15 YEARS OF B-BBEE

a critical evaluation

Working paper

SAKELIGA

SELFSTANDIGE SAKEGEMEENSKAP

Contents

The economic consequences of BEE

1. INTRODUCTION

By Piet le Roux (CEO, Sakeliga)

It has now been 15 years since the proclamation of the Broad-Based Black Economic Empowerment Act in 2004. Promulgated by then president Thabo Mbeki, on the recommendations of now president Cyril Ramaphosa (then chairman of the Black Economic Empowerment Commission), the B-BBEE Act has been one of the cornerstones of government policy ever since and of great influence in the South African economy.

A decade and a half later, billions of rand worth of BEE deals – mostly in the form of share transfers to black persons on under market-value terms – has been concluded. But at what price? What has been achieved, and what were the economic consequences of that pursuit? And what can we expect its economic consequences to be in the years ahead? Both as matters of business strategy and of policy, these questions are of great importance. Answering them is what I have requested Sakeliga's analysts to do, and to do so in a consultative and eventually definitive way.

I shall be upfront that I have my doubts about BEE, and especially its post-2004 statutory phase. Yet, this is hardly an unusual position. From businesses to community organisations, from public intellectuals to politicians, from academia to households, and across race groups and communities, deep concern has been expressed about BEE. Perhaps because in the everyday reality of South Africa they can more easily speak freely than white persons on a matter such as this, the most stringent criticism of BEE has often been by black commentators. Recently it was Moeletsi Mbeki who called (again) for the scrapping of BEE, but luminaries such as Dr Sam Motunyane and Richard Maponya are on record to the same effect. But others have done so too, notably Anthea Jeffery of the IRR.

I shall also be upfront about our understanding of BEE. BEE has many layers, including skills development and corporate social responsibility (CSR), but if we are interested in its essence, we need to peel away those layers. And then, at its core, we find that BEE is about – in the words of the Minister of trade and Industry, Rob Davies – about the transfer of ownership and control in the economy. This essence is not always acknowledged, but it should also be rather uncontroversial. Just consider the way public debate about BEE is conducted: it is virtually always about ratios of black to white ownership and management control. It was not at all surprising to us that the latest iteration of the BEE codes has elevated transfers of ownership and management control to black persons to minimum requirements without which the outer layers of the BEE onion, such as skills development and CSR count for nothing. Recognising BEE in this way allows for greater clarity in analysis of its economic consequences.

Yet, it is true that when BEE was enacted, it listed various goals. These included considerations of justice: restoring to certain persons that which previous government policies deprived them unjustly of. It included considerations of politics: the pursuit of equality and redistribution based on race. And it included considerations of economics: to cause greater economic growth and benefit for all. In this study, we intend to study the latter, because we consider the economic consequences of BEE to be vital to evaluating the project as a whole. Has it achieved greater justice, but if so, at what cost? Has it achieved its political goals of equality and redistribution, but if so, at what cost? What are BEE's economic consequences? This is our study.

Our reason for doing the study is threefold.

First, there is the enormity of the BEE-project and the risks such enormous government interventions always entail. The scope refers not only to the rand value of BEE deals, but even more so to the scale at which political influence is brought to bear on the economy. Just in ownership transfers to black persons, billions of rand worth of BEE deals has been concluded. Some studies, such as Intellidex (2015), have given us insights into the extent of these deals with entities listed on the Johannesburg Stock Exchange (JSE). Yet the great majority of deals necessarily go unreported, as do the majority of management control transfers, about which we also know very little outside those at listed entities.[1] Our sense is that reported BEE deals are but the tip of the iceberg. More importantly, though, is the chain reaction BEE has caused. Ostensibly voluntary, BEE was required initially only of those who deal with the state. But it has grown, especially through various industry charters, such as mining and finance, to also be compulsory for firms in many sectors of the economy. Ultimately, however, what set the chain reaction off, was the requirement that complying firms were also to be scored on the BEE score of those from whom they procure inputs. Today, the whole South African economy is, for better or worse, spun in a web of BEE.

Second, there is the dearth of academic studies of the economics of BEE. With exceptions, BEE-studies have mostly been case studies, legal analyses, political commentary, surveys of attitudes or perceptions, or compilations of BEE deal information. Almost none have shed light on systematic, causal relations between BEE and economic behaviour such as investment, consumption, saving and production. Notable exceptions are Black (2002) and Acemoglu, Gelb and Robinson (2007). I have tried to make some contributions in this regard myself (Le Roux, 2017), but a definitive, accessible study remains elusive.[2]

And third, having kept a close eye on BEE-related legislative and regulatory developments, we strongly suspect that a new, very much expanded phase of BEE is on hand. While the first BEE deals go back much further, to the early 1990's, the B-BBEE Act of 2004 signalled a new era that can be considered the second, or statutory phase of BEE. Since then, BEE has largely been limited to the reach of this act, including its various industry charters and ministerial codes. However, several legislative or regulatory provisions are now set to significantly extend BEE's reach and intensity. These include amongst others the recent Competition Amendment Act, which makes BEE a pillar of competition policy, applied notably to prices, mergers and acquisitions; the Companies Amendment Bill, which puts BEE disputes under the jurisdiction of the Companies Tribunal; and several memoranda of understanding between different government departments with a view on more strictly enforcing BEE requirements. What was once a chain reaction indirectly affecting the whole economy, appears to us to become a much more direct, and much more stringent requirement reaching into all corners of the local economy. With the experience of Zimbabwe's Indigenisation Act just north of the South African border, we are concerned that the new phase of BEE more closely resembles that unfortunate policy experience.

To conclude: at Sakeliga we intend to come to terms with the economic consequences with BEE.

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[1] Some attempts at record-keeping, such as the Department of Labour's annual employment equity report, which might have revealed some changes in the racial composition of boards and senior management, have serious such serious methodological flaws, contradictions and general errors that they are useless for this purpose.

[2] Comprehensive work such as Jeffery (2013) is from a legal and historical perspective, and not an attempt at an economic theory of BEE.

In this working paper, you will find

1. Draft outlines of an economic framework for evaluating BEE, by Gerhard van Onselen, senior analyst at Sakeliga;
2. Draft comparative legal analyses, by Daniel du Plessis, legal analyst at Sakeliga;
3. A legal opinion by Adv Greta Engelbrecht furnished for Sakeliga on the joint implications of several legislative and regulatory developments with regard to BEE. We also include our former briefing to Adv Engelbrecht for the sake of completeness.

We invite your critical comments on this working paper, and welcome all offers to contribute. The working paper is compiled with a view on discussion at Sakeliga on 27 March 2019, where after we shall release further versions.

Regards,
Piet le Roux (CEO: Sakeliga)

2. TOWARDS A COST-BENEFIT ANALYSIS OF B-BBEE?

By Gerhard van Onselen

As will be illustrated in various sections of this document, Broad-based Black Economic Empowerment (B-BBEE) is a far-reaching policy in South Africa. B-BBEE boils down to efforts to alter the patterns of ownership of economic assets in order to reflect South Africa's race demographics – mainly, but not exclusively, to transfer the ownership of and management control over economic assets into the hands of 'Black' South Africans.

From its very nature, as a "dirigiste" economic intervention (so described by Black, 2002), B-BBEE moves away from free markets and non-interventionism. The South African state, by means of legislation, charters and codes, through its policy of B-BBEE, compels a change in the ownership patterns of businesses. Furthermore it sets the criteria for many transactions in the local marketplace. B-BBEE then directly affects firm ownership, management control, employment practices, procurement decisions and development in South Africa on a large scale.

It's evident that B-BBEE certainly has had an effect on the economy. More difficult, however, is to determine the true desirability of the policy's net impact on the economy and society. In our estimation, 15 years after the introduction of B-BBEE as a formal policy, much work still has to be done to evaluate the cost and benefits of B-BBEE.

The pertinent question we wish to raise in this section of the paper is whether the broadly considered benefit of B-BBEE is greater than the cost, or, phrased somewhat differently, is B-BBEE producing **net benefit** for a great number of people in South Africa?

BENEFIT FOR SOME – IS THAT ENOUGH?

Let's begin with what is clear and not being disputed. Evidently, B-BBEE certainly has produced benefits for certain groups and specific individuals in South Africa, and continues to do so. Intellidex Research, for instance, evaluated the outcome of empowerment deals undertaken by the JSE Top 100 companies for the period 2000 to 2014. In their findings, they conclude that as at 30 December 2014 an amount of R317 billion (net of tax and financing cost) was attributable to the beneficiaries of these empowerment deals. These empowerment beneficiaries included employees, investment partners, and communities.

Moreover, prominent black business people, such as Patrice Motsepe, through his mining interests, and other individuals including president Cyril Ramaphosa himself, certainly have benefitted from B-BBEE.

Even some white individuals, who might not have benefitted otherwise, may have benefitted from B-BBEE deals and partnerships. The point here is merely that B-BBEE was intended to produce benefit for certain groups and, arguably, is doing so for a significant number of beneficiaries.

BENEFITS, BUT AT WHAT COST?

If we conclude and accept that B-BBEE indeed provides benefit, the next thing to consider may be for whom specifically, and then also, more pertinently perhaps, we should seek to determine at what cost to the economy and society as a whole.

The issue on how broadly the benefit and cost of B-BBEE in reality are distributed among individuals is not trivial, but, for the sake of this initial analysis, we'll leave it aside for future consideration. Tentatively though, for the purpose of this paper, we'll simply accept that B-BBEE is providing benefit and limit our focus to the question on whether B-BBEE is producing net benefit or net cost.

That being said, we find it necessary to highlight a troubling possibility related to individual cost and individual benefit. Often the real-world effect of a policy such as B-BBEE is never as simple as policymakers see it (or perhaps would like it to be). With B-BBEE the supposed intention is to benefit disadvantaged black people. In reality, however, just as the case often is with tax incidence, "the poor" may inadvertently pay the economic cost, broadly defined, which was intended for others, such as "the rich", in less than obvious ways.

Economic complexity makes it difficult for policymakers to determine in advance who will be bearing the final cost of a policy, especially when we include the complexities of large-scale policy execution Yet, simply put, the final economic benefit and cost of intervention rarely fall where policymakers intend. It would be most troubling indeed, from a policy-outcomes perspective, if B-BBEE produced benefit to some classes, for example employees through share schemes or wealthy black individuals, at the expense of other disadvantaged classes of persons, such as the unemployed and the poor.

At the very least, pertinent policymaking, we argue, requires a thorough evaluation of the policy's actual outcomes to exclude such possibilities. This may raise further questions such as a) under which outcomes should B-BBEE be considered a success and b) under which outcomes should it be considered a failure?

TOWARDS A FRAMEWORK FOR EVALUATION

To evaluate the matter of the costs and benefits of B-BBEE we'll tentatively consider the issue from the perspective of an admittedly limited basic utilitarian analysis. Such a framework could accept B-BBEE as prudent if it improved the well-being of a great number of South Africans by producing net benefits to society.

A caveat is added, which is that even a generally positive utilitarian policy evaluation does not necessarily pass moral muster. Bear in mind that B-BBEE, by its very nature, infringes on classical notions of private ownership by reducing the say individuals have over their property and freedoms to freely transact and trade on markets.

B-BBEE assumes the use of implicit, direct, and seemingly expanding, state coercion over individual economic action, which does raise important moral consideration. These question will remain even in spite of net benefits from a utilitarian perspective – even if these net benefits do fall on a great number of people. For this section, however, we'll also leave such moral questions aside.

MODERATE OR RADICAL APPROACHES TO B-BBEE?

What is also evident is that approaches toward the implementation of B-BBEE differ among policy pundits. Some radical arguments in favour of B-BBEE may seek greater demographic race representation and "equality" in the "distribution" of economic assets more or less regardless of considerations of economic cost, or even in spite of high economic cost. Such an argument may manifest in rather unnuanced claims, such as a claim in the order of *assets in South Africa must be 'restored' to black people no matter what the cost*. To the most radical proponents, B-BBEE's intended

(re)distribution of economic assets through government intervention is considered beneficial and moral in and of itself.

Other proponents do not go as far. They may suggest that the potential benefits of B-BBEE-driven redistribution, and the forth flowing asset and income equality, is highly desirable, even if it moderately reduced economic growth and living standards among other considerations. Among such analysts the idea may be presented that the cost of B-BBEE should be regarded as a "sacrifice" or "tax" made in order to live in a more just and equitable society.

Admittedly, from our perspective we disagree with such sentiments. South Africa at present has nearly 9 million people who are broadly unemployed. Furthermore, poverty rates are high and governments assistance, in the form of social grants, given national budget constraints, according to some analysts cannot be sustained at the present course. Our contention is that any public policy that, wittingly or unwittingly, leaves the poor and disadvantaged more destitute by reducing their access to employment and other commercial opportunities is reckless and ill-advised. Basically, we propose that a policy that does not produce measurable net benefits or produces hefty dead-weight losses, should be abolished. However, even if B-BBEE's "sacrifice", "tax" or cost is considered justifiable by pundits, shouldn't we at the very least determine how big this "cost", "tax" or "sacrifice" actually is?

Moreover, it is doubtful, in our estimation, that any reasonable and proper implementation of B-BBEE would fail to give proper consideration of benefits and cost. This notion appears to be in line with the reasoning of section 36 of the constitution, which mandates a reasonable connection between the limitation of rights and the purpose of such limitations.

Limitation of rights

36. (1) The rights in 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.

(2) 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.

Importantly, in the case of government intervention, in our experience, the conceivable negatives are often hidden and require a deeper analysis. Shouldn't the coercive nature of such a state-coerced intervention require government to err on the side of caution? Various negative outcomes are often ascribed to B-BBEE. These suggested negative outcomes – which may also be described as potential hidden costs – include the following among others:

- Uneconomic unbundling of companies,
- reduced private sector investment,
- losses of skills and talent,
- increased policy uncertainty,
- cronyism and rent-seeking,

- a higher compliance cost for business,
- impeded economic efficiency,
- more expensive state procurement and,
- a larger strain on taxpayers.

It is reasonable to think that such negatives, if they were to materialize, it would lead to broad-based harm falling especially on the poor South Africans. Therefore, we deem it prudent for policymakers to actively and objectively evaluate the scale, likelihood and potential impact of such negative outcomes.

For the remainder of this section, we'll simply evaluate B-BBEE with reference to notable research and analysis on the topic. We welcome any input on rigorous additional literature on the topic.

TOWARDS THE CONCEPTUALIZATION OF THE COST OF B-BBEE

In discussing cost, we have to emphasize that the cost of B-BBEE has to be greater than mere costs of B-BBEE accounting and verification. In itself, the costs of B-BBEE verification (including in-house costs) calculated across the entire economy is already, likely, a substantial amount. We think that the picture on the cost of B-BBEE is limited and incomplete.

