

**South African Institute of Race Relations NPC**  
**Submission to the**  
**Portfolio Committee on Employment and Labour,**  
**National Assembly,**  
**regarding the**  
**Employment Equity Amendment Bill of 2020 [B14-2020]**  
**Johannesburg, 19<sup>th</sup> February 2021**

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**Introduction**

The Portfolio Committee on Employment and Labour (the committee) has invited interested people and stakeholders to submit written comments on the Employment Equity Amendment Bill of 2020 [B14-2020] (the Bill) to the committee by 19<sup>th</sup> February 2021.

This submission is made by the South African Institute of Race Relations NPC (IRR), a non-profit organisation formed in 1929 to oppose racial discrimination and promote racial goodwill. Its current objects are to promote democracy, human rights, development, and reconciliation between the peoples of South Africa.

### **No satisfactory SEIAS assessment**

Since September 2015, all new legislation in South Africa has had to be subjected to a ‘socio-economic impact assessment’ before it is adopted. This must be done in terms of the Guidelines for the Socio-Economic Impact Assessment System (SEIAS) developed by the Department of Planning, Monitoring, and Evaluation in May 2015. The aim of this new system is to ensure that ‘the full costs of regulations and especially the impact on the economy’ are fully understood before new rules are introduced.<sup>1</sup>

According to the Guidelines, SEIAS must be applied at various stages in the policy process. Once new legislation has been proposed, ‘an initial assessment’ must be conducted to identify different ‘options for addressing the problem’ and making ‘a rough evaluation’ of their respective costs and benefits. Thereafter, ‘appropriate consultation’ is needed, along with ‘a continual review of the impact assessment as the proposals evolve’.<sup>2</sup>

A ‘final impact assessment’ must then be developed that ‘provides a detailed evaluation of the likely effects of the [proposed law] in terms of implementation and compliance costs as well as the anticipated outcome’. When a bill is published ‘for public comment and consultation with stakeholders’, this final assessment must be attached to it. A particularly important need, moreover, is to ‘identify when the burdens of change loom so large that they could lead to excessive costs to society, for instance through disinvestment by business or a loss of skills to emigration’.<sup>3</sup>

The Bill is likely to trigger precisely such ‘excessive costs’, in the form of both disinvestment and emigration. It will also deter investment, limit growth, reduce employment, add to inequality, and make recovery from the Covid-19 lockdown, which has caused unprecedented damage to an already ailing economy, yet harder to achieve. Yet no proper SEIAS assessment of the Bill has been carried out, while no final SEIAS report has been appended to the Bill to help inform the public in providing their comment.

Instead, the Memorandum on the Objects of the Bill vastly understates the likely ‘financial implications’ of the Bill. Instead of trying to assess its negative impact on the entire society, the document focuses solely on whether the Bill will result in any increased implementation costs for the state.

According to Paragraph 5 of the Memorandum, the state is likely to incur some R1.2m in additional expenses in implementing the Bill. This is because the Bill seeks to bring Section 53 of the 1998 Act into operation – and this provision (dormant up to now) requires designated employers wanting to do business with the government to obtain a certificate of

employment equity (EE) compliance from the minister of employment and labour (the minister).

This in turn has implications for the National Treasury and its chief procurement officer, as well as for the BEE Policy Unit within the Department of Trade and Industry and the Department of Mineral Resources and Energy (as the EE targets to be set for the mining sector need to be aligned to the provisions of the Mining Charter). In addition, the Commission for Conciliation, Mediation, and Arbitration (CCMA) will have to confirm that a designated employer has not breached the unfair discrimination provisions in the 1998 Act or the minimum wage rules laid down under the National Minimum Wage Act of 2018 (see *Eligibility for state contracts*, below).<sup>4</sup>

To ensure there is proper coordination between these various state entities, ‘systems alignment is critical between the EE System, the CCMA Case Management System, and the National Minimum Wage System’, which deals with applications for exemption.<sup>5</sup> However, the R1.2m that may be needed to increase coordination between different state entities is only a very small part of the Bill’s overall economic ramifications. Its likely negative effect in deterring reconstruction and recovery from the Covid-19 pandemic is the most important issue of all – and needs to be canvassed in full in the public participation process, not bypassed.

### **Proper public participation**

Public participation in the legislative process is a vital aspect of South Africa’s democracy, as the Constitutional Court has repeatedly reaffirmed in judgments spanning a decade or more. These include *Matatiele Municipality and others v President of the Republic of South Africa and others*, *Doctors for Life International v Speaker of the National Assembly and others*, and *Land Access Movement of South Africa and others v Chairperson of the National Council of Provinces and others*.<sup>6</sup>

The key constitutional provisions in this regard are Sections 59, 72, and 118. According to Section 59(1) of the Constitution, the National Assembly ‘must facilitate public involvement in the legislative...processes of the Assembly and its committees’. In the *New Clicks* case in the Constitutional Court, Mr Justice Albie Sachs noted that there were many ways in which public participation could be facilitated. He added: ‘What matters is that...a reasonable opportunity is offered to members of the public and all interested parties *to know about the issues* and to have an adequate say’. This passage was quoted with approval in both *Doctors for Life* and in the *Land Access* case.<sup>7</sup>

According to the Memorandum on the Objects of the Bill, the proposed amendments were discussed and negotiated at the National Economic Development and Labour Council (Nedlac) from October 2017 to April 2018. The Bill was then published for public comment, while public hearings were held in all nine provinces in October 2018. Comments received during this consultation process were taken into account in finalising the Bill.<sup>8</sup>

The Memorandum implies that this public consultation process, which was carried out solely in 2018, was sufficient in crafting the current version of the Bill. However, it fails to take account of the fundamentally different economic environment in which the country now finds itself as it grapples with the Covid-19 pandemic. This massive economic crisis must be taken fully into account, not brushed aside in the current consultation process.

