Namibia and South Africa represent the world's most unequal region, with Namibia and South Africa having higher inequality than the rest, and Lesotho the least.⁶⁸ The Report shows that about 20% of inequality in Southern Africa relates to inherent circumstances such as location, gender, age, and parental background. When race is included in the analysis, the contribution of inequality of opportunity more than doubles.⁶⁹ High wealth inequality limits intergenerational economic mobility, making consumption inequality persistent over time.⁷⁰

In the labour market, having post-secondary or tertiary education is key to both accessing jobs and obtaining better wages once employed.⁷¹ In Namibia and South Africa, where inequality is distinctly higher than in the other countries in Southern Africa, the World Bank found that the acute inequality in land ownership also contributes towards perpetuating the historically high levels of income inequality.⁷² The World Bank referred to the following as the main causes of inequality in South Africa and other regional states: spatial disparities; high unemployment; poor governance and productivity; inefficiency in spending on education and health; inefficient delivery of public services; and land distribution.⁷³

In 2019, the United Nations World University Institute for Development Economics Research (Uni-Wider) conducted an analysis of poverty dynamics in South Africa for the period 2008 to 2017.⁷⁴ The study focused on the correlation of transitions into and out of poverty, and

⁶⁶ *Stats SA Poverty Trends in South Africa: An Examination of Absolute Poverty between 2006 and 2018* (2017) 18.

⁶⁷ *World Bank Inequality in Southern Africa: An Assessment of the Southern African Customs Union* (2022) 9.

⁶⁸ As above.

⁶⁹ As above 1-7.

⁷⁰ As above 41.

⁷¹ As above 36 and 89.

⁷² As above 60-65.

⁷³ As above 118-123.

⁷⁴ United Nations University World Institute for Development Economics Research (Uni-Wider) *Snakes and Ladders and Loaded Dice* (Mar 2019) 1.

investigated how multi-dimensional inequalities in terms of household and individual characteristics relate to both poverty persistence and vulnerability poverty.⁷⁵

For the purpose of their study, they distinguished between three main categories. The first category is “poor” which was classified according to Stats SA’s upper-bound poverty line (UBPL) as an income of R1 138 per person per month in March 2017, including households with an income of R531 per month, classified by Stats SA as living within the extreme food poverty line (FPL). The FPL captures the level of consumption below which individuals are unable to purchase sufficient food to fulfil their caloric requirements even if all expenditure is on food. This group also constitutes the chronically poor, meaning those who do not transcend in and out of poverty. The Uni-Wider study showed that about 30% of the South African population fall within the category of chronically poor.⁷⁶

The second category is a group of so-called “non-poor” households who find themselves in a position of economic precariousness when they are teetering on the brink of poverty. This group is referred to as “non-poor but vulnerable” or “transient poor”. They constitute 26,8% of the population.⁷⁷

The third category is a “stable middle class”. They are defined as a group of non-poor households who are non-vulnerable, meaning they face a relatively low risk of falling into poverty over time. The study found that 24,4% of the South African population can be classified as part of the stable middle class or “elite”.⁷⁸

The study draws on expenditure rather than income of households as a measure of economic welfare. This method is based on the assumption that expenditure is a good proxy for the resources which are available to individuals and hence reflective of their overall living standards and economic wellbeing. This method of analysing poverty is further based on the premise that the extent to which households are able to manage consumption expenditure is a better measurement of permanent household income.⁷⁹

⁷⁵ As above 1-5 and 23.

⁷⁶ As above 1, 2 and 24.

⁷⁷ As above 2 and 24.

⁷⁸ As above.

⁷⁹ As above 6.

The study found that the food-poor and non-poor households (the first and second categories) display a greater degree of stability; that is, they largely remain in their respective positions.⁸⁰ A clear distinction was also apparent in the dynamic poverty patterns across the urban/rural divide. A striking 2,5% of rural households remained non-poor (stable middle-class) throughout the study period (2008 to 2007), while 82,86% were poor. In contrast, 24,7% of urban households remained stably non-poor and 42,7% were poor.⁸¹

Persistent poverty was found to affect primarily African, single-parent, female-headed and rural households. It was found that these households were often poorly educated and long-term unemployed.⁸² The urban African population, in particular, were found to be affected by transient poverty – those who are poor and often move out of poverty, and those who are not poor but often fall (back) into poverty over time.⁸³ The study found that the third category of stable middle class is resilient to poverty due to their employment status and type of employment. These resilient households were found to be formally and permanently employed, with union coverage.⁸⁴

According to the study, those described as poor and non-poor but vulnerable or transient poor should receive special attention and be targeted in policy formulation.⁸⁵ Finally, the study found that there was indicative evidence that the poor (and vulnerable non-poor) were not only more exposed to several risk factors, but also seem disproportionately deprived in terms of their access to effective formal and informal insurance mechanisms to confront these socio-economic risks. This higher risk of exposure and the inadequacy of existing coping strategies necessitate “targeted social protection interventions”. The Uni-Wider study suggested that to overcome poverty, policymakers will be required to investigate more closely how social stratification is related to distribution and poverty-triggering events, on the one hand, and access to coping mechanisms, on the other.⁸⁶

The IMF and Uni-Wider studies further revealed that much emphasis was placed by government

⁸⁰ As above 9.

⁸¹ As above.

⁸² As above 11.

⁸³ As above.

⁸⁴ As above 24.

⁸⁵ As above.

⁸⁶ As above.

on reducing inequality, for instance the efforts to cap executive pay.⁸⁷ If such measures do in fact result in bringing the incomes of the lowest and highest earners closer together, and consequently reduce inequality, they have not in any sense positively changed the income position or social status of the poor at the lowest levels. Therefore, measures to cap or reduce the income of high earners will not necessarily change the poverty position of the lower strata.

The relationship between income distribution and economic growth has been the subject of ongoing debate.⁸⁸ The relationship depends on a country's stage of development.⁸⁹ Piketty opines that in developing countries such as South Africa, a rise in economic growth will in all probability have a positive effect on inequality.⁹⁰ This is not necessarily the case in developed countries.⁹¹ In environments of high growth in developing countries it will ameliorate the position of the poor, but also exponentially promote the position of the middle and upper middle class.⁹² Therefore, in a high-growth environment, inequality may increase but poverty levels will be reduced.⁹³ The National Planning Commission indicated in 2012 that South Africa would need an annual growth rate of at least 5% and would have to increase the growth rate gradually to be twice that rate in 2030 to accommodate new job seekers per year.⁹⁴ South Africa has averaged a growth of less than 2% since 2004,⁹⁵ with unemployment escalating from 20% in 2004 to almost 32% in 2023.⁹⁶

Data and various studies have shown that certain black social groups are particularly vulnerable to poverty and inequality, namely black people from rural areas in the Eastern Cape and Limpopo; those described as poor and transient poor; black women; households headed by uneducated black female single parents; the black youth; people with no or poor-quality education; and people with disabilities.

⁸⁷ As above. Also Francis and Massie (2018) 49 who point out that disclosure of pay parities and setting of pay ratio caps are options for tackling pay inequality.

⁸⁸ Thillainathan and Cheong *MJES* (2016) 51; and Piketty (2020) 24-27.

⁸⁹ World Bank *Effects of Income Inequality on Aggregate Output* (2015) 149-175; and Piketty (2020) 24.

⁹⁰ Piketty (2020) 24.

⁹¹ Seekings and Nattrass (2006) 12-17.

⁹² Milanovic (2018) 18.

⁹³ Piketty (2020) 24; Also see Milanovic (2018) 90 who states that countries which “had faster growing rates having also had greater reduction in inequality”.

⁹⁴ National Planning Commission *The National Development Plan 2012-2030* (2012) 110.

⁹⁵ World Bank *Macrotrends – South Africa Unemployment Rate 1960-2024* (2024) 2.

⁹⁶ Stats SA *Quarterly Labour Force Survey Quarter 3: 2023* (Nov 2023) 21 and 22.

What is required, therefore, is a shift in focus from primarily closing income and wealth gaps, to eradicating poverty, which may in any event reduce inequality as the country becomes more developed. Even if it does not reduce inequality for certain periods of high growth, a scenario of reduced levels of poverty in exchange for temporary higher inequality may be a better trade-off. B-BBEE, by empowering the lower income and social status groups, will shift the focus from upper- and middle-class enrichment to the eradication of poverty of the lower social class. This approach will address inequality from the bottom up and also reduce poverty.

2.3 HISTORY OF INEQUALITY IN SOUTH AFRICA

Some political commentators, social scientists and historians argue that gross income and wealth inequality based on race in South Africa can be largely attributed to structural injustices caused by historical race-based laws and policies.⁹⁷ Past discrimination based on identity traits such as race, gender and disability can be perpetuating and structural and could exclude people from economic participation and the labour market.⁹⁸

Terreblanche states that when the ANC assumed power in 1994, it inherited a rather contradictory legacy. On the one hand, it inherited the most developed economy in Africa, with a modern, well-developed infrastructure. On the other hand, it inherited major socio-economic problems. These socio-economic problems include high levels of unemployment; the abject poverty of 50% of the population; sharp inequalities in the distribution of income, property and opportunities; and high levels of crime and violence. It was particularly black South Africans, and more specifically Africans, who were, and still are, at the receiving end of this socio-economic subjugation.⁹⁹

These socio-economic challenges are “largely the unresolved remnants of white domination and apartheid”.¹⁰⁰ Terreblanche suggests that any attempt to study South African history to determine the core reasons for the accelerated levels of inequality in South Africa presently,

⁹⁷ Terreblanche (2002) 3-5. Also see Turok (2018) 3 and 4 who notes that structural inequality is illustrated by the fact the labour market is split in two extreme types. A small number of highly paid people in the formal sector and a much larger number who work in low-paid jobs and are often in the informal industry.

⁹⁸ Terreblanche (2002) 25; and Smith (2018) 109-115.

⁹⁹ Terreblanche (2002) 4; and Department of Trade and Industry (DTI) *South Africa's Economic Transformation: A Strategy for Broad-Based Economic Empowerment* (2003) 4.

¹⁰⁰ As above.

should be from any one of the following three perspectives: firstly, the perspective of white political and economic domination; secondly, the perspective of land deprivation; and thirdly, the perspective of black labour.¹⁰¹

Terreblanche proposes that a true reflection of the history of inequality should begin with the arrival of the Dutch settlers in 1652. The development of inequality can be described over three periods between 1652 and 1900, namely colonialism (1652-1890); segregation (1890-1948); and apartheid (1948-1990).¹⁰²

Terreblanche's suggestion that an investigation into inequality should start with the arrival of the Dutch settlers in 1652 seems oversimplified. The socio-economic position of Europe in comparison to Africa in the 1500s and 1600s at the time of the Europeans' arrival in Africa, as a starting point, also needs to be considered. Socio-economic disparities and levels of literacy already existed between Europeans and Africans by the time Europeans set foot in Africa. Thus, white Europeans and indigenous African Groups did not start on an equal footing.¹⁰³

Although the modern study of African economics suggests that Africa's economy was not as underdeveloped as earlier historians suggested,¹⁰⁴ most historians believe that Europe had advanced economies compared to Africa in the 15th to 17th century when Europeans arrived in Africa. During that time, Europe, and especially Western Europe, experienced continued urbanisation with an exponential growth in consumer markets, so-called proto-industrialisation,¹⁰⁵ and cross-border trading.¹⁰⁶

This was seen as the start of early Western capitalism. The availability of capital had a profound influence on the advancement of technology, entrepreneurships, money markets, currencies, prices and inflation, monetary systems, shipbuilding, maritime trade, agriculture, trade, manufacturing, banking, weaponry development and military capacity.¹⁰⁷

¹⁰¹ Terreblanche (2002) 6.

¹⁰² Terreblanche (2002) 4, 153, 179, 219 and 297.

¹⁰³ Rietbergen (2021) 1-15.

¹⁰⁴ Mlambo *Oxford Research Encyclopedias* (2018) 1 and 16.

¹⁰⁵ Ogilvie (2008) 1 describes "proto-industrialisation" as the massive preparation of exported handicrafts which took place in Europe between the 15th and 16th century.

¹⁰⁶ As above.

¹⁰⁷ De Vries (1976) 15-25; and Herald *EH. Net Encyclopedia* (2004) 1-4.

Although the northern, eastern and central parts of Africa had empires and cities which traded with Arab groups in the late centuries before, and early centuries of the Christian Era, it was not on the same economic scale and level of sophistication as that of Europe.¹⁰⁸ The East African economy specifically was Arabic and not African during this period. During the time of European discovery, Southern Africa was characterised by tribal, territorial, indigenous, hunter-gatherer and subsistence communities.¹⁰⁹

Urbanisation has always been a key measurement of economic and industrial development. During the time of the European discovery of Africa, indigenous people (Khoikhoi, San and Bantu) in South Africa lived a nomadic life in rural areas, while in Holland two-thirds of the population were already living in towns.¹¹⁰ This highlights the vast differences in the level of economic, social and cultural development between Europe and Africa.

Ebrahim Harvey, a political writer and analyst, states that in the wider global context, differences between the level of development of the Dutch settlers at the time of European discovery and the conditions they found in the Cape, “are vast, multi-layered and stark”. He continues by pointing out that “no politics, ideology or revolutionary fervour in fact can ignore those facts and realities”.¹¹¹ However, he uses this reality to advance a pro-socialist thesis. Harvey argues that capitalism, which originated in white Western Europe and is historically superior compared to black Africa, is in fact inherently racist. He maintains in line with Marxist-Leninist-theory that for this reason, socialism cannot co-exist with capitalism and that capitalism needs to be totally dismantled to ensure a non-racist and classless society in which the working class governs.¹¹²

It is also commonly accepted by historians and economists that the European economies excelled as a result of access to resources and labour, especially after the colonisation of Africa by European countries in the 1800s. This further widened the inequality gap between Europe and Africa. Industrialisation and mining by the colonisers brought infrastructure and other developments to Africa. There are various studies (and debates) in which the advantages of

¹⁰⁸ Oliver and Fage (1970) 13-15.

¹⁰⁹ Marshall and Hildebrand *Journal of World Prehistory* (2002) 100-120; and Mlambo *Oxford Research Encyclopedias* (2018) 3 and 4.

¹¹⁰ Giliomee *et al* (2022) 14-37 describe the indigenous people before and at the time of the arrival of Europeans as hunter-gatherers and substance farmers.

¹¹¹ Harvey (2021) 51. Ebrahim Harvey is a former trade unionist, a political writer, analyst and commentator.

¹¹² As above 52 and 53.

development and the income it generated for African tribal chiefs and governments are weighed up against the adverse effects of the slave trade and depletion of African resources.¹¹³ The classic question often asked by academics is: what would the present inequality position have been between Europe and Africa if Europeans had never set foot in Africa?¹¹⁴

An examination of this question does not fall within the ambit of this study. Its importance in terms of the purpose of this study is twofold. Firstly, as a starting point, the realisation that historically socio-economic inequality between Whites from Europe and the black indigenous people of Africa existed before and at the time of arrival of Europeans in South Africa. Secondly, how did the period following the arrival of the Europeans further shape the history of inequality? This post-arrival period will be studied as from the recording of history in 1652 and will be viewed from two perspectives. Firstly, a brief study of the political system of disenfranchisement of non-white people before 1994 is important as political power may generally be assumed to precipitate economic power. The opposite also applies, namely that political disempowerment may be generally assumed to lead to economic disempowerment.¹¹⁵ This leads to the second perspective, namely the historical developments in respect of the political and socio-economic disempowerment of black people before 1994.

The approach adopted in this part of the study is to provide background information regarding the various types of societies that existed and the politico-social dimensions since 1652. This is examined over time instead of within a particular period; for instance, the apartheid era is not singled out. Such approach will give a better understanding of the political decisions taken at a particular stage and how they influenced history over the centuries. This perspective should not be regarded as a defence of any political ideology that existed at any specific period but is intended to ensure the proper positioning thereof within the context of historical events. It should also be viewed within the reality that any discussion and analysis of political ideology and South Africa's history will be contested, and no-one's analysis can always be regarded as neutral or objective. The history of inequality in South Africa will be discussed within a brief overview of the history of South Africa and the three main contributors to inequality, namely land, labour and education. This is important as the Constitutional Court, in *Government of the Republic of South*

¹¹³ Frankema *et al African Economic History Network* (2015) 15.

¹¹⁴ See Heldring and Robinson *National Bureau of Economic Research* (2012) 1-7.

¹¹⁵ See Terreblanche (2002) 5 who refers to the "special relationship between power, land and labour" as contributing to the inequality of black people.

*Africa and Others v Grootboom and Others*¹¹⁶ stated that rights must not only be understood in their technical context but also in social context.¹¹⁷

2.3.1 Brief Overview of the History of South Africa

2.3.1.1 Political History

In order to understand the impact of history on the ability of black people to fully participate in the present economy, an overview of South Africa's history will be discussed from a political point of view, including the dispossession of land and resources of non-white people and the effect thereof on labour and education of black people.¹¹⁸

In 1652, a supply and trading depot was founded at the Cape by the Dutch East Indian Company (Dutch Verenigde Oosindische Compagnie – VOC). The purpose of the settlement was to facilitate trade with East India. The settlement in the Cape was not orchestrated by the Dutch government but rather by a chartered company with its headquarters in Batavia, presently Jakarta, the capital city of the present Indonesia located in the northern parts of the Java Island. The settlement by VOC was therefore a commercial undertaking.¹¹⁹

During the 17th century, the Dutch Parliament delegated to the VOC its law-making and other state authorities in respect of all foreign territories occupied by the company. The legislative, executive and judicial authority in the Cape therefore vested in the head of the VOC in the Cape, namely the Governor in Council. These powers were executed in terms of the directives issued from Batavia. No voting or other political rights existed during the period of VOC rule.¹²⁰

With the second occupation of the Cape in 1806 by the British, Dutch rule ended and was replaced by the British government's authority which vested in the Governor. The Governor had vast powers. His legislative and executive powers were only subject to the British government under certain circumstances. In 1825, a nominated Advisory Council was introduced in the Cape,

¹¹⁶ 2001(1) SA 46 (CC).

¹¹⁷ As above para [22].

¹¹⁸ Department of Trade and Industry (DTI) *South Africa's Economic Transformation: A Strategy for Broad-Based Black Economic Empowerment* (2003) 5 which identifies the "legacy of dispossession of black people from economic power" in the 1800s and 1900s as present reasons for economic exclusion of black people.

¹¹⁹ Giliomee *et al* (2022) xvi and 62; and Simpson (2021) 1.

¹²⁰ Carpenter (1987) 50-58.

composed of a chief justice and other leading state officials.¹²¹

In 1834, the Governor in the Cape, Sir Benjamin D'Urban, introduced a new constitution for the colony. It provided for two Councils, namely an Executive Council and Legislative Council. The Executive Council exercised control over the Governor's powers. However, the Governor remained in a powerful position as he could veto decisions in the Council. In 1837, municipal boards were instituted which allowed for representatives to be elected. This introduced the first representative institution in the Cape.¹²²

In 1853, a new constitutional system was introduced which for the first time provided for a Parliament composed of a Governor and two Houses, namely an upper house, the Legislative Council, and a lower house, the House of Assembly. The House of Assembly consisted of 46 members to be elected in electoral constituencies. Criteria for election (franchise qualification) to the House of Assembly were low and did not exclude any race from participating. Higher qualifications were required for the Legislative Council.¹²³

As from 1872, the principle that the executive had to enjoy the support of the majority in Parliament, applied. White males could be elected to the executive, subject to certain very low educational and economic qualifications. Parliament had to be convened once a year. The system was based on the British Westminster model which recognised freedom of speech and debate. As colony boundaries expanded, more indigenous people were included in its jurisdiction. As a result, the system was gradually amended, and franchise qualifications were made stricter.¹²⁴

Since the second occupation of the Cape by the British in 1806, the Afrikaner¹²⁵ burghers in the Cape were increasingly in dispute with the British authorities who constantly accused them of and prosecuted them for illegally occupying indigenous land within the British territory. At the end of 1835, many of the Afrikaner burghers finally decided that they could no longer stay along

¹²¹ As above.

¹²² As above.

¹²³ As above 60.

¹²⁴ As above 59 and 60.

¹²⁵ Giliomee *et al* (2022) 102 explain that the Afrikaner descended mainly from the Dutch and their numbers were later supplemented by Huguenot refugees from France and immigrants from Germany. Also see s 6(1) of the Constitution, in terms of which Afrikaans is recognised as one of the 11 official languages.

the Eastern border, which was a war zone between burghers and Xhosas, the black ethnic group living in that area. In their experience the option was either to move away or to perish. They pioneered into the northern and eastern regions of South Africa. On their journey northward, the pioneers (Trekks) had to move over land and territories occupied by indigenous groups. This repeatedly brought them into conflict with these groups, with ensuing skirmishes and loss of life, cattle and livelihood on both sides.¹²⁶

The majority of the Trekks settled in Natal (the present KwaZulu-Natal Province). In 1838 the Trekks established the Republic of Natalia and adopted a document titled *Regulation en Instructien* to govern the area.¹²⁷ The region was subsequently occupied by the British in 1842 and from then onwards governed under the British colonial system, with a qualified non-racial franchise, as in the Cape. Many Trekks who initially settled in Natal were not prepared to serve under British rule and pioneered to the northern parts of South Africa. The British established a sugar cane industry in the 1860s in Natal. Farm owners had a difficult time attracting Zulu (the black ethnic group in that area) labourers to work on their plantations, so the British brought in thousands of labourers from India. As a result of the importation of Indian labourers to Durban, the largest city in Natal, it became home to the largest concentration of Indians outside India. This created the “Asiatic-vote dilemma” from the British colonial perspective. The British government started with a process to disenfranchise the Indians. This led to the promulgation of the Franchise Act in 1896¹²⁸, excluding all non-whites from exercising their vote in the Natal colony.¹²⁹ The region remained a British colony until the unification of the colonies in 1910 when the Union of South Africa was established.¹³⁰

Those Trekks who did not settle in Natal eventually settled in the central and northern parts of South Africa which became the Orange Free State and the Zuid-Afrikaansche Republiek (ZAR or Transvaal).¹³¹ In the 1850s, Britain recognised the independence of the two Trekks states. Shortly afterwards, the Free State embarked on a process to draft its own constitution. In terms of the Free State constitution, only whites had voting rights and citizenship, but the law had to

¹²⁶ Giliomee *et al* (2022) 108-113.

¹²⁷ Malan and Grobbelaar-du Plessis (2022) 70.

¹²⁸ Franchise Act 8 of 1896.

¹²⁹ Dilke (1890) 518; and Magyar and Ranchod *Africa Insight* (1985) 32.

¹³⁰ Changuion and Steenkamp (2011) 184.

¹³¹ Binckes (2013) 230.

be equally and impartially applicable to all.¹³²

Transvaal adopted a constitution much later, only in 1858. The seat of government was in Pretoria. The executive authority vested in the State President and Executive Council. Only ZAR white male citizens had voting rights.¹³³

Both the Republics were involved in a war with Britain from 1899 to 1902, known as the Anglo-Boer War.¹³⁴ The cause of the war was primarily to gain control over the rich gold deposits discovered in 1886 in the Witwatersrand.¹³⁵ After the end of the Anglo-Boer War and the conclusion of a peace accord, namely the Treaty of Vereeniging in 1902, the Republics of the Free State and Transvaal both lost their sovereignty and became British colonies. Up until 1910, with the unification of South Africa, the former Republics of the Free State and Transvaal were subject to British colonial rule with their respective constitutions having been revoked under the Treaty of Vereeniging.¹³⁶ With regard to voting rights for non-whites, the Treaty stated that the “question of granting Franchise to Natives will not be decided until after the introduction of Self-Government”.¹³⁷

In 1910 the Union of South Africa came into being. The South African Act of 1909¹³⁸ regulated the unification of the four colonies, namely the Cape, Natal, Free State and Transvaal. This Act was adopted by the British Parliament. The Union government was premised on the British Westminster model. Although the provinces (former colonies) received a measure of autonomy, the Union Parliament exercised full authority over the provinces.¹³⁹ Voting qualifications in the former colonies were retained. The franchise was reserved for whites – white males initially. The dispensation of a qualified franchise for Africans and Coloureds in the Cape and Natal was retained. It was also entrenched in that it could be changed only on the basis of a two thirds

¹³² Wiechers and Verloren van Themaat (1967) 193-194; and Malan and Grobbelaar-du Plessis (2022) 70 and 74.

¹³³ As above.

¹³⁴ Simpson (2021) 1. The name of the war was changed to the South African War to commemorate the role of all South Africans during the War.

¹³⁵ Malan and Grobbelaar-du Plessis (2022) 75.

¹³⁶ Clauses 2 and 7 of the Treaty of Vereeniging (31 May 1902).

¹³⁷ As above clause 8.

¹³⁸ Edw VII, C9 (ordonnance issued by King VII of Britain). Also see s 6 of the South African Act which provided that colonies shall become provinces and that the provinces shall have the same limits as the respective colonies at the establishment of the Union.

¹³⁹ S 19 of the South African Act of 1909.

parliamentary majority.¹⁴⁰ Many black people outside the Cape Colony, especially black Africans, expected the Cape Colony's qualified non-racial franchise (based on the ownership of property) to be extended to other colonies (provinces) after unification in 1910.¹⁴¹ This did not happen.

Any extension of the Cape's position on enfranchisement of non-whites was effectively blocked by legislative provisions.¹⁴²

The Union's legislative and executive authority was initially subject to the legislative and executive control of the British Parliament. In 1919, the Union became party to the Peace Treaty of Versailles¹⁴³ and a member of the League of Nations in 1920.¹⁴⁴ The equal status of South Africa with Great Britain, together with other British dominions such as Canada, Ireland, Australia and India, was confirmed by the League of Nations in 1926.¹⁴⁵ This was achieved by the Statute of Westminster, 1931.¹⁴⁶ In terms of this Statute, the British Parliament relinquished all legislative power over these former colonies.¹⁴⁷

In 1934, the Union of South Africa went one step further after the conclusion of the Statute of Westminster, in confirming the Union's independent status. It subsequently adopted the Status of the Union Act.¹⁴⁸ This Act provided that the Union's independence could not be unilaterally revoked by the British Parliament. The right of appeal to the British Privy Council against decisions of the South African Supreme Court was abolished in 1951 by means of the Privy Council Appeal Act.¹⁴⁹ From 1910 to 1961, the governance of matters affecting black people vested in the Governor-General.¹⁵⁰

¹⁴⁰ As above ss 35-37 and 152.

¹⁴¹ See Ngcukaitobi (2018) 233 and 234 and the petition drawn up by the South African Native Convention (SANC) and the Transvaal Native Congress representing black African people appealing for the qualified franchise in the Cape Colony to be extended after unification in 1910.

¹⁴² Ss 35-37 and 152 of the South African Act.

¹⁴³ Treaty of Peace with Germany (Treaty of Versailles) (28 Jun 1919).

¹⁴⁴ As above Part 1. The Treaty of Versailles, apart from being a peace accord ending the First World War, it also provided for The Convention of the League of Nations in Part 1 of the Treaty, consisting of 26 articles.

¹⁴⁵ Rautenbach and Venter (2018) 14; and Malan and Grobbelaar-du Plessis (2022) 79.

¹⁴⁶ Ch 4 of the Statute of Westminster, 1931 provided that the statute is an Act with the purpose "to give effect to certain resolutions passed by Imperial Conferences held in the years 1926 and 1930".

¹⁴⁷ As above ss 4 and 5.

¹⁴⁸ 69 of 1934.

¹⁴⁹ 15 of 1950.

¹⁵⁰ S 151 of the South African Act and The Black Administration Act 38 of 1927 granted full legislative powers over native affairs to the Governor-General.

With the Statute of Westminster, the South African Parliament became sovereign. This sovereignty paved the way for the introduction of further policies to disenfranchise many non-whites (blacks) in South Africa. The sovereignty of Parliament, secured in terms of the Statute of Westminster, lasted until it was replaced with the Interim Constitution in 1994.

A system of local and tribal self-governance had existed for indigenous groups in Transkei since the 19th century. In 1930, a joint council was established for the whole territory. In 1936, the qualified black franchise was abolished, and ethnic black people were placed on a separate voters' roll. They could only vote for and elect white members of the House of Assembly and the Cape provincial council.¹⁵¹ Provision was also made for a national representative council for black people with only advisory functions; however, the council was abolished in 1951. In 1930, white women gained universal suffrage.¹⁵²

In 1948 the National Party came into power. The separate development policy with the distinct name of apartheid was intensified and legally enforced. A number of laws were passed to further this policy. In 1950, the Population Registration Act¹⁵³ was enacted. It provided for the compilation of a register of the entire South African population.¹⁵⁴ It reflected the classification of each individual as a white person, a coloured person (this included not only persons of mixed descent, known as Coloureds in South Africa, but also Malays, Indians and Chinese) or a native (the terms "Bantu" or "native" were used by the white minority government to describe black Africans).¹⁵⁵ Disputes over race classification were to be settled by reference to a person's physical appearance, social acceptance and descent.¹⁵⁶ Race classification boards were established with the power to make the determination of race classification in disputed cases.¹⁵⁷

Also in 1950, the Group Areas Act¹⁵⁸ was passed to provide for the creation of separate "group areas" in towns and cities for Whites, Africans and Coloureds. Persons could only acquire property in areas designated for each race. It was also a crime if a person continued to occupy

¹⁵¹ Representation of Blacks Act 12 of 1936; and Malan and Grobbelaar-du Plessis (2022) 78.

¹⁵² Women's Enfranchisement Act 18 of 1930.

¹⁵³ 30 of 1950.

¹⁵⁴ As above s 2.

¹⁵⁵ As above s 5(1).

¹⁵⁶ As above s 11.

¹⁵⁷ As above s 11(3).

¹⁵⁸ 41 of 1950.

premises in areas outside those designated for each race.¹⁵⁹

The Cape Province had a qualified franchise since 1854 which allowed a small number of non-whites in the Cape to be included in the common voters' roll.¹⁶⁰ Except for coloured voters in the Cape Province, government removed all ethnic black voters from the common voters' roll in 1936 with the introduction of the Representation of Natives Act.¹⁶¹ In 1956, the National Party government adopted the Separate Representation of Voters Act¹⁶² which also removed all coloured voters from the common voters' roll.¹⁶³

The Black Authorities Act was adopted in 1951.¹⁶⁴ This was an extension of the Black Administration Act of 1927.¹⁶⁵ It made provision for the establishment of Regional and Territorial Authorities for each specific ethnic group in traditional territorial areas (reserved areas).¹⁶⁶ Territorial Authorities were set up and positions were given to Chiefs and Headmen who became responsible for allocation of land, the welfare and pension system, and development. The traditional leadership of the African population had to some extent become representatives of the white government.¹⁶⁷ An important piece of legislation in the broader scheme of the government's policy of separate development was the Promotion of Black Self-Governing Act in 1959.¹⁶⁸ This Act allowed for the transformation of traditional tribal lands into fully fledged self-governing and eventually independent territories or "Bantustans". The aim was to provide for the

¹⁵⁹ As above ss 8, 9 and 10.

¹⁶⁰ S 35 of the South African Act.

¹⁶¹ 12 of 1936. Also referred to as the Representation of Blacks Act.

¹⁶² 46 of 1951.

¹⁶³ Malan and Grobbelaar-du Plessis (2022) 78 and 80.

¹⁶⁴ 68 of 1951. The Act was initially promulgated as the Bantu Authorities Act, 68 of 1951 subsequently remained the Black Authorities Act 1951. It succeeded the Native Affairs Act 23 of 1920.

¹⁶⁵ 38 of 1927. Also referred to as the Native Administration Act.

¹⁶⁶ See *Bhe v Magistrate Khayalitsha*; *Shibi v Sithole*, *South African Human Rights Commission v President of the Republic of South Africa* 2005(1) SA 580 (CC); 2005(1) BCLR 1 (CC) para [61] Langa DCJ observed that the Black Authorities Act as well as the Black Administration Act 38 of 1927 became "a cornerstone of racial oppression, division and conflict in South Africa, the legacy of which will take years to completely eradicate".

¹⁶⁷ See *Western Cape Provincial Government: In re DVB Behuising (Pty) Ltd v North-West Provincial Government* 2001 (1) SA 500 (CC); 2000 (4) BCLR 347 (CC) para [41]. Ngcobo J describes the role of this legislation as follows: "The Native Administration Act 38 of 1927 appointed the Governor-General (later the State President) as 'supreme chief' of all Africans. It gave him power to govern Africans by proclamation. The powers given to him were virtually absolute. He could order the removal of an entire African community from one place to another. The Native Administration Act became the most powerful tool in the implementation of forced removals of Africans from the so-called 'white areas' into the areas reserved for them. These removals resulted in untold suffering. This geographical plan of segregation was described as forming part of 'a colossal social experiment and a long-term policy'".

¹⁶⁸ 46 of 1959. Originally promulgated as the Self-Governing Act 46 of 1959. Subsequently reviewed and called the Promotion of Bantu (and later) Black self-government Act 46 of 1959, and later, the Representation between the Republic of South Africa and Self-Governing Territories Act 46 of 1959.

right to self-determination of the country's black population.¹⁶⁹

In furtherance of government's policy of separate development by means of homelands and self-governing territories, the Bantu Homelands Citizenship Act¹⁷⁰ was adopted in 1970. This Act linked black people, loosely based on affiliation by tribe or ethnicity, to various self-governing territories by means of citizenship. However, they did not forfeit their South African citizenship in the process. Black people could exercise voting rights in these self-governing territories and other rights in respect of their traditional tribal territories.¹⁷¹

The ten self-governing territories or Bantustans that were identified in terms of the government's policy of separate development were: Transkei and Ciskei for the Xhosa; Bophuthatswana for the Tswana; Venda for the Venda; KwaZulu for the Zulu; Lebowa for the Pedi or North Sotho; QwaQwa for the South Sotho; KaNgwana for the South African Swazi; KwaNdebele for the Ndebele; and Gazankulu for the Shangaan. Between 1976 and 1981, only four of these Bantustans acquired independence, namely Transkei, Bophuthatswana, Venda and Ciskei. They became known as the TBVC¹⁷² states. The other six Bantustans, described as self-governing homelands, refused independence.¹⁷³ The independence of the four Bantustans was introduced by means of a separate law adopted for each of them.¹⁷⁴

In 1971, the adoption of the National States Constitution Act¹⁷⁵ provided for different stages of self-government within these territories. With regard to the objective of the separate development policies of the government, Dr Connie Mulder, then Minister of Bantu Administration and Development, stated as follows:

"If our policy is taken to its full logical conclusion as far as black people are concerned there will be not one black man with South African citizenship ... every black man in South Africa will eventually be accommodated in some independent new state in this favourable way and there will no longer be a moral obligation on this Parliament to accommodate these people

¹⁶⁹ As above ss 1 and 3.

¹⁷⁰ 26 of 1970. Later renamed the Black States Citizenship Act, 1970 and the National State Citizenship Act, 1970.

¹⁷¹ As above s 1.

¹⁷² An acronym for Transkei, Bophuthatswana, Venda and Ciskei.

¹⁷³ Drummond *JSTOR* (1991) 369-370; Giliomee *et al* (2022) 500 and 501; and Simpson (2021) 256, 257, 290, 327, 341 and 354.

¹⁷⁴ Status of Transkei Act 100 of 1976; Status of Bophuthatswana Act 89 of 1977; Status of Venda Act 107 of 1979; and the Status of Ciskei Act 110 of 1981.

¹⁷⁵ 21 of 1971.

politically”.¹⁷⁶

In 1983, a new Constitution was adopted for South Africa¹⁷⁷ which came into effect on 3 September 1984. It introduced various constitutional reforms. The 1983 Constitution extended the parliamentary franchise to coloured and Indian people. It further divided government functions into own affairs and general affairs. A tricameral parliament was created which was composed according to race. Parliament consisted of three Houses, namely a House of Assembly, a House of Representatives and a House of Delegates.¹⁷⁸ The House of Assembly consisted of 174 white members; the House of Assembly of 85 coloured members; and the House of Delegates of 45 Indian members.¹⁷⁹ Joint assemblies of all three Houses made law on general affairs, while each House made law on matters unique or exclusively applicable to the particular race group.¹⁸⁰ The offices of state president and prime minister were combined to provide for a State President, who is not merely ceremonial in status but oversees all executive functions. These constitutional amendments attempted to incorporate coloured and Indian people in democratic processes. The biggest flaw of these constitutional reforms was the continued side-lining of African people from parliamentary and adjunct democratic participation.¹⁸¹

The Restoration of South African Citizenship Act of 1986¹⁸² was introduced to restore the citizenship of black people domiciled in the Republic of South African and who had lost their citizenship as a result of the independence status acquired by Transkei, Bophuthatswana, Venda and Ciskei.

2.3.1.2 Power Relationships and their Effect on Land and Labour

When the VOC established its post at Table Bay in 1652, a large part of the Cape was inhabited by the Khoisan. It was estimated that about 100 000 Khoisan lived over a vast area of the present

¹⁷⁶ Mulder *House of Assembly Debates*, 72, col. 579 (7 Feb 1978).

¹⁷⁷ Constitution of the Republic of South Africa Act 110 of 1983 (hereafter referred to as the 1983 Constitution)

¹⁷⁸ As above s 37(1).

¹⁷⁹ As above s 41.

¹⁸⁰ As above ss 14 and 15.

¹⁸¹ Chaskalson *et al* (1998) 1-10; and Magyar and Ranchod *Africa Insight* (1985) 33.

¹⁸² 73 of 1986.

Western Cape¹⁸³ The Khoisan had lived in southern Africa for thousands of years before the Dutch arrived spread over large areas and had a nomadic lifestyle. The VOC originally depended on the Khoikhoi to secure trade in cattle and sheep. The company therefore wanted to maintain a sound relationship with the Khoisan. Jan van Riebeeck, the first commander of the VOC in the Cape, received strict instructions to treat the Khoisan respectfully and to do nothing to disturb their cultural integrity and socio-economic stability. He had apparently applied this policy very strictly.¹⁸⁴

The number of freehold farms given to free burgers by the VOC increased from 50 in 1682 to 260 in 1705 and 435 in 1731.¹⁸⁵ The VOC also established 250 Huguenots from France and gave them freehold land and financial support. The VOC also concluded contracts with them for supplying meat, corn and other produce to the VOC, its officials, members of the mercantile class and free burgers.¹⁸⁶

This resulted in the establishment of a permanent community which grew steadily. By 1672, the VOC took over the adjacent areas of Hottentots Holland, False Bay and Saldanha Bay.¹⁸⁷

In 1656, the first conflict between the Dutch and local Khoi erupted as a result of the appropriation of land by Dutch farmers. The Khoikhoi were nomadic and felt they should have free access to all land all the time to graze their cattle. This was the situation for the Khoikhoi up to that stage. It brought them into direct conflict with the Dutch farmers who were given land as part of the VOC policy of freehold ownership where they farmed and lived. The Khoikhoi saw the Dutch as competition for available grazing and as invaders who curbed their freedom of movement, while the Europeans were of the opinion that the Khoikhoi intruded on private designated property, threatening their agricultural resources and existence.¹⁸⁸

The situation erupted in 1656 with attacks by the Khoikhoi on Dutch farmers. The Dutch managed to ward off these attacks, with fatalities on both sides. The Khoikhoi attempted to

¹⁸³ Elphick and Malherbe (1989) 4-7. Khoisan is the collective name for two indigenous groups: the Khoikhoi, who kept cattle and sheep, and the *San*, who were hunter-gatherers. Also see Giliomee *et al* (2022) 29-30, 73 and 78.

¹⁸⁴ As above.

¹⁸⁵ Guelke (1987) ch 2.

¹⁸⁶ As above.

¹⁸⁷ As above.

¹⁸⁸ Giliomee *et al* (2022) 73-78, and Terreblanche (2002) 153-155.

regain their territory with renewed attacks in 1659 and again in 1673, without much success, resulting in the loss of life on both sides, more so on the Khoikhoi side.¹⁸⁹

By the end of the 1600s, a major part of the Western Cape was under Dutch control and most of the land had been assigned to white farmers as freehold. Eventually, the nomadic Khoikhoi were forced to move and some joined forces with San groups who lived in the southern regions of the Cape.¹⁹⁰ Together they attacked, raided, assaulted, burgled, murdered and looted the Dutch and other Khoi groups along the southern coast of the Cape.¹⁹¹ The Khoikhoi who stayed behind in the Cape became labourers, especially shepherds, and were economically absorbed into the Cape Dutch community.¹⁹²

Apart from disputes between the Khoisan and white farmers, white farmers came into conflict with Xhosas in the south-east border regions of the present Western Cape. Conflict mainly revolved around land which involved raids, counterraided and often escalated into wars. After the second occupation of the Cape by the British in 1806, these tensions escalated.

Between 1812 and 1879, nine frontier wars were fought between British colonial forces and the Xhosa. Various reasons are cited for the frontier wars, for example competition for land; broken promises and retaliation from both sides; and the work of missionaries to Christianise the Xhosa and cleanse them from “impure” customary practices.¹⁹³

The Sixth frontier war between 1834 and 1835 was the bloodiest and described as “the mother of all wars”.¹⁹⁴ The Xhosa chiefs sent a message to the British saying that the reason for their anger and the invasion was the constant strong-arm actions against them. The Xhosa swept into the colony, burning hundreds of homesteads, farms and crops, and taking thousands of livestock. Many white settlers and Afrikaner burghers were killed.¹⁹⁵ This war was one of the triggers for the Trekkers who moved northwards during this period.

¹⁸⁹ Giliomee (2007) 50.

¹⁹⁰ As above. Also see Barnard (2012) 20-25.

¹⁹¹ Elphick and Malherbe (1989) 155.

¹⁹² Giliomee (2007) 50 and 51.

¹⁹³ Giliomee *et al* (2022) 110, 144-153.

¹⁹⁴ Binckes (2013) 196.

¹⁹⁵ Franken (1949) 235. The loss for both Afrikaner and British frontier farmers were 5 715 horses, 161 930 sheep and goats, 114 930 heads of cattle and 756 houses and 58 wagons burnt to ash.

The Ninth and last frontier war between the British forces and the Xhosa from 1878 to 1879 turned out to be disastrous for the Xhosa. At least 4 000 men, woman and children from the Ciskei and Transkei areas were sent as prisoners of war to the Cape where they were used as cheap labour.¹⁹⁶

The occupation of Natal by British forces in 1843 had not only caused conflict and greater dissatisfaction for Trekker pioneers who eventually left the region but also created a great deal of hardship for the (black) Zulu ethnic group who traditionally occupied the Natal region. The period between 1879 and 1896 saw the fragmentation of the Zulu Kingdom. The Anglo-Zulu war in 1879 left the Zulu nation divided, with their land confiscated and controlled by the British. After the war, the victorious British divided Zululand into 13 small sections or chiefdoms.¹⁹⁷ By 1887, the whole of Zululand had been annexed by the British. The British imposed taxes on migrant wages and as such redirected productive forces and income away from the Zulu monarchy.¹⁹⁸ Marks, a historian, wrote that “the establishment of African reserves and the survival of African chieftaincy as central elements of segregation originated not in the Boer Republics, but in Natal, the most of British colonies”.¹⁹⁹

Giliomee explains that the Anglo-Boer War which broke out in 1899 between Britain and the two Boer or Trekker Republics and which lasted until 1902, had far-reaching socio-political and socio-economic implications for the white Afrikaners and black people, especially the Africans, for generations to come. The socio-political effects of the War resulted in homelessness, poverty, discrimination and polarisation of groups of people relating to their political beliefs, social class and race.²⁰⁰

The main cause of the war was the control of the rich goldfields in the Boer Republics, especially the Transvaal.²⁰¹ This war was renowned for the so-called “scorched earth” strategy adopted by Britain and the concentration camps.²⁰² A total of 116 572 women and children were detained in 50 different camps for Whites. A total of 34 430 (about 30%) died in these camps, of whom 80%

¹⁹⁶ Sparks (1991) 137.

¹⁹⁷ Changuion and Steenkamp (2011) 184.

¹⁹⁸ Dilke (1890) 518.

¹⁹⁹ Marks (2013) 91.

²⁰⁰ Giliomee (2007) 346.

²⁰¹ Giliomee *et al* (2022) 30.

²⁰² Pretorius (2001) 1-10.

(27 381) were children and 14 431 were under the age of two.²⁰³ This means four out of every five deaths were children. Of the women with children who fled into the veld to escape the camps and whose homesteads and livelihoods had been destroyed, 14 000 remained in the veld at the end of the war. The death toll among these individuals is estimated at approximately 2 400. On the battle field, 6 189 (including young boys) of the 53 000 Boer fighters died. The total Afrikaner death toll (fighters, woman and children) stood at 40 619, which represented 8,5% of the total Afrikaner population at the time. For the two Boer Republics it represented 19% of the Afrikaner population, of whom 80% were children.²⁰⁴

Approximately 115 000 Blacks (mainly Africans) were placed in approximately 64 to 66 camps with poor living conditions that lead to outcry also in Brittain. They too were starving due to the scorched-earth strategy employed by the British. They were treated as refugees and served as labourers for the British officers in the camps. Recent figures indicate that between 15 423 to 18 000 black people died, the majority of whom were children. The black population in the two Boer Republics totalled 905 000 at the outbreak of the war. The deaths represented approximately 12,7% of the Boer Republic's black population.²⁰⁵

The Anglo-Boer War resulted in more than 120 000 British casualties, including 22 000 dead, out of a total of 442 435. Many died from dysentery, mainly typhoid, wounds and other illnesses or accidents.²⁰⁶

The inhumane treatment of especially women and children during the war left the Afrikaner with deep psychologic scars.²⁰⁷ This, coupled with the suppression of the Afrikaner culture and language after the war, served as inspiration for Afrikaner Nationalism.²⁰⁸ Afrikaner Nationalism had a direct correlation with self-preservation and separate development based on ethnic destinations as the bedrock of apartheid.²⁰⁹

²⁰³ Nasson and Grundling (2013) 25; Reynolds *M-Thesis NWU* (2007) 171-181; and Pretorius (2012) 246.

²⁰⁴ Pretorius (2012) 246-247.

²⁰⁵ As above 249 and 252; Nasson and Grundling (2013) 25; and Kessler (2001) 143.

²⁰⁶ Pakenham (1997) 572. Also see Giliomee *et al* (2022) 314 who state that "warfare claimed the lives of 7 000 Boer and 22 000 imperial troops".

²⁰⁷ Giliomee (2007) 255. Emily Hobhouse in an attempt to inform the British republic, described the actions of Britain in respect of the camps as "wholesale cruelty" and to keep the camps going was "murder of the children".

²⁰⁸ Giliomee (2007) 198; and Steyn (1987) 97.

²⁰⁹ Sparks (1991) 190 states: "The British provided the harassment, the catalogue of grievance, the century of wrong, that in the end produced Afrikaner nationalism".

But the war also inspired African Nationalism. It is estimated that between 100 000 and 120 000 black people, mainly Africans, participated on Britain's side in various roles.²¹⁰ Many were lured by the British with money and a promise that if the British were victorious, the Africans would gain political and economic benefits after the war.²¹¹ However, this is not how things turned out. The scorched-earth approach implemented by the British during the Anglo-Boer War left many Afrikaners destitute and homeless, with no means of production because of the destruction of their land. This was the beginning of the so-called *armblanke vraagstuk* (poor white question).²¹² It forced many Afrikaner families to seek refuge in towns and employment in the mines.²¹³ This placed the Afrikaner in direct competition with Blacks for job opportunities.²¹⁴

2.3.2 Development of Labour and Employment Relations

After white employees of the VOC in the Cape under control of the Dutch had been allowed to set up independent farms, some farmers at their own initiative started to employ the Khoikhoi as *inboekelinge* or serfs.²¹⁵

From 1703 onwards, the VOC Governor gradually granted grazing permits and loan farms to *freeburgers* in areas more distant from Cape Town and allowed the *Trekboere* to barter and trade with the Khoikhoi. As the *Trekboere* settled further away from Cape Town, it became increasingly difficult for the VOC to control the acquisition of land and the payment of annual fees.²¹⁶

After the second occupation of the Cape by the British in 1806, several proclamations were issued which affected the socio-economic conditions of indigenous people in the Cape, especially in respect of labour and the freedom of movement.

²¹⁰ Blake (2011) 68-69.

²¹¹ Giliomee (2007) 278.

²¹² As above (2007) 346 states that by 1924 there were 300 000 poor Whites in South Africa representing 22% of the white population. More than 80% of these poor Whites were Afrikaner. Also see Changuion and Steenkamp (2011) 153.

²¹³ As above (2007) 323 and 405-406 estimates that by 1890, fewer than 10 000 Afrikaner (2% - 3%) were urbanised. By 1926, 36 years later, 391 000 (41%) lived in cities and towns, and by 1936, 535 000 (50%) lived in cities and towns. By 1936, the Afrikaner earned only 60% of what English-speaking Whites earned.

²¹⁴ Terreblanche (2002) 9 and 10.

²¹⁵ De Kock (1950) 14.

²¹⁶ Giliomee *et al* (2022) 74.

In 1806, Cape Governor Caledon introduced the “Hottentot Proclamation” to regulate the use of Khoi and San labour. This involved a pass system being introduced which affected the freedom of movement of non-whites in the Cape.²¹⁷

In 1812, the Apprenticeship Ordinance was promulgated in the Cape Colony. This gave any white farmer the right to apprentice the children of his labourers for a period of ten years from the age of eight.²¹⁸ Lewis points out that this Ordinance should be viewed against similar child employment practices in Britain at that time. Parliament in Britain passed the Cotton Factories Regulation Act of 1819, decreeing the minimum age of child workers to be nine, and the maximum working hours per day to be 12. Between 1851 and 1881, the British textile mills employed well over 100 000 children under the age of 15 – a figure that does not take into account the children working in mines and as chimney sweeps.²¹⁹

The Frontier Wars between the British and Xhosas resulted in the division and annexation of Xhosa land between 1856 and 1858 by the British. Unable to earn a living from land, many Xhosas had no option but to work as labourers on white farms. Subsequently, the Masters and Servants Act²²⁰ was enacted in 1856, making it a crime for a black man to quit his job. Under the Vagrancy Laws of 1879²²¹ it was illegal for a black man to be in the colony without work. Women and children were not allowed to accompany men to town. Men worked far away from home for long periods, which was said to be the birth of the migrant labour system in South Africa.²²²

It is also alleged that in 1857, 4 000 Zulus were sold to British farmers, mostly sugar farmers in Natal for whom they had to work for three years without pay as so-called apprentices. These people were sold like slaves, despite the official abolition of slavery by the British in 1833.²²³

Unofficially the British continued trading slaves for years afterwards. The Zulu slaves were, for instance, paraded and inspected for certain qualities before the transaction was concluded, akin

²¹⁷ Elphick and Giliomee (1989) 200-210.

²¹⁸ Apprenticeship of Servants Proclamation of 1812.

²¹⁹ Lewis (2016) 406.

²²⁰ 15 of 1856.

²²¹ Vagrancy Ordinance of 1834 and later the Vagrancy Act of 1879.

²²² Lewis (2016) 408.

²²³ Van Bart (2012) 32 and 165.

to the practice of the slave trade era.²²⁴

With the discovery of diamonds in 1867 in Kimberley and gold in 1886 on the Witwatersrand, the mining magnate Cecil John Rhodes and De Beers Consolidated eventually took the lead in controlling labour at the mines.²²⁵ Starting in July 1872, all native labourers had to register on arrival and carry a pass. They were also compelled to accept service contracts. Any non-white without a pass and contract was liable for arrest, fines and corporal punishment. All diamonds found in the possession of a labourer were deemed to be the property of the employer. Any labourer found guilty of diamond theft could be flogged up to fifty lashes and sentenced to 12 months' hard labour. Pass laws were vigorously enforced by the police and courts. Nearly 5 000 cases of pass law offences or desertion were brought before magistrates in 1872 alone. As these labour laws only applied to black or native labourers, this is reasoned as the foundation of racial prejudice in labour relations.²²⁶

In 1890, when Cecil John Rhodes became Prime Minister of the Cape Colony, he introduced the Glen Gray Act of 1894²²⁷ – the so-called Native Bill for Africa. The Act established a system of individual (rather than communal) land tenure and created a labour tax to force Xhosa men in the Northern Cape and Transkei area into employment on commercial farms or in industry.²²⁸ The Glen Gray Act also imposed evening curfews in all cities and towns.²²⁹ It provided for separate locations (residential areas) for Africans and Asians, as well as the requirement to carry a pass to prove they were authorised to live or move through an urban area outside their designated “location”.²³⁰

The aftermath of the Anglo-Boer War from 1899 to 1902 had seen increased racial issues and a direct impact on workplace-related tension. Giliomee states that – “[t]he aggressive policy of imperialism carried out by Joseph Chamberlain and Alfred Milner in South Africa caused a sharp intra-white division in Cape politics, which also affected the racial issue”.²³¹ Terreblanche noted

²²⁴ As above.

²²⁵ Reader (1997) 449.

²²⁶ As above 503.

²²⁷ 25 of 1894.

²²⁸ As above ss 33 and 47.

²²⁹ As above s 34.

²³⁰ As above.

²³¹ Giliomee (2007) 296.

that the Anglo-Boer War resulted in competition for employment between poor white (mainly Afrikaner) and black labourers. This, according to Terreblanche, created racial tension.²³²

After the Anglo-Boer War, under the governance of the British Crown, a new pass law was introduced requiring all non-white employees on the Witwatersrand to display a badge indicating that they were employed. In the Cape, labour and hut taxes were imposed to penalise those black people who were not earning, thereby forcing them to work.²³³

In the aftermath of the miners' strike of 1922, the primary focus of government was the protection of white workers. For this purpose, the Wage Act²³⁴ was passed in 1925, permitting government to determine wage rates in specific industries. The Act excluded agricultural and domestic workers, who were mainly black. Consequently, employers were still able to determine their wages. The Mines and Works Amendment Act²³⁵ was passed in 1926, making race-based appointments or the so-called "colour bar" lawful in the mining industry. The "civilized labour policy" of the then Prime Minister, General JBM Hertzog, was often viewed as the replacement of Africans with white workers, often at higher wages.²³⁶

From an economic point of view, an important structural change in the relationship between land, labour and the white property class occurred in the late 19th and early 20th centuries. By that time almost all agricultural land had been occupied. Consequently, it was no longer possible for all the members of the white population to become landowners.²³⁷ In addition, especially during the period of economic modernisation initiated by the mining revolution since the 1870s, it became apparent that a sizeable percentage of the white landowning class (mainly Afrikaners) were farming on agricultural units that were not economically viable.²³⁸ These small landowners went bankrupt in great numbers (from 1880 until 1940) and became either squatters (*bywoners*) or members of a white, mainly Afrikaner, wage-earning class (*armblankes*) with no choice but to compete with the black wage-earning workers for jobs.²³⁹ This proletarianisation of a large part

²³² Terreblanche (2002) 9 and 10.

²³³ Lewis (2016) 397.

²³⁴ Wage Act 27 of 1925.

²³⁵ Mines and Works Amendment Act 25 of 1926.

²³⁶ Ngcukaitobi (2018) 249.

²³⁷ Bundy (1988) 200-210.

²³⁸ Trapido *JDS* (1978) 34 and 35.

²³⁹ As above.

of the white population drastically changed the South African political landscape and labour market.²⁴⁰ For the first time since the beginning of the 18th century, a formerly white wage-earning class existed parallel to a black wage-earning class.²⁴¹ This situation also had major political implications.

According to Terreblanche, during the first three quarters of the 20th century, the intense competition between the white and black labouring classes for the same jobs dominated political and economic developments.²⁴² Because the political rights of Whites were entrenched by the South African Act of 1909 and given the overwhelming numbers (size) of black workers compared to white workers, the white-controlled South African Parliament enacted a multitude of labour laws from 1910 until the 1960s aimed at protecting the white working class.²⁴³ African trade unions were prohibited under the law that provided for collective bargaining and industrial conciliation.²⁴⁴ Africans were prohibited from striking and the security laws were invoked to restrict the activities of African leaders in the workplace.²⁴⁵

Blacks were largely confined to their own traditional territorial areas except when they were employed in areas outside these traditional territories. They were required to carry “passes” or documents issued by government as evidence of authorisation to be in areas outside their traditional territories.²⁴⁶ Migration to the cities was difficult to control, however, as there were no job opportunities in the traditional territories.²⁴⁷ In order to curb the flow of blacks to the cities, existing pass laws were consolidated and tightened in 1952 by the Abolition of Passes and Co-ordination of Documents Act,²⁴⁸ which also extended the pass laws to black women.²⁴⁹ It became an offence in terms of this legislation for a black person over the age of 16 years to stay for longer than 72 hours in an urban area without permission. Failure to produce such permission in the form of a pass was a punishable offence.²⁵⁰ Further restrictions on movement were to be

²⁴⁰ Terreblanche (2002) 9 and 10.

²⁴¹ As above 10.

²⁴² As above 241.

²⁴³ The Mines and Works Act 12 of 1911; Industrial Conciliation Act 11 of 1924; the Job Reservation Act of 1926; The Mines and Works Act 25 of 1926; Industrial Conciliation Act 28 of 1956; and the Job Reservation Act 8 of 1957.

²⁴⁴ S 7(1) and (3) of the Industrial Conciliation Act.

²⁴⁵ As above s 12.

²⁴⁶ Simpson (2021) 170.

²⁴⁷ Makgetla (2018) 92 and 93.

²⁴⁸ 67 of 1952. Also known as the “Pass Law Act”.

²⁴⁹ S 2(1) of the Abolition of Passes and Co-ordination of Documents Act.

²⁵⁰ S 10 of the Black (Natives) Laws Amendment Act 54 of 1952.

found in curfew regulations and ordinances in the cities and in a law allowing Bantu Affairs commissioners to deem a black person “idle and undesirable” and to order his removal from an urban area.²⁵¹

Donald Treiman and Yao Lu explained the effect of migrant work on the family income and cohesive system of black households. During apartheid, a substantial section of the black population was relegated to scattered rural reserves that contained extremely limited employment opportunities outside of agriculture. Survival for rural blacks was thus heavily dependent on households successfully devising some means of employment in urban and white areas. Black labourers, mostly men, would find employment on a contract basis in mines, in urban industry or on white-owned farms, with contracts lasting from six months to two years.²⁵² Constrained by pass laws designed to deter the settlement of blacks in white areas, blacks were considered “guest workers” and were allowed residence in these areas only with proper documentation. Unemployed family members were forced to remain in rural areas. Consequently, black labour migration was circular, and migrants returned home at least once every year.²⁵³

Most black labour migrants (80%) remitted substantial portions of their incomes to households they left behind, representing more than 30% of total household income. In 1993, one in four black households was dependent on remittance income. However, remittances were mostly used for consumption purposes.²⁵⁴

2.3.3 Land Dispossession

According to Terreblanche, during the 17th and 19th century, black indigenous people were deprived of land by whites, mainly as a result of the superior military capacity of whites and the lack of political power of blacks.²⁵⁵ During the 20th century, four pieces of legislation led to the large-scale loss of land by black people, namely the Natives Land Act of 1913,²⁵⁶ the Native

²⁵¹ S 28 of the Black Administration Act 38 of 1927; and s 7 (2) of the Bantu Authorities Act 68 of 1951.

²⁵² Treiman and Lu *Social Forces* (2011) 1123.

²⁵³ As above 1123 and 1124.

²⁵⁴ As above 1124.

²⁵⁵ Terreblanche (2002) 8.

²⁵⁶ 27 of 1913. This Act later became known as the Black Land Act. Since this part of the study provides an historical overview reference will be made to the Act's original title.

Trust and Land Act of 1936,²⁵⁷ the Group Area Act of 1950,²⁵⁸ and the Group Areas Act of 1966.²⁵⁹

2.3.3.1 The Natives Land Act of 1913

The Natives Land Act is said to have laid the foundation for apartheid and territorial segregation and, for the first time, formalised limitations on black land ownership.²⁶⁰ The Act introduced ethnic differentiation based on the political policy of separate development and apartheid of the time that differentiation between different race groups was fundamentally desirable.²⁶¹ According to section 1(1) of the Act—

“Except with the approval of the Governor-General—

a native shall not enter into any agreement or transaction for the purchase, hire or other acquisition from a person other than a native, of any such land or of any right thereto, interest therein, or servitude thereover; and

a person other than a native shall not enter into any agreement or transaction for the purchase, hire or other acquisition from a native of any such land or of any right thereto, interest therein, or servitude thereover”.

The purpose of the Act was to regulate the acquisition (purchasing and leasing) of land in several parts of the Union. It largely prohibited the sale of land by whites to blacks and *vice versa*. The aim of the Act was further reinforced by section 1(2) of the Act, which stated as follows:

“From and after the commencement of this Act, no person other than a native shall purchase, hire or in any other manner whatever acquire any land in a scheduled native area or enter into any agreement or transaction for the purchase, hire or other acquisition, direct or indirect, of any such land or of any right thereto or interest therein or servitude thereover, except with the approval of the Governor-General”.

Any agreement concluded in contravention of this prohibition was *ab initio* null and void²⁶² and

²⁵⁷ 18 of 1936.

²⁵⁸ 41 of 1950.

²⁵⁹ 36 of 1966.

²⁶⁰ Robinson *BJIL* (1997) 472.

²⁶¹ Davenport *Development Southern Africa* (1987) 396.

²⁶² S 1(4) of the Natives Land Act.

was punishable by the imposition of a fine or imprisonment, with or without hard labour, not exceeding six months.²⁶³ The Act further made provision for the establishment of a commission mandated with the identification of areas within which black people²⁶⁴ would not be permitted to acquire or rent land²⁶⁵ or have any interest in land, as well as areas where persons other than black people would be prohibited from acquiring or renting land or having any interest in land.²⁶⁶ In terms of the Act, scheduled areas were designated and an estimated 8% of South African land was reserved for black South Africans.²⁶⁷

The Act effectively prohibited “sharecropping contracts”²⁶⁸ between white landowners and black farmers, resulting in many black farmers losing a substantial portion of their income. This, in turn, resulted in further economic hardship for them. As the Act was based on racial segregation, it is said that this piece of legislation was the effective starting point for apartheid.²⁶⁹ The Act represented the first step towards effecting racially based segregation, a system which was furthered through the Native Trust and Land Act 18 of 1936.²⁷⁰

2.3.3.2 The Natives Trust and Land Act of 1936

The Native Trust and Land Act made provision for the establishment of the South African Native Trust. The South African Native Trust was a state agency with its primary function to administer trust land and “.... for the settlement, support, benefit, and material welfare of the natives of the Union”.²⁷¹ The Act abolished individual land ownership by black people and introduced trust tenure through the creation of the South African Development Trust, which was a government body responsible for purchasing land in “released areas” for black settlement.²⁷²

²⁶³ As above s 5(1).

²⁶⁴ As above s 10 which refers to “natives” as opposed to “black people” and defines the term native as “any person, male or female, who is a member or an aboriginal race or tribe of Africa”.

²⁶⁵ According to s 10 of the Act, a person shall be deemed to hire land if “in consideration of his being permitted to occupy that land or any portion thereof (a) he pays or promises to pay to any person a rent in money; or (b) he renders or promises to render to any person a share of the produce of that land...”.

²⁶⁶ As above s 2(1)(a).

²⁶⁷ Rugege *IJLI* (2004) 284.

²⁶⁸ Davenport *Acta Juridica* (1985) 61 describes “sharecropping contracts” as contracts of this type were agreements between the white landowner and farm workers in terms of which the farm workers were allowed to use a portion of the farmer’s land for their own production and in return the farm workers would provide a certain amount of labour. Davenport *Development Southern Africa* (1987) 396 notes that the Land Act had a crippling effect on black agriculture.

²⁶⁹ Kloppers and Pienaar *PER/PELJ* (2014) 682.

²⁷⁰ The Act later became known as the Development Trust and Land Act.

²⁷¹ S 4(1) of the Natives Trust and Land Act.

²⁷² As above s 5(1)-(4).

In terms of section 2(1) of the Act, certain areas of land (including land identified in the Natives Land Act) were transferred to the Native Trust to be administered by the Trust. Vested in the Trust was land reserved for the occupation of natives and land within the scheduled native areas identified in the Natives Land Act.²⁷³ The South African Native Trust Fund²⁷⁴ was created and the funds utilised to acquire and develop land of the Trust, to advance the interest of natives in scheduled native areas, and to generally assist and develop the “material, moral and social wellbeing of natives” residing on Trust land.²⁷⁵ The Act further empowered the Trust to acquire land for native settlement, but limited the amount of land that could be acquired in this regard to approximately 13% of the surface of the Union of South Africa.²⁷⁶ The land which could be acquired by the Trust was further limited to land within the scheduled native areas or within released areas.²⁷⁷ The Act created “reserves” for black people and increased the 8% of land reserved by the Natives Land Act to 13%, confining 80% of the population to this area.²⁷⁸ In order to achieve the objectives of the Act, section 13 empowered the trustees of the Trust to expropriate land owned by natives outside a scheduled area for reasons of public health or for any other reason which would promote public welfare or be in the public interest. Compensation paid upon expropriation was determined by the fair market value of the land without any improvement, plus the value of the necessary or useful improvements, plus the value of luxurious improvements (limited to the actual cost of such improvements), plus a sum compensating for inconvenience.²⁷⁹

The Native Trust and Land Act was an important instrument used by the then government to facilitate its policy of racial segregation. The Act stripped black South Africans of their right to own land or even to live outside demarcated areas without proper authorisation by the relevant authorities.

²⁷³ As above s 6(1).

²⁷⁴ A fund created in terms s 8 of the Natives Trust and Land Act.

²⁷⁵ As above s 9(1).

²⁷⁶ As above. It should be noted that this percentage reflected the position in 1936 and as time lapsed, the percentage was increased through initiatives such as the creation of the former homelands.

²⁷⁷ As above s 10(2).

²⁷⁸ Robinson *BJIL* (1997) 475.

²⁷⁹ S 13(4) of the Natives Trust and Land Act.

2.3.3.3 The Group Areas Act of 1950²⁸⁰

The Group Areas Act of 1950 was used by the government to forcibly remove black, coloured and Indian people from designated “white areas”.²⁸¹ According to Schoombee, group areas legislation functioned essentially “through the control of ownership of immovable property, and of the occupation and “use” of land and premises, on the basis of race”.²⁸²

The main aim of the Act was to provide for the establishment of group areas and for the control of the acquisition of immovable property and the occupation of land and premises.²⁸³ The Act established three groups of people – a white group, a native group and a coloured group.²⁸⁴ Based on the creation of these groups, the Act made provision for the establishment of group areas designated for the exclusive use and ownership of members of a particular group.²⁸⁵ Persons who were not of the same group as the group area, were not permitted to occupy any land or premises in a group area except under the authority of a permit,²⁸⁶ nor were they permitted to own immovable property in an area from which they were disqualified.²⁸⁷

2.3.3.4 The Group Areas Act of 1966

The aim of the Group Areas Act of 1966 was to consolidate the law related to the establishment of group areas and to regulate the control of the acquisition of immovable property and the occupation of land and premises.²⁸⁸ The Group Areas Act of 1966 further complemented the Group Areas Act of 1950. The 1966 Act shows numerous similarities with the Group Areas Act of 1950 and also established three groups for the purposes of the Act, namely white, Bantu and coloured groups.²⁸⁹ Section 13 of the Act prohibits the acquisition of immovable property in a

²⁸⁰ Hereinafter referred to as the Group Areas Act of 1950.

²⁸¹ Kloppers and Pienaar *PER/PELJ* (2014) 684.

²⁸² Schoombee *Acta Juridica* (1985) 77.

²⁸³ The Act also contained measures to ensure proper municipal administration in certain areas (s 7); restrictions on certain agreements relating to immovable property in controlled areas (s 8); restrictions on the occupation of land in controlled areas (s 10); and measures regarding the disposition of property held in contravention of the Act (s 20).

²⁸⁴ S 2(1) of the Group Areas Act of 1950. A member of the coloured group is defined as a person who is not a member of the white or native groups.

²⁸⁵ As above s 3(1).

²⁸⁶ As above s 4(1).

²⁸⁷ As above s 5(1). Also see s 19 in terms of which any agreement allowing persons from outside a designated group to occupy or own property in an area not designated to them would *ab initio* null and void.

²⁸⁸ Ss 1 and 2 of the Group Areas Act of 1966.

²⁸⁹ As above s 2(1). The Act moved away from the use of the word “native” and used the term “Bantu” to refer to “any person

controlled area. These sections reflect sections 4 and 5 of the Group Areas Act of 1950. The Act also stated that—

“no person who is a member of any group shall occupy and no person shall allow any such person to occupy any land or premises in a specified area which was not lawfully occupied ... except under the authority of a permit”.²⁹⁰

However, the Act did provide that it would not be unlawful for a person to occupy land or premises if such person is a *bona fide* servant or employee of the state; or is a *bona fide* visitor for a total of not more than ninety days in any calendar year of any person lawfully residing on the land or premises; or is a *bona fide* pupil attending a school controlled or aided by the state.²⁹¹

In furtherance of its policy of racial segregation, section 23 of the Act empowered the then State President to proclaim through the *Government Gazette* an area for the exclusive occupation by or ownership of members of a specified group. In conjunction with section 23, sections 26 and 27 of the Act prohibited the occupation or acquisition of property by disqualified persons in group areas. Regarding the enforcement of the Act, the then South African Police Force was given extensive powers. As an example of these powers, section 43(1)(a) empowered the police to enter any premises without a warrant when investigating a suspected offence in terms of the Act, and to conduct any search as might be necessary. The Group Areas Act of 1966 is described by Van der Walt as the basis of separate development, especially in residential areas.²⁹² It was estimated that between 1960 and 1983 approximately 3,5 million people were forcibly removed as a result of the discriminatory laws passed on land in South Africa.²⁹³

2.3.4 Educational Disparities

As early as the late 1800s, segregation was already applied in schools in the Cape Colony. Rhodes, as the then Prime Minister of the Cape Colony, introduced “industrial schools” in 1891 in the Cape for non-whites, which is widely held to have pioneered the training of non-whites to

who in fact is or who is generally accepted as a member of an aboriginal race or tribe in Africa” (s 12(1)(b)(i) of the Group Areas Act of 1966).

²⁹⁰ As above s 17(1).

²⁹¹ As above s 17(2).

²⁹² Van der Walt *De Jure* (1990) 26.

²⁹³ Robinson *BJIL* (1997) 477; and Department of Land Affairs *White Paper on Land Policies* 1997 (1997) para 2.5.

be useful labourers and servants.²⁹⁴ In tandem with the territorial changes imposed by Rhodes and his ministers, the Glen Gray Act of 1894 also imposed segregation in towns. Black people who had been an integral part of urban life up to that time, suddenly experienced segregation in schools, sports, prisons, hospitals, theatres and on public transport.²⁹⁵ Rhodes said the following in 1890 to explain his theory for the adoption of policies and legislation in respect of native people:

“These are my policies on native affairs, and these are the politics of South Africa...The native is to be treated as a child and denied the franchise...We must adopt a system of despotism, such as works so well in India, in our relations with the barbarians of South Africa”.²⁹⁶

With regard to black education, Giliomee explains that in the decade after the end of the First World War, there was a surge in the African demand for education. With the assistance of state subsidies, church and mission schools provided almost all the education for African and coloured children. By 1920, education in South Africa was fully segregated.²⁹⁷ The Afrikaans-orientated Dutch Reformed Church in the 1930s held the view that education in South Africa must be based on a group’s national culture, giving a prominent place to its language, history and customs. This was contrary to the English-orientated Roman Catholic and Anglican churches’ approach that education in missionary schools should be conducted in English.²⁹⁸

In 1953, under the system of apartheid and separate development, the Bantu Education Act²⁹⁹ placed the education of black children under the control of the central government. In introducing the Bantu Education Act, the then Native Affairs Minister, H.F Verwoerd, insisted that the better-paid jobs in the so-called white areas would continue to be reserved for Whites, while careers in white-collar jobs would be made available to Africans in the administration of the various homeland governments.³⁰⁰

The Bantu Education Act granted the Native Affairs Department the authority to determine the

²⁹⁴ Thomas (1997) 280.

²⁹⁵ As above.

²⁹⁶ As above xiii-xvi.

²⁹⁷ Giliomee (2020) 142.

²⁹⁸ As above 142-145.

²⁹⁹ 47 of 1953.

³⁰⁰ Giliomee (2020) 178.

curriculum and teacher service conditions in black schools. In a Senate speech on 7 June 1955, Verwoerd explained his approach of separate development and separate education to prepare each race group for employment within their communities:

“The Bantu must be guided to serve his own community in all respects because [t]here is no place for him in the European community above the level of certain forms of labour”.³⁰¹

He further explained that the existing mission schools were unfit for this purpose. The reason for this, he explained, was that these mission schools prepared students—

“not for life within a Bantu community, progressively uplifted by education, but for a life outside the community, and for posts which do not in fact exist ... the community has not been developed to such an extent that it can absorb in suitable posts those of its sons and daughters who have won fine examination certificates”.³⁰²

2.3.5 The Impact of Past Discrimination on the Present Economic Participation of Black People

Apart from the political, civil and social impact that the long history of colonial subjugation, segregation and apartheid had on black people, it also affected their ability to participate in the economy.³⁰³

Various racially discriminatory laws, adopted specifically in the apartheid era, disenfranchised and deprived black people of political, civil and social rights, and had a significant impact on economic opportunities for black people.³⁰⁴ In terms of the Group Areas Act, for instance, black people were forbidden to own immovable property or set up businesses in white areas (outside the Bantustans) which made up 87% of the country.³⁰⁵ They could own immovable property in terms of a communal system in areas reserved for black people under the management of

³⁰¹ Simpson (2021) 148.

³⁰² As above.

³⁰³ Ponte *et al* DAC (2007) 19; Preamble of the Broad-Based Black Economic Employment Act 53 of 2003; and *Certification of the Constitution of the Republic of South Africa 1996* 1996(4) SA 744 (CC) paras [5]-[7].

³⁰⁴ Department of Trade and Industry (DTI) *South Africa's Economic Transformation: A Strategy for Broad-Based Economic Empowerment* (2003) 6 and 7.

³⁰⁵ Ss 8 and 9 of the Group Areas Act 41 of 1950.

traditional leaders and with which they were traditionally associated based on ethnicity.³⁰⁶ At the end of 1987, it was estimated that 47 000 Africans held land under a leasehold system.³⁰⁷ Statistical data suggests that in the early 1990s, 67 000 white farmers owned 86% of the agricultural land, equating to an average of 16,2 hectares per rural resident, compared to 13,1 million Africans who lived in the remainder of the rural area on less than one hectare per person, on average.³⁰⁸

The residential rights of black people were also restricted. This and influx control measures had a wide-ranging impact on housing, labour and land tenure.³⁰⁹ Africans were for a large part of the apartheid era only allowed to live in urban areas if they had formal employment. Those without urban residential rights, as well as the family members of those employed in urban areas, were compelled to stay and attempt to make a living in homelands or Bantustans. These homelands were located largely in impoverished underdeveloped rural areas without resources, with poor infrastructure, and few economic opportunities. Those black people with formal employment who were eligible to stay in cities, had to stay in townships on the outskirts of metropolitan hubs far away from economic centres. This made it far more difficult for black people to work or to start a business.³¹⁰ Statistics from the World Bank in 1998 indicate that in most developing countries, unemployment is lower in rural areas. The reason for this, as cited by the World Bank, is that subsistence farming tends to pick up the slack of any excess labour. However, this is not the case in South Africa. For Africans, the likelihood of finding employment in rural areas is much lower.³¹¹

This distortion is believed to have been brought about by the pass law and influx control measures applied during apartheid.³¹² A second reason is the gradual decline of subsistence-based rural economies under the pressure of ever-increasing commercial agricultural, manufacturing and infrastructure development activities.³¹³

³⁰⁶ S 1 of the National States Citizenship Act 26 of 1970. Also see *Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 3 SA 589 (CC); 2005 21 BCLR 347 (CC) para [32].

³⁰⁷ Gqubule (2006) 92.

³⁰⁸ As above.

³⁰⁹ Black Urban Areas Act 21 of 1923; Black Administration Act 38 of 1927; and Bantu (Black) Administration Act 68 of 1951.

³¹⁰ Makgetla (2018) 77 and 78.

³¹¹ World Bank *South African Labour Markets Adjustments and Inequalities Discussion Paper 12* (1998) ii.

³¹² Makgetla (2018) 77 and 78.

³¹³ Innes (2007) 49-73.

Africans were not allowed to trade in areas outside the townships. Licences to trade were issued by the Minister of Bantu Administration and Development. Business activities were limited to trading in groceries and household necessities.³¹⁴ In terms of section 13(1) of the Group Areas Act of 1966,³¹⁵ black people were not allowed to own or lease property or hold a majority interest (majority of shares) in a company which owned or leased property outside areas designated for black people. This meant that blacks who owned enterprises could not acquire business premises outside areas designated for their respective race groups, or trade in the more affluent white areas.

The state provided municipal services during the apartheid era in industrial nodes and suburbs at the same levels found in high-income economies.³¹⁶ In contrast, African residential areas in general lacked running water, electricity, waste removal and adequate roads. In 1996, more than 88% of non-Africans had electricity, access to running piped water and regular waste removal services. For Africans, access ranged from 27% for piped water to 44% for electricity.³¹⁷

The ANC, during its National Conferences in 1954 and 1969, resolved that black education under apartheid was effectively limited to the cultural and communal roles unilaterally perceived by government.³¹⁸ Black people's education system under apartheid was, according to the ANC, developed to further this objective.³¹⁹ Some argue that the inferior education of blacks under apartheid was to benefit white workers.³²⁰ Other commentators argue that present black education is worse than before 1994. Mamphela Ramphele, former chancellor of the University of Cape Town, asserted that the present education system has lower standards than under "Bantu education" during apartheid.³²¹ Jonathan Jansen, a Professor of Education at the University of Stellenbosch, is of the opinion that good education is expensive today and

³¹⁴ Gqubule (2006) 92; and Marais *OBITER* (2006) 113.

³¹⁵ 36 of 1966.

³¹⁶ Makgetla (2018) 78.

³¹⁷ As above.

³¹⁸ See the ANC *The Freedom Charter Revolutionary Programme of the ANC* (1969) 8th page in which the unilateral curriculums of black education were condemned: "The language of [black] people are not permitted to be developed by them in their own way. Ignorant and officious White professors sit on education committees as arbiters of African languages and books without consultation with the people concerned".

³¹⁹ See the ANC's 43rd *National Conference Resolutions* (1954) 3rd page in which the Conference rejected "Verwoerd's evil Act [the Bantu Education Act] as the moral and spiritual enslavement of our children".

³²⁰ Makgetla (2018) 77 states that apartheid policies effectively limited Blacks' "access" to quality education in order to create a shortage. That, in turn, increased the premium for skills, making it easier for Whites, who had privileged access to training and education, to claim "European pay and benefits". Also see Seekings and Nattrass (2006) 4 which observe: "[U]nder apartheid, discrimination within classes (by race) exaggerated the effect of inequalities between classes".

³²¹ Mtshali *IOL* (Mar 2012) 23.

unaffordable for many if compared to education under apartheid.³²²

Giliomee explains that until the 1970s the per capita spending on coloured and African pupils was much lower than on whites. State spending on coloured and African education steadily increased. A fair degree of consensus developed in Parliament that African and coloured education had to be improved and that the racial gap in spending on education had to be reduced as rapidly as possible.³²³ The government's priority was to satisfy black demands for improved education and public health services. It would do so by keeping expenditure on whites constant until greater equilibrium was reached.³²⁴ The inequality in education expenditure is illustrated in figures released by the Institute for Race Relations in 1984. The figures showed that between 1974/75 and 1982/83, per capita expenditure had increased from R605 to R1 385 for whites; from R125,53 to R593,37 for Indians; and from R39,53 to a mere R192,34 for Africans.³²⁵ These figures are further manifested in education and employment levels. According to Makgetla, in 1996, 25% of whites aged 18 to 64 had a post-secondary degree or diploma, compared to 3% of Africans. As a result, although whites made up only 13% of the population, they accounted for 49% of working-age people with a post-secondary education or training.³²⁶

In 1959, all universities situated in white areas were closed to non-white students in terms of the Extension of University Act.³²⁷ Separate universities were established for each non-white racial group.³²⁸ It is said that black people often found it difficult to attend black universities situated in territorial areas far away from where they stayed or worked outside the Bantustans.³²⁹ It is argued that the fact that black universities were situated in Bantustans, away from industrial and economic hubs in the metropolis, isolated black people spatially and economically. It is viewed by some that the system entrenched a lack of access to resources and work organisation for black people.³³⁰

As a result of the restricted scope of black basic education, limited access to tertiary education,

³²² Jansen *Times Live* (Feb 2023) 1.

³²³ Giliomee (2020) 178.

³²⁴ As above 179.

³²⁵ Bolt *ISA* (1984) 9-11.

³²⁶ Makgetla (2018) 77.

³²⁷ 45 of 1959.

³²⁸ S 5(2) and (3) of the Extension of University Education Act.

³²⁹ Gqubule (2006) 91; and Makgetla (2018) 92 and 93.

³³⁰ As above.

and job reservation, black people found it difficult to acquire the necessary experience and skills to excel in skilled, professional and management positions.³³¹ This is illustrated by the fact that only 0,5% of all the companies listed on the Johannesburg Stock Exchange (JSE) in 1992 had black directors. Out of a total of 2 250 directors of the top 100 companies, only 40 were black, thus fewer than 2%. In 1992, only 2 100 black people held top and middle management positions in the private sector.³³² With regard to professional, technical and administrative positions, only 250 000 black people held any such positions in 1989.³³³ Black people were further limited in their choice of professional careers. The only positions to which they could aspire were in education (teachers) for black pupils, and preachers.³³⁴

According to Stats SA, at the end of apartheid, 50% of Blacks had no education or had incomplete primary education and only 7% had completed secondary or higher education. It was reported that in 1996, black females aged 20 years and older had the lowest educational qualifications, with 20% of black females having received no education at all. Among black males, 14% had not received any education. Conversely, 99% of whites aged 20 years and older had received secondary education.³³⁵

The perpetuating effect of poor-quality or lack of education beyond generations was emphasised by Stats SA in 2016. It emphasised that the differences in international mobility had remained significant across population groups. The same families tend to constitute the most educated group from one generation to the next. Economists refer to this as the under-education trap as some families remain unskilled from one generation to the next.³³⁶

The civil and socio-economic disempowerment endured by black people prior to 1994 can be largely attributed to a lack of political power as well as the implementation of policies and legislation to promote the ideologies of segregation and later apartheid. Economic discrimination under apartheid can be summarised as centred on limiting the access of the majority of black

³³¹ Makgetla (2018) 88. Also see Harvey (2021) 189 who argues that weakness derived in part from the illiteracy and lack of formal and proper education by black people has been a major factor hindering the development of black people and also did “enormous damage to African communities, with long-term implications”.

³³² Gqubule (2006) 99.

³³³ As above.

³³⁴ As above.

³³⁵ Stats SA *Education in South Africa: Selected findings from Census '96* (1997) 1-10.

³³⁶ Stats SA *Education Series III: Educational enrolment and achievement, 2016* (2016) 88-120.

people to quality education, skilled jobs and professional occupations, urban residence, infrastructure as well as ownership of businesses and land.³³⁷

Terreblanche describes the impact of apartheid on the economic participation of black people as follows:

“Decades of apartheid and racial capitalism have disempowered the black community politically, socially and economically...Social disempowerment has been caused by poverty and...economic disempowerment...by discrimination, the totally inadequate educational system and the lack of opportunities to develop senior leadership in private and public business organisations and in trade unions. The restructuring of South African economy would be incomplete if it did not succeed in rectifying the above situation”.³³⁸

2.4 IDEOLOGY AND IDEOLOGICAL DEVELOPMENT OF THE RULING ANC

Piketty posits that social ideologies usually evolved in response to historical experience.³³⁹ These ideologies are intertwined and demonstrate the basis and rationale of Broad-Based Black Economic Empowerment (B-BBEE) policies as outlined in legislation (*de jure* B-BBEE) and how they play out in practice (*de facto* B-BBEE). It is further important to understand the context of historical events as it also explains certain ideological beliefs and how they developed.

In the context of equality, the interrogation of the intersection of the political, economic, social and ideological is imperative.³⁴⁰ Heywood describes an ideology as more or less a coherent, systematic and consistent set of ideas and values that provide a basis for political action, whether this is intended to pressure, modify or overthrow the existing system of power relationships.³⁴¹

Piketty notes that ideology has social, economic and political dimensions.³⁴² It is an attempt to respond to a broad set of questions concerning the desirable or ideal organisation of society.

³³⁷ As above 76-78.

³³⁸ Terreblanche *SEP* (1991) 9.

³³⁹ Piketty (2020) 10.

³⁴⁰ Smith (2018) 165.

³⁴¹ Heywood (2007) 45. Andrew Heywood was Vice Principal of Croydon College, England and previously been Director of Studies at Orpington College, London, England. He has over 20 years' experience as a Head of Politics and a politics lecturer. He currently works as a freelance author and consultant.

³⁴² Piketty (2020) 3.

Given the complexity of the issues involving ideology, no ideology can ever demand full and total assent: conflict and disagreement are, according to Piketty, inherent to the very notion of ideology.³⁴³

In order to understand the socio-economic policies of the day, such as the B-BBEE programme, one must have regard for the ideologies that shape them. Ideologies, as systems of ideas, ideals and beliefs, are deeply ingrained in personal and political convictions. They form the prism through which policies are conceived.

Policy choices of the ANC are determined by several ideologies. This ultimately translates into government policy and legislation such as the B-BBEE programme. These ideologies can be traced back to the ANC's inception in 1912 and have developed over time. ANC ideologies developed against the background of the history of inequality and discrimination in South Africa. History was interpreted in a specific way by the ANC, which played a significant role in the ideologies adopted by the ANC over time. These ideologies were also strongly influenced by international developments during transition to South Africa's constitutional democracy.³⁴⁴ With regard to political and socio-economic policies, three main ANC ideological pillars can be identified, namely African Nationalism, the Freedom Charter and the National Democratic Revolution (NDR). Although the ANC is regarded as a "broad church" incorporating a wide array of "liberation ideologies", these ideological pillars largely influence the socio-economic policies adopted by means of resolutions at ANC National Conferences which resolutions lead to the adoption of government policies and legislation such as BEE policies and legislation. This is discussed in paragraph 2.5 below. To understand the present categorisation of the beneficiaries of BEE, an understanding of the history and development of these ANC ideologies and policies is important.

2.4.1 African Nationalism

A sequence of historic events fostered a strong feeling of nationalism and consolidation among, especially Africans, in the pursuit of the recognition of political and socio-economic claims for

³⁴³ As above.

³⁴⁴ Odendaal (2022) 365-367 refers to the period Feb 1990 to Apr 1994 as the "Transitional Period". Also see Currie and De Waal (2016) 4-6.

Africans. The ANC was strongly influenced, both ideologically and politically, during its formation period, and in the first half of the 20th century by British liberalism.³⁴⁵ Between the 1830s and 1900s, several hundred Africans travelled to Britain and the USA for educational, religious and political reasons. Africans who travelled abroad for education were linked to various missionaries and therefore predominantly of a liberal democratic persuasion.³⁴⁶ This set the tone to some degree for the reformist politics of the ANC when it was founded in 1912.³⁴⁷

From the mid-1890s onwards, black South Africans began to visit the USA in increasing numbers, including the cream of the new educated elite in Southern Africa. Among the students who studied in the USA were John Langalibalele Dube, the founding president of the ANC, and Pixley ka Isaka Seme (called Pixley Seme), a future president of the ANC. They were exposed to experiences and ideas in the USA which, unlike Britain, had a more assertive, separatist black narrative. This was influenced by the history of slavery and by “Jim Crow” segregation, especially in the American south during the decades after the Civil War. These formative experiences of African people who later became leaders of the ANC played a pivotal role both in shaping its birth in 1912 and what it became thereafter, including its beliefs, ideas and programmes during the decades of struggle.³⁴⁸

Four of the first five ANC presidents had travelled abroad for education or other purposes before 1900, with the result that there are numerous ideological, political and class links and continuities between the pre-history and the later history of the ANC. The internationalism of the early years was described as cosmopolitan liberalism. At the time it did not resemble the revolutionary internationalism of the Bolshevik party in Russia.³⁴⁹

Influenced by their studies in the USA, ANC leaders espoused ideas encountered among African Americans. Dube, who later became the founding President of the ANC, returned in 1899 after completing his studies in the USA with a strong belief in the idea of “Africa for the Africans”. Coming from the founding president of the ANC, this was ideologically important and went on to fundamentally influence ANC thinking at the time and, later on, its membership, organisation

³⁴⁵ Ngqulunga (2017) 38 and 39. Ngqulunga’s *The Man Who Founded the ANC*, is a biography of Pixley ka Isaka Seme, the founder of the ANC.

³⁴⁶ Giliomee (2020) 142.

³⁴⁷ Harvey (2021) 150 and 151.

³⁴⁸ Odendaal (2012) 255; and Harvey (2021) 152.

³⁴⁹ Harvey (2021) 152.

and leadership. Dube also asserted that “Justice will be done only when the African ruled the country”. Already then, prior to the birth of the ANC, the notion of narrow Africanism started to emerge.³⁵⁰

In order to understand the ANC’s strong sense of African Nationalism, it is important to understand the way in which the ANC was established. The events that ultimately led to the founding of the ANC and galvanisation of African unity across all African tribes in South Africa can be traced back to the Anglo-Boer War and the relationship between certain African groups and the British.

During the Anglo-Boer War, the British colonial authorities not only promised Africans, but “assured” them that “equal laws” and “equal liberties” would be granted to all population groups after a Boer defeat.³⁵¹ This promise by the British was made to compensate Africans for joining British forces during the War.³⁵² But during the negotiations for the drafting of the Treaty of Vereeniging,³⁵³ the British representatives reneged on these promises by making a concession to the Afrikaners. The concession was that the franchise would be postponed until after the restoration of self-governance to the former Boer republics. This left the Africans with a sense of betrayal and the realisation that African efforts will have to be consolidated to gain recognition of claims for Africans.³⁵⁴

In 1909, the South African Native Convention (SANC) was founded. The main reason for its formation was to campaign against the exclusion of black people from negotiations for the establishment of the Union in South Africa in 1910.³⁵⁵ As a result of the qualified black franchise in the Cape Colony, the organisation was very active in the Cape. Black politics at that time demanded that the pressure on Britain and the Union government for enfranchisement of black people, be extended to other provinces.³⁵⁶

In order to resist the political side-lining of Africans in the soon-to-be-formed Union, the ANC

³⁵⁰ Odendaal (2012) 287 and 290.

³⁵¹ Ngcukaitobi (2018) 232; and Giliomee *et al* (2022) 313.

³⁵² Giliomee (2007) 278; and Ngcukaitobi (2018) 232.

³⁵³ The treaty that brought the Anglo-Boer War to an end.

³⁵⁴ Clause 8 of the Treaty of Vereeniging.

³⁵⁵ Ngqulunga (2017) 46.

³⁵⁶ As above 52.

and other black organisations followed an approach of petitions, deputations and delegation.³⁵⁷ The first petition in 1908 to the High Commissioner for Southern Africa, Walter Hely-Hutchinson, was for the representation of Africans in the government of the proposed Union of South Africa. The Transvaal Native Congress, writing on behalf of the “aboriginal natives of South Africa resident in the Transvaal” called for Africans to be granted “representation in the Parliament of the Union of United South Africa” and extension to Africans of “the full political privileges as may be granted to the European population in the constitution”.³⁵⁸

Speaking against the Union of South Africa Bill (which later became the South African Act) in 1909, SANC requested that reference to “race and colour” be deleted from the Bill. They suggested that clause 33 of the Bill be amended to read “European male adults and native and coloured voters”. This would grant Africans “representation in the Parliament of a United South Africa”. They further called for a law recognising that all persons within the Union were entitled to full and equal rights and privileges, subject only to the conditions and limitations established by law, and applicable to all citizens, irrespective of class, colour or creed.³⁵⁹

In June 1909, African chiefs from the Transkei addressed a petition to the Governor of the Cape Colony. They pointed out that the limited rights of black franchise which were enjoyed in the Cape Colony were threatened by the Act of the Union. They protested against the use of race and colour in parliamentary selection, as this excluded the vast majority of South Africans from participating in the affairs of “their country”.³⁶⁰

When these pleas fell upon deaf ears, the SANC decided to approach the British government directly. They sent a delegation to London in 1909. The delegation was joined, amongst others, by Pixley Seme, John Dube, Alfred Mangena, Richard Msimang, and J.T Jabavu who later played a leading role in the founding of the African Native National Congress as frontrunner of the ANC.³⁶¹

A petition calling for racial equality was also drawn up by J.T Jabavu during the same period

³⁵⁷ Ngcukaitobi (2018) 233.

³⁵⁸ Táíwò (2009) 91-92.

³⁵⁹ Karis and Carter (1973) 148; and Ngcukaitobi (2018) 233.

³⁶⁰ Karis and Carter 149.

³⁶¹ As above.

when the House of Commons (British Lower House of Parliament) debated the enactment of the South African Bill into law.³⁶² During the consideration of and debate on the Bill by the House of Commons, the Secretary of State for the Colonies, Sir George Grey, remarked on the controversial issue of extending the limited Cape black franchise that he was not prepared to “take the responsibility for the possible wrecking of the Union by a provision of this kind”. If there were to be a change in this regard, it must be made in South Africa by the South Africans themselves. The Bill was eventually passed, as proposed by the Secretary of State for the Colonies.³⁶³

The SANC realised that Africans would have to unite and take bold action. Jabavu, one of the delegates in London, stated:

“The Native and Coloured people must now realize that an entirely new chapter in South African history is opening, in which they will depend on themselves...for the securing of maintenance of their civil and political rights. They must come united politically...”³⁶⁴

Some African leaders requested that the activities of SANC be expanded to the northern provinces, especially Transvaal.³⁶⁵ For this purpose, and under the leadership of Pixley Seme, a national congress was to be convened. This was done on 8 January 1912 in Bloemfontein under the name of the South African Native National Congress (SANNC).³⁶⁶ Dube was elected as the first President.³⁶⁷ The Constitution contained a preamble, as well as the main aims of the SANNC, namely to “promote unity and mutual cooperation between the Bantu races”; to establish a “centre of communication between the government and the aboriginal races of South Africa”; to “promote the educational, social, economic and political elevation of the native people in South Africa”; and to promote “better understanding between the native Chiefs of South Africa”. A further aim was for the SANNC to “bring about mutual understanding between the white and black inhabitants of South Africa”. Finally, the Congress would strive to “safeguard generally the interest of the inhabitants throughout the native races of South Africa and to obtain

³⁶² As above 151.

³⁶³ Ngcukaitobi (2018) 239 and 240.

³⁶⁴ Karis and Carter (1973) 154.

³⁶⁵ Ngqulunga (2017) 52.

³⁶⁶ As above 53.

³⁶⁷ As above 57.

redress of any other just grievances”.³⁶⁸

After the meeting formalities were dealt with, Seme delivered the keynote address. He opened with the following declaration:

“Chiefs of royal blood and gentlemen of our race...We have discovered that in the land of their birth, Africans are treated as hewers of wood and drawers of water. The white people of this country have formed what is known as the Union of South Africa – a union in which we have no voice in the making of laws and no part in their administration. We have called you...so that we can together devise ways and means of forming our national union for the purpose of creating national unity and defending our rights and privileges.”³⁶⁹

In respect of membership of the SANNC, ordinary membership would be open “to all men who belonged to the so-called negro or aboriginal African races South of the Zambesi”. Honorary membership would be composed of two classes: The “Ruling Chiefs and Hereditary Princes of African blood”, and “men and women who shall have rendered eminent service to the native races of South Africa”. As for auxiliary membership, “all the wives of any affiliated branch” (that is, female members by virtue of being wives of ordinary members).³⁷⁰

The enactment of the Union Act of South Africa in 1909 and with the establishment of the Union of South African in 1910, racial segregation was institutionalised in South Africa. It was extended beyond formal state institutions into the social sphere such as schools, modes of transport and living areas.³⁷¹ The allocation of land based on race became legally entrenched with the enactment of the Natives Land Act of 1913, as discussed in paragraphs 2.3.3.1 and 2.3.3.2 above.

The SANNC launched a campaign to oppose the Act by petitioning the Prime Minister of the

³⁶⁸ As above 54.

³⁶⁹ As above 55.

³⁷⁰ As above 50 and 51.

³⁷¹ See *Moller v Keimoes School Committee and Another* 1911 Appellant Division Reports p 165 which concerned racial segregation of schools. Although no statute provided for racial segregation in public school, Chief Justice Henry de Villiers, considered race to be an important consideration in judicial interpretation and held that “white parents could not be compelled to send their children to a school with children of mixed origin could be compelled to attend”. Also see *Williams and Adendorf v Johannesburg Municipality* 1915 Transvaal Provincial Division Reports p 106 in a legal issue regarding the law allowed racial segregation in the use of tramcars. The Court held that “feelings of sensitivity, even the prejudices and foibles of the general body of reasonable citizens” the law should be interpreted to allow racial segregation in the use of public transport.

Union in 1914. Signed by the President of the SANNC (Dube), the petition spoke on behalf of “all the native tribes of South Africa”. The petition stated that racial segregation was not practical but an instrument to take away the independence of black people and their means of self-improvement.

The petition argues that restricting black people to reserved areas would deprive Africans of cattle, restricting their ability to acquire land, and compelling them into service contracts with white farmers. The petition further stated that “compulsory service at reduced wages and high rents will not be separation, but an intermingling of the most injurious character of both races”.³⁷² The petition was not acknowledged by the Prime Minister of the Union or any government official and was totally ignored. The SANNC then felt compelled to approach the British government in the United Kingdom directly. A delegation under the leadership of Dr Walter Rubusana was sent to Britain in 1914, but they were not well received.³⁷³ British authorities had little sympathy for the SANNC’s cause and maintained its stance that the issue must be addressed in South Africa by South Africans.³⁷⁴

On the SANNC’s return to South Africa, the world was in a state of war. The war, the First World War, saw global powers facing each other: Germany versus France and Russia as the main opposing forces, with various European and other countries such as Britain in alliance with them. Apart from white South Africans deployed, thousands of Africans were sent to German South West Africa by the Union government to assist in rail construction for military purposes. In 1916, 17 000 African troops served under General Smuts in German East Africa (now Tanzania) in support of the British. The SANNC supported the deployment of 25 000 Africans to do manual work in French docks to assist British allied forces. Many Africans succumbed during the War.³⁷⁵

At the end of the War in 1918, African expectations were high that Britain would assist them in obtaining political rights and resolve the land issue in South Africa. This expectation was based on their sacrifices and their supportive role of Britain and Allied forces during the War. In December 1918, the SANNC submitted a petition to the then British monarch, King George V,

³⁷² Karis and Carter (1973) 176-178.

³⁷³ As above.

³⁷⁴ Willan *The Journal of African History* (1979) 83-102; and Simpson (2021) 26 and 27.

³⁷⁵ Karis and Carter (1973) 229-235.

reminding him of the “active role played by ourselves” in assisting Britain in the War. They asked for “equality under British rule in South Africa”. A deputation was sent to meet the British Prime Minister, David Lloyd George, but they returned empty-handed. Britain maintained its policy of self-governance for South Africans and would refrain from interfering in the domestic political affairs of South Africa.³⁷⁶

Therefore, after several petitions and deputations over a period of ten years, Africans realised that the British imperial government would not fight on their behalf and that they would have to deal with their political disenfranchisement themselves. A strong sense of “black consciousness” started to develop amongst Africans. The strategy of deputations to Britain would gradually but surely be abandoned.³⁷⁷

In 1923, the Native Urban Areas Act of 1923 was enacted to control the influx of black people into urban areas by means of a pass system. The SANNC responded by adopting the African Bill of Rights (1923). The document demanded equal rights for Africans and declared that as human beings, the “Bantu inhabitants” of the country have the indisputable right to a place of abode in the “land of their fathers”. As “sons of the soil” Africans have the “unrestricted ownership of this land, the land of their birth”. Accordingly, the petition continued, the “great European races of the Union” were urged to take the rights of the natives into “serious consideration”.³⁷⁸ As with previous attempts, these attempts were ignored by the South African government as well as the British.³⁷⁹

The SANNC was renamed the African National Congress (ANC) in 1923.³⁸⁰ During the period that followed from the mid-1920s to the outbreak of the Second World War in 1939, the ANC was reported to be rife with internal factionalism and experienced financial difficulty. Its political structures were weak, as it was grappling with its identity – was it a party of the African elite or a mass-based party? Furthermore, Zaccheus Richard Mahabane who was the president-general of the ANC between 1924 to 1927, was suspected of communist leanings after his visit to the Soviet Union in 1927. This further weakened the identity of the ANC.³⁸¹

³⁷⁶ As above 236 and 237.

³⁷⁷ Ngcukaitobi (2018) 247.

³⁷⁸ Asmal *et al* (2005) 45.

³⁷⁹ Ngcukaitobi (2018) 248.

³⁸⁰ Ngqulunga (2017) 2.

³⁸¹ Karis and Carter (1973) 482-483; and Ngcukaitobi (2018) 252 and 254.

This was also the period which saw a continuous growth in Afrikaner Nationalism. Afrikaner Nationalism was inspired by the humiliating events of the Anglo-Boer War and gained momentum with the establishment of the National Party (NP) in 1914. The founder of the NP, General J.B.M Hertzog, became prime minister in 1924. Afrikaner Nationalism posed a new threat to the rights and freedom of Africans.³⁸² It was during this time of growing Afrikaner Nationalism that the ANC was organisationally weak and could not effectively oppose the adoption of legislation which impacted the socio-economic position of Africans, such as the Wage Act of 1925, the Native Affairs Bill in 1925, and the Mines and Works Amendment Act in 1926.

In 1943, the ANC at its conference, adopted two documents as policies, namely the Africans' Claims in South Africa and the Bill of Rights. Both documents were formulated in response to the Atlantic Charter created under the leadership of the United States and the United Kingdom which was drawn up at the height of the Second World War and contained various "common principles" on which they based their hopes "for a better future for the world".³⁸³ It contained eight principles to which the United States and the United Kingdom committed themselves. Among these principles was a pledge to "seek no aggrandisement, territorial or other". No territorial changes would be made to countries falling under the control of either the United States or the United Kingdom unless these were "with the freely expressed wishes of the people's consent". There was a further commitment to "respect the right of all peoples to choose the form of government under which they will live" and to restore "sovereign rights and self-government ... to those who have been forcibly deprived of them".³⁸⁴

According to the Atlantic Charter, economic prosperity was important to ensure world peace. Therefore "all states, great or small, victor or vanquished" should be guaranteed "access on equal terms, to the trade and the raw materials of the world". Economic cooperation was necessary to secure improved labour standards, economic advancement and the social security of each country.³⁸⁵

After the war, peace should be established, giving "assurance to all men in all the lands that they

³⁸² Giliomee (2020) 38-39, 124 and 126-127; and Simpson (2021) 48.

³⁸³ Odendaal (2022) 11.

³⁸⁴ Ngcubaitobi (2018) 264 and 265.

³⁸⁵ As above 265.

may live out their lives in freedom free from fear and want”. There should be freedom of movement, with people being able to “cross the oceans without hindrance”. Finally, the use of force should be abandoned in settling disputes and there should be “a wider and permanent system of general security” that might result in the disarmament of nations which “threaten or may threaten aggression outside of their frontiers”.³⁸⁶ The Atlantic Charter promised a set of new normative principles that would underpin government within and between states.

The Atlantic Charter was paradoxical in the sense that in 1941, the African continent was mainly occupied by European countries. It was also the British Prime Minister, Winston Churchill, who refused to extend the principles of the Atlantic Charter to Blacks and Indians in Africa and Asian British colonies and dominions as this would threaten the British Empire. The ANC described the Atlantic Charter, which was not applied to black Africans, as “nothing more than empty words”.³⁸⁷ At the December 1942 conference of the ANC, the then ANC President, Dr A.B Xuma, declared that the freedoms promised by the Atlantic Charter, such as freedom from fear, freedom from want and freedom from oppression, were vital and fundamental. “They have a special meaning and significance to the Africans in South Africa”. To translate the promises of the Atlantic Charter into reality, it was necessary to develop an “Atlantic Charter for Africans of the Union of South Africa”, Xuma said. Such a charter should not be based on race, as the “test of the people is their aim, not their colour”, suggested Xuma. Xuma’s proposal that an African Charter for Africans be drawn up was unanimously adopted at the conference. This led to the establishment of a committee comprising 28 influential Africans to formulate a charter. Two documents were produced by the committee, the first being the *Africans’ Claims in South Africa* and the second the *Bill of Rights*.³⁸⁸ The *Africans’ Claims* document in essence acknowledged all the principles contained in the Atlantic Charter but claimed that these principles should also be applied to African people in South Africa.³⁸⁹

The second document produced by the committee, the Bill of Rights, Full Citizenship Rights and Demands, formed part of the African Charter. The rights contained in the Bill of Rights were listed under seven headings: Full Citizenship Rights and Demands; Land; Industry and Labour; Commerce; Education; Public Health and Medical Services; and Discriminatory Legislation.

³⁸⁶ As above.

³⁸⁷ Karis and John (2016) 255.

³⁸⁸ As above 270-272.

³⁸⁹ Odendaal (2022) 11.

Racial discrimination as exemplified by a racially based franchise should be outlawed, with voting being extended “to all adults, regardless of race”. Courts should dispense equal justice to all. Freedom of movement and freedom of residence should be guaranteed and restrictive laws such as the Natives Land Act and Urban Area Act had to be scrapped. Everyone, regardless of race, should have the right to “own, buy, hire, leave and occupy land or any other form of property”. The right to engage in any occupation, trade or profession without discrimination was demanded. Employment in the public service should be available for all. Every child had the right to “free and compulsory education” and “admission to technical schools, universities and other institutions of higher learning”. It was recognised that unless employment opportunities were available to all without regard to race, access to schools would be meaningless. Thus, the related demand for equal pay for equal work and equal opportunities. The document concluded with a demand for discriminatory laws and discriminatory clauses in the constitution to be repealed.³⁹⁰ The African Claims were dismissed locally and abroad as “proposals which are wildly impracticable”.³⁹¹ Although the African Claims of 1943 fell on deaf ears then, it is widely regarded as the foundation of the Bill of Rights in the present Constitution of South Africa. The African Claims succeeded in consolidating the views of Africans of which rights were internationally recognized and should be granted to all, including Africans.³⁹²

During the period after the Second World War, the ANC was said to be ideologically squeezed between the vicious nationalism of the Afrikaners and the continuing, although weakened, imperialism of Britain.³⁹³ Under the ANC leadership of Dr Xuma, the ANC Youth League was established in 1944. The Youth League’s goals were the same as those spelled out by the ANC (then the SANNC) in 1912, and as priority the urgent task to resist government’s encroachment on African liberty and land. The age of “decorous” protest came to an end and was replaced with a strategy of mobilisation, agitation and confrontation.³⁹⁴

The Youth League consisted of, amongst others, Nelson Mandela, Walter Sisulu and Oliver Tambo. The first Youth League President was Anton Lembede who did not focus solely on confrontation but also envisioned a new order, a vision of a “non-racial” future for South Africa.

³⁹⁰ Karis and John (2016) 275.

³⁹¹ As above 278.

³⁹² Odendaal (2022) 11 and 12; and Ngcukaitobi (2018) 5.

³⁹³ Ngcukaitobi (2018) 250.

³⁹⁴ Meredith (2010) 199 and 200; and Ngcukaitobi (2018) 258.

The Youth League had drawn up its militant “Programme of Action” in 1949. Its mission was to drive the politics of the ANC towards radical confrontation in the form of boycotts, strikes, protests and civil disobedience. For them, radicalisation of the ANC was an urgent imperative with the election of D.F. Malan of the National Party as prime minister. For them the mandate that D.F. Malan received from his National Party elective constituency was clear: South Africa must become a white man’s country and apartheid was now the official and unequivocal policy of the government. The Youth League’s “Programme of Action” was officially adopted by the ANC conference in 1949.³⁹⁵

One of the first successes of mass resistance facilitated by the ANC in terms of its Programme of Action was in 1952, known as the “Defiance Campaign”. In light of the protest activities undertaken by Coloureds, Indians and Africans against the discriminatory laws passed by the government at the time, Walter Sisulu introduced the idea of a coordinated civil-disobedience campaign against the government, involving trained volunteers from all groups who would deliberately provoke arrests and imprisonment by contravening selected laws and regulations. If sufficient numbers were arrested, the jails would overflow, and the system would collapse.³⁹⁶

In January 1952, an ultimatum calling for the repeal of six unjust laws, signed by Dr Moroka (the then ANC President) and Sisulu, was sent to Prime Minister Malan. Among the laws cited were the Suppression of Communism Act,³⁹⁷ the Group Areas Act,³⁹⁸ the Separate Registration of Voters Bill³⁹⁹ and the pass laws. Unless the government complied, the signatories warned, a “Defiance Campaign” would start. Malan’s secretary replied that the government had no intention of repealing the laws and warned it would use the full machinery at its disposal to quell any disturbances. The date then set for the start for the Defiance Campaign was 26 June 1950. It was a date that was to become a focal point in the calendar of resistance activity for years to come.⁴⁰⁰

The mission of the campaign was to flout apartheid laws through acts of defiance such as using

³⁹⁵ ANC *Programme of Action* (1949) 1st and 2nd page. Document is unnumbered.

³⁹⁶ Meredith (2010) 88; and Giliomee *et al* (2022) 469.

³⁹⁷ 44 of 1950.

³⁹⁸ 41 of 1950.

³⁹⁹ Simpson (2021) 143 and 144. As frontrunner to the later adopted Separate Representation of Voters Act 46 of 1951 in which the franchise enjoyed by Coloureds in the Cape would be revoked.

⁴⁰⁰ Meredith (2010) 89.

railway coaches, waiting rooms and platform seats designated for Europeans only, or by parading on the streets after curfew without permits, or by entering locations without permits. Whenever possible, the authorities were to be forewarned of the intentions of each batch of volunteers; in some cases, full lists of names of the volunteers involved were politely handed to the police. It was envisioned that this level of protest would result in mass defiance.⁴⁰¹

Early in the morning of 26 June 1952, a group of volunteers in Port Elizabeth marched through the “Europeans Only” entrance at the railway station, singing freedom songs and accompanied by a cheering crowd of friends and family. They were promptly arrested by police. Later in the day in Boksburg, east of Johannesburg, a small group of Africans and Indians, led by Walter Sisulu and a veteran Gandhi supporter, Nana Sita, walked into the African location without entry permits, holding their thumbs in the Congress salute. Mandela was present, but only as a spectator. He had previously delivered a letter to the Boksburg magistrate, advising him that a group of volunteers would enter the location without permits. All the groups were taken off to the police cells. That night, ANC supporters meeting in the Garment Workers’ Hall in Anderson Street in Johannesburg left the building after the curfew had started at 11 p.m. and were arrested.⁴⁰²

The campaign soon grabbed the popular imagination. The slogan *Mayibuye Afrika!* – “Let Africa return!” – became a common greeting on the streets. With almost religious fervour, days of prayer, hymn-singing and church services were held throughout the country. During July, more than 1 500 people were arrested for acts of civil disobedience; in September, the peak of the campaign, the number reached 2 500. In five months, nearly 8 000 people went to prison for periods ranging from one to three weeks, most of them charged under the Suppression of Communism Act.⁴⁰³

In December, in one of the final acts of defiance, a group of volunteers contravened permit regulations in Germiston. Their number included seven whites, one of whom, Patrick Duncan, was the son of a former governor-general. Duncan’s act of defiance was said to have given the campaign both prestige and respectability.⁴⁰⁴

⁴⁰¹ As above.

⁴⁰² As above 90; Simpson (2021) 141; and Giliomee *et al* (2022) 469.

⁴⁰³ Meredith (2010) 91.

⁴⁰⁴ As above 92.

The government, meanwhile, reacted not in the conciliatory manner that some in the ANC had anticipated but with ruthless determination to crush the campaign. In July, police raided the offices of the ANC and the Indian Congress and the homes of their officials, confiscating documents and papers, and then arrested 20 leaders of the campaign in Johannesburg, including Mandela, Sisulu, Marks, Moroka, Dadoo and Cachalia, who were charged for promoting communism. Mandela was arrested in the office of the law firm of H.M Basner where he was working at the time, but, like the others, he was subsequently released on bail.⁴⁰⁵

Their trial in November became the focus of national attention. For the first time, ANC leaders faced the prospect of imprisonment for political protest against the government, an event which distinguished the Defiance Campaign from all other protests over the previous 40 years. Crowds of supporters gathered outside the Johannesburg High Court. In a packed courtroom, all were found guilty of what was termed “statutory communism”. But as the judge in the case, Judge Franz Rumpff, admitted, [t]his has nothing to do with communism as it is commonly known”. Furthermore, he accepted that although the accused had planned acts that ranged from “open non-compliance of laws to something that equals high treason”, they had consistently instructed their supporters “to follow a peaceful course of action and to avoid violence in any shape or form”. They were sentenced to nine months’ imprisonment with hard labour, but the sentence was suspended for two years.⁴⁰⁶

To ensure that this campaign was stamped out and that no similar one could ever be started again, the government employed new measures. In December, prohibition orders were imposed on 50 leaders and organisers, preventing some, like Marks and Dadoo, from participating in any ANC or Indian Congress activity for life, and others for shorter periods. Mandela was prohibited from attending meetings of any kind and restricted to the district of Johannesburg for a period of six months. New legislation⁴⁰⁷ was then introduced which imposed severe penalties of fines, imprisonment and corporal punishment for anyone inciting others to commit civil-disobedience offences and which empowered the government to declare a state of emergency and use emergency regulations whenever “the maintenance of public order was endangered”. The effect was to make protest virtually illegal.⁴⁰⁸

⁴⁰⁵ As above.

⁴⁰⁶ As above.

⁴⁰⁷ The Criminal Law Amendment Act 8 of 1953.

⁴⁰⁸ Meredith (2010) 93; and Giliomee *et al* (2022) 469.

The Defiance Campaign of 1952 was said to have transformed the ANC from an elite group into a mass movement. The sight of Africans defying the government won it new prestige and strengthened a sense of solidarity. The fear of refusing to submit to white authority lost its sting. The ANC membership in the wake of the campaign rose from 7 000 to as many as 100 000. Abroad, the African cause gained international attention for the first time.⁴⁰⁹

The sense of achievement among people such as Mandela who participated in the campaign was profound. “The campaign freed me from any lingering sense of doubt or inferiority I might still have felt,” he said. “It liberated me from the feeling of being overwhelmed by the power and seeming invincibility of the white man and his institutions”.⁴¹⁰

In 1955, the ANC adopted the Freedom Charter compiled by the Congress of the People. The Congress of the People consisted of various organisations that opposed the government’s policy of apartheid.⁴¹¹ The Freedom Charter envisioned, amongst others, South Africa as a home for all and proclaimed that “South Africa belongs to all who live in it, black and white”. Mandela notes that the African nationalists within the ANC were outraged by this clause in the Freedom Charter. In the Africanist view, the only true owners of South Africa were Africans. The Africanists claimed that the ANC, through adopting the Freedom Charter and its willingness to support multiracial objectives, had yielded to the influence of other racial groups. What Africanists wanted, Mandela explained, was to abandon the Freedom Charter and to return to the era of “go-it-alone” politics and revert to the 1949 “Programme of Action” which emphasised “freedom from white domination”. They insisted that nothing could be gained from trying to appease white opinion. The only way in which white domination could be broken was by black force, Mandela recalled.⁴¹²

In the wake of adopting the Freedom Charter, the police arrested several “activists” (those opposing apartheid) in 1956. In 1957, the state prosecuted 156 people for high treason. The prosecution’s case was that the 156 accused were members of a countrywide conspiracy, plotting to overthrow the existing government by revolutionary methods involving violence and the establishment of a communist state. The Freedom Charter, the Congress of the People and

⁴⁰⁹ Meredith (2010) 93.

⁴¹⁰ As above 94.

⁴¹¹ As above 130. The Congress of the People consisted of four organisations: the ANC, Congress of Democrats, the Indian Congress and the Coloured People’s Organisation.