Locally, businesses spend sizable amounts on B-BBEE accounting and verification. Already, these represent funds that entrepreneurs could have applied differently in firms, perhaps on capital formation, employment or savings for future contingencies. Yet these costs certainly represent only a portion of the entire cost of B-BBEE, when cost is properly considered in terms of the broader economic opportunity cost. To illustrate the point, if B-BBEE leads to losses in economic efficiency (aptly described as fewer goods produced per unit of input) through higher spending on compliance and, consequently, lowers spending on investment and expansion, these losses would have to be calculated toward the overall economic opportunity cost of B-BBEE.

We suggest that for B-BBEE to be considered a prudent policy, it would have to produce a greater total benefit (net benefit) in spite of its overall cost.

To gather some further thought on the cost and benefit of B-BBEE we surveyed a limited range of literature. Our literature survey found sparse rigorous research on the matter. What did emerge, broadly considered, were a number of themes from which theorists have posited beneficial or detrimental outcomes of B-BBEE.

Troublingly though, as far as we could gather, the South African government itself, as custodian of the policy, has not undertaken a rigorous, formal, and thorough cost-benefit investigation into the matter. B-BBEE continues unabashed. As of early 2019, this policy has no sunset clause.

15 years after the formal introduction of the policy, perhaps the time is ripe to take stock of the policy's actual outcomes and costs.

NOTABLE HISTORIC LITERATURE

Acemoglu et al. (2007) considered the likely impact of B-BBEE on "economic efficiency". Another author, Black (2002), considered B-BBEE more in terms of normative or moral considerations in light of South Africa's past.

What complicates such calculations is that such “costs” and “benefits” can rarely be directly related to rand and sent values reflected in real-world market prices. Acemoglu’s study, as is pointed out by Le Roux (2017), sheds light on the difficulties and limits of data-driven analysis.

Eventually, in the final estimations, costs and benefits will arguably inadvertently also reflect subjective evaluations of policymakers and key stakeholders, the views of which is likely susceptible to undue incentives and influences.

The aforementioned authors Black (2002) and Acemoglu et al. (2007) undertook influential formalized evaluations on Black Economic Empowerment in the 2000s. These studies considered the impact of B-BBEE from the perspective of economic efficiency and other normative considerations. In their main conclusions, these authors reasoned that B-BBEE would have a positive impact if it brought about a more beneficial allocation of economic resources.

Implicit in Acemoglu et al. and Black’s assumptions was the idea that economic resources, including human capital, was sub-optimally distributed. B-BBEE, they reasoned, would move idle resources into more productive economic uses, thereby creating efficiency benefits. Such benefits, they argued, would include improvements in the quality (Black, 2002) and distribution (Acemoglu et al., 2007) of human capital.

On a side-note, it should be considered that such arguments, such as the arguments by Acemoglu et al. and Black, apparently did not consider market processes as adequate for resource re-allocation. Such a line of reasoning is often questioned by free-market advocates, especially if one considers that the entire function of the free-market system, within the profit-loss framework, is to shift resources from uneconomic to more economic ends in service of the preferences of consumers.

Moreover, these authors also posited beneficial outcomes from the perspective of public goods theory. The intervention of B-BBEE, they argued, would lead to a more favourable creation of public goods (public benefits) such as political stability (Acemoglu et al., 2007) and less crime (Black, 2002). Consequently, these authors suggested, there would be a more favorable climate for commerce than would be the case on purely non-interventionist markets. While such arguments deserve consideration, it should also be considered that if B-BBEE coincidingly were to impose hefty economic costs and dead-weight losses on the economy, that in itself would work against such a favourable climate.

Le Roux (2017) in a master’s degree dissertation, questions to the conclusion of Acemoglu et al. and Black from an “Austrian economic perspective”. Le Roux suggests that B-BBEE may have adverse effects on quality of the entrepreneurial function and the general levels of economic investment.

Le Roux’s argument may be briefly summarized as follows. Firstly, that firm ownership matters. Le Roux points to the close relationship that exists between ownership and the entrepreneurial function. B-BBEE, especially stipulations that require or incentivizes the transfer of ownership, negatively affects this relationship. Consequently, Le Roux expects to find a negative relationship between economic growth and exogenous interventions with ownership through B-BBEE.

Secondly, Le Roux, points to possible trade-offs between consumption and investment. This consideration is especially pertinent to those that consider private sector investment-driven growth as important. Le Roux postulates that, B-BBEE through an economy-wide government incentivized transfers of ownership, will tend to increase consumption (ceteris paribus) across the economy and reduce economy-wide investment. Theoretically, such a general decrease in investment will adversely

affect the economy's production possibilities curve (shrinking the entire curve), which, according to Le Roux, will be negative, or unsupportive for economic growth.

SECTION CONCLUSION

The outline above provide some ideas on developing an outline for a cost-benefit framework for the analysis of B-BBEE. We seek to answer whether B-BBEE is producing net benefit or net harm to people in South Africa. Clearly, such an analysis is no simple matter. Many variables need to be taken into account. Considerations may include normative and positive considerations. Moreover, the question on the application of B-BBEE, whether through a more radical or more moderate approaches perhaps need further consideration. Lastly however, we affirm our view that at the very least the cost and benefit need to be determined as a matter of policy prudency and proper risk management. Following below are a number of questions on which we'll appreciate further input from the working group.

QUESTIONS FOR INPUT

1. Are you aware of any proper and relevant literature on the topic of B-BBEE we have to consider for our analysis?
2. What would be reasonable overarching theoretical framework for the evaluation of B-BBEE's benefit and cost?
3. Is the utilitarian framework suggested above sufficient or lacking? And, if lacking, in which respect? What would you propose for an alternative?
4. Is our premise on net benefits of B-BBEE as a success or failure criteria reasonable and correct? Please explain your view.
5. How would one go about measuring, empirically if possible, the extent of the benefit of B-BBEE?
6. How would one go about measuring, empirically if possible, the extent of the cost of B-BBEE?
7. Are there any notable limits to empirical measurement of B-BBEE, which may result in an incomplete or fallacious picture?
8. Please list all of the benefits of B-BBEE direct and indirect that constitute the overall benefit of B-BBEE you deem relevant for inclusion.
9. Please list all of the costs of B-BBEE direct and indirect (opportunity costs) that constitute the overall cost of B-BBEE you deem relevant for inclusion.
10. Given the abovementioned discussion, when can B-BBEE, in your estimation, be considered a successful policy? Please give an outline of the relevant success criteria if possible.
11. When should B-BBEE be considered a policy failure? Please provide and outline of applicable failure criteria.
12. Do you have any additional questions or comments for our consideration?

3. COMPARATIVE POLICY ANALYSIS

By Daniel du Plessis, Legal Analyst, Sakeliga

INTERNATIONAL TRENDS IN AFFIRMATIVE ACTION PROGRAMMES

Policies under the broad heading of "affirmative action" have become increasingly common through the course of the past century. Any meaningful discussion of such policies is, however, complicated by the fact that there may be very little correspondence between what is considered the proper role of "affirmative action".

Though policies under the broad heading of "affirmative action" are exceedingly diverse, some general themes may be observed. Generally, jurisdictions which make use of such policies make use of the following strategies in seeking to achieve equality of outcome:

1. Reservation of jobs
2. Reservation of political positions
3. Reservation of positions in education
4. Private sector-initiatives

(See table 1 below for a more detailed international comparison of these policies internationally.)

Not all instances of affirmative action are, of course, equally useful for understanding the effect these policies have on South Africa.

For purposes of this chapter, Malaysia and India will be discussed more thoroughly as two examples of particular relevance. Though, naturally, neither country is perfectly analogous to South Africa historically, politically, or economically, sufficient parallels exist to allow for useful comparison.

MALAYSIA

MALAYSIA'S DEMOGRAPHICS

Malaysia is a Southeast Asian country inhabited, according to a 2010 census, by approximately 28.3 million people.[3] The population is religiously diverse, with approximately 60% being Muslim, 20% Buddhist and majority of the rest being either Christian or Hindu.[4] Ethnically, it is diverse as well, consisting of Bumiputera (67.4%), Chinese (24.6%), Indians (7.3%) and others (0.7%).[5]

Some discussion of the largest of these groups, the Bumiputera, is warranted. The Bumiputera are not a true ethnic group in own right, and it might be more appropriate to consider them a loose collection of the indigenous peoples of Malaysia – hence "Bumiputera", or "sons of the soil". This group chiefly

[3] Department of Statistics Malaysia, 'Population Distribution and Basic Demographic Characteristic Report 2010 (Updated: 05/08/2011)' (*Department of Statistics Malaysia,,* 2011) <https://www.dosm.gov.my/v1/index.php?r=column/ctheme&menu_id=L0pheU43NWJwRWVSZklWdzQ4TlhUUT09&bul_id=MDMxdHZjWTk1SjFzTzNkRXYzcVZjdz09> accessed 02/27

[4] Ibid

[5] Ibid

consists of ethnic Malays (comprising approximately 54% of the total 6[OBJ], with the balance consisting of Bumiputera of other ethnic origins (that is, around 12% of the total population). The Malay majority has been compared to historically disadvantaged persons in South Africa, on the basis that they are, similarly, a "politically dominant and economically disadvantaged *majority.*7[OBJ] Parallels in the composition of this group when compared to the broader definition of "black" in South Africa are also immediately apparent.

Economically, it is clear that Malaysia is gradually moving from developing to developed country, a trend which is illustrated by a number of economic consequences. Malaysia's population is growing increasingly urbanised, for instance.[8] Malaysia's human development index was calculated at 0.802 in 2017, putting it in the range of "very high human development" states. HDI has increased steeply from the 1990's until today[9].

HISTORY OF AFFIRMATIVE ACTION PROGRAMMES IN MALAYSIA

Affirmative programs in Malaysia predate independence, as during colonial times steps had already been taken by the colonial authorities to implement preferential policies in selecting and training Bumiputera Malays for service in the state's administration.[10] Following independence, modern affirmative action in Malaysia had its genesis in Government's response to what has, subsequently, been called the "13 May incident". In the aftermath of the 1969 Malaysian general election, serious sectarian violence broke out in Kaula Lampur.

The riots led to the declaration of a state of emergency and the appointment of a temporary caretaker government, the National Operations Council, which governed the country until 1971.

In reaction to the racial unrest of the 1960's, the NOC implemented the Malaysian New Economic Policy – often abbreviated the NEP – in 1971. Though this policy would form the basis of numerous affirmative action programs, many of the policies that were derived from it would aim at more general poverty elimination. The NEP's goals were also relatively modest, especially in comparison to South African equivalents – aiming only to have *Bumiputera* economic ownership reach 30% by 1991.

Economic growth was seen as a key part of this larger policy, as any policy that would reduce the welfare of other citizens in absolute – rather than relative terms – was seen as being politically anathema.

[6] Hwok-Aun Lee, 'Affirmative action in Malaysia and South Africa: contrasting structures, continuing pursuits' (2015) 50 Journal of Asian and African studies 615
[7] Ibid
[8] Department of Statistics Malaysia, 'Population Distribution and Basic Demographic Characteristic Report 2010 (Updated: 05/08/2011)'
[9] Data sourced from the United Nationas Development Programee, http://hdr.undp.org/en/data.
[10] Lee Hock Guan, 'Affirmative Action in Malaysia' (2005) Southeast Asian Affairs 211

Affirmative action in Malaysia is entrenched by article 153 of the Malaysian Constitution, which reads, in part:

> *It shall be the responsibility of the Yang di-Pertuan Agong* [the king] *to safeguard the special position of the Malays and natives of any of the States of Sabah and Sarawak and the legitimate interests of other communities in accordance with the provisions of this Article.*

Federal Constitution of Malaysia, Article 153

It bears mentioning that the term "special position", being somewhat non-specific, is not entirely clear on the character of the *Bumiputera*'s entitlement. Considering that, as in South Africa, the Malaysian Federal Constitution contains specific prohibitions on discrimination in article 8, it should be clear that this position seems to trump – at least in part – the bare right to formal equality.

> *(1) All persons are equal before the law and entitled to the equal protection of the law.*
>
> *(2) Except as expressly authorized by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent or place of birth in any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.*
>
> ***Federal Constitution of Malaysia, Article 8***

Efforts to increase *Bumiputera* participation in the economy have included the creation of the *Bumiputera Commercial and Industrial Community,* which consisted of a number of ad hoc programs over a number of decades, including grants, privatisation, nationalisation and much else.[11] These programs reflect a general trend in Malaysian Affirmative Action programs, namely that they are largely *ad hoc* programs driven by state action.

It is not entirely surprising, then, that affirmative action has had minimal effects on private sector employment. This is largely to be ascribed to a difference in focus in how AA programs are enacted. In stark contrast with formal, statutory requirements set out by the B-BBEE Act, PPPFA and EE, Malaysian affirmative action takes places through discretionary action by the executive. This means, apart from quotas in university enrolment and public sector employment, that AA is implemented through discrete programs and specific transactions or contracts with the state.[12] Accordingly, while the NEP has set guidelines for ethnic representivity on all levels, it is largely only the public sector which has followed them.[13]

Interference in private sector appointments is severely constrained,[14] but the exception to this general trend has been privatisation, which has often been purported to serve to develop Bumiputra enterprise. In practice, however, many instances of privatisation in this way have only served to enrich

[11] Lee, 'Affirmative action in Malaysia and South Africa: contrasting structures, continuing pursuits'
[12] Hwok-Aun Lee, 'Affirmative action regime formation in Malaysia and South Africa' (2016) 51 Journal of Asian and African studies 511.
[13] Lee, 'Affirmative action in Malaysia and South Africa: contrasting structures, continuing pursuits'
[14] Lee, 'Affirmative action regime formation in Malaysia and South Africa'

a politically connected minority of the target *Bumiputera* group.[15] Racial quotas are applicable in licensing and regulation and have been criticised as being breeding grounds for patronage and rent seeking on similar grounds. In addition, certain NEP-derived policies have been characterised as being more aggressive than the general tenor of Malaysian affirmative action more generally. Especially in the early years of NEP policy, for instance, companies engaging in initial public offerings were required to set 30% of the offered shares aside for *Bumiputera* investors.[16]

With regards to education and training, affirmative action administered centrally, with institutions being accountable to the central governmental structures.[17] This is particularly the case in the tertiary sector. It is noteworthy that affirmative action is carried out by means of quotas in public university admissions, government scholarships and *Bumiputera* exclusive institutes. It has been remarked that, in contrast to the South African approach, affirmative action in Malaysia was buttressed by improvements in education and supporting structures.[18]

EFFECTS OF AFFIRMATIVE ACTION PROGRAMMES IN MALAYSIA

Some have argued that the large number of ethnic enclaves present in the Malaysian economy are largely due to the effects of affirmative action programmes. In this way, for instance, public service and industry exposed to affirmative action programmes have turned into clear *Bumiputera* enclaves.[19] Similarly, other ethnic groups seem to have formed their own enclaves on own initiative as well as survival strategy.[20] Companies staff seem to reflect, more or less, the shareholders and management, with Chinese companies having largely Chinese staff, for instance, and Ethnic Malaysian companies largely staffed by Ethnic Malaysians.[21] This pattern was also repeated in university enrolments.

