

**THE APPROPRIATENESS OF EQUALITY LEGISLATION IN ADDRESSING
THE CHALLENGES FACED BY
BLACK PROFESSIONAL EMPLOYEES
IN SOUTH AFRICA**

Thesis presented in fulfilment of the requirements for a PhD in Law
at the University of the Western Cape

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DEDICATION

I dedicate this thesis to my late father, Ikey van de Rheede.

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DECLARATION

I, Jeannine van de Rheede, declare that 'The appropriateness of equality legislation in addressing the challenges faced by black professional employees in the private sector' is my own work and that it has not been submitted before any degree or examination in any other university, and that all sources I have used or quotes have been indicated and acknowledged as complete references.

Signed:  _____

Jeannine van de Rheede

11 November 2019

Signed:



Professor Kitty Malherbe

ABBREVIATIONS AND ACRONYMS

ACCA	Association of Chartered Certified Accountants
ADP	Audit Development Programme
BEE	Black Economic Empowerment
B-BBEEA	Broad-Based Black Economic Empowerment Act 53 of 2003
B-BBEECom	Broad-Based Black Economic Empowerment Commission
BLA	Black Lawyers Association
B. Proc	Baccalaures Procuratoris
CHE	Council for Higher Education
CIMA	Chartered Institute of Management Accountants
CLS	Critical Legal Studies
Convention 111	International Labour Organisation Convention (No.111) concerning Discrimination in Respect of Employment and Occupation 1958
EAP	Economically active population
EEA	Employment Equity Act 55 of 1998
EME	Exempted micro-enterprise
ESD	Enterprise and Supplier development
FSC	Financial Sector Code 2017
FSCA	Financial Sector Conduct Authority
IISA	Insurance Institute of South Africa
IRBA	Independent Regulatory Board for Auditors
IT	Information technology
LLB	Baccalaureus Legum
LEAD	Legal Education and Development
LSSA	Law Society of South Africa
LE	Large Enterprise
NBA	National Bar Association
NPAT	Net profit after tax
PPPFA	Preferential Procurement Policy Framework Act 5 of 2000
QSFI	Qualifying Small Financial Institution
QSE	Qualifying Small Enterprise
RCA	Registered candidate auditor
SAICA	South African Institute of Chartered Accountants
SAIPA	South African Institute of Professional Accountants
SED	Socio-Economic Development
SETA	Skills Education Training Authorities

LIST OF ANNEXURES

- A: Generic ownership scorecard
- B: QSE ownership scorecard
- C: Generic management control scorecard
- D: QSE management control scorecard
- E: Generic skills development scorecard
- F: Learning programme matrix
- G: QSE skills development scorecard
- H: Generic enterprise and supplier development scorecard
- I: QSE enterprise and supplier development scorecard
- J: Generic socio-economic development scorecard
- K: QSE socio-economic development scorecard
- L: FSC Generic ownership scorecard
- M: FSC QSFI ownership scorecard
- N: FSC Generic management control scorecard
- O: FSC QSFI management control scorecard
- P: FSC Generic skills development scorecard
- Q: FSC QSFI skills development scorecard
- R: FSC Generic enterprise and supplier development scorecard

- S: FSC QSFI enterprise and supplier development scorecard
- T: FSC Generic socio-economic development and consumer education scorecard
- U: FSC QSFI socio-economic development and consumer education scorecard

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ABSTRACT

All employees aspire to work at a place of employment which is free from racial discrimination, where equal opportunity and fair treatment are not merely principles that are promoted and encouraged, but implemented actively by their employers. For a number of black professional employees in South Africa, however, currently this is merely an aspiration. Evidence suggests that black people are still subjected to racial discrimination and that their growth into the ownership and management structures of the enterprises that employ them, is insignificant in comparison to their white counterparts, despite the progressive legislative measures enacted by the legislature to ensure otherwise. The Employment Equity Act 55 of 1998, as amended, was promulgated in order to promote equal opportunities and fair treatment in employment, through the elimination of unfair discrimination and to implement affirmative action measures to redress the disadvantages in employment experienced by designated groups. The Broad-Based Black Economic Empowerment Act 53 of 2003, as amended, was enacted to promote the economic participation of black people in South Africa. The objective of this thesis is to examine the relevant provisions of the Employment Equity Act 55 of 1998, as amended, its Regulations, the Codes of Good Practice enacted in terms thereof, as well as the Broad-Based Black Economic Empowerment Act 53 of 2003, as amended, together with its Codes of Good of Practice to determine whether this equality legislation is the appropriate vehicle to address the challenges experienced by black professional employees in the private sector. The stories of black professional employees' experiences obtained from academic literature available insofar as it relates to racial discrimination, affirmative action and black economic empowerment is discussed through the lens of Critical Race Theory. This is done with a view to determining whether the slow pace of racial transformation when it comes to black professional employees employed in the private sector is an issue that the law can address. Particular reference is made to two professions: the legal profession and the financial professions. This thesis examines the difference between the minimalist and maximalist approaches to Black Economic Empowerment (BEE). The thesis reveals the limits to the incentive structure that does not place a premium on black ownership and that allows enterprises to benefit from BEE while not really changing management structures. It argues that seen through the lens of critical race theory the current equality legislation discussed in this thesis is based on including black people in a system where privilege and power are asymmetrically distributed. It also argues that legislation in itself is unable to rectify racial injustices. It therefore demonstrates the limitations of the current equality legislation as a vehicle to address the challenges faced by black professional employees in the private sector.

KEY WORDS: Broad-Based Black Economic Empowerment Act 53 of 2003, as amended, Codes of Good Practice, Critical race theory, Employment Equity Act 55 of 1998, as amended, Employment Equity Regulations, financial professions,

legal profession, professional employees, private sector, racial discrimination

CHAPTER 1

INTRODUCTION

1.1 INTRODUCTION

1.1.1 Background

The relationship between an employer and an employee is a complex one. It comprises a power imbalance between the two parties. The employer prescribes the terms and conditions which regulate the relationship between the employer and the employee,¹ which includes the employee's remuneration.² However, the employee possesses rights, which places the employee in the position to ensure that the legal obligations borne by the employer are adhered to, and protects the employee³ in the event of the employer's non-compliance with any legal obligations that relate to the employee.⁴

Some employees are in the fortunate position where they are able to negotiate or even prescribe their own remuneration. This is particularly so for professional employees when they find themselves in favourable working conditions.⁵ 'Professional employees' are specialists in their field of employment, who have obtained a tertiary level education.⁶ In addition, they make independent decisions and have expectations of career trajectory.⁷ Professional employees are also inclined to negotiate their own conditions of employment, such as their leave days, working time and conditions relating to their future growth within the place of employment.⁸ However, despite the aforementioned, a professional employee is hardly ever in a position to control the way in which he or she is treated by the employer⁹ and whether he or she in fact advances within the enterprise¹⁰ in the future.

Instances of black professional employees in South Africa being subjected to racial discrimination

¹ Section 7 of the Basic Conditions of Employment Act 75 of 1997, as amended.

² Grogan J *Workplace Law* 11ed (2014) 60.

³ Section 78(1) Basic Conditions of Employment Act 75 of 1997, as amended.

⁴ Section 185 Labour Relations Act 66 of 1995, as amended.

⁵ Grobler P & Warnich S *Human Resource Management in South Africa* 3 ed (2006) 18.

⁶ Grobler P & Warnich S *Human Resource Management in South Africa* 3 ed (2006) 18.

⁷ Frahm-Arp M *Professional Women in South African Pentecostal Charismatic Churches* (2010) 15.

⁸ Robbins SP & Odendaal A *Organizational Behaviour: Global and Southern African perspectives* (2003) 163.

⁹ Van Niekerk A & Christianson MA *Law@work* (2008) 107.

¹⁰ The term 'enterprise' is used when referring to the employer's business throughout this thesis, because this is the terminology employed in the context of black economic empowerment.

at the behest of their employers have been reported.¹¹ Race formed the basis of discrimination during the years of the apartheid regime's existence in South Africa. Following the transition to political democracy, Parliament codified the prohibition of unfair discrimination in the workplace by enacting the Employment Equity Act 55 of 1998, as amended ('EEA'). Parliament has enacted equality legislation to redress the imbalances caused by apartheid and the historical legacy of workplace discrimination. Equality legislation is the blanket term used in this theses to include the EEA, its Regulations, the Codes of Good Practice enacted in terms thereof,¹² the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, the Broad-Based Black Economic Empowerment Act 53 of 2003, as amended ('B-BBEEA'), together with the Codes of Good Practice, as amended enacted in terms thereof.¹³ The EEA, applies to workplace discrimination, while the Promotion of Equality and Prevention of Unfair Discrimination 4 of 2000 applies to persons who are excluded from the scope of the EEA.¹⁴ The EEA was enacted primarily to promote the constitutional right to equality and to give effect to the prohibition of unfair discrimination contained in sections 9(3) and 9(4) of the Constitution. Furthermore, it aimed to 'achieve a diverse workforce broadly representative of the people'¹⁵ of South Africa and to 'promote economic development and efficiency in the workforce'¹⁶ and thus gives effect to section 9(2) of the Constitution.¹⁷

The B-BBEEA was enacted to 'promote the achievement of the constitutional right to equality, increase broad-based and effective participation of black people in the economy, promote a higher growth rate, increased employment and more equitable income distribution'.¹⁸ Subsequent to the enactment of the B-BBEEA, the Codes of Good Practice were gazetted. In terms of the B-BBEEA, enterprises may measure their broad-based black economic empowerment ('BEE') status which is known as their BEE rating.¹⁹ The Codes of Good Practice contain various scorecards which are utilised to determine the BEE ratings of enterprises.²⁰

¹¹ Bezuidenhout A & Bischoff C *Tracking the Progress on the Implementation and Impact of the Employment Equity Act since its inception* (Research commissioned by Department of Labour South Africa, 2008) 16; Sadler E 'A profile and the work environment of black chartered accountants in South Africa' (2002) 10 *Meditari Accountancy Research* 170; Centre for Applied Legal Studies *Transformation of the Legal Profession* (2014) 44.

¹² Such as the Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans GN R424 in GG 40817 of 12 May 2017.

¹³ B-BBEE Codes code series 000 in GG 36928 of 11 October 2013; B-BBEE Codes code series 100 in GG 36928 of 11 October 2013; B-BBEE Codes code series 200 in GG 36928 of 11 October 2013; B-BBEE Codes code series 300 in GG 36928 of 11 October 2013; B-BBEE Codes code series 400 in GG 36928 of 11 October 2013; B-BBEE Codes code series 500 in GG 36928 of 11 October 2013; B-BBEE Codes code series 601 in GG 38766 of 6 May 2015; B-BBEE Code code series 602 in GG 38766 of 6 May 2015; B-BBEE Codes code series 603 in GG 38766 of 6 May 2015; B-BBEE Codes code series 604 in GG 38766 of 6 May 2015; B-BBEE Codes code series 605 in GG 38766 of 6 May 2015.

¹⁴ Section 5(3) Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

¹⁵ Preamble to EEA.

¹⁶ Preamble to EEA.

¹⁷ See para 2.1 below.

¹⁸ Preamble to the B-BBEEA.

¹⁹ Balshaw T & Goldberg J *Broad-Based Black Economic Empowerment Amended Codes and Scorecard* 3ed (2014) 17.

²⁰ See para 5.4 below.

1.1.2 Problem Statement

The objective to work for a place of employment which is free from racial discrimination, where treatment is fair, encompassing dignity and mutual respect and where advancement is based on equal opportunity, is one common among all South African employees. Similar to white professional employees, black professional employees work hard to obtain their tertiary qualifications, even harder at times, in order to overcome below-average schooling²¹ and language barriers.²² Despite these major academic achievements, once black professionals enter places of employment to embark on the path of their chosen career, they are faced with the impediment known as racial discrimination.

In addition to having to deal with racial discrimination, some black professional employees battle to climb the corporate ladder, because of the lack of equal opportunities²³ and the corporate cultures within these enterprises.²⁴ Despite the low percentage of black people who form part of the racial composition of the ownership and management structures of these enterprises,²⁵ employers seem to be successful in obtaining good BEE ratings which provide them with a number of financial benefits.

1.1.3 Aims of the Study

While the EEA focuses on employment opportunity redress in workplace practices, the B-BBEEA, was promulgated in order to provide black people with economic opportunities to manage, own and increase financial and managerial control in the South African economy. This thesis determines whether the slow pace of racial transformation in South Africa when it comes to black professional employees employed within the private sector is an issue that the law can address, and if so, whether the EEA and the B-BBEEA are the appropriate vehicles to do so.

Despite the fact that discrimination on the ground of gender is also present in the workplace, gender discrimination is not part of the focus of this thesis. The reason for this choice of focus is that gender discrimination includes discrimination against white females. This thesis consists of an analysis of the equality legislation which includes the B-BBEEA. Insofar as white persons (females)

²¹ Lewin T & Mawoyo M *Student access and success: issues and interventions in South African universities* (Inyathelo: the South African institute for advancement, 2014) 51.

²² Lewin T & Mawoyo M *Student access and success: issues and interventions in South African universities* (Inyathelo: the South African institute for advancement, 2014) 57.

²³ Booysen L 'Barriers to Employment equity implementation and retention of Blacks in management in South Africa (2007) 31 *South African Journal of Labour Relations* 61.

²⁴ Booysen L 'Barriers to Employment equity implementation and retention of Blacks in management in South Africa (2007) 31 *South African Journal of Labour Relations* 62.

²⁵ Department of Labour *Commission for Employment Equity Annual Report* (2014-2015) 33.

are concerned, the B-BBEEA does not apply.²⁶ Gender discrimination is thus excluded from the scope of this thesis.

This thesis concentrates on the challenges experienced by professional employees only. The research will establish in which manner the current situation experienced by black professional employees within the private sector can be improved for all the parties concerned. In order to achieve the aforementioned outcomes, the thesis focuses on two professions within the private sector: the legal and the financial professions. These professions have been selected not only because they are privately owned and governed, amongst others, by the legislation which forms the subject matter of this thesis, but also as a result of the fact that both of these professions are governed by their own regulatory bodies, each with its own set of rules and ethics to be adhered to by the professional people which they govern. In addition, the legal profession was chosen since it is an example of a profession which makes use of the B-BBEE Codes, while the financial professions are an example of a group of professions to which the B-BBEE Codes find no application and which determines its BEE ratings by using a code of its own known as the Financial Sector Code 2017 ('FSC'). By opting to examine the legal and financial professions, it is possible to determine the role of the EEA's provisions in relation to racial transformation and affirmative action. The legal profession includes attorneys, while the financial professions include accountants, auditors, financial advisors, investment and asset managers as well as employees employed by banks and insurance companies.²⁷

In addition, the legal and the financial professions have been selected because generally law firms employ fewer than 50 employees (to which the provisions relating to affirmative action do not apply), while the financial professions generally consist of enterprises who employ more than 50 employees (to which the provisions relating to affirmative action apply). These professions were deliberately chosen to establish whether the equality legislation is the appropriate vehicle to address the challenges faced by black professionals. Were it to be found in this thesis that the pace of racial transformation is faster in the case of the financial professions as compared to the legal profession, this would show that the affirmative action measures in the EEA are successful in achieving racial transformation. However, if it is found that there is a comparatively slow pace of racial transformation in both professions this would indicate that the equality legislation is not an appropriate vehicle to address the challenges faced by black professional employees in the private sector.

This research pertains to all black professional employees, thereby including those employees

²⁶ Section 1 of the Broad-Based Black Economic Empowerment Act 53 of 2003, as amended.

²⁷ See para 8.1 below.

employed by employers who do not fall within the definition of 'designated employers'²⁸ with specific reference to the legal and financial professions.

Critical race theory is used as the lens through which the challenges faced by black professional employees in South Africa are examined in the latter chapters of the thesis. Critical race theory informs both the methodology and structure of this thesis. The introduction of critical race theory as a theoretical framework only in chapter 6 and not earlier is deliberate, because the thesis will first consist of an examination and analysis of the text of the relevant legislation and the manner in which it is interpreted by both the courts and the literature relevant to the research. Critical race theory is introduced in the latter half of the thesis as the lens through which the role of equality legislation in achieving racial transformation is assessed in the specific contexts of the legal and financial professions. Critical race theory is used to determine whether the current legal framework for addressing the inequalities which exist is appropriate.

Advocates are not employed by the law firms that instruct them, which implies that as a consequence their relationship falls beyond the scope of the EEA. However, the relevant issues relating to the relationship between advocates and the law firms who instruct them will be outlined in this thesis, because the services which advocates render to law firms is relevant to the manner in which law firms are able to obtain good BEE ratings.

1.1.4 Research Question

The research question of the thesis and the ancillary research questions in respect of each chapter are set out below. The main research question is stated first, and thereafter the ancillary research questions to be answered in each of the chapters are listed per chapter.

The main research question of this thesis:

- . Is the slow pace of racial transformation in South Africa when it comes to black professional employees within the private sector an issue that the law can address, with emphasis being placed on racial discrimination and affirmative action on the one hand and BEE on the other?

Chapter 2:

- . What role does legislation aimed at addressing racial discrimination play in protecting black

²⁸ See para 2.2.1 below.

professional employees in the private sector?

Chapter 3:

- . What are the benefits of affirmative action legislation for black professional employees in the private sector?
- . What are the shortcomings of the legal framework governing affirmative action?
- . How should affirmative action measures taken in terms of the EEA be assessed by the courts?

Chapter 4:

- . What role does the corporate culture of an enterprise play in racial transformation?

Chapter 5:

- . What are the shortcomings of the legal framework that make it possible for enterprises to obtain good BEE ratings despite the low percentage of black people who form part of the racial composition of the ownership and management structures of these enterprises?
 - Are ownership and management structures of enterprises sufficiently regulated?

Chapter 6:

- . Can critical race theory as a theoretical framework provide a different perspective in the analysis of unfair discrimination, affirmative action and BEE to the current statutory framework?

Chapter 7:

- . Is the legislative framework aimed at addressing racial discrimination and aimed at advancing black people which is currently in place the appropriate vehicle to address the challenges faced by black attorneys in the legal profession if evaluated through the lens of critical race theory?
 - Is there a slow pace of racial transformation in the legal profession and which of the shortcomings of the legal framework advanced in chapter 3, if any, are dominant in the legal profession? Will amendments to legislation reduce the shortcomings?
 - Are some law firms obtaining good BEE ratings and is there a low percentage of black people who form part of the ownership and management structures of law

firms? In this event, which of the shortcomings of the BEE framework advanced in chapter 5 making it possible for enterprises to obtain good BEE ratings, despite the low percentage of black people who form part of the ownership and management structures of enterprises, if any, are dominant in the legal profession? Will amendments to current legislation address the shortcomings?

Chapter 8:

- . Viewed through the lens of critical race theory is the current statutory framework an appropriate vehicle to address the challenges faced by black professionals in the financial professions?
 - . Is there a slow pace of racial transformation in the financial professions and which of the shortcomings of the legal framework identified in chapter 3, if any, are dominant in the financial professions? Can the law be amended to reduce the shortcomings?
 - . Are there enterprises in the financial professions who are obtaining good BEE ratings and is there a low percentage of black professional employees who form part of the ownership and management structures of such enterprises? In such a case, which of the shortcomings of the legal framework advanced in chapter 5 which make it possible for enterprises to obtain good BEE ratings in such circumstances, are dominant in the financial professions? Will amending the law address these shortcomings?

1.2 THE SIGNIFICANCE OF THE RESEARCH TOPIC

Given the nature of South Africa's past, the issues relating to racial equality and transformation in South Africa are of particular significance to its citizens. Racial discrimination is a topic which is relevant to all South Africans whether within the employment context or not. This is not only by virtue of the fact that the consequences of apartheid are still present today, but also as a result of the fact that all South Africans are affected by the legislation that has been enacted to correct the imbalances; caused by the existence of the legislation and policies in terms of apartheid.

The fact that racial discrimination is still present in the workplace²⁹ despite the the EEA prohibiting unfair discrimination, is concerning and it is therefore vital to determine whether there are problematic aspects of the legislation. This is similarly the case with the slow pace of change in the racial composition of the ownership and management structures of existing enterprises with the

²⁹ Department of Labour Commission for Employment Equity Annual Report (2018-2019) 11.

existence of the B-BBEEA and its Codes of Good Practice.³⁰

It is important to determine whether the problem stems from the manner in which the provisions contained in the aforementioned legislation have been drafted or whether there are aspects that cannot be remedied by the law at all.

The National Bar Association met with the Law Society of South Africa and the Black Lawyer's Association in Sandton during May 2015, where it was acknowledged that there is a 'lack of advancement of black lawyers.'³¹ Minister Masutha³² attended the meeting, where he stated that 'the question was why change is happening so slowly and if it was happening at all?'³³ thereby confirming the significance of the issues in question.

The issues of racial discrimination and the insignificant change in the racial composition of the ownership and management structures of enterprises, are important to the black professional employees who work within the private sector. This is because it is these issues that affect them directly, by virtue of the fact that these have been cited as the main reasons for their lack of job satisfaction and for their ultimate departure from enterprises.³⁴ Black professionals who are employed in the private sector may find themselves working in challenging circumstances. It is valuable for such persons to understand what the causes are of the situation in which they find themselves and how this negative situation in the workplace can be changed, especially where employers are complying with equality legislation.³⁵ Where black professional employees are experiencing challenges even in circumstances where employers are complying with the EEA, this implies that legislation is unable to address the challenges which these employees experience. It is for this reason that critical race theory will be introduced in the latter half of the thesis.

Once the research questions have been answered, it will be possible to ascertain the manner in which the current situation experienced by black professional employees working within the private sector, can be remedied to ensure a more productive working environment for all; but most importantly, the extent to which the law can play a role in addressing the challenges experienced by black professional employees.

³⁰ Department of Labour *Commission for Employment Equity Annual Report* (2014-2015) 33.

³¹ Manyathi-Jele N 'Lack of advancement of black and female lawyers in the spotlight' (2015) 554 *De Rebus* 12 14.

³² Minister Masutha was the Minister of Justice and Correctional Services for the period 2014-2019.

³³ Manyathi-Jele N 'Lack of advancement of black and female lawyers in the spotlight' (2015) 554 *De Rebus* 12 16.

³⁴ Booysen L 'Barriers to Employment equity implementation and retention of Blacks in management in South Africa (2007) 31 *South African Journal of Labour Relations* 62.

³⁵ Centre for Applied Legal Studies *Transformation of the Legal Profession* 53.

1.3 LITERATURE REVIEW

According to Booysen's research the problem with the EEA lies in its implementation.³⁶ She provides a summary of the reasons for the high attrition rates of black professionals.³⁷ These reasons are directly linked to the employer's implementation of the EEA.

Her research comprises the collection of data from black and white professional employees employed on the managerial, as well as non-managerial levels of an enterprise. The data collected was divided into various categories to establish the themes which emerged from the interviews conducted. It emerged that the findings fell into two categories: the implementation of the employment equity strategy and the retention of black employees. As far as the implementation of employment equity is concerned, a number of barriers were identified, being:

'insufficient focus, coordination and integration of existing implementing processes, lack of shared understanding and communication about employment equity issues, lack of leadership commitment, inconsistent implementation practices without consequences, white fears around employment equity and specific organisational culture issues.'³⁸

As far as the failure to retain black employees are concerned, the most prominent factor appeared to be

'an organizational culture perceived not to be conducive to attracting and retaining blacks as a result of a white male dominated culture, lack of transformation, racial divisions in power structures, labour division, perceived tokenism, poor structures for talent management, coaching, mentoring and career succession'.³⁹

She provides valuable insight into the attitudes of both black and white employees working on both the managerial and non-managerial levels. However, her research is limited to only one financial institution, Money Bank. Despite the fact that it is a perfect example of an enterprise with all the necessary policies and procedures in place, in compliance with legislation, where the policies and procedures are not translated into action to the benefit of the employees in respect of whom they were drafted, it remains only one example thereby providing a limited view of the shortcomings of the EEA.

Research was also conducted by Jongens into the perceptions around the implementation of

³⁶ Booysen L 'Barriers to Employment equity implementation and retention of Blacks in management in South Africa (2007) 31 *South African Journal of Labour Relations* 47.

³⁷ Booysen L 'Barriers to Employment equity implementation and retention of Blacks in management in South Africa (2007) 31 *South African Journal of Labour Relations* 50.

³⁸ Booysen L 'Barriers to Employment equity implementation and retention of Blacks in management in South Africa (2007) 31 *South African Journal of Labour Relations* 57.

³⁹ Booysen L 'Barriers to Employment equity implementation and retention of Blacks in management in South Africa (2007) 31 *South African Journal of Labour Relations* 61.

employment equity legislation.⁴⁰ The objectives of the study were to determine whether a perception existed that the employer was playing a 'numbers game', whether discrimination against black and white employees took place at the workplace, what the opinions were of employees when it comes to leadership's responsibility regarding issues relating to employment equity and what management's views were on discrimination and on the implementation of targets.⁴¹ The research conducted comprised interviews of approximately 55 employees at a large financial institution in South Africa.⁴² Jongens provides insight that for certain companies the need to transform is overshadowed by the need to comply with the provisions of the EEA,⁴³ the fact that the importance of communication between employers and employees cannot be underestimated and the fact that the corporate culture in workplaces can be a challenge for black employees within an enterprise.⁴⁴ Despite the insight provided, this study also only concentrates on one company within the financial profession.

Oosthuizen and Naidoo also conducted research in which barriers to employment equity were identified.⁴⁵ The research revealed that employees from designated groups and non-designated groups have negative attitudes with regard to their experiences of employment equity.⁴⁶ Despite the fact that this research is beneficial in that it consists of the views of employees from 21 organisations,⁴⁷ it may not be representative of all South African enterprises.

As a result of critical race theory being used as the lens through which the challenges faced by black professional employees in South Africa are examined, the works of Bergerson,⁴⁸ Conradie⁴⁹ and Barlow⁵⁰ are used in this thesis to show what critical race theory encompasses. Harris⁵¹ claims that 'whiteness' is a form of property. Her work is discussed in this thesis in order to demonstrate how 'whiteness' includes the right to exclude. The works of Costagno,⁵² Bergerson⁵³ and Wing,⁵⁴

⁴⁰ Jongens C 'Perceptions of employment equity implementation at a major South African multi-national financial corporation' (2006) 2(1) *Postamble* 30.

⁴¹ Jongens C 'Perceptions of employment equity implementation at a major South African multi-national financial corporation' (2006) 2(1) *Postamble* 31.

⁴² Jongens C 'Perceptions of employment equity implementation at a major South African multi-national financial corporation' (2006) 2(1) *Postamble* 33.

⁴³ Jongens C 'Perceptions of employment equity implementation at a major South African multi-national financial corporation' (2006) 2(1) *Postamble* 33.

⁴⁴ Jongens C 'Perceptions of employment equity implementation at a major South African multi-national financial corporation' (2006) 2(1) *Postamble* 37.

⁴⁵ Oosthuizen R & Naidoo V 'Attitudes towards and experience of employment equity' (2010) 36 *SAJIP* 836.

⁴⁶ Oosthuizen R & Naidoo V 'Attitudes towards and experience of employment equity' (2010) 36 *SAJIP* 836.

⁴⁷ Oosthuizen R & Naidoo V 'Attitudes towards and experience of employment equity' (2010) 36 *SAJIP* 836.

⁴⁸ Bergerson AA 'Critical race theory and white racism: is there room for white scholars in fighting racism in education?' (2003) 16(1) *International Journal of Qualitative Studies in Education* 52.

⁴⁹ Conradie MS 'Critical race theory and the question of safety in dialogues on race' (2016) 36 (1) *Acta Theologica* 8.

⁵⁰ Barlow R 'Racism, Justified: A Critical Look at Critical Race Theory' (2016) *The Harvard Law Record* 1.

⁵¹ Harris CI 'Whiteness as property' in Crenshaw K *Critical Race Theory: The Key Writings that Formed the Movement* (1996) 276.

⁵² Costagno AE 'Commonsense understandings of equality and social change: a critical race theory analysis of liberalism at Spruce Middle School' (2009) 22 (6) *International Journal of Qualitative Studies in Education* 755.

as well as Delgado and Stefanic⁵⁵ are also used to outline the tenets upon which critical race theory are based. The work of Modiri⁵⁶ is relied on in this thesis to show how critical race theory is relevant to the equality legislation in South Africa. Modiri's argument that the emphasis on the law being objective can only address the most blatant forms of racial discrimination, while failing to provide any insight into the structural nature of racial power is supported by the findings in this thesis.

The Centre for Applied Legal Studies (CALs) conducted research on transformation within the legal profession.⁵⁷ The purpose of the said study was to determine why limited change has taken place within the legal profession, as far as race and gender are concerned.⁵⁸ The study aimed to identify the barriers to advancement in the profession and identified the measures to mitigate these impediments.⁵⁹ The study consisted of electronic surveys and individual interviews.⁶⁰ The report confirmed that 'black legal practitioners believed that they have to work twice as hard in order to disprove negative assumptions such as preconceived notions of inability, however even after doing so, due to racism, they get half as far'.⁶¹ The report further confirmed, as stated by Manyathi-Jele, that the legal profession is still dominated by white males.⁶² The research succeeded in identifying a number of barriers which exist within the legal profession and made a number of recommendations in order to change the status quo, the most important of which, is that the Judicial Service Commission should get involved by taking responsibility for the patterns of discrimination within the legal profession.⁶³

Notwithstanding the valuable contribution made by the CALs in obtaining feedback from the legal profession as a whole, the research concentrates on only one profession. Furthermore, it does not go further in identifying whether the implementation of the EEA may be faulty or whether the issue lies with the manner in which its provisions have been drafted.

The extensive research published in law journal articles on addressing racial discrimination, using affirmative action to achieve racial transformation is not catalogued in this literature review, but contributes greatly to the analysis in the substantive chapters of this thesis.

⁵³ Bergerson AA 'Critical race theory and white racism: is there room for white scholars in fighting racism in education?' (2003) 16(1) *International Journal of Qualitative Studies in Education* 52.

⁵⁴ Wing AK 'Is there a future for critical race theory?' (2016) 66(1) *Journal of Legal Education* 48.

⁵⁵ Delgado R & Stefanic J *Critical race theory: an introduction* 2ed (2012) 27.

⁵⁶ Modiri JM 'The colour of the law, power and knowledge: introducing critical race theory in (post-) apartheid South Africa' (2012) 28 *SAJHR* 418.

⁵⁷ Centre for Applied Legal Studies *Transformation of the Legal Profession* (2014) 1.

⁵⁸ Centre for Applied Legal Studies *Transformation of the Legal Profession* (2014) 5.

⁵⁹ Centre for Applied Legal Studies *Transformation of the Legal Profession* (2014) 19.

⁶⁰ Centre for Applied Legal Studies *Transformation of the Legal Profession* (2014) 19.

⁶¹ Centre for Applied Legal Studies *Transformation of the Legal Profession* (2014) 33.

⁶² Manyathi-Jele N 'Report: Transformation of the legal profession' (2014) 211 *De Rebus* 18.

⁶³ Manyathi-Jele N 'Report: Transformation of the legal profession' (2014) 211 *De Rebus* 18.

This thesis is an original study by virtue of the fact that it examines the texts of the EEA, its Regulations and the B-BBEEA, together with the Codes enacted in terms thereof to identify the shortcomings of the legal framework. It also creates a link between the equality legislation and the corporate culture of enterprises. In addition, the legislation is evaluated from the perspective of critical race theory to determine whether the current equality legislation is the appropriate vehicle to address the lack of transformation in the legal and financial professions.

1.4 METHODOLOGY

The thesis first examines the relevant statutory provisions to determine what the shortcomings are of the current legal framework. The thesis includes an examination of the provisions of the EEA, its Regulations, the Codes of Good Practice enacted in terms thereof, the B-BBEEA, and the B-BBEE Codes, promulgated in terms thereof, as a result of the aforementioned statutes forming the basis of this research.⁶⁴ The B-BBEE Codes contain the scorecards and the formulas used to determine the BEE status of an enterprise, thereby enabling enterprises to obtain BEE ratings. These scorecards are relevant to this thesis, since they determine the manner in which enterprises obtain BEE ratings.

Since the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 applies to persons who are excluded from the scope of the EEA, the Promotion of Equality and Prevention of Unfair Discrimination Act falls beyond the scope of this thesis.

Court judgments assist in determining the answers to the research questions, since the courts are required to interpret the provisions of the Constitution and statutes. Court judgments are discussed to determine how the relevant legislation has been interpreted, but more importantly, to identify the aspects of the legislation that the courts have had difficulty in interpreting, such as the conflicting judgments on the appropriate standard to apply to assess affirmative action measures taken by the employer. The court judgments also provide additional insight into the manner in which provisions are implemented by employers.

This research also comprises the consideration of books, statistics, journal articles which includes interdisciplinary research, drawing from research situated in the disciplines of sociology, economics and industrial psychology.

Statistics are included, in order to determine both the current situation and the rate of

⁶⁴ This thesis reflects the law on 11 November 2019.

improvement, if any, with respect to the issues in question. Journal articles are also included, since a number of the authors thereof, have obtained data by way of interviews with both the employees and employers in order to research relevant topics, the outcomes of which, are pivotal in answering the research question. In addition, books and journal articles contain the views of the authors on the relevant provisions of the EEA and the B-BBEEA, thereby providing valuable additional insight. Much of the insights on critical race theory included in this thesis are also drawn from books and journal articles on the topic. Interdisciplinary research in the fields of economic and management sciences will be referred to in order to provide a background to BEE.

The stories of black professional employees in the legal and financial professions are relayed in order to present the black professional employees' experiences of racial discrimination, affirmative action and BEE. The decision not to embark on an empirical study is due to the difficulty with which statistically relevant data on each type of professional in the legal and financial professions would have been obtained. As a result of the selection of critical race theory as the lens through which the role of equality legislation in addressing the challenges faced by black professionals in the legal and financial professions is evaluated, the stories of the experiences of the professionals cited in the literature and reports should carry as much weight as empirical data.

1.5 ANTICIPATED ANSWER

Seen through the lens of critical race theory, there are limitations to the current equality legislation's ability to address the challenges faced by black professional employees in the private sector. This is because the said legislation is drafted from a white perspective and because legislation is unable to rectify racial injustices.

1.6 CHAPTER OUTLINE

This thesis consists of nine chapters. The first chapter of this thesis, the current chapter, is the introduction which includes *inter alia* the problem statement, research questions, the literature review and the research methodology.

Chapter 2 of this thesis consists of a detailed analysis of the statutory framework for dealing with racial discrimination. It contains a discussion on the provisions governing discrimination, the concept of unfairness and the remedies which are available to employees who are successful with unfair discrimination claims. Chapter 3 of this thesis includes a discussion of the provisions governing affirmative action, the procedural obligations which the EEA places on designated

employers, as well as an assessment of the standards to determine whether any of the standards are appropriate in assessing the affirmative action measures taken by employers.

Chapter 4 consists of a discussion of the concept of corporate culture with a view to determining the role which the prevailing corporate culture plays in the pace of racial transformation in a particular enterprise. By virtue of the fact that the corporate culture is relevant to both unfair discrimination and affirmative action, it is discussed separate from chapters 2 and 3. Chapter 4 consists of a discussion of the affect of the corporate culture within the context of unfair discrimination and within the context of affirmative action.

Chapter 5 consists of a discussion of the statutory provisions governing BEE and the BEE scorecards to determine how it is possible for enterprises to obtain good BEE ratings when there is a low percentage of black people who form part of the management and ownership structures of enterprises. This chapter is discussed after the chapter dealing with the corporate culture, because the corporate culture is affected by the composition of the management structures of enterprises.

A discussion of critical race theory is contained in chapter 6 in order to determine which insights critical race theory brings in the analysis of unfair discrimination, affirmative action and BEE. The discussion on critical race theory deliberately follows after the text of equality legislation has been examined. This is done to ensure that the shortcomings inherent to the particular provisions in the current legal framework are identified prior to critical race theory being used as the lens through which the appropriateness of using equality legislation (or any law) is assessed.

Chapter 7 of this thesis contains a discussion of the historical background of the legal profession as well as of the current legal profession. This is followed by the accounts of the experiences of black attorneys in the legal profession which is based on the literature available insofar as racial discrimination, affirmative action, the corporate culture and BEE is concerned. This chapter will determine what the state of racial transformation is in the legal profession. The main objective of the chapter is to ascertain whether equality legislation is the most appropriate vehicle to address the challenges faced by black attorneys in the profession.