⁴¹² As above 129-134.

the Defiance Campaign were all cited as key parts of the conspiracy.⁴¹³ After the acquittal of the 156 people accused of high treason in 1957, Mandela noted the nationalist impact it had:

“...the treason trial served as a rallying point for anti-apartheid activists. The accused became popular heroes. For many Blacks, the ANC emerged as a real force capable of challenging government”.⁴¹⁴

In 1961, the ANC, under the strong influence of the Youth League, adopted an even more aggressive approach of resistance in the form of military-style sabotage and guerrilla action, the “armed struggle”.⁴¹⁵ This led to the formation of the ANC’s military wing, *Umkhonto we Sizwe* (Spear of the Nation).⁴¹⁶

Umkhonto we Sizwe embarked on various acts of sabotage targeting government and municipal buildings.⁴¹⁷ In July 1963, various leaders and high-ranking members of the ANC and its military wing were arrested for conspiracy and sabotage-related conduct at Liliesleaf Farm on the outskirts of the suburb of Rivonia, north of Johannesburg. These included Walter Sisulu, Govan Mbeki, Ahmed Kathrada, Lionel Bernstein, Bob Hepple and Raymond Mhlaba.⁴¹⁸ Nelson Mandela was at that stage serving a prison sentence of five years without the possibility of parole for a conviction on charges of inciting workers in essential occupations to act illegally and for leaving the country without a valid travel permit.⁴¹⁹ The police confiscated various documents during its raid and arrests at Liliesleaf Farm. The most significant document was *Operation Mayibuye* which cited ambitious plans for an elaborate guerilla warfare strategy in South Africa. A host of other documents relating to revolutionary methods, arms manufacture, guerilla recruitment and training, and contacts with communist countries such as China, the Soviet Union and East European Communist governments such as East Germany were also confiscated. The Liliesleaf documents confiscated included 106 maps indicating targets such as police stations, post offices, government offices, railway lines, telephone lines and power pylons. The police also found bomb-making equipment and sketches and diagrams for the production of hand

⁴¹³ As above 134-138.

⁴¹⁴ As above 142.

⁴¹⁵ Simpson (2016) 31; and Meredith (2010) 198-201.

⁴¹⁶ As above.

⁴¹⁷ Meredith (2010) 207 and 208 which acts of sabotage included explosions at government buildings in Johannesburg, Durban and Port Elizabeth on 16 Dec 1961 and at a municipal office in Dube, an African township south of Johannesburg, killing one saboteur and injuring another.

⁴¹⁸ As above 242 and 243; and Simpson (2021) 190.

⁴¹⁹ Meredith (2010) 218 and 226.

grenades. Although Mandela was not present during the raid and arrests at Liliesleaf Farm, he was severely implicated in all of this. More than ten documents were in his handwriting and contained, amongst others, his diary recording, his military training in Ethiopia and discussions with Algerian officials on guerilla warfare tactics.⁴²⁰

The ensuing trial, referred to as the Rivonia Trial, featured ten accused, namely those arrested at Liliesleaf Farm, as well as Mandela. The accused were charged under the Sabotage Act⁴²¹ and the Suppression of Communist Act⁴²² for being directly involved or complicit or accessories in more than 200 acts of sabotage and guerilla warfare in South Africa. The Sabotage Act made provision for the death penalty. In addition to the accused in court, the indictment listed 24 co-conspirators, including Arthur Goldreich, Harold Wolpe, Michael Harmel, Joe Slovo, Jack Hodgson, Moses Kotane, Oliver Tambo, JB Marks, Ben Turok, Joe Modise, Alfred Nokwe, Duma Nokwe and Gertrude Shope.⁴²³

The trial began on 3 December 1963. All the accused initially pleaded not guilty on all the charges. The charges against one of the accused (Hepple) were withdrawn in the course of the trial. During the trial, the prosecution called 173 witnesses and presented hundreds of documents, photographs and maps and a whole library of captured books on guerilla warfare. All Mandela's papers found at Liliesleaf were produced as evidential material.⁴²⁴ Only Mandela, Sisulu and Mbeki were fully implicated as leading figures in the conspiracy. It was then agreed between the prosecution and the defence that six of the accused would make admissions of guilt on certain charges. The remaining three – Bernstein, Kathrada and Mhlaba – persisted in the plea of not guilty.⁴²⁵

In order to ensure that the court heard a clear and coherent account of their political aims and ideals, the accused decided that Mandela should open the case for the defence by reading a statement from the dock, unhindered by cross-examination from the prosecution.⁴²⁶ In legal terms, this meant that any testimony he would provide by the way of his address could not be

⁴²⁰ As above 243; and Giliomee *et al* (2022) 482.

⁴²¹ General Laws Amendment Act 76 of 1962 also known as the Sabotage Act.

⁴²² 44 of 1950.

⁴²³ Meredith (2010) 248-250; and Le Roux and Davies (2019) 78.

⁴²⁴ Meredith (2010) 256; and Simpson (2021) 191.

⁴²⁵ Meredith (2010) 259.

⁴²⁶ As above; Le Roux and Davis (2019) 80 and 82.

challenged by the prosecution but it would have far less evidential weight. It was said that part of the defence strategy not to call Mandela as witness was to keep the prosecution guessing as to the nature of the defence plan.⁴²⁷ Mandela explained in his statement to the court why the ANC resorted to violence and acknowledged his role in forming Umkhonto we Sizwe but denied that he planned sabotage. He stated that it was not planned “in a spirit of recklessness, not because I have any love of violence. I planned it as a result of ... the political situation that has arisen after many years of tyranny, exploitation and oppression of my people by the Whites”.⁴²⁸

Mandela went on to explain that “Africans want a just share in the whole of South Africa, they want security and a stake in society”.⁴²⁹ He said that “above all, we want equal political rights, because without them our disabilities will be permanent”.⁴³⁰

The most notorious part of Mandela’s statement was the final words of his statement:

“During my lifetime I have dedicated myself to this struggle of the African people. I have fought against white domination, and I have fought against black domination. I have cherished the ideal of a democratic and free society in which all persons live together in harmony and with equal opportunities. It is an ideal which I hope to live for and to achieve. But if needs be, it is an ideal for which I am prepared to die.”⁴³¹

The central interest throughout the case was whether or not the conspirators would receive the death penalty. This statement by Mandela was widely perceived to be laudable and brave, especially his willingness to die for the cause in the face of a possible death sentence.

As the Rivonia trial reached its climax, it stirred intense interest abroad. Mandela’s defiant statement in court regarding his beliefs and his willingness to die for the cause of democracy in South Africa had captured world-wide attention and admiration. Demonstrations were held in Europe and the United States. Students at the University of London elected Mandela as president of the students’ union midway through the trial. On 9 June 1964, two days before the judge was due to give his verdict, the United Nations Security Council urged the South African

⁴²⁷ Le Roux and Davis (2019) 80.

⁴²⁸ Meredith (2010) 263; and Simpson (2021) 192.

⁴²⁹ Meredith (2010) 265.

⁴³⁰ As above.

⁴³¹ As above; and Simpson (2021) 192.

government to end the trial and to grant amnesty to the accused and all others who had been restricted or imprisoned for opposing apartheid. Britain and the United States abstained from voting on the matter in the Security Council.⁴³² On 11 June 1964, Judge de Wet found all the accused except Bernstein guilty. He reserved sentence for the following day. All the accused were sentenced to life imprisonment.⁴³³

Other leaders of Umkhonto we Sizwe were arrested in the wake of the Rivonia Trial.⁴³⁴ Measured by the objectives that Mandela set out in court during the Rivonia trial, Umkhonto's sabotage campaign was said to be a total failure.⁴³⁵ Although the Rivonia trial spelled the beginning of the end for the endeavours of Umkhonto, it focused the international community's attention on racial issues in South Africa. This assisted the ANC in a new offensive in the form of international isolation and economic sanctions against South Africa in the late 1960s, 1970s and 1980s.⁴³⁶

The ensuing ANC conference at Morogoro (Tanzania) from 25 April to 1 May 1969 was seen as an important change in Africanist ideology for the ANC. The *Strategy and Tactics* document of that conference, amongst others, read as follows:

"Our nationalism must not be confused with chauvinism or narrow nationalism of a previous epoch. It must not be confused with a classical drive by an elitist group among the oppressed people to gain ascendancy so that they can replace the oppressor in the exploitation of the mass".⁴³⁷

At this conference, the ANC opened up its membership to all races.⁴³⁸ From then on, the ANC used the word "black" to include Africans, Coloureds and Indians. This was to create a more consolidated front against white domination. According to Ben Turok, a further reason for the adoption of the Morogoro approach was that the struggle was not about a small black elite replacing the white elite. It recognised the role of the working class congruous with Marxist theory.⁴³⁹ Despite Turok's sentiments, the Morogoro conference in fact strongly confirmed the

⁴³² Meredith (2010) 268.

⁴³³ As above 266 and 272; and Giliomee *et al* (2022) 424 and 485.

⁴³⁴ Simpson (2021) 192-194.

⁴³⁵ Meredith (2010) 273.

⁴³⁶ Giliomee *et al* (2022) 485.

⁴³⁷ ANC *Report on Strategy and Tactics* (1969) 12th page. The document is unnumbered.

⁴³⁸ ANC *The Freedom Charter Revolutionary Programme* (1969) 6th page. Open membership was finally confirmed at Kabwe Conference, ANC *Report, main decisions and recommendations* (1985) 7th page. Documents are unnumbered.

⁴³⁹ Turok (2015) 143-147.

ANC's Africanist focus in that the planned "revolution" was presented as a revolution of the "African oppressed",⁴⁴⁰ that "we must not be ambiguous on the question of the primary role of the most oppressed African mass..."⁴⁴¹ and the African National Congress assented the right of "the African people as indigenous owners of the country".⁴⁴²

From 1969 onwards, the international pressure on the South African government, largely promoted by the efforts of ANC leaders in exile, started to mount. During the Fifth Summit Conference of East and Central African states from 14 to 16 April 1969 in Lusaka, the capital of Zambia, the *Lusaka Manifesto* (originally the *Manifesto of Southern Africa*) was created. The manifesto called on all Southern African countries ruled by white minorities, namely South Africa, Rhodesia (now Zimbabwe), Mozambique and Angola (under Portuguese rule), to relinquish white supremacy and minority rule and singled out Apartheid South Africa for violation of human rights. In the manifesto, which was subsequently adopted by both the Organisation of African Unity and the United Nations, 13 heads of state offered to enter into dialogue with the rulers of these Southern African states on condition that they accept basic principles of human rights and human liberties. They also threatened to support the various so-called "liberation wars" in these countries if negotiations failed. The *Lusaka Manifesto* paved the way for the *Mogadishu Declaration* issued in 1971⁴⁴³ and the *Lusaka Declaration on Racism and Racial Prejudice* of 1979 issued by the Commonwealth Heads of Government.⁴⁴⁴

The year 1976 saw the "Soweto Uprising". Afrikaans was the trigger that brought Soweto⁴⁴⁵ pupils out in protest which erupted on 16 June 1976. In the two decades before the uprising of 1976, Afrikaans had become identified by blacks as the language of the oppressors. There were certain deep-seated structural factors that caused the situation to explode once the first deadly police bullets were fired.⁴⁴⁶ At the core of it all was the lack of political rights and political freedom.

⁴⁴⁰ ANC *Report on Strategy and Tactics* (1969) 12th page. Document is unnumbered.

⁴⁴¹ As above 13th page.

⁴⁴² ANC *The Freedom Charter Revolutionary Programme of the ANC* (1969) 1st page. Document is unnumbered.

⁴⁴³ Mtshali *Internationale spectator: tijdschrift voor Internationale politiek* (1972) 966-977 explains the difference between the *Lusaka Manifesto* and the *Mogadishu Declaration of 1971*. The *Mogadishu Declaration* was jointly drafted by liberation movements to establish some form of collective security system for the East and Central African states.

⁴⁴⁴ Commonwealth Heads of Government *Lusaka Declaration on Racism and Racial Prejudice* (1979) proclaimed the desire of the Commonwealth States "to work collectively as well as severely for the eradication of all forms of racism and racial prejudice ... to achieve equal rights for all citizens regardless of race, colour, sex, creed or political belief ... The Declaration then rejected "as inhuman and intolerable policies designed to perpetuate apartheid, racial segmentation or other policies based on theories that racial groups and may be inherently superior or inferior".

⁴⁴⁵ Soweto is an African township situated southwest of Johannesburg.

⁴⁴⁶ Giliomee *et al* (2022) 514.

Tsietsi Mahinini, the first leader of the Soweto students, said black students were not only tired of the education system but of “the system of the country, the way laws are made by the white minority”. Blacks in the urban areas enjoyed virtually no political rights. Next to the lack of political rights, the pass laws and the larger system of influx control were the main causes of discontent.⁴⁴⁷

In Soweto, opposition to “Bantu education” which had been introduced in 1954, was traditionally the strongest. Giliomee *et al* point out that it was here that the use of mother-tongue instruction and the disparities in per capita spending were resented most. Between 1955 and 1976, fifteen times more was spent per capita on a white pupil than on a black pupil. Hand in hand with this went growing uncertainty about securing a job after leaving school.⁴⁴⁸

Most of the leaders of the protesting black youth were inspired by the Black Consciousness movement.⁴⁴⁹ The protestors attacked and burned down municipal buildings, beer halls, schools, clinics and libraries, and organised several work stoppages. On 4 August 1976, some 20 000 students tried to march to the centre of Johannesburg but were turned back by the police. In the subsequent months, pupils tried to organise stay-aways of workers on several occasions. There was a successful campaign against rent increases, which forced the resignation of the Soweto Urban Bantu Council.⁴⁵⁰ The security police increasingly targeted teachers and students in an attempt to quell the revolt, but it was only partly successful because of the mass nature of the participation. Jimmy Kruger, Minister of Police and Prisons, estimated that one-fifth of the residents of Soweto participated. More than 500 teachers resigned in the first year of the uprising. Secondary education in Soweto was brought virtually to a standstill.⁴⁵¹

Violent protests in townships spread throughout the Transvaal, the northern Free State, Natal and the northern Cape. In August, the Bophuthatswana homeland legislative assembly in Mafeking was burned down. In the same month, unrest in Port Elizabeth claimed 33 lives on the campuses of black universities. In the first four months after the events of 16 June 1976, some

⁴⁴⁷ As above.

⁴⁴⁸ As above.

⁴⁴⁹ As above 516. Steve Biko was seen as the father of “Black Consciousness” who warned of the psychological scares and damage caused by apartheid and warned a month before the uprising: “The masses of Black people within the country will increasingly become defiant”.

⁴⁵⁰ As above.

⁴⁵¹ As above.

160 communities demonstrated their anger and frustration. In the first six months 176 died, most shot and killed by the police.⁴⁵²

Apart from Soweto, the most important centre of the revolt was Cape Town. There were huge demonstrations in Gugulethu, Langa and Nyanga. Coloured pupils and university students demonstrated. Marches by both coloured and black children to the centre of Cape Town ended in bloody clashes with the police. In December, clashes broke out between youths and hostel dwellers, causing the destruction of numerous houses and the flight of thousands.⁴⁵³

Black local councillors resigned in several towns and there were prolonged school boycotts. By October 1977, when the uprising finally subsided, between 600 and 700 people had been killed. The uprising was said to have rocked South Africa and changed the political landscape. Thousands of children fled the country to continue the so-called struggle for freedom led by the ANC. Most of them joined the ANC, many enlisting with Umkhonto we Sizwe.

In October 1977, Jimmy Kruger, then Minister of Justice, legally forbid (prohibited) all the organisations associated with the Black Consciousness movement, as well as Johannesburg's leading black newspaper *The World*, and the Christian Institute headed by Beyers Naudé.⁴⁵⁴

In a single paragraph, Obed Kunene, editor of the Durban-based Zulu newspaper *Ilanga*, captured better than anyone else the multiple causes of the Soweto revolt and the destruction of facilities that accompanied it:

“Blacks do not destroy facilities ... They destroy symbols of the entire system devised by Whites for them ... pass laws with the repugnant manifestation, Bantu education, job reservation, unequal pay for equal work, no security of tenure, no landownership rights, poor living conditions, migrant labour, inequitable distribution of the country's wealth and a denial of the democratic right to decision-making. It is a system that has virtually ruined the fabric of black society, especially in the urban areas. It is abhorred, resented, despised, and hated almost to pathological limits”.⁴⁵⁵

⁴⁵² As above 517.

⁴⁵³ As above.

⁴⁵⁴ As above.

⁴⁵⁵ As above.

In 1985 at its Kabwe conference in Zambia, the ANC allowed other races to serve as National Executive Committee members.⁴⁵⁶ It also approved intensifying the ANC's armed struggle called the "People's War".⁴⁵⁷ This "war" was based on the insurgence of military elements of the ANC into the urban areas of South Africa and the mobilisation of workers and the public in general to make South Africa ungovernable.⁴⁵⁸

There are various reasons why African Nationalism has since the birth of the ANC been so deeply ingrained in African politics. The lack of education, organisation and political alternatives for the African masses when the ANC was formed, and the tenacious hold of cultural and religious traditions were among the many factors mentioned.⁴⁵⁹

African Nationalism in this context, according to Mandela, is a matter of "black consciousness". He explains African Nationalism by comparing it to Afrikaner Nationalism:

"The Nationalists led by Dr Daniel Malan [1948], a former minister of Dutch Reformed Church and a newspaper editor, were a party animated by bitterness – bitterness towards the British, who had treated them as inferiors for decades and bitterness towards the African, who the Nationalists believed was threatening the prosperity and purity of Afrikaner culture".⁴⁶⁰

Mandela then continues to explain the relationship between Africans and apartheid:

"The lack of human dignity experienced by Africans is a direct result of the policy of white supremacy. White supremacy implies black inferiority".⁴⁶¹

Mandela speaks of his own thoughts of revenge:

"At Majuba Hill, the Afrikaner stoutly defended his independence against the British imperialism and struck a blow for nationalism. Now the descendants of those same freedom fighters were persecuting my people who were struggling for precisely the same thing the Afrikaners had once fought and died for. I drove through those historic hills, thinking less of

⁴⁵⁶ ANC Report, *main decisions and recommendations* (1985) 6th page. Document is unnumbered.

⁴⁵⁷ As above.

⁴⁵⁸ ANC Report of the Commission on cadre policy, political and ideological work (1985) 30th page. Document is unnumbered. Also see Jeffery (2019) 4 and 5.

⁴⁵⁹ Harvey (2021) 166.

⁴⁶⁰ Mandela (1994) 127.

⁴⁶¹ As above 437.

ironies of history by which the oppressed becomes the oppressor than of how the ruthless Afrikaners deserved their own Majuba Hills at the hands of my people”.⁴⁶²

African Nationalism, as an ideological pillar, is important for the purpose of this research as it explains, amongst other things, the concept of demographic “representivity” (representation) which determines the proportion of the beneficiaries of BEE according to race. This is discussed in chapter 5, paragraph 5.3.3.5 below.⁴⁶³

2.4.2 The Freedom Charter

In order to restore a sense of purpose, the ANC in 1953 developed the idea of holding a national convention called the Congress of the People to form a vision of the democratic future to which it aspired. The primary purpose of the Congress would be to draft a Freedom Charter for all people and groups in South Africa.⁴⁶⁴ From such a Congress, a declaration should be formulated that would inspire all the people of South Africa with fresh hope for the future. It was hoped that such a declaration would turn the minds of people away from the sterile and negative struggles of the past and present a positive programme of freedom in their lifetime. A further objective of such a declaration was to mirror the future for South Africa. This would have the effect of galvanising the people of South Africa into “action and make them go on over into the offensive against the reactionary forces at work...instead of being perpetually on the defensive...”.⁴⁶⁵

The Congress Alliance (Congress Movement) consisting of the ANC, Congress of Democrats, the Indian Congress and newly formed Coloured People’s Organization based in Cape Town.⁴⁶⁶ In 1954 the Congress Movement appointed a National Action Council which organised country-wide meetings where popular public demands for an ideal South Africa would be used as part of the Congress of the People campaign. These demands were combined and drafted in broad terms in a 1 500-word unnumbered document. The National Council accepted this document, known as the Freedom Charter, by means of a unanimous vote on 26 June 1955 in Kliptown, Soweto.⁴⁶⁷ The Freedom Charter was adopted a year later in March 1956 by the ANC at a

⁴⁶² As above 208.

⁴⁶³ See ch 6, para 6.4.1.2 below.

⁴⁶⁴ ANC 42nd National Conference Resolutions (1953) 20.

⁴⁶⁵ ANC 43rd National Conference Resolutions (1954) 16-19.

⁴⁶⁶ Meredith (2010) 134.

⁴⁶⁷ Simpson (2021) 147 and 148.

special ANC Conference called to ratify the Freedom Charter.⁴⁶⁸ The Freedom Charter is a notoriously ambiguous document, despite its brevity, simplicity and transparency of language. The Freedom Charter starts off with a statement:

“We, the People of South Africa, declare for all our country and the world to know that South Africa belongs to all who live in it, black and white, and that no government can justly claim authority unless it is based on the will of the people”.

The Preamble makes four statements and declares that the Charter is adopted and “we pledge ourselves to strive together sparing neither strength nor courage, until the democratic changes here set out have been won”. The Charter then has six paragraphs with the following headings: “The People Shall Govern!”; “All National Groups Shall Have Equal Rights!”; “The People Shall Share in the Country’s Wealth!”; “The Land Shall Be Shared Amongst Those Who Work It!”; “All Shall Be Equal Before the Law!”; and “All Shall Enjoy Equal Rights!”.⁴⁶⁹ Under the heading “The People Shall Share in the Country’s Wealth” the following demands are made:

“The national wealth of our country, the heritage of all South Africans, shall be restored to the people; The mineral wealth beneath the soil, the Banks and monopoly industry shall be transferred to the ownership of the people as a whole; All other industry and trade shall be controlled to assist the well-being of the people; All people shall have equal rights to trade where they choose to manufacture and to enter all trades, crafts and professions”.⁴⁷⁰

With regard to the ideals contained in the Freedom Charter concerning the “monopoly industry” and the restoration of mineral wealth, Mandela noted that the Freedom Charter was frequently condemned as a “Marxist document” with its bold promises. He said in fact that it “was carefully designed to be all things to all men...The tone throughout was one of simple idealism”.⁴⁷¹

The range of possible meanings contained within the Charter has resulted in it being interpreted in a variety of ways.⁴⁷² The meaning of the so-called economic clauses of the Freedom Charter evoked the most uncertainty. Some view the Freedom Charter as the foundation on which the

⁴⁶⁸ Meredith (2010) 134.

⁴⁶⁹ ANC *Freedom Charter* available on the ANC’s website: anc1912.org.za/the-freedom-charter-2/.

⁴⁷⁰ As above.

⁴⁷¹ Meredith (2010) 133.

⁴⁷² Hudson *Transformation I Psychology in Society* (1986) 7.

socialist approach of the National Democratic Revolution (NDR)⁴⁷³ is premised, as discussed in paragraph 2.4.3 below. This notion is based on the transfer of ownership of “mineral wealth ... the Banks and monopoly industry ... to the people as a whole”. This suggests, according to proponents of the NDR, a move away from capitalism to nationalisation of critical industries (referred to as “commanding heights” in Communist literature).⁴⁷⁴ For others it means a mixed economy where the state plays a role in regulating markets without necessarily owning them. Some suggest it is not socialist but anti-capitalist. Another version is that it would be a transitional social formation, a democracy, located between capitalism and socialism, and that its path of development would be “non-capitalist”.⁴⁷⁵

Mandela denied in 1956 that the Freedom Charter constitutes a “blueprint for a socialist state”. He stressed that the dispossession of the white “mining kings” and “land barons” called for in the Charter would result not only in socialism but, on the contrary, ... would “open up fresh fields for the development of a prosperous non-European bourgeoisie class”. Consequently, he argued, “for the first time in the history of this country, the non-European bourgeoisie will have the opportunity to own in their own name a right mill (*sic*) and factory, and trade and private enterprise will boom and flourish as never before”.⁴⁷⁶ These sentiments of Mandela were confirmed later during the ANC’s Kabwe Conference in 1985. Here the ANC stated that “though the Freedom Charter is not a programme for socialism, it must nevertheless be distinguished from a conventional bourgeoisie-democratic programme”. Although the Freedom Charter “projects the seizure of economic assets” from “capitalist firms or trans-national corporations” and will “strip the ruling class of the actual substance of its power”, it will “secure the interests of the small property owner, the petty commodity producer, the artisan, traders and professional strata”.⁴⁷⁷

Although the ANC and Mandela denied the socialist nature of the Freedom Charter, Mandela was clear about the impact it would have. He wrote that the Charter is more than a mere list of demands for democratic reform. “It is a revolutionary document precisely because the changes it envisages cannot be won without breaking up the economic and political dispensation of

⁴⁷³ See para 2.4.3 below.

⁴⁷⁴ See Southall *Review of African Political Economy* (2008) 485.

⁴⁷⁵ Hudson *Transformation I Psychology in Society* (1986) 8-10.

⁴⁷⁶ As above 8 and 9.

⁴⁷⁷ ANC *The Nature of the South African Ruling Class* (1985) 14th page. The document is unnumbered.

present South Africa”.⁴⁷⁸ In 1956, he stressed as follows in this regard:

“It is true that in demanding the nationalisation of the banks, the gold mines and the land, the Charter strikes a fatal blow at the financial and gold-mining monopolies and farming interest that have for centuries plundered the country and condemned its people to servitude. But such a step is imperative because the realisation of the Charter is inconceivable, in fact, impossible, unless and until these monopolies are smashed and the national wealth of the country turned to the people”.⁴⁷⁹

The ambiguity and contradictions are evident in Mandela’s “*I am prepared to die*” speech during the Rivonia Trial where he said:

“The Freedom Charter calls for the redistribution of land but not nationalisation of land; it provides for nationalisation of mines, banks and monopoly industry because big monopolies are owned by one race only, and without such nationalisation, racial domination would be perpetuated despite the spread of political power”.⁴⁸⁰

Here Mandela called for the redistribution of land, not its nationalisation. What is significant about this call for nationalisation by Mandela based on the Freedom Charter is the fact that monopolies need to be nationalised due to their racial ownership, referring to white ownership. This implies that monopolies could escape nationalisation if they are owned by black people.⁴⁸¹ This seems to suggest a form of nationalisation by transferring or redistributing ownership from one race to another.

The Freedom Charter has been a lodestar for the ANC.⁴⁸² Some say it was a precursor of the South African Constitution as the ANC derived much of its inspiration for the Constitution from there.⁴⁸³ The revolutionary nature of the Freedom Charter as envisaged by Mandela was confirmed by the ANC’s Morogoro Conference in 1969. According to *The Freedom Charter Revolutionary Programme of the ANC*⁴⁸⁴ adopted at the Morogoro Conference, the “armed struggle” was to “overthrow the racist regime” and “in its place the ANC will establish a

⁴⁷⁸ Meredith (2010) 135.

⁴⁷⁹ As above 134 and 135.

⁴⁸⁰ Harvey (2021) 199.

⁴⁸¹ MacDonald (2006) 127-128.

⁴⁸² Hudson *Transformation I Psychology in Society* (1986) 9.

⁴⁸³ Odendaal (2022) 11.

⁴⁸⁴ ANC *The Freedom Charter Revolutionary Programme of the ANC* (1969).

democratic state along the lines indicated in the Freedom Charter”. According to the Conference, the power of the Freedom Charter’s revolutionary message was the fact that it was a “declaration of all People in South Africa”.⁴⁸⁵

The Freedom Charter was also the reason for the splintering-off of the Pan Africanist Congress of Azania (PAC) from the ANC. The bone of contention within the ANC ranks was the first statement in the Freedom Charter, namely that “South Africa belongs to all who live in it, black and white...”. This unhappiness reached a climax on 1 November 1958 when Albert Luthuli, the then President-General of the ANC, addressed the Transvaal Provincial Conference. Luthuli referred to a dangerously narrow African Nationalism that was to take shape within the ANC. This, he said, “tends to encourage us to go back to a tribalism mentality”. Luthuli said that whatever apartheid might do to disturb racial peace in South Africa, the ANC will never pursue the same disastrous course of narrow nationalism. The hard-line Africanists in the meeting declared that “Africa is for the Africans and the white man must go back to Europe”. The next day the Africanist group delivered a document to the door of the conference hall. The document said that they are not prepared to settle their dispute with the ANC by violence and are also not prepared to remain any longer in an organisation that has the Freedom Charter as its policy.⁴⁸⁶ On 8 November 1958, the Africanists, under the leadership of Robert Sobukwe, confirmed that they have seceded from the ANC. Sobukwe founded the PAC on 6 April 1959.⁴⁸⁷

For some the notion of nationalisation in the Freedom Charter is very strong. The Economic Freedom Fighters (EFF), a political party established in 2013 after a split from the ANC, for instance, according to their constitution based on Marxist theories, advocates for the nationalisation of mines, banks and other strategic sectors of the economy. It is believed that the EFF premised this ideology on the Freedom Charter.⁴⁸⁸ Besides the important role that the Freedom Charter plays in the ideology of the ANC, it was also adopted by the other Tripartite Alliance⁴⁸⁹ partners, namely the South African Communist Party in 1962 and the Congress of

⁴⁸⁵ As above 2nd page. The document is unnumbered.

⁴⁸⁶ Simpson (2016) 16 and 17; and Simpson (2021) 160 and 161.

⁴⁸⁷ As above.

⁴⁸⁸ *Economic Freedom Fighters Constitution* adopted 16 Dec 2014 3. Also see Nsizwazonke *AJDS* (2021) which states that: “Drawing from the 1955 Freedom Charter the EFF provides a new radical interpretation of the document that seeks to address inequality, private ownership of national resources and landlessness, among other issues”.

⁴⁸⁹ The Tripartite Alliance is the political alliance between the ANC, the South Africa Communist Party and Cosatu.

South African Trade Unions (Cosatu) in 1987.⁴⁹⁰ Although the Freedom Charter is interpreted in a variety of ways, it has not lost its relevance and resonates in various official documents and court judgements. For instance, as part of government's transformation policy, the Department of Trade, Industry and Competition (then the Department of Trade and Industry) published a Strategy for B-BBEE in 2003. The Strategy states that the transformation envisaged in the B-BBEE Act is an economy that meets the needs of the people in a more equitable manner and "goes back to the Freedom Charter of 1955".⁴⁹¹

The South African Human Rights Commission (SAHRC) released an Equality Report in 2018. With reference to the policy of placing the economy on a substantially different path that ensured more rapid growth and reduced inequality, the SAHRC stated that government's policy in this regard was not new. The achievement of substantive equality in terms of wealth has its roots in the Freedom Charter of 1955, which states that "the national wealth of our country, the heritage of South Africans, shall be restored to the people..."⁴⁹²

In *New Nation Movement NPC and Others v President of the Republic of South Africa*,⁴⁹³ the Constitutional Court, per Jafta J, concurred with the first judgement by Madlanga J and affirmed the relevance of history in the process of interpreting the Bill of Rights.⁴⁹⁴ The court states that the right to vote and the right to stand for public office have always been viewed as interconnected and crucial to a democratic system of government. The court then points out that it comes as no surprise that the Freedom Charter placed these rights at the top of its aspirations for change during the erstwhile apartheid era. The court then quoted as follows from the Charter: "every man and women should have the right to vote for and stand as a candidate for all bodies which make law..."⁴⁹⁵

In *Chamber of Mines of South Africa v Minister of Mineral Resources and Others*⁴⁹⁶ where the ownership of Historically Disadvantaged South Africans (HDSA) had to be determined for

⁴⁹⁰ Mosala *et al* *KOERS-Bulletin for Christian Scholarship* (2019) 9 and 10.

⁴⁹¹ Department of Trade and Industry (DTI) *South Africa's Economic Transformation: A Strategy for Broad-Based Economic Empowerment* (2003) 4.

⁴⁹² South African Human Rights Commission *Equality Report 2017/18* (2018) 15.

⁴⁹³ [2020] ZACC 11; 2020 (6) SA 257 (CC); 2020 (8) BCLR 950 (CC).

⁴⁹⁴ As above para [143].

⁴⁹⁵ As above para [142].

⁴⁹⁶ (41661/2015) [2018] ZAGPPHC 8; [2018] 2 ALL SA 391 (GP); 2018 (4) SA 581 (GP) (4 Apr 2018) (hereafter referred to as *Chamber of Mines*).

calculating compliance in terms of the Minerals and Petroleum Resources Development Act,⁴⁹⁷ the Minister of Mineral Resources as Respondent objected to the HDSA ownership of the Applicant based on the fact that HDSA ownership was concentrated in the hands of a few anchor partners with a handful of beneficiaries, “contrary to the spirit of the Freedom Charter and Mining Charter”. The court did not agree with the Minister and held that the Applicant had complied with the legislative requirements for HDSA ownership.⁴⁹⁸

The Freedom Charter forms an integral part of the ANC and is also incorporated into the Constitution of the ANC as an appendix. It is also central to the ANC’s transformation policies. The Constitution of the ANC states the following as one of its aims and objectives:

“To end apartheid in all its forms and to transform South Africa as rapidly as possible into a united, non-racial, non-sexist and democratic country based on the principles of the Freedom Charter (Appendix 2) and in pursuit of the National Democratic Revolution”.⁴⁹⁹

This objective was adopted as one of the Resolutions of the ANC’s 49th National Conference in 1994, shortly after it won the first democratic elections in April 1994. The resolution reads that “the key strategic objective of our struggle remains the building of a united, democratic, non-racial and non-sexist society as envisaged in the Freedom Charter”.⁵⁰⁰ This important and integral position of the Freedom Charter in relation to the NDR was reaffirmed in all the National Conference Resolutions of the ANC from 1994 to 2022 as discussed in paragraphs 2.5.1 to 2.5.7 below.

2.4.3 The National Democratic Revolution

The ANC’s ideological objectives are defined as the National Democratic Revolution (NDR) which is one of the core strategies enunciated in the ANC’s Constitution to end apartheid and to achieve its desired society. The NDR is also an end in itself – the so-called national democratic or social state.⁵⁰¹ The NDR forms the broad basis for the adoption of socio-economic policies of

⁴⁹⁷ 28 of 2002.

⁴⁹⁸ *Chamber of Mines* (note 496 above) para [125].

⁴⁹⁹ ANC *African National Congress Constitution* (2017) 32 and 33.

⁵⁰⁰ ANC *49th National Conference Resolutions* (1994) the 2nd page under “Strategy and Tactics”. The document is unnumbered.

⁵⁰¹ ANC *African National Congress Constitution* (2017) Rule 2.2 states that to “end apartheid...based on the principles of the Freedom Charter...and in pursuit of the National Democratic Revolution”.

the ANC.

There is not a single theoretical policy document defining the full scope of the NDR. It consists of various building blocks and had been shaped over time.⁵⁰² The NDR has a Marxist-Leninist pedigree and is based on Marxist-Leninist theory and terminology of ultimately establishing communism through a revolutionary process of socialism and has been evolved through international communism trends.

In order to elucidate the ideology of the NDR, a basic understanding of the various theoretical structures of influences is required.

2.4.3.1 Socialism, Communism and Marxism-Leninism

There are various definitions and explanations in political philosophy to explain the political theories of socialism, communism and Marxism-Leninism.⁵⁰³ The scope of this study does not include an in-depth comparison and analysis of these theories. The explanation provided herein is a basic and elementary understanding of some of the theories as far as it relates to the subject matter of this study.

The Marxist-Leninist model emanated from events in Russia and the phases that socialism and Marxism went through. It was developed from Bolshevism by Lenin and later Stalin in the 1920s based on their understanding and synthesis of orthodox Marxism. The formation of the Soviet version of dialectical and historical materialism in the 1930s became the Soviet interpretation of Marxism and was used as examples by Marxist-Leninists in other countries.⁵⁰⁴

Marxism-Leninism holds that a two-stage communist revolution is needed to replace capitalism. Both Marx and Lenin believed that the transition from one mode of production to another could not occur immediately but necessarily takes the form of a process. In the case of the transition from capitalism to communism, Marx and Lenin refer to the process as “socialism”. Here, throughout the duration of this process, the relations of production of the preceding mode of

⁵⁰² Hudson *Transformation I Psychology in Society* (1986) 6.

⁵⁰³ Stevens (2011) xi-xxi.

⁵⁰⁴ Smith (2014) 126.

production (the capitalist “private” appropriation of the means of production), are progressively replaced by new relations of production (communist “social” appropriation of the means of production).⁵⁰⁵ Transitional thus denotes a period during which the relations of production of the preceding mode of production are progressively transformed. This transformation, in the case of the movement from capitalist to communism, begins with the appropriation of the means of production by the workers’ state. Thereafter, this appropriation must pass into the hands of the direct producers themselves in order for the social appropriation of the means of production to be consummated.⁵⁰⁶

A vanguard party, organised through democratic centralism, could seize power on behalf of the working class (proletariat) and establish a one-party socialist state called the “dictatorship of the proletariat”.⁵⁰⁷

Marxism-Leninism puts forward the recognition of the class struggle as a dominating principle of social change and historical development. In addition, the proletariat were to carry out the mission of the reconstruction of society.⁵⁰⁸ The state would control the means of production, suppress opposition and counter-revolution, and promote state collectivism. This will pave the way for an eventual communist society that would be classless and stateless.⁵⁰⁹ This will endorse the final objective, namely the creation of a community owning all the means of production and providing each of its participants with consumption according to their needs.⁵¹⁰

Socialism, the period of transition, is defined as “the first phase of communism”, a phase marked by the residues, the “defects” of capitalism.⁵¹¹

Because socialism and communism oppose capitalism, it is important to understand the unique features of capitalism. Five distinct features of capitalism can be identified: (1) The bulk of the means of production is privately owned and controlled; (2) People legally own their labour power – meaning they control the labour of others; (3) Markets are the main mechanism allocating

⁵⁰⁵ Marx (1974) 2-7; and Lenin (1963) 7.

⁵⁰⁶ Hudson *Transformation I Psychology in Society* (1986) 21; and Gregor (2009) 253.

⁵⁰⁷ Morgan (2015) 3355.

⁵⁰⁸ As above; and Gregor (2009) 252 and 253.

⁵⁰⁹ Williams (1983) 289.

⁵¹⁰ Morgan (2015) 3355; and Gregor (2009) 245.

⁵¹¹ Marx (1974) 2-7; and Lenin (1963) 7.

inputs and outputs of production and determining how societies' productive surplus is used, including whether and how it is consumed or invested; (4) There is a class division between capitalists and workers, involving specific relationships which shape the labour market, the enterprise and the broader political process; and (5) Production is primarily oriented towards capital accumulation.⁵¹²

In contrast to capitalism, socialism can be defined as a type of society in which, at a minimum, the bulk of the means of production is under social, democratic control.⁵¹³ Socialists have condemned capitalism by alleging that it typically features exploitation, domination, alienation and inefficiency.⁵¹⁴ It is not within the scope of this study to fully analyse the political ideologies of capitalism, socialism, communism and Marxism-Leninism. A basic and general understanding of these ideologies are sufficient to elucidate the essence of ANC and government socio-economic policies, what it aims to achieve and how it influences who the beneficiaries of BEE are.

2.4.3.2 The NDR's road to South Africa

The way in which the NDR was rooted in South Africa should be understood from a three-pronged process in which the steps run parallel: Firstly, the formulation and development of the NDR based on Marxist-Leninist theories; secondly, the role of the South African Communist Party (SACP) in South Africa; and thirdly, the SACP's relationship with and influence on the ANC. Instead of dealing with these processes separately, they will be approached chronologically.

The International Socialist League of South Africa (ISL) was formed in 1915,⁵¹⁵ close on the heels of the founding of the SANNC in 1912 which was later renamed the ANC.⁵¹⁶ This was during a period of black protest against the disenfranchisement of black people after the formation of the Union of South Africa.⁵¹⁷

⁵¹² Gilabert and O'Neill *Stanford Encyclopedia* (2019) 2 and 3.

⁵¹³ As above 3; and Woolsey (1870) 14.

⁵¹⁴ Gilabert and O'Neill *Stanford Encyclopedia* (2019) 4.

⁵¹⁵ Bunting (1998) 26.

⁵¹⁶ Ngqulunga (2017) 2.

⁵¹⁷ As above.

The ISL viewed the situation in South Africa from a Marxist perspective and concluded that its main objective was to unite the working class across race and gender lines. The ISL realised that socialism must include all races.⁵¹⁸

It set out to work with a wide array of black formations. With the assistance of the Industrial and Commercial Workers Union (ICWU), the first black trade union in South Africa, the Industrial Workers of Africa (IWA) was established in 1917.⁵¹⁹ In 1917, following the Russian Revolution,⁵²⁰ the League was dissolved. It was revived as the Communist Party of South Africa (CPSA) in 1921 with the merger of various other socialist and communist orientated groups.⁵²¹

The Communist International (Comintern), also known as the Third International, was an international organisation founded in 1919 that advocated world communism and which was led and controlled by the Communist Party of the Soviet Union.⁵²²

The Second Congress of the Comintern was convened in Petrograd and Moscow during the period 19 July to 7 August 1920. Under the leadership of Lenin, the congress dealt with the so-called “National and Colonial Question” of imperialism and the working-class struggle of the oppressed nations against a small number of oppressor nations.⁵²³ The oppressor nation enjoyed a great deal of wealth with powerful military power compared to the oppressed nations. It was decided that the Comintern and proletariat parties in backward or oppressed countries can support national movements led by the bourgeoisie. Bourgeoisie-led democratic movements in the colonies could be regarded as national revolutionary movements towards communism if they allowed communists “to educate” the masses and lead them.⁵²⁴ Consequently, the phrase “national revolutionary movements” was adopted to describe these movements. Although Russia was not seen as an oppressed nation, the main idea of Lenin’s theory was that socialist Russia and anti-colonial movements were natural allies (despite the bourgeoisie nature of anti-colonial movements) and as such they should join forces and act collectively as a united front to

⁵¹⁸ Bunting (1998) 26.

⁵¹⁹ As above.

⁵²⁰ Legassick (2007) 158.

⁵²¹ Bunting (1998) 26.

⁵²² Conquest (1990) 399.

⁵²³ Lenin (1950) 215-220.

⁵²⁴ As above.

oppose Western imperialism.⁵²⁵ The Comintern then adopted a resolution at the 1920 congress which outlined the objectives of the Comintern to—

“struggle by all available means, including armed force, for the overthrow of the international bourgeoisie and the creation of an international soviet republic as a transition stage to the complete abolition of the state”.⁵²⁶

On 1 September 1920, the Comintern convened the Congress of the People of the East in Baku Azerbaijan. Most delegates were from so-called “backward countries”. The congress adopted a manifesto which outlined a strategy for fighting imperialist rule. The congress also endorsed the resolution of the Second Congress of the Comintern in July 1920 to support the bourgeoisie-democratic movements. Delegates at the congress committed the Congress, under the banner of the Comintern, as a united front to forge alliances between the peasants and proletarian parties in backward countries.⁵²⁷

The newly formed Communist Party of South Africa became an affiliate of the Comintern in 1921.⁵²⁸ After Lenin’s death in 1924, Lenin’s theory presented and adopted by the Second Congress of the Comintern in 1920, was amended under the leadership of Stalin, Lenin’s successor. While Lenin stressed the possibility and even the desirability of an alliance with the local bourgeoisie as long as it was done under the banner and influence of communism, this was repudiated by Stalin. Thus, as a general principle of communism globally, the Fifth Congress of the Comintern in 1924 rejected the idea that the bourgeoisie could have any anti-colonial potential. As national revolutions led by the bourgeoisie were capitalist in nature, only capitalist societies could be expected to emerge from revolutions, according to Stalin.⁵²⁹

Unlike Lenin, Stalin also did not believe that in the course of anti-colonial struggle, pre-capitalist colonial societies could transition to socialism by by-passing the capitalist stage of development.⁵³⁰ According to Stalin, the hegemony of the proletariat had to be achieved in the bourgeoisie-democratic revolutions, which was the main task of communist parties in anti-

⁵²⁵ Filatova *South African Historical Journal* (2012) 509.

⁵²⁶ Fisher (1955) 13.

⁵²⁷ *White Slavic Review* (1974) 492-514.

⁵²⁸ As above.

⁵²⁹ Filatova *South African Historical Journal* (2012) 510.

⁵³⁰ As above.

colonial and national-liberation revolutions.⁵³¹

Although the Communist Party of South Africa joined the Comintern in 1921, it was only in 1927 that this international communist body centred in Moscow became directly involved in South Africa's affairs. One of the leaders of the Communist Party of South Africa, Gomes La Guma, visited Moscow twice during that year. He was joined by Josiah Gumede, newly elected president of the small and ineffective ANC. During these visits, La Guma, joined by Gumede, met Comintern leaders and discussed South Africa's political situation with them.⁵³² Subsequently, at the Comintern's Sixth Congress in late 1928, it adopted a vision for South Africa. It was decreed that—

“the Communist Party of South Africa must combine the fight against all anti-native laws with the general political slogan in the fight against British domination, the slogan of an independent native South African Republic as a stage, towards a workers' and peasants' republic with full rights for all races, black, coloured and white”.⁵³³

The idea of a two-stage revolution was first introduced by Lenin in 1905. It consisted of the first phase for achieving democracy and the second one for socialism.⁵³⁴ For South Africa, the Comintern adopted a first stage to include the national liberation of Africans. The second stage remained unchanged.⁵³⁵ The Native Republic's vision was that the Communist Party of South Africa should associate with native organisations such as the ANC. While retaining its independence, the Communist Party should contribute towards the work of these organisations and focus in particular on the ANC and broaden the scope of the ANC's operations. This should be done to transform the ANC into a nationalist revolutionary organisation capable of building a strong defence against capitalists and British imperialists.⁵³⁶

Following the enactment of the Suppression of Communist Act in 1950,⁵³⁷ the Communist Party of South Africa and its activities were prohibited. Its dissolution was not achieved by the

⁵³¹ As above.

⁵³² As above 511.

⁵³³ As above.

⁵³⁴ Lenin (1963) 7 and 8; and Gregor (2009) 245-247.

⁵³⁵ Filatova *South African Historical Journal* (2012) 512.

⁵³⁶ Bunting (1998) 39.

⁵³⁷ Act 44 of 1950.

prohibition, however, as the organisation changed tactics and operated covertly underground.⁵³⁸ The ANC was prohibited in 1960, and its leaders went abroad in exile. Like the Communist Party, it operated underground during its period of proscription.⁵³⁹ During this period, the late 1950s and early 1960s, a new realisation started to emerge in the international communist community about the role of the bourgeoisie in pursuing the independence of colonies. Ex-colonial socialist formations under the rule of the national bourgeoisie ceased to be perceived by the international communist movement as irrevocably integrated into the imperialist anti-democratic camp. It was acknowledged that the national bourgeoisie could oppose imperialism and lead the ex-colonies towards real national autonomy. Constitutional political independence was seen as a necessary precondition for their achievement of economic independence.⁵⁴⁰ Constitutional political independence in this context means a totalitarian state which operates without constraints in the name of the people and where the state controls all facets of society – politically, legally and economically.⁵⁴¹

Political independence had to be complemented by a series of economic measures if the newly independent nations were to achieve balanced, autonomous economic growth. This was considered necessary if they were to ultimately entrench their autonomy. These measures included the nationalisation of foreign-owned enterprises and financial institutions, or at least their subjection to strict control by the state; the creation of state-controlled enterprises; and the introduction of economic planning by the state.⁵⁴²

During the 1950s and 1960s, the ANC edged closer to Marxist-Leninist ideology. In the 1950s several of its leaders such as Walter Sisulu and Nelson Mandela joined the Communist Party as members.⁵⁴³ In the decades 1960 to 1990, the Soviet Union was the closest and most important ally of the ANC. The Soviet Union supplied the ANC's military wing, Umkhonto we Sizwe, with arms, ammunition, military and other equipment, transport, food; it trained Umkhonto we Sizwe cadres and provided financial and political support.⁵⁴⁴

⁵³⁸ Koster (1986) 16.

⁵³⁹ Simpson (2016); and Meredith (2010) 173

⁵⁴⁰ Hudson *Transformation I Psychology in Society* (1986) 16.

⁵⁴¹ See Slovo *Umsebenzi Discussion Pamphlet* (1988) 12th page in which he described the “safeguarding of the independence of the vanguard and mass class origins of the workers” as essential to maintain “long-term socialist” aspirations.

⁵⁴² Tarabrin (1975) 53.

⁵⁴³ Meredith (2010) 129.

⁵⁴⁴ Filatova *South African Historical Journal* (2012) 507; and Simpson (2016) 76.

The Communist Party of South Africa convened a conference in 1962 where it adopted the *Road to South African Freedom* as its programme of action.⁵⁴⁵ It declared that South Africa had a unique form of colonialism, and it was labelled “Colonialism of a Special Type” (CST).⁵⁴⁶ CST described a situation in which the colonised lived on the same soil in the same country, side by side with the coloniser. They regarded South Africa’s situation as an imperialist relationship in which “white South Africa” operated as the imperialist state and “non-white South Africa” was subordinate. The *Road to South African Freedom* programme endorsed the NDR as a remedy for this Colonialism of a Special Type.⁵⁴⁷

The main objective of the NDR was the national liberation of the African people and the elimination of every form of racially based discrimination and privilege. The NDR would restore the land and wealth of the country to the people and guarantee democracy, freedom and equal rights and opportunities to all.⁵⁴⁸ In pursuit of this, the Communist Party endorsed the Freedom Charter. The Communist Party acknowledged that the Freedom Charter was not a socialist programme but that its implementation would be a step in the direction of a socialist state.⁵⁴⁹ The Freedom Charter is therefore seen by the Communist Party as the first stage of the NDR.

During the ANC’s Morogoro Tanzania Consultative Conference in 1969, the ANC officially endorsed the Communist Party’s NDR strategy as a road to a society which accords with the Freedom Charter.⁵⁵⁰ The armed struggle, which was gradually deployed with the initial adoption of the ANC Youth League’s inspired “Programme of Action” in 1949 and the later establishment of the military wing in 1961, was seen as “the first phase, ...the complete political and economic emancipation of all our people...the liberation of the Africans”.⁵⁵¹

According to the *Report on the Strategy and Tactics of the African National Congress* adopted at the Morogoro Conference in 1969, only the success of the NDR was capable of destroying the existing social and economic relationship to bring with it a correction of the historical

⁵⁴⁵ SACP *Programme of the South African Communist Party 1962* (1962) 12th page. Document is unnumbered.

⁵⁴⁶ As above.

⁵⁴⁷ As above 12th-22nd page.

⁵⁴⁸ As above.

⁵⁴⁹ Koster (1986) 42.

⁵⁵⁰ ANC *Report on Strategy and Tactics* (1969) 15th page. Document is unnumbered.

⁵⁵¹ As above 6th and 7th page.

injustices perpetrated against the indigenous majority.⁵⁵² At the Morogoro Conference, it was also resolved that the NDR will lay the basis for a new and deeper international approach. The struggle of the oppressed people in South Africa, according to the *Strategy and Tactics* document, was taking place within an international context of transition towards a socialist system.⁵⁵³ The Morogoro Conference also described the Freedom Charter as a revolutionary programme in the sense that the ideals of the Charter should be achieved by means of a “successful armed revolution”.⁵⁵⁴

In the mid-1970s the international communist fraternity replaced the term “national democracy” with “social orientation”. This was to remedy what was felt to be the “non-socialist” connotation of the term “national democracy”.⁵⁵⁵ A socialist-oriented social formation such as a national democracy is seen as pre-socialist. States of socialist orientation were defined by their pursuance of policies aimed at “the gradual creation of the political, material, social and cultural preconditions for the transition to building socialism”.⁵⁵⁶

In 1971, at the Communist Party of South Africa’s congress, Oliver Tambo, the President of the ANC, addressed the congress and came out in favour of socialism. He said that the ANC was leading the masses towards revolution to overthrow of the fascist regime, seize power and build a “socialist society”.⁵⁵⁷

The South African Communist Party (SACP) in its 1984 constitution, declared that its aim was to lead the working class towards the strategic goal of establishing a “socialist republic”, with the more immediate aim of achieving the objectives of the NDR which is inseparably linked to it.⁵⁵⁸ The SACP’s constitution describes the core of the NDR as—

“...the national liberation of African people in particular, and the black people in general, the destruction of the economic and political power of the racist ruling class and the establishment of one united state of people’s power in which the working class will be the dominant force and which will move uninterruptedly towards social emancipation and the total abolition of

⁵⁵² As above.

⁵⁵³ As above 1st and 12th page.

⁵⁵⁴ ANC *The Freedom Charter Revolutionary Programme of the ANC* (1969) 1st-10th page. The document is unnumbered.

⁵⁵⁵ Steele (1984) 171.

⁵⁵⁶ As above.

⁵⁵⁷ Filatova *South African Historical Journal* (2012) 532.

⁵⁵⁸ Slovo *Umsebenzi Discussion Pamphlet* (1988) 3rd page. The document is unnumbered.

exploitation of man by man”.⁵⁵⁹

Joe Slovo, the then General Secretary of the SACP, in 1988 explained the NDR’s approach in respect of the relationship between the working class and the black upper and middle class. He conceded that in terms of classic Marxist-Leninist theory, the diverse classes of the revolutionary camp do not necessarily coincide. They do not have the same consistency and commitment or the immediate objectives of the democratic revolution.⁵⁶⁰

However, he pointed out, South Africa’s situation required the unification of all classes to achieve democracy during the first stage of the NDR, and thereafter for all classes to contribute during the second stage to socialism.⁵⁶¹ He explained, with reference to Lenin, that the class struggle in a period of capitalist hegemony is, in the long term, a political struggle for the ultimate achievement of power by the working people. But the content of this class struggle does not remain fixed for all time and is dictated by the concrete situation at a given historical moment.⁵⁶² He further pointed out that “the shortest route to socialism is via a democratic state”. National liberation, on the other hand, is “a short-term class imperative for the working class”.⁵⁶³ He contended that black capitalists were continually oppressed by monopolies in the accumulation process and that the black middle and upper class would see benefits to be associated with the workers in order to destroy an exploitive system.⁵⁶⁴ The working class, in joining forces with the black upper and middle class, would be protected by its “vanguard”.⁵⁶⁵ Without saying specifically who the vanguard was, he seems to refer to the trade unions, the SACP and possibly the ANC, which are in alliance.

In the context of black upper and middle class, he also stressed the imperative role to be played by the private sector in the transition to socialism.⁵⁶⁶ He stated that “the Freedom Charter and our *Party Programme* do not, however, project socialism as the immediate consequence of a people’s victory”. During this phase of transition “a vital role, under specific conditions, will

⁵⁵⁹ As above.

⁵⁶⁰ As above.

⁵⁶¹ As above.

⁵⁶² As above 6th page.

⁵⁶³ As above.

⁵⁶⁴ As above 10th and 11th page.

⁵⁶⁵ As above 7th page.

⁵⁶⁶ As above 11th page.

undoubtedly be required of a private sector”.⁵⁶⁷ He added that it would be “harmful demagoguery” and a recipe for chaos to proclaim that the post-apartheid state could, at a stroke, do away completely with a market economy, eliminate the whole private sector, and dispense with the accumulated business experience and management skills of this sector.⁵⁶⁸

In order to appease those who might think this tolerance of a market economy, the private sector and black capitalism is counter-intuitive and may lead to an expansion of the capitalist system, Slovo pointed out that the Freedom Charter provided the solution in that “[A]ll other industry and trade shall be *controlled* to assist the wellbeing of the people” (own emphasis).⁵⁶⁹ He further assured them that “social control over the main means of production and distribution by a political power in which the working class is dominant, should more than counter-balance such tendencies”.⁵⁷⁰

Slovo’s stance on the upper and middle class as part of the transition to socialism coincided with the view adopted by the International Communist fraternity in the late 1950s and 1960 to tolerate and support the bourgeoisie in achieving anti-colonialism and socialism. The ideals of the NDR and socialism pursued by the ruling party are expounded by Southall. He explains it (writing in 2008, prior to the start of the Zuma era) as follows:

“[C]apture of the state and internal decolonisation [by an ANC coming into power in a post-apartheid South Africa] would require, both in terms of social justice and the needs of the economy, the rapid growth of the black middle class and indeed, the expansion of a class of black capitalists. After all, democratisation could not stop with the state: it also demanded popular control of the commanding heights of the economy. It is clear that the NDR prioritizes control of the state as the essential instrument for transformation”.⁵⁷¹

The growth of the black upper and middle class is one of the objectives of the NDR. The B-BBEE programme’s design, as will be shown in this study, is such that it primarily sets out to promote this specific NDR objective (the growth of the black bourgeoisie) despite the B-BBEE

⁵⁶⁷ As above.

⁵⁶⁸ As above.

⁵⁶⁹ As above.

⁵⁷⁰ As above 12th page.

⁵⁷¹ Southall *Review of African Political Economy* (2008) 284-286. Southall is Emeritus Professor in Sociology, University of the Witwatersrand and Professional Research Associate, Department of Politics and International Studies.

programme's stated broad-based objectives.

2.5 THE ANC's CONSTITUTION AND SOCIO-ECONOMIC POLICY CONSIDERATIONS AND DEVELOPMENTS

The ANC's policies and practices are significantly influenced by ideology which was developed over the course of more than a century. These ideologies are also incorporated into the ANC's constitution, policy formulations and policies adopted through structures such as the ANC's National Conferences. These ideologies are instrumental in the way socio-economic policies of the ANC such as the B-BBEE programme are conceived, the basis and rationale on which these policies are adopted, and the purpose of these policies.

The ANC's constitution provides the basis for its policy choices. Under its constitution's "Aims and Objectives", it enunciates as its first objective to "unite all the people of South Africa, *Africans in particular...*" (own emphasis).⁵⁷² The ending of apartheid in all its forms as rapidly as possible, stated as its second aim and objective, will be based on the principles of the *Freedom Charter* and in pursuit of the *National Democratic Revolution*" (own emphasis).⁵⁷³

The ANC's constitution has no reference to the South African Constitution. It states in its Preamble that one of its objectives is to unite South Africa into a "non-racial, non-sexist and democratic country...".⁵⁷⁴ These values are also part of the Founding Provisions of the South African Constitution.⁵⁷⁵ However, the ANC's constitution does not pursue the objectives of non-racialism, non-sexism and a democratic state based on the values of the South African Constitution but rather based on the principles of the Freedom Charter and the NDR.

On being accepted as a member in the ANC, a new member must make a solemn declaration that he or she shall abide by the aims and objectives of the ANC's constitution and the Freedom Charter.⁵⁷⁶ The ANC's constitution also provides, under the rubric "Powers and Duties of the National Conference", that the National Conference shall "[D]ecide on and determine the policy,

⁵⁷² ANC *African National Congress Constitution* (2017) Rule 2.1.

⁵⁷³ As above Rule 2.2.

⁵⁷⁴ As above.

⁵⁷⁵ Ss 1 and 1(b) of the Constitution.

⁵⁷⁶ ANC *African National Congress Constitution* (2017) Rule 4.16.

programme and Constitution of the ANC”.⁵⁷⁷ The ANC’s National Conference serves as the main body for adopting the organisation’s policies. The Conferences held can be divided into three periods. The first period is from 1912, when the ANC was founded, to 1960, when it was prohibited. During this period the ANC held regular conferences, often in consecutive years.⁵⁷⁸

During the second period, from 1960 to 1990, while the ANC was prohibited and the majority of their leaders were in detention or in exile, it held two National Consultative Conferences. They were held in April 1969 in Morogoro, Tanzania⁵⁷⁹ and in June 1985 in Kabwe, Zambia.⁵⁸⁰ The distinction between National Conferences and National Consultative Conferences held by the ANC is that National Consultative Conferences were held during the period the ANC was prohibited in South Africa and shortly thereafter. In all other instances it held National Conferences. The reason for the distinction is that it was not possible during the ANC’s prohibition and shortly thereafter to convene all the ANC structures and branches as required by the ANC’s constitution to properly constitute National Conferences.

The third period commenced when the ANC was unbanned in February 1990. With all of the ANC’s leaders returning from exile and released from prison, the ANC held its first conference on South African soil in 30 years in Johannesburg from 14 to 16 December 1990. This 1990 Conference was also a Consultative Conference and its third and last National Consultative Conference.⁵⁸¹ The ANC’s first National Conference (not Consultative Congress) since it was prohibited in 1960 was held after 31 years in July 1991 in Durban.⁵⁸² This 1991 Conference centred around topics of the then negotiations and transition to democracy. The Freedom Charter was also reaffirmed during the 1991 Conference as the primary ANC policy document on international relations.⁵⁸³

Besides the Morogoro and Kabwe Conferences which were of ideologic significance for the ANC

⁵⁷⁷ As above Rule 11.1.

⁵⁷⁸ ANC 47th National Conference Resolutions (1959). A total of 47 National Conferences were held from 1912 to 1960.

⁵⁷⁹ ANC 1st National Consultative Conference Related Documents (1969).

⁵⁸⁰ ANC 2nd National Consultative Conference Reports (1985). Although some 1985 Conference documents refer to the “3rd” national Consultative Conference, it is an error as the “Introduction” refers to the “Second” National Conference as well as the rest of the documents.

⁵⁸¹ ANC 3rd National Consultative Conference Resolutions (1990). According to the *Resolutions* and *Declaration* issued at this Conference, this was the 3rd National Consultative Conference, although it is not stated as such in the title of the main conference documents.

⁵⁸² ANC 48th National Conference Resolutions (1991).

⁵⁸³ ANC 48th National Conference Resolutions: Resolution on foreign policy (1991).

and where it had adopted the NDR as its overarching policy and strategy as discussed in paragraph 2.4.3 above, the National Conferences held since achieving political power in 1994 were also of particular importance. Each conference provides an understanding of the ideological orientation of the ANC, specifically its socio-economic policies as these policies ultimately translated into government policy and legislation.

The 1994 National Conference in Bloemfontein was the first National Conference held by the ANC after winning the first democratic elections in April 1994.⁵⁸⁴ From then on, the ANC held a National Conference every five years.

2.5.1 The 49th National Conference held in Bloemfontein in 1994

This Conference adopted a “Resolution on Strategy and Tactics”.⁵⁸⁵ This was not a separate document but formed part of the main body of Resolutions as one indivisible document. As first remark, the Resolution stated that the April 1994 victory marks a breakthrough into the phase of the NDR.⁵⁸⁶ It stated that the NDR is essentially about the transfer of power to the people and that the transfer of power is a “process” and not “an event or a moment”.⁵⁸⁷

It noted that the transfer of power to the people means the simultaneous transformation, or democratisation of power. “We are not simply transferring unchanged power structures, institutions and attitudes from one elite to another.”⁵⁸⁸

The *Strategy and Tactics* resolution contained a commitment to the following core strategic goals: The key strategic objective remained a united, democratic, non-racial and non-sexist society as envisaged in the Freedom Charter; the “main content of this phase” remained the all-round political, economic and social emancipation of the majority oppressed characterised as the black majority and “the African people in particular”; the “main social motive force” for transformation remained the working class; and the ANC’s commitment was to be a “broad movement and home for all historically oppressed strata...capable of organizing and mobilizing

⁵⁸⁴ ANC 49th National Conference Resolutions (1994).

⁵⁸⁵ As above.

⁵⁸⁶ As above para 1.

⁵⁸⁷ As above paras 2 and 3.

⁵⁸⁸ As above para 5.

the broad mass of our people”.⁵⁸⁹

On the topic “Transformation of Society”, the Conference resolved that the public service should be representative of South Africa’s society. This should be achieved through affirmative action programmes and speeding up the employment of Africans, Coloureds, Indians and other previously excluded groups, especially in the management echelons.⁵⁹⁰ The Judiciary should be transformed, and an independent and representative prosecuting authority established.⁵⁹¹ In line with the ideals of the *Freedom Charter* that “the people shall govern”, all aspects of social life and economic activities should be “democratised”. Civil society groups such as “trade unions, civics, women’s groups and youth movements” should ensure power to the people, “the right to exercise their power” and active involvement in all aspects of civil society.⁵⁹²

The “Transformation of the Economy” is seen as a “fundamental component of the transformation of the country to achieve non-sexism, democracy, non-racialism, development and equity”.⁵⁹³ It was resolved that black economic empowerment is central to reconstruction and development of South Africa. Black economic empowerment should therefore be aimed at empowering communities rather than a limited number of individuals.⁵⁹⁴ The government’s tender system needed to be reviewed to “assist in bringing on board small contractors”.⁵⁹⁵

The resolutions adopted at the Bloemfontein Conference relating to the “Transformation of Society” should be seen as the furtherance of the objectives of the NDR in which the ANC established itself as the central power in government and all spheres of society. This is what Malan refers to as a patrimonial state and a form of governance in which all power flows directly from the ruler. Under the guise of transformation, the ANC endeavours to establish a totalitarian state akin to democratic centralism in the Soviet Union.⁵⁹⁶ The resolutions adopted in respect of “Transformation in Society” and “Transformation of Society” led to the adoption of government’s

⁵⁸⁹ As above paras 1-4.

⁵⁹⁰ As above paras 1.2, 1.3, 3.1-3.3 and 4.3.

⁵⁹¹ As above paras 6 and 7.1.

⁵⁹² ANC 49th National Conference Resolutions: *A Basic guide to the Reconstruction and Development Programme (1994)* 11th, 15th and 17th pages.

⁵⁹³ As above para 1.

⁵⁹⁴ As above para 6.3.

⁵⁹⁵ As above para 6.4.

⁵⁹⁶ Malan (2019) 102 and 103.

policy of “Reconstruction and Development” as government policy.⁵⁹⁷ It is based on the traditions of the Freedom Charter and provided for affirmative action in the public service, the empowerment of black people in the economy, and the use of civil society to transform society.⁵⁹⁸

2.5.2 The 50th National Conference held in Mafikeng in 1997

The 50th National Conference held in 1997 signifies the most significant policy conference of the ANC post-1994. Closer analysis reveals that this Conference set in motion the events leading up to state capture and the large-scale looting of state resources through government procurement processes, affirmative action and BEE programmes. The most important resolution presented and adopted as a policy by the Conference, was the *Strategy and Tactics* in the form of a separate document.⁵⁹⁹ This document dealt exclusively with the NDR, the threats to be addressed, and tactics to pursue the NDR. This comprehensive *Strategy and Tactics* resolution adopted at the Mafikeng Conference formed the basis for all the other resolutions adopted by the ANC at that specific Conference and served as a benchmark for all the ensuing Conference resolutions for the next 26 years. All subsequent Conferences would use as point of departure the *Strategy and Tactics* adopted at Mafikeng.

The *Strategy and Tactics* resolution commenced with a summary of the South African history of racial discrimination. It reaffirmed the Communist Party of South Africa’s “colonialism of a special type” doctrine where the white settler minority was in an imperialist and oppressive relationship with the majority African population and the “colonial power” (whites) shared the same territory as the oppressed (Africans).⁶⁰⁰ The *Strategy and Tactics* resolution emphasised the fact that the ANC had to make compromises during the 1990-1994 constitutional negotiations and transition to democracy and that there were no “outright winners” during the negotiations.⁶⁰¹

The compromises made by the ANC during this process constrained the victory and “coloured the final settlement, some of them codified in the constitution”. These compromises were

⁵⁹⁷ ANC *The Reconstruction and Development Programme: A Policy Framework* (1990-1994) which later became government policy published as: Parliament of the Republic of South Africa *White Paper on Reconstruction and Development Programme (RDP) (1994)*.

⁵⁹⁸ ANC *49th National Conference Resolutions: A basic guide to the Reconstruction and Development Programme* (1994) 2nd, 12th, 13th and 17th pages.

⁵⁹⁹ ANC *Strategy and Tactics* (1997).

⁶⁰⁰ As above para 2.

⁶⁰¹ As above.

necessary to secure political power, but it continued to restrain transformation.⁶⁰² The *Strategy and Tactics* resolution then identified four areas of constraint relating to the public service and private sector which needed to be addressed.⁶⁰³

First, “the rights of the existing public service, including the security forces, the judiciary and parastatals were entrenched during the negotiation process” to allow the ruling clique to ease itself out of power without undue resistance”.⁶⁰⁴ Secondly, the democratic movement took over an apartheid state machinery that was intact and in which the majority of the public servants “resolved to continue in their positions”. While the constitutional framework allowed the new government to transform the public service, this was to be a long-drawn-out process which was also met with resistance from within.⁶⁰⁵ Thirdly, the majority of public servants, and especially those at senior level, the captains of industry and editorial rooms in most of the media, shared the perspective of the former government. All of them were regarded as strategically placed to undermine transformation in favour of the “privileged classes”. Lastly, the “dirty war” networks within and outside South Africa remained intact.⁶⁰⁶ They were either “burrowed” within the state machinery, or “concealed in front companies and other private enterprises”.⁶⁰⁷

“Counter-revolutionary” forces were identified in the *Strategy and Tactics* resolution as “aims and actions to subvert transformation”. These efforts to subvert transformation could be supplemented by “legislatures and networks in the judiciary, the economy, the media and other centres of power”. The immediate objectives of these counter-revolutionary forces were to “disorganize, weaken and destroy the ANC”, the “vanguard of the NDR”. Therefore, it is critical for the ANC to “use those centres of power” in which it has a foothold “to transform the state machinery”.⁶⁰⁸

The *Strategy and Tactics* recognised the rapid emergence of the “black bourgeoisie” and middle strata as a direct result of opportunities created by the ANC government. What is often hailed in the private sector as “black empowerment is symbolic and devoid of real substance”. These new

⁶⁰² As above para 3.

⁶⁰³ As above.

⁶⁰⁴ As above.

⁶⁰⁵ As above.

⁶⁰⁶ As above.

⁶⁰⁷ As above para 4.

⁶⁰⁸ As above para 6.

capitalist classes can become “witting[ly]...tools of monopoly interests...”. It stressed the importance of the emerging black bourgeoisie and middle strata as forces of transformation whose interests coincided with at least the immediate interests of the majority. They are regarded in this phase of the NDR as part of the “motive forces” of fundamental change.⁶⁰⁹

The path to riches for some can also be directly via public office. The occupation of positions of power by individuals held disadvantages and benefits, according to the *Strategy and Tactics*. A disadvantage and risk to the NDR was identified as the creation of “social distance” between them and the “constituencies they represent”.⁶¹⁰ The benefit of holding positions of power was that it also afforded “the movement and its leaders’ powerful possibilities of patronage”.⁶¹¹ The document stated that “[T]here is nothing untoward per se in advancing cadres who, by their selfless contribution to the cause, deserve such acknowledgement”.⁶¹²

The *Strategy and Tactics* suggested that in order to promote the objectives of the NDR and to eliminate the counter-revolutionary risks, the ANC must “seek to expand and deepen the power of democratic forces in all centres critical to the NDR”. The ANC must strengthen the hold of the democratic movement on state power and transform the state machinery. This should be done by means of affirmative action and the deployment of cadres in influential government positions and by regulating the private sector.⁶¹³ Areas in the public service that would require immediate transformation were the judiciary, the army, the police, and the intelligence structures.⁶¹⁴

In addition to the *Strategy and Tactics*, the Conference also adopted several other resolutions to give effect to the *Strategy and Tactics*. These enabling resolutions were divided under six main topics: (1) “Role of State and Governance”; (2) “Building the ANC”; (3) “International Relations”; (4) “Economic Transformation”; (5) “Peace and Stability”; and (6) “General Resolutions”.⁶¹⁵

Under the “Role of the State and Governance”, it adopted the following policies relating to

⁶⁰⁹ As above para 7.

⁶¹⁰ As above.

⁶¹¹ As above.

⁶¹² As above para 8.

⁶¹³ As above para 11.

⁶¹⁴ As above para 10.

⁶¹⁵ ANC 50th National Conference Resolutions (1997).

governance and socio-economic transformation: The ANC structures must ensure that the ANC and its cadres play a leading role in local economic development forums (LEDf); the ANC and its structures are central to the management and co-ordination of all processes of governance and must ensure that all legislation enacted conforms to ANC policies and meets its transformation objectives; the deployment of elected ANC representatives in all geographic and sectoral constituencies including Members of Parliament, Provincial Legislatures and Cabinet Ministers; and Premiers and Members of Executive in Provincial Governments should contribute towards the development of ANC policies.⁶¹⁶ In order to avoid a shift in policy development towards government away from the ANC, ANC cadres deployed must be empowered and the ANC should build and maintain sufficient capacity to take the lead in the development of ANC policy to be implemented in the central, provincial and local spheres of government.⁶¹⁷ The state must play a developmental role in effecting socio-economic transformation; the fundamental transformation of the state be considered a priority objective of the NDR; and a detailed, coordinated programme must be developed that would lead to “the implementation of the ANC’s strategic objectives by all the political structures of the ANC”.⁶¹⁸

Under the topic “Building the ANC” various resolutions were adopted which related to socio-economic programmes of government. Reaffirming the ANC’s continued commitment to the national liberation of “Blacks in general and Africans in particular”, with the working class leading the democratic revolution,⁶¹⁹ the Conference resolved that: Affirmative Action should be more rapidly implemented in government and should focus primarily on the poor and disadvantaged who were “mainly African and should include the poor from other communities”;⁶²⁰ the ANC must develop programmes to guide the evolution of the “emerging black bourgeoisie”; and the ANC must monitor employment patterns and practices within Ministries and Government Departments to ensure that they reflect the demographics of the population.⁶²¹ For the purpose of transformation and to perform the “National Democratic tasks” and fulfil the critical role of political leadership, cadres need to be deployed to various organs of state, the public service, to “other centres of power in society” and the private sector.⁶²² Decisions of the ANC are final and a

⁶¹⁶ As above 13th page. The document is unnumbered.

⁶¹⁷ As above 15th page.

⁶¹⁸ As above 16th page.

⁶¹⁹ As above 20th and 21st page.

⁶²⁰ As above 21st and 22nd page.

⁶²¹ As above 22nd page.

⁶²² As above 23rd and 24th page.

breach of ANC policy by cadres deployed shall “constitute a serious offence”.⁶²³

In respect of Economic Transformation, a resolution was adopted that all economic policies should be geared towards a competitive, fast-growing and developing economy which creates jobs for all job seekers; redistribution of wealth, income and opportunities in favour of the poor and the historically disadvantaged; and popular involvement and participation of all South Africans in the economy and in economic decisions.⁶²⁴

The importance of rural development was emphasised.⁶²⁵ The Freedom Charter was reaffirmed as the single most important document which “stands out as the most comprehensive expression of the ideals of the movement”.⁶²⁶ Due to the importance of the mining industry, it must be transformed by means of affirmative action and for “state-held mineral rights”.⁶²⁷

The Conference Resolutions adopted in 1997 gave rise to various important government policies and legislation introduced in the wake of the Conference, namely (1) it set in motion the resolution adopted by the ANC-orientated Black Business Council in 1997 to establish a commission under the leadership of Cyril Ramaphosa to investigate and make recommendations on black economic empowerment, as discussed in more detail in chapter 6, paragraph 6.2; (2) the enactment of the Employment Equity Act (EEA) in 1998⁶²⁸ which provided for the equitable representation of all race and gender groups in all occupational levels in workplaces in proportion to the population of society in terms of the Economic Active Population (EAP) as discussed in chapter 5, paragraph 5.3.2; (3) the introduction of the *White Paper on Affirmative Action in the Public Service*⁶²⁹ in 1998 which provided for affirmative action in the public service to represent on all occupational levels the race and gender demographics of society, as discussed in chapter 5, paragraph 5.3.3; (4) the enactment of the Preferential Procurement Policy Framework Act (PPPFA)⁶³⁰ and Public Procurement Regulations, 2001,⁶³¹ which

⁶²³ As above 25th page.

⁶²⁴ As above 38th page.

⁶²⁵ As above 39th page.

⁶²⁶ As above.

⁶²⁷ As above 44th page.

⁶²⁸ Act 55 of 1998.

⁶²⁹ Department of Public Service and Administration *White Paper on Affirmative Action in the Public Service* (1998) published in *Government Gazette* No. 18800 dated 23 Apr 1998.

⁶³⁰ 5 of 2000.

⁶³¹ *Preferential Procurement Regulations, 2001* published in *Government Gazette* No. 22549 dated 10 Aug 2001.

made provision for the making of regulations and to benefit Historically Disadvantaged Individuals (HDIs) discussed in chapter 5, paragraph 5.4; (5) the enactment of the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA)⁶³² which prohibited discrimination by the state and all private legal subjects and provided for the promotion of equal economic opportunities for all individuals and communities, as discussed in chapter 5, paragraph 5.2; (6) the adoption of the Liquid Fuels Charter in 2000 and the Mining Charter in 2002 empowering Historically Disadvantaged South Africans through a points and scorecard system to qualify for permits and licences for mining;⁶³³ and (7) the enactment of the Mineral and Petroleum Resources Act in 2002⁶³⁴ as discussed in chapter 6, paragraph 6.2 to place all mining rights under the control of the state to give direct effect to the ANC resolution adopted at the 1997 Conference.

2.5.3 The 51st National Conference held in Stellenbosch in 2002

During this Conference, a *Strategy and Tactics* document was presented as a discussion document in preparation for the National Conference.⁶³⁵ The document explained how the ANC's strategy and tactics in pursuit of the NDR had changed over time depending on the circumstances of each period.⁶³⁶ It reaffirmed the "Freedom Charter as the strategic objective of the NDR". It also pointed out that "the interpretation of the Charter has evolved over time, influences by the objective national and international environment".⁶³⁷ The document then summarised the main objectives of the NDR as adopted at the previous 1997 Mafikeng Conference of "attained state power" and the place and role of the "emergent black bourgeoisie" in the pursuit of the NDR.⁶³⁸

It reiterated the need "to build and strengthen the ANC" as organisation which leads the people to social transformation, "strengthen its hold on state power" and to "transform the state

⁶³² Act 4 of 2000.

⁶³³ Republic of South Africa *Charter for the South African Petroleum and Liquid Fuels Industry on Empowering Historically Disadvantaged South Africans in the Petroleum Liquid Fuels Industry* (2000); and Republic of South Africa *Broad Based Socio-Economic Empowerment Charter for the South African Mining Sector* (2002).

⁶³⁴ Ss 14, 17 and 23 of the Mineral and Petroleum Resources Development Act 28 of 2002.

⁶³⁵ ANC *Strategy and Tactics* (2002).

⁶³⁶ As above paras 8-10.

⁶³⁷ As above paras 7, 16-25.

⁶³⁸ As above paras 28-31.

machinery”.⁶³⁹ One of the new challenges identified by the *Strategy and Tactics* was the role of “patriotic capital” and its relationship to the NDR. Patriotic capital was referred to as “broader than just the black bourgeoisie”. Since the NDR aimed to “change apartheid property relations”, private capital interests may be in conflict with this aim of the NDR.⁶⁴⁰

The *Strategy and Tactics* reaffirmed the ANC, South African Communist Party (SACP) and Congress of South African Trade Unions (Cosatu) as Tripartite Alliance in pursuing the NDR. It stressed that all “motive forces”, particularly the black bourgeoisie “stands to gain victory of the NDR”. The ANC was confirmed as leading all motive forces.⁶⁴¹ The issue that needed to be addressed, according to the *Strategy and Tactics*, was the possibility that the “theoretical method and/or national and class alignment” had changed so significantly, with the black bourgeoisie as motive force joining the black working class, that a review was required.⁶⁴² Another issue that required consideration was the “vanguard role of the working class in the NDR” as the composition of the working class had also changed.⁶⁴³ The ANC reaffirmed that it was characterised in all previous *Strategy and Tactics* as “the vanguard of all these motive forces of the NDR”. The question to be considered was whether a “mass liberation movement” can be described as “vanguard”.⁶⁴⁴

Various resolutions were adopted by the National Conference based on the issues raised in the *Strategy and Tactics* under the topic “Social Transformation”. It was reaffirmed that the ANC is the leading force for social transformation and that its cadres have an obligation to spearhead and lead transformation whenever they were deployed, “guided by the slogans, vision and objectives of the ANC”.⁶⁴⁵

Under the topic “Black Economic Empowerment (BEE)”, the Conference noted that little progress had been made in achieving greater operational participation in the economy by black people, as well as reference to the rise in so-called “fronting”.⁶⁴⁶ This limited participation of black

⁶³⁹ As above para 32.

⁶⁴⁰ As above para 37.

⁶⁴¹ As above para 54.

⁶⁴² As above para 40.

⁶⁴³ As above para 41.

⁶⁴⁴ As above para 54.

⁶⁴⁵ ANC 51st National Conference Resolutions (2002) para 1. The document is unpaginated and para numbers are limited to each topic – paras are not progressively numbered.

⁶⁴⁶ As above under the heading “Noting That” para 2.

people in the economy limited the ANC's ability to expand the production base, sustain economic development, eradicate poverty, and contribute to a better life for all.⁶⁴⁷

The Conference then adopted a total of twelve resolutions in respect of BEE, the most notable being as follows: (1) BEE was defined in its broadest sense as an integrated and coherent “socio-economic process” and its benefits must be shared across society with as wide an impact as possible;⁶⁴⁸ (2) The indicators for the success of BEE are overall equity in incomes and wealth, and increasing levels of black participation in the ownership of the economy, which will be measured by the extent to which there was “operational participation and control of the economy” and the extent to which there had been “transfer and possession of skills and a retention of assets by the BEE beneficiaries”;⁶⁴⁹ (3) Ensuring that BEE was broad based, supportive of collective ownership programmes by working people and communities, in the form of collective enterprises and cooperatives, supportive of the creation of an entrepreneurial class and the accumulation of assets by the poor with a focus on the development of rural economies;⁶⁵⁰ (4) The ANC would encourage target groups, especially women, institutions working with children, people with disabilities, youth and the elderly, to take up opportunities provided by BEE;⁶⁵¹ (5) The ANC would work with the emergent black capitalist class to ensure the involvement of black business people in BEE;⁶⁵² (6) Government should intensify its support for small, medium and micro enterprises;⁶⁵³ (7) Enhancing the effective use of government's instruments, such as licensing, procurement, state assets and the restructuring and provision of finance to target BEE;⁶⁵⁴ and (8) Government must design an enabling regulatory framework, including operational guidelines to promote certainty in the implementation and regulation of BEE.⁶⁵⁵

These resolutions led to the adoption of the report and recommendations on the implementation and format of BEE by the Black Economic Empowerment Commission (BEECom), chaired by

⁶⁴⁷ As above para 3.

⁶⁴⁸ As above under the heading “Therefore Resolves” para 1.

⁶⁴⁹ As above para 2.

⁶⁵⁰ As above para 3.

⁶⁵¹ As above para 4.

⁶⁵² As above para 5.

⁶⁵³ As above para 6.

⁶⁵⁴ As above para 10.

⁶⁵⁵ As above para 11.

Cyril Ramaphosa.⁶⁵⁶ This, in turn, led to the BEE Strategy issued in 2003,⁶⁵⁷ and enactment of the B-BBEE Act in 2003 which commenced in 2004⁶⁵⁸ and the first B-BBEE Codes in 2005, discussed in more detail in chapter 6, paragraphs 6.2 and 6.3.

2.5.4 The 52nd National Conference held in Polokwane in 2007

This Conference, as in the case of previous conferences, was informed by a *Strategy and Tactics* document tracking the progress of the NDR and identifying new risks and opportunities to pursue the NDR. The *Strategy and Tactics* document repeated the history of black resistance and the role of Africans and the meaning of the concept of “Colonialism of a Special Type”, reaffirming that “our approach is informed by the ideals contained in the Freedom Charter”.⁶⁵⁹

The *Strategy and Tactics* expanded on the definition of Colonialism of a Special Type and explained that it consisted of “three interrelated antagonistic contradictions”, namely class, race and patriarchal relations of power. This antagonism found expression in national oppression based on race, class and super-exploitation directed against black workers on the basis of race, and the “triple oppression of the mass of women based on their race, their class and their gender”. The NDR thus sought “to abolish this combination of social conflict”.⁶⁶⁰ It confirmed that the main aim of the NDR was to liberate “the Africans in particular, and the Blacks in general”.⁶⁶¹ The *Strategy and Tactics* also explained that a “national democratic society” will have a “mixed economy”, with state, co-operative and other social ownership, and private capital. The balance between social and private ownership shall depend on “the concrete tasks of the NDR at any point in time”.⁶⁶²

The *Strategy and Tactics* of 2007 also outlined the roles of the South African Constitution in pursuing the NDR and observed that “as a broad canvass, the Constitution and the state system

⁶⁵⁶ Black Economic Empowerment Commission (BEECom) *The BEECom Report* (2001) 1; Madi (2016) 49; and Ponte *et al* DAC (2007) 11.

⁶⁵⁷ Department of Trade and Industry (DTI) (2003) *South Africa’s Economic Transformation: A Strategy for Broad-Based Black Economic Empowerment* (2003) 4 and 11-13.

⁶⁵⁸ Act 53 of 2003 as amended by Act 46 of 2013 published in *Government Gazette* No. 37271 dated 27 Jan 2014.

⁶⁵⁹ ANC *Strategy and Tactics* (2007) paras 14 and 182.

⁶⁶⁰ As above paras 33 and 34.

⁶⁶¹ As above para 39.

⁶⁶² As above para 49.

provide the requisite wherewithal to implement the objectives of the NDR”.⁶⁶³

It further noted that the removal of the glass ceiling of apartheid had created space for many blacks to rise into the middle and upper strata of society. It is in this middle sector where the greatest dynamics in income mobility were to be found. However, despite the improvement in black and female ownership and control of wealth and access to management, many black professional opportunities were still limited, with overall proportions which “were inversely related to the country’s demographics”. As such, while progressive forces have attained political power, economic power still remained largely in the hands of the white minority.⁶⁶⁴

As part of the motive forces, the black middle strata were seen as a “critical resource” of the NDR. They included the “intelligentsia, small business operators and professionals”.⁶⁶⁵ The emergence of the black capitalist group was regarded as a direct creation of the NDR. The continued de-racialisation of ownership and control of wealth and income was seen as being in “the objective interest” of the black capitalist and their role as motive force in the continued advancement of the NDR.⁶⁶⁶ The *Strategy and Tactics* also cautioned that the rise of black capitalists may result in a conflict of interest due to their relationship with white capitalists. This may lead to a “comprador bourgeoisie” (acting as an agent for private capitalists) or black capitalists being constantly tempted to use corrupt means to advance their personal interest – and may thus develop into a “parasitic bureaucratic bourgeoisie”.⁶⁶⁷ In respect of monopoly companies, the *Strategy and Tactics* confirmed the approach of liberation movements to private capital within a national democratic society “as a system that encourages competition, promotes sustainable labour-absorbing [employment] activity, discourages rent-seeking in the form of super-profits arising from monopoly control and other selfish advantages...”.⁶⁶⁸

The relationship between the state and private capital was in general described as one of “unity and struggle, co-operation and contestation”. On the one hand, the democratic state had to create an environment conducive to private investments from which the investors can derive reasonable returns, and through which employment and technology progress can be achieved.

⁶⁶³ As above para 75.

⁶⁶⁴ As above para 79.

⁶⁶⁵ As above para 105.

⁶⁶⁶ As above para 106.

⁶⁶⁷ As above para 107.

⁶⁶⁸ As above para 115.

On the other hand, the state should, through state-owned enterprises, effective regulation, taxation and other means, ensure redistribution of income; direct investments into areas of national development; play a central role in public goods; and broadly ensure social responsibility. The “balance between unity and struggle will be dictated by the strategic imperatives of the NDR”.⁶⁶⁹ For this purpose, the democratic state should have the “strategic capacity and instruments” at its disposal.⁶⁷⁰

In order for the ANC to exercise its “vanguard role”, the ANC confirmed the high premium placed on the “involvement of cadres in all centres of power”. This included “state institutions”, the presence of “members and supporters of the ANC in business”, to “better reshape production relations in line with the outlook of a national democratic society”.⁶⁷¹

The “white community” was still defined by the *Strategy and Tactics* as “antagonists of the NDR!”.⁶⁷² The most important resolutions adopted by the National Conference to give effect to the *Strategy and Tactics* related to furtherance of the deployment of cadres; strengthening of the central role of the state; and the focus on BEE.⁶⁷³

Under the topic “Deployment of Cadres”, the Conference affirmed that the ANC remained the key strategic centre of power which must “exercise leadership of the state and society in pursuit of the objectives of the NDR”.⁶⁷⁴ The Conference then instructed the National Executive Council (NEC) of the ANC to ensure that the ANC’s 1997 Resolution on Deployment is further developed to strengthen “deployment of cadres to senior positions of authority”.⁶⁷⁵ The Conference adopted a “specific approach” to be followed in respect of the appointment of cadres in state and other institutions: at local level, the “Regional Executive Council (REC)” of the ANC should make three names available in order of priority who should be considered for mayorship to the Provincial Executive Council (PEC) of the ANC, and the PEC will make a final decision based on the pool of names submitted by the REC. For appointments of cadres at provincial government level, the

⁶⁶⁹ As above para 116.

⁶⁷⁰ As above para 117.

⁶⁷¹ As above para 129.

⁶⁷² As above para 109.

⁶⁷³ ANC 52nd *National Council Resolutions* (2007). All the previous Conference resolutions referred to “National Conference” or “Consultative Conference” or “National Consultative Conference”. The 52nd Conference Resolutions referred to “National Council”, although the resolutions were adopted by the Conference.

⁶⁷⁴ As above para 55.

⁶⁷⁵ As above para 56.

PEC of the ANC should recommend a pool of not more than three cadres in order of priority who should be considered for Premiership. The NEC will make a final determination based on the pool of names it received. At national government level, it was resolved that the ANC President shall be the organisation's candidate for President of the Republic. The prerogative of the President, premiers and mayors to appoint and release members of cabinet, executive councils and mayoral committees should be exercised only after consultation with the leadership of the ANC. The NEC was instructed to develop criteria for the deployment of cadres to senior positions in government, such as the President, Premiers and Mayors.⁶⁷⁶

Under the topic "Economic Transformation", the Conference resolved to strengthen the role of the central organs of state to maintain its strategic role in shaping the key sectors of the economy;⁶⁷⁷ to deploy government resources to build small and micro enterprises;⁶⁷⁸ to accelerate growth through transformation of the structures of production and ownership, amongst others, through state custodianship of natural resources; to develop anti-monopoly and anti-concentration policies; to broaden and deracialise the ownership and control of productive assets to include black people, women and youth; and to promote new black enterprises as a broad-based BEE arm.⁶⁷⁹

Under the subject "Transformation of the Judiciary", the Conference resolved that appropriate mechanisms must be urgently established to pursue the priority of establishing an adequate pool of judicial officers who are "steeped in and reflect the progressive values of our constitution" – referring to the ANC's Constitution.⁶⁸⁰

Part of the ANC's objectives in terms of the ideals of the NDR to transform society is to have a judiciary that shares the same political beliefs as those of the ANC. To achieve this, the judiciary must firstly be transformed to realise the objective of equitable transformation, and secondly to appoint judges and magistrates who interpret and adjudicate the Constitution and legislation in line with the political directives and convictions of the ANC.⁶⁸¹ This is discussed in more detail in chapter 3, paragraph 3.6 below.

⁶⁷⁶ As above para 84.

⁶⁷⁷ ANC 52nd *National Council Resolution* (2007) under the heading "Therefore Resolves" paras 1.1 and 1.5.

⁶⁷⁸ As above para 1.9.

⁶⁷⁹ As above para 2.3.

⁶⁸⁰ As above para 5.

⁶⁸¹ Malan (2019) 156.

The Conference further resolved that the unity and coherence of the ANC was an absolute requirement in the advancement of the NDR and that the ANC needed to improve “the capacity of its communication cadres”. The Conference noted that the print media was not covered by a sectoral B-BBEE Charter, and that where media houses had concluded BEE transactions, they had not “translated into a diversity of views”. This underscored the fact that advertising profiles and key management positions remained largely the same.⁶⁸²

2.5.5 The 53rd National Conference held in Mangaung in 2012

As was the case with previous conferences, the 53rd National Conference in Mangaung was largely informed by the *Strategy and Tactics* document in pursuit of the NDR.⁶⁸³ The document was in essence a repeat of similar documents at previous conferences. The only new addition was the so-called “Second Phase of the Transition”.⁶⁸⁴ In this regard, the *Strategy and Tactics* noted that South Africa was in a continuous and “seamless transition from Apartheid to a National Democratic Society”. The interventions required to speed up change, especially with regard to economic and social transformation, related to the “Second Phase” of transition. The Second Phase can be understood as “marking the [S]econd [p]hase in the transition to a National Democratic Society”. This Second Phase of the transition should be characterised by economic action to effect “thorough-going economic transformation and democratic consolidation”.⁶⁸⁵ For this to happen, the following was required: The ANC, the Alliance and broad democratic forces need to renew themselves to lead in its implementation;⁶⁸⁶ at the core of the Second Phase should be a concerted drive to eradicate poverty and to reduce inequality;⁶⁸⁷ this required a variety of interventions such as building infrastructure, increasing employment opportunities and implementing programmes to eliminate youth and women marginalisation;⁶⁸⁸ it included programmes to extend access to education, healthcare, water, housing, electricity and land.⁶⁸⁹

In this regard, the “Vision 2030” contained in the *National Development Plan (NDP)*⁶⁹⁰ released

⁶⁸² As above under the heading “The Battle of Ideas” paras 94 and 115.

⁶⁸³ ANC *Strategy and Tactics* (2012).

⁶⁸⁴ As above para 31.

⁶⁸⁵ As above.

⁶⁸⁶ As above.

⁶⁸⁷ As above para 32.

⁶⁸⁸ As above para 33.

⁶⁸⁹ As above paras 34 and 35.

⁶⁹⁰ National Planning Commission *The National Development Plan (NDP) 2012-2030* (2012).

in 2012 was welcomed as it was regarded to be in many respects aligned to the objectives of the ANC and its own elaboration of the “[s]econd [p]hase of the transition to a National Democratic Society”.⁶⁹¹

The resolutions relating to socio-economic measures taken by the Conference were also nothing new. Some of the previous resolutions were characterised by the addition of a more “urgent” or “radical” adjective. Some of these measures were as follows: Taking the programme of economic transformation to new heights by fast-tracking “the development of entrepreneurs, small-medium entities, including “large-scale” infrastructure;⁶⁹² taking “urgent and practical steps” to build the capacity of the state to intervene in key sectors of the economy;⁶⁹³ working towards the implementation of the NDP which sought to advance the NDR;⁶⁹⁴ “The [s]econd [p]hase of the transition should thus mark a decisive break with unemployment, exploitation, inequality and poverty”;⁶⁹⁵ “radical” improvement in the outcomes generated by the education system;⁶⁹⁶ and promoting B-BBEE at the minimum of 30% to 50% direct ownership and control of the Information and Communication Technologies Industry to be achieved by 2020.⁶⁹⁷

In order to control the media for political purposes, as resolved at the 2012 National Conference, the government used the B-BBEE Sector Codes to achieve its goals. In 2012, government issued the B-BBEE Sector Code for the Information, Communication and Technology Sector, setting a target of 30% black ownership on the scorecard to measure B-BBEE compliance.⁶⁹⁸ This requirement was ramped up to 45% black ownership in terms of a new Media, Advertising and Communication Sector Code published in 2012⁶⁹⁹. Of significance is that the 30% and subsequent 45% black ownership requirement for the media sector was substantially higher than for the rest of the sectors which required 25,1% black ownership in terms of the Generic Codes of Good Practice.⁷⁰⁰ This ownership requirement is evidence of the control the ANC gained over key sectors and levers of power through BEE.

⁶⁹¹ ANC *Strategy and Tactics* (2012) para 38.

⁶⁹² ANC 53rd *National Conference Resolutions* (2012) 9.

⁶⁹³ As above.

⁶⁹⁴ As above 12 and 22.

⁶⁹⁵ As above 21.

⁶⁹⁶ As above 22.

⁶⁹⁷ As above 57.

⁶⁹⁸ *ICT Sector Code* published in *Government Gazette* No. 35423 dated 6 Jun 2012 19.

⁶⁹⁹ *Marketing, Advertising and Communication Sector Code* published in *Government Gazette* No. 39887 dated 1 Apr 2016 10.

⁷⁰⁰ Para 2 of Statement 100 of the B-BBEE Codes.

2.5.6 The 54th National Conference held at Nasrec, Johannesburg in 2017

The *Strategy and Tactics* document was largely a repeat of the previous conferences. The only real new threat in pursuing the NDR was identified as the ANC itself. It stated that the ANC faced declining fortunes. Internal squabbles, money politics, corruption and poor performance in government all conspired to undermine the ANC's legitimacy in the eyes of the public.⁷⁰¹ Significant sections of the motive forces seemed to have lost confidence in the capacity and will of the ANC to carry out the agenda of social transformation.⁷⁰² Crucial to the achievement of a national democratic society was the attainment of political power.⁷⁰³ Since the ANC is viewed as the "organised vanguard", a loss of confidence in and support for the ANC threaten the pursuit of the NDR.⁷⁰⁴ The Conference also heard that there were "signs of retrogression towards the fundamental change" and that "subjective factors reflected in the weakness of the ANC and the government it led", accounted for this state of affairs.⁷⁰⁵

The *Strategy and Tactics* concluded with an observation that the marginalised are less prepared to bear the agony of past social relations. At the same time, an increasing number of the "privileged seem to appreciate that their interests were closely linked to those of society as a whole".⁷⁰⁶

The socio-economic resolutions adopted by the Conference were in essence a rewording and reworking of previous resolutions. The only real difference was the ANC's own internal reflection. In line with the *Strategy and Tactics* at this Conference, the ANC bemoaned the loss of confidence in the ANC because of internal factional competition to control state resources, social distance, corruption, nepotism, arrogance, elitism, factionalism, manipulation of organisational processes, abuse of state power, and prioritising self-interest above the people. It recognised that even the staunchest ANC supporters agreed that the "sins of incumbency" were deeply entrenched, and that the ANC had lost much of its influence and appeal among "students, young intellectuals and the black middle class".⁷⁰⁷ The need was also expressed to develop the

⁷⁰¹ ANC *Strategy and Tactics* (2017) 10.

⁷⁰² As above 13.

⁷⁰³ As above 11.

⁷⁰⁴ As above.

⁷⁰⁵ As above 21.

⁷⁰⁶ As above 27 and 28.

⁷⁰⁷ ANC 54th National Conference Report and Resolutions (2017) 13.

capacity of cadres deployed by the ANC towards higher levels of government and management.⁷⁰⁸

In respect of corruption, the Conference noted that “corruption robbed billions” from the citizens. The current leadership of the ANC seemed helpless to arrest these practices. Further, the state investigative and prosecutorial authorities appeared to be weakened and affected by factional battles, rendering them unable to perform their functions effectively.⁷⁰⁹

In order to address the ANC’s credibility and integrity to deal with corruption, the Conference adopted the following important resolutions: Demand that every cadre accused of, or reported to be involved in, corrupt practices, account to the ANC’s Integrity Committee or face disciplinary processes; summarily suspend people who failed to give an acceptable explanation or to “voluntarily step down” while facing disciplinary, investigative or prosecutorial procedure; and that the ANC should respect the Constitution of South Africa and rule of law, and implement the NEC’s earlier resolution on state capture, including the expeditious establishment of a Judicial Commission of Inquiry.⁷¹⁰

In respect of “strengthening B-BBEE”, the Conference adopted the following resolutions which were merely a repeat and rewording of previous resolutions: state procurement should be used as an empowerment lever;⁷¹¹ the Preferential Procurement Policy Framework Act (PPPFA) should be significantly amended to fully realise all the objectives set out in section 217 of the Constitution;⁷¹² the “set aside” principle in the PPPFA, which reserves contracts for black-empowered enterprises, must be further strengthened to more effectively promote black business;⁷¹³ the black industrialist programme should be strengthened;⁷¹⁴ the government should intensify the use of state concessions as a policy tool for economic development and transformation;⁷¹⁵ and a worker empowerment component should be introduced in the policy framework to “massify share-ownership among workers and to provide for worker

⁷⁰⁸ As above 17 and 19.

⁷⁰⁹ As above 21.

⁷¹⁰ As above.

⁷¹¹ As above 33.

⁷¹² As above.

⁷¹³ As above.

⁷¹⁴ As above.

⁷¹⁵ As above.

representatives sitting on boards of companies”.⁷¹⁶

The resolution adopted by the Conference to expedite the establishment of a Judicial Commission of Inquiry into “state capture” led to the establishment of the so-called State Capture Commission in 2017.⁷¹⁷ The State Capture Commission’s Reports were released in 2022 and revealed various incidents of corruption and fraud involving government’s framework processes which were enabled by cadre deployment and B-BBEE. According to these reports, the ANC was implicated in various criminal acts. The ANC President described the ANC as “Accused Number One” because of the part it played in the looting of states resources.⁷¹⁸

2.5.7 The 55th National Conference held at Nasrec, Johannesburg in 2022

The format of resolutions adopted during this Conference differed from that of previous conferences. Each resolution was contained in a separate document, for instance *Arts, Culture and Heritage*; *Economic Transformation*, and *Social Transformation*. The *Strategy and Tactics Resolution* was one of the resolutions contained in a separate document and not a discussion document as in the past, and which was later adopted as part of the main body of resolutions.

The 2022 *Strategy and Tactics Resolution* was a much watered-down version of the *Strategy and Tactics* documents of previous conferences. It consisted of only seven pages, compared to 25 to 30 pages at previous conferences.⁷¹⁹ Needless to say, the 2022 *Strategy and Tactics Resolution* did not reveal anything new in pursuing the NDR. It repeated an earlier observation that on the domestic front, the conclusion was that the NDR is facing grave danger as the balance of forces were shifting away from the “progressive forces”. The ANC-led democratic movement was increasingly losing the “strategic initiative” and “moral high-ground” while the “counter-revolution” was gaining confidence regarding the possible removal of the ANC from power and ultimately derailment of the transformation of South Africa.⁷²⁰

⁷¹⁶ As above.

⁷¹⁷ *Proclamation No. 3 of 2018* by the President of the Republic of South Africa appointing a Judicial Commission of Inquiry into allegations of state capture, corruption and fraud in the public sector, including organs of state, published in *Government Gazette* No. 41403 dated 25 Jan 2018. Also see *Judicial Commission of Inquiry into State Capture Report: Parts I-VI* (2022).

⁷¹⁸ *Judicial Commission of Inquiry into State Capture Report: Parts I-VI* (2022). Also see ch 5, paras 5.3.4 and 5.4.4 below; and ch 6, para 6.8, below.

⁷¹⁹ ANC *Strategy and Tactics Resolution* (2022) 1-7.

⁷²⁰ As above 5.

The toning down of the NDR lexicon in the 2022 *Strategy and Tactics Resolution* is also striking. The term “NDR” itself was used only twice towards the end of the document.⁷²¹ Where previous documents were couched in Marxist-Leninist and NDR terms such as “economic emancipation”, “bourgeoisie”, “colonialism of a special type”, “vanguard”, “revolution” and “Africans in particular and Blacks in general”, the 2022 Conference had omitted these terms from its *Strategy and Tactics Resolution*. The resolution referred once to the Freedom Charter and also incorporated the Constitution of South Africa as part of the vision, values and principles of the national democratic society.⁷²²

The *Social Transformation Resolution* adopted did not reflect any socio-economic resolutions but mere statements. The “Introduction” to this Resolution commenced by citing that the ANC is the leader in society charged with the “mammoth task” of leading the NDR. The main objective of the NDR was defined as “building a democratic, non-racial and non-sexist society in which all citizens enjoy a better life, and are guaranteed political, social, economic, cultural and religious rights as enshrined in the Constitution”.⁷²³

It stated further that one of the tasks that the ANC had to undertake in “spearheading” the NDR was to “implement a radical social transformation programme geared towards ending poverty, unemployment and inequality”. The strategic objective of social transformation was to transform society and build a new one that is peaceful, equal and just, as “envisioned in the Freedom Charter, *Ready to Govern* policy document, the Constitution of the Republic of South Africa, the National Development Plan, the UN Agenda 2030 and Africa’s Agenda 2063”.⁷²⁴

The *Economic Transformation Resolution* document stated that the ANC derived its values and norms from the Constitution of South Africa and the Freedom Charter.⁷²⁵ It reaffirmed that “thorough-going” social and economic transformation required an economy that is growing, creating employment, reducing poverty and closing the inequality gap.⁷²⁶ The characterisation of the current phase of the NDR at the 53rd National Conference in Mangaung as the “[s]econd [p]hase of our ongoing transition from colonialism and apartheid to a National Democratic

⁷²¹ As above.

⁷²² As above 1.

⁷²³ ANC 55th National Conference Resolutions *Social Transformation Resolution* (2022) 1.

⁷²⁴ As above.

⁷²⁵ ANC 55th National Conference Resolutions *Economic Transformation Resolution* (2022) 1.

⁷²⁶ As above.

Society”, was reaffirmed.⁷²⁷ One of the “key tasks of the NDR” was cited as being “to progressively reduce income inequality in order to create an equitable society”.⁷²⁸

On the topic of “Transformation, Empowerment (B-BBEE) and Preferential Procurement”, the inefficiencies in the “implementation of B-BBEE policy by both private and public sector entities” cast “doubt on the policy”.⁷²⁹ It was reaffirmed that state procurement was an important lever for empowerment and industrial development.⁷³⁰ Consequently, it was resolved that the task of empowerment should be undertaken with “greater intensity and purpose”;⁷³¹ that government and all its entities must continue to implement preferential procurement policy to advance people who had been disadvantaged by unfair discrimination;⁷³² that public bodies must contract for goods and services in a manner that is fair, equitable, transparent, competitive and cost-effective;⁷³³ and that the implementation of procurement targets for women-owned and youth-managed businesses, businesses owned by people living with disabilities, and businesses owned by military veterans should be accelerated.⁷³⁴

The ANC also adopted several resolutions under *Legislature and Governance*. Of importance is the “Introduction” to the resolution which states the approach of the ANC to governance and transformation. It states that the “ANC’s approach to state power is informed by the Freedom Charter and the principle that ‘The People Shall Govern’”. It is noteworthy here that the ANC does not base their approach on the principles and provisions of the Constitution of South Africa, but rather on the Freedom Charter. The resolution further states that the main goal of state transformation is—

“building a developmental state that provides effective basic services and with capabilities to take forward a far-reaching agenda of national economic development whilst at the same time placing people and their investment at the centre of the process”.⁷³⁵

⁷²⁷ As above 2.

⁷²⁸ As above 5.

⁷²⁹ As above 8.

⁷³⁰ As above.

⁷³¹ As above.

⁷³² As above.

⁷³³ As above.

⁷³⁴ As above.

⁷³⁵ ANC’s 55th *National Conference Resolutions Legislative and Governance* (2022) 1.

“Developmental state” refers to the state as the centre of power often used in socialist terminology in advancing the NDR’s “far reaching agenda”.⁷³⁶

2.6 CONCLUSION

This chapter relates to the first research sub-question posed in chapter 1, paragraph 1.2 above, namely the present definition or categorisation of the beneficiaries of B-BBEE. This question is answered by reference to the present prevalence of inequality in South Africa, the history of inequality and the evolution of the ANC’s ideology, as basis for government policy and legislation in categorising and defining the beneficiaries of B-BBEE.

South Africa is epitomised by extremely high levels of inequality. This can be attributed to present-day as well as historic factors.⁷³⁷

Income and wealth data indicate that inequality is manifested in terms of race, gender and people with disabilities. The categories of society most affected by inequality are black people and especially Africans, black women, black youth and people with disabilities. Some categories, such as black women, may fall within more than one category, and experience multiple or intersectional forms of discrimination based on race and gender.⁷³⁸ Social classes such as Blacks in rural areas, rural African, single-parent female-headed households, the poor and transient poor and those with poor-quality education, have been identified as particularly vulnerable to inequality and poverty.

A new pattern of inequality has also emerged over the past 20 years within the African population, with such inequality levels increasing disproportionate to other race groups. This can be attributed to the emergence of a rapid-growing African upper and middle class. The growth of the African upper and middle class was at the expense of the poor African population, which further exacerbated inequality levels within the African population group. The expansion of the African upper and middle class has also not reduced race inequality over the corresponding

⁷³⁶ Slovo *Umsebenzi Discussion Pamphlet* (1988) 11th page; Southall *Review of African Political Economy* (2008) 284-286; and Ponte *et al DAC* (2007) 936.

⁷³⁷ See para 2.2 above.

⁷³⁸ As above.

period.⁷³⁹

Historical causes of inequality can be summarised as the lack of political power by black people, which translated in a loss of land, livelihood and social cultural structures.⁷⁴⁰ Significant socio-economic disparity existed between Europe and Africa in the 15th to 17th centuries. At the point that Europeans arrived in South Africa, white Europeans and black indigenous groups were not on the same socio-economic footing.⁷⁴¹ European expansion in South Africa gave rise to conflict relating to land, labour resources and means of survival.

The occupation of the Cape by the British in 1806, marked the beginning of an imperialistic expansion of the British empire. This resulted on frontier wars and the dramatic reduction of land available to black indigenous groups.⁷⁴² British imperialism also brought them in conflict with Afrikaner burghers (Boers) who were descended mainly from Dutch settlers and French Huguenots who arrived in the Cape in the 17th century. The Boers' endeavours to venture northward in order to escape British rule, brought them into contact with inland indigenous groups, resulting in continuous conflict, skirmishes, retaliation and loss of land.⁷⁴³

The advent of the Second Anglo-Boer War at the end of the 19th century saw a dramatic turn in the history of South Africa and the socio-economic fortunes of white Afrikaners as well as black people, especially black African indigenous people.⁷⁴⁴ The scorched-earth approach adopted by the British during the war destroyed large parts of the subsistence farming systems that rural people relied on for survival. The humiliation experienced by Afrikaners as a result of the war and events in the wake of the war, including the suppression of the Afrikaans language and culture, fostered a strong sense of Afrikaner Nationalism which transcended into a policy of self-preservation and separate development which became known as "apartheid".⁷⁴⁵

During approximately the same time as the emergence of Afrikaner Nationalism, African Nationalism was strongly inspired by the exclusion of black people from political participation in

⁷³⁹ As above.

⁷⁴⁰ See paras 2.3.1 and 2.3.3 above.

⁷⁴¹ See para 2.3 above.

⁷⁴² See paras 2.3.1 and 2.3.2 above.

⁷⁴³ As above.

⁷⁴⁴ As above.

⁷⁴⁵ See para 2.3.2 above.

the Union of South Africa after the Anglo Boer War.⁷⁴⁶ African Nationalism grew steadily during the first half of the 20th century and was strengthened by discriminatory legislation adopted during the apartheid era to promote the policy of self-preservation and separate development.⁷⁴⁷

Legislation to separate communities based on race was introduced during the colonial period under British rule in the 19th century and was progressively accelerated in the first half of the 20th century (segregation) and even more rapidly during the apartheid era in the second half of the 20th century.⁷⁴⁸ This denial of political, civil and socio-economic privileges and rights to black people culminated in the statement of rights in the form of the Freedom Charter in 1955, which further galvanised African Nationalism.⁷⁴⁹ The Freedom Charter became a common vision for movements against apartheid.⁷⁵⁰ This later inspired a more violent approach to oppose apartheid in the 1960s in the form of the so-called “armed struggle” and the “People’s War” in the 1980s.⁷⁵¹ This black offensive against apartheid in the 1960s was morally justified by the ANC in terms of the NDR.⁷⁵² The NDR was a Marxist-Leninist concept developed by the international communist community (the Comintern) since the 1920s under the leadership of Soviet communist leaders such as Lenin and later Stalin.⁷⁵³

The strategic aim of the Soviet Union with the development of the NDR was to garner the support of colonised countries against the Western imperial capitalist powers. The NDR was a blueprint to achieve political power first and then, through a socialist stage, ultimately implement a system of communism.⁷⁵⁴ The NDR is premised distinctively on Marxist-Leninist theory of equality and a classless society, in which “capital is restructured” and dominated by those who own the means of production, the working class or “proletariat”. The interests of the proletariat needed to be overseen by a centralised and authoritarian “vanguard party” as government.⁷⁵⁵ The NDR views democracy as the shortest route to socialism and communism. The NDR strongly opposes capitalism which the NDR regards as exploitive.⁷⁵⁶

⁷⁴⁶ See para 2.4.1 above.

⁷⁴⁷ As above.

⁷⁴⁸ See paras 2.3.1, 2.3.2 and 2.4.1 above.

⁷⁴⁹ See paras 2.4.1 and 2.4.2 above.

⁷⁵⁰ As above.

⁷⁵¹ See para 2.4.1 above.

⁷⁵² See para 2.4.3 above.

⁷⁵³ As above.

⁷⁵⁴ As above.

⁷⁵⁵ As above.

⁷⁵⁶ As above.

One of the approaches of the NDR is to join forces with the upper and middle class, the “bourgeoisie” in the transition or transformation to socialism. As the bourgeoisie is critical to the success of a “socialist revolution”, they must be extended and controlled by the central authoritative “vanguard” of the revolution.⁷⁵⁷ The NDR was introduced in South Africa by the South African Communist Party in the 1920s in consequence of its affiliation with the Comintern. The South African Communist Party contributed to the work of the ANC.⁷⁵⁸ Various leaders of the ANC in the 1950s became members of the Communist Party whilst retaining their ANC affiliation and leadership roles.⁷⁵⁹ After the prohibition of the ANC in 1960, various of its leaders abroad (in exile) found support for the ANC cause in the Soviet Union and socialist Eastern Europe.⁷⁶⁰ This led to the adoption of the NDR ideology at the ANC’s Consultative Conference in 1969 held in Morogoro.⁷⁶¹ The NDR was reaffirmed by the ANC during the 1985 Kabwe Consultative Congress, and thereafter at the first National Conference after ascending to political power in 1994, and every ensuing National Conference.⁷⁶²

The ANC has in essence three ideological streams which were developed over time and are all interrelated, namely African Nationalism, the views expressed in the Freedom Charter, and the NDR. The African Nationalism mantra of “Africans in particular and Blacks in general” finds expression in the NDR’s concept of “colonialism of a special type” (CST). In terms of this concept, the NDR was designed to abolish the oppressive relationship which existed between the white minority as settlers and oppressors, and the oppressed African masses as the colonised.⁷⁶³ This is described as an imperialistic exploitive relationship although the oppressors and oppressed share the same country, and the oppressor does not operate from a foreign mother country as in conventional colonial systems.⁷⁶⁴ The Africanist connection with the NDR through the CST is important, as the CST cannot include all black people. Indians, for instance, are regarded as black but not indigenous, and are historically foreign and imported to Africa. Indians, as black minority group, therefore, do not fit within the NDR’s definition and classification of majority indigenous colonial oppressed group. Only Africans can fit into this role, according to

⁷⁵⁷ As above.

⁷⁵⁸ As above 2.4.1 and 2.4.3.

⁷⁵⁹ See para 2.4.1 above.

⁷⁶⁰ See para 2.4.3 above.

⁷⁶¹ As above.

⁷⁶² As above.

⁷⁶³ As above.

⁷⁶⁴ As above.

the NDR.⁷⁶⁵

The Freedom Charter is portrayed as envisaging the ideal national democratic or national socialist society which the NDR pursues.⁷⁶⁶ This symbiosis between the Freedom Charter and the NDR is also reflected in the ANC's Constitution.⁷⁶⁷ The role of African Nationalism on its own or as part of the NDR and its relation to the Freedom Charter are incapsulated in the *Strategy and Tactics* resolutions as the basis for socio-economic policy resolutions adopted by the ANC's National Conferences.⁷⁶⁸

In terms of the Freedom Charter – “[A]ll other industry and trade shall be controlled to assist the well-being of the people”.⁷⁶⁹ In terms of the NDR, this implies that government should exercise control over businesses to pursue the NDR's socialist objectives.⁷⁷⁰ Conventional nationalisation can be viewed as a system – normally a socialist or communist system – in which the government owns and controls the means of production to the benefit of the community and society at large. BEE is a programme which dictates business ownership, appointments of staff and socio-economic benefits. Thus, the BEE programme in this sense operates as a mechanism to “nationalize” the means of production. The working mechanism of B-BBEE is explained in chapter 6, paragraph 6.4 below.

Three specific aspects of the ANC's ideology emerge as of particular importance for the purpose of this study. Firstly, the adoption of the NDR *Strategy and Tactics* in 1997 at the ANC's Mafikeng Conference for the ANC to lead government and for government to be strengthened by ANC cadres to be deployed in government and the private sector to transform society through a transitional socialist stage, so-called “transformation”.⁷⁷¹ This policy created a patronage network which, as will be shown later in this study, allowed access to state resources under government procurement processes and B-BBEE, enabling “state capture” to benefit the ANC and personal interests of the middle and upper class sectors of society and the politically connected to

⁷⁶⁵ As above.

⁷⁶⁶ As above.

⁷⁶⁷ See para 2.5 above.

⁷⁶⁸ As above.

⁷⁶⁹ ANC *Freedom Charter* under the heading “The People shall Share in the Country's Wealth” 11th, 12th and 14th page.

⁷⁷⁰ Slovo *Umsebenzi Discussion Pamphlet* (1988) explained that during the transition phase of the NDR, it is required to “transform a major portion of wealth from private to social property” and for the working class to gain “social control over the means of production” with “the eventual destruction of the existing capital structure”, as objective.