Bumiputera graduates are more dependent on employment in the public sector than graduates from other ethnic groupings[22] and are often plagued by perceptions that they are less competent or less educated than members of other ethnic groupings.[23]

While affirmative action nominally targets all *Bumiputera,*[24] outcomes have generally lagged behind for non-Malay members of this grouping, especially with regards to education and the attainment of high level positions in government.[25] While affirmative action policies were intended to assist all *Bumiputera*-groups, the apparent result has been that ethnic Malays have been disproportionately advantaged, with less powerful groups being left in the cold.[26] Often these groups, most prominently the *Orang Asli*, are the poorest and most destitute in society.

[15] Ibid
[16] Notably, this requirement does not follow the “once-empowered, always empowered”-principle.
[17] Lee, 'Affirmative action in Malaysia and South Africa: contrasting structures, continuing pursuits'
[18] ibid
[19] Guan, 'Affirmative Action in Malaysia'
[20] Ibid
[21] Ibid
[22] Lee, 'Affirmative action in Malaysia and South Africa: contrasting structures, continuing pursuits'
[23] Ibid
[24] Ibid
[25] Ibid
[26] Guan, 'Affirmative Action in Malaysia'

INDIA

India is another example of a state where a demographic majority is the designated group for purposes of affirmative action. Affirmative action in India is multifaceted, with policies aiming to establishing representivity in political positions, state employment and tertiary education. Intervention in the private sector is, however, largely limited

Key to reservation in India are the categories of citizens which are deemed eligible, broadly divisible amongst the lines of

- scheduled castes
- scheduled tribes
- other "backward" classes.

Affirmative action generally finds application by means of what the Indian Constitution terms "reservation" of jobs within state-controlled entities. Despite the apparent importance of this policy, reservation is currently limited to a maximum of 50% of available posts, due to the landmark decision in the Indra Sawhney-case. The availability of suitable candidates is also, furthermore, limited by the application of a doctrine which limits eligibility for affirmative action programmes, the so-called "creamy layer" doctrine.

Of particular importance in the Indian experience are the employment policies applicable to the so-called "other backward classes" and the effects of policies, like the "creamy layer" doctrine, which attempt to move beyond mere group membership as a proxy for past disadvantage.

"OTHER BACKWARD CLASSES" AND JOB RESERVATION

"OBC's" ("Other Backward Classes") have been estimated, at various times, of comprising anything from 36% to 52% of the Indian population, though the constituent parts of these groups are not defined in the Indian Constitution. Though the other categories are similarly vague, their intended targets, namely the *dalit* (or untouchables), is clear. "OBC's" serve as a general catch-all category for any persons deemed to be socially and economically disadvantaged, apart from those who are members of the scheduled castes and tribes. Defining the exact scope of this category has been described as being "vexing" and has been the subject of a great deal of legal dispute. In addition, the Indian state has recently moved to creating a new, catch-all "economically backward" category, which is planned to serve as an additional category for reservation.

Commentators have noted that this category is, if anything, likely to benefit the upper castes, who would not, under normal circumstances, be eligible for reservation as members of scheduled tribes or casts.

Though the Indian constitution entrenches the "equality of opportunity in matters of public employment" in article 16, it includes a specific exclusion for the application of reservation-policies. It states, for instance, in article 16(4)-(4B) that

> *(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.*
>
> *(4A) Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.*

> *(4B) Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent. reservation on total number of vacancies of that year.*

The net effect of the above provisions is that the Indian government not only has the right to reserve appointments or posts in favour of such citizens as it determines are not adequately represented, but also to have posts stay open indefinitely as long as appropriate candidates are not found amongst such underrepresented classes of citizens.

THE "CREAMY LAYER" DOCTRINE

The so-called "creamy layer" was first proposed by Justice Krishna Iyer in *State of Kerala vs NM Thomas*, who hypothesised that reservation may have adverse effects, due to the fact that an upper-class of advantaged persons (the "creamy layer") would appear in groups designated for reservation. This would lead to an early saturation of such reserved opportunities in education, employment and politics, leaving the broader majority of previously disadvantaged groups behind. This would occur, according to Mathew J, as the most fortunate members of designated groups would be most likely to have the means and opportunities to take full advantage of these legislated benefits.

> *A word of sociological caution. In the light of experience, here and elsewhere, the danger of 'reservation', it seems to me, is three-fold. Its 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. Secondly, this claim is over-played extravagantly in democracy by large and vocal groups whose burden of backwardness has been substantially lightened by the march of time and measures of better education and more opportunities of employment, but wish to wear the 'weaker section' label as a means to score over their near-equals formally categorised as the upper brackets.*
>
> ***State Of Kerala & Anr vs N. M. Thomas & Ors 1976 AIR 490***

This doctrine was confirmed in the landmark 1992 case, *Indra Sawhney v Union of India*, which established this principle of "qualitative exclusion from BEE". Currently, an annual salary of approx. R160 000 excludes certain categories of designated groups from qualifying for reservations. The creamy layer principle, however, only applies to "OBC's" and not other qualifying designated groups. It is not surprising to note, then, that richer members of these other groups have been accused of benefiting unduly from affirmative action policies.

CONCLUSIONS

It seems clear that a number of tentative conclusions may be reached after giving due consideration to the effects of affirmative action policies in other jurisdictions. In the first instance, it may be surmised that certain effects and results are almost sure to follow where affirmative action policies are implemented. On the other hand, it seems clear that not all affirmative action policies are equally destructive to economic development and progress.

GENERAL EFFECTS OF AFFIRMATIVE ACTION POLICIES

Affirmative action policies seem to nearly always lead to rent-seeking behaviour and the establishment of networks of patronage. Even in the relatively modest application of these principles in Malaysia, for instance, politically connected elites in the designated groups were far more likely to be the beneficiaries of privatisation and state-mandated investment. This phenomenon, furthermore, seems to extend beyond the members of these politically connected elites and, more broadly, to the members of the designated group who have the most education and means. So, for instance, in all three jurisdictions under consideration, it has been observed that an upper crust of privileged elites has come into being, and that their existence often precludes other members from designated groups from benefitting from affirmative action policies. This, in turn, often causes inter-group inequality to decline sharply, but intra-group inequality to increase.

Affirmative action in education often seems to lead to adverse perceptions as to graduate-quality for designated groups and for a disproportionate uptake of designated-group graduates into the employ of state-controlled entities. This, in turn, seems to lead to over-representation of designated groups in state employ and the establishment of counter-enclaves by other communities and ethnic groupings.

FACTORS WHICH EXACERBATE THE NEGATIVE EFFECTS OF AFFIRMATIVE ACTION POLICIES

It seems that economic activity is only tangentially affected by affirmative action policies where such policies are only enacted in the immediate orbit of the state. In the case of *ad hoc* and short-term programs, even where such programs are extensive and well-funded, private sector activity seems largely unimpeded and occasional adverse effects may be discounted in the long term.

Where the state, however, succeeds in employing market forces for the purposes of enacting its policies, the effects seem to be far greater. The ability of the state to do so seems to be a direct reflection of the spend the state brings to bear in itself, as well as to which extent it possesses the ability pass on affirmative action policies to its suppliers, and their suppliers in turn.

Affirmative action, finally, seems to be particularly deleterious where it is conducted unduly aggressively. Setting quotas too high, too fast seems to be one area in which South Africa has diverged quite substantially from the other states under consideration. Along similar lines, where an increase in employment of designated groups does not reflect a concomitant increase in quality of systems for education or training, the pool of eligible members of the designated group may be quickly exhausted. This, in turn, leaves employers and entities who seek to achieve racial quotas without compromising quality without clear recourse – and, generally, drives them to seek out the most politically expedient solution to the problem.

COMPARISON OF AFFIRMATIVE ACTION POLICIES

State	Facets of affirmative policies				Other measures	Designated groups	Estimated proportion of designated group of total population
	State jobs	Political Positions	Education	Private sector involvement			
Brazil			X				Approx 8%
Canada	X			X	Only federally regulated industries, approx. 10% of workforce.	People with disabilities, aboriginal people, visible minorities	Approx 14%
China		X	X		Exemption from 1-child policy	Non-Han ethnic minorities	Approx 8.5%
France				X		Women	Approx 51%
India	X	X	X	?			Approx 70%
Israel	X		X			Minorities	Approx 25%
Malaysia						Ethnic Malays	Approx 65%
New Zealand			X				Approx 23%
Norway				X		Women	Approx 51%
Romania			X			Romani	Approx 1.5%
Slovakia	?	?	?	?	Position uncertain following decision by Slovakian Constitutional Court.	Various minority groups	Approx 20%
South Africa	X		X	X		Previously Disadvantaged Individuals	Approx 92% (estimated)
Taiwan		X		X		Aboriginal Taiwanese	Approx 2.3%
United States of America	DIVERSE		X				Approx 18%

4. CONTEMPORARY LEGAL DEVELOPMENTS

Advocate briefing memorandum – compiled by Sakeliga. Legal opinion follows the memorandum.

MEMORANDUM

To: Mr. Piet le Roux (CEO Sakeliga)
From: Gerhard van Onselen (Senior Analyst: Sakeliga)
Date: 5 October 2018

BRIEFING ON RECENT OFFICIAL DOCUMENTS THAT PERTAIN TO B-BBEE ENFORCEMENT IN SOUTH AFRICA

EXECUTIVE SUMMARY

Sakeliga is in the process of studying a number of official documents, including amendment bills and memoranda of understanding (MOUs) that relate to the implementation and enforcement of B-BBEE in South Africa. A general reading of these documents suggest the possibility that B-BBEE is heading in the direction of more stringent enforcement.

The purpose of this briefing document is to provide an initial outline of the relevant documentation and salient features therein, for consideration by Sakeliga's legal team. We posit the following questions to guide our analysis of the documents:

1) Will the proposed amendments of the Companies Act and the Competition Act, read together with a developing range of MOUs between the B-BBEE Commission and other regulatory bodies, allow for a more forceful and stringent enforcement of the B-BBEE?

2) If the answer to (1) is yes. What would be the most relevant implications for businesses, specifically including Sakeliga's member businesses?

3) If the answer to (1) is yes. To what extent would the degree of enforcement materially differ from the current levels of enforcement?

Included in our preliminary review are the following documents:

a. *Strategy of the Broad-Based Black Economic Empowerment Commission 2017/18 – 2021/22*
b. *Companies Amendment Bill [B – 2018]*
c. *Competition Amendment Bill [B23 – 2018]*
d. *Employment Equity Amendment Bill [B – 2018]*
e. *MOU: B-BBEE Commission & Competition Commission: Signed 6 June 2017*
f. *MOU: B-BBEE Commission & Companies and Intellectual Property Rights Commission (CIPC): Signed 5 June 2017*
g. *MOU: B-BBEE Commission and the South African Revenue Service (SARS): Signed 21 May 2018*

The documents above raises important issues on the enforcement of B-BBEE in South Africa:

- The strategic plan of the B-BBEE Commission appears to call for stronger interventions and effort in the enforcement of B-BBEE. Fronting is noted with special emphasis in the plan.

- A proposed amendment to the Section 195 of the Companies Act through the Companies Amendment Bill, 2018, has been noted. On appearance the amendment seems to empower the companies tribunal to adjudicate on B-BBEE related matters.
- Proposed amendments to the Competition Act through the recent Competition Amendment Bill, 2018, especially the provisions that pertain to abuse of dominance and price discrimination, seem to allow for a more stringent application B-BBEE in competition law.
- The newly released Employment Equity Amendment Bill seeks to activate the dormant Section 53 of the Employment Equity Act (EEA), which requires EE compliance certificates when dealing with the state. Furthermore, the EE Amendment Bill seeks to set sectoral targets for EE compliance.
- Since 2017, the B-BBEE Commission entered into a number Memoranda of Understanding with various regulatory bodies, including SARS. These agreements appear to center on the alignment of the mandates of various regulatory agencies to improve B-BBEE enforcement. Especially noteworthy is provisions for the sharing of information, possibly related to B-BBEE compliance investigations.

1. BACKGROUND

The Broad-Based Black Economic Empowerment Commission (the B-BBEE Commission hereafter) was established in terms of Section 13B of the B-BBEE Act 46 of 2013 and started its official operations in June 2016.

Among other functions, the Commission receives B-BBEE complaints, conducts pro-active and reactive B-BBEE investigations and enforces compliance to the B-BEEE Act of 2013.[1] The B-BBEE Commission falls under the department of trade and industry (DTI), which is headed op by Dr Rob Davies, MP. Ms Zodwa Ntuli is the current commissioner of the B-BBEE Commission.

In 2018, three relevant amendment bills were tabled. The Competition Amendment Bill [B23 – 2018], the draft Companies Amendment Bill, 2018 and the Employment Equity Amendment Bill, 2018. Sakeliga already submitted comment on the Competition Amendment Bill. All of these bills, from an initial reading, appear to allow for more stringent enforcement and implementation of B-BBEE, and employment equity in the case of the EEA, through different laws.

In addition, since 2017 the B-BBEE Commission has signed or is in process of signing MOUs with a number of governmental bodies, including SARS, the CIPC, the Competition Commission, the North West Gambling Board and the South African National Standard Authority. According to media reports, the Commission is also in process of finalizing an agreement with the National Prosecuting Authority.

2. GUIDING QUESTIONS

For the purpose of this analysis, the following question are suggested to guide the evaluation:

Question 1: Will the proposed amendments of the Companies Act and the Competition Act, read together with the developing range of MOUs between the B-BBEE Commission and other regulatory bodies, allow for a more forceful and stringent enforcement of the B-BBEE?

Question 2: If the answer to Q1 is yes. What would be the most relevant implications for businesses, specifically including Sakeliga's member businesses?

Question 3: If the answer to Q1 is yes. To what extent would the degree of enforcement materially differ from the current levels of enforcement?

3. SUMMARY OF DOCUMENTS FOR REVIEW

Strategy of the Broad-Based Black Economic Empowerment Commission

The B-BBEE Commission published its most recent three-year annual performance plan in 2017[2] (the plan hereinafter). The plan outlines the Commission's initiatives and focus areas. Salient features of the plan relevant to this review are outlined below in bulleted format:

- According to Dr Rob Davies, cited from page 1 of the plan:

  *"This [the B-BBEE Commission] is a step in the right direction to deal with challenges of poverty, unemployment and inequality **with much stronger interventions and effort**. There is a need to fundamentally change the complexion and structure of our economy to enable entry and full participation by black people. [Emphasis added in bold.]*

- B-BBEE Commissioner Zodwa Ntuli notes on page 2 that:
  *To accelerate the transformation that will achieve equality, eradicate poverty and reduce the rate of unemployment, much stronger and **radical interventions and monitoring tools** are required.*

Judging alone from the comments above, it already seems likely that the B-BBEE Commission aims to step-up and sophisticate its activities. However, the plan itself provides more insight into the direction of the commission's interventions.