### ***A fundamentally different economic situation***

Even before the Covid-19 crisis hit, South Africa had been downgraded to sub-investment or ‘junk’ status by all international ratings agencies.<sup>9</sup> After almost a year of Covid-19 lockdowns, moreover, the country’s GDP has shrunk to an unprecedented extent, some 1.7 million people have lost their jobs, and tax revenues have tumbled. According to the National Treasury’s projections in October 2020, public debt was set to soar to some 82% of GDP and then to 95% of GDP in 2025. The government needed to borrow roughly R2.2bn a day, mainly to fund consumption spending, and the budget deficit was likely to rise to some 15% of GDP.<sup>10</sup>

More recent figures show that tax revenues have held up better than expected, partly because of a sharp rally in commodity prices. This could result in a R100bn revenue overrun, compared to what was anticipated in October 2020. This unexpected revenue would reduce the main budget deficit to 12.5% of GDP and bring the gross-debt-to-GDP ratio down from 82% to about 79%. But these figures are still extremely high, especially for an emerging market economy, such as South Africa. In addition, the unexpected revenue windfall could easily be squandered on the already high public sector wage bill, or on further bailouts for dysfunctional state-owned enterprises (SOEs).<sup>11</sup>

Against this background, South Africa urgently needs an upsurge in foreign and local direct investment to jumpstart growth, expand employment, and quicken economic recovery. But this will become even more difficult to achieve if this Bill is enacted into law. Its unrealistic demands will serve as a major brake on reconstruction and recovery – and will do so at a time when market-friendly reforms have never been more vital.

### ***A misleading diagnosis of the problem to be fixed***

The government has also provided a misleading analysis of why the Bill is needed. In August 2018, for instance, the minister of employment and labour, Thulas Nxesi, claimed there had been ‘little transformation’ in the workplace since the Employment Equity (EE) Act of 1998 (the 1998 Act) came into force some 20 years ago.

Mr Nxesi based this assessment on the 19<sup>th</sup> annual report of the Commission for Employment Equity, released that month. This put African representation at the top management level at 76% in the public service and at 12% in the private sector, whereas whites occupied some 70% of these senior posts.

In response, Mr Nxesi called for an amendment bill to be fast-tracked by Parliament, so that the state could set employment equity (EE) targets for firms in every sector. ‘We are now going to start to be very hard,’ he said, and firms that failed to meet these targets for ‘no justifiable reason’ would risk ‘prosecution’.<sup>12</sup>

Non-compliant firms would also be barred from doing business with the state under a currently dormant provision of the EE Act (Section 53), which would soon to be brought into operation. This, said Mr Nxesi, would give the state ‘the force it needs’.<sup>13</sup>

### *Black upward mobility even under apartheid*

The ANC has long denied the extent of black upward mobility in the apartheid period. It prefers to overlook this phenomenon, it seems, partly because it undermines its chosen ‘anti-racist’ narrative, but also because the ANC cannot claim credit for positive changes that took place before it came to power. Instead, the ruling party likes to claim that ‘the black middle class is the product of ANC policy’, as ANC secretary general Gwede Mantashe stated in 2014. According to Mantashe, the ANC has ‘a duty to explain’ to black South Africans the extent of their dependence on empowerment policies. The ruling party also expects the black middle class strongly to ‘defend’ the EE policies which are supposedly ‘responsible for its existence’.<sup>14</sup>

The ANC’s implicit message is that black South Africans cannot rise without the help of EE. This is plainly false. It is also debilitating in that it encourages even the ‘born-free’ generation to see itself as EE-dependent. Yet black entrepreneurs flourished in various spheres prior to 1994, even under apartheid’s pervasive restrictions. The multi-billion rand minibus taxi industry is the best known example of this. However, the growth of black business under Nafcoc – the National African Federated Chamber of Commerce and Industry, established in 1964 – was also a singular achievement.

One of the factors helping to facilitate black upward mobility in the apartheid period was a crippling shortage of ‘white’ skills. By the late 1960s, following a decade of rapid growth, it was evident that the white minority was too small to meet the needs of the economy. As the skills shortage worsened, business repeatedly urged the National Party (NP) government to ease restrictions on black employment and advancement. In 1973 prime minister John Vorster finally yielded to this pressure, saying his government would no longer stand in the way of blacks moving into higher jobs. This resulted in considerable advances for black South Africans and a significant narrowing of racial inequality.<sup>15</sup>

This skills shortage also helped push the NP government into embarking on a series of reforms. From the early 1970s onwards, it improved the quality of ‘Bantu’ education, expanded black trade union rights, abolished influx control, and allowed black home ownership in urban townships, among other things. These policy shifts reflected the increasing economic interdependence of black and white South Africans. They also made the political exclusion of blacks all the more difficult to sustain, which is a key part of the reason

the NP government embarked on negotiations for a democratic ‘new’ South Africa in February 1990.<sup>16</sup>

*The real barriers holding black South Africans back*

The real barriers to upward mobility for black South Africans lie not in the alleged racism of the white minority, but rather in a host of other challenges. These include:<sup>17</sup>

- limited direct investment and anaemic growth, even in the pre-Covid-19 period;
- escalating joblessness over many years;
- bad schools and often uncaring teachers;
- high rates of crime;
- an increasing dependency on the state, which the ANC has done much to foster and entrench;
- debilitating perceptions of victimhood that undermine individual agency;
- the erosion of family life, leading to widespread single parenthood and a preponderance of absent fathers;
- a mistaken reliance on racial targets in EE and black economic empowerment (BEE) rules, which benefit a relative elite while harming the great majority; and
- an ideologically driven assumption that ‘demographic representivity’ is the norm in all heterogeneous societies and would be evident in South Africa as well were it not for white racism and intransigence.