Chapter 8 consists of a discussion of the regulation of the financial professions which is followed by an account of the stories of black members of the financial professions with reference to racial discrimination, affirmative action, the corporate culture and BEE. The chapter will determine whether racial discrimination takes place in the sector and what the experiences are of black professionals insofar as affirmative action and BEE is concerned in the financial professions. The chapter will establish whether equality legislation is the most appropriate vehicle to address the challenges which are experienced by black professionals in the profession.

Chapters 2, 3 and 5 examine the law as it stands at present. The objectives of the EEA and the B-BBEEA are discussed in chapters 2 and 5 respectively. The law governing racial discrimination, affirmative action and BEE is discussed in chapters 2, 3 and 5 after which it is criticised through the lens of critical race theory in chapters 6, 7 and 8. The law is discussed in this order to determine whether the statutes achieve their objectives and whether the slow pace of racial transformation in South Africa when it comes to black professional employees within the private sector is an issue that the legislation can address.

The final chapter, chapter 9, contains the conclusions, which evaluates whether the equality legislation framework lives up to the racial transformation goals that were cited in the reasons for the enactment of the legislation. It also assesses, through the lens of critical race theory, the appropriateness of the equality legislation in addressing the challenges faced by black professional employees in the private sector.

CHAPTER 2

THE STATUTORY FRAMEWORK FOR DEALING WITH RACIAL DISCRIMINATION

2.1 INTRODUCTION

Race remains one of the most sensitive issues in South Africa.⁶⁵ The political equality which was achieved as a result of the advent of the democratic dispensation in 1994, was not matched with similar progress in the workplace, especially not in the private sector.⁶⁶ The presence of racial discrimination, whether blatant or subtle, has the power to destroy the relationship between an employer and an employee.⁶⁷ The unequal treatment of people from the various race groups is an issue of contention within South Africa. It has become one of the considerations which should be taken into account by South Africans when making business decisions, whether dealing with members of their own race group or not.⁶⁸ This is particularly so, due to the existence of apartheid when black people were oppressed as a result of laws, which legalised, encouraged and promoted white supremacy.

The Labour Court has held that

'racism remains manifestly in existence in South Africa. The bitterness and sensitivity of persons historically and directly or indirectly still subjected to those prejudices is understandable. Where perceptions of their existence are shown to have been justified, it is right and proper that wherever and whenever they are established, mechanisms should exist to address them *remedially*⁶⁹, therapeutically and where appropriate in the context of their social and legal unacceptability even punitively.⁷⁰

The effects of apartheid are still present today, more than two decades after its dissolution, thereby demonstrating just how influential it was.⁷¹ The dissolution of apartheid and the beginning of the constitutional order in South Africa saw principles being adopted, such as, constitutionalism, the

⁶⁵ Grogan J *Employment Rights* 2ed (2015) 214.

⁶⁶ Department of Labour *Commission for Employment Equity Annual Report* (2017-2018) 23.

⁶⁷ Booysen L 'Barriers to Employment equity implementation and retention of Blacks in management in South Africa (2007) 31 *South African Journal of Labour Relations* 62.

⁶⁸ Codes of good Practice, 2013 issued in terms of the Broad-Based Black Economic Empowerment Act 53 of 2003, as amended.

⁶⁹ My emphasis.

⁷⁰ *Mahlanyana v Cadbury (Pty) Ltd* (2000) 21 ILJ 2274 (LC) para 17.

⁷¹ Department of Labour *Commission for Employment Equity Annual Report* (2017-2018) 41.

rule of law, separation of powers and checks and balances, democracy and accountability, co-operative government, and devolution of power.⁷² As a result of apartheid being based on inequality and discrimination, the importance of the right to equality ('the equality clause') entrenched in section 9 of the Constitution, is obvious. Section 9 governs the right to equality and the prohibition against discrimination. In terms of section 9 of the Constitution:

- '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.'

Despite the rights protected in terms of the Constitution, particularly section 9 thereof, inequalities are still present today. Statutes have been promulgated in terms of the Constitution with the main objective of eliminating these inequalities. The EEA is one such statute, with its focus on the elimination and prohibition of unfair discrimination and on affirmative action.⁷³ A statute, such as the EEA, which gives effect to a basic right is not limited to providing the minimum which is required by the Constitution, but is allowed to provide more generous protection than is provided for by the Constitution, provided that it does not violate the right of any other person.⁷⁴ Unlike the legislation and policies in terms of apartheid, the EEA, the Regulations enacted in terms thereof, together with the Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans GN 40840 of 12 May 2017 ('Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans'), aim to achieve equity within the workplace.⁷⁵

The Constitutional Court tabulated the various stages of an enquiry in determining whether the

⁷² De Waal J, Currie I & Erasmus G *The Bill of Rights Handbook* 4ed (2001) 6.

⁷³ Sections 5, 6, 15 of the EEA.

⁷⁴ Du Toit D 'The evolution of the concept of 'unfair discrimination' in South African Labour Law' (2006) 27 *ILJ* 1312.

⁷⁵ Section 2 of the EEA.

equality clause had been violated in *Harksen v Lane NO*.⁷⁶ The stages of the said test ('Harksen test') are:

- 'a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate governmental purpose? If it does not, then there is a violation of section 9(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.
- b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:
 - i) Firstly, does the differentiation amount to 'discrimination'. If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.
 - ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed. If on unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.
- c) If the discrimination is found to be unfair, then a determination will have to be made as to whether the provision can be justified under the limitation clause.⁷⁷

The Constitutional Court's enquiry to determine whether the equality clause had been violated stated above should be used to determine whether differential treatment contained in legislation is constitutional in terms of the equality clause and not to determine whether a private employer's conduct towards a private employee amounts to unfair discrimination.⁷⁸ The reason for courts and claimants not being allowed to make use of section 9 of the Constitution directly is due to the fact that by relying on the Constitution directly, courts and claimants will be by-passing national legislation resulting in the principle of subsidiarity being contravened.⁷⁹ *Stokwe v MEC, Department of Education, Eastern Cape*⁸⁰ is one of the many cases where the applicant relied directly on section 9 of the Constitution in alleging discrimination on the ground of language as opposed to

⁷⁶ *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) para 53.

⁷⁷ *Harksen v Lane No* 1998 (1) SA 300 (CC) para 53.

⁷⁸ Du Toit D 'The prohibition of unfair discrimination: Applying s 3(d) of the Employment Equity Act 55 of 1998' in Dupper OC & Garbers C *Equality in the Workplace: Reflections from South Africa and Beyond* (2010) 156.

⁷⁹ Henrico R 'South African constitutional and legislative framework on equality: how effective is it in addressing religious discrimination in the workplace?' (2015) *Obiter* 287.

⁸⁰ *Stokwe v MEC, Department of Education, Eastern Cape* 2005 (8) BLLR 822 (LC).

making use of the provisions contained in the EEA. The applicant was unsuccessful in this case.⁸¹ The *Harksen* test was also applied in *University of South Africa v EC Reynhardt*⁸² and *Solidarity obo Barnard v SA Police Service*⁸³ despite the fact that the issue in these cases was to determine whether an employer's conduct towards a private employee amounted to unfair discrimination. The EEA, and not the Constitution, must be relied on by employees who institute claims of unfair discrimination against employers.⁸⁴ It is only in the event of the EEA failing to protect a basic right that direct reliance on the Constitution is allowed.⁸⁵ The *Harksen* test is discussed further below.⁸⁶

This chapter consists of a discussion of the statutory framework for dealing with racial discrimination by reviewing the provisions of the EEA insofar as they relate to racial discrimination. It provides an in-depth discussion of discrimination, unfairness, the statutory defences which may be raised against claims of unfair discrimination, and the remedies which are available to employees upon successful unfair discrimination claims. This is done with a view to evaluating whether the slow pace of racial transformation in South Africa with regard to black professional employees employed within the private sector is an issue which the law can address. In order to make the said determination this chapter aims to answer one question: What role can legislation aimed at addressing racial discrimination play in protecting black professional employees within the private sector?

2.2 THE EEA

2.2.1 Introduction

The EEA was promulgated during 1998 and was subsequently amended in 2004 and in 2013. The EEA was enacted in order to realise the rights entrenched in section 9 of the Constitution.⁸⁷ It aims to redress the imbalances caused by apartheid and the historical legacy of workplace discrimination.⁸⁸ The purpose of the EEA is to 'achieve equity in the workplace by:

- a) promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and

⁸¹ *Stokwe v MEC, Department of Education, Eastern Cape* (2019) 40 ILJ 773 (CC) para 1.

⁸² *University of South Africa v Renhardt* (2010) 31 ILJ 2368 (LAC) para 21.

⁸³ *Solidarity obo Barnard v South African Police Service* 2014 (2) SA 1 (SCA) para 50; *Solidarity obo Barnard v South African Police Service* 2014 ZACC 23 para 51.

⁸⁴ Du Toit D 'Protection against unfair discrimination in the workplace: Are the courts getting it right?' (2007) *LDD* 1.

⁸⁵ Du Toit D 'Protection against unfair discrimination in the workplace: Are the courts getting it right?' (2007) *LDD* 1.

⁸⁶ See para 3.4.1.2 and para 3.4.2.2 below.

⁸⁷ Preamble to the EEA.

⁸⁸ Horwitz FM & Jain H 'An assessment of Employment Equity and Broad-Based Black Economic Empowerment development in South Africa (2011) 30 *Equality Diversity and Inclusion: An International Journal* 298.

- b) implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories in the workplace.¹⁸⁹

The EEA distinguishes between provisions which apply to all employers and all employees and those which apply to designated employers and people from designated groups.⁹⁰ Chapter 2 of the EEA, governing the elimination and prohibition of unfair discrimination, applies to all employees and employers.⁹¹ Chapter 3, on the other hand, which consists of the provisions relating to affirmative action, only applies to designated employers and to people from designated groups, unless otherwise provided.⁹² A 'designated employer' is defined as:

- 'a) a person who employs 50 or more employees;⁹³
- b) a person who employs fewer than 50 employees but has an annual turnover that is equal to or above the applicable annual turnover of a small business in terms of Schedule 4 of this Act;
- c) a municipality, as referred to in Chapter 7 of the Constitution;
- d) an organ of state as defined in section 239 of the Constitution, but excluding local spheres of government, the National Defence Force, the National Intelligence Agency and the South African Secret Service, and
- e) an employer bound by collective agreement in terms of section 23 or 31 of the Labour Relations Act, which appoints it as a designated employer in terms of this Act, to the extent provided for in the agreement.⁹⁴

'Designated groups' consist of 'black people, women and people with disabilities who

- a) are citizens of the Republic of South Africa by birth or descent; or
- b) became citizens of the Republic of South Africa by naturalisation -
 - i) before 27 April 1994; or
 - ii) after 26 April 1994 and who would have been entitled to acquire citizenship by naturalisation prior to that date but who were precluded by apartheid policies.⁹⁵

The phrase 'black people' means Africans, Coloureds, Indians⁹⁶ and Chinese.⁹⁷ The provisions of the EEA which govern unfair discrimination are discussed below in order to determine whether legislation aimed at addressing racial discrimination benefits black professional employees in the private sector.

⁸⁹ Section 2 of the EEA.

⁹⁰ Section 4 of the EEA.

⁹¹ Section 4 of the EEA.

⁹² Section 4 of the EEA.

⁹³ My emphasis.

⁹⁴ Section 1 of the EEA.

⁹⁵ Section 1 of the EEA.

⁹⁶ Section 1 of the EEA.

⁹⁷ *Chinese Association of South Africa & others v Minister of Labour* 59251/2007 (2008) ZAGPHC 174.

2.2.2 Unfair Discrimination

Sections 5 and 6 of the EEA are of importance to this discussion, by virtue of the fact that they deal with the elimination of unfair discrimination and the prohibition of unfair discrimination respectively. Even though both the EEA and the Constitution prohibit unfair discrimination, neither the EEA nor the Constitution provides a definition of the term 'unfair discrimination'.

In terms of section 5 of the EEA, 'every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice'. Section 5 places a positive obligation on all employers to eliminate unfair discrimination in any employment policy or practice, and to promote equal opportunity in the workplace.⁹⁸ As a result of chapter 2 of the EEA applying to all employees, this includes black professional employees in the private sector. These employees are protected as a result of the enactment of section 5 of the EEA since their employers are required by law to take steps to promote equal opportunity in the workplace by eliminating unfair discrimination.

In terms of section 6(1) of the EEA:

'no person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including *race*⁹⁹, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth or any other arbitrary ground.'

Similar to section 5 of the EEA, all employees including black professional employees in the private sector are protected by section 6 of the EEA which prohibits unfair discrimination on the grounds mentioned above.

The determination of the presence of unfair discrimination consists of a two-stage enquiry. The first stage is an enquiry into the establishment of the presence of discrimination,¹⁰⁰ while the second stage is an enquiry into the 'unfairness' of the discrimination.¹⁰¹ The two-stage enquiry is confirmed by section 11 of the EEA which governs the burden of proof in discrimination cases.¹⁰² In terms of this section,

'(1) If unfair discrimination is alleged on a ground listed in section 6(1), the employer

⁹⁸ Section 5 of the EEA.

⁹⁹ My emphasis.

¹⁰⁰ Du Toit D, Godfrey S & Cooper C et al *Labour Relations Law A Comprehensive Guide* 6ed (2015) 660.

¹⁰¹ Du Toit D, Godfrey S & Cooper C et al *Labour Relations Law A Comprehensive Guide* 6ed (2015) 660.

¹⁰² Section 11 of the EEA.

against whom the allegation is made must prove, on a balance of probabilities, that such discrimination -

- a) did not take place as alleged; or
 - b) is rational and not unfair, or is otherwise justifiable
- (2) If unfair discrimination is alleged on an arbitrary ground, the complainant must prove, on a balance of probabilities, that -
- a) the conduct complained of is not rational;
 - b) the conduct complained of amounts to discrimination; and
 - c) the discrimination is unfair.¹⁰³

The provisions contained in the EEA governing unfair discrimination should be interpreted in compliance with the Constitution.¹⁰⁴ The provisions contained in the EEA should also be interpreted in compliance with the international law obligations of the Republic, in particular those contained in the International Labour Organisation Convention (No.111) concerning Discrimination in Respect of Employment and Occupation 1958 ('Convention 111').¹⁰⁵ South Africa ratified this Convention in 1997.¹⁰⁶

Convention 111 provides a definition of the term 'discrimination', stating that it includes:

- 'a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity in treatment in employment or occupation;
- b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies.¹⁰⁷

Despite the fact that the South African approach is to separate the element of discrimination from the element of unfairness, Convention 111 combines these two elements into a single concept.¹⁰⁸ One is able to reconcile these two elements with the equivalent aspects of the Convention's definition. If one applies the Convention 111's definition, 'unfair discrimination' means

¹⁰³ See para 2.2.2.2 below.

¹⁰⁴ Section 3(a) of the EEA.

¹⁰⁵ Section 3(d) of the EEA.

¹⁰⁶ International Labour Organisation Convention (No 111) concerning Discrimination in Respect of Employment and Occupation 1958.

¹⁰⁷ Article 1 Convention 111.

¹⁰⁸ Du Toit D, Godfrey S & Cooper C *et al Labour Relations Law A Comprehensive Guide* 6ed (2015) 662.

- a) a distinction, exclusion or preference
- b) which has the effect of nullifying or impairing equality of opportunity or treatment or occupation, and
- c) is based on any of the grounds listed in section 6(1) of the EEA.¹⁰⁹

The definition quoted above is consistent not only with the Convention 111, but also with the Constitution. As a result of Convention 111 providing a definition of the term 'discrimination' and the provisions of the EEA having to be interpreted in compliance with the Convention 111, there is an additional reason for courts and claimants not to rely directly on the Constitution, but to make use of the EEA in the case of unfair discrimination claims.¹¹⁰ The meanings of the terms 'discrimination' and 'unfairness' are discussed below.

2.2.2.1 Discrimination

Discrimination refers 'to differential treatment of a degrading or prejudicial nature'.¹¹¹ The Constitutional Court has held that 'discrimination' denotes the 'potential to impair the fundamental dignity of persons as human beings or to affect them adversely in a comparably serious manner'.¹¹² The term 'discrimination' is not defined by the EEA; however, since the EEA should be interpreted in compliance with the Convention 111, the term 'discrimination' for the purposes of the EEA must be given the same meaning as in the Convention.¹¹³

In ascertaining the presence of discrimination, the intention of the perpetrator is irrelevant.¹¹⁴ The most important factor is the effect which the differential treatment has on the individual or group.¹¹⁵ This approach is consistent both with constitutional jurisprudence where it is settled that the presence of discrimination is determined objectively and with the Convention 111's definition of 'discrimination' which 'is similarly formulated in objective terms'.¹¹⁶ The fact that the test is objective is suitable as it implies that in the event of an employee claiming to have been racially discriminated against by an employer, the employer's reasons for having discriminated against the employee on the basis of race will not be considered, save for the defences provided for by the

¹⁰⁹ Du Toit D & Potgieter M *Unfair Discrimination in the workplace* (2014) 18.

¹¹⁰ Du Toit D & Potgieter M *Unfair Discrimination in the workplace* (2014) 17; Du Toit D 'The prohibition of unfair discrimination: Applying s 3(d) of the Employment Equity Act 55 of 1998' in Dupper OC & Garbers C *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 151; Henrico R 'South African constitutional and legislative framework on equality: how effective is it in addressing religious discrimination in the workplace?' (2015) *Obiter* 288.

¹¹¹ Dupper O & Garbers C *Equality in the Workplace Reflections from South Africa and Beyond* (2009) 139.

¹¹² *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) para 47.

¹¹³ See 2.2.2 below.

¹¹⁴ Du Toit D, Bosch D & Woolfrey D *Labour Relations Law A Comprehensive Guide* 5ed (2006) 580.

¹¹⁵ Du Toit D, Bosch D & Woolfrey D *Labour Relations Law A Comprehensive Guide* 5ed (2006) 580.

¹¹⁶ *City Council of Pretoria v Walker* (1998) 3 BCLR 257 (CC) 278; *Harksen v Lane No* 1998 (1) SA 300 (CC) para 53.

EEA.¹¹⁷

Similar to the Constitution, the EEA prohibits both direct and indirect discrimination. Direct and indirect discrimination is discussed below.

2.2.2.1.1 Direct Discrimination

Direct discrimination occurs when 'adverse action is taken against people precisely because they possess one of the characteristics listed in section 6(1) of the EEA'.¹¹⁸ Hepple confirms that the ideal of equality has been given seven meanings which are

'1) respect for equal worth, dignity and identity as a fundamental human right; 2) eliminating status inequality and disadvantage; 3) consistent treatment/ formal equality; 4) substantive equality of opportunity; 5) equality of capabilities; 6) equality of outcomes, 7) fairness.'¹¹⁹

He argues that the prohibition of direct discrimination is inspired by the first two meanings.¹²⁰ The argument of Hepple is supported in this thesis and is in line with substantive equality.¹²¹

Section 6(1) of the EEA contains the list of grounds on which discrimination is prohibited. There must be a causal link between the prohibited ground and the prejudicial treatment complained of.¹²² What this implies in the event of racial discrimination, is that direct racial discrimination occurs when a person is treated differently as a result of his or her race.

The meaning of direct discrimination has been analysed in a number of cases.¹²³ The Labour Court held that 'the mere existence of disparate treatment of people of, for example, different races, is not discrimination on the ground of race, unless the difference in race is the reason for the disparate treatment'.¹²⁴ The issue that arises is how close the causal link should be between the prohibited ground and the prejudicial treatment to constitute 'unfair discrimination'. There are five approaches insofar as the causal link is concerned. One view is that the prohibited ground must be

¹¹⁷ The relevant defences which may be raised by an employer are that the discrimination did not take place; that another employee committed the discrimination in which case section 60 of the EEA is applicable; that the discrimination complained of is due to an inherent requirement of the job; or where affirmative action measures were taken by the employer; Section 6(2) EEA. See para 2.2.2.2 and para 2.2.2.3 below.

¹¹⁸ Grogan J *Workplace Law* 10ed (2010) 96.

¹¹⁹ Hepple B & Du Toit D 'Can discrimination ever be fair?' in Malherbe K and Sloth-Nielson J *Labour Law into the Future: Essays in honour of D'Arcy du Toit* (2012) 3.

¹²⁰ Hepple B & Du Toit D 'Can discrimination ever be fair?' in Malherbe K and Sloth-Nielson J *Labour Law into the Future: Essays in honour of D'Arcy du Toit* (2012) 3.

¹²¹ Discussed below in paragraph 2.2.2.3.

¹²² *University of Cape Town v Auf der Heyde* (2001) 22 ILJ 2647 (LAC) 2657.

¹²³ For example, *Association of Professional Teachers & another v Minister of Education & Others* (1995) 16 ILJ 1048 (IC) and *Louw v Golden Arrow Bus Services* (2000) 21 ILJ 188 (LC).

¹²⁴ *Louw v Golden Arrow Bus Services (Pty) Ltd* (2000) 21 ILJ 188 (LC) 197.

the sole reason for the differentiation. The 'but for' test was applied by the Labour Appeal Court in *Woolworths (Pty) Ltd v Whitehead*¹²⁵ where judgment was given in the employer's favour on the basis that the employee was 'unable to show that, but for her pregnancy, she would have been appointed to the position'.¹²⁶ The second approach adopted by the Labour Court in *Walters v Transitional Local Council of Port Elizabeth* is that 'it is enough to show that the prohibited ground was the principal reason though not the sole reason for the differentiation'.¹²⁷

The third, fourth and fifth approaches were adopted in *Louw v Golden Arrow Bus Services (Pty) Ltd*.¹²⁸ The third approach is that 'any contamination by an impermissible reason is sufficient to find that the act or omission complained of is caused by it'.¹²⁹ The fourth approach is that 'an immaterial contamination is tantamount to no contamination', and the fifth approach is that 'discrimination will be unfair to the extent that it is based on an impermissible reason'.¹³⁰ Landman J held that the last approach is 'the only way to give effect to the injunction not to discriminate on an impermissible ground while leaving permissible discrimination intact'.¹³¹ This approach is agreed with as 'the employer will then have an opportunity to respond after which the court must decide on a balance of probabilities whether there was, in fact, discrimination on a prohibited ground. If the employer offers no explanation, the applicant will have discharged the onus'.¹³²

The EEA also prohibits discrimination on unlisted grounds which are found to be unfair. The prohibition of discrimination on any 'other arbitrary ground' was inserted into section 6(1) of the EEA by the 2013 Amendment Act.¹³³ Neither the Constitution nor the EEA provides criteria for determining the nature of such grounds. According to Convention 111, the criterion in respect of an unlisted ground as well as a listed ground is whether differentiation on that ground 'has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation'.¹³⁴ It must relate to 'personal attributes and characteristics' which if used as a basis for the discrimination could 'impair the fundamental human dignity of persons as human beings or...affect them adversely in a comparably serious manner'.¹³⁵ The Labour Court recognised 'qualifications, tertiary teaching and research experience, as unlisted grounds'.¹³⁶ In *McPherson v University of Kwazulu-*

¹²⁵ *Woolworths (Pty) Ltd v Whitehead* 2000 (6) BLLR 640 (LAC).

¹²⁶ *Woolworths (Pty) Ltd v Whitehead* 2000 (6) BLLR 640 (LAC) 649.

¹²⁷ *Walters v Transitional Local Council of Port Elizabeth* 2001 (1) BLLR 98 (LC) 110.

¹²⁸ *Louw v Golden Arrow Bus Services (Pty) Ltd* (2000) 21 ILJ 188 (LC) para 36.

¹²⁹ *Louw v Golden Arrow Bus Services (Pty) Ltd* (2000) 21 ILJ 188 (LC) para 36.

¹³⁰ *Louw v Golden Arrow Bus Service (Pty) Ltd* (2000) 21 ILJ 188 (LC) para 36.

¹³¹ *Louw v Golden Arrow Bus Service (Pty) Ltd* (2000) 21 ILJ 188 (LC) para 37.

¹³² Du Toit D, Bosch D & Woolfrey D *Labour Relations Law A Comprehensive Guide* 5ed (2006) 587.

¹³³ Employment Equity Amendment Act 47 of 2013.

¹³⁴ Section 3(d) of Convention 111.

¹³⁵ *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) para 53.

¹³⁶ *Stojce v University of KZN (Natal) & another* 2007 (3) BLLR 246 (LC) Other cases in which the courts identified attributes which would amount to unlisted grounds include *Larbi-Odam and Others v Member of the Executive Council of Education (North-West Province) and Another* 1998 (1) SA 745 (CC); *Khosa and Others v Minister of Social Development and Others* 2004 (6) SA 505 (CC).

Natal and another,¹³⁷ the Labour Court accepted that discrimination on the basis of an employee's temporary employment status is unfair.¹³⁸

2.2.2.1.2 Indirect Discrimination

There are a number of views regarding the meaning of indirect discrimination. One is that it 'comes about when an ostensibly neutral requirement adversely affects a disproportionate number of people from a protected group such as blacks'.¹³⁹ Another view is that indirect discrimination will only be present if the conduct complained of 'serves to nullify or impair equality of opportunity or treatment in employment or occupation meaning that it lacks an objective or job-related justification'.¹⁴⁰

Indirect discrimination can be summarised as being 'the application of an apparently neutral criterion which has a disproportionate impact on a particular group of employees that is definable in terms of a prohibited ground of discrimination (listed or unlisted) and cannot be justified in terms of objective employment related criteria'.¹⁴¹ The Labour Court has held that 'indirect race discrimination occurs when criteria, conditions or policies are applied which appear to be neutral, but which adversely affect a disproportionate number of a certain race group in circumstances where they are not justifiable'.¹⁴² It amounts to indirect discrimination when those qualities are mainly associated with a particular group of people, while excluding others.¹⁴³ Indirect discrimination may arise from the corporate culture within a place of employment¹⁴⁴ or 'opinions about qualities which are needed for a particular position'.¹⁴⁵ A conducive work environment which includes all employees with all their differences and their similarities is important.¹⁴⁶

As in the case with direct discrimination, it is not required that the indirect discrimination be intentional.¹⁴⁷ It is merely required that the situation be objectively examined in order 'to establish whether the standard has a disproportionate impact on the group concerned'¹⁴⁸ and whether it is objectively justified. In *Leonard Dingler Employee Executive Council and Others v Leonard Dingler*

¹³⁷ *McPherson v University of Kwazulu-Natal & another* (2008) 29 ILJ 674 (LC).

¹³⁸ *McPherson v University of Kwazulu-Natal & another* (2008) 29 ILJ 674 (LC) para 39.

¹³⁹ *Ntai & Others v South African Breweries Ltd* 2001 (2) BLLR 186 (LC) para 79.

¹⁴⁰ *Lagadien v University of Cape Town* 2001 (1) BLLR 76 (LC) para 14-15.

¹⁴¹ Du Toit D, Godfrey S & Cooper C *et al Labour Relations Law A Comprehensive Guide* 6ed (2015) 666.

¹⁴² *Leonard Dingler Employee Representative Council & others v Leonard Dingler (Pty) Ltd & others* 1997 (11) BLLR 1438 (LC) 292.

¹⁴³ Du Toit D & Potgieter M *Unfair Discrimination in the workplace* (2014) 27.

¹⁴⁴ See para 4.2 below.

¹⁴⁵ Du Toit D & Potgieter M *Unfair Discrimination in the workplace* (2014) 27.

¹⁴⁶ Thomas A 'Employment equity at selected companies in South Africa' (2003) *South African Journal of Labour Relations: Spring/Summer* 28.

¹⁴⁷ *Leonard Dingler Employee Representative Council & others v Leonard Dingler (Pty) Ltd & others* 1997 (11) BLLR 1438 (LC) 293.

¹⁴⁸ *Pretoria City Council v Walker* 1998 (3) BCLR 257 (CC) 278.

(Pty) Ltd & Others,¹⁴⁹ where the employer had two separate retirement funds for employees who were paid on a weekly basis and those who were paid on a monthly basis, the weekly-paid employees alleged unfair discrimination by their employer.¹⁵⁰ The reason for the allegation was that black employees were hired as weekly-paid employees while white employees were hired as monthly-paid employees.¹⁵¹ This resulted in only white employees having access to the Staff Benefit Fund.¹⁵² The Labour Court held that the employer had unfairly discriminated against the weekly-paid employees and that there was no reasonable or justifiable basis for this distinction.¹⁵³

2.2.2.1.3 Equal pay for work of equal value

The Employment Equity Regulations (the 'Regulations')¹⁵⁴ have been promulgated in terms of the EEA.¹⁵⁵ Regulation 3 is important to discrimination in that, similarly to section 5 of the EEA, it deals with eliminating unfair discrimination by obliging employers to eliminate differences, however these differences refer to those found in the terms and conditions of the employment. Regulation 3 reads:

- '1) An employer must, in order to eliminate unfair discrimination, take steps to eliminate differences in terms and conditions of employment, including remuneration of employees who perform work of equal value if those differences are directly or indirectly based on a listed ground or any arbitrary ground that is prohibited by section 6(1) of the Act.
- 2) Without limiting sub-regulation (1), an employer must ensure that employees are not paid different remuneration for work of equal value based on race, gender or disability.'

Regulation 4 stipulates 'that work performed by an employee-

- 1) is the same as the work of another employee of the same employee, if the work is identical or interchangeable.
- 2) is substantially the same as the work of another employee employed by that employer, if the work performed by the employee is sufficiently similar that they can reasonably be considered to be performing the same job, even if the work is not

¹⁴⁹ *Leonard Dingler Employee Representative Council & others v Leonard Dingler (Pty) Ltd & others* 1997 (11) BLLR 1438 (LC) 293.

¹⁵⁰ *Leonard Dingler Employee Representative Council & others v Leonard Dingler (Pty) Ltd & others* 1997 (11) BLLR 1438 (LC) 288.

¹⁵¹ *Leonard Dingler Employee Representative Council & others v Leonard Dingler (Pty) Ltd & others* 1997 (11) BLLR 1438 (LC) 288.

¹⁵² *Leonard Dingler Employee Representative Council & others v Leonard Dingler (Pty) Ltd & others* 1997 (11) BLLR 1438 (LC) 288.

¹⁵³ *Leonard Dingler Employee Representative Council & others v Leonard Dingler (Pty) Ltd & others* 1997 (11) BLLR 1438 (LC) 302.

¹⁵⁴ Employment Equity Regulations in *GN R595 GG 37873* of 1 August 2014.

¹⁵⁵ Section 55 of the EEA.

- identical or interchangeable;
- 3) is of the same value as the work of another employee of the same employee in a different job, if their respective occupations are accorded the same value in accordance with regulations 5 to 7.'

The Regulations serve the purpose of prescribing 'the criteria and methodology for assessing work of equal value'.¹⁵⁶ The Minister of Labour published the Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value which is aimed at providing practical guidance to employees and employers on the manner in which to apply the principle 'equal pay for work of equal value'.¹⁵⁷

Regulation 5 of the EEA assists in providing the necessary methodology for assessing work of equal value. Where a claim is made by an employee that Regulation 3 has been contravened by an employer, Regulation 5 would be utilised to determine whether Regulation 3 was in fact contravened. In terms of Regulation 5, it must first be established whether the work concerned is of equal value in accordance with regulation 6¹⁵⁸ and whether there is a difference in the terms and conditions of employment, including remuneration.¹⁵⁹ Thereafter it must be established, whether any such difference constitutes unfair discrimination by applying section 11 of the Act.¹⁶⁰

Regulation 5 was applied in *Govender and Umgungundlovu District Municipality*.¹⁶¹ The applicant was employed by Ernst and Young and was placed with the respondent on a contract basis in the position of Manager: Supply chain.¹⁶² The respondent advertised certain positions including Manager: Supply chain, which was advertised at task level 14, and Manager: Revenue, which was advertised at task level 16.¹⁶³ The applicant was encouraged by the respondent to apply for the position of Manager: Supply chain. However, 'the applicant was concerned about the position being advertised at task level 14, which in her opinion was too low and was equivalent to that of Manager: Revenue'.¹⁶⁴ The applicant contended that the work which she performed was of equal value to the work performed by the Manager: Revenue.¹⁶⁵ The applicant alleged that she was discriminated against unfairly on an arbitrary ground in relation to the difference between her salary and that of the Manager: Revenue.¹⁶⁶ In terms of Regulation 5 of the EEA, the first part of the enquiry into whether the conduct of the employer constituted unfair discrimination in terms of

¹⁵⁶ Regulation 2 of the EEA.

¹⁵⁷ 1.1 Code of Good Practice on Equal Pay/ Remuneration for Work of Equal Value GG 38837 1 June 2015.

¹⁵⁸ Regulation 5(1)(a) of the EEA

¹⁵⁹ Regulation 5(1)(b) of the EEA.

¹⁶⁰ Regulation 5(2) of the EEA.

¹⁶¹ *Govender and Umgungundlovu District Municipality* (2016) 37 ILJ 724 (CCMA).

¹⁶² *Govender and Umgungundlovu District Municipality* (2016) 37 ILJ 724 (CCMA) para 10.

¹⁶³ *Govender and Umgungundlovu District Municipality* (2016) 37 ILJ 724 (CCMA) para 13.

¹⁶⁴ *Govender and Umgungundlovu District Municipality* (2016) 37 ILJ 724 (CCMA) para 14.

¹⁶⁵ *Govender and Umgungundlovu District Municipality* (2016) 37 ILJ 724 (CCMA) para 23.

¹⁶⁶ *Govender and Umgungundlovu District Municipality* (2016) 37 ILJ 724 (CCMA) para 29.

section 6(4) of the EEA, required an assessment of whether the work of the applicant was the same, similar or of equal value to that of the comparator. The arbitrator referred to the burden of proof stipulated in section 11 of the EEA.¹⁶⁷ The first issue was to establish whether the conduct of the employer was rational. It was not disputed that the reason for the disparity in salary was that the position of Manager: Supply chain was graded lower than the position of Manager: Revenue, and that the lower salary, therefore, had nothing to do with any characteristic of the applicant.¹⁶⁸ As a result of the applicant's failure to prove that the conduct of the respondent was not irrational and her failure to prove that the respondent's conduct amounted to discrimination, her claim was dismissed.¹⁶⁹

In terms of Regulation 6(1), 'in considering whether work is of equal value, the relevant jobs must be objectively assessed taking into account the following criteria:

- 'a) the responsibility demanded of the work, including responsibility for people, finances and material;
- b) the skills, qualifications, including prior learning and experience required to perform the work whether formal or informal;
- c) physical, mental and emotional effort required to perform the work, and
- d) to the extent that it is relevant, the conditions under which work is performed, including physical environment, psychological conditions, time when and geographical location where work is performed.'

The factors set out in regulation 7 justify a differentiation in terms and conditions of employment. In terms of this regulation,

'if employees perform work that is of equal value, a difference in terms and conditions of employment, including remuneration, is not unfair discrimination if the difference is fair and rational and is based on any one or a combination of the following grounds:

- a) the individuals' respective seniority and length of service;
- b) the individuals' respective qualifications, ability, competence or potential above the minimum acceptable levels required for the performance of the job;
- c) the individuals' respective performance, quantity or quality of work, provided that the employees are equally subject to the employer's performance evaluation system, that the performance evaluation system is consistently applied.'

The Regulations make provision for discrimination on the basis of unequal pay for equal work. Evidence would have to be led to convince the court that the work is of comparable value. The law

¹⁶⁷ See para 2.2.2 above.

¹⁶⁸ *Govender and Umgungundlovu District Municipality* 2016 (37) ILJ 724 (CCMA) para 37.

¹⁶⁹ *Govender and Umgungundlovu District Municipality* (2016) 37) ILJ 724 (CCMA) para 43.

relating to 'equal pay for work of equal value' is important, because when employers pay certain employees less than other employees where work is of equal value, those who are paid less are afforded protection in the form of the above Regulations. These regulations are a step in the right direction and are important since they may be utilised by black professional employees in the workplace should they find themselves in such circumstances. The factors listed in Regulation 7 make provision for circumstances in which differences in terms and conditions of employment are justified. The factors contained in Regulation 7 which are important to this thesis are the individual's seniority, length of service, and qualifications. In the majority of situations, white employees will exceed the attainment of black employees with regard to the stated factors, thereby allowing employers to pay different remuneration to the relevant parties for work of equal value.¹⁷⁰ Regulation 7 does not address this and it prejudices black employees. The concern regarding seniority and length of service has its origin in inequality of opportunity to obtain work and qualifications during apartheid. These factors will be discussed further in Chapters 7 and 8 of this thesis.¹⁷¹

2.2.2.2 Unfairness

Once discrimination is proved to be present, the next step is to determine whether the discrimination is unfair. The meaning of discrimination suggests that the discrimination is rendered unfair when the discrimination is based on a prohibited ground, whether listed or unlisted.¹⁷² The Constitutional Court has held that where discrimination is based on one of the specified grounds, it is presumed to be unfair.¹⁷³ Discrimination is unfair if it is based on an aspect of the employee's personality. As a result of the fact that the 'human personality is not limited to the grounds referred to in section 6(1) of the EEA, the prohibition is extended to include discrimination on any other ground (referred to as an 'arbitrary ground' as it is referred to in the EEA).¹⁷⁴ The prohibition of discrimination on any 'other arbitrary ground' was inserted into the EEA in 2013.¹⁷⁵ As opposed to discrimination on a specified ground, the unfairness of discrimination on an unspecified ground cannot be presumed.¹⁷⁶

Section 11 of the EEA¹⁷⁷ governing the burden of proof was amended to distinguish between the burden of proof in respect of a claim based on a listed ground, on the one hand, and the burden of

¹⁷⁰ Even though the term 'designated employee' does not apply in this part of the legislation, the term 'blacks' is used in the same manner as in chapter III of the EEA.