⁷⁷¹ See para 2.5.2 above.

government and the ANC. Secondly, the political importance of the continuous growth of the black upper and middle class and black capitalists as “motive force” in pursuing the NDR⁷⁷² transition through affirmative action, government procurement and the B-BBEE programmes, becoming the primary *de facto* beneficiaries of B-BBEE programmes. Thirdly, the loss of political control by the ANC as vanguard will derail the ambitions of the Freedom Charter and the NDR, thus the importance of gaining the political support of especially African, upper- and middle-class black capitalists, black professionals and intelligentsia through “strengthening” of government procurement, B-BBEE programmes and affirmative action as transformation instruments during an era of continued dwindling popularity of the ANC.

Various policy documents and legislation were also adopted by government to give effect to the resolutions of the ANC. This legislation includes the EEA; PEPUDA; PPPFA; the Mineral and Petroleum Resources Act; and the B-BBEE Act. This is discussed in chapters 5 and 6 respectively.

The ANC’s policies based on its overarching ideology of transformation in terms of the NDR, can be summarised as: (1) transformation of the public service; (2) economic transformation; (3) transformation of the judiciary; and (4) transformation of society.

⁷⁷² See paras 2.5.3 and 2.5.4 above.

CHAPTER 3

THE CONSTITUTIONAL FRAMEWORK

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3.1 INTRODUCTION

South Africa's history of race discrimination and minority rule ended in 1994 with the adoption of the Interim Constitution and later the present (1996) Constitution. The Constitution makes provision for universal adult suffrage, a national common voters' roll, regular elections and a multi-party system. Sovereignty of Parliament was replaced by a supreme Constitution, the rule of law and a Bill of Rights.¹ Various other constitutional concepts and principles support these principles, such as the separation of powers and independence of the judiciary. In line with many

¹ S 1(b) and (d) of the Constitution.

other constitutions, the South African Constitution consists of the various aspects of government² and dictates the division and extent of state powers.³

Current South African constitutional law is premised on the Constitution. The South African constitutional order after 1994 is characterised by various fundamental principles and concepts which underpin the present system. They tie the provisions of the Constitution together and capture them into a framework that defines the new democratic constitutional order.⁴ Although some principles are expressly provided for in the text of the Constitution itself, other principles are implied. These broadly applicable principles provide for what was described as a “blueprint for the new constitutional order”.⁵

The South African Constitution strongly accounts for the unique historical circumstances which led to its adoption, as well as South Africa’s own distinct political and socio-economic circumstances.⁶ Despite the political rights obtained by the previously excluded majority with the adoption of the Constitution, large groups of people are still socio-economically marginalised and impoverished in South Africa. They are excluded from active participation in all spheres of social society.⁷ Their social and economic exclusion is attributed to a multitude of inter-related aspects such as poverty, inequality and social inferiority. This must be viewed within the context of our history,⁸ but also the present state of affairs as it has evolved after 1994.⁹ As the Constitutional Court has pointed out, apartheid was a race-based policy which systematically discriminated against black people in all aspects of social life.¹⁰

² Ss 1(d), 7(2), 8(1), 12(1)(c), 14, 15(2), 19, 20, 21, 22, 26(2), 27(2), 29(4), 32(1)(a), 33-37 and Chs 3-13 of the Constitution.

³ *Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (CC) (hereafter referred to as *First Certification* judgement) paras [45](c) and (d). Also see the Constitutional Court’s website <http://www.constitutionalcourt.org.za/site/theconstitution/whatisaconstitution.htm> (accessed on 1 Nov 2021).

⁴ *Minister of Finance and Others v Van Heerden* 2004 (6) SA 121 (CC) (hereafter referred to as *Van Heerden*) para [22]. Also see Currie and de Waal (2016) 7 who state that the basic principles of the Constitution influence the interpretation of the Constitution including the Bill of Rights.

⁵ *S v Makwanyane and Another* 1995 (3) SA 391 (CC) (hereafter referred to as *Makwanyane*) para [87]; and Currie and de Waal (2016) 8.

⁶ *Solidarity and Others v Department of Correctional Services and Others* [2016] ZACC 18 (hereafter referred to as *Correctional Services*) para [46]; *Van Heerden* (note 4 above) para [26]. Also see O’Regan *Helen Suzman Memorial Lecture* (2011) 2. O’Regan J states: “It is unarguable that South Africa remains a society deeply scarred by its history. The deep inequalities that persist are visible reminders of the effects of apartheid and colonialism. Until these scars are healed, the vision of the Constitution will not have been achieved. There is a great burden on government in particular, to address this historic legacy”.

⁷ *Van Heerden* (note 4 above) para [25]; Also see Department of Trade and Industry (DTI) *South Africa’s Economic Transformation: A Strategy for Broad-Based Black Economic Empowerment* (2003) 4 and 5.

⁸ *Van Heerden* (note 4 above) para [26].

⁹ *Judicial Commission of Inquiry into State Capture Report: Parts I-VI* (2022).

¹⁰ *Brink v Kitshoff NO* 1996 (4) SA 197 (CC) (hereafter referred to as *Brink*) para [40]. The court stated: “Black people were prevented from becoming owners of property or residing in areas classified as ‘white’, which constituted nearly 90% of the

Due to South Africa's discriminatory history, the Constitution as a whole reflects a strong commitment to promote the achievement of equality. The Preamble, for instance, proclaims that the people adopt the Constitution so as to establish a society based on democratic values, social justice and fundamental human rights and to "[i]mprove the quality of life of all citizens and free the potential of each person". Various other provisions across the text of the Constitution endorse socio-economic upliftment and empowerment interventions, such as the Broad-Based Black Economic Empowerment (B-BBEE) programme.¹¹

The Constitutional Court has affirmed the ideal of transformation, stating that the Constitution's "commitment to transform society ... lies at the heart of our constitutional order".¹² Further, the "achievement of equality preoccupies our constitutional thinking" and "goes to the bedrock of constitutional architecture".¹³ The Constitution seeks to create an enabling legal framework to end the divisions of the past and to transform society "based on democratic values, social justice and fundamental rights".¹⁴ The South African Constitution is said to have a "transformative mission".¹⁵ Due to the comprehensive catalogue of fundamental rights contained in the Constitution, including socio-economic rights, coupled with strong values and aspirations to ensure dignity, equality and freedom, the South African Constitution is often lauded as the world's most admirable.¹⁶

Currie and de Waal explain that equality, apart from being a "controversial social concept", is also a difficult concept to understand within a legal perspective.¹⁷ Its basic, abstract and formal meaning suggests that people who are in a similar position should also be treated similarly or equally. On the other hand, as a logical parallel assumption, people who are not similarly situated should be treated dissimilarly. As they point out, it is not the basic and abstract idea of equality that is enigmatic and contentious, but rather two supportive issues to the idea of treating people in similar situations the same. In order to understand the legal concept of equality, the difference

land mass of South Africa; senior jobs and access to established schools and universities were denied to them; civic amenities, including transport systems, public parks, libraries and many shops were also closed to black people. Instead, separate and inferior facilities were provided. The deep scars of this appalling programme are still visible in our society".

¹¹ Also see ss 1(a), 3(2)(a), 24, 26, 27, 29, 152(1)(c), 153(a), 195(1) and 217(2) of the Constitution.

¹² *Soobramoney v Minister of Health, KZN* 1998 (1) SA 765 (CC) (hereafter referred to as *Soobramoney*) para [8].

¹³ *Van Heerden* (note 4 above) paras [22] and [23].

¹⁴ Preamble of the Constitution; and *Van Heerden* (note 4 above) para [22].

¹⁵ *South African Police Service v Solidarity obo Barnard* [2014] ZACC 23 (hereafter referred to as *Barnard*) para [29].

¹⁶ See Cameron *SAJEJ* (2019) 1; Sachs *St Louis LJ* (1997) 1257; and Odendaal (2022) 366.

¹⁷ Currie and de Waal (2016) 210 and 211.

between differentiation, discrimination and unfair discrimination is discussed in paragraph 3.5.1 below.

The Constitution does not only provide for the right to equality and the right not to be unfairly discriminated against, but also for active measures to be taken to “promote the achievement of equality”.¹⁸ These measures, in general referred to as remedial, restitutionary or affirmative measures, have to meet the requirements of the Constitution.¹⁹ South Africa’s higher courts, especially the Constitutional Court, have over time developed certain criteria for an affirmative measure to meet the requirements of the Constitution. These criteria are to some extent inconsistent with legislation and international law requirements. This is discussed in paragraph 3.5.2 below.

Central to the concept of equality and any measure to achieve or promote equality, is the principle of substantive equality versus formal equality. Like all constitutional rights, the constitutional “guarantee of equality” must be interpreted contextually. This involves an understanding of South Africa’s history and the commitment in the Constitution not to repeat the injustices of the past.²⁰ This is discussed in paragraph 3.3 below.

In applying affirmative measures within the context of the equality provisions as a whole and the values underpinning the Constitution, our courts have had difficulties in dealing with the concept of equality. Currie and de Waal’s assertion that equality is a difficult and controversial concept, is supported by what has been described as the slew of conflicting and dissenting judgements on equality by our highest courts as discussed in paragraph 3.5 below. It illustrates the cognitive awkwardness of our courts in determining the normative standards of affirmative measures within an equality framework.

Our equality jurisprudence must also be understood in the context of the political conception of transformation and transformative constitutionalism. Political ideology explains our equality jurisprudence and reveals who the actual beneficiaries of B-BBEE are. This is discussed in paragraph 3.6 below. The wide formulation of the beneficiaries of affirmative measures by the

¹⁸ S 9(2) of the Constitution; and *Van Heerden* (note 4 above) para [24].

¹⁹ *Van Heerden* (note 4 above) para [28].

²⁰ *Makwanyane* (note 5 above) paras [9], [12] and [13]; and *Van Heerden* (note 4 above) paras [25] and [26].

Constitution and norms laid down by our courts largely explains the failure of the B-BBEE programme to promote substantive equality.

3.2 THE BASIC CONSTITUTIONAL CONCEPTS AND PRINCIPLES

This part does not include an in-depth discussion of the constitutional principles as they fall outside the central scope of this research. Only the basic concepts of these principles are enunciated insofar as they are relevant to the discussion in this chapter. These principles are Constitutionalism; Separation of Powers; Supremacy of the Constitution; Independence of the Judiciary and Judicial Powers; the Rule of Law; and the Bill of Rights.

3.2.1 Constitutionalism

According to Currie and de Waal, the particular version of constitutionalism that informs the South African Constitution prescribes a structure to contain state power.²¹ Constitutionalism ensures that the power and authority of the state are clearly defined and limited to avoid arbitrary rule, autocracy or dictatorship and to protect the interests of society.²² With the acceptance of a constitutional democracy in South Africa, “the output of the majoritarian legislature and the executive is to be filtered” by the concepts and principles of the Constitution.²³

Moseneke, a former Deputy Chief Justice, cautions that a claim that constitutionalism amounts only to limiting the powers of government is “misleading and potentially dangerous”.²⁴ Drawing from the views of the political philosopher, Giovanni Sartori,²⁵ Moseneke argues that constitutionalism is the technique of retaining the advantages of the rule of legislation, while reducing their respective shortcomings. Constitutionalism, according to Moseneke, adopts rules by legislatures but with limitations to prevent tampering with the fundamental rights which affect the liberty of the citizens.²⁶

²¹ Currie and de Waal (2016) 8.

²² As above.

²³ Van Wyk *et al* (1994) 1 point out that whatever the content of legislation, the Bill of Rights will accord greater weight to certain rights than the decision of Parliament, and the values of the Constitution to which South Africa bind themselves, trump the output of a transient legislature.

²⁴ Moseneke *SALJ* (2012) 20.

²⁵ Sartori (1989) 308.

²⁶ Moseneke *SALJ* (2012) 20.

Malan explains that constitutionalism is in essence concerned with two inter-related questions. The one is normative and the other structural. The structural question or concept flows from the normative question. The normative question revolves around justice and specifically justice on a comprehensive scale. This involves the quest for a just society. The justice in this sense is ethically inspired and not merely justice in a legal-technical sense. The second (structural) question relates to government and public power – how such power should be allocated, exercised and controlled in order to best achieve justice?²⁷

Malan further explains that the concept of constitutionalism is very old and predates the current dominant state system. The concept of constitutionalism witnessed different and changing views over time. However, it is possible to gauge from this evolution essential elements which form the core of constitutionalism. All four these essential elements flow from the normative and structural concepts above. These essential elements are: justice; fundamentality; the consensual basis of the rule of law; and a limited government which includes a balance of power, the notion of the mixed constitution and of public office.²⁸

The elements of justice and fundamentality are normative in nature while the elements of the consensual basis of the rule of law and a limited government are structural in nature.²⁹ To explain each essential element succinctly, normativity – that is, the commitment to justice – means that the pursuit of justice is the core of constitutionalism. That is why *ius* (law) and *iustitia* (justice) are inseparable. Law is the art of goodness and fairness. The idea that the pursuit of justice is an essential element of law was not only proclaimed in the ancient Digest of Justinian's *Corpus Iuris Civilis* but has been a driving force behind natural law thinking and also resonates in modern legal theory.³⁰ Therefore, justice and constitutionalism are as inseparable as law and justice. Constitutionalism encompasses the notion of justice on a grand scale, meaning it pursues justice for all, including all individuals and communities. Thus, the closer a constitution reaches the point of achieving justice for all, the closer it moves to constitutionalism.³¹

In terms of the second essential element, fundamental (higher) law, constitutionalism

²⁷ Malan (2019) 8.

²⁸ As above.

²⁹ As above 8 and 9.

³⁰ As above 9 and 10.

³¹ As above 10 and 11.

presupposes a distinction between fundamental law or a higher law in comparison to other or ordinary law. Fundamentality does not necessarily require a written instrument. A set of binding unwritten precepts, practices, usages or conventions that are customarily adhered to and dealing with typical constitutional matters, may equally satisfy the requirement of fundamentality. The notion of a higher law is of ancient origin. Presently, the idea of higher law is found in the written supreme Constitution.³²

The second essential element, the consensual basis of the rule of law (customary law-abiding conduct), involves the notion that the rule of law is an essential element of constitutionalism. Therefore, public governance must be conducted on a consistent basis in terms of predetermined, properly promulgated legal rules (and principles) ensuring the citizenry guaranteed legal protection without the fear of unpredictable, arbitrary decision-making outside the confines of predetermined law. Such law must be obeyed by the citizenry and all public office-bearers.³³

Enforcement of the law and constitution is not possible without an effective power apparatus capable of remedying instances of legal disobedience. Law and the constitution are premised on people and government acting in conformity with the law. People act in accordance with the law particularly when they are in agreement with the law. This is where the consensual basis of the rule of law comes in. Broad consensus on the content of the law and the constitution prevails when there is a community of people bound together by their commitment to the law and the constitution. On that consensual basis the community voluntarily and habitually acts in accordance with the law. Such community is not created artificially by way of individuals contracting to the law under which they will be living but owes its existence to an already existing culture rooted in a common ethos of which the law is an element. Thus, the rule of law is not based primarily on the law and the constitution, which is an active and premeditated creation. The opposite is true: the law and constitution are in fact aspects of the character of the community. Constitutionalism is therefore primarily embodied in the general customary, consensual conduct in compliance with the law; in people of the same community (unwittingly) experiencing and living the law as an integral part of the identity of such community, rather than being imposed from outside or established for the first time by individuals who enter into a law-

³² As above 12.

³³ As above 12.

creating and constitution-creating contract.³⁴

In respect of limited government; diffusion and balance of power; and the idea of the mixed constitution and public office, it is the responsibility of the government, consisting of the apparatus of public office-bearers, to safeguard justice by governing in the interest of the public good as whole. This is to exert legitimate force as prescribed by the applicable law if necessary in the event of unlawful conduct, and to fend off external threats. However, governmental power may go astray. Power might be abused to the detriment of smaller or larger parts of the citizenry, thus defeating the very purpose of constitutionalism. It might be exercised for the benefit of only a particular person or group of persons within government; a single person (and his or her patronage) in the case of autocratic rule; a racial, religious, ethnic, economic or any other minority that forms an oligarchy, or any racial, class or ethnic group that constitutes the majority; or scenarios where democracy descends into majority domination.³⁵

The two normative (or ideal) elements of constitutionalism, namely the commitment to justice and the enhanced status of fundamental law, are not sufficient for safeguarding constitutionalism. The normative element has to be complemented and buttressed by suitable structures of public power in general and governmental power in particular. This structural element is essential to constitutionalism. For this reason, questions around governmental power – its allocation, exercise, limitation and control – are and have always been imperative. The essence is that there must never be a single centre of government power. There must be a distribution or spread of government power and generally of public power. The various centres of power must be checked, controlled, balanced and limited by counter-power in order to counter governmental and other sources of public power.

If not, absolutism and arbitrary governmental decision-making, which is the arch antagonist of constitutionalism, will set in. The essence of the classical idea of the mixed (and balanced) constitution, which goes back to the very beginning of political theorising, provided for a multitude of centres of power as well as for suitable checks on power.³⁶

³⁴ As above 13.

³⁵ As above 14.

³⁶ As above 10.

Constitutionalism can therefore be summarised as the containment of state power in such a way that government has enough power to govern effectively, but which ensures justice for all, including justice for minorities, and protection against majority tyranny.

3.2.2 Separation of Powers

The doctrine of separation of powers (*trias politica*) is not explicitly mentioned in the text of the Constitution but is derived from the structure (distinct allocation of powers and functions between the various branches and spheres of government)³⁷ of the Constitution.³⁸ The government is divided into national, provincial and local spheres.³⁹ The Legislature; the President and the Executive; and the courts as the Judiciary, are referred to as the branches of government. Cognisant of the divergent position of the sovereignty of Parliament in the United Kingdom's Westminster system compared to Parliament's subservient status under a supreme Constitution in South Africa, the following succinctly illustrates the relationship between the three powers of government, especially the Executive and the courts, in a judgement by Lord Musti II in 1995:

“Parliament has legally unchallengeable right to make whatever laws it thinks right. The executive carries on the administration of the country in accordance with the powers conferred on it by law. The courts interpret the laws and see that they are obeyed”.⁴⁰

In other words, in terms of their functions, the legislative branch (Parliament) is responsible for making law in the form of legislation; the executive branch (Cabinet) is responsible for developing and implementing policy and legislation; and the judiciary (the courts) is responsible for interpreting and adjudicating disputes. In the *First Certification* judgement,⁴¹ the Constitutional Court held that Constitutional Principle VI⁴² required the 1996 Constitution to provide for a

³⁷ Rozenberg (2020) 2 explains that when the term “government” is used broadly, it includes all spheres of government – national, provincial and local government. However, he explains, it is often used narrowly to refer to the executive only.

³⁸ *South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC) paras [25] and [45]. The court held the separation of powers is implied in the Constitution. Also see Bekink (2016) 100 who explains that despite “some modern practices of disintegration of the original doctrine [of separation of powers], and criticism against it, separation of powers remains an integral part of the theory and philosophy of constitutional law and constitutionalism”.

³⁹ Ss 40(1) and 41 (1)(g) of the Constitution provide that “government is constituted as national, provincial and local spheres of government” and that within each sphere they are required to “exercise their power and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere”. Also see chs 4,5 and 8 of the Constitution which allocate powers and functions between Parliament, the Executive and the Judiciary.

⁴⁰ *R v Home Secretary ex parte Fire Brigades Union* [1995] 2 AC 513 para [567].

⁴¹ *First Certification* judgement (note 3 above).

⁴² As above para [15] the Constitutional Court described the adoption of 34 Constitutional Principles during the Multi-Party

separation of powers between the legislature, the executive and the judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.⁴³ The Constitutional Court explained that the principle of separation of powers recognises the “functional independence of branches of government” while the principle of checks and balances focuses on “the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another”.⁴⁴ The legislature and executive branches are often referred to as the political branches of government.⁴⁵

The purpose of the doctrine of separation of powers is threefold. Firstly, it is intended to avoid the concentration of power within a single branch, sphere, person or body and the consequent abuse of power.⁴⁶ Secondly, according to some commentators, it promotes greater government efficiency.⁴⁷ Thirdly, it enables complex tasks of governance, law-making and law enforcement to be performed by the respective institutions that are best suited to do so.⁴⁸ A further advantage of the separation of powers, according to Ackerman, is that “the people” are the source of constitutional values, not the government. Thus, within a constitutional structure which separates the powers of the legislative and executive arms of government from those of the judiciary with constitutional power of review, one branch of government is prevented from being authoritative or from exclusively laying claim to “we the people”, according to Ackerman.⁴⁹

A complete or absolute separation of power is not possible. All state functions and authority have a degree of overlap between the various branches.⁵⁰ In the famous dictum of the United States

Negotiation Process (MPNP) in Mar 1993 as framework for the final Constitution, as a “solemn pact recorded as Constitutional Principles” and “to be foundational to the new constitution”.

⁴³ As above paras [108] – [112].

⁴⁴ As above para [109].

⁴⁵ Bekink (2016) 102 refers to “political organs” and decisions taken at “political level”.

⁴⁶ See *Glenister v President of the Republic of South Africa* 2009 (1) SA 287 (CC) para [35] (hereafter referred to as *Glenister*) in which the Constitutional Court said that “the principle of checks and balances focuses on the desirability that the constitutional order, as a totality, prevent the branches of government from usurping power from one another”.

⁴⁷ Currie and de Waal (2016) 18. Also see *De Lange v Smuts NO* 1998 (3) SA 785 (CC) (hereafter referred to as *De Lange*) para [60] in which the Constitutional Court held that government should not be diffused of power to the extent that government is unable to take timely measures in public interest.

⁴⁸ Bekink (2016) 100-103. Also see Liebenberg (2010) 67 who argues that this purpose of the doctrine of separation of powers contributes to a rigid approach within liberal democracies and frustrates transformation.

⁴⁹ Ackerman (1991) 5.

⁵⁰ *First Certification* judgement (note 3 above) para [109] the Constitutional Court said that the doctrine of separation of powers is not fixed or rigid, and that various overlaps do occur. Also see *Mwelase and Others v Director-General for the Department of Rural and Land Reform and Another* [2019] ZACC 30 (hereafter referred to as *Mwelase*) para [46] in which the court stated: “The courts and government are not at odds about fulfilling the aspirations of the Constitution, nor does the separation of powers imply a rigid or static conception of strictly demarcated functional roles”.

(US) Justice Oliver Wendell Holmes explained that the machinery of government cannot work properly if it is not allowed “a little play in its joints”.⁵¹ The spheres and the branches within each sphere, although distinct in relation to their respective compilation, powers and responsibilities, are also interdependent and inter-related.⁵² The separate branches are accountable to each other by means of a system of checks and balances.⁵³ In terms of this internal control system, the branches control and oversee one another.⁵⁴ The judiciary uses its powers to review legislation and executive conduct.⁵⁵ Parliament as the legislature is conferred with the power to oversee the executive.⁵⁶ The legislative and executive authorities, in turn, are involved in the appointment of judges to the Constitutional Court as counter control mechanism.⁵⁷

The separation of the judiciary from the other branches of government is of paramount importance for proper functioning of the doctrine of separation of powers required by the Constitution. The role the courts are required to play is to ensure that all branches act within their respective powers and obligations imposed by the Constitution.⁵⁸ In order to do so, the

⁵¹ *Bain Peanut Co of Texas et al v Prinson et al* 282 US 499 (1931) para [501] quoted by Mokgoro and Sachs JJ in *Bel Porto School Governing Body and Others v Premier, Western Cape and Another* 2002 (3) SA 265 (CC) (hereafter referred to as *Bel Porto School*) para [154]. Also see *NSPCA v Minister of Agricultural, Forestry and Fisheries* [2013] ZACC 26; 2013 (5) SA 571 (CC); 2013 (10) BCLR 1159 (CC) (hereafter referred to as *NSPCA*) para [13] in which Zondo J recognised that the separation of powers doctrine is neither fixed nor rigid, but can be expressed in many different ways, subject to checks and balances, and that the Constitution does not provide for a total separation of powers between the Legislature, the Executive and the Judiciary. Also see *Speaker of the National Assembly v Public Protector and Others* [2022] ZACC 1 (hereafter referred to as *Public Protector*) para [59] in which the Constitutional Court states that an assumption that the doctrine of separation of powers is absolute, is erroneously premised.

⁵² Ss 40 and 41 of the Constitution. Also see *Eskom Holdings Soc Ltd v Lekwa Ratepayers Association and Other; Eskom Holdings Soc Ltd v Vaal River Development Association (Pty) Ltd and Others* (870/20) [2022] ZASCA 10 (21 Jan 2022) in which the court ordered the different spheres of government to make reasonable efforts in good faith to settle intergovernmental disputes in line with ss 40 and 41 of the Constitution and the Intergovernmental Relations Framework Act 13 of 2005.

⁵³ *Glenister* (note 46 above) para [35].

⁵⁴ *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others* 1995 (4) SA 877 (CC) para [55]. The Constitutional Court held that the doctrine of separation of powers is sufficiently broad to permit not only interdependence between the executive and legislative, but also strict independence.

⁵⁵ Ss 167 (4), 170 and 172 (1) of the Constitution. Also see *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC) (hereafter referred to as *Doctors for Life*) para [37].

⁵⁶ S 55(2)(a) and (b) of the Constitution. Also see *Economic Freedom Fighters v Speaker of the National Assembly and Others*; [2016] ZACC 11 (hereafter referred to as *EFF*) paras [103] and [104] in which the Constitutional Court declared that the President failed to comply with the remedial action taken against him by the Public Protector. This failure by the President, the court held, is inconsistent with his obligations to uphold, defend and respect the Constitution as the supreme law of the Republic and the duty to assist and protect the office of the Public Protector. “Similarly, the failure by the National Assembly to hold the President accountable by ensuring that he complies with the remedial action taken against him, is inconsistent with its obligations to scrutinize and oversee executive action and to maintain oversight of the exercise of executive powers by the President. And in particular, to give urgent attention to or intervene by facilitating his compliance with the remedial action”.

⁵⁷ S 174(3) and (4) of the Constitution states that the President, after consulting the Judicial Service Commission and the leaders of parties presented in the National Assembly, appoints the Chief Justice and the Deputy Chief Justice. The President also appoints judges of the Constitutional Court after consulting the Chief Justice and the leaders of parties represented in the National Assembly.

⁵⁸ *Glenister* (note 46 above) para [33]. The court held that the courts are the ultimate guardians of the Constitution.

courts must maintain their independence and perceived independence.⁵⁹ The courts are also required to abide by and recognise the constitutional limits of their powers.⁶⁰ Despite the courts' constitutional power and function to ensure compliance with the Constitution, they do not have plenary or absolute powers.⁶¹

The courts have recognised the important roles the Legislature plays in a democratic dispensation. The Legislature (in theory at least) gives effect to the will of the people.⁶² The policies of the political party representing the majority of voters in the Legislature will permeate in government policy and legislation.⁶³ The Legislature will enact legislation to formulise and enact policy and the Executive will implement legislation on government policy. Given that the Legislature consists of representatives embodying “the people” and “the will of the people”, the courts have recognised the deference to which the Legislature is entitled from the other branches of government. Our courts have adopted the stance that it would not be in the interest of justice and democracy for the courts to interfere with legislative powers unless extreme circumstances and necessity so dictate, and then only in the least intrusive manner possible.⁶⁴ However, the courts will not hesitate to strike down legislation⁶⁵ or rules⁶⁶ adopted by Parliament which are inconsistent with the Constitution. In doing so, the courts can sever⁶⁷ or read provisions into the

⁵⁹ *Public Protector v Speaker of the National Assembly and Others; Democracy in Action v Speaker of the National Assembly and Others* (2107/2020; 1731/2020) [2021] ZAWCHC 152 (28 Jul 2021) paras [57] and [58].

⁶⁰ *EFF* (note 56 above) para [93]. The Constitutional Court held that the courts must “be mindful of the vital strictures of their powers”. Also see *Mwelase* (note 50 above) para [49] in which Cameron J for the majority stated: “In cases of extreme rights infringements, the ultimate boundary lies at court control of the remedial process”.

⁶¹ *Doctors for Life* (note 55 above) paras [37] and [38]. The Constitutional Court held as follows: “Courts must be conscious of the vital limits on judicial authority and the Constitution’s design to leave certain matters to other branches of government. They too must observe the constitutional limits of their authority. This means that the judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution”. Also see *EFF* (note 56 above) para [93].

⁶² *Doctors for Life* (note 55 above) paras [37] and [38].

⁶³ *New Nation Movement NPC and Others v President of the Republic of South Africa* [2020] ZACC 11; 2020 (6) SA 257 (CC); 2020 (8) BCLR 950 (CC) (hereafter referred to as *New Nation Movement*) para [152]. Also see *Ramakatsa v Magashule* 2013(2) BCLR (CC) para [67] in which the Constitutional Court held that it cannot be gainsaid that success for political parties in elections lies in the policies they adopt and put forward as a plan for addressing challenges and problems facing communities.

⁶⁴ See *New National Party v Government of the Republic of South Africa* 1999 (3) SA 191 (CC) (hereafter referred to as *New National Party*) paras [19] and [20] in which the Constitutional Court stated: “It is to be emphasized that it is for Parliament to determine the means by which voters must identify themselves ... But this does not mean that Parliament is at large in determining the way in which the electoral scheme is to be structured. The first of the constitutional constraints placed upon Parliament is that there must be a rational relationship between the scheme which is adopted and the achievement of a legitimate purpose. Parliament cannot act capriciously and arbitrarily”.

⁶⁵ *S v Lawrence* 1997 (4) SA 1176 (CC) paras [3]-[5].

⁶⁶ *Public Protector* (note 51 above) para [118] in which the court declared certain rules adopted by Parliament to remove the Public Protector in terms of s 194 of the Constitution, unconstitutional and invalid.

⁶⁷ As above.

text (reading-in)⁶⁸ but the courts cannot legislate.⁶⁹ The decisions about the reasonableness of statutory provisions are matters which ordinarily fall within the exclusive realm of Parliament.⁷⁰

The courts would also be reluctant to get involved in the parliamentary processes of passing legislation unless an applicant is able to show that they would have no effective remedy once the legislative process is finalised.⁷¹ The courts have refrained from declaring the statutes enacted inconsistent with the Constitution unless the legislature was given sufficient opportunity to consider the matter and make representations to the court.⁷²

The courts have also recognised the Legislature's role to apply legislation to give effect to the rights provided for in the Constitution. The courts resolve constitutional rights disputes by applying the legislation giving effect to that right, rather than resorting to the abstract provisions of the Constitution.⁷³ This approach by the courts ensures compliance with legislation enacted by the Legislature in deference to the Legislature's position to promote rights provided for in the Constitution.⁷⁴

The executive branch is often regarded as the most powerful and influential branch of government. A great deal of state power culminates in the role of the Executive.⁷⁵ The central role of the Executive in initiating and applying legislation is further explained by Richard Calland and Mandy Taylor as follows:

"Many of the decisions about the use of public power occur by way of delegated legislation, regulation or *ad hoc* policy. Policy is determined extensively by the executive branch of government, with the legislature in

⁶⁸ *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs* (CCT 10/99) [1999] ZACC 17; 2000 (2) SA 1 BCLR 39 (2 Dec 1999) (hereafter referred to *Gay and Lesbian Equality I*) paras [73]-[76].

⁶⁹ *Coetzee v Government of the Republic of South Africa* 1995 (4) SA 631 (CC) para [17] in which Kriegler J held that the details of law-making was a constitutional activity given to the legislature.

⁷⁰ *New National Party* (note 64 above) para [19].

⁷¹ *Glenister* (note 46 above) paras [43]-[44].

⁷² *Mabaso v Law Society, Northern Province and Others* 2005 (2) SA 117 (CC) para [12] the Constitutional Court held, in view of Rule 5 of the Constitutional Court Rules which requires a party who challenges the constitutionality of an Act of Parliament, to take steps to join the authority who is responsible for the administration of that law in the proceedings before the court.

⁷³ *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku and Another* [2022] ZACC 5 (hereafter referred to as *Masuku*) para [95].

⁷⁴ As above para [102]. The Constitutional Court held that this approach "goes to the heartland of the separation of powers doctrine...".

⁷⁵ Kirby (2004) 65. US Judge Michael Kirby points out that "the legislators are often, in fact, subordinate to the power of the Executive once they elect it" and in "our complex society, the Executive, in turn, is often heavily dependent upon unelected officials".

reality confined to the task of scrutinizing policy and making recommendations to the government on policy. In reality, moreover, the executive is the initiator of changes in law and policy, the legislature merely the respondent. This reflects a wider reality: that the executive arm of government holds most of the cards – the expertise, the resources, the experience in technocrats. In most government systems the world over, there is a relative imbalance of power between the two arms of government.”⁷⁶

3.2.3 Supremacy of the Constitution

The Constitution states as one of its Founding Provisions that the Republic of South Africa is one sovereign democratic state founded on the value of, amongst others, the supremacy of the Constitution.⁷⁷ Section 2 of the Constitution states that—

“The Constitution in the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.”

In *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa*⁷⁸ the Constitutional Court held, with reference to the Interim Constitution, that the adoption of the Interim Constitution was a legal watershed in the South African legal jurisprudence.⁷⁹ It shifted all aspects of public law and constitutionalism from the ambit of the common law to the principles of the Constitution which is the supreme law. Where constitutional law was previously based on and developed constantly with the common law, the written Constitution now gave effect to the principles of constitutional law. All common law principles therefore had to be developed and applied consistently with and subject to the Constitution.⁸⁰

⁷⁶ Calland and Taylor *Law, Democracy and Development* (1997) 193.

⁷⁷ S 1(c) of the Constitution. Also see *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC) para [38]. Also see *Ayres and Another v Minister of Justice and Correctional Services and Another* [2021] ZACC 12 para [16]. Also see Malan (2019) 259 who argues that there is no supreme constitution as constitutions are ever changing “in step with the dominant socio-political forces in society”.

⁷⁸ 2000 (2) SA 674 (CC) (hereafter referred to as *Pharmaceutical Manufacturers*).

⁷⁹ As above para [45].

⁸⁰ As above para [46]; and s 39(2) and (3) of the Constitution. Also see *King NO and Others v De Jager and Others* [2021] ZACC (hereafter referred to as *King*) paras [72] and [76] where the Constitutional Court held that the common law principle of freedom of testation failed to meet the normative values of the Constitution not to unfairly discriminate against female descendants.

The court held in *Minister of Correctional Services v Tobani*⁸¹ that whereas previously constitutional law was developed and formed part of the common law, the roles had been reversed. The written Constitution gave effect to the governing principles of constitutional law. Under the common law, if a state functionary exceeded its statutory powers, such an action would be regarded as *ultra vires*. Such powers executed and performed by a functionary of the state outside the purview of legislative authority will now be invalid under the Constitution in terms of the doctrine of legality. The court further held that the common law was not a body of law separate from the Constitution. There was only one system of law in South Africa, namely the system operating under the auspices of the Constitution. The court observed that the common law test of unlawfulness fits comfortably within the principles of constitutional legality.⁸²

The Supremacy of the Constitution is safeguarded (in theory) as it sets a threshold of at least 75% support of members of the National Assembly and at least six of the nine provinces to amend a founding provision as values of the Constitution⁸³ to protect against discarding the supremacy of the Constitution and circumventing judicial review.⁸⁴ This is a much higher bar than the thresholds required for the amendments to other parts of the Constitution⁸⁵ or legislation in general.⁸⁶

3.2.4 Independence of the Judiciary and Judicial Powers

The Supremacy of the Constitution, and for that matter any rule of law, would be without substance if it is not enforced by an independent adjudication authority. The authority to enforce the Constitution is vested in the courts.⁸⁷ To ensure that the judiciary applies the Constitution

⁸¹ 2003 (5) SA 26 (ECD).

⁸² As above paras [134] and [135]. Also see *Beadica 231 and Others v Trustees for the time being of the Oregon Trust and Others* [2020] ZACC 13 (hereafter referred to as *Beadica*) para [71].

⁸³ S 1 of the Constitution provides for the supremacy of the Constitution and the rule of law. Also see Moseneke *SALJ* (2012) 18 who points out that the values of the Constitution are to a large extent shielded, as they are “collectively chosen to immunize [it] from populist” and cannot be “rubbished” by even a democratic majority. Also see Ackerman (1991) 5 who points out that “the people” are the source of constitutional values.

⁸⁴ S 74(1) of the Constitution. Also see Currie and de Waal (2016) 13 who reason that the inclusion of the rule of law in the Founding Provisions super-entrenches a “mini-constitution”.

⁸⁵ S 74(2) and (3) of the Constitution requires at least a two-third support of members of the National Assembly and at least six of the provinces to amend ch 2 and any other provision of the Constitution. In respect of any other amendments, apart from amendments to ss 1, 74(1) and ch 2 of the Constitution, the support of at least six provinces to the amendment is required if the amendment relates to a matter that effects the Council of Provinces; alters provincial boundaries, powers, functions or institutions; or amends a provision that deals specifically with provisional matters.

⁸⁶ As above s 53(1)(c) requires in general a majority of the votes cast by members of the National Assembly.

⁸⁷ As above s 165(1).

impartially, without fear, favour or prejudice, its independence is (in theory) secured by the Constitution.⁸⁸ The courts are thus in theory subject only to the Constitution and the law. The Constitution further endeavours to protect the integrity of the courts and provides that no person or organ of state may interfere with the functions of the courts.⁸⁹ It also places an obligation on organs of state to assist and protect the independence, impartiality, dignity, accessibility and effectiveness of courts through legislation and other measures.⁹⁰ The Constitution explicitly provides that an order issued by a court binds all persons, including the state.⁹¹

The Constitution confers courts with the power to declare any law or conduct that is inconsistent with the Constitution as invalid to the extent of its inconsistency and are obliged in terms of the Constitution to do so when deciding constitutional matters.⁹² The courts may also make an order that is just and equitable to remedy any legislation or conduct which is inconsistent with the Constitution.⁹³

The Constitution further asserts its supremacy by requiring the legislative authority, that is Parliament, to act in accordance with and within the bounds of the Constitution.⁹⁴ Members of Cabinet (the Executive) are likewise compelled to act in accordance with the Constitution.⁹⁵ They are “accountable collectively and individually to Parliament for the exercise of their powers and performance of their duties”.⁹⁶

⁸⁸ As above s 165(2).

⁸⁹ As above s 165(3).

⁹⁰ As above s 165(4). Also see *Municipal Manager O.R. Tambo District Municipality and Another v Ndabeni* [2022] ZACC (3) (hereafter referred to as *O.R. Tambo Municipality*) para [38] in which the Constitutional Court held: “Organs of state, of which the Municipality is one, are expressly enjoined to ‘assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the court’”.

⁹¹ S 165(5) of the Constitution. Also see *O.R. Tambo Municipality* (note 90 above) para [58]. The Constitutional Court further held that municipalities have a “heightened duty to comply with court orders... They have obligations under the Constitution to respect the rule of law and the courts are guardians of the Constitution”. Also see *MEC for Health, Eastern Cape v Kirkland Investments (Pty) Ltd* (2014) ZACC 6; 2014 (3) SA 481 (CC); 2014 (5) BCLR 547 (CC) (hereafter referred to as *Kirkland*) para [82] in which the Constitutional Court stated in respect of the duty of the state: “there is a higher duty on the state to respect the rule of law, to fulfil procedure requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline”.

⁹² S 172(1)(a) of the Constitution.

⁹³ As above s 172(1)(b). Also see *Black Sash Trust v Minister of Social Development* [2017] ZACC 8; 2017 (3) SA 335 (CC); 2017 (5) BCLR 543 (CC) (hereafter referred to as *Black Sash*) para [40] in which Froneman J for the majority held “that the suspension of the validity of the contract between SASSA [South African Social Security Agency] and CPS [Cash Pay Services (Pty) Ltd] did not prevent the court from regulating and supervising both the content and performance of the contract. It did so on the basis that both SASSA and CPS were organs of state in relation to the contract...and that “this Court’s remedial power under section 172(1)(b)(ii) of the Constitution allowed it”.

⁹⁴ S 44(4) of the Constitution.

⁹⁵ As above s 92(3).

⁹⁶ As above s 92(2).

Although the Constitution does not specifically refer to South Africa as a constitutional state (*Rechtstaat*),⁹⁷ the supremacy of the Constitution that binds the state and all the other prerequisites of such a state are present.⁹⁸

3.2.5 The Rule of Law

The rule of law is one of the founding values of the Constitution.⁹⁹ The rule of law entails the protection of fundamental rights and requires the state to act in a lawful manner.¹⁰⁰ The rule of law is embedded in section 1(c) of the Constitution. In *Minister of Finance v Aribusiness*,¹⁰¹ the Constitutional Court held that conduct by an organ of state that has no foundation in some law breaches “the principle of legality which is a subset of the rule of law”. Based on the legality principle, the rationality test is applied by the courts in their assessment of the exercise of state power.¹⁰²

In *Prinsloo v Van der Linde*,¹⁰³ the Constitutional Court regards rationality and arbitrariness as two sides of the same coin:

“In regard to mere differentiation the constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest ‘naked preferences’ that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state.”¹⁰⁴

In *Makwanyane*,¹⁰⁵ the Constitutional Court does the same, explaining that “in a constitutional state...state action must be such that it is capable of being analysed and justified rationally”.¹⁰⁶

⁹⁷ *First Certification* judgement (note 3 above) para [45](a). Also see Bekink (2016) 117 who states that the concept of a constitutional state originated in German constitutional law.

⁹⁸ *First Certification* judgement (note 3 above) para [45](a) refers to a “constitutional democracy based on the supremacy of the Constitution protected by an independent judiciary”. Also see Rautenbach and Venter (2018) 10 who explain that the concept of constitutional state is similar to the principle of constitutionalism that includes also other constitutional principles of separation of powers, legality, legal certainty, access to independent courts, enforceable fundamental rights and multi-party democratic government.

⁹⁹ S 1(c) of the Constitution.

¹⁰⁰ See *Kirkland* (note 91 above) para [82] in which the court held that there is a higher duty on the state to respect the rule of law and “thread respectfully when dealing with rights”.

¹⁰¹ [2022] ZACC 4 (hereafter referred to as *Minister of Finance*) para [118].

¹⁰² *Pharmaceutical Manufacturers* (note 78 above) para [85].

¹⁰³ 1997(3) SA 1012 (CC) (hereafter referred to as *Prinsloo*).

¹⁰⁴ As above para [25].

¹⁰⁵ *Makwanyane* (note 5 above).

¹⁰⁶ As above para [156].

According to principle and precedent, an arbitrary decision is by nature one taken without reason, or without adequate reason. It includes a decision taken where there is no legitimate government purpose at all. That constitutes the end of the rationality inquiry – such a decision is necessarily irrational.¹⁰⁷ In *Makwanyane*, the court further explained that arbitrariness must also inevitably lead to unequal treatment of persons. Arbitrary actions or decisions are incapable of providing rational explanations why persons placed similarly are treated in a substantially different way. Without such a rational justifying mechanism, unequal treatment must follow.¹⁰⁸

In *Pharmaceutical Manufacturers*, the Constitutional Court held that the Constitution requires that public power vested in the executive and other functionaries be exercised in an objectively rational manner.¹⁰⁹ Rationality in this sense is a minimum threshold requirement applicable to the exercise of all public power. Action that fails to pass this threshold is inconsistent with the requirements of the Constitution and therefore unlawful. This does not mean that the courts can or should substitute their opinions as to what is appropriate for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision viewed objectively is rational, a court may not interfere with the decision merely because it disagrees with the decision or considers that the power was exercised inappropriately. The court further pointed out that in respect of a decision that is objectively irrational, a court has the power to intervene and set aside the irrational decision.¹¹⁰

The state may not act capriciously or arbitrarily. If the state acts outside the purview of legislative power or if its conduct is not rationally related to the authority provided and the objective sought, such action would be contrary to the principle of legality and the rule of law, and thus unconstitutional and invalid.¹¹¹

¹⁰⁷ As above.

¹⁰⁸ As above.

¹⁰⁹ *Pharmaceutical Manufacturers* (note 78 above) para [89].

¹¹⁰ As above para [90].

¹¹¹ *Minister of Finance* (note 101 above) para [118] per Madlanga J for the majority held that the Minister did not have the legislative power to make the Preferential Procurement Regulations, 2017 and for that reason “the regulations are invalid for being *ultra vires* the enabling section”. Also see *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Traditional Metropolitan Council and Others* 1999 (1) SA 374 (CC) para [58] in which the Constitutional Court held: “It seems central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law”.

In summary, the principle of the rule of law and legality in respect of public power require that all public power be exercised within the scope of legislative parameters in a rational manner as an important element of legality and the rule of law. Rationality requires an objective test and demands that the state does not exercise its powers in a irrational or arbitrary manner. Rationality requires a rational relationship between the law and state conduct (for instance by the Executive) and the achievement of a legitimate government purpose (the Legislature).

3.2.6 Bill of Rights

The importance of fundamental rights is emphasised at the outset in the Constitution. The Preamble states as one of the objectives of the Constitution is to establish a society based on, amongst others, “fundamental human rights”. The rights as such are contained in Chapter 2 of the Constitution entitled the “Bill of Rights”. Section 7(1) of the Constitution states that the Bill of Rights is a cornerstone of democracy in South Africa. It protects the rights of all inhabitants and affirms the democratic values of human dignity, equality and freedom. It requires the state to respect, protect, promote and fulfil the rights provided for in the Bill of Rights.¹¹² The rights in the Bill of Rights are subject to the limitations contained in section 36¹¹³ or elsewhere in the Bill of Rights.¹¹⁴

The Bill of Rights has specific provisions as to whom it shall apply. It states that the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state¹¹⁵ and binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.¹¹⁶ When applying a provision of the Bill of Rights to a natural or juristic person in terms of section 8(2), a court, in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and may develop rules of the common

¹¹² S 7(2) of the Constitution.

¹¹³ As above s 36 provides that “(1) The Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including – (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose. Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

¹¹⁴ As above s 7(3).

¹¹⁵ As above s 8(1).

¹¹⁶ As above s 8(2).

law to limit the right, provided that the limitation is in accordance with section 36(1).¹¹⁷ A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.¹¹⁸

The Bill of Rights also has specific provisions for the interpretation of the Bill. Section 39 states that when interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; must consider international law; and may consider foreign law.¹¹⁹ Also, when interpreting legislation and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.¹²⁰

The Bill of Rights expressly does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, on condition that they are consistent with the Bill.¹²¹ As far as the enforcement of rights is concerned, section 38 of the Constitution provides that anyone listed in section 38 has the right to approach a competent court, alleging that a right in the Bill of Rights had been infringed or threatened, and the court may grant appropriate relief. This appropriate relief may include a declaration of rights. The persons who may approach a court are: anyone acting in their own interest; anyone acting on behalf of another person who cannot act in their own name; anyone acting as a member of, or in the interest of, a group or class of persons; anyone acting in the public interest; and an association acting in the interest of its members.¹²²

A Bill of Rights is also often referred to as a “charter” of rights. It is not an isolated or alone-standing category of provisions. A Bill of Rights needs to be interpreted as part of the broader constitutional law concepts and principles.¹²³ The different provisions of the Constitution must

¹¹⁷ As above s 8(3)(a) and (b).

¹¹⁸ As above s 8(4).

¹¹⁹ As above s 39(1)(a) – (c).

¹²⁰ As above s 39(2).

¹²¹ As above s 39(3).

¹²² As above s 38(a) – (e).

¹²³ See *Soobramoney* (note 12 above) paras [8] and [42] in which the court highlighted that in interpreting the provisions of the Constitution, it should be acute aware of what factors prevail, for instance when unemployment and inadequate social security is essential in the interrelation of the right to health in the Bill of Rights. Also see *Makwanyane* (note 5 above) para [94] in which the Constitutional Court pointed out that constitutional factors must be viewed together and not in isolation. Also see *Minister of Finance* (note 101 above) para [79] in which the Constitutional Court held that the stand-alone reading of the provisions of the Constitution ignores the founding values of the Constitution.

be read in harmony, including in the exercise of weighing up rights, which are discussed in more detail in paragraph 3.3 below.¹²⁴ A Bill of Rights forms an integral part of a constitution and constitutional law and is not elevated to the status of a super constitution.

In assessing the exercise of state powers, the courts will enforce the rights provided in the Bill of Rights subject to the limitations of rights provided for in section 36 of the Constitution.¹²⁵ Section 36 prevents the arbitrary limitation, infringement and curtailment of people's rights¹²⁶ and sets strict requirements for the limitation of such rights.¹²⁷ Thus, a broad rather than narrow interpretation is given to fundamental rights enshrined in the Constitution.¹²⁸

Before the advent of the Interim Constitution in 1994, all individuals enjoyed certain freedoms and privileges under law applicable at that point in time: the common law, customary law and legislation. Many former common-law freedoms were incorporated into the Bill of Rights. Even if they are not explicitly provided for in the Bill of Rights, they are still recognised and protected within the ambit of the Constitution.¹²⁹

The Bill of Rights in the South African Constitution provides for a wide range of rights, namely political, civil, socio-economic, as well as other rights. In the *First Certification* judgement, the Constitutional Court held that in compliance with Constitutional Principle II contained in the Interim Constitution, the 1996 Constitution may make provision for certain universally accepted fundamental rights and civil liberties, and even "new rights" and "rights more generously than would be required by the universal accepted norm".¹³⁰

Apart from the positive duties imposed on the state to protect, promote and fulfil the rights delineated in the Bill of Rights,¹³¹ a number of provisions of the Bill of Rights also impose duties

¹²⁴ See *King* (note 80 above) para [203]. Also see *United Democratic Movement v President of the Republic of South Africa and Others* 2003 (1) SA 495 (CC) (hereafter referred to as *UDM*) para [83] in which the Constitutional Court stated: "A court must endeavour to give effect to all the provisions of the Constitution. It would be extraordinary to conclude that a provision of the Constitution cannot be enforced because of an irreconcilable tension with another provision. When there is tension, the courts must do their best to harmonise the relevant provisions and give effect to all of them".

¹²⁵ *Makwanyane* (note 5 above) paras [100]-[103].

¹²⁶ *First Certification* judgement (note 3 above) para [56].

¹²⁷ S 36 of the Constitution.

¹²⁸ *Makwanyane* (note 5 above) para [100].

¹²⁹ S 39(3) of the Constitution states: "The Bill of Rights does not deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill".

¹³⁰ *First Certification* judgement (note 3 above) para [52].

¹³¹ S 7 of the Constitution.

on private individuals in certain circumstances.¹³² The Bill of Rights therefore has both direct and indirect horizontal and vertical application. Direct application of the duties under the Bill of Rights is governed by section 8 of the Constitution. Section 8(1) of the Constitution deals with direct vertical application (the relationship between state and individual). It dictates the circumstances under which law and state conduct may be impugned for being inconsistent with the Bill of Rights. Section 8(2), on the other hand, refers to the direct horizontal application and when infringement of rights between private persons *inter se* can be challenged and remedied.¹³³

The role of the Bill of Rights in the Interim Constitution is summarised by Davies *et al*¹³⁴ as follows:

“...the new Bill of Rights will accord greater weight to certain rights than to the decisions of Parliament...Unlike ordinary legislation, a Bill of Rights enjoys particular status as a link between the political morality and aspiration of society and positive law. Consequently, a particular set of political convictions gains imprimatur of positive legal authority. Thus, its constraints competing moralities with which it is inconsistent in the name of the people...a Bill of Rights talks to society and informs it, not only of what kind of society it is but also the one which it ought to be. It contains not only constrains but also aspirations.”

Arguably, the Bill of Rights as a separate chapter in the Constitution had the greatest impact of all constitutional provisions on contemporary life in South African society. The Bill of Rights has since 1994 been the main source of the majority of ground-breaking rulings handed down by the Constitutional Court.¹³⁵ The Bill provides for the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

Although the Bill of Rights does not in theory constitute a hierarchy of rights as recognised by the Constitutional Court, one right may be preferred over the other.¹³⁶ In this regard, it should be

¹³² As above s 8(2) provides that the Bill of Rights binds all natural and juristic persons taking into account the nature and duty imposed by the right.

¹³³ *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para [29].

¹³⁴ Davies *et al* (1994) 2 and 3. Also see *Makwanyane* (note 5 above) para [7] in which the Constitutional Court held that the Interim Constitution established a new order in which human rights and democracy are entrenched.

¹³⁵ See the Constitutional Court website: www.constitutionalcourt.org.za/site/yourrights/thebillofrights.htm (accessed on 31 Jul 2022); and s 7(1) of the Constitution.

¹³⁶ *South African Broadcasting Corporation Limited v National Director of Public Prosecution and Others* (CCT 58/06) [2006] ZACC 15; 2007 (1) SA 523 CC; 2007 (2) BCLR 167 (CC); [2006] JOL 18339 (CC) (21 Sep 2006) para [55] the Constitutional Court per Langa CJ for the majority held that “although it is correct that our Constitution does not postulate a hierarchy of rights in the abstract there are circumstances in which one right will take precedence over others” and (para [125]) by Mokgoro J in one

borne in mind that certain distinct rights in the Bill of Rights, such as the right to freedom,¹³⁷ the right to dignity,¹³⁸ and the right to equality,¹³⁹ are also part of the core values¹⁴⁰ of the Constitution. Therefore, in practice, these three rights will be applied in any balancing of rights due to their multiple roles and statuses as rights and values within the broader constitutional framework.¹⁴¹ These rights, which are also core or foundational values, have to some extent a predominant status as lead role players within the broader scheme and value system of the Constitution.

It follows, therefore, that there is a very close constitutional relation between the rule of law, supremacy of the Constitution and the Bill of Rights.

3.3 INTERPRETATION OF THE CONSTITUTION

The interpretation of the Constitution is not part of the core of this study. Yet, it is important because all law, including law relating to B-BBEE is constitutionally interpreted. The discussion that follows enunciates the basic principles of the interpretation of the Constitution insofar as they provide a basis for the concepts discussed in greater depth later in this chapter.

The Constitution as such does not prescribe how it should be interpreted. Section 39 contains an interpretation clause which pertains to the Bill of Rights, while section 239 contains certain definitions which apply to the interpretation of the Constitution as a whole. However, the instructions contained in section 39 are themselves so abstract as to require a great deal of interpretation. For example, section 39(1) requires a court interpreting the Bill of Rights to “promote the values that underlie and open and democratic society based on human dignity, equality and freedom”.

of the dissenting judgements which states: “clearly therefore, when freedom of expression does conflict with other rights a court must balance the conflicting rights proportionally. Our Constitution does not envisage a hierarchy of rights where courts simply prefer one right over the other. Also see *Makwanyane* (note 5 above) para [213].

¹³⁷ S 12 of the Constitution.

¹³⁸ As above s 10.

¹³⁹ As above s 9.

¹⁴⁰ As above s 1(a) (the Founding Provisions); and s 7(1) under the rubric “Rights” as introduction to the Bill of Rights.

¹⁴¹ See the inclusion of the right of freedom, dignity and equality under s 1(a) (Founding Provisions); s 36 (Limitation of Rights); and s 39 (1)(a) (Interpretation of the Bill of Rights). Also see *Van Heerden* (note 4 above) para [22] in which the court stated: “Thus the achievement of equality is not only a guaranteed and justiciable right in our Bill of Rights but also a core value and foundational value; a standard which must inform all law and against which all law must be tested for constitutional consonance”.

The Constitutional Court has laid down guidelines as to how the Constitution in general and the Bill of Rights in particular should be interpreted. Some of these guidelines relevant to this study are discussed immediately below, while section 39 and the interpretation of the Bill of Rights are discussed in para 3.3.2 below.

3.3.1 Interpretation methods that give Expression to the Underlying Values of the Constitution

The method of interpreting the Constitution and the Bill of Rights has been established in several judgements of the Constitutional Court and the Supreme Court of Appeal. In summary, these judgements hold that the language of the constitutional text must be interpreted generally, purposively and in context.¹⁴² For the purpose of this study, it is not important to discuss all the constitutional interpretational principles and methods laid down by the courts. Of importance is the role of the text and especially purposive interpretation as methods of interpretation. Purposive interpretation is of importance to understand the interpretation of the equality clause of the Constitution (section 9) in the context of the notion of transformation.

3.3.1.1 Role of the Text

The obvious starting point for determining the meaning of a provision in the Constitution is the text itself. In the very first judgement of the Constitutional Court, *S v Zuma*, Kentridge AJ emphasised the importance of the text:

“While we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a written instrument. I am well aware of the fallacy of supposing that general language must have a single ‘objective meaning’. Nor is it easy to avoid the influence of one’s personal intellectual and moral preconceptions. But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean.”¹⁴³

Moreover, individual textual provisions of the Constitution may not be considered and construed

¹⁴² *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd and Another* 2011 (1) SA 327 (CC); 2011 (2) BCLR 207 (CC) (23 Nov 2010) para [32].

¹⁴³ *S v Zuma* 1995 (2) SA 642 (CC) (hereafter referred to as *Zuma*) para [17].

in isolation. They must be interpreted contextually in the light of the Constitution as a whole.¹⁴⁴ However, constitutional disputes can seldom be resolved with reference to the literal meaning (sometimes called the “ordinary” or “dictionary” meaning) of the Constitution’s provisions alone. The Constitution provides a complex framework with both procedural and substantive elements. Particularly when it comes to substantive prescriptions such as the rights provided for in the Bill of Rights, the Constitution is said to be abstract and open-ended in much of its formulation.¹⁴⁵ This means that constitutional interpretation unavoidably involves more than the determination of the literal meaning of particular provisions. In fact, even when there is an apparently self-evident literal meaning that can be given to a constitutional provision, the proper interpretation of the provision may entail looking beyond that meaning.¹⁴⁶

In *Makwanyane*, the Constitutional Court (quoting Kentridge AJ in *Zuma*) adopted the following approach to the interpretation of the Bill of Rights:

“whilst paying due regard to the language that has been used, [an interpretation of the Bill of Rights should be] ‘generous’ and ‘purposive’ and ‘give ... expression to the underlying values of the Constitution’.”¹⁴⁷

What Kentridge AJ had stressed in *Zuma* is that the interpretation of the Constitution must be grounded in the text itself and that the text sets the limits of a feasible interpretation. If there is plain meaning of a provision, it cannot be ignored in favour of a “generous” and “purposive” account of the provision’s meaning. Conversely, the dictum in *Makwanyane* emphasised that while the literal meaning must be taken into account (given “due regard”), it is not necessarily conclusive. Hence, a literal meaning will be an acceptable interpretation of a provision only if it accords with a generous and purposive interpretation that “gives expression to the underlying values of the Constitution”. Therefore, the *Makwanyane* passage better describes the Constitutional Court’s interpretative approach. On a number of occasions, the court has preferred “generous” and “purposive” interpretations to contrary interpretations based on the literal meaning of a provision.¹⁴⁸

¹⁴⁴ *Matatiele Municipality v President of the Republic of South Africa* 2007 (6) SA 477 (CC) para [36].

¹⁴⁵ Currie and de Waal (2016) 135 and 136; and Malan (2019) 184.

¹⁴⁶ As above.

¹⁴⁷ *Makwanyane* (note 5 above) para [9].

¹⁴⁸ See *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC) (hereafter referred to as *Sanderson*) para [20]-[24] in which the court came to the conclusion that, despite contrary indications in the text, the right to be tried within a reasonable time protects both trial and non-trial related interests of the accused.

There is, however, a limit to what can be made of the text. Although the court must seek to give effect to the object or purpose of a provision, it may not impose a meaning on the text that it is not reasonably capable of bearing;¹⁴⁹ the interpretation may not be “unduly strained”.¹⁵⁰

The text of the Constitution, however clear its wording, is still capable of different interpretation. Malan explains that the orthodox doctrine of interpretation has a strong abstract flavour. Accordingly, it is assumed that every reasonable person engaged in the interpretation of a particular formulation would attach essentially the same meaning to such formulation.¹⁵¹

Interpretation of the Constitution is a distinctively communal activity. Interpreters are operating within the boundaries of a community of interpreters, that is, a particular tradition of interpretation. Each interpretive community is characterised by its own pre-understandings, ideological convictions and objectives and they lay down their own norms, disciplines and principles for interpretation. Interpretation is therefore correct and accurate only within the confines and in terms of the criteria of the accepted convictions, objectives and disciplinary protocols of the interpretive community to which the interpreter belongs.¹⁵²

Each interpretive community has its own prejudices and preferences which guide and at the same time limit the interpretive choices of interpreters of the community in question. The prejudices and interests of a particular interpretive community generate particular and unique expectations of what should be read in the text and how it should be applied. Interpretation and application of the text are possible only because the members of a particular interpretive community have common prejudices and favour certain interests that are coherent to that community. Malan further explains that when interpreting a text, the interpreter is already influenced by and acts in pursuance of a particular pre-understanding of the text, which in the case of legal texts determines the interpreter’s understanding of the law and the Constitution. Pre-understandings are extraneous to the text and to a large extent also political and ideological. They relate to the political and ideological commitments and interests of the community of interpreters. Yet they play a decisive role in the way the text is interpreted, including the manner

¹⁴⁹ *South African Airways (Pty) Ltd v Aviation Union of South Africa* 2011 (3) SA 148 (SCA) para [29].

¹⁵⁰ *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others* 2001 (1) SA 545 (CC) para [24].

¹⁵¹ Malan (2019) 180.

¹⁵² As above 181 and 182.

in which meaning is attributed and how it is applied. Therefore, part of the pre-understanding of the text involves the political and ideological convictions of the interpreters. Thus, interpretation is a distinctively political and ideological matter.¹⁵³

More than one interpretive community is often engaged in the interpretation of the same document, including the same Constitution. This is why, for example, the appointment of judges is a politically charged exercise. The appointment of judges is not only about the competency of the candidates, but often also about their ideological and political convictions. This is also, as explained in paragraph 3.6 below, why the Judicial Service Commission in South Africa is intent on promoting the appointment of so-called transformation candidates, namely judges who share with the rest of the dominant political elite (in the legislature, executive, the ruling party and subsidiary institutions) the same “transformationist ideological convictions” and objectives. Together with the other sectors of the dominant elite, the judiciary forms an integral part of the same dominant interpretive community. They view the Constitution through the same prism as the rest of the dominant elite. They share the same pre-understanding and regard the Constitution as an instrument towards the achievement of the same goals as “the rest of the dominant elite and finally interpret it in essentially the same way”. They deliver judgements that legitimise and defend the ideologically motivated actions of the dominant elite and in doing so they advance the ideological commitments of such elite.¹⁵⁴ This is further discussed in paragraph 3.6 below.

Malan also explains that interpretation, more specifically legal interpretation, is not an abstract exercise. It always takes place within a practical situation that requires decisions to be taken on the basis of interpretation. There is therefore no “free-floating abstract meaning” which is only later applied to particular contexts. It is interpreted within a practical situation, “within the scenario of a specific dispute”. This further underscores the pivotal importance of the broader context, “which is extraneous to the text”, as a factor influencing the meaning of the text that is to be interpreted. Interpretation takes place within a “specific, concrete situation and the interpreter’s outlook is determined by that situation”.¹⁵⁵

¹⁵³ As above 182.

¹⁵⁴ As above 185.

¹⁵⁵ As above 183.

Consequently, Malan concludes, the meaning of one and the same constitution and one and the same formulation of any part thereof can and does in fact change. When the historical context and the text has to be applied to a “new situation, new light is cast on the text and a new meaning emerges”. Moreover, “historical contexts change consistently in keeping with the ever-changing socio-political realities”. The text is therefore “consistently viewed and applied in new ways”.¹⁵⁶

In respect of the interpretation of constitutional rights, these rights are usually “widely and indefinitely formulated”. The text in this case, therefore, leaves a broad space for changing meanings in keeping with the contexts and the situations in which the rights have to be applied. That is why the Constitution is said to be a “value-laden text”. These values can hardly be expressed in clear and unambiguous language. Moreover, a constitution’s text is said to be “a durable one and unlike legislation not readily subject to amendment”. The Constitution therefore has expansive and inevitably ambiguous formulations that are meant to cater for an “inestimable array of exigencies over a long period of time”.¹⁵⁷

It can be concluded that through interpretive activity, interpreters do not infer or deduce meaning from the text as the orthodox doctrine would suggest. On the contrary, “interpreters do not find meaning, they make it; they in fact create and produce meaning”. The text does not speak for itself. It is the interpreter who makes the “text to speak”. The meaning of the text is not an “object waiting to be appropriated or discovered”.¹⁵⁸

3.3.1.2 Purposive Interpretation

Purposive interpretation is aimed at gauging the core values that underpin the listed fundamental rights in an open and democratic society based on human dignity, equality and freedom, and then to prefer the interpretation of a provision that best supports and protects those values. In this regard, the Constitutional Court approved the following statement by the Canadian Supreme Court in *R v Big M Drug Mart Ltd*:

“The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be

¹⁵⁶ As above 184.

¹⁵⁷ As above.

¹⁵⁸ As above.

understood, in other words, in the light of the interests it was meant to protect. In my view, this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought ...”¹⁵⁹

The Canadian Court explained that the purpose of the right should be sought by reference to the character and larger objects of the rights itself, to the language chosen to articulate the specific right or freedom, and to the historical origins of the concepts enshrined. Where applicable, the purpose of the right should also be established by considering the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be “a generous rather than a legalistic one”, aimed at fulfilling the “purpose of the guarantee” and securing for individuals the full benefit of the Charter’s protection.¹⁶⁰

Purposive interpretation recognises that the interpretation of the Bill of Rights involves a value judgement. Ultimately, however, it does not prescribe how the value judgement is to be made. The making of this judgement is central to the exercise of interpreting the Bill of Rights.

South Africa’s political history plays an important role in the interpretation of the Constitution.¹⁶¹ The Constitution is said to be a consequence of and a reaction to South Africa’s history. One of the purposes of the Constitution is a desire that there should be, in the word of Mahomed J in *S v Mhlungu and Others*, “a ringing and decisive break with the past”.¹⁶² A purposive interpretation will therefore take this history and the desire not to repeat it into account when determining the meaning of a constitutional provision: In *Shabalala v Attorney General of the Transvaal*,¹⁶³ the Constitutional Court held that—

“[T]he Constitution is not simply some kind of statutory codification of an acceptable or legitimate past. It retains from the past only what is defensible and represents a radical and decisive break from that part of the past which is unacceptable. It constitutes a decisive break from a culture of Apartheid and racism to a constitutionally protected culture of openness and

¹⁵⁹ *R v Big M Drug Mart Ltd* 1985 18 DLR (4th) 321 (hereafter referred to as *Big Drug*) 395-396, cited in *Zuma* (note 143 above) para [15]; and *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) para [51].

¹⁶⁰ *Big Drug* (note 159 above) 396.

¹⁶¹ See *Executive Council, Western Cape v Minister of Provincial Affairs* 2000 (1) SA 661 (CC) (hereafter referred to as *Executive Council Western Cape*) para [44] where political history tends to be even more important in structure of government litigation, where it often provides direct and decisive guidance for the interpretation of the Constitution.

¹⁶² *S v Mhlungu* 1995 (3) SA 867 (CC) para [8].

¹⁶³ 1996 (1) SA 725 CC.

democracy and universal rights for South Africans of all ages, classes and colours. The relevant provisions of the Constitution must therefore be interpreted so as to give effect to the purposes sought to be advanced by their enactment.”¹⁶⁴

The use of historical interpretation is well illustrated by the Constitutional Court’s judgements dealing with the equality clause. In *Brink*, the Constitutional Court held that—

“As in other national constitutions, s 8 of the Interim Constitution is the product of our own particular history. Perhaps more than any of the other provisions in chapter 3, its interpretation must be based on the specific language of s 8, as well as our own constitutional context. Our history is of particular relevance to the concept of equality. The policy of apartheid, in law and in fact, systematically discriminated against black people in all aspects of social life.”¹⁶⁵

The court, in *Brink*, then explained the impact of past discrimination on black people:

“Black people were prevented from becoming owners of property or even residing in areas classified as ‘white’, which constituted nearly ninety percent of the landmass of South Africa; senior jobs and access to schools and universities were denied to them; civic amenities, including transport systems, public parks, libraries and many shops were also closed to black people. Instead, separate and inferior facilities were provided. The deep scars of this appalling programme are still visible in our society. It is in the light of that history and the enduring legacy that it bequeathed that the equality clause needs to be interpreted.”¹⁶⁶

Purposive interpretation has considerable prevalence in a number of jurisdictions and has repeatedly been preferred in South Africa. This is evidenced by the Constitutional Court judgements in *Zuma*¹⁶⁷ and *Makwanyane*.¹⁶⁸ Malan points out that applying the considerations set out by the Constitutional Court with reference to the Canadian case of *Big Drug*¹⁶⁹ to

¹⁶⁴ As above para [26]. Also see *Mphahlele v First National Bank of SA Ltd* 1999 (2) SA 667 (CC) para [11]: “simply because a practice was established during the apartheid era does not, without more, render it bad or unconstitutional”.

¹⁶⁵ See *Brink* (note 10 above) para [40]. Section 9 prohibits “unfair discrimination”, requiring a court to interpret what forms of law or conduct fall within the scope of the prohibition. One of the factors to be taken into account in this interpretation is historical. Also see *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) (hereafter referred to as *Harksen*) para [52] in which the court held that, when determining whether discrimination is unfair, one of the factors that must be taken into account is whether the complainant suffered in the past from patterns of disadvantage. Also see *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) (hereafter referred to as *Walker*) para [45]-[48].

¹⁶⁶ *Brink* (note 10 above) para [40].

¹⁶⁷ *Zuma* (note 143 above).

¹⁶⁸ *Makwanyane* (note 5 above).

¹⁶⁹ *Big Drug* (note 159 above).

determine the purpose of a constitutional right is not as clear-cut and fool-proof as generally professed. On close analysis, none of the considerations listed in *Big Drug* are either individually or taken together sufficient to establish accurately the correct and objective meanings of constitutional-rights provisions and are not capable therefore to secure a minimum acceptable understanding of these meanings. Each of these aids, factors or considerations introduces an additional source of uncertainty as to what constitutional-rights provisions are supposed to mean.¹⁷⁰

Malan explains that the first consideration, namely the nature and larger objects of the Bill of Rights, creates an additional front of controversy about the meaning of the provision which is under consideration. This is due to interpreters having different pre-understandings and ideological outlooks and expectations of the nature and larger objects of the Bill of Rights. Some might view the Constitution and the Bill of Rights as a fundamentally stabilising force. There might be a directly opposite view regarding the nature and larger objects of the Bill of Rights. Accordingly, the Constitution might be perceived as the foundation not for stability, but for large-scale social and economic change with a view to dismantling the present society and replacing it with something entirely new.¹⁷¹

The second consideration, namely the language used to articulate the specific right, is an essential precondition for an interpretive exercise. The language used to articulate a provision provides meaning to that provision. That is in fact the main reason for different meanings regarding the provision to be interpreted. It is the only way to establish meaning and at the same time the reason why different meanings can be gauged from the same subject matter.¹⁷²

The third consideration is the historical origins of the provision or the concept to be interpreted, as well as the history and background of the adoption of the Constitution. There is no guarantee that the views on the historical origins of a provision will promote consensus on the correct meaning of constitutional provisions. On the contrary, interpretations of the history and background of the adoption of the Constitution are bound to further exacerbate the differences between the meanings of constitutional provisions. This is particularly true for South African

¹⁷⁰ Malan (2019) 189.

¹⁷¹ As above 190.

¹⁷² As above.

history “which is marked by deep differences of historical interpretations”.¹⁷³

The fourth of the abovementioned considerations is the meaning and the purpose of other rights associated with the right under consideration. No doubt other associated rights should also be considered, to avoid contradictions and to interpret the provision in question in proper context. Nevertheless, this does not necessarily suggest that consensus may be reached on the accurate and objective meaning of the provision in question. The direct opposite might be true, namely that associated rights might add further problems in finding accurate and basically objective meanings, especially constitutional-rights provisions which are “broadly and inevitably also ambiguously formulated”. Each associated provision is therefore “accompanied by specific meaning-controversies, thus increasing the uncertainty of the meaning under consideration”.¹⁷⁴

The fifth consideration suggests that constitutional provisions, specifically constitutional rights, should be construed generously rather than legalistic, so as to afford every person entitled the full benefit of the Bill of Rights. This can hardly be of help because rights are often contradictory and “susceptible to different irreconcilable interpretations”. This is because Bills of Rights usually include formulations emanating from a “variety of conflicting ideological perspectives”, which could become the “source of interpretive battles”. Moreover, depending on the convictions and relative strengths of the interpretive communities, one right is often preferred above another. The essence is that it is practically impossible to construe all rights generously. A generous interpretation of one right often necessitates a restrictive interpretation, or disregard for another right. It is not surprising, therefore, that the Constitutional Court, notwithstanding its statement that rights should be construed generously rather than legalistically, subsequently conceded that such interpretation would often be logically impossible.¹⁷⁵

Malan further points out that on close analysis, it is clear that purposive interpretation is an ineffective method of establishing correct, basically objective and stable meanings. The opposite prevails if these aids are applied: the uncertainties about the meanings of constitutional provisions give rise to multiple conflicting interpretations among competing interpretive communities about the meanings of constitutional provisions; rather than producing clarity and

¹⁷³ As above 190 and 191.

¹⁷⁴ As above 192.

¹⁷⁵ See *Soobramoney* (note 12 above) para 17.

basic consensus on meanings, interpretive differences are aggravated.¹⁷⁶

It can be argued that there is no inherent, objective and universal meaning in the formulations of the Constitution, including in constitutional-rights formulations. Moreover, there is also no interpretive method capable of discovering, and securing with any degree of accuracy, objective and authentic meanings. Constitutional formulations do not speak for themselves. The meanings of the constitutional formulations are not directly known and there is no way to predict their impact with any measure of certainty. They are only “vicariously known”, namely through the “interpretation by interpreters who are members of interpretative communities” and who interpret formulations in accordance with the interpretive communities’ ideologically inspired understanding of the Constitution. Moreover, the meanings of constitutional formulations “only come to light at the moment they are interpreted”. Different and changing meanings with “concomitant and changing implications” are also attributed to constitutional formulations in interpretive exercises.¹⁷⁷

It is evident that there usually is more than one interpretive ideology. South Africa’s transformative interpretation rooted in the ANC’s political ideology of transformation, has been preferred by the high courts. The ideology of transformation has amalgamated with purposive interpretation, in that “transformationism” regards the achievement of a socialist and basically homogenous society as the main purpose of the Constitution.¹⁷⁸ This is discussed in paragraph 3.6 below.

3.3.2 Interpretation of the Bill of Rights Clause

Two provisions of the Constitution are of importance for the purpose of this study when interpreting the Bill of Rights, especially the equality clause provided for in section 9: Firstly, section 39(1) which makes provision for international law and to an extent foreign law in interpreting the Bill of Rights; and secondly, section 231(2) which incorporates international law into South African domestic law. Section 39 of the Constitution reads:

“(1) When interpreting the Bill of Rights, a court, tribunal or forum –

¹⁷⁶ Malan (2019) 193.

¹⁷⁷ As above 224.

¹⁷⁸ As above.

- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- (b) must consider international law; and
- (c) may consider foreign law.

Section 39(1) requires an interpretation that promotes the values which underlie an open and democratic society based on equality and freedom. It seems that the society referred to is not necessarily the present South African society, but an abstract and ideal one. Despite the importance of context, the everyday realities of South African society will therefore not feature as much in the interpretative stage of the fundamental right analysis when the scope of the right is determined. They may prove to be decisive at the stage when the constitutionality of limitations of the right is considered.¹⁷⁹

Section 39(1) refers to the use of public international law and foreign law. In *Makwanyane*, the court stated that both binding and non-binding public international law may be used as tools of interpretation:

“International agreements and customary international law provide a framework within which ... [the Bill of Rights] can be evaluated and understood, and for that purpose decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights and the European Court of Human Rights, and in appropriate cases, reports of specialized agencies such as the International Labour Organization may provide guidance as to the correct interpretation of particular provisions.”¹⁸⁰

These remarks make it clear that for purposes of interpretation, the Constitution permits reference to international human rights law in general.¹⁸¹ It is not confined to instruments that are binding on South Africa.¹⁸² The fact that South Africa is at present party to relatively few

¹⁷⁹ Currie and de Waal (2016) 146.

¹⁸⁰ *Makwanyane* (note 5 above) paras [36]-[37].

¹⁸¹ As above. The court reached its conclusion with reference to the work of John Dugard (see note 36 of the judgement). According to Dugard *SAJHR* (1994) 208, s 39(1) of the Constitution does not merely require a court to consider treaties to which South Africa is a party or customary rules that have been accepted by South African courts, but also to – (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) judicial decisions and the teaching of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. Dugard argues that such a conclusion follows logically from the use of the term “public international law” without qualification in s 39(1) and to give maximum effect to the otherwise incomplete catalogue of rights in the Bill of Rights.

¹⁸² See *Azanian People’s Organisation (AZAPO) v President of the Republic of South Africa* 1996 (4) SA 671 (CC) para [26] in

international human rights agreements is therefore not an obstacle to invoking international human rights law for the purposes of section 39(1). Section 39(1) invokes public international law primarily for the purpose of interpretation of rights and for determining their scope, not for proving their existence.

Section 39(1) states that courts must consider applicable public international law, but “may” consider foreign law.¹⁸³ This is an injunction to consider the applicable international law, but not to consider foreign law.

The Constitutional Court held, in *Makwanyane*, that comparative human rights jurisprudence will be of great importance while an indigenous jurisprudence is developed. However, added the court, foreign case law will not necessarily provide a safe guide to the interpretation of the Bill of Rights.¹⁸⁴ In *Sanderson*, the Constitutional Court expressed its concerns in this regard as follows:

“Comparative research is generally valuable and is all the more so when dealing with problems new to our jurisprudence but well developed in mature constitutional democracies. Both the interim and the final Constitutions, moreover, indicate that comparative research is either mandatory or advisable...Nevertheless, the use of foreign precedent requires circumspection and acknowledgment that transplants require careful management.”¹⁸⁵

Despite these remarks, many of the Constitutional Court’s decisions are based on comparative constitutional law.¹⁸⁶ Extensive reference is almost always made to the legal positions in especially internationally recognised open and democratic societies based on freedom and equality. Apart from section 39(1) of the Constitution which obliges the consideration of international law when interpreting the Bill of Rights, section 231 of the Constitution makes provision for the incorporation of international treaties and conventions into South African

which it was confirmed that binding international law has greater persuasive force since “the lawmakers of the Constitution should not lightly be presumed to authorise any law which might constitute a breach of the obligations of the State in terms of [such] international law”. Also see Dugard *SAJHR* (1994) 208 who explains that the Constitution makes provision for considering international human rights law in general and it is not limited to international instruments that are binding on South Africa.

¹⁸³ See *Sanderson* (note 148 above) para [26].

¹⁸⁴ *Makwanyane* (note 5 above) para [37].

¹⁸⁵ *Sanderson* (note 148 above) para [26].

¹⁸⁶ See *Haffajee NO v Ethekwini Municipality* 2011 (6) SA 134 (CC) para [44] in which the court used comparative foreign law to ascertain whether the determination of compensation is a prerequisite for the constitutional validity of expropriation.

domestic law.¹⁸⁷ Section 231 has therefore a wider application than merely interpreting the Bill of Rights. Section 231 is discussed in chapter 4, paragraph 4.2 below as part of the discussion on the application of international law on measures to promote equality.

3.4 CONSTITUTIONAL FRAMEWORK OF SOCIO-ECONOMIC EMPOWERMENT

The Constitution has various provisions endorsing the promotion of socio-economic equality through socio-economic redress or affirmative measures such as B-BBEE. The Preamble to the Constitution, for instance, recognises the injustices of the past and that South Africa belongs to all who live in it. The Constitution then sets out as one of its objectives to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights where every citizen is equally protected by law, and to improve the quality of life of all citizens.

The Founding Provisions of the Constitution further provide that the Republic of South Africa is founded on the values of human dignity and the achievement of equality.¹⁸⁸ All citizens are equally entitled to the rights, privileges and benefits of citizenship as a founding principle.¹⁸⁹

The Bill of Rights in the Constitution contains a combination of political, civil, social, cultural and other rights. As held in *Pharmaceutical Manufacturers*, the Constitution was not intended to be an exhaustive code of all rights that exist under law.¹⁹⁰ Section 39(3) of the Constitution provides that the Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation on condition they are not inconsistent with the Bill. In *Pharmaceutical Manufacturers*, the Constitutional Court further pointed out that although the Constitution expressly mentioned that there are rights beyond those expressly mentioned in the Constitution, it does not mean that there are two systems of law. Those rights outside the Constitution must be interpreted to promote the “spirit, purport and

¹⁸⁷ S 231(2) and (3) of the Constitution reads: “(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces unless it is an agreement referred to in subsection (3). (3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled by the Assembly and the Council within a reasonable time”.

¹⁸⁸ S 1(a) of the Constitution.

¹⁸⁹ As above s 3(2)(a).

¹⁹⁰ *Pharmaceutical Manufacturers* (note 78 above) para [49].

objects of the Bill of Rights”.¹⁹¹

The Constitution includes a wide array of social, cultural and economic rights to reinforce socio-economic upliftment.¹⁹² Socio-economic rights are the right to access to adequate housing (section 26); the right to healthcare, food, water and social security (section 27); rights of children (section 28); the right to education (section 29); and detainees’ rights to adequate accommodation, nutrition, reading material and medical treatment (section 35(2)(e)). The rights provided for in sections 26 and 27 require the state to “take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights”.¹⁹³ The rights provided for in sections 28, 29 and 35(2)(e) are not qualified by requiring from the state reasonable measures, progressive realisation or resource constraints. However, in respect of the right to education, section 29(1) provides that, the state must, through “reasonable measures”, make further education progressively available and accessible.¹⁹⁴

In *Government of the Republic of South Africa and Others v Grootboom and Others*,¹⁹⁵ the Constitutional Court emphasised that the inclusion of socio-economic rights in the Bill of Rights plays an important role in the Constitution’s vision to ensure a better life for all. The Constitution endeavours, through the realisation of socio-economic rights, to allow people disadvantaged by their social and economic circumstances to become more capable of enjoying a life of dignity, freedom and equality.¹⁹⁶ Socio-economic rights demonstrate a “deep concern for material inequality closely associated with past exclusion and poverty”.¹⁹⁷

The property clause in the Constitution – section 25 – makes provision for remedial and restitutionary measures in respect of property, especially land, which has socio-economic upliftment and achievement of equality as objective.¹⁹⁸ Section 25(1)(2)(a) provides that property

¹⁹¹ As above; and s 39(2) of the Constitution.

¹⁹² Ss 24, 26, 27 and 29 of the Constitution. The complete provisions of social, cultural and economic rights are s 22 (freedom of trade, occupation and profession); s 23 (labour relations); s 24 (environment); s 25 (property and land); s 26 (housing); s 27 (health care, food, water and social security); s 28 (children’s rights); s 29 (education); s 30 (language and culture); s 31 (the rights of culture, religious and linguistic communities); and s 35(2)(e) (the socio-economic rights of persons deprived of liberty).

¹⁹³ As above ss 26(2) and 27(2).

¹⁹⁴ As above s 29(1)(b).

¹⁹⁵ 2001(1) SA 46 CC.

¹⁹⁶ As above para [1]; and *Road Accident Fund v Mdeyide* 2011 (2) SA 26 (CC) para [125] (dissenting judgement of Froneman J).

¹⁹⁷ *Residents of Joe Slovo Community; Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC) para [142].

¹⁹⁸ S 25(4)(b) of the Constitution states that “property is not limited to land”.

may be expropriated for a public purpose or in the public interest. Public interest includes “the nation’s commitment to land reform”, and reforms to bring about equitable access to all South Africa’s natural resources.¹⁹⁹ Section 25(5) imposes an obligation on the state to take reasonable legislative and other measures within its available resources, to enable citizens to gain access to land on an equitable basis. Section 25(6) provides for a person or community whose tenure of land is insecure as a result of past racially discriminatory laws or practices to be entitled to tenure that is legally secured, or to comparable redress, to the extent provided for by an Act of Parliament. A person or community dispossessed of property after 19 June 1913 (when the Land Act of 1913 was enacted) as a result of past racially discriminatory laws or practices, is in terms of section 25(7) of the Constitution entitled to restitution of that property or to equitable redress, to the extent provided for by an Act of Parliament. Section 25(8) provides the state with a discretion to take legislative and other measures to achieve land, water and related reform in order to redress the results of past discrimination, in accordance with the limitation of rights provided for by section 36(1) of the Constitution.

Various other laws emanating from fundamental rights provided for in the Bill of Rights have as objective to promote equality through socio-economic development. For instance, section 23 of the Constitution provides that everyone has the right to fair labour practices and various other workplace-related rights.²⁰⁰ The Labour Relations Act of 1995²⁰¹ enacted as a result of the provisions of section 27 of the Interim Constitution, which rights are presently provided for in section 23 of the Constitution, states that the purpose of the Labour Relations Act is to, amongst others, “advance economic development”.²⁰²

The Constitution imposes an obligation on the state as a whole “to take reasonable legislation and other measures ... to achieve the progressive realisation of some socio-economic rights”.²⁰³ Apart from socio-economic rights provided for by the Constitution, the Constitution also places an onus on local government and public administration in general to promote the social economic development of communities.²⁰⁴

¹⁹⁹ As above s 25(4)(a).

²⁰⁰ As above s 23(1) – (5).

²⁰¹ Act 66 of 1995.

²⁰² As above s 1.

²⁰³ Ss 26 and 27 of the Constitution.

²⁰⁴ As above ss 152(1)(c), 153(a) and 195(1)(c).

Section 174(2) of the Constitution requires the judiciary to reflect broadly the racial and gender composition of South Africa. Section 193(2) has a similar provision in relation to the composition of the bodies established in terms of chapter 9 of the Constitution. Section 195(1)(i) also provides for the public administration to be broadly representative of the South African people based on “the need to redress imbalances of the past to achieve broad representation”.²⁰⁵ The aspect of broad representativity will be discussed in chapter 5, paragraph 5.3.3.5 as part of the discussion of the Employment Equity Act.²⁰⁶

Section 217 of the Constitution authorises governments in all spheres – national, provincial and local – to implement procurement policies providing for categories of persons as preferred suppliers for the protection or advancement of persons, or categories of persons disadvantaged by unfair discrimination.²⁰⁷ This is discussed in chapter 5, paragraph 5.4. However, the most profound provision for socio-economic empowerment in the Constitution is the equality clause in section 9.

3.5 CONSTITUTIONAL BASIS OF EQUALITY

The first right provided for by the Bill of Rights is the right to equality in section 9 of the Constitution and of specific importance in this research. Subsections (1) and (2) of section 9 provide that—

“(1) Everyone is equal before the law and has equal protection and benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.”

Section 9 has five subsections in total. Apart from the first two subsections above, the third prohibits unfair discrimination on certain listed grounds by the state.²⁰⁸ The fourth extends the

²⁰⁵ As above s 152(1)(c). See *Correctional Services* (note 6 above) para [4] in which Zondo J for the majority held that the Employment Equity Act which seeks representativity of designated groups “is a legislative measure contemplated in s 9(2) of the Constitution”.

²⁰⁶ See *Correctional Services* (note 6 above) para [4] in which Zondo J for the majority held that the Employment Equity Act which seeks representativity of designated groups “is a legislative measure contemplated in s 9(2) of the Constitution”.

²⁰⁷ S 217(2) of the Constitution; and *Minister of Finance* (note 101 above) para [99] in which the Constitutional Court held that what s 217(2) of the Constitution seeks to achieve is consonant with those of s 9(2), that is “true and substantive equality”.

²⁰⁸ S 9(3) of the Constitution.

prohibition of unfair discrimination to horizontal levels between private persons. It also requires enactment of legislation to prohibit unfair discrimination at all levels.²⁰⁹ The final subsection is an evidentiary provision. Subsections (3) to (5) state as follows:

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

Section 9(2) is very pertinent for the present research. It authorises government, through the implementation of legislation and other measures, to protect and advance persons, or categories of persons, disadvantaged by unfair discrimination in order to achieve equality. This serves as the constitutional justification for government to adopt policies and implement legislation (measures) such as the B-BBEE programme to remedy economic inequality caused by a previous race-based discriminatory system.

In consequence of the principle of the rule of law, measures referred to in section 9(2) must withstand constitutional muster. To that end, it must be shown that these measures are designed to achieve the objective of section 9(2), which is to protect and advance persons or categories of persons disadvantaged by unfair discrimination and, more specifically, to actually promote the achievement of equality. Hence, the measures must be shown to be capable of achieving equality, more specifically substantive equality.²¹⁰

In order to understand the legal difficulties posed by affirmative measures within an equality framework, the concepts of differentiation, discrimination, unfairness and substantive equality

²⁰⁹ As above s 9(4).

²¹⁰ S 9(2) of the Constitution. Also see *Minister of Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others* [2018] ZACC 20 (hereafter referred to as *Insolvency Practitioners*) para [39] in which the court held that for a restitutionary measure to comply with s 9(2) of the Constitution, it must be capable of achieving equality. Also see Du Plessis and Pretorius *THRHR* (2017) 394 who state that “the substantive equality clause, however, like all the other constitutional provisions...not only mandates the implementation of empowering economic measures, but also provides binding prescriptions for their design and implementation. It both authorises and sets normative boundaries for measures of this nature”.

need to be elucidated.

3.5.1 Right to Equality

The constitutional right to equality does not prevent the state from making classifications and treating people of different categories differently. The principle of equality does not require everyone to be treated the same. From a moral point of view, people in the same position should be treated the same. Consequently, laws may classify people and treat them differently for a variety of legitimate reasons. It is in fact often necessary for the state to differentiate and for legitimate reasons to treat people differently. Such differentiation may impact people differently.²¹¹

Therefore, not every differentiation constitutes unequal treatment. It is crucial to have clearly defined legal norms providing the framework for distinguishing legitimate differentiation from constitutionally impermissible differentiation. Section 9(3) lists the grounds on which unfair discrimination is prohibited.²¹² These, however, as is evident from the wording of the subsection, are not the only grounds. There are additional grounds which in our jurisprudence are called analogous grounds. These provisions and ensuing jurisprudence are the set of norms to distinguish between legitimate and illegitimate forms of (unfair) discrimination. Analogous grounds not featuring in the list of prohibited grounds of unfair discrimination, may still be unfair if the discrimination impairs the dignity of those affected or impacts them in a material manner.²¹³ In other words, differentiation is permissible if it does not amount to unfair discrimination.

Differentiation as such is not regarded as unfair if it is “mere differentiation”.²¹⁴ Mere differentiation that is not discriminatory, as will be shown, is not subjected to a fairness test. Its validity is tested by the more generous standard of rationality.

Rationality dictates that law or conduct that differentiates between groups of people is permitted on condition that it does not deny a person equal protection or benefit of the law or is tantamount

²¹¹ See *Prinsloo* (note 103 above) paras [24]-[26].

²¹² S 9(3) of the Constitution lists the grounds as: race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

²¹³ *Harksen* (note 165 above) para [46].

²¹⁴ *Prinsloo* (note 103 above) para [25].

to unequal treatment under the law in violation of section 9(1). A law or conduct will violate section 9(1) if the differentiation does not have a legitimate purpose (is arbitrary) and if there is no rational connection (irrational conduct) between the differentiation and the purpose. In *Prinsloo*,²¹⁵ the Constitutional Court explained this principle as follows:

“Accordingly, before it can be said that mere differentiation infringes s 8 [of the Interim Constitution] it must be established that there is no rational relationship between the differentiation in question and the government purpose which is proffered to validate it. In the absence of such rational relationship the differentiation would infringe s 8.”²¹⁶

The level of application of section 9(1) to test the constitutional validity of differentiation has decreased considerably since the Constitutional Court’s development of a general rationality requirement, stemming from the rule of law in section 1 of the Constitution. In *Pharmaceutical Manufacturers*, the Constitutional Court held that all exercise of public power, whether in the form of law or conduct, must be rational—

“it is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.”²¹⁷

The rationality requirement of section 9(1) is specific in that it outlaws specifically arbitrary differentiation, and not arbitrariness in general. Unlike section 9(1), the general requirement of rationality imposed by the rule of law in section 1 of the Constitution is not necessarily triggered by differentiation. There is, in other words, no need for an applicant to show that a law or conduct results in a differentiation between persons or groups of people in order to challenge the rationality of the law or conduct. In terms of section 9(1), rationality is a sub-category of the broader rule-of-law rationality. Therefore, once the rationality test in pursuit of section 1 is finalised, there is no need to again consider the rationality of law or conduct in terms of section

²¹⁵ As above.

²¹⁶ As above para [26].

²¹⁷ *Pharmaceutical Manufacturers* (note 78 above) para [85]. Also see *New National Party* (note 64 above) para [84].

9(1).²¹⁸

In order to illustrate the above, the Constitutional Court in *Harksen*²¹⁹ delineated the stages of an inquiry into a violation of the equality clause as follows: Firstly, does the challenged law or conduct differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not, then there is a violation of section 9(1). Even if it does bear a rational connection, it might nevertheless amount to unfair discrimination. This necessitates a second question: Does the differentiation amount to unfair discrimination? This requires a two-phase analysis: (1) Does the differentiation amount to “discrimination”? If it is on a specified ground listed in section 9(3), then discrimination is established. If it is not on a specified ground, then the assessment will depend on whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious matter; and (2) If the differentiation amounts to “discrimination”, does it amount to “unfair discrimination”? If it has been found to be on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will (now in pursuance of section 9(5)) have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in a similar situation. If, at the end of this stage of the inquiry, the differentiation is found not to be unfair, then the conclusion will be that there was no violation of subsections 9(3) and (4). If the discrimination is found to be unfair, then a determination will have to be made as to whether the provision can be justified under the limitation clause in section 36 of the Constitution.²²⁰

The *Harksen* test essentially means that there is a preliminary inquiry as to whether the impugned provision or conduct differentiates between people or categories of people. This is a threshold test. If there is no differentiation, then there is no violation of any part of section 9. That concludes the inquiry. However, if a provision or conduct does differentiate, then a second stage of the analysis is necessitated. The first phase concerns the right to equal treatment and equality before the law in section 9(1). It tests whether the law or conduct has a rational basis, thus whether there is a rational connection between the differentiation in question and a legitimate

²¹⁸ See *Bel Porto School* (note 51 above) para [120] in which the court held that conduct found rational in the context of rule of law rationality is not irrational for purposes of s 9(1).

²¹⁹ *Harksen* (note 165 above).

²²⁰ As above para [53].

governmental purpose that it is designed to further or achieve equality. If the answer to this is negative, then the impugned law or conduct violates section 9(1), and it fails at the first stage. If, however, the differentiation is shown to be rational, then the second phase of the inquiry is activated. A differentiation that is rational may nevertheless be unfair discrimination under section 9(3) or (4).

In respect of the “rational connection” test, the court will evaluate the reasons given by the government for a law that differentiates in order to determine whether the purpose of the law is legitimate. It will then consider whether there is a rational relationship between the purpose of the law and the differentiation imposed by the law. The court may not inquire into the availability of other more suitable methods of achieving the purpose.²²¹

Discrimination is a specific form of differentiation. Unlike “mere differentiation”, discrimination is differentiation on illegitimate grounds (the “listed grounds”).²²² The Constitutional Court has held that differentiation on grounds that are analogous to those listed in section 9(3) (the “analogous grounds”) will also constitute discrimination. An analogous ground is one that is “based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them seriously in a comparably serious manner”.²²³

The difference between the listed grounds and the analogous grounds is that differentiation on one or other of the listed grounds is presumed to be unfair discrimination. Differentiation on an analogous ground, on the other hand, is not presumed to be discrimination, but must be shown by the applicant to be unfair discrimination. In the event of a listed ground, the applicant is only required to show that the differentiation is based on one or other of the listed grounds. Discrimination on a listed ground is presumed unfair. Hence, it is not required to prove that the discrimination on a listed ground is unfair. Where the discrimination is on an analogous ground, the applicant has to prove the unfairness of the discrimination by showing that it impairs his or her fundamental dignity or impacts him or her a material manner.²²⁴

²²¹ *Jooste v Score Supermarket Trading (Pty) Ltd* 1999 (2) SA 1 (CC) para [17].

²²² S 9(3) of the Constitution.

²²³ *Harksen* (note 165 above) para [46].

²²⁴ S 9(5) of the Constitution provides that discrimination on one or more of the grounds listed in s 9(3) is unfair “unless it is established that the discrimination is fair”.

In *Hugo*,²²⁵ the President granted a remission of sentence to all mothers who were in prison at the time and who had children under the age of twelve years. The respondent, a prisoner who was the father of a child under twelve, argued that the President's order unfairly discriminated against him on the basis of gender. The court found that the President's act constituted discrimination on two grounds, namely "sex, coupled with parenthood of children below the age of 12".²²⁶ The first of these was a listed ground. This means that the act should be considered unfair discrimination unless the contrary is proved.

The majority of the court held that, in South African society, mothers are primarily responsible for nurturing and rearing children. This imposes a tremendous burden on women and is one of the root causes of women's inequality in society. Thus, it could not be argued that the decision not to afford male prisoners the same opportunity impaired their sense of dignity as human beings or their sense of equal worth. Further, the President's act was to achieve a worthy and important societal goal. It was designed to benefit three groups of prisoners, namely disabled prisoners, young people, and mothers of young children, as an act of mercy. The fact that all these groups were regarded as particularly vulnerable in our society, and that in the case of the disabled and young mothers, belonged to groups who had been victims of discrimination in the past, weighed with the court in concluding that the discrimination was not unfair. The discrimination was against a class of individuals (fathers) who had not historically been subject to disadvantage.²²⁷

The equality clause does not prohibit discrimination *per se*; it prohibits unfair discrimination. The important implication of this is that not all discrimination is unfair. Fairness is therefore a moral concept that distinguishes legitimate from illegitimate discrimination.²²⁸ The determining factor in establishing unfair discrimination is the impact of the discrimination on its victim.²²⁹ Unfair discrimination "principally means treating people differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity".²³⁰ The concept of dignity is central to understanding unfair discrimination. Unfair discrimination is differential treatment that is hurtful or demeaning and where, for no good reason, some people are regarded

²²⁵ *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) (hereafter referred to as *Hugo*).

²²⁶ As above paras [31], [39] and [40].

²²⁷ As above.

²²⁸ Albery (2002) 105.

²²⁹ *Harksen* (note 165 above) paras [50] and [51]. Also see *Walker* (note 165 above) paras [47] – [81].

²³⁰ *Prinsloo* (note 103 above) para [31].

as inferior or incapable, or less deserving of respect than others. It also occurs when law or conduct perpetuates or does nothing to remedy existing disadvantage and marginalisation.

The following factors must be taken into account in determining whether discrimination has an unfair impact:²³¹ (1) The position of the complainants in society and whether they had been victims of past patterns of discrimination. Differential treatment that burdens people in a disadvantaged position is more likely to be unfair than burdens placed on those who are relatively well off; (2) The nature of the discriminating law or action and the purpose sought to be achieved by it. An important consideration would be whether the primary purpose of the law or action is to achieve a worthy and important societal goal; (3) The extent to which the rights of the complainant have been impaired and whether there has been an impairment of his or her fundamental dignity.²³²

In principle, both unfair discrimination and differentiation without a rational basis can be justified as limitations of the right to equality in terms of section 36 of the Constitution. This is a general limitation clause contained in the Bill of Rights. The clause applies generally to all the rights listed in the Bill of Rights.²³³ This requires a two-stage process of analysis. If it is argued that conduct or a provision of the law infringes a right in the Bill of Rights, it will first have to be determined whether that right has in fact been infringed. The second stage commences once it has been shown that a right had been infringed. The respondent (usually the state) is required to show that the infringement is a justifiable limitation of the right.²³⁴ This entails showing that the criteria set out in section 36 are satisfied, namely: the right has been limited by law of general application in a democratic society based on human dignity, equality and freedom.²³⁵ The test for the justifiability of a limitation of right is much more onerous than the rational connection test.

Currie and de Waal opine that in the case of the right to equality, it is difficult in any event to apply the usual two-stage analysis of a right and its limitation as it is unclear whether section 36 can have any meaningful application to section 9. This is because the section 9 rights are qualified by the same criteria as, or criteria similar to those used to adjudicate the legitimacy of

²³¹ *Harksen* (note 165 above) para [52].

²³² As above.

²³³ S 36 of the Constitution.

²³⁴ *Makwanyane* (note 5 above) para [102].

²³⁵ S 36(1) of the Constitution.

a limitation of rights in section 36.²³⁶ For instance, discrimination that has already been characterised as “unfair” because it is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings, can hardly be acceptable in an open and democratic society based on human dignity, freedom and equality.²³⁷ Similarly, it is difficult to imagine how one could justify as “reasonable” a law which differentiates for reasons not rationally related to a legitimate government purpose and which is therefore arbitrary.²³⁸

However, the Constitutional Court has held that it is neither desirable nor feasible to perform both stages of the inquiry. The first-stage rational basis inquiry would be “clearly unnecessary” where a court holds that the discrimination is unfair and unjustifiable. Therefore, in cases in which a court finds that a law or conduct unjustifiably infringes section 9(3) or (4), there is no need to first consider whether the law or conduct is a violation of section 9(1).²³⁹

Consequently, section 9 identifies three ways in which a law or conduct might differentiate between people or categories of people. First, there is what the Constitutional Court terms “mere differentiation” which, while it treats some people differently, does not amount to discrimination. Mere differentiation will fail the section 9(1) test unless it has a rational connection to a legitimate government purpose. Secondly, there is differentiation which amounts to unfair discrimination prohibited by section 9(3) and (4). Even where there is a rational connection between differentiation and a legitimate government purpose, the differentiation will still violate the equality clause if it amounts to unfair discrimination. Thirdly, there is the category of law or conduct called fair discrimination, namely law or conduct that discriminates but does not do so unfairly, taking into account “the impact of the discrimination on the complainant and others in his or her situation”.

Further, it is not necessary that a law or conduct which has a discriminatory effect was intended

²³⁶ Currie and de Waal (2016) 218.

²³⁷ *S v K* 1997 (9) BCLR 1283 (C) para [30].

²³⁸ *Gay and Lesbian Equality I* (note 68 above) paras [56] and [59]. The court held that there is no rational connection between an objective of protecting family life and the exclusion of gay and lesbian couples from immigration legislation promoting family unity. The legislation could not be justified under s 36 for the same reason. Also see *Van der Merwe v Road Accident Fund* 2006 (4) SA 230 (CC) para [63]. The court stated: “The lack of a legitimate purpose renders, at the outset, the limitation unjustifiable”.

²³⁹ See *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* (CCT 11/98) [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 (9 Oct 1988) (CC) (hereafter referred to as *Gay and Lesbian Equality 2*) para [18].

to discriminate.²⁴⁰ The applicants have only to demonstrate that they were unfairly discriminated against but not that the unfair discrimination was intentional.²⁴¹ A requirement to prove intent would place an onerous burden of proof on an applicant, particularly in cases where indirect discrimination is alleged.

While intent to discriminate is not a condition to prove discrimination, intention to discriminate is relevant to determine whether the discrimination has been unfair. One of the factors determining whether discrimination has an unfair impact is the purpose of the conduct or action and whether “its purpose is manifestly not directed, in the first instance, at impairing the complainants ... but is aimed at achieving a worthy and important societal goal”.²⁴² Conduct or action that is committed with the intent to discriminate is more likely to be regarded as unfair than conduct or action that lacks intent to be discriminatory.²⁴³

3.5.2 Substantive Equality and Affirmative Measures

The Constitution not only provides for the right to equality and the right not to be unfairly discriminated against, but also for the “achievement of equality”.²⁴⁴ The achievement of equality is also incorporated as a founding value of the Constitution.²⁴⁵ The Constitution imposes a positive duty on the state to protect and promote the achievement of equality;²⁴⁶ a duty which also binds the judiciary.²⁴⁷

A particular understanding of equality is envisaged by the incorporation into section 9(2) of “legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination”. These measures, referred to as “restitutionary measures” or “affirmative action”, may be perceived to be measures to promote the achievement

²⁴⁰ *Walker* (note 165 above) para [43].

²⁴¹ See *Gay and Lesbian Equality 1* (note 68 above) para [68]. The provisions of the Aliens Control Act 96 of 1991 granted a benefit to married persons. In doing so, it excluded homosexual partners from the benefit. It is unlikely that the exclusion was intentional, but the legislature’s discriminatory intention or lack of it is irrelevant. The court found the provision irrational and that it unfairly discriminated against homosexual partners.

²⁴² As above [52].

²⁴³ *Walker* (note 165 above) para [44].

²⁴⁴ S 9(2) of the Constitution.

²⁴⁵ As above s 1(a).

²⁴⁶ As above s 7(2).

²⁴⁷ *Van Heerden* (note 4 above) para [24].

of equality.²⁴⁸

According to the Constitutional Court in *Gay and Lesbian Equality 2*, this provision for measures to achieve equality in section 9(2) recognises a conception of “remedial” or “restitutionary equality”:

“Past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely...One could refer to such equality as remedial or restitutionary equality.”²⁴⁹

According to the Constitutional Court, the Constitution can be described as a “transformative constitution”.²⁵⁰ This requires an understanding that the constitutional value of equality is a process towards the goal of achieving an equal society.²⁵¹ In the course of this process and in pursuing transformation, unequal treatment may have to be tolerated. In *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Tourism and Others*,²⁵² the Constitutional Court stated—

“... transformation is a process...The measures that bring about transformation will inevitably affect some members of the society adversely, particularly those coming from the previously advantaged communities ... What is required, though, is that the process of transformation must be carried out in accordance with the Constitution.”²⁵³

Inevitably, the adoption of affirmative action measures will give rise to tension between certain constitutional rights and values, as is evident in the abundance of divergent Constitutional Court judgements handed down in these matters.²⁵⁴ Due to the “transformation tensions” that may emerge as a result of weighing up opposing rights and interests, the Constitutional Court

²⁴⁸ As above para [28].

²⁴⁹ *Gay and Lesbian Equality 2* (note 239 above) paras [60] and [61].

²⁵⁰ *Barnard* (note 15 above) para [29]. Also see *Mdeyide* (note 196 above) para [125]; *King* (note 80 above) paras [166], [194], [202], [218], [219], [224] and [244]; and *Solidarity obo Members v Barloworld Equipment Southern Africa and Others* (CCT 102/21) [2022] ZACC 15; (2022) 43 ILJ 1757 (CC); [2022] 9 BLLR 779 (CC); 2023 (1) BCLR (CC) (6 May 2022) paras [7], [10]-[12], [18], [29], [30], [47]-[49], [51]-[54], [60] and [61].

²⁵¹ *Van Heerden* (note 4 above) para [25] in which the Constitutional Court stated that “our Constitution heralds...the start of a credible and abiding process of reparation for past exclusion, disposition and dignity...”.

²⁵² 2004 7 (4) SA 490 (CC).

²⁵³ As above para [74].

²⁵⁴ See *Van Heerden* (note 4 above) paras [78], [111] and [136]; *Barnard* (note 15 above) paras [110] and [159]; and *Insolvency Practitioners* (note 210 above) para [85].

cautioned that measures to promote equality should be implemented in a cautionary manner as required within an egalitarian constitutional environment.²⁵⁵ The court further forewarned that “we must be careful that the steps taken to promote substantive equality do not unwittingly infringe the dignity of other individuals – especially those who were themselves previously disadvantaged”.²⁵⁶

The Constitutional Court was called on early in our constitutional dispensation to adjudicate on matters of affirmative measures within the realm of equality, more specifically substantive equality. Consequently, a large body of equality case law emanates from judgements delivered by the Constitutional Court in terms of section 8 of the Interim Constitution as predecessor to section 9 of the present Constitution. Due to the similarity of the two provisions, the Constitutional Court’s interpretation of section 8 of the Interim Constitution will apply to the Constitution.²⁵⁷

In one of the first cases, *Brink*,²⁵⁸ the Constitutional Court directly considered the equality clause of the Interim Constitution and endorsed the norm of substantive equality. The court expressed itself in broad terms on the interrelationship between affirmative action, equality and the right to protection against unfair discrimination. The court held that in light of the long record of systemic inequality in South Africa, the equality guarantee provided for by the Constitution should be read as a “product of our particular history”.²⁵⁹

In *Brink*, given the enduring legacy of inequality, the court explained that the equality clause has a dual function. Its “primary purposes” are to proscribe discrimination against people who are members of disfavoured groups and “to permit positive steps to redress the effects of such discrimination”.²⁶⁰ The court considered the relationship between an affirmative action policy aimed at favouring disadvantaged groups and those policies that fall within the ambit of section 8(3)(a) of the Interim Constitution which may be the subject of an unfair discrimination challenge in terms of section 8(2). In this regard, O’Regan J suggested *obiter*, that such a differential measure is not subject to an unfair discrimination challenge in terms of section 8(2) of the Interim

²⁵⁵ *Barnard* (note 15 above) para [30].

²⁵⁶ As above para [31].

²⁵⁷ *Prince v President, Cape Law Society* 2001 (2) SA 388 (CC) paras [36] and [38]; and *Walker* (note 165 above) para [12].

²⁵⁸ *Brink* (note 10 above).

²⁵⁹ As above para [40].

²⁶⁰ As above paras [41] – [42].

Constitution.²⁶¹

The next judgement of importance in the early development of substantive equality is *Hugo*.²⁶² Although the concept of “substantive equality” was not explicitly applied in *Hugo*, Goldstone J nevertheless interpreted section 8 of the Interim Constitution by differentiating between a substantive and formal understanding of equality. With specific reference to section 8(3)(a) of the Interim Constitution, he emphasised the need to develop a concept of unfair discrimination which recognises that although “the ultimate goal is the creation of a society which affords each human equal treatment on the basis of equal worth and freedom, such a society cannot be achieved through the insistence upon identical treatment in all circumstances”.²⁶³

The *Hugo* judgement adopted a different approach from that applied in *Brink* in respect of the relationship between affirmation action measures and the right to protection against unfair discrimination. The imposer of the impugned affirmative action measure was, according to *Hugo*, explicitly required to show that the impact on those excluded from its benefits was not unfair. This conferral of the onus on the imposer in *Hugo* implies that affirmative action measures do not escape the onus to prove fairness of a discriminatory measure.²⁶⁴

In *Gay and Lesbian Equality 2*,²⁶⁵ the Court directly addressed the relationship between the two separate sub-clauses in section 9(2) of the Constitution, namely the promotion of substantive equality sub-clause and the affirmative action (remedial) sub-clause. Here the court recognised, by interpreting section 9(2), that due to the history of South Africa, mere prospective or probable non-discrimination would be inadequate to deal sufficiently with the continuous effects of past discrimination. Therefore, the first phrase (“equality includes the full and equal enjoyment of all rights and freedoms”) should be interpreted in conjunction with the need to develop measures to achieve equality stated in the second sub-clause. The court consequently recognised the necessity for remedial or restitutionary measures as a requirement of substantive rather than formal equality.²⁶⁶ Ackerman J explains the relationship between the two sub-clauses of section 9(2) of the Constitution as follows:

²⁶¹ As above para [44].

²⁶² *Hugo* (note 225 above).

²⁶³ As above para [41].

²⁶⁴ As above paras [39] – [41].

²⁶⁵ *Gay and Lesbian Equality 2* (note 239 above).

²⁶⁶ As above paras [60] – [61].

“Section 9 of the 1996 Constitution, like its predecessor, clearly contemplates both substantive and remedial equality. Substantive equality is envisaged when section 9(2) unequivocally asserts that equality includes ‘the full and equal enjoyment of all rights and freedoms.’ The State’s further obliged ‘to promote the achievement of such equality’ by legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination, ‘which envisages remedial equality’.”²⁶⁷

A distinction between formal and substantive equality suggests that formal equality means sameness of treatment. The law must treat individuals in the same circumstances the same. Substantive equality, on the other hand, requires the law to ensure equality of outcome and tolerates disparity of treatment to achieve this goal.²⁶⁸ Thus, formal equality merely requires that all persons are equal bearers of rights. Inequality, in terms of this view, is an anomaly that can be overcome by granting the same rights and entitlements to all in accordance with the same “neutral” norm or standard. Formal equality disregards actual social and economic disparities between groups and individuals. Substantive equality, in turn, requires an examination and consideration of the actual social and economic conditions of groups and individuals in society in order to determine whether the Constitution’s commitment to equality is being sustained. The results or effects (substance) of a particular rule are highlighted rather than its mere form.²⁶⁹

In comparing formal versus substantive equality in the context of the principles and purposes of the Constitution and the historical burden of inequality that it seeks to overcome, a formal understanding of equality risks the equality commitments of the Constitution.²⁷⁰ A substantive conception of equality, on the other hand, reinforces these fundamental values. A purposive approach to constitutional interpretation means that section 9 must be read as premised on a substantive conception of equality. The Constitutional Court expounded as follows:

“We need ... to develop a concept of unfair discrimination which recognizes that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved.”²⁷¹

²⁶⁷ As above para [62].

²⁶⁸ *Hugo* (note 225 above) para [41].

²⁶⁹ *Gay and Lesbian Equality 2* (note 239 above) paras [60] and [62].

²⁷⁰ *Van Heerden* (note 4 above) para [26].

²⁷¹ *Hugo* (note 225 above) para [41].

In the landmark case of *Van Heerden*²⁷² regarding the affirmative action clause in section 9(2) of the Constitution, the Constitutional Court confirmed that positive measures in our equality jurisprudence are an integral part of substantive equality. The *Van Heerden* judgement involved a dispute of unfair discrimination based on race and political affiliation as a consequence of different pension fund benefits implemented for different groups or categories of parliamentarians.²⁷³

According to Moseneke J in the majority judgement, positive measures should not be subject to the test of presumptive unfairness for discrimination under section 9(3) and (5) but should be evaluated against the three criteria set in section 9(2). The test asks whether such measures (1) target persons or categories of persons who have been disadvantaged by unfair discrimination; (2) are designed to protect or advance such persons or categories of persons; and (3) promote the achievement of equality. Measures that meet these three criteria are not presumed to be unfair. Only in instances where a measure does not meet the three criteria set in section 9(2), should the unfair discrimination inquiry set out in *Harksen* be applied.²⁷⁴

The court in *Van Heerden* explained the difference between formal and substantive inequality as well as its relation to discrimination. A major constitutional objective is the creation of a non-racial and non-sexist egalitarian society underpinned by human dignity, the rule of law and a democratic ethos and human rights. From this emerges a conception of equality. This conception of equality goes beyond mere formal equality and mere non-discrimination which requires identical treatment whatever the “starting point or impact”.²⁷⁵ The substantive notion of equality, according to *Van Heerden*, recognises that besides uneven race, class and gender attributes of society, other levels and forms of social differentiation and systematic underprivilege still persist. The Constitution permits the dismantling of such differentiation and the prevention of the creation of new patterns of disadvantage. It authorises measures to protect and advance persons or categories of persons disadvantaged by unfair discrimination.²⁷⁶ Such measures are not in themselves a deviation from, or “invasive of, the right to equality guaranteed by the Constitution”. They are not “reverse discrimination or positive discrimination”, but “integral to the reach of our

²⁷² *Van Heerden* (note 4 above).

²⁷³ As above para [11].

²⁷⁴ As above paras [27] and [36].

²⁷⁵ As above para [26].

²⁷⁶ As above para [27].

equality protection”.²⁷⁷

The court further explained that a comprehensive understanding of the Constitution’s conception of equality “requires a harmonious reading of the provisions of Section 9”.²⁷⁸ In other words, the court explained, the provisions of section 9(1) and 9(2) are “complementary”; both contribute to the constitutional goal of achieving equality to ensure full and equal enjoyment of all rights. A disjunctive or oppositional reading of the two subsections would, according to the court, “frustrate the foundational equality” and “broader social justice” objectives of the Constitution.²⁷⁹

Van Heerden held that measures to promote equality in terms of section 9(2) are both “necessary and mutually reinforcing” and the Constitution embraces for good reason a substantive conception of equality inclusive of measures to redress existing inequality. The court further held that in the absence of a positive commitment to progressively eradicate socially constructed barriers and to root out systematic or institutionalised underprivilege, the “constitutional promise of equality before the law and its equal protection and benefit must, in the context of our country, ring hollow”.²⁸⁰ Therefore, legislative and other measures that fall within the requirements of section 9(2) are “not presumptively unfair”. Remedial measures are not a “derogation form, but a substantive and composite part of the equality protection”. Their primary objective is to promote the achievement of equality and therefore “differentiation aimed at protecting or advancing persons disadvantaged by unfair discrimination is warranted” on condition that the measure is shown to conform to the internal test set by section 9(2).²⁸¹

The court further held that restitutionary measures, even if they are based on any of the grounds of discrimination listed in section 9(3), must pass muster under section 9(2) and cannot be presumed to be unfairly discriminatory. To hold otherwise, the court explained, “would mean that the scheme of section 9 is internally inconsistent” or that the provisions of section 9(2) “are a mere interpretative aid or even surplusage”. Such presumptive unfairness would also unduly require the judiciary to second-guess the legislature and executive concerning the appropriate measures to overcome the effect of unfair discrimination.²⁸²

²⁷⁷ As above para [30].