*Demographic representivity is never ‘the norm’*

According to Thomas Sowell of Stanford University’s Hoover Institution, in his 1994 book on *Race and Culture*: ‘The even distribution or proportional representation of groups in occupations or institutions remains an intellectual construct defied by reality in society after society. Nor can this be attributed to exclusions or discrimination, for often some powerless or persecuted minorities predominate in prosperous occupations.... Attributing every “imbalance” to employer discrimination assumes away the manifest effects of differences in educational achievement, family upbringing, cultural traditions, [and] marital patterns... When one begins indulging assumptions like that, one has left reason behind and entered the realm of mysticism.’<sup>18</sup>

Sowell also highlights the importance of ‘culture’ – defined by him as ‘knowledge, skills, experiences, and habits’ – in explaining inter-group differences in countries across the world and over many centuries. His 1990s trilogy of books (*Race and Culture*, *Migrations and Culture*, and *Conquests and Culture*) points out that persistent disparities between racial groups are a notable feature within every heterogeneous society – and have very little to do with the racism that the ANC posits as their key cause.<sup>19</sup>

Sowell gives innumerable examples, many of which fall outside the white:black binary on which the ANC chooses to focus. A century ago, notes Sowell, Jews made up 6% of Hungary’s population but constituted the majority of its doctors. In Indonesia, the Chinese minority (5% of the total) owned 80% of the country’s invested capital. In the Austro-Hungarian empire, 75% of Serbo-Croatian adults were illiterate in 1900, as against a mere

6% of Germans. In the late 19<sup>th</sup> and early 20<sup>th</sup> centuries, immigrants to America who came from southern and eastern Europe were largely rural people lacking specialised skills, which is why their incomes were only 15% of those of the mostly urban immigrants who came from northern European countries.<sup>20</sup>

The underlying reality is that people are not ‘blank slates’. Since they are not all essentially the same, they cannot simply be slotted into any role or position irrespective of their individual ages, education levels, aptitudes, skills, experiences, and personality attributes. Independent writer Samuel Kronen (along with many other analysts) thus agrees with Sowell that ‘virtually no two ethnic groups in history have ever achieved equal outcomes on all measures, anywhere, ever. Equal outcomes and proportional representation are the exception, not the rule’. Demographic representivity in employment (or elsewhere) simply cannot be achieved<sup>21</sup> – yet this is the impossible goal that underpins both the EE Act and the current Bill.

### **Core provisions of the 1998 Act**

A brief recap of the core provisions of the 1998 Act is needed to grasp the full significance of the proposed amendments in the Bill.

Under the 1998 Act, designated employers of a specified size must ensure that ‘black people’, women, and the disabled are ‘equitably represented’ at all levels of the workforce. Black people are defined as ‘Africans, coloureds, and Indians’. However, the Population Registration Act of 1950 – which established these racial categories and set out rules for classifying people into them – was repealed by the NP government in 1991. Hence, there is no longer any legislation that defines these categories or explains how classification is to be achieved.<sup>22</sup>

The 1998 Act seeks to cater for this problem by requiring (via regulation) that all employees should ‘voluntarily’ classify themselves as ‘white’, ‘Indian’, ‘coloured’, or ‘African’. Three decades after the NP ended racial classification, the ANC government has thus breathed new life into a system that would otherwise long since have ended. Moreover, if employees refuse to classify themselves or provide ‘inaccurate information’, employers must take over the task of racial classification, using for this purpose ‘reliable historical and existing data’, whatever that might mean.<sup>23</sup>

Once employees have been identified by race, employers must use national and regional demographic data to assess the degree to which black people are ‘under-represented’ at every level in the workforce. This in turn depends on how far the proportion of black employees at any level differs from the black share of the economically active population (EAP) – defined as those people between the ages of 15 and 64 who work or are seeking jobs. Africans, coloured people and Indians currently constitute 91% of the EAP at national level, making this the target for overall black representation that employers are expected to achieve. Since Africans make up around 79% of the EAP, this is the ultimate target for African representation at all levels.<sup>24</sup>

The 1998 Act expressly ‘excludes’ the use of ‘quotas’, but employers are nevertheless expected to set ‘numerical goals’ and apply ‘preferential treatment’ to black people to correct for under-representation and ensure their equitable representation at every level, from the most junior up to senior management and board levels. Though only black people who are ‘suitably qualified’ are entitled to preferential treatment, this criterion is broadly defined. It may depend on formal qualifications or relevant experience, but it also suffices if a black person has ‘the capacity to acquire, within a reasonable time, the ability to do the job’.<sup>25</sup>

Employers that fail to make ‘reasonable progress’ towards demographic representivity (or to comply with various other requirements) are currently punishable by a maximum fine of R1.5m or 2% of annual turnover, whichever is the greater, for a first such ‘offence’. From this already high level, maximum fines increase to R2.7m, or 10% of annual turnover, again whichever is the greater, for a fifth similar offence within three years.<sup>26</sup> These penalties are at least three times more severe than the fines (R500 000 to R900 000) which applied when the 1998 Act was initially adopted.<sup>27</sup>

Such penalties are extraordinarily high. As the government’s own regulatory impact analysis warned in 2010, fines of the current magnitude could readily push many firms into bankruptcy. Since net profits generally run at well below 10% of turnover, the penalties that now apply could contribute to ‘company contraction and retrenchments, and even company closure, resulting in job losses and negative impacts on economic growth’, as the government’s analysis warned.<sup>28</sup>

The overall target of 79% for African representation at senior levels is also problematic for various reasons. For start with, it assumes that all Africans between the ages of 15 and 64 who either work or wish to do so are automatically suitable for management and professional posts. In practice, however, such positions commonly require university degrees, along with significant experience in the workplace, which people under the age of 35 are unlikely to have acquired. But the African population is a youthful one: so much so that in 2019 Africans aged 35 to 64 made up only 43% of the EAP, making this a more realistic target than 79%. However, even a 43% target is in fact too ambitious, as only 5.3% of Africans over the age of 20 (fewer than 1.5m people) had a degree or higher qualification in 2018. In addition, more than half these individuals were recent graduates without the years of experience required for demanding management jobs.<sup>29</sup>

Despite these major practical barriers to implementation, the government has already tightened up the provisions of the 1998 Act in various ways. The amendments adopted in 2013 not only tripled maximum fines, but also stripped away many of the specific defences – including skills shortages and economic malaise – on which private sector employers could previously rely. The 2013 amendments also shifted the onus onto employers, who must now show ‘reasonable grounds’ for any failures to meet the government’s unrealistic racial targets.<sup>30</sup>



### *Implementation in the public service*

Implementation of the 1998 Act has proceeded apace over the past 20 years – and particularly so in the public service. This is evident from the most recent report of the Employment Equity Commission, an entity established under the Act to monitor the statute’s implementation.