¹⁷¹ See para 7.2, para 7.5.3.2 & para 8.3.3.2 below.

¹⁷² Du Toit D, Godfrey S & Cooper C *et al Labour Relations Law A Comprehensive Guide* 6ed (2015) 674.

¹⁷³ Du Toit D, Godfrey S & Cooper C *et al Labour Relations Law A Comprehensive Guide* 6ed (2015) 661.

¹⁷⁴ Du Toit D & Potgieter M *Unfair Discrimination in the workplace* (2014) 24.

¹⁷⁵ Employment Equity Amendment Act 47 of 2013.

¹⁷⁶ Du Toit D & Potgieter M *Unfair Discrimination in the workplace* (2014) 25.

¹⁷⁷ See para 2.2.2 above.

proof in respect of a claim based on an arbitrary ground on the other. As far as subsection 11(1) of the EEA, governing claims based on a listed ground, is concerned, the onus rests on the employer, while in terms of subsection 11(2), governing claims based on an arbitrary ground, the onus rests on the complainant. The complainant is required to specify the ground(s) on which he or she alleges that the discrimination took place in order to determine on which party the onus rests. This is necessary to determine whether the discrimination falls within the scope of unfair discrimination as set out in section 6(1) of the EEA. If one of the listed grounds is alleged, section 6 will automatically be applicable.¹⁷⁸ Discrimination on an unlisted ground, however, may also be unfair if that ground is analogous to a listed ground in that it relates to attributes and characteristics which could impair the fundamental human dignity of persons as human beings, or affects them adversely in a comparably serious manner as in the case of listed grounds.¹⁷⁹

'Arbitrary grounds' is a category of unspecified grounds. Thus 'even if [these grounds] are not necessarily analogous to specified grounds, they are nevertheless arbitrary.'¹⁸⁰ Unfairness of discrimination on an arbitrary ground should therefore be given a broader meaning than the test thus far applied to unlisted or unspecified grounds.¹⁸¹ The term 'arbitrary' could only have been introduced in order to broaden the protection of employees against discrimination.'¹⁸² Discrimination may be shown to be unfair if the ground can be shown to be arbitrary in the sense of being random, illogical, subjective or otherwise unjustifiable even if it is not clearly related to any particular attributes and characteristics of the complainant.¹⁸³

Section 11 of the EEA imposes a burden on the employee to allege facts which are sufficient to raise a credible possibility that unfair discrimination has taken place.¹⁸⁴ The employer will then have an opportunity to respond. In the event of discrimination being alleged on a listed ground, an employer would be required to prove a) that such discrimination had not taken place¹⁸⁵ or b) that it 'is rational and not unfair, or is otherwise justifiable'.¹⁸⁶ The first two defences included in section 11(1) of the EEA require that one or both of the elements of unfair discrimination are absent.¹⁸⁷ The discrimination would not be rational if the differentiation manifests 'naked preferences' that serve no legitimate purpose.¹⁸⁸ The rationality of the conduct could be tested against existing case law where the rationality of an employer's decision was in issue.¹⁸⁹ Here a rational connection to the

¹⁷⁸ Du Toit D & Potgieter M *Unfair Discrimination in the workplace* (2014) 137.

¹⁷⁹ *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) para 53.

¹⁸⁰ Du Toit D & Potgieter M *Unfair Discrimination in the workplace* (2014) 25.

¹⁸¹ Du Toit D & Potgieter M *Unfair Discrimination in the workplace* (2014) 136.

¹⁸² Du Toit D & Potgieter M *Unfair Discrimination in the workplace* (2014) 136.

¹⁸³ Du Toit D & Potgieter M *Unfair Discrimination in the workplace* (2014) 137.

¹⁸⁴ Du Toit D & Potgieter M *Unfair Discrimination in the workplace* (2014) 92.

¹⁸⁵ Section 11(1)(a) of the EEA.

¹⁸⁶ Section 11(1)(b) of the EEA.

¹⁸⁷ Du Toit D & Potgieter M *Unfair Discrimination in the workplace* (2014) 92.

¹⁸⁸ *Pioneer Foods (Pty) Ltd v Workers against Regression & others* case no C687/15 para 53.

¹⁸⁹ Du Toit D & Potgieter M *Unfair Discrimination in the workplace* (2014) 92.

employer's business should be established.¹⁹⁰ Justifiability requires a proportionality test that takes into account any defences available to the employer being an inherent requirement of the job or where affirmative action measures are taken by the employer.¹⁹¹

In the event of discrimination based on race being raised, it will be presumed to be unfair since race is a prohibited ground.¹⁹² A claim of unfair discrimination based on race may be defended by an employer by demonstrating that the conduct complained of did not take place as alleged, or is rational and not unfair or is due to an inherent requirement of the job or due to affirmative action measures taken by the employer which are consistent with the purposes of the EEA.¹⁹³

2.2.2.3 The Statutory Defences to claims of unfair discrimination

In terms of the EEA

'it is not unfair to-

- a) take affirmative action measures consistent with the purposes of this Act;¹⁹⁴ or
- b) distinguish, exclude or prefer any person on the basis of an inherent requirement of the job.¹⁹⁵

The issue that arises is whether the statutory defences that may be raised against a claim of unfair discrimination viz affirmative action measures or an inherent requirement of the job, amount to discrimination which is fair or whether it is neither 'unfair' nor 'discrimination'. In making this determination it is important to differentiate between formal equality and substantive equality. Insofar as formal equality is concerned

'formal equality presupposes that all persons are equal bearers of rights within a just social order. According to this view inequality is an aberration which can be eliminated by extending the same rights and entitlements to all in accordance with the same 'neutral' norm or standard'.¹⁹⁶

When it comes to formal equality, differentiation of any nature is regarded as discrimination irrespective of whether the differentiation is aimed at redressing past discrimination.¹⁹⁷ Substantive

¹⁹⁰ *Pioneer Foods (Pty) Ltd v Workers against Regression & others* case no C687/15 para 52.

¹⁹¹ Section 6(2) of the EEA.

¹⁹² Dupper O & Garbers C *Equality in the Workplace Reflections from South Africa and Beyond* (2009) 154.

¹⁹³ Sections 11(1) and 6(2) EEA.

¹⁹⁴ See para 3.4.2.4 below.

¹⁹⁵ Section 6(2) of the EEA.

¹⁹⁶ Van de Lanotte J, Sarken J & Haeck Y Van der Lanotte et al *The principle of equality: A South African and Belgian perspective* (2001) 144.

¹⁹⁷ Partington J & Van Der Walt A 'The development of defences in unfair discrimination cases (part 2)' (2005)26 *Obiter*

equality, on the other hand,

'recognises the deep levels of systematic inequality on the basis of race, gender and other grounds, which have been inherited from the past. It proposes that in order for full equality to be achieved, this systematic inequality needs to be addressed and eradicated and that those who suffered from disadvantage in the past are entitled to positive unequal treatment in the present.'¹⁹⁸

Substantive equality thus aims to address the inequalities of the past. From a formal equality perspective, affirmative action may be viewed as being 'reverse discrimination' against white people.¹⁹⁹ Affirmative action is not viewed as 'reverse discrimination' insofar as substantive equality is concerned since substantive equality embraces the aim of addressing the inequalities of the past. Anti-discrimination measures protect equality and confirm that no discrimination may take place, while it has been argued that affirmative action measures allow unequal treatment which is deemed to be fair discrimination in the case of affirmative action²⁰⁰ and an inherent requirement of the job.

In *University of South Africa v Reynhardt*²⁰¹ the statutory defence raised against the alleged claim of discrimination was affirmative action. The Labour Appeal Court held that once the respondent could show that he had been discriminated against on the ground of race, the onus then rested on the appellant to satisfy the court, on a balance of probabilities, that the discrimination was not unfair.²⁰²

Despite the fact that courts have determined that action taken based on the two statutory defences amount to discrimination which is fair,²⁰³ it has been argued that inherent requirements of a job and affirmative action measures do not amount to discrimination at all.²⁰⁴

In terms of the Convention 111²⁰⁵ 'any distinction, exclusion or preference in respect of a particular

596.

¹⁹⁸ Cooper C 'The boundaries of equality in labour law' (2004) (25) 5 *ILJ* 817.

¹⁹⁹ Partington J & Van Der Walt A 'The development of defences in unfair discrimination cases (part 2) 2005 (26) *Obiter* 596; Vermeulen LP & Coetzee M 'Perceptions of the dimensions of the fairness of affirmative action: a pilot study' (2006) 37(2) *S. Afr. J. Bus. Manage* 53.

²⁰⁰ Coetzee M & Bezuidenhout M 'The fairness of affirmative action: In the eye of the beholder' (2011) 15 *South African Business Review* 82.

²⁰¹ *University of South Africa v Reynhardt* (2010) 31 *ILJ* 2368.

²⁰² *University of South Africa v Reynhardt* (2010) 31 *ILJ* 2368 para 21.

²⁰³ *Solidarity obo Barnard v South African Police Service* 2014 ZACC 23 para 21; *University of South Africa v Reynhardt* (2010) 31 *ILJ* 2368 para 21.

²⁰⁴ Du Toit D & Potgieter M *Unfair Discrimination in the workplace* (2014) 93.

²⁰⁵ The provisions of the EEA should be interpreted in compliance with the Convention 111.

job based on the inherent requirements thereof shall not be deemed to be discrimination.¹²⁰⁶ The Convention further confirms that

'1) Special measures of protection or assistance provided for in other Conventions or recommendations adopted by the International Labour Conference shall not be deemed to be discrimination.

2. Any Member may, after consultation, with representative employers' and workers' organisations, where such exist, determine that other special measures designed to meet the particular requirements of persons who, for reasons such as sex, age, disablement, family responsibilities or social or cultural status, are generally recognised to require special protection or assistance, shall not be deemed to be discrimination.¹²⁰⁷

Du Toit supports the view that the statutory defences do not amount to discrimination at all, and argues that by rendering the two statutory defences discrimination it would render the statutory defences irrelevant.²⁰⁸ An example provided by Du Toit is that where an employer establishes that the alleged racial discrimination amounts to an affirmative action measure, the employer will thereby be acknowledging to have committed an act of discrimination on a racial basis which is a listed ground and therefore it will be presumed to be unfair.²⁰⁹ Hepple states that the argument that the statutory defences do not amount to discrimination is based on the fact that both inherent requirements of a job and affirmative action measures are based on legitimate purposes despite the fact that both are based on prohibited grounds.²¹⁰ Hepple argues that affirmative action measures do not amount to 'fair' discrimination, but that it is merely a means to achieve the right to substantive equality of opportunity.²¹¹ When referring to section 9(2) of the Constitution, the Constitutional Court²¹² held that 'restitutionary measures sometimes referred to as affirmative action may be taken to promote the achievement of equality'.²¹³ The Constitutional Court held further that the 'remedial measures are not a derogation from, but a substantive and composite part of the equality protection envisaged by the provisions of the Constitution as a whole'.²¹⁴

Since affirmative action measures have been created in order to remedy the imbalances caused by apartheid, and the provisions relating to affirmative action forming an integral part of the EEA, this topic is discussed further in chapter 3.

²⁰⁶ Article 1(2) of Convention 111.

²⁰⁷ Article 5 of Convention 111.

²⁰⁸ Du Toit D & Potgieter M *Unfair Discrimination in the workplace* (2014) 94.

²⁰⁹ Du Toit D & Potgieter M *Unfair Discrimination in the workplace* (2014) 94.

²¹⁰ Hepple B 'Can discrimination ever be fair?' in Malherbe K & Sloth Nielsen J *Labour Law into the Future: Essays in honour of D'Arcy du Toit* (2012) 16.

²¹¹ Hepple B 'Can discrimination ever be fair?' in Malherbe K & Sloth Nielsen J *Labour Law into the Future: Essays in honour of D'Arcy du Toit* (2012) 16.

²¹² *Minister of Finance v Van Heerden* 2004 (12) BLLR 1181 (CC).

²¹³ *Minister of Finance v Van Heerden* 2004 (12) BLLR 1181 (CC) para 28.

²¹⁴ *Minister of Finance v Van Heerden* 2004 (12) BLLR 1181 (CC) para 32.

2.2.2.4 Remedies for Unfair Discrimination

In circumstances where an employee is successful in an unfair discrimination claim in arbitration proceedings, the commissioner of the CCMA has the power to 'make any appropriate arbitration award that gives effect to a provision of the [EEA]'.²¹⁵ In the event of an employee being successful in establishing that he or she has been unfairly discriminated against, the 'Labour Court may make an order which is just and equitable in the circumstances'.²¹⁶ Such order may include payment of compensation by the employer to the employee;²¹⁷ payment of damages by the employer to the employee;²¹⁸ or a direction to the employer to take steps to prevent the same unfair discrimination or similar practices from taking place in the future.²¹⁹ In addition, the Labour Court may also make an order directing that an employer, other than a designated employer, comply with Chapter III of the EEA as if it were a designated employer,²²⁰ or an order directing that the employer's name be removed from the register referred to in section 41,²²¹ or to publish the Court's order.²²²

These remedies serve as a form of protection to black professional employees who are able to access these remedies in the event of their success with unfair discrimination claims. The legislature should be commended for the variety of remedies which are available to these employees. As a result of these provisions applying to all employees, black professional employees in the private sector are protected as a consequence.

2.3 CONCLUSION

The objective of this thesis is to determine whether the slow pace of racial transformation in South Africa with regards to black professional employees employed within the private sector is an issue that the law can address. In order to make such a determination this chapter aims to determine the role that legislation aimed at addressing racial discrimination plays in protecting black professional employees in the private sector.

This chapter shows that effort has been made by the legislature to address racial transformation. The provisions of the EEA that have been discussed in this chapter apply to all employers and employees and thus include black professional employees in the private sector. In terms of the

²¹⁵ Section 48 of the EEA.

²¹⁶ Section 50(2) of the EEA.

²¹⁷ Section 50(2)(a) of the EEA.

²¹⁸ Section 50(2)(b) of the EEA.

²¹⁹ Section 50(2)(c) of the EEA.

²²⁰ Section 50(2)(d) of the EEA.

²²¹ Section 41 of the EEA states that the Minister must keep a register of designated employers who have submitted reports as required in terms of Section 21 of the EEA.

²²² Section 50(2)(f) of the EEA.

EEA, employers are required to take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in terms of section 5 of the EEA, and unfair discrimination is prohibited by section 6 of the EEA on various grounds which includes the ground of race. Black professional employees in the private sector are protected as a result of the enactment of sections 5 of 6 of the EEA. In determining the presence of discrimination, the intention of the perpetrator is irrelevant. This implies that where an employee shows that he or she has been discriminated against by his or her employer on a racial basis, whether directly or indirectly, the employer's reasons for having discriminated against the employee will not be taken into consideration, save for the defences which may be raised by an employer in terms of the EEA.

This chapter sets out the ways in which the presence of unfair discrimination is established. Section 11 of the EEA outlines the burden of proof to be utilised in unfair discrimination cases. In the event of an employee instituting a claim of racial discrimination, liability may be avoided where the employer proves that the discrimination did not occur, or that such discrimination is rational and not unfair, or that the statutory defences of an inherent requirement of the job or affirmative action have been successfully raised by the employer.²²³ This chapter outlines the remedies which are available to all employees who are successful with unfair discrimination claims. As a result of these remedies being available to all employees this includes black professional employees in the private sector. This implies that black professional employees in the private sector can access these remedies being available to employees in the event of their success with unfair discrimination claims. The discussion in this chapter illustrates that while courts have accepted that the two statutory defences amount to fair discrimination, it has been argued that the two defences may not amount to discrimination at all.

This chapter has revealed that indirect discrimination may arise from the corporate culture of an enterprise. The role which the corporate culture plays in racial transformation will be discussed in chapter 4.

The aim of this chapter was to determine the role that legislation aimed at addressing racial discrimination plays in protecting black professional employees in the private sector. While this chapter has revealed some of the provisions which have been enacted by the legislature which protects black professional employees in the private sector, it is necessary to determine whether the provisions governing affirmative action benefits black professional employees. It is for this reason that the provisions relating to affirmative action measures are discussed in the chapter that follows.

²²³ Section 6(2) EEA.

CHAPTER 3

THE STATUTORY FRAMEWORK FOR AFFIRMATIVE ACTION

3.1 INTRODUCTION

'Affirmative action measures' are 'measures designed to ensure that suitably qualified people from designated groups have *equal employment opportunities* and are *equitably represented*²²⁴ in all occupational levels in the workforce of a designated employer'.²²⁵

The supporters of affirmative action perceive affirmative action as being an equitable manner by which groups who were previously discriminated against can be repaid, and therefore as a means to correct the wrongs of the past which were created by unfair discrimination.²²⁶ Affirmative action aims to allow groups that have been previously discriminated against to catch up with the groups who were not discriminated against.²²⁷ As far as affirmative action is concerned, the Constitutional Court held:

'In section 8(3), the Interim Constitution contains an express recognition that there is a need for measures to seek to alleviate the disadvantage which is the product of past discrimination. We need, therefore, to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not.'²²⁸

Chapter 2 determined the role that legislation aimed at addressing racial discrimination plays in protecting black professional employees in the private sector. Chapter 2 revealed some of the efforts made by the legislature which protects black professional employees in the private sector, such as, the provisions governing unfair discrimination and the remedies which are available to

²²⁴ My emphasis. See para 3.4.2 below.

²²⁵ Section 15(1) of the EEA.

²²⁶ Budeli-Nemakonde M 'Employment equity and affirmative action in South Africa: A review of the Jurisprudence of the courts since 1994' (2016) 3 *African Journal of Democracy and Governance* 83.

²²⁷ Budeli-Nemakonde M (2016) 84.

²²⁸ *President of the Republic of South Africa and Another v Hugo* (1997) 6 BCLR 708 (CC) 729 F-H referred to in *Independent Municipal & Allied Workers Union v Greater Louis Trichardt Transitional Local Council* (2000) 21 ILJ 1119 (LC).

employees who are successful with unfair discrimination claims. This chapter determines whether black professional employees in the private sector benefit from affirmative action legislation. It is for this reason that this chapter consists of a discussion of the provisions of the EEA that govern affirmative action. In addition to making the aforementioned determination, this chapter aims to establish what the shortcomings are of the legal framework and the appropriate standard to apply in assessing affirmative action measures taken in terms of the EEA. This chapter provides an in depth discussion of affirmative action measures, as well as the procedural obligations which the EEA places on designated employers, and examines the standards which may be used in assessing affirmative action measures.

3.2 AFFIRMATIVE ACTION MEASURES

There are two opposing views regarding affirmative action. The first view is that affirmative action is an exception to the right to equality (formal equality),²²⁹ while the second view sees affirmative action as part of the right to equality (substantive equality).²³⁰ It has been argued that the Constitution creates tensions, because it is committed to recognising and redressing the discrimination of the past by way of affirmative action, while it is similarly committed to a society that is non-racial.²³¹ It is submitted that these tensions do not exist, because the Constitution embraces a substantive conception of equality and since the 'essence of restitutionary measures is to guarantee the right to equality, their implementation cannot be subjected to an individual's right to equality'.²³² Affirmative action 'is thus neither an exception to, nor a qualification of the right to equality'.²³³ To view affirmative action as an exception to the right to equality is problematic, because one then utilises a conception of equality that does not require affirmative action: this is not the case in South Africa, because affirmative action forms an important part of the right to equality as it is a means to achieve a more equal society.²³⁴

Affirmative action presents itself as both a defence²³⁵ and as a duty.²³⁶ It is a defence in that section 6(2) of the EEA provides that 'it is not unfair to take affirmative action measures consistent with the purposes of the EEA'. Section 6(2) of the EEA, therefore confirms that differential

²²⁹ In terms of formal equality any action that uses grounds such as race or gender as a criterion for decision making whether directed at in favour or against a disadvantaged group would be unlawful. - McGregor M 'The nature of affirmative action: a defence or a right' (2003) 15 *SA Merc LJ* 423.

²³⁰ See paragraph 2.2.2.3 above.

²³¹ Preamble and sections 1(b) and 9 of the Constitution; *Solidarity obo Barnard v South African Police Service* 2014 ZACC 23 para 77.

²³² *Solidarity obo Barnard v South African Police Service* 2014 ZACC 23 para 231.

²³³ McGregor M 'The nature of affirmative action: a defence or a right' (2003) 15 *SA Merc LJ* 422; Dupper O 'Affirmative action and substantive equality: The South African experience' (2002) 14 *SA Merc LJ* 276.

²³⁴ McGregor M 'The nature of affirmative action: a defence or a right' (2003) 15 *SA Merc LJ* 423; See para 2.2.2.3 above.

²³⁵ Section 6(2)(a) of the EEA.

²³⁶ Section 13(1) of the EEA.

treatment for the purposes of affirmative action does not amount to unfair discrimination. In order for an employer to escape liability, the affirmative action measure must be consistent with the purpose of the EEA.²³⁷

The issue that arises is whether it is sufficient for an employer to show that the beneficiary of an affirmative action measure is a member of a group which was discriminated against during apartheid or whether the employer must prove that the successful applicant was personally disadvantaged. In *Stoman v Minister of Safety and Security & others*²³⁸ the Labour Court answered this question by stating that 'emphasis is certainly on the group or category of persons of which the particular member happens to be a member...the aim is to advance the category of persons to which he belongs'.²³⁹

Just as affirmative action is a defence, so too it is a duty, in that it obliges every designated employer to implement affirmative action measures for people from designated groups in order to achieve employment equity²⁴⁰ and to carry out certain duties prescribed by the EEA which consist of the duties to consult with their employees, to conduct an analysis, to prepare an employment equity plan and to report to the Director-General of the Department of Labour.²⁴¹

The Labour Court has held that the EEA provides employees with a right to affirmative action.²⁴² The EEA provides for the affirmative measures to be implemented by designated employers. In the event of black professional employees in the private sector being employed by designated employers they are able to benefit from the opportunities which are made available to them as a consequence of their employer being required to implement affirmative action measures. In terms of section 15(2) these affirmative action measures must include

- 'a) *measures to identify and eliminate employment barriers*,²⁴³ including unfair discrimination, which adversely affect people from designated groups;
- b) measures designed to *further diversity in the workplace*²⁴⁴ based on equal dignity and respect of all people;
- c) *making reasonable accommodation*²⁴⁵ for people from designated groups in order to ensure that they *enjoy equal opportunities*²⁴⁶ and are *equitably represented*²⁴⁷ in the

²³⁷ See para 3.4.2.4 below.

²³⁸ *Stoman v Minister of Safety and Security and others* (2002) 23 ILJ 1020 (T) 1034 B-E.

²³⁹ *Stoman v Minister of Safety and Security and others* (2002) 23 ILJ 1020 (T) 1035 F-I.

²⁴⁰ Section 13(1) of the EEA, *Harmse v City of Cape Town* (2003) 24 ILJ 1130 (LC) para 33.

²⁴¹ Section 13(2) of the EEA.

²⁴² *Harmse v City of Cape Town* (2003) 24 ILJ 1130 (LC) para 49.

²⁴³ My emphasis.

²⁴⁴ My emphasis.

²⁴⁵ My emphasis.

²⁴⁶ My emphasis.

- workforce of a designated employer;
- d) subject to subsection (3), measures to-
- i) ensure the *equitable representation*²⁴⁸ of suitably qualified people from designated groups in all occupational levels in the workforce; and
 - ii) *retain and develop people*²⁴⁹ from designated groups and to *implement appropriate training measures*,²⁵⁰ including measures in terms of an Act of Parliament providing for skills development'.

The affirmative action measures above will be discussed in more detail in the following paragraphs.

3.2.1 Measures to identify and eliminate employment barriers

The first type of affirmative action measure to be implemented by designated employers is 'measures to identify and eliminate employment barriers, including unfair discrimination, which adversely affect people from designated groups'.²⁵¹ The fact that the legislature deliberately requires the provisions relating to affirmative action measures only to apply to designated employers implies that employers who are not designated employers are not required to identify and eliminate employment barriers, including unfair discrimination, which adversely affects people from designated groups. This is a shortcoming of the legal framework.

Employment barriers include 'barriers that may contribute to the underrepresentation or underutilisation of employees from designated groups'²⁵² and 'barriers that may contribute to the lack of affirmation of diversity in the workplace'.²⁵³ Employment barriers are identified when the consultation by a designated employer takes place as required in terms of section 16 of the EEA, and when the analysis is conducted by the employer in terms of section 19(1) of the EEA. In the event of employment barriers being identified, this should be eliminated by the designated employer.²⁵⁴

In a number of situations, these employment barriers 'are deeply imbedded in the workplace policies, procedures and workplace organisation which results in it being difficult to remove'.²⁵⁵ The removal of these barriers will therefore take time and effort through the revision of policies,

²⁴⁷ See para 3.4.2 below.

²⁴⁸ See para 3.4.2 below.

²⁴⁹ My emphasis.

²⁵⁰ My emphasis.

²⁵¹ Section 15(2)(a) of the EEA.

²⁵² Provision 6.1.3.1(b) Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans GN R424 in GG 40817 of 12 May 2017.

²⁵³ Provision 6.1.3.1(b) Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans GN R424 in GG 40817 of 12 May 2017.

²⁵⁴ Section 15(2)(a) of the EEA.

²⁵⁵ Tinarelli S *Employers' guide to the Employment Equity Act* 7ed (2012) 51.

procedures and work practices. The EEA recognises the length of time of this process, and is the reason why a period of five years is provided to designated employers in order to implement the provisions.²⁵⁶

In the event of black professional employees in the private sector being employed by a designated employer, they benefit from the obligation placed on designated employers to identify and eliminate the employment barriers which they may be subjected to.

3.2.2 Measures designed to further diversity in the workplace

The second type of affirmative action measures is 'measures designed to further diversity in the workplace based on equal dignity and respect of all people'.²⁵⁷ The term 'diversity' has been defined as 'acknowledging, understanding, accepting, valuing and celebrating differences among people with respect'.²⁵⁸ Despite the fact that further diversity, in a numerical sense, by having more employees from designated groups is important, this is not the only objective. The objective here is 'to promote diversity in a qualitative sense by ensuring that employees from designated groups are fully integrated employees, or to put it differently, to make the workplace genuinely accommodative of persons from different backgrounds'.²⁵⁹ The objective is to ensure that none of the employees are marginalised and that all the employees 'feel equally valued'.²⁶⁰

Employees who participated in a study conducted by Mazibuko and Govender perceived that an employer valuing diversity enhances employee performance and 60 percent of employees who participated in the same study perceived that 'an employer's understanding of the value of diversity enhances productivity and innovation'.²⁶¹ Employers should make every reasonable effort to ensure that the needs of the employees whose contribution is valued are met, 'especially those from designated groups who may feel relatively isolated in their positions and who may be exposed to indirect discrimination'.²⁶² The employees' knowledge of what is expected is important in boosting confidence, making employees feel that they belong and knowing that they have a voice.²⁶³

²⁵⁶ See para 3.3.3 below.

²⁵⁷ Section 15(2)(b) of the EEA.

²⁵⁸ Mazibuko JV & Govender KK 'Exploring workplace diversity and organisational effectiveness: A South African exploratory case study' (2017) 15 *SAJHRM* 866.

²⁵⁹ Du Toit D & Potgieter M *Unfair Discrimination in the workplace* (2014) 158.

²⁶⁰ Du Toit D & Potgieter M *Unfair Discrimination in the workplace* (2014) 158.

²⁶¹ Mazibuko JV & Govender KK 'Exploring workplace diversity and organisational effectiveness: A South African exploratory case study' (2017) 15 *SAJHRM* 868. The study explored the perceptions of employees on diversity. A survey was conducted in an enterprise in South Africa where 227 questionnaires were completed.

²⁶² Du Toit D & Potgieter M *Unfair Discrimination in the workplace* (2014) 161.

²⁶³ Du Toit D & Potgieter M *Unfair Discrimination in the workplace* (2014) 159.

The legislature's requirement that affirmative action measures should only apply to designated employers implies that employers who are not designated employers are not required to implement measures designed to further diversity in the workplace. This is a shortcoming of the legal framework.

In circumstances where black professional employees in the private sector are employed by a designated employer, they benefit from the obligation placed on designated employers to implement measures designed to further diversity since their employers would then be required to ensure that they are fully integrated in the workplace and that they do not feel isolated.

3.2.3 Making reasonable accommodation for people from designated groups

The third measure involves 'making reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce'.²⁶⁴

'Reasonable accommodation' is defined as 'any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to or participate or advance in employment'.²⁶⁵ This entails removing barriers or 'discriminatory practices which hinder persons from designated groups from gaining access to or participating and advancing'²⁶⁶ in the place of employment.

Any special needs of employees from designated groups should be catered for as far as reasonably possible. In circumstances where it is possible for an employer to 'make reasonable accommodation for the needs and circumstances of an employee without undue hardship to the employer, and the employer refuses to do so, this may constitute unfair discrimination'.²⁶⁷ An example of where this is relevant in the case of racial discrimination, would be where an employer provides training in Afrikaans knowing that the majority of the black employees may be disadvantaged in the process, and refusing to provide training in a language which the black employees will understand. In these circumstances it would be possible for the employer to make reasonable accommodation for the needs and circumstances of the relevant employees by providing training in a language which is understood by the employees without undue hardship to the employer. Instances have been reported of black people being excluded in workplaces due to

²⁶⁴ Section 15(2)(c) of the EEA.

²⁶⁵ Section 1 of the EEA.

²⁶⁶ Tinarelli S *Employers' guide to the Employment Equity Act* 7ed (2012) 52.

²⁶⁷ Item 5.2.2 Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices GN 1358 of 4 August 2005.

their employer's use of the Afrikaans language.²⁶⁸ In the event of black professional employees in the private sector being employed by a designated employer, they benefit from the obligation placed on designated employers to make reasonable accommodation for their needs.

The requirement that affirmative action measures should only apply to designated employers implies that employers who are not designated employers are not required to make reasonable accommodation for people from designated groups. This is a shortcoming of the legal framework.

3.2.4 Measures to ensure equitable representation of people from designated groups

The next type of affirmative action measure to be implemented by designated employers is measures to 'ensure the equitable representation of suitably qualified people from designated groups in all occupational levels in the workforce'.²⁶⁹ This affirmative action measure is an additional manner in which people from designated groups, which includes black professional employees in the private sector, are assisted by the EEA. In the event of black professional employees in the private sector being suitably qualified they are able to benefit from the obligation placed on designated employers to ensure equitable representation.

In terms of section 20(3) of the EEA, a person may be declared suitably qualified for a job 'as a result of one or a combination of that person's formal qualifications, prior learning, relevant experience or capacity to acquire within a reasonable period, the ability to do the job'. In determining whether a person is suitably qualified for a job, an employer may not unfairly discriminate against a person, solely on the grounds of that person's lack of experience.²⁷⁰

The issue that arises is how great the skills, experience or qualification gap should be before the appointment of a less qualified or experienced candidate becomes irrational. This question was answered in *Stoman v Minister of Safety and Security & others*,²⁷¹ where it was held that the gap may be considerable.²⁷² The Transvaal Provincial Division of the High Court (as it was previously known) stated that 'an affirmative action appointment is not necessarily unfair merely because the designated candidate is less qualified and that the requirement of rationality remains. The appointment of people who are wholly unqualified or less than suitably qualified or incapable cannot be justified'.²⁷³

²⁶⁸ Nkomo S 'Moving from the letter of the law to the spirit of the law: the challenges of realising the intent of employment equity and affirmative action' (2011) *Transformation* 136.

²⁶⁹ Section 15(2)(d)(i) of the EEA.

²⁷⁰ Section 20(5) of the EEA.

²⁷¹ *Stoman v Minister of Safety and Security and others* (2002) 23 ILJ 1020 (T).

²⁷² *Stoman v Minister of Safety and Security and others* (2002) 23 ILJ 1020 (T) 1033.

²⁷³ *Stoman v Minister of Safety and Security and others* (2002) 23 ILJ 1020 (T) 1034.

In *Reynhardt v University of South Africa*,²⁷⁴ Professor Reynhardt applied for the position of Dean of Science for a second term.²⁷⁵ A coloured junior professor was appointed instead.²⁷⁶ Reynhardt claimed discrimination on the basis that he is white.²⁷⁷ The Labour Court held that the university's equity policy used merit as the sole criterion once equity targets have been achieved.²⁷⁸ The equity target had been more than satisfied among deans, and as such, emphasis was meant to be placed solely on the criterion of merit as opposed to equity targets.²⁷⁹ As a result, Professor Reynhardt was compensated.²⁸⁰ In *Alexandre v Provincial Administration of the Western Cape Department of Health*,²⁸¹ a white male applied for a higher position with the respondent; however a coloured male was appointed.²⁸² The Labour Court held that employers are obliged to accord proper weight to the factors which render people 'suitably qualified' as set out in the EEA.²⁸³ It was held furthermore that 'the evaluation of these factors need not be applied with scientific precision, but that it was sufficient if they are applied in a manner calculated to advance the legitimate aims of affirmative action'.²⁸⁴ It was held that under both the EEA and the Department of Health's policy, one of the criteria for determining whether a person is suitably qualified for the job is the capacity to acquire the ability to do the job, which had been taken into account.²⁸⁵ The Labour Court was satisfied that the selection panel had attached proper weight to the successful candidate's proven skills and experience and to the extent that race had played a role in the choice of the successful candidate, this was justifiable, because the appointment redressed past discrimination experienced.²⁸⁶

The case law above illustrates that the skills, experience and qualifications gap of a less qualified or less experienced candidate and other candidates may be considerable before it is rendered irrational. In addition, it shows that the factors in the EEA which render persons suitably qualified need not be applied rigidly, but instead, should advance the objectives of affirmative action. These principles should be utilised in order to address the racial imbalances within employment.

A number of cases have come before the courts pertaining to the manner in which affirmative action measures have been applied by employers.²⁸⁷ In *Coetzer & Others v Minister of Safety and*

²⁷⁴ *Reynhardt v University of South Africa* 2008 (29) ILJ 725 (LC).

²⁷⁵ *Reynhardt v University of South Africa* 2008 (29) ILJ 725 (LC) para 3.

²⁷⁶ *Reynhardt v University of South Africa* 2008 (29) ILJ 725 (LC) para 6.

²⁷⁷ *Reynhardt v University of South Africa* 2008 (29) ILJ 725 (LC) para 6.

²⁷⁸ *Reynhardt v University of South Africa* 2008 (29) ILJ 725 (LC) para 124.

²⁷⁹ *Reynhardt v University of South Africa* 2008 (29) ILJ 725 (LC) para 132.

²⁸⁰ *Reynhardt v University of South Africa* 2008 (29) ILJ 725 (LC) para 146.

²⁸¹ *Alexandre v Provincial Administration of the Western Cape Department of Health* (2005) 26 ILJ 765 (LC).

²⁸² *Alexandre v Provincial Administration of the Western Cape Department of Health* (2005) 26 ILJ 765 (LC) 767.

²⁸³ *Alexandre v Provincial Administration of the Western Cape Department of Health* (2005) 26 ILJ 765 (LC) 767.

²⁸⁴ *Alexandre v Provincial Administration of the Western Cape Department of Health* (2005) 26 ILJ 765 (LC) 768.

²⁸⁵ *Alexandre v Provincial Administration of the Western Cape Department of Health* (2005) 26 ILJ 765 (LC) 778.

²⁸⁶ *Alexandre v Provincial Administration of the Western Cape Department of Health* (2005) 26 ILJ 765 (LC) 778.