- On page 10, the plan lists the functions of the commission, which are cited from section 13F of the B-BBEE Act 46 of 2013. Among its many functions, it is deemed especially pertinent to note that the commission is tasked,

  "To investigate, either on its own initiative or in response to complaints received, any matter concerning broad-based black economic empowerment."

- According to Davies, on again page 1 of the plan, the majority of complaints received by the Commission since its inception concerns fronting:

  *"Statistics from complaints show that fronting continues to be a threat to real black economic empowerment with over 80% complaints in this area. **The B-BBEE Commission must be resourced adequately to deal with these issues effectively**" [Emphasis added].*

  - A Recent media report[3] also suggests that fronting will be an important focus of the B-BBEE Commission. During a media conference in September 2018, where the commission explained its role as a regulator, *"Lindiwe Madonsela revealed that one of the key challenges the commission was tackling was the level of fronting, **mainly by white-owned companies who use black people to acquire compliance certificates**."*

B-BBEE Commissioner Ntuli, the overview section of the plan (pp. 2 – 5), makes mention of B-BBEE Commission's activities related to investigations and enforcement of the B-BBEE Act. Some relevant excerpts follow:

- *"Our strategies further aim to achieve **prevention of non-compliance, swift detection and action on identified malpractices**, and voluntary compliance." Page 3.*

- *"We will **collaborate and align our work with those of other regulatory agencies**, including the Commission on Employment Equity, to track and monitor the management control and skills development trends and advocate for change or accelerated pace." Page 3.*

- *"High level operational systems and tools [IT systems] are necessary." Page 14.*

- The Commission's strategic goals are outlined on page 16 of the plan, these include Strategic Goal 2, which is, "[To] Implement[ing] **corrective enforcement** to achieve compliance" and Strategic Goal 3: "**Collaborating with relevant stakeholders** to advance transformation"

- The B-BBEE Commission has five active operational programmes (cf. pp. 18 – 26 of the plan). Programme 2 (on page 20) outlines to the Commission's "programme for investigations and enforcement". This programme aims to, *"Initiate pro and reactive investigations and produce report [sic] with recommendations – **includes summons, public hearings and raids where required**."* Furthermore under this programme the Commission will, "***Refer cases for prosecution [when necessary] – include exploring damages award**."*

Companies Amendment Bill 2018

The Companies Amendment Bill, 2018, was published for public comment on 21 September 2018. The bill proposes a number of important changes to the Companies Act. Of these, an amendment of Section 195 of the principle act seeks to empower the Companies Tribunal to *"adjudicate on any matters affecting a company as may be referred to it in the prescribed manner by the B-BBEE Commission."* Section 195 of the Companies Act is presented below with the proposed amendment included in the underlined section:

1) The Companies Tribunal, or a member of the Tribunal acting alone in accordance with this Act, may—

(a) adjudicate in relation to any application that may be made to it in terms of this Act, and make any order provided for in this Act in respect of such an application;

(b) assist in the resolution of disputes as contemplated in Part C of Chapter 7; ~~and~~

(c) perform any other function assigned to it by or in terms of this Act, or any law mentioned in Schedule 4~~.~~; and

*(d)**adjudicate on any matters affecting a company** as may be referred to it in the prescribed manner by the B-BBEE Commission in terms of the Broad-Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003); and*

(e)make an appropriate order.

Competition Amendment Bill [B23 – 2018]

Sakeliga submitted comment on the Competition Amendment Bill, 2018, in August 2018. The full submission is available at the following link. Relevant to the questions at hand are proposed amendments to Sections 8, 9, 10 and 16 of the Competition Act, which, on appearance, seem to incorporate further B-BBEE criteria into competition law.

Abuse of dominance

The Competition Amendment Bill (the Bill) aims to substitute Section 8 of the current Companies Act with a new Section 8(1) to (4). The amendment is included below for ease of reference. Pertinent to this discussion is the proposed Section 8(1)(vii), 8(2) and 8(4) which are emphasized in bold:

8. Abuse of dominance prohibited

(1) It is prohibited for a dominant *firm* to—

(a) charge an ~~**[excessive price]**~~ excessive price to the detriment of ~~**[consumers]**~~ customers;

(b) refuse to give a competitor access to an *essential facility* when it is economically feasible to do so;

(c) engage in an *exclusionary act*, other than an act listed in paragraph *(d)*, if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive~~**[,]**~~ gain; or

(d) engage in any of the following *exclusionary acts*, unless the *firm* concerned can show technological, efficiency or other pro-competitive~~**[,]**~~ gains which outweigh the anti-competitive effect of its act—

(i) requiring or inducing a supplier or customer to not deal with a competitor;

(ii) refusing to supply scarce ~~**[goods]**~~ *goods or services* to a competitor or customer when supplying those ~~**[goods]**~~ *goods or services* is economically feasible;

(iii) selling *goods or services* on condition that the buyer purchases separate *goods or services* unrelated to the object of a contract, or forcing a buyer to accept a condition unrelated to the object of a contract;

(iv) selling *goods or services* ~~**[below their marginal or average variable cost; or]**~~ at *predatory prices*;

(v) buying-up a scarce supply of intermediate goods or resources required by a competitor;

(vi) engaging in a *margin squeeze*; or

(vii) requiring a supplier which is not a dominant *firm*, particularly a *small and medium business* or a *firm* controlled or owned by a historically disadvantaged person, to sell its products to the dominant *firm* at a price which impedes the ability of the supplier to *participate* effectively.

(2) If there is a *prima facie* case of abuse of dominance because the dominant *firm* charged an excessive price or required a supplier to sell at a price which impedes the ability of the supplier to *participate* effectively, the dominant *firm* must show that the price was reasonable.

[...]

(4) The Competition Commission must publish guidelines in terms of section 79 setting out the relevant factors and benchmarks for determining whether the practice set out in subsection (1)*(d)*(vii) impedes the ability of a *firm* which is not a dominant *firm*, particularly a *small* and *medium business* or a *firm* owned or controlled by a historically disadvantaged person, to *participate* effectively.

Prohibited price discrimination

Section 9 of the Competition Act deals with prohibited price discrimination and dominant firms. The following amendment is proposed for Section 9. Especially the amendment to clause 9(3) of the amendment raises concern.

6. Section 9 of the principal Act is hereby amended—

(a) by the substitution in subsection (1) for paragraph (a) of the following paragraph:

''(a) it is likely to have the effect of [substantially] preventing or lessening competition;''; and

(b) by the addition of the following subsections after subsection (2):

''(3) When determining whether the dominant firm's action is prohibited price discrimination, the dominant firm must show ***that its action does not impede the ability of small and medium businesses and firms controlled or owned by historically disadvantaged persons to participate effectively.***

(4) The provisions of subsections (1) to (3), read with the changes required by the context, apply to a dominant firm as the purchaser of goods or services.''.

The Bill also proposes an amendment to Section 10 of the Competition Act, which deals with exemptions from anti-competitive conduct. The amendment of Section 10(3)(b)(ii) of the Competition Act is noteworthy. Clause 7 of the amendment bill follows.

7. Section 10 of the principal Act is hereby amended—

[...]

(b) by the substitution in subsection (3)*(b)* for subparagraph (ii) of the following subparagraph:

''(ii) promotion of the **[ability of]** effective entry into, *participation* in and expansion within a market by *small* **[*business*,]** *and medium businesses*, or *firms* controlled or owned by historically disadvantaged persons **[, to become competitive]**;'';

[...]

The section below places the amendment above in context of Section 10(3) of the Competition Act.

(3) The Competition Commission may grant an exemption in terms of subsection (2)

(a) only if- (a) any restriction imposed on the firms concerned by the agreement or practice concerned, or category of agreements or practices concerned, is required to attain an objective mentioned in paragraph (b); and

(b) the agreement or practice concerned, or category of agreements or practices concerned, contributes to any of the following objectives:

(i) maintenance or promotion of exports;

~~*(ii) promotion of the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive;*~~

''(ii) promotion of the ***[ability of]*** *effective entry into, participation in and expansion within a market by small* ***[business,]*** *and medium businesses, or firms controlled or owned by historically disadvantaged persons* ***[, to become competitive]****;*
[...]

Merger considerations

Section 16 of the Competition Act relates to the Competition Commission's consideration of mergers. The Bill's proposed amendments to Section 16(3) and (4) of the Competition Act specifies that the Competition Tribunal, upon application by the Competition Commission may, *"revoke its own decision to approve or conditionally approve a merger"* or to *"make any appropriate order regarding any condition relating to the merger"*. The proposed amendment of the competition act is outlined below, with the relevant amendment included in underlined text.

''(3) Upon application by the Competition Commission, the Competition Tribunal may—

(a) revoke its own decision to approve or conditionally approve a merger, and section 15, read with the changes required by the context, applies to a revocation in terms of this subsection; or

(b) make any appropriate order regarding any condition relating to the merger, including the issues referred to in section 12A(3)(b) and (c).

(4) The Competition Tribunal must—

(a) publish a notice of a decision made in terms of subsection (2) or (3)(a) in the Gazette; and

(b) issue written reasons for any such decision.''

Special new reference is made in the amendment above to Section 12A(3)(b) and (c) of the Competition Act. Section 12A(3)(b) and (c) lists certain issues, which include B-BBEE criteria, on which the Competition Tribunal may, "*make any appropriate order regarding any condition relating to the merger".* Section 12A(3)(b) and (c) of the Competition Act 89 of 1998 is included below for ease reference. Note especially 12A(3)(c), which states the *"the ability of small businesses, or* ***firms controlled or owned by historically disadvantaged persons****, to become competitive"*.

(3) When determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or the Competition Tribunal must consider the effect that the merger will have on-

(a) a particular industrial sector or region;

(b) employment;

(c) the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive ; and

(d) the ability of national industries to compete in international markets.

Employment Equity Amendment Bill, 2018

The Employment Equity Amendment Bill, 2018, was published for public comment on 21 September 2018. The EE Amendment Bill makes two significant changes to the current act. Firstly, it seeks to implement the not yet promulgated Section 53 of the EE Act, which deals with the requirement of companies to obtain EE compliance certificates in order to conduct business with the state. Secondly, the bill seeks to establish sectoral EE targets in a new Section 15A of the Act, in order to mandate "equitable representation of suitably qualified people from designated groups at all occupational levels in the workforce." Section 15A as drafted in the EE Amendment Bill, is presented below.

15A Establishment of sectoral targets

(1) The Minister may publish a notice in the Gazette identifying national economic sectors for the purposes of this Act, having regard to any relevant code contained in the Standard Industrial Classification of all Economic Activities published by Statistics South Africa.

(2) The Minister may, after consulting the relevant sectors and with the advice of the Commission, for the purpose of ensuring the equitable representation of suitably qualified people from designated groups at all occupational levels in the workforce, by notice in the Gazette set numerical targets for any sector or part of a sector identified in terms of subsection (1).

(3) A notice issued in terms of subsection (2) may set different numerical targets for different occupational levels, or regions within a sector or on the basis of any other relevant factor.

(4) A draft of any notice that the Minister proposes to issue in terms of subsection (3) must be published in the Gazette and interested parties must be permitted at least 30 days to comment on the draft notice."

(5) The Minister may issue regulations prescribing the criteria to be taken into account in determining a numerical target in terms of subsection (2).

Memoranda of Understanding

Since 2017, the B-BBEE commission has signed a number of important memoranda of understanding with selected regulatory bodies. To date, agreements have been signed between the B-BBEE Commssion and the SARS (May 2018), the CIPC (June 2017) the Competition Commission (June 2017) and the National Gambling Board.

Further agreements with the South African National Standards Authority and the National Prosecuting Authority are presently being finalized.[4]

All of these agreements appear to flow from the B-BBEE Commission's drive set out in its strategic plan to, "*collaborate and align our [B-BBEE Commission's] work with those of other regulatory agencies".* Briefly considered, the MOUs appear to center on the alignment of mandates, but especially on the sharing of information and compliance investigations.

Some selected excerpts from the applicable MOUs, deemed relevant here, are included in a condensed bulleted format below. Our emphasis is added in bold. Some points are also underlined to further emphasize some points. It is recommended to consider the complete MOUs for the appropriate context.

- In the MOU between the B-BBEE Commission and SARS, both agencies agree to certain outcomes, these are set out below.

1. *SARS agrees to:*

*a) **Share such information as may be necessary with the B -BBEE Commission** insofar as this would be consistent with the confidentiality requirements of legislation administered by the Commissioner for SARS.*

*b) **Collaborate with the B -BBEE Commission on such other matters as may be agreed** to between the B -BBEE Commission and SARS from time -to -time.*

*c) **Share with the B -BBEE Commission information relating to possible fronting practices or non- compliance with the B -BBEE Act.** Share such information as may be necessary with the B -BBEE Commission insofar as this would be consistent with the confidentiality requirements of legislation administered by the Commissioner for SARS.*

3.1.2 B -BBEE Commission agrees to, where applicable:

*a) **Provide SARS with information**, upon request, in so far as this would be consistent with confidentiality requirements in the B -BBEE Act, in relation to:*

*(i) **Major broad -based black economic empowerment transactions** concluded;*

*(ii) **Ownership and management control details relating to broad -based black economic empowerment transactions** entities;*

*(iii) **Complaints received** by the B -BBEE Commission concerning broadbased black economic empowerment transactions; and*

*(iv) Any other relevant information that will enable SARS to conduct **checks on the service provider's tax compliance**; and*

*b) **Share information with SARS on suspicious illegal activities** that may potentially impact revenue collection.*

- Highlights from the MOU between the B-BBEE Commission and the Competition Commission are included below.

1.1 This Agreement is entered into in order to establish the manner in which the Parties will interact with each other ***in respect of the investigation, evaluation and analysis of merger transactions and/ or complaints involving persons' subject to regulation of the B -BBEE Act.***

[...]

2.1.3 The Commission and the B -BBEE Commission ***shall consult with each other and evaluate the complaint*** *in order to establish how the matter should be managed in terms of this Agreement;*

2.1.4 When the ***Commission considers a transaction with implications for the B -BBEE, the Commission must consult with the B -BBEE Commission****. The Commission* ***must*** *have regard for the B -BBEE Commission views.*

[...]

2.1.8 In the event that the matter is dealt with by the Commission, representatives from the ***B -BBEE Commission may participate*** *in the matter through inter alia attending meetings when required; providing inputs during the case investigation and making representations at the Competition Tribunal hearing if necessary.*

- Highlights from the MOU between the B-BBEE Commission and the CIPC:

3.1 [Purpose of MOU] This ("MOU ") sets forth the points of agreement between the B -BBEE COMMISSION and CIPC ***regarding exchange of certain information and interface of system*** *in order to inter alia* ***enable the B-BBEE COMMISSION to have access to CIPC business registration information for purposes of improving B-BBEE COMMISSION's processes concerned.***

[...]