The commission’s 20<sup>th</sup> report shows, for example, that Africans made up 76.7% of top managers at the national level of government in March 2020. Within this same category, coloured people made up 8.3%, Indians 6.1% and whites 8.5%.<sup>31</sup>

The supposed ‘norm’ of demographic representivity has thus largely been attained at this most senior level within the public service. This is despite the fact that the African population is a youthful one lacking necessary experience – and that only 5.3% of Africans over the age of 20 have the university degrees that are generally needed or advisable for such senior jobs.<sup>32</sup>

The commission’s 2020 figures (like the similar statistics it has reported over many years) point to an astonishingly fast pace of EE implementation in the public service. This seems to have been achieved in three ways: first, by implementing rigid racial quotas rather than the more flexible ‘numerical goals’ mandated by the EE Act; secondly, by appointing black people without the necessary skills and experience; and, thirdly, by leaving important posts vacant where suitable black candidates cannot be found.<sup>33</sup>

The upshot has been a crippling loss of experience and institutional memory, made worse by the rule (as earlier described) that allows black people to be appointed on the basis of their ‘potential to acquire...the ability to do the job’. According to Professor Peter Franks of the School of Public Leadership at the University of Stellenbosch, ‘this [rule] has become the favoured loophole behind which kin, friends, and comrades have been favoured over more competent applicants’. EE – along with the ANC policy of cadre deployment it has helped to facilitate – have thus generated ‘a perfect storm...of poor management, deficient and partial decision-making, excessive staff turnover, and high levels of...corruption’.<sup>34</sup>

EE has also helped to drive skilled managers and engineers out of SOEs and municipalities and replace them with individuals lacking the same experience and capacity. In 2015 political analyst Moeletsi Mbeki warned that SOEs, irrespective of how many bail-outs they received, would never become more efficient because they were ‘so badly managed by political appointees’. Added Professor William Gumede of Wits University in January 2019: ‘The best people are often not recruited or promoted [to SOEs]. Senior management and boards are often appointed for patronage, political and corrupt reasons rather than for competence. Incompetent boards and management often appoint family, friends and allies to middle and lower management, cascading the zone of incompetence downwards in the organisation.’<sup>35</sup>

At Eskom – which has been crippled by unsustainable debt, inadequate maintenance, and repeated breakdowns at its ageing fleet of coal-fired power stations – human error is so common that it accounts for 40% of plant breakdowns. It may also have been a key factor in two explosions early in 2019 which put two units (at Duvha and Lethabo) out of service. Public enterprises minister Pravin Gordhan has acknowledged that much of the malaise at the parastatal stems from the fact that ‘good people were lost and incompetent people put in their place’. He has also spoken of enticing back some of the white engineers who were earlier pushed out. Yet Eskom nevertheless still plans to reduce its white personnel – including experienced engineers and managers – still further. Even in the face of an electricity crisis that threatens to destroy the economy, EE is still being given priority.<sup>36</sup>

The same phenomenon is evident throughout the floundering public service. An EE-induced exodus of skilled managers and engineers from many municipalities has been particularly serious, however, because it has crippled their capacity to manage their wastewater plants. Hundreds of these plants have broken down, while close on 4 billion litres of raw or partially treated sewage are being discharged into the country’s rivers and dams every day.

Along the Vaal River, as a local business chamber commented in April 2019, sewage was being spilled ‘at record levels’ into ‘townships, suburbs, central business districts, schools, clinics, council buildings, apartment blocks and roads’. This has since been confirmed via an investigation conducted by the South African Human Rights Commission (HRC). Having examined for itself ‘the flow of raw sewerage on public streets, paths, and into homes’ in the Vaal area, the HRC has recently concluded that the cause of this dangerous pollution lies in the failure of the Emfuleni Municipality to maintain and operate its ‘dilapidated wastewater treatment plants’. Moreover, though the municipality had been warned ten years earlier that it lacked the skills to sustain its wastewater management systems – and that ‘the necessary skills were [in fact] available in South Africa’ – it had failed to ‘appoint skilled workers and/or develop capacity for employees to be able to provide the necessary services’.<sup>37</sup>

Water expert Anthony Turton, strategic advisor at TouchStone Resources, agrees that ‘South Africa is suffering from an “induced” deficit of engineering and other technical skills, and especially so at municipal level. This shortage can be traced directly to the government’s determined pursuit of narrowly defined racial targets at the expense of broader issues such as service delivery and economic growth. Were it not for this factor, the engineering skills available would suffice to meet present needs. Hence, if the government were willing to deracialise the appointment of technical skills, the current shortage would be overcome.’<sup>38</sup> Again, however, EE continues to trump all other considerations.

Rapid fulfilment of EE targets in the public service has benefited a small group of relatively skilled and often politically connected black people. However, it has greatly harmed the great majority of poor black South Africans – who have little hope of ever being appointed to senior posts in the public service or the SOEs – but who daily bear the brunt of the state’s declining capacity.

### *Implementation in the private sector*

After the transition to majority rule in 1994, the private sector – which had pressurised the NP government into numerous reforms from the early 1970s onwards – had still more reason to embrace black advancement in the workplace. By September 1997, shortly before the initial EE bill was published, 90% of the 150 large employers surveyed by a human resources consultancy, FSA-Contact, had affirmative action programmes in place, even though this was not required by law. The proportion of black people in senior management at these firms thus increased from 5% in 1995 to 12% in 1998 – and was projected to rise further to 21% in 2001, an overall increase of some 325%. In addition, the proportion of black people in middle management increased from 10% to 21% between 1994 and 1998, and was projected to increase to 29% by 2001.<sup>39</sup>

Given the shortage of skilled black South Africans of an appropriate age for management posts, this increase in black representation was a notable achievement. It was made all the more remarkable by a simultaneous increase in the proportion of black managers in the public service. Between 1994 and 1997, this grew from 6% to 38% at national level and, from the same baseline, to 66% in provincial administrations. This rapid increase in black management in the public sector significantly reduced the pool of black candidates available for private sector posts.<sup>40</sup>