²⁸⁷ *Solidarity obo Barnard v SA Police Service* (130) SALJ 31; *SA Police Service v Solidarity obo Barnard* (2013) 34 ILJ 590 (LAC); *Solidarity obo Barnard v SA Police Service* 2014) (2) SA 1 (SCA); *SA Police Service v Solidarity obo Barnard* (2014) 35 ILJ 2981 (CC).

Security and another,²⁸⁸ ('the Coetzer case') as the applicants were white males they could only apply for certain posts, and after the posts open to non-designated employees were filled they applied for the posts open to designated groups only.²⁸⁹ Their applications were rejected even though there had been no applications from designated groups.²⁹⁰ The Labour Court was required to decide on the issue of how a court should resolve situations in which an employer turns down qualified and suitable members from non-designated groups when there was no competition at all from members from designated groups.²⁹¹ The question was posed whether the efforts of the SAPS to promote representivity in the unit were rationally balanced with efforts to maintain and enhance efficiency.²⁹² The problem was that the SAPS based its defence solely on its claim that it had conformed to the representivity requirements of the EEA, but had not addressed the efficiency requirement at all.²⁹³ The Labour Court held that rationality²⁹⁴ cannot be served where a public authority fails to make appointments because there are no takers from designated employees.²⁹⁵

In *Independent Municipal & Allied Workers Union v Greater Louis Trichardt Transitional Local Council*,²⁹⁶ the Labour Court held that an employer can rely on affirmative action as a defence only if it has an affirmative action policy.²⁹⁷ It further held that in the absence of such a policy, the failure to explain why an apparently weak candidate had been appointed gave rise to the presumption that there was no justification for the appointment.²⁹⁸ The Labour Court held further that affirmative action should not be implemented in an arbitrary manner.²⁹⁹

Where employers do not fall within the meaning of designated employers they are not required to implement measures to ensure equitable representation of people from designated groups. This is a shortcoming of the legal framework.

3.2.5 Measures to retain and develop people from designated groups

The final type of affirmative action measures to be implemented are 'measures to retain and

²⁸⁸ *Coetzer & others v Minister of Safety & Security & another* (2003) 24 ILJ 163 (LC).

²⁸⁹ *Coetzer & others v Minister of Safety & Security & another* (2003) 24 ILJ 163 (LC) 167.

²⁹⁰ *Coetzer & others v Minister of Safety & Security & another* (2003) 24 ILJ 163 (LC) 168.

²⁹¹ *Coetzer & others v Minister of Safety & Security & another* (2003) 24 ILJ 163 (LC) 168.

²⁹² *Coetzer & others v Minister of Safety & Security & another* (2003) 24 ILJ 163 (LC) 174.

²⁹³ *Coetzer & others v Minister of Safety & Security & another* (2003) 24 ILJ 163 (LC) 176.

²⁹⁴ See para 3.4.2.1 below.

²⁹⁵ *Coetzer & others v Minister of Safety & Security & another* (2003) 24 ILJ 163 (LC) 176.

²⁹⁶ *Independent Municipal & Allied Workers Union v Greater Louis Trichardt Transitional Local Council* (2000) 21 ILJ 1119 (LC).

²⁹⁷ *Independent Municipal & Allied Workers Union v Greater Louis Trichardt Transitional Local Council* (2000) 21 ILJ 1119 (LC) para 19.

²⁹⁸ *Independent Municipal & Allied Workers Union v Greater Louis Trichardt Transitional Local Council* (2000) 21 ILJ 1119 (LC) para 32.

²⁹⁹ *Independent Municipal & Allied Workers Union v Greater Louis Trichardt Transitional Local Council* (2000) 21 ILJ 1119 (LC) para 32.

develop people from designated groups and to implement appropriate training measures'.³⁰⁰ Knowledge of the reasons for employees leaving their employment obtained by way of surveys or properly conducted exit interviews is necessary in order to develop retention strategies. The profile of the workforce which is drawn up during the course of the employment equity analysis,³⁰¹ should include a skills profile which will indicate where skills development is needed.³⁰²

In circumstances where black professional employees in the private sector are employed by a designated employer, they benefit from this provision since their employer would be placed under an obligation to develop them. Their employer would also be required to place measures such as retention strategies in place to assist in retaining these employees.

The issue arises whether appointing or promoting designated employees over non-designated employees in order to retain employees from designated groups amounts to unfair discrimination. Cases have arisen where non-designated employees claim that they have been discriminated against when they are overlooked for promotions or appointments in favour of designated employees.³⁰³ White males have little chance of succeeding with such claims if their employers favour designated employees to achieve equity targets.³⁰⁴ Non-designated employees may only be successful with such claims in the event of an employer's failure to comply with the relevant laws relating to affirmative action.³⁰⁵ One such example would be where section 15(3) of the EEA which provides that affirmative action measures include preferential treatment and numerical goals, but exclude quotas, is contravened. This means that there would be a contravention of section 15(3) of the EEA where targets are so rigidly pursued so as to amount to quotas.³⁰⁶

Where employers do not fall within the meaning of designated employers they are not required to take steps to retain and develop people from designated groups. This is a shortcoming of the legal framework.

³⁰⁰ Section 15(2)(d)(ii) of the EEA.

³⁰¹ See para 3.3.2 below.

³⁰² Du Toit D & Potgieter M *Unfair Discrimination in the workplace* (2014) 162.

³⁰³ *Solidarity obo Barnard v South African Police Service* (2010) 31 ILJ 742 (LC); *South African Police Service v Solidarity obo Barnard* 2013 (34) ILJ 590 (LAC) 607; *Solidarity obo Barnard v South African Police Service* (2014) 35 ILJ 416 (SCA); *South African Police Service v Solidarity obo Barnard* (2014) 35 ILJ 2981 (CC); *University of South Africa v Reynhardt* (2010) 31 ILJ 2368 (LAC); *Alexandre v Provincial Administration of the Western Cape Department of Health* (2005) 26 ILJ 765 (LC).

³⁰⁴ Grogan J *Employment Rights* 2ed (2015) 113.

³⁰⁵ Grogan J *Employment Rights* 2ed (2015) 113.

³⁰⁶ In *South African Police Service v Solidarity obo Barnard* 2014 (35) ILJ 2981 (CC) at para 66, the Constitutional Court held that the National Commissioner did not pursue targets so rigidly to amount to quotas.

3.3 DUTIES OF DESIGNATED EMPLOYERS

Section 13(2) of the EEA prescribes the specific duties of designated employers in relation to the employment equity plan. It provides that designated employers must consult with their employees as required by section 16 of the EEA,³⁰⁷ conduct an analysis as required by section 19 of the EEA,³⁰⁸ prepare an employment equity plan as required by section 20 of the EEA,³⁰⁹ and report to the Director-General on progress made in implementing its employment equity plan as required by section 21 of the EEA.³¹⁰ The Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans as well as the Integration of Employment Equity into Human Resource Policies and Practices ('Integration of Employment Equity Code') provides guidelines with regard to the duties which the EEA places on designated employers.³¹¹ The stated duties prescribed by section 13(2) of the EEA are discussed individually below.

3.3.1 Consultation with employees

A designated employer's first obligation in terms of the EEA in relation to the employment equity plan is 'to consult with a representative trade union or unions who represent the employees as well as any employees or representatives nominated by them'.³¹² In the event of there being no union at the workplace, the designated employer must consult with the employees or their representatives directly.³¹³ The Integration of Employment Equity Code confirms that the success of employment equity depends on whether the consultation process is productive or not.³¹⁴

The employees should be informed of the provisions of the EEA and the application thereof.³¹⁵ In terms of section 25(1) of the EEA, employers are required to inform employees of the provisions of the EEA, by way of a notice that must be displayed at the workplace. The notice referred to in section 25(1) of the EEA is contained in form EEA 3 to the Regulations. Employees should also be informed of the consultation process which the employer intends to follow as well as of the

³⁰⁷ Section 13(2)(a) of the EEA.

³⁰⁸ Section 13(2)(b) of the EEA.

³⁰⁹ Section 13(2)(c) of the EEA.

³¹⁰ Section 13(2)(d) of the EEA.

³¹¹ Provision 1 Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans *GN R424* in *GG 40817* of 12 May 2017.

³¹² Section 16(2)(1)(a) EEA. A 'representative trade union' is defined by section 1 of the EEA as a trade union as defined by section 213 of the Labour Relations Act and registered in terms of section 96 of the EEA. 'Trade union' is defined by section 213 of the Labour Relations Act 66 of 1995 as an association of employees whose principal purpose is to regulate relations between employees and employers, including any employers' organisation.

³¹³ Section 16(2)(1)(b) EEA.

³¹⁴ Provision 5.3.14 of the Integration of Employment Equity Code.

³¹⁵ Provision 6.1.2.1 of the Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans *GN R424* in *GG 40817* of 12 May 2017.

advantages that participation in the process will have for employees.³¹⁶

The term 'consultation' is not defined by the EEA; however, it is defined by the Labour Relations Act 66 of 1995 as being not merely an exchange of views, but a 'joint consensus seeking process'.³¹⁷ The employer should make every effort to consult and 'to reach consensus during the consultation process'.³¹⁸ The former Appellate Division defined 'consultation' as a 'joint problem-solving exercise'.³¹⁹ 'Consultation' can be summarised as meaning

- putting proposals rather than finished decisions to the consulting partner(s);
- disclosing all relevant information subject to confidentiality and legality;
- allowing the consulting partner(s) to respond to the employer's proposals and to make alternative proposals;
- responding to alternative proposals and if not, accepting them, giving the reasons why not.³²⁰

The consultation should include

- a) Reasonable opportunity for employee representatives to meet with the employer to consult on the conducting of an analysis, development of a plan and the submitting of reports to the Department of Labour.
- b) The opportunity for both employer and employee representatives to provide feedback to their respective constituencies.
- c) The request, receipt and consideration of relevant information.
- d) The allocation of adequate time for each of the steps to be completed.³²¹

Employers are required to consult with their employees who fall within all occupational levels of the workforce, and also with those employees of both non-designated groups as well designated groups.³²² This consultation should not only take place in the beginning of the affirmative action process. It should also continue when conducting an analysis, when preparing and implementing the employment equity plan, and when submitting the employment equity report to the Director-General.³²³

The consultation should include: an opportunity for employee representatives to meet, an

³¹⁶ Provision 6.1.2.1 of the Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans GN R424 in GG 40817 of 12 May 2017.

³¹⁷ Section 1 of the Labour Relations Act 66 of 1995.

³¹⁸ Tinarelli S *Employers' guide to the Employment Equity Act* 7ed (2012) 64.

³¹⁹ *Atlantis Diesel Engines (Pty) Ltd v NUMSA* 1995 (1) BLLR 1 (A).

³²⁰ Du Toit D, Godfrey S & Cooper C et al *Labour Relations Law A Comprehensive Guide* 6ed (2015) 741.

³²¹ Provision 6.1.2.6 of the Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans GN R424 in GG 40817 of 12 May 2017.

³²² Provision 6.1.2.2 of the Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans GN R424 in GG 40817 of 12 May 2017.

³²³ Provision 6.1.2.2 of the Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans GN R424 in GG 40817 of 12 May 2017.

opportunity for representatives of the employees and employer to report back to their constituencies, the right to request and consider information which is relevant to the consultation process, and provide adequate time for the aforementioned steps.³²⁴

The aim of the consultation process is to discuss the analysis which the designated employer is required to conduct into the designated employer's policies, practices, working environment and workforce,³²⁵ the preparation and implementation of the designated employer's employment equity plan,³²⁶ and the report which the designated employer is required to submit to the Director-General.³²⁷ While the EEA lists topics which must be discussed during the consultations, neither the Regulations, nor the Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans, nor the Integration of Employment Equity Code provides details as regards the specific aspects where employee input is required. The fact that there is a lack of specific direction in this regard may allow designated employers not to obtain employee input where employee input may be of value. This would be particularly so in circumstances where employees are not represented by trade unions. It may therefore be useful for the legislature to enact provisions in either the Regulations or the Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans to provide the parties with specific guidance in this regard.

The unions or employees who consult with the designated employers must reflect the interests of employees from all levels of the workplace,³²⁸ employees from designated groups,³²⁹ and employees who do not form part of the designated groups.³³⁰ The fact that the legislature made express provision that the interests of employees from designated groups should be reflected is pivotal in ensuring that the voice of those who fall within the category of designated groups is heard. In the event of employees from designated groups being subjected to racial discrimination the consultation process may be used by them to inform the designated employer thereof. The employees from designated groups may provide the designated employer with examples of their experiences of racial discrimination, and an opportunity to respond to the points raised by these employees. The employees from designated groups may also suggest manners in which such instances of racial discrimination, whether direct or indirect, can be avoided in the future.

³²⁴ Provision 6.1.2.6 of the Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans *GN R424 in GG 40817* of 12 May 2017.

³²⁵ Section 17(a) of the EEA.

³²⁶ Section 17(b) of the EEA.

³²⁷ Section 17(c) of the EEA.

³²⁸ Section 16(2)(a) of the EEA.

³²⁹ Section 16(2)(b) of the EEA.

³³⁰ Section 16(2)(c) of the EEA.

Consultation with employees

'should commence as early as possible in the process and should include *inter alia* the establishment of a consultative forum or the use of an existing forum to consult with employees for the purposes of employment equity issues, and should involve employee representatives and trade unions reflecting the interests of employees from both non-designated and designated groups and 'across all occupational levels of the workforce'.³³¹

One of the benefits of the employee representatives' participation in the consultation forum is that they can provide the employer with information pertaining to the interests and attitudes of the employees.³³² Management is therefore required to 'consider any criticisms, problems or proposals which the employee representatives raise during the consultation forum, insofar as matters earmarked for consultation are concerned, prior to making any final decision.'³³³ It is acknowledged that employees who are not represented by unions may have different interests and attitudes, from those who are unionised which may result in the consideration of criticisms and proposals being problematic.

In order to demonstrate their intention to reach an agreement, management should provide reasons for not accepting any of the proposals put forward by employee representatives, after having considered them.³³⁴ In order to minimise conflict, it is important for employers not to treat the consultation process as a win-lose situation.³³⁵

Research shows that there are factors that may lead to conflict during the consultations, and of which designated employers should be aware, including 'ideological differences, cultural differences, educational deficiencies and low levels of trust'.³³⁶ Similarly research has found that 'issues relating to cultural diversity are viewed by employees as peripheral issues which matter only when employment equity plans are to be drafted and submitted as well as when government tenders demand certain transformation requirements'.³³⁷

In the study conducted by Oosthuizen and Naidoo people from designated groups identified certain barriers to employment equity.³³⁸ While it is acknowledged that only 21 organisations were included

³³¹ Provision 6.1.2.5 of the Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans GN R424 in GG 40817 of 12 May 2017.

³³² Tinarelli S *Employers' guide to the Employment Equity Act 7ed* (2012) 65.

³³³ Tinarelli S *Employers' guide to the Employment Equity Act 7ed* (2012) 65.

³³⁴ Tinarelli S *Employers' guide to the Employment Equity Act 7ed* (2012) 65.

³³⁵ Tinarelli S *Employers' guide to the Employment Equity Act 7ed* (2012) 65.

³³⁶ Tinarelli S *Employers' guide to the Employment Equity Act 7ed* (2012) 66.

³³⁷ Zulu PS & Parumasur SB 'Employee perceptions of the management of cultural diversity and workplace transformation' (2009) 35(1) *SAJIP* 49.

³³⁸ Oosthuizen R & Naidoo V 'Attitudes towards and experience of employment equity' (2010) 36 *SAJIP* 836. See para 1.3 above.

in the study, and that this may not be representative of all South African organisations, the barriers which were identified are important in providing insight into the shortcomings of the legal framework. It has been confirmed by employees who participated in the study that beneficiaries and non-beneficiaries of employment equity plans alike have negative attitudes regarding their experiences of employment equity, and that employers should bear this in mind.³³⁹ Beneficiaries who are appointed may fear tokenism and marginalisation, as well as being viewed as victims of white manipulation.³⁴⁰ Beneficiaries who are classified as 'professional employees' dislike the labels associated with employment equity, such as, 'less qualified' or 'incompetent', and, instead, believe in individual merit.³⁴¹ White employees, on the other hand, 'question the political legitimacy of employment equity and fear the limitation of their career opportunities, and revenge or retribution on the part of previously disadvantaged groups'.³⁴² Employers should make every effort to take into account the stated considerations and to transform the environment, as opposed to merely complying with its statutory obligations without changing the type of organisational culture that leads to perceptions such as reflected above.³⁴³ Employers should use the consultation process as an opportunity to obtain feedback from employees to ensure a productive working environment.

In order to ensure that the consultation process is effective, the designated employer should disclose all the relevant information to the consulting parties.³⁴⁴ Such information must include

'the extent to which suitably qualified people from designated groups are equitably represented within each occupational level in the employer's workforce in relation to the demographic profile of the national and provincial economic active population, steps taken by the designated employer to train suitably qualified people from designated groups, steps to be taken by a designated employer to recruit and promote persons from designated groups, the extent to which the designated employer has made progress in eliminating employment barriers that adversely affect people from designated groups, steps taken by an employer to appoint and retain suitably qualified people from designated groups and steps taken by the designated employer to provide reasonable accommodation for suitably qualified people from designated groups.'³⁴⁵

The 1999 Code of Good Practice included a provision that an employer is not required to disclose information which is 'private, confidential or subject to certain other restrictions'; however, such provision is not found in the Code of Good Practice: Preparation, Implementation and Monitoring of

³³⁹ Oosthuizen R & Naidoo V 'Attitudes towards and experience of employment equity' (2010) 36 *SAJIP* 836.

³⁴⁰ Oosthuizen R & Naidoo V 'Attitudes towards and experience of employment equity' (2010) 36 *SAJIP* 836.

³⁴¹ Oosthuizen R & Naidoo V 'Attitudes towards and experience of employment equity' (2010) 36 *SAJIP* 836.

³⁴² Oosthuizen R & Naidoo V 'Attitudes towards and experience of employment equity' (2010) 36 *SAJIP* 836.

³⁴³ Zulu PS & Parumasur SB 'Employee perceptions of the management of cultural diversity and workplace transformation' (2009) 35(1) *SAJIP* 49.

³⁴⁴ Section 18(1) of the EEA.

³⁴⁵ Provision 6.1.2.9 of the Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans *GN R424 in GG 40817 of 12 May 2017*.

Employment Equity Plans.³⁴⁶ An employer's confidential information is protected in terms of the Protection of Personal Information Act 4 of 2013³⁴⁷ An employee may however obtain such information in terms of the Promotion of Access to Information Act 2 of 2000 *inter alia* by ensuring compliance with certain procedural requirements and in the event of the information being required for the protection or exercise of any rights.³⁴⁸

The consultation process is important within the context of affirmative action. Consultation not only ensures legitimacy, but is also important because 'employers do not have all the answers'.³⁴⁹ Since affirmative action measures 'may address sensitive issues, call for behavioural change and could be controversial, it should embody the widest form of consensus'.³⁵⁰ Designated employers should not merely consult with its employees for the purpose of complying with one of its obligations in terms of the EEA, but should ensure that every attempt is made to reach consensus on topics that are being discussed. Input by employees provides valuable insight and can assist in identifying solutions when dealing with barriers to employment equity.³⁵¹

The obligation placed on designated employees to consult can be beneficial to employers since the experience can be used to obtain constructive criticism in order to improve the working environment and to eliminate racial discrimination. The consultation process is also beneficial to employees, especially those who are experiencing racial discrimination, since it provides them with an opportunity to speak their minds. Similar to other employees who are employed by designated employers, black professional employees in the private sector benefit from the obligation placed on their employers to consult, as this opportunity may be used by black professional employees to provide input on matters relating to affirmative action which affect them directly.

The question is whether employees will make use of this opportunity given the position in which they find themselves *vis-à-vis* the employer. The employee finds him or herself in a subordinate position in relation to the employer. Du Toit suggests that this subordinate position is a defining feature of the employment relationship in comparison to the independent contracting relationship.³⁵² The reason why this is a problem is the inconsistency between the right to equality, on the one hand, and the inherent inequality in employment, on the other.³⁵³ The question which has been posed is: whether the structure of the employment relationship, being the contractual

³⁴⁶ Du Toit D & Potgieter M *Unfair Discrimination in the workplace* (2014) 151.

³⁴⁷ Section 11 Protection of Personal Information Act 4 of 2013.

³⁴⁸ Section 50(1) Promotion of Access to Information Act 2 of 2000.

³⁴⁹ Du Toit D & Potgieter M *Unfair Discrimination in the workplace* (2014) 149.

³⁵⁰ Du Toit D & Potgieter M *Unfair Discrimination in the workplace* (2014) 149.

³⁵¹ Du Toit D & Potgieter M *Unfair Discrimination in the workplace* (2014) 149.

³⁵² Du Toit D 'The Right to Equality versus employer 'control' and employee 'subordination': Are some more equal than others?' (2016) *ILJ* 2.

³⁵³ Du Toit D (2016) 2.

subordination of the employee, is an impermissible limitation of the employee's right to equality.³⁵⁴ In answering this question, it is suggested that any assertion of the 'employer's power of control must stop short of constituting an unacceptable and unjustifiable limitation of the employees' right to equality'.³⁵⁵ It is not only the employee's subordination which results in the imbalance in the employment relationship; it is also the common law duty on the employee to further the business of the employer³⁵⁶ when there is no corresponding duty which falls on the employer to 'devote itself to its subordinate's interests beyond the payment of remuneration,³⁵⁷ providing reasonably safe working conditions³⁵⁸ and compliance with specific duties in terms of legislation'.³⁵⁹ It has been argued that besides an employee's need for direction in the performance of his or her duties, there is no justification for the subordination and that beyond this functional limit, subordination and inequality seem to be unconstitutional.³⁶⁰

The legislature should be commended for placing an obligation on designated employers to consult with their employees. This must also be seen as an opportunity for employees to consult with their employers, because it is a mechanism which may be used by employees not only to provide input on matters relating to affirmative action matters generally, but may also be used by employees who are being subjected to racial discrimination to bring their experiences to the attention of the designated employer. It is noteworthy to mention however that some of the provisions contained in the Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans have been drafted as if all employees are represented by employee representatives or trade unions, since mention is made of trade unions and employee representatives.³⁶¹ The subordinate position of employees may result in employees not always taking advantage of the consultation process, particularly those who are not represented by trade unions.

The EEA lists topics which must be discussed during the consultations; however details on the specific aspects where the employees' input is required is lacking. In the event of specific direction being provided by the legislature in this regard, it may compel designated employers to obtain employee input on matters which employees would not have otherwise provided input having regard to the position in which employees find themselves *vis-à-vis* the employer. In the event of employees being aware that their input is legally required, they may take greater advantage of this

³⁵⁴ Du Toit D (2016) 11.

³⁵⁵ Du Toit D (2016) 13.

³⁵⁶ Grogan J *Workplace Law* 11ed (2014) 54.

³⁵⁷ Grogan J *Workplace Law* 11ed (2014) 60.

³⁵⁸ Grogan J *Workplace Law* 11ed (2014) 61.

³⁵⁹ Du Toit D (2016) 14.

³⁶⁰ Du Toit D (2016) 25.

³⁶¹ Provision 6.1.2.5 of the Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans GN R424 in GG 40817 of 12 May 2017; Provision 6.1.2.6 Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans GN R424 in GG 40817 of 12 May 2017.

opportunity despite their subordinate position.

3.3.2 Conducting an analysis

A designated employer's second obligation in relation to the employment equity plan is to conduct an analysis of the employer's policies, practices, procedures and the working environment. The designated employer's duty to conduct an analysis is governed by section 19 of the EEA which reads:

- '1) A designated employer must collect information and conduct an analysis, as prescribed, of its employment policies, practices, procedures and the working environment, in order to identify employment barriers which adversely affect people from designated groups.
- 2) An analysis conducted in terms of subsection (1) must include a profile, as prescribed, of the designated employer's workforce within each occupational level³⁶² in order to determine the degree of underrepresentation of people from designated groups in various occupational levels in that employer's workforce.'

The purpose of conducting 'the analysis is

- a) to determine the extent of under-representation of employees i.e. both permanent and temporary workers from the designated groups in the different occupational levels of the employer's workforce in terms of race, gender and disability.
- b) to assess all employment policies, practices, procedures and the working environment so as to-
 - identify any barriers that may contribute to the underrepresentation or under-utilisation of employees from the designated groups;
 - identify any barriers or factors that may contribute to the lack of affirmation of diversity in the workplace;
 - identify other employment conditions that may adversely affect designated groups; and
 - identify practices or factors that positively promote employment equity and diversity in the workplace including reasonable accommodation.'³⁶³

The analysis must focus on employment policies and practices as well as on the working

³⁶² Occupational levels are divided into categories of 'top management; senior management; professionally qualified, experienced and mid-management; skilled technical and academically qualified workers, junior management, supervisors, foreman, superintendents; semi-skilled and discretionary decision-making and finally unskilled and defined decision making.'; Form EEA 9 to the Regulations; Du Toit D, Godfrey S & Cooper C *et al Labour Relations Law A Comprehensive Guide* 6ed (2015) 748.

³⁶³ Provision 6.1.3.1 of the Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans GN R424 in GG 40817 of 12 May 2017.

environment.³⁶⁴ 'Employment practices' must be distinguished from 'policies' and 'procedures'. Policies and procedures are formal documents, often drafted by attorneys or human resource specialists, which 'are less likely to contain discriminatory provisions'.³⁶⁵ Employment practices refer to informal, undocumented rules of the workplace which may be analysed by way of group discussions, interviews or attitudinal surveys.³⁶⁶

There is no precise definition of the 'working environment' of an enterprise. It amounts to the 'corporate culture' of an enterprise and the way in which the employees of the enterprise experience it.³⁶⁷ The corporate culture could be a source of unfair discrimination³⁶⁸ as well as an issue to be addressed by affirmative action measures. The corporate culture is of importance to this thesis and is discussed further in Chapter 4.

The review of the employment policies, practices, procedures and the working environment, as required by Section 19(1), should consist of a critical examination of all established policies, practices, procedures and the working environment to identify employment barriers. This should include:

- 'a). Recruitment, selection, pre-employment testing and induction, promotion, development and retention.
- b) Succession and experience planning and promotions and transfers.
- c) Job assignments and training opportunities.
- d) Performance and remuneration, including equal pay for work of equal value;
- e) Discipline and dispute resolution.
- f) Working conditions including accommodation of cultural, religious and other diversity differences.
- g) Reasonable accommodation, including for persons with disabilities.
- h) Corporate culture.
- i) Any other policy, procedure or practices that may arise from the consultative process.³⁶⁹

Section 19(1) of the EEA therefore requires designated employers to conduct an analysis to determine which employment barriers exist. Each enterprise will differ with regard to the employment barriers which exist. The information required for the analysis in terms of section 19(1) may be elicited by asking the relevant persons in the employer's business questions which would

³⁶⁴ Section 19 of the EEA.

³⁶⁵ Du Toit D & Potgieter M *Unfair Discrimination in the workplace* (2014) 153.

³⁶⁶ Provision 5.3.5 of the Integration of Employment Equity Code.

³⁶⁷ Du Toit D & Potgieter M *Unfair Discrimination in the workplace* (2014) 156.

³⁶⁸ Du Toit D & Potgieter M *Unfair Discrimination in the workplace* (2014) 156.

³⁶⁹ Provision 6.1.3.3 of the Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans GN R424 in GG 40817 of 12 May 2017.

be predetermined and structured.³⁷⁰ Information may also be obtained by scrutinising the policies and procedures of the workplace.³⁷¹ Form EEA 12 to the Regulations contains the template for reporting on the analysis which should be conducted by an employer in respect of its employment policies, practices, procedures and working environment in terms of section 19(1).

In order to eliminate unfair discrimination, designated employers are required to identify the forms of discrimination which exist, and then to formulate manners in which the discrimination may be eliminated.³⁷² The more indirect or subtle forms of discrimination and stereotyping which could prevent the employment or promotion of certain groups of people should also be taken into consideration during the review of the employment policies, practices, procedures and working environment.³⁷³

Section 19(2) refers to the second type of analysis: the determination of the degree of underrepresentation of designated groups within each occupational level of the employer's business. The analysis must also concentrate on the composition of the workforce in terms of the categories of race, gender and persons with disabilities.³⁷⁴ Section 19(2) requires an employer to compile a workforce profile. First, employers should differentiate between employees from the various groups (blacks, women and people with disabilities) with reference to both members of designated groups and non-designated groups.³⁷⁵ Secondly, employers should compare the number of employees from designated groups with the relevant demographics.³⁷⁶

Regulation 8 of the EEA governs the designated employer's duties insofar as the collection of information and conducting the required analysis. It reads:

- '1) When a designated employer collects information contemplated in section 19 of the Act, the employer must request each employee in the workforce to complete a declaration using the EEA1 form;
- 2) An employee may add information to the EEA1 form;
- 3) Where the employee refuses to complete the EEA1 form or provides inaccurate information, the employer may establish the designation of an employee by using reliable historical and existing data.
- 4) A designated employer must conduct an analysis as required by section 19 of the Act

³⁷⁰ Tinarelli S *Employers' guide to the Employment Equity Act 7ed* (2012) 72.

³⁷¹ Tinarelli S *Employers' guide to the Employment Equity Act 7ed* (2012) 72.

³⁷² Du Toit D & Potgieter M *Unfair Discrimination in the workplace* (2014) 157.

³⁷³ Tinarelli S *Employers' guide to the Employment Equity Act 7ed* (2012) 72.

³⁷⁴ Du Toit D, Godfrey S & Cooper C *Labour Relations Law A Comprehensive Guide 6ed* (2015) 746.

³⁷⁵ Provision 6.1.3.2(a) of the Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans GN R424 in GG 40817 of 12 May 2017.

³⁷⁶ Provision 6.1.3.2(c) of the Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans GN R424 in GG 40817 of 12 May 2017.

by reviewing its workforce profile and employment policies, practices, procedures and the working environment in order to identify employment barriers which adversely affect people from designated groups from being equitably represented across all occupational levels. The outcome of the analysis should be reported using the EEA12 in these regulations.

- 5) A designated employer must refer to the relevant Codes of Good Practice issued in terms of section 54 of the Act as a guide when collecting information and conducting the analysis required by section 19 of the Act.
- 6) When a designated employer conducts the analysis required by section 19 of the Act, the employer may refer to-
 - a) EEA8, a guide on the applicable national and regional economically active population (EAP); and
 - b) EEA9, which contains a description of occupational levels.'

The first form, EEA 1, provided by the Regulations, is known as the 'Declaration by the Employee' which requires specific details, such as gender, race and disability.³⁷⁷ When a designated employer collects information about the individual employees for the purpose of compiling a workforce profile to determine the degree of underrepresentivity of employees from designated groups, the employer has two options.³⁷⁸ In terms of Regulation 8, the employer must either request each employee in the workforce to complete a declaration which must be in the form of form EEA 1 on a voluntary basis, or use existing dependable records of the employer containing the information required by form EEA 1. In the event of the employer choosing the first option, the employee is required to complete the form, while the employer is required to keep the information obtained confidential.³⁷⁹ Employees who complete the form must be allowed to make changes to the form at any time upon their request.³⁸⁰ In the event of the employer choosing the second option, viz the use of existing records, 'each employee has the right to verify any information concerning the employer'.³⁸¹

The analysis to be conducted by the designated employer should provide a comparison of designated groups by occupational levels with relevant demographic data. Form EEA 8 to the Regulations requires demographic data for the purposes of comparing the number of employees from designated groups with relevant demographics.³⁸² Form EEA 8 to the Regulations provides the information in order to obtain the demographic data according to the economically active population.³⁸³ Form EEA 9 provides information on occupational levels.³⁸⁴

³⁷⁷ EEA1 to the Regulations.

³⁷⁸ Tinarelli S *Employers' guide to the Employment Equity Act 7ed* (2012) 70.

³⁷⁹ Tinarelli S *Employers' guide to the Employment Equity Act 7ed* (2012) 70.

³⁸⁰ Tinarelli S *Employers' guide to the Employment Equity Act 7ed* (2012) 70.

³⁸¹ Tinarelli S *Employers' guide to the Employment Equity Act 7ed* (2012) 70.

³⁸² Tinarelli S *Employers' guide to the Employment Equity Act 7ed* (2012) 73.

³⁸³ Form EEA8 to the Regulations EEA.

The information which the employer is required to collect will establish whether persons from designated groups are underrepresented in any occupational levels and 'whether any employment policy or practice or the working environment, creates barriers restricting the advancement of black people, women and disabled persons'.³⁸⁵

Similar to the obligation to consult, the obligation to conduct an analysis is a valuable tool for employers to identify the presence of employment barriers. This is so because one of the purposes of conducting the analysis is to identify employment barriers which adversely affect people from designated groups, and such employment barriers could include racial discrimination. The information which designated employers are required to obtain for the purposes of the analysis includes asking the relevant persons in the workplace whether a policy or practice is discriminatory. In the event that barriers, such as racial discrimination, are identified by the designated employer, designated employers will then be required to formulate manners in which the discrimination may be eliminated. Once barriers related to the working environment have been identified they should be eliminated by the designated employer, which may have the effect of improving the working environment as a whole. Black professional employees in the private sector benefit as a result of the obligation placed on designated employers to conduct an analysis since their employers would be required to identify employment barriers including unfair discrimination and to formulate manners in which such barriers may be removed. The analysis required by section 19(2) serves as a form of protection in that designated employers, as a result, will be in possession of a workforce profile to be utilised to improve the degree of underrepresentation of designated groups.

The barriers which employees identify during the analysis may differ from workplace to workplace. The employees who participated in the study conducted by Oosthuizen and Naidoo identified insufficient training and development as well as the absence of retention strategies as being barriers to employment equity.³⁸⁶ These factors were identified by the participants in the study despite the fact that the affirmative action measures which designated employers are required to implement should include measures to retain and develop people from designated groups.³⁸⁷ Barriers were also identified by employees in the study conducted by Booysen.³⁸⁸ Black people perceive themselves as being 'tokens and due to little delegation of real responsibility or decision-making authority, they are not fully integrated into [enterprises]'.³⁸⁹ The phenomenon known as the

³⁸⁴ Form EEA9 to the Regulations EEA.

³⁸⁵ Du Toit D, Godfrey S & Cooper C *Labour Relations Law A Comprehensive Guide* 6ed (2015) 643.

³⁸⁶ Oosthuizen R & Naidoo V 'Attitudes towards and experience of employment equity' 2010 (36) *SAJIP* 843.

³⁸⁷ Section 15(2)(d)(ii) of the EEA. See para 3.2.5 above.

³⁸⁸ Booysen L 'Barriers to Employment Equity implementation and retention of Blacks in management in South Africa' (2007) 31 *South African Journal of Labour Relations* 65. See para 1.3 above.

³⁸⁹ Booysen L 'Barriers to Employment Equity implementation and retention of Blacks in management in South Africa' (2007) 31 *South African Journal of Labour Relations* 65.

'upward-floating colour bar' has been identified as being a barrier to employment equity where black employees are promoted, 'but do not have real authority, because white employees are being promoted simultaneously above them'.³⁹⁰ White fears around employment equity were highlighted in that white employees are remaining in their positions as opposed to developing their skills in order to venture into other opportunities.³⁹¹ Nkomo conducted a study of the challenges of realising the intent of employment equity and affirmative action.³⁹² Employees who participated in this study perceived that some white employees deny that the effects of apartheid are still present in the workplace.³⁹³ For this reason, it has been said that 'it is difficult to embrace the spirit of the law when there is no agreement on the presence of a problem'.³⁹⁴

People from both designated and non-designated groups who participated in Oosthuizen and Naidoo's study are of the opinion that 'employment equity is a numbers game, as opposed to creating real value within the workplace'.³⁹⁵

A legislative omission which may be identified is that it would be useful to include provisions in the EEA to provide employees of an employer as a collective with an opportunity to conduct an analysis, to ensure that they are in possession of information of their own. This would be particularly useful for employees who are not represented by trade unions. Employees should be provided with an opportunity to conduct an analysis of the policies, practices, procedures, and working environment. The employees' analysis should also include a profile of the designated employer's workforce within each occupational level in order to determine the degree of underrepresentation of people from designated groups.³⁹⁶ When designated employers are required to conduct their analysis in terms of section 19(1) of the EEA, they obtain the necessary information by asking the relevant employees questions and/or by scrutinising the policies and procedures of the workplace. By providing employees with the opportunity to conduct their own analysis, people from designated groups may disclose barriers which adversely affect them, and which they would not otherwise have brought to the attention of their employer due to the employees' subordinate position preventing them from taking full advantage of the consultation process, which informs the analysis to be conducted by their employer. It would be possible for

³⁹⁰ Oosthuizen R & Naidoo V 'Attitudes towards and experience of employment equity' 2010 (36) *SAJIP* 843.