²⁷⁸ As above para [28].

²⁷⁹ As above para [30].

²⁸⁰ As above para [31].

²⁸¹ As above para [32].

²⁸² As above para [33].

Contrary to the non-unfair discriminative position held in respect of any measure to promote equality, the court held that in each inequality claim the situation of the complainants in society; their history and vulnerability; the history, nature and purpose of the discriminatory practice; and whether it improves or adds to group disadvantage in real life context, must be scrutinised in order to determine its fairness or whether it otherwise conforms to the values of the Constitution. In the assessment of fairness or conformity to the values of the Constitution, a flexible “situation-sensitive” approach is required due to shifting patterns of discrimination. The court explained that such a discrimination inquiry requires several stages as set out in *Harksen*.²⁸³

In *Van Heerden*, the court suggests that an affirmative measure is not subject to a conventional rationality test, but rather to the three criteria set by section 9(2) as an internal constitutional test. It is also not subject to a presumption of unfair discrimination, but a constitutional fairness test which shifts the onus to prove fairness away from the sponsor of an affirmative measure. This approach in *Van Heerden* further suggests that positive or affirmative measures are instead primarily subject to an evaluation of purpose and effects, guided by the values underpinning the right and testing the measure’s ability to overcome disadvantage, rather than the impact it may have on individual dignity.

The court in *Van Heerden* laid down the requirements for each one of the three criteria for validity in terms of section 9(2) separately. Firstly, the persons or categories of persons who have been disadvantaged by unfair discrimination as the targeted beneficiaries of any affirmative measure, must be shown to have been disadvantaged by unfair discrimination.²⁸⁴ The court pointed out that the starting point in any equality analysis is almost always a comparison between affected classes. It is often difficult, impractical and undesirable to design a legislative programme with pure differentiation demarcating the affected classes exactly. Within each class there may indeed be exceptional “hard cases” or “windfall beneficiaries”. However, these anomalies will not affect the legal efficacy of such a programme. The distinction must be measured against the majority and not the exceptional and problematic minority of beneficiaries to which it applies. Therefore, the validity of an affirmative action programme should be judged by whether an overwhelming majority of the beneficiaries of the favoured class persons are designated as

²⁸³ As above para [27].

²⁸⁴ As above para [38].

disadvantaged by unfair discrimination.²⁸⁵

With regard to the second criterion, namely whether the measure is “designed to protect or advance” those disadvantaged by unfair discrimination, remedial measures are directed at an envisaged future outcome. Although it is difficult to project the future, remedial measures must be capable of attaining the desired outcome. If a remedial measure is arbitrary, capricious or displays naked preference, it is not designed to achieve the constitutionally authorised objective. Moreover, if it is clear that a measure is not reasonably likely to benefit those disadvantaged by unfair discrimination, it would not constitute a measure contemplated by section 9(2).²⁸⁶ To set a requirement of a remedial measure to establish a precise prediction of a future outcome is to set a standard too high and defeats the objective of section 9(2).²⁸⁷

In respect of the second criterion, section 9(2) does not prescribe a “necessity test”. Therefore, it is not necessary that a remedial measure disfavors one class in order to uplift another. A necessity or purpose to prejudice or penalise others would require those who implement such measures to establish that there is no less onerous way in which the remedial objective may be achieved. Prejudice that may arise from the implementation of an affirmative measure, the court explained, is incidental and not targeted.²⁸⁸

With regard to the third and last requirement that the measure “promotes the achievement of equality”, the question is whether a measure will in the “long run” promote the achievement of equality. This requires an appreciation of the effect of the measure in the context of our broader society. It should be accepted that the achievement of this goal may often come at a price for those who were previously advantaged.²⁸⁹ In order to determine if a measure will in the “long term promote equality”, the constitutional vision of a non-racial, non-sexist society in which each person is recognised and treated as a human being of equal worth and dignity within the recognition of “diversity”, must be borne in mind. In particular, the court cautioned, a measure should not constitute an “abuse of power” or “impose such substantial and undue harm on those excluded” from its benefits that the long-term constitutional goal is threatened.²⁹⁰

²⁸⁵ As above paras [39] and [40].

²⁸⁶ As above para [41].

²⁸⁷ As above para [42].

²⁸⁸ As above para [43].

²⁸⁹ As above para [44].

²⁹⁰ As above.

The three separate minority dissenting judgements delivered in *Van Heerden* by Mokgoro J, Ngcobo J and Sachs J, respectively, agreed with the final conclusion of the majority judgement. However, they ascended a different route taken in achieving the same goal. Mokgoro J, in the first dissenting judgement, held that section 9 of the Constitution must be considered as a whole and agreed with the majority judgement that an affirmative measure should meet all the requirements of section 9(2), and that such a measure should not be subject to a fairness test in terms of section 9(3). She further cautioned against the elimination and omission of certain provisions of section 9, such as the requirement for fairness. Such elimination or omission, according to Mokgoro J, has the potential of disqualifying certain affirmative measures, which would be contrary to the constitutional aim of achieving substantive equality. She further held that although an affirmative measure may not meet all the requirements in terms of section 9(2), such measure may, despite being found to be discriminatory in nature, nevertheless be deemed not to be unfair and consequently pass the constitutional equality test in terms of section 9(3).²⁹¹ Thus, according to Mokgoro J, a test for the constitutional validity of an affirmative measure should include a test of fairness.

Ngcobo J, in the second dissenting judgement, held that the principles underlying remedial equality do not operate only in the context of section 9(2). He further held that the constitutional validity of the impugned rules must still be determined in light of the equality guarantee, and involves three basic inquiries, namely (1) whether the impugned rules make a differentiation that bears a rational connection to a legitimate government purpose, and if so (2) whether the differentiation amounts to unfair discrimination, and if so (3) whether the impugned rules can be justified under the limitation's provisions. If the differentiation bears no such rational connection, there is a violation of section 9(1), and the second inquiry does not arise. Similarly, if the differentiation does not amount to unfair discrimination, the third does not arise".²⁹² The test suggested by Ngcobo J thus coincides with the test laid down in *Harksen*²⁹³ which includes the consideration or weighing up of unfair discrimination.

Sachs J, in the third dissenting judgement, observed as follows at the commencement of his judgement in relation to the majority and the other minority judgements:

²⁹¹ As above paras [75] – [90].

²⁹² As above paras [109] – [111].

²⁹³ *Harksen* (note 165 above) para [53].

“Paradoxical as it may appear, I concur in the judgement of Moseneke J on the one hand and the respective judgements of Ngcobo J and Mokgoro J on the other, even though they disagree on one major issue and arrive at the same outcome by different constitutional routes. As I read them the judgements appear eloquently to mirror each other. In relation to starting point and formal road travelled, they are opposite.”²⁹⁴

Sachs J went further and explained that subsections 9(2) and 9(3) of the Constitution are not competitive or that the two subsections represent alternative approaches and should rather be seen to be “cumulative, interrelated and indivisible”.²⁹⁵ He held that where different constitutionally protected interests are involved, it is prudent to avoid “categorical and definitional reasoning” and instead opt for “context-based proportional interrelationships, balanced and weighed” according to the fundamental constitutional values applicable to each situation.²⁹⁶ He further underscored the difference between formal equality and substantive equality. Formal equality, according to Sachs J, would require the same treatment for all who find themselves in a similar situation, which is based on a “status-quo-orientated conservant approach” and looks at social situations in a “neutral, colour-blind and gender-blind” way. On the other hand, the substantive approach, according to Sachs J, is not whether the affirmative measure concerned treats all affected the same but rather focuses on whether “it serves to advance or retard the equal enjoyment in practice” of constitutional rights and freedoms. A substantive approach to equality, according to Sachs J, “eschews preoccupation with technical exactitude”; it is “algebraic rather than geometric, relational rather than linear”. He went further and held that the critical factor in evaluating equality and the relationship between constitutionally permitted affirmative measures and the unfairness of such measures is “not sameness or symmetry, but human dignity, a quality which by its very nature prospers least when caged”.²⁹⁷

Sachs J’s argument suggests a discretionary approach depending on the circumstances (different routes), provided that “it serves to advance or retard the equal enjoyment in practice” – thus substantive equality.

The *Van Heerden* judgement evoked various academic comments in respect of the

²⁹⁴ As above para [135].

²⁹⁵ As above para [136].

²⁹⁶ As above para [140].

²⁹⁷ As above paras [142] – [146].

constitutionally informed legal standard to test affirmative measures.²⁹⁸ The four judgements delivered in *Van Heerden* created uncertainty and elicited discussions and commentary about the constitutional normative standard to be applied in respect of affirmative measures. This uncertainty was further exacerbated by the various divergent court judgements delivered in *Barnard*.²⁹⁹

The gist of Ms Barnard's (a white female's) complaint was the fact that she was overlooked for promotion by her employer, the Commissioner of the South African Police Service (SAPS), based on race in terms of the SAPS's affirmative action policy. The objective of the employer's policy was to create race and gender representivity at all occupational levels within the organisation. Ms Barnard was overlooked for the promotion despite the fact that women are included in the Employment Equity Act's definition of designated groups.³⁰⁰ Ms Barnard contended that overlooking her for appointment and promotion constitutes unfair discrimination based on race, not by virtue of the SAPS's employment equity plan *per se*, but rather in the way it is implemented.³⁰¹ The court *a quo*, the Labour Court, finding against the SAPS, predicated its findings on the fact that the SAPS had not on a balance of probabilities discharged the onus of showing that the discrimination was not unfair.³⁰²

The Labour Appeal Court's approach on appeal was to assess the status of the SAPS's Employment Equity Plan (EEP) as a restitutionary measure envisaged in section 9(2) of the Constitution. The balance of assessment in the Labour Appeal Court shifted from the impact the measure has on the complainant (fairness) to whether the EEP and its implementation meet the requirements of an affirmative measure in terms of section 9(2) of the Constitution. The Labour Appeal Court held that because "the essence of restitutionary measures is to guarantee the right to equality", their implementation cannot be subjected to an individual's right to equality.³⁰³ The Labour Appeal Court found that the Commissioner was rationally pursuing the goal of representivity and that overlooking Ms Barnard for appointment did not constitute unfair discrimination in terms of section 6(2)(a) of the Employment Equity Act.³⁰⁴

²⁹⁸ Albertyn *SALJ* (2015) 711-767; Pretorius *SAJHR* (2010) 536-570; and Du Plessis and Pretorius *THRHR* (2017) 391-411.

²⁹⁹ *Barnard* (note 15 above).

³⁰⁰ S 1 of the Employment Act defines designated groups as black people, women and people with disabilities.

³⁰¹ *Barnard* (note 15 above) paras [8] – [14].

³⁰² *Solidarity obo Barnard v South African Police Service* (2010) 31 ILJ 742 (LC) para [43.6].

³⁰³ *South African Police Service v Solidarity obo Barnard* 2013 (3) BCLR 320 (LAC) paras [17] and [20].

³⁰⁴ As above.

Dissatisfied with the judgement in the Labour Appeal Court, the applicant lodged an appeal with the Supreme Court of Appeal.³⁰⁵ Although the Supreme Court of Appeal, with reference to *Van Heerden*, assessed the matter within the overall understanding of substantive equality, restitution, reparation and the pursuance of the constitutional goals of a “non-racial, non-sexist egalitarian society underpinned by human dignity, the [R]ule of [L]aw, a democratic ethos and human rights”, it judged the matter squarely within the realm of unfair discrimination under section 6 of the Employment Equity Act.³⁰⁶

The Supreme Court of Appeal found that the level of scrutiny of positive or affirmative measures must be vigorous and fair, especially as race classifications were central to “the grand apartheid design” and, although necessary, should be used, with care in pursuing and building a fully inclusive society. It consequently found that the SAPS had not discharged the onus of showing that the discrimination was fair, and ultimately concluded that the decision by the Commissioner not to appoint Ms Barnard constituted unfair discrimination.³⁰⁷

The judicial discord in approaches between constitutionally justified affirmative measures and the application of the constitutional equality guarantee in terms of the right not to be unfairly discriminated against, continued unabatedly in the Constitutional Court judgements handed down in *Barnard*.³⁰⁸ This is demonstrated by the four judgements comprising 114 pages delivered in this case. As was the case with *Van Heerden*, all the minority judgements concurred with the seven-judge majority judgement in endorsing a substantive understanding of equality of the Constitution as pivotal for overcoming the legacy of the past and found that positive and restitutive measures are essential in achieving equality and reconciliation.³⁰⁹ They all concurred that the decision not to appoint Ms Barnard was justified. As was the case with *Van Heerden*, the various judgements in *Barnard* differ profoundly in their conceptualisation of the claim and their respective understanding of equality and its underlying principles. They also differ on the level and extent of scrutiny to be applied to positive measures and the nature, degree and extent of justification for such measures.

³⁰⁵ *Solidarity obo Barnard v South African Police Service* (165/2013) [2013] ZASCA 177 (28 Nov 2013) (2014) (2) SA 1 (SCA).

³⁰⁶ As above para [57].

³⁰⁷ As above para [80].

³⁰⁸ *Barnard* (note 15 above).

³⁰⁹ As above paras [36], [59] and [60] – [65].

The range of principles applied by the judgements in *Barnard* varied from the assessment of rationality and reasonableness delivered for the majority by Moseneke J and by Jafta J in one of the minority judgements,³¹⁰ to the assessment of fairness under the Employment Equity Act by Cameron J, Froneman J and Majiedt AJ (Cameron J *et al*) in a separate minority judgement,³¹¹ to an assessment of purpose and impact within the constitutional principles and values as a whole delivered by Van der Westhuizen J in his own minority judgement.³¹²

Barnard was adjudicated by the majority in terms of the Promotion of Administrative Justice Act (PAJA)³¹³ due to Ms Barnard's (the respondent) disagreement with the decision and discretion exercised by the National Commissioner not to appoint her based on the adverse effect it would have on representivity in terms of the SAPS's EEP.³¹⁴ Despite the fact that the EEP was not evaluated as a measure to promote the achievement of equality within the realm of section 9(2) of the Constitution, the majority held, in line with *Van Heerden*, that measures that meet the three criteria set out in section 9(2), do not bear the burden to prove that such a measure is fair. Such measures are "neither unfair nor presumed to be unfair".³¹⁵ In *Barnard*, the majority extended the scope of the first criterion to also include "people who have been susceptible to unfair discrimination".³¹⁶ The court further held that the manner in which restitutionary measures were applied may be challenged because a validly adopted EEP must be put to use lawfully. Such a plan may not be harnessed beyond its lawful limits or applied capriciously or for an ulterior or impermissible purpose.³¹⁷ As a bare minimum, the principle of legality requires that the implementation of a legitimate restitutionary measure must be rationally related to the terms and objectives of the measure, namely a legitimate purpose and nothing else.³¹⁸ The majority further held that restitutionary measures should not constitute "rigid inflexible quotas" or create "absolute barriers" of promotion.³¹⁹

Cameron J *et al* pointed out that the Constitution permits past disadvantages to be taken into

³¹⁰ As above paras [74], [77], [80], [82], [92] and [96].

³¹¹ As above paras [224] – [228].

³¹² As above paras [128], [130], [131], [146] – [149], [164] – [177] and [187].

³¹³ Act 3 of 2000.

³¹⁴ *Barnard* (note 15 above) para [60].

³¹⁵ As above paras [35]–[37].

³¹⁶ As above para [36]. Also see *Gay and Lesbian Equality 2* (note 239 above) paras [25] and [26] in which the court highlighted the susceptibility of gay and lesbian people to unfair discrimination by society.

³¹⁷ *Barnard* (note 15 above) para [38].

³¹⁸ As above.

³¹⁹ As above paras [54] and [62].

account to achieve substantive equality. For reasons of history, racial and gender disadvantages are the most prominent, but they are not the only ones. They do not exclude other signifiers of disadvantage such as social origin or birth and cautioned “not to allow race to become the only decisive factor in employment decisions”.³²⁰ They agreed with the majority that rationality is the “bare minimum” requirement but held further that Ms Barnard’s challenge required a “less differential standard”. A mere deferential standard, as suggested by the majority, would make it difficult to hold that a decision-maker had impermissibly converted a set of numerical targets into quotas or that a decision-maker’s balancing of the interests of the multiple of designated groups was adversely affected by restitutionary measures. The need for a decision-maker to give adequate reasons is particularly important when the decision was based primarily on race or any attribute listed in section 9(3) of the Constitution.³²¹ As Ms Barnard’s complaint was that she was unfairly discriminated against, they held that this imposes a standard different from, and additional to, rationality.³²² They then evaluated the fairness of the implementation of the EEP.³²³ This approach by Cameron J *et al*, suggests a fairness test less onerous than the unfair discrimination test but more onerous than a mere rationality test.

Van der Westhuizen J did not opt for a fairness test, as held by Cameron J *et al*, because in his opinion, fairness is generally used in a “wider” sense and is a “vague” concept.³²⁴ It may also risk internal inconsistency between the provisions of subsections 9(2) and (3) of the Constitution.³²⁵ He opted for a proportionality type of test similar to the factors to be weighed up in terms of section 36 of the Constitution – the limitation of rights clause.³²⁶ Van der Westhuizen J also elucidated the rationality test in respect of the three-pronged (three criteria) test laid down in *Van Heerden* and confirmed by the majority in *Barnard*.³²⁷ Van der Westhuizen J explained that the first two prongs test whether the measure, in its design, is rationally connected to the end it aims to achieve to protect or advance persons, or categories of persons, disadvantaged by discrimination. The focus of the third prong is explained by Van der Westhuizen J to be somewhat different as its focus is not only the measure, but also its implementation. The word

³²⁰ As above paras [79] and [80].

³²¹ As above paras [105] and [106].

³²² As above para [96].

³²³ As above paras [113], [121] and [123].

³²⁴ As above para [159].

³²⁵ As above para [158].

³²⁶ As above paras [162], [166] and [167].

³²⁷ As above para [36].

“achievement” in section 9(2) implies “some effect or impact”. This could hardly be tested without contemplating “some action taken”.³²⁸ The third prong in *Van Heerden*, Van der Westhuizen J further explained, “requires an appreciation of the effect and impact of the measure, more than mere abstract rationality testing is required”.³²⁹ Although rationality is a requirement of the exercise of all public power in terms of the legality principle, the application of the rationality test in respect of the first two criteria and the third criterion will apply to all private or public employers, according to Van der Westhuizen J.³³⁰

Jafta J, in his minority judgement in *Barnard*, concurred with the majority judgement and excluded the fairness test held by Cameron *et al* and the proportionality test held by Van der Westhuizen J as the appropriate standards to assess a restitutionary measure. He described fairness as a “double-edged sword”. This would require determining what is fair in a given case to “account” for “competing interests”.³³¹ Such an approach would, according to Jafta J, undermine the very objective which section 9(2) of the Constitution seeks to achieve.³³² Jafta J then relied on the position held in the Labour Appeal Court in *Barnard* that the “essence of restitutionary measures is to guarantee the right to equality, and their implementation cannot be subjected to an individual’s right to equality”.³³³ He pointed out that the Labour Appeal Court and the Labour Court are specialist courts established to decide labour law matters. Therefore, the development of labour law jurisprudence must begin in those courts. Interference with that jurisprudence would be justified only if those courts were mistaken in the formulation or application of important principles. Jafta J further held that no arguments were brought before the Court in *Barnard*, showing that the Labour Appeal Court was wrong. Jafta J pointed out that the approach followed by the Labour Appeal Court was not based on the application of the proposed standards of fairness and proportionality.³³⁴ He consequently held that by “not appointing Ms Barnard and reserving the post for black officers, the National Commissioner sought to achieve representivity and equity in the Police Service”. This accords with its Employment Equity Plan, is consistent with the purpose of the Employment Equity Act, and its

³²⁸ As above para [143].

³²⁹ As above para [146].

³³⁰ As above para [141].

³³¹ As above para [228].

³³² As above para [229].

³³³ As above para [231].

³³⁴ As above para [232].

“decision cannot constitute unfair discrimination, nor can it be taken to be unfair”.³³⁵

The uncertainty in respect of the concept of substantive equality and its relationship to remedial measures was further exacerbated in the Constitutional Court judgement handed down in *Insolvency Practitioners*.³³⁶ The judgement reaffirmed the position adopted by the majority decision in *Van Heerden*. However, as was the trend in *Van Heerden* and *Barnard*, the *Insolvency Practitioners* case is characterised by a split judgement underscoring the prevailing conceptual difficulty in our equality jurisprudence. Of further significance is that the Constitutional Court, in the *Insolvency Practitioners* matter, incorporated the arbitrariness test as a separate test to the rationally test.

The essence of the dispute in *Insolvency Practitioners* was the implementation of a policy by the appellant (the Minister) to give preference to previously disadvantaged groups in the appointment of Insolvency Practitioners to promote equality in the insolvency practitioner’s (liquidator’s) industry. The appointment of practitioners in terms of the policy postulates a mechanical system where practitioners were appointed as liquidators in sequence from a list divided into various categories, with appointments from some categories more frequently than others. The way in which previously disadvantaged groups were divided into categories created an anomaly that discriminated against certain categories disadvantaged by discrimination in the past.³³⁷

The court, in the *Insolvency Practitioners* case, held that arbitrariness and capriciousness are separate constitutional requirements premised in the rule of law in respect of the exercise of all public power. These requirements should apply in addition to the three criteria set for restitutionary measures contemplated in section 9(2) of the Constitution. The court held that the rule against arbitrariness and capriciousness applies to the exercise of all public power, just as the exercise of such power must meet the rationality standard.³³⁸ This rule, according to the court, should also apply to the exercise of public power in respect of an affirmative measure.

The court went further and distinguished between arbitrariness and rationality and held that the

³³⁵ As above para [227].

³³⁶ *Insolvency Practitioners* (note 210 above).

³³⁷ As above paras [19]-[26], [32], [41] and [44].

³³⁸ As above para [47].

Constitution requires that every action taken in exercising public power must be underpinned by a plausible reason. Such reasons must justify the action taken.³³⁹

In respect of rationality, the court held that there may be an overlap between the rule against arbitrariness and the requirement for rationality although these are separate concepts against which the exercise of public power is tested. The court explained that arbitrariness is established by the absence or presence of reasons which do not justify the affirmative action measure taken. Rationality, on the other hand, the court held, does not speak to the justification of the action but rather to determining the link between the purpose and the means chosen to achieve such purpose. Rationality, the court further held, is a standard lower than arbitrariness.³⁴⁰ The court explained the application of the rationality and arbitrariness test in respect of the three criteria laid down in *Van Heerden*. In respect of the second criterion, the court in *Insolvency Practitioners* pointed out that according to *Van Heerden*, measures that are arbitrary, capricious or display naked preference could not be designed to achieve a constitutionally authorised purpose. The court held, however, that although this statement in *Van Heerden* is correct, it must not be read as incorporating into the second criterion the demand that “a restitutionary measure should not be arbitrary or capricious”. The court explained that these are in any event separate requirements of the Constitution which are not merely applicable to restitutionary measures contemplated in section 9(2) of the Constitution. They apply to the exercise of all public power in general, just as the exercise of public power must meet the rationality standard.³⁴¹

The court further explained that there is an overlap between the second and third criterion laid down in *Van Heerden*. The second criterion requires that a measure’s design must be such as to protect and advance those who were disadvantaged by unfair discrimination, and that the measure must be “reasonably capable of attaining the desired outcome”. The outcome here in respect of the third criterion is the achievement of equality.³⁴²

This position held in *Insolvency Practitioners* coincides with Van der Westhuizen J’s explanation

³³⁹ As above para [53].

³⁴⁰ As above para [55]. Also see Budlender and Mbikiwa *SAJEJ* (2019) 78-81 who criticized the *Insolvency Practitioners* judgement in respect of the court’s contention that rationality is not concerned with justification and that arbitrariness is a separate and higher standard than rationality. They argue, with reference to *Pharmaceutical Manufacturers* (note 78 above) that rationality involves justification to justify a rational means and that rationality and arbitrariness are two sides of the same coin.

³⁴¹ *Insolvency Practitioners* (note 210 above) [47].

³⁴² As above para [44].

in *Barnard* that the rationality test in respect of the first two criteria and the third criterion requires an outcome of substantive equality. The court ultimately held that the policy announced by the Minister of Constitutional Development for the appointment of Insolvency Liquidators “fails to prove that the policy is reasonably likely to achieve equality, which means that there is no proof of a rational link between the policy and the purpose sought to be achieved”.³⁴³

The effect of the *Insolvency Practitioners* judgement on measures to promote equality in terms of section 9(2) of the Constitution is that the tests for arbitrariness and capriciousness are not specifically provided for as a legality requirement for restitutionary measures in section 9(2) of the Constitution. However, this test (legality requirement) should, by virtue of its application to the exercise of all public power and the rule of law in terms of section 1(a) of the Constitution, also apply to the exercise of public power in respect of restitutionary measures which meet the three criteria set in section 9. The connection between the second and third criterion requires a specific outcome to achieve equality – therefore substantive equality.

To summarise, the requirements for a restitutionary measure to be constitutionally permissible is regulated by the internal test for section 9(2) of the Constitution. From this internal test, the Constitutional Court in *Van Heerden*, which was later confirmed in *Barnard*, developed the three criteria test. A restitutionary measure which meets these three criteria, set in *Van Heerden*, is not unfair or presumed to be unfair, as is the case with the test for unfair discrimination in terms of section 9(3), (4) and (5).

The application of the test for affirmative action measures set in *Van Heerden*, was the subject matter of several dissenting High Court, Supreme Court of Appeal and minority judgements in *Van Heerden* and *Barnard*. Although these dissenting and minority judgements are non-binding, they illustrate the difficulty our courts have in determining a normative standard for a restitutionary measure, especially in the absence of an unfair discrimination test.

The void left by not having an unfair discrimination standard to curtail the extent and effect of an affirmative action or restitutionary measure has, in my assessment, opened our equality jurisprudence for politically motivated judgements as discussed in paragraph 3.6 below.

³⁴³ As above para [58].

A constitutional standard for the implementation of a restitutionary measure that has strongly emerged from the majority judgements in *Van Heerden*, *Barnard* and *Insolvency Practitioners*, is the concept of substantive equality.

As argued in chapter 7, paragraph 7.3.3.5 and 7.4 below, and as subject matter of this research, the B-BBEE programme falls well short of meeting the substantive equality standard of the Constitution. This is largely attributed to the formulation and defining of the beneficiaries of BEE.

3.6 TRANSFORMATION AND THE NOTION OF TRANSFORMATIVE CONSTITUTIONALISM

The term “transformation” is not mentioned in the Constitution, although the Constitutional Court often use this term in the context of the Constitution. In *Bel Porto School*, the Constitutional Court referred to the “process of transformation”³⁴⁴ and in *Barnard* said that the Constitution has a “transformative mission”.³⁴⁵ The term is also used in legislation such as the B-BBEE Act which refers to the objectives of B-BBEE as “economic transformation”.³⁴⁶ If the term is not used in the Constitution, the question arises as to what its origin is and why it figures so prominently in the context of remedial measures contemplated in section 9(2) of the Constitution and legislation. In this context, it is important to distinguish between the political conception of transformation embedded in the ANC ideology, and constitutionally gauged transformation based on the Interim Constitution and 1996 Constitution.

In terms of the ANC’s Constitution, the ANC pursues the objective of an equal society based on the principles of the *Freedom Charter* and the National Democratic Revolution (NDR).³⁴⁷ The ANC’s Constitution does not make any reference to the South African Constitution, although the objective of an equal society is also one of the founding values and rights provided for in the South African Constitution.³⁴⁸ The South African Constitution, viewed holistically, is perceived to be based strongly on the principle of constitutionalism. Constitutionalism restricts state power on the one hand, and on the other hand, it empowers the state to realize socio-economic rights and promote equality. The Constitution provides for a comprehensive catalogue of human rights

³⁴⁴ *Bel Porto School* (note 51 above) para [7].

³⁴⁵ *Barnard* (note 15 above) para [29]. Also see *Insolvency Practitioners* (note 210 above) paras [40] and [50].

³⁴⁶ S 2 of the B-BBEE Act.

³⁴⁷ ANC *African National Congress Constitution* (2017) Rules 2.1 and 2.2.

³⁴⁸ Ss 1(a) and 9(1) and (2) of the Constitution.

and is described as a “standard liberal democratic” constitution.³⁴⁹ The South African Constitution therefore promotes the achievement of equality on a variety of fronts, with – in theory at least – a strong commitment to protect what it aims to achieve, namely rights and equality. In other words, the South African Constitution, understood from a liberal democratic vantage point, endeavours to promote equality by protecting and weighing up all fundamental rights and values of the Constitution.

The ANC pursues equality by means of the NDR as entrenched in its own constitution which requires totalitarian state control and the majoritarian ideal of African Nationalism, an ideal that is hardly compatible with a liberal democratic constitutional system. This requires a specific understanding or interpretation of equality. The ANC’s interpretation of equality requires, according to Stacey, that all people be treated exactly the same. This means that individuals have an equal amount of influence in determining what a good life is and are consequently all forced to adopt and pursue whatever is collectively determined to be a good life, regardless of what might constitute a good life for dissenting individuals.³⁵⁰ This is based on socialist theory that the state should enforce the common good. Those who do not conform to the collective or majoritarian good or character should “be forced to be free” and to live their lives according to “collective decisions to which they actually unknowingly agree”, merely because they “belong to a society with a particular character”. Therefore, the rights of individuals are limited by the right of the collective to decide what the right of equal individuals to liberty is. The ANC’s transformation policies contained in the B-BBEE programme, and the EEA based on the principle of broad representation (representivity), must be seen as society, the majority – “we the people” – taking collective action to transform all aspects of power and society towards an equal, better life for the collective majority to affirm a “national character”.³⁵¹

The constitutional understanding of transformation emanates from the Postscript in the Interim Constitution and the Preamble to the 1996 Constitution. The Postscript stated that the Constitution provided a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a bright future founded on the recognition of human rights, democracy and peaceful co-existence and development of

³⁴⁹ Stacey *Politikon* (2003) 133.

³⁵⁰ As above 134.

³⁵¹ As above 142; and Hudson *Politikon* (2000) 97.

opportunities for all South Africans, irrespective of colour, race, belief or sex.³⁵² The Preamble to the 1996 Constitution iterates in the same vein that “we” recognise the injustices of our past and “adopt this Constitution as the supreme law of the Republic so as to ... heal the divisions of the past ... lay the foundations for a democratic and open society in which government is based on the will of the people” and “every citizen is equally protected by law” and to “improve the quality of life of all citizens”. So, what both South African Constitutions rely on is that the trajectory (transit) from the bad past to a utopian future is via the Constitution.

There is, therefore, a great deal of similarity between the political concept of transformation and the constitutional understanding of transformation. The political concept conceives transformation as the route to an NDR socialist state where the state has totalitarian authority in a classless equal society and individual rights are subservient to majority interests. On the other hand, constitutional transformation, if viewed from a liberal democratic perspective, perceives transition to equality in consequence of the protection of individual rights.

The question is therefore: how can the two forms of transformations, one political and the other constitutional, be connected to ensure that the political objective is achieved within the realm of the Constitution? The answer lies in the transformation of the judiciary and the notion of transformative constitutionalism which reconciles the two concepts.³⁵³

In terms of the NDR, the shortest route to socialism is through a democratic state.³⁵⁴ Democratic instruments such as the Constitution need to be enlisted in the transition to socialism. During the ANC’s National Conference in 2007, the Constitution and the state system were identified as providing the “requisite wherewithal” and “broad canvass” as instruments to implement the objectives of the NDR.³⁵⁵ The highest courts interpret and apply the Constitution. The Constitutional Court is described as the “guardian of our Constitution”, with “exclusive jurisdiction in respect of certain constitutional matters” and “final decisions on those constitutional matters”.³⁵⁶ Through transformation, the notion of “transformative constitutionalism” and the principle of representativity, the judiciary – as an important centre of power – must be

³⁵² Postscript of the Interim Constitution.

³⁵³ See Malan (2019) 198.

³⁵⁴ Slovo *Umsebenzi Discussion Pamphlet* (1988) 6th page. Also see ch 2, para 2.4.3.2 above.

³⁵⁵ *ANC Strategy and Tactics* (2007) paras 75; and ch 2, para 2.5.4 above.

³⁵⁶ *Pharmaceutical Manufacturers* (note 78 above) para [55].

transformed to allow for the appointment of judges to interpret the Constitution according to the ideologies and political convictions of the ANC to give effect to the ideals of the “transformation of society”.³⁵⁷

On 17 February 2003, Mr JH de Lange, as ANC Member of Parliament and Chair of the Justice Portfolio Committee, and later Deputy Minister of Justice, stated in the National Assembly that the transformation of the judiciary comprised two parts: Firstly, the realisation of the objective of the equitable representation of Blacks and women, described as “diversity of symbolic transformation”; and secondly, transformation relating to the ideological approach adopted by judges and magistrates when interpreting the letter and spirit of the Constitution. This was referred to by De Lange as intellectual content on substantive transformation. The ultimate test, according to De Lange, would be—

“... how individual judges and magistrates will pursue their legitimate and genuine constitutional obligations, without wittingly or unwittingly going out of their way to frustrate or undermine the legitimate and genuine choices and aspirations of the majority of South Africans to create a fully functionally democracy and a socio-economic and ideologically transformed country.”³⁵⁸

What is expected of the judiciary as a whole was also made clear by Jacob Zuma, the former ANC President as President of the Republic of South Africa in his address in the National Assembly on 1 November 2011, bidding farewell to Chief Justice Ngcobo and welcoming Chief Justice Mogoeng:

“We respect the powers and role conferred by our Constitution on the legislature and the judiciary. At the same time, we expect the same from these very important institutions of our democratic dispensation. The Executive must be allowed to conduct its administration and policy-making work as freely as it possible can. The powers conferred on the courts cannot be regarded as superior to the powers resulting from a mandate given by the people in a popular vote.”³⁵⁹

So, what Zuma suggested is that the Executive should be free to take decisions based on the majority political position of the ANC without Parliament fulfilling its oversight role and the

³⁵⁷ Malan (2019) 193-206; and ch 3, para 3.5 above.

³⁵⁸ Parliament of the Republic of South Africa *Hansard Papers* (2003-02-17).

³⁵⁹ Zuma *The Presidency* (Nov 2011) 1.

judiciary fulfilling their judicial role to ensure compliance with the Constitution by the Executive. A blind deference to government is required of the judiciary by certain leadership elements of the ANC. This demand should also be seen in the context of the NDR for the central government to exercise control without interference by the judiciary.

The term “transformative constitutionalism” was first coined by Karl Klare in 1998.³⁶⁰ He focused his analysis on adjudication and how transformative adjudication by judges can be a mechanism to contribute towards social change. Klare highlighted what he termed the “inherent conservatism” in the jurisprudential approach of judges and the South African legal culture in general. Klare’s reference to “legal culture” involves the “professional sensibilities, habits of mind and intellectual reflexes” of lawyers. According to Klare, it also involves those ingrained ideas about how the law operates and what arguments are convincing.³⁶¹ He theorised that our recourse to this culture is subconscious and second nature as it forms the basis of how we approach legal problems. According to Klare, judges have a tendency to follow a “formalistic or technical approach”. He regards this approach to legal interpretation as “highly structured, technicist, literal and rule-bound” as opposed to “policy-oriented and consequentialist” as an approach he favoured and suggested.³⁶² Klare’s analysis has been particularly influential in respect of the notion of justification. He is often quoted in academic and judicial engagement. One of the core aspects of his views centres around how judges should justify the outcomes of their decisions within the realm of a transformative constitution.³⁶³ He described transformative constitutionalism as a long-term project of constitutional enactment, interpretation and enforcement committed ... to transforming a country’s political and social institutions and power relationships in a democratic, participatory and egalitarian direction.³⁶⁴ Therefore, according to Klare, the Constitution is not regarded as an instrument to restrain government power, but as an instrument for the achievement of fundamental change – politically, socially, economically, culturally and intellectually.³⁶⁵ To that end, all organs of state, the courts and civil society must be conscripted and mobilised. The South African Constitution “creates” the legal framework for the fundamental transformation of unjust political, social, economic and cultural relations in South African society. The Constitution is not an instrument for safeguarding continuity and

³⁶⁰ Klare *SAJHR* (1998) 150.

³⁶¹ As above 166, 168, 170, 181 and 187.

³⁶² As above 151, 156, 161 and 168.

³⁶³ As above 147.

³⁶⁴ As above.

³⁶⁵ Malan (2019) 194.

stability of existing interests and rights. To the contrary, it is the supreme weapon for guaranteeing the radical transformation of existing political, social, economic, cultural and intellectual relations – an instrument for an encompassing and comprehensive legally guided change. Consequently, the Constitution must also be interpreted to bring about such encompassing and far-reaching change.³⁶⁶

Various other scholars echoed Klare's sentiment about the conservatism of the South African legal culture. They argue that the legal culture is still based largely on formal rather than substantive legal reasoning. This approach of so-called formal reasoning prevents an inquiry into the true motivation and purpose of, and objections to certain decisions. It presents the law as neutral and objective when in actual fact it denotes a particular political approach which ushers a singular conception of society.³⁶⁷ Froneman, for instance, referred to this notion of the law being neutral and objective as a "delusional danger" which has not totally subsided with the adoption of a new Constitution post 1994. The Constitution, like any other law, is open to formal interpretation and consequently allows judges to avoid engagement with substance and ricochet from the search for justice.³⁶⁸

Langa, a former Chief Justice of South Africa, articulated two basic ideas of transformation: economic transformation and a change in legal culture. He viewed the establishment of a truly equal society and the provision of basic socio-economic rights to all as a necessary part of transformation. He pointed out that transformation means "change" and that transformation in terms of the Constitution is not temporary.³⁶⁹ In respect of legal culture, he explains as follows:

³⁶⁶ As above.

³⁶⁷ Botha *SAJHR* (2004) 249; and Van der Walt *Fundamina* (2006) 13. Also see Moseneke *SAJHR* (2002) 309-315 who articulates transformative adjudication as an "epoch making opportunity which liberates the judicial function from the confines of the common law, customary law or any other law to the extent of its inconsistency with the Constitution". Also see Cameron *SAJEJ* (2019) 12 who states that the "sheer extent of court's new review powers coupled with the explicit transformative nature of the Constitution necessarily shifts the way in which courts must interpret the law. Substantive arguments, rather than legalistic or authoritarian argument, should generally prevail". Also see Hoexter *SAJHR* (2008) 283 and 286 who refers to judges as "social engineers" and states further: "I still believe that judges are indeed social engineers, whether they know it or not. It seems to me that the best judges are the ones who do know it and who thus make their social engineering choices more or less consciously and openly... Perhaps we need a new judicial policy that will allow judges to break out of that legal culture [of formalism] and realise their own power under the Constitution. I believe that such a policy already has a name "*transformative adjudication*"... the type of adjudication which is the task of judges who are enjoined by the Constitution to uphold and advance its transformative design" (at 286). Also see Liebenberg *ESR Review* (2005) 5 who states: "The adjudication of social rights claims can infuse a substantive dimension into the interpretation of the Bill of Rights as whole. This can help counter the development of a formalist jurisprudence in which historical, social and economic context in which rights claims ... are ignored or discounted".

³⁶⁸ Froneman *Stell LR* (2005) 1.

³⁶⁹ Langa *Stell LR* (2006) 353.

“Under a transformative Constitution, judges bear the ultimate responsibility to justify their decisions, not only by reference to authority, but by reference to ideas and values. This approach to adjudication, requires an acceptance of the politics of law... There is no longer place for assertions that the law can be kept isolated from politics. While they are not the same, they are inherently and necessary linked. At the same time, transformative adjudication requires judges to acknowledge the effect of what has been referred to elsewhere as the “personal, intellectual, moral or intellectual preconceptions” on their decision making.”³⁷⁰

Several examples exist to illustrate that our courts have largely subscribed to the political notion of transformation or transformative constitutionalism in the way they interpret and apply the Constitution. Relevant examples will be provided here which relate directly to this study.

In *Van Heerden*, Moseneke J for the majority stated that the Constitution “imposes a positive duty on all organs of state to protect and promote the achievement of equality – a duty which binds the judiciary too”.³⁷¹ This statement classically coincides with the notion of transformative constitutionalism and political transformation. Such a duty as claimed by Moseneke, is not the only duty imposed on the judiciary by the Constitution in terms of section 8(1) of the Constitution. Section 165(2) of the Constitution also expects the judiciary to be independent and impartial and to ensure that restitutionary measures implemented by the executive and legislature conform to the requirements of the Constitution. A call on the judiciary to promote the achievement of equality together with the other arms of government suggests a non-neutral and political position by the judiciary.

Also in *Van Heerden*, Moseneke J held that a restitutionary measure is not presumptively unfair as such inquiry would “unduly require the judiciary to second guess the legislature and the executive concerning the appropriate measures to overcome the effect of unfair

³⁷⁰ As above 354. Also see Van der Walt *Fundamina* (2006) 15 in respect of the influence and role of politics in interpreting the Constitution, Van der Walt stated: “These [eviction] cases illustrate the fact that the transformative purpose of the anti-eviction laws can only be realized if and when judges interpret and apply those laws with due cognizance of their political aims and aspirations. In doing so, the judges are inevitably in a confrontation between tradition and transformation; neither the statutory authority of the reform laws can insulate the courts from being involved in this politically determined wrangle between stability and change. The cases show that judges struggle with the seemingly inevitable and immutable support that the common law provides for the position of the landowner, which makes it difficult to decide eviction cases with empathy for the occupiers. However, the land-reform laws explicitly require empathy for occupiers to be evicted from their homes and therefor it becomes necessary to make what looks like policy choices between the interpretive frameworks of the Constitution and land reform laws on the one hand and the common law on the other. Judges, being trained in interpreting and applying the common law by way of common law logic, find it difficult to make this switch”.

³⁷¹ *Van Heerden* (note 4 above) para [24].

discrimination”.³⁷² This deference seems to coincide with the call by Zuma in the National Assembly in 2011. In the Labour Appeal Court in *Barnard*, Mhambo J held that the essence of restitutionary measures is to guarantee the right to equality and that consequently their implementation cannot be subjected to an individual’s right to equality. He explained his decision as follows:

“On the basis of this discussion, it is clear that the Labour Court erred in treating the implementation of restitutionary measures as subject to the individual conception of a right to equality. This is more so as this approach promotes the interests of persons from designated categories to continue an unfair advantage which they had enjoyed under apartheid.”³⁷³

The fact that the right of equality cannot be raised as a defence against a restitutionary measure, is a rejection of individual rights, especially vulnerable minority groups, in favour of the interest of the majority. This corresponds with the ANC’s ideological and political understanding of transformation and equality, namely that individual rights are subservient to the will and interest of “we the people” – the dominant political majority. This Labour Appeal Court judgement in *Barnard* was in fact upheld by the majority per Moseneke J in *Barnard* which set aside the Supreme Court of Appeal judgement in which the appeal against the Labour Appeal Court was upheld.³⁷⁴ Jafta J in *Barnard* used this Labour Appeal Court judgement as authority to claim that a fairness and proportionality standard should not be applied in respect of a restitutionary measure. Consequently, Jafta J held, the decision by the National Commissioner of the South African Police not to promote Ms Barnard was fair and lawful and he was justified to reserve those positions for black officers. This, despite the fact that section 15(3) of the EEA prohibits job reservation in implementing equitable representation in the workplace.³⁷⁵

In *Correctional Services*,³⁷⁶ Zondo J, for the majority, in explaining the representivity principle, stated that nobody can justifiably dispute that although all black people suffered hardships under apartheid and racial discriminatory laws and practices, “the greatest hardships were suffered by African people”. Zondo J did not explain the basis or provide evidence for this statement and the rational connection to benefitting Africans eight times more than other disadvantaged groups,

³⁷² As above para [33].

³⁷³ *South African Police Service v Solidarity obo Barnard* 2013 (3) BCLR 320 (LAC) para [30].

³⁷⁴ *Barnard* (note 15 above) para [72].

³⁷⁵ As above paras [227], [231] and [232].

³⁷⁶ *Correctional Services* (note 6 above) para [46].

compared for instance to the claim of the “doubly-exploited working class”.³⁷⁷ Hence, there is no explanation, justification and rationale for benefitting black people in accordance with their proportion of the population to make up for unknown proportional suffering in the past. The two are not commensurate without statistical evidence. Again, this statement is not based on objective facts. It seems to support the political notion of transformation based on the *Freedom Charter* and African Nationalism. Its aim is to benefit the politically dominant African group by transforming the public service and private sector by means of affirmative action and the principle of representivity.

At the ANC’s National Conference held in Mafikeng in 1997, it was resolved that the mining industry is an important role player in South Africa, and that the ANC as government should control the mining industry together with all other levers of power.³⁷⁸ This led to the enactment of the Mineral and Petroleum Resources Act in 2002³⁷⁹ which nationalised all mining rights in South Africa. The Act authorised government (executive) to issue mining licences for anyone that aspired to prospect or mine in South Africa.³⁸⁰ A requirement for qualifying for a mining licence is a percentage black ownership. In an ensuing challenge to the constitutionality of the Act, in *Agri South Africa v Minister of Minerals and Energy*³⁸¹ the Constitutional Court per Mogoeng J held that expropriation of property as contemplated in section 25(1) of the Constitution did take place, but that those expropriated are not entitled to compensation as envisaged by section 25(1). According to Mogoeng, the state was merely holding such rights as custodians on behalf of third parties. Consequently, this was a deprivation for which no compensation was due, and did not constitute an infringement of the right to property.³⁸²

The court’s view that the state had not acquired any right previously vested in private holders of these mineral rights, was illogical and evoked critique.³⁸³ This specific judgement can to my mind be directly attributed to the political ideology of the ANC in relation to controlling mining rights, as resolved at the ANC National Conference of 1997, and nationalisation of the mineral wealth

³⁷⁷ See Slovo *Umsebenzi Discussion Pamphlet* (1985) 5th and 7th page who stated that “it is the black working class which, in practice, suffers the most” and that the “national oppression weighs heavily on South Africa’s doubly-exploited working class”.

³⁷⁸ ANC 50th National Conference Resolutions (1997) 44th page.

³⁷⁹ Act 28 of 2002.

³⁸⁰ As above ss 14, 17 and 23.

³⁸¹ (CCT/51/12) [2013] ZACC 9; 2013 (4) SA 1 (CC); 2013 (7) BCLR 727 (CC) (18 Apr 2013).

³⁸² As above paras [106] and [107].

³⁸³ Badenhorst *De Jure* (2014) 279-280; and Malan (2019) 206 and 207.

as declared in the *Freedom Charter*. Therefore, the political ideology of transformation is now embedded in the constitutional understanding of transformation. This was achieved by transforming the judiciary and for it to be entertained under the guise of transformative constitutionalism.³⁸⁴ Much of the South African jurisprudence on equality today is based on the political ideology of transformation. This means that individual rights and rights of those belonging to vulnerable minorities have to be sacrificed on the altar of majority interests in the name of transformation, without a normative standard of fairness, as discussed in paragraph 3.5 above.

3.7 CONCLUSION

This chapter deals with the main research question and the second research sub-question posed in chapter 1, paragraph 1.2 above, namely what the appropriate constitutional test or normative standard for substantive equality is. This is answered by considering the basic Constitutional principles: how the Constitution is interpreted; the provision of socio-economic rights by the Constitution; the right to equality and specifically the measures to promote the achievement of equality; and the role of political ideology in the way the right to equality is applied.

The adoption of the Constitution as the supreme law has influenced all aspects of law. All laws, the common law as well as customary law, are subservient to the Constitution.³⁸⁵ In line with conventional constitutions, the South African Constitution curtails state powers. It does so by means of structural and procedural limits and the substantive limits imposed by the Bill of Rights.

The Constitution imposes an obligation on the state to promote the socio-economic goal of equality. The Constitution thus seeks to strike a balance between allowing adequate state powers *vis-à-vis* preventing the undue use or abuse of power, that is enough power to promote equality through socio-economic and transformation measures, on the one hand, and to prevent abuse and suppression of freedom of citizens, on the other.

The supremacy of the Constitution and the rule of law require enforcement and protection by an independent judiciary.³⁸⁶ The Constitution imposes various obligations imposed on all state

³⁸⁴ Malan (2019) ch 6.

³⁸⁵ S 2 of the Constitution.

³⁸⁶ As above s 165.

institutions to safeguard the Constitution, the rule of law and the integrity and independence of the judiciary.³⁸⁷

Although a purposive interpretation is preferred by our highest courts in interpreting the Constitution, no interpretation method or set of considerations presently preferred and applied by our courts provide an objective or neutral meaning of the provisions of rights contained in the Constitution. Through constitutional interpretation, binding meanings that are attributed to the Constitution are utilised to further the political ideological programme of transformation of the dominant elite (pivoting around the ANC). This programme is aimed at legitimising the cause of the dominant elite and delegitimising competing claims in terms of which the dominant elite is challenged in the name of transformative constitutionalism. Viewed in this light, the notion of the supreme Constitution is highly questionable as judges are appointed based on their political views and interpret the Constitution according to their commitment to transformation. The notion ostensibly seems reassuring but on close analysis the meaning and effect of formulations of the Constitution are dependent on what meanings the dominant elite, through interpretive activity, ascribe to them. These meanings are mobilised to strengthen the dominant elite and to serve as defence against challengers whose rights-based claims are ruled constitutionally illegitimate and bad in law.³⁸⁸

In line with the rule of law and supremacy of the Constitution, the courts have the power to review state action and to enforce and protect the rights provided for in the Bill of Rights. It further requires the state to act lawfully. All state action must fall within the parameters of an empowering law. If not, it is *ultra-virus* from a common law perspective and also violate the legality requirement from a constitutional point of view.³⁸⁹ To introduce measures, the government must also be empowered by a legislative mandate. The means chosen by government to pursue legislation or in exercising state power must be rationally linked to the legitimate purpose or objective sought within the ambit of the empowering legislation. It may be arbitrary or capricious.³⁹⁰ This is referred to as the principle of legality.³⁹¹

The Constitution subscribes and promotes socio-economic upliftment, advancement and

³⁸⁷ As above s 165(4).

³⁸⁸ Malan (2019) 187 and 188.

³⁸⁹ *Minister of Finance* (note 101 above) para [118].

³⁹⁰ *Insolvency Practitioners* (note 210 above) para [58]; and para 3.2.5 above.

³⁹¹ *Minister of Finance* (note 101 above) para [118]; and para 3.2.5 above.

empowerment. It is said that transformation lies at the heart of the Constitution. The most important provision for promoting measures dealing with socio-economic advancement is the equality clause in subsections 9(1) and (2) of the Constitution. Subsection 9(2), in particular, authorises legislation and other measures to protect and advance persons, or categories of persons, disadvantaged by unfair discrimination. The aim of this provision is to remedy centuries of race-based discrimination and socio-economic restrictions and exclusion. The right to equality can therefore be conceptualised as the *raison d'être* of socio-economic redress policies.

Substantive equality sets the standard or norm for constitutionally legitimate affirmative measures. In the context of measures and policies with the objective of addressing and eliminating inequality, these measures can be viewed in a “formal” or “substantive” sense. Formal equality requires laws and policies that treat everyone the same (equal) and appear to be neutral in approach. A formal understanding of equality requires sameness of treatment irrespective of the impact or effect thereof. However, such formal equality laws and policies may exacerbate and perpetuate existing inequalities since they do not seek as objective to change or transform the present unequal state of affairs (*status quo*). Substantive equality, on the other hand, requires equality of outcome. Substantive equality is alive to actual social and economic conditions to determine whether meaningful, real and concrete equality, as envisaged by the Constitution, has been attained. This commitment to equality also recognises shifting patterns in inequality, for instance from inter-race to intra-race and class inequality.³⁹²

Although some areas of South Africa’s equality jurisprudence remain uncertain and unsettled, various clear principles have emerged, although some may be objectionable. Affirmative measures are considered as part of equality and not as an exception thereof. Measures which are implemented to promote equality in terms of section 9(2) of the Constitution are not subject to a test of unfair discrimination in terms of subsections 9(3) and (4), provided that they meet the requirements of subsection 9(2). These three requirements are measures which: (1) target persons or categories of persons who have been disadvantaged by unfair discrimination; (2) are designed to protect or advance such persons or categories of persons; and (3) promote the achievement of equality. Although a measure might meet the three criteria set in *Van Heerden* and is not unfair or presumed to be unfair, it must still meet the rationality tests as a minimum requirement. The three criteria overlap and must be applied in unison. The causal link between

³⁹² *Van Heerden* (note 4 above) para [27].

the first two criteria and the third criterion forms the basis of substantive equality. This requires a specific outcome of impact or effect on inequality, more than mere rationality.

Much of South Africa's equality jurisprudence is based on the political ideological notion of transformation. It is rooted in the NDR. This requires a particular understanding of equality based on the notion that individual rights and rights of those belonging to minorities have to be subjected to the will of the majority.³⁹³ This specific understanding was, over time, firmly established within our equality and constitutional jurisprudence. This was achieved through transformation of the judiciary and the notion of transformative constitutionalism. In order to secure conformation with the dominant (ANC) force in the legislature and executive, there is a consistent trend of highest courts interpreting and applying the Constitution in conforming with the majority political ideology of the NDR. This political ideology plays a paramount role in dictating whom the real beneficiaries of B-BBEE are, as discussed in chapter 6 below.

On the question of how to promote equality as envisaged by section 9(2) of the Constitution, and also to strike a balance between the disadvantaged and previously advantaged, the answer lies in a "situation-sensitive approach" due to the shifting patterns of discrimination. In *Van Heerden* it was held that in "the assessment of fairness or otherwise a flexible but 'situation-sensitive' approach is indispensable" due to the shifting patterns of discrimination in "our evolving society".³⁹⁴

Patterns of inequality are now more prevalent along class lines than racial lines as discussed in chapter 2, paragraph 2.2 above. This was not the situation 30 years ago when the Constitution was adopted, and 20 years ago, when the B-BBEE policies and legislation were introduced. Shifting patterns of discrimination and equality have changed the face of inequality in South Africa. The recommendations to the B-BBEE programme suggested at the final stage of this research, chapter 7, paragraph 7.5, attempt to focus the B-BBEE programme exclusively on the lower black classes as the beneficiaries of BEE and to exclude the economically and educated and socially advanced middle- and upper black classes from the benefits of BEE.

³⁹³ Slovo *Umsebenzi Discussion Pamphlet* (1988) 2nd page explained that the protection of the rights of certain groups by the Constitution must be prevented and be avoided as it will entrench the privilege of minorities at the expense of the rights of the majority of South Africans.

³⁹⁴ *Van Heerden* (note 4 above) para [27].

CHAPTER 4

INTERNATIONAL LAW AND COMPARABLE FOREIGN JURISDICTIONS

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4.1 INTRODUCTION

International law and comparable foreign law play an important role in South African domestic law. The Constitution has comprehensive provisions for the incorporation of international law into South Africa's domestic law. There are also provisions regulating the consideration of international law in disputes relating to constitutional rights.¹ The bulk of international law consists of treaty law – multilateral and bilateral – and customary international law.² For present purposes, selected multilateral conventions are the most important. Foreign law is the domestic law, most importantly the jurisprudence, of individual states.³

Section 39(1)(a) of the Constitution makes it mandatory for courts, tribunals or forums to consider

¹ Ss 39(1)(b) and (c), 233 and 234 of the Constitution; and *S v Makwanyane and Another* 1995 (3) SA 391 (CC) (hereafter referred to as *Makwanyane*) paras [35] and [37].

² Art 39(1) of the Statute of the International Court of Justice describes the sources of international law as international conventions (treaties), international custom, general principles of law recognized by civilized nations, and judicial decisions and the teachings of the most highly qualified publicists and subsidiary means for the determination of rules of law.

³ *Makwanyane* (note 1 above) para [37].

international law when interpreting the Bill of Rights of the Constitution. Apart from international law obligations, the Constitution also provides that in interpreting the Bill of Rights, a court, tribunal or forum may consider foreign law.⁴ The application of international law in the interpretation of the Bill of Rights is discussed in chapter 3, paragraph 3.3.2 above. Section 231 of the Constitution makes provision for the incorporation of international treaties and conventions into South African domestic law.⁵ Section 233 of the Constitution provides for every court to prefer any reasonable interpretation that is consistent with international law when interpreting any legislation.

The Preamble to the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA)⁶ states that South Africa “has international obligations under binding treaties and customary international law in the field of human rights which promote equality and prohibit unfair discrimination”. PEPUDA then specifies some of these obligations, among others, the Convention of the Elimination of All Forms of Discrimination Against Women and the Convention on the Elimination of All Forms of Racial Discrimination. Section 2(h) of PEPUDA also lists as one of its objectives the facilitation of further compliance with international obligations. The Preamble to the Employment Equity Act (EEA) has likewise as one of its objectives to give effect to the obligations of the Republic as a member of the International Labour Organization.⁷

The sources of international law are described in article 38(1) of the Statute of the International Court of Justice as: (1) international conventions (treaties), whether general or particular; (2) international customs, as evidence of a general practice accepted as law (customary international law); (3) the general principles of law recognised by civilised nations; and (4) judicial decisions and the teachings of the most highly qualified publicists, as subsidiary means for the determination of rules of law.

⁴ S 39(1)(c) of the Constitution.

⁵ As above s 231(2) states: “An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in sub-section (3)”. Also see *Bekink* (2016) 663 and 669 referring to the process of adopting treaties and conventions to be adopted as part of domestic law as a “dualist approach” involving the executive as treaty-making authority and Parliament as the National Assembly to ratify such treaties/conventions. This dualist approach, according to Bekink, flows from the doctrine of separation of powers. Bekink also points out that treaties are often given other names such as: “conventions”, “declarations”, “charters”, “covenants”, “pacts”, “protocols” and “exchange of notes”. Also see Dugard II (2018) 29 who explains treaties as agreements between states or states and international organisations governed by international law.

⁶ Act 4 of 2000.

⁷ Preamble of the EEA 55 of 1998.

Dugard explains that article 38 was first drafted in 1920 for the Statute of the Permanent Court of International Justice. Therefore, it no longer accurately reflects all the materials and forms of state practices which comprise contemporary sources of international law. However, every effort is made to bring new developments in respect of sources of law within the categories of sources recognised by article 38. This inevitably leads to the expansion of sources beyond those originally provided for by article 38.⁸

Section 231(5) of the Constitution provides that the Republic is bound by international agreements which were binding on the Republic when the Constitution took effect. Section 231(2) of the Constitution determines that an international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces. Any international agreement becomes law in the Republic when it is enacted into law by national legislation.⁹

In *Makwanyane*, the Constitutional Court pointed out that South African courts are required to construe the South African Constitution and not the constitutions of foreign countries. The South African Constitution must be interpreted with due regard to the South African legal system, history and circumstances, and the structure and language of the South African Constitution. South African courts can derive assistance from foreign case law, which is compatible with South African law, but are in no way bound by it.¹⁰

Although borrowing from another system is a common legal practice, it may create problems when a rule is torn from its domestic roots and transplanted into foreign soil.¹¹ Kriegler J cautioned in this regard as follows:

“Nor does the advent of the Constitution, which codifies them, warrant the wholesale importation of foreign doctrines or precedents. To be true we are to promote values not yet rooted in our traditions and we must have regard to applicable public international law. We are also permitted to have regard to foreign case law. But that does not amount to a wholesale importation of

⁸ Dugard II (2018) 28.

⁹ S 231(4) of the Constitution. Also see Malan *THRHR* (2015) who states that the decision of tribunals which interpret international law instruments which South Africa approved will be binding on South Africa in terms on s 231(2) of the Constitution. Also see Dugard *SAJHR* (1994) 208 that the Constitution permits reference to international human rights law in general and it is not confined to instruments that are binding on South Africa.

¹⁰ *Makwanyane* (note 1 above) para [37].

¹¹ Wallis *SAJEJ* (2018) 97.

doctrines from foreign jurisdictions”.¹²

In literature and studies of equality, reference is often made to affirmative programmes or policies applied in the United States, Canada, Malaysia and India.¹³ Not all foreign law redress and equality jurisprudence normally associated with inquiries in the area of affirmative measures to promote equality, is applicable to the South African version of Broad-Based Black Economic Empowerment (B-BBEE) or this study. For instance, the United States’ model of affirmative action emanated from the 1960s. It required contractors for the supply of goods or services to the United States government to employ minority (black and Hispanic) workers.¹⁴ Much of the case law flowing from this policy of affirmative action relates to unfair discrimination in an employment context and admission to institutions of higher education, which is not the focus of the present study. The most important distinction between South Africa and the United States regarding affirmative action is that measures to promote the achievement of equality, such as the B-BBEE programme and affirmation action in an employment context, are authorised by section 9(2) of the South African Constitution. The United States’ Constitution does not provide for such measures.

Moseneke J in *Minister of Finance and Others v Van Heerden*¹⁵ remarked that the US anti-discrimination approach regards affirmative action measures as a “suspect category” which must pass strict judicial scrutiny. The US test requires evidence that differentiation on the grounds of race “is a necessary means” to promote a compelling or overriding state interest. He points out that South Africa’s equality jurisprudence differs substantially from the US approach to equality. “Our respective histories, social context and constitutional design differ markedly”. Moseneke J cautioned that South Africa must exercise great caution not to import non-compatible foreign equality prudence which may inflect on the South African equality jurisprudence the American notions of “suspect categories of state action” and “strict scrutiny”.¹⁶

¹² *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) para [144].

¹³ *Ponte et al DAC* (2007) 938; *Du Plessis and Pretorius THRHR* (2017) 405-407; and *Janse van Rensburg LLD Thesis* (2010) 223-249 and 447-449.

¹⁴ *Schuwert UCLR* (1972) 743-750.

¹⁵ 2004 (6) SA 121 (CC).

¹⁶ As above para [29]. Also see *Students for Fair Admissions, Inc. Petitioner v President and Fellows of Harvard College*; and *Students for Fair Admissions, Inc. Petitioner v University of North Carolina et al* 600 US 21-707 and 20-1199 (2023) VI in which the Supreme Court of the United States held that the Harvard College and University of North Carolina’s “admission programmes cannot be reconciled with the Equal Protection clause” of the US Constitution and that race cannot be employed as criteria for admission programmes to higher educational institutions.

Canada also has a long history of affirmative action. This originated in the 1970s with the adoption of a policy to ensure adequate representation of French Canadians in the public service.¹⁷ As with the United States, the Canadian jurisprudence largely involves disputes in an employment context.

Malaysia in 1970 adopted a policy driven by government intervention to eradicate poverty and to restructure economic imbalances among the major ethnic groups in Malaysia. India adopted a similar programme to benefit their “backward caste-classes”. The Malaysian and Indian experiences are more relevant to the South African situation.¹⁸ Both their constitutions, like the South African Constitution but unlike the United States Constitution, make provision for measures to be introduced to promote the interests of previously disadvantaged groups. In Malaysia, these measures include, amongst others, the increase of ownership in corporates, similar to South Africa’s B-BBEE programme. India’s policy of job reservation in the public service also applies to access to higher educational institutions. It is therefore in part similar to the South African B-BBEE programme which provides for the skills development of black people in the private sector by means of, amongst others, tertiary education.

This study does not include a full legal comparative study of South Africa, Malaysia and India, for the following two reasons: Firstly, the construction of the Malaysian and Indian constitutions in respect of permitting affirmative measures for certain groups, differs vastly from the South African Constitution. The Malaysian and Indian affirmative action provisions are regarded as an exception to the right not to be unfairly discriminated against and are referred to as “reverse discrimination” or “positive discrimination”. The notions of “reverse discrimination” or “positive discrimination” in respect of measures to promote equality in terms of section 9(2) of the Constitution were already rejected by the Constitutional Courts in *Van Heerden*.¹⁹ Secondly, no constitutional challenges have been instituted against the Malaysian redress policy. This is due to the provisions of article 153(2) and (3) of the Malaysian Constitution which permit the Malaysian parliament to prohibit the questioning of any matter, right, status, position or privilege protected by article 153. Similarly in South Africa, no constitutional challenges were brought

¹⁷ Agócs *Canadian Public Policy Journal* (1986) 148-162.

¹⁸ Ponte *et al DAC* (2007) 938 state that South Africa’s BEE programme is largely based on the Malaysian redress model.

¹⁹ *Van Heerden* (note 15 above) para [30] the Constitutional Court stated that remedial or restitutionary measures “are not in themselves a deviation from, or invasive of the right to equality guaranteed by the Constitution. They are not ‘reversed discrimination’ or ‘positive discrimination’...” but “integral to the reach of our equality protection”.

before the courts thus far to dispute the constitutional compliance of the B-BBEE programme. Matters that were brought before the courts involved affirmative action disputes, but the Employment Equity Act itself was also not constitutionally challenged. India did experience some constitutional challenges in respect of their reservation policy. These cases are discussed in this research in chapter 4, paragraph 4.3.2 below. Therefore, the vast difference in the way the South African Constitution deals with restitutionary measures in the context of promoting equality compared to Malaysia and India, coupled with the lack of case law will not make a full legal comparison feasible. Instead, as B-BBEE is a socio-economic policy,²⁰ this research aims to evaluate both the positive and negative socio-economic and political consequences emerging from the respective socio-economic redress programmes in Malaysia and India and their ability to promote equality. The historic origins and development as well as the successes and failures of the programmes in Malaysia and India are assessed to gauge what lessons South Africa can learn from these programmes. In this regard, the study will focus in particular on the legal and practical beneficiaries of the Malaysian and Indian models. However, the relevant international human rights law pertinent to the present research question is dealt with first.

4.2 INTERNATIONAL LAW

From an international law point of view in the context of affirmative measures to promote equality, two United Nations treaties are of particular importance: the International Covenant on Civil and Political Rights (ICCPR);²¹ and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).²²

The ICCPR, together with the International Covenant on Economic Social and Cultural Rights (ICESCR),²³ were adopted by the United Nations in 1966 to enforce the aspirations of the Universal Declaration of Human Rights.²⁴ Both the ICCPR and the ICESCR came into effect in 1976. The ICCPR, the ICESCR, and the Declaration of Human Rights as such were to form the so-called “International Bill of Rights”.²⁵

²⁰ S 1 of the B-BBEE Act, the definition of “broad-based black economic empowerment”; and Department of Trade and Industry (DTI) *South Africa’s Economic Transformation: A Strategy for Broad-Based Economic Empowerment* (2003) 4 and 25.

²¹ United Nations General Assembly *Resolution 2200 A (xxi)* adopted on 16 Dec 1966. Also see Farrell *Trinity CL Rev* (2002) 213. It took 10 years for all the requisite number of states to ratify the ICCPR and was only entered into force on 23 Mar 1976.

²² United Nations General Assembly *Resolution 2106* adopted on 21 Dec 1965.

²³ United Nations General Assembly *Resolution 2200A(xxi)* adopted on 16 Dec 1966.

²⁴ Art 11(1) of the Universal Declaration of Human Rights UN Doc.A/810 (1948).

²⁵ Steiner and Alston (2000) 136.

The focus of the ICCPR is on individual rights and contains two main statements of individual equality. The first is Article 2, which states that—

“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.

Article 2 is in essence limited to distinctions in application of the rights guaranteed by the Covenant. The second main statement, Article 26, is an equal protection clause that applies to any legislation or state action, whether or not it is contained in the Covenant. It states—

“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.

In addition, Article 5 qualifies the rights provided for in Articles 2 and 26. Article 5 states in part:

“Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant”.²⁶

The only protection of group rights, as opposed to individual rights, in the ICCPR is provided for in Article 27, which states—

“In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language”.

There is no specific mention of affirmative action in the ICCPR. However, the Human Rights Committee, which consists of independent experts who monitor implementation of the Covenant

²⁶ Art 5(1) of the ICCPR.

and was created pursuant to the Covenant, does from time to time issue statements and opinions on relevant provisions in the form of General Comments. The General Comment on Article 26 issued in 2000 points out that the principle of equality in given circumstances requires state parties to take affirmative action to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, the Committee points out that where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the state should take specific action to address those conditions. Such action may involve temporarily granting the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, provided that such action is needed to correct discrimination, it qualifies as legitimate differentiation under the Covenant on condition that it is temporary of nature.²⁷

The Committee points out that not every differentiation of treatment will constitute discrimination. The criteria for such differentiation are that it must be reasonable and objective, and the aim must be to achieve a purpose which is legitimate under the Covenant.²⁸ In respect of Article 26, the Human Rights Committee acknowledges that distinctions may be required to correct conditions that perpetuate discrimination. It states that such differential treatment does not constitute discrimination in itself provided that it serves a legitimate purpose under the Covenant. Equality is clearly a legitimate purpose under the Covenant, as explicitly provided for in Article 26. According to this General Comment, preferential treatment aimed at advancing equality is acceptable.²⁹

Although the General Comment is only a statement of the Human Rights Committee's interpretation of Article 26 and not legally binding, it is still an important consideration. A General Comment is being considered more frequently as an authoritative statement akin to an advisory opinion of the International Court of Justice.³⁰ Most importantly, it reveals the approach that the Committee will most likely adopt on a particular issue. As expected, South Africa did not ratify the ICCPR under its NP-led white government. The post-apartheid ANC-led government was more receptive. South Africa signed the Covenant on 3 October 1994, and ratified it on 10

²⁷ Human Rights Committee *General Comment* 18 (2000) para 10.

²⁸ As above para 13.

²⁹ As above para 12.

³⁰ Buergenthal *Max Planck Yearbook of United Nations Law Online* (2001) 350.

December 1998, making its obligations binding on South Africa.³¹

Tension prevails between affirmative action and the concept of equal protection, Marc Bossuyt, UN Special Rapporteur on the Concept and Practice of Affirmative Action, cautioned that “affirmative action policies must be carefully controlled and not be permitted to undermine the principle of non-discrimination itself”.³² These international requirements for affirmative measures are also applicable to affirmative action measures implemented in South Africa, such as B-BBEE and those in terms of the EEA.

The ICCPR is an instrument intended to protect individual rights from abuse by one’s own government.³³ Accordingly, affirmative action has traditionally been considered within the context of minority rights. Academic works describe affirmative action as a modern expansion of minority rights.³⁴ Legislation from other jurisdictions supports the premise that affirmative action has always been exercised in favour of groups which are, by some definition, “minority groups”.³⁵ Besides, it is generally accepted that affirmative action benefits a group rather than individuals.³⁶ With two exceptions, the ICCPR is concerned with individual rights. The two exceptions, found in Articles 1 and 27, are both concerned with minority rights.³⁷ It could be argued that if a group right in the form of affirmative action is permissible under the ICCPR, it can only be allowed if it is considered to be a right for the benefit of persons belonging to minority communities.

Even if minority status is not considered a specific prerequisite for preferential treatment – as is the case in the ICCPR, and the General Comment on Article 26 – the issue of political dominance remains problematic. Any attempt by a state to favour the majority of the population when that majority is politically dominant might be viewed as contrary to the Covenant’s commitment to

³¹ See ICCPR, Ratification Annex.

³² Bossuyt, *Preliminary Report on the Concept and Practice of Affirmative Action*, UNDoc.E/CN.4/Sub.2/2000/11 (United Nations 2000) 44.

³³ Farrell *Trinity CL Review* (2002) 221. Also see Malan *De Jure* (2008) 82 who explains that the third parties who receive protection from the treaties “are all the individuals under the jurisdiction of the state parties to the multilateral agreements” and “individuals are not parties to the conclusion of these treaties but they are subjects of international law in consequence thereof”.

³⁴ Sigler (1983) 133.

³⁵ Farrell *Trinity CL Review* (2002) 220. Farrell cites for example, affirmative action programmes in the United States which benefit Blacks and women, and Indian programmes which benefit the Scheduled Castes and Scheduled Tribes.

³⁶ See *Adarand Constructors, Inc v Federico Pera, Secretary of Transport, et al.* 515 U.S. 200, 115 S. Ct. 2097 210.

³⁷ Arts 1 and 27 of the ICCPR. Also see Farrell *Trinity CL Rev* (2002) who argues that “although Article 1 refers to ‘people’ instead of ‘minorities’, it can be argued that the only reason that ‘people’ would need a right to self-determination is if it was a politically non-dominant group, which fits certain definitions of a ‘minority’. Therefore, the rights guaranteed to ‘people’ in Article 1 are minority rights”.

equality.³⁸

The potential for discrimination against minority groups by a government strengthens this argument. One of the recognised limitations on affirmative action is that it may not lead to discrimination.³⁹ A government which enacts affirmative action legislation that is detrimental to a non-dominant minority, is clearly suspect, and such an action could certainly be viewed as actually or potentially discriminatory.

From an international law point of view there might also potentially be a problem if economic inequality is used to justify preferential treatment once a system based on equal franchise has been achieved. Legislation can be said to lead to discrimination if economic inequality is used as justification, but it draws distinctions based on race rather than economic status.⁴⁰ As the Special Rapporteur wrote, just because—

“[a] particular category of the population has suffered from disadvantaged economic or social conditions does not mean that in order to upgrade its material position any distinction based on the characteristic defining the group should be considered legitimate”.⁴¹

In other words, in redressing economic disadvantages, affirmative action programmes must focus on economic status, as opposed to racial status. In the South African context, measures to promote the achievement of socio-economic equality such as B-BBEE, employment equity and government’s preferential procurement policies, are based purely on race. The economic status of beneficiaries of these measures are not taken into account.

Apart from the ICCPR, another United Nations treaty of importance to affirmative measures is the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). The ICERD was ratified by South Africa in 1998.⁴² It defines racial discrimination as including discrimination that causes the unequal enjoyment of rights and freedoms in the economic

³⁸ Farrell *Trinity CL Review* (2002) 221.

³⁹ Bossuyt *Preliminary Report on the Concept and Practice of Affirmative Action*, UN.Doc.E/CN.4/Sub.2/2000/11 (United Nations 2000) 11. The other limitation is that such measures must be temporary.

⁴⁰ As above.

⁴¹ Bossuyt *Preliminary Report on the Concept and Practice of Affirmative Action* UN.Doc.E/CN.4/Sub.2/2000/11 (United Nations 2000) 63.

⁴² Dugard II (2018) 474.

sphere.⁴³

The ICERD also makes provision for so-called “special measures”. These special measures may be adopted for the sole purpose of securing the adequate advancement of certain racial and ethnic groups or individuals to ensure equal enjoyment or exercise of human rights and fundamental freedoms. Such special measures shall not be deemed racial discrimination subject to certain conditions; for example, such measures may not, as a consequence, lead to the application of separate rights for different race groups and shall be discontinued after the objectives for which they were taken have been achieved.⁴⁴

State parties are further obligated by the ICERD to take “concrete measures” in the social, economic, cultural and other fields to ensure the adequate development and protection of certain racial groups or individuals belonging to these parties. The purpose of these concrete measures should be to serve as a guarantee of full and equal enjoyment of human rights and fundamental freedoms. The same requirements apply for concrete measures in terms of the ICERD as for special measures.⁴⁵

The Committee on the Elimination of Racial Discrimination (CERD), established under the auspices of the ICERD to monitor and enforce the ICERD, states in its *General Recommendation* that “special measures” implemented to ensure equal enjoyment of rights are not regarded as unfair discrimination.⁴⁶ Affirmative action measures should therefore be temporary, tailored to the needs of the groups or individuals concerned,⁴⁷ and should cease once substantive equality is achieved.⁴⁸

The CERD should always be interpreted in its context.⁴⁹ Thus, when implementing special

⁴³ Art 1(1) of the ICERD. The term “racial discrimination” is defined as “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise on an equal footing of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life”.

⁴⁴ As above art 1(4).

⁴⁵ As above art 2.

⁴⁶ CERD *General Recommendation No 32: The meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination* CERD/C/GC/32 (2009) para 11.

⁴⁷ As above para 17.

⁴⁸ As above para 11.

⁴⁹ As above para 5.

measures, the characteristics of the groups must be considered.⁵⁰ Anyone implementing special measures must therefore be able to show an objective and reasonable justification for differential treatment.⁵¹ The Recommendation further states that differential treatment will “constitute discrimination if the criteria for such differentiation judged in the light of the objectives and purposes of the Convention, are not applied pertinent to a legitimate aim, and are not proportional to the achievement of this aim”.⁵² According to the CERD, “to treat in an equal manner persons or groups whose situations are objectively different will constitute discrimination in effect, as will the unequal treatment of persons whose situations are objectively the same”.⁵³ The CERD explains the prerequisites for the implementation of special measures as follows:

“Special measures should be appropriate to the situation to be remedied, be legitimate, necessary in a demographic society, respect the principles of fairness and proportionality, and be temporary. The measures should be designed and implemented on the basis of need, grounded in a realistic appraisal of the current situation of the individuals and communities concerned”.⁵⁴

It is set as a requirement by the CERD in pursuit of its objectives, that such “need” must be determined on the basis of data disassembled and broken down (“disaggregated”) by “race, colour, descent and ethnic or national origin”. A gender perspective should also be incorporated into the “socio-economic and cultural status and conditions” of the group concerned.⁵⁵ Preferably, classification of individuals should take place through a process of self-identification, unless imposed classification can be justified.⁵⁶ Finally, in order to ensure that special measures remain temporary, the CERD requires that state parties engage in a “continuing system” of monitoring the application and results of such measures.⁵⁷

In November 2014, South Africa submitted its fourth of eight periodical reports to the CERD indicating that although significant progress had been made in advancing formal equality in South Africa, it has not translated into substantive equality. The South African report further identified various challenges related to achieving equality, especially in the areas of economic

⁵⁰ As above para 8.

⁵¹ As above.

⁵² As above.

⁵³ As above.

⁵⁴ As above para 16.

⁵⁵ As above para 17.

⁵⁶ As above para 34.

⁵⁷ As above para 35.

and social historical inequality and land reform. The report indicated that certain sectors of the economy, such as those involving indigenous people, gender minorities and HIV-positive individuals, were particularly susceptible and vulnerable to discrimination and marginalisation.⁵⁸

The Convention of the Elimination of All Forms of Discrimination against Woman (CEDAW) provides that temporary special measures do not constitute unfair discrimination. It states that separate rights should not be maintained where evidence factually indicates that gender equality within a specific context has been achieved.⁵⁹

The Convention of Rights of Persons with Disabilities (CRPD) likewise provides for “specific measures” that are required to achieve substantive equality for persons with disabilities, and states that such specific measures do not postulate discrimination. The CRPD emphasises that women with disabilities face multiple forms of discrimination. This accordingly obliges member states to adopt and implement measures designed to ensure the equal enjoyment of rights and freedoms for this particularly vulnerable group in society.⁶⁰

The African Charter on Human and Peoples’ Rights (ACHPR) specifically prohibits all forms of unfair discrimination. It strongly affirms the principle of equality before the law and equal benefit and protection of the law. In the context of economic redress policies, the ACHPR obliges all member states to undertake to eliminate all forms of foreign economic exploitation. This will, according to the ACHPR, enable “their peoples” to fully benefit from the advantages derived from their national resources. The Charter explicitly includes the right to develop and the right of “peoples” to enjoy economic development.⁶¹

In September 2000, leaders of 189 states as members of the United Nations signed the historic *Millennium Declaration*. This Declaration contains the *Millennium Development Goals* (MDGs) which reflect the global community’s commitment to pursuing certain specific development goals in order to reduce poverty, promote equality and achieve greater socio-economic justice.⁶²

⁵⁸ CERD *Consideration of reports submitted by States’ parties under article 9 of the Convention – South Africa* CERD/C/ZAF/4-8 (2014) 223-225.

⁵⁹ Art 4(1) of the CEDAW.

⁶⁰ Art 6(1) of the CRPD.

⁶¹ Arts 21(5) and 22(1) of the ACHPR.

⁶² *Millennium Declaration - Transforming our World: The 2030 Agenda for Sustainable Development* UN General Assembly A/RES/ 70/1 (2015).

These objectives of the MDGs are to be promoted by member states and should be achieved by 2030. Seventeen goals are enumerated in a strategy document, namely the *Sustainable Development Goals* (SDGs).⁶³ The SDGs were adopted by the United Nations General Assembly in September 2015. The objective of the SDGs is to reduce inequalities within and among countries with an emphasis on curbing vertical and horizontal economic inequalities. The SDGs focus primarily on the wealth and income equality of the lower 40% of the population. This is done in an attempt to reduce inequality, not only among groups within countries, but significantly, also within particular target groups in each country.⁶⁴

The International Labour Organization's (ILO) Convention on Discrimination provides that in an employment context, "special measures of protection and assistance" designed to meet the particular requirements of persons who are generally recognised to require special protection or assistance, shall not be deemed to be discrimination. These special protection or assistance measures can, according to the Convention, be implemented in respect of particular requirements of persons based on factors such as "sex, age, disablement, family responsibilities or social or cultural status".⁶⁵

The Convention defines discrimination as the distinction, exclusion or preference made based on race, colour, sex, religion, political opinion, national extraction or social origin, which may have the effect of nullifying or impairing equality of opportunity or treatment "in" employment or occupation.⁶⁶ Employment and occupation in this regard refer to access to vocational training, access to employment and to a particular occupation, as well as the terms and conditions of employment.⁶⁷ Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be regarded as discrimination.⁶⁸

Although the ILO Convention does not set specific requirements for measures to promote equal

⁶³ *Sustainable Development Goals (SDGs)* are: no poverty and hunger; good health and well-being; quality education; gender equality; clean water and sanitation; affordable and clean energy; decent work and economic growth; industry, innovation and infrastructure; reduced inequalities; sustainable cities and communities; responsible consumption and production; climate action; life below water; life on land; peace and justice and strong institutions; and partnerships to achieve the goals.

⁶⁴ *Sustainable Development Goals (SDGs)* 10 Target 10.1 states: "By 2030, progressively achieve and sustain income growth of the bottom 40% of the population at a rate higher than the national average".

⁶⁵ Art 5 of the ILO Convention C111 – Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

⁶⁶ As above art 1(2)(a).

⁶⁷ As above art 1(3).

⁶⁸ As above art 1(2).

opportunities, it does recognise that “discrimination constitutes a violation of rights enunciated by the Universal Declaration of Human Rights”.⁶⁹ The provision for special protection or assistance measures in terms of the ILO Convention, will therefore be subjected to the ICCPR adopted by the United Nations to enforce the aspiration of the Universal Declaration of Human Rights,⁷⁰ as well as the statements of the Human Rights Committee.⁷¹ Therefore, although special measures adopted by state parties in terms of the ILO Convention to create equal employment opportunities are not *per se* discrimination, they will have to fall within the parameters of what is reasonable and objective as stated by the Human Rights Committee.⁷² The Employment Equity Act (EEA) is legislation that purports to specifically give effect to the ILO Convention and is subject to its norms.⁷³

4.3 REDRESS POLICIES IN OTHER JURISDICTIONS

4.3.1 Socio-Economic Redress in Malaysia

4.3.1.1 The Malaysian Constitution

The Malaysian population consists largely of indigenous Malays and other smaller indigenous groups, referred to as the *Bumiputera*. The Bumiputera make up 70% of the population. The rest of the population consists mainly of people of Indian or Chinese descent.⁷⁴

On gaining independence in 1957, Malaysia adopted the *Federal Constitution of Malaysia*. The Malaysian Constitution was the result of negotiations between various political groups in Malaysia and Britain to end British colonial rule and grant Malaysia sovereignty.⁷⁵

Malaysia has a federal constitution which consists of fifteen “Parts”. These Parts are divided into four main categories, namely: (1) “The States, Religion and Law of the Federation”;⁷⁶ (2)

⁶⁹ As above the Preamble.

⁷⁰ Art 11(1) of the Universal Declaration of Human Rights UN Doc.A/810 (1948).

⁷¹ Human Rights Committee *General Comment* 18 (2000) para 10.

⁷² As above para 13.

⁷³ The Preamble of the EEA 55 of 1998 states that the Act is introduced to “give effect to the obligations of the Republic as a member of the International Labour Organisation”.

⁷⁴ UN Research Institute for Social Development, *The New Economic Policy and interethnic relations in Malaysia* (2004) 1-10; and Lee *Southeast Asian Studies* (2022) 307.

⁷⁵ Osman-Rani *Institute of Southeast Asian Studies* (2004) 205.

⁷⁶ Part I of the *Federal Constitution of Malaysia*.

“Fundamental Liberties”;⁷⁷ (3) “Citizenship”;⁷⁸ (4) “The Federation”;⁷⁹ and (5) “General and Miscellaneous”.⁸⁰

The Malaysian Constitution is entrenched as the supreme law of the Federation and any law passed after independence day of 31 August 1957 (referred to as “Merdeka Day”) which is inconsistent with the Constitution shall, to the extent of the inconsistency, be void.⁸¹ The Federal Court has the power under the Malaysian Constitution to declare any law passed by Parliament invalid if it falls outside of Parliament’s mandate. It may also adjudicate disputes between states (provinces) or disputes between the Federation and a state.⁸²

In respect of equality, the Malaysian Constitution provides for all persons to be equal before the law and to be entitled to the equal protection of the law.⁸³ Discrimination against citizens is prohibited except as expressly authorised by the Constitution.⁸⁴ The Constitution provides that the equality clause does not invalidate or prohibit, among others, any provision for the protection, well-being or advancement of the aboriginal peoples of the Malay Peninsula (including the reservation of land), or the reservation of a reasonable proportion of suitable positions in the public service for aborigines.⁸⁵

The Malaysian Constitution entrenches property rights and provides that no one shall be deprived of property save in accordance with law. No law shall provide for the compulsory acquisition or use of property without adequate compensation.⁸⁶ It further makes provision for the continuation of Malaysian reserves (areas specifically designated for indigenous Malays) which existed before independence and the disposal of reserved land under certain circumstances.⁸⁷

The Malaysian Constitution grants powers to the federal government’s parliament to proclaim

⁷⁷ As above Part II.

⁷⁸ As above Part III.

⁷⁹ As above Parts IV-XI and XII-XV.

⁸⁰ As above Part XII.

⁸¹ As above art 4(1).

⁸² As above art 128(1).

⁸³ As above art 8(1).

⁸⁴ As above art 8(2).

⁸⁵ As above art 8(5)(c).

⁸⁶ As above art 13(1) and (2).

⁸⁷ As above art 89(1), (1A) and (6).

legislation in order to advance any “national development plan” introduced by the federal government. This is irrespective of the powers of any state (province) to regulate any affairs related to such national or regional development plan introduced by the federal government.⁸⁸ This provision in the Malaysian Constitution played an important role in centralising the governance of economic redress policies introduced from the early 1970s by the federal government to implement affirmative action programmes in Malaysia nationally.

The biggest enabler of socio-economic redress measures in Malaysia is found in the Malaysian Constitution which provides for safeguarding of the special position and legitimate interests of the Malays and natives and their communities by the head of the Federal Executive.⁸⁹ The Constitution further permits parliament to prohibit the challenging or questioning of any matter right, status, position or privilege protected by article 153 to protect Malay privileges.⁹⁰ The Malaysian Constitution authorises the reservation of such proportions of positions in the public service in respect of scholarships or other educational or training privileges as the head of the Federal Executive may deem fit;⁹¹ reservation of permits and licences to operate any trade or business;⁹² and the reservation of places in tertiary educational institutions.⁹³ This provision of reservation in favour of Malays and natives in the Malaysian Constitution is referred to as “special rights” secured for Malays and natives as compensation during independence as a result of their inferior socio-economic status emanating from economic segregation during the period of British colonial rule. Special rights were secured for Malays in exchange for granting citizenship to resident non-Malays, such as Chinese and Indians, after independence.⁹⁴

4.3.1.2 History of Inequality in Malaysia and the National Economic Plan (NEP)

Chinese people had migrated to Malaya (as Malaysia was known before independence) when the Portuguese captured the city of Malacca in the sixteenth century. During the British colonial period (between the late 19th and mid-20th century), Malaya witnessed a large number of Chinese and Indian immigrants flocking into the country.⁹⁵ The immigrants played an important role in

⁸⁸ As above.

⁸⁹ As above art 153.

⁹⁰ As above art 153(2) and (3).

⁹¹ As above art 153(3).

⁹² As above art 153(8).

⁹³ As above art 153 (8A).

⁹⁴ Osman-Rani *Institute of Southeast Asian Studies* (2004) 206; and Thillainathan and Cheong *MJES* (2016) 53.

⁹⁵ Mokhtar *et al JMC* (2013) 12.

changing the lifestyle of the early inhabitants in Malaysia. Malaysia was an agriculture-based economy, mainly producing rubber and tin. The indigenous people, including the Malays, mostly lived in the rural areas and predominantly engaged in subsistence farming and the agricultural sector. The ethnic Chinese were engaged in mining and commerce, while ethnic Indians worked on plantations. Segregation of the main ethnic groups based on geographical areas evolved naturally.⁹⁶

After gaining independent in 1957, the country had a disproportionate pattern of wealth distribution in which the Chinese held a large portion compared to the other two main ethnic groups in the country, the Indians and Malays. Poverty was most prevalent among the Malay group since the Malays occupied the rural areas, whereas the Indians lived in working estates, and the Chinese were concentrated in urban locations of the country. The Chinese mostly engaged in business activities and had a relatively higher standard of living than the Malays and to a lesser extent the Indians.⁹⁷

The segregation of the main ethnic groups also extended to education, with multi-ethnic government schools co-existing with Mandarin (Chinese) and Tamil (from India) language vernacular schools. Under British colonial and commercial influence, employment in the formal sector depended on mastery of the English language. English was the medium of instruction in the urban schools, which put the predominantly rural Malays educated in their ethnic language at a disadvantage.⁹⁸

Segregation served to entrench inter-ethnic differences in average income as reflected in the incidence of poverty by race. The monthly household income in 1970 in Malaysia, for instance, ranged from as low as 172 Malaysian Ringgit (RM – the Malaysian currency)⁹⁹ for the Malays, to RM304 for the Indians and RM394 for the Chinese.¹⁰⁰ The unequal distribution of wealth among different ethnic groups in Malaysia created ethnic tensions which resulted in the eruption of ethnic riots in 1969 killing hundreds of people.¹⁰¹ It was only after the 1969 riots that the Second Malaysia Plan (1971-1975) was developed by the government as the principal policy

⁹⁶ As above.

⁹⁷ As above.

⁹⁸ Thillainathan and Cheong *MJES* (2016) 53.

⁹⁹ Malaysian currency is expressed as RM, an abbreviation for Malaysian Ringgit (MYR).

¹⁰⁰ Thillainathan and Cheong *MJES* (2016) 57.

¹⁰¹ International Monetary Fund (IMF) *When is economic growth pro-poor? Experiences in Malaysia and Pakistan* (2002) 1.

response to the riots. Part of the Second Malaysian Plan was the New Economic Plan (NEP). The NEP was considered as an affirmative action policy due to its main aim of benefiting and protecting the Bumiputera (the Malays and other minority indigenous groups) who comprise 70% of the population.¹⁰² The Bumiputera consist of 56% Malays (Muslim) and 14% other smaller or minority indigenous groups (mainly non-Muslim).¹⁰³

The NEP was implemented in 1971 as part of the Second Malaysia Plan and applied for 20 years, with two main objectives to achieve national unity.¹⁰⁴ The first main objective of the NEP was to eradicate poverty irrespective of race by means of “redistribution with growth”. This objective was to be achieved by increasing employment opportunities and income levels and improving public facilities for the people as a whole. The second objective was to address the economic imbalance as well as the disproportionate income distribution among different ethnic groups. In order to achieve the second objective, the following measures were introduced: imposition of quotas and preferential treatment for the Bumiputera; reservation of commercial licensing practices in favour of the Bumiputera; promotion of the business interests of the Bumiputera; rigid education quotas; quotas for employment; quotas for ownership in the corporate sector; the creation of Bumiputera commercial and industrial communities; subsidies, loans and grants by government to certain industries; purchasing of equity shares for the benefit of the Bumiputera; and the establishment of growth centres in the rural areas. These objectives were regarded as critical to move away from a predominantly agricultural economy and to open up opportunities for the Bumiputera to become involved in business and industries. In essence, the NEP aimed at creating proportional representation for the different race groups at all occupational levels and business.¹⁰⁵

Under the auspices of the NEP, the education medium of instruction was changed from English to indigenous Bahasa Malaysian. A significant national education budget was reserved to

¹⁰² UN Research Institute for Social Development, *The New Economic Policy and interethnic relations in Malaysia* (2004) 1-10.

¹⁰³ Lee *Southeast Asian Studies* (2022) 307. In Peninsula Malaysia, the Bumiputeras are essentially the Malays (Muslim), and in the east Malaysian states of Sarawak and Sabah, the Bumiputeras include all the ethnic indigenous groups, both Muslim and non-Muslim: Malay, Melanau, Dayak (essentially non-Muslim natives, including the Iban, Bidayuh and the Orang Ulu), Kadazan-Dusun and others.

¹⁰⁴ Osman-Rani *Institute of Southeast Asian Studies* (2004) 204. The NEP was implemented within the framework of the long-term Outline Perspective Plan (OPP), 1971-1990. Some elements of the NEP were retained in the New Development Policy (NDP) (1991-2000) and New Vision Policy (NVP) (2001-2010).

¹⁰⁵ Asian Development Bank Institute *Macro-Economic Management amid ethnic diversity: Fifty years of Malaysian experience* (2008) 1-15; Osman-Rani *Institute of Southeast Asian Studies* (2004) 205; and Thillainathan and Cheong *MJES* (2016) 56.

develop the skills levels of the Bumiputera and to help advance the interests of the Bumiputera in the industries and business. Various quota systems, such as an education quota and government subsidies, were introduced to assist the Bumiputera in education and skills development.¹⁰⁶ In 1979, the government introduced an ethnic quota system for admission to public higher education institutions, namely 55% for Bumiputera, 35% for Chinese and 10% for Indians and others.¹⁰⁷ As a result, in 1980, the Bumiputera accounted for 53,7% of the total enrolment at local public higher institutions, increasing to 65,3% in 1988. In addition, the government exerted massive pressure on private employers to employ Bumiputera. As a result, by 1990, the Bumiputera made up almost half of both the white-collar and working-class employees.¹⁰⁸

According to the NEP, the Bumiputera population was to be assigned a 30% share in the modern sector of the economy to enhance their participation in the industrial sector and at the same time raise their living standards. A 30% ownership in public (listed) corporates by the Bumiputera was used as a benchmark to measure the overall effectiveness of affirmative action measures in terms of the NEP.¹⁰⁹ The NEP also required the state to intervene in the economy in terms of resource allocation and to control business enterprises so that the objectives of the NEP could be achieved. This was done by setting up collective enterprises which held capital shares for the Bumiputera. Many enterprises were established from 1970 to 1983 under the NEP. Thus, the country witnessed its bureaucracy grew four times its initial size from 139 476 employees in 1970 to 521 818 in 1983.¹¹⁰

In addition to collective ownership enterprises to manage shares in businesses for the Bumiputera, the government had also introduced an initiative to redistribute shares in corporations to capable Malays, the elites and those educated, to achieve the goal of a 30% share in listed corporates by the Bumiputera. This initiative was in the form of Malaysia's privatisation programme which was first introduced under the NEP as part of the government's strategy for capital accumulation and growth. The programme to privatise state assets was utilised mainly to allocate shares to selected Bumiputera. This form of wealth distribution created

¹⁰⁶ Mokhtar *et al JMC* (2013) 13.

¹⁰⁷ As above 15.

¹⁰⁸ As above.

¹⁰⁹ As above 14-20; and Thillainathan and Cheong *MJES* (2016) 51.

¹¹⁰ As above.

an extensive concentration of ownership in the hands of an elite minority, not solely Bumiputera but particularly those Malays with strong political ties.¹¹¹

4.3.1.3 Successes, Failures and Ultimate Beneficiaries of the NEP

The successes and failures of the NEP have been widely debated. The dominant view suggests that the NEP had some short-term successes but in the long term created distortions and entrenched structural economic deficiencies.¹¹² As one of the aims of the NEP was to increase income and eradicate poverty, data suggests that this aim was largely achieved.

Malaysia's success in reducing poverty has been described as spectacular. Malaysia succeeded in reducing its incidence of poverty from 49,3% in 1970 to 16,5% in 1990.¹¹³ In 2018, less than 1% of households lived in poverty.¹¹⁴ For the bottom 40% of the household income groups, data between 1970 to 1985¹¹⁵ reflects that household income had risen from RM 264 in 1970 to RM 1 095 in 1985. The bottom 40% household income for the Bumiputera grew from RM 172 in 1970 to RM 852 in 1985; for Indians from RM 304 to RM 1 094; and for Chinese from RM 394 to RM 1 502 in the same period.¹¹⁶

The Indian-Bumiputera income ratio gap for the same period decreased from 1,76 to 1,28, and the Chinese-Bumiputera income gap from 2,29 to 1,76.¹¹⁷ This means that the Indian household income of the bottom 40% of households was 1,28 times higher than a Bumiputera household in 1985, compared to 1,76 times higher in 1970. Chinese household income was 1,76 times higher in 1985, compared to 2,29 times higher in 1970.

It was possible to achieve some of the NEP goals because of the rapid economic growth experienced in Malaysia during the NEP period. The average annual economic growth rate was

¹¹¹ As above.

¹¹² Thillainathan and Cheong *MJES* (2016) 59; Osman-Rani *Institute of Southeast Asian Studies* (2004) 205; Berma *Kajian Malaysia* (2003) 211 and 212; Xavier and Ahmed *International Journal of Public Sector Management* (2012) 234; and Mills *et al* (2020) 118.

¹¹³ Berma *Kajian Malaysia* (2003) 221.

¹¹⁴ Mills *et al* (2020) 112.

¹¹⁵ During 1985 and 1986, the Malaysian economy experienced a recession and again in 1997 during the Asian Financial Crisis. Therefore, economic data is often reflected to coincide with these periods rather than the running span of the NEP (1971-1990).

¹¹⁶ Thillainathan and Cheong *MJES* (2016) 57.

¹¹⁷ As above.

estimated at 7,3% from the period 1971 to 1975, and 8,6% from 1976 to 1980. The success of the NEP was further attributed to economic development and sufficient government resources made available for development.¹¹⁸ As a consequence, the Malaysian economy reduced unemployment from 8% in 1970 to 2,2% in 1996.¹¹⁹

In respect of the NEP's target of 30% ownership in listed corporates for Bumiputera, just short of 20% was achieved by 1990.¹²⁰ The Bumiputera's ownership in listed corporates increased from 2,4% in 1990 to 19,4% in 1998, compared to other Malaysians whose ownership increased from 34,3% to 56%, and foreigners whose ownership shares decreased from 63,3% to 24,6% in the same period.¹²¹ Therefore, the increase in the ownership of listed corporates by the Malaysians in general and the Bumiputera in particular was at the expense of foreign shareholders and not local Malaysians.

Although the NEP was implemented to raise the living standard of the entire Bumiputera population, it also had some downsides. For instance, it encouraged corruption, patronage and political nepotism referred to as "money politics", with an increasing number of political parties and politicians participating. Consequently, the NEP benefited only the Malay elites, the Chinese and Indian politicians, and businessmen who formed stronger ties with the political parties.¹²²

Money politics has also caused a disproportionate distribution of wealth among the Bumiputera in Malaysia. This can be attributed to the people who managed public corporations and agencies – mainly politicians and government officials.¹²³ Some of the Bumiputera used their ethnic status to obtain business licences and contracts for the non-Bumiputera. The non-Bumiputera, in turn, paid the Bumiputera corruptly for their contributions.¹²⁴

The implementation of the NEP required the accumulation of economic powers and resources in the state, thus enabling the political elite to use this power as a political mechanism to enlist electoral support from the public. As the government controlled public enterprises to achieve the

¹¹⁸ As above 51-68.

¹¹⁹ Rasiah and Shari *Cambridge Journal of Economics* (2001) 58.

¹²⁰ Mills *et al* (2020) 118; and Osman-Rani *Institute of Southeast Asian Studies* (2004) 214.

¹²¹ Osman-Rani *Institute of Southeast Asian Studies* (2004) 214.

¹²² Khan and Jomo *Cambridge University Press* (2000) 1-40.

¹²³ As above 5-40; Mokhtar *et al JMC* (2013) 14; and Mills *et al* (2020) 119.

¹²⁴ As above.

goals of the NEP, the ruling politicians eventually had an opportunity to be involved in development projects. The development strategy has for the most part pragmatically pursued the achievement of the ambitions of the ruling political leaders. Other political parties got involved in business for financial security and to fund their activities and protect their own interests. Some political parties operated by focusing mainly on party and individual interests.¹²⁵

Various long-term distortions were identified as a result of the Malaysian government's aggressive interference in the economy through the NEP. The sharp downturn of the Malaysian economy in the mid-1980s and 1997 is attributed to increasing state interference in the economy, which later resulted in a shortage of efficient "economic performers" because public enterprises lacked the necessary skills, such as management and financial discipline. This situation brought the country under heavy foreign debt. The state's involvement in business was also said to be a cause of foreign debt as it led to deliberate embezzlement of funds by politicians. Employment was based on political affiliation rather than merit, which caused public enterprises and other state organisations to employ incompetent people with inadequate skills and knowledge. This was cited as one of the reasons why public enterprises could not cope with the impact of the global economic recession in the 1980s and the Asian Financial crisis in 1997.¹²⁶

The Malaysian government's privatisation programme has been abused, especially for the development, consolidation and benefit of politically linked businessmen. Government politicians used certain Bumiputera as proxy for their business ventures. Money politics and patronage had also resulted in political power being centralised in the hands of the United Malays National Organization (UMNO). Most Malay businessmen depended on Malay government politicians for business benefits because these politicians had exclusive power over the patronage system. This trend apparently persists until today, with UMNO having become a more active corporate player compared to other political parties.¹²⁷

The NEP envisaged that education would impact future socio-economic positions. Some believed that the middle class was formed in the 1970s and 1980s by those individuals who had gained access to tertiary education thanks to the reforms initiated by the NEP in the 1970s.¹²⁸

¹²⁵ Mokhtar *et al JMC* (2013) 14; and Lee *Akademika* 64 (2004) 65-81.

¹²⁶ As above; and Mills *et al* (2020) 121.

¹²⁷ Mokhtar *et al JMC* (2013) 15.

¹²⁸ As above.

The NEP had several unintended consequences. Malaysia used to be on par or better off than peer countries such as South Korea, Singapore and Taiwan in terms of its economic growth and political stability. The picture has changed. Unlike these counterparts that have entered the category of high-income countries in the world, Malaysia is trapped in a high middle-income country category. This is due to one of the most talked-about issues in Malaysia, namely the deteriorating quality of its higher education. This can be directly attributed to the NEP as the NEP introduced a quota system for the enrolment of students, which led to a maximum number of student enrolment regardless of their academic qualifications. Consequently, the quality of local graduates declined compared to those from peer countries in the region. The emphasis was on the quantity of enrolment rather than the quality of the higher education. The graduates produced by the local universities did not meet the requirements of the recruiting firms, resulting in a shortage of skilled staff. More than 80% of Malaysian workers are not in a position to drive the economy upwards given that their educational achievements are low or below peer countries. It is said that without the requisite talent, Malaysia will be unable to enter high value-added markets and incapable of operating high-end technologies.¹²⁹ A pertinent shortcoming of the NEP is pointed out by economists and commentators as being the relatively less prominence given to quality education and the inordinate emphasis on equity ownership.¹³⁰

While wealth disparities among ethnic groups have narrowed, the inequality gap widened within these groups, especially the Bumiputera. One of the most enduring legacies of the NEP is the class inequality it has created within the Bumiputera. The Malays, who are politically dominant, represent the majority of the Bumiputera.¹³¹ Their income and wealth have increased significantly compared to that of other minority Bumiputera groups.¹³² In a study conducted in Sarawak, one of the states (provinces) with the highest concentration of Bumiputera,¹³³ an average of 70,1% of the minority Bumiputera households were poor in 1976 and 31,7% were poor when the NEP ended in 1990. In comparison, only 16,5% of Malay households in the province were still poor in 1990.¹³⁴

¹²⁹ Xavier and Ahmad *International Journal of Public Sector Management* (2012) 234.

¹³⁰ Lee *Southeast Asian Studies* (2022) 307.

¹³¹ As above 300.

¹³² Berma *Kajian Malaysia* (2003) 213 lists the minority Bumiputera in the province of Sarawak as the Iban, Bidayuh, Melanau and Orang Ulu.

¹³³ As above 213. The percentages of Bumiputera in the province of Sarawak in 2000 was 70,6%.

¹³⁴ As above 222.

In 1975, 54,8% of the average minority Bumiputera households earned less than RM 200 per month compared to 31,5% of the Malay. In 1990, the minority Bumiputera household earned on average RM 840, and the Malay household RM 1 332.¹³⁵

From 1970 to 1985, 75% of all new public service jobs went to Malays. A large percentage, 80%, of senior positions in public service were occupied by Malays. The participation of the smaller minority indigenous groups (referred to as Bumiputera minority) within the Bumiputera group in professional and technical occupations was 4,6% in 1990, compared to 12,7% of Malays as the majority group within the Bumiputera. In 1990, 66,5% of the Bumiputera minority groups worked in lower-income sectors of the economy such as agriculture and forestry, compared to 29,9% of Malays.¹³⁶ The involvement of Bumiputera minority groups in more lucrative sectors such as manufacturing, construction and wholesale, is very limited.¹³⁷

Although the ownership of Bumiputera in listed corporates increased during the tenure of the NEP, in the state of Sarawak with a large concentration of the population Bumiputera, the Bumiputera minority held no publicly listed shares. The Bumiputera minority also held no chairperson positions on the boards of any listed corporate.¹³⁸

Undoubtedly, the NEP succeeded in increasing Malay household income, but the NEP is also largely to be blamed for high inequality within the Bumiputera community. It was the political dominant Malays within the Bumiputera group who largely benefited from the economic growth during the NEP period.¹³⁹

The NEP appears to be biased against the Bumiputera minority groups in public sector employment and business support. The NEP's employment and wealth restructuring programmes achieved limited success in increasing the number of Bumiputera minorities in the management and administration occupational category.

While it is said that an increasing number of Bumiputera have entered the modern and lucrative

¹³⁵ As above 228 and 232.

¹³⁶ As above 233.

¹³⁷ As above 234.

¹³⁸ As above 235-239.

¹³⁹ As above 232.

economic sectors in Malaysia, the fact remains that economic growth during the NEP period did not equally benefit the majority of the poor Bumiputera. The largest part of the poor Bumiputera continue to predominate in the rural sector. For those who managed to migrate to the urban areas, the majority of the Bumiputera minority were employed in lower rungs of occupational ladders, such as clerical staff, salespersons, restaurant waiters/waitresses and cashiers in the retail industry.¹⁴⁰

More pertinent is the failure of the Bumiputera minority to own corporate equity. It is said that the NEP flowed only one way. The NEP succeeded in moving Malays into urban commercial sectors where they were under-represented, but hardly succeeded in moving the poor section of the Bumiputera out of low-income sectors, such as agriculture, where they were over-represented.¹⁴¹

The success of the NEP to reduce unemployment and poverty can be attributed to the high levels of growth achieved during the tenure of the programme, rather than the affirmative measures introduced by the NEP. The affirmative measures implemented under the auspices of the NEP instead created long-term structural anomalies and class inequality in Malaysia.

4.3.2 India's "Creamy Layer"

4.3.2.1 The Nature of the Indian Caste System

The Indian caste system ("a four-tier caste hierarchy") is historically one of the main dimensions in terms of which Hindu people are classified according to social class, religion, region, tribe, gender and language. It is generally accepted that the caste system in India is more than 3 000 years old.¹⁴² The Indian caste system is considered a closed system of stratification, which means that a person's social status depends on the caste into which the person was born. There are limitations on interaction and contact with people from another social status.¹⁴³ Although this or other forms of differentiation exist in all human societies, it becomes problematic when one or more of these dimensions overlap and become the sole basis for systematic ranking and unequal access to valued resources such as wealth, income, power and prestige.

¹⁴⁰ As above 250.

¹⁴¹ As above 251.

¹⁴² Bidner and Eswaran *Journal of Development Economics* (2015) 142.

¹⁴³ Sridharan *ALJ* (1999) 100.

The caste system classifies people into four hierarchically ranked main castes called “varnas”. They are classified according to occupation, which determines access to wealth, power and privilege. The Brahmins (or Brahmans), usually priests and scholars, are at the top. Next are the Kshatriyas, or political rulers and soldiers. They are followed by the Vaishyas, the farmers, traders and merchants. The fourth are Shudras, who are usually labourers, peasants, artisans and servants. At the very bottom are the Achhoots or Dalits – those considered the untouchables. These individuals perform occupations that are considered unclean and polluting, such as scavenging and skinning dead animals, street sweepers and latrine cleaners. They are considered outcasts and are not included in the ranked castes and fall outside the Hindu caste system.¹⁴⁴ The four main castes are further divided into about 3 000 castes and 25 000 sub-castes, each based on their specific occupation.¹⁴⁵

The caste system includes three elements: expulsion, hierarchy and hereditary. It is characterised as a system divided into a large number of hereditarily specialised groups which are hierarchically superposed and mutually opposed. It does not tolerate the principle of rising in status, of groups mixing, and of changing occupations. The two most important characteristics of the Indian caste system have to do with endogamy and occupational restriction. Every member of a caste or sub-caste is required to marry within their own caste. Any violation of this results in expulsion from one’s family and caste. When it comes to occupation, every caste is associated with a particular occupation which its members are required to follow. Another characteristic is that every caste imposes restrictions on its members with regard to diet and has its own laws which govern the food habits of the members. Another is the social interaction between castes. There are strict barriers when it comes to a superior caste mixing with an inferior caste. Hence, under the caste system, every caste abides by well-established customs and well-defined norms of interaction.¹⁴⁶

The caste system significantly impacted the economic structure in the rural Indian villages. The village was essentially a food-providing unit, where each family of the craft or service caste was linked with one or more of the landowning farmer-caste family. This was known as the *jajmani* system, which survived in India up to the arrival of the British.¹⁴⁷

¹⁴⁴ Deshpande *CPSU* (2010) 5.

¹⁴⁵ Writer *BBC News* (Jun 2019) 19; and Olcott *American Sociological Review* (1944) 648.

¹⁴⁶ Deshpande *CPSU* (2010) 5.

¹⁴⁷ As above 6. India was a British colony from 1858 to 1947.

The rigidity of the caste system was affected by the arrival of the British. The British brought with them their own traditional form of government. As Christians, the British did not have much sympathy for the Hindu institutions. During the initial days of the British East India Company's rule, caste privileges and customs were encouraged, but the British courts began to disagree with the discrimination against the lower castes.¹⁴⁸

Under British colonial rule, a certain number of traditional caste-linked crafts were made redundant because of the large number of imports of manufactured goods from the urban industrial centres which made these traditional crafts superfluous. Because of this, many weavers had to turn to agriculture. In other places, occupations that had been passed down from generation to generation ceased because of industrial production in their area. Under British rule, members of the indigenous rural lower caste were also promised special programmes (such as healthcare, legal assistance, allocation of land, scholarships, loans and grants) and were legally protected against social discrimination (such as forced labour and untouchability) enforced on individuals from certain castes. These measures resulted in the gradual phasing out of certain well-established traditional caste customs and rituals.¹⁴⁹

Since India's independence from Britain in 1947, the trend to relax rules relating to the caste system has continued. There was more sharing between members of the middle and upper castes, but those in the lowest castes continued to be treated differently. There was also a significant change in occupational trends among men since the mid-1900s. Earlier, most men were dedicated to their traditional caste-related jobs, but by the late 1900s, most had taken up new occupations in a far more westernised and commercial economy.¹⁵⁰

4.3.2.2 The Development and Legal Framework of the Caste Reservation Policy

In order to improve the socio-economic position of the lower castes in India, three categories or groups were identified as beneficiaries of government's reservation policy during the 1900s. The first group is the Scheduled Castes (SCs), who include communities considered to be untouchables. The second are the Scheduled Tribes (STs). This category includes those

¹⁴⁸ Sridharan *ALJ* (1999) 103 and 104.

¹⁴⁹ As above.

¹⁵⁰ Deshpande *CPSU* (2010) 1.

communities who did not accept the caste system and preferred to reside deep in the jungles, forests and mountains of India, away from the main population. The Scheduled Tribes are also called Adivasi, meaning aboriginals. The third group, namely the Other Backward Classes (OBCs), who consists of members of various castes who are higher than untouchables but still considerably low in caste hierarchy.¹⁵¹ They are considered to be affected by “backwardness” based on social and economic disadvantages. The OBCs presently represent 42% of Indian households.¹⁵²

Even before India’s independence from Britain in 1947, the British, in the beginning of the 1900s, started to introduce a system of reservation to the benefit of the outcasts or so-called “Untouchables”, in order to secure social stability. The British were slowly providing Indians access to political representation with limited population-based representation on provincial councils.¹⁵³

When the British announced in 1908 their intention to reform the political system, a delegation of conservative Muslims requested that they (the Muslims) be given separate electorates. The British, eager to maintain alliances with these powerful representatives of the Muslim population, granted the request. A separate electorate was introduced by means of the Indian Council’s Act in 1909 for Muslims and extended to other groups such as Indian Christians, Anglo-Indians and Europeans by the Government of India Act in 1919.¹⁵⁴

Although separate electorates were not established for Untouchables at this time, the creation of separate electorates for Muslims paved the way for this possibility. After 23 years, and many attempts to secure further political reforms that would benefit the low caste groups, a coalition of Indian groups formed the so-called “Poona Pact” in 1932. The Poona Pact further established reserved seats for certain groups, but it did not provide for separate electorates for Untouchables. The Poona Pact represented a compromise between Untouchable leaders who sought separate electorates and other leaders who opposed a British offer of separate electorates and reserved seats to Untouchables. The implementation of this compromise

¹⁵¹ Sridharan *ALJ* (1999) 99.

¹⁵² Rathore *Statista* (Jul 2023) 10.

¹⁵³ Sridharan *ALJ* (1999) 105.

¹⁵⁴ As above 105 and 106. Separate electorates mean that under British rule, seats were reserved in government for a specific group and voting for the reserved constituency was allowed for only members of that specific community.

furthered the trend of determining policy along group identities and laid the groundwork for reservations in government employment after Independence.¹⁵⁵

In order to more accurately determine the Untouchables and the social status of Indians within the caste system, the British conducted a census in 1936. The census created a formal record of caste but fell short of accurately characterising the system.¹⁵⁶ From this inadequate census data, the British created a list of Scheduled Castes in 1936. The purpose of the list was to facilitate electoral reforms such as reserving seats for the Scheduled Castes. The questions during the census for determining untouchability pointed to the incidence of socio-economic impairment as the crucial test. Although the questions were fairly vague, the existence of multiple (and ambiguous) criteria permitted regional variations by providing the census supervisors with a fair amount of discretion. Ultimately, each provincial supervisor was to compile their own list and was instructed to include only those castes who definitely suffered from serious social and political handicaps on account of their degraded position in the Hindu social scheme. From the outset, the identification of castes with a lower socio-economic status was the criterion to qualify for benefits under the reservation policy to correct such position. The approach was that because the impairment was inflicted along lines of group categorisation, the remedy could and should be available for the group along the same lines.¹⁵⁷

After independence in 1947, the Constituent Assembly convened in 1948 to draft India's Constitution. Safeguards for various underprivileged groups were considered and enshrined in the Constitution.¹⁵⁸ The Indian Constitution provided for equality before the law¹⁵⁹ and included explicit provisions for reserving appointments for "backward classes" in government.¹⁶⁰ It prohibited discrimination on grounds of "religion, race, caste, sex [or] place of birth",¹⁶¹ with an exception permitting "special provisions" for women, children¹⁶² and socially and educationally "backward classes" of citizens.¹⁶³ The Indian Constitution prohibits public employment

¹⁵⁵ As above.

¹⁵⁶ As above 109.

¹⁵⁷ As above 109 and 110.

¹⁵⁸ As above 107.

¹⁵⁹ Art 14 of *The Constitution of India* (Constitution of India).

¹⁶⁰ Arts 15(4), 16(1) and 332 of the Constitution of India. Backward classes were not defined in the Constitution in terms of specific castes. Art 338(10) referred to "Scheduled Castes" as including those backward classes as the President may, on receipt of the report of a Commission appointed under art 340(1), may specify.

¹⁶¹ As above art 15.

¹⁶² As above art 15(3).