3.6 This MOU embodies the understanding of the Parties with regard to a relationship of consultation, mutual support and co- operation between them, and serves to ***strengthen and formalise a relationship between the Parties with reference to investigation, and training*** *within the parameters of the Act and legislation and policies regulating the B -BBEE COMMISSION.*

[...]

3.1.1 ***Each Party will provide the fullest possible measure of assistance to the other subject to applicable legislation and policies*** *and any other terms and conditions agreed upon between the CIPC and the B -BBEE COMMISSION.*

Ends.

B-BBEE timeline

1961

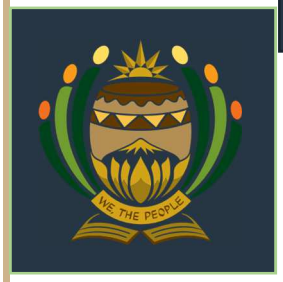
First usage of the term "Affirmative Action" in Executive Order 10925 by American President John F. Kennedy. Focus on equal treatment of employees of government contractors, regardless of "race, religion and national origin".

1996

Promulgation of the current South African constitution. Contains provision excluding corrective measures from the prohibition on discrimination in the Equality Clause. Also includes provisions such as section 195, which determines that public administration should be broadly representative of the South African people.

PRE-LEGISLATIVE ERA

POST-LEGISLATIVE ERA



1998 - 2003

Promulgation of the *Employment Equity Act*, the *Preferential Procurement Policy Framework Act* and the *Broad-Based Black Economic Empowerment Act*.

2007

Codes of Good Practice and *Interpretive guide* gazetted.

2014 - 2016

Developments in case law: *South African Police Service v Solidarity obo Barnard* (2014) and *Solidarity and Others v Department of Correctional Services and Others* (2016).

THE CURRENT DAY

Today

A new phase of B-BBEE? Increasingly, B-BBEE and B-BBEE-like provisions are being promulgated in many different areas of law.

Ex parte:

SAKELIGA

In re:

BROAD-BASED BLACK ECONOMIC EMPOWERMENT ENFORCEMENT

OPINION

INTRODUCTION

1. My consultant, Sakeliga, has noted that certain proposed amendments to the Companies Act 71 of 2008 ('**Companies Act**') and the Competition Act No 89 of 1998 ('**Competition Act**'), read with the terms of Memoranda of Understanding ('**MOU**') entered into between the Broad-Based Black Economic Empowerment Commission ('**B-BBEE Commission**') and other regulatory bodies that include the Competition Commission ('**the CompCom**'), the Companies and Intellectual Property Rights Commission ('**CIPC**') and the South African Revenue Service ('**SARS**') suggest an intention to achieve more forceful and stringent enforcement of Broad-Based Black Economic Empowerment ('**B-BBEE**') imperatives.
2. I have been requested to consider whether Sakeliga's conclusion is supported by my analysis and, if so –

2.1. what the most relevant implications for business (particularly Sakeliga's members) might be;

2.2. the extent to which the degree of enforcement would differ materially from current levels of enforcement.

3. I have also been requested to consider any legal basis for objection to the proposed amendments, subject to the consideration that a more comprehensive analysis may follow in due course, if such analysis requires extensive time.

PROGRESSIVE ADVANCEMENT OF THE B-BBEE IMPERATIVE

4. The Broad-Based Black Economic Empowerment Act 53 of 2003 ('**the BBBEE Act**') was enacted *inter alia* to '*establish a legislative framework for the promotion of black economic empowerment*' and '*to empower the Minister to issue codes of good practice and to publish transformation charters*'.[27] The statute may arguably be said to

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[27] BBBEE Act Long Title.

constitute a legislative measure '*designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination*', as contemplated in s 9(2) of the Constitution of the Republic of South Africa, Act 108 of 1996 ('**the Constitution**'), a topic more fully discussed hereinbelow.

5. The Preamble to the B-BBEE Act states that:

5.1. '*under apartheid, race was used to control access to South Africa's productive resources and access to skills*';

5.2. '*South Africa's economy still excludes the vast majority of its people from ownership of productive assets and the possession of advanced skills*';

5.3. '*South Africa's economy performs below its potential because of the low level of income earned and generated by the majority of its people*'; and

5.4. '*unless further steps are taken to increase the effective participation of the majority of South Africans in the economy, the stability and prosperity of the economy in the future may be undermined to the detriment of all South Africans, irrespective of race*'.

6. On this basis, the B-BBEE Act is said to be enacted in order to:

6.1. '*promote the achievement of the constitutional right to equality, increase broad-based and effective participation of black people in the economy and promote a higher growth rate, increased employment and more equitable income distribution*'; and

6.2. '*establish a national policy on broad-based economic empowerment so as to promote the economic unity of the nation, protect the common market, and promote equal opportunity and equal access to government services*'.

7. The objectives of the B-BBEE Act are set out in section 2 thereof. These are '*to facilitate broad-based economic empowerment by*':

7.1. '*promoting economic transformation in order to enable meaningful participation of black people in the economy*';[28]

7.2. '*achieving a substantial change in the racial composition of ownership and management structures and in the skilled occupations of existing and new enterprises*';[29]

7.3. '*increasing the extent to which communities, workers, cooperatives and other collective enterprises own and manage existing and new enterprises and increasing their access to economic activities, infrastructure and skills training*';[30]

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[28] BBBEE Act s 2(*a*).
[29] BBBEE Act s 2(*b*).
[30] BBBEE Act s 2(*c*).

7.4. '*increasing the extent to which black women own and manage existing and new enterprises, and increasing their access to economic activities, infrastructure and skills training*';[31]

7.5. '*promoting investment programmes that lead to broad-based and meaningful participation in the economy by black people in order to achieve sustainable development and general prosperity*';[32]

7.6. '*empowering rural and local communities by enabling access to economic activities, land, infrastructure, ownership and skills*';[33] and

7.7. '*promoting access to finance for black economic empowerment*'.[34]

8. In accordance with section 3 of the B-BBEE Act, any person applying the statute must '*give effect to its objectives*' and ensure compliance with the Constitution.

9. It can be inferred from the objectives set out, as read with the long title to and preamble of the statute, that the B-BBEE Act is primarily concerned with promoting ownership and meaningful participation in the economy by black people. Associated with these objectives is skills-development aimed at benefitting black people in particular.

10. In a foreword to Vuyo Jack's book *Broad-based BEE – The Complete Guide*[35] the now-president of the country, Cyril Rampahosa, wrote:

'*The future of BEE will see a wider use of the policy as it entrenches itself in an unquestioningly positive manner. Within the market, the common misconception of a predetermined sunset for BEE exists. This sentiment is detrimental to our economic drive. The objective of empowerment is to promote the equitable participation of Black people, especially Black women, in the mainstream economy. The need for active Black economic participation will never come to an end.*

When the notion of BEE started, many businesses doubted its place in the economy. Most businesses have since come to realise that rather than being an unnecessary burdensome cost it is, in fact, a boon to their progress. Embracing BEE has not only proved to be the right thing to do, but also a cornerstone in the economic growth of our country.

There will come a time when we will no longer need to talk about the need for a policy on transformation. The practices promoted by the Codes will become accepted norms for doing business in our country. Once robust and substantial contributions, as promoted by the Codes, become normal business custom, BEE will become a non-issue to all of us. As BEE evolves, the implementation will become so perfectly and thoroughly done that we will not need to close the door on BEE. We will be so deeply immersed in the practice that it will not end; it will become part of us, second nature.

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[31] BBBEE Act s 2(*d*).
[32] BBBEE Act s 2(*e*).
[33] BBBEE Act s 2(*f*).
[34] BBBEE Act s 2(*g*).
[35] Frontrunner Publishers 2007 at pp viii - ix.

Black people's economic participation is here to stay. The sooner reluctant players in the private sector embrace the substance of BEE, the sooner will we see real progress made in the growth of our country.'

11. In the text of the work itself, Vuyo Jack comments that '*Broad-based BEE tries to drive transformation from all levels as opposed to waiting for it to happen on a purely free-market basis, which would take more time than is politically available*'.[36]

12. These comments must be read against the backdrop of the position of the African National Congress ('**ANC**'), recounted in the introduction of Anthea Jeffery's book *BEE – Helping or Hurting,*[37] that affirmative action (including empowerment) was an alternative to simply '*confiscating the spoils of apartheid and sharing them out amongst … the dispossessed'*, on account of the fact that such an option would have '*the immediate attraction of correcting historical injustice',* but that it '*could not* '*realistically be advanced'* against the backdrop of a negotiated transition. It was feared that such a drastic approach would lead to '*capital flight, the destruction of the economy, and international isolation'*.

13. What is patently clear is that the intention with B-BBEE has always been radical, a sort of graduated confiscation of the spoils of apartheid and the re-distribution thereof to those assessed to have been disempowered under apartheid. Prior to the adoption of the statute, other measures such as the Mining Charter and preferential procurement policies were employed to advance this objective. The progressively greater burdens placed upon businesses through changes to the Codes adopted under the B-BBEE Act are clear indicators of greater intervention over time to secure the attainment of the objective. There can be no doubt that frustration with what is perceived to be the slow transfer of wealth to black people has, over time, led to greater and greater levels of intervention to secure black empowerment.

14. In inevitable conclusion to reach is that amendments to legislation such as the Companies Act and the Competition Act are intended to secure greater levels of empowerment, and the enforcement of empowerment imperatives.

14.1. An article by Rosalind Lake of Norton Rose Fulbright of 13 August 2018 '*Competition Amendment Bill 2018 aims to protect market participation for non-dominant firms'*[38] notes that the overriding intention with the amendments proposed is '*to address perceived high levels of concentration and the skewed ownership profile of the South African economy*', although the Competition Act already contains means to advance economic redistributive justice.

14.2. The general intention with the amendments to the Companies Act is more broad-ranging - some of the proposed changes noticeably serve to strengthen checks

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[36] At p 22.

[37] Tafelberg Publishers 2014.

[38] https://www.financialinstitutionslegalsnapshot.com/2018/08/competition-amendment-bill-2018-aims-to-protect-market-participation-of-non-dominant-firms/.

and balances and ensure investor confidence, whilst others are aimed at softening regulatory requirements which may have proven arduous over the years. However, the amendment to section 195(1) clearly signals a stronger enforcement intention by extending enforcement powers in this regard to the Companies Tribunal.

15. In a sense, the B-BBEE Act may be seen as only the backbone of empowerment actions, with legislation such as the Companies Act and the Competition Act now treated as a means to stimulate greater levels of empowerment.
16. The MOUs do not have the same legislative standing as the statutes, but the intention with them is clearly co-operation between the B-BBEE Commission and other regulatory authorities to ensure that non-compliant firms are *'caught',* or to motivate greater empowerment by firms subject to the regulatory authority of those institutions that are co-operated with.

IMPLICATIONS

Extension of the jurisdiction of the Companies Tribunal

17. Currently, the Companies Tribunal, as an agency of the Department of Trade and Industry ('**dti**'), is supposed to provide speedy resolution of company disputes in South Africa. The introduction of section 195(1)(*d*) effectively extends the jurisdiction of the Companies Tribunal to not only the application of the Companies Act itself, but also disputes between the B-BBEE Commission and companies subject to its jurisdiction.
18. Complaints concerning non-compliance with B-BBEE, as initiated or received by the B-BBEE Commission become justiciable at the hands of the Companies Tribunal, at the election of the B-BBEE Commission. What this means at a practical level is hard to predict, and falls somewhat outside the bounds of a legal opinion. It appears to me that the extension of the jurisdiction of the Companies Tribunal has the capacity to introduce jurisdictional uncertainty, and procedural challenges. It is not clear to me that the procedures of the Companies Tribunal are appropriate to the determination of complaints by the B-BBEE Commission, and many procedural skirmishes may flow from this fact. What is also not clear to me, is the relief that might be ordered by the Companies Tribunal in consequence of the acceptance by it of a complaint by the B-BBEE Commission. This uncertainty is undesirable, and may be argued to an affront to the founding principle that South Africa is governed by the rule of law. Clarity on the potential consequences of breaches of the law is necessary to ensure adherence to the rule of law. More generally, the carving out of the jurisdiction of the courts to place jurisdiction in the hands of administrative tribunals such as the Companies Tribunal may be said to be an affront to the rule of law.

Competition Act Amendments

19. It is expected that, if the proposed amendments to the Competition Act are effected, business in South Africa will be affected materially. The Bill introducing the amendments has been presented as an instrument of economic policy that aims to

address policy that aims to address policy imperatives of Government related to the South African economy and its history - in particular with respect to questions of inequality, skewed ownership and the perceived concentrated nature of the economy. The Bill seems predicated on a misdirected approach to economic outcomes and incentives (especially insofar as assumptions about economic concentration are concerned).

20. A noted central theme is that the Bill focuses strongly on the importance of fostering small and medium businesses and advancing transformation. While the Bill endeavours to balance various imperatives, legitimate concerns may be directed at the provisions relating to acquisitions by foreign firms and the market inquiry provisions (as being ill-advised at a stage in South Africa's development when it is endeavouring to attract foreign investment and foster economic recovery).

21. This is a particular concern in the merger context:

21.1. The competition authorities represent a critical gateway to the economy. No large deal can proceed without their approval (whether conditional or unconditional). The competition authorities' application and enforcement of the relevant provisions of the Competition Act is therefore central to fostering both foreign and local investment. This is especially pertinent in the context of South Africa's continuing economic recovery.

21.2. Any perceived uncertainty introduced into the Competition Act when the Bill is passed into law may have the unintended consequence of disincentivising firms from pursuing mergers in South Africa and/or investing in the country.

21.3. A central focus of the Bill is the elevation of the '*public interest*'. In particular, inter alia, the Bill focuses on addressing issues of concentration; scrutinising the racially-skewed spread of ownership in the South African economy; and realising a transformative vision of economic empowerment for all South Africans, especially those individuals who are historically excluded and disadvantaged.

21.4. Insofar as the merger control regime is concerned, this focus is not unexpected. Public interest has played a major role in the South African merger review process, becoming increasingly important over time. The notion of the public interest has, in fact, been applied even more broadly than the stated public interest factors already included in the Competition Act, being the effect that a transaction might have on (i) a particular industrial sector or region; (ii) employment; (iii) the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive; and (iv) the ability of national industries to compete in international markets.

21.5. While the Bill does not codify this general public interest framework, it does introduce further public interest factors as follows:

21.5.1. The amendment of item (iii) described above which now reads '*the ability of small and medium businesses, or firms controlled or owned by historically*

disadvantaged persons, to effectively enter into, participate in and expand within the market' (the '**amended public interest factor'**);

21.5.2. The insertion of a new public interest factor, which reads: '*the promotion of a greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons and workers in firms in the market*' (the '**new public interest factor**').