³⁹¹ Booysen L 'Barriers to Employment Equity implementation and retention of Blacks in management in South Africa' (2007) 31 *South African Journal of Labour Relations* 57.

³⁹² Two organisations were included in the study. The data was obtained by way of interviews conducted and focus group discussions as well as by way of evaluating company documents.

³⁹³ Nkomo S 'Moving from the letter of the law to the spirit of the law: the challenges of realising the intent of employment equity and affirmative action' (2011) *Transformation* 132.

³⁹⁴ Nkomo S 'Moving from the letter of the law to the spirit of the law: the challenges of realising the intent of employment equity and affirmative action' (2011) *Transformation* 139.

³⁹⁵ Oosthuizen R & Naidoo V 'Attitudes towards and experience of employment equity' 2010 (36) *SAJIP* 844. This was also perceived by employees who participated in the study conducted by Achibong - Archibong U 'Affirmative action in South Africa Are we creating new casualties?' (2013) 3 (1) *Journal of Psychological Issues in Organizational Culture* 20.

³⁹⁶ This would be useful in order to prevent fronting practices by employers. See para 5.7 below.

employees to conduct their own analysis since designated employers are required to disclose all relevant information to the consulting parties for the purposes of the consultation process.³⁹⁷ The information which the employees are able to obtain from the designated employer can be used by the employees to conduct their analysis

Employees are in an appropriate position to conduct the analysis since the effects of the policies, practices, procedures, and the working environment are known to the employees and affect them directly. Providing employees with an opportunity to conduct their own analysis may assist them in providing their employers with suggestions for the removal of barriers which affect the employees.

3.3.3 Preparing an employment equity plan

The third duty of a designated employer is the drafting of the employment equity plan, which is the outcome of the consultations held between the consulting parties and the analysis conducted. The employment equity plan should in effect 'aim to achieve reasonable progress towards employment equity'.³⁹⁸ The employment equity plan is not only 'a designated employer's implementation programme to achieve equitable representation and fair treatment of designated groups',³⁹⁹ but also exists in order to address the barriers to fair employment practices.⁴⁰⁰

In terms of Regulation 9(1), a designated employer 'must refer to the relevant Codes of Good Practice issued in terms of section 54 of the Act when preparing the Employment Equity Plan contemplated in section 20 of the Act'. In terms of provision 7 of the Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans, in developing the employment equity plan, the employer must consult and attempt to reach agreement by taking certain aspects into consideration, such as, the time frames which have been established, the resources identified and allocated for the implementation of the employment equity plan, the national and provincial economically active population (EAP), and the corrective measures which have been formulated together with the analysis report.⁴⁰¹

The employer must consult and attempt to reach consensus on the barriers to, and the under-representation of, designated groups which they identified in the analysis report.⁴⁰² The analysis

³⁹⁷ See para 3.3.1 above.

³⁹⁸ Section 20 (1) of the EEA.

³⁹⁹ Provision 4.1 of the Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans GN R424 in GG 40817 of 12 May 2017.

⁴⁰⁰ Provision 4.2 of the Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans GN R424 in GG 40817 of 12 May 2017.

⁴⁰¹ Provision 7 of the Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans GN R424 in GG 40817 of 12 May 2017.

⁴⁰² Provision 7.1.1 of the Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity

report must be used to determine which affirmative action measures would be included in the employment equity plan in response to the barriers which were identified in policies, practices, procedures and the working environment.⁴⁰³

The process in relation to the employment equity plan is initiated by the employer; however, it may be assigned to a permanent employee who reports directly to the accounting officer or chief executive officer of the place of employment.⁴⁰⁴ In the case of a larger workforce, the process for 'initiating the process for the development, implementation and monitoring of the employment equity plan may be assigned to senior managers'.⁴⁰⁵

In terms of Regulation 9(2) of the EEA, the minimum elements to be included in the Employment Equity Plan are contained in form EEA 13 to the Regulations. According to the Integration of Employment Equity Code, for each of the forms of unfair discrimination identified during the analysis of policies and practices conducted, a designated employer is required to formulate appropriate barrier removal measures.⁴⁰⁶ This implies that improvements and solutions arrived at during the consultation process will form the basis of the relevant affirmative action measures to be incorporated in the employment equity plan.⁴⁰⁷

When determining the duration of the employment equity plan an employer should consider *inter alia* the workforce size, the nature and location of the workplace, 'the time needed to implement affirmative action measures to achieve numerical and non-numerical goals', and the fact that the employment equity plan must be for a minimum period of one year and maximum period of five years.⁴⁰⁸ The employment equity plan should include the objectives to be achieved for each year of the plan,⁴⁰⁹ the affirmative action measures to be implemented,⁴¹⁰ the numerical goals to achieve equitable representation of suitably qualified people from designated groups within each level of the workforce in the event of an underrepresentation of people from designated groups being identified, together with the timetable within which this will be achieved and the strategies to be applied in order to achieve these goals.⁴¹¹ The determination of underrepresentation is the main factor to consider in formulating the numerical goals that must be achieved by a designated

Plans.

⁴⁰³ Provision 7.1.2 of the Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans.

⁴⁰⁴ Provision 6.1.1(a) of the Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans.

⁴⁰⁵ Provision 6.1.1(d) of the Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans.

⁴⁰⁶ Du Toit D & Potgieter M *Unfair Discrimination in the workplace* (2014) 157.

⁴⁰⁷ Du Toit D & Potgieter M *Unfair Discrimination in the workplace* (2014) 157.

⁴⁰⁸ Provision 7.2 of the Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans.

⁴⁰⁹ Section 20(2)(a) of the EEA.

⁴¹⁰ Section 20(2)(b) of the EEA.

⁴¹¹ Section 20(2)(c) of the EEA.

employer.⁴¹² The employment equity plan should also include the timetable for each year of the plan for the achievement of numerical goals and further objectives other than numerical goals,⁴¹³ the duration of the plan,⁴¹⁴ together with the procedures that will be utilised in order to monitor and evaluate the implementation of the plan, as well as whether reasonable progress is being made towards the implementation of employment equity.⁴¹⁵ Furthermore, the internal procedures to resolve a dispute insofar as the interpretation or implementation of the plan is concerned should be included,⁴¹⁶ the persons responsible for overseeing and implementing the plan,⁴¹⁷ and any other matter.⁴¹⁸ Since the employment equity plan must contain affirmative action measures, its effect is to 'create an integrated process of identifying and addressing the equitable representation of persons from designated groups within the workplace, as well as to eliminate unfair discrimination'.⁴¹⁹

Once drafted, a copy of the employment equity plan must be made available to the employees of the designated employer for consultation and copying.⁴²⁰ This requirement is consistent with the aim of encouraging an inclusive process where employees at all levels are able to participate.⁴²¹ Providing all employees with access to the employment equity plan is important to ensure that they understand what the objectives are, what is expected, and to participate in the monitoring process.⁴²² This requirement that the employment equity plan be made available to employees of a designated employer may be useful in circumstances where employees are provided with an opportunity to conduct their own analysis, for two reasons. The first reason is that it would enable employees to compare the employment equity plan drafted by their employer with the analysis which the employees conducted prior to the employment equity plan being drafted, to determine whether what the employees established during the analysis which they conducted was addressed in the employment equity plan. The second reason is that it will result in the employees being able to ask the right questions when the designated employer consults with its employees prior to the employer's report being submitted to the Director-General.

Criteria for appointments and promotions stipulated in the plan should not make it impossible for non-designated employees to be considered for appointment and promotion.⁴²³ Courts have held

⁴¹² Louw AM 'Extrapolating 'equality' from the Letter of the Law: Some thoughts on the Limits of Affirmative Action under the Employment Equity Act 55 of 1998' (2006) 18 *SA Merc LJ* 341.

⁴¹³ Section 20(2)(d) of the EEA.

⁴¹⁴ Section 20(2)(e) of the EEA.

⁴¹⁵ Section 20(2)(f) of the EEA.

⁴¹⁶ Section 20(2)(g) of the EEA.

⁴¹⁷ Section 20(2)(h) of the EEA.

⁴¹⁸ Section 20(2)(i) of the EEA.

⁴¹⁹ Du Toit D, Godfrey S & Cooper C *et al Labour Relations Law A Comprehensive Guide* 6ed (2015) 631.

⁴²⁰ Section 25(3) of the EEA.

⁴²¹ Du Toit D, Godfrey S & Cooper C *et al Labour Relations Law A Comprehensive Guide* 6ed (2015) 752.

⁴²² Du Toit D, Godfrey S & Cooper C *et al Labour Relations Law A Comprehensive Guide* 6ed (2015) 753.

⁴²³ Section 15 (4) of the EEA, Grogan J *Employment Rights* 2ed (2015) 195.

that a designated employer can only rely on affirmative action as a defence to a claim of unfair discrimination if there is an affirmative action policy in place and that appointments should not merely be made as a result of a candidate being black.⁴²⁴ There should be substantive fulfilment in order to ensure that the connection between the affirmative action measure and the objectives of the policy or plan is maintained.⁴²⁵

In *Gordon v Department of Health, Kwazulu-Natal*⁴²⁶ the Labour Court held that the law does not require an employer to have a formal affirmative action plan in place before making an affirmative action appointment.⁴²⁷ The aforementioned was upheld by the Labour Appeal Court,⁴²⁸ however overturned on appeal by the Supreme Court of Appeal.⁴²⁹ The Supreme Court of Appeal held that 'properly formulated plans go a long way towards meeting the requirement of rationality'.⁴³⁰ This judgment suggests that, without a plan, 'an employer who overlooks a superior non-designated candidate and appoints or promotes an inferior designated candidate will find it difficult to prove that it has not unfairly discriminated against the non-designated candidate'.⁴³¹ This judgment shows that sole reliance on the duty to implement affirmative action measures without an employment equity plan, in order to favour people from designated groups is an inadequate defence.

Cases in which the Labour Court held that the implementation of the employment equity plan and affirmative action was erroneous and arbitrary include *Baxter v National Commissioner: Correctional Services & another*⁴³² and *University of South Africa v Reynhardt*.⁴³³ Cases such as the aforementioned demonstrates that while employers are complying with the EEA by preparing an employment equity plan, the plans are not always applied by employers as they should be. The EEA sets out the affirmative action measures which designated employers are required to implement together with the outcomes which each measure is required to achieve. It has been said that even though employers have employment equity plans in place and have complied with their obligations in terms of the EEA, the lack of translation of those plans into practice within the workplace is a barrier to the implementation of employment equity.⁴³⁴ Despite the fact that some employers are not applying their employment equity plans correctly, in other cases, as was

⁴²⁴ *Allied Workers Union v Greater Louis Trichardt Transitional Local Council* 2000 (21) ILJ 119 (LC); *Gordon v Department of Health, Kwazulu-Natal* 2008 (29) ILJ 2535 (SCA) para 22; *South African Police Service v Solidarity obo Barnard* (2014) 35 ILJ 2981 (CC) 15.

⁴²⁵ Du Toit D & Potgieter M *Unfair Discrimination in the workplace* (2014) 87.

⁴²⁶ *Gordon v Department of Health, KwaZulu-Natal* (2004) 25 ILJ 1431 (LC).

⁴²⁷ *Gordon v Department of Health, KwaZulu-Natal* (2008) 29 ILJ 2535 (SCA) para 5.

⁴²⁸ *Gordon v Department of Health, KwaZulu-Natal* (2008) 29 ILJ 2535 (SCA) para 6.

⁴²⁹ *Gordon v Department of Health, KwaZulu-Natal* (2008) 29 ILJ 2535 (SCA) para 29.

⁴³⁰ *Gordon v Department of Health, KwaZulu-Natal* (2008) 29 ILJ 2535 (SCA) para 22. See para 3.4.2.1 below for a discussion on the rationality standard.

⁴³¹ Grogan J *Employment Rights* (2010) 198.

⁴³² *Baxter v National Commissioner: Correctional Services & another* (2006) 9 BLLR 844 (LC) para 49.

⁴³³ *University of South Africa v Reynhardt* (2010) 21 ILJ 2368 (LAC) para 35.

⁴³⁴ Booysen L 'Barriers to Employment Equity implementation and retention of Blacks in management in South Africa' (2007) 31 *South African Journal of Labour Relations* 54.

confirmed in the studies conducted by Booyesen, there is merely slow progress in the implementation of existing employment equity plans.⁴³⁵ Louw speaks about the nature of affirmative action contained in the EEA being arbitrary and irrational and the fact that it 'lends itself to embracing impersonal tick-boxes'.⁴³⁶ The fact that the nature of affirmative action contained in the EEA lends itself to impersonal tick-boxes shows that the affirmative action framework is problematic.

Black professional employees in the private sector benefit as a result of the obligation placed on designated employers to prepare an employment equity plan. This is so, because by employers being required to prepare an employment equity plan, employers would be in possession of a plan to address the barriers to fair employment practices which employers would be required to implement, and employers would be in possession of a plan to be used to achieve equitable representation.

3.3.4 Reporting to the Director-General

The final duty of a designated employer is the requirement to report to the Director-General of the Department of Labour.⁴³⁷ Prior to the amendment of the EEA, the EEA differentiated between designated employers who employed fewer than 150 employees and those designated employers who employed 150 or more employees, regarding the requirement of reporting.⁴³⁸ This distinction has been removed by the Employment Equity Act Amendment Act 2013.

In terms of section 21(1) of the EEA as amended, a designated employer is required to submit a report to the Director -General once every year on the first working day of October or on such other date as may be prescribed.⁴³⁹ The aforementioned provision refers to all designated employees irrespective of the number of their employees.

The employer is required to consult with the employees or employee representatives and union representatives through the established forum prior to submitting the employment equity report to the Department of Labour.⁴⁴⁰ The report must contain the prescribed information and must be

⁴³⁵ Booyesen L 'Barriers to Employment Equity implementation and retention of Blacks in management in South Africa' (2007) 31 *South African Journal of Labour Relations* 55.

⁴³⁶ Louw AM 'The Employment Equity Act, 1998 (and other myths about the pursuit of "equality", "equity" and "dignity" in post-apartheid South Africa)' (2015) 18(3) *PER* 633.

⁴³⁷ Section 13(2)(d) of the EEA.

⁴³⁸ Section 21(1) and section 21(2) of the EEA.

⁴³⁹ Section 21(1) of the EEA.

⁴⁴⁰ Provision 8(b) of the Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans GN R424 in *GG* 40817 of 12 May 2017.

signed by the chief executive officer of the designated employer.⁴⁴¹ Form EEA 2 to the Regulations to the EEA enables designated employers to comply with the requirement of reporting to the Director-General. An employer who is unable to submit a report to the Director-General by the first working day of October, must notify the Director-General in writing before the last working day of August in the same year providing reasons for its inability to do so.⁴⁴²

The Director-General has the right to apply to the Labour Court to impose a fine, in the event of the designated employer's failure to submit the report,⁴⁴³ failure to notify and give reasons to the Director-General in terms of section 21 (4A)⁴⁴⁴ of the EEA, or has provided the Director-General, with false or invalid reasons.⁴⁴⁵ If a designated employer is unable to submit an employment equity report timeously, the designated employer concerned, is required to inform the Director-General by making use of the relevant notice template ('the Director-General notification form') found in form EEA 14 to the Regulations.

A designated employer is required to place its most recent report submitted to the Director-General in prominent places that are accessible to all employees in each of its workplaces.⁴⁴⁶ Employees such as black professional employees in the private sector benefit as a result of the obligation which is placed on designated employers to report to the Director-General, because these employees would have the Director-General to check on the information provided and the measures taken by their employers.

It is recommended that, in an attempt to reduce the barriers to the implementation of employment equity, employees as a collective should also be allowed to report to the Director-General on the designated employer's progress in implementing the employment equity plan. This recommendation would be particularly important for employees who are not represented by trade unions. This may be important for black professional employees who are not represented by trade unions. It would enable the Director-General to compare the information obtained from both parties in order to determine its accuracy. It may even contribute to the increase in racial transformation if designated employers are aware that employees are submitting a report of their own.

⁴⁴¹ Section 21(4) of the EEA.

⁴⁴² Section 21(4A) of the EEA.

⁴⁴³ Section 21(4B)(a) of the EEA.

⁴⁴⁴ Section 21(4B)(b) of the EEA.

⁴⁴⁵ Section 21 (4B)(c) of the EEA.

⁴⁴⁶ Section 25(1)(a) of the EEA.

3.4 THE APPROPRIATE STANDARD FOR ASSESSING AFFIRMATIVE ACTION MEASURES

The issue that arises is how affirmative action measures taken in terms of the EEA should be assessed. This will be discussed below.

3.4.1 Constitutional Court Judgments

In order to determine which standard to apply to affirmative action measures taken in terms of the provisions of the EEA the main constitutional court judgments in which the various standards were applied are discussed below. While the constitutional judgments which are discussed do not all deal with affirmative action, they are relevant due to them being the leading cases in which the standards were applied. Insofar as the rationality standard is concerned, *Minister of Finance and Other v Van Heerden* ('*Van Heerden*') is discussed; insofar as the fairness standard is concerned, *Harksen v Lane NO*⁴⁴⁷ is discussed; and insofar as the proportionality standard is concerned, *S v Makwanyane*⁴⁴⁸ is discussed. The Labour Court, Labour Appeal Court, Supreme Court of Appeal and Constitutional Court judgments in respect of the dispute between *Solidarity and the South African Police Service (Barnard cases)* where all three standards were applied are also outlined.

3.4.1.1 Minister of Finance and Other v Van Heerden

Van Heerden involved the constitutional validity of certain rules of a pension scheme which distinguished between parliamentarians who were members in 1994 for the first time and parliamentarians who were members prior to 1994 and then re-elected.⁴⁴⁹ The rules of the new fund differentiated between various categories of parliamentarians and provided different employer contribution amounts depending on the category.⁴⁵⁰ A claim of unfair discrimination was raised for this reason.⁴⁵¹ The High Court ruled that the rule of the fund differentiating between categories of parliamentarians to determine employer contributions was unconstitutional.⁴⁵² An application for leave to appeal from the High Court was brought, and the appeal was upheld.⁴⁵³ This judgment will be discussed further below in light of the Constitutional Court having developed the rationality standard in this judgment.⁴⁵⁴

⁴⁴⁷ *Harksen v Lane NO* 1998 (1) SA 300 (CC).

⁴⁴⁸ *S v Makwanyane* 1995 (6) BCLR 665 (CC).

⁴⁴⁹ *Minister of Finance and Other v Van Heerden* 2004 (6) SA 121 (CC) para 5; Pretorius J 'Fairness in transformation: A critique of the Constitutional Court's affirmative action jurisprudence' (2010) *SAJHR* 544.

⁴⁵⁰ *Minister of Finance and Other v Van Heerden* 2004 (6) SA 121 (CC) para 10.

⁴⁵¹ *Minister of Finance and Other v Van Heerden* 2004 (6) SA 121 (CC) para 11.

⁴⁵² *Minister of Finance and Other v Van Heerden* 2004 (6) SA 121 (CC) para 15.

⁴⁵³ *Minister of Finance and Other v Van Heerden* 2004 (6) SA 121 (CC) para 57.

⁴⁵⁴ See para 3.4.2.1 below.

3.4.1.2 Harksen v Lane NO

Harksen v Lane NO concerned the constitutionality of sections 21,⁴⁵⁵ 64⁴⁵⁶ and 65⁴⁵⁷ of the Insolvency Act 24 of 1936 (the 'Insolvency Act'). The estate of Mr Harksen was placed under final sequestration.⁴⁵⁸ Mrs Harksen who was married to Mr Harksen out of community of property was the applicant in the proceedings.⁴⁵⁹ Mrs Harksen had been summoned to subject herself to interrogation and to produce documents in terms of sections 64 and 65 of the Insolvency Act. It was submitted that section 21 of the Insolvency Act was a violation of the equality clause, particularly in that the vesting provision constitutes unequal treatment of solvent spouses and discriminates unfairly against them, and that it imposes burdens on them beyond those applicable to other persons with whom the insolvent has had any dealings.⁴⁶⁰ The Constitutional Court formulated a test to determine whether the equality clause had been violated.⁴⁶¹

3.4.1.3 S v Makwanyane

S v Makwanyane concerned the constitutionality of section 277(1)(a) of the Criminal Procedure Act 51 of 1977 ('the Criminal Procedure Act')⁴⁶² The Constitutional Court declared section 277(1) of the Criminal Procedure Act and other legislation sanctioning capital punishment inconsistent with the constitution.⁴⁶³ This judgment will be discussed further below in relation to the proportionality standard.⁴⁶⁴

⁴⁵⁵ Section 21 of the Insolvency Act provides that 'the effect of the sequestration of the separate estate of one of the two spouses who are not living apart under a judicial order of separation shall be to vest in the Master, until a trustee is appointed and, upon the appointment of a trustee, to vest in him all the property of the spouse who has not been sequestrated as if it were property of the sequestrated estate'.

⁴⁵⁶ Section 64(1) of the Insolvency Act provides that 'the insolvent must attend the first and second meetings of the creditors of the insolvent estate unless he or she has previously obtained written permission from the presiding officer to be absent'. Section 64(2) grants the presiding officer the authority to summon any person who is known or upon reasonable ground believed to be or to have been in possession of property of the insolvent or indebted to the estate.

⁴⁵⁷ Section 65(2) of the Insolvency Act provides that 'persons summoned to produce books or documents may invoke the law relating to privilege as applicable to a witness summoned to produce a book or document or giving evidence in a court of law'.

⁴⁵⁸ *Harksen v Lane NO* 1998 (1) SA 300 (CC) para 2.

⁴⁵⁹ *Harksen v Lane NO* 1998 (1) SA 300 (CC) para 2.

⁴⁶⁰ *Harksen v Lane NO* 1998 (1) SA 300 (CC) para 40.

⁴⁶¹ *Harksen v Lane NO* 1998 (1) SA 300 (CC) para 53.

⁴⁶² *S v Makwanyane* 1995 (6) BCLR 665 (CC) para 3. In *S v Makwanyane* two accused who were convicted of two counts of murder, one count of attempted murder, and one count of robbery. In respect of the counts of murder they were sentenced to death, and to imprisonment in respect of the other counts. They appealed against the convictions and the sentences. In terms of the then section 277(1)(a) of the 'Criminal Procedure Act, the death penalty was a competent sentence for murder.

⁴⁶³ *S v Makwanyane* 1995 (6) BCLR 665 (CC) para 151.

⁴⁶⁴ See para 3.4.2.3 below.

3.4.1.4 Barnard

Barnard concerned facts similar to those of the case of *Coetzer & Others v Minister of Safety and Security and another*.⁴⁶⁵ It concerned a decision by the National Commissioner of the Police Service not to appoint a white female police captain to a vacant post, solely because her promotion would not address representivity.⁴⁶⁶ According to the South African Police Service ('the SAPS'), promoting a white officer would not take the number of blacks in the unit and at the rank concerned any closer to the racial targets laid down by the employment equity plan of the SAPS.⁴⁶⁷ When the post of superintendent was created in 2005, Barnard applied.⁴⁶⁸ The interviewing panel rated her far higher than the nearest black candidate and recommended her appointment.⁴⁶⁹ The National Commissioner decided that no appointment should be made, because it would not increase the ratio of black employees to other races in the inspectorate.⁴⁷⁰ The post was withdrawn, but re-advertised the following year.⁴⁷¹ Barnard applied again and was unsuccessful once again.⁴⁷² The post was re-advertised and Barnard referred a dispute to the CCMA.⁴⁷³ The SAPS failed to attend the conciliation.⁴⁷⁴

Barnard approached the Labour Court for relief where the Labour Court held that the provisions of the EEA and the employment equity plan of the SAPS must be applied in accordance with the principles of fairness and with due regard to Barnard's constitutional right to equality and dignity.⁴⁷⁵ The Labour Court held further that it was not appropriate to apply the numerical goals set out in the employment equity plan as due consideration should be given to the individuals adversely affected.⁴⁷⁶ Where a post cannot be filled by a designated employee, because a suitable candidate from that group cannot be found, promotion of a person from a non-designated group cannot be denied without a satisfactory explanation.⁴⁷⁷ There must be a rational connection between the provisions of the equity plan and the measures adopted to implement the plan, and regard must be paid to the efficient operation of the public service.⁴⁷⁸ Since the SAPS had failed to advance any reason other than its desire to reach equity targets to explain leaving the post vacant, the Labour Court found that it had failed to discharge the onus of proving that the discrimination

⁴⁶⁵ See para 3.2.4 above.

⁴⁶⁶ *Solidarity obo Barnard v South African Police Service* (2010) 31 ILJ 742 (LC) 756.

⁴⁶⁷ *Solidarity obo Barnard v South African Police Service* (2010) 31 ILJ 742 (LC) 756.

⁴⁶⁸ *Solidarity obo Barnard v South African Police Service* (2010) 31 ILJ 742 (LC) 752.

⁴⁶⁹ *Solidarity obo Barnard v South African Police Service* (2010) 31 ILJ 742 (LC) 753.

⁴⁷⁰ *Solidarity obo Barnard v South African Police Service* (2010) 31 ILJ 742 (LC) 756.

⁴⁷¹ *Solidarity obo Barnard v South African Police Service* (2010) 31 ILJ 742 (LC) 752.

⁴⁷² *Solidarity obo Barnard v South African Police Service* (2010) 31 ILJ 742 (LC) 752.

⁴⁷³ *Solidarity obo Barnard v South African Police Service* (2010) 31 ILJ 742 (LC) 755.

⁴⁷⁴ *Solidarity obo Barnard v South African Police Service* (2010) 31 ILJ 742 (LC) 755.

⁴⁷⁵ *Solidarity obo Barnard v South African Police Service* (2010) 31 ILJ 742 (LC) 755.

⁴⁷⁶ *Solidarity obo Barnard v South African Police Service* (2010) 31 ILJ 742 (LC) 755.

⁴⁷⁷ *Solidarity obo Barnard v South African Police Service* (2010) 31 ILJ 742 (LC) 756.

⁴⁷⁸ *Solidarity obo Barnard v South African Police Service* (2010) 31 ILJ 742 (LC) 756.

was not unfair.⁴⁷⁹ The Labour Court directed that she be promoted.⁴⁸⁰

The SAPS took the matter on appeal to the Labour Appeal Court, where the appeal was upheld and the order of the Labour Court set aside.⁴⁸¹ The reasoning behind the judgment of the Labour Appeal Court was that the Labour Court misconstrued the purpose of employment equity measures by submitting that it was subject to an individual's right to equality and dignity, since the essence of restitutionary measures is to guarantee the right to equality.⁴⁸² The Labour Appeal Court held that the SAPS's employment equity plan set numerical goals which had to be met and that in terms of the employment equity plan posts were not available for the appointment or promotion of white candidates.⁴⁸³ The Labour Appeal Court held further that by appointing Barnard the overrepresentation of white employees at the level of employment in question would be aggravated, and that in the circumstances discriminating against Barnard would be justifiable.⁴⁸⁴ As regards the issue relating to the rationality between the equity plan and its obligations, as raised by the Labour Court, the Labour Appeal Court held that this was not in issue and that it would only be in issue where there was a challenge to the equity plan which there was not.⁴⁸⁵

Barnard took the matter on appeal to the Supreme Court of Appeal⁴⁸⁶ where the decision of the Labour Appeal Court was reversed and the Supreme Court of Appeal ordered that compensation be paid to Barnard.⁴⁸⁷ The Supreme Court of Appeal's reason for finding in favour of Barnard was that the SAPS not appointing Barnard because of race, amounted to discrimination, and the SAPS had failed to show that the discrimination was not unfair.⁴⁸⁸ The matter was taken on further appeal to the Constitutional Court. The Constitutional Court set aside the order of the Supreme Court of Appeal.⁴⁸⁹

3.4.2 Standards applied in judgments

The standards of rationality, fairness and proportionality are discussed below with a view to determining what the courts have viewed the appropriate standard for assessing affirmative action measures taken in terms of the EEA to be.

⁴⁷⁹ *Solidarity obo Barnard v South African Police Service* (2010) 31 ILJ 742 (LC) 759.

⁴⁸⁰ *Solidarity obo Barnard v South African Police Service* (2010) 31 ILJ 742 (LC) 761.

⁴⁸¹ *South African Police Service v Solidarity obo Barnard* (2013) 34 ILJ 590 (LAC) 607.

⁴⁸² *South African Police Service v Solidarity obo Barnard* (2013) 34 ILJ 590 (LAC) 606.

⁴⁸³ *South African Police Service v Solidarity obo Barnard* (2013) 34 ILJ 590 (LAC) 604.

⁴⁸⁴ *South African Police Service v Solidarity obo Barnard* (2013) 34 ILJ 590 (LAC) 606.

⁴⁸⁵ *South African Police Service v Solidarity obo Barnard* (2013) 34 ILJ 590 (LAC) 606.

⁴⁸⁶ *Solidarity obo Barnard v South African Police Service* (2014) 35 ILJ 416 (SCA).

⁴⁸⁷ *Solidarity obo Barnard v South African Police Service* (2014) 35 ILJ 416 (SCA) 440.

⁴⁸⁸ *Solidarity obo Barnard v South African Police Service* (2014) 35 ILJ 416 (SCA) 440.

⁴⁸⁹ *South African Police Service v Solidarity obo Barnard* (2014) 35 ILJ 2981 (CC) para 73. The standards applied in the majority and minority judgments which resulted in the outcome of the case are discussed below which

3.4.2.1 The rationality standard

The essence of rationality is justification.⁴⁹⁰ This means that rationality demands that decisions are arrived at as a result of evidence and reasons.⁴⁹¹ In *Van Heerden* the Constitutional Court established a three prong rationality test to determine whether a measure falls within section 9(2) of the Constitution. In terms of this test, the question is

'whether the measure

- a) targets persons or categories of persons who have been disadvantaged by unfair discrimination;
- b) whether the measure is designed to protect or advance such persons or categories of persons and
- c) whether the measure promotes the achievement of equality'⁴⁹² (the 'Van Heerden test').

With regards to the first question, it must be shown that the beneficiaries were disadvantaged by unfair discrimination. In *Van Heerden* the court asked whether 'an overwhelming majority of the members of the favoured class were [people from designated groups]'.⁴⁹³ In terms of the first question the Minister and the fund submitted that the 'differentiated contribution scheme was set up to promote equality between the members of the CPF and the new members who were in the past excluded on the account of race'.⁴⁹⁴ It was held that the existence of a minority of members of parliament who were not unfairly discriminated against during apartheid, but who still benefitted from the contribution scheme did not affect the validity of the remedial measure.⁴⁹⁵

With regards to the second question, whether the measure is designed to protect or advance such persons or categories of persons, the Constitutional Court stated that the remedial measures must be 'reasonably capable of attaining the desired outcome'.⁴⁹⁶ The Constitutional Court noted, importantly, that it is not required for a provider of remedial measures to show that one class has been disfavoured in order to uplift another.⁴⁹⁷ It was held that the members of the relevant class were beneficiaries of a generously funded pension scheme.⁴⁹⁸

With regards to the third question, whether the measure promotes the achievement of equality, the Constitutional Court held that determining whether a measure will promote the achievement of

⁴⁹⁰ Fergus E 'Towards Unity- Reconciling fairness and rationality in affirmative action disputes' (2015) 36 *ILJ* 56.

⁴⁹¹ Fergus E 'Towards Unity- Reconciling fairness and rationality in affirmative action disputes' (2015) 36 *ILJ* 56.

⁴⁹² *Minister of Finance and Other v Van Heerden* 2004 (6) SA 121 (CC) para 37.

⁴⁹³ *Minister of Finance and Other v Van Heerden* 2004 (6) SA 121 (CC) para 40.

⁴⁹⁴ *Minister of Finance and Other v Van Heerden* 2004 (6) SA 121 (CC) para 38.

⁴⁹⁵ *Minister of Finance and Other v Van Heerden* 2004 (6) SA 121 (CC) para 40.

⁴⁹⁶ *Minister of Finance and Other v Van Heerden* 2004 (6) SA 121 (CC) para 41.

⁴⁹⁷ *Minister of Finance and Other v Van Heerden* 2004 (6) SA 121 (CC) para 42.

⁴⁹⁸ *Minister of Finance and Other v Van Heerden* 2004 (6) SA 121 (CC) para 43.

equality requires an appreciation of the effect of the measure in the context of the broader society, which implies that even though persons who do not fall within the category of designated groups are disadvantaged by the measure, this will not automatically render the measure in conflict with section 9 of the Constitution.⁴⁹⁹ It was held that the scheme promotes the achievement of equality since it served the purpose of advancing persons who were discriminated against in the past.⁵⁰⁰

In *Barnard*, Moseneke ACJ (majority judgment) held that remedial measures, such as affirmative action, should be implemented in a way which advances those groups who suffered from past discrimination, and that they should not unduly invade the human dignity of those affected by the affirmative action measures.⁵⁰¹ Moseneke ACJ held further that affirmative action are steps which should be taken in order to achieve substantive equality.⁵⁰² The employment equity plan which the Police Service adopted sets numerical goals and these targets were informed by national demographics.⁵⁰³ Moseneke ACJ asked the question whether the National Commissioner's decision was invalid, because representivity was over-emphasised at the expense of Barnard's competence.⁵⁰⁴ Moseneke ACJ held that an affirmative action measure must be rational, in other words it must be applied to advance its purpose.⁵⁰⁵ Moseneke ACJ reached two findings. The first finding was that 'the Supreme Court of Appeal applied the incorrect principle by expecting the SAPS to prove that discrimination was not unfair, and then holding that the SAPS had failed to discharge this burden'.⁵⁰⁶ He reasoned that 'the Supreme Court of Appeal had viewed Barnard's claim as an attack on the police's employment equity plan, which it was not'.⁵⁰⁷ It was held that when employer's affirmative action measures are scrutinised, courts are required to apply section 6(2) of the EEA read with section 9 of the Constitution.⁵⁰⁸ He stated that 'this meant that presumptions of unfairness do not apply to employment equity plans which complied with section 6(2) of the EEA'.⁵⁰⁹

The second finding was that the case before the Constitutional Court was not one of unfair discrimination; instead Barnard sought to introduce a new cause of action in the form of a review of the decision of the National Commissioner not to appoint her.⁵¹⁰ Moseneke ACJ held that Ms Barnard was not entitled to raise a new cause of action and even if she was, it would have failed because the National Commissioner acted rationally in accordance with the national instruction to

⁴⁹⁹ *Minister of Finance and Other v Van Heerden* 2004 (6) SA 121 (CC) para 44.

⁵⁰⁰ *Minister of Finance and Other v Van Heerden* 2004 (6) SA 121 (CC) para 52.

⁵⁰¹ *South African Police Service v Solidarity obo Barnard* (2014) 35 ILJ 2981 (CC) para 39.

⁵⁰² *South African Police Service v Solidarity obo Barnard* (2014) 35 ILJ 2981 (CC) para 39.

⁵⁰³ *Solidarity obo Barnard v South African Police Service* 2014 ZACC 23 para 44.

⁵⁰⁴ *Solidarity obo Barnard v South African Police Service* 2014 ZACC 23 para 65.

⁵⁰⁵ *South African Police Service v Solidarity obo Barnard* (2014) 35 ILJ 2981 (CC) para 39.

⁵⁰⁶ *South African Police Service v Solidarity obo Barnard* (2014) 35 ILJ 2981 (CC) para 51.

⁵⁰⁷ *South African Police Service v Solidarity obo Barnard* (2014) 35 ILJ 2981 (CC) para 51.

⁵⁰⁸ *South African Police Service v Solidarity obo Barnard* (2014) 35 ILJ 2981 (CC) para 53.

⁵⁰⁹ *Solidarity obo Barnard v South African Police Service* 2014 ZACC 23 para 51.