¹⁶³ As above art 15(4).

discrimination on grounds of “religion, race, caste, sex, descent, place of birth, [or] residence...”.¹⁶⁴ However, the Constitution specifically acknowledges the implicit tension of providing “equality of opportunity” in a society rampant with systemic and functional inequities.¹⁶⁵ Thus, article 16(4) of the Indian Constitution provides that the state may make provision for the reservation of appointments or posts in government in favour of any backward class of citizens which, in the opinion of the state, is not adequately represented in the public service. Moreover, the Constitution requires the government to promote educational and economic interests of the backward classes and protect them from all forms of injustice and exploitation.¹⁶⁶

The Indian Constitution also specifically abolished the practice of “Untouchability”.¹⁶⁷ This means that the isolation or restriction of any person’s social rights based on his or her caste is prohibited.¹⁶⁸

The Indian Constitution therefore incorporates the notion of equal treatment of individuals as well as the notion that members of a group who have suffered from hierarchical subordination and structuralised inequality may face unique obstacles to advance socially. The interests of disadvantaged groups can then be promoted by means of measures such as the reservation of positions in terms of the Indian Constitution. The Constitution in this regard also obliges the government to promote the interests of these groups, and explicitly permits the reservation of appointments or other preferences to overcome the negative consequences of membership in a “backward class”.¹⁶⁹

The Constitution contemplated reservations not as a rule, but as an exception, authorised only for the limited purpose of advancing the backward. However, the Constitution neither specified which groups should comprise the beneficiaries of this exception, nor provided detailed guidance or standards for the identification of these groups.¹⁷⁰ The Constitution merely permitted special provisions and reservation in educational institutions and government employment for “backward

¹⁶⁴ As above art 16(2).

¹⁶⁵ As above art 16(1).

¹⁶⁶ As above arts 15(5), 338(5) and 340.

¹⁶⁷ As above art 17.

¹⁶⁸ The Untouchability Offences Act 22 of 1955 promulgated as a result of the Indian Constitution, provides for penalties for preventing anyone from enjoying a wide variety of religious, occupational and social rights on the grounds that he or she is from a Scheduled Caste or Scheduled Tribe.

¹⁶⁹ Arts 15(5) and 340 of the Constitution of India.

¹⁷⁰ As above art 341(1) gives the President the powers to specify the castes, races or tribes to be deemed “Scheduled Castes”.

classes". The backward class category evolved over time and presently comprises the Scheduled Castes (noted for their untouchability), Scheduled Tribes (included for their geographic and socio-cultural isolation from the general population), and Other Backward Classes (the designation for backward groups not included in the first two groups, typically a low caste that is not untouchable).¹⁷¹

After the enactment of the Constitution in 1949, the President (the new head of state) adopted a list of Scheduled Castes that basically re-enacted the 1936 British census-based list. A further list compiled in 1956 eliminated a few more anomalies and the government acknowledged that this list was not exhaustive. Thus, while the government did not attempt to create a more accurate account than the 1936 census, it acknowledged to some degree that the 1936 census, or perhaps any census, could not provide a complete and accurate account of untouchability.¹⁷²

In 1951 and in accordance with the Indian Constitution,¹⁷³ the President established the First Backward Classes Commission, the so-called "Kalelkar Commission". The Commission was mandated to investigate the plight of the socially and educationally backward classes, and to recommend steps to remove the difficulties under which they labour and to improve their conditions. The Commission's report published in 1956, recommended a system of reservation in government employment and access to education, analogous to those that several southern states in India had maintained for years before independence.¹⁷⁴

The *Kalelkar Report* first recommended a new and continuous census operation.¹⁷⁵ The Report also took note of "Special Groups" whose exclusion from the existing lists of backward groups should be reconsidered, calling for further examination of several groups, as well as inhabitants of certain regions.¹⁷⁶ Moreover, the Commission affirmed the practice of using caste as a primary criterion of backwardness. In its report, the Commission acknowledged the economic impairment inflicted upon groups and that those groups' position could not be remedied without recognition of the group characteristic of the impairment.¹⁷⁷

¹⁷¹ Sridharan *ALJ* (1999) 108-109.

¹⁷² As above 110.

¹⁷³ Art 338 of the Constitution of India.

¹⁷⁴ Government of India Ministry of Welfare *Report of the (First) Backward Classes Commission* (1956) Recommendations 4 and 6.

¹⁷⁵ As above Recommendation 1.

¹⁷⁶ As above Observation 9.

¹⁷⁷ As above Observation 11.

Based on the Commission's recommendations, government instituted a system of reservations. However, government went further than what the Commission recommended and qualified reservation policies in many important respects. It excluded, for instance, Christians and Muslims (including Hindus who had converted to these religions) from eligibility, limiting the scope of the policy to Hindu communities. In addition to religious disqualifications, the government instituted regional qualifications. Reservation policies designated Scheduled Castes by state, and sometimes by district, and recognised that the social and educational backwardness of a group may vary in degree in different areas.¹⁷⁸ Yet, despite these limitations, India's policy of "compensatory discrimination"¹⁷⁹ consisted of quotas, or strict reservations of designated percentages of government positions and in educational institutions for beneficiary groups, according to their representation in the society. Membership in a beneficiary group alone qualified a candidate to receive a reserved or privileged position.

With the tensions created by the implementation of reservations in educational institutions and for employment in government, the judiciary was increasingly called upon to adjudicate on disputes involving government reservation policies. Specifically, the courts began to examine the various attempts by government to offer an acceptable definition of disadvantage. Attempting to set parameters for the Indian Constitutional exception which permitted reservations for "backward classes", the courts noted time and again that caste was a particularly salient variant of disadvantage, but should not function as the sole criterion.

In *Balaji v State of Mysore*,¹⁸⁰ the Indian Supreme Court first confronted the possible limitations of caste as a ground of disadvantage. Although the Court criticised the state of Mysore's heavy reliance on caste as a criterion of backwardness, it still approved the use of caste as a unit of designation.¹⁸¹

In *State of Andhra Pradesh v Sagar*¹⁸² the court, citing *Balaji*, invalidated a list of backward classes because the state had not presented any evidence of the criteria adopted for the purpose

¹⁷⁸ Sridharan *ALJ* (1999) 111.

¹⁷⁹ As above 111 and 112. The term "compensatory discrimination" is often used in literature to refer to the reservations provided for in art 16 of the Constitution of India in which reservation is excluded from the unfair discrimination prohibition in the Indian Constitution.

¹⁸⁰ 1963 AIR (SC) 649 (hereafter referred to as *Balaji*).

¹⁸¹ As above the 19th page. The judgement is unnumbered.

¹⁸² 1968 AIR (SC) 1379 (hereafter referred to as *Sagar*).

of determining the backward classes.¹⁸³ Still, this did not shift the policy's focus to the individual, but maintained emphasis on the group. Although the court was unwilling to allow an automatic presumption of disadvantage for the group, it sought evidence about the group's status, and not the status of individual members of the group, to establish the propriety of reservations for this group.

Similarly, in *Rajendran v State of Madras*,¹⁸⁴ the court noted that a caste is also a class of citizens and if the caste as a whole is socially and educationally backward, reservation can be made in favour of such caste on the ground that it is a socially and educationally backward class of citizens within the meaning of article 15(4) of the Indian Constitution. While the court noted that a reservation based solely on caste would be unjustifiable, caste could be one of several factors considered, including social and educational backwardness. The court later reaffirmed *Balaji*, but specifically repudiated the notion that caste, while potentially useful was a necessary or the sole factor in establishing disadvantage.¹⁸⁵

In 1978 the government appointed the Second Backward Classes Commission, the "Mandal Commission".¹⁸⁶ The Commission, mandated with reassessing government's reservation policy, followed a methodology of creating a sophisticated set of criteria to define the beneficiaries of the policy. The Commission found that, in fact, caste was the essence of social backwardness. Congruent with Supreme Court holdings, it treated caste as a legitimate criterion by which to measure reservation policies, and also accorded significant weight to caste as the criterion by which to determine inclusion in a list of backward classes. The Commission again recognised that if group membership was the source of impairment and inequality, it might be integral to the remedy.¹⁸⁷ At this stage, caste was still considered the first criterion to determine disadvantage, but was not the only criterion used. Social and educational status and other important factors were considered to determine backwardness.

Accordingly, the Commission specified castes subordinated in the hierarchy (though ranked above those designated as Scheduled Castes) as "Other Backward Classes" (OBCs) and

¹⁸³ As above the 12th page. The judgement is unnumbered.

¹⁸⁴ 1968 AIR (SC) 1012.

¹⁸⁵ As above the 11th page. The judgement is unnumbered.

¹⁸⁶ Sridharan *ALJ* (1999) 114.

¹⁸⁷ Government of India Ministry of Welfare *Report of the (Second) Backward Classes Commission* (1980) 57.

recommended a 27% reservation in government employment for these newly identified groups.¹⁸⁸ The Report further recommended an additional 10% reservation for economically backward sections of society who did not fall under the other existing reservation schemes. The Report also recommended that the reservation be expanded to include promotion; that unfilled quotas be carried for three years; and that all private sector organisations receiving public financial assistance should also be subject to the policy.¹⁸⁹

Additionally, the Report attempted to verify the economic backwardness of these social and educationally backward castes, presenting the sort of empirical knowledge on which the *Sagar* judgement placed emphasis.¹⁹⁰ The Commission went beyond mere caste as a criterion to also include the most backward subsections of various religions in the list of Other Backward Classes, suggesting that “low caste” and “backward class” were not co-extensive.¹⁹¹

The Mandal Report was released in 1980, but the government shelved it for ten years.¹⁹² During this period, the court in 1985 in *Vasanth Kumar v State of Karnataka*¹⁹³ issued an advisory opinion on the criteria to be used to define disadvantage for the purpose of reservations. Four of the five judges approved the use of caste as a criterion to identify backward classes. One judge recommended that caste be used as one criterion, but “in certain cases an income ceiling might be set” to cull out those members of a generally backward class who are advanced. One other judge suggested that caste rank should not be considered at all, and that economic factors alone should determine backwardness.¹⁹⁴

Then, in August 1990, the President of India announced that he would implement the Mandal Report’s recommendation of 27% reservations in educational institutions and government employment for Other Backward Classes. Public resistance, violent riots and protests against the Mandal Report’s recommendations ensued, especially by those groups aggrieved for not being included in the list of Other Backward Classes. Consequently, the policy’s implementation

¹⁸⁸ As above 58. While the OBCs actually represented 52% of the Indian population, according to the Commission, the Commission limited its recommendation to 27% (in addition to the 22,5% already reserved for Scheduled Castes and Scheduled Tribes) in line with the Supreme Court’s holding in *Balaji* that reservations in the government could not exceed 50% in total.

¹⁸⁹ As above 58 and 59.

¹⁹⁰ As above.

¹⁹¹ As above 60.

¹⁹² Sridharan *ALJ* (1999) 115.

¹⁹³ 1985 AIR (SC) 1495.

¹⁹⁴ As above the 47th page. The judgement is unnumbered.

was stayed while the Supreme Court considered its constitutionality in *Indira Sawhney v Union of India (Indira Sawhney 1)*.¹⁹⁵

In *Indira Sawhney 1*, a majority of a nine-judge panel of the Supreme Court, in a 300-page judgement, validated the Mandal Report and the implementation of 27% reservation in educational institutions, government appointments and promotions, but added one crucial dimension to the definition of disadvantage. First, the court affirmed that caste can be a vital, even the first, consideration in compiling a list of socially and educationally backward classes, as long as the caste is primarily socially and educationally backward, as determined by empirical evidence.¹⁹⁶ The court continued to explore the value of economic criteria, determining that criteria need not be solely economical to the exclusion of caste considerations, and noted that “social hierarchy and economic position exhibit an indisputable mutuality”.¹⁹⁷

However, to ensure that benefits would truly flow to the most disadvantaged, the court issued a requirement of a means test, or the “creamy layer” test. The test called for, among other things, an “imposition of an income limit, for the purpose of excluding persons (from the backward classes) whose income is above the said limit”.¹⁹⁸ The court held that “only caste” cannot be the basis for reservation and considered the thorny issue of accurately identifying the creamy layer. The court wondered “how and where to draw the line” between the deserving and the creamy layer among backward classes. The court emphasised that “the basis of exclusion should not merely be economic, unless of course the economic advancement is so high that it necessarily means social advancement”.¹⁹⁹

In respect of social advancement, the court observed that some individuals and families gain sufficient means to develop “capacities to compete” with others in the field. The court held that social advancement is to be judged by the capacity to compete with advanced castes (referred to as “forward castes”) achieved by the members of the backward classes.²⁰⁰ The principle of “once backward, always backward” is not acceptable, and requires “periodic examination” of a

¹⁹⁵ 1993 AIR (SC) 477 (hereafter referred to as *Indira Sawhney 1*). Some sources and even judgements refer to “Indira” as “Indra”. The word “Indira” is more commonly used.

¹⁹⁶ As above para [796].

¹⁹⁷ As above para [522].

¹⁹⁸ As above para [629].

¹⁹⁹ As above paras [790] – [792].

²⁰⁰ As above para [533].

backward class. The court pointed out that care should be taken to ensure that forward castes or formerly backward classes are not included in the backward caste list.²⁰¹ The court also cautioned against the dangers of identifying the creamy layer solely on an economic basis.²⁰² For example, the court pointed out that a person who earns 36 000 Rupees a month may be economically well off in rural India, but the same salary in a metropolitan city may not account for much. In this regard, the court warned that while the income of a person can be taken as a measure of their social advancement, the limit to be prescribed should not be such as to result in “taking away with one hand what is given with the other. The income limit must be such as to mean and signify social advancement”.²⁰³

The central government was directed by the court in *Indira Sawhney 1* to identify and notify the creamy layer within four months of the court’s ruling. After such notification, the creamy layer within the backward classes shall “cease” to be covered by the reservations under article 16(4) of the Indian Constitution.²⁰⁴ As a result of the court’s direction in *Indira Sawhney 1*, the central government by means of an *Office Memorandum* and based on further recommendations by the National Commission for Backward Classes, issued directives to be used for defining the creamy layer.²⁰⁵ These directives allowed the various state governments to develop their own criteria based on their own unique circumstances within the parameters of the national directives. The majority of the states then constituted commissions to determine their own criteria. Subsequently, criteria based on the national directives and a state’s own needs were enacted in each state respectively.²⁰⁶

However, certain states like Kerala did not promptly implement the *Indira Sawhney 1* judgement or national directives. This led to the *Indira Sawhney v Union of India and Others (Indira Sawhney 2)*²⁰⁷ judgement in 1999. In this judgement, the court fulfilled the role of the reluctant state and went to the extent of assessing the criteria for determining the creamy layer among backward classes with reference to *Indira Sawhney 1*. The judgement in *Indira Sawhney 2* confirmed the criteria laid down in *Indira Sawhney 1* and held, among others, that persons from

²⁰¹ As above para [798].

²⁰² As above paras [174] and [539].

²⁰³ As above para [792].

²⁰⁴ As above para [793].

²⁰⁵ Central Government of India *Office Memorandum dated 8.9.93*.

²⁰⁶ For instance, the Bihar Reservation of Vacancies in Posts and Services (Amendment) Ordinance 5 of 1995.

²⁰⁷ [1999] INSC 418 (13 Dec 1999) (hereafter referred to as *Indira Sawhney 2*).

backward classes who occupied positions in higher services in government had reached a higher level of social advancement and economic status. Therefore, they were not entitled to be treated as backward. Such persons were to be treated as members of the creamy layer without any further inquiry.²⁰⁸ Likewise, people with sufficient income who were in a position to provide employment to others should also be taken to have reached a higher social status and be treated as “outside the backward class” category. Other categories, such as persons with agricultural holdings or income from property, must be included in the creamy layer.²⁰⁹

In 2021 in *Pichra Warg Kalyan Mahasala Haryane and Another v The State of Haryane and Another*,²¹⁰ the Supreme Court of India struck down a notification issued by the state of Haryane in 2016 and another notification issued in 2018. Both notifications identified as creamy layer those backward class members whose gross annual income exceeded 600 000 Rupees. The notifications further determined that children from backward class sections whose families earn less than 300 000 Rupees annually would receive priority in admission to educational institutions over their counterparts who earn more than 300 000 but less than 600 000 Rupees (the creamy layer threshold) per annum.²¹¹

The Supreme Court struck down the Haryane notifications as a “flagrant violation” of the Haryane Backward Classes (Reservations in Services and Admission in Educational Institutions) Act of 2016.²¹² The court held that section 5(2) of the Act required the state to consider socio-economic and other factors together to identify and exclude the creamy layer from backward class members.²¹³

The importance of excluding the creamy layer from the category of backwardness was confirmed in *Jarnail Singh v Lachhmi Narain Gupta (Jarnail Singh 1)* in 2018.²¹⁴ Justice Nariman said that unless the creamy layer principle was applied and the creamy layer was excluded from the category of backward casts, those genuinely deserving reservation would not access it. He observed that the creamy layer principle was based on the fundamental right of equality.²¹⁵ He

²⁰⁸ As above the 8th and 9th page. Judgement is unnumbered.

²⁰⁹ As above the 8th – 12th and 21st page.

²¹⁰ Non-Reported Civil Appeal Case No. 4952 of 2021 heard by the Supreme Court of India.

²¹¹ As above paras [4] and [5].

²¹² As above para [14].

²¹³ As above paras [11] and [12].

²¹⁴ 2018 AIR (SC) 22985 (hereafter referred to as *Jarnail Singh 1*).

²¹⁵ As above para [4].

observed:

“Benefits, by and large, are snatched away by the top creamy layer of the backward caste or class, thus keeping the weakest among the weak always weak and leaving the fortunate layers to consume the whole cake”.²¹⁶

In *Jarnail Singh v Lachhmi Narain Gupta (Jarnail Singh 2)*²¹⁷ in 2022, the court emphasised the importance of considering the individual and not only the group to which the individual belongs. Adequate data must be collected by the state to determine reservations for backward classes.²¹⁸ In respect of using reservation as basis for the promotion of a specific government employee (referred to by the court as a “cadre”), the state should justify reservation in promotions with respect to the employee to whom the promotion applied, and not the “group” to which the employee belongs.²¹⁹ The court held that the data pertaining to a group, which would be an amalgamation of certain employees in a service, would not give the correct picture of the inadequacy of representation by backward classes in relation to which reservations for promotion is sought to be made.²²⁰

The Central government and the various state governments have over time developed a complicated set of criteria to determine the creamy layer. The creamy layer test attempts to account for a variety of indicators of transcendence of social, educational and economic disadvantage. For example, the test addresses intergenerational transmission of status by disallowing children whose parents have achieved high-ranking positions in government or the military from claiming reserved positions. The test also prescribes income criteria for people engaged in professional employment and trade/commerce; develops various calculations of wealth derived from agricultural landholdings depending on whether and to what extent the land is irrigated; and sets a general income/wealth test.²²¹

4.3.2.3 Critique, Achievements and the Ultimate Beneficiaries of the Reservation Policy

India’s reservation policy provoked intense controversy, including concern that a policy driven

²¹⁶ As above para [15].

²¹⁷ 2022 AIR (SC) 629 (hereafter referred to as *Jarnail Singh 2*).

²¹⁸ As above para [46].

²¹⁹ As above.

²²⁰ As above para [47].

²²¹ *Indira Sawhney 2* (note 207 above) the 14th page.

by caste is inherently divisive and will in fact serve to solidify the caste system. Many critics contend that reservation “has its uses but only up to a point, and there is no way by which it can become an instrument for restructuring society”.²²²

Several scholars believe that the reservation policy has “strengthened the anti-Scheduled Caste attitudes”. The most challenging critique of the reservation policy entails the relationship between caste and socio-economic class. These criticisms often highlight that although purely economic indicators may still establish a rough estimation of caste groups (that is, caste may end up being the unit), caste should not be the starting point of determining backwardness.²²³

Some critics contend that because of social reforms, including reservation policies, many socially backward or low castes have achieved significant degrees of economic mobility and have thereby achieved significant degrees of social mobility. It is said that the social advances introduced by the British, such as the saleability of property under the concept of ownership, education and Western emphasis on individuality and equality, contributed to the economic mobility of the Indian society.²²⁴

Unfortunately, such opportunities for advancement were frequently captured by the high castes. Low castes had some minimal access to these avenues of mobility. As a result, the cultural and ideological gap between high and low castes grew. Moreover, some low-caste members did have access to trading or employment opportunities, and the mobility of a few low castes has an inspiring effect on all the others in the region. The achievement of some community members offered the community valuable cultural capital through which backward classes developed their powerful role as a political pressure point.²²⁵

Others argue that achieving economic mobility and advancement does not necessarily correlate with mobility in social status. Economic mobility is often a distortion of an individual’s true socio-economic position.²²⁶ Studies suggest that members of low castes who surpass the bounds of economic stratification still encounter significant difficulty in achieving full identification with a

²²² Sridharan *ALJ* (1999) 117.

²²³ Srinivas *Frontline* (1997) 68.

²²⁴ As above.

²²⁵ As above 77-79.

²²⁶ As above.

higher social status as members of the new middle class. They have not yet been able to get themselves fully accepted in the old middle class.²²⁷

Critics emphasise that caste undermines and circumvents the recognition of class, which they claim is the primary structuring phenomenon of Indian society. Caste and class, as cross-cutting categories, interact in an inversely proportionate relationship. Caste classifies individuals on the basis of shared characteristics such as birth into a particular (endogamous) group. Caste then, as a system of ranking, relies on the homogeneity of these groups.²²⁸ In contrast, class is a function of individual factors such as education, occupation, wealth, style of living and so on. Class operates as a potential source of heterogeneity within caste groups and can diminish the prominence of caste as criterion for disadvantage.²²⁹ Therefore, maintaining a caste's boundaries of homogeneity – that is, refusing this transformation of the caste system with the assistance of caste reservations – attenuates the possibility of class becoming a potent framework for socio-political organisation.²³⁰

Interestingly, the creamy layer test delineates the boundaries of caste homogeneity. The court specifically sought to maintain the connecting link of backwardness, namely the caste groups. By expelling from the caste category, the advanced members of the group, the creamy layer test individualises some members of the group and in doing so maintains the efficacy and fairness of the group status as a proxy for disadvantage.²³¹

India's reservation policy grew from a desire to reject its own systems of inequality as it simultaneously rejected the yoke of British colonialism. Moreover, it sought to achieve equality in a manner consistent with the complex nature of inequality in the Indian society and recognising that inequities had calcified through group membership. While individual rights need to be protected, they were to be balanced against the needs and rights of groups to receive relief from their disadvantaged social position. Thus, the Indian Constitution acknowledges the need to balance these positions and provided a flexible space for individual rights and group rights to confront and interact with each other.

²²⁷ Ram (1995) 440 and 453.

²²⁸ As above.

²²⁹ D'Souza (1995) 228 and 234.

²³⁰ As above.

²³¹ Sridharan *ALJ* (1999) 120.

The reservation policy recognises the interaction of caste and socio-economic class. Elected officials have often expanded caste-based reservation policies as a reward for votes from groups who are invaluable to their electoral success. However, courts have consistently avoided drawing permanent lines that define disadvantage or backwardness as a function of either caste or class. Instead, the policies, as refined by the courts, have attempted to encompass both caste and class, and recognised the constantly shifting relationship between the two. Unfortunately, however, only a relatively small proportion of the lower castes have benefited from these preferential (reservation) policies. Job reservation for certain castes was essentially aimed at procuring a larger share of government jobs for the new elite.²³²

The threshold for determining the creamy layer is revised every three years. Currently, families with an annual income above 800 000 Indian Rupees (about USD 813 or R14 000 per month)²³³ are considered part of the creamy layer.²³⁴ Some argue that the thresholds set by the government to determine the creamy layer are far too low and based on inaccurate data. Data in 2004, for instance, suggests that the wealthiest 10% of the population in India accounts for about 25% of the total national consumption. Yet, the threshold set for the creamy layer then and presently does not succeed in excluding several households forming part of the affluent 10% of the population from the benefits reserved for the OBCs.²³⁵

Reservation policies are confined to employment in the public sector. The total employment in the public sector has been steadily declining in recent years due to cost-cutting measures introduced by the Indian government. Given the strong correlation between economic status and education, the small number of jobs available is likely to be grabbed by the privileged castes with high levels of education. It is said that if the benefits of reservations are to reach those for whom it is designed, namely the deprived sections of the OBCs, the creamy layer must be much more meticulously identified and excluded. It is well known that income can easily be under-reported; hence the call to use criteria which would be more effective.²³⁶

It is also said that reservations serve essentially as tools for the absorption of the privileged

²³² Chaudhury *Economic and Political Weekly* (May 2004) 15.

²³³ *Forbes Advisor* (Jul 2023) 16 indicates that one US Dollar (USD) is equal to 82 Indian Rupees, and one Indian Rupee is equal to 0,012 USD and 0,22 South African Rand (R).

²³⁴ Rathore *Statista* (Jul 2023) 10.

²³⁵ As above; and Chaudhury *Economic and Political Weekly* (May 2004) 15.

²³⁶ As above.

sections of lower castes into the ruling classes. The mechanism of absorption of strong elements from the lower castes has historically been an integral part of the ability of the caste system to survive challenges and is said to be one of its political strengths.²³⁷ The politics of “caste identity” founded on reservations causes the economic problems of the poor not receiving due attention. It also prevents the poor who belong to high, middle and low castes from uniting along class lines. Therefore, the use of caste as proxy for reservation effectively keeps the deprived masses divided and politically weak. Caste as criterion for reservation has the ability to divide communities. This polarisation, it is argued, seems to be the most useful aspect of the caste system for the ruling classes. These political advantages of the caste system and the access it offers to government positions through reservation and affirmative action, have resulted in various political alliances or governing coalitions with the lower castes.²³⁸

4.4 CONCLUSION

This chapter is a discussion of the main research question, and the fourth sub-question delineated in chapter 1, paragraph 1.2, with reference to what the international standards are for measures such as the B-BBEE programme and what lessons can be learned from international law and compatible foreign jurisdictions.

The South African Constitution makes provision for courts, tribunals or forums to consider international law when interpreting the Bill of Rights.²³⁹ International law instruments have emphatic provisions to ensure equality before the law and to protect individuals against discrimination.²⁴⁰ These instruments also provide for affirmative action to diminish or eliminate conditions that perpetuate discrimination provided that it is reasonable, proportional, objective, temporary and intended to achieve a legitimate purpose.²⁴¹ Such affirmative action measures are also not *per se* discriminatory,²⁴² but should be carefully applied so as not to undermine the principle of non-discrimination as such.²⁴³

²³⁷ Ambedkar (1987) 47.

²³⁸ Kothari *The Times of India* (Sep 1990) 28.

²³⁹ S 39(1)(a) of the Constitution.

²⁴⁰ Art 26 of the ICCPR.

²⁴¹ Human Rights Committee *General Comment* 18 (2000) para 10.

²⁴² As above.

²⁴³ Bossuyt, *Preliminary Report on the Concept and Practice of Affirmative Action*, UN.Doc.E/CN.4/Sub.2/2000/11 (United Nation 2000) 44.

The international law instruments anticipate affirmative action measures to be used to promote the interests of minority groups and not necessarily those of the political dominant and specifically the majority, as in South Africa. Affirmative measures to promote the majority who are politically dominant create a greater risk of discrimination against politically weak minorities.²⁴⁴ Affirmative or “special measures” should also be based in a realistic appraisal of the current situation and social status of individuals and communities concerned.²⁴⁵ Social and economic status should be based on separate data in respect of various factors such as race and gender but also the socio-economic conditions of groups. Measures implemented must not create new forms of inequality, such as inequality within groups. State parties must continuously monitor the application of measures to ensure that they are effective and temporary and to avoid new patterns of discrimination evolving.²⁴⁶

The Constitution also provides that in interpreting the Bill of Rights, a court or forum may consider foreign law.²⁴⁷ Two foreign jurisdictions, Malaysia and India, are of importance and relevant to South Africa’s application of B-BBEE, especially the way in which the beneficiaries of these programmes are categorised. Malaysia’s Constitution prohibits discrimination but allows for the promotion of the interests of indigenous groups by setting quotas for appointment to positions in government, reserving places in educational institutions, and giving preference in the form of licences and permits to operate businesses and professions.²⁴⁸

Based on this constitutional mandate, the Malaysian government implemented drastic measures by means of the National Economic Plan (NEP) from 1971 to 1990. This involved, among others, a target of 30% corporate ownership for the indigenous groups (the Bumiputera), which consisted largely of the Malay politically dominant (majority) group and also smaller minority indigenous groups.²⁴⁹ The NEP was implemented in conjunction with strong economic and development measures to rapidly grow the economy. The economy grew by an average of 7% during this period (1971-1990) and drastically reduced unemployment and poverty.²⁵⁰ However, it also created long-term structural anomalies in the Malaysian economy which haunted the

²⁴⁴ As above 63.

²⁴⁵ CERD *General Recommendation No 32: The meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination* CERD/C/GC/32 (2009) para 16.

²⁴⁶ See para 4.2 above.

²⁴⁷ Art 39(1)(c) of the Constitution.

²⁴⁸ Arts 8(5)(c) and 153 of the *Federal Constitution of Malaysia*.

²⁴⁹ Thillainathan and Cheong *MJES* (2016) 51.

²⁵⁰ See para 4.3.1.2 above.

Malaysian economy for many years thereafter. Two of the main structural anomalies relate to the low or below-average higher educational standards of Malaysians and the lack of advanced technical and technological skills to grow the economy. The structural anomalies, among others, resulted in an economic recession in Malaysia in the mid-1980s and contributed to the Asian Financial Crisis in 1997.²⁵¹

In addition, despite the reduction in poverty, the NEP did not address inequality. Instead, it created new patterns of inequality. The inequality gap within the beneficiary Bumiputera group during the NEP period widened. The income and wealth of the Malay as the dominant political group within the Bumiputera group, grew proportionately much faster than the other minority groups within the larger Bumiputera group.²⁵²

India's Constitution also makes provision for promoting the interests of Scheduled Castes, Scheduled Tribes and other backward classes of citizens. The Other Backward Classes category was introduced in the 1990s to benefit certain backward groups together with the Scheduled Castes and Scheduled Tribes specifically provided for in the Indian Constitution. Although the Indian Constitution does not provide for the extensive measures of corporate ownership, licences and permits as does the Malaysian Constitution, it contains "special provisions" for educationally backward classes and the reservation of positions in government for backward classes.²⁵³

Initially, merely being a member of a Scheduled Caste, Scheduled Tribe or Other Backward Class (beneficiary class) would qualify someone for privileges under the reservation policy. This single criterion was later extended to incorporate a "means test" to determine the social status of individuals ("creamy layer") within a beneficiary class. The Supreme Court of India emphasised that to ensure that benefits flow to the lower social status individuals within the beneficiary classes, the creamy layer should be excluded from the benefits of government's reservation policies. The focus should shift from the group to the individual as the sole traditional criterion to determine backwardness. Apart from caste, income alone is also not an adequate measure to determine economic advancement. In this regard, factors such as social hierarchy,

²⁵¹ See para 4.3.1.3 above.

²⁵² As above.

²⁵³ Arts 14-16 of the Constitution of India.

economic position and the “capacity to compete” are all to be considered in determining economic advancement and exclusion from benefits from reservation policies.²⁵⁴

However, due to inaccurate and inadequate data, low thresholds are set to determine the creamy layer. Given the superior educational position of certain individuals within beneficiary classes, coupled with political opportunism, the reservation system in India largely benefits only a small group of politically connected individuals in beneficiary classes.²⁵⁵ As a result, the largest portion of lower classes within beneficiary classes and educational institutions are still overlooked for positions in government.

The experiences with Malaysia and India’s redress models are comparable to South Africa’s B-BBEE programme in a variety of ways. Firstly, the Malaysian and Indian Constitutions make specific provision for measures to be adopted to promote the interest of disadvantaged groups, similar to section 9(2) of the South African Constitution. Malaysia, in particular through their NEP programme, aimed to increase the ownership of Malays in public (listed) corporations. It used the regulatory authority of government to achieve this goal such as giving preference to Malayan businesses in government procurement, privatisation of state assets, and the issuing of licences. This is similar to the authority provided by section 10 of the B-BBEE Act to government and organs of state in issuing licences and permits and considering grants to promote black ownership and control of businesses in South Africa. This is the reason why it is said that South Africa’s B-BBEE programme is premised on the Malaysian NEP.²⁵⁶

Although the Indian reservation policy does not go as far as the Malaysian and South African models to increase the ownership and control of enterprises by previously disadvantaged groups, it is relevant due to the way the criteria for beneficiaries of the Indian policy have evolved over time. The Indian reservation policy also aims to promote the educational development of backward groups similar to South Africa’s B-BBEE programme and is not solely related to affirmative action in an employment context.

The most prominent lessons South Africa can learn from Malaysia and India are threefold. Firstly,

²⁵⁴ See para 4.3.2.2 above.

²⁵⁵ Chaudhury *Economic and Political Weekly* (May 2004) 15.

²⁵⁶ Ponte *et al DAC* (2007) 940 and 941.

as was evident in Malaysia, their socio-economic redress programme (the NEP) was successful in reducing poverty due to the measures introduced by the Malaysian government to rapidly grow the economy and create employment for the duration of the NEP. An average growth rate of 7% was maintained during the operation of the NEP.

Secondly, the Malaysian NEP did not target the lower income groups. This resulted in the politically dominant Malays accumulating the bulk of benefits which emanated from the NEP. Consequently, it created a growing gap between upper and lower classes and an increase in inequality.

Thirdly, as can be learned from India, caste as sole criterion to determine disadvantage cannot remain the sole criterion *ad infinitum*. Over time other factors such as the level of education and income start to play an increasingly important role to determine disadvantage.

According to the Indian mantra, once poor does not mean always poor. A comparison between South Africa on the one hand, and Malaysia and India on the other, is drawn in the final conclusion in chapter 7, paragraph 7.3 below.

CHAPTER 5

PROMOTION OF EQUALITY LEGISLATION

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5.1 INTRODUCTION

Apart from the Broad-Based Black Economic Empowerment (B-BBEE) Act, various other pieces of legislation were enacted to give effect to the proscription of unfair discrimination and the achievement of equality in terms of section 9 of the Constitution. The legislation most closely related to B-BBEE in this regard is the Promotion of Equality and Prevention of Unfair

Discrimination Act¹ (PEPUDA or the Equality Act),² the Employment Equity Act (EEA)³ and the Preferential Procurement Policy Framework Act (PPPFA).⁴

All three statutes were enacted as a direct consequence of the obligation imposed on government to do so by the Constitution, while PEPUDA and the EEA were enacted to also give effect to binding international law.⁵ Section 9(4) of the Constitution provides that national legislation “must be enacted” to prevent or prohibit unfair discrimination. The enactment of PEPUDA and the EEA in particular is therefore a direct consequence of this specific obligation placed on the legislature by section 9 of the Constitution. This also applies to the PPPFA as section 217(3) of the Constitution requires the enactment of national legislation to prescribe a framework within which a government procurement policy provided for in section 217(2) of the Constitution, must be implemented.

These provisions for the enactment of specific legislation are over and above the general duty placed on the state by the Constitution to “respect, protect, promote and fulfil the rights in the Bill of Rights”.⁶ Section 9(2) of the Constitution makes further provision for legislative and other measures to be taken to promote the achievement of equality.

All three of these distinct pieces of legislation, together with the B-BBEE Act, set out specific aims and objectives to ultimately achieve the same end goal of equality. The objectives of the respective legislation are closely linked to specific persons or a category of persons that the particular legislation aims to benefit in an attempt to promote or achieve equality. The EEA, PPPFA and B-BBEE Act focus in particular on black people as beneficiaries. Affirmative action in the public service is based on the demographic equal representation principle of the EEA, while the EEA also introduced affirmative action in the private sector, including civil society, based on the principle of equal race and gender representativity. This principle of “representativity” is also incorporated into the B-BBEE programme. It is said that the EEA was a precursor of B-BBEE.⁷

¹ Act 4 of 2000 as amended by the Promotion of Equality and Prevention of Unfair Discrimination Amendment Act 52 of 2002.

² Currie and de Waal (2016) 244; and Kok *SAJHE* (2017) 25. Both refer to PEPUDA as the “Equality Act”.

³ 55 of 1998.

⁴ 5 of 2000.

⁵ Preamble and s 2(h) of PEPUDA; Preamble of the EEA; and the Preamble of the PPPFA.

⁶ S 7(2) of the Constitution.

⁷ Jack (2007) 20. Vuyo Jack is a chartered accountant as well as co-founder and chairman of Empowerdex, South Africa’s best-known B-BBEE rating agency that was instrumental in developing a rating index for measuring B-BBEE compliance levels.

Over and above the objectives of the legislation and whom they purport to benefit, is the relationship between the various statutes *inter se* as well as their relationship with the B-BBEE programme. The statutes have a specific hierarchy, overlap and operate in unison. Compliance with the respective statutes is often constructed by cross-section provisions between the statutes. Therefore, it is imperative to understand the operation of each statute and the way they all interoperate. In respect of the relation between B-BBEE and the PPPFA for instance, Mogoeng J in *Viking Pony African Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd and Another*⁸ observed that the people of South Africa, through their democratic government, developed, amongst others, the “broad-based black economic programme and the preferential procurement policy” to address the economic imbalances in society.⁹

5.2 THE EQUALITY ACT (PEPUDA)

PEPUDA aims to give effect to the constitutional right to equality. Section 9(3) and (4) of the Constitution prohibit unfair discrimination by the state and private persons. Section 9(4) of the Constitution further requires the enactment of national legislation to prohibit or prevent unfair discrimination. The Equality Act was also enacted in terms of international law obligations in the field of human rights, which obligations aim to promote equality and prohibit unfair discrimination.¹⁰ The Act contains an overriding (trumping) clause proclaiming that the provisions of PEPUDA take precedence over any other law except the Constitution.¹¹

The overreaching aim of PEPUDA, to prohibit or prevent unfair discrimination practised by persons or institutions other than the state and to promote equality are relevant to this study.¹² Other objectives of PEPUDA are to prohibit harassment and to prevent hate speech.¹³ These other objectives, however, fall outside the scope of the present research. Another aspect of importance in respect of PEPUDA for the purpose of this study is who the beneficiaries of PEPUDA are.

Jack is also a visiting professor at the School of Management at the University of the Free State. He also served on the Department of Trade and Industry Commission which developed the B-BBEE Codes.

⁸ 2011 (1) SA 327 (CC); 2011 (2) BCLR 207 (CC) (23 Nov 2010).

⁹ As above para [2].

¹⁰ As above the Preamble and s 2(h) which refer to binding treaties in terms of the Convention on the Elimination of All Forms of Discrimination Against Women and the International Convention on the Elimination of All Forms of Racial Discrimination. S 5(2) of PEPUDA.

¹² Header and s 2(b) of PEPUDA.

¹³ Header and s 2(c) of PEPUDA.

PEPUDA, as a starting point, describes the purpose of the Act as the “restructuring and transformation [of] our society and its institutions” due to systemic inequalities and unfair discrimination. These inequalities “remain deeply embedded in social structures, practices and attitudes”, which undermines the aspirations of “our constitutional democracy”.¹⁴ In order to overcome this state of affairs, PEPUDA endeavours to advance historically disadvantaged individuals, communities and social groups by means of “special legal and other measures”.¹⁵ In respect of the beneficiaries of the Act, the Act defines “socio-economic status” as a social or economic condition or perceived condition of a person disadvantaged by poverty, a low employment status or a lack of or a low level of education.¹⁶ This definition is important as it identifies vulnerable persons which may by virtue of socio-economic attributes be more prone or susceptible to unfair discrimination.

The Equality Act is often referred to as an ambitious piece of legislation since it aims to eradicate social and economic inequalities, especially those that are systemic.¹⁷ PEPUDA provides for 13 objectives to achieve the aims and vision specified in the Act.¹⁸ These objectives can be divided in three main categories: (1) prohibiting unfair discrimination by the state and other persons; (2) providing recourse and remedies to victims of unfair discrimination; and (3) promoting the achievement of substantive equality.

Insofar as the first main objective, namely, to prevent unfair discrimination, is concerned, PEPUDA has vertical and horizontal application in that it binds the state and all persons.¹⁹ The scope of application of the Act does not include workplace discrimination provided for by the EEA.²⁰ In respect of preventing unfair discrimination, PEPUDA defines the terms “prohibited grounds”²¹ and “discrimination” respectively.²² Chapter 2 contains general and specific grounds

¹⁴ As above the Preamble.

¹⁵ As above.

¹⁶ As above s 1(1).

¹⁷ Currie and de Waal (2016) 244; and Kok *TSAR* (2001) 294.

¹⁸ S 2 of PEPUDA.

¹⁹ As above s 5(1); and s 1 which defines “person” to include a juristic person, a non-juristic entity, a group or a category of persons.

²⁰ As above s 5(3).

²¹ As above s 1 defines “prohibited grounds” as “(a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, conscience, belief, culture, language and birth; or (b) any other ground where discrimination based on that other ground – (i) causes or perpetuates systemic disadvantage; (ii) undermines human dignity; or (iii) adversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner that is comparable to discrimination on grounds in paragraph (a)”.

²² As above s 1 defines “discrimination” as “any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly - (a) imposes burdens, obligations or disadvantage on; or (b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds”.

on which unfair discrimination is prohibited by the state and private persons.²³

The analogous, non-specific (non-listed) grounds of unfair discrimination, are explicitly included in the definition of “prohibited grounds” of PEPUDA.²⁴ These might be other grounds that cause or perpetuate systemic disadvantage, undermine human dignity or adversely affect the equality enjoyment of a persons’ rights and freedoms in a serious manner that are comparable to the specific grounds of discrimination listed in the definition of prohibited grounds. PEPUDA presumes discrimination on a prohibited (listed) and non-listed ground to be unfair. It therefore goes further than section 9(5) of the Constitution by also presuming that discrimination on a non-listed ground is unfair.²⁵ In *Harksen v Lane NO and Others*²⁶, the Constitutional Court held that if discrimination is alleged on a non-listed ground in the Constitution, the complainant bears the onus to prove the discrimination is unfair.²⁷ PEPUDA thus shifts the burden of proof from the complainant to the respondent in cases of discrimination on a non-listed ground.

Criticism often levelled against PEPUDA is precisely its extension of the test for “prohibited grounds” which is wider than the one proposed by the Constitution. Kok, for instance, argues that section 14 of PEPUDA only contains a defence based on fairness, while the Constitution, at least in theory, allows a respondent to argue that the unfair discrimination is still justifiable.²⁸ However, as the Constitution provides a minimum level of protection, the extension of prohibited grounds to include new grounds for discrimination was found by the Constitutional Court to be justified.²⁹

²³ As above ss 6-12 prohibit unfair discrimination in general but also specifically in respect of race, gender, disability, hate speech, harassment and the publication of information that unfairly discriminates. Also see *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku and Another* [2022] ZACC 5 (hereafter referred to as *Masuku*) para [15] in which derogatory statements targeted at the Jewish community was held to be hate speech in terms of s 10 of PEPUDA. Also see *King NO and Others v De Jager and Others* [2021] ZACC 4 where a clause in a will discriminating against female descendants was found to be contrary to s 8 (prohibition of unfair discrimination on ground of gender) of PEPUDA. Also see *Minister of Justice and Correctional Services and Others v Pretorius and Others* (A312/2018) [2022] ZAGPJHC 2 (21 Jan 2022) paras [15] and [16] in which the High Court held that the blanket prohibition in terms of a policy of the Department to withhold computers from certain prisoners, impaired their right to further education in terms of s 29 of the Constitution. This, the court held, perpetuated systemic disadvantage, undermined human dignity and constitute unfair discrimination in terms of one of the listed grounds, s 1(b)(ii) – undermining of human dignity, in the Act.

²⁴ S 1 of PEPUDA, the definition of “prohibited grounds”.

²⁵ S 13(2) of PEPUDA provides that if discrimination did take place on a non-listed ground of the definition of “prohibited grounds”, then the discrimination is unfair if one or more of the conditions provided for in para (b) of the definition of “prohibited grounds” are met, unless the respondent proves that the discrimination is fair.

²⁶ 1998(1) SA 300 (CC) (hereafter referred to as *Harksen*).

²⁷ As above para [134].

²⁸ Kok *SAJHE* (2017) 34.

²⁹ *Qwelane v South African Human Rights Commission and Another* [2021] ZACC 22 (CC) para [129].

The second main objective of PEPUDA is to provide recourse and remedies to the victims of unfair discrimination. For this purpose, PEPUDA creates special Equality Courts for the various magisterial districts, with experienced and trained staff to deal with equality disputes. The Equality Courts have wide-ranging powers, such as the power to grant interdicts; to award damages; to direct an “unconditional apology”; to order a respondent to undergo an audit of specific policies; and to require a respondent to submit regular progress reports to the court.³⁰

The third main objective of PEPUDA is to promote equality.³¹ It provides a list of positive duties imposed on the state to develop substantive equality and address unfair discrimination. PEPUDA further provides for the development of action plans, codes of practice, internal mechanisms, and information campaigns by the state.³² Similar responsibilities are imposed on persons who directly or indirectly contract with the state or who exercise public power.³³ Government therefore aims to enforce compliance with these provisions by persons contracting with the state through government’s procurement policy. Although these provisions contained in sections 24 to 28 and 29(2) of PEPUDA are still to be proclaimed and are not yet in force, it demonstrates the objectives and measures envisaged by PEPUDA to promote equality.

Section 14(1) of PEPUDA further states that it is not unfair discrimination to apply measures designed to protect or advance persons or categories of persons previously disadvantaged by unfair discrimination. This is similar to the provisions of section 9(2) of the Constitution, with the exception of the phrase “it is not unfair discrimination” at the beginning of section 14 of PEPUDA. This phrase in section 14(1) of PEPUDA is not explicitly included in the text of section 9(2) of the Constitution.

Section 14(2) of PEPUDA, in respect of restitutionary measures to promote equality, states that in determining whether the respondent has proven that the discrimination is fair, certain factors must be taken into account. These factors are the context, those factors referred to in subsection (3), and whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned. The factors in

³⁰ S 13 of PEPUDA.

³¹ As above s 1 defines “equality” to mean the full and equal enjoyment of rights and freedoms as contemplated in the Constitution and includes *de jure* and *de facto* equality and also equality in terms of outcomes.

³² As above s 25.

³³ As above s 26.

subsection (3) to be considered include the likely impairment of dignity; impact on the dignity of the complainant; the position of the complainant in society; the nature and extent of discrimination; whether discrimination is systemic in nature; whether it has a legitimate purpose; whether and to what extent the discrimination achieves its purpose; whether there is a less restrictive and less disadvantageous way to achieve such purpose; and steps taken by the respondent to address the disadvantage which arises from or is related to one or more of the prohibited grounds to accommodate diversity.

A reading of section 14 suggests that the factors enumerated in subsections (2) and (3) of section 14 to determine fairness, postulate a reasonableness and proportionality test, combined with a consideration of the impact on those affected. It is therefore clear that subsection (1) of section 14 relating to affirmative measures is subject to the reasonableness and proportionality test in subsection (2). The wording of subsection (2) – “In determining whether the respondent has proven that the discrimination is fair...”, is a direct reference to the preceding subsection (1). On reading subsections (1) and (2) together, as the text suggests, it is evident that fairness and justifiability of an affirmative measure are rebuttable by weighing up the factors in subsections (2) and (3). However, as will be discussed below, section 14(1) will in the light of Constitutional Court judgements delivered after enactment of PEPUDA, be applied separately from section 14(2).

PEPUDA also contains a Schedule which lists ten practices relating to discrimination in various spheres of commercial and recreation activities.³⁴ This list is intended to emphasise and illustrate some discriminatory practices unique to certain areas of operation and for the state to pass legislation to address them.³⁵

The Equality Act provides much-needed clarity on the meaning of equality and unfair discrimination. For instance, it defines “discrimination” as any act or omission which includes a policy, law, rule, practice, condition or situation that imposes burdens, obligations or

³⁴ As above. The Schedule provides for an Illustrative List of Unfair Practices in Certain Sectors in terms of s 29 of the Act. The Schedule lists the following sectors: Employment and Labour; Education; Health Care Services; Housing, accommodation, land and property; Insurance Services; Pensions; Partnerships; Professions and bodies; Provision of goods, services and facilities; and clubs, sport and associations.

³⁵ As above s 29 which refers to the Schedule that contains an Illustrative List of Unfair Practices in certain sectors. Also see Kok *TSAR* (2001) 308 who states that the Schedule contains practices that “are or may” be unfair. He further observes that most of the practices contain qualifications such as “unfair”, “reasonable” and “practicable”. These qualifications are, according to Kok, mirrored in the Constitution’s equality and limitation clauses.

disadvantages or withholds benefits, opportunities or advantages.³⁶ The Act also contains a helpful definition of the term “equality” to include the full and equal enjoyment of rights and freedoms. The definition of equality further includes *de jure* and *de facto* equality and equality in terms of outcomes.³⁷ This distinction between *de jure*, *de facto* and equality of outcomes corresponds with the principle to promote substantive rather than mere formal equality laid down by the Constitutional Court.³⁸

The effect of PEPUDA is that remedies for a breach of the right to equality should be sought in accordance with the substantive provisions of PEPUDA and using its procedures, instead of resorting directly to section 9 of the Constitution. After commencement of PEPUDA, enforcers of equality rights could only rely directly on the provisions of section 9 of the Constitution in instances where PEPUDA or other legislation falls short of the protection provided for by the Constitution.³⁹

This study supports the view that PEPUDA is vague and incoherent as it does not reflect the most recent Constitutional Court judgement on equality.⁴⁰ Kok is of the opinion that PEPUDA consists of provisions based on a body of constitutional case law preceding the enactment of PEPUDA and that it is to a large extent a codification of such case law.⁴¹ Currie and de Waal are of the opinion and predict that the interpretation of PEPUDA is likely to follow the jurisprudence of the Constitutional Court’s dealing with section 9 of the Constitution.⁴² These views are illustrated by the provisions of section 14 of PEPUDA which allow for a test of fairness and proportionality in instances of restitutionary measures to promote equality. These provisions of PEPUDA seem to reflect the Constitutional Court’s judgement in *Harksen*⁴³ delivered before the enactment of PEPUDA rather than that of *Van Heerden*⁴⁴ delivered after the enactment of

³⁶ S 1 of PEPUDA.

³⁷ As above.

³⁸ See *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) (hereafter referred to as *Hugo*) paras [59] and [60]; and *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* (CCT 11/98) [1998]; ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 (9 Oct 1998) (hereafter referred to as *Gay and Lesbian Equality 2*) para [62].

³⁹ See *MEC for Education: KwaZulu-Natal and Others v Pillay* (CCT 51/06) [2007] ZACC 21; 2007(3) BCLR 287 (CC); 2007(2) SA 106 (CC); (2007) 28 ILJ 133 (CC) (5 Oct 2007) para [40] in which the Constitutional Court held that in terms of the principle of subsidiarity, claims brought under the Equality Act must be considered within “the four corners of the Act” and not directly on the Constitutional right.

⁴⁰ Kok *TSAR* (2001) 294.

⁴¹ As above 295, 296, 300, 301 and 307; and Kok *SAHJE* (2016) 32, 33 and 36.

⁴² Currie and de Waal (2016) 245.

⁴³ *Harksen* (note 26 above) para [46].

⁴⁴ *Minister of Finance and Others v Van Heerden* 2004 (6) SA 121 (CC) (hereafter referred to as *Van Heerden*).

the Act. Although not adjudicating on the constitutional permissibility of a restitutionary measure to promote the achievement of equality *per se*, the Constitutional Court in *Harksen*, amongst others, weighed up the impact of a discriminating statutory provision on the complainant to consider the fairness of such a provision.⁴⁵ In *Van Heerden*, on the other hand, the Constitutional Court held that a restitutionary measure which promotes the achievement of equality and conforms to the three criteria set in section 9(2) of the Constitution, is not subject to a presumption of unfair discrimination.⁴⁶ Only where a measure does not meet the three criteria set in section 9(2), should the unfair discrimination inquiry set out in *Harksen* be applied.⁴⁷ PEPUDA will likely be interpreted in the same way.

PEPUDA further contains a variety of vague and broadly formulated provisions. The vague formulation of hate speech in section 10 of PEPUDA, for instance, led to the Constitutional Court's decision that it was inconsistent with the Constitution. In *Qwelane v South African Human Rights Commission and Another*,⁴⁸ the Constitutional Court declared section 10 of PEPUDA inconsistent with section 16 of the Constitution to the extent that section 10 included the word "hurtful" in the prohibition of hate speech.⁴⁹ This low standard in the context of the hate speech prohibition may, according to the court, unduly encroach the freedom of expression provided for in section 16 of the Constitution.⁵⁰ The court held that section 10(1)(a) of PEPUDA is irredeemably vague and undermines the rule of law "enshrined" in section 1(c) of the Constitution.⁵¹ Although the decision in *Masuku* is not directly applicable to the research question, it supports the opinion held that PEPUDA is vague.

In the economic and business sphere and applicable to the B-BBEE programme, PEPUDA provides that racial discrimination may also mean "the denial of access to opportunities...and contractual opportunities".⁵² These broad provisions of PEPUDA which cast a wide net over commercial activities, such as freedom of contract and competition in a free and open market

⁴⁵ *Harksen* (note 26 above) para [46]. The Constitutional Court was called upon to adjudicate on the constitutionality of a provision of the Insolvency Act 24 of 1936 which allegedly unfairly discriminated against a married spouses' right in the event of the liquidation of a spouse's estate. The court held that the impugned provision did not have such a severe impact, inconvenience and prejudice on the applicant to constitute unfair discrimination in terms of s 8 of the Interim Constitution.

⁴⁶ *Van Heerden* (note 44 above) paras [27] and [32].

⁴⁷ As above para [36].

⁴⁸ [2021] ZACC 22.

⁴⁹ As above para [154].

⁵⁰ As above para [153].

⁵¹ As above para [157]. Also see Malan and Grobbelaar-du Plessis *THRHR* (2020) 284-293.

⁵² Ss 7(e), 8(h), 9(c) and 12 of PEPUDA.

and society, amount to an authoritarian government system. They unduly permit government interference contrary to the principle of constitutionalism.⁵³ The B-BBEE requirements as prerequisite to render goods and services to government and large corporations can be viewed as undue government interference in a free and open market and society, as discussed in paragraph 5.4.3 below.

Insofar as the beneficiaries of PEPUDA are concerned, the Act aims to protect those who had been disadvantaged in the past based on race, gender and disability. These are broad categories. The Act has an extended definition of “person”. In addition to natural and juristic persons, the Act includes groups or categories of persons whom it aims to protect against unfair discrimination and to advance in achieving equality. Section 9(2) of the Constitution permits measures to be taken to protect and advance persons or *categories* of persons disadvantaged by unfair discrimination. Read with its aims and objectives, the Act includes social groups and communities as categories envisaged by section 9(2) of the Constitution. The Act defines “socio-economic status” with reference to those particularly vulnerable due to poverty, low employment and educational status. It will be argued and recommended in the final chapter of this research (chapter 7 below) that socio-economic status as defined in PEPUDA should be a determining factor in who the beneficiaries of BEE should be.

For the purpose of this study, PEPUDA is significant in three respects. Firstly, it aims to broaden the protection provided against unfair discrimination and measures to promote the achievement of equality. PEPUDA includes the non-listed grounds of discrimination in the definition of prohibited grounds and presumes discrimination on a prohibited (listed) and non-listed ground to be unfair. Secondly, PEPUDA broadens the list of those protected and promoted by the Constitution. PEPUDA includes individuals, juristic persons, “non-juristic entities, groups or categories of persons”, as well as communities and social groups.⁵⁴ PEPUDA thus endeavours to extend “persons or categories or persons” provided for in section 9(2) of the Constitution to include broader communities and social groups. PEPUDA also includes a definition of socio-economic status which sets a norm to identify those vulnerable or prone to unfair discrimination.

⁵³ Currie and de Waal (2016) 8 describe constitutionalism as a theoretical prescription which requires that the “power of the state should be defined and limited by law to protect the interest of society. Constitutionalism is a way of ensuring limited government as opposed to arbitrary rule of autocracy or a dictatorship”. Also see Malan (2019) 8 and 9 who states that constitutionalism consists of four elements: (1) justice; (2) fundamentality; (3) the consensual basis of the rule of law; (4) limited government, to which is related: division – diffusion – and balance of power, the notion of the mixed constitution and the notion of public office.

⁵⁴ The Preamble and s 1(a) of PEPUDA.

Thirdly, by virtue of section 14 of PEPUDA and a proper interpretation of the text of the statute, it provides for measures to promote the achievement of equality to be subjected to a fairness, reasonableness and proportionality test. However, the majority judgement of the Constitutional Court in *Van Heerden* in respect of the fairness of restitutionary measures to promote the achievement of equality, delivered after commencement of PEPUDA, contradicts PEPUDA in this regard. The judgement in *Van Heerden* will in all likelihood be followed to interpret and apply section 14 of the Act.

5.3 EMPLOYMENT EQUITY LEGISLATION

5.3.1 The Employment Equity Act (EEA)

The objectives of the EEA⁵⁵ are to achieve equity and eliminate unfair discrimination in the workplace; to ensure the implementation of employment equity to redress the effects of discrimination; to achieve a diverse workforce broadly representative of the people of South Africa; provide for the implementation of affirmative action measures to redress the disadvantages in employment experienced by designated groups; and to ensure the equitable representation of designated groups in all occupational categories and levels in the workforce.⁵⁶

With reference to the public service, section 195(1)(i) of the Constitution states that “the public administration must be broadly representative of the South African people...” and “...need to redress the imbalances of the past to achieve broad representation”. The principle of “broad representation” for the public service provided for by the Constitution is therefore extended by the EEA to all workplaces.

Designated groups are the beneficiaries of the EEA. They are defined as black people, women and people with disabilities. However, with the enactment of the Employment Equity Act of 2013,⁵⁷ the definition of designated groups was brought in line with the B-BBEE Act to make it applicable only to South African citizens.⁵⁸ Black people are defined as Africans, Coloureds and

⁵⁵ 55 of 1998, as amended by the Employment Equity Amendment Acts of: 65 of 2002; 68 of 2002; 52 of 2003; 11 of 2013; 47 of 2013; and 4 of 2022. The last amendment to the Act, the Employment Equity Amendment Act 4 of 2022, was published in *Government Gazette* No. 48418 dated 14 Apr 2023 of which the President must still publish the date of implementation.

⁵⁶ Preamble and s 2 of the EEA.

⁵⁷ Act 47 of 2013.

⁵⁸ As above s 1 which defines “designated groups” as black people, women and people with disabilities who are citizens of the Republic of South Africa by birth or descent, or who became citizens of the Republic of South African by naturalisation before 27 April 1994 or after 27 April 1994 and who would have been entitled to acquire citizenship by naturalisation prior to that

Indians.⁵⁹ A “designated employer” is defined in the EEA as an employer which employs 50 or more employees and includes a municipality; an organ of state; and an employer bound by a collective agreement to be a designated employer.⁶⁰ The Act does not only apply to business enterprises, but to all organisations, associations and clubs irrespective of whether their objectives are to enhance educational, religious or any social or charitable activity.⁶¹

Chapter I of the EEA consists of the definitions, purpose, interpretation, and scope of application of the Act. The Act binds all employees and employers and is applicable to the state and private workplaces.⁶² The EEA also contains a trumping provision. The provisions of the Act shall prevail if any law other than the Constitution or an Act of Parliament expressly amending the EEA, is in conflict with the EEA.⁶³

From a compliance point of view, the Act is divided into two main parts. The first part (chapter II) applies to all employers and prohibits unfair discrimination in the workplace. The second part (chapter III) provides for affirmative action and is only applicable to designated employers.

Chapter II places an obligation on all employers to take steps to promote equal opportunities in the workplace by eliminating unfair discrimination in any employment policy or practice.⁶⁴ The Act prohibits unfair discrimination by any “person” in any employment policy or practice on one or more of the following prohibited grounds: 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 or any other arbitrary ground.⁶⁵ A difference in terms and conditions of employment among employees of the same employer performing the same or substantially the same work of equal value, that is directly or

date but who were precluded by apartheid policies.

⁵⁹ As above s 1.

⁶⁰ As above. The definition of “designated employer” was amended by s 10 of the Employment Equity Amendment Act 4 of 2022 by omitting an employer who employs less than 50 employees but exceeds the annual turnover threshold by the EEA for each sector.

⁶¹ Malan *TSAR* (2010) 431.

⁶² S 4 of the EEA. The Act is not applicable to members of the National Defence Force, the National Intelligence Service or the South African Secret Service.

⁶³ As above s 6.

⁶⁴ As above s 5. Also see s 1 of the EEA which defines an “employment policy or practice” to include recruitment procedures, advertising and selection criteria; appointments and the appointment process; job classification and grading; remuneration, employment benefits and terms and conditions of employment; job assignments; the working environment and facilities; training and development; performance evaluation systems; promotion; transfer; demotion; disciplinary measures other than dismissal; and dismissal.

⁶⁵ As above s 6(1).

indirectly based on any one or more grounds listed in section 6(1), is unfair discrimination.⁶⁶ The Act prohibits unfair discrimination not only by employers but also by other persons in the workplace such as employees. The EEA excludes from its unfair discrimination proscription the application of affirmative measures consistent with the purpose of the Act, or the exclusion, distinguishing or preference of any person based on the inherent requirement of a job.⁶⁷ Harassment⁶⁸ of an employee on any one or more of the prohibited grounds is also a form of unfair discrimination and prohibited by the Act.⁶⁹

Whenever unfair discrimination is alleged on a listed ground in terms of the EEA, the employer against whom the allegation is made, bears the onus to prove that it did not take place or is rational and not unfair or is otherwise justifiable.⁷⁰ If unfair discrimination is alleged on an arbitrary ground, the complainant must prove, on a balance of probabilities, that the conduct complained of is not rational, amounts to discrimination and is unfair.⁷¹

Chapter III places additional obligations on designated employers. They must implement affirmative action measures in the workplace for people from designated groups.⁷² Affirmative action measures are designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented at all occupational levels in the workforce of a designated employer.⁷³ These measures should include: measures to identify and eliminate employment barriers; measures designed to diversify the workplace based on the principles of equal dignity and respect for all; measures to “reasonably accommodate”⁷⁴ people from designated groups to enable them to enjoy equal opportunities and “equitable representation”; measures to ensure the equitable representation of suitably qualified people

⁶⁶ As above s 6(2).

⁶⁷ As above s 6(2). Also see *Damons v City of Cape Town* [2022] ZACC 13 para [147] in which the Constitutional Court held that “it is a complete defence to a claim of unfair discrimination” for not employing an employee in a specific job who sustained injuries whilst on duty and who does not as a result of injuries, meet the inherent requirements of that job.

⁶⁸ The *Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace*, issued in terms of s 54(1) of the EEA, and published in *Government Gazette* No. 46056 dated 18 Mar 2022, para 4 explains harassment to be generally understood to be the unwanted conduct which impairs dignity which creates a hostile or intimidating work environment and is related to one or more grounds in respect of which discrimination is prohibited in terms of s 6(1) of the EEA.

⁶⁹ S 6(3) of the EEA.

⁷⁰ As above s 11(1).

⁷¹ As above s 11(2).

⁷² As above s 13.

⁷³ As above s 15(1). Also see Malan *TSAR* (2010) 430 who explains that “equitable representation” means that each sector within the national population profile must be reflected in the staff composition of each employer to which the act applies.

⁷⁴ S 1 of the EEA defines “reasonable accommodation” as “any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to or participate or advance in employment”.

from designated groups at all occupational levels; and measures to retain and develop people from designated groups.⁷⁵ The term “equitable representation” is not defined in the Act. In *Solidarity and Others v Department of Correctional Services and Others*⁷⁶ Zondo J, for the majority, explained that the broadly representative requirement must apply in relation to the demographic profile of the national and regional active population at each occupational level of an organisation. The court explained that the meaning of broadly representation in the Constitution and various other legislation was the same as equitable representation in the EEA.⁷⁷

The EEA provides that “suitably qualified” for a job can be as a result of formal qualifications; prior learning; relevant experience; or capacity to acquire, within a reasonable time, the ability to do the job.⁷⁸ Persons disadvantaged by discrimination in the past were previously overlooked for appointment in positions, especially those at higher occupational levels, and could therefore not obtain the necessary experience. Thus, the Act provides by means of this clause a measure to assist designated groups who have the required qualifications but lack the necessary experience to be considered for appointment based on their “capacity to acquire” the necessary skill to do the job. It can also be regarded as a measure to assist young persons, with little to no work experience, to be considered for employment. The Act goes even further in its endeavour to assist persons from designated groups without experience. It states that an employer may not, in considering the relevant factors to determine whether a person is suitable for a job, “unfairly discriminate against a person solely on the grounds of that person’s lack of relevant experience”.⁷⁹ Discrimination solely based on “a lack of experience” is therefore, by virtue of this clause, added to the prohibited grounds provided for by section 6(2) of the EEA.

For the purpose of implementing and monitoring affirmative action in terms of the Act, designated employers must prepare employment equity plans and report annually to the Department of Employment and Labour on progress in achieving the targets reflected in their plans.⁸⁰ A plan must have a duration of at least one year and a maximum duration of five years.⁸¹

⁷⁵ As above s 15(2).

⁷⁶ [2016] ZACC 18 (hereafter referred to as *Correctional Services*).

⁷⁷ As above paras [73] – [76], the court explained that the provisions of ss 15(2), 19(1), 20(2)(c) and 42(a) – (e) of the EEA must be read together with s 195(1)(i) of the Constitution, s 1(2)(b) of the Public Services Act 103 of 1994 and s 96(3)(c) of the Correctional Service Act 111 of 1998.

⁷⁸ S 20(3) and (4) of the EEA.

⁷⁹ As above s 20(5).

⁸⁰ As above ss 20 and 21.

⁸¹ As above s 20(2)(e). Also see *Employment Equity Act: Code of Good Practice on the Preparation, Implementation and*

In order to draw up an employment equity plan, a designated employer is required to conduct an analysis and assessment of all the practices and policies in the workplace.⁸² In doing so and in order to determine numerical goals for employment to be included in the employment equity plan, the employer must consult and attempt to reach agreement with employees in the workplace.⁸³ The goals (targets) reflected in the employment equity plan must be numerical targets and the preferential treatment of those from designated groups but may not constitute quotas.⁸⁴ In terms of the EEA, affirmative measures should not establish “absolute barriers” to the prospective or continued employment or advancement of people who are not from designated groups.⁸⁵ In the past, employers could determine their own targets. However, in terms of the 2022 amendments to the Act, these targets, in future, must be according to the targets set by the Minister of Employment and Labour (the Minister), as discussed in more detail below.⁸⁶

Designated employers have a further reporting duty. They must annually, with the submission of their employment equity reports, also submit a statement on the remuneration and benefits received in each occupational category and level of that employer’s workforce to the National Wage Commission.⁸⁷ Such a statement must also reflect any unfair discrimination by an employer by virtue of a difference in terms and conditions of employment. Should disproportionate income differentials or unfair discrimination be reflected in a designated employer’s report and statement, a designated employer must take measures to progressively reduce such differentials.⁸⁸

Further obligations placed on designated employers by the Act are to: assign at least one senior manager with the necessary authority to monitor the implementation of equity plans;⁸⁹ display in the workplace the provisions of the EEA which must be accessible to all employees;⁹⁰ keep and

Monitoring of the Employment Equity Plan published in *Government Gazette* No. 40817 dated 28 Apr 2017.

⁸² Ss 16 and 19 of the EEA.

⁸³ As above s 16(1).

⁸⁴ As above s 15(3).

⁸⁵ As above s 15(4).

⁸⁶ As above s 15A which was amended by s 54 of the Employment Equity Amendment Act 4 of 2022. The first targets in the form of Draft Regulations were published in *Government Gazette* No. 48589 dated 12 May 2023.

⁸⁷ S 27 of the EEA. The National Wage Commission was established by s 8 of the National Minimum Wage Act 9 of 2018 which took effect on 1 Jan 2019.

⁸⁸ S 27 of the EEA. Also see the *Employment Equity Act: Code of Good Practice on Equal Pay / Remuneration for work of Equal Value* published in *Government Gazette* No. 38837 dated 1 Jun 2015.

⁸⁹ S 24 of the EEA.

⁹⁰ As above s 25.

maintain records of its workforce and records relevant to its compliance with the employment equity plan for a prescribed period as determined by the Minister.⁹¹

A labour inspector in the employment of the Department of Employment and Labour may issue a compliance order to an employer if an employer fails to comply with certain provisions of the Act.⁹² If an employer fails to comply with a compliance order issued by a labour inspector within the period stipulated in the order, the Director-General can apply to the Labour Court to make a compliance order issued by a labour inspector an order of the Labour Court.⁹³

A further measure provided for in the EEA to ensure compliance, is the conferral of review powers on the Director-General.⁹⁴ The Director-General may conduct a review to determine whether a designated employer is compliant with the Act, including compliance with sectoral targets set by the Minister in terms of section 15A of the Act. In doing so, the Director-General can require certain information and records from a designated employer and insist on a meeting with an employer.⁹⁵ The Director-General may then issue directives (“steps”) to be taken and the period within which the steps should be taken to ensure compliance.⁹⁶ Should an employer fail to comply with the steps, request, or directive issued by the Director-General, the Director-General may apply to the Labour Court for an appropriate remedial order.⁹⁷ The Director-General may also apply to the Labour Court to impose a fine in accordance with Schedule 1 of the Act, if a designated employer fails to prepare or implement an equity plan in terms of section 20 of the Act.⁹⁸

The Act also makes provision for the Minister to issue a certificate of competence to an employer as a measure to ensure compliance. Certificates of competence are required by those employers that offer to conclude agreements (tenders) with any organ of state. An offer for furnishing supplies or services, or leasing of anything to an organ of state, must have attached to that offer

⁹¹ As above s 26.

⁹² As above s 37(1). The matters in respect of which a compliance order may be issued by an inspector are those provided for in ss 16, 19-26 of the EEA.

⁹³ As above s 37(6).

⁹⁴ As above s 43(1).

⁹⁵ As above s 43(2).

⁹⁶ As above s 44.

⁹⁷ As above ss 45 and 50(1)(f).

⁹⁸ As above ss 20(7), 53(5) and Schedule 1.

a certificate issued by the Minister confirming compliance with the Act.⁹⁹ If the employer is a non-designated employer, the certificate must be in respect of compliance with chapter II, and in the event of a designated employer, compliance with chapter II and chapter III of the Act.¹⁰⁰ A certificate may only be issued by the Minister under the following conditions: the employer has complied with the numerical sectoral targets set by the Minister that apply to that specific employer;¹⁰¹ the employer has raised a reasonable ground to justify its failure to comply with any targets with which the employer is obliged to comply;¹⁰² the employer has submitted an employment equity report for the present reporting period;¹⁰³ no finding has been made by the Commission for Conciliation, Mediation and Arbitration (CCMA) or a court within the preceding 12 months that the employer was in breach of the prohibition of unfair discrimination provided for in the EEA;¹⁰⁴ and the CCMA has not issued an award against the employer within the preceding 12 months for failing to pay the minimum wage in terms of the National Minimum Wage Act.¹⁰⁵

The Labour Court may make any appropriate order,¹⁰⁶ award compensation¹⁰⁷ and damages,¹⁰⁸ and impose fines¹⁰⁹ varying from R1 500 000 to R2 700 000, for the contravention of certain provisions of the Act.¹¹⁰ The Act only creates one offence. It prohibits any person from disclosing any confidential information acquired in performing a function in terms of the Act.¹¹¹ A person convicted of such offence in terms of the Act, may be sentenced to a fine not exceeding R30

⁹⁹ As above s 53(1) and (2).

¹⁰⁰ As above s 53(1)(b)(i).

¹⁰¹ As above s 53(6)(a).

¹⁰² As above s 53(6)(b).

¹⁰³ As above s 53(6)(c).

¹⁰⁴ As above s 53(6)(d).

¹⁰⁵ As above s 53(6)(e).

¹⁰⁶ As above s 50(1).

¹⁰⁷ As above s 50(1)(d).

¹⁰⁸ As above s 50(1)(e).

¹⁰⁹ As above s 50(1)(g).

¹¹⁰ As above Schedule 1. A fine of R1 500 may be imposed for a first contravention of ss 16 (read with s 17), 19, 22-26 and 43(2) of the EEA; R1 800 000 for a second contravention; R2 100 000 for a previous contravention within 12 months or two previous contraventions in respect of the same provision within three years; R2 400 000 for three previous contraventions in respect of the same provision within three years; and R2 700 000 for four previous contraventions in respect of the same provision within three years. Contraventions of any provisions of ss 20, 21, 23 and 44(b), a fine of the greater of R1 500 000 or 2% of an employer's turnover for a first contravention; the greater of R1 800 000 or 4% of turnover for a second contravention; the greater of R2 100 000 or 6% of turnover for a second contravention within 12 months or two contraventions in respect of the same provision within three years; the greater of R2 400 000 or 8% of turnover for three previous convictions of the same provision within three years; or the greater of R2 700 000 or 18% of turnover for four contraventions in respect of the same provision in four years.

¹¹¹ As above s 59(1).

000.¹¹² The EEA does not provide for the imposition of any fines for a designated employer that does not reach any affirmative action goals or targets set by the employer as such, or by the Minister in terms of the Act.

The EEA contains an important defence for employers. Section 42 states that in determining whether a designated employer is implementing employment equity in compliance with the Act, any person or body applying the Act may take the following factors into account: the factors enumerated in section 15 of the Act;¹¹³ the extent to which suitable, qualified people from and amongst designated groups are equitable represented within each occupational category and level in relation to the demographic profile of the EAP targets and pool of suitably qualified people from designated groups; economic and financial factors relevant to the sector in which the employer operates; present and expected economic and financial circumstances of the employers business; the number of present and planned vacancies that exist in the various occupational categories; the employer's labour turnover; reasonable steps taken by a designated employer to train suitably qualified people from designated groups; reasonable steps taken by a designated employer to implement its employment equity plan; the extent to which the designated employer has made progress in eliminating employment barriers that adversely affect people from designated groups; reasonable steps taken by an employer to appoint and promote suitably qualified people from designated groups; and any other reasonable ground.¹¹⁴

With the enactment of the Employment Equity Amendment Act of 2022 (the Amendment Act)¹¹⁵ which came into effect in April 2023,¹¹⁶ the Minister was authorised to identify economic sectors for the purpose of the Act and to determine targets for each sector of the economy. These sectors and targets may be amended from time to time by the Minister. The Minister must allow a 30-day period for interested parties to comment before publishing the final targets in the *Government Gazette*.¹¹⁷ The Amendment Act requires employers to comply with the numerical sectoral targets set by the Minister in their respective employment equity plans and report

¹¹² As above s 59(3).

¹¹³ As above s 15(3) and (4) includes preferential treatment and numerical goals but exclude quotas. A designated employer is also not required to take any decision concerning an employment policy or practice that would establish an absolute barrier to the prospective or continued employment or advancement of people who are not from a designated group.

¹¹⁴ As above s 42(1)(a)-(e). In terms of s 42(2), the Minister may issue regulations which must be considered by any person who is required to determine if a designated employer complied with the Act.

¹¹⁵ 4 of 2022.

¹¹⁶ *Employment Equity Amendment Act, 2022* as published in *Government Gazette* No. 48418 dated 14 Apr 2023.

¹¹⁷ S 4 of the Amendment Act, which inserted s 15A into the EEA.

annually on progress in achieving the targets.¹¹⁸

5.3.2 The Draft Employment Equity Regulations

The first draft notice, with sectors and targets, in the form of regulations (draft Employment Equity Regulations) were published by the Minister in May 2023, which will apply for a period of five years.¹¹⁹ It is expected that the final EE Regulations will largely be the same as the draft, so it is worth considering the provisions of the draft EE Regulations.

The draft EE Regulations contain a list of 18 economic sectors identified by the Minister.¹²⁰ For each economic sector identified by the Minister, it breaks down the national and provincial targets for every population (demographic) group. The targets provide for Whites, Africans, Coloureds and Indians, as well as targets for gender for each of the following four upper occupational levels: Top Management, Senior Management, Professional Qualified, and Skilled levels. For instance, for the first economic sector listed in the draft EE Regulations, Agriculture, Forestry and Fisheries, the national target for the skilled occupational level for all males is as follows: 43,8% for Africans; 5,1% for Coloureds; 1,5% for Indians; and 4% for Whites. The overall target for all black males (African, Coloureds and Indians) is 50,4%. For Skilled females it is: 24% Africans; 2,8% Coloureds; 0,8% Indians; and 3,5% Whites. The overall target for black females is 27,6%. The national overall gender target for this sector is 67,8% Africans; 7,9% Coloureds; 2,3% Indians; and 8% Whites. The overall black (male and female) target is 78%.¹²¹ The targets are set lower for each of the higher occupational levels. For instance, for Top Management in the Agricultural, Forestry and Fisheries industry, the overall black target is 35%, namely 20% for black males and 15% for black females.¹²²

¹¹⁸ S6 of the Amendment Act by inserting s 2A into the EEA.

¹¹⁹ *Employment Equity Act, 1998 (Act 55 of 1998 as amended) Draft Employment Equity Regulations, 2023 for Public Comment* published in *Government Gazette* No. 48589 dated 12 May 2023.

¹²⁰ As above 4. No numbers are assigned to the provisions of the draft Regulations; therefore, reference is made to the relevant page numbers. The Economic Sectors identified are: Agriculture, Forestry and Fishing; Mining and Quarrying; Manufacturing; Construction; Financial and Insurance Activities; Transportation and Storage; Information and Communication; Water Supply, Sewerage, Waste Management and Remedial Activities; Electricity, Gas, Steam and Air Conditioning Supply; Human Health and Social Work Activities; Art, Entertainment and Recreation; Real Estate Activities; Professional, Scientific and Technical Activities; Wholesale and Retail Trade, Repair of Motor Vehicles and Motorcycles; Accommodation and Food Service Activities; Public Administration, Defence, Compulsory Social Security; Education; and Administrative and Support Activities.

¹²¹ As above 6 and 7.

¹²² As above.

The targets for the respective occupational levels are based proportionally on the Economically Active Population (EAP).¹²³ According to Stats SA, the EAP breakdown in South Africa in 2022 and in the third quarter of 2023 was as follows: Africans, 80%; Coloureds, 9,3%; Indians, 2,7%; and Whites at 8%.¹²⁴

The overall EAP demographic targets published by Stats SA do add up to 100%. However, the targets for the respective occupational levels set by the Minister do not add up to 100%. The reason for this is unknown as no reason is provided in the draft EE Regulations. It is suspected that the initial targets are set low and will be increased by the Minister over time to ultimately cover 100% of all positions in the upper occupational levels.

In respect of the semi-skilled and unskilled occupational levels for which the Minister has not set sectoral targets, the draft EE Regulations stipulate that designated employers must still provide for targets for these occupational levels in their respective employment equity plans according to the overall EAP demographic targets published quarterly by Stats SA.¹²⁵

The draft EE Regulations determine that designated employers must use either the national or the provincial demographic targets, and not both. It states that the national targets must be used by employers that conduct their “business/operations nationally” and provincial targets for those that operate only in a particular province.¹²⁶ It is unclear what is meant by conducting “business/operations nationally” as it is not defined or explained in the draft EE Regulations. It could be interpreted in a variety of ways; for instance, an employer that operates in more than one province; or that operates in all the provinces (nationally) or has a business premises in one province but render goods and services in more than one province or has a business premises in more than one province or in all the provinces; or that employs staff in more than one or in all provinces. As the aim of the Act is to promote the representativity of persons disadvantaged by unfair discrimination in the workplace, national business/operations should logically mean an employer that employs staff in more than one province rather than one that conducts business

¹²³ The EAP targets are published quarterly in the *Quarterly Labour Force Survey (QLFS)* by Stats SA based on the total number of people between the ages of 15 and 64 willing or able to work. It excludes persons not working, not seeking work or not available for work.

¹²⁴ Stats SA *Mid-Year population estimate* (2022) 2; and Stats SA *Quarterly Labour Force Survey Quarter 3:2023* (Nov 2023) 5.

¹²⁵ Draft EE Regulations 5.

¹²⁶ As above.

or operations in more than one province. An employer employing staff in more than one province should be expected to resort to the national targets. This particular provision in the draft EE Regulations should be amended to read that all employers that employ staff in more than one province should use the national targets instead of the term “business / operations”.

The importance of whether to use the national or provincial targets was illustrated in the judgement of *Correctional Services*.¹²⁷ The Constitutional Court per Zondo J for the majority held that the Department of Correctional Services’ Employment Equity Plan was unlawful as it only provided for national demographic targets to be considered for appointments in the Department of Correctional Services. As section 42 of the EEA required both national and regional demographics to be considered at that stage before the Act was amended,¹²⁸ the court held that the Department’s Employment Equity Plan unfairly discriminated against coloured people in the Western Cape who were overlooked for appointments. The Western Cape’s regional demographic targets for coloured people are much higher than the national demographic targets.¹²⁹

The Constitutional Court judgement in *Minister of Finance v Aribusiness NPC*¹³⁰ is also relevant in respect of the draft EE Regulations. Madlanga J for the majority explained that the purpose served by regulations in general is to make an Act of Parliament work.¹³¹ The court further held that regulations cannot be contrary and outside the scope provided for by the enabling Act. If so, the regulations would be *ultra vires* and therefore arbitrary and invalid.¹³²

The EEA determines that employment targets cannot set rigid quotas or establish absolute barriers to continued employment or advancement of people. The draft EE Regulations ambiguously regulate the use of either national or provincial demographic targets and in their present form rigidly determine when the national or regional targets must be used. This was echoed by the minority judgement of Nugent AJ in *Correctional Services* that “[O]nce the maxima in each category have been reached, they are rigid barriers to appointment”.¹³³ Employers that

¹²⁷ *Correctional Services* (note 76 above).

¹²⁸ S 16 of the Employment Equity Amendment Act 47 of 2013 substituted the word “must” in s 42(1) of the EEA with the word “may” providing discretion to use either the national or provincial economically active population data.

¹²⁹ *Correctional Services* (note 76 above) para [79].

¹³⁰ [2022] ZACC 4 (hereafter referred to as *Minister of Finance*).

¹³¹ As above para [103].

¹³² As above paras [108], [118] and [119].

¹³³ *Correctional Services* (note 76 above) para [115].

conduct their business operations nationally are required to use the national demographic targets. This will result in limited employment and promotion opportunities for minority disadvantaged groups such as Indians in KwaZulu-Natal and coloureds in the Western Cape and Northern Cape for whom regional targets are much higher than the national targets. This will constitute absolute barriers which are prohibited by the EEA.

The Minister may argue that the sector targets are not quotas as provision is made for deviations. However, the wording of the EEA is mandatory and requires full compliance with the sectoral targets set by the Minister. No deviations are tolerated, unless an employer has raised reasonable grounds to justify its failure to comply.¹³⁴ For instance, section 20(2)(A) of the EEA states that the numerical goals set by an employer “must” comply with any sectoral targets set by the Minister, and section 53(6) that the Minister “may only” issue a certificate if the Minister is satisfied that an employer “has complied” with a numerical target set by the Minister.

This study argues that the targets set by the Minister constitute rigid minimum quotas which are unlawful.¹³⁵ The difference between targets and quotas is that targets are flexible, and quotas are rigid.¹³⁶ In *Correctional Services*,¹³⁷ the majority held that the Department of Correctional Service’s EE Plan provided for a deviation from the targets. The circumstances under which a deviation would be allowed, is where an applicant has scarce skills or the operational requirements (or needs) of the Department (employer) were such that a deviation from the targets was justified. The court held that once it is accepted that the Department of Correctional Services’ EE Plan contained a provision for deviations from the targets of the Plan, “the targets cannot be said to be rigid”.¹³⁸ Further, the court held that the deviation from the targets offers a wide discretion to the Department to deviate based on their operational needs if the Department so requires.¹³⁹ Nugent AJ, in his minority judgement in *Correctional Services*, held that a rigid allocation of posts is not made flexible by excluding some posts from its scope as the Department

¹³⁴ S 53(6)(b) of the EEA.

¹³⁵ As above s 15(3) states that measures to ensure equitable representation include preferential treatment and numerical goals but exclude quotas.

¹³⁶ *Correctional Services* (note 76 above) para [51]; and *South African Police Service v Solidarity obo Barnard* [2014] ZACC 23 (hereafter referred to as *Barnard*) paras [54] and [62].

¹³⁷ *Correctional Services* (note 76 above).

¹³⁸ As above paras [51], [53] and [60].

¹³⁹ As above para [54]. Also see *Barnard* (note 136 above) para [62] in which the Constitutional Court recognised the discretion of the employer to deviate from the numerical targets set in an EE Plan for operational reasons as flexible and not constituting rigid quotas.

did, but a “flexible plan is one that allows flexibility in all appointments to which the Plan applies”.¹⁴⁰

The Amendment Act does not provide for any deviations to be incorporated into the EE Plans of employers. Furthermore, a designated employer does not have the discretion by reason of scarce skills or operational requirements as held in *Correctional Services* and to consequently deviate from the targets set by the Minister. A designated employer may raise a reasonable ground to justify its failure to comply with any mandatory targets set by the Minister, but the final discretion lies with the Minister, not the employer. Evaluating the operational requirements and needs of an employer’s business, is a task a Minister is quite obviously ill-equipped to perform.

Goals are by their very nature ideals and not mandatory. In *Barnard* numerical goals were referred to “as a flexible employment guideline to a designated employer”.¹⁴¹ The Amendment Act has therefore replaced the discretion of an employer based on the needs of its own business with an onus to justify any non-compliance which constitutes a rigid application of proportional quotas rather than targets or “goals”.¹⁴² Nugent AJ in *Correctional Services* pointed out that the Department of Correctional Services’ Plan, which was based merely on the propositional targets of the EEA, lacked the appreciation and did not provide for the “nuances and complexities” or attempted to “harmonise the constitutional tensions” or the “balancing of rights” required by the Constitutional Court. Nugent AJ held—

“In contrast to the thoughtful, emphatic, and textured plan one might expect if weight is given to what was expressed by the court, what we have before us is only cold and impersonal arithmetic...The hallmark of the implementation directions is that those responsible for making appointments must apply the racial and gender allocations unswervingly.”¹⁴³

The draft EE Regulations, on occasion, determine a numerical target of 0%. In the Agriculture, Forestry and Fisheries sector in Limpopo, for instance, the numerical target for both coloured males and females for certain upper occupational levels are 0%.¹⁴⁴ To my mind, a target of 0%

¹⁴⁰ *Correctional Services* (note 76 above) para [114].

¹⁴¹ *Barnard* (note 136 above) para [54].

¹⁴² *Correctional Services* (note 76 above) para [77] in which the Constitutional Court referred to numerical targets also as “goals”.

¹⁴³ As above paras [102] and [107].

¹⁴⁴ Draft EE Regulations 6 and 7.

can neither be a “target” nor be designed to protect or advance anyone. It is meaningless and unconstitutional.

The Amendment Act, in addition to the provision for issuing certificates of competence, grants the Minister a wide range of powers, including the power to identify economic sectors and set targets for each economic sector; to set population and gender targets for occupational levels nationally and provincial; to consider deviations from the targets; and to issue certificates of compliance for targets set by him- or herself.

The trade union, Solidarity, launched a dispute with the International Labour Organization (ILO) against the Department to challenge the constitutionality and international law legitimacy of the new EEA. South Africa is a member of the ILO.¹⁴⁵ The CCMA was requested by the ILO to facilitate the resolution of the dispute.¹⁴⁶ Solidarity argued that the latest amendments to the EEA are contrary to the international labour conventions, accusing the government of being in contempt of such conventions as well as the country’s Constitution. Solidarity maintained that in their current form, the draft Regulations were racially rigid and flouted ILO Convention C111 of the international labour law.¹⁴⁷

Eventually the dispute was resolved. The agreement reached between Solidarity and the South African government acknowledges that affirmative action is a coherent package of measures, of a temporary nature and in line with the Constitution, aimed specifically at correcting the position of members of a target group as defined in the EEA. In order to obtain effective equality, affirmative action shall be applied in a nuanced way, as embodied in the agreement between Solidarity and the government. The EEA statistics will be merely one of many factors that will be taken into account in the compliance analysis of affirmative action in any workplace, and no absolute barrier may be placed upon any employment practices affecting any persons from any group.¹⁴⁸

¹⁴⁵ South Africa is signatory to the ILO – an organisation under the United Nations – which is devoted to promoting social justice and internationally recognised human and labour rights, pursuing its founding mission that labour peace is essential to prosperity.

¹⁴⁶ Legodi *SABC News* (Jun 2023) 29.

¹⁴⁷ As above; and art 5 of the ILO Convention C111 – Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

¹⁴⁸ *Solidarity and The Republic of South Africa Settlement Agreement* in the International Labour Organisation Conciliation Process Case no: H 02-23.

It was also agreed that for the purpose of preparing and implementing employment equity plans and for reporting and compliance analysis of affirmative action in any workplace, the following criteria must be taken into account: Inherent requirements of the job; the pool of suitably qualified persons; the qualifications, skills, experience and the capacity to acquire, within a reasonable timeframe, the ability to do the job; the rate of turnover and natural attrition within a workplace; and recruitment and promotional trends within a workplace.¹⁴⁹

In the compliance analysis of affirmative action in any workplace, justifiable/reasonable grounds for not complying with the targets as set by the employer and/or any other targets set by any other party, may include insufficient recruitment opportunities; insufficient promotion opportunities; insufficient target individuals from the designated groups with the relevant qualification, skills and experience; CCMA awards / court orders; transfer of business; mergers/acquisitions; and impact on the business economic circumstances.¹⁵⁰

No penalties or any form of disadvantage will be incurred by an employer if in the compliance analysis of affirmative action in any workplace, there are justifiable/reasonable grounds for not complying with targets. Employment termination of any kind may not be affected as a consequence of affirmative action.¹⁵¹

The agreement is to a large extent a confirmation and extension of the factors to be considered, as provided for by sections 15 and 42 of the EEA. Solidarity's best achievement is possibly the inclusion of a "lack of experience" as a justifiable ground for not complying with targets. This is especially remarkable as section 20(5) of the EEA specifically prohibits discrimination based solely on a lack of experience. It is doubtful whether the Minister could have legally agreed to such override of the Act. Should it be included in the final EE Regulations as promised by the Minister, such provisions may be *ultra vires* the empowering provision.¹⁵² The signed agreement will now form part of the public submissions on the EEA's draft Regulations, with the consolidated submissions expected to be taken to the President.

The agreement between Solidarity and the government emanated from an international law

¹⁴⁹ As above.

¹⁵⁰ As above.

¹⁵¹ As above.

¹⁵² *Minister of Finance* (note 130 above) para [103].

dispute which was settled under the auspices of the ILO. As a consequence, the legal status of the agreement would be that in the event of a breach of the agreement by government, Solidarity as a complainant would have recourse to the ILO.

5.3.3 The Principle of Representivity, Political Ideology and Equality

The term “representativity” emanates from the term “broad representation” provided for in the Constitution¹⁵³ and the term “equitable representation” provided for in the EEA.¹⁵⁴ It refers to the representation of the various race groups and genders in the workplace according to their respective proportions of the national population, roughly 80% Africans, 9% Coloureds, 8% Whites and 3% Indians.¹⁵⁵ Proportional representation, as a means of representing elected legislatures in proportion to the percentage of votes acquired during national elections provided for in the Constitution, is based on the same representativity principle.¹⁵⁶

The concept of representation in a working environment as such is not unique to South Africa. The European Union, for instance, has since 1976 made provision for the “equal treatment” of the sexes (males and females) to promote the working conditions of especially woman with regard to access to employment, promotion, vocational training and working conditions. It is worth to briefly consider the European Union’s representation jurisprudence.

5.3.3.1 Representation in the European Union

European Directive 76/207 provides for “equality in practice between men and women in working life”.¹⁵⁷ It allows measures to be maintained and adopted to provide for specific advantages that make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.¹⁵⁸

Member States are advised, amongst others, to adopt positive action policies designed to

¹⁵³ S 195(1) of the Constitution.

¹⁵⁴ S 15(2) of the EEA.

¹⁵⁵ Stats SA *Mid-year population estimate* (2022) 2.

¹⁵⁶ S 46(1)(d) of the Constitution.

¹⁵⁷ Art 1(1) of *European Council (EC) Directive 76/207* (The Equal Treatment Directive). Although Directive 76/207 is repealed and replaced by Directive 2006/54, the European Court of Justice’s judgements in terms of the repealed directive continues to be applicable in interpreting the provisions of the recast Directive 2006/54.

¹⁵⁸ As above art 141(1) and (4).

eliminate existing inequalities affecting women; eliminate or counteract the prejudicial effects for women in employment or seeking employment; encourage the participation of women in various occupations within those sectors of working life where women are presently under-represented; and to promote positive action measures in the public as well as private sector to promote the interests of women to achieve gender equality.¹⁵⁹

There have been several cases before the European Court of Justice (ECJ) which raise questions concerning the extent of positive action measures permitted by Directive 76/207. A selection of cases and the principles emerging from these cases are discussed below.

In *Kalanke v Freie Hansestadt Bremen*,¹⁶⁰ the court held that national laws which guarantee women absolute and unconditional priority for appointment or promotion in sectors in which they are under-represented go beyond the limits of the exception provided by article 2(4) of the Directive.

In *Marschall v Land Nordrhein-Westfalen*,¹⁶¹ the ECJ ruled that in sectors where women are under-represented, the preference given to a woman candidate who is as qualified as the male candidate for promotion, could be accommodated within the provisions of article 2(4). It is permitted to counteract the prejudicial effect on female candidates of attitudes and behaviour, such as fear that women will interrupt their careers more frequently or that due to household and family duties, they will be less flexible in their working hours. However, this was conditional upon an objective assessment of all candidates to take account of criteria relating to individual circumstances which could allow for the male candidate to be preferred if those criteria are applied.

*Badeck v Landesamt beim Staatsgerichtshof des Landes Hessen*¹⁶² applied the representation principle in the context of legislation requiring women's advancement plans as positive measures to set targets to increase the representation of women in sectors where they were under-represented. Quotas were also established for training positions in occupations where women were under-represented. All these measures were considered potentially within article 2(4) and

¹⁵⁹ *European Council Recommendation 84/635/EEC* of 13 Dec 1984.

¹⁶⁰ Case C-450/93 [1995] ECR I-3051, ECJ.

¹⁶¹ Case C-409/95 ECR I-6363.

¹⁶² Case C-158/97 [2000] ECHR I-1875.

permissible positive action measures provided that they did not automatically and unconditionally give priority to men when women and men were equally qualified.

*Abrahamsson v Fogelqvist*¹⁶³ considered legislation which gave preference to a candidate who was a member of the female sex with qualifications not equal to but inferior to those of candidates of the opposite sex. The ECJ ruled that such legislation contravened article 2 of EC Council Directive 76/207 (as substituted).

In *EFTA Surveillance Authority v Kingdom of Norway*,¹⁶⁴ the European Free Trade Association (EFTA)¹⁶⁵ Court, in applying the Directive's provisions, considered national legislation which automatically allocated positions to the under-represented class and therefore contravened the principle ruling against automatic preference.

However, in *Lommers v Minister Van Landbouw, Natuurbeheer en Visserij*,¹⁶⁶ the ECJ decided that provision of nursery facilities for female employees while only making provision for male employees in an emergency, was not discriminatory if it was construed as allowing male staff who took care of children themselves to have access to the same terms as female staff. While the reasoning might be considered somewhat strained, the important principle applied was that in determining the scope of any derogation from an individual right such as equal treatment of men and women, due regard must be had to the principle of proportionality. Derogations must remain within the limit of what is appropriate and necessary to achieve the aim of improving the ability of women to pursue a career on equal footing with men, and the principle of equal treatment reconciled as far as possible with achieving that aim.

Applying the same principle in *Briheche v Ministre de L'Interieur*,¹⁶⁷ the court found it was not proportionate to exempt widows who had not remarried from an age of 45 to be subjected to examination for recruitment of administrative assistants while not exempting other widowers in the same circumstances.

¹⁶³ Case C-407/98 [2000] ECR I-5539.

¹⁶⁴ Case E-1/02 [2003] 1 CMLR 725.

¹⁶⁵ The EFTA Court is a supranational judicial body responsible for the three EFTA members who are also members of the European Economic Area bound by the European Directives: Iceland, Liechtenstein and Norway.

¹⁶⁶ Case C-476/99 [2002] ECR I-2891, [2004] 2 CMLR 1141.

¹⁶⁷ Case C-319/03 [2004] ECR I-8807.

In terms of European law, the principle of gender representivity is applied on condition that it does not constitute absolute, unconditional and automatic priority, but is balanced on what is proportional and justifiable in every situation. The principle of representativity which applies in Europe is applied far more broadly in South Africa and includes a trilogy of demographic factors, namely race, gender and to some extent disability.¹⁶⁸ The South African representivity principle is strongly entrenched as broad representation in the Constitution and other legislation dealing with equitable representation (representivity) in the public service. The EEA has extended the representivity principle also to affirmative action in the private sector. The EEA applies to both the public service and the private sector.

5.3.3.2 Representivity in the Context of the Constitution, Legislation and Affirmative Action in the Public Service

The representivity principle is provided for in peremptory terms in several places in the Constitution. Section 174(2) of the Constitution provides for the judiciary to broadly reflect the racial and gender composition of South Africa. Section 193(2) provides that Commissions established in terms of Chapter 9 of the Constitution, so-called “Chapter Nine Institutions”, must reflect broadly the race and gender composition in South Africa when members of Chapter Nine Institutions are appointed. Section 195(1) requires that the public administration must also be broadly representative of the South African people.¹⁶⁹

The Public Service Act provides that in making appointments and filling posts in the public service, due regard “shall be had to equality and the other democratic values and principles enshrined in the Constitution”.¹⁷⁰ The evaluation of persons in the public service shall be based on training, skills, competence, knowledge and “the need to redress”, in accordance with the EEA, “the imbalances of the past” to achieve a public service “broadly representative of the South African people including representation according to race, gender and disability”.¹⁷¹ Legislation regulating specific national government departments, such as the Correctional

¹⁶⁸ Although the EEA makes provision for people with disabilities as part of designated groups, people with disabilities are not included in the new sector targets published by the Minister.

¹⁶⁹ S 195(1)(1) of the Constitution reads: “(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles ... (i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness and the need to redress the imbalances of the past to achieve broad representativity”.

¹⁷⁰ S 11(1) of the Public Service Act 103 of 1994.

¹⁷¹ As above s 11(2)(b).

Services Act¹⁷² and the South African Police Service Act,¹⁷³ has similar representivity requirements. Various other statutes were passed since the adoption of the 1996 Constitution to affect the principle of broad representation (representivity) within the broader public administration. Malan identified 46 pieces of legislation in 2010 regulating various areas of state administration and requiring executive bodies to comply with the principle of representivity in their respective management and staff compositions.¹⁷⁴

The term “broadly represented” in the Constitution or other legislation dealing with the appointment of staff in government departments or public administration is not explained in the Constitution or the relevant legislation itself. In *Correctional Services*¹⁷⁵ the Constitutional Court held that broadly representative means a workforce “inclusive of all race groups and both genders” and the “level of representation of each group must broadly accord with its level of representation among the people of South Africa”. The court explained that it would be unacceptable, for example, for a designated employer to have a workforce of 500 employees, 50 of whom occupy senior management positions, but where only five of those senior management positions are held by African people while 20 are held by white people, 15 by coloured people and 10 by Indian people “despite the fact that in the population of South Africa, African people are by far the majority”. Such a workforce could not conceivably be said to be broadly representative of the people of South Africa. The court held

“Nobody can justifiably dispute that although under apartheid and racial discriminatory laws and practices, all Black people suffered hardship, the greatest hardships were suffered by African people ... Therefore, any corrective measure, such as an employment equity plan or an affirmative action programme, cannot succeed in reversing the imbalances of the past if it is based on the notion that Black people would be equitable represented in a workforce or in a particular occupational level if there are enough Coloured people or Indian people even if there are no African people or there are only a few African people.”¹⁷⁶

¹⁷² S 96(3)(c) of the Correctional Services Act 111 of 1998 reads: “... the assessment of persons for purpose of appointment and promotion shall be based on level of training, relevant skills, competence and the need to redress the imbalance of the past in order to achieve a Department broadly representative of the South African population, including representation according to race, gender and disability”.

¹⁷³ S 27 of the South African Police Service Act 68 of 1995 determines that appointments shall be made as provided for in terms of the Interim Constitution. S 212(2) of the Interim Constitution provided to “promote an efficient public service broadly representative of the South African communities”. This was later incorporated in the Police Services Act by s 17 of the South African Police Services Amendment Act 10 of 2012.

¹⁷⁴ Malan *TSAR* (2010) 428 and 429.

¹⁷⁵ *Correctional Services* (note 76 above) para [41].

¹⁷⁶ As above para [46].

A further characteristic of the broadly representative prerequisite in the Constitution and other legislation in respect of the public service and public administration is that it does not state that the objective of the broadly representative requirement is to promote the achievement of equality provided for in section 9(2) of the Constitution. The use of the phrase “to redress imbalances of the past” in section 195(1)(i) of the Constitution suggests that broad representation is a remedial or restitutionary measure envisaged in section 9(2), but the Constitution does not make that connection or refer to past discrimination or the reason for the imbalances. The equality objectives of representivity were, amongst others, explained in the government’s *White Paper on Affirmative Action in the Public Service* (White Paper) which was released in 1998.¹⁷⁷ It served as a policy for affirmative action in the public service.¹⁷⁸ At that point in time, the Employment Equity Bill¹⁷⁹ had already been published in December 1997, and the Act a such was enacted later in 1998. The White Paper referred to the Employment Equity Bill which was to become law later that year and emphasised that the affirmative action policy reflected in the White Paper “must particularly be understood within the framework of the Employment Equity Bill”.¹⁸⁰

The “Introduction” of the White Paper states in part that the government had inherited a public service which was strongly influenced by discriminatory employment policies and practices based on race, gender and disability. Consequently, these groups are poorly representative at decision-making levels as well as in the other technical, occupational classes. It stated that—

“The Constitution identifies representativeness of the Public Service as one of the main foundations of a non-racist, non-sexist and democratic society that integrates people with disabilities.”¹⁸¹

The White Paper defined affirmative action as the additional corrective steps which must be taken for those who had been historically disadvantaged by unfair discrimination to be able to derive full benefit from an “equitable employment environment”. The policy emphasised the Constitution’s requirement that the composition of the public service must be broadly representative of South African society as a whole.¹⁸²

¹⁷⁷ Department of Public Service and Administration *White Paper on Affirmative Action in the Public Service* (1998) published in *Government Gazette* No. 18800 dated 23 Apr 1998.

¹⁷⁸ As above 5.

¹⁷⁹ 75 of 1997.

¹⁸⁰ Department of Public Service and Administration *White Paper on Affirmative Action in the Public Service* (1998) 5.

¹⁸¹ As above.

¹⁸² As above 9.

The White Paper stated that affirmative action is a corrective measure of government to bring about equality for the target groups that had suffered in “innumerable historical injustices”. These groups earmarked for advancement under the affirmative policy enunciated in the White Paper were three categories or persons: black people, women and persons with disabilities.¹⁸³ To achieve the objective of broad representation, the White Paper enumerated specific targets to achieve this goal. These targets were based on the composition of the South African population in 1995 reflected as 75% African, 13% White, 9% Coloured and 3% Indian people. Women, who comprised just over half (51%) of the entire population, were made up of 76% African women, 12% White women, 9% Coloured women and 3% Indian women. People with disabilities comprised 5% of the population.¹⁸⁴

The percentage of black people at management level in the public service in December 1997 was 33%, the percentage of women in management level 13%, and the percentage of people with disabilities, 0,02%. The White Paper further set targets to be met: 50% of black people and 30% women at management level by 1999 and 2% of the workforce of people with disabilities by 2005. The initial targets were minimum targets serving as a “baseline” on which national departments and provincial administrations were expected to improve. These targets would be increased to reach the “ultimate goal, which is that all groups and levels within the Public Service should be representative of society as a whole”.¹⁸⁵

Another purpose of representivity stated in the White Paper is to prevent the abuse of certain target groups at the expense of others. The White Paper explained that there are “distorted ways of applying affirmative action” by “boosting some groups of the target group at the expense of others”, thereby perpetuating their disadvantaged status. For instance, the White Paper explained the tendency within some departments to recruit one group of women at the expense of others; for instance, the recruitment of white women at the expense of African, Coloured or Indian women. So too, the White paper continued, a practice had evolved to promote one group amongst the broad group “black people” while ignoring the others. Persons with disabilities suffered in a similar way, where abled persons within the targeted group were employed and persons with disabilities were overlooked. The White Paper strongly emphasised that all groups

¹⁸³ As above 24-27.

¹⁸⁴ As above 22.

¹⁸⁵ As above 23.

within the target group need to benefit directly from affirmative action in accordance with their “relative disadvantaged status, their needs and the needs of the organisation”.¹⁸⁶ This reason for representativity provided for in the White Paper coincided with the position held in *Correctional Services* above that Africans suffered the most as a result of past discrimination, and due to their “relative disadvantaged status” compared to other groups, should be compensated in relation to their percentage of the South African population.

Apart from the main objectives to ensure a broadly representative workforce in the public service by means of affirmative action to serve as a corrective measure of imbalances caused by past discrimination and to prevent abuse, the White Paper also set out a second main objective, namely to transform the public service into an efficient and effective instrument capable of delivering equitable services to all citizens and of driving the country’s economic and social development. The White Paper explained that government’s ability to transform the public service had been severely limited by its legacy of ineffectiveness, unfair discrimination and division on the basis of race and gender and which almost totally excluded people with disabilities. As a result, the White Paper further explained that the public service lacked legitimacy and credibility in the eyes of the majority of South Africans, stating as follows:

“Restoring legitimacy and credibility through the development of a broadly representative Public Service has become to be seen as one of the keys of the transformation process.”¹⁸⁷

Coupled with this objective to promote an effective and efficient public service is the importance of developing a diverse management style, not only in order to support broad representation and to “achieve democratic legitimacy”, but also to increase efficiency and effectiveness, improve service delivery and develop “more participatory management styles”.¹⁸⁸

The objectives of achieving broad representation based on the principle of representativity in the public service through affirmative action, can then be summarised as: (1) to act as a remedial measure of imbalances created by the past; (2) to bring about equality for the target groups who had suffered historical injustices; (3) to prevent abuse by preferring one target group above the

¹⁸⁶ As above 25 and 26.

¹⁸⁷ As above 8.

¹⁸⁸ As above 26.

other; (4) to create an effective and efficient public service capable of delivering equitable services to all citizens; (5) to drive the country's economic and social development; (6) to achieve democratic legitimacy; and (7) to develop a diverse management culture and more participatory management styles.

Although affirmative action formed part of government policies since 1994, such as the *Reconstruction and Development Programme (RDP)*,¹⁸⁹ the EEA was the first piece of legislation to statutorily regulate affirmative action. It was only in 1998 with the introduction of the EEA, which also formed the basis of affirmative action in the public service and private sector, that the objectives of representivity related to achieving equality as envisaged in section 9(2) of the Constitution, were first established. The introduction of the EEA not only had a profound influence on affirmative action in the public service, but also extended the principle of broad representation provided for in the Constitution and other legislation dealing with the broader public service to the private sector as a whole. The term "broad representation" used in the Constitution and public service legislation was replaced by the term "equitable representation" which has the same meaning as "broadly representative" as explained in *Correctional Services*.¹⁹⁰

The EEA is also seen as one of the instruments to achieve the objectives of B-BBEE. The main objective of B-BBEE is to substantially increase the proportion of black people who own, manage and control existing and new enterprises.¹⁹¹ The EEA's demographic targets were also incorporated into the B-BBEE programme to ensure demographic representivity.¹⁹² The correlation between the EEA, the principle of representivity and the B-BBEE programme is discussed in more detail in chapter 6, paragraphs 6.4.1.2 and 6.4.1.3 below which deal specifically with the mechanisms of B-BBEE.

5.3.3.3 The Elevated Status of Representivity

The Constitution, legislation and policies for affirmative action which make provision for the

¹⁸⁹ Parliament of the Republic of South Africa *White Paper on Reconstruction and Development* (1994).

¹⁹⁰ *Correctional Services* (note 76 above) para [41].

¹⁹¹ S 2 of the B-BBEE Act; and Department of Trade and Industry (DTI) (2003) *South Africa's Economic Transformation: A Strategy for Broad-Based Black Economic Empowerment* (2003) 12.

¹⁹² See ch 6, para 6.4.1.2 below.

principles of representivity, always incorporated, as part of the representativity principle, the requirements of high standards of professional ethics,¹⁹³ efficiency,¹⁹⁴ good human resources management,¹⁹⁵ knowledge,¹⁹⁶ suitably qualified,¹⁹⁷ based on level of training,¹⁹⁸ relevant skills and competence.¹⁹⁹

Efficiency, effectiveness, legitimacy and credibility were stated as the imperatives for an equitable workforce created by affirmative action and broad representivity in the public service.²⁰⁰ The importance of promoting efficiency when affirmation action based on representivity is applied was emphasised in two earlier judgements, one just before the introduction of the EEA and one shortly thereafter. In *Public Servants Association of South Africa and Others v Minister of Justice and Others*,²⁰¹ Swart J stated—

“An efficient administration must consequently be promoted at the same time as a broadly representative administration is promoted ... It also means that productivity cannot be pursued as an object *in vacuo* at the cost of other constitutional requirements. Although, what an efficient public administration is, may to a certain extent, be subject to interpretation, it also means to my mind that the efficiency be compromised by promoting a broadly representative administration.”²⁰²

The court further explained that it was a matter of logic and experience that the civil service bears the enormous responsibility and requires the extensive expertise to manage the country on the ground from day to day. Therefore, a broadly representative public administration cannot be promoted at the expense of an efficient administration.²⁰³

In *Stoman v Minister of Safety and Security and Others*,²⁰⁴ Van der Westhuizen J held as follows:

“As far as efficiency is concerned, I am respectfully of the view that the

¹⁹³ S 195(1)(a) of the Constitution.

¹⁹⁴ As above s 195(1)(b).

¹⁹⁵ As above s 195(1)(h).

¹⁹⁶ S 11(2)(b) of the Public Service Act.

¹⁹⁷ As above.

¹⁹⁸ As above.

¹⁹⁹ As above.

²⁰⁰ Department of Public Service and Administration *White Paper on Affirmative Action in the Public Service* (1998) 8.

²⁰¹ 1997(3) SA 925 (T); 1997(5) BCLR 577(T).

²⁰² As above paras 989J-990H.

²⁰³ As above.

²⁰⁴ (2002) (3) SA 468(T) (hereafter referred to as *Stoman*).

requirement of representivity is often linked to the ideal of efficiency. A police service, for example, could hardly be efficient if its composition is not at all representative of the community it is supposed to serve.”²⁰⁵

The connection between efficiency and representivity was also explained by Van der Westhuizen J in *Barnard*:

“Representivity may increase service delivery and efficiency, because it raises the legitimacy of public institutions in the eyes of the community it is meant to serve.”²⁰⁶

However, the constitutional and legislative imperatives of effectiveness and efficiency for representivity in time become less important, with representivity the beginning and end objective. On 18 August 2009, former justice of the Constitutional Court, Kriegler, noted that representivity had become the paramount principle applied by the Judicial Service Commission (JSC) in the selection of judges, despite it being at odds with the Constitution. Kriegler stated—

“But, from where I look at the judiciary today, and the way I have been watching the Judicial Service Commission, this ethnic/gender balance in section 174 of the Constitution has become the be-all and the end-all when the JSC makes its selections. And if it is not the be-all and the end-all; at the very least it has been elevated to the overriding fundamental requirement.”²⁰⁷

In 2003, the former Deputy Minister of Justice and Constitutional Development, Mr De Lange, at that stage in his capacity as chair of the Justice and Constitutional Committee in the National Assembly before becoming Deputy Minister, outlined the two criteria for the appointment of judges. Addressing the National Assembly, he explained that the appointment of judges was determined by government’s policy of transformation of the judiciary, which comprised, firstly, the realisation of the objective of equitable representation of blacks and women, referred to as “diversity, personnel and symbolism transformation”, and secondly, transformation relating to intellectual or ideological approach adopted by judges and magistrates, which referred to as “intellectual content or substantive transformation”.²⁰⁸ With the appointment of judges, therefore,

²⁰⁵ As above p 1033.

²⁰⁶ *Barnard* (note 136 above) para [185].

²⁰⁷ Kriegler *Wits Law School (Lecture)* (Aug 2009) 18.

²⁰⁸ Parliament of the Republic of South Africa *Hansard Papers* (2003-02-17) 124; Malan *TSAR* (2010) 432; and Malan (2019) 156.

the primary aim in terms of transformation should be to reflect the national population in the composition of the judiciary.

Former Chief Justice Mogoeng expressed the priority of transformation of the judiciary through representivity as the ultimate goal. According to him, the appointment of judges was “not all about merit” and that “transformation is just as important”; he also said the Constitution did not require that the “best of the best” be appointed as judges.²⁰⁹

In *Barnard* the Constitutional Court held that the Commission of the South African Police Service (SAPS) was entitled not to appoint a white female despite the fact that she had on two occasions been found by two different interviewing panels to be the best candidate. The Commission’s decision was justified in that the relevant population quota threshold (white women) had already been reached, and that her appointment would have compromised representivity at the SAPS.²¹⁰ The Constitutional Court gave preference to representivity instead of competence and skills. Cameron J, Froneman J and Majiedt AJ held in *Barnard* that “there was thus greater justification for prioritising racial representivity over other considerations”.²¹¹

Jafta J in *Barnard* held that by not appointing Ms Barnard and reserving the post for black officers, the National Commissioner sought to achieve representivity and equity in the police service. According to Jafta J, representivity is the most important objective even if it resulted in job reservation and despite the fact that job reservation is specifically prohibited by section 15(3) of the EEA.

The elevated status of the representativity principle is important for the purpose of this research. As discussed in chapters 6 and 7, the present formulation of the beneficiaries of BEE is such that it benefits largely the African middel- and upper classes. The representativity principle ensures that the political ideology to redistribute the means of production to Africans are fulfilled as discussed in chapter 2, paragraph 2.6 above.

Therefore, although the Constitution and other legislation includes competence, effectiveness,

²⁰⁹ Mogoeng (2019) 141.

²¹⁰ *Barnard* (note 136 above) para [62].

²¹¹ As above para [123].

efficiency and various other requirements as part of the process of promoting representivity, representivity had become the overriding criterion.

5.3.3.4 Homogenisation and Political Ideology

The principle of representivity provided for in the EEA covers a wide spectrum of society. It does not only cover the public service, but also all private sector workplaces (designated employers that employ 50 or more people).²¹² The EEA does not only apply to employers of business enterprises, but to all employers irrespective of their legal entity formation or motive. It, therefore, covers cultural, recreational, sports, religious, educational, youth, political or professional organisations and any other association, organisation or society with employees.²¹³ The representivity net is also cast wider with its incorporation into the Management and Control element of the B-BBEE Generic Scorecard. This element requires measured entities to comply with the EEA targets to pursue the management targets set in the B-BBEE Codes.²¹⁴ Therefore, even if an employer employs fewer than 50 people and is not regarded as a designated employer for purposes of the EEA, such an employer as measured entity may have to comply with the representivity targets of the EEA to become B-BBEE compliant. B-BBEE compliance for many smaller entities, for instance charities, clubs and non-profit organisations, is an imperative as many of them depend on government grants, licences and permits for their survival. In terms of section 10 of the B-BBEE Act, government departments are obliged to consider B-BBEE compliance as criterion for the approval of grants, licences and permits. Many civil society entities rely on local government approval to use local recreation facilities and amenities. Such approval by local authorities and government departments requires B-BBEE compliance and therefore representivity. Local governments often insist on “black ownership” of entities, which in the case of associations, clubs, non-profit organisations and trusts are defined as entities that benefit at least 51% black people.²¹⁵ To qualify for broader financial assistance, a 75% black beneficiary requirement is set for these civil society organisations.²¹⁶ Therefore, organisations

²¹² S 1 of the EEA, the definition of “designated employer”.

²¹³ Malan *TSAR* (2010) 431.

²¹⁴ See ch 6, para 6.4.1.2 below.

²¹⁵ *Statement 004: Scorecards for Specialised Enterprises* published in *Government Gazette* No. 38766 dated 6 May 2015 paras 2.7 and 2.9. “Specialised Enterprises” are: Companies limited by guarantee; Higher Educational Institutions; Non-profit companies; Public entities and Enterprises exclusively owned by organs of state and Public Benefit Schemes or Public Benefit Organisations.

²¹⁶ Schedule 1 of the B-BBEE Codes and the definition of “Socio-Economic Development Contributions” which means “monetary or non-monetary contributions implemented for communities, natural persons or groups of natural persons where

and entities which choose to organise outside the requirements of the EEA, will not come in contention for government grants, licences, permits and donations.