Not surprisingly in these circumstances, data gathered by FSA-Contact showed that 63% of employers had experienced the ‘poaching’ of black managers by firms willing to pay significant premiums to attract them to their staff. This level of poaching – coupled with a willingness to pay black people premiums ranging from 10% to 20% above normal salaries – testified to an enormous unmet demand for black managers in the private sector, rather than a racist refusal to employ them.<sup>41</sup>

There was thus no need for legislation to force the private sector to hire blacks, as the IRR commented in 1998. The real obstacle to black advancement lay not in white racism, but rather in the huge skills deficit in the country. Hence, the key requirement was to increase black skills through excellent education, while fostering rapid rates of economic growth. The faster the economy grew, the more demand there would be for skilled people of all colours.<sup>42</sup>

In the parliamentary debate on the Bill, the Department of Labour (as it then was) sought to downplay the significance of the skills shortage. However, it also inserted a key clause into the Bill that obliged enforcement agencies to take into account the size of ‘the pool of suitably qualified’ black people from which employers might reasonably be expected to promote or appoint. The then labour minister, Tito Mboweni, also assured companies that they would not be expected to ‘grab a hobo off the streets’ and make him a director. Though firms would have to make ‘reasonable’ progress towards the state’s goal of demographic representivity, they would have some discretion in setting their own racial targets along the way, provided they did so in consultation with trade unions and employees.<sup>43</sup>

However, this flexibility was much reduced in 2008, with the coming into force of the government's black economic empowerment (BEE) codes of good practice. Instead of allowing businesses to choose their own racial targets, the BEE generic codes (as tightened up in 2013) put pressure on them to increase black representation to 60% at senior management level, 75% at middle management level, and 88% among junior managers. However, given the age and skills profile of the black population, even a 60% target for black representation at senior management is not easy to attain.<sup>44</sup>

Next came the 2013 amendments to the EE Act, which not only tripled maximum fines but also stripped away many of the specific defences – including skills shortages and poor economic conditions – on which private sector employers could previously rely. Employers could still escape punishment if they had 'reasonable grounds' for failing to meet their targets, but the onus was now placed on them to prove the presence of factors of this kind.<sup>45</sup>

This was another damaging change, as the executive director of the Manufacturing Circle, Coenraad Bezuidenhout, pointed out. Mr Bezuidenhout warned that businesses – unlike state entities with access to tax revenues – do not have budgets that 'automatically get replenished every year'. Many firms could thus be driven into bankruptcy by the 'low productivity and high vacancy rates' that unrealistic EE targets were likely to generate. The stricter EE rules being introduced could 'kill off businesses and employment growth where demographic representivity was not easily attainable', he said.<sup>46</sup>

Since the skills shortage has never been overcome and economic growth remained meagre for many years before the Covid-19 crisis, black representation in management posts in the private sector is still well below the supposed norm of demographic representivity. According to the most recent report of the Employment Equity Commission, Africans made up 12% of top managers in March 2020, with coloureds at 5.4% and Indians at 10.6%. Whites constituted 68.5% of the total at this most senior level.<sup>47</sup>

Though this supposed 'shortfall' has little to do with white racism, the ANC is now determined to be 'very harsh' on the private sector. It is also intent on putting an end to the 'self-regulation' that has supposedly failed, and on stepping up the penalties for non-compliance – as the Bill now does.<sup>48</sup>

Like the EE Act, the Bill will apply to all designated employers in the public service, the municipalities, the SOEs, and various other state entities. However, since these organisations have largely fulfilled the government's racial targets, enforcement of the Bill is likely to be focused mainly on the private sector.

## **Core provisions of the Bill**

### ***Redefinition of designated employers***

The prohibition on unfair racial discrimination under the 1998 Act is binding on all employers, but the obligation to achieve demographic representivity at every level applies

solely to ‘designated employers’. These are defined in the 1998 Act as employers that employ 50 people or more and/or have annual turnover exceeding specific thresholds.

Under the Bill, however, the reference to turnover will fall away altogether.<sup>49</sup> This is intended to reduce the regulatory burden on small employers, says the Memorandum on the Objects of the Bill.<sup>50</sup> Hence, only employers with 50 or more employees will be subject to the minister’s new powers to set their EE targets for them.

The removal of the turnover criterion is an important step forward. However, the remaining rule will give firms perverse incentives to avoid growing their workforces above the 50-employee threshold. Yet this is the opposite of what the country needs as it battles to bring down its extraordinarily high rate of unemployment (currently some 31% on the official definition) to less damaging levels.

### ***Determination of sectoral numerical targets***

Clause 4 of the Bill adds a new Section 15A to the 1998 Act. This provision empowers the minister to ‘set numerical targets for any national economic sector’. Within these sectors, differing numerical targets may be set for ‘different occupational levels, sub-sectors, or regions’.<sup>51</sup>

No one can tell what these numerical targets will be, as the minister’s discretion to determine differing targets is to be largely unfettered. This discretionary power is highly problematic in itself, as it makes the relevant rules uncertain, unpredictable, and subject to rapid change. It also undermines the rule of law, which requires that laws be certain and clear at all times. Moreover, since the ‘supremacy of the rule of law’ is one of the founding values of South Africa’s democracy, the minister’s discretionary powers also put the new Section 15A in conflict with Section 1 of the Constitution.

How onerous the compliance obligation might become is impossible to tell. It is probable, however, that the minister’s numerical targets may be modelled, initially at least, on those in the BEE generic codes, as earlier described. This would make these BEE targets compulsory for all employers in the specified sectors that have 50 employees or more. Since little has been done to counter the pervasive skills deficit – and the economy has shrunk at an unprecedented pace during the prolonged Covid-19 lockdown – compliance is likely to be inordinately costly and difficult for many struggling businesses to achieve.