⁵¹⁰ *South African Police Service v Solidarity obo Barnard* (2014) 35 ILJ 2981 (CC) para 58.

pursue employment equity targets by which he was bound, which meant that failing to fill the post would not compromise service delivery, Ms Barnard had not been denied promotion indefinitely and the National Commissioner's reasons for not appointing her were adequate.⁵¹¹

Fergus highlights the fact that the majority judgment in Barnard accepted that the presumption of unfairness does not apply to affirmative action measures, which meets the requirements of section 6(2) of the EEA and that the minimum standard required for the application of affirmative action measures is rationality.⁵¹²

3.4.2.2 The fairness standard

Fairness entails a 'balancing exercise in which the interests of both sides are weighed against each other, to reach an equitable outcome'.⁵¹³ The fairness test tabulated by the Constitutional Court in *Harksen v Lane NO* which is used to determine whether the equality clause has been violated was discussed in chapter 2 of this thesis.⁵¹⁴ The fairness test of *Harksen v Lane NO* focuses on the position of the complainant, and therefore in an affirmative action context will focus on the effect of the measure on the complainant's human dignity.⁵¹⁵ *Harksen* identified the position of the complainant as being one of the most important elements of the fairness enquiry.⁵¹⁶ Fairness is a standard that the Constitution recognises in the employment context and in relation to restitutionary measures. The Labour Court has held that affirmative action measures should be fair.⁵¹⁷

O'Regan J stated that

'Fairness is one of the core values of our constitutional order: the requirement of fairness is imposed on administrative decision-makers by section 33 of the Constitution; on courts by sections 34 and 35 of the Constitution; in respect of labour practices by section 23 of the Constitution and in relation to discrimination by section 9 of the Constitution.'⁵¹⁸

The impact of the discrimination on those who have alleged that they have suffered from it, is what

⁵¹¹ *South African Police Service v Solidarity obo Barnard* (2014) 35 ILJ 2981 (CC) para 67.

⁵¹² Fergus E 'Towards Unity- Reconciling fairness and rationality in affirmative action disputes' (2015) 36 *ILJ* 46.

⁵¹³ Fergus E 'Towards Unity- Reconciling fairness and rationality in affirmative action disputes' (2015) 36 *ILJ* 56.

⁵¹⁴ See para 2.1 above.

⁵¹⁵ *Harksen v Lane NO* 1998 (1) SA 300 (CC) para 46.

⁵¹⁶ Pretorius J 'Fairness in transformation: A critique of the Constitutional Court's affirmative action jurisprudence' (2010) 26 *SAJHR* 541.

⁵¹⁷ *Baxter v National Commissioner: Correctional Services & another* (2006) 9 BLLR 844 (LC) para 49; *Independent Municipal & Allied Workers Union v Greater Louis Trichardt Transitional Local Council* (1999) ZALC 107 (16 July 1999) para 32.

⁵¹⁸ *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews & Another* 2009 (4) SA 529 CC.

is important in terms of the fairness standard.⁵¹⁹

The Constitutional Court judgment of Cameron J, Froneman J and Majiedt AJ in *Barnard* agreed with Moseneke ACJ insofar as there was no attack on the validity of the employment equity plan, but merely a challenge on the manner in which the police had implemented the plan.⁵²⁰ It was further agreed that Barnard was not entitled to raise a new cause of action in the form of a review, but that it was a claim of unfair discrimination that was before the Court.⁵²¹ While Cameron J acknowledged that rationality should be the bare minimum requirement since all exercises of public power should at least be rational, the appropriate standard was considered to be fairness.⁵²² Cameron J held that 'unlike mere rationality, it is sufficiently encompassing to allow courts to assess consistency with the provisions and purposes of the [EEA], which recognise the importance of fair treatment in employment.'⁵²³ Cameron J acknowledged that there are two objections to the use of the fairness standard. First, that it is vague, and secondly that it 'may be internally inconsistent in individual implementation cases where the general restitutionary measures or policies have already passed constitutional muster and thus do not constitute unfair discrimination', but argued that neither of these two objections are convincing.⁵²⁴ Cameron J held that

'assessing the fairness of the individual implementation of affirmative action measures is different to deciding whether those measures amount to unfair discrimination [because] the latter enquiry is at the general level of determining whether the formulation and content of a restitutionary measure is constitutionally compliant, [while] the former enquiry examines whether a specific implementation of a measure that is constitutionally compliant in its general form is nevertheless in conflict with the provisions of the [EEA].'⁵²⁵

The standard of fairness was applied, and Cameron J considered whether the National Commissioner's decision not to appoint Barnard was a fair implementation of SAPS's employment equity plan.⁵²⁶ The EEA requires employers to implement affirmative action measures to redress the discrimination against women; however, of the 122 employees in the SAPS within the branch in question, there were already 61 women and 61 men.⁵²⁷ Cameron J concluded that the National Commissioner's decision not to appoint Barnard was fair.⁵²⁸ The reasons given by Cameron J were that the National Commissioner's failure to address the issue of gender representativity and failure

⁵¹⁹ Fergus E 'Towards Unity- Reconciling fairness and rationality in affirmative action disputes' (2015) 36 *ILJ* 57.

⁵²⁰ *South African Police Service v Solidarity obo Barnard* (2014) 35 *ILJ* 2981 (CC) para 74.

⁵²¹ *South African Police Service v Solidarity obo Barnard* (2014) 35 *ILJ* 2981 (CC) para 74.

⁵²² *South African Police Service v Solidarity obo Barnard* (2014) 35 *ILJ* 2981 (CC) para 98.

⁵²³ *South African Police Service v Solidarity obo Barnard* (2014) 35 *ILJ* 2981 (CC) para 98.

⁵²⁴ *Solidarity obo Barnard v South African Police Service* 2014 ZACC 23 para 99.

⁵²⁵ *Solidarity obo Barnard v South African Police Service* 2014 ZACC 23 para 101.

⁵²⁶ *South African Police Service v Solidarity obo Barnard* (2014) 35 *ILJ* 2981 (CC) para 120.

⁵²⁷ *Solidarity obo Barnard v South African Police Service* 2014 ZACC 23 para 114.

⁵²⁸ *South African Police Service v Solidarity obo Barnard* (2014) 35 *ILJ* 2981 (CC) para 121.

to adequately address the question of service delivery were not indicative of unfairness.⁵²⁹ Cameron J held that the National Commissioner could fairly have determined that racial representivity was a more urgent a problem than gender representivity.⁵³⁰ Cameron J also held that the affirmative action policy of the SAPS did not constitute an absolute bar to Barnard insofar as future promotion was concerned.⁵³¹ The reasons did not justify the conclusion that the non-appointment of Barnard would compromise service delivery, and Barnard did not present any evidence that her promotion would achieve service delivery.⁵³²

Solidarity & Others v Department of Correctional Services and others,⁵³³ concerned a situation in which the applicants applied for appointments to certain posts where some of the applicants were recommended for appointment, however were denied the appointments.⁵³⁴ In the case of the males the reason given for the refusal to appoint the applicants was due to the overrepresentation of coloured employees in the occupational level in question, while in the case of females the reason given for the refusal to appoint the applicants was due to the overrepresentation of females in the occupational level in question.⁵³⁵ The applicants claimed that the refusal to appoint them amounted to unfair discrimination on the grounds of race and gender.⁵³⁶ The Constitutional Court had to determine whether the Barnard principle applied to designated groups, that is whether ‘an employer may refuse to appoint an African person, Coloured person or Indian person on the basis that African people, Coloured people or Indian people, as the case may be, are already overrepresented or adequately represented in the occupational level to which the particular African, Coloured or Indian candidate seeks appointment’.⁵³⁷ The Constitutional Court held that the Barnard principle is not limited to white candidates and that black candidates⁵³⁸ are subject to the Barnard principle as well.⁵³⁹ The aforementioned was held despite Moseneke ACJ stating that ‘we must be careful that the steps to promote substantive equality do not unwittingly infringe the dignity of other individuals – especially those who were themselves previously disadvantaged’.⁵⁴⁰

⁵²⁹ *South African Police Service v Solidarity obo Barnard* (2014) 35 ILJ 2981 (CC) para 121.

⁵³⁰ *Solidarity obo Barnard v South African Police Service* 2014 ZACC 23 para 122.

⁵³¹ *South African Police Service v Solidarity obo Barnard* (2014) 35 ILJ 2981 (CC) para 123.

⁵³² *South African Police Service v Solidarity obo Barnard* (2014) 35 ILJ 2981 (CC) para 121.

⁵³³ *Solidarity and Others v Department of Correctional Services and Others* 2016 (10) BCLR 1349 (CC).

⁵³⁴ *Solidarity and Others v Department of Correctional Services and Others* 2016 (10) BCLR 1349 (CC) para 6.

⁵³⁵ *Solidarity and Others v Department of Correctional Services and Others* 2016 (10) BCLR 1349 (CC) para 6.

⁵³⁶ *Solidarity and Others v Department of Correctional Services and Others* 2016 (10) BCLR 1349 (CC) para 65.

⁵³⁷ *Solidarity and Others v Department of Correctional Services and Others* 2016 (10) BCLR 1349 (CC) para 38.

⁵³⁸ Black people includes coloured people. See para 2.2.1 above.

⁵³⁹ *Solidarity and Others v Department of Correctional Services and Others* 2016 (10) BCLR 1349 (CC) para 40.

⁵⁴⁰ *South African Police Service v Solidarity obo Barnard* (2014) 35 ILJ 2981 (CC) para 67.

3.4.2.3 The proportionality standard

The proportionality standard

'involves a balancing act between competing interests and objectives of the state and the interests of the individual and embodies a sense of an appropriate relationship between the ends and the means of state action. Proportionality demands that when an individual's rights are affected or threatened by state action, only such action shall be countenanced which is suitable, necessary and not out of proportion to the gains to the community. Proportionality can thus be seen to be synonymous for reasonableness.'⁵⁴¹

Proportionality requires the judiciary 'to assess the legitimacy of whatever law or regulation or ruling is before them from the perspective of those who reap its greatest benefits and those who stand to lose the most'.⁵⁴² In order to determine whether a limitation to a constitutional right is reasonable, the limitations clause contained in section 36 of the Constitution should be applied. In terms of the Constitution, the rights in the Bill of Rights may be limited only in terms of law of general application, and such limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.⁵⁴³

A limitation of a constitutional right is acceptable if it is proportional.⁵⁴⁴ In *S v Makwanyane* the Constitutional Court held that 'proportionality is an ingredient to be taken into account in deciding whether a penalty is cruel, inhuman or degrading'.⁵⁴⁵ All relevant factors should be taken into consideration in order to determine whether the limitation of rights is reasonable and justifiable. Chaskalson P held that the

'limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values and ultimately an assessment based on proportionality...In the balancing process the relevant considerations will include the nature of the right that is limited and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question.'⁵⁴⁶

⁵⁴¹ Barrie G 'The application of the doctrine of proportionality in South African courts' (2013) 28 *SAPL* 40.

⁵⁴² Pretorius J 'Fairness in transformation: A critique of the Constitutional Court's affirmative action jurisprudence' (2010) *SAJHR* 555.

⁵⁴³ Section 36 of the Constitution.

⁵⁴⁴ Barrie G 'The application of the doctrine of proportionality in South African courts' (2013) 28 *SAPL* 47.

⁵⁴⁵ *S v Makwanyane* 1995 (6) BCLR 665 (CC) para 94; The death penalty was not dealt with in the Constitution, however in terms of section 11(2) of the Constitution 'cruel, inhuman or degrading treatment or punishment' is prohibited. The two accused relied on the right to life and the right to dignity. The Constitutional Court referred to the limitations clause in terms of which a limitation of rights shall be permissible in the event of it being reasonable, justifiable, and does not negate the essential content of the right.

⁵⁴⁶ *S v Makwanyane* 1995 (6) BCLR 665 (CC) para 104.

This balancing process was conducted by the Constitutional Court. The Constitutional Court held that

'in the balancing process the principal factors that have to be weighed are on the one hand the destruction of life and dignity that is a consequence of the implementation of the death sentence, the elements of arbitrariness and the possibility of error in the enforcement of capital punishment and the existence of a severe alternative punishment (life imprisonment) and on the other, the claim that the death sentence is a greater deterrent to murder and will more effectively prevent its commission, that would a sentence of life imprisonment and that there is a public demand for retributive justice to be imposed on murderers which only the death sentence can meet.'⁵⁴⁷

In *Barnard*, Van der Westhuizen J also ruled in favour of the SAPS,⁵⁴⁸ by applying *inter alia* the Van Heerden test.⁵⁴⁹ Van der Westhuizen J recognised that affirmative action measures are not an exception to the right to equality, but formed part of the right to equality.⁵⁵⁰ He held that affirmative action and its implementation are not immune to scrutiny and thus referred to *Van Heerden's* three-prong test.⁵⁵¹ Where a measure passed the *Van Heerden* test in form, but its application had been challenged, an additional means of scrutiny beyond 'abuse of power and undue harm' was required.⁵⁵² He described the question as 'whether the measure as implemented had served to advance or retard the equal enjoyment in practice of the rights and freedoms that are promised by the Constitution, but have not already been achieved'.⁵⁵³ Van der Westhuizen J held that equality can mean more than representivity⁵⁵⁴ and by concentrating on the issue of representivity only, 'a measure's implementation may thwart other equality concerns'.⁵⁵⁵ However in the case of *Barnard*, equality meant representivity and since Barnard's promotion would have resulted in the over-representation of her designated group employed at the specific level, 'her appointment would have aggravated racial inequality'.⁵⁵⁶ However, that was not the end of the matter for Van der Westhuizen J who then held that

'the question whether the implementation passes constitutional muster also has to take into account how it may affect other constitutional rights and values. A separate enquiry - one

⁵⁴⁷ *S v Makwanyane* 1995 (6) BCLR 665 (CC) para 145.

⁵⁴⁸ *Solidarity obo Barnard v South African Police Service* 2014 ZACC 23 para 195.

⁵⁴⁹ *Solidarity obo Barnard v South African Police Service* 2014 ZACC 23 para 142.

⁵⁵⁰ *South African Police Service v Solidarity obo Barnard* (2014) 35 ILJ 2981 (CC) para 136.

⁵⁵¹ *South African Police Service v Solidarity obo Barnard* (2014) 35 ILJ 2981 (CC) para 143.

⁵⁵² *South African Police Service v Solidarity obo Barnard* (2014) 35 ILJ 2981 (CC) para 148.

⁵⁵³ *South African Police Service v Solidarity obo Barnard* (2014) 35 ILJ 2981 (CC) para 148; Fergus E 'Towards Unity-Reconciling fairness and rationality in affirmative action disputes' (2015) 36 *ILJ* 50.

⁵⁵⁴ Equality should also include the fact that employees from designated groups are not granted the same opportunities as employees who do not form part of designated groups.

⁵⁵⁵ *South African Police Service v Solidarity obo Barnard* (2014) 35 ILJ 2981 (CC) para 149.

⁵⁵⁶ *South African Police Service v Solidarity obo Barnard* (2014) 35 ILJ 2981 (CC) para 150.

which does not only use equality as a barometer - needs to be undertaken. What barometer would be appropriate to test the impact of the implementation?'

In determining what barometer to use, Van der Westhuizen J stated that the proportionality enquiry would be helpful in measuring the impact of one right on another.⁵⁵⁷ He applied the proportionality standard by considering two aspects. First, the impact of the implementation of the affirmative action measure policy on Barnard's human dignity was assessed, and the Judge concluded that Barnard's human dignity was not restricted excessively and was 'reasonably and justifiably outweighed by the goal of affirmative action'.⁵⁵⁸ Secondly, the impact of not promoting her on service delivery was assessed, and the Judge concluded that it was not disproportionate for the SAPS to prioritise representivity over the possible impact on service delivery.⁵⁵⁹

3.4.2.4 No standard/purpose of the EEA

Jaftha J did not address the standard applicable due to the fact that the parties were responsible for raising issues to be determined by the court.⁵⁶⁰ He held that an issue may only be raised by the court *mero motu* in the event of such issue being apparent from the papers and in the event of its determination being necessary to adjudicate the case properly.⁵⁶¹ As a result of this not being the situation in the *Barnard* case, the issue of the appropriate standard to be applied could not be raised by the court *mero motu*.⁵⁶²

The EEA states that taking affirmative action measures consistent with the purpose of the EEA does not constitute unfair discrimination.⁵⁶³ Jafta J held that the EEA required affirmative action measures to be consistent with the purposes of the EEA.⁵⁶⁴ Jaftha J held that the issue was whether the decision not to appoint Barnard was consistent with the purpose of the EEA, and he held that it was.⁵⁶⁵ Jaftha J answered the question whether the National Commissioner's decision is consistent with the purpose of the EEA in the affirmative, due to the fact that one of the purposes of the EEA is to achieve employment equity by implementing affirmative action measures to redress the disadvantages experienced by designated groups in order to ensure equitable representation in all occupational levels in the workforce.⁵⁶⁶ Jafta J held that the National Commissioner decided not to appoint Barnard, because her appointment would be contrary to the contents of the

⁵⁵⁷ *South African Police Service v Solidarity obo Barnard* (2014) 35 ILJ 2981 (CC) para 162.

⁵⁵⁸ *South African Police Service v Solidarity obo Barnard* (2014) 35 ILJ 2981 (CC) para 183.

⁵⁵⁹ *South African Police Service v Solidarity obo Barnard* (2014) 35 ILJ 2981 (CC) para 189.

⁵⁶⁰ *South African Police Service v Solidarity obo Barnard* (2014) 35 ILJ 2981 (CC) para 217.

⁵⁶¹ *South African Police Service v Solidarity obo Barnard* (2014) 35 ILJ 2981 (CC) para 218.

⁵⁶² *South African Police Service v Solidarity obo Barnard* (2014) 35 ILJ 2981 (CC) para 219.

⁵⁶³ *Solidarity obo Barnard v South African Police Service* 2014 ZACC 23 para 223.

⁵⁶⁴ *Solidarity obo Barnard v South African Police Service* 2014 ZACC 23 para 225.

⁵⁶⁵ *Solidarity obo Barnard v South African Police Service* 2014 ZACC 23 para 225.

⁵⁶⁶ *Solidarity obo Barnard v South African Police Service* 2014 ZACC 23 para 225.

employment equity plan.⁵⁶⁷ He held further that the fairness test which required balancing the competing interests of the parties to a dispute, is an inappropriate test in the context of affirmative action.⁵⁶⁸ Given that an advantaged individual's rights could not be weighed equally against those who had been previously discriminated against, Jafta J held further that the National Commissioner's decision cannot constitute unfair discrimination, nor can it be held to be unfair, and that due to the aforementioned, fairness cannot be the standard.⁵⁶⁹

3.4.2.5 An analysis of the standards applied in judgments

In order to determine whether any of the standards can be applied to assess affirmative action measures in terms of the EEA, each standard and its effect will be discussed individually.

The rationality standard is the least strict of the three standards. Insofar as the rationality standard is concerned decisions should be arrived at as a result of reasons.⁵⁷⁰ It has been argued that 'differentiation aimed at protecting or advancing persons disadvantaged by unfair discrimination is constitutionally warranted provided the measures are shown to conform to the section 9(2) test' (Van Heerden test).⁵⁷¹ In the event of an affirmative action measure passing the rationality test of *Van Heerden*, it has been argued that a non-beneficiary will not be able to claim that the measure discriminates against him or her. Louw disagrees with this reasoning.⁵⁷² In support of this opposition Louw refers to the wording used in *Van Heerden* where Moseneke J held that a measure that satisfies the *Van Heerden* test cannot be *presumed* to be unfair in terms of section 9(5), and that this does not mean that the affirmative action measure cannot be unfair, only that it cannot be *presumed* to be unfair.⁵⁷³ Moseneke J held that restitutionary measures which passed muster in terms of section 9(2) of the Constitution could not be presumed to be unfairly discriminatory, because 'such presumptive unfairness would unduly require the judiciary to second guess the legislature and the executive concerning the appropriate measures to overcome the effect of unfair discrimination'.⁵⁷⁴ Applying the presumption of unfairness to affirmative action would place these restitutionary measures in the same category as ordinary forms of discrimination which should not be the case.

⁵⁶⁷ *Solidarity obo Barnard v South African Police Service* 2014 ZACC 23 para 224.

⁵⁶⁸ *Solidarity obo Barnard v South African Police Service* 2014 ZACC 23 para 228.

⁵⁶⁹ *Solidarity obo Barnard v South African Police Service* 2014 ZACC 23 para 227.

⁵⁷⁰ Fergus E 'Towards Unity- Reconciling fairness and rationality in affirmative action disputes' (2015) 36 *ILJ* 56.

⁵⁷¹ Pretorius J 'Fairness in transformation: A critique of the Constitutional Court's affirmative action jurisprudence' (2010) 26 *SAJHR* 546.

⁵⁷² Louw AM 'The Employment Equity Act, 1998 (and other myths about the pursuit of "equality", "equity" and "dignity" in post-apartheid South Africa)' (2015) 18(3) *PER* 602.

⁵⁷³ Louw AM 'The Employment Equity Act, 1998 (and other myths about the pursuit of "equality", "equity" and "dignity" in post-apartheid South Africa)' (2015) 18(3) *PER* 602.

⁵⁷⁴ Pretorius J 'Fairness in transformation: A critique of the Constitutional Court's affirmative action jurisprudence' (2010) 26 *SAJHR* 549.

Objections have been raised against the standard of rationality. Pretorius argues that the rationality standard demands no explanation in the event of the measure being an unfair or disproportionate invasion of rights.⁵⁷⁵ Pretorius argues that the rationality standard does not contain any of the elements of fairness and proportionality, and as a result has been created in isolation from sections 9(3) and 36 of the Constitution.⁵⁷⁶ He states further that the Constitutional Court's approach in *Van Heerden* in interpreting section 9(2) in isolation

'seems curious in light of its general sensitivity to the danger of reading specific constitutional provisions in isolation. Construing constitutional provisions in light of the constitution as a whole is a necessary corollary of the contextual and purposive approach to constitutional interpretation'.⁵⁷⁷

Cameron J, who is a supporter of the fairness standard, criticises the rationality standard for not allowing a court to interrogate a decision-maker's balancing of the interests of people from designated groups and the persons affected by the affirmative action measures.⁵⁷⁸ Fergus states that insofar as rationality is concerned focussing on the reasons provided by one person, being the employer, as opposed to taking the interests of those affected into consideration, may hamper the rights of those who are affected by the employer's decision.⁵⁷⁹

Rationality has been said to be better suited for assessing affirmative action measures, rather than fairness and proportionality is. According to Fergus the third leg of the *Van Heerden* test is important, 'as measures which impose undue harm on those negatively affected by them or constitute an abuse of power, fall short of this requirement'.⁵⁸⁰ In her opinion, through this, 'the rights and interests of previously advantaged persons are secured'.⁵⁸¹ She argues that while factors linked to an employer's justification for affirmative action measures (whether in the form or in the implementation thereof) should fall within the rationality component of the test, those dealing with dignity and the imposition of harm on persons negatively affected by affirmative action should be placed within the third leg of the *Van Heerden* test.⁵⁸²

A remedial measure must meet the three conditions set out in the *Van Heerden* test in order to comply with section 9(2) of the Constitution. If a measure meets these three requirements, it

⁵⁷⁵ Pretorius J 'Accountability, Contextualisation and the standard of judicial review of affirmative action: *Solidarity obo Barnard v South African Police Services*' (2013) *SALJ* 40.

⁵⁷⁶ Pretorius J 'Fairness in transformation: A critique of the Constitutional Court's affirmative action jurisprudence' (2010) 26 *SAJHR* 536.

⁵⁷⁷ Pretorius J 'Fairness in transformation: A critique of the Constitutional Court's affirmative action jurisprudence' (2010) 26 *SAJHR* 558.

⁵⁷⁸ *South African Police Service v Solidarity obo Barnard* 2014 (35) *ILJ* 2981 (CC) para 96.

⁵⁷⁹ Fergus E 'Towards Unity- Reconciling fairness and rationality in affirmative action disputes' (2015) 36 *ILJ* 59.

⁵⁸⁰ Fergus E 'Towards Unity- Reconciling fairness and rationality in affirmative action disputes' (2015) 36 *ILJ* 69.

⁵⁸¹ Fergus E 'Towards Unity- Reconciling fairness and rationality in affirmative action disputes' (2015) 36 *ILJ* 69.

⁵⁸² Fergus E 'Towards Unity- Reconciling fairness and rationality in affirmative action disputes' (2015) 36 *ILJ* 69.

cannot be presumed to be unfairly discriminatory.⁵⁸³ In the event of the measure falling within the scope of section 9(2), it will not constitute unfair discrimination.⁵⁸⁴ However, if the affirmative action measure does not fall under section 9(2) of the Constitution and it constitutes discrimination on a prohibited ground, it will be necessary to resort to the *Harksen* test to determine whether the measure is prohibited in terms of section 9(3) in which case it may constitute unfair discrimination.⁵⁸⁵

In determining whether the rationality standard is the appropriate standard to assess affirmative action measures in terms of the EEA the *Van Heerden* test should be applied. Affirmative action measures apply to people from designated groups, and thus target categories of persons disadvantaged by past unfair discrimination. Affirmative action measures have also been designed to protect or advance people from designated groups. Louw argues that the EEA's affirmative action scheme does not promote the achievement of substantive equality.⁵⁸⁶ In this regard he speaks about the references in the EEA to representivity,⁵⁸⁷ and the fact that there is no connection between representivity and equality.⁵⁸⁸ As a result of the absence of a link between representivity and equality, affirmative action measures fail to meet the third condition of the *Van Heerden* test, and may thus be rendered unconstitutional. This shows that the rationality test is inappropriate.

The dual function which has been ascribed to the right against unfair discrimination (to prevent discrimination and to allow remedial action) supports the view that affirmative action measures are not 'exempt from unfair discrimination scrutiny'.⁵⁸⁹ The fairness standard was criticised by Van Der Westhuizen J who held that:

'Section 9(3) deals with differentiation which amounts to unfair discrimination. By definition, measures under section 9(2) do not amount to unfair discrimination...once a measure has withstood the section 9(2) *Van Heerden* enquiry and is found not to be unfair, another investigation into its fairness, informed by section 9(3) considerations, may not always make practical sense.'

⁵⁸³ Louw AM 'The Employment Equity Act, 1998 (and other myths about the pursuit of "equality", "equity" and "dignity" in post-apartheid South Africa)' (2015) 18(3) *PER* 602.

⁵⁸⁴ Louw AM 'The Employment Equity Act, 1998 (and other myths about the pursuit of "equality", "equity" and "dignity" in post-apartheid South Africa)' (2015) 18(3) *PER* 602.

⁵⁸⁵ Pretorius JL 'Accountability, contextualisation and the standard of judicial review of affirmative action: *Solidarity obo Barnard v South African Police Services*' (2013) 130 *SALJ* 36; Louw AM 'The Employment Equity Act, 1998 (and other myths about the pursuit of "equality", "equity" and "dignity" in post-apartheid South Africa)' (2015) 18(3) *PER* 602.

⁵⁸⁶ Louw AM 'The Employment Equity Act, 1998 (and other myths about the pursuit of "equality", "equity" and "dignity" in post-apartheid South Africa)' (2015) 18(3) *PER* 647.

⁵⁸⁷ See para 3.1 and para 3.2.4 above.

⁵⁸⁸ Louw AM 'The Employment Equity Act, 1998 (and other myths about the pursuit of "equality", "equity" and "dignity" in post-apartheid South Africa)' (2015) 18(3) *PER* 647.

⁵⁸⁹ Pretorius J 'Fairness in transformation: A critique of the Constitutional Court's affirmative action jurisprudence' (2010) 26 *SAJHR* 541.

It has been argued that the fairness standard looks at the effect of the measure on the complainant's human dignity and thus requires that the measure should be something more than just rational.⁵⁹⁰ Fairness seems to be more objective than rationality i.e. '[fairness] requires courts to pass value judgments'.⁵⁹¹ Fairness is therefore based more on the discretion of individual judgments than rationality.⁵⁹² Affirmative action forms part of the right to equality.⁵⁹³ It has been argued that this implies that weighing the interests of a designated group against a non-designated individual while maintaining the substantive nature of equality, is contradictory.⁵⁹⁴ The fairness standard was also criticised in that applying the fairness standard would frustrate the goal of section 9(2) of the Constitution, if undue attention is paid to the persons disadvantaged by the affirmative action measure.⁵⁹⁵ Louw however argues that 'a fairness enquiry into the effects of an affirmative action measure does not entail subjugating such a measure to any individual's rights to equality and/ or dignity, it requires that the fairness (and proportionality) of something that purports to promote equality must still comply with the requirements of the Constitution'.⁵⁹⁶ In this regard Pretorius states that

'the view that fairness testing under section 9(3) is mainly or "predominantly" concerned with the complainant is not new... and has been advanced by some in order to ascribe distinguishable roles to the fairness testing under s 9(3) and the proportionality inquiry in terms of s 36. Given the content that the Court has ascribed to the fairness requirement in *Harksen* and its subsequent application, such attempts are not particularly promising. The contextual factors utilised to steer the fairness inquiry makes apparent that it has - like the limitation clause - a clear balancing function. This is the reason why even members of the Court itself have raised doubts whether the fairness and proportionality inquiries are distinguishable. The fairness inquiry, as conceived and applied by the Court, can by definition, not focus solely or even 'predominantly' on only one of the parties involved and still fulfil the "proportionate balancing" function. The fairness of a measure is not decided by considering its impact on complainants in isolation. The legal evaluation of the degree of detrimental impact caused by a particular discriminatory measure is also relative to the legal evaluation of the importance of the purpose of the measure...fairness necessarily involves a weighing and balancing of competing interests and considerations. In *Harksen*, after listing the factors relevant to the fairness investigation, the Constitutional Court underlined this by emphasising that it is the *cumulative effect* of these competing factors that must be examined in order to come to a conclusion on unfairness. The Court, therefore, more than often not,

⁵⁹⁰ Louw AM 'The Employment Equity Act, 1998 (and other myths about the pursuit of "equality", "equity" and "dignity" in post-apartheid South Africa)' (2015) 18(3) *PER* 603.

⁵⁹¹ Fergus E 'Towards Unity- Reconciling fairness and rationality in affirmative action disputes' (2015) 36 *ILJ* 58.

⁵⁹² Fergus E 'Towards Unity- Reconciling fairness and rationality in affirmative action disputes' (2015) 36 *ILJ* 58.

⁵⁹³ See para 2.2.2.3 above.

⁵⁹⁴ Fergus E 'Towards Unity- Reconciling fairness and rationality in affirmative action disputes' (2015) 36 *ILJ* 59.

⁵⁹⁵ *Minister of Finance and Other v Van Heerden* 2004 (6) SA 121 (CC) para 80.

⁵⁹⁶ Louw AM 'The Employment Equity Act, 1998 (and other myths about the pursuit of "equality", "equity" and "dignity" in post-apartheid South Africa)' (2015) 18(3) *PER* 604.

ends its fairness inquiry with a conclusion typical of balancing analysis of the proportionality test.⁵⁹⁷

Pretorius makes a convincing argument. If his views are correct, it is necessary to outline the factors which he is referring to. The *Harksen* factors referred to by Pretorius to be considered in order to determine unfairness include

- 'a) the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage, whether the discrimination in the case under consideration is on a specified ground or not;
- b) the nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed in the first instance, at impairing the complainants...,but is aimed at achieving a worthy and important societal goal, such as for example, the furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether complainants have in fact suffered the impairment in question;
- c) with due regard to (a) and (b) above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.⁵⁹⁸

These factors confirm that fairness of a measure is not determined *solely* by looking at the impact which an affirmative action measure has on a complainant.

As far as the standard to apply to assess affirmative action measures in terms of the EEA is concerned, the fairness standard would be inappropriate. This is due to the fact that undue attention would be paid to the complainants,⁵⁹⁹ their position in society and the extent to which their rights and interests have been affected. While it is acknowledged that the purpose which the power or provision aims to achieve is considered, emphasis is placed on the complainants as was confirmed in *Harksen*.⁶⁰⁰ This shows that affirmative action measures in terms of the EEA cannot be subjected to the fairness standard as this would frustrate the goal that it is required to achieve.

Unlike the rationality test, which was criticised for not taking the interests of persons disadvantaged by the affirmative action into consideration, applying the proportionality standard would take the competing interests into consideration.⁶⁰¹ In criticising the proportionality standard, Fergus

⁵⁹⁷ Pretorius J 'Fairness in transformation: A critique of the Constitutional Court's affirmative action jurisprudence' (2010) 26 *SAJHR* 553.

⁵⁹⁸ *Harksen v Lane NO* 1998 (1) SA 300 (CC) para 51.

⁵⁹⁹ A complainant would usually be an aggrieved person from a non-designated group.

⁶⁰⁰ *Harksen v Lane NO* 1998 (1) SA 300 (CC) para 46.

⁶⁰¹ Pretorius J 'Fairness in transformation: A critique of the Constitutional Court's affirmative action jurisprudence'

submitted that

'while the value of proportionality in balancing competing constitutional rights and values is clear, the suitability of full-scale proportionality assessment in the restitutive sphere is unclear. The danger is that if judges are encouraged to weigh the equality imperative against all manner and form of constitutional rights and values raised by litigants, restitutive measures may be subject to unduly broad review. Considering whether a measure is the least restrictive means of achieving transformation would conceivably exacerbate this'.⁶⁰²

The proportionality standard involves applying the relevant factors to determine whether the limitation of the right to equality is reasonable and justifiable. If a judiciary assesses the legitimacy of affirmative action measures from the perspective of those who reap its greatest benefits (people from designated groups) and those who stand to lose the most (people who do not form part of designated groups) affirmative action measures would surely be subjected to an unduly broad review. The proportionality standard would thus be an inappropriate standard to use to assess affirmative action measures.

The discussion above confirms that neither of the three standards would be the sole appropriate standard to use to assess affirmative action measures. To date the courts have not agreed on the appropriate standard to use for this purpose. This indicates that the interpretation of the EEA is challenging and that the EEA is not an appropriate vehicle to achieve racial transformation. The Constitutional Court has held that 'legislation cannot be circumvented by resorting directly on constitutional rights'.⁶⁰³ Legislation can however be measured against constitutional rights.⁶⁰⁴ It is therefore interesting that the Constitutional Court has focused on section 9 of the Constitution when it comes to assessing affirmative action measures and has made very little reference to the EEA itself.

3.5 COMPLIANCE WITH THE PROVISIONS OF THE EEA

A number of sections have been included in the EEA to ensure compliance with its provisions. Labour inspectors have a number of powers. These powers include the power 'to enter, question and inspect' a place of employment in accordance with the provisions of sections 65 and 66 of the Basic Conditions of Employment Act 75 of 1997.⁶⁰⁵ Labour inspectors may obtain a written undertaking from a designated employer in the event of a designated employer's failure to consult

(2010) 26 SAJHR 554.

⁶⁰² Fergus E 'Towards Unity- Reconciling fairness and rationality in affirmative action disputes' (2015) 36 ILJ 52.

⁶⁰³ *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and others* 2006 (2) SA 311 (CC) para 97.

⁶⁰⁴ *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and others* 2006 (2) SA 311 (CC) para 97.

⁶⁰⁵ Section 35 of the EEA.

with employees, conduct an analysis, publish its report, assign responsibility to one of its senior managers, inform its employees in terms of section 25 or keep records in terms of section 26.⁶⁰⁶ In the event of a designated employer's failure to comply with the duties in terms of the EEA, a labour inspector also has the power to issue a compliance order.⁶⁰⁷ The compliance order must contain *inter alia* the provisions of the EEA with which the designated employer has failed to comply, the details of the conduct which formed the basis of the non-compliance, as well as any written undertaking which the designated employer provided, together with any failure by the designated employer to comply with such written undertaking.⁶⁰⁸ In the event of a compliance order being received by a designated employer, such an employer is required to display a copy thereof at a place accessible to the affected employees.⁶⁰⁹ A designated employer must comply with the compliance order within the time period stated therein.⁶¹⁰ In the event of a designated employer's failure to comply with such order within the specified time period, the Director-General may apply to the Labour Court to make the compliance order an order of the Labour Court.⁶¹¹ The forms to be completed by the designated employer in question insofar as the written undertaking is concerned and insofar as the compliance order is concerned, are contained in forms EEA 5 and EEA 6 respectively. Sections 39 and 40 of the EEA, which once outlined designated employers' rights to object and appeal against compliance orders, have been repealed. As a result of the repeal of these sections, once a compliance order is received by an employer, an employer is left with no recourse in terms of the EEA.

Powers are also given to the Director-General of Labour to ensure compliance with the EEA. In terms of section 42 of the EEA, the Director-General has the power to determine whether a designated employer is implementing employment equity in compliance with the EEA,⁶¹² and may conduct a review to confirm this.⁶¹³ In assessing a designated employer's implementation of employment equity, the Director-General may consider a number of factors. These factors include:

- 'a) the extent to which suitably qualified people from and amongst the designated groups are equitably represented within each occupational level in that employer's workforce in relation to the demographic profile of the national and regional economically active population;
- b) reasonable steps taken by a designated employer to train suitably qualified people from designated groups;
- c) reasonable steps taken by a designated employer to implement its employment

⁶⁰⁶ Section 36 of the EEA.

⁶⁰⁷ Section 37 of the EEA.

⁶⁰⁸ Section 37(2) of the EEA.