Malan explains that civil society organisations form the backbone of communities. They all aim to further the objectives of one or more community interest. In doing so, they assume the character of the community or those interests they endeavour to promote. This is embodied in their founding constitutions, structures and compositions. The enforcement of representivity based on the population composition of society as a whole will impose on these societies, compositions and structures requirements incongruous with their own communities, community objectives and character. As the representivity principle reflects the African majority, it will impose on all minority community civil society structures the requirement to conform to the ideals or character of the dominant African majority. This will undermine and erode the very reason for the establishment and existence of these structures in communities. This is described by Malan as an annexation of minority interest by the majority and the homogenisation of society to conform to the national character of the dominant majority. As Malan further explains, a constitutional democracy allows governance by the political majority, but not dominance of minorities. The rights of all individuals are protected in a Bill of Rights, not only those of the majority. One of the characteristics of rights is the protection they provide to minorities against majority dominance.²¹⁷ Malan submits that homogenisation enforced by representativity is an invasion of the right to freedom of association, freedom of expression, and the right of persons who belong to a cultural religion or linguistic community to enjoy their culture, practices and religion and use their language together with other members of that community.²¹⁸

This role of representivity in homogenising society to conform to the national character of the majority should be seen in the context of the ANC's political ideology of African Nationalism rooted in the *Freedom Charter* and the NDR. In the *Freedom Charter's* declaration of "We, the People ... The People shall share in the Country's Wealth ... the national health shall be restored to the people ..." and "The Land Shall Be Shared Amongst Those Who Work It",²¹⁹ the ANC claims the people to be Africans, as they are the original indigenous and majority people of South

at least 75% of the beneficiaries are Black people".

²¹⁷ Malan *TSAR* (2010) 444-446.

²¹⁸ As above 446.

²¹⁹ *Freedom Charter* available on the ANC's website: anc1912.org.za/the-freedom-charter-2/.

Africa.²²⁰ This is promoted by slogans such as “Africa for the Africans” and “Africans first”. Resolutions adopted by the ANC are based on the mantra of “Blacks in general and Africans in particular”. This mantra is also contained in the constitution of the South African Communist Party (SACP) with whom the ANC is in alliance, and which introduced the Marxist-Leninist theory of the NDR to the ANC.²²¹ The SACP and NDR seek a classless society of the workers’ class. The “The Land Shall Be Shared Amongst Those Who Work It” is applied by the ANC and SACP to refer to African workers whose interest must be protected by the ANC as vanguard of the workers.

The majoritarian basis of the representivity principle is derived from the *Freedom Charter*, namely that the people and those who work the land as the African majority should be “vanguarded” by the state. The ANC adopted several resolutions to the effect that the *Freedom Charter* should be the basis for promoting the transformation of society to a NDR outcome of a socialist society. During the ANC’s National Conference in 2002, the Conference reaffirmed the “Freedom Charter as the strategic objective of the NDR”.²²²

Southall explained the role of representivity to promote the objectives of the NDR as follows:

“the demand for representivity has allowed for the upward mobility of blacks within the corporate sector to be presented as commensurate with the furtherance of the NDR.”²²³

As discussed in chapters 6 and 7 below, the representativity principle ensures that political connected individuals benefit from BEE, not the uneducated or poor and vulnerable black people at the lower end of the social order.

5.3.3.5 Representivity, Rationality and Equality

Up to this point, our courts were not required to adjudicate on the constitutionality of the EEA. The cases which did serve before the courts involved challenging promotions in the public

²²⁰ ANC *The Freedom Charter Revolutionary Programme of the ANC* (1969) 1st and 2nd page; and ANC *Report on Strategy and Tactics* (1969) 12th and 13th page.

²²¹ Slovo *Umsebenzi Discussion Pamphlet* (1988) 3rd page.

²²² ANC *Strategy and Tactics* (1997) para 6; and ANC *Strategy and Tactics* (2002) paras 7, 16-25 where the ANC’s National Conference reaffirmed the “Freedom Charter as the strategic objective of the NDR”.

²²³ Southall *Review of African Political Economy* (2008) 285.

service made in respect of Employment Equity Plans based on the EEA. The courts have only gone as far as comparing these Employment Equity Plans with the EEA without assessing the EEA within the context of the Constitution. In doing so, they have *prima facie* observed that representivity provided for in the EEA is a measure which promotes equality.²²⁴ The test to be used for a remedial measure to pass the equality standard of the Constitution is the three-criteria test as per *Van Heerden*, namely that a measure must: (1) target persons or categories of persons who had been disadvantaged by unfair discrimination; (2) be designed to protect or advance those persons or categories of persons disadvantaged by unfair discrimination; and (3) promote the achievement of equality.²²⁵

In *Barnard*, the Constitutional Court held that as a bare minimum, a legitimate restitutionary measure must be rationally related to the terms and objectives of the measure.²²⁶ This rationally test is the generous or deferential rationality test.²²⁷ This, according to Van der Westhuizen J in *Barnard*, applies to the first two criteria.²²⁸

When testing the EEA against the first two criteria, that is whether the EEA and the representivity criteria are reasonably capable of achieving the desired outcome, the answer is yes and no. In 2014, the public service announced that it was fully representative of the South African population in respect of race but not gender.²²⁹ The Commission for Employment Equity in 2023 reported that insofar as the private sector was concerned, senior management positions were still dominated by white males despite the EEA being in existence for 16 years. White males represented 52,6% of all senior management positions, followed by males and females combined: 13,8% Africans, 5,8% Coloureds and 11,6% Indians.²³⁰

The EEA succeeded partially in achieving the demographic targets in the public service but failed dismally in the private sector. But the equality test does not end with a measure merely achieving

²²⁴ *Stoman* (note 204 above) paras 477 D-E and 482 G; *Barnard* (note 136 above) paras [40], [150] and [183]; and *Correctional Services* (note 76 above) para [46].

²²⁵ *Van Heerden* (note 44 above) para [33].

²²⁶ *Barnard* (note 136 above) para [39].

²²⁷ *Minister of Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others* [2018] ZACC 20 para [55].

²²⁸ *Barnard* (note 136 above) para [143].

²²⁹ Department of Public Service and Administration *Annual Report on Employment Equity in the Public Service 2013/2014* (Jan 2014) 9.

²³⁰ Commission for Employment Equity 23rd *Commission for Employment Equity Report 2022-23* (Nov 2023) 4.

its own objective. The next step in the inquiry is to determine whether the first two criteria are causally linked (a nexus) to the third criterion,²³¹ meaning does the EEA objectively promote substantive equality? The meaning of substantive equality has been developed over many cases since the introduction of the Interim Constitution. This is often explained by the courts by comparing formal equality to substantive equality. While formal equality takes a neutral position of treating all equally, substantive equality rather seeks outcomes that promote equality. In terms of formal equality, all those in different positions will be treated the same, which will merely entrench existing equality, whereas with substantive equality those in different positions will be treated differently to achieve outcomes towards ultimate equality.²³² Substantive equality further requires an impact, effect or progress, and not merely an attempt.²³³

Although the EEA might be able to achieve its goal of proportional representation of all race groups, that is not to say that once full representivity is achieved at all levels, it will promote the achievement of equality. Those benefitting from EEA are not the unemployed or those without education, but those with proper education and access to resources. As stated by Kanya—

“Borrowing from Lenin’s ‘labour aristocracy’, a ‘black managerial aristocracy’ is emerging in South Africa at the expense of the vast number of blacks who are still unskilled and unemployed. The danger of the country’s corporatist ‘deal’, on affirmative action is that it benefits those least in need while the unorganised unemployed fail to be represented.”²³⁴

This is supported by the far above-average unemployment rate amongst African people as discussed in chapter 2, paragraph 2.2, despite them being the main beneficiaries of affirmative action in the public and private sector. The African population is also the only population group with growing inequality within the group. The main beneficiaries of affirmative action are the middle and affluent classes which have grown substantially and at a much faster rate than the same classes in the other population groups. At the same time, the poor classes of the African population group have experienced an increase in poverty levels, which exacerbated inequality and created new patterns of class inequality.²³⁵

²³¹ *Van Heerden* (note 46 above) para [42].

²³² *Brink v Kitshoff NO* 1996 (4) SA 197 (CC) paras [41] – [42]; *Hugo* (note 39 above) para [41]; and *Gay and Lesbian Equality* 2 (note 38 above) paras [60] and [61].

²³³ *Barnard* (note 136 above) para [143]; and *Van Heerden* (note 46 above) para [31].

²³⁴ Kanya *Journal of Modern African Studies* (1997) 239.

²³⁵ See ch 2, para 2.2 above.

The reason for the EEA's inability to promote equality is that its designated groups are not designed and based on detailed information disaggregated to the social needs of those at the lower end and poor classes.²³⁶ Such a measure which does not cater for the most vulnerable groups based on the disaggregated data of the social needs of these groups, cannot be said to be designed to achieve substantive equality.

Malan concludes that the closest the principle of representivity gets is formal equality, which is contrary to the constitutional requirement of substantive equality. He explains that since various people and groups find themselves in different positions, they are differently affected by the application of representivity. It is highly beneficial to the majority and extremely disadvantageous to the minorities. Hence, he submitted that—

“representivity is not a strategy of equality but a strategy of systematic substantive inequality to the detriment of the minorities. In fact, the working of representativity is a textbook example of the distinction between formal and substantive equality and how harmful the effects of formal equality can be.”²³⁷

Stacey submits that the ANC's interpretation of equality requires that all people be treated essentially the same. This means that all individuals have an equal amount of influence in the determination of what a good life is. All should be forced to adopt and pursue a good life for dissenting individuals. The state is the instrument through which this common good is enforced. Those who do not conform to the collective or majoritarian good or character “should be forced to be free” and to live lives according to collective decisions to which they actually unknowingly agree, because they simply belong to a society with a particular character.²³⁸

Various commentators have over time highlighted objectives with the constitutional compatibility and inconsistencies in the application of the representativity principle contained in the EEA.²³⁹ The most significant anomalies in the operation of the representivity principle were pointed out by some of the minority judgements in *Barnard* and *Correctional Services*.

²³⁶ South African Human Rights Commission *Equality Report 2017/18* (2018) 34.

²³⁷ Malan *TSAR* (2010) 447.

²³⁸ Stacey *Politikon* (2003) 134.

²³⁹ Jeffery (2014) 87 and 88; Louw *PER/PELJ* (2015) 4-6; and Malan *TSAR* (2010) 446-448.

In *Barnard*, Van der Westhuizen J pointed out that by focusing on representivity alone, a measure's implementation may thwart other equality concerns. He explained that in the case of minority disadvantaged groups, which comprise a small percentage of the population, the numerical target for the group would be very small or even non-existent. If a candidate of a minority disadvantaged group cannot be appointed, it would in effect disadvantage previously disadvantaged groups.²⁴⁰

Nugent AJ, in a minority dissenting judgement in *Correctional Services*, pointed out various anomalies and irrationalities in the way the representivity principle applies. Although he referred to the Employment Equity Plan of the employer in question, these anomalies are relevant to the EEA as the Employment Equity Plan of the employer was based on the provisions of the EEA.

The EEA's primary measure of representivity is the "demographic profile" of the economically active population. A demographic profile is a statistical analysis of the characteristics of a population constructed upon whatever characteristics one chooses to analyse. For powerful historical reasons, Nugent AJ explained, the statute has focused on race and gender as markers of employment equity.²⁴¹ But if the demographic profile of the population is to be the measure of employment equity, then all the characteristics of the population that are relevant must be considered and not only some. To select only one characteristic and ignore others that are relevant, will produce an irrational result.²⁴² It is well established that a rational decision calls for all relevant factors to be taken into account and not only some. The factors that are relevant depend on the purpose of the inquiry.²⁴³

The nature of the inquiry mandated by the EEA makes it clear that the racial characteristics of the demographic profile were primarily what the Legislature had in mind, but there are many facets to those characteristics. National proportions are but one characteristic of the population's demographic profile. There are others. To ascribe to the demographic profile of the population no more than the proportion of each racial group in the entire country, is misleading and according to Nugent AJ, violates the objective of the EEA.²⁴⁴ There is an important fact that is in

²⁴⁰ *Barnard* (note 136 above) para [149].

²⁴¹ *Correctional Services* (note 76 above) para [121].

²⁴² As above para [122].

²⁴³ As above para [124].

²⁴⁴ As above para [123].

any event inherent in the demographic profile of the population as a whole, namely its uneven distribution throughout the country. Without its uneven distribution being brought into account, the racial proportions of the population, as an entirety, are dangerously misleading if applied when compiling an Employment Equity Plan.²⁴⁵

The present purpose of the EEA is representivity in the workplace. This is achieved by equitable access to employment opportunities – and employment opportunities are accessible to people only where they live. The objective of the EEA is not to induce “racial migrations to accommodate the statistics”. Its objective is accessibility of employment opportunities, which can only be achieved if the location of applicants for the posts is taken into account. Statistics that serve as a tool for such a purpose will be those that reflect the reality of the population, and the reality is that the races are not distributed uniformly throughout the country, which is not reflected in the targets set by the EEA and its regulations.²⁴⁶ If racial proportions are to be the measure of a representative workforce, then they must necessarily reflect the distribution of the people making up those proportions. To do otherwise produces irrational anomalies.²⁴⁷

Nugent AJ further observed that the vast majority of coloured people live in the Western and Northern Cape. The 2011 census revealed that coloured people comprised 48,8% of the population of the Western Cape, and 40,3% of the population of the Northern Cape. In all other provinces except the Eastern Cape, where they comprised 8,3% of the population, their presence was negligible. In Limpopo they made up a mere 0,3%, while 96,7% of the population of that province were what the census calls “Black Africans”. Translating those proportions into numbers at the time of the 2011 census, there were some 16 000 coloured people and some 5,2 million black African people in Limpopo. Approximately 2,8 million coloured people and 1,9 million black African people lived in the Western Cape. There is no rationality in restricting almost half the population of the Western Cape to 8,8% of employment opportunities in that province, and simultaneously extending 8,8% of employment opportunities in Limpopo to 0,3% of the population. Of every 100 work opportunities in the Western Cape, nine are made accessible to some 2,8 million coloured people, while in Limpopo nine opportunities are made accessible to roughly 16 000 coloured people. And while in Limpopo nine of every 100 posts are made

²⁴⁵ As above para [120]; and South African Human Rights Commission *Equality Report 2017/18* (2018) 35.

²⁴⁶ *Correctional Services* (note 76 above) para [125]. Also see South African Human Rights Commission *Equality Report 2017/18* (2018) 37 and 38.

²⁴⁷ *Correctional Services* (note 76 above) para [126].

accessible to roughly 16 000 coloured people, only 73 are made available to 2,8 million black African people, denying some 20% of employment opportunities to almost the whole population. Conversely, in the Western Cape nine of each 100 opportunities are made accessible to some 2,8 million coloured people while 1,9 million black African people have access to 73.²⁴⁸

The same anomalies irrationally apply wherever the distribution of the population is ignored. Anomalies will necessarily abound when people are reduced to national statistics. This is particularly so if the statistics bear no relation to the purpose for which they are used.²⁴⁹ Applying the racial proportions as a whole ensures that every branch, every office, and every nook and cranny of an employer's structure is constructed accordingly, but that does not serve the purpose of equitable employment. If access to employment is to be allocated in proportions, one might expect it to be allocated relative to the proportions of the potential employees, not relative to overall proportions that lump together people who in fact live a thousand kilometres and more apart.²⁵⁰

It is submitted that there is no rational explanation for reserving posts for the various race groups with reference solely to their proportions as part of the national population, with no regard to their distribution. It is argued that it is wrong to base the "demographic profile" of the entire national population solely on its racial proportions. The racial proportions of the population are not its demographic profile. They are but one characteristic of the demographic profile, and in themselves they do not provide a coherent basis upon which to measure employment representivity. It is important to consider the regional profile of the population as regional distribution is in any event inherent in the country's demographic profile. On that ground, too, Nugent AJ concluded that the EEA is irrational and in consequence unlawful.²⁵¹ While affirmative action measures are directed towards redressing past discrimination against the entire designated group, discrimination within the group is sanctioned if it is in pursuit of equitable representivity.²⁵²

Nugent AJ emphasised the need to apply employment equity in a nuanced and harmonised way.

²⁴⁸ As above paras [127] – [129].

²⁴⁹ As above para [130].

²⁵⁰ As above para [134]. Also see Malan *TSAR* (2010) 434-436.

²⁵¹ Correctional Services (note 76 above) para [132].

²⁵² As above para [121].

He explained that reconciling the redress the Constitution demands with the constitutional protection afforded to the dignity of others, is profoundly difficult. Such a goal can only be achieved by a “visionary and textured” employment equity provision that incorporates mechanisms enabling thoughtful balance to be brought to a range of interests. That is the only way in which the constitutional tensions referred to in *Barnard* are harmonised. That is also how the Constitution’s demand for a public service that is “broadly representative of the South African people” will be realised. He explained that South Africans are a vibrantly diversified people. Consequently, it does the cause of transformation no good to render them “ciphers reflected in an arid ration having no normative content”.²⁵³

The South African Human Rights Commission (SAHRC) also pointed out that the representivity principle which was applied in *Barnard* to a white woman, and was affirmed for all race groups in *Correctional Services*, creates further imbalances.²⁵⁴ According to the SAHRC, a white male from an advantaged group may be preferred over an African female from a target group if the population target for African females is filled and that of white males not. This, according to the SAHRC, will prevent and create absolute barriers for suitable candidates from previously disadvantaged groups from being appointed.²⁵⁵

The anomalies in and unintended consequences of the application of the representivity principle are also laid bare in the EEA requirement that suitable qualified persons at all occupational levels must be appointed in accordance with the Economically Active Population (EAP) targets. In 2014, the public service announced that “[I]n terms of the need to transform the Public Service in a way that it reflects the national demographics, this ideal has been reached at a racial level”. It added that “the representation of the four racial groups corresponds with their national demographic figures”.²⁵⁶ The profile of the national EAP distribution per race at that stage was: 75,2% African, 10,8% White, 10,6% Coloured and 3,1% Indian.²⁵⁷

In April the same year, 2014, the Commission for Employment Equity published its 14th annual report on employment equity, covering the period from 2013 to 2014. This report found that,

²⁵³ As above para [133].

²⁵⁴ As above para [40]; and South African Human Rights Commission *Equality Report 2017/18* (2018) 36.

²⁵⁵ South African Human Rights Commission *Equality Report 2017/18* (2018) 36.

²⁵⁶ Department of Public Service and Administration *Annual Report on Employment Equity in the Public Service 2013/2014* (Jan 2014) 9.

²⁵⁷ As above 8.

among “all government” employers in this period, Africans held 69% of top management jobs, 63% of senior management posts, 67% of jobs at the “professionally qualified” level (formerly termed “middle management”), and 79% of skilled jobs. Had Coloured and Indian representation been taken into account, black South Africans held 84% of top management posts. They also constituted 78% of senior management, 82% of professionally qualified staff and 90% of skilled personnel.²⁵⁸

Jeffery argued that given the age and skills profile of the African population, these figures are “remarkable”. She explained, for instance, the Commission’s figure of 69% for African representation at top management level in government, which comes close to the total African share (75%) of the economically active population. Yet in 2013 economically active Africans within the 35 to 64 age cohort from which top managers can realistically be drawn, made up only 36% of the total economically active population. In addition, in 2012 only 992 000 Africans (4% of those aged 20 or older) had any form of post-school training. Moreover, figures released by Statistics South Africa in April 2014 showed that half (54%) of young people between the ages of 15 and 34 had no work experience at all, while 47% did not have matric.²⁵⁹ Such factors confirm that a 75% target for African representation at top management level is far too ambitious – and yet this target had already come close to being fulfilled for senior management in 2014.²⁶⁰ She submitted that the public service must have dug deeply into the ranks of black South Africans aged 35 and more to attain so high a degree of black representation at this most demanding level of management. This, in turn, makes it all the more surprising that African representation at senior management levels – and among professionally qualified and skilled staff – had also come so close to demographic representivity. Overall, the Commission’s figures point to an astonishingly fast pace of affirmative action in the public sector. This, according to Jeffery, seems to have been achieved in three ways: first, by implementing rigid racial quotas rather than the more flexible “numerical goals” mandated by the EEA; secondly, by appointing black people without the necessary skills and experience; and thirdly, by leaving posts vacant where no suitable black candidates can be found.²⁶¹

The above illustrates that representivity targets can amount to absolute barriers in employment.

²⁵⁸ Commission for Employment Equity *14th Annual Report 2013 – 2014* (2014) 26, 32, 40, 46 and 86.

²⁵⁹ Stats SA *Report on Labour Market Dynamics in South Africa 2014* (2014) 2-7.

²⁶⁰ Jeffery (2014) 87 and 88.

²⁶¹ As above 88.

The way the representivity principle operates creates rigid quotas once the population targets are filled. This will create absolute barriers in employment and constitute job reservation as posts will be left open to be filled by black officials in the future, as was the case in *Barnard*. It results in less suitably qualified persons being considered and appointed, especially at management levels, due to the smaller pool of suitably qualified persons available. Therefore, representativity creates anomalies which the EEA specifically prohibits, rendering the EEA internally inconsistent and irrational. The representative principle contained in the EEA does not meet the substantive equality requirement of the Constitution to achieve equality. In fact, it fails on the first rationality hurdle, being irrational and arbitrary due to its internal inconsistencies to achieve its own objective and that of substantive equality.

The beneficiaries of affirmative action are not focused on those in need of employment, without education or which fall in the poverty and low-income classes. This is discussed in more detail in chapter 7 below. Thus, the representativity principle and the affirmative action measures provided by the EEA does not promote equality.

5.3.4 The Connection between Demographic Representativity, Transformation, Corruption and State Capture

The utilisation of demographic representativity as an instrument of transformation also came under the spotlight during the State Capture Commission.²⁶² One of the terms of reference of the Commission was to investigate and make recommendations to the President regarding the nature and extent of corruption in awarding contracts and tenders to companies and business entities or organisations by public entities listed under Schedule 2 of the Public Finance Management Act.²⁶³ The Commission heard evidence that the ANC, through its policy of Cadre Deployment, placed loyal “cadres” in key positions in government. This enabled corruption and patronage through government’s and public entities’ procurement processes.²⁶⁴

Evidence before the Commission indicates that Cadre Deployment was facilitated through the

²⁶² *Proclamation No. 3 of 2018* by the President of the Republic of South Africa appointing a Judicial Commission of Inquiry to inquire into allegations of State Capture, corruption and fraud in the public sector, including organs of state, published in *Government Gazette* No. 41403 dated 25 Jan 2018.

²⁶³ Public Finance Management Act 1 of 1999. Also see *Judicial Commission of Inquiry into State Capture Report: Part I: Vol. I* v.

²⁶⁴ *Judicial Commission of Inquiry into State Capture Report: Part VI: Vol. I* 197-202.

ANC's Cadre Deployment Committee (Deployment Committee). The Deployment Committee was headed by the ANC Deputy President at the time and comprised 15 National Executive Committee (NEC) members, including the Deputy Secretary-General of the ANC.²⁶⁵

The ANC's Cadre Deployment Policy required the ANC's approval, through its Deployment Committee, of appointments of "key centres of authority" within the state.²⁶⁶ According to the testimony of Gwede Mantashe, the then General-Secretary of the ANC and present Minister of Mineral Resource and Energy, the strategic deployment of "comrades" is an important part of the ANC's strategy to control the "levers of power in the state".²⁶⁷

It was testified that the Deployment Committee not only covertly approved key appointments in the state, but also facilitated "leadership in critical institutions including the private sector".²⁶⁸

The President of the ANC and South Africa, Cyril Ramaphosa, testified before the State Capture Commission that the Cadre Deployment Policy of the ANC "aims to ensure the transformation of South Africa's institutions following the end of Apartheid. Deployment ensures that these institutions reflect the demographics of the country".²⁶⁹ During the period of State Capture, Ramaphosa was the ANC Deputy President and headed the Deployment Committee.

The Commission found that the deployment of cadres in the state by the ANC was illegal and contrary to sections 195 and 197 of the Constitution.²⁷⁰ As the Committee did not consider other candidates outside the ANC, the process followed by the ANC was flawed and is contrary to the right to equality.²⁷¹ In respect of the ANC's Cadre Deployment Policy and its role in state capture, the Commission found that despite the ANC's endeavours to control all levels of power in the state, it could not contain corruption; in fact, corruption increased under the ANC's Cadre Deployment,²⁷² and the ANC as a political party benefitted unduly and corruptly from donations from those that received contracts to deliver goods and services to the state, enabled by Cadre

²⁶⁵ As above 231.

²⁶⁶ As above 234.

²⁶⁷ As above 200.

²⁶⁸ As above 233 and 234.

²⁶⁹ As above 231.

²⁷⁰ As above.

²⁷¹ As above 257.

²⁷² As above 200, 202 and 245.

Deployment.²⁷³

Malan explains that totalitarianism in terms of the ANC's strategy of the National Democratic Revolution (NDR) serves as the main explanation for placing all key centres of power under the control of the ANC through cadre deployment. "It is not merely some fleeting error soon to disappear. It occupies a central place in the ANC's ideological project".²⁷⁴

This implies a direct correlation and causal connection between transformation, affirmative action and demographic representativity, and corruption and state capture.

5.4 THE GOVERNMENT'S PREFERENTIAL PROCUREMENT LEGAL FRAMEWORK

5.4.1 International and Constitutional Context of Government's Preferential Procurement

The size of public expenditure in any economy is considerable, thus making public procurement a strategic policy instrument to address an array of government objectives.²⁷⁵ The World Bank states that public procurement as a percentage of gross domestic product (GDP) is between 5% and 20% in both developed and developing countries.²⁷⁶ With such spending power, it is not surprising that public procurement plays a strategic role within the economy and that governments globally often use their purchasing power to pursue objectives other than merely buying what they need to fulfil their governmental tasks. This linkage of procurement with broad economic, social and environmental policies is called "secondary" or "horizontal" policies.²⁷⁷ Noteworthy international examples of "secondary" or "horizontal" policies pursued through procurement are the "buy America" policies implemented in the USA since the 1930s²⁷⁸ and the environmental policies pursued by the European Union and its members via Green Public Procurement.²⁷⁹

The development of some international law instruments bolstered the use of procurement for development objectives, especially in Africa. The most prominent of these is the adoption of the

²⁷³ As above 263 – 266.

²⁷⁴ Malan (2019) 103.

²⁷⁵ Makube (2018) 80.

²⁷⁶ World Bank *The World Bank Group and Public Procurement: An Independent Evaluation* (2014) 51.

²⁷⁷ Arrowsmith *Journal of Public Procurement* (2010) 149.

²⁷⁸ Buy American Act of 1933; Buy American Act of 1978; and the American Recovery and Reinvestment Act of 2009.

²⁷⁹ La Chimia (2018) 32.

Sustainable Development Goals by the United Nations as part of its 2030 *Agenda for Sustainable Development*.²⁸⁰

The explicit linkage of public procurement with development under the framework of the *Sustainable Development Goals* is supported by other international instrument developments. One example is the *General Comment* of the United Nations Committee on Economic, Social and Cultural Rights. Here, the Committee recommends that State Parties of the International Covenant on Economic, Social and Cultural Rights use their public procurement regimes to fulfil their obligations under the Covenant.²⁸¹

The emergence of growing international acceptance of an overt developmental agenda in public procurement is also evident in the 2011 United Nations Commission on International Trade Law's (UNCITRAL) Model Law on Public Procurement. The revised text of the Model Law explicitly recognises the potential incorporation of "socio-economic policies" as "environmental, social, economic and other policies" of member states into their procurement regulations or other provisions of law. The Model Law requires the use of socio-economic policies in public procurement to be authorised in law.²⁸²

The relation between public procurement and development is evident in the Addis Ababa Action Agenda of 2015, where the parties committed themselves to "establish[ing] transparent public procurement frameworks as a strategic tool to reinforce 'sustainable development'".²⁸³

The United Nations Working Group on Business and Human Rights emphasised the role of "economic diplomacy tools", such as public procurement, as part of a state's duty to protect against human rights abuses and as a policy area with tremendous potential to contribute positively towards advancing human rights and sustainable development. This statement of the Working Group highlights the role of human rights in underpinning the development agenda in the linkage between public procurement and development.²⁸⁴

²⁸⁰ *Millennium Declaration - Transforming our World: the 2030 Agenda for Sustainable Development* UN General Assembly A/RES/ 70/1 (2015), the *Sustainable Development Goals (SDGs)* Goals 12 and 17.

²⁸¹ United Nations Committee on Economic, Social and Cultural Rights *General Comment No. 24 of 2017 on state obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities* (2017) 14.

²⁸² UNCITRAL Model Law on Public Procurement, 2011.

²⁸³ Quinot (2018) 16.

²⁸⁴ UN Working Group of Business and Human Rights *The State as an economic actor: the role of economic diplomacy tools to promote business respect on human rights* (Sep 2017) 1-3.

According to Phoebe Bolton, a ground-breaking researcher and author on the topic of public procurement, it is an internationally recognised practice for governments to use their procurement power to promote the development of previous disadvantaged groups.²⁸⁵

Nowhere is the association of public procurement with human rights and socio-economic development more evident than in South Africa. The National Treasury estimated expenditure on public procurement in the 2012/13 financial year to be around R500 billion, which increased substantially thereafter.²⁸⁶ The government of South Africa, through the National Development Plan (NDP),²⁸⁷ New Growth Path (NGP)²⁸⁸ and the Industrial Policy Action Plan (IPAP),²⁸⁹ has identified public procurement as one of the key policy instruments for the promotion and acceleration of economic development and transformation. This policy position is supported by the PPPFA and its preferential procurement regulations, as well as the B-BBEE Act and its Codes of Good Practice.

The biggest enabler of the use of government procurement to promote those disadvantaged by unfair discrimination is the Constitution. It lays the foundation for legislation and other measures to be adopted to use procurement as an instrument to promote substantive equality.²⁹⁰

5.4.2 The Preferential Procurement Policy Framework Act (PPPFA)

The PPPFA was enacted to provide a framework for the implementation of preferential procurement as required by section 217(3) of the Constitution.²⁹¹ The PPPFA provides for the categories of preference in the allocation of contracts and the protection or advancement of persons or categories of persons disadvantaged by unfair discrimination. In *Allpay Consolidated*

²⁸⁵ Bolton (2007) 4.

²⁸⁶ National Treasury *Public Sector Supply Chain Management Review* (2015) 3. Also see the *Judicial Commission of Inquiry into State Capture Report: Part 1 Vol. 3* 720, which, based on South African Reserve Bank Statistics, shows that the government channelled R 917 billion through public procurement which equates to 19,5% of the South African GDP.

²⁸⁷ National Planning Commission *The National Development Plan (NDP) 2012-2030* (2012) 119, 124 and 139.

²⁸⁸ DTI *New Growth Path (NGP)* (2010) 13, 17, 21-22 and 31.

²⁸⁹ DTI *Industrial Policy Action Plan (IPAP)* (2014) 46 and 47.

²⁹⁰ Ss 9, 217(2) and (3) of the Constitution.

²⁹¹ Header of the PPPFA. Also see s 217 of the Constitution which states “(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. (2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for (a) categories of preference in the allocation of contracts; (b) the protection or advancement of persons, or categories of persons disadvantaged by discrimination. (3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented”.

*Investment Holdings (Pty) Ltd and Others v Chief Executive Office, South African Social Security Agency and Others*²⁹² Froneman J observed that “economic redress for previously disadvantaged people also lies at the heart of our constitutional and legislative procurement framework”.²⁹³

In *Minister of Finance*²⁹⁴ the Constitutional Court explained that what section 217(3) of the Constitution seeks to achieve is consonant with the transformative nature of the Constitution and its provisions dovetail with the equality provisions of section 9(2) of the Constitution. In this regard, the court stated—

“Without provisions of this nature, true and substantive equality would forever be pie in the sky for the vast majority of South Africans and the transformative agenda of the Constitution would be unrealistic.”²⁹⁵

Geo Quinot, a professor in the Department of Public Law at Stellenbosch University and a procurement law expert, states that the use of public procurement in South Africa is aimed at promoting wealth redistribution as part of the overall constitutional objective of addressing the continued disadvantage created by past unfair discrimination.²⁹⁶

The PPPFA provides that an organ of state must determine its own preferential procurement policy and implement such policy within the framework of the PPPFA.²⁹⁷ The Act determines a point system to be used in two categories on a 90/10 or 80/20 basis respectively, depending on the size of a contract, which threshold is to be determined by the Minister of Finance (Minister). Quinot explains that the Act in essence involves a system of “price preference at the award stage of adjudication of public tenders”. Section 2 of the PPPFA prescribes a preferential procurement framework in terms of which a “fixed percentage” of the adjudication criteria must meet the peremptory preferential requirement of procurement. The fixed percentage will be either 10% or 20% depending on the value of the contract. For contracts with a higher value, the percentage will be 10% and for contracts with a lower value 20%. The exact values must be determined by

²⁹² [2013] ZACC 42.

²⁹³ As above para [99].

²⁹⁴ *Minister of Finance* (note 130 above).

²⁹⁵ As above para [99].

²⁹⁶ Quinot *Journal of South African Law* (2018) 856. Also see Van Eck and Padayachy *Industrial Law Journal* (2022) 2222 who refer to the PPFA as a “step towards the economic inclusion of black people in the broader economy”.

²⁹⁷ S 2(1) of the PPPFA.

regulation. The remaining 90% or 80% of the procurement criteria relate specifically to price. Therefore, bidders can score a 10% or 20% preference over the price offered by competitors based on preferential criteria. The Act therefore contemplates price to be the single biggest factor in awarding tenders. The Act prescribes a point system to implement this framework that “involves adjudicating all bids against a total of 100 points split between price (90 or 80 points) and preference (10 or 20 points)”.²⁹⁸ The bidder scoring the highest number of points should be awarded the tender “unless objective criteria ... justify the award to another tenderer”.²⁹⁹ The 10 or 20 points allocatable in each category are for a “specific goal”.³⁰⁰ Specific goals may include contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability³⁰¹ and implementing the programmes of the Reconstruction and Development Programme (RDP).³⁰² Any specific goal for which a point may be awarded must be clearly specified in the invitation to submit a tender.³⁰³ A contract must be awarded to a tenderer that scores the highest points, unless objective criteria justify the awarding of a tender to another bidder.³⁰⁴ Any specific goals for which points are given must be measurable, quantifiable, and monitored for compliance.³⁰⁵

The Minister, in terms of the Act, is enjoined to make regulations regarding any matter that may be “necessary or expedient” in order to achieve the objects of the PPPFA.³⁰⁶

5.4.3 The Preferential Procurement Regulations (PPRs) and the Correlation with the B-BBEE Programme

Although the PPPFA sets the broad framework for awarding state contracts, the bulk of the criteria is contained in the PPRs.³⁰⁷ Since the inception of the PPPFA, four versions or iterations of the PPRs were published. The PPRs were largely influenced by the introduction of the B-

²⁹⁸ Quinot *Journal of South African Law* (2018) 857.

²⁹⁹ S 2(1)(f) of the PPPFA; and Quinot (2018) 857. Also see Van Eck and Padayachy *Industrial Law Journal* (2022) 2229.

³⁰⁰ S 2(1)(b) of the PPPFA.

³⁰¹ As above s 2(1)(d)(i).

³⁰² As above s 2(1)(d)(ii). Also see *Parliament of the Republic of South Africa White Paper on Reconstruction and Development* (Nov 1994) 7 published in *Government Gazette* No. 16085 dated 23 Nov 1994. The RDP is described as a policy framework for integrated and coherent socio-economic process.

³⁰³ S 2(1)(e) of the PPPFA.

³⁰⁴ As above s 2(1)(f).

³⁰⁵ As above s 2(2).

³⁰⁶ As above s 5(1).

³⁰⁷ Quinot *Journal of South African Law* (2018) 856 who states that “the real meat of the regulatory regime governing preferential procurement is found in the regulations under the Act”.

BBEE Act in 2003³⁰⁸ (as discussed below) and subsequent amendments to B-BBEE legislation over time. The first PPRs were promulgated in 2001,³⁰⁹ before the introduction of B-BBEE legislation in 2003. It defined “Historically Disadvantaged Individual (HDI)” as any person who is a South African and became a citizen on or before adoption of the Interim Constitution and who, due to apartheid policy, had no franchise in national elections prior to the introduction of the Interim Constitution; or who is a female or has a disability.³¹⁰ This is discussed in more detail in chapter 6, paragraph 6.6.1 below.

The Regulations also provided for the 80/20 points system prescribed in the PPPFA to be used for contracts with a value above R30 000 up to a value of R500 000.³¹¹ The 90/10 points must be used to calculate the points for price in respect of contracts with a value above R500 000.³¹² Contracts with a value below R30 000 were excluded from the point system prescribed in the PPPFA. The 20 points for a “specific goal” set aside for contracts with a value of between R30 000 and R500 000 and the 10 points set aside for contracts with a value above R500 000 may be awarded to a tenderer for being an HDI or for subcontracting a portion of the contract to an HDI. These points for a specific goal may also be awarded for achieving some of the other specific goals provided for in the PPRs.³¹³

Points awarded for ownership held by HDIs in a bidding entity must be calculated as a percentage of the equity held by an HDI in such an entity.³¹⁴ For instance, if an HDI held 100% of the equity (shares), the entity would score the full 20 or 10 points set aside for specific goals. Consequently, if an HDI held 50% of the equity, the entity would score 10 out of 20 or 5 out of 10 points, as the case may be. A further requirement in terms of the PPRs to recognise equity ownership by HDIs is that HDIs must be actively involved in the operations of a business and exercise control commensurate with their degree of ownership in a business.³¹⁵

Apart from equity ownership by HDIs, the 2001 Regulations also allowed, amongst others, for

³⁰⁸ *Broad-Based Black Economic Empowerment Act 53 of 2003* published in *Government Gazette* No. 25899 dated 9 Jan 2004 with commencement date 21 Apr 2004.

³⁰⁹ *Preferential Procurement Regulations, 2001* published in *Government Gazette* No. 22549 dated 10 Aug 2001.

³¹⁰ Reg 1(h) of the PPRs, 2001.

³¹¹ As above reg 3(1).

³¹² As above reg 4(1).

³¹³ As above regs 3(2) and 4(2).

³¹⁴ As above reg 13(5).

³¹⁵ As above reg 13(2).

points to be awarded for other specific goals such as: the promotion of enterprises located in a specific region or rural areas; improving the skill levels of workers; the amount of an entity's wage bill spent on advanced training programmes; and the upliftment of communities through housing, transport, schools and donations to charity organisations.³¹⁶

These special goals in the 2001 PPRs were to a large extent a precursor of the B-BBEE elements which are used to measure an entity's B-BBEE compliance in terms of the B-BBEE Scorecard introduced later in 2007 by the B-BBEE Codes. The elements are Ownership; Management and Control; Skills Development; Enterprise Development; and Socio-Economic Development.

Although B-BBEE legislation was introduced by the promulgation of the B-BEE Act in 2003,³¹⁷ it took a while for government to get all the B-BBEE regulatory mechanisms in place as discussed in chapter 6, paragraph 6.3 below. After the B-BBEE Act was enacted, the B-BBEE Codes of Good Practice (the B-BBEE Codes) were introduced in 2007³¹⁸ and thereafter Sector Codes.³¹⁹ The B-BBEE Codes determined the criteria for compliance in general and the Sector Codes set sector-specific criteria. In 2011, the regulatory framework for a B-BBEE Verification Professional Regulator³²⁰ was put in place which provided for B-BBEE rating agencies to be accredited to issue B-BBEE certificates to entities to prove B-BBEE compliance in terms of the B-BBEE Codes.³²¹

The B-BBEE Act has a very important provision which directly affects government procurement. Section 10 of the B-BBEE Act compels every organ of state and public entity to apply any relevant code of good practice issued in terms of the B-BBEE Act in, amongst others, the "developing and implementing [of] a preferential procurement policy".³²²

³¹⁶ As above reg 17(1)(e)-(k).

³¹⁷ *B-BBEE Act 53 of 2003* published in *Government Gazette* No. 25899 dated 9 Jan 2004 with commencement date 21 Apr 2004.

³¹⁸ *Broad-Based Black Economic Empowerment Act (53/2003): Codes of Good Practice on Black Economic Empowerment* published in *Government Gazette* No. 29617 dated 9 Feb 2007.

³¹⁹ Issued for a particular sector of the economy in terms of s 9(1)(e) of the B-BBEE Act which determine the criteria for the measurement of compliance for entities operating within the scope of a specific sector for which a Sector Code was published.

³²⁰ S 1 of the B-BBEE Act defining a "B-BBEE Verification Professional Regulator" as "a body appointed by the Minister for the accreditation of rating agencies or the authorisation of B-BBEE Verification professionals".

³²¹ *Broad-Based Black Economic Empowerment Verification – Statement 005* published in *Government Gazette* No. 34612 dated 23 Sep 2011.

³²² S 10(1)(b) of the B-BBEE Act. Also see *Airports Company South Africa SOC Ltd v Imperial Group Ltd and Others* (1306/18) [2020] ZASCA 2; [2020] 2 All SA 1 (SCA); 2020 (4) SA 17 (SCA) (31 Jan 2020) (hereafter referred to as *Airports Company South Africa*) paras [36] and [37].

With the introduction of a B-BBEE regulatory system under a Regulatory Body with rating agents to issue B-BBEE certificates to confirm the B-BBEE Status Level of entities, the last piece of the B-BBEE regulatory puzzle was in place. This immediately prompted amendments to the PPRs, and in 2011 the second version of the PPRs was drafted.³²³ Van Eck and Padayachy refer to the connection between the B-BBEE Act and the PPPFA as “a complicated link between the Procurement Act and B-BBEE Codes”.³²⁴

The influence of the B-BBEE legislation on the PPRs of 2011 was apparent from the outset. On commencement of the Regulations, definitions for the terms “B-BBEE”, “B-BBEE Act” and “B-BBEE status level or contribution”³²⁵ were introduced for the first time. The Rand value of contracts for the use of the 80/20-point system was amended in terms of the 2011 PPRs to include contracts between R30 000 and R1 million.³²⁶ The 80/20 point system could also, at the discretion of a state department, be used for contracts with a value below R30 000.³²⁷ The 90/10 points system must be used for contracts with a value of R1 million and above.³²⁸ The specific portion of points set aside for “specific goals” had to be used to recognise the “B-BBEE Status Level” of entities bidding for state contracts.³²⁹ Entities with an annual turnover above R5 million had to submit B-BBEE certificates issued by accredited rating agencies as proof of compliance. Those with an annual turnover below R5 million could submit certificates from registered auditors or accountants.³³⁰

In respect of the 20 points set aside for specific goals for contracts with a value below R1 million, the full complement of points must be awarded to those bidders with the highest level of B-BBEE compliance – those with a Status Level 1. The points were gradually reduced. The lower the B-BBEE Status Level, the lower the points. The lowest B-BBEE Status Level 8 was awarded 2 points, with 0 points for a Non-Compliant Status Level.³³¹ The same formula applied in respect of the 10 points for specific goals set aside for contracts with a value above R1 million. For the highest B-BBEE Status Level of 1, 10 points were awarded, with 1 point for the lowest

³²³ *Preferential Procurement Regulations, 2011* published in *Government Gazette* No. 34350 dated 8 Jun 2011.

³²⁴ Van Eck and Padayachy *Industrial Law Journal* (2022) 2224.

³²⁵ Reg 1(c)-(e) of the PPRs, 2011.

³²⁶ As above reg 5(1).

³²⁷ As above reg 5(1)(b).

³²⁸ As above reg 6(1).

³²⁹ As above regs 5(2) and 6(2).

³³⁰ As above reg 10(1)-(2).

³³¹ As above reg 5(2).

compliance level of 8, and 0 points for non-compliant entities.³³² The remainder of the points, namely 80 for contracts with a value above R30 000 and below R1 million, and 90 points for those above R1 million, were awarded for price and efficiency.³³³

The aggregate of points for price, efficiency and the specific goals would give a bidder its total score.³³⁴ Unless special circumstances are present,³³⁵ a bidder with the highest points will be awarded the contract.³³⁶

Between 2013 and 2015, the B-BBEE legislation underwent wholesale changes which had a profound influence on government's procurement regulatory framework. In 2013, the B-BBEE Amendment Act³³⁷ was enacted which, amongst others, introduced a trumping provision.³³⁸ The trumping provision provided that in the event of any conflict between the B-BBEE Act and any other law in force prior to the date of commencement of the B-BBEE Amendment Act, the B-BBEE Act shall prevail. The trumping provision of the B-BBEE Act commenced one year later on 24 October 2015,³³⁹ and therefore prevailed over the PPPFA, which was promulgated in 2000, and the PPRs in 2011. Consequently, the PPPFA and PPRs had to be strictly aligned with the B-BBEE Act. The provisions of the B-BBEE Act became peremptory provisions from then onwards for any matters relating to government procurement.

In *Airports Company South Africa*, the Supreme Court of Appeal held that any deviation in government procurement from the "peremptory terms" of the B-BBEE Act, would deem the procurement process unlawful and invalid.³⁴⁰

The B-BBEE Amendment Act of 2013 further introduced offences of fronting and

³³² As above reg 6(2).

³³³ As above regs 5(1) and 6(1).

³³⁴ As above regs 5(4) and 6(4).

³³⁵ As above reg 7. A contract must be in terms of s 2(1)(f) of the PPPFA be awarded to the tenderer who scores the highest points, unless objective criteria justify the award to another tenderer.

³³⁶ Regs 5(5) and 6(5) of the PPRs, 2011.

³³⁷ *Broad-Based Black Economic Empowerment Amendment Act 46 of 2013* published in *Government Gazette* No. 37271 dated 27 Jan 2014, which commenced on 24 Oct 2014.

³³⁸ S 3(2) of the B-BBEE Act inserted by s 3(b) of the B-BBEE Amendment Act of 2013.

³³⁹ S 3(b) of the B-BBEE Amendment Act provided for the commencement for the purpose of s 3(b) to be one year later than the commencement of the B-BBEE Act. The effective date for the commencement of the trumping provision is therefore 24 Oct 2015, and for the remainder of the Act, 24 Oct 2014.

³⁴⁰ *Airports Company South Africa* (note 322 above) paras [36] and [37].

misrepresentation of B-BBEE status.³⁴¹ It prohibited business with organs of state for a period of 10 years following a conviction under the B-BBEE Act.³⁴²

The B-BBEE Codes were also revised in line with the amendments to the B-BBEE Act, and the amended or revised Codes were implemented in May 2015.³⁴³ These wide-ranging changes to the B-BBEE legislation prompted the third iteration of the PPRs in 2017.³⁴⁴ The 2017 PPRs included a definition for “black people” and “black designated groups”.³⁴⁵ These definitions referred to the meaning assigned to them by the B-BBEE Act. The Regulations also contained a definition of “designated group”³⁴⁶ which means black designated groups; black people; women; people with disabilities; and small enterprises as defined in the National Small Enterprises Act.³⁴⁷

The 2017 PPRs provided that an organ of state must determine and stipulate in the tender documents, amongst others, the preference points system applicable to the tender. If it is unclear which point system will be applicable, then either the 80/20 or 90/10 preference point system shall apply.³⁴⁸ An organ of state must also determine whether pre-qualification criteria are applicable to the tender. If pre-qualification criteria apply to advance certain designated groups, then the organ of state is compelled to advertise the tender with a specific tendering condition that only certain tenderers may respond; for instance, those with a stipulated minimum B-BBEE Status Level; certain smaller size businesses as defined such as Exempted Micro-Enterprises

³⁴¹ S 130 of the B-BBEE Act.

³⁴² As above s 13P.

³⁴³ *The Amended or Revised Codes of Good Practice* published in *Government Gazette* No. 36928 dated 11 Oct 2013 – Fully implemented on 1 May 2015 in *Government Gazette* No. 38764 on 5 May 2015.

³⁴⁴ *Preferential Procurement Regulations, 2017* published in *Government Gazette* No. 40553 dated 20 Jan 2017, implemented on 1 Apr 2017. Also see *Minister of Finance* (note 130 above) paras [6] and [31] in which the adoption of the PPRs, 2017 was submitted as objective to align the PPRs with the B-BBEE legislation.

³⁴⁵ Reg 1 of the PPRs, 2017. “Black Designated Groups” are defined in Schedule 1 of the B-BBEE Codes and mean: “unemployed black people not attending and not required by law to attend an educational institution and not awaiting admission to an educational institution; black people who are youth between the age of 18 and 34 years of age; black people with disabilities; black people living in rural and underdeveloped areas; and black military veterans.

³⁴⁶ Reg 1 of the PPRs, 2017.

³⁴⁷ 102 of 1996. S 1 of the National Small Enterprises Act defines a small enterprise as an enterprise managed by one owner or more and which can be classified as a micro-, a very small, a small or medium enterprise provided for by the Schedule to the Act, based on total full-time employees employed, annual turnover and total gross asset value per Sector. The thresholds of the Schedule were amended by *Revised Schedule 1 of the National Definition of Small Enterprise in South Africa* in *Government Gazette* No. 42304 dated 5 Mar 2019.

³⁴⁸ Reg 3(a) of the PPRs, 2017. Also see Quinot *Journal of South African Law* (2018) 857 and 858, who points out that the price preference requirement provided for in the PPPFA and given content in the 2001 and 2011 set of regulations “is largely maintained in the 2017 regulations”. However, the 2017 regulations introduced a more flexible approach for government departments to indicate in the invitation to tender which points split will be applied.

(EMEs) and Qualifying Small Enterprises (QSEs) in the B-BBEE Act;³⁴⁹ and a tenderer that sub-contracts a minimum of 30% of the contract to those categories that are at least 51% black owned, such as black youth, black women, black people with disabilities, black people living in rural areas, and black military veterans.³⁵⁰

The Rand value for using the 80/20 preference point system was amended by the 2017 PPRs to include tenders above R30 000 and up to R50 million.³⁵¹ The 90/10-point system applied to all tenders with a value above R50 million.³⁵² The 2017 PPRs also provided for subcontracting as a condition of a tender. It stated that if subcontracting for a contract above R30 million is feasible, an organ of state must apply subcontracting to advance designated groups.³⁵³ Subcontracting beneficiary requirements are to a large extent the same as those stipulated in regulation 4(1) as pre-qualification criteria, namely smaller entities defined in the B-BBEE Codes and 51% black-owned entities.³⁵⁴ Subcontractors must be selected from a list of suppliers made available by an organ of state to tenderers.

The provisions of regulations 3(b), 4 and 9 of the 2017 PPRs which determine pre-qualification criteria to advance certain groups and exclude any other tender, for instance white people, from tendering, were at the heart of the High Court case in *Afribusiness NPC v Minister of Finance*.³⁵⁵ It is important to briefly consider the various judgements delivered in this case as the dispute morphed over the span of these judgements.

The High Court held that the 2017 PPRs did not exclude white people because designated groups that may be advanced included EMEs and QSEs irrespective of race.³⁵⁶ Consequently, the High Court held that the promulgation of the 2017 PPRs was reasonable and fair, and the applicant's application was dismissed with costs.³⁵⁷ The applicant then appealed to the Supreme Court of Appeal (SCA).³⁵⁸ The SCA held that the Minister could not, by way of regulations, create

³⁴⁹ Paras 4.1 and 5.1 of the B-BBEE Codes categorise an EME as an entity with an annual turnover of R10 million or less and a QSE as an entity with an annual turnover of between R10 million and R50 million.

³⁵⁰ Reg 4(1) of the PPRs, 2017.

³⁵¹ As above reg 6(1).

³⁵² As above reg 7(1).

³⁵³ As above reg 9(1).

³⁵⁴ As above reg 9(2).

³⁵⁵ Unreported judgement in the High Court of South Africa, Gauteng Division, Pretoria, Case No. 34523/2017 (28 Nov 2018).

³⁵⁶ As above para [61].

³⁵⁷ As above paras [71] and [79].

³⁵⁸ *Afribusiness NPC v Minister of Finance* [2020] ZASCA 140; 2021 (1) SA 325 (SCA).

a framework that is contradictory to the framework mandated in the PPPFA. The authorising legislation does not authorise organs of state to incorporate conditions in tender documents that are inconsistent with the PPPFA.³⁵⁹ As a consequence, the appeal was upheld and the SCA issued an order that the 2017 PPRs were inconsistent with the PPPFA and section 217 of the Constitution. The declaration of invalidity was suspended for 12 months to enable the Minister to take corrective action.³⁶⁰

On appeal to the Constitutional Court,³⁶¹ the court had to decide whether the Minister had the power to promulgate preferential procurement regulations and if the PPPFA and the Constitution permits pre-qualification (or pre-disqualification) criteria as conditions for a tender.³⁶² With reference to the PPPFA, the majority of the court per Madlanga J held that each organ of state must determine its own preferential procurement policy (section 2(1) of the PPPFA) and “[t]he Minister may make regulations regarding any matter that may be necessary or expedient to prescribe in order to achieve the objects of this Act (section 5(1) of the PPPFA)”.³⁶³ The court held that the words “necessary or expedient” mean “only if unavoidable”, “needing to be done” or “must be done”.³⁶⁴ Consequently, the court held that the Minister had no need to draft the 2017 PPRs and that in terms of the principle of legality, which is a subset of the rule of law,³⁶⁵ the 2017 PPRs were invalid for being *ultra vires* the empowering section of the PPPFA.³⁶⁶

In a single minority dissenting judgement in *Minister of Finance*, Mhlanta J interpreted the meaning of “necessary or expedient” in the context of the whole text of the enabling provisions. Read with the phrase “any matter”, Mhlanta J held that it gave the Minister wide powers and a discretion to make procurement regulations.³⁶⁷ According to the minority judgement, the Minister was at liberty to make preferential procurement regulations if he or she deems it necessary or expedient in order to promote the objective of the PPPFA. Therefore, the 2017 PPRs were not *ultra vires* and invalid.³⁶⁸

³⁵⁹ As above para [43].

³⁶⁰ As above para [47].

³⁶¹ *Minister of Finance* (note 130 above).

³⁶² As above para [20].

³⁶³ As above para [101].

³⁶⁴ As above para [114].

³⁶⁵ As above para [118].

³⁶⁶ As above para [108].

³⁶⁷ As above para [46].

³⁶⁸ As above paras [81], [82] and [93].

An important matter and at the core of this judgement from the time the matter was first heard in the High Court, was the question of the validity of the pre-qualification criteria in the 2017 PPRs. The Constitutional Court based its judgement solely on the wording “necessary” or “expedient” in the enabling PPPFA. The Constitutional Court did not make a ruling in respect of the substance of the validity of the pre-qualification criteria and left the matter open.

Although not stated as such, it is presumed that the Constitutional Court did not deem it necessary to adjudicate on the validity of specific clauses of the 2017 PPRs, such as those providing for pre-qualification criteria, if the PPRs are in any event in totality invalid. In light of the Constitutional Court’s judgement, the 2017 PPRs were repealed by a fourth edition of the PPRs in 2022.³⁶⁹ All references to “black people”, “black designated groups” and “B-BBEE” were removed from the 2022 PPRs. The Regulations had the same dual 80/20- and 90/10-point system based on the same thresholds (rand values) as in the 2017 PPRs and contain a definition for a “specific goal” similar to the one which appeared in the 2001 PPRs. A specific goal included contracting with persons, or categories of persons historically disadvantaged by unfair discrimination based on race, gender and disability, and implementation of programmes of the RDP.³⁷⁰

The 2022 PPRs were a much-diluted version compared to the previous PPRs. The intention with the 2022 PPRs was made clear in a Media Statement³⁷¹ released by the National Treasury in the wake of publishing the 2022 PPRs. It stated that the 2022 Regulations are a “placeholder while we finalise the Bill”. A new Act is envisaged, referred to as the “Public Procurement Bill”, which would replace the PPPFA. According to the Media Statement, the new Act will give the Minister the legislative power to make preferential procurement regulations.

National Treasury indicated that the only issue to be corrected in light of the *Minister of Finance* judgement by the Constitutional Court is the Minister’s powers to make regulations. It might be that those powers will be broadly formulated to coincide with the minority dissenting judgement delivered by Mhlanta J in *Minister of Finance*. The Media Statement is silent on the question of the inclusion and continuation of the pre-qualification criteria in the new contemplated

³⁶⁹ *Preferential Procurement Regulations, 2022* published in *Government Gazette* No. 47452 dated 4 Nov 2022, which came into effect on 16 Jan 2023.

³⁷⁰ Reg 1 of the PPRs, 2022.

³⁷¹ National Treasury *Media Statement* (Nov 2022) 8.

regulations.

As the Constitutional Court did not hold the use of pre-qualification criteria to be invalid and given Treasury's silence on the matter of pre-qualification criteria, the new regulations made under a new Act could again include pre-qualification criteria similar to those provided for in the invalid 2017 PPRs. However, the inclusion of pre-qualification criteria in the PPRs in future may be shortsighted as the SCA held that the use of pre-qualification criteria is not mandated by the PPPFA and is also inconsistent with section 217 of the Constitution. Even if the envisaged new Act is broadly formulated to give the Minister wide discretionary powers to overcome the *ultra vires* defect of the regulations, pre-qualification criteria *per se* may still be inconsistent with section 217 of the Constitution as held by the SCA. The Constitutional Court did not set aside any of the SCA's findings. Thus, the SCA's judgement that the pre-qualification criteria are unconstitutional for being inconsistent with section 217 of the Constitution and therefore invalid, still stands.

The 2022 PPRs have very broadly defined beneficiaries similar to section 9(2) of the Constitution, namely persons or category of persons disadvantaged by unfair discrimination. It does not distinguish within these broad categories between vulnerable groups, the social needs of groups or the means or social status of individuals.

5.4.4 The Connection between Government Procurement, Transformation, Corruption and State Capture

In 2020, President Cyril Ramaphosa identified government tender manipulation as “perhaps the best-known form of corruption”. Ramaphosa, as President of the ANC, took the unprecedented step of authorising an open letter to ANC members on 23 August 2020 in which he called the public’s “anger and disillusionment...understandable and justified”. He urged the ANC to accept that it was “deeply implicated in South Africa’s corruption problem...The ANC may not stand alone in the dock, but it does stand as Accused No. 1”.³⁷² The Centre for Risk Analysis, an Institute of Race Relations think-tank, published a report in 2020 claiming that of the 80 National Executive Council (NEC) members of the ANC outside the Top Six, (president, deputy president, chairperson, secretary-general and deputy secretary-general),³⁷³ 41 had been implicated in

³⁷² Ramaphosa *ANC-LH* (Aug 2020) 23.

³⁷³ After the 55th National Conference of the ANC held at Nasrec in 2022, the position of a second deputy-general was added to

reported acts of serious corruption that could result in prison terms of up to 15 years. Only nine had never been implicated in any corruption.³⁷⁴

Apart from ANC office bearers as such, government employees and family members of the political elite are also frequently implicated in corruption involving government procurement.

On 19 July 2020, it was revealed in newspaper reports that the Gauteng Provincial Government granted 75 companies – most of which had existed for less than a year – contracts worth R2,2 billion for Covid-19-related expenditure, such as the acquisition of Personal Protective Equipment (PPE) at prices up to seven times their market value. It was suggested that government officials, ANC members and their family members were the beneficiaries of these irregularities.³⁷⁵

In response to these allegations, the President, in July 2020, directed the Special Investigation Unit (SIU) to investigate the procurement of, or contracting of goods, works and services, including construction, refurbishment, leasing and occupation in respect of the National State of Disaster.³⁷⁶ The SIU was specifically mandated to investigate, amongst others, “improper or unlawful conduct of employees or officials of the State Institution; or...to corruptly or unduly benefit themselves or any other person...”.³⁷⁷

In a report released on 25 January 2022,³⁷⁸ the SIU revealed that it had investigated 5 467 government contracts awarded to 3 066 service providers with a total value of R14,3 billion.³⁷⁹ By the time the SIU’s report was released, investigations had been finalised with respect to 4 503 contracts, of which 2 803 were found to be irregular. This amounts to just over 62% of the finalised investigations.³⁸⁰ Forty-five matters – constituting a combined value of R2,1 billion – have been enrolled with the Special Tribunal on Corruption, Fraud and Illicit Money Flows. The Special Tribunal has a statutory mandate to recover public funds syphoned from the fiscus

the chief executive organ of the ANC and it is since referred to as the “Top Seven”.

³⁷⁴ Centre for Risk Analysis *Webinar 27* (Aug 2020) 27; and Simpson (2021) 481.

³⁷⁵ Simpson (2021) 478.

³⁷⁶ As declared by the *Declaration of a National State of Disaster* in *Government Gazette* No. 43096 dated 15 Mar 2020.

³⁷⁷ *Special Investigating Units and Special Tribunals Act, 1996 (Act No. 74 of 1996): Referral of Matters to Existing Special Investigating Unit* published in *Government Gazette* No. 43546 dated 23 Jul 2020, 3-5.

³⁷⁸ SIU *FINAL REPORT* (10 Dec 2021).

³⁷⁹ As above 5.

³⁸⁰ As above 5 and 6.

through corruption, fraud and illicit money flows, and engages in civil action that is more flexible and less time-consuming than adversarial.³⁸¹

The SIU has made 224 referrals for disciplinary action against officials in government departments or entities; 386 referrals to the National Prosecuting Authority; three referrals for Executive Action; and 330 referrals for Administrative Action, which includes blacklisting.

The rand value of actual cash and assets to be recovered on the basis of the investigation is R551,5 million, while cash and assets recovered at the time the SIU's report was released totalled R34,2 million.³⁸²

The value of potential loss prevented by the investigation is R114,2 million, while contracts set aside amounted to R170,4 million.³⁸³

The SIU's report further revealed that entities, especially those owned by government officials, use B-BBEE credentials fraudulently to be favoured as preferred suppliers in terms of government procurement.³⁸⁴

The SIU found that a company belonging to the husband of the President's spokesperson had received Covid-19 contracts worth R125 million.³⁸⁵ He was a co-director in a company with the wife of the then Member of the Executive Council (MEC) for Health in the Gauteng Provincial government³⁸⁶ who received the contract. It was reported in the media that the then secretary-general of the ANC and previous premier of the Free State, Ace Magashule's two sons, received Covid-19 contracts worth a combined R2,7 million in the Free State.³⁸⁷ Magashule defended the contracts awarded to his sons as a deeply entrenched practice within the ANC. He said—

“Tell me of one leader of the ANC who has not done business with government.”³⁸⁸

³⁸¹ As above 7.

³⁸² As above.

³⁸³ As above.

³⁸⁴ As above 224, 231, 234, 242, 244 and 731.

³⁸⁵ As above 234 and 235.

³⁸⁶ As above 273.

³⁸⁷ Simpson (2021) 479.

³⁸⁸ As above 480.

Later he added:

“Are you saying our brothers and sisters and children must not actually do any work... There are more than... 1,5 million members of the ANC; are you saying I’m not supposed to be working with those people if they do business?”³⁸⁹

The involvement of state employees doing business with government is central to irregular and corrupt awarding of state contracts. In 2018, National Treasury reported that 28 427 employees of the state were registered owners, directors and non-executive directors of suppliers who are registered on the government’s Central Supplier Database (CSD). Of the total registered on the CSD, 2 704 employees were actively doing business with government and an amount of R8 billion was paid by government to these suppliers.³⁹⁰

The high number of employees registered on the government’s database as suppliers and those actually doing business with government, is notwithstanding amendments effected in February 2017 to the Public Service Regulations, 2016³⁹¹ and the Public Administration Management Act.³⁹² These amendments declared public servants conducting business with the state a criminal offence.

In November 2022, it was reported that only 119 public servants are still registered on the CSD with the purpose of tendering for business with the state.³⁹³

Four organisations, namely the Public Affairs Research Institute (PARI), Public Service Accountability Monitor, The Ethics Institute (TEI) and Corruption Watch, believe that the provisions in legislation, barring employees of the state from doing business with the state, are inadequate. They say that section 8 of the Public Administration Management Act does not adequately address situations where employees might not be directors of companies but are nonetheless the ultimate beneficiaries of such contracts. To close such gaps, information regarding beneficial ownership of companies that do business with the state should also be taken into consideration. They suggest that the Public Administration Management Act should

³⁸⁹ As above.

³⁹⁰ National Treasury *State Employees Conducting Business with Government* (15 Feb 2018) 10.

³⁹¹ Reg 13(c) of the Public Service Regulations, 2016.

³⁹² S 8 of the Public Administration Management Act 11 of 2014.

³⁹³ Gabana *The Public Servant* (Nov 2022) 29.

be expanded to state that employees who are not only directors, but also beneficial owners are not allowed to do business with the state. A failure to comply with such provision should also constitute a criminal offence and an act of misconduct.³⁹⁴

The four organisations suggest that the gaps that allow for abuse of government procurement by state employees who indirectly own companies or exercise effective control over such companies and ultimately receive benefits, should be closed.

Government procurement was the central topic of investigation by the State Capture Commission.³⁹⁵ The Commission identified various shortcomings in the procurement processes of government and state-owned enterprises. These shortcomings allowed unlawful access to state resources by criminal business syndicates which operated in unison with high-ranking government officials, members of Cabinet and the President.³⁹⁶ The Commission found that “State Capture thrived at our country’s SOEs (state-owned enterprises) despite the fact that the necessary legislation to prevent it were in place”.³⁹⁷

The areas identified by the Commission which enabled state capture were: patterns of abuse at each stage of the procurement cycle;³⁹⁸ collapse of governance and oversight in state-owned enterprises;³⁹⁹ fragmentation of oversight bodies;⁴⁰⁰ poor record of oversight bodies;⁴⁰¹ strategic appointments and dismissal of staff through Cadre Deployment and other means to place accomplices in decision-making positions;⁴⁰² a breakdown of demarcation between Board of Directors and executive decision-makers;⁴⁰³ problems in legislative design;⁴⁰⁴ difficulties in interpreting the legislative mosaic;⁴⁰⁵ the extent to which legislation has decentralised the procurement process;⁴⁰⁶ and the efficiency and competence of procurement officers.⁴⁰⁷

³⁹⁴ Writer *NEWS 24* (Sep 2023) 17.

³⁹⁵ *Judicial Commission of Inquiry into State Capture Report: Part 1: Vol. 3* 720 – 725.

³⁹⁶ *Judicial Commission of Inquiry into State Capture Report: Part 1: Vol. 2* 619 and 620.

³⁹⁷ As above 621.

³⁹⁸ *Judicial Commission of Inquiry into State Capture Report: Part 1: Vol. 3* 726 – 751.

³⁹⁹ As above 753 – 756.

⁴⁰⁰ As above 823.

⁴⁰¹ As above 824.

⁴⁰² As above 757 – 763.

⁴⁰³ As above 764 – 765.

⁴⁰⁴ As above 795.

⁴⁰⁵ As above.

⁴⁰⁶ As above 797.

⁴⁰⁷ As above 800.

The Commission made nine recommendations for the improvement of the procurement processes in government and state-owned enterprises: (1) The adoption of a National Charter against Corruption;⁴⁰⁸ (2) the establishment of an independent Agency against corruption in public procurement;⁴⁰⁹ (3) protection for whistle-blowers;⁴¹⁰ (4) deferred prosecution arrangements;⁴¹¹ (5) the creation of a procurement officer's profession;⁴¹² (6) the enhancement of transparency;⁴¹³ (7) protection for accounting officers and accounting authorities acting in good faith;⁴¹⁴ (8) amendment of the Prevention and Combatting of Corrupt Activities Act 12 of 2004;⁴¹⁵ and (9) amendments to the Political Party Funding Act 6 of 2018.⁴¹⁶

Irregularities with regard to government procurement are central to corruption and nepotism in South Africa.

The State Capture Commission's findings and the confusion created by the judgement in *Minister of Finance v Aribusiness NPC*⁴¹⁷ in declaring the 2017 PPRs invalid and the vacuum it created in government procurement, prompted wide commentary. Some suggest, congruous with the State Capture Commission's findings, that the network of legislation which seeks to give effect to economic transformation, is fragmented and complicated. This web of related legislation is in serious need of reform and elucidation. This is largely due to the disconnect between the PPPFA and other legislation regulating government procurement such as the B-BBEE Act.⁴¹⁸

5.5 CONCLUSION

One of the research questions posed in chapter 1, paragraph 1.2 above is: what is the present definition and categorisation of the beneficiaries of the B-BBEE? In order to answer this question, the legislation closely related to the objective of the B-BBEE Act to promote the achievement of equality and prohibit unfair discrimination, is considered, namely PEPUDA, the EEA and the

⁴⁰⁸ As above 844.

⁴⁰⁹ As above 845.

⁴¹⁰ As above 851.

⁴¹¹ As above 852.

⁴¹² As above.

⁴¹³ As above 853.

⁴¹⁴ As above.

⁴¹⁵ As above 854.

⁴¹⁶ As above.

⁴¹⁷ Minister of Finance (note 130 above).

⁴¹⁸ Van Eck and Padayachy *Industrial Law Journal* (2022) 2235.

PPPFA.

PEPUDA, the EEA and the PPPFA are all rooted in the equality clause of the Constitution and obligations imposed on the state by the Constitution to promulgate legislation to promote equality.

PEPUDA extends the presumption of unfair discrimination provided for in the Constitution to acts of unfair discrimination on non-listed grounds. It binds the state and private persons, as discussed in chapter 3, paragraph 3.5 above. It aims to extend the prohibition of unfair discrimination provided for in the Constitution to wider social structures, communities and instances of social interaction. The Act further aims to eradicate “economic inequalities ... that are systemic in nature”⁴¹⁹ and to promote the achievement of equality by providing for affirmative measures as provided for in section 9(2) of the Constitution.⁴²⁰ PEPUDA provides that measures to promote or achieve equality are not *per se* unfair discrimination and lists various factors to consider when discrimination will be fair or unfair.⁴²¹

The beneficiaries of affirmative action measures are broadly defined in PEPUDA, similar to section 9(2) of the Constitution, as persons or categories of persons disadvantaged by unfair discrimination.⁴²² PEPUDA contains a definition of “socio-economic status” which recognises persons disadvantaged by poverty, low employment status or low-level educational qualifications.⁴²³ Despite recognising the social status of those vulnerable to unfair discrimination and inequality, the Act does not provide for any specific measures to promote or advance the position of these social groups.

The EEA aims to promote equality by prohibiting unfair discrimination in the workplace and to achieve representativity of designated groups in all occupational levels.⁴²⁴ The Act provides that affirmative measures to promote equality are not unfair discrimination provided that they are consistent with the objectives of the Act. Differentiation based on the inherent requirements of a

⁴¹⁹ Preamble of PEPUDA.

⁴²⁰ As above s 14(1).

⁴²¹ As above s 14(2) and (3).

⁴²² As above s 14(1).

⁴²³ As above.

⁴²⁴ Preamble and s 2 of the EEA.

job is also not regarded as unfair.⁴²⁵ The Act regards discrimination against a person from a designated group for employment or promotion based solely on a lack of experience, where a person from a designated group is suitably qualified and has the capacity to acquire the necessary skill to do the job, as unfair.⁴²⁶

Designated groups are broadly defined in the EEA to include black people, women and persons with disabilities, with black people meaning Africans, Coloureds and Indians in generic terms.⁴²⁷ The EEA does not distinguish between or make provision for the individual needs or social status of persons within the broad definition of beneficiaries. Moreover, the EEA does not provide specifically for the promotion of advancement of any vulnerable social groups within this broad category of beneficiaries, such as youth and persons from rural areas, or individuals who are poor.

Although the definition of designated groups in the EEA includes people with disabilities, the EEA has no specific measures to advance them or any other socially vulnerable groups. The numerical targets set by the Minister for each economic sector provide for racial and gender (demographic) targets, but not for people with disabilities or other vulnerable groups. This despite the fact that persons with disabilities are included in the definition of designated groups in the EEA. The EEA lacks focus on vulnerable groups based on disaggregated data to determine the social conditions and needs of target groups, as required by international law instruments and the Constitution. Hence, it makes the EEA and the principle of representativity incompatible with the Constitution.

The representation of people in the workplace according to demographic targets resulted in African people being the major beneficiaries due to their position as the vast majority of the population. This study argues that the way the “representativity” principle works results in various inconsistencies with the EEA as such, which renders the representativity principle and the EEA irrational and therefore unlawful. These inconsistencies can be summarised as causing or creating: (1) rigid quotas; (2) absolute barriers to advance in employment; (3) job reservations for race groups; (4) disadvantage of targeted groups, especially minority disadvantaged groups;

⁴²⁵ As above s 6(2).

⁴²⁶ As above s 20(4).

⁴²⁷ As above s 1.

(5) failure to consider regional race composition of economically active people; (6) a reduction in the pool of suitably qualified people because the economically active people at the various occupational levels are not taken into account; and (7) a reduction in the pool of suitably qualified people by not contextualising regional differences in race and economically active people at all levels, resulting in less qualified people being appointed and promoted and thus a negative impact on effectiveness and efficiency.

There is also a direct connection between the EEA and the B-BBEE programme. One of the elements measured in terms of the B-BBEE Scorecard is Management and Control, which measures demographic representativity at managerial levels in the workplace.⁴²⁸ This is done according to the representativity at management levels⁴²⁹ as reflected annually in a measured entity's employment equity report submitted to the Department of Employment and Labour as designated employer in terms of the EEA.⁴³⁰

The PPPFA aims to promote equality by giving preference in the awarding of state contracts to those persons, or categories of persons disadvantaged by unfair discrimination. The beneficiaries of preferential procurement were initially defined as Historical Disadvantaged Individuals who included South African citizens who could not vote before 1994, women, and people with disabilities.⁴³¹ Later iterations of the procurement regulations were aligned with B-BBEE legislation in respect of "black people" and "designated groups".⁴³²

Although the procurement regulations made provision in 2017 for 51% black-owned enterprises in rural areas, or those owned by black females and black youth, they did not give special preference to these vulnerable groups or consider the social standing of individuals within these broad categories of beneficiaries.

These vulnerable groups were mere options along with other black people. For instance, contracts could be awarded to a 51% black male-owned enterprise, or an enterprise which is 51% owned by black vulnerable groups or black designated groups such as black women,

⁴²⁸ Statement 200 of the B-BBEE Codes: The General Principles for Measuring Management and Control.

⁴²⁹ As above paras 2.1 and 2.2.

⁴³⁰ S 21 of the EEA.

⁴³¹ Reg 1 of the PPRs, 2001.

⁴³² Reg 1 of the PPRs, 2011 and PPRs, 2017.

youths or those in rural areas. Any one of them would suffice and receive the same preference.

PEPUDA, the EEA, the PPPFA and B-BBEE are interrelated and interoperate. PEPUDA, the EEA and B-BBEE are enforced through the PPPFA for businesses to be considered for preference in awarding government contracts. EEA is not only enforced by issuing certificates by the Minister of Employment and Labour annually, but is also an element to be measured for B-BBEE compliance. B-BBEE compliance, in turn, is a mandatory requirement for preferential procurement in terms of the PPPFA, the PPRs and the B-BBEE Act.

It is evident that the present legal framework is incapable of deterring corruption involving state resources. The manipulation of state tenders is at the centre of corruption. It involves a wide array of people benefiting illegally from state resources, including government employees; members of the ANC; office bearers of the ANC; the ANC as political party, members of Cabinet; and family members of those employees, members and office bearers, as discussed in paragraph 5.4.4 above.

The State Capture Commission has, amongst others, laid bare the abuse of employment equity, broad and equal representativity and government procurement. In terms of the objective to promote the representativity of black people, the ANC, through its Cadre Deployment Policy and Cadre Deployment Committee, used the appointment of black people for political and criminal purposes. The appointment of black people was done to strengthen the hold of the ANC over the state. Under the guise of deploying cadres to promote the demographic representativity at all occupational levels in government and the private sector, as envisaged by the Constitution and the EEA, the ANC placed cadres in key strategic positions to promote the corrupt business interests of various individuals, including those with close links to the President, as discussed in paragraph 5.3.4 above. This created a breakdown and dismantling of control and oversight mechanisms in the procurement processes of government and state-owned enterprises. It also enabled deployed cadres to benefit themselves and assisted criminal elements to access state resources through government procurement process.

The complicity of the ANC in creating patronage networks to access state resources is evident in the funding and donations channelled as kickbacks to the ANC, as found by the State Capture Commission, as discussed in paragraph 5.4.4 above.

A second aspect revealed by the State Capture Commission in respect of government procurement is the fragmentation and complicated legal framework regulating government procurement and the ineptness of state functionaries operating within the government procurement processes. This was largely exploited by those involved in State Capture.⁴³³

To understand the relationship between the EEA and government procurement requires a proper understanding of the working mechanism of B-BBEE, its history, whom it benefits, and its interaction with the EEA's principle of representativity and government procurement processes. This is discussed in chapter 6 to follow.

⁴³³ *Judicial Commission of Inquiry into State Capture Report: Part 1: Vol. 2* 621; and *Judicial Commission of Inquiry into State Capture Report: Part 1: Vol. 3* 726 – 844.

CHAPTER 6

THE LEGISLATIVE FRAMEWORK AND MECHANISMS OF THE B-BBEE PROGRAMME

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6.1 INTRODUCTION

According to B-BBEE legislation, given the history of South Africa and despite numerous policy formulations, the majority of black people still increasingly experience difficulty in finding proper employment in managerial positions or acquiring the necessary skills and expertise to start and

generate their own businesses.¹ Millions of black people are trapped in abject poverty and excluded from the mainstream of economic activity due to a lack of education, training and the applicable skills to find a job or to progress in a career or business.² However, the exclusion of the majority of black people from meaningful participation in the economy cannot only be attributed to South Africa's history, but is also as a result of present factors such as low economic growth, poor economic policies, corruption, the effects of state capture and the design of, amongst others, the B-BBEE programme.

Government considered various policies and legislative interventions to give effect to the socio-economic and redress imperative in the Constitution, of which the Broad-Based Black Economic Empowerment (B-BBEE) Act is the most significant. The main objective of B-BBEE is to substantially increase the number of enterprises owned, managed and controlled by black people.³ To achieve this objective, B-BBEE legislation involves a programme for businesses to achieve B-BBEE compliancy or a B-BBEE Status Level depending on the B-BBEE initiatives they embark on. The higher an entity's B-BBEE Status Level, the more competitive it becomes in providing goods and services to government and other enterprises. Government's significant procurement muscle and regulatory leverage to grant licences and concessions and to sell assets to the private sector, are the main drivers of the process.⁴

Apart from direct economic policies and economic redress policies adopted by government, it has since 1994 also enacted various other legislation to give effect to the socio-economic rights entrenched in the Bill of Rights of the Constitution.⁵ This was ostensibly done in an attempt to promote equality, create social justice, and bolster inclusive growth,⁶ but on closer examination reveals a deeper political objective. The following legislation is best known: the Labour Relations

¹ Preamble of the B-BBEE Act.

² Department of Trade and Industry (DTI) *South Africa's Economic Transformation: A Strategy for Broad-Based Black Economic Empowerment* (2003) 4-6; and the Commission for Employment Equity *Annual Report 2020–2021* (2021) 42-74.

³ Department of Trade and Industry (DTI) (2003) *South Africa's Economic Transformation: A Strategy for Broad-Based Black Economic Empowerment* (2003) 12.

⁴ S 10(1) of the B-BBEE Act. Also see Balshaw and Goldberg (2014) 16 who describe Government's Procurement Policy as a "process of correcting historical imbalances" by "... redirecting capital to black people through the manifestation of government's significant (monopolistic) procurement budget and regulations".

⁵ S 26-29 of the Constitution. Also see *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) para [1]. Also see Liebenberg (2010) 21 and 22. According to Liebenberg, it was hoped that recognising the social-economic dimensions of human dignity, freedom and equality would "enrich participatory democracy by enabling persons marginalised by poverty to challenge decisions and omissions which have an impact on social-economic well-being".

⁶ Department of Trade and Industry (DTI) *South Africa's Economic Transformation: A Strategy for Broad-Based Black Economic Empowerment* (2003) 4 and 11-13.

Act;⁷ the Basic Conditions of Employment Act;⁸ the Employment Equity Act (EEA);⁹ the Skills Development Act;¹⁰ the Skills Development Levies Act;¹¹ the Extension of Security Tenure Act;¹² the Restitution of Lands Rights Act;¹³ the Promotion of Equality and the Prevention of Unfair Discrimination Act (PEPUDA);¹⁴ the Preferential Procurement Framework Policy Act (PPPFA);¹⁵ and the Competition Act.¹⁶ Some of these laws include sanctions for non-compliance and play a significant role in supporting the constitutional objectives underpinning the B-BBEE policies and B-BBEE legislation.¹⁷

The most significant piece of legislation to directly promote economic redress is the B-BBEE Act introduced in 2003.¹⁸ It enjoins the Minister of Trade, Industry and Competition to develop, amongst others, codes of good practice (B-BBEE Codes) to standardise a set of criteria for all businesses to become B-BBEE compliant.¹⁹ The B-BBEE Codes also provide for the “interpretation and definition” of B-BBEE for all relevant stakeholders of the economy.²⁰ These B-BBEE Codes were initially published as broad guidelines in 2005 and evolved over time.²¹

B-BBEE is part of an overarching policy relating to economic transformation.²² Legally, this policy emanates from the equality clause, especially section 9(2) and other provisions in the

⁷ 66 of 1995.

⁸ 75 of 1997.

⁹ 55 of 1998.

¹⁰ 97 of 1998.

¹¹ 9 of 1999.

¹² 62 of 1997.

¹³ 22 of 1994. Also see *Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another* [2019] ZACC 30 para [6] in which Cameron J for the majority referred to the Restitution of Lands Rights Act as the flagship piece of legislation “to fulfil the overall constitutional promise of restitution to these deprived rights in land by racial sub-ordination”.

¹⁴ 4 of 2000.

¹⁵ 5 of 2000.

¹⁶ 89 of 1998. The Competition Act, which came into force in 1999, is seen as part of empowerment legislation as the purpose of the Act is, amongst others, to promote a greater spread of ownership.

¹⁷ See *Speaker of the National Assembly v Land Access Movement of South Africa* [2019] ZACC 10; 2019 JDR 0548 (CC); 2019 (5) BCLR 619 (CC) paras [65] and [66] per Mhlantla J for the majority who stated that, for instance, land reform could be “a catalyst for structural change in society”. Expeditious land restitution, the court said, “contribute to a wider, more striking conscientiousness that centres on the constitutional values of equality and dignity, and gives rise to ideals of social justice, identity, the stimulation of economic activity, the promotion of gender equality, and a contribution towards the development of rural livelihoods”.

¹⁸ *Broad Based Black Economic Empowerment Act 53 of 2003* published in *Government Gazette* No. 25899 dated 9 Jan 2004 with commencement date 21 Apr 2004.

¹⁹ As above s 9(1) and (3).

²⁰ As above s 9(1)(a).

²¹ *Codes of Good Practice* published in *Government Gazette* No. 28351 dated 20 Dec 2005.

²² S 2(a) and the Objectives of the B-BBEE Act. Also see Department of Trade and Industry (DTI) *South Africa’s Economic Transformation: A Strategy for Broad-Based Black Economic Empowerment* (2003) 13.

Constitution, purportedly intended, amongst others, to eradicate poverty, inequality and discrimination.²³ Other policy considerations to enhance economic redress on a rights or egalitarian basis within this broader policy framework are employment equity, land reform and further education.²⁴ Although each of these three policies has its own distinct policy and legal framework, they overlap and are intertwined with the B-BBEE programme. Employment equity and skills development, for instance, are elements and sub-elements to be measured under the B-BBEE scorecard as discussed in paragraphs 6.4.1.2 and 6.4.1.3 below, while the degree of participation by an entity in respect of land redistribution is measured under the B-BBEE Sector Charter for the Agricultural Sector.²⁵

Apart from specific economic redress policies, several other general economic policies were also adopted by the African National Congress (ANC) before 1994 and later by the ANC government to change the structure of the economy to allow more people to participate. The main economic policies adopted are: the *Reconstruction and Development Programme (RDP)* from 1990 to 1994;²⁶ *Transition to Democracy: A Framework for Macro Economic Policy* in 1993;²⁷ *Growth, Employment and Retribution, a Macro-Economic Strategy (GEAR)* in 1996;²⁸ the *New Growth Path (NGP)* in 2010;²⁹ the *National Development Plan (NDP)* in 2012;³⁰ the *Industrial Policy Action Plan (IPAP)* in 2014;³¹ and the *Black Industrialist Policy* in 2015.³² These general economic policies have a profound influence on transformation and redress policies and are the main drivers for giving effect to the objectives of B-BBEE legislation.

In order to implement these policies successfully, government had to adopt appropriate legislation. This did not happen overnight and the first B-BBEE legislation was only enacted 10 years after the dawn of democracy.

²³ Preamble of the B-BBEE Act; and ss 9, 24, 26, 27, 28, 195 and 217 of the Constitution.

²⁴ South African Human Rights Commission *Equality Report 2017/18* (2018) 4, 5, 12 and 13.

²⁵ *Amended AgriBEE Sector Code, 2017* published in *Government Gazette* No. 41306 dated 8 Dec 2017.

²⁶ ANC *The Reconstruction and Development Programme: A Policy Framework* (1990-1994) which later became government policy published as: Parliament of the Republic of South Africa *White Paper on Reconstruction and Development* (1994).

²⁷ ANC Macro-Economic Research Group (MERG) *The Transition to Democracy: A Framework for Macro Economic Policy* (Dec 1993).

²⁸ Department of Finance *Growth, Employment and Retribution, a Macro-Economic Strategy (GEAR)* (1996).

²⁹ DTI *New Growth Path (NGP)* (2010).

³⁰ National Planning Commission *The National Development Plan (NDP) 2012-2030* (2012).

³¹ DTI *Industrial Policy Action Plan (IPAP) – Economic Sectors and Employment Cluster 2014 – 2017* (2014).

³² DTI *Black Industrialist Policy* (2015).

Data inescapably suggests a need for socio-economic redress programmes such as B-BBEE.³³ The question is whether the present B-BBEE programme is fit for its purpose.³⁴ To understand how the B-BBEE programme is designed to promote substantive equality, an appreciation of its history, development and mechanism is required. Further, the programme operates within a socio-economic and socio-political environment.³⁵ All of these are consequently interwoven and have to be understood to fully assess whom the beneficiaries of the B-BBEE programme are and its ability to promote substantive equality.

6.2 HISTORY OF B-BBEE

The concept of Black Economic Empowerment (BEE)³⁶ emerged in the early 1990s as a central ANC policy in addressing the socio-economic legacies of apartheid, as reflected in three separate policy documents of the ANC: *Ready to Govern*;³⁷ *The Transition to Democracy: A Framework for Macro Economic Policy*;³⁸ and the *Reconstruction and Development Programme (RDP)*.³⁹ The main objectives of these programmes were to promote the representativity of black people in the workplace through affirmative action programmes and to increase the ownership of black people in major corporations with a narrow approach of focusing solely on black shareholding in companies. This narrow approach resulted in a small elite group benefiting.

In the history of B-BBEE, the early 1990s was an important period marking the so-called “first wave” of BEE in South Africa.⁴⁰ The “first wave” refers to equity transactions between big corporations, the black elite and influential black individuals, mostly those who were politically connected to the ANC.

³³ See ch 2, para 2.2 above.

³⁴ Madonsela (2018) 21 suggests that in order to address inequalities, requires a long-term view or reviewing of “current and past policies to assess the extent to which they have the capacity to reduce poverty and inequality”.

³⁵ Motlanthe (2018) 10; Smith (2018) 164-166; Seekings and Nattrass (2006) 1-17; and Booysen (2011) 447-451.

³⁶ Black Economic Empowerment was the term used before the adoption of B-BBEE.

³⁷ ANC *Ready to Govern* (1992) para 6.

³⁸ ANC Macro Economic Research Group (MERG) *The Transition to Democracy: A Framework for Macro Economic Policy* Dec (1993) 43, 90 and 103.

³⁹ ANC *The Reconstruction and Development Programme: A Policy Framework* (1990-1994) 93.

⁴⁰ See Jack (2007) 7. Jack is a chartered accountant as well as co-founder and chairman of Empowerdex, South Africa’s best-known B-BBEE rating agency that was instrumental in developing a rating index for measuring B-BBEE compliance levels. Jack is also a visiting professor at the School of Management at the University of the Free State. He also served on the then Department of Trade and Industry Commission (now the Department of Trade, Industry and Competition) which developed the B-BBEE Codes. Also see Ponte *et al* DAC (2007) 941.

One of the first major BEE transactions was concluded in 1993. The financial services group Sanlam, via Sankorp, sold its controlling interest in Metropolitan Life (Metlife) to the black shareholders of Metlife Investment Holdings (Methold), a consortium formed by prominent black businesspeople and community leaders. The consortium eventually became New Africa Investments Limited (Nail), chaired by Dr Nthato Motlana.⁴¹

Through a voting pool agreement with Sankorp, Nail was able to exert effective control over Metlife with its 10% stake. Methold had purchased 10% of Metropolitan in a deal financed by the Industrial Development Corporation (IDC). The transaction propelled Nail towards becoming the first black company to be listed on the Johannesburg Stock Exchange (JSE). By 1997, Nail had increased its stake in Metlife to 51%, after which it cancelled the voting pool arrangement with Sankorp.⁴² It acquired assets in the cellular network operator MTN as well as in the financial sector in Africa Merchant Bank (AMB) and Theta (which later became African Bank Investments). They also acquired media interests, including one of South Africa's largest daily newspapers, *Sowetan*, Radio Jacaranda and a radio advertising firm, Radmark.⁴³

Along the way, others joined Dr Nthato Motlana at the helm of Nail, including Dikgang Moseneke (who later became Deputy Chief Justice), Cyril Ramaphosa (who was the ANC chief negotiator during the transitional constitutional negotiations from 1991 to 1994⁴⁴ and later became President of the ANC and of South Africa) and Zwelakhe Sisulu (who between 1994 and 1997 was the Chief Executive Officer of the South African Broadcasting Corporation (SABC)). Ramaphosa brought along a group of investors called the National Empowerment Consortium, which included several trade union funds. This capital injection helped Nail buy industrial conglomerate Johnnic from the Anglo-American Corporation in the mining industry.⁴⁵

Nail grew into one of the largest black-owned publicly trading companies. By the end of 1998, a peak year for the bull run on the JSE, Nail had a market capitalisation of nearly R6 billion. Its success served as a catalyst for the entry of other black consortiums into the BEE transaction arena in the late 1990s.⁴⁶ Mzi Khumalo, another political heavyweight, who was, amongst others,

⁴¹ Jack (2007) 7 and 8.

⁴² As above.

⁴³ As above.

⁴⁴ Odendaal (2022) 360.

⁴⁵ Jack (2007) 7 and 8.

⁴⁶ As above 8; Mpfu-Walsh (2021) 97; and Department of Trade and Industry (DTI) *South Africa's Economic Transformation: A*

secretary of the Mohlakeng Youth Congress affiliated to the United Democratic Front, a front organisation for the ANC during its prohibition in the 1980s until 1990, became heavily involved in black ownership transactions in the mining industry. Through his empowerment consortium, Simane, he also entered into substantial share transactions with gold producer Harmony Gold during the initial phase of BEE.⁴⁷

After the 1994 elections, Ramaphosa, Patrice Motsepe (brother-in-law of Ramaphosa),⁴⁸ Saki Macozoma (a former organiser of the anti-apartheid African Students Movement and political prisoner with Nelson Mandela) and Tokyo Sexwale (also a former political prisoner with Nelson Mandela and later the Premier of the Gauteng Province), in particular, became what is described as a “fairy tale” of “overnight billionaires” with “staggering wealth” from mainly mining stocks (shares).⁴⁹

These BEE transactions did not involve the outright purchase of shares for cash. With the use of so-called “Special Purpose Vehicles”,⁵⁰ transactions were heavily leveraged against the value of the shares with the businesses within which the shares were bought, financing the transactions or being the main guarantors of debt.⁵¹ Southall explained that as part of the ANC’s strategy in terms of the National Democratic Revolution (NDR) to give the political elite mobility in the corporates in South Africa, big corporates were prepared to provide the capital that the ANC political elite needed to acquire shares in corporates in exchange for “political capital”.⁵² Therefore, new BEE partners were not required to invest capital of their own to acquire shares. These transactions, financed by big corporates themselves or where they act as guarantors of acquisition debt granted by, in particular, the Industrial Development Corporation (IDC),⁵³ a state-owned enterprise, allowed the ANC political elite to amass substantial wealth in a short

Strategy for Broad-Based Black Economic Empowerment (2003) 10.

⁴⁷ Jack (2007) 9.

⁴⁸ Patrick *Sowetan* (Jun 2022) 19 confirms the family relationship between Ramaphosa and Motsepe. Motsepe is Ramaphosa’s brother-in-law, he is married to Ramaphosa’s sister.

⁴⁹ Ponte *et al DAC* (2007) 947; Jack (2007) 60; Mpofu-Walsh (2021) 97; and Harvey (2021) 252, 272, 318 and 383. Harvey estimates the combined wealth of former union leaders who are also ANC executives, such as, Cyril Ramaphosa, Marcel Golding and Johnny Copelyn from mainly mining and other stocks involving BEE transaction to be valued at R10 billion collectively.

⁵⁰ Jack (2007) 383 explains a SPV as a vehicle formed specifically to facilitate the financing of a BEE party where the party needs a combination of bank, vendor and equity finance. The mechanics of an SPV structure are that the financier provides funds to the SPV in exchange for a combination of equity and debt instruments.

⁵¹ Jack (2007) 8; and Ponte *et al DAC* (2007) 941 and 946.

⁵² Southall *Review of African Political Economy* (2008) 284-286.

⁵³ Department of Trade and Industry (DTI) *South Africa’s Economic Transformation: A Strategy for Broad-Based Black Economic Empowerment* (2003) 19 states that the “IDC will remain at the forefront of BEE ... of the empowerment process”.

space of time. It is reported that in the 1990s the IDC financed 690 empowerment deals worth more than R6,6 billion.⁵⁴ With the advent of the Asian financial crisis towards the end of the 1990s, the value of shares globally plummeted.⁵⁵ This created a debt-asset deficit.⁵⁶ Consequently, several BEE deals had to be restructured or unbundled and the number of BEE deals declined dramatically from then onwards.⁵⁷

Two interventions then spurred a renewed interest in BEE transactions. First, the adoption in 1997 of a resolution by the Black Business Council,⁵⁸ a black business umbrella group, to investigate and make recommendations regarding BEE.⁵⁹ Cyril Ramaphosa was appointed in 1998 by the Black Business Council to lead the Black Economic Empowerment Commission (BEECom).⁶⁰ Ramaphosa was at the forefront of BEE transactions at that point. One of the mandates of the BEECom was to formulate a coherent vision and strategy for BEE.⁶¹ This led to the release of the BEECom Report in 2001,⁶² which formed the basis of the B-BBEE programme and legislation that required, amongst others, consideration of black equity ownership as prerequisite for contracting with the state.⁶³

The BEECom was an initiative of black business. Ponte *et al* state as follows:

“The BEE Commission was envisioned as a vehicle through which to address their [black business] specific perception of the flaws of BEE, as

⁵⁴ Department of Trade and Industry (DTI) *South Africa's Economic Transformation: A Strategy for Broad-Based Black Economic Empowerment* (2003) 10.

⁵⁵ International Monetary Fund (IMF) *The Asia Crisis: Causes, Policy Responses and Outcomes* (1999) 3.

⁵⁶ Department of Trade and Industry (DTI) *South Africa's Economic Transformation: A Strategy for Broad-Based Black Economic Empowerment* (2003) 10.

⁵⁷ Southall (2022) 109 mentions that BEE deals involved around 10% of the total JSE capitalisation between 1994 and 1997. The proportion of Black equity on the JSE collapsed to one percent as a result of the Asian crisis in 1997.

⁵⁸ Ponte *et al* *DAC* (2007) 941. The Black Business Council was an umbrella group of eleven prominent Black business organisations. The Black Business Council was founded in 1996 by Black businessmen and professionals to play a central role in key national economic activities and merged with Business South Africa in 2003 to form the chief lobby group Business Unity South Africa (BUSA).

⁵⁹ As above 941 and 942.

⁶⁰ As above; and Madi (2016) 49. Phinda Madi was one of the Commissioners of the BEECom. Also see Black Economic Empowerment Commission (BEECom) *The BEECom Report* (2001) on the seventh (unnumbered) page of the Report, as part of its introduction, it indicates Cyril Ramaphosa as Chairman and 21 other Commissioners. The Report consists of 10 Chapters consisting of 72 pages, the initial, unnumbered introductory pages excluded. Also see Jack (2007) 21; and Madi (2016) xxxiii. Some sources suggest that the (BEECom) was established in 1997 (Jack) while others mention 1998 (Madi). The date of 1998 is more commonly advocated by commentators.

⁶¹ Black Economic Empowerment Commission (BEECom) *The BEECom Report* (2001) 1 and 2.

⁶² As above.

⁶³ As above 31 and 32; and the PPPFA and PPRs, 2001. Also see Department of Trade and Industry (DTI) *South Africa's Economic Transformation: A Strategy for Broad-Based Black Economic Empowerment* (2003) 4 which states that the B-BBEE Strategy was informed by the contributions of the BEECom.

well as to provide a coherent understanding of the definitions and processes associated with it. In other words, emerging black capital and their ANC network sought a clarification and codification of BEE.”⁶⁴

Jack explains that the outcome of the BEECom report actually assisted black businesses in the middle- and lower-income groups, as broad-based initiatives recommended by the BEECom in fact offered a practical opportunity for black businesses to participate in the economy and not necessarily to incorporate the broader communities and workers.⁶⁵

The second intervention which revived the conclusion of BEE transactions, was the Petroleum and Liquid Fuels Industry Charter⁶⁶ released in 2000 and the Mining Charter in 2002.⁶⁷ The Liquid Fuels Charter set an ownership target of 25,1% for Historically Disadvantaged South Africans and an overall target of 25% black ownership to be achieved in the industry within 10 years.⁶⁸ The Mining Charter required 26% black ownership.⁶⁹

These charters were given regulatory weight in the Mineral and Petroleum Resources Development Act in 2002.⁷⁰ The Act also nationalised mining rights, authorising the government (executive) to issue mining licences to obtain mining rights.⁷¹ These included “old” as well as “new” mining rights. Compliance with the Mining Charter was a prerequisite to qualify for licensing rights for mining and mining prospecting in South Africa. Companies wishing to mine or prospect in South Africa required a black partner to do so. The nationalisation of mining rights and enforcement of a 26% black ownership requirement provided renewed impetus in BEE transactions.

This policy to nationalise mining rights, which boosted B-BBEE transactions, received welcomed assistance later in 2013 in the form of the Constitutional Court’s judgement in *Agri South Africa*

⁶⁴ Ponte *et al* DAC (2007) 941.

⁶⁵ Jack (2007) 22.

⁶⁶ Republic of South Africa *Charter for the South African Petroleum and Liquid Fuels Industry on Empowering Historically Disadvantaged South Africans in the Petroleum Liquid Fuels Industry* (2000).

⁶⁷ Republic of South Africa *Broad Based Socio-Economic Empowerment Charter for the South African Mining Sector* (2002).

⁶⁸ Republic of South Africa *Charter for the South African Petroleum and Liquid Fuels Industry on Empowering Historically Disadvantaged South Africans in the Petroleum Liquid Fuels Industry* (2000) 1-10.

⁶⁹ Republic of South Africa *Broad Based Socio-Economic Empowerment Charter for the South African Mining Sector* (2002) 7-14.

⁷⁰ 28 of 2002.

⁷¹ As above ss 14, 17 and 23.

v Minister of Minerals and Energy.⁷² The Constitutional Court was not prepared in *Agri SA*'s case to interpret the rights to property generously. The court held that the nationalisation of mining rights by the state was not contrary to the rights to property outlined in the section 25 of the Constitution⁷³ as discussed in chapter 3, paragraph 3.6. This judgement by the Constitutional Court seems to fit the political requirement of the day as the nationalisation of mining rights was a specific resolution adopted by the ANC during its 1997 National Conference to further its political ideology of the NDR.⁷⁴

The release of the BEECom's report in 2001, the adoption of the Mining Charters and nationalisation of mining rights in 2002, coupled with the enactment of the government's Preferential Procurement Policy Framework Act (PPPFA) in 2000,⁷⁵ and Preferential Procurement Regulations (PPRs) in 2001,⁷⁶ had from a BEE point of view, the desired effect. Where BEE transactions on the JSE between 1996 and 2003 amounted to R90 billion, it skyrocketed to R350 billion between 2004 to 2008.⁷⁷ The IDC was reported to have approved financing for 191 empowerment deals in 2002, representing about 37% of the total number of financing approvals by the IDC. While the amount of funding for empowerment deals was R56,4 million in 1998, it rose to R1,2 billion for the first six months of 2002.⁷⁸

The political impact of large BEE transactions during the first wave of BEE cannot be underestimated. The majority of BEE deals in the 1990s and 2000s directly or indirectly involved big corporates, including JSE companies. Yet, a large segment of the aspiring black lower and middle class (referred to in the ANC literature as "capitalist class")⁷⁹ was left out in the cold. This aggrieved capitalist class played an important role in the ANC. They became one of the driving forces of internal disputes and factionalism that raged within the ANC and were mobilised to support Jacob Zuma to become the ANC and South Africa's President in 2009.⁸⁰ This paved the

⁷² (CCT/51/12) [2013] ZACC 9; 2013 (4) SA 1 (CC); 2013 (7) BCLR 727 (CC) (18 Apr 2013) (hereafter referred to as *Agri*).

⁷³ As above paras [107] and [108].

⁷⁴ ANC 50th National Conference Resolutions (1997) 44th page. Also see Malan (2019) 205 who describes the judgment as idiosyncratic and illogical.

⁷⁵ 5 of 2000.

⁷⁶ *Preferential Procurement Regulations, 2001* published in *Government Gazette* No. 22549 dated 10 Aug 2001.

⁷⁷ Cargill (2010) 33.

⁷⁸ Department of Trade and Industry (DTI) *South Africa's Economic Transformation: A Strategy for Broad-Based Black Economic Empowerment* (2003) 10.

⁷⁹ See Southall *Review of African Political Economy* (2008) 284-286 who refers to the black bourgeoisie as the "emergent black capitalist class"; and Mantashe *SABS News Bulletin* (Jun 2015) 12 who stated that "BEE creates black capitalists".

⁸⁰ Southall (2022) 110.

way for “state capture” which involved the large-scale abuse of government procurement processes and B-BBEE to siphon off state resources.⁸¹

Southall explains the relationship between big corporates and the ANC as an incorporation of the ANC elite and black emerging bourgeoisie into the management and ownership structures of corporations in exchange for “political capital”. This was done to assist the political elite, especially the African bourgeoisie, who lacked capital to acquire equity in corporations. Big corporations were, according to Southall, happy to accede in exchange for political protection.⁸² This “political capital” (protection or cover) must be seen in the context of the ANC’s ideology of representivity and the *Freedom Charter* and would allow big corporations to avoid nationalisation if they are owned and managed by Africans, as discussed in chapter 2 paragraph 2.4.2.

Some argue that the willingness of big corporates to give ANC elites a piece of the economic pie was not for altruistic or empowerment purposes, but to take out political cover. This is perhaps best captured by Moeletsi Mbeki, a political analyst and brother of the former President, Thabo Mbeki, who states—

“The first purpose of BEE was to create a buffer group among the political class that would become an ally of big business in South Africa...The conglomerates took their marginal assets and gave them to politically influential black people, with the purpose, in my view, not to transform the economy but to create a black political class that is in alliance with the conglomerates and therefore wants to maintain the *status quo* of our economy and the ways it operates.”⁸³

However, empowerment deals involving the black elite during the 1990s and early 2000s were not perceived as problematic by the government. In fact, the government supported and justified these transactions. In its B-BBEE Strategy,⁸⁴ government states—

“This ‘generation of empowerment deals’ had many difficulties but should not be dismissed as having no impact. They provided empowerment with a high profile and brought forth a new generation of business leaders.”⁸⁵

⁸¹ *Judicial Commission of Inquiry into State Capture Report Part 1: Vol. 3* 726-751.

⁸² Southall *Review of African Political Economy* (2008) 284-286.

⁸³ Mbeki (2019) 89-116; and Harvey (2021) 372.

⁸⁴ Department of Trade and Industry (DTI) *South Africa’s Economic Transformation: A Strategy for Broad-Based Black Economic Empowerment* (2003) 70.

⁸⁵ As above 11.

Although some major equity transactions involving black individuals and certain black consortia were concluded prior to and during the early years of the present constitutional order, the progress and pace of increasing black ownership of corporations, especially by collective groups such as employees and communities, were painstakingly slow.⁸⁶

However, in 1998, two events concurrently changed the complexion of BEE from a narrow-based BEE policy, as epitomised by BEE deals involving the black elite and big corporates, to an ostensible broad-based approach. Firstly, on 29 May 1998, the then Deputy President, Thabo Mbeki, opened the National Assembly debate on “Reconciliation and Nation Building” with what became known as his “Two Nations” speech. In his speech he emphasised that South Africa consisted of two societies, the one rich and the other poor, which ran along racial lines. He emphasised that national unity and reconciliation between black and white South Africans would remain an impossible dream if socio-economic disparities were not addressed soon. He underscored the fact that socio-economic inequalities prevented black South Africans from exercising their constitutional rights to citizenship to the same extent as white South Africans due to unequal access to economic opportunities.⁸⁷

Although the BEECom established under the leadership of Cyril Ramaphosa in 1998 was one of the catalysts which re-ignited BEE equity transactions involving the political elite, it was ironically also the second event that laid the foundation for a shift from narrow-based to broad-based BEE, in theory at least.⁸⁸ The BEECom released a comprehensive report in 2001 consisting of findings and recommendations. Remarkably it was the BEECom which recommended that the BEE project should not only be a vehicle for wealth accumulation by the emerging “black capitalist class” but should also focus on a broader spectrum of beneficiaries such as vulnerable and designated groups.⁸⁹ The BEECom report proposed that the BEE programme should also ensure empowerment through a wider array of interventions. These interventions, the BEECom recommended, should include skills development, support and development of small black-owned businesses, creating markets and providing for the offset of products and opening up new markets for new small black entrants in the economy. The

⁸⁶ As above; and Ponte *et al DAC* (2007) 1.

⁸⁷ Mbeki *Acndocs* (1998); and Ponte *et al DAC* (2007) 934.

⁸⁸ Jack (2007) 10.

⁸⁹ Black Economic Empowerment Commission (BEECom) *The BEECom Report* (2001) 1; Madi (2016) 49; and Ponte *et al DAC* (2007) 11.

BEECom further proposed various elements or “pillars” to be measured, as well as benchmarks and guidelines to determine the level of compliance of enterprises that participate in the BEE programme.⁹⁰ One of the most significant recommendations made by the BEECom, however, is that government should give preference to BEE-compliant enterprises when procuring goods and services from private sector suppliers.⁹¹ The BEECom emphasised that the BEE programme should form part of a new growth plan for the economy.⁹²

The BEECom’s report was instrumental in establishing the theory and lexicon of a broader and more inclusive “broad-based” empowerment programme. The early years of the 21st century is therefore generally considered as the commencement of the second phase or wave of BEE, referred to as “broad-based empowerment”. This led to the later official incorporation of the term “Broad-Based Black Economic Empowerment (B-BBEE)” into policies and legislation.⁹³

The second phase of BEE subsequently saw the emergence of legislation adopted by government in an attempt to give impetus to the more inclusive concept of broad-based empowerment proposed by the BEECom. For instance, the Preferential Procurement Regulations of 2001, even before the advent of the B-BBEE legislation in 2003, already incorporated various broad-based initiatives proposed by the BEECom to socially and economically uplift and empower Historically Disadvantaged Individuals (HDIs). These initiatives included: equity ownership by HDIs in bidding entities; the extent to which bidding entities provide training and skills development; rendering assistance to small and rural enterprises; and socio-economic empowerment initiatives such as housing and transport.⁹⁴

The first industry transformation Charter for the Petroleum and Liquid Fuels Industry, released late in 2000, and the Mining Charter in 2002 were both hallmarked by their broad-based approach and the measurement of elements (or pillars) as suggested by the BEECom. Both Charters were given regulatory status by being incorporated into the Mineral and Petroleum Resources Development Act (MPRDA).⁹⁵ These Charters were the first broad-based black

⁹⁰ Black Economic Empowerment Commission (BEECom) *The BEECom Report* (2001) 1 and 2; Madi (2016) 13; and Jack (2007) 21.

⁹¹ Black Economic Empowerment Commission (BEECom) *The BEECom Report* (2001) 32; Jack (2007) 21; and Madi (2016) xxxiii.

⁹² Black Economic Empowerment Commission (BEECom) *The BEECom Report* (2001) 2.

⁹³ Ponte *et al DAC* (2007) 942.

⁹⁴ Reg 17(1)(e)-(k) of the PPRs, 2001.

⁹⁵ 28 of 2002. Also see Jack (2007) 23.

economic empowerment policies developed by the government in conjunction with various role players in the respective industries.⁹⁶

They were acutely instrumental in paving the way for the later incorporation of the broad-based principles contained in B-BBEE legislation promulgated in 2003.

During the ANC's National Conference in Mafikeng (now Mahikeng) in 1997, the ANC adopted a resolution that affirmative action and socio-economic transformation should be driven by government. This coincided and supported the Black Business Council's resolution in the same year to establish BEECom to investigate and make recommendations regarding promoting and enforcing BEE.⁹⁷ In 2002, during the ANC's National Conference in Stellenbosch, the ANC adopted as ANC policy the BEECom's recommendation that BEE should be enforced by legislation.⁹⁸

Subsequently, in March 2003, government released and published a strategy document on BEE which clearly enunciated and provided prominence to the concept of a more inclusive and broad-based BEE approach. It states—

“Our country requires an economy that can meet the needs of all our economic citizens [sic] – our people and their enterprises – in a sustainable manner. This will only be possible if our country builds on the full potential of all persons and communities across the length and breadth of this country. Government's objective is to achieve this vision of an adaptive economy characterised by growth, employment and equity by 2014.”⁹⁹

The release of the B-BBEE Strategy document was followed shortly afterwards by the promulgation of the Broad-Based Black Economic Empowerment Act (B-BBEE Act) of 2003.¹⁰⁰

⁹⁶ See *Chamber of Mines of South Africa v Minister of Mineral Resources and Others* (41661/2015) [2018] ZAGPPHC 8; [2018] 2 ALL SA 391 (GP); 2018 (4) SA 581 (GP) (4 Apr 2018) para [103]; and *Mineral Council of South Africa v Minister of Mineral Resources and Another* (20341/19) [2020] ZAGPJHC 171 (30 Jun 2020) para [35] in which the court held that the status of the Mining Charters developed in terms of the MPRDA were policy and not law.

⁹⁷ ANC 50th National Conference Resolutions (1997) on the 25th page. Also see ch 2, para 2.5.2 above.

⁹⁸ ANC 51st National Conference Resolutions (2002) para 3. Also see ch 2, para 2.5.3 above.

⁹⁹ Department of Trade and Industry (DTI) *South Africa's Economic Transformation: A Strategy for Broad-Based Black Economic Empowerment* (2003) 4.

¹⁰⁰ Promulgated in *Government Gazette* No. 25899 dated 9 Jan 2004 with commencement date 21 Apr 2004.

6.3 LEGAL FRAMEWORK AND REGULATORY AUTHORITIES

The present B-BBEE legal framework and legislation, which play a role in the interpretation and application of B-BBEE, can be summarised as follows: the Constitution;¹⁰¹ the B-BBEE Act of 2003 as amended by the B-BBEE Amendment Act of 2013;¹⁰² the B-BBEE Codes;¹⁰³ the Strategy for Broad-Based Black Economic Empowerment;¹⁰⁴ the Sector Codes;¹⁰⁵ the B-BBEE Regulations;¹⁰⁶ Guidelines and Practice Notes;¹⁰⁷ and the Verification Manual.¹⁰⁸

Other legislation influencing the operations of B-BBEE is as follows: the Public Finance Management Act, including Treasury Regulations and Directives;¹⁰⁹ the Preferential Procurement Policy Framework Act¹¹⁰ and Preferential Procurement Regulations;¹¹¹ the National Empowerment Fund Act;¹¹² the Competition Act;¹¹³ the Employment Equity Act;¹¹⁴ the Skills Development Act¹¹⁵ and the Companies Act.¹¹⁶

The B-BBEE Strategy and the B-BBEE Act form the overarching policy and legislative framework of the B-BBEE programme.

¹⁰¹ Ss 9(2) and 217 of the Constitution.

¹⁰² Act 53 of 2003 as amended by Act 46 of 2013 published in *Government Gazette* No. 37271 dated 27 Jan 2014.

¹⁰³ Issued in terms of s 9 of the B-BBEE Act.

¹⁰⁴ Issued in terms of s 11 of the B-BBEE Act; and Department of Trade and Industry (DTI) *South Africa's Economic Transformation: A Strategy for Broad-Based Black Economic Empowerment* (2003).

¹⁰⁵ Issued for a particular sector of the economy in terms of s 9 (1)(e) of the B-BBEE Act. Sector Codes set the criteria for measuring entities in a particular sector of the economy. In this regard see *Statement 003: Amended Guidelines for Developing and Gazetting of Sector Codes* published in *Government Gazette* No. 38766 dated 6 May 2015.

¹⁰⁶ Issued in terms of s 14(1) of the B-BBEE Act. The only Regulations published up to date are the *Broad-Based Black Economic Empowerment Regulations*, published in *Government Gazette* No. 40053 dated 6 Jun 2016 to regulate the functions of the B-BBEE Commission. The Regulations are often referred to as the B-BBEE Regulations, 2016.

¹⁰⁷ Issued in terms of s 14(2) of the B-BBEE Act relating to the interpretation and application of the B-BBEE Act.

¹⁰⁸ Issued in terms of s 9(1) of the B-BBEE Act and published in *Government Gazette* No. 31255 dated 18 Jul 2008. The only document that is allowed to be used by Verification Agents in measuring an entity in terms of the B-BBEE Codes. This document determines the methodology to be used during the verification process by verification agents. According to Jack (2007) 39 and 40, this methodology is essential to determine the rating or verification standard as a prerequisite of acceptance by businesses.

¹⁰⁹ 1 of 1999.

¹¹⁰ 5 of 2000.

¹¹¹ *Preferential Procurement Regulations, 2022*, published in *Government Gazette* No. 47452 dated 4 Nov 2022. The publication of these Regulations followed the declaration of invalidity of the Preferential Procurement Regulations, 2017 by the Constitutional Court in *Minister of Finance v Afribusiness NPC* [2022] ZACC 4 (hereafter referred to as *Minister of Finance*) para [119].

¹¹² 105 of 1998.

¹¹³ 89 of 1998.

¹¹⁴ 55 of 1998.

¹¹⁵ 97 of 1998.

¹¹⁶ 71 of 2008.

6.3.1 The B-BBEE Strategy

For a proper comprehension of the role played by B-BBEE and the purpose of the various pieces of legislation within the BEE regulatory framework, the B-BBEE Strategy needs to be understood. The B-BBEE Strategy, issued in terms of section 11 of the B-BBEE Act, plays an important role in understanding the concept of B-BBEE. Firstly, the Act determines that the B-BBEE Strategy must provide for an integrated, co-ordinated and uniform approach to B-BBEE.¹¹⁷ Secondly, the strategy places into focus black economic empowerment and serves as an overarching economic transformation strategic framework. The B-BBEE Strategy suggests that although every piece of legislation enacted since 1994 attempted to redress the legacy of past race-based discrimination in some way or another, such legislation was said to lack coherence and a common understanding of black economic empowerment.¹¹⁸

The B-BBEE Strategy, at the outset, states its broad objectives and envisioned timeframes as follows:

“Our country requires an economy that can meet the needs of all our economic citizens – our people and their enterprises in a sustainable manner. This will only be possible if our economy builds as on the full potential of all persons and communities across the length and breadth of this country. Government’s objective is to achieve this vision of an adoptive economy characterised by growth, employment and equity by 2014.”

The B-BBEE Strategy enunciates B-BBEE as “a comprehensive black economic strategy that draws together the various elements of government’s transformative programme”.¹¹⁹ Government’s approach in incorporating B-BBEE as part of the broader economic policy and said to be focusing on growth, is outlined in the strategy.¹²⁰ Growth should be viewed in terms of the main objective stated in the strategy, namely to substantially increase the number of black people who have ownership and control of existing and new enterprises.¹²¹ The strategy suggests that once this objective is achieved and more black people participate in the economy,

¹¹⁷ S 11(2)(a) of the B-BBEE Act.

¹¹⁸ Department of Trade and Industry (DTI) *South Africa’s Economic Transformation: A Strategy for Broad-Based Black Economic Empowerment* (2003) 10.

¹¹⁹ As above 10-13.

¹²⁰ As above 13.

