ISSUE ALERT

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PEPUDA AMENDMENT BILL

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EQUALITY OF OUTCOMES AND THE PEPUDA AMENDMENT BILL

Proposed amendments to the Promotion of Equality and Prevention of Unfair Discrimination Act (Pepuda) of 2000 (the Act) could pressurise a host of companies and other entities to change the terms on which they interact with black, female, disabled, poor (and many other) people to avoid heavy penalties for failing to 'promote equality in terms of impact and outcomes'.

The obligations imposed by the Bill will be impossible for companies and other entities to fulfil. They will also be enormously costly and burdensome, if only because the 'equality' being demanded cannot be measured, let alone attained. In addition, the unrealistic expectations raised by the Bill will inevitably remain unmet, fuelling polarisation and giving impetus to yet more statist interventions.

Obligation to promote equality

The existing Act, which took effect on 16th June 2003, already bars unfair discrimination on a host of prohibited grounds. It also contains a chapter on the obligation resting on all companies (and a host of other entities) to promote equality. Though this chapter has never been brought into operation, that is now set to change under a sweeping set of proposed amendments to the statute.

The Department of Justice and Constitutional Development (the Department) has invited public comment on a proposed Pepuda amendment bill (the Bill), which would require companies, as part of their 'general responsibility to promote equality', to:

- 'eliminate discrimination' that is 'related to' 18 listed grounds – and an indefinite number of 'comparable' grounds, including 'poverty' – even if that discrimination is neither 'intentional' nor 'unfair' nor 'the dominant reason' for the conduct in question;
- provide 'equal…access to resources, opportunities, benefits and advantages'; and/or
- achieve 'equality in terms of impact and outcome'.

No defence of 'fair' discrimination

The Department may possibly have made a drafting error in demanding the elimination of all discrimination – rather than that which is 'unfair' – as part of the general obligation to 'promote equality'. This omission seems intentional, however, for it strips away the defence of 'fair' discrimination that applies under the first 'leg' of the Act, which aims at the 'prevention of unfair discrimination'.

Where unfair discrimination is alleged under the Act – say because a bank charges higher interest rates to people who pose a higher risk of default and who happen to be black – the bank may be able to avoid liability by showing (among 12 other things) that it has 'differentiated reasonably and justifiably between persons according to objectively determinable criteria, intrinsic to the activity concerned'.

This 'objective criteria' defence applies solely to claims of unfair discrimination. It is thus irrelevant under the second 'leg' of the Act, which aims at the promotion of equality. Hence, a bank will not be able to rely on the defence of 'objective criteria' once the Bill takes effect and it is the bank's failure to promote equality that is in issue.

To avoid liability under the equality rules, companies will be obliged, as earlier outlined, to 'eliminate discrimination', provide 'equal access' to resources and benefits, and/or achieve 'equality in terms of impact and outcomes'. They will have to do so, moreover, on 18 'prohibited' grounds as well as any other 'comparable' grounds that may in time be added.

Discrimination 'related to' the prohibited grounds

Under the Bill, the definition of 'discrimination' is being expanded to a significant extent. Under the revised wording, discrimination will mean any act, omission, practice, or situation that, 'whether intentionally or not', imposes burdens on, withholds benefits from, 'causes prejudice to', or 'otherwise undermines the dignity' of any person for a reason 'related to' the prohibited grounds. It is irrelevant whether that reason was 'the sole or dominant' reason for the act or omission in question.

The Act lists 18 prohibited grounds, these being race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth, and HIV/AIDS status.

Also potentially included in the prohibited grounds are any other grounds which 'perpetuate systemic disadvantage', undermine human dignity, or adversely affect rights and freedoms in a serious manner 'comparable to' discrimination on a ground already listed. A potential new prohibited ground need satisfy only one of these criteria.