21.6. Whereas, under the Competition Act as it stands, the competition authorities are required to consider whether an otherwise anti-competitive merger could be saved on the basis of a substantial positive public interest impact, the Bill elevates the public interest inquiry to be on equal footing with the competition inquiry. However, previously, no significant merger that was anti-competitive was ever saved on the basis of public interest benefits alone. Conversely, no pro-competitive significant merger has been prohibited on the basis of an adverse public interest impact.

21.7. Questions may well be asked about how drastic a change this constitutes, especially where:

21.7.1. In practice, public interest factors have (in many instances) been given, not only equal weight to competition factors, but sometimes even great import, hence the amendments may not be as far reaching as they appear;

21.7.2. Given the new public interest factor, what is likely to receive greater scrutiny are transactions resulting in a diminution in ownership by historically disadvantaged persons. A careful balance will need to be struck by the competition authorities to ensure the interests of those persons are not rendered partially or wholly illiquid when not selling to other historically disadvantaged persons;

21.7.3. In addition, merging parties may, as a matter of course, be compelled to offer public interest focused conditions in order to win approval (especially in South Africa '*focused*' transactions or where the parties have major operations in the country) – including perhaps a condition to implement a B-BBEE transaction (which has become a feature of the current landscape, albeit in larger deals). This remains to be seen though.

22. Another aspect that may have great impact is the strengthening of the abuse of dominance provisions of the Competition Act, and requiring special attention to be given to the effect of anti-competitive conduct on small and medium businesses and firms owned or controlled by historically disadvantaged persons. This is particularly the case in respect of '*excessive pricing'*. It must be emphasised that any discussion regarding excessive pricing is not without controversy, and South Africa has been one of the few jurisdictions internationally that has sought to actively enforce such provisions. Most competition regulators internationally have sought to shy away from the regulation of pricing on the basis that this unduly impacts ordinary competitive

processes. Depending on the circumstances, higher prices may well be necessary to attract entry and innovation and allow for the provision of higher quality products and services to consumers. In South Africa, the policy appears to be that high prices are bad in and of themselves, and the changes proposed in the Amendment Bill appear to be a further reflection of this policy.

23. Section 9 of the Competition Act, as it currently stands, prohibits price discrimination by a dominant firm if the price discrimination implicates equivalent transactions and is likely to result in a substantial lessening or prevention of competition. The discrimination may be justified on certain grounds, including allowances for differences in costs of supply, meeting price competition, and changing market conditions. The proposed amendment introduces an additional requirement that – '(*3) When determining whether the dominant firm's action is prohibited price discrimination, the dominant firm must show that its action does not impede the ability of small and medium businesses and firms controlled or owned by historically disadvantaged persons to participate effectively*.' This introduces an onus on dominant firms.

23.1. At present, the CompCom or a complainant is required to prove the elements of price discrimination and to show that the discrimination has resulted in a substantial lessening or prevention of competition. Only then is the dominant firm required to justify its conduct based on the limited grounds provided in the Competition Act. In the absence of a showing of substantial harm to competition, the dominant firm bears no obligation to justify its conduct.

23.2. The proposed addition raises several questions. First, on an ordinary reading of the provision, it is unclear when the onus is intended to apply (i.e. it is unclear whether absent a showing of harm to competition, the dominant firm need not discharge the onus or whether the dominant firm is required to bear this onus even where harm to competition is not demonstrated). Second, it is unclear as to how, practically speaking, a dominant will be able to discharge the onus in circumstances where it does not necessarily participate in its customers' markets and where it does not have insight into the markets in which customers operate. This onus should rather be for the CompCom to discharge, as it is best placed to do so.

23.3. This requirement does suggest though that dominant firms can no longer be agnostic about the profile of their customers and suppliers; and that they may have to invest in understanding these businesses and their contemplated growth over time. The exact scope of this obligation will have to be delineated by the competition authorities, especially where the meaning of '*participate*' is concerned.

24. Notionally, the amended exemption provisions provided for in the Bill could enable small and medium enterprises and firms owned or controlled by historically disadvantaged persons to engage in '*naked*' cartel conduct, such as the fixing of purchase and selling prices or the allocation of customers, territories and products. It

remains to be seen how the CompCom will in such instances balance the interests of consumers with the objectives of addressing high levels of concentration and the skewed ownership profile of the economy.

25. Overall, it can be accepted that the competition authorities will be authorised to be far more interventionist in promoting transformation imperatives, and that the greater powers will be exercised, with the greatest effect on firms that engage in merger activity, where the public interest issues will stand front and centre.

LEGAL CHALLENGE?

Introduction

26. A starting point for the consideration of a potential challenge must be the state of the law, particularly the law on equality. This, because it appears that the greater levels of intervention for purposes of promoting empowerment incentives automatically raise questions of equality before the law and race-based assessment.

The common law framework within which section 9 of the Constitution operates

27. Under the common law, a person is free to act or decline to act unless the law prescribes otherwise. Before concluding that this freedom has been abridged, the court must be satisfied that the law, upon a proper construction of its terms, is truly intended to have this effect, and abridgement will not lightly be presumed. '*It is a wholesome rule of our law which requires a strict construction to be placed upon statutory provisions which interfere with elementary rights*.'[39] In construing subordinate legislation, courts would strike down provisions that were considered '*unreasonable*'. Ordinarily, a rule would be unreasonable if it fell outside the range of rules that reasonable people might make, but within this context, the word was assigned a special, more limited, meaning. It was to denote something less than conventional unreasonableness but more than mere irrationality. Measures, by reference to this intermediate standard, would be struck down if they were '*partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men*.' If the measure was unjust but not manifestly so, it would survive scrutiny; so too if it disclosed some degree of justification even though the justification was not compelling. Parliament, the representative of the people, could sanction measures that were misguided or mistaken,[40] but it could not be taken to legitimate the perverse or absurd. If a measure was '*off the wall*', as the saying

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[39] *Dadoo Ltd & others v Krugersdorp Municipal Council* 1920 AD 530 at 552.

[40] A measure '*is not unreasonable merely because particular judges may think it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification which some judges may think ought to be there*'.

goes, then '*the Court might well say, "Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires.*"'[41]

28. Using the same interpretative approach, the common law courts would presume, unless the contrary was clear, that the lawgiver intended to promote the public interest by means properly tailored for the purpose. Unless constrained to do otherwise, they would reject a construction which produces a result that is arbitrary, partial or unequal in its operation. They would '*not lightly construe a statute in such a way that its effect is to achieve apparently purposeless, illogical and unfair discrimination between persons who might fall within its ambit. [and, if] the language of the statute is reasonably capable of an interpretation which avoids that result, that is the interpretation which the Court will give it rather than the one which would attribute to the Legislature a whimsical predilection for purposeless and unfair discrimination*.'[42] Rationality was the touchstone and, in defence of liberty, they would, when they could, discountenance statutory constructions that were redolent of perverseness, injustice and, most pertinently for our purpose, unfairly discriminatory.

29. Nonetheless, constrained by the doctrine of parliamentary sovereignty, courts felt bound to implement statutes, however oppressive they might be, if they were unambiguous in the powers they conferred on officials or the burdens they imposed on the subjects of their decision. This was a consequence of a conception of democracy that treated the will of Parliament, once properly discerned, as supreme and inviolable, recognizing the existence of no testing right that might vest in the courts. But within those limits, they made themselves the protectors of the rights and liberties of the ordinary person as best they could. So, for instance, in *Metal & Allied Workers Union v Minister of Manpower*,[43] the court held that, in the absence of an express power to make a racially-conditioned decision, the Registrar of Trade Unions acted unlawfully in registering non-racial unions as capable of representing black workers alone.

30. What the common law reprobated, it must be stressed, was not the use of race per se, but its use in an arbitrary or uneven way. In *R v Carelse*[44] and *R v Abdurahman*,[45] the court intervened not because the regulatory measures employed the criterion of race to segregate the amenities in question – beaches in the first case, railway carriages in the second - but because the actual division operated to the palpable disadvantage of the races who were not white. Discrimination itself was not the perceived mischief, but

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[41] *Kruse v Johnson* [1898] 2 QB 91 at 99-100, whose applicability in our law has never been questioned, Broome JP rightly remarking in *R v Jopp* 1949 (4) SA 11 (N) at 13 that the doctrine had been approvingly applied in a '*long line of cases*'.

[42] *Lister v Incorporated Law Society, Natal* 1969 (1) SA 431 (N) at 434.

[43] 1983 (3) SA 238 (N).

[44] 1943 CPD 242.

[45] 1950 (3) SA 136 (A). See too *R v Lusu* 1953 (2) SA 484 (A).

discrimination producing an unfair outcome. The consequence of this approach was an in-principle acceptance of racial streaming and its condemnation only when its impact proved in fact to be disparate. The case on point, more infamous than celebrated, is *Minister of Posts & Telegraphs v Rasool*,[46] in which our then highest court was required to decide on the validity of a bye-law that, without expressly being so authorized, segregated the facilities of the post office between '*Europeans*' and '*Non-Europeans*'. In argument the objecting party, an Indian, accepted that the two streams were functionally equivalent but claimed that the measure was inherently demeaning. The argument was rejected by a majority of the appeal court, whose views are captured in the judgement of De Villiers JA. '*In my opinion … a discrimination which is not accompanied by inequality of rights, duties, privileges or treatment, is not per se unreasonable merely because it is made on grounds of race or colour ….*'[47] Gardiner AJA dissented. Commencing with a useful discussion of the distinction between differentiation and discrimination, he went on to say: '*I cannot shut my eyes to the fact that the instruction is actuated by the circumstances that a large number of Europeans object to being brought into contact in public offices with non-Europeans, and that they regard the latter as being of a lower order of civilization*.' In the light of this fact, '*any fresh classification on colour lines can … be interpreted only as a fresh instance of relegation of Asiatics and natives to a lower order … Such treatment is an impairment of the dignitas of the person affected ….*' [48] This followed ineluctably from the fact that '*the Asiatic is treated by our Legislation as being below the white man, [and] the native is treated as … being of yet a lower order*.'[49]

The constitutional dispensation and section 9

31. The common law, it is trite, operates residually. It yields to enactments by the lawgiver and they include, of course, the Constitution itself, which is the supreme enactment.

32. In 1994, South Africa abandoned the Westminster model, in which parliament reigns supreme, and opted for governance subject a written, justiciable, constitution. The constitution in question, always intended to be interim in effect, was replaced by the Constitution in 1996. These constitutions, being superordinate, are a special sort of law, but they are not a codification of all law and is not intended to be. They recognize that other laws will exist that in no way clash with them - laws which are consistent with

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[46] 1934 AD 167.

[47] At 182.

[48] At 190-91. The dialectic reflects underlying social attitudes and structures of power in a way that eerily tracks the seminal decision of the US Supreme Court in *Plessy v Ferguson* 163 US 537 *(1896).*

[49] At 191.

their dictates or upon whose validity they make no pronouncement – and such laws continue to operate untrammelled.[50] These laws include the common law.

33. The Constitution opens by stating that the '*Republic of South Africa is one, sovereign, democratic state founded on … human dignity, the achievement of equality and the advancement of human rights and freedoms*'. Explicitly incorporated in this introductory clause, which is '*foundational' in its effect,*[51] *is a commitment to 'non-racialism and non-sexism*'.[52] After a few preliminary sections, it enacts a Bill of Rights, far-reaching in scope and content, that tracks the rights created by its predecessor. The Constitution makes the Bill of Rights a charter against which all law, primary and subordinate, can be tested for coherence and validity.

34. Included in the Bill of Rights is the Equality Clause, which is to be found in section 9. Tracking its predecessor, which was in section 8 of the Interim Constitution, the clause reads as follows:

> '1. *Everyone is equal before the law and has the right to 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.*
>
> *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, culture, 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*.'

35. The construction of section 9 and of enactments promulgated pursuant to, is framed by three interpretative rules embodied in the Constitution itself.

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[50] Cf s 39(3) of the Constitution: '*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, to the extent that they are consistent with the Bill*.'

[51] See, for instance, *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism & others* [2004] ZACC 15, 2004 (4) SA 490 (CC), 2004 (7) BCLR 687 (CC) at para [73].

[52] Section 1.

35.1. The first is that the Bill of Rights must be construed in a manner that promotes the values underlying an '*open and democratic society based on human dignity, equality and freedom*'.

35.2. The second is that parliamentary statutes and other enactments must be construed in a manner that promotes the spirit, purport and the objects of the Bill of Rights.[53]

35.3. The third is that international law '*must*' and foreign law '*may*' be considered when construing the Bill of Rights.[54]

36. The United Nations Charter provides a useful starting point for a consideration of the third special provision, the one that requires international law to be considered in construing the Bill of Rights. Codifying the major principles of international relations, it exacts a pledge from member states to promote '*respect for, and universal observance of, human rights and fundamental freedoms*'. It reaffirms faith in human rights, in the dignity and worth of human beings and in the equal rights of men and women. Its aim is to promote formal equality by prohibiting discrimination but substantive equality of outcome through affirmative action is not envisaged. The UN's Universal Declaration of Human Rights picks up the theme. Pledging to promote universal respect for and observance of human rights as '*fundamental freedoms*', it sets out three main principles of human rights, namely freedom, equality and dignity. These rights are regarded as '*inalienable*' and must be respected without distinction of any kind.

37. These principles have been developed in international instruments that emphasize the principles of dignity and equality and contain non-discrimination clauses. At their forefront is the International Convention on the Elimination of Race Discrimination ('**ICERD**'). In clause 4 it pertinently states that *'[s]pecial measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination*.' The clause, which manifestly countenances affirmative action, propounds a conception of substantive equality that is sensitive to past disadvantages and systemic patterns of discrimination. Crucially, however, it contains a proviso which states that affirmative action '*measures [shall] not, as a consequence, lead to the maintenance of separate rights for different racial groups and*

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[53] Section 39(2) of the Constitution. Generally, see *Investigating Directorate: Serious Offences v Hyundai Motor Distributors (Pty) Ltd : In re Hyundai Motor Distributors (Pty) Ltd v Smit NO* [2000] ZACC 12, 2001 (1) SA 545 (CC) at para [21], *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* [2004] ZACC 15, 2004 (4) SA 490 (CC) at paras [88]-[92], *South African Police Service v Public Servants Association* [2006] ZACC 18, 2007 (3) SA 521 (CC) at para [20].