¹²¹ As above 12 and 21. The Strategy states that “BEE must result in an increase in the ownership and control of the economy by black people. This means that a significant proportion of black persons’ ownership of assets and enterprises must be a controlling interest ... “.

it will lead to economic growth. The strategy therefore sets as prerequisite for economic growth the inclusion of the black majority who are still not participating meaningfully in the economy. It also states that government's strategy with regard to B-BBEE is "to look beyond the redress of past imbalances to situate BEE as a powerful tool to broaden the country's economic base and accelerate growth, job creation and poverty eradications".¹²² The strategy also emphasises the importance of the Employment Equity Act (EEA) as part of B-BBEE to achieve the B-BBEE programme's objectives.¹²³ The EEA incorporates the principle of representivity into the Act, as discussed in paragraphs 6.4.1.2 and 6.4.1.3 below. This, in essence, sets out the socio-political environment within which the B-BBEE programme operates.¹²⁴ Thus, apart from the objectives of B-BBEE contained in the B-BBEE Act itself, the B-BBEE programme is also strategically positioned to play a role in the broader economic policy of government. Reference to the objectives of B-BBEE should not be seen as being confined to the immediate objectives provided for only in the Act but should include its strategic objectives of economic growth mainly through redistribution and representivity within a wider macro-economic and socio-political environment. The successes or failures of B-BBEE should also be viewed within its strategic role as economic policy role player. In this regard, the strategic positioning of B-BBEE, as outlined in the B-BBEE Strategy, should be understood and assessed.

The B-BBEE Strategy, as a starting point, emphasises that B-BBEE rests on four key principles. It is (1) broad based; (2) an inclusive process; (3) associated with good governance; and (4) is part of the country's growth strategy.¹²⁵

For the purpose of this study, principles (1), (2) and (4) are of importance and require closer examination.

With regard to the broad-based versus narrow-based approach to B-BBEE, the Strategy emphasises the importance of finding the appropriate balance between a very broad definition and an overly narrow one. To define B-BBEE too broadly equates it to economic development

¹²² As above 11.

¹²³ As above 22. The B-BBEE Strategy states: "Enterprises are required to comply with the Employment Equity Act to bring about an equitable representation of black persons in all occupations and at all levels of the organisation over a period of time. The involvement of black persons in operational, professional cadres and executive decision-making is a critical aspect of BEE".

¹²⁴ As above 4 and 5. The Strategy states that "in South Africa, the socio-political and moral imperative to redress racial discrimination is also an imperative dictated by the need for sustainable growth".

¹²⁵ As above 13.

and transformation in general. The Strategy must be commensurate with the totality of government's programme of reconstruction and development. To define B-BBEE too narrowly limits it to a set of transactions transferring corporate assets from white to black ownership.¹²⁶

Government therefore defines B-BBEE as an integral and coherent socio-economic process that directly contributes to the economic transformation of South Africa. B-BBEE envisions a significant increase in the number of black people who manage, own and control the economy, as well as a significant decrease in income inequalities between race groups.¹²⁷ This can be seen as the main objective of the B-BBEE programme.

B-BBEE will therefore include broad-based elements of empowerment such as human resource development, employment equity, enterprise development, preferential procurement, as well as investment, ownership and control of enterprises and economic assets.¹²⁸ As part of the broad-based strategy, B-BBEE sets out, in theory, to increase the proportion of the ownership and management of economic activities vested in communities and broad-based enterprises such as trade unions, employee trusts, co-operatives and other collective enterprises.¹²⁹

The strategy further envisages the empowerment of black persons, defined as a generic term for "indigenous Africans, Coloureds and Indians" as a prerequisite for growth, development and stability in the economy.¹³⁰ This definition of beneficiaries of B-BBEE is discussed in paragraph 6.6.1 below. The entrenched and continued economic inequality is viewed as a deterrent to growth, economic development, job creation and poverty eradication.¹³¹ If a more equal economic system is not created, economic growth could exacerbate inequalities, according to the strategy. The medium- to long-term sustainability of such unequal economies is argued to be vulnerable. The socio-political and moral imperative "to redress racial discrimination is also an imperative dictated by the need for sustainable growth".¹³²

The strategy further states in respect of an "inclusive process", the second principle, namely that

¹²⁶ As above 12.

¹²⁷ As above.

¹²⁸ As above.

¹²⁹ As above 13.

¹³⁰ As above 12.

¹³¹ As above 4.

¹³² As above 13.

growth has to be shared “equitably by all South Africans” and that growth can only be accelerated and sustained if all South Africans are meaningfully integrated into the economy. In order to “advance our economic transformation” the state needs to actively lead the development and implementation of a focused and coherent strategy to achieve broad-based black economic empowerment and the deracialisation of the South African economy.¹³³

The strategy explains that economic growth, development and B-BBEE are complementary and related processes. Government’s approach is stressed as an inclusive process. No economy can grow, according to the strategy, by excluding any part of its people, and an economy that is not growing cannot integrate all its citizens in a meaningful way. The strategy emphasises that a B-BBEE process is associated with growth, development and enterprise development and not merely the redistribution of existing wealth.¹³⁴

In terms of the fourth principle, namely that in order to grow the economy, more enterprises are needed to produce value-added goods and services to attract more investments and to employ more people in productive activities. Therefore, a core component of the B-BBEE approach is the creation and nurturing of new enterprises, undertaking new forms of economic and value-adding activities.¹³⁵

6.3.2 The B-BBEE Act

Apart from the B-BBEE Strategy which sets out the overarching uniform strategic approach to B-BBEE, the main enabling legislation of the B-BBEE programme is the B-BBEE Act.¹³⁶ It empowers the Minister of Trade, Industry and Competition to promulgate subsidiary legislation in the form of Codes of Good Practice (B-BBEE Codes);¹³⁷ a Strategy for B-BBEE;¹³⁸ Sector Charters for specific sectors of the economy;¹³⁹ Regulations;¹⁴⁰ and Guidelines and Practice

¹³³ As above 6.

¹³⁴ As above 13.

¹³⁵ As above 14.

¹³⁶ 53 of 2003 as amended by the B-BBEE Amendment Act 46 of 2013.

¹³⁷ S 9 of the B-BBEE Act.

¹³⁸ As above s 11; and Department of Trade and Industry (DTI) *South Africa’s Economic Transformation: A Strategy for Broad-Based Black Economic Empowerment* (2003).

¹³⁹ S 12 of the B-BBEE Act.

¹⁴⁰ As above s 14(1).

Notices to effectively implement B-BBEE.¹⁴¹

The B-BBEE Act provides the basic legislative framework within which all subsidiary legislation operates. The B-BBEE Act defines “this Act” as including “any code of good practice or regulation made under this Act”.¹⁴² It forms the legal basis of the B-BBEE programme.

The beneficiaries of B-BBEE are defined as “black people” which is a generic term referring broadly to Africans, Coloureds and Indians.¹⁴³ A similar definition is provided for in the B-BBEE Codes. This definition is discussed in detail in paragraph 6.6.1 below.

Section 1 of the B-BBEE Act defines “broad-based black economic empowerment” and section 2 sets out the objectives of the Act. The objectives of the Act and the definition of broad-based black economic empowerment are similar and can be summarised as: (1) promoting economic transformation to enable meaningful participation by black people in the economy; (2) substantially changing the racial composition of ownership and management structures in the economy; (3) changing the structure of skilled occupations in existing and new enterprises; (4) increasing the ownership and management of enterprises by black women, communities,¹⁴⁴ workers, cooperatives and other collective enterprises; (5) increasing the skills, infrastructure and economic activities of black women, communities, workers, cooperatives and collective enterprises; (6) promoting investment programmes that lead to broad-based and meaningful participation in the economy by black people to achieve sustainable development and general prosperity; (7) empowering rural and local communities by providing access to economic activities, land, infrastructure, ownership and skills; (8) promoting access to finance for black start-ups, small enterprises and those in the informal sector; and (9) increasing the effective economic participation and access to finance of black-owned and managed enterprises.¹⁴⁵

In interpreting the B-BBEE Act, its provisions must purposively be interpreted to give effect to

¹⁴¹ As above s 14(2).

¹⁴² As above s 1.

¹⁴³ As above.

¹⁴⁴ The term “communities” is not defined in B-BBEE legislation. The Department of Trade and Industry (DTI) *South Africa's Economic Transformation: A Strategy for Broad-Based Black Economic Empowerment* (2003) 10 states that “Government’s approach was to situate black economic empowerment within the context of a broader national empowerment strategy that focused on historically disadvantaged people and particular black people, woman, youth, the disabled and rural communities”.

¹⁴⁵ S 2(a)-(h) of the B-BBEE Act.

the Constitution.¹⁴⁶

The B-BBEE Act also contains a so-called “trumping” provision. It provides that the B-BBEE Act shall prevail if “any law” which was in existence prior to the commencement of the B-BBEE Amendment Act of 2013, contains a provision that conflicts with the B-BBEE Act.¹⁴⁷ The Equality Act (or PEPUDA)¹⁴⁸ and the Employment Equity Act (EEA)¹⁴⁹ both contain prevailing or trumping provisions.¹⁵⁰

According to this construction, the B-BBEE Act will trump PEPUDA and the EEA in the event of any conflicting provisions as PEPUDA and the EEA were in existence since 1998 and 2000 respectively, well before the commencement date of this specific provision of the B-BBEE Amendment Act, namely 24 October 2015.¹⁵¹

One of the most important provisions of the B-BBEE Act is section 10(1). It compels every organ of state and public entity to apply any relevant code of good practice issued in terms of the B-BBEE Act in: determining qualification criteria for the issuing of licences, concessions or other forms of authorisations in respect of any economic activity in terms of any law; developing and implementing a preferential procurement policy; determining qualification criteria for the sale of state-owned enterprises; developing criteria for entering into partnerships with the private sector; and determining criteria for awarding incentives, and for grants and investment schemes in support of B-BBEE.¹⁵²

Section 10(2)(a) of the Act allows for an organ of state and public entity to be exempted by the Minister of Trade, Industry and Competition from the provisions of section 10(1).¹⁵³

¹⁴⁶ As above s 3.

¹⁴⁷ As above s 3(2).

¹⁴⁸ 4 of 2000.

¹⁴⁹ 55 of 1998.

¹⁵⁰ S 5(2) of PEPUDA states: “If any conflict relating to a matter dealt with in this Act arises between this Act and the provisions of any other law, other than the Constitution or an Act of Parliament expressly amending this Act, the provisions of this Act must prevail”, and s 6 of the EEA provides that the EEA shall prevail if any law other than the Constitution or an Act of Parliament expressly amend the EEA is in conflict with the EEA.

¹⁵¹ S 3(2) of the B-BBEE Act was inserted by s (3)(b) of the B-BBEE Amendment Act which Act commenced on 24 Oct 2014 in terms of *Government Gazette* No. 37271 dated 27 Jan 2014. S 3(b) of the B-BBEE Amendment Act provided for the commencement for the purpose of s 3(b) to be one year later than the commencement of the B-BBEE Act. The effective date for the commencement of the trumping provision is therefore 24 Oct 2015, and for the remainder of the Act, 24 Oct 2014.

¹⁵² S 10(1)(a)-(e) of the B-BBEE Act.

¹⁵³ As above s 10(2)(a) of the Act provides that the Minister may, after consultation with the relevant organ of state or public entity exempt the organ of state from the requirements provided for in s 10(1) or allow a deviation therefrom if particular

In *Airports Company South Africa SOC Ltd v Imperial Group Ltd and Others*¹⁵⁴, the Supreme Court of Appeal held that the “peremptory terms” of section 10 of the B-BBEE Act are to allow for uniformity amongst state departments and public entities in applying procurement criteria. Any deviation without the approval of the Minister of Trade, Industry and Competition would result in the procurement process being unlawful and invalid.¹⁵⁵

Due to the obligation placed on all organs of state by the provisions of section 10 as well as the trumping provision of the B-BBEE Act, section 10 of the B-BBEE Act was instrumental in the changes effected to the Preferential Procurement Regulations (PPRs) over time.¹⁵⁶

Despite the “peremptory terms” of section 10 of the B-BBEE Act, the Supreme Court of Appeal (SCA) in *AfriForum NPC v Minister of Tourism and Others*¹⁵⁷ was not prepared to extend the application of section 10 of the B-BBEE Act to the Disaster Management Act (DMA).¹⁵⁸ The SCA declared a directive made by the Minister of Tourism for the distribution of funds from the Tourism Relief Fund invalid.¹⁵⁹ The Fund was established in terms of the DMA to assist small businesses in the tourism industry to mitigate the impact of the COVID-19 pandemic.¹⁶⁰ The Minister determined criteria in terms of section 10(1)(e) of the B-BBEE Act,¹⁶¹ amongst others, for the distribution of funds. This meant that black-owned businesses would benefit from the Fund at the cost of white-owned businesses.¹⁶² The Minister submitted that “she was obliged by statute to include in her direction B-BBEE criteria for eligibility to financial assistance”.¹⁶³ The

objectively verifiable facts or circumstances applicable to the organ of state or public entity necessitate an exemption or deviation. The Minister may in terms of s 10(2)(b) publish a notice of deviation in the *Government Gazette*.

¹⁵⁴ (1306/18) [2020] ZASCA 2; [2020] 2 All SA 1 (SCA); 2020 (4) SA 17 (SCA) (31 Jan 2020) (hereafter referred to *Airports Company South Africa*).

¹⁵⁵ As above paras [36] – [39].

¹⁵⁶ In *Minister of Finance* (note 111 above) para [80] it was submitted to the Constitutional Court that the repeal of the PPRs of 2011 by the 2017, PPRs “emanates from Cabinet’s decision that the public sector preferential procurement system needs to be aligned with the objects of the B-BBEE Act”. Also see *Airports Company* (note 154 above) para [37] in which the Supreme Court of Appeal held that it is undisputed that the Preferential Procurement Policy Framework Act and the B-BBEE Act constitute the legislation scheme for government procurement.

¹⁵⁷ *AfriForum NPC v Minister of Tourism and Others; Solidarity Trade Union v Minister of Small Business Development and Others* (499/2020 and 498/2020) [2021] ZASCA 121 (22 Sep 2021) (hereafter referred to as *Minister of Tourism*). The AfriForum and Solidarity Trade Union applications were jointly heard.

¹⁵⁸ 57 of 2002.

¹⁵⁹ *Minister of Tourism* (note 157 above) para [56].

¹⁶⁰ As above paras [6] and [19]. An amount of R 200 million was allocated to the Fund to provide once-off payments up to a maximum amount of R 50 000 per business to businesses in the tourism industry which were adversely affected by COVID-19.

¹⁶¹ S 10(1)(a) of the B-BBEE Act determines that every organ of state and public entity must apply any relevant code of good practice issued in term so the B-BBEE Act in “determining criteria for the awarding of incentives, grants and investment schemes in support of broad-based black economic empowerment”.

¹⁶² *Minister of Tourism* (note 157 above) paras [20] and [29].

¹⁶³ As above paras [32] and [37].

Minister stated that the statutory obligation imposed on her by section 10 of the B-BBEE Act to apply B-BBEE criteria in the distribution of funds “should be the start and end of the application”.¹⁶⁴

The SCA held that the Fund was established in terms of the DMA¹⁶⁵ and regulations.¹⁶⁶ The DMA’s objectives differ from those of the B-BBEE Act. The aim of the DMA is to prevent or limit disasters, mitigate their impact and enable post-disaster recovery. The court stated that the differences in purpose between the two statutes are clear.¹⁶⁷

The SCA considered the wording of section 10(1)(e) of the B-BBEE Act which the Minister relied on to consider B-BBEE criteria in the distribution of funds. The court held that section 10(1)(e) should be applied when incentives, grants and investment schemes are considered by government “in support of B-BBEE”.¹⁶⁸ The court held that amounts paid from the DMA Fund are not funds in support of B-BBEE but are intended to mitigate the impact of COVID-19.¹⁶⁹ The SCA consequently declared the rules for the distribution of funds from the DMA Fund invalid.¹⁷⁰

6.3.3 B-BBEE Regulatory Bodies

The regulators and functionaries overseeing the implementation of B-BBEE legislation are the Minister of Trade, Industry and Competition, as the political custodian to whom the implementation of the B-BBEE Act has been assigned;¹⁷¹ the Department of Trade, Industry and Competition as organ of state and line functionary to regulate and oversee the industry as a whole;¹⁷² the B-BBEE Commission established in terms of section 13B of the B-BBEE Act to act as a watchdog;¹⁷³ and the South African National Accreditation Systems (SANAS) as regulatory body to accredit rating of verification agencies to issue verification certificates.¹⁷⁴ Verification

¹⁶⁴ As above.

¹⁶⁵ S 27(3) of the DMA.

¹⁶⁶ Reg 10(8) of the Disaster Management Regulations of 2020.

¹⁶⁷ *Minister of Tourism* (note 157 above) para [44].

¹⁶⁸ As above para [47].

¹⁶⁹ As above para [44].

¹⁷⁰ As above.

¹⁷¹ S 1 of the B-BBEE Act, the definition of “Minister”.

¹⁷² Balshaw and Goldberg (2014) 76.

¹⁷³ Regulated by the B-BBEE Regulations, 2016 with functions in terms of s 13F of the B-BBEE Act; Balshaw and Goldberg (2014) 76; and Jeffery (2014) 187.

¹⁷⁴ The B-BBEE Verification Professional Regulator as defined in s 1 of the B-BBEE Act appointed by the Minister of Trade, Industry and Competition in terms of *Broad Based Black Economic Empowerment Verification – Statement 005* published in

Certificates confirm the compliance and Status Level as outcome of the measurement process in terms of the B-BBEE Codes.¹⁷⁵

Reference to the B-BBEE Commission established in terms of section 13B of the B-BBEE Act is not to be confused with the BEE Commission (BEECom) established in 1998.¹⁷⁶ The latter was not established in terms of legislation and has no present relevance to the implementation of any B-BBEE legislation or policy. The BEECom was a black private sector initiative established by the Black Business Council and had conducted research and compiled a report in 2001 that led to the formulation of the B-BBEE Strategy and enactment of the B-BBEE Act in 2003.¹⁷⁷ The B-BBEE Commission, on the other hand, is a statutory body established in terms of section 13B of the B-BBEE Act to perform a variety of administrative and enforcement functions in terms of section 13F of the B-BBEE Act and B-BBEE Regulations.

The B-BBEE Act also makes provision for an Advisory Council.¹⁷⁸ The functions of the Council in terms of the Act are to advise government on issues relating to B-BBEE.¹⁷⁹ The Council is not a regulatory or oversight body in the context of enforcing implementation of the B-BBEE Act or the B-BBEE Codes, but merely an advisory body to government.

The B-BBEE Act does not provide for any sanctions such as fines and compliance orders to enforce B-BBEE compliance. However, with the enactment of the B-BBEE Amendment Act of 2013, provision was made for significant fines and other sanctions for illegal conduct, for instance misrepresenting of B-BBEE status or engaging in so-called “fronting practices”. Fronting practices are transactions, arrangements or other acts or conduct that directly or indirectly undermine or frustrate the achievement of the objectives of the B-BBEE Act.¹⁸⁰ Misrepresentation and fronting practices constitute criminal offences in terms of the B-BBEE Act.¹⁸¹ Any person convicted of an offence in terms of the B-BBEE Act is also barred from doing

Government Gazette No. 34612 dated 23 Sep 2011. On 4 March 2016, the Independent Regulatory Board of Auditors (IRBA) informed all B-BBEE approved registered auditors (BAR’s) of the IRBA Board’s decision to withdraw as a B-BBEE Verification Professional Regulator from B-BBEE the verification industry. As from 1 Jan 2017, SANAS is the sole regulatory body to accredit verification agents.

¹⁷⁵ Paras 1.6, 3.1.3 and 8 of Statement 000 of the B-BBEE Codes.

¹⁷⁶ See para 6.2 above.

¹⁷⁷ As above.

¹⁷⁸ S 4 of the B-BBEE Act.

¹⁷⁹ As above s 5.

¹⁸⁰ As above s 1, the definition of “fronting practice”.

¹⁸¹ As above s 130. Also see s 1 of the B-BBEE Act which defines a “fronting practice” as a “transaction arrangement or other act

business with the state for a period of 10 years.¹⁸²

6.4 WORKING MECHANISM OF B-BBEE

Whereas the B-BBEE Act and Strategy set out the objectives and economic transformation strategy of B-BBEE, the B-BBEE Codes issued in terms of the Act by the Minister of Trade, Industry and Competition determine the measuring and working mechanisms of the B-BBEE programme. The B-BBEE Codes set the rules and criteria for entities to become B-BBEE compliant.

With the amendment of the B-BBEE Act by the B-BBEE Amendment Act in 2013,¹⁸³ the B-BBEE Codes published in 2007¹⁸⁴ were also amended in October 2013 under the Zuma administration by a new set of more onerous B-BBEE Codes generally referred to as the Amended or Revised B-BBEE Codes.¹⁸⁵

Becoming B-BBEE compliant is in theory “voluntary”. No legislation forces any business to be participants in B-BBEE or to become B-BBEE compliant. Compliance is determined by an entity’s clients and industry requirements. However, for many enterprises becoming and remaining B-BBEE compliant is a business imperative in order to do business with government and big corporates and to meet the licensing requirements to operate a business.¹⁸⁶

To prove B-BBEE compliance, a system was implemented through the B-BBEE Codes to measure an entity’s B-BBEE compliance. Compliance is determined according to levels referred to as “B-BBEE Status Levels”. Level 1 is the highest level and level 8 the lowest level.

or conduct that directly or indirectly undermines or frustrates the achievement of the objectives of this Act or the implementation of any of the provisions of this Act...”. This definition then identifies four specific types of activities or arrangements that would constitute a fronting practice. Also see *Passenger Rail Agency of South Africa v Swifambo Rail Agency Limited* (2015/42219) [2017] ZAGPJHC 177 (3 Jul 2017) para [97]; and *Viking Pony African Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd and Another* 2011(1) SA 327 (CC); 2011 (2) BCLR 207 (CC) (23 Nov 2010) para [59]; Gerber and Curlewis *THRHR* (2018) 353-355; and Gerber and van Eck *THRHR* (2019) 156 and 157.

¹⁸² S 13P of the B-BBEE Act.

¹⁸³ Act 46 of 2013 published in *Government Gazette* No. 37271 dated 27 Jan 2014 which commenced on 24 Oct 2014.

¹⁸⁴ Published in *Government Gazette* No. 29617 dated 9 Feb 2007.

¹⁸⁵ *Government Gazette* No. 36928 dated 11 Oct 2013 implemented on a transitional period with full implementation on 1 May 2015 by means of *Government Gazette* No. 38764 dated 5 May 2015.

¹⁸⁶ S 10 of the B-BBEE Act. Also see Jack (2007) 78; and Jeffery (2014) 138, 143 who cite B-BBEE as a social economic and strategic imperative rather than a legal obligation. Also see Balshaw and Goldberg (2014) 39.

Depending on the size and category of a measured entity, there are three ways to prove B-BBEE compliance: Firstly, by means of an affidavit; secondly, a certificate issued by the Companies Intellectual Property Commission (CIPC); or thirdly, measurement in terms of a scorecard, in which case a B-BBEE compliance certificate is issued by a verification or rating agent.¹⁸⁷

The levels of compliance in terms of a scorecard are determined according to the total number of points earned on a scorecard for various B-BBEE initiatives embarked on by a measured entity. The initiatives are divided into elements. Level 1 is achieved if more than 100 points are scored, and level 8 for entities scoring between 40 and 50 points on the scorecard. Those with fewer than 40 points are considered to be “non-compliant” entities.¹⁸⁸ The maximum number of points is 120.

The criteria to decide whether the scorecard or other means must be used to determine compliance, are based on the size of a business and the percentage of black ownership for smaller categories of business. The size of a business is based on the total annual revenue (turnover) of a business.¹⁸⁹

According to the annual turnover of a business, businesses are divided into three categories, namely: Exempted Micro Enterprises (EMEs) – annual turnover of R10 million or less (which includes Start-Up Enterprises in the first year of operation); Qualifying Small Enterprises (QSEs) – between R10 million and R50 million; and Large or Generic Enterprises – more than R50 million.¹⁹⁰

An EME has three ways to prove its B-BBEE Status Level: Firstly, by means of an affidavit deposited of by the owner of the EME or a certificate issued by CIPC. All EMEs receive an automatic Status Level 4 merely based on their annual turnover as the sole criteria.¹⁹¹ Secondly, all EMEs with 51% or higher black ownership qualify for a Status Level 2, while those that are 100% black owned receive a Status Level 1.¹⁹² These black-owned EMEs prove their Status

¹⁸⁷ Para 3.2 of Statement 000 of the B-BBEE Codes.

¹⁸⁸ As above para 9.2.

¹⁸⁹ As above Schedule 1 the definition of “Total Revenue”.

¹⁹⁰ As above paras 4-8. Some of these annual turnover thresholds may differ for entities under the Sector Codes published for particular sectors of the economy in terms of s 9(1)(e) of the B-BBEE Act.

¹⁹¹ As above para 4.2 of Statement 000 of the B-BBEE Codes.

¹⁹² As above para 4.4.

Levels by means of an affidavit.¹⁹³ Two criteria apply to these types of black-owned EMEs: Black ownership and annual turnover. Thirdly, all other EMEs or any one of the first two types of EMEs for which an affidavit or CIPC certificate can be used, may opt for measurement on a scorecard if they choose to achieve a higher Status Level than the fixed Status Levels determined by the B-BBEE Codes.¹⁹⁴ For instance, entities with at least 51% but less than 100% black ownership qualify for a Status Level 2. If they want to proceed to a Status Level 1 without 100% black ownership, they can choose to be measured in terms of a scorecard.

QSEs can prove their B-BBEE Status Levels in two ways, namely an affidavit or a certificate issued by a verification agent based on a scorecard. QSEs do not have the option of a CIPC certificate. QSEs with at least 51% black ownership qualify for a Status Level 2 and QSEs with 100% black ownership, a Status Level 1.¹⁹⁵ Both these types of black-owned QSEs can merely depose of an affidavit annually confirming their annual turnover and level (percentage) of black ownership. Such affidavit serves as proof of their B-BBEE Status Level.¹⁹⁶ All other QSEs must, in order to prove compliance, be measured in terms of a scorecard, including those black-owned QSEs which chose to enhance their B-BBEE Status Levels from the fixed Levels set by the Codes.¹⁹⁷

Large (generic) Enterprises can only prove their B-BBEE Status Level in one way and that is by means of a scorecard referred to as a Generic Scorecard.¹⁹⁸

It is submitted that the B-BBEE mechanism is a complicated system of definitions, rules and calculations. This requires professional advice, which makes compliance with B-BBEE onerous and expensive.

6.4.1 Scorecards

Two types of scorecards are provided for by the Codes: a scorecard for Large Enterprises¹⁹⁹

¹⁹³ As above para 4.6.

¹⁹⁴ As above para 4.5.

¹⁹⁵ As above para 5.3.

¹⁹⁶ As above para 5.3.3.

¹⁹⁷ As above para 5.4.

¹⁹⁸ As above para 6.2.

¹⁹⁹ As above paras 3.2.3 and 8.

referred to as a “Generic Scorecard” and one for QSEs referred to as a “QSE Scorecard”.²⁰⁰ An EME which requires measurement in terms of a scorecard, must be measured in terms of the QSE Scorecard. The QSE Scorecard has the same elements as a Generic Scorecard. The targets and requirements for earning points on some of the sub-categories, are less onerous for the QSE Scorecard.²⁰¹

For those entities whose B-BBEE compliance must be determined by measurement in terms of a scorecard, so-called “elements” (initiatives) are measured, with the total points scored for all elements determining the level of a measured entity’s B-BBEE compliance. Each element on the scorecard is broken down in smaller sub-elements, components or units, each with its own criteria or rules enumerated in the B-BBEE Codes to be recognised. The following elements and points are applicable to the Generic Scorecard: Ownership, 25 points; Management and Control (including Employment Equity) as a component, 19 points; Skills Development, 20 points; Enterprise and Supplier Development (including Preferential Procurement as a sub-element), 42 points; and Socio-Economic Development, five points. The Generic Scorecard totals 111 points, with a maximum of 120 points, including bonus points.²⁰²

6.4.1.1 The Ownership Element

The target for black ownership is 25,1%. The Ownership Element measures three main “indicators” as sub-elements to determine the level of black ownership of an entity. The first main indicator is exercisable voting rights. For this sub-element, four points are awarded and if black women hold at least 10% of the exercisable voting rights in an entity,²⁰³ a further two points are awarded. The second indicator is economic interest for six points, of which two further points are awarded if at least 10% of the economic interest accrues to black women.²⁰⁴ The third indicator is for the realisation of equity value to a black shareholder with a maximum of eight points.²⁰⁵ This indicator measures the percentage of acquisition debt outstanding against the value of the shares (equity).²⁰⁶ Points are only allocated for the portion unencumbered by debt (“net

²⁰⁰ As above para 3.2.3.

²⁰¹ *Code Series 600: Measurement Framework for Qualifying Small Enterprises (QSEs)* published in *Government Gazette* No. 38766 dated 6 May 2015.

²⁰² Paras 9.1 and 9.2 of Statement 000 of the B-BBEE Codes.

²⁰³ As above para 2.1 of Statement 100.

²⁰⁴ As above para 2.2.

²⁰⁵ As above para 2.3.

²⁰⁶ Schedule 1 of the B-BBEE Codes and the definition of “Acquisition Debt”.

value”).²⁰⁷ The greater the equity portion unencumbered and the greater the real net value of the shares, the more points are awarded. Other initiatives for which points can be earned under the Ownership Element are for black broad-based programmes, such as employee share ownership programmes and community programmes (three points), if such programmes hold at least 3% of the total shareholding.²⁰⁸ For shares held by “New Entrants”, two more points are awarded.²⁰⁹ A New Entrant is described as a black person holding less than R50 million in equity value.²¹⁰

Black people may hold their rights of ownership directly or indirectly through some form of entity such as: a Company; a Close Corporation; a Co-operative; a Trust; a Broad-Based Ownership Scheme; an Employee Share Ownership Programme; a partnership or other association of natural persons; or any form of juristic person recognised under South African Law.²¹¹ The Codes also allow for black people to hold shares through pension and private equity funds to be recognised under Black Ownership.²¹²

The Codes, when measuring the rights of ownership by black people, only recognise rights ultimately held by natural persons. To determine the percentage “black natural persons” holding shares through legal entities in one another, the “Flow-Through Principle” is used to determine the ultimate beneficiaries.²¹³

Therefore, if a company holds shares in another company, only the percentage shares held by black natural persons in the measured company will be recognised in proportion to the holding company’s overall shareholding in that other (measured) entity. For instance, if Company A, which is 70% black owned, holds 26% of the shares in Company B, then the percentage black shareholding in Company B will be calculated as 70 x 26%, which equates to 18,2% black ownership in Company B. Pro-rata points will be awarded to Company B as it does not meet the full target of 25,1% black ownership.

²⁰⁷ Annexe 100 (E), paras 3 and 4 of Statement 100 of the B-BBEE Codes provide a formula for calculating the Acquisition Debt against the value of the shares of a period of 10 years.

²⁰⁸ Para 2.2.3 of Statement 100 of the B-BBEE Codes.

²⁰⁹ As above para 2.2.4.

²¹⁰ As above Schedule 1 and the definition of “Black New Entrant”.

²¹¹ Para 3.1.1 of Statement 100 of the B-BBEE Codes.

²¹² As above para 3.10.

²¹³ As above para 3.3.

6.4.1.2 The Management and Control Element

With regard to the Management and Control Element, the main objective is to measure the representation of black people at management level and the control exercised by black people within a measured entity at board of directors and management level.²¹⁴ This is done by calculating the percentage of voting rights in the hands of black people on the board of directors and the percentage of black people appointed at all other management levels within a measured entity.²¹⁵ The other management levels measured are: other executive managers who are not board members; senior management; middle management and junior management.

The target for voting rights exercisable by black people at board level is 50% for six points, of which two points are allocated if at least 25% of the voting rights are exercisable by black female board members.²¹⁶ The target for other executive managers who are not board members, is 60%, with three points awarded if at least 30% of the other executive management are black females.²¹⁷ The same target of 60% for three points applies to senior management level.²¹⁸

For middle management, the target for positions held by black people is 75%, and for junior management 88% for three points each. The three points include one point at each middle- and junior-management level if half of the targets are met by black females.²¹⁹

Two points are also awarded if black employees with disabilities represent at least 2% of the total workforce of a measured entity.²²⁰ The 2 points awarded for disabled persons are the only non-management component measured under this element.

In determining a measured entity's score, the targets for senior-, middle- and junior-management levels should be further broken down into specific criteria according to the different race sub-groups within the definition of "black people" in the Employment Equity Act, referred to as the Economic Active Population (EAP) targets.²²¹

²¹⁴ Para 1 of Statement 200 of the B-BBEE Codes.

²¹⁵ As above para 2.1.

²¹⁶ As above paras 2.1.1 – 2.1.4.

²¹⁷ As above para 2.2.

²¹⁸ As above para 2.3.

²¹⁹ As above paras 2.4 and 2.5.

²²⁰ As above para 2.6.

²²¹ As above para 2.2. The EAP targets are published quarterly in the *Quarterly Labour Force Survey (QLFS)* by Stats SA based

This means that at all management levels, excluding board level, points are awarded if the EAP demographic and gender targets for black people are represented in proportion to the EAP targets set by the Codes, namely black males, black females, coloured males, coloured females, Indian males and Indian females.²²²

To explain the above: if a measured entity has 10 junior manager positions in total, nine will have to be filled by black people in order to meet the scorecard target for junior management level of 88%, and at least four of the nine should be black females to meet the gender target of 44%. The nine black people further have to meet the EAP demographic representativity target. According to the EAP national demographic target, Africans represent 87,6%, Coloureds 10,1% and Indians 2,3%.²²³ So, out of the nine positions, Africans will have to occupy eight positions, leaving one position to be filled by either a coloured or Indian male or female. This illustrates that it is not possible to fit all the demographic requirements mathematically into all post levels available with the minority groups squeezed out of the equation.

In the above example, the minority groups are left with three positions short. The way in which the mathematical representativity calculation works, and for measured entities to receive maximum points, the African group as the overwhelming majority's target (quota) will be filled first irrespective whether enough positions are available to accommodate all the black groups. What is left over will be filled by the minority groups. The points lost for not filling quotas set for Coloureds and Indians are minimal compared to the points lost if not filled by Africans.

To further illustrate the above: if all nine black positions are equally filled by African males and African females, the measured entity will receive almost all the points as only one position out of the nine is not filled by a minority group. On the other hand, if all nine positions are filled by Coloureds or Indians, a measured entity will only receive recognition for one position and receive almost no points. The other eight positions which ought to be filled by Africans will not be recognised and no points will be earned by a measured entity. Therefore, the representativity formula does not only benefit Africans based on their superior numbers, but also in the way the

on the total number of people between the ages of 15 and 64 willing or able to work. It excludes persons not working, not seeking work or not available for work.

²²² Para 4.1 of Statement 200 of the B-BBEE Codes.

²²³ Stats SA *Mid-year population estimate* (2022) viii disregarding the white percentage, based on only Africans, Coloureds and Indians.

B-BBEE Codes are designed and operate.

6.4.1.3 The Skills Development Element

With the Skills Development Element the aim is to measure a measured entity's contribution to the training and development of black people.²²⁴ Four groups of black beneficiaries are targeted, namely black employees, black unemployed persons, black employees with disabilities, and black students at Higher Education Institutions.

The contribution towards the training of black people is determined by calculating the amount spent by a measured entity on skills development initiatives for black people as a percentage of its payroll ("Leviable Amount").²²⁵ This Leviable Amount target is 6% in the case of Large Enterprises which are measured in terms of the Generic Scorecard.²²⁶

For instance, if a measured entity's annual payroll is R10 million, it needs to spend R600 000 per year on the training of black people. This 6% target is broken down into sub-targets as follows: 3,5% on general learning programmes contained in the B-BBEE Codes²²⁷ for six points; 2,5% on bursaries for black students at Higher Education Institutions for four points; and 0,3% on learning programmes specified in the B-BBEE Codes for black employees with disabilities.²²⁸ The Skills Development Element further requires that the number of black people (employed or unemployed) participating in learnership,²²⁹ apprenticeship²³⁰ and internship²³¹ programmes should be at least 5% of the total workforce (black and white employees) to earn six points.²³² This element encourages the enrolment of specifically unemployed black persons for learnership, apprenticeship and internship programmes as it allows for five bonus points if

²²⁴ Paras 2.1 and 5 of Statement 300 of the B-BBEE Codes.

²²⁵ As above para 2.1.1. The term "Leviable Amount" is derived from the 1% portion of payroll on which entities pay Skills Development Levies in terms of the Skills Development Levies Act 9 of 1999.

²²⁶ Para 2.1.1 of the B-BBEE Codes.

²²⁷ As above Annexe 300(A) provides for various types of training programme by means of a Learning Programme Matrix: Bursaries or scholarships; Internships; Learnerships; Learnerships or Internships; Work-integrated learning; Informal training by means of a Learning Programme Matrix (Occupationally directed) and Informal training (work-based).

²²⁸ As above paras 2.1.1.1 – 2.1.1.3 of Statement 300 of the B-BBEE Codes.

²²⁹ Schedule 1 of the B-BBEE Codes defines a "Learnership" as a work-based route to qualification. It is a workplace education and training programme consisting of structured practical workplace experience and structural theoretical training.

²³⁰ As above defines "Apprenticeship" as an agreement between an apprentice and an employer for a set period of time during which the apprentice works and receive training in the workplace.

²³¹ As above defines an "Internship" as an opportunity to integrate career related experience into undergraduate education by participating in planned supervised work.

²³² Para 2.1.2.1 of Statement 300 of the B-BBEE Codes.

unemployed learners on these training programmes are employed after completion of the learnership, apprenticeship or internship programmes.²³³

Apart from the expenditure on employees with disabilities, all training expenditure must be based on the overall EAP demographic representativity of black people.²³⁴ The sub-targets should therefore be broken down similarly to those of the Management and Control Element according to the different race sub-groups within the definition of “black people” as well as gender in each race group.²³⁵ For instance, if a measured entity is required to spend an amount of R600 000 as its target on the training of black people, then based on the EAP national demographic targets of 2022, 87,6% of the target amount equating to R525 600 must be spent on Africans, 10,1% or R60 600 on Coloureds and 2,3% or R13 800 on Indians, with at least half of these amounts spent on females in each race group.

6.4.1.4 The Enterprise and Supplier Development Element

This element consists of three sub-elements, namely Enterprise Development, Supplier Development and Preferential Procurement.²³⁶ The aim of this element is to benefit primarily black-owned enterprises and to a lesser extent other small businesses by assisting them operationally and by procuring goods and services from them as preferred suppliers.

The Enterprise Development sub-element allows for five points if a measured entity spent at least 1% of its annual net profit after tax (NPAT)²³⁷ on initiatives to assist black-owned EMEs and QSEs.²³⁸ Large entities which are at least 51% black owned may also be beneficiaries of Enterprise Development initiatives on condition that they started to receive assistance or contributions as Enterprise Development beneficiaries when they were still EMEs or QSEs. Large black-owned beneficiary enterprises may only qualify for Enterprise Development contributions for five years after becoming a Large Enterprise.²³⁹

²³³ As above para 2.1.3.

²³⁴ As above para 2.2.

²³⁵ As above para 2.3 and Annexe 300(B).

²³⁶ Para 3 of Statement 400 of the B-BBEE Codes.

²³⁷ As above para 3.1 contains a formula if an enterprise does not make a profit or its profits is less than a quarter of the industry norm as published quarterly by Stats SA, or for an average NPAT to be calculated over the five preceding financial periods, or to use the net profit of the industry norm.

²³⁸ As above para 2.3.

²³⁹ As above para 3.7.

Types of initiatives that are recognised as enterprise development contributions include investments in beneficiary entities; loans made to beneficiary entities; grant contributions paid to beneficiary entities; assistance with overhead costs of beneficiary entities; discounts provided to beneficiary entities; provision of training or mentorship for beneficiary entities; and payments made by the measured entity to suitably qualified third parties to perform enterprise development on the measured entity's behalf.²⁴⁰

The criteria for the Supplier Development sub-element are the same as for the Enterprise Development sub-element, with two exceptions, namely: the beneficiary entity of a supplier development contribution must be a supplier of goods and services to the measured entity; and the target to be spent needs to be 2% of NPAT to earn 10 points.²⁴¹

The aim with the two sub-elements, Enterprise Development and Supplier Development, is to develop an enterprise development beneficiary's operational capacity to become a supplier of the measured entity.²⁴² One bonus point is then awarded if an enterprise development beneficiary ultimately becomes a supplier of the measured entity.²⁴³ Another bonus point is awarded if any new jobs are created with an enterprise development or supplier development beneficiary as a result of the contributions received from a measured entity.²⁴⁴

The aim with the Preferential Procurement sub-element is to give preference to black-owned enterprises in the procurement of goods and services. Under this sub-element, points are awarded according to the B-BBEE Status Level of a measured entity's suppliers and the amount procured from such a supplier in proportion to the total annual procurement of a measured entity. The total amount of a measured entity's procurement is referred to as "total measured procurement spent" (TMPS).²⁴⁵ The TMPS consists of the total operational and capital expenditure as well as cost of sale components as reflected in a measured entity's annual financial statements.²⁴⁶ Financial expenses that are excluded from the TMPS are taxation; salaries; wages; remunerations and emoluments; imported capital goods or components for

²⁴⁰ As above para 9.

²⁴¹ As above para 2.2.

²⁴² As above para 4.9.

²⁴³ As above para 2.4.1.

²⁴⁴ As above para 2.4.2.

²⁴⁵ As above Annexe 400(A).

²⁴⁶ As above para 5.

value-added production in South Africa where such capital goods or components are not produced locally; and pass-through third-party procurement. Pass-through third-party procurement is all procurement for a third party or a client that is recorded as an expense in the third party or client's annual financial statements and not recorded in the measured entity's annual financial statements.²⁴⁷

For the purpose of calculating the amount spent per supplier, each R1 procured is recognised according to the B-BBEE Recognition Level of a supplier. The B-BBEE Recognition Level is determined in accordance with a supplier's B-BBEE Status Level. For instance, if a supplier has a Status Level 1, then their Recognition Level is 135%. Entities with a B-BBEE Status Level 4 have a Recognition Level of 100%, while those on the lowest Status Level of 8 have a Recognition Level of 10%. Non-compliant entities have a 0% Recognition Level.²⁴⁸ This means that for every rand procured from a Status Level 1 Contributor, R1,35 can be recognised as procured from that supplier, while for procurement from a Status Level 4 Contributor, R1 can be recognised for every R1 procured. With procurement from a Status Level 8 Contributor, R0,10 can be recognised for every R1 procured. The points recognised under the Preferential Procurement sub-element works on a sliding scale, with 135% for the highest Recognition Level (level 1) and 10% for the lowest level (level 8).

A measured entity cannot earn all the points under the Preferential Procurement sub-elements by procuring all its goods and services from one high B-BBEE Status Level Contributor. The percentage of the TMPS to be spent is broken down in components to ensure procurement from a wide array of businesses, especially black-owned and smaller businesses. The overall preferential procurement target is 80% of TMPS from suppliers across all categories according to their respective Recognition Levels to earn five points. The overall target of TMPS is broken down as follows: 15% of the TMPS procured from QSEs for three points; 15% from EMEs for four points; 50% from at least 51% black-owned suppliers for 11 points; and 12% from at least 30% black women-owned suppliers for four points.²⁴⁹ Two bonus points are awarded if 2% is

²⁴⁷ As above para 6.

²⁴⁸ Para 9.2 of Statement 000 of the B-BBEE Codes.

²⁴⁹ As above paras 2.1.1 – 2.1.5.

procured from Designated Group Suppliers²⁵⁰ that are at least 51% black owned.²⁵¹ For example, if a measured entity procures R10 of his total TMPS target of R100 from a supplier with a Recognition Level 1, then R13,5 will be recognised based on the 135% Recognition Level calculation. If that supplier is also at least 30% black women owned, the measured entity will meet the target of 12% of its TMPS procurement from such category of entities and earn the full four points for this component.

6.4.1.5 The Socio-Economic Development Element

The objective of the Socio-Economic Development Element is to recognise the facilitation of income-generating activities for black people and the promotion of sustainable access for black beneficiaries to the economy.²⁵² The beneficiaries of socio-economic development contributions are communities, those living in rural areas, and natural persons or groups of natural persons where at least 75% of such groups or collective beneficiaries are black people.²⁵³

The B-BBEE Codes recognise the amount spent on socio-economic development initiatives as a target of 1% of a measured entity's NPAT for five points.²⁵⁴ Socio-economic initiatives recognisable are to a large extent the same as for the Enterprise Development and Supplier Development sub-elements and include grant contributions to black beneficiaries; guarantees given or security provided for credit or loans for beneficiaries; direct costs incurred by a measured entity in assisting beneficiaries; capital advances to beneficiary communities; provision of training or mentorship for beneficiary communities; and payments made by measured entities to third parties to perform socio-economic development on the measured entity's behalf.²⁵⁵

²⁵⁰ As above Schedule 1 defines "Black Designated Groups" as: unemployed black people not attending and not required by law to attend an educational institution and not awaiting admission to an educational institution; Black people who are youth between the age of 18 and 34 years of age; Black people with disabilities; Black people living in rural and underdeveloped areas; and Black military veterans.

²⁵¹ Para 2.1.6 of Statement 400 of the B-BBEE Codes.

²⁵² Para 3.2.1 of Statement 500 of the B-BBEE Codes.

²⁵³ As above Schedule 1 the definition of "Socio-Economic Development Contributions".

²⁵⁴ Para 2.3 of Statement 500 of the B-BBEE Codes.

²⁵⁵ As above para 3.2.4.

6.4.1.6 Raising or Lowering of Overall Scorecard Levels

With the implementation of the 2013 Amended Codes, a new mechanism was introduced to prioritise certain B-BBEE elements on the scorecards.²⁵⁶ For these priority elements a sub-minimum of 40% of the aggregate points for the respective priority elements (excluding bonus points) is required.²⁵⁷ If the sub-minimum is not achieved on any one of the priority elements, the measured entity's overall Status Level is lowered by one level.²⁵⁸

A measured entity can only be lowered by one level. This means that if a measured entity misses out on more than one priority element, the entity's status will still only be lowered by one level. Measured entities are not penalised a level for each priority element in which they fail to meet the sub-minimum targets.²⁵⁹

For Large Enterprises, there are three priority elements: the Ownership Element; Skills Development Element; and Enterprise and Supplier Development Element (which includes procurement as a sub-element).²⁶⁰ The priority requirement under the Ownership Element does not apply for the whole element, but only for the Net Value sub-element which accounts for eight of the 25 ownership points. For this sub-element, a point of at least 3,2 (40% of eight points) is required to meet the sub-minimum pre-condition.²⁶¹ The points for the Net Value sub-element are based on a formula which calculates the value of the shares less any encumberment over the paying-off period up to a maximum of 10 years. The prioritisation of this sub-element is to ensure that black partners receive at least some equity value on entering equity transactions.²⁶²

The priority element requirements for QSE Scorecards allow for a little more leeway. The Ownership Element is a compulsory priority element (sub-element of Net Value). A QSE can then choose one of the other two priority elements, namely the Skills Development Element or the Enterprise and Supplier Development Element, as a priority element.²⁶³ A QSE does not have to comply with both the Skills Development Element and Enterprise and Supplier

²⁵⁶ Para 3.3 of Statement 000 of the B-BBEE Codes.

²⁵⁷ As above para 3.3.3.1.

²⁵⁸ As above para 3.3.3.

²⁵⁹ As above para 3.3.3.1.

²⁶⁰ As above para 3.3.1.

²⁶¹ As above para 3.3.1.1.1.

²⁶² Para 4 of Annexe 100 (E) of Statement 100 of the B-BBEE Codes.

²⁶³ As above para 3.3.2.2.

Development Element as priority elements.

In 2018, under the “New Dawn” banner of President Ramaphosa,²⁶⁴ a new initiative was added to the B-BBEE legal framework. Entities could employ young people as part of the so-called Youth Employment Service (YES) Programme²⁶⁵ to achieve higher (advanced) Status Levels. The above were incorporated into the B-BBEE Codes, which resulted in the 2019 Amendments to the Codes.²⁶⁶ The YES Programme allows all entities measured in terms of a scorecard to enhance their scorecard Status Levels by one level if they meet the target for youth employment, and by two levels if they achieve twice the target. The targets for youth employment in terms of the YES Programme are set according to the number of persons already employed by EMEs and QSEs and the annual turnover for Large Enterprises. The targets work on a sliding scale; the more people employed by an EME or QSE or the higher the annual turnover of a Large Enterprise, the higher the target. For instance, if an EME or QSE employs one to 19 employees, the target is one employee. If 80 to 99 are employed, the target is five employees. For Large Enterprises with an annual turnover of between R50 million and R75 million, the target is six YES employees, and for those with an annual turnover of between R250 million and R299 million, the target is 11 employees.²⁶⁷

6.4.2 Government’s Role and Dynamics of B-BBEE

Government plays an important role in the B-BBEE programme in two ways. Firstly, government procures significant amounts from the private sector annually.²⁶⁸ Section 217(2) of the Constitution provides that government may, contrary to standard financial principles, procure on a preferential basis where the objective is to advance people who were disadvantaged by unfair discrimination.²⁶⁹

²⁶⁴ Simpson (2021) 460.

²⁶⁵ *Department of Trade and Industry Notice 640 of 2018 Practice Note 1 of 2018 – Youth Employment Service Initiative* published in *Government Gazette* No. 41975 dated 12 Oct 2018 (hereafter referred to as *DTI Practice Note 1 of 2018*).

²⁶⁶ *Amended Codes 31 May 2019* published in *Government Gazette* No. 42496 dated 31 May 2019.

²⁶⁷ Para 4 of *DTI Practice Note 1 of 2018* (note 265 above).

²⁶⁸ *National Treasury Public Sector Supply Chain Management Review* (2015) 3 estimates expenditure on public procurement on around R500 billion per annum. Also see the *Judicial Commission of Inquiry into State Capture Report: Part 1: Vol. 2 720* which shows government procurement as R967 billion.

²⁶⁹ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Office, South African Social Security Agency and Others* [2013] ZACC 42 para [47]. Also see *Minister of Finance* (note 111 above) para [98] in which the court held that not recognising the disadvantage of the majority of people in government procurement will perpetuate disadvantage and widening of its gap.

Secondly, section 10 of the B-BBEE Act compels every organ of state and public entity to apply any relevant code of good practice issued in terms of the B-BBEE Act, amongst others, for determining qualification criteria for the issuing of licences; awarding of incentives and grants; and developing and implementing a preferential procurement policy.²⁷⁰

Government's preferential procurement regulations provide for a points system in which B-BBEE-compliant entities receive preference for providing goods and services to government. This ultimately forces entities to embark on strategies to enhance their B-BBEE compliance through black ownership and other initiatives in order to be considered for government contracts.

Apart from supplying goods to government, many businesses also need a high B-BBEE Status Level to be considered for the issuing of licences and permits such as import and export licences from government, to do business. Anthea Jeffery, prominent legal and political commentator, and an author who holds a doctorate in law from the University of London, contends that BEE negatively affects businesses and the economy. She refers to the significant costs involved for enterprises to become compliant. These costs and regulatory burden “are a significant irritant” to multinational corporations and led to disinvestment and scaling down of multinational operations in South Africa.²⁷¹

For those businesses not doing any business with government or which are not dependent on government licences to operate, participation in B-BBEE is determined by their clients, what their competitors are doing with regard to B-BBEE, and what their B-BBEE capabilities are. Measured entities force their suppliers to have good Status Levels as this would increase a measured entity's own points under the Preferential Procurement sub-element of the scorecard.

The dynamics of B-BBEE in the economy are such that all businesses will eventually be involved because an entity's Status Level is determined by their suppliers' status, while their suppliers' status, in turn, is determined by their own suppliers and so forth. This is often referred to as the cascading effect in the supply chain.²⁷² The influence of a supplier's B-BBEE status on a measured entity's B-BBEE compliance is measured under the sub-element of Preferential

²⁷⁰ S 10(1)(a)-(e) of the B-BBEE Act.

²⁷¹ Jeffery (2014) 348 to 353.

²⁷² Balshaw and Goldberg (2014) 24; and Jeffery (2014) 144 and 165.

Procurement and has become the main driver of the B-BBEE process.²⁷³ The pressure put on suppliers by their clients to become B-BBEE compliant and continuously improve their B-BBEE compliancy, as well as the preference given to black-owned entities, will to a large extent determine a business's need and imperative to participate in the B-BBEE programme.²⁷⁴

Many businesses are therefore required to comply with B-BBEE, such as those supplying goods and services directly to government and those depending on permits to be issued by government. They are the first-tier suppliers. The second-tier suppliers that are required to comply with B-BBEE are those enterprises which supply goods and services to first-tier enterprises and third-tier suppliers who supply to second-tier enterprises and so forth. This cascading effect forces almost all enterprises to be B-BBEE compliant.

Therefore, many businesses need a good B-BBEE compliance level to remain in business, which contradicts the claim that B-BBEE is purely "voluntary".²⁷⁵ Apart from the normal competitive elements confronting every business, namely price, quality and service, South Africa has an additional competitive criterion, namely B-BBEE compliance or B-BBEE status.²⁷⁶

6.5 LIFESPAN AND MONITORING OF B-BBEE PROGRESS

The B-BBEE Act as such does not provide for a duration period or deadline for when the B-BBEE programme will be phased out. The B-BBEE Strategy issued in 2003 in terms of the Act, indicated that government's objective is to achieve its vision in terms of BEE by 2014. Government's vision is enunciated in the B-BBEE Strategy as "an economy that can meet the needs of all economic citizens – our people and their enterprises – in a sustainable manner". This is to be achieved if South Africa "builds on the full potential of all persons and communities" in South Africa.²⁷⁷ The National Planning Commission indicated in 2012 that preference for

²⁷³ Paras 3.1.2 and 3.1.3 of Statement 000 of the B-BBEE Codes provide that the Codes apply to "all measured entities that undertake any economic activity with all Organs of State and Public Entities; [and] any other Measured Entity that undertakes...any economic activity with any other Measured Entity...".

²⁷⁴ Balshaw and Goldberg (2014) 14; and Jack (2007) 26, 298 and 299. According to Jack those procuring directly from government are first-tier suppliers and they must buy from second-tier suppliers that have a high B-BBEE recognition level. "Through this trickledown effect the business imperative is driven to virtually every business operation in SA", Jack says.

²⁷⁵ Jack (2007) 79; and Jeffery (2014) 138 who cite B-BBEE as a social economic and strategic imperative rather than a legal obligation.

²⁷⁶ Kleynhans and Kruger *Acta Commercii* (2014) 1; and Balshaw and Goldberg (2014) 56.

²⁷⁷ Department of Trade and Industry (DTI) *South Africa's Economic Transformation: A Strategy for Broad-Based Black Economic Empowerment* (2003) 4.

defining historical disadvantage should be accorded to race “for at least the next decade”.²⁷⁸

By 2014, the B-BBEE Act had not been revoked as suggested by the B-BBEE Strategy but was replaced by a more onerous B-BBEE Amendment Act and B-BBEE Codes. No further indication was provided as to when the B-BBEE programme would be phased out. The amended B-BBEE Codes indicate under the heading “Duration of the B-BBEE Codes” that a Code remains in effect until amended, substituted or repealed.²⁷⁹ Although the initial suggestion was that B-BBEE would be phased out after 10 years, the B-BBEE programme is in fact in place for an indefinite period. The South African B-BBEE programme differs in this regard markedly from the Malaysian redress programme, the New Economic Plan (NEP), introduced in 1971. The effectiveness of the NEP was measured by setting a 30% ownership target in public corporates for the Bumiputera by 1990.²⁸⁰

The B-BBEE Act makes provision for the monitoring of certain BEE transactions. In terms of the Act, one of the B-BBEE Commission’s functions is to maintain a register of “major broad-based black economic empowerment transactions”. Major B-BBEE transactions are transactions above a threshold determined by the Minister by notice in the *Government Gazette*.²⁸¹ The threshold value of B-BBEE transactions above which the B-BBEE Commission must maintain a register is R25 million.²⁸²

The Act further provides that the B-BBEE Commission may receive and analyse reports, as may be prescribed concerning B-BBEE compliance, from organs of state, public entities and private sector enterprises.²⁸³

The B-BBEE Act also places a reporting duty on certain entities. All spheres of government, public entities and organs of state are required to report on their compliance with B-BBEE in their audited annual financial statements.²⁸⁴

²⁷⁸ National Planning Commission *The National Development Plan (NDP) 2012-2023* (2012) 467.

²⁷⁹ Para 12.1 of the B-BBEE Codes.

²⁸⁰ See ch 4 para 4.3.1.2, above.

²⁸¹ S 13F(1)(f) of the B-BBEE Act.

²⁸² *Threshold for Major B-BBEE Transactions* published in *Government Gazette* No. 40898 dated 9 Jun 2017.

²⁸³ S 13F(1)(g) of the B-BBEE Act.

²⁸⁴ As above s 13G(1).

All public companies listed on the JSE must provide the B-BBEE Commission annually with a report on their compliance with B-BBEE.²⁸⁵ In order to give effect to these provisions of the Act, the Minister issued and published the B-BBEE Regulations.²⁸⁶

From the reports submitted by government, public entities and public listed entities, as well as those of major B-BBEE transactions, the B-BBEE Commission annually issues two reports: the *Analysis of Major B-BBEE Transactions Report* and the *National Status and Trends on B-BBEE Transformation*. These annual reports are also accompanied by media statements released by the B-BBEE Commission. In respect of the 2021 *National Status and Trends Report*,²⁸⁷ the B-BBEE Commission stated in its 2022 *Media Release*²⁸⁸ that overall black ownership had declined to 29,5% from 31% in 2020, with Management and Control down to 51,6% from 57% in 2020. Further, no entities listed on the JSE are 100% black owned, which is the same as in 2020, while 3% were reported in 2019 and 1% in 2018. The Commission further noted that this decline in black ownership persists despite the fact that more than 500 “B-BBEE ownership deals” worth over R600 billion in transactional value had been reported to the B-BBEE Commission since 2017.²⁸⁹

The statutory requirement to report on black ownership does not oblige enterprises to report to the B-BBEE Commission the category of black people benefitting from B-BBEE ownership transactions. Although the B-BBEE Codes aim to benefit black designated groups, government does not have a system in place to monitor who had benefitted from, for instance, the R600 billion worth of B-BBEE transactions that the B-BBEE Commission reported on.

In this regard, the Committee on the Elimination of Racial Discrimination (CERD) also referred to the lack of adequate data and failure by the South African government to effectively promote equality. In considering South Africa’s fourth to eighth periodic reports to the CERD on compliance with the International Convention on the Elimination of All Forms of Racial Discrimination, the CERD noted 24 concerns to substantiate its view that South Africa is in non-compliance with the Convention.²⁹⁰ Three of these concerns relate to this study: (1) “Statistical

²⁸⁵ As above s 13G(2).

²⁸⁶ Regs 12 and 18 of the B-BBEE Regulations published in *Government Gazette* No. 40053 dated 6 Jun 2016.

²⁸⁷ B-BBEE Commission *National Status and Trends on B-BBEE Transformation Report 2021* 77, 78 and 85.

²⁸⁸ B-BBEE Commission *Media Release* (Jul 2022) 31.

²⁸⁹ As above.

²⁹⁰ CERD *Concluding observations on the combined fourth to eighth periodic reports of South Africa* (5 Oct 2016) 2-6.

data”;²⁹¹ (2) “Special measures”;²⁹² and (3) the “Situation of black and marginalised ethnic women and girls”.²⁹³

In respect of “Statistical data”, the CERD emphasised that South Africa needs a more exhaustive set of demographic statistics disaggregated as required by article 1(1) of the Convention.²⁹⁴

Regarding “Special measures”, the CERD noted the special measures implemented by the South African government through the EEA and B-BBEE Act. However, the CERD expressed its concern over the lack of comprehensive disaggregated data on the impact of these special measures on affected groups, especially the most disadvantaged and vulnerable among them. This lack of comprehensive data on the impact of special measures is, according to the CERD, contrary to the Committee’s *General Recommendation No. 32* issued in 2009.²⁹⁵

In respect of the “Situation of black and marginalised ethnic women and girls”, the CERD expressed its concern that their vulnerable position due to multiple forms of discrimination and the need to promote equal access to services is not adequately addressed by special measures and legislation, contrary to the Committee’s *General Recommendation No. 23* issued in 1997.²⁹⁶

South Africa was required to take corrective measures in respect of the concerns raised by the CERD, and to indicate in its next periodic report how these concerns were addressed.²⁹⁷ In the CERD’s evaluation of South Africa’s ensuing periodic report in 2023, the same concerns were raised in respect of “Statistics” and “Special measures” as in the 2016 assessment.²⁹⁸

In respect of Statistics, the CERD again expressed concerns about the lack of comprehensive and disaggregated statistics on Indigenous People, for instance the Khoisan and non-citizens such as migrants, refugees, asylum-seekers and stateless persons.²⁹⁹ The Committee stated that the lack of comprehensive data limits the ability of the Committee to properly assess the

²⁹¹ As above 2.

²⁹² As above 3.

²⁹³ As above 4 and 5.

²⁹⁴ As above 2.

²⁹⁵ As above 3 and 4. Also see the *CERD General Recommendation No. 32: The meaning and scope of special measures in the International Convention on the Elimination of All Forms of Racial Discrimination* CERD/C/GC/32 (2009).

²⁹⁶ CERD *Concluding observations on the combined fourth to eighth periodic reports of South Africa* (5 Oct 2016) 4 and 5. Also see CERD *General Recommendation No. 23 on the rights of Indigenous People* (1997).

²⁹⁷ CERD *Concluding observations on the combined fourth to eighth periodic reports of South Africa* (5 Oct 2016) 8.

²⁹⁸ CERD *Concluding observations on the combined ninth to eleventh periodic reports of South Africa* (27 Dec 2023).

²⁹⁹ As above 1 and 2.

situation of such groups, including their socio-economic status and any progress achieved by implementing targeted policies and programmes. South Africa was directed to collect reliable, updated and comprehensive statistics together with socio-economic indicators disaggregated by gender and age, language spoken, access to education, employment, health care and housing. The purpose of such comprehensive data should form the empirical basis for assessing the equal enjoyment of the rights enshrined in the Convention.³⁰⁰

Regarding “Special measures”, the Committee again regretted the “lack of detailed information on the conduct of impact assessment of the special measures implemented”. The Committee recommended the establishment of monitoring and evaluation mechanisms to conduct regular impact assessments of the special measures such as EEA and B-BBEE to address inequalities.³⁰¹

Recent amendments to the Companies Act³⁰² and Companies Regulations will, to a certain extent, allow government to gather information on the black ownership of all companies in South Africa. The General Laws Amendment Act³⁰³ was part of a slew of new legislation to bring South Africa’s financial regulatory environment in line with international standards. The new bill was based on recommendations made by the Financial Action Task Force (FATF)³⁰⁴ to improve the country’s ability to tackle financial crime and corruption.³⁰⁵ To achieve this, government set out to amend several pieces of legislation, most notably the Companies Act. Within the Companies Act, its regulations were amended to ensure, amongst others, that the Companies and Intellectual Properties Commission (CIPC) is informed of all persons holding more than 5% beneficial ownership and interest in companies.³⁰⁶ This reporting requirement is a first-time provision to indicate the race and gender of those holding at least 5% beneficial ownership in companies. The new reporting duty will provide data on the black ownership of companies, but it still lacks a breakdown of the social standing of black shareholders to measure the impact of

³⁰⁰ As above 2.

³⁰¹ As above 5.

³⁰² 71 of 2008.

³⁰³ 22 of 2022.

³⁰⁴ BUREAU FOR ECONOMIC RESEARCH (BER) *WEEKLY REVIEW NUMBER 7* (27 Feb 2023) 1. The FATF is an inter-governmental body that sets international standards aimed at preventing global money laundering and terrorist financing activities.

³⁰⁵ *Companies Act (71/2008): General Laws Amendment Act (22/2022): Invitation for public comment on the Draft Amendment Regulations 2023* published in *Government Gazette* No. 48210 dated 10 Mar 2023.

³⁰⁶ Reg (2)(A) of the Companies Regulations, 2011 amended by reg 30 of the Companies Amendment Regulations 2023.

B-BBEE on the vulnerable, poor and marginalised.

6.6 THE DESIGN AND APPLICATION OF B-BBEE IN RESPECT OF ITS BENEFICIARIES

6.6.1 The Beneficiaries

The demarcation of the beneficiaries of empowerment legislation such as the B-BBEE programme is rooted in the Interim Constitution and the present (1996) Constitution, as discussed in chapter 3, paragraphs 3.4 and 3.5 above. The Interim Constitution stated that no person shall be unfairly discriminated against. However, it does not preclude measures designed to achieve adequate protection and the advancement of persons, groups or categories of persons previously disadvantaged by unfair discrimination, to permit their full and equal enjoyment of all rights and freedoms.³⁰⁷

From this provision of the Interim Constitution emanated the term “previously disadvantaged people”. The Interim Constitution did not specifically define the term “previously disadvantaged people”. Sections 9(2) and 217(2) of the 1996 Constitution refer to persons or categories of persons disadvantaged by “unfair discrimination”, without providing a definition or explanation of such persons or category of persons. The Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA)³⁰⁸ enacted in 2000 referred to “historically disadvantaged individuals, communities and social groups”.³⁰⁹ The BEECom Report released in 2001 referred to “previously disadvantaged individuals” or “previously disadvantaged South African black people”.³¹⁰

Based on the terms used by the BEECom Report, and prior to the enactment of B-BBEE legislation in 2003, various empowerment legislation then defined previously disadvantaged individuals or people. The Preferential Procurement Regulations (PPRs) of 2001, issued in terms of the Preferential Procurement Policy Framework Act (PPPFA), contained a definition of “Historically Disadvantaged Individuals” or “HDI” which means South African citizens who, due

³⁰⁷ S 8(2) and (3)(a) of the Interim Constitution.

³⁰⁸ Act 4 of 2000.

³⁰⁹ As above the Preamble.

³¹⁰ Black Economic Empowerment Commission (BEECom) The *BEECom Report* (2001) 1 and 2.

to the apartheid policy that had been in place, had no franchise in national elections prior to the introduction of the Interim Constitution, or are female and/or have a disability. In terms of the PPRs, however, persons who obtained South African citizenship on or after the enactment of the Interim Constitution were deemed not to be HDIs.³¹¹

The Minerals and Petroleum Resources Development Act (MPRDA) of 2002 defines “historically disadvantaged people” as any person, category of persons or community, disadvantaged by unfair discrimination before the Interim Constitution took effect. This definition includes any association whose members are largely persons disadvantaged by unfair discrimination before the Interim Constitution took effect, or in the case of a juristic person, whose members own or control such a juristic person.³¹²

The definitions of “previously disadvantaged individuals” and “previously disadvantaged people” in the PPRs of 2001 and the MPRDA respectively, did not limit the beneficiaries to those who were disadvantaged based on race. It also included persons disadvantaged by other forms of discrimination, such as women and persons with disabilities.

A similar broad definition is also contained in the Employment Equity Act (EEA) of 1998. “Designated groups” in the EEA is defined as meaning black people, women and people with disabilities.³¹³

The B-BBEE Act differs from other empowerment legislation such as the EEA, the PPRs and MPRDA by benefitting only those who were subjected to unfair discrimination based on race. Legislation itself does not provide specific reasons for this approach. Jack explains that in the history of South Africa, people were excluded on the grounds of race, gender and disability. Exclusion by race was affected through legal means, whereas exclusion based on gender and disability often took place tacitly or covertly behind closed doors. As the B-BBEE policy was enacted into law, the government’s approach was that legislation should only counteract previous legislation and not tacit exclusions. As previous legal instruments did not act against gender or people with disabilities, it did not make sense to impose a legal imperative through B-

³¹¹ Reg 1(h) of the PPRs, 2001.

³¹² S 1 of the Minerals and Petroleum Resources Development Act 28 of 2002.

³¹³ S 1 of the EEA.

BBEE to correct this imbalance, according to Jack. It was against this backdrop that government adopted the approach to include only black people as the beneficiaries of the B-BBEE programme.³¹⁴

The beneficiaries of B-BBEE are defined in the B-BBEE Act as “black people”.³¹⁵ This definition also evolved over time.

In the first version of the B-BBEE Act of 2003, the term “black people” was defined as “a generic term which means Africans, Coloureds and Indians”. The B-BBEE Codes of 2007 went on to qualify this definition in the Act by including the criteria that black people must also be South African citizens.³¹⁶ In 2007, the High Court ordered Chinese people to be included in the definition of black people of the B-BBEE Act.³¹⁷ The statutory definition was therefore by virtue of this High Court judgement extended to mean Africans, Coloureds and Indians which includes Chinese as part of the Indian (Asian) demographic group. In line with the B-BBEE Strategy to benefit “indigenous Africans, Coloureds and Indians”³¹⁸ the definition of black people was amended, with further qualifications to the 2003 and 2007 definitions by the B-BBEE Amendment Act of 2013. The amended definition reads—

“‘black people’ is a generic term which means Africans, Coloureds and Indians—

- (a) who are citizens of the Republic of South Africa by birth or descent; or
- (b) who became citizens of the Republic of South Africa by naturalisation –

- (i) before 27 April 1994; or
- (ii) on or after 27 April 1994 and who would have been entitled to acquire citizenship by naturalisation prior to that date.”³¹⁹

³¹⁴ Jack (2007) 48 and 49.

³¹⁵ S 1 of the B-BBEE Act.

³¹⁶ The definition of Black people in Schedule 1 of the *Codes of Good Practice on Black Economic Empowerment* published in *Government Gazette* No. 29617 dated 9 Feb 2007 read: “Black people” means African, Coloured or Indian persons who are natural persons and are citizens of the Republic of South Africa by birth or descent; or are citizens of the Republic of South Africa by naturalisation which occurred before the commencement date of the Constitution of the Republic of South Africa Act of 1993; or occurring after the commencement date of the Constitution of the Republic of South Africa Act of 1993, but who without apartheid policy, would have qualified for naturalisation before then.

³¹⁷ *Chinese Association of South Africa and Others v The Minister of Labour and Others* 2008 ZAGPHC 174 (18 Jun 2008).

³¹⁸ Department of Trade and Industry (DTI) *South Africa’s Economic Transformation: A Strategy for Broad-Based Black Economic Empowerment* (2003) 12.

³¹⁹ S 1(b) of the B-BBEE Act.

This amendment to the definition of black people ensured that black people who immigrated to South Africa after 27 April 1994 could not be beneficiaries of the B-BBEE programme, unless they were entitled to acquire citizenship by naturalisation prior to 27 April 1994, which is the date of the first democratic election and the date when the Interim Constitution took effect.

The provision to incorporate South African citizens by birth into the definition includes historically disadvantaged black people as well as black people born after 1994. The so-called “born-frees” are therefore incorporated as beneficiaries of B-BBEE. The argument is that in most situations the parents of this group who had been disadvantaged by discrimination, were still in no position to provide proper opportunities for them.³²⁰ In this regard, the High Court in *Sand Shifters Africa (Pty) Ltd and Others v Commissioner: Broad-Based Black Economic Empowerment Commission and Another*³²¹ explained the perpetuating effect of past discrimination as follows:

“In fact, it is a misnomer to label black people as the previously disadvantaged, as is a common parlance of the government and business. Nothing could be further from the truth; black people are the previously discriminated against and presently disadvantaged. It is not by chance that black people are landless, poverty-stricken, unemployed *en masse* and visited by all kinds of social and economic ills.”³²²

A loophole in the provision to include black South African citizens by birth is that although black people coming from other countries after 1994 will not qualify for benefits, their children born in South Africa will qualify as black people and therefore as beneficiaries of B-BBEE.³²³

The provision of including black people who acquire citizenship by descent, also creates an anomaly and uncertainty. It is not certain whether it includes a first generation, a second generation or until what degree of consanguinity, for example an overseas-based black person who has never been to South Africa but had a parent who was a South African citizen. If such an overseas-based black person holds 51% shares in a company, the company can claim to be black owned and qualify for benefits in terms of B-BBEE.³²⁴

³²⁰ Jack (2007) 46.

³²¹ (2021/61622) [2023] ZAGPPHC 1815 (24 Oct 2023).

³²² As above [41].

³²³ Jack (2007) 46.

³²⁴ As above 47.

Within the definition of black people, the B-BBEE Codes focus on vulnerable groups referred to as “black designated groups”. Black designated groups provide for specific categories of black people and are defined in the B-BBEE Codes as (1) unemployed black people not required by law to attend an educational institution; (2) black youths;³²⁵ (3) black people with disabilities;³²⁶ (4) black people living in rural and underdeveloped areas; and (5) black military veterans.³²⁷

The B-BBEE Codes give so-called “enhanced recognition” or special preference to the interests of vulnerable and marginalised designated groups.³²⁸ For instance, black women are required to make up between 40% and 50% of the beneficiaries of the elements of the scorecard.³²⁹ To specifically benefit designated groups, points are allocated if at least 3% of an entity’s ownership is in the hands of broad-based schemes and cooperatives consisting in general of collective community- and rural-based programmes.³³⁰ Under the Management and Control element, two points are awarded if at least 2% of the workforce are black persons with disabilities.³³¹ In terms of the Skills Development element, provision is made for the additional training of black employees with disabilities³³² as well as unemployed black people.³³³ Procurement of at least 2% from a supplier within a black designated group under the Preferential Procurement sub-element equates to two points.³³⁴ Lastly, donations to community-based charities are also recognised under the Socio-Economic Development element, with a maximum of 10 points.³³⁵ The definitions of black people and black designated groups in the B-BBEE Act and Codes must be distinguished from similar definitions in the EEA and the PPRs. Although the same terms are used, they do not always have the same meaning. “Black people” in the EEA is “a generic term which means Africans, Coloureds and Indians”.³³⁶ The definition of black people in the EEA is the same as the definition in the B-BBEE Act. “Designated groups” in the EEA is defined as

³²⁵ As defined in s 1(vi) of the National Youth Commission Act 19 of 1996, youth persons “means persons between the ages of 14 and 35”.

³²⁶ As defined in the *Code of Good Practice on Employment of Persons with Disabilities* issued in terms of s 54 of the Employment Equity Act 55 of 1998 and published in *Government Gazette* No. 39383 dated 9 Nov 2015.

³²⁷ Black veterans who qualify as military veterans in terms of the Military Veterans Act 18 of 2011.

³²⁸ Para 10 of Statement 000 of the B-BBEE Codes.

³²⁹ As above para 10.1.1.

³³⁰ Paras 2.2.3.1 - 2.2.3.4 of Statement 100 of the B-BBEE Codes.

³³¹ As above para 2.6.1 of Statement 200 of the B-BBEE Codes.

³³² As above para 2.1.1.2 of Statement 300 of the B-BBEE Codes provides for three points if the 0,3% of annual payroll expenditure is spent on the training of Black disabled people.

³³³ As above para 2.1.3 of Statement 300 of the B-BBEE Codes.

³³⁴ As above para 2.2.1 of Statement 400 of the B-BBEE Codes.

³³⁵ As above para 2.3 of Statement 500 of the B-BBEE Codes requires donation or other socio-economic related initiatives equal to at least 1% of the entities net profit after tax (NPAT).

³³⁶ S 1 of the EEA.

black people, women and people with disabilities.³³⁷ The definition of designated groups in the EEA differs from the definition of black designated groups in the B-BBEE Act. This definition in the EEA makes provision for women and people with disabilities who are not necessarily black people. In other words, women, irrespective of race and people with disabilities irrespective of race and gender.³³⁸

The reason why the EEA includes a wide category of beneficiaries is that both legal and structural discrimination had occurred against these groups in terms of employment opportunities. The aim of the EEA is therefore to address the broader discrimination experienced in workplaces.³³⁹ Although the EEA makes provision for white women, white people with disabilities, only black people as defined in the B-BBEE Act are recognised when measuring the Management and Control element of the B-BBEE Codes.³⁴⁰ Therefore, not all beneficiaries of the EEA qualify as beneficiaries in terms of the B-BBEE programme.

The definitions of the PPRs were more aligned with the BBEE Act and Codes. For instance, the revoked 2017 PPRs defined “black people” and “black designated groups”³⁴¹ with reference to the respective definitions in the B-BBEE Codes. The 2017 PPRs also contained a definition of “designated groups” which included women, people with disabilities and small enterprises irrespective of race.³⁴² The 2022 PPRs, which replaced the 2017 PPRs, have no reference to black people or designated groups. They do, however, provide for points to be allocated under specific goals to give preference to persons or categories of persons historically disadvantaged by unfair discrimination based on race, gender and disability.³⁴³

The South African Human Rights Commission (SAHRC) noted that whereas the population is provided with the opportunity to self-classify when statistical data is gathered for a population census, self-classification does not translate into legislation that provides for measures such as

³³⁷ As above.

³³⁸ See Department of Employment and Labour *Media Release* (Aug 2022) 31. The Employment Equity Amendment Bill, 2020 was passed by Parliament on 17 May 2022 and awaiting the assenting and signing into law by the President. The main objective of the amendments is to empower the Minister to regulate sector specific Employment Equity targets. The new Act aims to regulate compliance to issue compliance certificates in terms of s 53 of the Act. This means that businesses that do business with the state will have to be in good standing when it comes to compliance with Employment Equity.

³³⁹ Jack (2007) 49.

³⁴⁰ Para 2.1 of Statement 200 of the B-BBEE Codes.

³⁴¹ Reg 1 of the PPRs, 2017.

³⁴² As above.

³⁴³ Reg 1 of the PPRs, 2022.

the EEA and B-BBEE programme. EEA, B-BBEE and consequently government procurement regulations classify beneficiaries of affirmative measures according to the racial classification system used by the former white government. In the case of the EEA, the scope was extended to include women and persons with disabilities. The SAHRC therefore concluded that indigenous people, those whose ethnic descent may be from mixed-race marriages, and linguistic and tribal minorities within the designated groups are not accommodated within the EEA and B-BBEE programme.³⁴⁴

Thus, the *de jure* beneficiaries of the B-BBEE programme can be summarised as black people (Africans, Coloureds and Indians) who are citizens of South Africa, with a specific focus on what is perceived as vulnerable groups (designated groups), communities and workers. However, the beneficiaries of the B-BBEE programme and vulnerable groups are not determined based on statistical demographic data that includes social and economic needs.

The SAHRC further pointed out that the PPRs have since 2005 followed the definitions in the B-BBEE Act to determine the beneficiaries of government procurement.³⁴⁵ The PPRs did not provide any guidance to government departments for determining which vulnerable groups are most deserving of specific government contracts or are feasible for subcontracting. The PPRs were not based on a realistic appraisal of need that includes the consideration of socio-economic factors.³⁴⁶

6.6.2 Repeated Empowerment of the Same Individuals

The B-BBEE Act recognises that the vast majority of South Africans are “excluded from the ownership of productive assets” and that there is a need to increase the effective participation of the majority of South Africans in the economy.³⁴⁷

The beneficiaries of B-BBEE are defined broadly and include all black people disadvantaged based on race. No distinction is made between individuals based on wealth or levels of education. This creates various scenarios which undermine the objective to incorporate masses

³⁴⁴ South African Human Rights Commission *Equality Report 2017/18* (2018) 34.

³⁴⁵ See ch 5, para 5.4.3 above.

³⁴⁶ South African Human Rights Commission *Equality Report 2017/18* (2018) 34.

³⁴⁷ Preamble of the B-BBEE Act.

of people into the economy.

For instance, B-BBEE legislation does not provide for beneficiaries to be assisted only up to a certain point, or to be excluded from future benefits once the B-BBEE programme has fulfilled its objective in respect of individuals. The fact that individual beneficiaries do not ultimately reach a point where they no longer qualify or had “graduated out of the B-BBEE school”, makes the programme stagnant as it effectively blocks other participants. No room is created for new participants and the same beneficiaries could benefit perpetually.³⁴⁸

The narrow-based trend experienced during the first wave of BEE characterised by deals involving politically connected and big corporates, is therefore continued and legitimised under the present B-BBEE dispensation. Moreover, repeatedly benefitting the same individuals enables political patronage, corruption and abuse of the B-BBEE programme as laid bare by the State Capture Commission.³⁴⁹

6.6.3 The Points System

Although the B-BBEE Codes attempt to focus on the empowerment of vulnerable designated groups, the measures provided in the Codes to promote more benefits for vulnerable groups are, in the context of the design and overall point system, quite minimal. For instance, the Ownership Element allows three points out of 25 for ownership by black designated groups and two points for “Black New Entrants”. A Black New Entrant is defined in the Codes as a black person who has never before held more than R50 million of equity in other entities.³⁵⁰ This threshold is extremely high and nonsensical for a “new entrant”. In terms of this threshold, black millionaires and some multi-millionaires will qualify to be incorporated into black ownership initiatives as new entrants.

The overall design of the B-BBEE Codes is such that they mainly benefit black individuals in the so-called upper- and middleclass.³⁵¹ The type of black person who meets the majority of the

³⁴⁸ Jack (2007) 59.

³⁴⁹ See para 6.8 below.

³⁵⁰ Schedule 1 of the B-BBEE Codes.

³⁵¹ S 2(b) of the B-BBEE Act states that one of the objectives of B-BBEE is to “substantially change the racial composition of ownership and management structures and in the skilled occupation of existing and new enterprises”.

requirements of the B-BBEE Codes is not uneducated, unemployed or poor. For instance, the Management and Control Element allows 16 of the possible 19 points to be allocated for black people serving at board of directors' level or at other executive management and senior, middle and junior management levels.³⁵² Someone serving at these levels in companies will be tasked with specific statutory fiduciary duties which cannot be performed by illiterate or uneducated persons.³⁵³

Likewise, the bulk of the Enterprise and Supplier Development Element points, that is 30 out of 40 points, which include Preferential Procurement as a sub-element, is allocated for procuring from black-owned businesses.³⁵⁴ Only two points are given for procuring from black designated group suppliers.

A pertinent characteristic of the B-BBEE programme is the way in which it is designed to promote the narrow focus on black ownership. Although the Ownership Element as such requires only 25,1% black Ownership, the driver of black ownership is the Preferential Procurement sub-element. Under the Preferential Procurement sub-element, the majority of points are allocated for procuring from black -owned enterprises. By virtue of the Preferential Procurement points allocation, entities are forced to become black owned instead of having a good B-BBEE Status Level. Very few points under Preferential Procurement are allocated based on an entity's Status Level.³⁵⁵ Therefore, entities are required to be black owned in order to supply goods or services to other B-BBEE-compliant enterprises.

According to the B-BBEE programme's design it is clearly intended to promote the business interest of the black bourgeoisie in line with the ANC's policy of the NDR discussed in chapter 2, paragraph 2.4.3.2.

6.6.4 Government's Hidden Agenda

At the centre of the broad-based objectives envisaged by the BEECom Report, the B-BBEE

³⁵² Paras 2.1-2.5 of Statement 200 of the B-BBEE Codes.

³⁵³ S 76 of the Companies Act 71 of 2008 requires certain competence by a director and prescribed officers in the executing of their fiduciary duties. "Prescribed officers" are in terms of reg 38 of the Companies Regulations, 2011 Executive Managers who are not necessarily directors, but who exercise executive control and management functions.

³⁵⁴ Paras 2.1, 2.3 and 2.4 of Statement 400 of the B-BBEE Codes.

³⁵⁵ See para 6.4.1.4 above.

Strategy and the B-BBEE Act, is the promotion of the interests of communities, workers, cooperatives and collective enterprises.³⁵⁶ Ownership in entities by these collective groups is referred to as indirect ownership.³⁵⁷ The Ownership element only allows three out of 20 points to be allocated for ownership by way of broad-based or collective ownership programmes.³⁵⁸

Most collective ownership programmes with workers and community members as beneficiaries are housed in trusts as legal structures. These structures often involve persons from black designated groups. With regard to designated groups and their incorporation into ownership structures, Jack notes—

“The Codes incorporate black designated groups on the ownership scorecard to encourage the measured entity to devise schemes that will benefit black people who would ordinarily not have an opportunity to share in the ownership of the Company.”³⁵⁹

For instance, when the Revised B-BBEE Codes of 2013 were published for final implementation after the transition period, the Minister of Trade and Industry (as the Department was known then)³⁶⁰ published a notice in the *Government Gazette*³⁶¹ which reads—

“1(d) Black participants in Broad-Based Ownership Schemes and Employee Share Ownership Programmes holding rights of Ownership in a Measured Entity must only score points under paragraph 2.2.3 under the Ownership scorecard.”³⁶²

Paragraph 2.2.3 of the Ownership Element, allows for three additional points as an incentive if entities use these broad-based programmes as part of their ownership structure.³⁶³ Entities with at least 25,1% ownership using broad-based programmes can therefore receive the full

³⁵⁶ Black Economic Empowerment Commission (BEECom) *The BEECom Report* (2001) 5 and 6; Department of Trade and Industry (DTI) *South Africa's Economic Transformation: A Strategy for Broad-Based Black Economic Empowerment* (2003) 25; and s 2 of the B-BBEE Act.

³⁵⁷ Jack (2007) 153 and 154 explains that indirect ownership is ownership of equity instruments held through a third-party intermediary such as broad-based ownership programmes and public benefit organisations.

³⁵⁸ Paras 2.2.3.1-2.2.3.4 of Statement 100 of the B-BBEE Codes.

³⁵⁹ Jack (2007) 128.

³⁶⁰ Presently the Department of Trade, Industry and Competition.

³⁶¹ *Broad-Based Black Economic Empowerment Act (53/2003): Revised Notice of Clarification* published in *Government Gazette Notice No. 38764* dated 5 May 2015.

³⁶² As above para 1(d).

³⁶³ Para 2.2.3 of Statement 100 of the B-BBEE Codes.

complement of 25 points under the Ownership element.³⁶⁴ The intention of the Minister's notice was to reduce these 25 points to only three points for entities that use broad-based ownership programmes to discourage the use of these programmes and to undermine the broad-based objectives of the B-BBEE programme.

Apart from its undermining objective, this notice was also unlawfully issued as it endeavoured to amend the B-BBEE Codes without following the process of public participation prescribed by the Act. The B-BBEE Act requires a process of public participation before the Codes can be amended.³⁶⁵ The *ultra vires* notice issued by the Minister was revoked 10 days later by the Minister.³⁶⁶

It was clear that government had attempted to slip in a notice without public participation for the purpose of amending the Codes to lower the points for the use of broad-based programmes and to discourage the use of broad-based programmes for B-BBEE ownership. Although the erroneous notice was revoked it showed government's hand and long-term strategy with regard to whom should ultimately benefit from the B-BBEE programme.

Something similar happened in 2002 when a draft Mining Charter was leaked to the press on 19 July 2002. The leaked draft stated that mining companies were required to have at least 51% black ownership. This, despite government's assurance that the required black ownership should be fixed at 25,1%. Over the following two days, the value of South African mining stocks on the JSE declined by R56 billion as international investors reacted negatively and disinvested.³⁶⁷ Although government attempted to put out the fires caused by the leaked Mining Charter, the local and international investors became sceptical of the government's long-term strategy to eventually require black ownership of 51% to operate in the mining industry. The 51% black ownership requirement was perceived as merely an extension of BEE deals already concluded with the politically connected in the mining industry, which government wanted to continue and legally enforce.

³⁶⁴ As above para 2 of Statement 100 on condition the programme allows for at least 50% black woman participation.

³⁶⁵ S 9(5) of the B-BBEE Act requires the Minister to publish any intended issuing, replacement or amendment of the B-BBEE Codes for at least 60 days for public comment.

³⁶⁶ Para 2 of the *Broad-Based Black Economic Empowerment Act (53/2013)*: *Revised Notice of Clarification* published in *Government Gazette* No. 38799 dated 15 May 2015.

³⁶⁷ Ponte *et al* DAC (2007) 943; and Joffe *Business Day* (Aug 2005) 23.

With the establishment of the B-BBEE Commission in 2016,³⁶⁸ this approach by government to discourage the use of collective broad-based programmes gained new momentum. The B-BBEE Commission was often quoted in the media as saying that “trusts” as broad-based empowerment programmes involving employees and communities were the main culprits in “fronting” incidents.³⁶⁹ The Commission also published guidelines on its website for the use of trusts.³⁷⁰ These guidelines in various respects contradicted the rules and criteria set by the Codes for the use of trusts in ownership structures.³⁷¹ The unabated public denouncement of trusts by the Commission created uncertainty and discouraged the use of employee and community collective ownership programmes in general.³⁷² This public uncertainty prompted the Minister in 2021 to clarify and reaffirm the use of collective enterprises for ownership purposes.³⁷³

Despite all these corrections made by government, the public is rightfully cynical about government’s commitment to the broad-based ideals of B-BBEE. This was further exacerbated by the following public statement made by Gwede Mantashe in 2015, when he was the Secretary-General of the ANC:³⁷⁴

“if you understand BEE for what it is, I think if we philosophise, we are being less than honest. BEE creates black capitalists simply, that’s what it does, so it will produce capitalists.”

The symbiotic relationship between broad-based and narrow-based BEE is well encapsulated by Jack. He explains that broad-based initiatives in fact assist not only lower-income groups, but also the middleclass. He explains that the participation of these groups will buttress narrow-based BEE by means of so-called broad-based initiatives.³⁷⁵ This illustrates the point that the present B-BBEE programme reinforces narrow- instead of broad-based empowerment and that broad-based initiatives are merely a means to a narrow-focused end.

³⁶⁸ Regulated by the B-BBEE Regulations, 2016.

³⁶⁹ Du Plessis *Stell LR* (2022) 412; Phakati *Business Day* (Oct 2017) 27; and Paton *Business Day* (24 Apr 2019) 24.

³⁷⁰ B-BBEE Commission *UNDERSTAND THE USE OF TRUSTS IN B-BBEE OWNERSHIP INITIATIVES* (29 Nov 2018).

³⁷¹ Paras 3.1.1.4, 3.9, 3.12, Annexe 100(B), Annexe 100(C) and Annexe 100(D) of Statement 100 of the B-BBEE Codes.

³⁷² Editorial *Business Day* (Apr 2019) 24; and Paton *Business Day* (Nov 2020) 24.

³⁷³ Department of Trade, Industry and Competition *Explanatory Memorandum for Gazette on Rules for Discretionary Collective Enterprises published in terms of the B-BBEE Act* published in *Government Gazette* No. 44591 dated 18 May 2021. Also see Paton *Business Day* (Feb 2021) 9; and Abreu *De Rebus* (Nov 2021) 10 and 11.

³⁷⁴ Madi (2016) 42; and Mantashe *SABC News Bulletin* (Jun 2015) 12.

³⁷⁵ Jack (2007) 22.

6.7 POLITICAL IDEOLOGY AND PERFORMANCE OF B-BBEE

The two main objectives delineated in the B-BBEE Strategy and the B-BBEE Act are: (1) to substantially increase the number of black people who own, manage and control new and existing enterprises; and (2) to grow the economy by including black people in the mainstream of activities.

The success of the B-BBEE programme's design can be assessed by looking at data in three areas: Firstly, the extent to which black ownership of enterprises has increased; secondly, the increase in the number of black people in especially senior management of enterprises; and thirdly, the economic growth of South Africa.

In respect of the first two areas of performance – the extent to which black ownership, management and control of enterprises has increased – the B-BBEE Commission and the Commission for Employment Equity indicated very little progress in those areas. In fact, the situation is regressing. According to the B-BBEE Commission's latest statistics released in 2022, the overall black ownership of enterprises had declined to 29,5% from 31% in 2020, with black management and control of enterprises down to 51,6% from 57% in 2020. According to this data, the Johannesburg Stock Exchange (JSE) has no black-owned entities compared to 3% in 2019.³⁷⁶ White males still hold the vast majority of senior management positions in the private sector at 52,6%, followed by Africans (males and females) 13,8%, Coloureds (males and females) 5,8% and Indians (males and females) 11,6%.³⁷⁷

In respect of the B-BBEE programme's ability to grow the economy – the third area of performance – it is best to compare it to the National Economic Plan (NEP) of Malaysia. The big difference between the NEP and B-BBEE, however, is that the NEP has as vision and strategy for “redistribution with growth”³⁷⁸ while the B-BBEE programme is premised in terms of the B-BBEE Strategy to be a programme of growth through redistribution. So, where the NEP had seen growth as a prerequisite for including the Bumiputera in the economy (inclusive growth) to

³⁷⁶ B-BBEE Commission *National Status and Trends on B-BBEE Transformation Report 2021* 77, 78 and 85; and B-BBEE Commission *Media Release* (Jul 2022) 31.

³⁷⁷ Commission for Employment Equity *23rd Commission for Employment Equity Annual Report 2022-23* (Nov 2023)41.

³⁷⁸ Osman-Rani *Institute of Southeast Asian Studies* (2004) 205.

address poverty and inequality, the approach and point of departure of B-BBEE is the inclusion of black people in the economy, mainly by means of redistribution, to eradicate economic inequality and grow the economy.³⁷⁹ Comparing the data and results achieved by the NEP against the B-BBEE programme, it is obvious that the NEP's approach to implement measures to ensure growth as a launching pad for the NEP is the correct approach to eradicate unemployment and poverty. During the 20-year period in which the NEP operated (1970-1990), an average growth rate of over 7% was sustained in Malaysia, which reduced unemployment from close to 8% in 1970 to 2%, and poverty from 49,3% to 16,5% in 1990, with almost zero in 2018.³⁸⁰ In comparison, during the 20-year period that the B-BBEE programme has been in operation (2004-2024), the South African growth rate (measured as Gross Domestic Product – GDP) was almost 4,6% in 2004 with the introduction of B-BBEE. It has gradually decreased to 3% in 2010, 1,3% in 2015, 0,3% in 2019 and 1,9% in 2022.³⁸¹ The growth rate prediction for 2024 is a mere 1,6%.³⁸² Unemployment has risen from approximately 20% in 2004 to almost 32% in 2023.³⁸³ This, despite the fact that the National Development Plan (NDP) required that South Africa should average a growth rate of over 5% as from 2010 and increase the growth rate gradually to be twice that rate by 2030 in order to accommodate the growing population and new job seekers every year.³⁸⁴ Poverty and inequality have consequently risen during the period since the B-BBEE programme was introduced, especially amongst the African population as main beneficiaries of the EEA and B-BBEE programme.³⁸⁵ Black African unemployment rates have been consistently higher than those of other population groups over the past 10 years, with a rate of 36% in 2023 compared to the national average of 31,9%.³⁸⁶

An important requirement for special measures in terms of international law instruments is that the beneficiaries of such measures should be classified according to their social and economic conditions based on broken down (“disaggregated”) data. The SAHRC has pointed out that the socio-economic data on the beneficiaries of BEE is disaggregated according to the apartheid-

³⁷⁹ Department of Trade and Industry (DTI) *South Africa's Economic Transformation: A Strategy for Broad-Based Black Economic Empowerment* (2003) 4,5 and 11.

³⁸⁰ Rasiah and Shari *Cambridge Journal of Economics* (2001) 58.

³⁸¹ Department: Planning, Monitoring and Evaluation *30 Year Review of South Africa's Democracy* (1994-2024) 5.

³⁸² National Treasury *2024 Budget Review Economic Outlook* (2024) 4.

³⁸³ As above 6; and World Bank *Macrotrends – South Africa Unemployment Rate 1960-2024* (2024) 2.

³⁸⁴ National Planning Commission *The National Development Plan (NDP) 2012-2030* (2012) 110.

³⁸⁵ Stats SA *Poverty Trends in South Africa: An Examination of Absolute Poverty between 2006 and 2015* (2017) 20 and 21.

³⁸⁶ Stats SA *Quarterly Labour Force Survey Quarter 3: 2023* (Nov 2023) 21 and 22.

era classification system of population groups and not social and economic indicators.³⁸⁷ Measures should be continuously monitored to assess the impact of special measures on beneficiaries and to ensure that measures are discontinued once substantial equality is achieved. In terms of this requirement, South Africa's B-BBEE and Employment Equity programmes were found on two occasions (2016 and 2023) by the Committee on the Elimination of Racial Discrimination (CERD) not to have met the requirements of the ICERD. The CERD expressed its concern regarding the lack of disaggregated statistics compiled by South Africa on vulnerable groups and the lack of detailed information on the impact of special measures on targeted groups, indigenous groups and non-citizens.³⁸⁸

The serious flaws of the B-BBEE programme must also be understood in the context of the political ideology and socio-political environment within which it operates. The ANC's ideology stands on three pillars: African Nationalism, the *Freedom Charter* and the NDR, with the NDR being the overarching ideology and policy, as discussed in chapter 2, paragraph 2.4. The *Freedom Charter* and the objectives of the NDR are specifically mentioned in the ANC's Constitution as the means by which an equal "national democratic" society should be achieved. The ANC, during its National Conference held every five years, also evaluates any new developments that may pose a threat to progress in achieving the NDR's objectives. The National Conference is the ANC's highest policy-formulating body.³⁸⁹ The resolutions adopted during these Conferences become ANC policies, which then translate into government policies and legislation.

It can therefore be concluded that the *de jure* beneficiaries of B-BBEE are found in the text of B-BBEE legislation such as the Act and the Codes purports to be a project to remedy past racial discrimination. The *de facto* beneficiaries are not *per se* defined in B-BBEE legislation but are determined by the ANC's political ideology of transformation in terms of the NDR. The wide formulation of the *de jure* beneficiaries in B-BBEE legislation allows the *de facto* beneficiaries to enjoy legitimacy.

³⁸⁷ South African Human Rights Commission *Equality Report 2017/18* (2018) 34.

³⁸⁸ CERD *Concluding observations on the combined fourth to eighth periodic reports of South Africa* (5 Oct 2016) 8; and CERD *Concluding observations on the combined ninth to eleventh periodic reports of South Africa* (27 Dec 2023) 5.

³⁸⁹ ANC *African National Congress Constitution* (2017) Rule 2.2; and ch 2, para 2.5 above.

Since coming into power in 1994, the ANC has held eight National Conferences. The NDR is used as foundation of all ANC resolutions and policies adopted at the Conferences. The following can be summarised as resolutions adopted at National Conferences and the principles on which such resolutions are based, and have a direct bearing on BEE and whom the present beneficiaries of B-BBEE are: (1) Transfer of power to the people means the simultaneous transformation or democratisation of power to vest in the ANC and the state;³⁹⁰ (2) The ANC must strengthen its hold on state power and all other levers of power;³⁹¹ (3) The public service (especially senior management), judiciary, economy, captains of industry and the media are seen as centres of power;³⁹² (4) Reaffirming the ANC's continued commitment to the national liberation of "Blacks in general, Africans in particular";³⁹³ (5) The working class remains the "main social motive for a democratic revolution";³⁹⁴ and (6) The role of the black and especially African bourgeoisie to assist in the struggle of the working class as "forces of transformation" whose interests coincide with at least the immediate interests of the majority.³⁹⁵

In order to achieve the above, the following course of action was adopted by the ANC to give effect to the objective of establishing control over all centres of power: (1) The immediate transformation of the judiciary, army, police and intelligence structures;³⁹⁶ (2) Transformation of the public service through affirmative action to ensure that the public service is representative of the South African population;³⁹⁷ (3) The deployment of "cadres" in all positions of influence, power and control in the public and private sector, which cadres must be "guided by the slogans, vision and objectives of the ANC";³⁹⁸ (4) Urgent measures must be established to ensure the appointment of judicial officers who are "steeped in" and reflect the "progressive values" of the ANC's Constitution;³⁹⁹ (5) Regulate the private sector;⁴⁰⁰ (6) The ANC must develop programmes to guide the emerging black bourgeoisie and benefit them through BEE programmes and government procurement;⁴⁰¹ (7) Given the importance of the mining industry,

³⁹⁰ ANC 49th National Conference Resolutions (1994) para 5; and ch 2, para 2.5.1.

³⁹¹ ANC Strategy and Tactics (1997) para 6; and ch 2, para 2.5.2.

³⁹² As above.

³⁹³ ANC 50th National Conference Resolutions (1997) 20th and 21st pages.

³⁹⁴ ANC 49th Conference Resolutions (1994) paras 1 - 4.

³⁹⁵ ANC Strategy and Tactics (1997) para 7.

³⁹⁶ As above.

³⁹⁷ As above para 11.

³⁹⁸ As above para 10; and ANC 51st National Conference Resolutions (2002) para 1.

³⁹⁹ ANC 52nd National Council Resolution (2007) para 5.

⁴⁰⁰ ANC Strategy and Tactics (2007) para 116.

⁴⁰¹ ANC 51st National Conference Resolutions (2002) para 10 and 11.

it must be transformed by means of affirmative action and “state-held mineral rights”;⁴⁰² (8) Promote B-BBEE to ensure between 30% and 50% direct black ownership and control of the media and communications technology industry “to translate in a diversity of views”;⁴⁰³ (9) The use of the broad principles of the South African Constitution to pursue the objectives of the NDR;⁴⁰⁴ and (10) The benefits of holding power affords the ANC and its “leaders powerful possibilities of patronage” which “by their selfless contribution to the cause, deserve such acknowledgement”.⁴⁰⁵

Therefore, the resolutions and policies adopted by the ANC, as well as the ANC’s Constitution, involve four areas of government policy: (1) Transformation of the public service; (2) Transformation of society;⁴⁰⁶ (3) Economic transformation; and (4) Transformation of the judiciary.

For the purpose of this study, it is important to determine how the ANC’s ideology delineates who the beneficiaries of B-BBEE are. The third area of economic transformation has a direct relation to the beneficiaries of BEE.

Economic transformation is embodied in government policy in the form of the Employment Equity Act (EEA) and B-BBEE programme (collectively BEE). It involves all entities in the public, private and civil sphere (businesses, organisations, associations and workplaces). In terms of the *Freedom Charter*, which calls for the nationalisation of banks, corporates, mines and the wealth of the country, B-BBEE serves as an instrument of “nationalisation”, as discussed in chapter 2, paragraph 2.6. In terms of the NDR, the programme incorporated in the ANC’s Constitution,⁴⁰⁷ the ANC regards the transfer of productive assets, land and corporates to Africans as envisioned in the *Freedom Charter* as a form of “nationalisation”. The means of production, assets, businesses, banks, mines and land are to be transferred “from private into social property” (as

⁴⁰² ANC 50th National Conference Resolutions (1997) 44th page.

⁴⁰³ ANC 53rd National Conference Resolutions (2012) 57.

⁴⁰⁴ ANC *Strategy and Tactics* (2007) para 75.

⁴⁰⁵ ANC *Strategy and Tactics* (1997) para 8.

⁴⁰⁶ ANC 55th National Conference Resolutions *Social Transformation Resolution* (2022) 1; and ANC 49th National Conference Resolution: *A Basic guide to the Reconstruction and Development Programme* (1994) 15th-17th pages envisaged “social groups, such as women’s groups and youth movements” referred to as “civil society” to take a leading role in transforming society to conform to the ideals of the Freedom Charter that “the people shall govern”.

⁴⁰⁷ ANC *African National Congress Constitution* (2017) Rule 2.2.

a form of “nationalisation”) – to the dominant African political elite and African bourgeoisie under the guardianship of the ANC as “vanguard” of the workers.⁴⁰⁸ This objective is to be achieved by means of BEE as instrument of transformation. The main objective of the B-BBEE programme is to substantially increase the black ownership, management and control of enterprises in accordance with the representivity principle contained in BEE legislation and the EEA. This wealth of the nation and productive assets will be transferred during the transformation process from “the former ruling oppressive class” and ultimately placed under the control of a socialist state⁴⁰⁹ – a theory developed by Lenin. In practical terms, from a NDR perspective, the beneficiaries of BEE cannot be those with low levels of education or the unemployed, but rather those with high levels of education – the black managerial aristocracy – to ensure that assets end up in the hands of the politically dominant black bourgeoisie to be “nationalised” – controlled by the ANC as vanguard of “we the people” in terms of the Freedom Charter. Therefore, the B-BBEE programme is designed mainly to empower the African middle and affluent classes to own, manage and control enterprises.

6.8 CORRUPTION, STATE CAPTURE AND ABUSE OF THE B-BBEE PROGRAMME

Those who are vulnerable and supposed to benefit from the B-BBEE programme are often exploited by the politically connected and elite. Some of the most pertinent instances are concisely discussed. During the Judicial Commission of Inquiry into State Capture (State Capture Commission)⁴¹⁰, evidence was adduced of how government officials and political office-bearers assisted the Gupta family business to siphon off millions of rands to Gupta businesses through black empowerment projects. The terms of reference of the Commission were, amongst others, to investigate the “awarding of contracts by certain organs of state to entities that enabled or turned a blind eye ... to alleged corrupt practices by the Gupta family and his [the President’s] son in relation to allegedly linking appointments to *quid pro quo* conditions”.⁴¹¹ The Guptas are

⁴⁰⁸ Slovo *Umsebenzi Discussion Pamphlet* (1988) 11th, 12th and 14th page explained that the transforming of private into social property involves the “social control over the means of production and distribution by a political power in which the working class is dominant” which must result in “the eventual destruction of the existing capital structure”.

⁴⁰⁹ ANC *African National Congress Constitution* (2017) Rule 2.2; Slovo *Umsebenzi Discussion Pamphlet* (1988) 11th, 12th and 14th page; and chapter 2, paragraph 2.5 above and various resolutions adopted by the ANC to re-affirm the NDR as the central ANC policy. Slovo explained that during the transition from socialism to communism, which are a process driven by the NDR, it requires the placing of the means of production under the social control of the state.

⁴¹⁰ *Proclamation No. 3 of 2018* by the President of the Republic of South Africa appointing a Judicial Commission of Inquiry into allegations of state capture, corruption and fraud in the public sector, including organs of state, published in *Government Gazette* No. 41403 dated 25 Jan 2018. Also see *Judicial Commission of Inquiry into State Capture Report: Parts I-VI* (2022).

⁴¹¹ *Judicial Commission of Inquiry into State Capture Report: Part 1: Vol. 1 ii*.

an Indian family who immigrated to South Africa in the late 1990s and do not fit the definition of black people in the B-BBEE Act.

The so-called “Vrede Dairy” or “Estina” projects involved an amount of R570 million made available by the Free State provincial government to assist and develop small black dairy farmers in Vrede, a small town in a poor rural area of the Free State Province.⁴¹² Government documents revealed that the project would “be in effect black economic empowerment in accordance with the AgriBEE Charter on Black Economic Empowerment”.⁴¹³ A “Special Purpose Vehicle” was to be registered in which small black rural farmers as BEE beneficiaries were to hold 51% of the shares. Estina, a service delivery entity, would hold the remaining 49% shares. Estina was a company owned and managed by a Gupta associate.⁴¹⁴ In terms of an agreement between the provincial government and Estina, Estina would provide, amongst others, assistance in identifying suitable avenues for participation in dairy projects in South Africa and help to execute deals in South Africa.⁴¹⁵ Money from the Provincial Department of Agriculture in the Free State was paid to Estina, and not the Special Purpose Vehicle. Between 2013 and 2015, millions of rands were paid to Estina and then paid over to other Gupta entities.⁴¹⁶ No development took place and no BEE beneficiary benefitted from or was involved in the project.⁴¹⁷ The project was merely set up under the guise of BEE to channel government funds to the Gupta family.

The B-BBEE programme is also often abused for the benefit of senior government officials. For instance, the State Capture Commission heard evidence of how senior executives and board members of a state-owned enterprise, the South African Airways (SAA), benefitted illegally from BEE companies through the SAA’s procurement process.

In 2015, under SAA’s policy of “aggressive transformation”, 30% of all SAA procurement had to be “set aside” for procuring from BEE (black-owned) enterprises.⁴¹⁸ This, despite the fact that setting aside quotas was contrary to the Preferential Procurement Regulations of 2011 as well

⁴¹² As above 15.

⁴¹³ As above.

⁴¹⁴ As above 10 and 11.

⁴¹⁵ As above 12.

⁴¹⁶ As above 19.

⁴¹⁷ As above 80, 205 and 207.

⁴¹⁸ As above 85.

as the B-BBEE Act.⁴¹⁹ This unlawful policy was pointed out by procurement managers as well as in a letter from the B-BBEE Commission addressed to the SAA board.⁴²⁰ Nevertheless, the B-BBEE Commission was ignored, and staff were instructed by SAA's board members to implement the unlawful policy.⁴²¹

Under the guise of this illegal transformation policy, some senior executives and board members of SAA set up a black-owned front company in which they had a substantial financial interest.⁴²² They then forced companies that supplied goods and services to SAA to set aside 30% of the value of each contract awarded to them by SAA for the front company.⁴²³ Even companies that already had a Status Level 1 in respect of black ownership were forced to set aside 30% of the value of all contracts awarded to them by the SAA, for the black-owned front company.⁴²⁴

The same SAA executives also exerted pressure on SAA procurement staff and suppliers to set aside portions of SAA contracts for the ANC's military veterans.⁴²⁵ The military veterans are specifically included for additional benefits in terms of the definition of "Black Designated Groups" in the B-BBEE Act. The leaders of the ANC's Military Veterans Association who spearheaded the efforts to obtain contracts as BEE partners through SAA, were politically connected to President Zuma and the Gupta family. These leaders were strongly implicated in state capture activities by the State Capture Commission.⁴²⁶

Several instances of funds being channelled to the ANC as political party in exchange for contracts with government or state-owned companies were reported to the State Capture Commission.⁴²⁷ The Commission noted that it was a matter of grave concern that the evidence provided to the Commission established a "link" between corruption and grants, tenders and political party funding. It noted that "in at least two instances, the proceeds of corruption were diverted to a political party, in both instances the ANC".⁴²⁸ Corruption and the abuse of the B-

⁴¹⁹ As above 91.

⁴²⁰ As above 89.

⁴²¹ As above 85.

⁴²² As above 87 and 88.

⁴²³ As above 89.

⁴²⁴ As above.

⁴²⁵ As above 105.

⁴²⁶ As above 105 – 107.

⁴²⁷ As above 802.

⁴²⁸ As above.

BBEE programme not only benefit the politically connected but also the ANC as a political party.

To further illustrate the ANC's abuse of B-BBEE for financial and patronage benefit, the United States District Court for the District of Columbia in *Securities and Exchange Commission v Hitachi Ltd*⁴²⁹ in 2015 ordered the international company Hitachi to pay civil penalties pursuant to section 21(d) of the United States' Securities Exchange Act of 1934.⁴³⁰ The civil penalties relate to Hitachi's corrupt relationship with the ANC as political party and Hitachi's BEE business partner to obtain state contracts.

The *Hitachi* judgement revealed that Hitachi Power Europe (Gmbh) was an international supplier of boilers for power stations. It was wholly owned by Hitachi Ltd as mother company based in Germany. Hitachi Power Africa (Pty) Ltd (HPA) was then incorporated in 2015 by HPE in South Africa to pursue business opportunities in South Africa.⁴³¹

Chancellor House Holdings (Pty) Ltd is a South African investment firm created by the ANC as a funding vehicle for the ANC. Chancellor House was administered by members of the National Executive of the ANC.⁴³²

In order to enter the boiler and energy market in South Africa, HPA "partnered with a local black-owned entity...to qualify under the requirements of South Africa's Black Economic Empowerment Act of 2003 ("BEE")".⁴³³ Due to Chancellor House and its parent organisation, Chancellor House Trust's "extensive political connections with the Government of South Africa, with the ANC and with Eskom", Chancellor House was offered a 25,1% stake (shareholding) in HPA.⁴³⁴ As part of the transaction, Chancellor House obtained a seat on HPA's board with Chancellor House's chairperson becoming a director of HPA.⁴³⁵

In addition to the Shareholders Agreement that existed between HPA and Chancellor House,

⁴²⁹ 45 1:15 – CV – 01573 (2015) (hereafter referred to as *Hitachi*).

⁴³⁰ As above para [80].

⁴³¹ As above paras [13] and [14].

⁴³² As above para [17].

⁴³³ As above paras [18] and [21].

⁴³⁴ As above paras [22] and [28].

⁴³⁵ As above paras [28] and [30].

the parties entered into a “side-arrangement” in terms of which Chancellor House would be paid by HPA for “its exertion of influence during the Eskom tender process”.⁴³⁶

The Medupi and Kusile power station contracts awarded to HPA together accounted for approximately USD 5,6 billion.⁴³⁷ Chancellor House submitted several invoices in the course of 2008 to HPA for success fees described as “tender support fees” totalling USD 1,123,382.⁴³⁸ HPA recorded the support fees in its annual financial statements as “consulting fees”.⁴³⁹ As a result of the Eskom power station contracts, Chancellor House was also paid dividends of USD 1,758,170 in the 2010 financial year and USD 3,268,325 for the 2011 year.⁴⁴⁰ In 2014, HPA repurchased the Chancellor House shares for USD 4,4 million.⁴⁴¹ The total amount paid to Chancellor House by Hitachi as a result of the Medupi and Kusile power station contracts was USD 10,5 million.⁴⁴²

Hitachi Ltd was fined an amount of USD 19 million for reflecting the amounts paid to the ANC through Chancellor House incorrectly as “consulting fees” and “dividends” knowing very well it was for “Chancellor to use its political influence to help obtain government contracts”.⁴⁴³ This was in contravention of section 13 of the American Security Exchange Act.⁴⁴⁴

Hitachi Ltd did not oppose the application and paid the penalties.⁴⁴⁵ The ANC as political party, through Chancellor House, became a BEE partner of Hitachi which is clearly a front for the ANC to generate revenue from corrupt activities and which undermines the objectives of the B-BBEE Act. Despite the unlawful and corrupt relationship between the ANC, Chancellor House and Hitachi, and Hitachi’s admission of guilt by paying the penalties without opposing any of the allegations, the South African authorities did not lodge any investigations or institute any prosecution in this regard.

⁴³⁶ As above para [35].

⁴³⁷ As above para [57].

⁴³⁸ As above para [59].

⁴³⁹ As above para [60].

⁴⁴⁰ As above paras [64] and [66].

⁴⁴¹ As above para [68].

⁴⁴² As above para [69].

⁴⁴³ As above para [71].

⁴⁴⁴ As above paras [73] – [80].

⁴⁴⁵ As above *Consent of Defendant Hitachi Ltd*.

6.9 CONCLUSION

Two of the research questions posed in chapter 1, paragraph 1.2 above are: “What is the present definition or categorisation of the beneficiaries of B-BBEE?” and “What insights can be derived from the history of B-BBEE since its commencement and the degree of success to achieve its purpose?” This chapter answers these questions by looking at the history of B-BBEE, how it evolved, the working mechanism of the B-BBEE programme, and whom the legal and real beneficiaries of B-BBEE are.

The early era of BEE transactions just before and after the beginning of the Constitutional transition in 1994, was characterised by transactions involving big corporations and those who were politically connected. Ironically, it was under the influence of black business and those at the forefront of BEE transactions in the 1990s that the approach was adopted to move away from narrow-based to so-called “broad-based black economic empowerment”.⁴⁴⁶ The concept of black economic empowerment was also adopted by the ANC at its National Conference in 1997 as part of the ANC’s economic transformation strategy.⁴⁴⁷ The introduction of B-BBEE was therefore a black elite and ANC initiative. This led to the adoption of a B-BBEE legislative framework to, in theory, promote empowerment on a broad level involving the workers, communities, cooperatives and inhabitants of rural areas. Furthermore, the broad-based concept of BEE, in theory, not only involves the empowerment of black people through ownership in companies, but also various other initiatives such as skills development, enterprise development and socio-economic development.⁴⁴⁸

Therefore, in terms of the B-BBEE Strategy and the B-BBEE Act, the present use of the terms “BEE” and “broad based” should be understood in a dual context. Firstly, BEE refers to those policies and laws that specifically benefit black people, such as the Employment Equity Act, the Preferential Policy Framework Act, the Preferential Procurement Regulations and the B-BBEE programme. This legislation all contains definitions of “black people”. Secondly, the term “broad based” is only defined and used in the context of a specific BEE programme, namely the B-BBEE programme. “Broad based” in respect of the B-BBEE programme refers to two concepts

⁴⁴⁶ See para 6.2 above.

⁴⁴⁷ ANC *50th National Conference Resolutions* (1997) 44th page.