The Act identifies socio-economic status as a possible additional ground – and defines it as 'a social or economic condition' of a person 'disadvantaged by poverty, low employment status or low-level educational qualifications'. The Act also empowers an equality court to decide, in any future case, that socio-economic status should indeed be recognised as a prohibited ground.

Poverty has already been recognised as a comparable ground by the Western Cape high court, sitting as an equality court. This was in a public sector context (the allocation of police officers to wealthy and poor areas) but recognition could in time extend into the business sphere as well.

Consequences of failing to promote equality

Companies that fail to 'eliminate discrimination', ensure 'equal access', and/or achieve 'equality of outcomes' may be penalised under the legislation or codes that various ministers will be obliged to adopt in order to promote equality. There is no certainty as yet as to what such penalties could comprise.

Companies that fail to promote equality in any of these three ways will not necessarily be liable for damages under the Act for any resulting financial loss or 'impairment of dignity'. (According to the Act, these penalties apply solely in cases of 'unfair' discrimination, hate speech, or harassment, and the Bill does not change this situation.)

However, the expanded definition of discrimination in the Bill may make it more difficult for companies to prove that any discrimination in which they may unintentionally have engaged is not unfair. The 'objective criteria' defence will still be available, but companies may nevertheless find it harder to show the fairness of their conduct when the definition of discrimination is so much wider than before.

If they fail to discharge this onus, then the Act's many penalties for unfair discrimination will indeed be applied – and will come on top of any punishments imposed under other rules for failing to promote equality.

Ramifications of the Bill

The provisions of the Bill are so broad that its ramifications are difficult to assess. Some insights may, however, be gained from the following examples. All these deal with sectors of the economy which the Act already singles out for criticism via an illustrative 'schedule' of practices which 'are or may be unfair' and so 'need to be addressed'.

Banking sector

In the 'housing', 'land' and 'property' spheres, the Act identifies 'red-lining on the grounds of race and social status' as an unfair or potentially unfair practice. It applies the same critique to any 'unfair discrimination in the provision of housing bonds, loans, or financial assistance'.

At present, however, banks can largely defend themselves against unfair discrimination claims by showing that their lending practices 'differentiate reasonably and justifiably between persons according to objectively determinable criteria, intrinsic to the activity concerned'.

When the Bill takes effect, banks will be expected to 'eliminate discrimination', irrespective of whether this is fair or unfair, and the 'objective criteria' defence will be irrelevant in assessing whether they have failed to promote equality. The Bill is thus likely to put significant pressure on the country's major banks to change long-established methods of risk evaluation – and to engage in lending practices that may not be sustainable and could contribute to a banking crisis.

Perhaps not coincidentally, the sector already confronts a #Racistbanksmustfall campaign, involving the EFF, Cosas, Sanco, the MKMVA, Transform RSA, and various others. The campaign alleges, in the words of Transform RSA president Adil Nchabeleng, that 'banks are quick to repossess' cars or houses belonging to black people, that they 'target black people by closing their bank accounts', and that they charge blacks higher interest rates. Mr Nchabeleng also echoes recent criticisms by President Cyril Ramaphosa in accusing banks of having been 'racially selective in providing the R200bn in Covid-19 relief funds'.

Under the equality provisions in the Bill, the banks must, as noted, 'eliminate discrimination'. Hence, if Mr Nchabeleng is correct that banks charge different interest rates to white and black clients – even if this differentiation is based on their risk profiles rather than their race – then those banks have failed to 'eliminate discrimination' and hence to promote equality.

In addition, if Mr Nchabeleng can cite prima facie evidence that the cars of people who happen to be black are more swiftly repossessed than those of people who happen to be white (perhaps because of differing crime levels in different residential areas), then the banks will have failed to provide 'equal access' to 'resources' and 'advantages'. Nor will they have achieved 'equality in terms of impact and outcomes'.

In addition, if socio-economic status becomes recognised as a prohibited ground, banks will also have to ensure that the poor have 'equal access' to the 'opportunities and benefits' of home and other loans. Banks will also have to help the poor obtain equal outcomes with the rich in this regard.