[54] Section 39(1) (*b*) and (*c*).

that they shall not be continued after the objectives for which they were taken have been achieved.'[55]

38. The proviso is very important. It insists that affirmative action measures, in seeking to bring about equality, must not use extreme or irrelevant distinctions to achieve equality of outcome objectives, and must be kept under constant scrutiny to ensure that this principle is observed. Not every measure taken in pursuit of affirmative action should be accepted as legitimate merely because the object of the distinction is to improve the situation of the disadvantaged group - a legal rule is not necessarily legitimate because it pursues a legitimate goal. Affirmative action policies are permissible under international instruments only insofar as they do not contravene the principle of non-discrimination. This principle is explicated in guidelines framed by UNESCO in order to evaluate affirmative action policies. As a point of departure, they accept that differentiation on the basis of sex, race, colour, language, and religion, political or other opinion, membership of a racial minority, or birth or other status is illegitimate. Measures based on such criteria can, however, become legitimate if their object is to redress past systemic discrimination practised over many years on the self-same grounds and provided they do not disadvantage any person arbitrarily.[56]

39. When the express interpretative provisions are silent, the common law rules of statutory interpretation take over. Both the Constitution and ordinary enactments must, the authorities make plain, be construed purposively, that is, in order to give effect the object manifested by the language. The '*inevitable point of departure*'[57] is the language of the provision and the ultimate quest is for the object or intent of the measure. Constitutional provisions are governed by this proposition no less than any other. That they are couched in general terms provides no justification for construing them without rigour and the fact that they are constitutive of our human and other rights provides no warrant for some free-floating enquiry into their underlying '*values*'. Kentridge J made precisely this point in *S v Mhlungu & others*:[58]

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[55] Emphasis suppled.

[56] Within the context of labour law, *Convention 111 – Discrimination (Employment and Occupation) – 1958* is important. In Art 1(2)as read with Art 1(a) it obliges member states to promote equality of opportunity and treatment in respect of employment in order to eliminate discrimination, defined as '*any distinction, exclusion or preference made on the basis of race …*'. Provision is made for special measures to protect and assist people who are socially or economically disempowered, but race is not enumerated among the listed categories. South Africa has ratified the Convention and, in international law, is accordingly bound by it.

[57] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13, [2012] 2 All SA 262, 2012 (4) SA 593 (SCA) at para 18.

[58] [1995] ZACC 4, 1995 (3) SA 86, 1995 (7) BCLR 793 (CC) at para [78]

'There are limits to the principle that a Constitution should be construed generously so as to point out that a constitution is a legal instrument, and that respect has to be paid to allow to all persons the full benefit of the rights conferred on them, and those limits are to be found in the language of the Constitution itself. Thus, in Minister of Home Affairs (Bermuda) v Fisher and Another [1980] AC 319 (PC) at 329E-F, Lord Wilberforce was at pains to point out that a constitution is a legal instrument, and that respect has to be paid to the language used. This was accepted in the unanimous judgment delivered by [the Constitutional] Court in S v Zuma[59] where it was said: "We must heed Lord Wilberforce's reminder that even a constitution is a legal instrument, the language of which must be respected. If the language used by the lawgiver is ignored in favour of a general resort to "values" the result is not interpretation but divination."'

The protection against arbitrariness

40. Section 8 in the Interim Constitution[60] opened by stating that *'[e]very person shall have the right to equality before the law and to equal protection of the law*.' When section 9 replaced it, the right to '*equal benefit of the law*' was added so that, under the present provision, '*everyone is equal before the law and has the right to equal protection and benefit of the law*.' On the face of it, these rights are far-reaching, so much so that an

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[59] [1995] ZACC 1, 1995 (4) BCLR 401 (CC).

[60] Section 8 read as follows:

> '(1) Every person shall have the right to equality before the law and to equal protection of the law.
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> (2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.
>
> (3) (a) This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms.
>
> (b) Every person or community dispossessed of rights in land before the commencement of this Constitution under any law which would have been inconsistent with subsection (2) had that subsection been in operation at the time of the dispossession, shall be entitled to claim restitution of such rights subject to and in accordance with sections 121, 122 and 123.
>
> (4) Prima facie proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established.'

The clause in the Interim Constitution, s 8, was substantially the same as the current one, s 9, so there is every reason to treat the judicial exegesis of the first as applicable to the second. The Constitutional Court has certainly followed this approach. See *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour intervening)* [1998] ZACC 18, 1999 (2) SA 1, 1999 (2) BCLR 139 (CC) and cf *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* [1998] ZACC 15, 1999 (1) SA 6, 1998 (12) BCLR 1517 (CC) at para [15].

ordinary person – one untutored in the law – might be forgiven for concluding that, since equality under law is ultimately achieved only when everyone is treated the same, the law cannot permissibly distinguish between its subjects and by so doing treat them differently. But this conclusion would be practically impossible to apply – the law operates, and must operate, by differentiating between those subject to it. [61] '*If each and every differentiation made in terms of the law amounted to unequal treatment that had to be justified by means of resort to section 33, or else constituted discrimination which had to be shown not to be unfair, the courts could be called upon to review the justifiability or fairness of just about the whole legislative programme and almost all executive conduct. … The courts would be compelled to review the reasonableness or the fairness of every classification of rights, duties, privileges, immunities, benefits or disadvantages flowing from any law*.'[62] Since this result would be intolerable, the limit on what is constitutionally reviewable under the rubric of equality is a vital constraint.

41. The line taken by the Constitutional Court is that a legal measure will survive scrutiny under the sub-section unless it lacks a legitimate purpose or, enjoying such purpose, makes distinctions between people that fail rationally to achieve the purpose. So much is clear from the case in which this position was first adopted, *Prinsloo v van der Linde*:[63] '*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. The purpose of this aspect of equality is, therefore, to ensure that the state is bound to function in a rational manner. This has been said to promote the need for governmental action to relate to a defensible vision of the public good as well as to enhance the coherence and integrity of legislation. … Accordingly, before it can be said that mere differentiation infringes [subs (1)], it must be established that there is no rational relationship between the differentiation in question and the governmental purpose which is proffered to validate it. In the absence of such rational relationship the differentiation would infringe [subs (1)]*'.

The protection against unfair discrimination: section 9(3)

42. In *Harksen v Lane,*[64] the Constitutional Court revisited *Prinsloo* and reaffirmed its central message. Under subsection (1), it said, an enactment that differentiates between

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[61] '*It must be accepted that, in order to govern a modern country efficiently and to harmonise the interests of all its people for the common good, it is essential to regulate the affairs of its inhabitants extensively. It is impossible to do so without differentiation and without classifications which treat people differently and which impact on people differently*.' *Prinsloo v Van der Linde and Another* [1997] ZACC 5, 1997 (6) BCLR 759, 1997 (3) SA 1012 (CC) at para [24].

[62] *Prinsloo v Van der Linde & another* supra at para [17].

[63] *Prinsloo v Van der Linde and Another* supra at paras [25]-[26].

[64] [1997] ZACC 12, 1997 (11) BCLR 1489, 1998 (1) SA 300 (CC).

people or categories of people will be condemned if it shows no '*rational connection between the differentiation … and the legitimate governmental purpose it is designed to further or achieve*.' [65] But the converse is not necessarily true: an enactment, though rational, can yet be impugned on the grounds that it constitutes unfair discrimination.[66] '*The determination as to whether differentiation amounts to unfair discrimination … require a two-stage analysis. Firstly, the question arises whether the differentiation amounts to "discrimination" and, if it does, whether secondly, it amounts to "unfair discrimination*." It is as well, the court cautions us, to keep these two stages separate.[67]

43. Developing the theme, the court explained that discrimination arises in circumstances in which there is unequal treatment of people based on attributes and characteristics attaching to them.[68] The word '*discrimination*' operates, in consequence, to limit the scope of the protection and so must be distinguished from mere differentiation. Enactments that differentiate between persons or classes of person are in themselves unobjectionable, but they become discriminatory if they have the potential to affect the comparative well-being of persons or groups within the state in a way that, for present purposes, we can describe as visceral. The impact must, the judge continues, be deleterious. '*Given the history of this country, "discrimination" has acquired a particular pejorative meaning relating to the unequal treatment of people based on attributes and characteristics attaching to them.*[69]' This requirement, said the court, is deemed to be satisfied if the distinction is made by reference to one of the factors, of which race is but one of more than a dozen, specifically listed in the section. Otherwise its existence depends on '*whether, objectively, the ground [of differentiation] is based on attributes and characteristics which have the potential to impair the fundamental dignity of*

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[65] At para [42] read with para [44]. See too Prinsloo *v Van der Linde & another* [1997] ZACC 5, 1997 (6) BCLR 759, 1997 (3) SA 1012 (CC) at paras [25]. '*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. The purpose of this aspect of equality is, therefore, to ensure that the state is bound to function in a rational manner*." This passage was cited with approval in *City Council of Pretoria v Walker* [1998] ZACC 1, 1998 (2) SA 363, 1998 (3) BCLR 257 (CC) at para [27]

[66] *Harksen* at para [44].

[67] At para [45].

[68] *Harksen* at para [46].

[69] At para [46] citing *Prinsloo v Van der Linde & another* [1997] ZACC 5, 1997 (6) BCLR 759, 1997 (3) SA 1012 (CC) at para [31].

persons as human beings or to affect them adversely in a comparatively serious manner.'[70]

44. A discriminatory enactment, it should be borne in mind, will not, by reason of that fact alone, be struck down. Unfairness is required too. That this applies as much to section 9 as it did under section 8 of the Interim Constitution was put beyond doubt in *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour intervening)*: '*The first inquiry is whether there is a rational relationship between the differentiation and a legitimate government purpose. If there is no rational relationship, the differentiation in question amounts to a breach of section 8(1) or 9(1) respectively. The issue as to whether there is unfair discrimination in terms of section 8(2) or 9(3) would ordinarily arise only if there is such a rational relationship*.'[71]

45. Fairness, like public policy, are difficult concepts to apply, but courts are increasingly expected to work with it. It demands a consideration of all the relevant circumstances in order to strike an appropriate balance between competing interests. In *National Union of Mineworkers v Black Mountain Mineral Development Co (Pty) Ltd*, [72] Scott JA pronounced on the concept in considering the scope of the unfair labour practice jurisdiction. '*The ultimate determinant is fairness, by which is meant fairness to both [sides]. In deciding the question of fairness the Court must necessarily apply a moral or value judgment.*' Within the present context, the balance has to be struck between the victim of the discriminatory measure and those who profit from it, but the starting point will be to examine the impact of the discriminatory measure on those in the position of the complainant.[73] Of relevance will be the fact that are vulnerable or disadvantaged members of society; so too is the fact that the enactment is aimed at achieving a worthy and important societal goal, such as, for example, the furthering of equality for all;[74] and so too is the extent to which the discrimination has obtruded upon the dignity of people in the complainant's position.[75] If the enactment fails to pass this test, it will be

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[70] Supra at para [52](*b*)(i).

[71] *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour intervening)* [1998] ZACC 18, 1999 (2) SA 1, 1999 (2) BCLR 139 (CC) at para [10].

[72] (1997) 18 *ILJ* 439, 1997 (4) SA 51 (SCA) at para [6].

[73] At para [52](*b*)(ii).

[74] At para [50](*b*)

[75] At para 50(*c*). O'Regan J made substantially the same observation at para [89]. '*Factors relevant to the [determination of unfairness] would include the identity of the individual, and his or her membership of a group previously advantaged by or vulnerable to discrimination, as well as the nature of the interests affected by the discrimination*.' See too para [93]. Sachs J stressed that it is important to locate the enactment within its factual matrix and 'pay special regard to patterns of advantage and disadvantage experienced in real life which might not be evident on the face of the legislation itself' (at para [123].

condemned unless it can be justified under the limitations clause. This is true whether the discrimination is direct or indirect.[76] It is equally true whether there is an underlying intention to discriminate or not.[77]

46. In determining whether conduct, discriminatory in effect, is unfair, the court is required to proceed as stipulated by subsection (5). If the species of discrimination falls under one of the enumerated heads, it is said to be presumptively unfair by subsection (5), but the presumption can be rebutted on the facts. The reverse is true of un-designated forms of discrimination, which are presumed to be fair unless the opposite is proved.

The promotion of equality by affirmative action: section 9(2)

47. The Equality Clause has two basis components. One comprises the prohibition with which we have just been dealing, namely, that there shall be no unfair discrimination. It is negative in nature – it prohibits. The other comprises aright that is positive. It says that people are entitled to equality and, if they have been the denied this right by past unfair discrimination, measures to repair the harm are legitimate, indeed desirable. The right is created by section 9(2), which states as follows: '*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.*'

48. The second sentence of section 9(2) has nothing to say on the nature of the remedy that a restorative measure should embody. Neither it nor the first sentence says that the positive measures must be race-based, and some measures can undeniably have an equalizing effect without mentioning race. But when they do use race as the referent, they must be responsive to the unfair discrimination perceived to exist. It is the mischief being identified - past discrimination – that creates the context by reference to which the nature and scope of the remedial measure must be determined.

49. At a minimum, a measure under the Equality Clause must, like every other regulatory measure, have a proper object and be rationally tailored to attain the object. Justice Mokgoro put the issue on the footing that there need not be '*a rigid link between the*

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[76] *City Council of Pretoria v Walker* [1998] ZACC 1, 1998 (2) SA 363, 1998 (3) BCLR 257 (CC) at para [31]. Langa DP made the point thus: '*The inclusion of both direct and indirect discrimination within the ambit of the prohibition imposed by section 8(2) evinces a concern for the consequences rather than the form of conduct. It recognises that conduct which may appear to be neutral and non-discriminatory may nonetheless result in discrimination, and if it does, that it falls within the purview of [the equality] section....*'

[77] *City Council of Pretoria v Walker* supra at para [43]. But this '*This does not mean that absence of an intention to discriminate is irrelevant to the enquiry. The section prohibits "unfair" discrimination. The requirement of unfairness limits the application of the section and permits consideration to be given to the purpose of the conduct or action at the level of the enquiry into unfairness*' (at para [44]).

nature of the disadvantage suffered … and measures taken to alleviate that disadvantage' [but at least] 'there should be some correlation between the two.'[78]

50. In the course of negotiations that ushered in our democracy, it was decided that a special fund should be created to enhance and ring-fence the pension entitlements of old-order members of the parliament in a fund known as the CPF. Sometime after the election of the new order Parliament, provision was made by statute for a new fund that gave a temporary preference to members elected for the first time to the new parliament. The essence of the claim in the case, *Minister of Finance v van Heerden*,[79] was that the new scheme '*improperly disfavours him and the other category of … members who are in receipt of pensions from the CPF in comparison with new parliamentarians who … do not receive pension benefits from the CPF.*'[80] The impropriety was said to consist in an intent to prefer members '*based on intersecting grounds of race and political affiliation*.'[81] The relief claimed was an order entitling the CPF members to the same benefits under the new fund as those given the newcomers to the new parliament.[82]

51. The High Court '*favoured the approach that in [their] effect, the measures under attack were not mere differentiation but discriminatory and that they must be convincingly justified because they are premised on grounds listed in section 9(3)* ….'"[83] Moseneke J, writing for the majority, rejected this approach out of hand. In an effort to substantiate his stance, the learned Justice stated as follows: '*Remedial measures are not derogation from, but a substantive and composite part of, the equality protection envisaged by the provisions of section 9 and of the Constitution as a whole. Their primary object is to promote the achievement of equality. To that end, differentiation aimed at protecting or advancing persons disadvantaged by unfair discrimination is warranted provided the measures are shown to conform to the internal test set by section 9(2).*' Since such measures are intended to be benign and, if rational, will have this effect, the learned Justice found it impossible to believe that the reverse onus in subsection (5) might apply

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[78] *President of the Republic of South Africa and Another v Hugo* [1997] ZACC 4, 1997 (6) BCLR 708, 1997 (4) SA 1 (CC) at para [94].