### ***Reinforcing the compliance obligation***

Various provisions in the Bill further reinforce the obligation on designated employers to comply with the minister’s binding racial targets:

#### ***Content of employment equity plans***

Under Section 20 of the 1998 Act, employers have previously had some flexibility in setting their own racial targets in their employment equity plans. But the Bill removes this flexibility

by stating that ‘the numerical goals set by an employer...must comply with any [applicable] sectoral target’ specified by the minister.<sup>52</sup>

#### *Increased powers for labour inspectors*

All labour inspectors are empowered to obtain written undertakings from designated employers to ‘prepare employment equity plans’ that include the minister’s targets.<sup>53</sup>

#### *Assessment of compliance*

According to the Bill, the director general of labour – in ‘determining whether a designated employer is implementing employment equity’ – must also assess ‘whether or not the employer has complied with any [applicable] sectoral target’ set by the minister.<sup>54</sup>

#### *Eligibility for state contracts*

Section 53 of the EE Act – which has remained dormant to date, but will be made operative once the Bill is enacted – provides that state contracts may be issued solely to employers that are in compliance with the 1998 statute.<sup>55</sup>

In changing the existing wording of Section 53, the Bill makes it clear that the minister will be able to issue a compliance certificate only if an employer has either complied with a sectoral target set by the minister, or has ‘raised a reasonable ground to justify its failure to comply’.<sup>56</sup>

According to the Bill, compliance certificates must also be withheld from employers that have failed to submit their employment equity reports, or have (within the previous three years) either breached the EE Act’s prohibition on unfair discrimination or ‘failed to pay the minimum wage’ stipulated under the National Minimum Wage Act of 2018.<sup>57</sup>

#### **Ramifications of the Bill**

In 1994 the ANC put a misleading gloss on its proposed EE, BEE, and land reform policies when it claimed that:<sup>58</sup>

- EE would ensure a better use of ‘the talents and skills of the whole population’;
- BEE would help remove ‘all the obstacles to the development of black entrepreneurial capacity’; and
- land reform would rectify ownership and strengthen the property rights of all South Africans.

All these claims have proved false. The only accurate assessment made by the ANC was that these policies, if handled badly, would ‘redistribute resentment, damage the economy, and destroy social peace’. This warning understates the harm that has been done.

#### *EE’s persistent failures over some two decades*

Far from helping to ensure a better use of ‘the talents and skills of the whole population’, as the ANC promised back in 1994, EE has hobbled the economy and greatly harmed the black majority dependent on state services. It has also cemented inequality between the relatively

few who benefit from it and the 9.9 million black people who are currently unemployed (on the expanded definition which includes those no longer activity looking for work). These millions of jobless people have effectively been locked out of the economy and any real prospect of upward mobility. Their plight helps explain why the poorest black South Africans have seen so little improvement in their incomes, especially when compared to the relative black ‘elite’.

According to official figures on South Africa’s income distribution, in 2015 the bottom 40% among black South Africans obtained a mere 3.7% of national income, which was very much the same as the 3.4% this group had gained in 2006. By contrast, the top 10% among blacks gained 26% of national income (up from 19% in 2006), while the remaining 50% of blacks obtained 22% of the total (up from 16% in 2006).

If so-called coloureds and Indians are taken into account as well, the top 10% among black South Africans (as broadly defined) obtained 32% of national income in 2015. By contrast, the top 10% among whites gained 11% (down from 18% in 2006) – or three times less.<sup>59</sup>

This decline among the white top 10% is ignored by the ANC, as it contradicts its narrative of unbroken white privilege and economic power since 1994. More serious still is the ANC’s refusal to acknowledge that EE and other transformation policies have not worked for the bottom 40% of black South Africans, whose share of national income has stagnated even as EE and other BEE policies have been ever more stringently applied.

EE has been particularly damaging in the public sector, where implementation has helped cripple both the public service and core SOEs. All South Africans have paid a heavy price for this erosion of state competence, but the damage to the poor has been particularly severe. As RW Johnson, a journalist and former don at Oxford University, has pointed out, EE rules have ‘absolutely nothing to offer the vast majority of Africans, from mineworkers to domestics’. For these individuals, the EE legislation has simply resulted in worse service delivery by the public service and SOEs, lower economic growth, and fewer prospects of finding jobs.<sup>60</sup>

EE, of course, is not the only reason for the country’s persistent economic malaise. However, it has certainly contributed to dwindling investment, slower growth, higher unemployment, diminishing tax revenues, and rising public debt. Now that the Covid-19 lockdown has pushed the economy into unprecedented crisis, the government’s aim should not be to tighten up already damaging EE requirements – but rather to embark on the market-friendly reforms vitally needed to help attract investment and reignite growth.

Instead, however, the ruling party seems intent on undermining property rights (through expropriation without compensation, or nationalisation by another name), even as it trusses the private sector up in yet more damaging EE (and other) red tape. The Bill is a further manifestation of this *dirigiste* tendency, which is sure to cause more harm to an already stuttering economy.

### ***EE overlooks the most important business contributions***

EE overlooks the vital contributions that business already makes to gross fixed capital investment, employment, salaries, tax revenues, and GDP. These are by far the most important inputs the private sector can make to the upward mobility of all South Africans. Yet the EE Act, with its narrow emphasis on racial targets at every level of the workforce, ignores them all.

A few statistics provide at least some insight into the extent of the business contribution. Gross fixed capital formation, for example, averaged some R616bn a year (in constant 2010 prices) from 2015 to 2019, of which business contributed some 67% – or by far the lion’s share. Moreover, whereas fixed capital investment by the government and SOEs has decreased sharply since 2015, fixed investment by the private sector has grown.<sup>61</sup>

In 2018 the private sector provided formal employment to close on 8 million people and informal jobs to roughly 2.3 million more. Private sector employment thus far outstripped that provided by the government, with formal and informal businesses contributing some 70% of all jobs.<sup>62</sup>

In 2017, according to Statistics South Africa’s annual financial statistics, the private sector paid out close on R1.3 trillion in salaries to employees. This figure is an under-estimate, moreover, as this statistical analysis leaves out agriculture, financial intermediation, insurance, private educational institutions, and various other businesses.<sup>63</sup>

Business also contributes significantly to tax revenues. In the 2019/20 financial year, for instance, the private sector paid roughly R215bn in corporate income tax, plus R28bn in dividend withholding tax. It also made major contributions to total VAT receipts of close on R347bn, as well as the amounts collected via the fuel levy (R80bn) and customs and excise duties (R111bn). Private sector jobs also underpinned some 70% of the personal income tax (about R529bn) collected that year.<sup>64</sup>

Business further contributes by far the most to GDP. In 2019, for instance, GDP amounted to some R5 078bn in current prices.<sup>65</sup> Of this, the great bulk (some 70%) came from the private sector.