Failure to promote equality could expose the banks to penalties which remain as yet uncertain, as these will generally depend on the legislation and codes yet to be introduced by ministers.

However, if the banks are also accused of unfair discrimination – and fail to disprove this under the expanded definition of discrimination introduced by the Bill – then they will also face major penalties under the Act.

As part of these penalties, banks might be ordered by equality courts to pay damages for any resulting financial losses as well as for any 'impairment of dignity' and/or 'psychological suffering'. They could also have their banking licences withdrawn or made subject to more onerous conditions.

In practice, the amended Pepuda provisions, along with the other equality rules that ministers will be expected to introduce, could undermine established principles of risk assessment and require the granting of loans on equally easy terms to all individuals, companies, and other entities. Repossessions and foreclosures might have to be implemented on a strictly equal basis and without regard to differing risk factors.

The banks might then want to safeguard their businesses by raising interest rates and imposing stricter repossession terms on everyone. However, such decisions could themselves attract penalties for denying black, female, disabled, and poor people equal access to 'resources and opportunities'.

In a situation in which interest rates must perforce remain very low and loan repayments may become difficult to secure, banks could in time require guarantees and bailouts from the state to maintain confidence in the financial system and avoid a banking crisis. This could increase state ownership and control over the sector, making it easier for the government to direct the banks' considerable resources to wherever the tripartite alliance considers appropriate.

Education

In the education sphere, the Act already says it is 'unfair or potentially unfair' for any educational institution to 'unfairly withhold scholarships or bursaries from people on race or other grounds' or to fail 'reasonably and practicably to accommodate diversity'.

Once the Bill takes effect, private and other fee-paying (mostly former Model C) schools may come under increasing pressure to provide 'equal access' to their 'resources and benefits'. They may also have to ensure equality of outcomes on 19 (or more) listed grounds, including socio-economic status. In practice, fees will probably have to be reduced so that schools are equally affordable to the poor and the better off. Admissions criteria based on an established language or religion may have to be removed as well. Academic admission and examination standards may have to be adjusted downwards too, so that all pupils have equal outcomes – and none can be made to repeat a year while others proceed to the next, for example.

Such requirements could make it difficult for any private or fee-paying school to survive. This would help put an end to what many education activists depict as an unacceptable 'two-tier' schooling system, in which too many 'resources' and 'opportunities' are reserved for the fortunate few instead of being shared among all. Once such arguments are backed by the Bill, demands are likely to grow for all the fees, tax revenues, and other resources now divided between public and private schools to be allocated to a single state-controlled education fund modelled on the National Health Insurance (NHI) Fund. This education fund would then be used to provide equally much (or equally little) schooling to everyone.

Healthcare

As regards the healthcare sector, the Act already describes as 'unfair or potentially unfair' any 'failure to make healthcare facilities accessible to any person'. Equally suspect is 'unfairly refusing any person access to healthcare facilities'.

Once the Bill takes effect, private hospitals (along with many of the specialist group practices located within them) will come under increasing pressure to avoid any form of discrimination, even if this is

not unfair. They will also have to provide 'equal access' to 'resources and benefits' and ensure 'equality in terms of impact and outcomes'. Again, this will make it difficult for private hospitals to deny surgery or other costly medical treatments to black, female, disabled, or poor people – at prices all can equally afford – without risking significant penalties under the legislation and codes still to be adopted.

In practice, this may make it harder for private hospitals (and many private healthcare practices) to resist participating in the pending NHI scheme. Under this scheme, the NHI Fund – which will be appointed and controlled by the national health minister – will have the power to decide the prices of all healthcare goods and services, including the fees to be charged by doctors, specialists, and other healthcare providers. Under the combined impact of this Bill and the NHI legislation, many private hospitals and practitioners will have little choice but to accept the state's pervasive controls.