[79] *Supra*.

[80] *Van Heerden* supra at para [12].

[81] *Van Heerden* supra at para [12].

[82] The claim was, therefore, one for equalization upwards. Unsurprisingly, most claims founded on the equality doctrine are of this sort. The claimant typically says '*I want more so I have the same as the comparator*', not '*I want the comparator to have less so as to have the same as me*.'

[83] At para [32]

to them. He could not, he said, '*accept that our Constitution at once authorises measures aimed at redress of past inequality and disadvantage but also labels them as presumptively unfair. Such an approach, at the outset, tags s 9(2) measures as a suspect category that may be permissible only if shown not to discriminate unfairly.*'[84] Ordinary discrimination cases should, in his mind, continue to be assessed by reference to fairness, but affirmative action cases should be less strenuously scrutinized. This result was attainable, the judge decided, by a reading of the section as bifurcated and not as an integral whole. Ordinary discrimination cases should be housed under subsection (3), be dealt with by reference to fairness, and be subject to the operation of the reverse onus. Cases involving redress for past discrimination should be housed under subsection (2) and be tested by the application of a lesser standard. To hold otherwise would mean that subsection (2) was '*a mere interpretative aid or … surplusage*,' a result that was, in the judge's view, obviously untenable. The proper approach to the section was, he thought, to treat subsections (2) and (3) as mutually independent and give each a self-standing and substantive role to play. So harmonious an outcome could be realized by treating the former as controlling ordinary discrimination and the latter as regulating and facilitating affirmative action.

52. In *Harksen* the court made an authoritative pronouncement on the way ordinary discrimination cases should be determined. An act of differentiation would be unconstitutional if, first, it was visceral enough to be labelled discrimination; secondly, if its effects were detrimental to others so as to constitute discrimination; and thirdly, if the detrimental result was, in all the circumstances, unfair. In litigation on the matter, a demonstration of discrimination cast the onus on the perpetrator to displace the inference of unfairness. What *Van Heerden* held is that this approach is inapplicable to affirmative action cases. '*If a measure properly falls within the ambit of section 9(2) it does not constitute unfair discrimination. However, if the measure does not fall within section 9(2), and it constitutes discrimination on a prohibited ground, it will be necessary to resort to the Harksen test in order to ascertain whether the measures offend the anti-discrimination prohibition in section 9 (3).*'[85] The test under s 9(2) was not to be fairness, but something laxer. '*When a measure is challenged as violating the equality provision, its defender may meet the claim by showing that the measure is contemplated by section 9(2) in that it promotes the achievement of equality and is designed to protect and advance persons disadvantaged by unfair discrimination. It seems to me that to*

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[84] See too the judgement of Sachs J in *City Council of Pretoria v Walker* [1998] ZACC 1, 1998 (2) SA 363, 1998 (3) BCLR 257 (CC) at para [112].

[85] At para [36}

determine whether a measure falls within section 9(2) the enquiry is threefold. The first yardstick relates to whether the measure targets persons or categories of persons who have been disadvantaged by unfair discrimination; the second is whether the measure is designed to protect or advance such persons or categories of persons; and the third requirement is whether the measure promotes the achievement of equality.'[86]

53. The language in which the majority's test is framed may be oblique but its object is plain. The motive behind the measure provides the watershed between one form of assessment and the other. Race-based measures are prohibited if they are unfairly discriminatory, but measures designed to favour people previously disadvantaged will survive scrutiny if they are '*reasonably capable of attaining the desired outcome'*. A measure will have the character of reasonableness if it satisfies the test by which provisions are evaluated for rationality under subs (1). So much is certainly suggested by the ensuing words of the passage, which read: '*If the remedial measures are arbitrary, capricious or display naked preference they could hardly be said to be designed to achieve the constitutionally authorised end*.'

54. The passage continues, in more general terms, by saying: '*Moreover, if it is clear that they are not reasonably likely to achieve the end of advancing or benefiting the interests of those who have been disadvantaged by unfair discrimination, they would not constitute measures contemplated by section 9 (2).*'[87] But this sentence is, it seems clear, no more than a catch-all for cases of irrationality that cannot be categorized as 'arbitrary, capricious or [displaying] naked preference'. To believe otherwise would be to fly in the face of the reasoning by which the majority proceeded. Central to it is a rejection of the notion that affirmative action constitutes discrimination that, triggering the reverse onus in subsection (5) must be shown to be fair. Discrimination is not what it is, says the majority, and fairness is not the canon by which it must be evaluated. This leaves us with mere differentiation that, if irrational, is condemned under subs (1). Were it otherwise, said the majority, the presumptive unfairness that would be operative '*would unduly require the judiciary to second guess the legislature and the executive concerning the appropriate measures to overcome the effect of unfair discrimination*.'[88] In their view, deference is the court's proper response in the face of a challenge to an equalizing measure; the courts, in his view, must give decision-makers wide scope for the implementation of such measures. There is no place for the '*tightly*

[86] At para [37].

[87] At para [41].

[88] At para [33].

circumscribed affirmative action' that would otherwise pertain.[89]

55. The conclusion is that, if the object of a measure is to redress past discrimination, then it will not constitute pejorative discrimination and the measure will, in consequence, be legitimate provided it can be said to rationally achieve the aim.[90] Otherwise it must satisfy the standard, a stricter one, of fairness. Since scrutiny by reference to rationality postulates no more than a tenable relationship between means and ends, measures intended to promote the interests of people disadvantaged by past discrimination will be impugnable only if they are, as the saying goes, '*off the wall*'. This is the self-same, very low, threshold that governs the review of legislative and other measures in general. The effect of making this equation is to remove state-based affirmative action measures from the scope of equality review entirely. Whether this consequence was ever within the contemplation of the framers of the Constitution is, to put it mildly, highly debatable. Ngcobo J, in his dissenting judgement, did not think it was; he treated the *Harksen* test as controlling not just in cases of discrimination but also in the context of affirmative action.[91] The same is true of the sentiments of Sachs J.[92] But, we must accept, this is the law as handed down by our highest court that is unlikely to change.

Observations

56. Challenges to affirmative action measures over time have, to my mind, been reluctantly entertained. The underlying approach of the Constitutional Court is to tolerate affirmative action and empowerment measures.

57. This is apparent even from a judgment such as *Minister of Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others*[93] (the '***Insolvency Case***'), where the measure in question was set aside.

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[89] At para [2].

[90] It is settled that the canon postulated by the test is rationality. See A M Louw 'The Employment Equity Act, 1998 (and other Myths about the Pursuit of "Equality", "Equity" and "Dignity" in Post-Apartheid South Africa' 2015 (18) PELJ 594 at 600.

[91] See at para [110]: '*The proper approach to the question whether the impugned rules violate the equality clause involves three basic enquiries: first, whether the impugned rules make a differentiation that bears a rational connection to a legitimate government purpose; and if so, second, whether the differentiation amounts to unfair discrimination; and if so, third, whether the impugned rules can be justified under the limitations provision*.'

[92] See the following paragraphs: ' '[*136] … I do not however regard sections 9(2) and 9(3) as being competitive, or even as representing alternative approaches to achieving equality. I see them as cumulative, interrelated and indivisible. [140] … 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 called into play by the situation*.' The learned Justice pointed out, however, (at para [152]) that '*Courts must be reluctant to interfere with … measures [to destroy the caste-like character of our society]*.' See at para [152]).'

[93] [2018] ZACC 20 (CC).

57.1. Under prevailing insolvency legislation, the Master of the Court is entrusted with the power to appoint provisional liquidators to take charge of the estate in the period, which can be considerable, that elapses before a final liquidator is appointed. Over the years the Master developed a system under which creditors, whose interests are the only ones at stake, would file '*requisitions*' proposing candidates for the appointment of the liquidator they preferred. Needless to say, the system rewarded those liquidators who, in the eyes of the creditors, could be expected to wind the estate up most effectively. For over ten years, the Master has elected to supplement the appointees with a black person who, by learning the ropes, might promote the cause of transformation. Established liquidators, subscribing to the object, were content with the system even though they a significant portion of their fee would now go to a person they regarded as supernumerary. Creditors, for their part, were unconcerned since only a single fee remained payable.

57.2. The scheme has proved over time to be less than completely successful, and the Chief Master, decided it needed overhaul. What he envisaged was a system in which appointments would be made strictly in proportion to the national demographics of race and gender. In terms of the scheme, insolvency practitioners had in terms of a grid whose application would be mechanical and strict. While exceptions would be entertained in especially demanding cases, appointments would ordinarily be made consecutively in the ratio A4: B3: C2: D1, where -

57.2.1. '"*A" represents African, Coloured, Indian and Chinese females who became South African citizens before 27 April 1994; "B" represents African, Coloured, Indian and Chinese males who became South African citizens before 27 April 1994; "C" represents White females who became South African citizens before 27 April 1994; "D" represents African, Coloured, Indian and Chinese females and males, and White females, who have become South African citizens on or after 27 April 1994 and White males who are South African citizens*'

57.2.2. and the numbers '*4: 3: 2: 1 represent the number of insolvency practitioners that must be appointed in that sequence in respect of each such category*.'

57.3. Pivotal to the attack on the policy was the argument that the policy misconceives the object of the enabling statutes. The system they put in place, under which execution is levied on the estate of a defaulting debtor, is designed for the benefit of the unpaid creditors and them alone.[94] Its object is not to provide work for liquidators and line their pockets. A policy by which liquidators are appointed

[94] So much is absolutely clear from an understanding of the process, a proper examination of the enactments, and an appreciation of the judicial dicta on point.

must pursue this aim if it is not to be condemned as *ultra vires*, arbitrary and irrational. This required the wishes of the creditors to be treated as paramount, since no one could know better than they who best would serve their interests. Considerations of transformation might obtrude, to be sure, but this was only because, by amendments to the statute, provision had been made for them. Permitting them to overwhelm the wishes of creditor could never be right, however, and the policy, by doing precisely this, committed a grievous error.

57.4. Justice Jafta, who penned the majority judgment, by issuing a clarion call of the sort that customarily, adorns judgments in this field. The evils of the past, the consequence of nakedly racist attitudes, had created imbalances that required remedial action and the policy with which the court was now concerned was, in his view, just such a restitutionary measure.[95]

57.5. Counsel for the practitioners urged the Court to accept that, since the process of liquidation was intended to serve, and serve only, the interests of creditors, their wishes should be given due weight if not treated as dispositive. The majority had little doubt that this was the wrong approach. In its view it sufficed that the Master's list was confined to people who were, in the opinion of that functionary, '*suitably qualified*'. The interplay of market forces, which could be expected to sort out the differences in qualities of candidates, had no role to perform.[96] In the

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[95] Unexceptionably, he described restitutionary measures and the need that underpins them in the following terms (at para [1]): '*Restitutionary measures are a vital component of our transformative constitutional order. The drafters of our Constitution were alive to the fact that the abolition of discriminatory laws and the guarantee of equal rights alone would not lead to an egalitarian society envisaged in the Constitution. Something more had to be done in order to dismantle the injustices and inequalities arising from the apartheid legal order. Hence the Bill of Rights, which is a cornerstone of our democratic order, includes remedial measures*.'

[96] The summary encapsulates the substance of the following passages:

> *'[35] First, the expressly stated objectives of the policy are "to promote consistency, fairness, transparency and the achievement of equality for persons previously disadvantaged by unfair discrimination". The attainment of some of these objectives, especially fairness, would advance the interests of creditors. The policy seeks to achieve fairness to creditors by requiring that the alphabetical list contains only appropriately qualified insolvency practitioners and, where a complex matter arises, and the appointed practitioner is inappropriate to manage the estate, the Master may then also appoint a suitable senior practitioner. In addition, the policy requires that every practitioner appointed must timeously lodge a bond of security with the Master and it disqualifies a practitioner who has a conflict of interest from appointment in respect of the estate where a conflict arises. This illustrates the synergy between the overall objective of the Insolvency Act and section 158(2) which sets out the purposes for the policy the Minister is mandated to make.*
>
> *[36] Second, when the Master appoints provisional trustees under section 18 of the Insolvency Act, the objective is to protect the interests of creditors. While the process of appointment must accord with the policy determined by the Minister, the overarching purpose is to preserve the assets of the insolvent*

court's view, it mattered not that the current scheme, by making mere enrolment on the list sufficient to ensure that a practitioner would always have his turn, struck no such balance. The Supreme Court of Appeal had held that it is irrational to make an appointment without reference to '*factors such as the nature of the individual estate, and the industry specific knowledge, expertise or seniority of the practitioner concerned*.'[97] In rejecting this stance, the court created a situation in which practitioners, however idle, incompetent or inexperienced they might be, would receive briefs provided they satisfied the minimal requirements for admission to the roll.

58. For so long as the case remains a precedent, we should not lightly expect a measure to be impugned because it gives primacy to race over merit and the collective over the individual. That the court might embark upon a process in which interests are judiciously balanced seems unlikely at present.

Conclusion

59. It seems to me that serious consideration must be given to '*alternative'* challenges, that is challenges not focused on the race-based nature of the provisions sought to be introduced. Whilst both international law and particular interpretations of the common law and the equality clause indicate that there is a basis for challenge, it is my view that any challenge based exclusively in these principles would be unlikely to succeed. As with the *Insolvency case*, any proposed challenge to objectionable provisions must lie in attacks on the effects on those who might be expected to benefit from them, and on procedural grounds. I propose that further analysis be done to devise thoughts on alternative avenues.

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estate for the benefit of creditors. Before the first meeting of creditors, the Master steps into their shoes and is authorised to give directions to the provisional trustee, which could be given by creditors at a meeting.[23] In addition, a provisional trustee may not sell the assets of the estate without authorisation by the Master. Therefore, the scheme of appointment created by the Insolvency Act and the policy made by the Minister are in line with the overarching purpose of the Insolvency Act.'

Justice Madlanga, with whose minority judgement Justices Froneman and Kollapen concurred, made the same point. '*On what is before us it is uncontested that appointments are on the basis that all practitioners who make it to Masters' lists are suitably qualified to practise as insolvency attorneys. The very fact that each practitioner on the list is suitably qualified does cater for the interests of creditors*.'

[97] Ibid at para [50].

CONCLUSION

60. The enactments and MOU referred to me for consideration do indicate a greater intention to enforce B-BBEE. This has implications for those doing business that may be far-reaching, and which may not be capable of full understanding before these enactments are implemented.

61. The proposals fall to be challenged under section 9, but the likelihood of ultimate success is low on this basis. Alternative bases for challenge must be explored.

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11 October 2018