⁶⁰⁹ Section 37(4) of the EEA.

⁶¹⁰ Section 37(5) of the EEA.

⁶¹¹ Section 37(6) of the EEA.

⁶¹² Section 42 of the EEA.

⁶¹³ Section 43 of the EEA.

- equity plan;
- d) the extent to which the designated employer has made progress in eliminating employment barriers that adversely affect people from designated groups;
- dA) reasonable steps taken by an employer to appoint and promote suitably qualified people from designated groups;
- e) any other prescribed factor.⁶¹⁴

In *Solidarity and Others v Department of Correctional Services (the Department)* the Constitutional Court referred to section 42(a) of the EEA. The Constitutional Court held that 'equitable representation must be equitable representation in relation to the demographic profile of the national and regionally economically active population'.⁶¹⁵ Due to the Department only making use of national demographic profile in order 'to determine the level of representation of the different designated groups'⁶¹⁶ the Constitutional Court held that 'the Department acted in breach of its obligation in terms of section 42(a) and, thus, unlawfully'.⁶¹⁷

In the event of a designated employer's failure to comply with a request made by the Director-General to provide the Director-General with a copy of its current analysis,⁶¹⁸ employment equity plan⁶¹⁹, 'any book record, correspondence, document or information that could be reasonably be relevant to the review of the employer's compliance with the EEA'⁶²⁰ or any recommendation made by the Director-General, the Director-General may refer the non-compliance to the Labour Court.⁶²¹ In addition, the EEA provides for fines which may be imposed for contravening certain provisions of the EEA.⁶²²

In *Director-General of the Department of Labour v Jinhua Garments (Pty) Ltd*,⁶²³ the applicant (the Director-General of the Department of Labour) sought appropriate relief as a result of the respondent's failure to comply with certain provisions of the EEA.⁶²⁴ The respondent had contravened sections 16, 19, 20, 21, 22 and 23.⁶²⁵ The issue for determination was whether a fine should be imposed on the basis of the respondent's non-compliance with a compliance order issued, or for contravention of the individual sections of the EEA.⁶²⁶ The Labour Court noted that

⁶¹⁴ Section 42 of the EEA. Section 42(dA) was inserted in terms of the Employment Equity Amendment Act 2013.

⁶¹⁵ See para 3.4.2.2 above.

⁶¹⁶ *Solidarity and Others v Department of Correctional Services* 2016(10) BCLR 1349 (CC) in para 78

⁶¹⁷ *Solidarity and Others v Department of Correctional Services* 2016(10) BCLR 1349 (CC) in para 79.

⁶¹⁸ Section 43(2)(a) of the EEA

⁶¹⁹ Section 43(2)(a) of the EEA.

⁶²⁰ Section 43(2)(b) of the EEA.

⁶²¹ Section 45 of the EEA.

⁶²² Schedule 1 of the EEA.

⁶²³ *Director-General of Department of Labour v Jinhua* 2006 ZALC 100 (LC).

⁶²⁴ *Director-General of Department of Labour v Jinhua* 2006 ZALC 100 (LC) para 3.

⁶²⁵ *Director-General of Department of Labour v Jinhua* 2006 ZALC 100 (LC) para 4.

⁶²⁶ *Director-General of Department of Labour v Jinhua* 2006 ZALC 100 (LC) para 19.

there is a conflict between section 37(2)(e)⁶²⁷ and section 50(1)(g)⁶²⁸ of EEA, as to whether the maximum fine provided for in Schedule 1⁶²⁹ was for the contravention of the compliance order or for each individual contravention. It was held that the 'number of sections whose provisions have been contravened should in any event have an influence in assessing the appropriateness of the fine imposed, but to impose a fine on individual contraventions of sections would yield completely different results as opposed to the imposition of a fine for contravening a compliance order'.⁶³⁰ The Labour Court imposed a fine of R200 000.00, half of which was suspended for a period of three years on condition that the respondent did not contravene the provisions contained in sections 16, 19, 20 and 21 of the EEA.⁶³¹ This case confirmed that a more lenient construction had to be preferred in order to resolve the problem of the conflicting provisions.⁶³² As a result of this preference, the Labour Court imposed a fine for the violation of the compliance order, 'with the contravention of the other provisions of the sections of the EEA being relevant factors to be considered'.⁶³³

An additional obligation has been placed on designated employers in the event of the designated employer being a public company. Every designated employer is required to publish a summary of their employment equity report.⁶³⁴ The format of this summary is contained in form EEA 10 to the Regulations and is known as the 'Summary of the Employment Equity Progress Report' to be included in the annual report. This obligation provided for by the EEA goes further in ensuring transparency and assists in determining whether the process towards transformation is improving.

The duty placed on designated employers to report to the Director-General and the EEA provisions which have been included to ensure compliance with its provisions are all useful in reducing racial discrimination and in ensuring an increase in the pace at which transformation takes place. However, these provisions fall within the category of provisions that are not respected by employers. The Minister of Labour, Mildred Oliphant, stated that there is a slow pace of

⁶²⁷ In terms of section 37(2)(e) the compliance order must set out particulars including the maximum fine that may be imposed on an employer in terms of Schedule 1 for failing to comply with an order.

⁶²⁸ In terms of section 50(1)(g) the Labour Court may make any appropriate order including imposing a fine in accordance with Schedule 1 for a contravention of certain provisions of the [EEA].

⁶²⁹ Schedule 1 provides for the maximum fines which may be imposed in the event of there being contraventions of certain provisions of the EEA. The schedule differentiates between fines that may be imposed dependent on whether or not there are previous contraventions and the number of previous contraventions. The categories include in the event of there being a previous contravention of certain provisions; where there are no previous contraventions; where there is a previous contravention of the same provision; where there is a previous contravention within the previous 12 months or two previous contraventions in respect of the same provision within three years; where there are three previous contraventions in respect of the same provision within three years; where there are four previous convictions in respect of the same provision within three years.

⁶³⁰ *Director-General of Department of Labour v Jinghua* 2006 ZALC 100 (LC) para 19.

⁶³¹ *Director-General of Department of Labour v Jinghua* 2006 ZALC 100 (LC) para 23.

⁶³² *Director-General of Department of Labour v Jinghua* 2006 ZALC 100 (LC) para 19.

⁶³³ *Director-General of Department of Labour v Jinghua* 2006 ZALC 100 (LC) para 19.

⁶³⁴ Section 22(1) of the EEA.

transformation in the South African labour market.⁶³⁵ She is further reported to have mentioned that employers seem to take the fines which would be imposed for non-compliance with EEA legislation into consideration when formulating their budgets.⁶³⁶ This confirms that there are designated employers who are not complying with employment equity legislation, and that they are not taking the legislation seriously even to the extent of making provision in their budgets for fines for non-compliance with employment equity legislation.

3.6 CONCLUSION

In determining whether the slow pace of racial transformation in South Africa when it comes to black professional employees employed within the private sector is an issue which the law can address, this chapter served three purposes. First, it aims to determine what the benefits are of affirmative action legislation for black professional employees in the private sector. The discussion on affirmative action in this chapter confirms that legislative efforts have been made which benefit people from designated groups. In determining whether legislation aimed at addressing racial discrimination benefits black professional employees within the private sector, it is important to note that the law discussed in this chapter only applies to designated employers. This implies that the provisions relating to affirmative action only benefits black professional employees in the event of them being employed by a designated employer. This chapter reveals that legislative efforts include the creation of affirmative action measures which are designed to permit a measure of discrimination in favour of people from designated groups.

Affirmative action presents itself both as a defence and as a duty. It is a defence against a claim of unfair discrimination in that it is not unfair to take affirmative action measures consistent with the purposes of the EEA. Affirmative action presents itself as a duty since designated employers are required to implement the affirmative action measures set out in section 15(2) of the EEA. Black professional employees in the private sector benefit from the provisions contained in the EEA governing affirmative action in that in the event of them being employed by a designated employer, their employer is required to identify and eliminate employment barriers; implement measures to ensure further diversity in the workplace; make reasonable accommodation for people from designated groups; ensure equitable representation of people from designated groups; as well as to retain and develop people from designated groups.

In terms of the EEA, designated employers are also required to comply with specific duties: to

⁶³⁵ Henderson R 'Labour Department mulls harsher punishment for non-compliance with employment equity laws.' *Times Live* 9 May 2017 18.

⁶³⁶ Henderson R 'Labour Department mulls harsher punishment for non-compliance with employment equity laws.' *Times Live* 9 May 2017 18.

consult with their employees, to conduct an analysis, to prepare an employment equity plan, and to report to the Director-General of the Department of Labour. Black professional employees who are employed by designated employers benefit from these procedural duties in that during the consultation, the interests of employees from designated groups should be reflected. This is important in ensuring that the voice of these employees is heard. By way of the consultation black employees, which include black professional employees, are provided with an opportunity to provide input on matters related to affirmative action which affect them. By way of the analysis which designated employers are required to conduct employers are required to identify employment barriers and to formulate appropriate barrier removal measures for each form of unfair discrimination identified. The legislature has also included a number of sections in the EEA to ensure that designated employers comply with the provisions of the EEA, and these provide additional benefits to black professional employees within the private sector. Black professional employees also benefit from the obligation placed on designated employers to prepare an employment equity plan, because the plan aims to address the barriers which affect them and aims to achieve equitable representation, as well as from the obligation to report to the Director-General, who is responsible for overseeing the employer's progress in implementing employment equity.

The second objective of this chapter is to determine what the shortcomings are of the legal framework. The first shortcoming is that the legislature deliberately requires that the provisions relating to affirmative action only applies to employers who fall within the category of designated employers. Therefore, employees who are employed by employers who do not fall within such category are not provided with the same opportunities as employees who work for designated employers. As a result, there are employees who are working for employers who are not obligated to identify and eliminate employment barriers; to implement measures designed to further diversity and to ensure equitable representation of people from designated groups. This limited scope of the application of the provisions relating to affirmative action may be one of the reasons for challenges being experienced by black professional employees in the private sector. The fact that affirmative action measures should only be implemented by employers who employ 50 or more employees creates a difficulty, and for this reason it is recommended that the scope of the application of the provisions relating to affirmative action measures should be extended.

While 'employment equity legislation is largely uncontroversial, the means of achieving it are not and one can expect challenges to certain aspects of the EEA, as well as to employer's interpretation and implementation thereof'.⁶³⁷ Despite efforts made by the legislature, barriers to employment equity have been identified. The barriers to employment equity which have been identified show that designated employers' implementation of employment equity may be a problem. It has been said that even though employers have employment equity plans in place and

⁶³⁷ Du Plessis JV & Fouche MA A Practical guide to labour law 6ed (2007) 79.

have complied with their obligations in terms of the EEA, the lack of translation of those plans into practice within the workplace is a barrier to the implementation of employment equity. The Labour Court and the Labour Appeal Court has held that the implementation of employment equity plans and affirmative action measures was erroneous and arbitrary in certain cases. This shows that despite there being provisions in place governing affirmative action, and setting out the outcomes to be achieved when implementing affirmative action measures, challenges persist. Louw argues that the affirmative action framework contained in the EEA lends itself to embracing impersonal tick-boxes.⁶³⁸ The second shortcoming within the legal framework is thus the fact that while legislative efforts have been made to ensure that affirmative action is implemented, the affirmative action framework is problematic in that it requires no more than compliance from employers.

The third shortcoming within the legal framework relates to the legislative omissions which have been identified in this chapter. The first legislative omission relates to the topics which must be addressed during the consultation between designated employers and their employees. No direction is provided in the Regulations or in the Codes on the specific aspects where employee input is required. This lack of specific direction may allow designated employers not to obtain employee input where that may be of value. The second legislative omission which surfaced from this chapter is that employees of an employer as a collective should be provided with the opportunity to conduct their own analysis. Providing employees with an opportunity to conduct their own analysis may assist them in disclosing barriers which they would not otherwise have disclosed to their employer. The final legislative omission is that the EEA fails to provide employees with an opportunity to report to the Director-General. Providing employees of an employer as a collective with an opportunity to submit a report of their own to the Director-General may assist with the process of racial transformation. Providing employees of an employer as a collective with an opportunity to conduct an analysis and an opportunity to report to the Director-General will be particularly important for employees who are not represented by trade unions, since there is no one acting on their behalf during the times when consultations are held with the designated employer and when the analysis is conducted by the designated employer.

An additional shortcoming is the fact that the provisions governing designated employers' procedural duties have been drafted by the legislature in such a way that they cater mainly for employees who are represented by trade unions. This is evident from the fact that the consultations should include the opportunity for employee *representatives* to meet and an opportunity for *representatives* of the employees and employer to report back to their constituencies. The fact that some of the provisions have been drafted in this manner fails to consider employees who are not represented by trade unions.

⁶³⁸ Louw AM 'The Employment Equity Act, 1998 (and other myths about the pursuit of "equality", "equity" and "dignity" in post-apartheid South Africa)' (2015) 18(3) *PER* 633.

The final objective of this chapter is to determine what the appropriate standard is to apply in assessing the affirmative action measures in terms of the EEA. The rationality standard, the fairness standard, and the proportionality standard were discussed in this chapter. The analysis of the relevant literature on this issue revealed that neither of the standards are appropriate. To date the courts have not agreed on the appropriate standard to use to assess affirmative action measures. This indicates that the interpretation of the EEA is challenging even for the courts, who are required *inter alia* to assess the affirmative action measures which are implemented by employers. The question thus becomes: How appropriate is legislation that even judges in the highest court in South Africa find challenging to interpret as a vehicle to achieve racial transformation and to address the challenges faced by black professional employees?

In the event of the recommendations suggested in this chapter being put in place, it may result in a reduction of some of the challenges which black professional employees experience in the private sector, however challenges would remain. Even if the law is amended, the changes would be incremental and there is thus a need to determine whether the legal framework for addressing the inequalities caused by apartheid can be examined through an alternative theoretical framework. For this reason, the insights which critical race theory brings will be discussed in chapter 6.

The EEA provisions governing racial discrimination have been discussed in chapter 2, while this chapter provides an in-depth discussion of the provisions relating to affirmative action. It is important to determine how these provisions and the implementation of these provisions are affected by the corporate cultures of enterprises. This chapter revealed that a designated employer is required to conduct an analysis to identify employment barriers which adversely affect people from designated groups by way of assessing the working environment or corporate culture of the enterprise. The corporate culture of enterprises may have an effect on the racial discrimination which some black professional employees are subjected to and the employment barriers which exist within an enterprise. It is important to determine the role which the corporate culture plays in racial transformation and it is for this reason that the corporate culture is discussed in the chapter that follows.

CHAPTER 4

CORPORATE CULTURE

4.1 INTRODUCTION

Chapter 2 contained a discussion of the provisions that have been enacted by the legislature aimed at addressing racial discrimination and determined whether this legislation protects black professional employees within the private sector. Chapter 2 discussed the provisions governing unfair discrimination, the statutory defences which may be raised by employers against claims of unfair discrimination and the remedies available to employees who are successful with unfair discrimination claims. Chapter 3 determined what the benefits are of affirmative action legislation for black professional employees in the private sector. Chapter 3 provided an in-depth discussion of the provisions governing affirmative action and the procedural obligations which the EEA places on designated employers. The shortcomings of the legal framework were identified in chapter 3. The objective of this chapter is to determine the role which the corporate culture of an enterprise plays in racial transformation. Chapter 2 revealed that indirect discrimination may arise from the culture within a workplace and chapter 3 revealed that a designated employer is required to conduct an analysis to identify employment barriers which adversely affect people from designated groups by way of assessing the working environment or corporate culture of the enterprise. The prevailing corporate culture is therefore a factor common to both racial discrimination and affirmative action.

Once employees join an enterprise they 'bring along their unique set of characteristics and through the process of socialisation they are assimilated into their teams and into the culture of the enterprise'.⁶³⁹ The corporate culture of an enterprise is defined as 'the cement that combines a corporation together, however it also excludes others'.⁶⁴⁰ This chapter consists of a discussion of the corporate culture as a source of unfair discrimination and a discussion of the corporate culture within the context of affirmative action. As a result of the corporate culture of an enterprise being relevant to both unfair discrimination and to affirmative action it is necessary to understand how these two concepts are affected by the prevailing corporate culture being the reason for the

⁶³⁹ Mazibuko JV & Govender KK 'Exploring workplace diversity and organisational effectiveness: A South African exploratory case study' (2017) 15 *SA Journal of Human Resource Management* 865.

⁶⁴⁰ Thomas DA & Ely RJ 'Making differences matter: a new paradigm for managing diversity' (1999) *Harvard Business Review* 79; Jongens C 'Perceptions of employment equity implementation at a major South African multinational financial corporation (2006) 2(1) *Postamble* 37.

corporate culture being discussed in detail in this chapter and not the chapter above.

4.2 CORPORATE CULTURE AS UNFAIR DISCRIMINATION

Corporate cultures are formed and shaped by the dominant group.⁶⁴¹ The corporate culture of an enterprise may be a source of indirect discrimination.⁶⁴² A corporate culture can be viewed as a neutral criterion; however, once it has a disproportionate impact on a particular group, such as black people, and such impact cannot be objectively justified, the corporate culture will amount to indirect discrimination.⁶⁴³

Du Toit stresses the fact that the corporate culture of an enterprise is important in the way in which employees experience discrimination.⁶⁴⁴ He states that a culture where employees 'are expected to be highly proactive, grab work for themselves and be a self-starter is difficult to adjust to if the employee's culture taught the employee never to address a senior person, unless spoken to first and to wait until the senior person gives that employee attention'.⁶⁴⁵ This means that the employee in question will be overlooked when it comes to training and promotion. The corporate culture may even have an effect on the way in which black employees perform. 'Young black graduates who excelled at university may enter the workplace, but, finding the culture difficult to read, end up not performing as well as their qualifications might promise.'⁶⁴⁶ In these circumstances the corporate culture of an enterprise may be a source of indirect discrimination.⁶⁴⁷ This shows that the provisions in the EEA governing racial discrimination do not exist in isolation, but that its implementation is dependent on the manners in which they are experienced by people. Due to this being the case any amendments to the EEA that merely deal with technical issues will not solve the central issue being the way in which discrimination is experienced by people.

There are circumstances in which an employee's inability to succeed or fit into a work environment is not caused by a need to transform the culture in question, but emanates from the employee him or herself. South African law permits the dismissal of employees on the ground of incompatibility under certain circumstances. Incompatibility forms part of incapacity being one of the permissible

⁶⁴¹ Nkomo SM 'Why white men still dominate the top echelons of South Africa's private sector' *The Conversation* 4 August 2015 1.

⁶⁴² See para 2.2.2.1.2 above. 'Indirect discrimination' can be summarised as being 'the application of an apparently neutral criterion which has a disproportionate impact on a particular group of employees that is definable in terms of a prohibited ground of discrimination (listed or unlisted) and cannot be justified in terms of objective employment related criteria'; Du Toit D, Godfrey S & Cooper C *et al Labour Relations Law A Comprehensive Guide* 6ed (2015) 666.

⁶⁴³ See para 2.2.2.1.2 above.

⁶⁴⁴ Du Toit D & Potgieter M *Unfair Discrimination in the workplace* (2014) 159.

⁶⁴⁵ Du Toit D & Potgieter M *Unfair Discrimination in the workplace* (2014) 159.

⁶⁴⁶ Du Toit D & Potgieter M *Unfair Discrimination in the workplace* (2014) 31.

⁶⁴⁷ See para 7.5.2.1.2 and para 8.3.2.2 below where examples are provided of circumstances in which the corporate culture is a source of indirect discrimination.

grounds for which an employer may dismiss an employee.⁶⁴⁸ In *Larcombe v Natal Nylon Industries (Pty) Ltd*,⁶⁴⁹ the employee's dismissal on the ground of incompatibility with members of management was ruled to be unfair.⁶⁵⁰ The reason for the dismissal was as a result of the employee in question being involved in a quarrel with a member of management which resulted in the employer's decision that one of the two was required to leave.⁶⁵¹ The Industrial Court held that the reason provided by the employer for the dismissal was inadequate.⁶⁵² This was similarly the case in *Joslin v Olivetti Systems and Networks Africa (Pty) Ltd*⁶⁵³ where Joslin's employment was terminated as a result of his behaviour being unbecoming of a manager of the company; it was held that his dismissal was unfair.⁶⁵⁴ The Industrial Court held that an employee can only be dismissed in circumstances 'where the employee's eccentric behaviour is of such a gross nature that it causes consternation and disruption in the workplace and only after he or she has been properly counselled or warned'.⁶⁵⁵

In *Mgijima v Member of Executive Council Gauteng Department of Education and others*,⁶⁵⁶ the applicant, a senior manager was dismissed on the ground of incompatibility⁶⁵⁷ due to the poor management style of the applicant.⁶⁵⁸ There are reasons other than the poor management style of a manager that may cause incompatibility, or the inability of a manager 'to maintain a harmonious relationship with his or her colleagues'.⁶⁵⁹ These reasons include 'personality conflicts, the inability to integrate into the culture and the environment of the workplace'.⁶⁶⁰ This shows just how important the corporate culture is to the way in which employees experience an enterprise. This is so because even if employers apply all the provisions of the EEA successfully, a corporate culture can still exist which results in employees experiencing the workplace negatively.

*PSA obo AH Mbiza v Office of the Presidency*⁶⁶¹ was a matter in which the correct test to be applied in matters dealing with incompatibility was sought. Reference was made to *Lubke v*

⁶⁴⁸ Section 188 of the Labour Relations Act 66 of 1995.

⁶⁴⁹ *Larcombe v Natal Nylon Industries (Pty) Ltd* (1986) 7 ILJ 326 (IC).

⁶⁵⁰ *Larcombe v Natal Nylon Industries (Pty) Ltd* (1986) 7 ILJ 326 (IC).

⁶⁵¹ *Larcombe v Natal Nylon Industries (Pty) Ltd* (1986) 7 ILJ 326 (IC).

⁶⁵² *Larcombe v Natal Nylon Industries (Pty) Ltd* (1986) 7 ILJ 326 (IC).

⁶⁵³ *Joslin v Olivetti Systems and Networks Africa (Pty) Ltd* (1993) 14 ILJ 227 (IC).

⁶⁵⁴ *Joslin v Olivetti Systems and Networks Africa (Pty) Ltd* (1993) 14 ILJ 227 (IC).

⁶⁵⁵ *Joslin v Olivetti Systems and Networks Africa (Pty) Ltd* (1993) 14 ILJ 227 (IC) 230 F-J.

⁶⁵⁶ *Mgijima v Member of Executive Council Gauteng Department of Education and others* 2014 ZALCJHB 414 (27 October 2014).

⁶⁵⁷ *Mgijima v Member of Executive Council Gauteng Department of Education and others* 2014 ZALCJHB 414 (27 October 2014) 1 para 4.

⁶⁵⁸ *Mgijima v Member of Executive Council Gauteng Department of Education and others* 2014 ZALCJHB 414 (27 October 2014) para 71.

⁶⁵⁹ *Mgijima v Member of Executive Council Gauteng Department of Education and others* 2014 ZALCJHB 414 (27 October 2014) para 70.

⁶⁶⁰ *Mgijima v Member of Executive Council Gauteng Department of Education and others* 2014 ZALCJHB 414 (27 October 2014) para 70, *Jabari v Telkom SA (Pty) Ltd* 2006 (10) BLLR 924 (LC).

⁶⁶¹ *PSA obo AH Mbiza v Office of the Presidency* (2014) 35 ILJ 1628 (LC).

*Protective Packaging (Pty) Ltd*⁶⁶² and *Hopwood v Spanjaard Ltd*,⁶⁶³ in which it was confirmed that prior to dismissing an employee, an employer must make some 'sensible, practical and genuine effort to effect an improvement in interpersonal relationships when dealing with a manager whose work is otherwise satisfactory'. These cases illustrate that an employees' failure to advance in a place of employment is not always caused by actions of the employer, or by a need to transform the corporate culture, but at times it stems from the manner in which the employee fits into the corporate culture. This shows that even if an employer applies all the provisions of the EEA successfully, it may still not have any effect on the challenges which employees experience. The corporate culture is also relevant within the affirmative action context which is discussed below.

4.3 CORPORATE CULTURE AND AFFIRMATIVE ACTION

4.3.1 Measures to identify and eliminate employment barriers

Affirmative action measures should include 'measures to identify and eliminate employment barriers, including unfair discrimination, which adversely affect people from designated groups'.⁶⁶⁴ Similar to the circumstances where black graduates who excelled at university fail to perform well within the workplace due to the corporate culture amounting to indirect discrimination, the established corporate culture may also be a barrier to employment equity.⁶⁶⁵

Once barriers have been identified, employers should put mechanisms in place to remove such barriers.⁶⁶⁶ In the study conducted by Booyesen, the corporate culture was identified by employees as being a barrier to employment equity.⁶⁶⁷ This shows that the corporate culture is important to employment equity. The success of employment equity should therefore not only be measured in numbers, but also by its success in transforming the corporate culture within the workplace. Research has shown that the underestimation of the corporate culture and inattention to the larger organisational context within which an enterprise exists are the two most important barriers to the implementation of employment equity.⁶⁶⁸ Black employees speak of the expectation of fitting in with the historically developed 'white corporate cultures'.⁶⁶⁹ It would not be sufficient to place measures

⁶⁶² *Lubke v Protective Packaging (Pty) Ltd* (1994) 15 ILJ (IC) 429 D.

⁶⁶³ *Hopwood v Spanjaard Ltd* 1996 (2) BLLR 187 (IC) 196.

⁶⁶⁴ See para 3.2.1 above.

⁶⁶⁵ See para 7.5.3.2.1 and para 8.3.3.2.1 below where examples are provided of circumstances during which the corporate culture is an employment barrier.

⁶⁶⁶ See para 3.2.1 above.

⁶⁶⁷ Booyesen L 'Barriers to Employment Equity implementation and retention of Blacks in management in South Africa' (2007) 31 *South African Journal of Labour Relations* 57.

⁶⁶⁸ Nkomo S 'Moving from the letter of the law to the spirit of the law: the challenges of realising the intent of employment equity and affirmative action' (2011) 77 *Transformation* 134.

⁶⁶⁹ Thomas A 'Employment equity practices at selected companies in South Africa' (2003) 27(3) *South African Journal of Labour Relations: Spring/Summer* 23.

in place to assist black employees in understanding and adjusting to the 'white corporate cultures'.⁶⁷⁰ The control over whether a historically developed 'white corporate culture' exists in a workplace is dependent on the composition of management. The composition of management is relevant to affirmative action since designated employers are required to implement measures to ensure equitable representation of people from designated groups⁶⁷¹ and is also relevant to the manner in which the BEE rating of an enterprise is obtained.⁶⁷²

The corporate culture of an enterprise also contributes to black employees' growth within or exit from an enterprise.⁶⁷³ Black managers often leave enterprises not only to obtain higher salaries, but also as a result of feeling alienated from the historically established corporate culture and as a result of not being afforded the opportunity to add value to the enterprise.⁶⁷⁴ It has been reported that it is a challenge for employers to create a working environment where employees experience job satisfaction through 'fair employment practices, while also achieving company objectives'.⁶⁷⁵ This could be due to the fact that it would take a period of time for employers to learn and understand the needs of their employees, which time employers are not always willing to invest. Change in the working environment depends largely on whether there is active engagement between employers and employees and/or unions.⁶⁷⁶

Research has shown that the advancement of black professional employees within an enterprise is reduced by two phenomena namely opportunity hoarding and social closure practices.⁶⁷⁷ Opportunity hoarding means that those in the dominant positions preserve these positions for persons from their own race group.⁶⁷⁸ Social closure occurs both consciously and unconsciously, and has the effect of limiting the advancement of people from designated groups.⁶⁷⁹ Social closure practices include limited access to tacit knowledge required for the position, organisational cultures which are alienating, and exclusion based on the presumption of incompetence.⁶⁸⁰ The existence of circumstances that amount to opportunity hoarding and social closure practices shows that the provisions in the EEA governing affirmative action do not exist in isolation, but are dependent on the ways in which it is experienced by people.

⁶⁷⁰ The corporate culture should be changed to ensure that all employees feel included in the workplace.

⁶⁷¹ See para 3.2.4 above.

⁶⁷² See para 5.4.2 below.

⁶⁷³ Oosthuizen R & Naidoo V 'Attitudes towards and experience of employment equity' 2010 (36) *SAJIP* 836.

⁶⁷⁴ Thomas A 'Employment equity practices at selected companies in South Africa' (2003) 27(3) *South African Journal of Labour Relations: Spring/Summer* 28.

⁶⁷⁵ Oosthuizen R & Naidoo V 'Attitudes towards and experience of employment equity' 2010 (36) *SAJIP* 837.

⁶⁷⁶ Oosthuizen R & Naidoo V 'Attitudes towards and experience of employment equity' 2010 (36) *SAJIP* 837.

⁶⁷⁷ Nkomo SM 'Why white men still dominate the top echelons of South Africa's private sector' *The Conversation* 4 August 2015 1.

⁶⁷⁸ Wright EO 'Understanding class towards an integrated analytical approach' (2009) 60 *New Left Review* 104.

⁶⁷⁹ Nkomo SM 'Why white men still dominate the top echelons of South Africa's private sector' *The Conversation* 4 August 2015 1.

⁶⁸⁰ Nkomo SM 'Why white men still dominate the top echelons of South Africa's private sector' *The Conversation* 4 August 2015 1. See para 7.5.3.2.1 and para 8.3.3.2.1 below where examples of social closure practices are provided.

Opportunity hoarding may be possible due to the fact that white dominant enterprises may be able to obtain good BEE ratings by means other than by advancing black employees. Opportunity hoarding⁶⁸¹ and the manners in which enterprises are able to obtain good BEE ratings are explored further in the chapter that follows.

4.3.2 Measures designed to further diversity in the workplace

Affirmative action measures should include 'measures designed to further diversity in the workplace based on equal dignity and respect of all people'.⁶⁸² Managing diversity within a workplace forms part of employee attraction as well as employee retention.⁶⁸³ The corporate culture 'can never be taken for granted and may often need to be transformed in order to make provision for further diversity', which may result in management having to go for training in this regard.⁶⁸⁴ This would involve not judging employees from different backgrounds by the employer's own standards, but trying to understand the motivations of such employees and appreciating diversity.⁶⁸⁵

A lack of diversity may result in the enterprise's downfall.⁶⁸⁶ Steps to ensure the transformation of the corporate culture are essential since the 'importance of the corporate culture of an enterprise cannot be underestimated'.⁶⁸⁷ The employer's appreciation and understanding of diversity should go beyond mere compliance⁶⁸⁸ by recognising the value that employees add to an enterprise.⁶⁸⁹ A valuing diversity approach⁶⁹⁰ is based on employers recognising the equal value of the different identities of employees insofar as, *inter alia*, race and gender are concerned.⁶⁹¹ This valuing diversity approach should be implemented by employers in order to transform the corporate culture

⁶⁸¹ See para 5.5 below.

⁶⁸² See para 3.2.2 above.

⁶⁸³ Mazibuko JV & Govender KK 'Exploring workplace diversity and organisational effectiveness: A South African exploratory case study' (2017) 15 *SA Journal of Human Resource Management* 865.

⁶⁸⁴ Du Toit D & Potgieter M *Unfair Discrimination in the workplace* (2014) 159.

⁶⁸⁵ Du Toit D & Potgieter M *Unfair Discrimination in the workplace* (2014) 160.

⁶⁸⁶ Mazibuko JV & Govender KK 'Exploring workplace diversity and organisational effectiveness: A South African exploratory case study' (2017) 15 *SA Journal of Human Resource Management* 866.

⁶⁸⁷ Du Toit D & Potgieter M *Unfair Discrimination in the workplace* (2014) 31.

⁶⁸⁸ Louw's view is that the EEA lends itself to embracing impersonal tick-boxes. See para 3.3.3. The employer's understanding of diversity should go beyond compliance, however since the EEA lends itself to embracing impersonal tick-boxes, that is all the legislature requires.

⁶⁸⁹ Mazibuko JV & Govender KK 'Exploring workplace diversity and organisational effectiveness: A South African exploratory case study' (2017) 15 *SA Journal of Human Resource Management* 866.

⁶⁹⁰ Proponents of the valuing diversity approach argue that enterprises that are able to leverage diversity will be able to benefit in terms of innovation, creativity and performance; Nkomo S 'Moving from the letter of the law to the spirit of the law: the challenges of realising the intent of employment equity and affirmative action' (2011) 77 *Transformation* 134.

⁶⁹¹ Nkomo S 'Moving from the letter of the law to the spirit of the law: the challenges of realising the intent of employment equity and affirmative action' (2011) 77 *Transformation* 134.

within an enterprise.⁶⁹²

4.3.3 Measures to retain people from designated groups

Affirmative action should include measures to retain people from designated groups.⁶⁹³ Studies have shown that a negative corporate culture or a historically developed 'white corporate culture' is 'not conducive to attracting, developing and retaining employees equally from all the different race groups'.⁶⁹⁴ The corporate culture of a workplace plays an important role in whether an employer is able to retain people from designated groups.

4.4 CONCLUSION

The corporate culture of an enterprise is relevant to statutory measures aimed at eliminating unfair discrimination and is also relevant to affirmative action. The corporate culture may be a source of indirect discrimination in the event of the corporate culture having a disproportionate impact on a particular group of employees that is definable in terms of a prohibited ground, such as black employees, and where such impact cannot be objectively justified.

In terms of the EEA, designated employers are required to identify and eliminate employment barriers. Employees have identified the corporate culture as being an employment barrier where black employees perceive that they are required to fit in with historically 'white corporate cultures'. Designated employers are also required to implement measures designed to further diversity in the workplace based on equal dignity and respect for all people. This would result in designated employers having to understand the motivations and challenges of their employees as opposed to judging employees from different backgrounds. The issue that arises is whether it is in fact possible for employers to understand the challenges and motivations of their employees. Research has shown that people from designated groups leave enterprises due to corporate cultures which are exclusionary.

This chapter reveals that the provisions contained in the EEA governing unfair discrimination and affirmative action do not exist in isolation, but that their impact is dependent on how people experience them. This shows that amendments to the EEA that merely deal with technical issues will not solve this central issue being the way in which discrimination and affirmative action is

⁶⁹² Nkomo S 'Moving from the letter of the law to the spirit of the law: the challenges of realising the intent of employment equity and affirmative action' (2011) 77 *Transformation* 134.

⁶⁹³ See para 3.2.5 above.

⁶⁹⁴ Booysen L 'Barriers to Employment Equity implementation and retention of Blacks in management in South Africa' (2007) 31 *South African Journal of Labour Relations* 58; see para 7.5.3.2.2 and para 8.3.3.2.4 below.

experienced by people.

This chapter also reveals that employees' failure to advance in a place of employment is not always caused by actions of the employer, or by a need to transform the corporate culture, but at times it stems from the manner in which the employee fits into the corporate culture. This shows that even if an employer applies all the provisions of the EEA successfully, it may not necessarily have any real effect on the challenges which black employees' experience.

Research has shown that the advancement of black people is reduced by opportunity hoarding and by social closure practices.

Since amendments to the EEA that merely deal with technical issues cannot solve the way in which discrimination and affirmative action is experienced by people and even if an employer applies all the provisions of the EEA successfully, it may have little effect on the challenges which black employees experience, it is necessary to determine whether the legal framework for addressing the inequalities which exist can be examined through an alternative theoretical framework. The insights which critical race theory brings will thus be discussed in chapter 6.

The literature on the employees' stories and experiences of the corporate culture within enterprises in the context of unfair discrimination and affirmative action will be discussed further in chapters 7 and 8 of this thesis.

In the event of management consisting of a large percentage of black people they would play an important role in influencing the corporate culture of an enterprise. Similarly, an overwhelmingly white management would also have an impact on the corporate culture of an enterprise. Since the control over whether a historically developed 'white corporate culture' exists in an enterprise is dependent on the composition of management, chapter 5 will determine *inter alia* whether the B-BBEEA is an appropriate statutory vehicle to regulate the racial composition of management structures of enterprises.