⁴⁴⁸ See para 6.3.1 above.

which are firmly rooted in the history of BEE. Firstly, in respect of equity ownership in enterprises, it extends, in theory, to ownership beyond mere narrow black capitalists and includes the accumulation of wealth and assets by collective enterprises such as employee ownership programmes, community-based cooperatives or community broad-based ownership programmes.⁴⁴⁹ The second concept suggests that “broad based” is more than mere equity ownership by black people in corporates, but includes various other interventions or initiatives to empower black people to become economically sustainable, such as skills development and enterprise development.⁴⁵⁰

Despite the broad-based objectives of B-BBEE, and the ostensibly wide array of initiatives to benefit certain vulnerable sections of society such as designated groups, the points allocated and design of the B-BBEE programme do not promote the stated broad-based objectives of B-BBEE, namely promoting the economic sustainability of the workers, communities, the poor and vulnerable. The bulk of the points benefit those at board of directors’ level, managerial level, the black capitalists, and the black upper and middle class. Various actions by government further suggest that government attempts to discourage the use of broad-based schemes in ownership initiatives.⁴⁵¹

Although the B-BBEE programme proclaims broad-based objectives, the way it is designed and applied by government suggests a narrow focus on ownership to benefit those at the proximity of political power, as a mere continuation primarily of the BEE transactions of the 1990s. B-BBEE is a black capitalist programme and B-BBEE provides the impression of statutory legitimacy to BEE transactions involving the political and economic elite. Since the main stated objective of the B-BBEE programme in terms of the B-BBEE Strategy and the B-BBEE Act is to promote the number of black people who own and manage enterprises, B-BBEE aims to benefit primarily the black upper- and middle class to achieve this main objective and not those at the lower socio-economic strata. Whereas the *de jure* beneficiaries are defined in the B-BBEE legislation, the *de facto* beneficiaries must be understood within the political ideology of the NDR and economic transformation. The broad formulation of the *de jure* beneficiaries based

⁴⁴⁹ Department of Trade and Industry (DTI) *South Africa’s Economic Transformation: A Strategy for Broad-Based Black Economic Empowerment* (2003) 12 and 13.

⁴⁵⁰ As above 12.

⁴⁵¹ See para 6.5 above.

exclusively on political ideology, lends legitimacy to the *de facto* beneficiaries.

The design and mechanism of the B-BBEE programme make it a business imperative to be B-BBEE compliant preferably through black ownership as the primary requirement. Those entities which are not compliant and do not have the prerequisite black ownership will not come into consideration for state contracts, the supplying of goods and services to other entities, and for licences, permits and grants in terms of section 10 of the B-BBEE Act.

Unlike the Malaysian redress model, the B-BBEE programme has no specific goals to measure its effectiveness or to determine when it should be phased out. The B-BBEE programme is not a temporary programme and, in the absence of clear goals, could apply *ad infinitum*. Moreover, government collects data from a small segment of businesses to determine the state of black ownership and control. This data shows that the level of black ownership and control is decreasing. Contrary to international law requirements, government lacks adequate and broken-down data on the social standing of those who benefit from B-BBEE initiatives such as black ownership. Government also has no data to measure the impact of interventions such as Employment Equity and B-BBEE on affected vulnerable and marginalised designated groups. The CERD did not consider South Africa's EEA and B-BBEE Act adequate to promote the equality of marginalised groups such as black women and smaller indigenous groups. The demographic representation targets and the way they are applied largely benefit the African population. This further creates opportunities for political patronage within the largely African-dominated ANC. Vulnerable beneficiaries of B-BBEE are often exploited to benefit the political elite. B-BBEE is also abused by senior executives in government and state-owned enterprises to gain access to state resources through the preferential procurement process which gives preference to BEE companies under the guise of "transformation".⁴⁵²

Moreover, B-BBEE is used as a party-funding mechanism whereby funds from state contracts are channelled to the ANC as political party through front companies and corrupt activities. This is done by means of kickbacks to the ANC for assisting procuring companies to acquire state contracts. Investment companies acting as front companies of the ANC enable the ANC to act as "BEE partners" in companies which acquire state contracts. This, while the ANC does not

⁴⁵² See para 6.6 above.

contribute anything from a business perspective and is solely involved in exerting “political influence”. These activities clearly constitute corruption, fraud and a fronting offence in terms of section 13O of the B-BBEE Act and undermine the stated objectives of the Act.⁴⁵³

⁴⁵³ As above.

CHAPTER 7

CONCLUSIONS AND RECOMMENDATIONS

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7.1 INTRODUCTION

In chapter 1, paragraph 1.2 above, four research sub-questions were posed in answer to the main research question. In order to answer these questions in a chronological and sensible way, the conclusion and findings of this study will be divided into two main parts. In the first part, final conclusions are drawn on who the real beneficiaries of the Broad-Based Economic Empowerment (B-BBEE) programme are, and in the second part, the beneficiaries of B-BBEE within the normative framework of international law and the South African Constitution are compared. These two parts constitute the main research question as subject matter of this study.

Regarding the first part, two core questions need to be answered: firstly, who are the beneficiaries of B-BBEE as determined by legislation – the *de jure* beneficiaries and secondly, who are the actual beneficiaries – the *de facto* beneficiaries? To answer these questions, relevant aspects will be concisely discussed as concluded from the evidence gathered during this study, namely: the demand for a black economic empowerment programme; history's role in the present formulation of the beneficiaries; the shaping of the beneficiaries of B-BBEE by the ANC's ideology of transformation; and the present *de jure* and *de facto* beneficiaries of B-BBEE. This will provide the answers to the first and third research sub-questions and will be discussed in paragraph 7.2 below.

In respect of the second part of the conclusion and findings, that is assessing the beneficiaries of B-BBEE with the normative framework of international law and the Constitution, three aspects will be succinctly discussed as conclusive findings of this study, namely: lessons from other jurisdictions; international law requirements; and B-BBEE and the South African Constitution. This will constitute the findings of the second and fourth sub-research questions respectively

and is enunciated in paragraph 7.3 below.

The findings will be followed by recommendations to overcome the shortcomings of the B-BBEE programme to enable it to fulfil its present ostensible objective of promoting the achievement of (substantive) equality. This is delineated in paragraph 7.5 below.

7.2 THE BENEFICIARIES OF B-BBEE

Part 7.2 answers the first and third research sub-questions enumerated in chapter 1, paragraph 1.2 above.

7.2.1 A Demand for Black Economic Empowerment (BEE)

South Africa is internationally notorious for its high levels of inequality. The World Bank has labelled South Africa the most unequal country (society) in the world. Levels of poverty, unemployment and inequality are not only persistent but have in fact increased since 1994.¹

The main driver of income inequality is unemployment, with the unemployment rate in South Africa towards the end of 2023 at 31,9%.² Ownership of financial assets, such as holding shares in companies, is identified as a main contributor to wealth inequality.³ In measuring income and wealth inequality, data is conclusive that inequality in South Africa currently still manifests along the lines of race, gender, disability and youth, with black people the most affected, specifically the African population.⁴

Various groups were identified as being especially vulnerable and susceptible to poverty and inequality, such as those facing multiple forms of socio-economic conditions causing equality, particularly black females, black youths and black disabled persons.⁵ According to Stats SA, those most affected by poverty are generally African females; children younger than 17 years; those living in rural areas, the Eastern Cape and Limpopo, and poorly or uneducated people.⁶ A

¹ See ch 2, para 2.2 above; and World Bank *Overcoming Poverty and Inequality in South Africa* (2018) xv–xvi.

² Stats SA *Quarterly Labour Force Survey Quarter 3:2023* (Nov 2023) 4.

³ World Bank *Overcoming Poverty and Inequality in South Africa* (2018) xv and xvi.

⁴ South African Human Rights Commission *Equality Report 2017/18* (2018) 17.

⁵ As above 21.

⁶ Stats SA *Poverty Trends in South Africa: An Examination of Absolute Poverty between 2006 and 2015* (2017) 18.

study by the United Nations University World Institute for Development Economics Research (Uni-Wider) identified African single-parent, female-headed households and rural households as the most vulnerable groups in South Africa.⁷

Data suggests that the socio-economic conditions which contribute to inequality in South Africa are high unemployment; poor governance and productivity; the lack of education; levels and quality of education; access to land; geographic location; proximity to employment opportunities; and access to resources.⁸

Data also indicates that the African population had an exponential growth in its middle and upper middle (affluent) classes compared to other race groups since 1994.⁹ However, the poor classes within the African population group have also regressed further into poverty compared to other race groups. The data also indicates that the middle and upper classes of the African population group became more affluent in contrast to its poor classes.¹⁰ This widening gap of inequality within the African population group is the main reason for the increase in the overall inequality rate in South Africa, as the African population group accounts for roughly 80% of the national population. This expansion of the African middle and affluent classes at the expense of the African poor is indicative of a new pattern of inequality that is emerging, namely class and vertical inequality.

Given the present manifestation of inequality along the lines of race, gender, disability and youth, with black South Africans and specifically Africans the most affected, there is justification for a black economic programme to socio-economically empower, uplift and benefit vulnerable black people to remedy this situation, subject to the condition that the programme benefits the poor and vulnerable classes. Economists have emphasised the importance of economic growth to reduce unemployment, poverty and inequality.¹¹ The World Bank is of the view that interventions that simultaneously stimulate growth and reduce inequalities are likely to have far more impact than interventions that only stimulate growth or only reduce inequalities.¹²

⁷ United Nations University World Institute for Development Economics Research (Uni-Wider) *Snakes and Ladders and Loaded Dice* (Mar 2019) 1.

⁸ World Bank *Inequality in Southern Africa: An Assessment of the Southern African Customs Union* (2022) 118–123.

⁹ UCT Liberty Institute of Strategic Marketing *Black Middle-Class Report* (2022) 5.

¹⁰ Stats SA *Poverty Trends in South Africa: An Examination of Absolute Poverty between 2006 and 2015* (2017) 20 and 21; and The Economist *Economist.com* (Sep 2021) 23.

¹¹ Piketty (2020) 24; and Milanovic (2018) 90.

¹² World Bank *Overcoming Poverty and Inequality in South Africa* (2018) xxvi.

7.2.2 History's Role in the Present Formulation of the Beneficiaries of B-BBEE

The history of South Africa shows a correlation between the lack of political power by black people and the socio-economic conditions of black people described as the “special relationship between power, land and labour”.¹³ The pre-1994 period of South Africa's history can be divided into three parts: Colonialism, segregation and apartheid.¹⁴ Apart from a qualified franchise that existed until 1936 for Africans and 1956 for Coloureds, black people were in general denied the right to vote or to vote for candidates of their choice.¹⁵ This resulted in black people, despite being the majority of the population, serving for centuries under the rule of a white minority until 1994. This lack of political power by black people and the concentration of all political power in white people created a political imbalance in favour of whites, with severe socio-economic consequences for black people over time.¹⁶

Since the early colonial period, white European settlers competed for land with indigenous black people. This resulted in disputes, armed skirmishes and wars. Due to the military superiority of whites and the political power embodied in legislation by white controlled governments, the availability of land to indigenous groups were gradually restricted.¹⁷ These restrictions and loss of land by the black population led to the inability of blacks to sustain themselves through traditional subsistence farming and “forced” many black people to work as labourers on white-owned farms.¹⁸ This situation is often referred to as “unfree labour” by black people rendered to more affluent white landowners.¹⁹ The need for cheap black labour intensified with the advent of the mining industry and industrialisation from the late 1870s. This led to large-scale migration of black labour, with several laws enacted to regulate the movement of black people, wages and working conditions in favour of the white politically dominant group.²⁰

Until the mid-1900s, there was no formal school education for black people. Formal school education was phased in by legislation after 1948. In terms of government's policy of separate development, the education of black people was designed to prepare them for labour positions

¹³ Terreblanche (2002) 5.

¹⁴ Terreblanche (2002) 4, 153, 177, 219 and 297; and ch 2, para 2.3 above.

¹⁵ See ch 2, para 2.3.1.1 above.

¹⁶ See ch 2, para 2.3.1.2 above.

¹⁷ The Natives Land Act 27 of 1913; and the Native Trust and Land Act 18 of 1936.

¹⁸ See ch 2, para 2.3.1.2 above.

¹⁹ Terreblanche (2002) 8.

²⁰ As above 179-210.

which was felt by the then government to fit the requirement of black people. The view is held that, this, to a large extent, excluded black people from professional and high-income occupations and more technical management positions.²¹

During the period of apartheid (1948 to 1994), several laws were enacted as part of the then government's policy of "apartheid" and separate development to compel black people to live and work in certain areas, attend certain schools and universities, and to confine them to certain trades and occupations.

All these historic socio-economic circumstances contributed to a large extent to the current reasons for inequality, such as the lack of education, access to land, access to resources, and the inability of black people to start, operate and manage businesses. The historic causes of inequality therefore relate mainly to land, labour and education.²² It is not surprising that the South African Constitution (first the Interim Constitution and later the 1996 Constitution) makes provision for remedial and restitutionary measures to promote the achievement of equality and for several socio-economic rights in an attempt to remedy the causes of past discrimination and inequality.²³

Thus, the B-BBEE programme as a measure to achieve equality by increasing the number of black people who own, manage and control enterprises,²⁴ is justified as a remedial and restitutionary measure to address the effect of past racial discrimination that gave rise to inequality. B-BBEE endeavours to do so by means of a broad array of interventions, such as skills development, socio-economic development and government procurement,²⁵ which cannot be faulted. Historic developments and their contribution to the present state of inequality further support the need for a programme such as the B-BBEE programme to socio-economically empower black people through a broad spectrum of development initiatives.

²¹ Department of Public Service and Administration *White Paper on Affirmative Action in the Public Service* (1998) published in *Government Gazette* 18810 dated 23 Apr 1998.

²² Department of Trade and Industry (DTI) *South Africa's Economic Transformation: A Strategy for Broad-Based Black Economic Empowerment* (2003) 6, 7 and 28; and ch 2, para 2.3.5 above.

²³ S 9(2) of the Constitution and ch 3; para 3.4 above.

²⁴ S 2 of the B-BBEE Act.

²⁵ See ch 6, para 6.4 above.

7.2.3 The Shaping of the Categories of Beneficiaries of B-BBEE by the ANC's Political Ideology of Transformation

7.2.3.1 Origins and Foundation

The political exclusion and continuous deprivation of African people, especially of land, through discriminatory legislation, have led to the formation of the South African Native National Congress (SANNC) which later became the African National Congress (ANC), during the first quarter of the 1900s. The main aim of the ANC was to promote the interests of the African population.²⁶ The persistent increase in racially discriminatory legislation such as the Natives Land Act of 1913 and 1936,²⁷ coupled with the white government's continued refusal to incorporate Africans politically – firstly, during and after the forming of the Union of South Africa in 1910 and later under apartheid – have given rise to a strong feeling of consolidation and African Nationalism amongst African people. In the Africanist view, the only true owners of South Africa are Africans. Slogans such as “Africans first”, “Africa for the Africans” and “Blacks in general and Africans in particular” were adopted.²⁸

In the aftermath of the Second World War, in the 1940s and up to the 1950s, a new strategy of resistance was adopted by the ANC. This was initially in the form of passive resistance by deliberately refusing to comply with discriminatory laws. This “defiance” was later followed by more violent acts of sabotage of government buildings and infrastructure.²⁹

The acts of violence escalated to the point that political parties such as the South African Communist Party (SACP) and Pan Africanist Congress of Azania (PAC) that were in alliance with the ANC, were proscribed (banned) by the South African government in 1950.³⁰ During this period of resistance, the ANC adopted the *Freedom Charter* which called, amongst others, for the nationalising of banks, “industry and trade” (corporations) wealth and the mines (minerals) of South Africa.³¹ The ANC was proscribed in 1960.

²⁶ Ngqulunga (2017) 52; and ch 2, para 2.4.1 above.

²⁷ The Natives Land Act 27 of 1913; and the Native Trust and Land Act 18 of 1936.

²⁸ Odendaal (2012) 287 and 290; Harvey (2021) 152.

²⁹ ANC *Programme of Action* (1949) 1st and 2nd page.

³⁰ See ch 2, paras 2.4.1 and 2.4.2 above.

³¹ ANC *Freedom Charter* available on the ANC's website: anc1912.org.za/the-freedom-charter-2/; Meredith (2010) 129-134; and ch 2, paras 2.4.1 and 2.4.2 above.

During this period of proscription, the ANC found refuge in the Soviet Union where ANC leaders, already introduced to socialist thinking, were thoroughly exposed to communist and socialist theories. Under the influence of Soviet teachings and the SACP, the ANC adopted the National Democratic Revolution (NDR).³²

The NDR was developed by the Soviet Union in the early 1920s to deal with the struggles of the working class and to oppose Western capitalist countries which had colonised the African continent in the preceding centuries. The NDR was developed to free (de-colonise) African countries from Western colonisation through a process of transition to a socialist state.³³ This process is referred to as “the Revolution” or the “transformation of society”. The end objective of the NDR is idealised as classless (equal) society in terms of Marxist theory in which the socialist state, as “custodian”, controls all means of production, including land, to the benefit of the working class. The state’s role as the centre of power and vanguard of the working class was strongly developed under Lenin. Hence, the NDR is referred to as a Marxist-Leninist programme.³⁴

In respect of B-BBEE and the NDR, the NDR tolerates capitalism and private ownership of the means of production for the time being under the vanguard and control of the ANC, until ultimate transition to a socialist society. During this process, all classes are required to be unified to achieve the NDR’s goal. Although the bourgeoisie is seen as an enemy of the working class in terms of classic or traditional Marxist theory, it is regarded during this process of transition as an ally of the working class to gain control of productive assets from the former oppressive ruling class. Further, in terms of the NDR, the shortest route to socialism is through a democratic state and the use of democratic instruments, such as the transformationist interpretation and application of the existing South African Constitution, to pursue the NDR’s end goal.³⁵

The ANC’s ideology therefore stands on three pillars: African Nationalism, the *Freedom Charter* and the NDR, with the NDR being the overarching ideology and policy. The *Freedom Charter* and the objectives of the NDR are specifically mentioned in the ANC’s Constitution as the means through which an equal “national democratic” society should be achieved. The ANC also

³² See ch 2, paras 2.4.3.2 and 2.5 above.

³³ Filatova *South African Historical Journal* (2012) 509; and ch 2, para 2.4.3.2 above.

³⁴ As above.

³⁵ Slovo *Umsebenzi Discussion Pamphlet* (1988) 3rd page; and ch 2, para 2.4.3.2 above.

evaluates any new developments that may pose a threat to progress in achieving the NDR's objectives during its National Conference held every five years. The National Conference is the ANC's highest policy formulating body.³⁶ The resolutions adopted during these Conferences become ANC policies which then translate into government policies and legislation.

7.2.3.2 The NDR and ANC Policies

Since assuming power in 1994, the ANC has held eight National Conferences. The NDR is enlisted as foundation of all ANC resolutions and policies adopted at the Conferences. The following can be summarised as resolutions adopted at National Conferences and the principles on which such resolutions are based, and have a direct bearing on BEE and who the present beneficiaries of B-BBEE are: (1) Transfer of power to the people means the simultaneous transformation or democratisation of power to vest in the ANC and the state;³⁷ (2) The ANC must strengthen its hold on state power and all other levers of power;³⁸ (3) The public service (especially senior management), judiciary, economy, captains of industry and the media are seen as centres of power;³⁹ (4) Reaffirming the ANC's continued commitment to the national liberation of "Blacks in general, Africans in particular";⁴⁰ (5) The working class remains the "main social motive force for a democratic revolution";⁴¹ and (6) The role of the black and especially African bourgeoisie to assist in the struggle of the working class as "forces of transformation" whose interests coincide with at least the immediate interests of the majority.⁴²

To achieve the above, the following course of action was adopted by the ANC to give effect to the objective of establishing control over all centres of power, thus to achieve ANC power over all these institutions: (1) The immediate transformation of the judiciary, army, police and intelligence structures;⁴³ (2) Transformation of the public service through affirmative action to ensure that the public service is representative of the South African population;⁴⁴ (3) The deployment of "cadres" in all positions of influence, power and control in the public and private

³⁶ ANC *African National Congress Constitution* (2017) Rule 2.2; and ch 2, para 2.5 above.

³⁷ ANC *49th National Conference Resolutions* (1994) para 5; and ch 2, para 2.5.1 above.

³⁸ ANC *Strategy and Tactics* (1997) para 6; and ch 2, para 2.5.2 above.

³⁹ As above.

⁴⁰ ANC *50th National Conference Resolutions* (1997) 20th and 21st pages.

⁴¹ ANC *49th Conference Resolutions* (1994) paras 1 - 4.

⁴² ANC *Strategy and Tactics* (1997) para 7.

⁴³ As above.

⁴⁴ As above para 11.

sector, which cadres must be “guided by the slogans, vision and objectives of the ANC”;⁴⁵ (4) Urgent measures must be established to ensure the appointment of judicial officers who are “steeped in” and reflect the “progressive values” of the ANC’s Constitution;⁴⁶ (5) Regulate the private sector;⁴⁷ (6) The ANC must develop programmes to guide the emerging black bourgeoisie and benefit them through BEE programmes and government procurement;⁴⁸ (7) Given the importance of the mining industry, it must be transformed by means of affirmative action and “state-held mineral rights”;⁴⁹ (8) Promote B-BBEE to ensure between 30% and 50% direct black ownership and control of the media and Communications Technology Industry “to translate in a diversity of views”;⁵⁰ (9) The use of the broad principles of the South African Constitution to pursue the objectives of the NDR;⁵¹ and (10) The benefits of holding power affords the ANC and its “leaders powerful possibilities of patronage” which “by their selfless contribution to the cause, deserve such acknowledgement”.⁵²

Therefore, the resolutions and policies adopted by the ANC, as well as the ANC’s Constitution, involve four areas of government policy: (1) Transformation of the public service; (2) Transformation of society; (3) Economic transformation; and (4) Transformation of the judiciary.

7.2.3.3 The NDR and B-BBEE

For the purpose of this study, it is important to determine how the ANC’s ideology dictates who the beneficiaries of B-BBEE are. The three areas mentioned in (1) to (3) above are directly related to BEE.

7.2.3.3.1 Transformation of Society

The transformation of society is not only limited to the transformation of the public service judiciary and the economy as part of society, but also transforming the whole of civil society. During the ANC’s 49th National Congress held in 1994 in Bloemfontein, it emphasised the

⁴⁵ As above para 10; and ANC 51st National Conference Resolutions (2002) para 1.

⁴⁶ ANC 52nd National Council Resolution (2007) para 5.

⁴⁷ ANC Strategy and Tactics (2007) para 116.

⁴⁸ ANC 51st National Conference Resolutions (2002) paras 10 and 11.

⁴⁹ ANC 50th National Conference Resolutions (1997) 44th page.

⁵⁰ ANC 53rd National Conference Resolutions (2012) 57; and ANC 52nd National Council Resolution (2007) paras 94 and 115.

⁵¹ ANC Strategy and Tactics (2007) para 75.

⁵² As above para 8.

transformation of society according to the ideology of the *Freedom Charter* that “the people shall govern”. All civil society formations and structures must be utilised to “give power to the people” to “democratise society” and to be “actively involved” in all decision-making in society.⁵³

The transformation of society is based on the representiveness (“representivity”) principle and requires all workplaces in the public and private sphere as well as civil society to reflect the race and gender demographics of each race group in proportion to its percentage of the population. With Africans representing roughly 80% of the population, proportional representivity largely benefits them based on the ideology of African Nationalism – “Africans first”, “Africa for Africans” and “Black in general and Africans in particular”. This ensures that all spheres of society conform to the identity of the African majority within the resurgence of cultural nationalism to create a national character or social entity in the name of “a united people”, “one nation” and nation building to create a homogenous society.⁵⁴

7.2.3.3.2 Economic Transformation

Economic transformation is embodied in government policy in the form of the Employment Equity Act (EEA) and B-BBEE programme (collectively BEE). It involves all entities in the public, private and civil sphere (businesses, organisations, associations and workplaces). In terms of the *Freedom Charter*, which propagates the nationalisation of banks, corporates, mines and the wealth of the country, B-BBEE serves as an instrument of nationalisation. The ANC regards the transfer of productive assets, land and corporates to Africans as envisioned in the *Freedom Charter* as “nationalisation” as discussed in chapter 2, paragraph 2.6 above. The means of production, assets, businesses, banks, mines and land are to be transferred to the dominant African political elite and African bourgeoisie under the guardianship of the ANC as “vanguard” of the workers. This objective is to be achieved by means of the BEE as instrument of transformation. The B-BBEE programme has as one of its main objectives to, amongst others, substantially increase the black ownership, management and control of enterprises in accordance with the representivity principle contained in B-BBEE legislation and the EEA. This “wealth of the nation” and productive assets will be transferred during the transformation process

⁵³ ANC 49th National Conference Resolutions: *A basic guide to the Reconstruction and Development Programme* (1994) 2nd, 12th, 13th, 16th and 17th pages.

⁵⁴ Stacey *Politikon* (2003) 135; Malan *TSAR* (2010) 443; Malan (2019) 112 and 121-124; and ch 5, para 5.3.3 above.

from the former “ruling oppressive class” and ultimately placed under the control of a socialist state to the benefit of the oppressed worker class – a theory developed by Lenin. From an NDR perspective, the beneficiaries of BEE cannot be those with low levels of education or the unemployed, but rather those with high levels of education – the black managerial aristocracy – to ensure that assets end up in the hands of the politically dominant black bourgeoisie to be nationalised – controlled by the ANC on behalf of “we the people”. Therefore, the B-BBEE programme is designed mainly to empower the African middle and affluent classes to own, manage and control enterprises.

7.2.3.3.3 Transformation of the Judiciary

The transformation of the judiciary must be understood in the context of the South African Constitution, its values, the rights it makes provisions for, especially the right to equality, and the ANC’s Constitution.

In terms of the ANC’s Constitution, the ANC pursues the objective of an equal society based on the principles of the *Freedom Charter* and the NDR.⁵⁵ The ANC’s Constitution specifically does not make any reference to the South African Constitution, although the objective of an equal society is also one of the founding values and rights provided for in the South African Constitution.⁵⁶ The South African Constitution, viewed holistically, is perceived to be based strongly on the principle of constitutionalism which restricts state power, and provides for a wide array of human rights to ensure that it is recognised as a “standard liberal democratic” constitution.⁵⁷ The South African Constitution therefore promotes the achievement of equality on a variety of fronts with – in theory at least – a strong commitment to protect what it aims to achieve, namely rights and equality.

The ANC pursues equality by means of the NDR, entrenched in its own Constitution which requires totalitarian state control and the majoritarian ideal of African Nationalism, an ideal that cannot operate within a liberal democratic constitutional system. This requires a specific understanding or interpretation of equality.

⁵⁵ ANC *African National Congress Constitution* (2017) Rules 2.1 and 2.2.

⁵⁶ Ss 1(a) and 9(1) and (2) of the Constitution.

⁵⁷ Stacey *Politikon* (2003) 133.

The ANC's interpretation of equality requires that all people be treated essentially the same way. This means that individuals have an equal amount of influence in determining what a good life is, and are consequently all required to adopt and pursue whatever is collectively determined to be a good life, regardless of what might constitute a good life for dissenting individuals.⁵⁸ This is based on socialist theory that the state should enforce the common good. Those who do not conform to the collective or majoritarian good or character should "be forced to be free" and to live their lives according to collective decisions to which they actually unknowingly agree, merely because they belong to a society with a particular character. Therefore, the rights of individuals are limited by the right of the collective to decide what the right of equal individuals to liberty is. The ANC transformation policies contained in the B-BBEE programme and the EEA based on the principle of broad representation, must be seen as society, the majority – "we the people", taking collective action to transform all aspects of power and society towards an equal, better life for the collective majority to affirm a "national character".⁵⁹

As the shortest route to socialism in terms of the NDR is through a democratic state, democratic instruments such as the Constitution need to be utilised in the transition to socialism. During the ANC's National Conference in 2007, the Constitution and the state system were identified to provide the "requisite wherewithal" as instruments to implement the objectives of the NDR.⁶⁰ The highest courts interpret and apply the Constitution. The Constitutional Court is described as the "guardian of our Constitution", with "exclusive jurisdiction in respect of certain constitutional matters" and "final decisions on those constitutional matters".⁶¹ Through transformation, the notion of "transformative constitutionalism" and the principle of representativity, the judiciary – as an important level of power – must be transformed to allow for the appointment of judges to interpret the Constitution according to the ideologies and political convictions of the ANC to give effect to the ideals of the "transformation of society".⁶² This transformation of the judiciary has already led to questionable judgements by the Constitutional Court in respect of equality and measures to promote the achievement of equality. These judgements are often contrary to the principles laid down by the Constitutional Court as such, for example the holistic approach to,

⁵⁸ As above 134; and ch 3, para 3.5 above.

⁵⁹ Stacey *Politikon* (2003) 142; and Hudson *Politikon* (2000) 97.

⁶⁰ ANC *Strategy and Tactics* (2007) para 75; and ch 2, para 2.5.4 above.

⁶¹ *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) (hereafter referred to as *Pharmaceutical Manufacturers*) para [55]; and the Constitution Seventeenth Amendment Act 72 of 2013.

⁶² Malan (2019) 193-206.

and wide and generous interpretation of the Constitution, to promote the diversity of society. This has resulted in the Constitution being interpreted selectively under the auspices of “transformative constitutionalism” to serve the political convictions of the ANC’s “transformation of society” and NDR ideology.⁶³

B-BBEE, cadre deployment, affirmative action, representivity and the transformative interpretation of the Constitution are therefore important instruments in pursuing the transformation objectives of the ANC government. Politically connected beneficiaries of B-BBEE are incorporated into the B-BBEE programme as part of political ideology and as the real and actual beneficiaries of the present B-BBEE programme.

7.2.4 The *de jure* and *de facto* Beneficiaries of B-BBEE

7.2.4.1 The *de jure* Beneficiaries

The legally defined (*de jure*) beneficiaries of B-BBEE can best be explained by comparing them to the beneficiaries of other BEE-related legislation such as the Employment Equity Act (EEA),⁶⁴ the Preferential Policy Framework Act (PPPFA)⁶⁵ and its Preferential Procurement Regulations (PPRs).⁶⁶

The EEA initially contained a basic definition of beneficiaries as “designated groups” which means black people, women and persons with disabilities. ‘Black people’ is a generic term and means Africans, Coloureds and Indians.⁶⁷ In terms of designated groups, white women and white persons with disabilities are also beneficiaries of the EEA. The beneficiaries of the EEA were not initially confined to South African citizenship. However, with the enactment of the Employment Equity Amendment Act of 2013,⁶⁸ the requirement of citizenship was added to the definition of designated groups. In terms of the “equitable representation” requirement of the EEA,⁶⁹ which requires the appointment of races and gender proportional to their respective

⁶³ As above 224.

⁶⁴ S 5 of 1998.

⁶⁵ 5 of 2000.

⁶⁶ The regulations published in terms of the PPPFA in 2001, 2011, 2017 and 2022.

⁶⁷ S 1 of the EEA.

⁶⁸ Act 47 of 2013.

⁶⁹ S 15 of the EEA.

percentage of the Economic Active Population, Africans are by far the biggest segment to benefit from the EEA as they roughly represent 80% of the population, Coloureds 9%, Whites 8% and Indians 3%.⁷⁰

The B-BBEE Act has a similar method of determining its beneficiaries. Initially, similar to the EEA, it defined the beneficiaries as being exclusively “black people” which is a generic term for Africans, Coloureds and Indians. With the amendments to the B-BBEE Act in 2013,⁷¹ black people are also required to be citizens of the Republic of South Africa by means of birth, descent or naturalisation. Those qualifying for citizenship by means of naturalisation had to be nationalised before 27 April 1994, and those who became citizens after 27 April 1994 would have been entitled to citizenship by naturalisation before 27 April 1994, the date on which the Interim Constitution took effect.⁷² B-BBEE does not include white women and white people with disabilities as part of its beneficiaries. The definition of the beneficiaries of B-BBEE is therefore narrower than the definition in the EEA. The B-BBEE Act also has a different definition of “designated groups”. The designated groups are defined as vulnerable groups and include black people with disabilities; black youths between the ages of 15 and 35 years; black people from rural, underdeveloped areas; unemployed black people who were not required by law to undergo education; and black military veterans.⁷³ The ostensible aim of the B-BBEE programme is to give preference to these vulnerable designated groups.

The South African Human Rights Commission (SAHRC) noted that whereas the population is provided with the opportunity to self-classify when statistical data is gathered for a population census, self-classification does not translate into legislation that provides for measures such as the EEA and B-BBEE programme. EEA, B-BBEE and consequently government procurement regulations classify beneficiaries of affirmative measures according to the racial classification system used by the apartheid government. In the case of the EEA, the scope was extended to include women and persons with disabilities. The SAHRC therefore concluded that indigenous people, those whose ethnic descent may be from mixed race unions, and linguistic and tribal minorities within the designated groups are therefore not accommodated within the EEA and B-

⁷⁰ Stats SA *Quarterly Labour Force Survey Quarters 3:2023* (Nov 2023) 5; and Stats SA *Mid-year population estimate* (2022) 2.

⁷¹ By means of the B-BBEE Amendment Act 46 of 2013.

⁷² S 1 of the B-BBEE Act 53 of 2003.

⁷³ The Schedule 1 of the B-BBEE Codes.

BBEE programme.⁷⁴

Representivity also plays a role determining the beneficiaries of B-BBEE. The B-BBEE Codes measure under the Management and Control element the percentage of black people on all the management levels within an entity. This is done according to the “representivity” principle of the Economic Active Population (EAP) provided for in the EEA.⁷⁵ The amount of money that a measured entity spends on skills development is also determined according to the representivity principle of the EEA.⁷⁶ The difference between the representivity principle in the EEA and that provided for by B-BBEE legislation is that the white population is disregarded in B-BBEE as B-BBEE exclusively benefits black people. The white population’s EAP percentage is proportionally divided between the black race groups (that is black in the generic sense). This means that Africans will be allocated a bigger portion of the white quota as they are by far the biggest population group.⁷⁷

The objectives of the B-BBEE Act are also stated to promote the interests of communities and workers as part of its so-called broad-based objectives.⁷⁸ The B-BBEE Codes therefore make provision for broad-based ownership programmes and employee ownership schemes to accommodate collective ownership by communities and workers in entities.⁷⁹

Thus, the *de jure* beneficiaries of the B-BBEE programme can be summarised as black people (Africans, Coloureds and Indians) who are citizens of South Africa, with a specific focus on what is perceived as vulnerable groups (designated groups), communities and workers. However, the beneficiaries and vulnerable groups are not determined based on statistical demographic data that includes social and economic needs.

The PPRs have since 2005 followed the definitions in the B-BBEE Act to determine the beneficiaries of government procurement.⁸⁰ The PPRs did not provide any guidance to government departments to establish which vulnerable groups are most deserving of specific

⁷⁴ South African Human Rights Commission *Equality Report 2017/18* (2018) 34.

⁷⁵ Para 4.1 of Statement 200 in the B-BBEE Codes.

⁷⁶ Para 2.3 and Annexe 300(B) of Statement 300 of the B-BBEE Codes.

⁷⁷ Stats SA *Mid-year population estimate* (2022) 2 it is 87,6% Africans, 10,1% Coloureds and 2,3% Indians.

⁷⁸ S 2(c) of the B-BBEE Act.

⁷⁹ Paras 3.1.1.5 and 3.1.1.6 of Statement 100 of the B-BBEE Codes.

⁸⁰ See ch 5, para 5.4.3 above.

government contracts or are feasible for subcontracting. The PPRs were not based on a realistic appraisal of need that includes the consideration of socio-economic factors.

7.2.4.2 The *de facto* Beneficiaries

The *de facto* (actual) beneficiaries of B-BBEE, in contrast to the *de jure* beneficiaries, are only revealed once the design, operation and implementation of the B-BBEE programme are considered within a political ideological context.

In respect of its design and operation, only 13 out of a total of 120 points on the B-BBEE scorecard are reserved for initiatives involving vulnerable designated groups. In respect of broad-based and collective ownership programmes holding ownership in entities, only three points in total are reserved. Of the five elements measured on the scorecard, two elements, which form the bulk of the points, can only be complied with by black people from more affluent and socially advancement classes. These are Management and Control and Enterprise and Supplier Development, which includes Preferential Procurement as a sub-element.⁸¹ Black people expected to fill management positions and serve on boards of directors of entities and enterprises, are not the unemployed, unskilled and youth but rather those who have access to material resources such as finance, quality education and training. Black-owned entities with an annual turnover of less than R50 million are also not required to comply with the elements on the scorecard and receive an outright compliance one level (Enhanced Recognition) if they are 100% black owned, and an outright level two if they are at least 51% black owned.⁸² These black-owned entities are further advantaged by the fact that they do not have to be measured by a verification agent to prove their compliance but are only required to depose of an affidavit annually to confirm their annual turnover and percentage black ownership.⁸³ This further underscores the fact that the way in which the B-BBEE legislation is designed and operates overwhelmingly supports and benefits the black middle class (bourgeoisie) and upper classes who are already in an affluent position.

With regard to implementation, government was at the forefront of discrediting and threatening

⁸¹ See ch 6, para 6.6.3 above.

⁸² Paras 4.2 and 5.3 of Statement 000 of the B-BBEE Codes.

⁸³ As above paras 4.5 and 5.3.3.

in the media those entities using broad-based and collective ownership programmes to hold shares in companies, labelling it as disingenuous, fraud and involving fronting practices. This was done to discourage enterprises from implementing the broad-based objective of B-BBEE in an attempt to drive B-BBEE ownership towards a narrow focus of ownership to benefit the black elite. This despite the stated broad-based objectives of the Act and specific provision for the collective and community ownership of entities in the B-BBEE Codes. Government has also, by means of an unlawful notice published in the *Government Gazette*, attempted to arbitrarily reduce the points on the B-BBEE scorecard for broad-based and collective ownership programmes to only three out of 25 points. The *ultra vires* notice was only withdrawn by government after threats in the media of legal action to set aside the notice as *ultra vires*.⁸⁴

The implementation of the B-BBEE programme, contrary to the stated objectives and procedural safeguards provided in legislation, is further evidence of the actual operation and government's true intention to use the B-BBEE programme for the promotion of the black middle class (bourgeoisie) and upper class. This was also recognised as such by Vuyo Jack, who led the drafting of the B-BBEE Codes, and Minister Gwede Mantashe, former secretary general of the ANC and presently the Minister of Mineral Resources and Energy.⁸⁵

The enlisting of the B-BBEE programme by and with the aid of government to benefit the ANC and those politically connected to the ANC, has been revealed in various investigations not only locally, but also abroad. In 2016, a United States court found Hitachi Ltd, as part of a large international group of companies, guilty of contravening the United States' exchange legislation because of a corrupt relationship of one of its South African subsidiaries, Hitachi Power Africa (HPA), with the ANC. The ANC was Hitachi HPA's "BEE partner", not to contribute to the business operation of Hitachi but for the sole purpose, it was held, of asserting its political influence in a corrupt way to obtain state contracts.⁸⁶

The State Capture Commission has put in sharp focus a dimension of B-BBEE that was not previously researched although it was often bemoaned in the media, namely the utilization of the B-BBEE programme within the broader scheme of BEE legislation such as the Employment

⁸⁴ See ch 6, para 6.6.4 above.

⁸⁵ As above.

⁸⁶ *Securities and Exchange Commission v Hitachi Ltd* 45 1:15-CV-01573 (2015); and ch 6, para 6.7 above.

Equity Act (EEA) and government's preferential procurement policy to benefit the political elite. The abuse of the B-BBEE programme was intended to repurpose state resources to be syphoned off in a corrupt way by the ANC, the President, members of the Executive, ANC politicians, highly placed government officials (cadres) and their family members, to the benefit of these groups and individuals. The instruments used to commit these offences were created in the name of transformation, such as Cadre Deployment, affirmative action, the principle of representivity to ensure the equitable representation of all population groups, with preference to black-owned enterprises in the awarding of government contracts. Moreover, the State Capture Commission revealed that the corruption and maladministration in the public service were not isolated incidents involving a few unrelated individuals but was orchestrated within a wide network of political patronage.

It can therefore be concluded that the *de jure* beneficiaries of B-BBEE are found in the text of B-BBEE legislation such as the Act and the Codes in an attempt to remedy past racial discrimination. The formulation of the beneficiaries in the Act and Codes are very broadly formulated and includes all black people irrespective of social or economic status. This coincides with the broad formulation in section 9(2) of the Constitution to include anyone "disadvantaged by unfair discrimination". The *de facto* beneficiaries are not *per se* defined in B-BBEE legislation but are determined by the ANC's political ideology of transformation in terms of the NDR. The NDR aims to use the black middle class (bourgeoisie) in the transition period to a socialist state to combine efforts with the worker class to control all means of production. The NDR endeavours through BEE, to provide for the mobility of black people in corporations and enterprises, especially the African majority, to "nationalise" the means of production to be placed under the "vanguard" of the ANC, as discussed in chapter 2, paragraph 2.6 above. The wide formulation of the *de jure* beneficiaries in B-BBEE legislation allows the *de facto* beneficiaries to enjoy legitimacy.

7.3 COMPARING THE BENEFICIARIES OF B-BBEE WITH INTERNATIONAL LAW REQUIREMENTS AND THE CONSTITUTION

This part deals with the second and fourth research sub-questions posed in chapter 1, paragraph 1.2 above.

7.3.1 Lessons from Other Jurisdictions

Section 39(1) of the Constitution determines that when interpreting the Bill of Rights, a court, tribunal or forum may consider foreign law.

For the purpose of this study, the restitutionary measures implemented in Malaysia and India were analysed. However, the study of Malaysia and India was not a full legal comparison, for the reasons delineated in chapter 4, paragraph 4.1 above, but rather a study to compare their programmes with the South African B-BBEE programme in respect of whom these programmes benefit and the lessons South Africa can learn from these programmes. Both Malaysia and India's constitutions, like the South African Constitution, provide for measures to promote the socio-economic interest of previously disadvantaged groups. Malaysia and India's redress policies have thus more in common with South African policies than, for instance, the affirmative action measures in countries such as the United States whose constitution does not specifically provide for such measures.

7.3.1.1 Malaysia

Malaysia's model of restitutionary measures, the National Economic Plan (NEP), has significant similarities to South Africa's B-BBEE Programme. The NEP made provision for an increase in ownership of public listed corporations by a mainly dominant political majority group (Malays) as beneficiaries. The beneficiaries of the NEP did not only include the dominant political majority group as a previous disadvantaged group, but also minority indigenous disadvantaged groups. The beneficiaries of the Malaysian NEP programme are collectively referred to as the *Bumiputera*.⁸⁷

This situation is similar to South Africa's B-BBEE programme which has African people as the dominant majority political group as beneficiaries, and also includes minority previously disadvantaged groups, the Coloureds and Indians. The Malaysian NEP consisted of various government-supported initiatives to increase the ownership of the Bumiputera, such as preferred

⁸⁷ UN Research Institute for Social Development, *The New Economic Policy and inter-ethnic relations in Malaysia* (2004) 1-10; and ch 4, para 4.3.1.2 above.

reserved commercial licensing, grants, subsidies, rigid education quotas and privatisation.⁸⁸ As a result of the wide array of initiatives involving the Malaysian model, it is said that the B-BBEE programme with its so-called broad-based initiatives is based on the Malaysian NEP.⁸⁹

The big difference between the NEP and B-BBEE, however, is that the NEP has as vision and strategy for “redistribution with growth”⁹⁰ while the B-BBEE programme is premised in terms of the B-BBEE Strategy to be a programme of growth through redistribution. So, where the NEP had seen growth as a prerequisite for including the Bumiputera in the economy (inclusive growth) to address poverty and inequality, the B-BBEE Strategy has as approach and point of departure the inclusion of black people in the economy, mainly by means of redistribution, to eradicate inequality in the economy and in order to grow the economy.⁹¹ Comparing the data and results achieved by the NEP against the B-BBEE programme, it is obvious that the NEP’s approach to implement measures to ensure growth as a launching pad for the NEP in order to eradicate unemployment and poverty is the correct approach. During the 20-year period in which the NEP operated (1970-1990), an average growth rate of over 7% was sustained in Malaysia, which reduced unemployment from close to 8% in 1970 to 2%, and poverty from 49,3% to 16,5% in 1990, with almost zero in 2018.⁹² In comparison, during the 20-year period that the B-BBEE programme has been in operation (2004-2024), the South African growth rate (measured as Gross Domestic Product – GDP) was almost 4,6% in 2004 with the introduction of B-BBEE. It has gradually decreased to 3% in 2010, 1,3% in 2015, 0,3% in 2019 and 1,9% in 2022.⁹³ The growth rate prediction for 2024 is a mere 1,6%.⁹⁴ Unemployment has risen from approximately 20% in 2004 to almost 32% in 2023.⁹⁵ Thus, despite the fact that the National Development Plan (NDP) required that the South Africa averages a growth rate of over 5% as from 2010 and increases the growth rate gradually to be twice that rate by 2030 in order to accommodate the growing population and new job seekers every year.⁹⁶ Poverty and inequality have consequently risen during the period since the B-BBEE programme was introduced, especially amongst the

⁸⁸ Thillainathan and Cheong *MJES* (2016) 56.

⁸⁹ Ponte *et al DAC* (2007) 938.

⁹⁰ Osman-Rani *Institute of Southeast Asian Studies* (2004) 205.

⁹¹ Department of Trade and Industry (DTI) *South Africa’s Economic Transformation: A Strategy for Broad-Based Black Economic Empowerment* (2003) 4,5 and 11.

⁹² Rasiah and Shari *Cambridge Journal of Economics* (2001) 58.

⁹³ Department: Planning, Monitoring and Evaluation *30 Year Review of South Africa’s Democracy (1994-2024)* 5.

⁹⁴ National Treasury *2024 Budget Review Economic Outlook* (2024) 4.

⁹⁵ As above 6; and World Bank *Macrotrends – South Africa Unemployment Rate 1960-2024* (2024) 2.

⁹⁶ National Planning Commission *The National Development Plan (NDP) 2012-2030* (2012) 110.

African population as main beneficiaries of the EEA and B-BBEE programme.⁹⁷ Black African unemployment rates have been consistently higher than that of other population groups over the past 10 years, with a rate of 36% in 2023 compared to the national average of 31,9%.⁹⁸

The rapid reduction of unemployment and poverty by the NEP in Malaysia is attributed to the sustained high growth levels during the operation of the NEP rather than the initiatives introduced by government under the NEP to increase ownership in corporations by the Bumiputera.⁹⁹

Although the NEP drastically reduced unemployment and poverty in Malaysia, it also had an adverse effect on equality, with Malaysia recording a widening gap between rich and poor. This is attributed to the role of the dominant political majority Malaya as beneficiaries of the NEP, to accrue, largely through corruption and patronage, the largest portion of the benefits derived from the NEP at the cost of the minority disadvantaged groups. It is said that the NEP succeeded to transition the Bumiputera into the affluent occupations and social classes where they were under-represented, but failed to move the Bumiputera out of the poverty classes where they were over-represented.¹⁰⁰ This is the same position as in South Africa where the affluent classes within the African majority as politically dominant group benefit more, at the expense of the poor African classes.

The two main lessons learned from Malaysia are: Firstly, growth is a prerequisite for redistribution and inclusive growth to eradicate unemployment, poverty and inequality; secondly, a dominant political majority group as a beneficiary of remedial measures will use its political dominance and influence in all spheres of government and society to establish patronage networks to benefit the political elite at the expense of minority groups and the poor and vulnerable social groups.

7.3.1.2 India

India's system of reservation is much narrower than the Malaysian NEP or South African B-BBEE programme. It involves the reservation of positions in government for backward castes as

⁹⁷ Stats SA *Poverty Trends in South Africa: An Examination of Absolute Poverty between 2006 and 2015* (2017) 20 and 21.

⁹⁸ Stats SA *Quarterly Labour Force Survey Quarter 3: 2023* (Nov 2023) 21 and 22.

⁹⁹ See ch 4, para 4.3.1.3 above.

¹⁰⁰ Mills *et al* (2020) 21; and Mokhtar *et al JMC* (2013) 15.

well as reservations in higher education institutions. India's reservation system had been implemented in the early 1900s and received recognition in the Indian Constitution adopted shortly after India's independence from Britain in 1947 to advance those castes which by hereditary, social class, religion, region, tribe, gender and language were prevented or hampered from developing on a socio-economic level.¹⁰¹

As caste was historically the reason for backwardness, it was for many decades the sole criterion for benefits under the reservation system of India. Over time, many sections of the backward classes obtained affluent social status as a result of education, marriage between backward and advanced castes, and access to resources. This prompted the Indian courts to require the introduction of a so-called "means test" or "creamy layer" test as determined by empirical evidence.¹⁰² The creamy layer refers to those affluent sections of the backward caste which have the "means", such as education and access to resources, to compete on an equal footing with an advanced caste. The creamy layer is excluded from benefits of the reservation system despite the fact that a member of the "creamy layer" may also be a member of a backward caste.¹⁰³ The Indian High Court indicated that for as long as the creamy layer comes into consideration for benefits under its reservation system as part of a backward caste, benefits will not flow to the poor sections of a backward caste.¹⁰⁴ It is said that the affluent sections of all castes are in a social position due to their superior education and proximity to political influence, to assert political influence to benefit themselves at the expense of the poorer sections of their caste.¹⁰⁵

The Indian government and the various state (provincial) governments have, over time, developed a complicated set of criteria to establish the creamy layer. This involves, in essence, the setting of an income threshold for individuals and households, thresholds for the value of the assets that an individual or household holds, and by excluding high-ranking employees in government and the military. The children of high-ranking persons employed by government and the military can also not be considered under the reservation system for reserved places in higher educational institutions.¹⁰⁶

¹⁰¹ Sridharan *ALJ* (1999) 100; and ch 4, para 4.3.2.1.

¹⁰² *Indira Sawhney v Union of India* 1993 AIR (SC) 477 para [796].

¹⁰³ As above paras [790] – [792].

¹⁰⁴ *Jarnail Singh v Lachemi Narain Gupta* 2018 AIR (SC) 22985 para [15].

¹⁰⁵ See ch 4, para 4.3.2.3 above.

¹⁰⁶ Srinivas *Frontline* (1997) 62.

Therefore, in India caste is still the first criterion to be considered for benefits under the reservation system, followed by the social status and position of an individual. The main lesson learned from India is that once disadvantaged does not mean always or forever disadvantaged. What gave rise to disadvantage may still be a cardinal or even the first criterion, such as race in South Africa, but an individual's social status may evolve over time as a result of various social factors which must then be considered.

In terms of South Africa's B-BBEE programme, race is the sole criterion, without allowing for any social factors of the individual to be considered.

7.3.2 International Law Requirements

Section 39(1)(b) of the Constitution stipulates when interpreting the Bill of Rights, a court, tribunal or forum must consider international law.

International Law instruments such as the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD) and the International Labour's (ILO) Convention on Discrimination are concerned with the protection of human rights, such as the equal treatment of all individuals and the protection of individuals against discrimination.¹⁰⁷ However, they make provision for "special measures" to advance certain individuals and groups to diminish or eliminate conditions which cause or help to perpetuate discrimination and to ensure equal access to opportunities in an attempt to promote equality. Although these measures are regarded as not being discriminatory, the ICCPR and other international law instruments lay down strict requirements to ensure that human rights are not unjustifiably violated. These requirements can be summarised as follows: (1) Special measures must be temporary and require a continued system of monitoring;¹⁰⁸ (2) criteria for differentiation must be reasonable and objective;¹⁰⁹ (3) the aim of the measure must be to achieve a purpose which is legitimate under the Covenant;¹¹⁰ (4) affirmative measures must be carefully controlled and assessed and may not undermine the principle of non-discrimination as

¹⁰⁷ See ch 4, para 4.2 above.

¹⁰⁸ Human Rights Committee *General Comment* 18 (2000) para 10.

¹⁰⁹ As above para 13.

¹¹⁰ As above.

such;¹¹¹ (5) they may not lead to permanent separate rights for separate groups;¹¹² (6) they have to be discontinued after the objective for which they were introduced had been achieved;¹¹³ they have to be tailored to the needs of the groups and individuals concerned;¹¹⁴ (7) they have to be proportional to the achievement of a legitimate proposal of the Covenant;¹¹⁵ (8) they have to be appropriate to the situation to be remedied;¹¹⁶ (9) they have to be necessary in a democratic society;¹¹⁷ (10) the principles of fairness and proportionality have to be respected;¹¹⁸ (11) the measures should be designed and implemented on the basis of need, grounded in a realistic appraisal of the current situation of the individuals and communities concerned;¹¹⁹ (12) the measures must be determined on the basis of data disaggregated by race, colour, descent and ethnic or national origin;¹²⁰ and (13) the measures must curb vertical and horizontal economic equalities.¹²¹

Although special measures are not regarded as discrimination *per se*, the way in which they are implemented or applied may still be discrimination. This is clear from the requirements set by international law instruments for special measures. In order to promote equality of outcome (substantive equality), the CERD has emphasised that “to treat in an equal manner persons or groups whose situation are objectively different will constitute discrimination in effect. As will the unequal treatment of persons whose situations are objectively the same”.¹²² Furthermore, special measures in an international law context, have the advancement of minority groups in mind, unlike in South Africa and Malaysia where they benefit the politically dominant majority. In such circumstances the protection of minority rights or individuals as members of minority groups against exploitation and tyranny by politically dominant majority groups, would require special measures to be applied more protectively.¹²³ In order to ensure that special measures succeed

¹¹¹ Bossuyt, *Preliminary Report on the Concept and Practice of Affirmative Action*, UN.Doc.E/CN.4/Sub.2/2000/11 (United Nations 2000) 44.

¹¹² Art 1(4) of the ICERD.

¹¹³ As above.

¹¹⁴ CERD *General Recommendation No 32: The meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination* CERD/C/GC/32 (2009) para 17.

¹¹⁵ As above para 8.

¹¹⁶ As above para 16.

¹¹⁷ As above.

¹¹⁸ As above.

¹¹⁹ As above.

¹²⁰ As above.

¹²¹ *Millennium Declaration – Transforming our World: the 2030 Agenda for Sustainable Development* UN General Assembly A/RES/70/1 (2015).

¹²² CERD *General Recommendation No 32: The meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination* CERD/C/GC/32 (2009) para 8.

¹²³ Farrel Trinity *CL Preview* (2022) 22.

in their purpose to promote socio-economic equality, the socio-economic position of a group or individual should be used as criteria to promote socio-economic equality, instead of other characteristics, such as race by the B-BBEE programme.¹²⁴

An important requirement for special measures in terms of international law instruments is that the beneficiaries of such measures should be classified according to their social and economic conditions based on dissassembled and broken down (“disaggregated”) data. The SAHRC has pointed out that the socio-economic data on the beneficiaries of BEE is disaggregated according to the apartheid-era classification system of population groups and not social and economic indicators.¹²⁵ Measures should be continuously monitored to assess the impact of special measures on beneficiaries and to ensure that measures are discontinued once substantial equality is achieved. In terms of this requirement, South Africa’s B-BBEE and Employment Equity programmes were found on two occasions (2016 and 2023) by the Committee on the Elimination of Racial Discrimination (CERD) not to have met the requirements of the ICERD. The CERD expressed its concern regarding the lack of disaggregated statistics compiled by South Africa on vulnerable groups and the lack of detailed information on the impact of special measures on targeted groups, indigenous groups and non-citizens.¹²⁶

From an international law perspective, the B-BBEE programme can be objected against based on four grounds. Firstly, the beneficiaries of B-BBEE are not classified in terms of disaggregated data according to their social needs and conditions and, as a consequence, any impact that the B-BBEE programme has on beneficiaries can also not be assessed and monitored. Secondly, as the impact on vulnerable groups cannot be measured, the programme cannot determine when substantive equality is achieved to phase out the programme, making the programme permanent rather than temporary. Thirdly, the programme creates vertical and new patterns of inequality, as indicated above, in respect of the growing inequality within the black population classes. Fourthly, it treats individuals with different social status and needs within targeted race groups the same, thus entrenching and exacerbating existing inequality.

¹²⁴ Bossuyt, *Preliminary Report on The Concept and Practice of Affirmative Action* UN Dec.E/CN.4/Sub.2/2000/11 (United Nations 2000) 63.

¹²⁵ South African Human Rights Commission *Equality Report 2017/18* (2018) 34.

¹²⁶ CERD *Concluding observations on the combined fourth to eighth periodic reports of South Africa* (5 Oct 2016) 8. CERD *Concluding observations on the combined ninth to eleventh periodic reports of South Africa* (27 Dec 2023) 5.

7.3.3 B-BBEE and the Constitution

Any programme which purports to advance the achievement of equality, such as the B-BBEE programme, must comply with the equality clause of the Constitution. This is assessed from three perspectives: Firstly, constitutional criteria for remedial measures; secondly, remedial measures and fairness; and thirdly, rationality and substantive equality.

7.3.3.1 Constitutional Criteria for Remedial Measures

Section 9(1) of the Constitution provides that everyone is equal before the law and has the right to equal protection and benefit of the law, and that everyone has the right to full and equal enjoyment of all rights and freedom (section 9(2)). It further provides for measures to be adopted to promote the achievement of equality of those persons or categories of persons disadvantaged by discrimination. Section 9(3) prohibits unfair discrimination by the state on various listed grounds, and section 9(4) prohibits unfair discrimination by any other person. Discrimination on one or more of the grounds listed in section 9(3) is unfair (presumption of unfairness) unless the contrary is established.

In *Minister of Finance and Others v Van Heerden*,¹²⁷ the Constitutional Court laid down the three criteria based on the provisions of section 9(2) for a measure to be constitutionally permissible. The measure must: (1) target persons or categories of persons who have been disadvantaged by unfair discrimination; (2) be designed to protect or advance those persons or categories of persons disadvantaged by unfair discrimination; and (3) promote the achievement of equality.

In *South African Police Service v Solidarity obo Barnard*, the first criteria were held by the court to also include people who have been “susceptible” to unfair discrimination.¹²⁸ The extension of section 9(2) to people who have been susceptible to unfair discrimination, include those categories of persons who have not been discriminated against directly by legislation, such as woman and people with disabilities, but those who were discriminated against by means of practices and stereotypes. In *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*, the Constitutional Court held that the discriminatory prohibitions

¹²⁷ 2004 (6) SA 121 (CC) para [33] (hereafter referred to as *Van Heerden*).

¹²⁸ [2014] ZACC 23 (hereafter referred to as *Barnard*) para [36].

on sex between men reinforces existing societal prejudices and severely increases the negative effects of such prejudices on their lives”.¹²⁹

The measures referred to in section 9(2) to promote the achievement of equality are often referred to by the courts as remedial, or restitutionary, or affirmative measures or affirmative action.¹³⁰ The three criteria set in *Van Heerden* are often referred to as a “three prong test”¹³¹, or a “rationality test”.¹³²

7.3.3.2 Remedial Measures and Fairness

The Constitution does not specifically provide for the right not to be unfairly discriminated against or the right to protection from discrimination as with other rights in the Bill of Rights. The Constitution takes another route. It prohibits unfair discrimination by the state and any other person on various listed grounds and presume discrimination to be unfair if discrimination is directly or indirectly based on any one or more of the listed grounds.¹³³ The protection against unfair discrimination is inherently part of the equality clause, namely equality before the law and the right to full and equal enjoyment of all rights and freedoms (section 9(1) and (2)) and the prohibition against unfair discrimination by the state or private legal subjects (section 9(3) and (4)).¹³⁴

In *Van Heerden*, the court held that a restitutionary measure that complies with the three criteria set in section 9(2), is not presumed to be unfair.¹³⁵ The exclusion of a presumption of unfair discrimination held in *Van Heerden* was further extended by the Constitutional Court in *Barnard*. In *Barnard*, the court held that once a measure in question passes the three criteria test, “it is neither unfair nor presumed to be unfair”.¹³⁶

¹²⁹ (CCT 11/98) [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 (Oct 1998) (hereafter referred to as *Gay and Lesbian Equality 2*) para [23].

¹³⁰ *Van Heerden* (note 127 above) paras [1], [29] and [30]; and *Barnard* (note 128 above) paras [22], [30], [32] and [138].

¹³¹ *Barnard* (note 128 above) per Van der Westhuizen J paras [142] and [143].

¹³² As above per Van der Westhuizen J para [142].

¹³³ S 9(3) and (4) of the Constitution. Also see *Van Heerden* (note 127 above) para [28] in which the Constitutional Court explained that the protection against unfair discrimination rendered by the Constitution is by means of a proscription against unfair discrimination in terms of s 9(3) and (4) of the Constitution.

¹³⁴ *Van Heerden* (note 127 above) para [24].

¹³⁵ As above para [33].

¹³⁶ *Barnard* (note 128 above) para [37].

The question of unfairness in respect of a restitutionary measure has been the subject matter of many divergent judgements and legal commentary. For instance, in the Labour Court and Supreme Court of Appeal in *Barnard*, these courts held that to have overlooked the complainant based on race was presumed to be unfair discrimination and that the respondent, the South African Police Service (the employer), did not discharge the onus of proving that the matter was in fact fair or not unfair.¹³⁷ These courts relied on the fairness test measuring the impact on a respondent laid down in *Harksen v Lane NO and Others*.¹³⁸ The Constitutional Court held in *Van Heerden* and *Barnard* respectively that the *Harksen* unfair discrimination test was applicable only once the restitutionary measure in question does not comply with the three criteria set in *Van Heerden*.¹³⁹

Legislation and international law instruments dealing with measures to promote equality follow a more nuanced approach towards weighing up various rights and interests. Section 14(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA),¹⁴⁰ provides that measures to promote equality are not unfair discrimination, but then in section 14(2) continues to specify 12 factors to consider in determining whether a respondent against whom a claim of unfair discrimination is made, has proved that the discrimination is in fact fair. These criteria include the context; whether the discrimination reasonably and justifiably differentiates between persons according to objectively determined criteria; whether the discrimination impairs or is likely to impair human dignity; the impact or likely impact on those affected by such measure; as well as the degree to which the rights of those affected are impeded. These criteria thus set a fairness as well as a proportionality test. This suggests that the legislator intended that a restitutionary measure is not *per se* unfair, but that fairness of the measure may come into consideration in the way a measure is applied or implemented. However, as a result of the *Van Heerden* judgement delivered subsequent to the enactment of PEPUDA, section 14(1) will in all likelihood be interpreted and applied as a standalone provision separate from section 14(2).

A similar provision is found in the EEA. Section 6(2) of the EEA provides that it is “not unfair discrimination to take affirmative action measures consistent with the purpose of the Act”.

¹³⁷ *Solidarity obo Barnard v South African Police Service* (2010) 31 ILJ 742 (LC) para [43.6]; and *Solidarity obo Barnard v South African Police Service* (165/2013) [2013] ZASCA 177 (28 Nov 2013) 2014 (2) SA 1 (SCA) para [50].

¹³⁸ 1998 (1) SA 300 (CC) (hereafter referred to as *Harksen*) para [46].

¹³⁹ *Van Heerden* (note 127 above) para [35]; and *Barnard* (note 128 above) paras [48] – [53].

¹⁴⁰ 4 of 2000.

Section 11(1) of the EEA provides that if unfair discrimination is alleged on a ground listed in section 6(1) of the EEA, the employer against whom the allegation is made must prove, “on a balance of probabilities”, that such discrimination did not take place (section 11(1)(a)) or “is rational and not unfair or is otherwise justifiable” (section 11(1)(b)). Despite this onus being placed on an employer by the EEA to rebut unfairness when an allegation of unfair discrimination is made, the Constitutional Court in *Barnard* held that an onus of proving fairness or rebut unfairness in terms of the EEA, does not apply if a measure meets the three criteria set in *Van Heerden*. This, in spite of the fact that the affected complainant in *Barnard* alleged unfair discrimination based on race, a prohibited ground listed in section 6(1) of the EEA.¹⁴¹ In *Solidarity and Others v Department of Correctional Services and Others* the Constitutional Court was prepared to consider the rationality, fairness and otherwise justifiability of an affirmative measure placed as onus on an employer by section 11(1)(b) of the EEA only once it was found that the measure did not comply with the EEA, and was thus unlawful.¹⁴²

International law instruments such as the ICERD and the ILO Convention on Discrimination also provide that “special measures” taken to promote equality are not discriminatory, but in the same breath set several prerequisites for those measures, such as the impact on those affected, and the proportion and degree to which the rights of those affected by the measure are restricted. This also suggests that although “special measures”, in terms of international law instruments, are not *per se* unfair discrimination, the way in which a measure is applied and implemented may constitute unfair discrimination.¹⁴³

The proper standard to be used to test a restitutionary measure was also pondered on by all three minority concurring judgements in *Barnard*. Cameron J, Froneman J and Majiedt AJ (Cameron J *et al*) considered the fairness test as the appropriate test.¹⁴⁴ Van der Westhuizen J, in *Barnard* held that the fairness test as standard “may not always make practical sense” as fairness is a vague concept. He instead opted for a proportionality test which would also consider the impact on these affected in proportion to various other factors akin to section 36 – the limitation of rights clause in the Constitution.¹⁴⁵ Jafta J in *Barnard* held that weighing fairness

¹⁴¹ *Barnard* (note 128 above) para [51].

¹⁴² [2016] ZACC 18 (hereafter referred to as *Correctional Services*) paras [81] and [82].

¹⁴³ See para 7.3.2 above.

¹⁴⁴ *Barnard* (note 128 above) para [98].

¹⁴⁵ As above paras [159] and [164].

would undermine the objectives of remedial measures as fairness is a “double-edged sword” because when “determining what is fair in a given case, account would have to be taken of competing interests”.¹⁴⁶ This approach to fairness followed by Jafta J, corresponds with the majority judgement in *Van Heerden* that a test of fairness in respect of a restitutionary measure would result in the judiciary second-guessing those who implement such measures in determining the appropriate measure to overcome the effect of unfair discrimination. Such a test would, according to *Van Heerden*, impose to a strict scrutiny of restitutionary measures and undermine their objective.¹⁴⁷ The Labour Appeal Court in *Barnard* held that because “the essence of restitutionary measures is to guarantee the right to equality”, their implementation cannot be “subjected to an individual’s” right to equality.¹⁴⁸ The significance of this Labour Appeal Court judgement is that the appeal held against it by the Supreme Court of Appeal in *Barnard* was set aside by the Constitutional Court. Consequently, the Labour Appeal Court judgement stands. It was also used as authority by Jafta J in *Barnard* for his judgement that job reservations for black officers were justified despite the prohibition of job reservation by section 15(3) of the EEA.¹⁴⁹

In *Van Heerden* the court stated that it is incumbent on courts in each equality claim to scrutinise the situation of the complainants in society and various factors in “order to determine its fairness” or otherwise a “flexible but situation sensitive approach is indispensable”.¹⁵⁰ The courts further acknowledge that affirmative action measures can also undermine those negatively affected by them (*Van Heerden*)¹⁵¹ and should therefore not be arbitrary, capricious or display naked preference (*Van Heerden*);¹⁵² should not impose substantial or undue harm on those excluded (*Van Heerden*);¹⁵³ “must be formulated with due care not to invade unduly on the dignity of all concerned” (*Barnard*);¹⁵⁴ the steps taken to promote substantive equality must not unwittingly infringe the dignity of other individuals (*Barnard*);¹⁵⁵ and “remedial measures must be implemented in such a way ... [that] they must not unduly invade the human dignity of those

¹⁴⁶ As above para [228].

¹⁴⁷ *Van Heerden* (note 127 above) para [33].

¹⁴⁸ *South African Police Service v Solidarity obo Barnard* 2013 (3) BCLR 320 (LAC) para [30].

¹⁴⁹ *Barnard* (note 128 above) para [231].

¹⁵⁰ *Van Heerden* (note 127 above) para [27].

¹⁵¹ As above para [27].

¹⁵² As above para [41].

¹⁵³ As above para [44].

¹⁵⁴ *Barnard* (note 128 above) para [30].

¹⁵⁵ As above para [31].

affected by them ... to achieve a non-racial, non-sexist and social inclusive society” (*Barnard*).¹⁵⁶ Although the Constitutional Court stated that the impact on and dignity of those affected by remedial measures should be acknowledged and weighed up, the court was not prepared to apply a fairness enquiry as a normative standard for remedial measures in terms of the equality clause of the Constitution.

This exclusion of the unfair discrimination enquiry in affirmative action disputes by the Constitutional Court seems not only to be contrary to its own statements, but also certain statutory provisions as well as international law instruments. However, it seems that the Constitutional Court is prepared to consider the impact of a remedial measure on those affected under a separate test or a unique restitutionary fairness-premised test that includes various factors, which test and standard have not yet been clearly delineated or applied by the Constitutional Court. This possibility is supported by Sachs J in *Van Heerden*:

“Where different constitutionally protected interests are involved, it is prudent to ... opt for a context-based proportionality interrelationships, balanced and weighed according to the fundamental constitutional values called into play by the situation.”¹⁵⁷

Likewise, in *Barnard*, Cameron J *et al* explained their view of the difference between the fairness of the individual implementation of affirmative action measures and unfair discrimination, which distinction suggests a unique type of remedial fairness test:

“The latter enquiry [unfair discrimination] is at the general level of determining whether the formulation and content of a restitutionary measure are constitutional compliant. The former enquiry [whether the individual implementation is fair] examines whether a specific implementation of a measure that is constitutional compliant in its general form is nevertheless in conflict with the provisions of the Act. We must insist that the specific implementation as well as the general formulation of remedial measures to be fair.”¹⁵⁸

¹⁵⁶ As above para [32].

¹⁵⁷ *Van Heerden* (note 127 above) para [140].

¹⁵⁸ *Barnard* (note 128 above) para [101].

7.3.3.3 Remedial Measures and Lawfulness

Despite the fact that remedial measures are not regarded as unfair or presumed to be unfair discrimination, they must still be lawful and rational. In *Barnard* and *Correctional Services*, the courts tested the Employment Equity Plans of the South African Police Services and the Department of Correctional Services, respectively, for compliance with the EEA. In *Barnard*, the court held that a remedial measure which complies with the three criteria set in section 9(2) of the Constitution and which is not unfair, can still be found by a court to have been “put into practice” unlawfully. “It may not be harnessed beyond its lawful limits or ... for an ulterior or impermissible purpose”.¹⁵⁹ The court in *Correctional Services* held that the Employment Equity Plan of the Department of Correctional Services did not comply with the EEA, was unlawful, and that its implementation was consequently unfair discrimination and an unfair labour practice.¹⁶⁰ In terms of the principle of the rule of law, a restitutionary measure must also be rational. In *Barnard*, the Constitutional Court held that as a bare minimum, the principle of legality would require that the implementation of a legitimate restitutionary measure must be rationally related to the terms and objectives of the measure. It must be applied to advance its legitimate purpose. Ordinarily, irrational conduct in implementing a lawful measure would attract unlawfulness.¹⁶¹

7.3.3.4 Rationality and Arbitrariness

To determine whether the B-BBEE programme complies with the three criteria set in *Van Heerden*, would not only require a test against each individual criteria but also the causal link between them. That requires a two-fold test: a rationality test and a substantive equality test.

In terms of the legality principle as a subset of the rule of law founded in section 1(c) of the Constitution, the exercise of all public power must be rational and therefore not arbitrary.¹⁶² This means that public power must be exercised for a legitimate purpose or within the confines of empowering legislation. It was held in *S v Makwanyane*¹⁶³ that “arbitrariness must also

¹⁵⁹ As above para [38].

¹⁶⁰ *Correctional Services* (note 142 above) para [82].

¹⁶¹ *Barnard* (note 128 above) para [39].

¹⁶² *Minister of Finance v Aribusiness NPC* [2022] ZACC 4 para [118]; and *Pharmaceutical Manufacturers* (note 61 above) para [17].

¹⁶³ 1995(3) SA 391 (CC).

inevitably, by its very nature, lead to the unequal treatment of persons”.¹⁶⁴ Rationality seeks to determine the link between the means and the objective it pursues. It is a generous and deferential standard lower than arbitrariness. The generous rationality test does not ask whether the measure in question is the best means or the only means through which the purpose may be achieved, but that it is reasonably capable of achieving its objective.¹⁶⁵ The courts should therefore also refrain from unnecessarily interfering with the means selected and should therefore be deferent and not be over prescriptive to legislative choices.¹⁶⁶

The arbitrariness and rationality tests of a restitutionary measure were developed by the courts and applied to the three criteria and their respective requirements set in *Van Heerden*. Before the development of the rationality principle in respect of a restitution or measures can be considered, the various requirements for each criterion set in *Van Heerden* need to be understood. These requirements for each criterion delineated in *Van Heerden* can be summarised as follows: In respect of the first criterion, the targeted persons or categories of persons who have been disadvantaged by unfair discrimination in the past, two requirements were set: (1) the starting point in any equality analysis is almost always a comparison between affected classes; and (2) although anomalies may occur within affected classes, it will not affect the legal efficacy of an affirmative action programme. The validity of an affirmative action programme should instead be judged by whether an overwhelming majority of the beneficiaries of the favoured class of persons are designated as disadvantaged by past unfair discrimination.¹⁶⁷

With regard to the second criterion – whether the measure is “designed to protect or advance” those disadvantaged by previous unfair discrimination – the court also set out two distinct requirements: (1) Remedial measures are directed at an envisaged future outcome, and it is therefore difficult to predict its outcome. Remedial measures must be capable of attaining the desired outcome and reasonably likely to benefit those disadvantaged by unfair discrimination. In *Van Heerden*, the court held that a “precise prediction of a future outcome” is not required and

¹⁶⁴ As above para [156].

¹⁶⁵ *Albutt v Centre for the Study of Violence and Reconciliation and Others* 2010 (3) SA 293 (CC) (hereafter referred to as *Albutt*) para [51]; and *Minister of Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others* [2018] ZACC 20 (hereafter referred to as *Insolvency Practitioners*) para [53].

¹⁶⁶ *Albutt* (note 165 above) para [51].

¹⁶⁷ *Van Heerden* (note 127 above) paras [39] and [44].

too strict a test.¹⁶⁸ A measure that is arbitrary, capricious or displays naked preference, is not designed to achieve the constitutionally authorised objective;¹⁶⁹ and (2) A remedial measure does not prescribe a “necessity test”, meaning that it is not necessary that a remedial measure must disfavour one class in order to uplift another.¹⁷⁰

With regard to the last criterion, namely that the measure must “promote the achievement of equality”, the court set one requirement: the measure will, in the “long run”, promote the achievement of equality. In respect of this requirement, the court laid down four factors that need to be considered: (1) It requires an appreciation of the effect of the measure in the context of our broader society; (2) The achievement of this goal may often come at a price for those who were previously advantaged; (3) The constitutional vision of a non-racial, non-sexist society in which all persons are recognised and treated as a human being of equal worth and dignity within the recognition of “diversity”, must be borne in mind; and (4) A measure should not constitute an “abuse of power” or “impose such substantial harm on those excluded” from its benefits that the long-term constitutional goal is threatened.¹⁷¹

In *Van Heerden*, apart from the three criteria and the requirements for each criterion, the court also stipulated three principles in respect of rationality and arbitrariness of a remedial measure, which were later further developed by the Constitutional Court in *Insolvency Practitioners*.¹⁷² Firstly, the court held that a presumption of unfairness or unfair discrimination would “unduly require the judiciary to second-guess the legislature and the executive concerning the appropriate measures to overcome the effect of unfair discrimination”.¹⁷³ This statement in the context of a fairness test also suggested a generous and deferential rationality test. The second principle is that a measure should not be “arbitrary, capricious or display naked preference”. This suggests a test higher than rationality. It was confirmed in *Insolvency Practitioners* that rationality is a standard lower than arbitrariness.¹⁷⁴ In respect of this specific requirement articulated in *Van Heerden*, the Constitutional Court in *Insolvency Practitioners* pointed out that this should not be read as incorporation into a restitutionary measure a requirement that it should not be arbitrary

¹⁶⁸ As above para [42].

¹⁶⁹ As above paras [41] and [42].

¹⁷⁰ As above para [43].

¹⁷¹ As above para [44].

¹⁷² As above para [33]; and *Insolvency Practitioners* (note 165 above) para [47].

¹⁷³ *Van Heerden* (note 127 above) para [33].

¹⁷⁴ *Insolvency Practitioners* (note 165 above) para [55].

or capricious. According to *Insolvency Practitioners*, these requirements are separate from the three criteria set in *Van Heerden* and apply in any event to the exercise of all public power in general, including the public power exercised in respect of restitutionary measures.¹⁷⁵ In *Barnard*, the majority held, as in *Van Heerden*, that “as a bare minimum”, the rule of law principle would require that the implementation of a legitimate restitutionary measure must be rationally related to the terms and objectives of the measure.¹⁷⁶ Cameron J *et al* in *Barnard*, disagreed with this deferential rationality test. They explained that because the complainant’s challenge was based on a claim of unfair discrimination, the court was required to apply a “less deferential standard than mere rationality”, and that the EEA imposes a “standard different from, and additional to, rationality”.¹⁷⁷

Cameron J *et al* continued to explain that important constitutional values can be in conflict when a decision-maker implements remedial measures, and this would require a court to examine the implementation of a remedial measure “with a more exacting level of scrutiny”. According to Cameron J *et al*, if they were to adopt the “more deferential standard” suggested by the majority of the court, it would be difficult to ever hold that a decision-maker converted contrary to the EEA a set of numerical targets into quotas, as any decision that accords with numerical goals would bear “at least some rational connection with the measure’s legitimate representativity goals”. Similarly, a mere rational standard would not allow a court to interrogate properly a decision-maker’s balancing of the multiple designated groups, or of their interests against those adversely affected by restitutionary measures.¹⁷⁸ Although not dealing directly with rationality, Van der Westhuizen J, in *Barnard*, emphasised the need for decision-makers to give adequate reasons, particularly when the decision was based on race or any other attribute listed in section 9(3). These adequate reasons and justification explained by Van der Westhuizen J also suggest a less deferential approach than mere rationality.¹⁷⁹

The third principle laid down in *Van Heerden* in respect of rationality and arbitrariness is the connection or nexus between the three criteria to establish a constitutionally permissible remedial measure. In *Van Heerden*, the court quoted from *Public Servants Association of South*

¹⁷⁵ As above para [47].

¹⁷⁶ *Barnard* (note 128 above) para [39].

¹⁷⁷ As above para [95].

¹⁷⁸ As above para [96].

¹⁷⁹ As above paras [105] and [106].

Africa and Others v Minister of Justice and Others,¹⁸⁰ namely that “the measures must be designed to achieve something, this denotes ... a causal connection between the designed measures and the objectives”.¹⁸¹ *Van Heerden* subsequently held that the differentiation applied in the measure in question to increase the pension benefits of those previously discriminated against constituted a rational connection to diminish the inequality between privileged and disadvantaged parliamentarians. Consequently, in that sense, the measure was held to promote the achievement of equality.¹⁸²

The connection between the three criteria was explained by Van der Westhuizen J in *Barnard*. The first “two prongs” (criteria) test whether the measure itself, in its design, “is rationally connected to the end it aims to achieve”. The focus of the third prong is different as it does not focus on the measure alone, but also on its implementation. The word “achieve” in section 9(2) implies, according to Van der Westhuizen J, “some effect or impact”. This could hardly be tested without contemplating some action taken in terms of the measure. *Van Heerden* thus, in the view of Van der Westhuizen J, acknowledges some distinction between a measure and its implementation.¹⁸³ Van der Westhuizen J continued to explain that when a measure as well as its implementation is evaluated, something more than compliance with the three criteria is required. The first two prongs must be rationally connected with the third prong to promote the achievement of equality. This requires an appreciation of the “effect and impact” of the measure, and “more than mere abstract rationality testing is required”.¹⁸⁴

The rational or casual connection between the criteria set in *Van Heerden* was also emphasised in *Insolvency Practitioners*. The court explained the “overlap” between the second and third criteria laid down in *Van Heerden*. The second criterion which demands that the restitutionary measure must be designed to protect and advance those who were disadvantaged by unfair discrimination, requires that the measure must be reasonably capable of attaining the desired outcome. “The outcome referred to here is the achievement of equality”.¹⁸⁵

It can be concluded that rationality and arbitrariness are required for the exercise of all public

¹⁸⁰ 1997 (3) SA 925(T); 1997 (5) BCLR 577(T).

¹⁸¹ As above para 989 A-B; and *Van Heerden* (note 127 above) para [42].

¹⁸² *Van Heerden* (note 127 above) para [52]

¹⁸³ *Barnard* (note 128 above) para [143].

¹⁸⁴ As above paras [145] and [146].

¹⁸⁵ *Insolvency Practitioners* (note 165 above) para [44].

power, including public power exercised in respect of a restitutionary measure. This rationally enquiry requires a two-stage approach. Firstly, the rationality of the measure requires as a bare minimum that a restitutionary measure be rationally connected to the objective it aims to achieve – it is therefore capable of achieving its objective. This is the basic generous and deferential form of rationality. But the enquiry does not stop there. The second phase of the enquiry asks if the first two criteria set in *Van Heerden* must then also be rationally connected to the third criteria – to determine if a measure promotes the achievement of equality. This requires the measure to have some effect or impact on the achievement of equality. This second stage of the rationality enquiry requires a specific outcome and is more stringent than mere abstract rationality testing. This outcome-based connection or nexus with the third criteria, irrespective of the fact that the measure is legitimate in form and not regarded as unfair, is the foundation of substantive equality. The courts have over time explained the meaning of substantive equality.

7.3.3.5 Substantive Equality

The achievement of equality and the right not to be discriminated against as the foundation of substantive equality, are not only provided for in section 9(2) of the Constitution but are also founding values of the Constitution.¹⁸⁶ The Constitution imposes a positive duty on the state to protect and promote the achievement of equality, a duty which also binds the judiciary.¹⁸⁷

Over time, the courts have developed an understanding of substantive equality, which can be summarised as follows: Positive steps are permitted to redress the effects of past discrimination;¹⁸⁸ A society which affords each human equal treatment on the basis of equal worth and freedom, cannot be achieved through identical treatment in all circumstances;¹⁸⁹ The necessity of remedial or restitutionary measures as a requirement of substantive rather than formal equality;¹⁹⁰ Formal equality means sameness of treatment while substantive equality requires equality of outcome and tolerates disparity of treatment to achieve substantive equality;¹⁹¹ Formal equality disregards actual social and economic disparities between groups, while substantive equality requires a consideration of the actual social and economic conditions

¹⁸⁶ S 1(a) of the Constitution.

¹⁸⁷ As above s 7(2); and *Van Heerden* (note 127 above) para [24].

¹⁸⁸ *Brink v Kitshoff* NO 1996(4) SA 197 (CC) paras [41] and [42].

¹⁸⁹ *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) (hereafter referred to as *Hugo*) para [41].

¹⁹⁰ *Gay and Lesbian Equality 2* (note 129 above) para [60].

¹⁹¹ *Hugo* (note 189 above) para [41].

of groups and individuals in society;¹⁹² The results and effects of a particular rule are highlighted in the case of substantive equality rather than its mere form;¹⁹³ Formal understanding of equality risks the equality commitments of the Constitution, while a substantive conception of equality reinforces the fundamental values of the Constitution;¹⁹⁴ Positive measures are an integral part of substantive equality and are not “reverse discrimination” of “positive discrimination”;¹⁹⁵ Substantive equality requires positive steps to be taken;¹⁹⁶ The substantive notion of equality recognises that besides uneven race, class and gender attributes, other social and systematic underprivilege must be dismantled to prevent the creation of new patterns of disadvantage;¹⁹⁷ Substantive equality requires “a positive commitment progressively to eradicate socially constructed barriers to equality”;¹⁹⁸ Substantive equality can only be achieved by providing advantages to those “upon which apartheid imposed heavy disadvantages”;¹⁹⁹ Recognition of substantive equality means ... that equality is more than mere non-discrimination.²⁰⁰

Substantive equality can therefore be summarised as measuring the impact and effect of a restitutionary measure and its outcome to progressively promote equality. It is more than mere action or an attempt but must be reasonably capable of achieving equality if viewed prospectively and, if viewed retrospectively, should have produced positive results in reducing inequality.

7.3.3.6 Evaluating the B-BBEE Programme against the Constitutional Norms of Equality

Assessment of the B-BBEE programme in the context of the Constitution would require a two-stage test. Firstly, against the first two criteria set out in *Van Heerden*, whether the programme meets the basic rationality test of being designed to be reasonably capable of achieving its own objectives and promoting or protecting those disadvantaged by unfair discrimination. If it does, then a stricter test of whether the B-BBEE programme achieve the outcomes of the substantive equality standard, is required.

¹⁹² *Gay and Lesbian Equality 2* (note 129 above) paras [60] and [61].

¹⁹³ As above.

¹⁹⁴ *Hugo* (note 189 above) para [41].

¹⁹⁵ *Van Heerden* (note 127 above) para [30].

¹⁹⁶ *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Tourism and Others* 2004 7 SA 490 (CC) para [74]; and *Barnard* (note 128 above) para [29].

¹⁹⁷ *Van Heerden* (note 127 above) para [27].

¹⁹⁸ As above para [31].

¹⁹⁹ *Barnard* (note 128 above) para [93].

²⁰⁰ As above para [137] with reference to *Stoman v Minister of Safety and Security and Others* 2002 (3) SA 468 (T) para 477 F-H.

As a starting point, the objectives of the B-BBEE programme should be revisited. The two main objectives set out in the B-BBEE Act and the B-BBEE Strategy document issued in terms of section 11 of the Act, are, firstly, to substantially increase the number of black people who own, manage and control enterprises; and secondly, to grow the economy by reducing the “inequality” that exists in respect of the number of people who own, manage and control black enterprises to include the majority of black people in the mainstream of the economy.²⁰¹

Stage one of the enquiry requires a determination whether the B-BBEE programme meets the first two criteria set in *Van Heerden*, thus whether B-BBEE targets persons or categories of persons who have been disadvantaged by unfair discrimination. This requires a comparison of affected classes to determine whether the overwhelming majority were subjected to past unfair discrimination.

The answer to this question is ‘yes’ as black people are the sole beneficiaries of the B-BBEE programme. Race was the organising principle in the pre-1994 legal order, which systematically deprived black people of land, in part, subjected them to inferior education, and confined them to low-end wage income positions. “Apartheid systematically and purposefully restricted the majority of South Africans [Blacks] from a meaningful participation in the economy”.²⁰²

The second question is whether the B-BBEE programme is “designed to protect or advance” those disadvantaged by unfair discrimination. The main factor to consider here is whether the B-BBEE programme has achieved the desired outcome, namely the outcome of benefitting those disadvantaged by unfair discrimination by substantially increasing the number of black people who own, manage and control businesses. Even if the generous rationality test is applied, the answer to this is negative.

According to the B-BBEE Commission’s latest statistics released in 2022, the overall black ownership of enterprises had declined to 29,5% from 31% in 2020, with black management and control of enterprises down to 51,6% from 57% in 2020. According to this data, the Johannesburg Stock Exchange (JSE) has no black-owned entities compared to 3% in 2019.²⁰³

²⁰¹ S 2(b) of the B-BBEE Act; and Department of Trade and Industry (DTI) *South Africa’s Economic Transformation: A Strategy for Broad-Based Black Economic Empowerment* (2003) 12, 14 – 17.

²⁰² Department of Trade and Industry (DTI) *South Africa’s Economic Transformation: A Strategy for Broad-Based Black Economic Empowerment* (2003) 4.

²⁰³ B-BBEE Commission *National Status and Trends on B-BBEE Transformation Report 2021* 77, 78 and 85; and B-BBEE

White males still hold the vast majority of senior management positions in the private sector at 52,6%, followed by Africans (males and females) 13,8%, Coloureds (males and females) 5,8% and Indians (males and females) 11,6%.²⁰⁴

Applying the stricter rationality test to determine whether B-BBEE is achieving substantive equality, the answer must be negative as illustrated by the growing inequality in South Africa and outlined in para 7.2.1 above – especially within the African population group. This, despite the fact that Africans are the main beneficiaries of BEE as a result of the representivity principle. Even if it is considered hypothetical that the B-BBEE programme can substantially increase the number of black people who own, manage and control enterprises, it will still fall short of the substantive equality requirement. The only outcome the BEE programme can guarantee, is a substantially higher number of black people owning, managing and controlling enterprises. This is not to say that it will reduce inequality in South Africa as it all depends on whom the beneficiaries are. If it is the elite, by replacing the one elite with another as is presently the case, it will merely increase inequality as data has shown that within the African population, the wealth of the African middle and upper affluent classes had increased in contrast to the poor African classes. This creates vertical and class inequality within population groups and establishes new patterns of discrimination. This is attributed to the design of the B-BBEE programme and especially whom the beneficiaries are. A programme that is not based on broken down (“disaggregation”) data of socio-economic needs of its beneficiaries, making it impossible to monitor the impact on those targeted, cannot be said to promote substantive equality. The record of the B-BBEE programme since its implementation in 2004, shows no increase in economic growth and employment or the eradication of poverty or inequality. In fact, economic growth, unemployment, poverty and inequality have regressed since the introduction of the B-BBEE programme. It had no positive impact or affect on the social conditions which drive inequality. The B-BBEE programme is ultimately designed as a political programme to change the composition of enterprises to reflect the dominant political African group in South Africa and to pursue the transformation ideals of the NDR as concluded in paragraph 7.2.4.2 above. It is not a programme designed to achieve substantive equality and therefore does not deserve of the protection of the equality clause in the Constitution.

Commission *Media Release* (Jul 2022) 31.

²⁰⁴ Commission for Employment Equity 23rd *Commission for Employment Equity Annual Report 2022-23* (Nov 2023) 41.

In respect of the objective of the B-BBEE programme to grow the economy by means of economic transformation and removing the inequalities in the economy, the declining growth figures and the adjunct increase in unemployment (as discussed in paragraphs 7.2.1 and 7.3.1.1 above) as the main driver of income inequality since the B-BBEE programme's introduction, are glaring. These figures illustrate the failure of the B-BBEE programme on all fronts to promote equality – lack of growth, increase in unemployment and poverty, and growing inequality.

Although affirmative action was not *per se* the focus of this study, it was briefly discussed to illustrate how the broad representation (representivity) principle operates and applies. This was necessitated by the fact that the representivity principle also applies to the B-BBEE programme. Although the B-BBEE programme is aimed at transforming the private sector, it was shown that the programme has dismally failed to substantially increase the number of black people who own, manage and control enterprises. For the public service, whose affirmative action policy is based on the EEA, the situation is better on the formal equality front, but just as dismal on the substantive equality front as in the private sector.

Although it was announced in 2014 that the public service as a whole was representative of the entire racial South African population,²⁰⁵ it has also not reduced inequality. This is clear from the growth in inequality, especially within the African population group as the main beneficiaries of affirmative action in the public service. The reason why the principle of representivity and affirmative action failed to promote equality is the same reason why the B-BBEE programme failed to promote equality. The only guaranteed outcome of the representivity principle is that of the composition of the population. However, the composition of the population does not include the beneficiaries who are not the unemployed or unskilled, but rather those with proper education and access to resources. A measure such as the affirmative action programme in the public service whose beneficiaries are not based on detailed information broken down to the social and economic needs of those at the lower end of the inequality ladder, cannot be said to be designed to promote the achievement of substantive equality. The affirmative action programme may, under certain circumstances, be justified as creating legitimacy by allowing all population groups a stake in the public service, and as a result create a “responsive public service”.²⁰⁶ From a

²⁰⁵ Department of Public Service and Administration *Annual Report on Employment Equity in the Public Service 2013/2014* (Jan 2014) 9.

²⁰⁶ See s 1(d) of the Constitution is founded on a democratic government to ensure accountability, responsiveness and openness. Also see Malan *TSAR* (2010) 438, 439, 446-448.

political point of view, the affirmative action programme of the public service can also be justified in that the public service reflects the politically dominant African group in South Africa and coincides with the contemporary political situation. However, from a substantive equality point of view the programme does not deserve protection under the equality clause which it presently *prima-facie* receives from the courts.²⁰⁷

7.4 SUMMARY OF FINDINGS

At the end of chapter 1, paragraph 1.1 above, the inability of the B-BBEE programme to promote the achievement of equality was challenged by applying two criteria. Firstly, why has B-BBEE, as the flagship programme of pursuing economic redress, failed to achieve or promote equality? Secondly, if the B-BBEE programme meets the three criteria set in *Van Heerden*, what is the cause of the problem? Is it in the way the provisions of the Constitution are formulated, or the criteria set in *Van Heerden*, or the formulation and implementation of the B-BBEE programme as such, or exceedingly poor economic policies and the political environment which led to the downfall and failure of the programme to promote the achievement of substantive equality?

The answer to all the research questions, and as subject matter of this study, is that at the heart of the failure of the B-BBEE programme to promote equality, is the way its beneficiaries are determined and the design of the B-BBEE programme as such. The flaws in the formulation and categorisation of its beneficiaries are as follows: (1) it benefits all persons and categories of persons disadvantaged by race, namely, black people, but does not distinguish between the social conditions of persons within the black population group; (2) it does not target and benefit the lower social status groups who experience increasing levels of poverty and inequality; (3) it does not target and benefit vulnerable groups; and (4) although the B-BEE programme's stated objective is to be broad-based, the way in which it is designed promotes a narrow focus on ownership, management and control of entities through, amongst others, the principle or representivity. This design excludes the unemployed, unskilled and those without access to resources as main drivers of inequality.

The way in which the B-BBEE programme beneficiaries are classified is contrary to international

²⁰⁷ Malan *TSAR* (2010) 447 and 449 argues that representivity can under certain circumstances at most promote formal equality which is in contrast with substantive equality.

law instruments as it is not based on disassembled and broken-down (“disaggregated”) data of those in social need of upliftment, nor can the impact on them be monitored. This flaw in the classification of the B-BBEE programme’s beneficiaries is the main reason for its inability to promote the achievement of equality. In fact, it creates new patterns of class inequality which are not only contrary to international law instruments, but also the Constitution. An important lesson learned from foreign jurisdictions that any programme designed to allow a dominant political group (such as in Malaysia) to control the benefits through government regulatory power, for example licencing and procurement, and which does not exclude the so-called “creamy layer” from its benefits (like India), will prevent benefits from flowing to the poor and vulnerable classes within those beneficiary groups.

Political dominance also leads to misappropriation and exploitation of the B-BBEE programme. It can be said that the B-BBEE programme fulfils a political role within the realm of the ANC’s NDR but fails dismally in its role to promote the achievement of equality as envisaged in the Constitution.

It is therefore found that the definition of the beneficiaries of the B-BBEE programme and South Africa’s system of data disaggregation are not in compliance with constitutional or international law obligations imposed by the ICERD, read in conjunction with the CERD’s general recommendations and concluding observations. Government’s failure to measure the impact of various affirmative action measures on the basis of need and disaggregated data, especially to the extent that such measures advance vulnerable groups, likewise violates the obligations imposed by the ICERD, the CERD and the substantive equality requirements of the Constitution.

It can be concluded that South Africa needs a black economic empowerment programme, but not the present one. The present B-BBEE programme is a blunt instrument and requires not only calibrating but also a reconfiguration. The following recommendations are largely an attempt to address the flaws of the present B-BBEE programme.

7.5 RECOMMENDATIONS

The recommendations are based on the information and data collected and analysed during this study. The data forms the basis of identifying the major shortcomings of the B-BBEE programme,

especially insofar as the beneficiaries of the programme are concerned.

As discussed in chapter 2, paragraph 2.2 above, vulnerable groups in need of socio-economic empowerment were identified according to research done by a variety of local and international institutions. These vulnerable groups were identified within the focus of those specific research objectives and methodology which may not necessarily coincide with the need of accurately identifying vulnerable groups for the purpose of overcoming the shortcomings of the B-BBEE programme. In order to identify the beneficiaries of a B-BBEE programme accurately, broken down data of all the vulnerable groups within the lower middle class and poor classes would be required. As an example, the majority of research has found that black households in rural areas are vulnerable, while other research has found that those living in rural areas of the Eastern Cape and Limpopo are particularly poor, as well as black female single parent households, especially those in rural areas. The data should be such that continued monitoring of vulnerable groups is possible. This is imperative in order to adjust the B-BBEE programme from time to time to promote the interests of those groups identified.

Therefore, the recommendations suggested herein should be seen as indicative of the basic areas and the direction towards which improvements should be made. Furthermore, many of the recommendations are not new. Many of them are already in part deployed in other legislation, such as in the areas of tax and employment to fulfil a similar purpose. The recommendations suggested herein are unique in the sense that they incorporate these legislative measures into the B-BBEE programme.

The principles on which the recommendations are based can be summarised as follows: (1) To align the B-BBEE programme with constitutional objectives for the B-BBEE programme to achieve substantive equality; (2) to promote equality within the lower and poor classes of black people; (3) To achieve (1) and (2) by increasing the number of vulnerable groups who own enterprises; (4) To increase ownership of enterprises to reduce unemployment, increase income, and allow vulnerable groups to own shares (assets) in enterprises; (5) To eliminate abuse of the B-BBEE programme; and (6) To prevent benefits from flowing to the middle and affluent black classes.

7.5.1 Race as Criterion

The B-BBEE programme includes as beneficiaries all black people, which by definition is a generic term for Africans, Coloureds and Indians with some pre-conditions in respect of being South African citizens by means of birth, descent or naturalisation as discussed in chapter 6, 6.6.1 above.

Due to South Africa's history of racial discrimination and the present manifestation of inequality relating to race, especially the African population, it is argued that race should remain the first criterion. This may change in future when race becomes of less importance and socio-economic factors become the most decisive indicator. This position of race being the only factor to qualify for benefits in terms of BEE (B-BBEE, EEA and preference for government procurement) was also identified by other prominent role players. The National Planning Commission indicated in 2012 that preference for defining historical disadvantage should be accorded to race "for at least the next decade".²⁰⁸ Cameron J *et al* in *Barnard* also pointed out:

"We should be careful not to allow race to become the only decisive factor in employment decisions ... Race, in other words, is still a vitally important measure of disadvantage, but in planning our future we should bear in mind the risk of concentrating excessively on it. To achieve the magnificent breadth of the Constitution's promise of full equality and freedom from disadvantage we must foresee a time when we look beyond race."²⁰⁹

7.5.2 Redefining Black People and Designated Groups

It is recommended that policymakers ought to amend the present categorisation of black designated groups to focus on those in the poor classes. The B-BBEE programme pretends to give substantial preference to "black designated groups" (see below) as vulnerable groups but as shown in this study, those benefits are woefully inadequate. It is recommended that the definition of black people remains as is as the first criterion, but that black designated groups become the sole beneficiaries of the programme and that the definition of designated groups be amended and focused on vulnerable and poor groups. Presently, the following five categories of persons are included as beneficiaries of black designated groups in the B-BBEE Codes: (1)

²⁰⁸ National Planning Commission *The National Development Plan (NDP) 2012 – 2030* (2012) 467.

²⁰⁹ *Barnard* (note 128 above) paras [80] and [81].

Unemployed black people not attending and not required by law to attend an educational institution and not awaiting admission to an educational institution; (2) Black people who are youths, as defined in the National Youth Commission Act 19 of 1996; (3) Black people who are persons with disabilities as defined in the Code of Good Practice on employment of people with disabilities under the Employment Equity Act; (4) Black people living in rural and underdeveloped areas; and (5) Black military veterans who qualify to be called military veterans in terms of the Military Veterans Act 18 of 2011.²¹⁰

It is recommended that the definition of black designated groups be divided into natural persons and non-natural (juristic) persons. For natural persons, an income²¹¹ threshold per month of not more than R241 110,59 should apply. This is also the amount for certain categories of employees to be excluded from some benefits, such as overtime payment and working hours, in terms of the Basic Condition of Employment Act 75 of 1997.²¹² This threshold is amended annually by the Minister of Labour and Employment and published in the *Government Gazette*.²¹³ The threshold of R254 371,67 was the threshold determined in 2024. It is further recommended that the present list of black designated groups be amended as follows: In respect of unemployed black people referred to in (1) above, the qualification for unemployed should be amended to provide for black unemployed people who had been unemployed for the past four weeks.²¹⁴ Those beneficiaries mentioned in (5) above, namely black military veterans, should be scrapped to avoid present political abuse.

In respect of non-natural juristic persons, such as partnerships, associations, trusts and joint ventures and other juristic persons such as companies, close corporations and co-operatives, it is suggested that the criterion should be set at a maximum annual turnover of R10 million for entities owned and controlled by natural persons delineated in the amended definition of black designated groups, or an annual turnover not exceeding R10 million for entities established or incorporated by black people and which had been in existence for less than three years. The

²¹⁰ As defined in Schedule 1 of the B-BBEE Codes.

²¹¹ As defined in s 1 of the Income Tax Act 58 of 1962 meaning “the amount remaining of the gross income ... after deducting therefrom any amounts exempt from normal tax”.

²¹² S 6 of the Basic Conditions of Employment Act.

²¹³ *Basic Conditions of Employment Act (No. 75 of 1997): Determination: Earnings Threshold* published in *Government Gazette* No. 50254 dated 5 Mar 2024.

²¹⁴ See Stats SA *Quarterly Labour Force Survey Quarter 3: 2023* (Nov 2023) 8.3. This classification is in accordance with the official definition of “unemployed” which are defined as persons who: (a) where not employed in the reference week; and (b) actively looked for work or tried to start a business in the preceding four weeks; and (c) were available for work.

latter will promote the establishment of true black-owned companies instead of black people taking up shares in traditional white companies (exchanging one elite with another). The maximum period of three years to qualify for benefits will prevent the same individuals from perpetually benefitting as well as abuse within a patronage network. The limit of three years will also coincide with the B-BBEE Strategy to promote new and emerging black-owned enterprises, which is mere lip service and not presently provided for in the B-BBEE Codes.²¹⁵

A further requirement for black-owned enterprises should be that any black person with more than 5% shares may not also be a shareholder or director of any other enterprise. This requirement of not holding shares in any other enterprise is presently applied in tax law to qualify individuals for favourable Small Business Corporation Tax.²¹⁶ This is incorporated in tax law to prevent individuals from benefitting from holding equity in multiple small businesses. The 5% shareholding threshold applies in terms of the Companies Act which requires any person holding more than 5% shares to report annually on beneficial ownership of entities.²¹⁷ At least 50% of all benefits in respect of black designated groups must accrue to black women. Therefore, the amended definition of black designated group should look as follows:

“black designated groups” means:

- (1) Any black natural persons listed under (a) – (d) below with a monthly income²¹⁸ not exceeding R 254 371,67, as amended from time to time:
 - (a) black people who are youth as defined in the National Commission Act 19 of 1996;
 - (b) persons with disabilities as defined in the Code of Good Practice on employment of people with disabilities under the Employment Equity Act;
 - (c) people living in rural and underdeveloped areas;
 - (d) unemployed black people who was unemployed for a consecutive period of four weeks immediately preceding receiving any benefits or come into consideration for benefits in terms of this programme;
- (2) Juristic persons²¹⁹ with an annual turnover not exceeding R 10 million

²¹⁵ Department of Trade and Industry (DTI) *South Africa's Economic Transformation: A Strategy for Broad-Based Black Economic Empowerment* (2003) 15 and 22.

²¹⁶ S 12E of the Income Tax Act.

²¹⁷ Reg (2)(A) of the Companies Regulations, 2011 amended by reg 30 of the Companies Amendment Regulations 2023.

²¹⁸ “Income” means the amount remaining of the gross income of a person after deducting therefrom any amounts exempted from normal tax as provided for in tax legislation.

²¹⁹ “Juristic persons” are defined as unincorporated partnerships, associations, joint ventures, trusts and entities as well as

and which are:

- (a) Owned and controlled by black natural persons mentioned in para (1) above; and
- (b) established or incorporated by black people and:
 - (i) are less than three years in existence; and
 - (ii) of which those holding more than 5% of the beneficial ownership does not hold any shares or serve as fiduciaries of any other profit oriented juristic person.”

7.5.3 The B-BBEE Scorecard

The amended definition of black designated groups will now be evaluated in respect of each element of the scorecard.

With the amended definition of black designated groups above as basis, each element of the B-BBEE scorecard will be individually evaluated to determine the impact of the amended definition on each element. The approach with the individual elements will be to briefly explain how the element presently works, what its aim is as well as its present shortcomings. Therefore, recommendations for amending the elements within the amended definition of black designated groups and an evaluation of the recommendations would reasonably remedy the present shortcomings.

7.5.3.1 The Ownership Element

As discussed in chapter 6, paragraph 6.4.1.1 above, the Ownership element has 25 points and measures three main indicators of ownership, namely exercisable voting rights; economic interest; and realisation. It measures voting rights as a shareholder and economic interest (for instance dividends) accruing to a shareholder as a percentage of the total voting rights and economic interest held in an enterprise. The target is 25,1%. It requires at least 12% voting rights and economic interest to be vested in black women. The Realisation indicator measures the percentage of debt with which the shareholding (equity) of a black shareholder is encumbered. The Realisation target works on a formula, but in essence requires at least 10% of the value of the shares to be unencumbered. Three points are awarded if at least 3% of the shareholding of

incorporated juristic persons.

an enterprise vests in collective broad-based schemes benefitting the community, charities and workers.²²⁰

The shortcoming of this element is that all black people from all social classes are treated the same and qualify automatically on race alone. The three points set aside for broad-based programmes are too insignificant to serve as an incentive to incorporate these programmes into the shareholding of enterprises.

Using the amended definition of black designated groups will exclude the middle and upper black affluent classes from benefits and ensure that benefits from holding shares in enterprises can only flow to the low-income groups, vulnerable groups, communities and workers. The benefits will be in the form of dividends as income and the value of shares as assets. This will address both components of measuring equality – income and wealth.

7.5.3.2 The Management and Control Element

This element totals 19 points, as discussed in chapter 6, paragraph 6.4.1.2 above. The main objective of this element is to increase the management and control of enterprises by black people. This is done by measuring the voting rights of black people at board of director level, and the rest of senior executive management up to junior management level as a percentage of black people represented at each level.

It allows two points if at least 2% of the workforce consist of persons with disabilities. Apart from persons with disabilities, it does not measure any other occupational levels. The element is mainly concerned with management levels. Black people must be represented at all management levels according to the equitable representation targets of the EEA. The EEA requires representation according to each race and gender's Economic Active People percentage of the total population.²²¹

This element is problematic for the following reasons: It does not give recognition for the employment of any lower employee groups where the majority of unemployed would enter the

²²⁰ See ch 6, para 6.4.1.1 above.

²²¹ See ch 6, para 6.4.1.2 above.

labour market; persons qualifying for positions in management are not the unskilled or unemployed, but those with quality education and access to resources; the representativity principle reduces the pool of qualified persons, creating job reservations, and discriminates against previously disadvantaged groups, creating absolute barriers to employment and promotion for all groups, including black people, as discussed in chapter 5, paragraph 5.3.3.5 above. It was identified as one of the main areas of exploitation for the purpose of cadre deployment, political favouritism, patronage and State Capture looting, as discussed in chapter 5, paragraph 5.4.4 above.

This specific measure is also used in the EEA to increase representivity at all occupational levels, especially management level.²²² Hence, it is unnecessary to enforce this outcome in two pieces legislation. For the reasons above, the mechanism of representivity should be scrapped altogether in the B-BBEE programme and the EEA. Suggesting alternatives to the EEA is not within the scope of this study, and as far as the Management and Control element of the B-BBEE scorecard is concerned, it is recommended that the element be replaced in total with an employment incentive element. A target of 10% of the measured entity's present workforce can be set for employing unemployed black people as defined in para (1)(d) of the amended definition of black designated groups. For instance, if an enterprise employs 10 persons, the target is to employ one unemployed person, and if a 100 persons are employed, the target is 10 unemployed persons within the financial period a measured entity is measured for B-BBEE compliance. Black females should form at least 50% of those employed. This would ensure absorption of the unemployed to reduce unemployment as main driver of poverty and inequality. It will further prevent the present abuse of this element for the purpose of cadre deployment and patronage.

7.5.3.3 The Skills Development Element

The Skills Development Element was discussed in detail chapter 6, paragraph 6.4.1.3 above. This element has 20 points. It aims to incentivise the training of all black people, employed and unemployed, black students at tertiary institutions and persons with disabilities, and encourages

²²² See ch 5, para 5.3.2 above, where the new employment targets enforceable by the Minister only applies to management and upper skilled levels.

the employment of a portion of all unemployed trainees.²²³ This is one of the most sensible elements on the scorecard. It is recommended that the allocation of points based on the representivity principle should not apply.

Most training expenses are allocated to black management and senior black management enrolling for postgraduate degrees such as a Master's in Business Administration (MBA).

Training should be restricted to those natural persons defined in para (1)(a)-(d) of the amended definition of black designated groups. At least 50% of all training expenses should be allocated towards black females. This will ensure the upskilling of black employed and unemployed persons, as well as the disabled at the lower end of the income classes who do not have access to resources.

7.5.3.4 The Enterprise and Supplier Development Element (including Preferential Procurement as sub-element)

This is the biggest element on the scorecard. It consists of three sub-elements and has 42 points. The first two sub-elements are Enterprise Development and Supplier Development. It was discussed in chapter 6, paragraph 6.4.1.4 above. The aim is to provide assistance in the form of capital, grants, skills and resources to small black-owned enterprises. Those are enterprises with an annual turnover of below R50 million. The difference between the two sub-elements is that Enterprise Development recognises assistance to any small-black-owned enterprise, while Supplier Development only recognises black-owned beneficiary enterprises which are suppliers of goods and services to a measured entity. The target amount to be spent is calculated as a percentage of a measured entity's annual net profit after tax.²²⁴ The shortcoming of these sub-elements is that they do not distinguish between well-established and newly incorporated black enterprises. Enterprises are merely categorised according to turnover.

This element has also led to opportunism as the same beneficiary entity can be assisted perpetually without becoming operationally independent from its donor (measured entity) or economically sustainable. This was discussed in chapter 6, paragraph 6.6.2 above. In order to address this problem, it is recommended that beneficiary entities be limited to those juristic persons who fit the requirements of para (2)(a) and (b) of the amended definition of black

²²³ See ch 6, para 6.4.1.3 above.

²²⁴ See ch 6, para 6.4.1.4 above.

designated groups.

Preferential Procurement is an important sub-element in the context of the mechanism and operation of B-BBEE. Enterprises endeavour to become compliant and black owned to be preferred as suppliers by bigger enterprises. The more an enterprise procures from a black-owned enterprise, the more points it earns under this sub-element. The points are divided between categories of suppliers based on their annual turnover, which are largely black-owned enterprises.²²⁵

This element has become one of the main areas of political favouritism as measured entities favour black political elite-owned enterprises which are normally more established enterprises, overlooking newly established and emerging small enterprises.²²⁶

Limiting procurement to juristic persons or black natural persons as defined in the amended definition of black designated groups, will prevent well-established companies from raking in all the benefits perpetually. Newly established black enterprises will benefit. They are allowed only three years from date of incorporation or from receiving benefits to become sustainable. This will open the door for new enterprises to be assisted.²²⁷ It will prevent the perpetual empowerment of the same individuals and enterprises, and cause initial B-BBEE beneficiary enterprises to look beyond B-BBEE after three years.

7.5.3.5 The Socio-Economic Development Element

This is the smallest element on the scorecard insofar as points are concerned. It has five points and aims to incentivise contributions to communities and charities to assist black people, especially in rural areas, to become economically sustainable. Initiatives include training, job creation, donations, loans and grants to community groups and charities, as discussed in chapter 6, paragraph 6.4.1.5 above.

The shortcoming of this element is that the scope of initiatives is too wide ranging and therefore

²²⁵ As above.

²²⁶ See ch 5, para 5.4.4 above.

²²⁷ See ch 6, para 6.6.2 above. Also see Jack (2007) 59 who pointed out that the B-BBEE programme does not allow for the “graduation” of beneficiaries from the programme. This shortcoming prevents new beneficiaries to be assisted.

ineffective. It is recommended that the assistance provided be limited to income-generating activities in communities, such as cultural villages, community-based manufacturing, arts-and-craft activities and the like. At least 50% of community beneficiaries assisted must be black women. A particular beneficiary of community-based activities can receive benefits for a period of up to five years. This will allow adequate assistance for community-based self-employed and small-scale activities to become sustainable.

7.6 FINAL OBSERVATIONS

Given South Africa's history of past race discrimination, it is understandable that empowerment programmes follow the former apartheid classification of race to determine the beneficiaries. Over time and as socio-economic conditions changed, the continued use of race alone has created new imbalances and exacerbated inequality. In future, race will probably become less important and it may even be that socio-economic conditions become the sole criterion. If socio-economic conditions is used as the sole criterion, it will still largely benefit black people, especially Africans, as they will form the largest portion of socially deprived persons.

The present B-BBEE programme has the potential of being a powerful instrument to eradicate South Africa's triple challenges of unemployment, poverty and inequality. It requires its beneficiaries to be aligned with the objectives of the Constitution and requirements of international law. Presently it is politically aligned. There is *per se* nothing wrong with programmes such as B-BBEE to promote the interests of the dominant political group. That is afterall how politics and democracy work. It was once remarked that the problem with democracy is its dependence on politicians.

The main objection against the B-BBEE programme is its disingenuous design and implementation. The B-BBEE programme's design and implementation were not challenged in any court thus far. As stated, the programme's objectives are to promote equality and the broad-based ideal of empowering communities, workers and those in rural areas – to uplift the poorest of the poor. Once the various layers of the programme are peeled away and the veil is lifted, its design reveals something different. As said, there is nothing wrong with a politically designed and orientated programme. The objection is that it is paraded and broadly accepted as a measure to promote equality and therefore enjoys the unjust protection that our courts are

prepared to extend to affirmative action programmes such as B-BBEE and the EEA in the name of transformation. Under this guise and protection, Cadre Deployment, State Capture and looting of resources were tolerated. Daylight robbery. A final quote from the *Everyday Life Bible* to conclude this study:

“And the house was filled with the fragrance of the perfume. But one of His disciples, Judas Iscariot, who was later to betray Him, objected, ‘why wasn’t the this perfume sold and the money given to the poor? It was worth a year’s wages. It would have easily brought three hundred silver pieces’. Now he did not say this because he cared for the poor, but because he was a thief, and having the purse, he took for himself what was put into it.”

John 12: 4-6

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<i>Du Plessis v De Klerk</i> 1996 (3) SA 850 (CC).	Full Citation
<i>Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly and Others</i> [2016] ZACC 11.	EFF
<i>Eskom Holdings Soc Ltd v Lekwa Ratepayers Association and Other; Eskom Holdings Soc Ltd v Vaal River Development Association (Pty) Ltd and Others</i> (870/20) [2022] ZASCA 10 (21 Jan 2022)	Full Citation
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<i>Fedsure Life Assurance Ltd and Others v Greater Johannesburg Traditional Metropolitan Council and Others</i> 1999 (1) SA 374 (CC).	Full Citation
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<i>Harksen v Lane NO and Others</i> 1998 (1) SA 300 (CC).	Full Citation
<i>Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others</i> 2001 (1) SA 545 (CC).	Full Citation
<i>Joe Slovo Community; Western Cape v Thubelisha Homes</i> 2010 (3) SA 454 (CC).	Full Citation
<i>Jooste v Score Supermarket Trading (Pty) Ltd</i> 1999 (2) SA 1 (CC).	Full Citation

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(i) SOUTH AFRICA...continued

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<i>Matatiele Municipality v President of the Republic of South Africa</i> 2007 (6) SA 477 (CC).	Full Citation
<i>MEC for Education: KwaZulu-Natal and Others v Pillay</i> (CCT 51/06) [2007] ZACC 21; 2007(3) BCLR 287 (CC); 2007(2) SA 106 (CC); (2007) 28 ILJ 133 (CC) (5 Oct 2007).	Full Citation
<i>MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd</i> (2014) ZACC 6; 2014 (3) SA 481 (CC); 2014 (5) BCLR 547 (CC).	<i>Kirland</i>
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<i>Minister of Correctional Services v Tobani</i> 2003 (5) SA 126 (ECD).	Full Citation
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<i>Minister of Finance v Afribusiness NPC</i> [2022] ZACC 4.	<i>Minister of Finance</i>
<i>Minister of Justice and Correctional Services and Others v Pretorius and Others</i> (A312/2018) [2022] ZAGPJHC 2 (21 Jan 2022).	Full Citation
<i>Moller v Keimoes School Committee and Another</i> 1911 Appellant Division Reports.	Full Citation
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<i>Municipal Manager O.R. Tambo District Municipality and Another v Ndabeni</i> [2022] ZACC 3.	<i>O.R. Tambo Municipality</i>
<i>Mwelase and Others v Director-General for the Department of Rural and Land Reform and Another</i> [2019] ZACC 30.	<i>Mwelase</i>

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<i>President of the Republic of South Africa v Hugo</i> 1997 (4) SA 1 (CC).	<i>Hugo</i>
<i>Pretoria City Council v Walker</i> 1998 (2) SA 363 (CC).	<i>Walker</i>
<i>Prince v President, Cape Law Society</i> 2001 (2) SA 388 (CC).	Full Citation
<i>Prinsloo v Van der Linde</i> 1997 (3) SA 1012 (CC).	<i>Prinsloo</i>
<i>Public Protector v Speaker of the National Assembly and Others; Democracy in Action v Speaker of the National Assembly and Others</i> (2107/2020; 1731/2020) [2021] ZAWCHC 152 (28 Jul 2021)	Full Citation
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<i>Road Accident Fund v Mdeyide</i> 2011 (2) SA 26 (CC).	<i>Mdeyide</i>
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(ii) INTERNATIONAL...continued

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IV STATUTES, PRACTICE NOTES AND CODES *(alphabetic)*

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