Figures of this kind underscore the magnitude of the private sector’s contributions to growth, investment, employment, tax revenues, and the like. Yet the enormous contribution that business makes to prosperity and upward mobility is generally overlooked by the EE Act, which simply ignores these important factors. Instead, it saddles business with shifting and onerous requirements that add substantially to operating and compliance costs, yet do little to help the great majority of black South Africans.

If many more businesses and millions more jobs are to be created, EE and other transformation policies need to be fundamentally recast. This requires a new focus for



empowerment policies: one that recognises the private sector's vital economic contributions and gives business incentives to expand. A new approach must also find practical ways to reach down to the grassroots and provide the poor with the inputs they most need to get ahead.

### **Shifting from EE and BEE to EED**

The IRR has for some years been developing an alternative approach to empowerment which would be far more effective than current EE and BEE policies in helping to liberate the poor. This alternative strategy is called 'Economic Empowerment for the Disadvantaged' or 'EED' and has three key features.

#### ***A scorecard that rewards key business contributions***

*First*, EED would recognise and reward firms for their vital contributions to investment, growth, employment, innovation, and development. Under a revised EED scorecard, businesses would thus earn EED points, among other things, for:

- capital inflows attracted,
- fixed investments made,
- jobs sustained or created,
- tax revenues paid,
- contributions made to export earnings, and
- spending on R&D and employee training.

An EED scorecard of this kind would promote investment, growth, and employment as well as the full use of all the country's skills. South Africa's growth rate, which has long lagged behind its emerging market peers, would then begin to match them instead. The potential benefits would be substantial, as illustrated by research conducted before the Covid-19 crisis struck.

In 2018 a study by the Bureau for Economic Research showed that 'the SA economy could have been up to 30% or R1-trillion larger and created 2.5 million more jobs had the country kept pace with other emerging markets and Sub-Saharan African economies over the past decade'.<sup>66</sup> This would have done far more than EE to expand opportunities and build prosperity among disadvantaged South Africans. The current burden of public debt could also have been significantly reduced, thereby allowing more revenue to be allocated to vouchers and other vital needs.

#### ***The voucher element in EED***

*Second*, EED would reach down to the grassroots by equipping the poor with the sound schooling, housing, and healthcare they need to help them get ahead. According to the National Treasury's *Medium Term Budget Policy Statement* in October 2020, some R700bn has been budgeted for schooling, healthcare, and housing/community development in the 2020/21 financial year. But the state's centralised and top-down delivery system is so inefficient and mismanaged – often because of the EE's insistence on putting racial targets before skills and experience – that outcomes have generally been extraordinarily poor.

Roughly 78% of South Africa's Grade 4 pupils cannot read for meaning in any language, while 61% of Grade 5 pupils are unable to add and subtract whole numbers. Not surprisingly, thus, some 60% of pupils drop out of school or fail their final examinations. In the housing sphere, 'RDP' homes are tiny and often badly built, while delivery has flagged to the point where the housing backlog (at 2.2 million units) is bigger than it was in 1994 (1.5 million). In public health care, most hospitals and clinics are so badly managed that only about 15% adequately meet minimum standards on such essentials as infection control and the availability of medicines.<sup>67</sup>

EED recognises that state spending is already high and cannot be increased. Hence, the key need is rather to get far more bang for every buck. This can be achieved by reallocating much of the revenue now being badly spent by the public service to tax-funded vouchers for schooling, housing, and healthcare for the poor. Low-income households empowered in this way would have real choices available to them. Schools and other entities would also have to compete for their custom, which would help to keep costs down and push quality up.

In the schooling sphere, dysfunctional public schools would have to up their game, while many more independent schools would be established to help meet burgeoning demand. In the housing arena, people could stop waiting endlessly on the state to provide and start building or upgrading their own homes. In the health sphere, people could join low-cost medical schemes or take out primary health insurance policies, giving them access to sound private care.<sup>68</sup>

Unlike EE and other aspects of BEE, these vouchers would truly empower the poor – as ordinary South Africans seem well aware. In December 2020, for example, some 75% of black respondents in an IRR field survey supported the idea of schooling, health care and housing vouchers. In addition, 74% of black respondents said these vouchers would be more effective than BEE in helping them to get ahead.<sup>69</sup>

Tax funded vouchers for schooling, housing, and healthcare are thus a crucial element in the EED proposal and would extend its reach to the poorest and most marginalised. Under such a system, business could also earn additional EED points by topping up the vouchers of the poorest, or by helping to improve the quality of provision in these three key spheres.

### ***A non-racial focus in keeping with the Constitution***

*Third*, EED – like the social grants system – would rely on a means test to determine disadvantage and stop using race as a proxy for this. EED would thus extend to disadvantaged whites, but this group is so small (only 0.16% of those living in poverty) that the benefits of EED would still go overwhelmingly to black South Africans. At the same time, EED's non-racial approach would resonate with the Constitution's founding values and bring an end to obnoxious race classification.<sup>70</sup>

### **Unconstitutionality of both the Bill and the 1998 Act**

The Bill, like the 1998 Act it is intended to amend, is inconsistent with various provisions of the Constitution, including its founding value of ‘non-racialism’. Section 1 of the Constitution expressly identifies non-racialism as a core value of post-apartheid South Africa. It also guarantees ‘the supremacy of the Constitution’ and states that any legislation ‘inconsistent’ with its terms is ‘invalid’.<sup>71</sup>

Important too is the equality clause (Section 9), which prohibits unfair discrimination on racial (and other listed) grounds and states that any discrimination on a listed ground ‘is unfair’ unless the contrary is proved. As an exception to these general principles, the clause allows the taking of ‘legislative...measures designed to...advance [those] disadvantaged by unfair discrimination’ and so ‘promote the achievement of equality’.<sup>72</sup>

A third relevant clause (Section 195) calls for a public administration that is ‘broadly representative of the South African people’. However, it also makes it clear that this goal cannot trump other needs. Employment practices in state entities must thus be ‘based on ability, objectivity, and fairness’. They must also ensure the ‘efficient, economic, and effective use of resources’.<sup>73</sup>

The Constitution makes no mention of either racial targets or the racial classifications these inevitably require. Nor does it endorse the EE Act’s goal of demographic representivity: the notion that every racial group should fan out into the workforce in strict accordance with its share of the economically active population – and irrespective of important criteria such as age, education, and experience.