The Bill's expanded definition of discrimination will also make it more difficult for medical schemes (and many others) to defend themselves against accusations of racism. The risk here is illustrated by the interim findings of race discrimination made in January 2021 against Discovery Health, the Government Employees' Medical Scheme (GEMS), and Medscheme. These findings were made by an independent panel established by the Council for Medical Schemes and chaired by Advocate Tembeka Ngcukaitobi.

The saga began in May 2019, when a number of black doctors and other health professionals alleged that medical schemes were discriminating against them on the basis of their race by withholding payment for the medical services they had rendered. Though this was being done under Section 59 of the Medical Schemes Act – which empowers medical schemes to investigate fraud, waste and abuse (FWA) costing some R28bn a year – black practitioners alleged that they were being singled out for investigation for racist reasons. By contrast, few white practitioners were being subjected to the same 'degrading, humiliating, and distressing treatment' (as the panel was later to describe it).

The medical schemes countered that the doctors selected for investigation were identified by codes and not by names, excluding any basis for racism. In addition, there was no evidence of 'explicit racial bias in the algorithms' being used to identify FWA, as the panel's investigation had confirmed.

The panel nevertheless found that 'black practitioners were 1.4 times more likely to be classified as having committed FWA than those identified as not black'. Since this imbalance could not be attributed to chance, the panel concluded that 'black providers had been unfairly discriminated against on the basis of race'. There was also 'unfair discrimination in outcomes'.

A final report will be issued after the responses of the medical schemes have been obtained. Many of the black practitioners concerned are nevertheless already planning to bring a class action for damages against Discovery, GEMS, and Medscheme. If they were to sue for unfair discrimination under Pepuda, the Act would allow them to seek substantial damages for financial loss, 'pain and suffering', and emotional distress. If the Bill (and its supplementary codes) were in force by then as well, they would probably be entitled to additional damages for the medical schemes' failure to 'promote equality'.

Insurance industry

As regards the insurance sector, the Act already identifies as 'unfair' (or potentially so) any 'unfair refusal to provide an insurance policy to any person' on any prohibited ground, including HIV/AIDS status.

Once the Bill takes effect and the promotion of equality becomes obligatory, the insurance industry, like the banks, may find it difficult to base underwriting decisions on established risk criteria. Equal outcomes in the payment of claims would also have to be provided. This would make it harder for insur-

ers to resist claims that are poorly substantiated, or which brush over contributory negligence or other wrongdoing (material non-disclosure, for example) on the part of the insured.

To maintain their profitability, insurance companies might then want to increase premiums for everyone – but this too could attract penalties for denying black, female, disabled, and poor people equal access to 'resources' and 'opportunities'. In such a situation, insurance companies might increasingly need state guarantees to survive. Again, this would help to bring the insurance sector and the substantial assets it manages under comprehensive state control.

Pension funds

In the pensions sphere, the Act already describes it as 'unfair' (or potentially so) to 'unfairly exclude any person from membership of a retirement fund' or to 'unfairly discriminate' against existing members or beneficiaries.

Once the Bill takes effect, pension funds will also have to ensure that black, female, disabled, and poor people have equal access to the 'resources' and 'benefits' they offer. They may also have to ensure 'equality of outcomes' as regards both the investment returns and the pension payouts they provide.

These requirements might make it difficult for private pension funds to survive. This in turn would increase the pressure on all private funds to participate in the National Social Security Fund (NSSF) the government has long been wanting to introduce as part of its comprehensive social security reforms.

Under the NSSF system, all employers and employees in both the public and private sectors will have to pay 10% of 'qualifying earnings' into a single state-controlled fund. Initially, this fund will be used to pay disability and death benefits as a key priority, as the pension needs of a generally youthful population are expected to be less pressing. As with the NHI system, the NSSF will greatly limit and could in time effectively terminate market-based provision. It will also give the government complete control over what in practice will often be the great bulk of pension savings.