The ‘demographic’ representivity required by the EE Act is also far more rigid than the ‘broad’ representivity sanctioned by the Constitution. In addition, the Constitution’s call for ‘broad representivity is confined to the ‘public administration’. Hence, it cannot justify the imposition of racial targets – quotas in all but name – on the private sector, as the Bill envisages.

Though the constitutional validity of the EE Act has never been directly tested in the Constitutional Court, the 2004 ruling of the Constitutional Court in the *Van Heerden* case is highly relevant in this regard.<sup>74</sup>

This case dealt with the validity of differing pension rules for pre- and post-1994 MPs under the equality clause. In handing down its judgment, the Constitutional Court rejected the plain wording of Section 9(5), which says that discrimination on race and other listed grounds ‘is unfair unless it is established that the discrimination is fair’. Instead of heeding this provision, the Court ruled that affirmative action measures cannot be presumed to be unfair because they are ‘authorised remedial measures’. Hence, the only tests to be applied in considering their validity are (1) whether they target the disadvantaged, (2) whether they are designed to advance them, and (3) whether they promote the achievement of equality.<sup>75</sup>

Despite having laid down these three tests some 16 years ago, the Constitutional Court has never tried to apply them to the practical outcomes of race-based rules. Were it to do so, however, both the Bill and the EE Act would fail on all three grounds.

First, most EE beneficiaries come from the most advantaged group within the black population: the roughly 15% with the best skills and (often) the best political connections. Like other affirmative action interventions all around the world, the EE Act helps only a relatively small elite within the previously disadvantaged group: what India calls ‘the creamy layer’.

Second, the EE Act has demonstrably failed to ‘advance’ the disadvantaged black majority. Instead, a rigid insistence on EE in the public service – marked, for example, by 76% African representation at the top management level in 2020, despite the limited pool of people with the necessary skills and experience – has undermined efficiency in almost every sphere.

Examples are legion: 80% of public schools are dysfunctional; 85% of public clinics and hospitals cannot comply with basic norms and standards; 87% of RDP houses are badly built ‘high-risk’ structures; billions of litres of untreated sewage are discharged into rivers every day from failing municipal wastewater treatment plants; essential infrastructure cannot be expanded because the state (in the words of former finance minister Trevor Manuel) lacks ‘the capacity to get projects off the ground’; and vital financial controls are persistently disregarded because ‘inadequately skilled people’ have been appointed to ‘crucial positions’.

Public service inefficiency has also become a key barrier to direct investment in the economy. According to the World Economic Forum, such ineffectiveness has long been identified as one of the most important obstacles to doing business in South Africa. Reduced investment has predictably restricted growth and increased unemployment and poverty, especially among the disadvantaged black majority.

On the third test, moreover, the EE Act has done little to ‘promote the achievement of equality’. On the contrary, income inequality (as measured on the Gini coefficient) has increased since 1994. This is largely because EE (and BEE) have widened inequality within the black majority by helping a small group to forge ahead, even as some 10 million black South Africans have remained jobless and mired in destitution.

By exacerbating unemployment, BEE has added greatly to inequality. The SACP has also taken note of this phenomenon, pointing out that inequality is now highest *within* the black population, which constitutes by far the biggest group within the country. This is the key reason why South Africa is now an even more unequal country than it was in 1994. Then its Gini co-efficient was 59.3. Now it stands at 63, making it (according to the World Bank) the most unequal nation in the world.<sup>76</sup>

Rising inter-black inequality is now significantly greater than the racial inequality that EE and BEE have also helped to foster. The white minority has scarce skills which remain in

high demand, whereas in the post-apartheid period millions of black people have emerged from the country's largely dysfunctional public schools with low levels of functional literacy and numeracy. These poorly skilled individuals have little opportunity for upward mobility, especially in the low-growth economy that EE and BEE have helped to generate.

Fortunately, however, the EED option provides a sound path out of this malaise. A race-neutral EED approach would not abandon the disadvantaged to poverty and hopelessness. Instead, it would provide the real empowerment that neither the EE Act nor the Bill (nor the wider BEE system) will ever bring.<sup>77</sup>

### **The way forward**

For the past 26 years, South Africa has been chasing down the wrong policy path on EE and BEE. Even before the Covid-19 crisis, both President Cyril Ramaphosa and public enterprises minister Pravin Gordhan agreed (in the run-up to the May 2019 election) on the 'urgent' need for a new empowerment model that would promote 'inclusive' growth and be effective in helping the poor to get ahead.

With the economy now reeling from the prolonged Covid-19 lockdown, EED offers the best way of achieving this new model. A shift from BEE and EE (especially in the more coercive form envisaged in the Bill) would lift sagging business confidence. It would also help to attract investment, quicken the growth rate, and make it possible to start generating many more jobs. At the same time, the voucher element in EED would bring immediate and concrete benefits to the poor, while helping to equip them for active participation in an expanding economy. EED's focus on disadvantage rather than race would simultaneously reduce racial polarisation and halt the capture of EE and BEE benefits by a relatively small elite.

In this vibrant new environment, direct investment would increase once more. Business and entrepreneurship would no longer be artificially constrained, while jobs would begin to expand. With employment rising, the skills of all South Africans would increasingly be used to the full. Wages would go up too – not because of government regulation or violent strikes, but in response to market forces. People would finally have real chances to climb the economic ladder in an economy growing so fast (at 5% of GDP a year) that it would virtually double in size every 14 years. This rising tide would be far more effective than the Bill in helping to lift all boats and making for the inclusive growth that Mr Ramaphosa has repeatedly pledged to help secure.

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