Companies both big and small

Under the Act, it is already 'unfair or potentially unfair' for any for any supplier of goods and services 'unfairly to refuse to provide goods and services' on any prohibited ground. These provisions apply to all companies, but are particularly onerous for small and medium enterprises (SMEs).

Once the Bill takes effect, all private companies selling goods and services will have to lower the prices so as to provide 'equal access' to the 'opportunities' and 'benefits' they offer, and ensure equality of outcomes as between the better off and the poor. As earlier noted, it will not be enough for companies to show that their current pricing strategies differentiate 'reasonably and justifiably between persons according to objectively determinable criteria, intrinsic to the activity concerned'. This provision in the Act provides a (partial) defence where the prohibition of unfair discrimination is in issue. However, it does not apply where the promotion of equality is what is at stake.

The Bill will thus give impetus to one of the ruling party's main ideological goals – the exclusion of the private sector from providing, at a profit, any socially important goods and services. These include banking, education, healthcare, social security, transport, and food.

Companies will still be permitted to supply these items, but they will increasingly have to do so on terms set by the state. Effectively, they will find market-based decision-making barred by the government. They are also likely to find that their survival has become dependent on what prices the tripartite

alliance permits them to charge. This will increase reliance on the ruling party, both among the general population and within the business community.

Increasing state control in pursuit of the National Democratic Revolution

Both the ANC and its dominant ally, the SACP, remain strongly committed to a socialist-orientated National Democratic Revolution (NDR) that both organisations first endorsed more than 60 years ago.

According to the SACP in *The South African Road to Socialism*, a particularly important NDR objective is to 'mobilise...the immense resources...controlled by...private capital' into 'the transformational agenda'. However, this mobilisation, as the party acknowledges, 'will not happen spontaneously and it will not happen willingly'.

Appropriate NDR interventions must therefore be implemented to achieve this objective. These range from 'enforcing strategic discipline' on cadres deployed to business to ensuring 'effective state... regulation', entering into 'public-private participation arrangements' and, if necessary, 'straightforward compulsion and even expropriation'.

The Bill clearly fits within the category of 'effective state…regulation'. Its underlying NDR objectives are being concealed, however, while the SACP/ANC alliance has been careful to play down the Bill's enormous ramifications – not only for the banks but also for a host of other companies and entities, including civil society organisations.

Pepuda and Critical Race Theory (CRT)

When Pepuda was adopted in 2000, the preamble to the statute declared that 'the consolidation of democracy in [South Africa] required the eradication of social and economic inequalities', especially those that were 'systemic in nature' and had been generated by 'colonialism, apartheid and patriarchy'.

This language comes straight from the Critical Race Theory (CRT) ideology now sweeping through the Western world. In 2000, however, CRT was still in its infancy – and South Africa was far ahead of the global curve in seeking, via Pepuda, to demand equality of outcomes in every sphere.

That CRT was still so little known was presumably one of the reasons the SACP/ANC alliance decided not to implement the equality chapter in the Act when it brought the rest of Pepuda into operation in 2003. Now, however, CRT ideology has spread so widely and become so deeply entrenched in the US and elsewhere that people who dare to question its core tenets commonly find themselves demeaned, deplatformed, or dismissed.

One of CRT's most important demands is for equal outcomes in every sphere. This concept has been strongly endorsed by Professor Ibram X. Kendi, one of the foremost apostles of CRT in the US, in his bestselling (2019) book on *How to be An Antiracist*. Since January 2021 equality of outcomes has also been effectively embraced by President Joe Biden as one of main policy planks of his administration.

As CRT deepens its hold over the West, measures like the Pepuda Bill in South Africa will gain a momentum and supposed credibility that will be difficult to resist. CRT will thus greatly strengthen the NDR ideology that already dominates the government's policy decisions. In giving yet more impetus to the NDR goal of 'placing social needs above private profits', CRT will further shift the country away from its free market system – and closer to the NDR goal of a socialist and then communist future.

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