CHAPTER 5

THE OWNERSHIP AND MANAGEMENT STRUCTURES OF ENTERPRISES

5.1 INTRODUCTION

In chapters 2 and 3 the sections of the EEA relevant to unfair discrimination and affirmative action were discussed. Chapter 2 revealed that provisions have been enacted by the legislature to eliminate the inequalities caused by apartheid thereby protecting employees, including black professional employees in the private sector. Chapter 3 revealed that provisions have been enacted to promote the achievement of equality, however shortcomings remain within the legal framework. Chapter 4 consists of a discussion on the role which the prevailing corporate culture plays in racial transformation in an enterprise and revealed that the provisions contained in the EEA governing unfair discrimination and affirmative action do not exist in isolation, but are dependent on the ways in which it is experienced by people. In addition, chapter 4 revealed that the corporate culture may be a source of indirect discrimination and a barrier to employment equity. Chapter 4 also revealed that a representative composition of the management of an enterprise affects the prevailing corporate culture of an enterprise. A representative composition of the management of an enterprise may be achieved when BEE legislation is complied with by an enterprise which is the reason for it being important to discuss BEE legislation, the additional piece of equality legislation. The B-BBEEA, which is discussed in this chapter, governs BEE and aims to correct the inequalities caused by apartheid. The purpose of this chapter is to determine what the shortcomings are of the legal framework that make it possible for enterprises to obtain good BEE ratings, despite the low percentage of black people who form part of the ownership and management structures of these enterprises.

In addition to racial discrimination, black professional employees are faced with a further impediment in the workplace in the form of hurdles which restrict the advancement of black professional employees, making it difficult for them to advance into the ownership and management structures of enterprises.⁶⁹⁵ These hurdles include the corporate cultures as well as the unequal opportunities within these enterprises.⁶⁹⁶

⁶⁹⁵ Horwitz FM & Jain H, 'An assessment of Employment Equity and Broad-Based Black Economic Empowerment developments in South Africa' (2011) 30 *Equality Diversity and Inclusion: An International Journal* 302.

⁶⁹⁶ Horwitz FM & Jain H, 'An assessment of Employment Equity and Broad-Based Black Economic Empowerment developments in South Africa' (2011) 30 *Equality Diversity and Inclusion: An International Journal* 302.

The composition of the ownership and management structures of an enterprise is important in ensuring its growth and success. Ownership is defined as the 'right to possession, the right to have exclusive control of a thing or to have such control as the nature of the thing permits'.⁶⁹⁷ Management is defined as 'a set of activities (including planning, decision making, organising, leading and controlling) directed at an organisation's resources (human, financial, physical and information) with the aim of achieving organisational goals in an effective and efficient manner'.⁶⁹⁸

The shortcomings of the legal framework that make it possible for enterprises to obtain good BEE ratings despite the low percentage of black people who form part of ownership and management structures will be determined as follows: First a background of the BEE landscape is provided. Secondly the provisions of the B-BBEEA and the B-BBEE Codes enacted in terms of the B-BBEEA are evaluated. The B-BBEE Codes will be discussed in order to show how enterprises' use of the scorecards and formulas contained in the Codes determines the BEE rating which enterprises obtain. A representative composition of management can play an important role in influencing the corporate culture of an enterprise.⁶⁹⁹ It is for this reason that the B-BBEE Codes will be used to determine whether transformation of management control of enterprises is regulated sufficiently. This chapter will also determine whether the ownership structures of enterprises are regulated sufficiently. This will be followed by a discussion of fronting practices as well as the legislative efforts made in order to prevent fronting practices from taking place. Fronting practices will be discussed to illustrate the impact these practices have on enterprises obtaining good BEE ratings, despite the low percentage of black people who form part of the ownership and management structures of enterprises. Finally, the chapter will address the question whether the B-BBEEA is achieving its objectives by considering the advantages and disadvantages of BEE, and will conclude with the writer's views on the possible shortcomings of the legal framework that make it possible for enterprises to obtain good BEE ratings in the aforementioned circumstances.

5.2 THE OBJECTIVES OF BEE

The process of BEE exists with the objective of balancing the economic playing field of black and white people in South Africa. BEE is defined as 'a specific government policy to advance economic transformation and enhance the economic participation of black people in the South African economy'.⁷⁰⁰ BEE is

⁶⁹⁷ Hudson A *New perspectives on property law: obligations and restitution* (2013) 95.

⁶⁹⁸ Griffin RW *Management* 12ed (2015) 5.

⁶⁹⁹ See para 4.3.1 above.

⁷⁰⁰ Kruger LP 'The impact of black economic empowerment (BEE) on South African businesses: Focussing on ten dimensions of business performance' (2011) 15(3) *South African Business Review* 207.

'a process aimed at strategically transforming the South African economy by *inter alia* spreading equity holdings to incorporate previously disadvantaged South Africans, re-organising management structures and ensuring greater participation of the majority in the economy to achieve economic justice'.⁷⁰¹

BEE is a government initiative which was created in order to promote economic transformation to enable black people to participate in the economy meaningfully.⁷⁰² BEE is seen as necessary to remedy the economic imbalances which occurred as a result of apartheid.⁷⁰³ Subsequent to the 1994 elections, discussions were held to determine what the appropriate strategies were to pursue BEE.⁷⁰⁴ A Broad-Based Black Economic Empowerment Commission ('B-BBEECom') was established during May 1998 to determine which barriers existed to black participation in the economy and to propose a viable BEE strategy.⁷⁰⁵ The B-BBEECom recommended that national legislation be enacted to facilitate BEE, which resulted in the B-BBEEA.⁷⁰⁶

The B-BBEEA was enacted in terms of section 9(2) of the Constitution which makes provision for legislation to be enacted in order to achieve equality and to remedy historical imbalances.⁷⁰⁷

As time progressed, BEE had different meanings; however, two dominant approaches emerged: the minimalist approach and the maximalist approach. As far as the minimalist approach is concerned, this approach

'emphasises a proportional representation of previously marginalised groups of people in the public and private sectors. It focuses BEE discourse and practice on the *career mobility* or *advancement of black managerial, professional and business ranks*'.⁷⁰⁸

Career mobility or the advancement of black professionals and those on managerial levels is important in order to change the composition of the structures who not only manage enterprises, but also those which own enterprises.

The minimalist approach defines BEE in terms of the creation of a black business class.⁷⁰⁹ This

⁷⁰¹ Osode PC 'The new Broad-Based Economic Empowerment Act: a critical evaluation' (2004) 18 *Speculum Juris* 108.

⁷⁰² Balshaw T & Goldberg J *Broad-Based Black Economic Empowerment Amended codes and scorecard* 3ed (2014) 13.

⁷⁰³ Ncwadi R & Onceya S 'Economic Empowerment Policies and Economic Growth in the Post-Apartheid South Africa- A Cointegration and Granger Causality' (2014) 5(10) *Mediterranean Journal of Social Sciences* 268.

⁷⁰⁴ Horwitz FM & Jain H, 'An assessment of Employment Equity and Broad-Based Black Economic Empowerment developments in South Africa' (2011) 30 *Equality Diversity and Inclusion: An International Journal* 301.

⁷⁰⁵ Horwitz FM & Jain H, 'An assessment of Employment Equity and Broad-Based Black Economic Empowerment developments in South Africa' (2011) 30 *Equality Diversity and Inclusion: An International Journal* 301.

⁷⁰⁶ Horwitz FM & Jain H, 'An assessment of Employment Equity and Broad-Based Black Economic Empowerment developments in South Africa' (2011) 30 *Equality Diversity and Inclusion: An International Journal* 301.

⁷⁰⁷ See para 2.1 above.

⁷⁰⁸ My emphasis. Gqubule D *Making mistakes righting wrongs: Insights into black economic empowerment* (2006) 5.

⁷⁰⁹ Gqubule D (2006) 5.

implies that BEE takes place every time a group of black individuals secures government tenders or obtains share certificates in previously white businesses.⁷¹⁰ This approach emphasises the 'distribution of the positions of the privileged between a few people within existing structures'.⁷¹¹

'This approach does not seek to alter the conditions that simultaneously engendered privileges on the one hand and sustained exploitation and marginalisation of the majority on the other. Rather it seeks to alter the racial composition of privileges and exploitations to create a new circuit of racial capital accumulation. A minimalist approach promotes the empowerment of a few black individuals and the disempowerment of the majority of the black population who do not have access to the new circuit of racial accumulation.'⁷¹²

While this approach may not promote the empowerment of the majority of black people, it does promote the empowerment of black professionals, which this thesis focuses on.

The maximalist approach to BEE entails restructuring on a wide scale involving an improvement of the conditions of the majority as well as more inclusive decision-making.⁷¹³ The maximalist approach

'entails the generation and redistribution of resources to the vast majority of the people, ranging from skills and educational training to land redistribution. Additionally [this approach stresses] the overall democratisation and transformation of institutions and organisational cultures rather than the mere inclusion of a few individuals from the previously disadvantaged communities in the ownership and management structures of the economy'.⁷¹⁴

The B-BBEECom decided to adopt the maximalist approach.⁷¹⁵ BEE should thus be viewed within the broad scope of empowerment processes which include *inter alia* meaningful ownership, skills and management development, rural development, specific measures to empower black females and job creation.⁷¹⁶ Meaningful ownership refers to a change in the racial composition of ownership structures of both existing and new enterprises.⁷¹⁷ Skills and management development refers to the increase in access to economic activities and skills training.⁷¹⁸ Rural development entails the empowerment of both rural and local communities by enabling access to economic activities, land,

⁷¹⁰ Daniel J & Southall R *State of the Nation: South Africa: 2004-2005* (2006) 456.

⁷¹¹ Daniel J & Southall R *State of the Nation: South Africa: 2004-2005* (2006) 456.

⁷¹² Gqubule D (2006) 5.

⁷¹³ Daniel J & Southall R *State of the Nation: South Africa: 2004-2005* (2006) 456.

⁷¹⁴ Gqubule D (2006) 11.

⁷¹⁵ Gqubule D (2006) 11.

⁷¹⁶ Gqubule D (2006) 11.

⁷¹⁷ Section 2(b) of the B-BBEEA.

⁷¹⁸ Section 2(c) of the B-BBEEA.

infrastructure, ownership and skills.⁷¹⁹ Women should also be empowered to own and manage enterprises and to increase their access to economic activities, skills training and infrastructure.⁷²⁰ Job creation entails promoting economic transformation to enable black people to participate in the economy meaningfully.⁷²¹

B-BBEECom's decision to adopt the maximalist approach as opposed to the minimalist approach is one of the factors which influences enterprises ability to obtain good BEE ratings despite the low percentage of black people who form part of the ownership and management structures of these enterprises. This is because, while the minimalist approach focuses on the ranks of black managers and professionals, the maximalist approach focuses on improving the conditions of the majority of the South African population, and does not focus only on ownership and management structures.

The issue arises of what the relationship is between employment equity legislation and the B-BBEEA. The application of employment equity legislation is limited to parties who form part of an employment relationship. Employment equity legislation aims to protect employees and focuses on opportunity redress within employment. The economic empowerment legislation on the other hand applies to a broader range of the population, including even those members of the population who are unemployed.⁷²² This is so, because the B-BBEEA provides black people with the opportunities to obtain access to the economy⁷²³ and to own and control businesses: it aims to change the social structure of South Africa.⁷²⁴

Employment equity legislation on its own is important in ensuring that change takes place in the social mobility of the workplace, but is not sufficient with regard to addressing broader social inequality, which is the reason for BEE.⁷²⁵ The practical working of BEE requires an enterprise to measure its BEE status in order to obtain a rating.⁷²⁶ Employers are able to obtain good BEE ratings despite the low percentage of black people who form part of the racial composition of the ownership and management structures of these enterprises.⁷²⁷ It is important to determine how this is possible when the B-BBEEA has been enacted with the objective of ensuring racial transformation in South Africa. In order to make this determination, the B-BBEEA will be discussed

⁷¹⁹ Musahara H *Inclusive Growth and Development: Issues in Eastern and Southern Africa* (2016) 128.

⁷²⁰ Section 2(d) of the B-BBEEA.

⁷²¹ Section 2(a) of the B-BBEEA.

⁷²² See para 5.4.4 and para 5.4.5 below.

⁷²³ See para 5.4.5 below.

⁷²⁴ See para 5.4.4 below.

⁷²⁵ Horwitz (2011) 302.

⁷²⁶ Seate BM & Poee RID 'The relative importance of managerial competencies for predicting the perceived job performance of Broad-Based Black Economic Empowerment verification practitioners' (2016) 14(1) *South African Journal of Human Resource Management* 696.

⁷²⁷ Department of Labour *Commission of Employment Equity Annual Report* (2014-2015) 33.

by focusing on the objectives of the B-BBEEA and the B-BBEE Codes in which the maximalist approach has been applied, together with opportunity hoarding and fronting practices.

5.3 THE BROAD-BASED BLACK ECONOMIC EMPOWERMENT ACT 53 OF 2003 (B-BBEEA)

5.3.1 Introduction

BEE is aimed at 'effecting a more equitable distribution of economic wealth and has been branded as the essential second wave of transformation after democratisation'.⁷²⁸ The beneficiaries of the B-BBEEA are black people. 'Black people' is defined by the B-BBEEA as 'a generic term which means Africans, Coloureds, Indians and Chinese:

- a) who are citizens of the Republic of South Africa by birth or decent; or
- b) who became citizens of the Republic of South Africa by naturalisation -
 - i) before 27 April 1994;
 - ii) on or after 27 April 1994 and who have been entitled to acquire citizenship by naturalisation prior to that date, but who were precluded from doing so by Apartheid policies'.⁷²⁹

The beneficiaries of the B-BBEEA differ in certain respects from the beneficiaries of the EEA. The beneficiaries of the EEA are black people, women and people with disabilities, where black people consist of Africans, Coloured people, Indian people and Chinese people.⁷³⁰ Women of all races and people with disabilities of all races are beneficiaries of affirmative action, while they are not beneficiaries of the B-BBEEA. This implies that while white women and white people with disabilities benefit from the provisions of the EEA, they do not benefit from the provisions of the B-BBEEA. As a result of black people in terms of the B-BBEEA including Africans, Coloureds and Chinese, where reference is made to black people in the B-BBEE Codes, this includes Africans, Coloureds and Chinese.⁷³¹

This thesis concentrates on the private sector. Unlike other legislative enactments, compliance with the legislation governing BEE is voluntary insofar as the private sector is concerned.⁷³² However, BEE affects almost every participant in the South African economy one way or another.⁷³³

⁷²⁸ Balshaw T & Goldberg J *Broad-Based Black Economic Empowerment Amended codes and scorecard* 3ed (2014) 13.

⁷²⁹ Section 1 B-BBEEA.

⁷³⁰ Section 1 of the EEA.

⁷³¹ See para 5.4 below.

⁷³² See para 5.7 below.

⁷³³ Balshaw T & Goldberg J *Broad-Based Black Economic Empowerment Amended codes and scorecard* 3ed (2014) 14.

Enterprises give BEE serious consideration since it has become an issue which is relevant in obtaining business and in the retention thereof,⁷³⁴ one example being tenders for government work where it is imperative for an enterprise to have a competitive BEE rating.⁷³⁵ The B-BBEEA and the Preferential Procurement Policy Framework Act 5 of 2000 ('Procurement Policy Act'), together with its Regulations provides 'the parameters within which organs of state may give preferential treatment to historically disadvantaged suppliers when making procurement decisions'.⁷³⁶ Even if firms from the private sector do not enter into transactions with the state or the agencies of the state, there is pressure towards compliance given that clients require their suppliers to be BEE compliant.⁷³⁷ At times compliance is a prerequisite in order to obtain and secure business.⁷³⁸ Such circumstances arise where private companies seek to obtain business from other private companies who require their service providers to be BEE compliant. This is similarly the case in a number of transactions with financial institutions that are reluctant to lend funds or to provide business to non-compliant enterprises.⁷³⁹ In order to determine how it is possible for enterprises to be successful in obtaining good BEE ratings, despite the low percentage of black people who form part of the ownership and management structures of these enterprises, it is necessary to explore the provisions of the B-BBEEA, with the starting point being the objectives of the B-BBEEA.

5.3.2 The objectives of the B-BBEEA

The main objective of the B-BBEEA is to ensure that wealth is distributed across as broad a spectrum of previously disadvantaged South Africans as possible.⁷⁴⁰

In terms of section 2 of the B-BBEEA, the B-BBEEA was enacted in order

'to facilitate broad-based black economic empowerment by

- a) promoting economic transformation in order to enable *meaningful participation* of black people in the economy;
- b) achieving a *substantial change in the racial composition of ownership and management structures* and in the *skilled occupations* of existing and new enterprises;
- c) increasing the extent to which communities, workers, co-operatives and other collective enterprises own and manage existing and new enterprises and increasing their access to economic activities, infrastructure and skills

⁷³⁴ Balshaw T & Goldberg J (2014) 25.

⁷³⁵ Seate & Poee (2016) 697.

⁷³⁶ Marais F & Coetzee L 'The determination of black ownership in companies for the purpose of black economic empowerment (Part 1)' *Obiter* (2006) 113.

⁷³⁷ Horwitz (2011) 309.

⁷³⁸ Horwitz (2011) 309.

⁷³⁹ Horwitz (2011) 309.

⁷⁴⁰ Ncwadi & Onceya (2014) 268.

- training;
- d) increasing the extent to which black woman own and *manage existing and new enterprises* and increasing their access to economic activities, infrastructure and skills training;
 - e) 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;
 - f) empowering rural and local communities by enabling access to economic activities, land, infrastructure, ownership and skills,
 - g) promoting access to finance for black start-ups, small, medium and micro enterprises, co-operatives and black entrepreneurs, including those in the informal business sector, and
 - h) increasing effective economic participation and black owned and managed enterprises, including, small, medium and micro enterprises and co-operatives and enhancing their access to financial and non-financial support'.⁷⁴¹

The first objective is the promotion of economic transformation to enable meaningful participation of black people in the economy. BEE is necessary to remedy the economic imbalances which are still present years after the abolition of apartheid. The inclusion of this objective in the B-BBEEA shows that the state aims to address the socio-economic ramifications of the past, one of which is the limited participation of black people in the South African economy.⁷⁴²

Section 2(c) of the B-BBEEA confirms that the B-BBEEA aims to increase the extent to which communities, workers, and co-operatives own and manage enterprises and increase their access to economic activities. Black businesses share some of the general characteristics of businesses in other countries; however, they face additional challenges which are specific to South Africa, namely, the imbalances caused by apartheid. Socio-economic development is one of the ways in which workers, communities and co-operatives can be stimulated to increase their access to economic activities.⁷⁴³

Section 2(d) of the B-BBEEA confirms that the B-BBEEA aims to increase the extent to which black women own and manage enterprises. An often-forgotten category of the beneficiaries of the post-apartheid legislation is the gender dimension. During apartheid the 'silence on gender equity in government and businesses was as deafening as that of racial and class equity'.⁷⁴⁴

⁷⁴¹ Section 2 of the B-BBEEA. Own Emphasis.

⁷⁴² Sibanda A 'Weighing the cost of BEE fronting on the best practices of corporate governance in South Africa' (2015) 29 *Speculum Juris* 23.

⁷⁴³ Kloppers H 'Driving Corporate social responsibility through black economic empowerment' (2014) 18 *LDD* 72.

⁷⁴⁴ Chisholm L & September J *Gender Equity in South African Education 1994-2004: perspective from Research, Government and Unions; Conference proceedings* (2005) 1.

The World Bank has determined that investing in gender equality brings about high returns on development investment especially as regards improved health, education and poverty reduction.⁷⁴⁵ It has been reported that 'female entrepreneurship could be the key to unlocking South African economic growth if more effect is made to support female entrepreneurs in a targeted way'.⁷⁴⁶

Insofar as the wage gap is concerned, research shows that males receive higher salaries than females.⁷⁴⁷ The gender gap in South Africa is one of the world's worst, with women earning an income which is less than a third of what men earn on average.⁷⁴⁸ These inequalities make women economically dependent on men.⁷⁴⁹ Men also outnumber women three to one in the five highest salary brackets.⁷⁵⁰

The World Bank's Gender and Development Unit explains that such gaps at the top of the earning spectrum is known as 'gender sorting'.⁷⁵¹ Gender sorting occurs where 'women are concentrated in less productive jobs and run enterprises where there are fewer opportunities for career advancement'.⁷⁵² Evidence shows that this is in fact the case in South Africa.⁷⁵³

During apartheid black women in South Africa were subjugated to the position of domestic workers which confirmed their mere positions as child-bearers and homecarers.⁷⁵⁴ This limited position was accompanied by oppression.⁷⁵⁵ Subsequent to the abolition of apartheid the state placed emphasis on black women. One of the most important features of democracy is the acceptance of gender equality and racial equality in the Constitution.⁷⁵⁶ Black women face challenges on three levels: race, gender and professional hierarchy, which play a role in their progression in society.⁷⁵⁷ The B-BBEEA aims to correct these imbalances by placing emphasis on empowerment of black women as an individual objective.

⁷⁴⁵ Rao A & Sandler J *Gender at work Theory and Practice for 21st century organizations* (2016) 1.

⁷⁴⁶ Irene BNO 'Women entrepreneurship in South Africa: understanding the role of competencies in business success' (2017) 9(1) *South African Journal of Entrepreneurship and Small Business Management* 121.

⁷⁴⁷ Grant L 'Men get lion's share of income' *Mail & Guardian* 24 April 2015 1; Steyn R & Jackson L 'Gender based discrimination in South Africa: a quantitative analysis of fairness in remuneration' (2015) 18 (2) *South African Journal of Economic and Management Sciences* 191.

⁷⁴⁸ Musahara H *Inclusive Growth and Development: Issues in Eastern and Southern Africa* (2016) 128.

⁷⁴⁹ Flebner H & Potts L *Societies in Transition - challenges to women's and gender studies* (2013) 3.

⁷⁵⁰ Musahara H *Inclusive Growth and Development: Issues in Eastern and Southern Africa* (2016) 128.

⁷⁵¹ The World Bank Group *Gender at work* (2014) 2.

⁷⁵² The World Bank Group *Gender at work* (2014) 2.

⁷⁵³ Musahara H *Inclusive Growth and Development: Issues in Eastern and Southern Africa* (2016) 128.

⁷⁵⁴ Ramohai J 'A black woman's perspective on understanding transformation and diversity in South African higher education' (2019) 4(1) *Transformation in Higher Education* 3.

⁷⁵⁵ Ramohai J 'A black woman's perspective on understanding transformation and diversity in South African higher education' (2019) 4(1) *Transformation in Higher Education* 3.

⁷⁵⁶ Daniel J & Southall R *State of the Nation: South Africa: 2004-2005* (2006) 336.

⁷⁵⁷ Shung King M & Gilson L 'Leadership experiences and Practices of South African health managers: what is the influence of gender? – a qualitative exploratory study' (2018) 17 *International Journal for Equity in Health* 153.

In terms of section 2(e) of the B-BBEEA, the Act also aims to promote investment programmes that may lead to meaningful participation by black people in the economy. This objective goes hand in hand with the objectives outlined in section 2(g) which is to promote access to finance for black start-up, small, medium and micro-enterprises, co-operatives and black entrepreneurs and section 2(h) of the B-BBEEA which is to increase black owned and managed enterprises and their effective economic participation. During apartheid black people were prevented from running businesses.⁷⁵⁸ The fact that the B-BBEEA aims to promote access to finance in terms of section 2(g) will assist black enterprises and black entrepreneurs. As far as the objectives contained in sections 2(e) and 2(h) are concerned, during the apartheid regime big banks and retailers were reluctant to offer credit to black people.⁷⁵⁹ During this period money was lent to people, but in unequal ways.⁷⁶⁰ The aim of enterprise development is to stimulate black businesses and to encourage social investment. This is important because 'encouraging the support of enterprise development through preferential procurement stimulates reciprocal needs between the investor and the beneficiary which will ultimately lead to sustainable development of black business.'⁷⁶¹ Black businesses are expected to grow as a result of transformation, as black South Africans in both the private and public sectors who have benefitted from post-apartheid legislation switch to self-employment and take advantage of the contacts they have made as well as the experiences they have gained.⁷⁶² By including these objectives in the B-BBEEA, the legislature recognises the disadvantaged starting point of black people as a result of apartheid policies.

The objective outlined in section 2(f) of the B-BBEEA refers to empowering rural and local communities. While the proportion of the population living in poverty has dropped since 1994, the actual number of people living in poverty has increased as the population has grown.⁷⁶³ Some goals have been achieved since the commencement of South Africa's constitutional dispensation. In many rural communities there is piped water available for the first time and the budget for housing, health, welfare, education and other social services has increased.⁷⁶⁴ While social assistance programmes have redistributed income to the poor and helped to bring the levels of poverty down, they have not changed the nature of poverty in South Africa.⁷⁶⁵ Many South Africans living in poverty have not moved beyond receiving a survivalist grant to obtain opportunities that

⁷⁵⁸ Sanchez D *Socio-economic transformation in South Africa black economic empowerment and small, medium and micro enterprises* (2006) 8.

⁷⁵⁹ Christophers B & Leyson A *Money and finance after the crisis: critical thinking for uncertain times* (2017) 149.

⁷⁶⁰ During apartheid all the credit options were made available to white people, while there were only some of the credit options made available to black people.

⁷⁶¹ Kloppers H 'Driving corporate social responsibility through black economic empowerment' (2014) 18 *LDD* 72.

⁷⁶² Sanchez D (2006) 10.

⁷⁶³ Herman M *Inclusive Growth and Development: Issues in Eastern and Southern Africa* (2016) 127.

⁷⁶⁴ Daniel J & Southall R *State of the Nation: South Africa: 2004-2005* (2006) 512.

⁷⁶⁵ Herman M (2016) 127.

allow them to leave behind the circumstances which cause them to remain in poverty.⁷⁶⁶ The weakness of the government's antipoverty programme has been government's failure to promote job-intensive growth or effective schooling for the poor. Poverty is also perpetuated by the low proportion of self-employed South Africans in the informal economy.⁷⁶⁷ According the Department of Trade and Industry:

'Our country requires an economy that can meet the needs of all economic citizens - our people and their enterprises in a sustainable manner. This will only be possible if our economy builds on the full potential of all persons and communities across every length and breadth'.⁷⁶⁸

BEE aims to address the economic needs of the country, so that more resources will become available, which will result in there being greater access to housing, to education⁷⁶⁹ and to there being a greater number of self-employed South Africans.

The objective which may be extracted from the list above and which is most relevant to this discussion is found in section 2(b) of the B-BBEEA: to achieve a substantial change in the racial composition of ownership and management structures of enterprises. When one considers the slow rate at which change in the racial composition of the ownership and management structures of enterprises is taking place, it is understandable that this objective has been included in the B-BBEEA. The tables below reflect the percentages of race groups in top and and senior management structures of enterprises.

Table 1: Percentages of race groups in top management:⁷⁷⁰

Top Management	2003	2005	2007	2009	2011	2013	2015	2016	2018
Whites	76.3	72.6	68.2	63.8	65.4	62.7	68.9	68.5	66.5
Africans	14.9	17.9	18.8	20.3	18.5	19.8	14.3	14.4	15.1
Coloureds	4	3.7	3.9	5.0	4.8	5.1	4.7	4.9	5.3
Indians	4.9	5.6	6.1	6.9	7.5	8.4	8.6	8.9	9.7

⁷⁶⁶ Herman M (2016) 127.

⁷⁶⁷ Herman M (2016) 127.

⁷⁶⁸ Kruger LP 'South African managers' perceptions of black economic empowerment (BEE: A 'sunset' clause may be necessary to ensure future sustainable growth' (2014) 18(1) *Southern African Business Review* 81.

⁷⁶⁹ Kloppers H 'Driving corporate social responsibility through black economic empowerment' (2014) 18 *LDD* 59.

⁷⁷⁰ Department of Labour *Commission for Employment Equity Report* (2013 - 2014) 15; Department of Labour *Commission for Employment Equity Report* (2015 - 2016) 19; Department of Labour *Commission for Employment Equity Report* (2016 - 2017) 12; Department of Labour *Commission for Employment Equity Report* (2018 - 2019) 20.

Table 2: Percentages of race groups in senior management:⁷⁷¹

Senior Management	2003	2005	2007	2009	2011	2013	2015	2016	2018
Whites	72.7	72.4	65	61.9	59.1	57	58.1	58.1	54.4
Africans	14.2	14.5	18.1	20	21.8	23	21.2	21.1	23.2
Coloureds	6.3	6	6.1	6.4	7	7	7.4	7.7	8
Indians	6.8	7	8.2	9.1	9.6	10.1	10.2	10.6	11.1

The tables above show that there has been a decline in white employees occupying positions at the levels of both top management and senior management. In addition, it shows that the percentage of African employees at both the levels of top management and senior management has increased (except during 2013); however, they remain under-represented.⁷⁷² Interestingly, the tables reflect that there has been a decline in Coloured employees occupying positions at the top management level from 2009 to 2016. While the reasons for this situation are unknown, it may be caused by a number of factors, such as, fewer suitable Coloured people available or applying for these positions, or the fact that coloured people are adequately represented or overrepresented in enterprises which implies that the employer is allowed to refuse to appoint Coloured people,⁷⁷³ the fact that while the B-BBEEA is benefitting certain beneficiaries of BEE, minority groups are being excluded, or it could merely be the fact that the figures are becoming more reflective of the demographics of the population of South Africa as a whole.

The tables above confirm that change in the racial composition of the management structures of enterprises has occurred, but at a slow pace. The fact that there is a lower percentage of black employees in managerial positions in comparison to white employees will have an effect on the corporate cultures within the enterprises concerned.⁷⁷⁴ This is so due to the fact that the control over whether a historically developed 'white corporate culture' persists in a workplace is dependent on a representative composition of management.⁷⁷⁵ In the event of the management of workplaces consisting of a large percentage of black people they would play an important role in influencing the corporate culture within a workplace.

As a result of the objective outlined in section 2(b) of the B-BBEEA, it is vital to determine how enterprises are obtaining good BEE ratings when there are enterprises who are not changing the

⁷⁷¹ Department of Labour *Commission for Employment Equity Report* (2013 - 2014) 16; Department of Labour *Commission for Employment Equity Report* (2015 - 2016) 24; Department of Labour *Commission for Employment Equity Report* (2016 - 2017) 17; Department of Labour *Commission for Employment Equity Report* (2018 - 2019) 25.

⁷⁷² Horwitz (2011) 304.

⁷⁷³ See *Solidarity and Others v Department of Correctional Services and Others* 2016 (10) BCLR 1349 (CC) discussed in para 3.4.2.2 above.

⁷⁷⁴ See para 4.3.1 above.

⁷⁷⁵ See para 4.3.1 above.

racial composition of their management structures. For this reason, it is necessary to discuss the B-BBEE Codes, since it is these provisions that prescribe the methodology to be followed in determining the BEE status of enterprises. The formulas contained in the B-BBEE Codes will be discussed in order to demonstrate how complicated the scorecards are and to demonstrate how focusing on certain aspects (elements) of the B-BBEE Codes, while neglecting others can enable enterprises to obtain good BEE ratings.

The B-BBEE Codes refer to the enterprises that make use of the B-BBEE Codes to calculate their BEE status as 'measured entities'. A measured entity is an 'entity as well as an organ of state or public entity subject to measurement under the [B-BBEE Codes]'.⁷⁷⁶ The BEE status is used by the measured entity's customers, to whom goods are supplied and/or services are rendered, as a basis upon which service providers are chosen.⁷⁷⁷ The level of a measured entity's status is important by the virtue of the fact that it provides a competitive advantage in circumstances where entities are competing for the same business.⁷⁷⁸ It is for this reason that enterprises in the private sector are choosing to have a BEE rating, despite the fact that compliance is voluntary.

5.4 THE B-BBEE CODES

The B-BBEE Codes were promulgated during 2007 and amended during 2013 and 2015. The B-BBEE Codes were enacted to provide a standard manner by which the BEE status of an entity could be calculated. Prior to the amendment of the B-BBEE Codes, the BEE status of entities was measured across seven elements being ownership, management control, employment equity, skills development, preferential procurement, enterprise development and socio-economic development.⁷⁷⁹ At present, the BEE status of an entity is measured across five elements, namely, ownership, management control, skills development, enterprise and supplier development and socio-economic development. Management control and employment equity have merged into one element, as have preferential procurement and enterprise development.⁷⁸⁰

The B-BBEE Codes contain two scorecards: The Generic scorecard and the Qualifying Small Enterprise ('QSE') scorecard which are set out below.

⁷⁷⁶ B-BBEE Codes in GG 36928 of 11 October 2013 Schedule 1 Part 2.

⁷⁷⁷ Balshaw T & Goldberg J *Broad-Based Black Economic Empowerment Amended codes and scorecard* 3ed (2014) 17.

⁷⁷⁸ Balshaw T & Goldberg J *Broad-Based Black Economic Empowerment Amended codes and scorecard* 3ed (2014) 18.

⁷⁷⁹ B-BBEE Codes code series 000 GN29617 of 9 February 2007 para 7.

⁷⁸⁰ Pooe RID 'The latest 'big thing' for South African companies: Enterprise and supplier development - proposing an implementation framework' (2016) 10(1) *Journal of Transport and supply chain management* 235.

Table 3: The Generic scorecard as reflected in the B-BBEE Code series 000 in GG 36928 of 11 October 2013 para 8.1:

Element	Weighting	Code series reference
Ownership	25 points	100
Management	15 points	200
Skills Development	20 points	300
Enterprise and supplier development	40 points	400
Socio-Economic development	5 points	500

Table 4: The QSE scorecard as reflected in the B-BBEE Code series 600 in GG 38766 of 6 May 2015 para 3.1:

Element	Weighting	Code series reference
Ownership	25 points	601
Management	15 points	602
Skills Development	25 points	603
Enterprise and supplier development	30 points	604
Socio-Economic development	5 points	605

The score obtained by a measured entity is determined by making use of either the Generic or the QSE scorecards; however, there are entities to which neither of the scorecards apply.⁷⁸¹ In respect of both the Generic and the QSE scorecards above, higher points are allocated to the skills development element and the enterprise and supplier development element than what is allocated to management control. While it is acknowledged that high points have been allocated to the ownership element, the fact that more points have been allocated to skills development and to enterprise and supplier development than management control may result in enterprises opting to comply with skills development and enterprise and supplier development rather than with management control. This can be identified as a shortcoming of the legal framework which makes it possible for enterprises to obtain good BEE ratings without paying much attention to management control. If the minimalist approach was adopted this problem would not have occurred, because emphasis would have been placed on the advancement of black professionals as opposed to concentrating on the generation and redistribution of resources to empower the majority of black people.⁷⁸²

The table below sets out the manner in which the BEE status of a measured entity is determined. It consists of eight contribution levels and their respective recognition levels.⁷⁸³ The 'overall

⁷⁸¹ Such as an Exempted Micro Enterprise. This is discussed further below. The manners in which scores are obtained are discussed in detail in paragraphs 5.4.1 - 5.4.5 below.

⁷⁸² See para 5.2 above.

⁷⁸³ B-BBEE Codes code series 000 in GG 36928 of 11 October 2013 para 8.2.1.

performance of a measured entity⁷⁸⁴ by making use of either the Generic scorecard or the QSE scorecard, will provide a measured entity with points which will determine its BEE recognition level and contribution level (BEE status).⁷⁸⁵ As indicated in the table below, an entity which scores less than 40 points is deemed to be non-compliant.

Table 5: B-BBEEA Recognition levels as reflected in the B-BBEE Code series 000 in GG 36928 of 11 October 2013 para 8.2.1:

CONTRIBUTION LEVEL	QUALIFICATION POINTS	BEE RECOGNITION LEVEL
Level 1 contributor	≥100	135%
Level 2 contributor	≥95 but < 100	125%
Level 3 contributor	≥90 but < 95	110%
Level 4 contributor	≥80 but < 90	100%
Level 5 contributor	≥75 but < 80	80%
Level 6 contributor	≥70 but < 75	60%
Level 7 contributor	≥55 but < 70	50%
Level 8 contributor	≥40 but < 55	10%
Non-compliant contributor	<40	0%

The mathematical anomaly that in order to obtain a BEE rating of level 1 to level 3, an enterprise should obtain a BEE recognition level higher than 100%, is worth noting. An enterprise can therefore have a 100% BEE recognition level, whilst only be regarded as a level 4 contributor. Entities are divided into four categories: an exempted micro-enterprise (EME), a start-up enterprise, a qualifying small enterprise (QSE) and a large enterprise (LE).⁷⁸⁶ Where an enterprise has an annual total revenue of R10 million or less such an enterprise will automatically qualify as an EME.⁷⁸⁷ EMEs are deemed to have a BEE recognition level of 100% which is a BEE status of level 4.⁷⁸⁸ Despite the aforementioned, an EME will qualify for elevation to level 1, having a BEE recognition level of 135% in circumstances where it is 100% black owned.⁷⁸⁹ An EME qualifies for elevation to a level 2 contributor which means a BEE recognition level of 125% where it is at least 51% black owned.⁷⁹⁰ Every year an EME is required to obtain a sworn affidavit⁷⁹¹ confirming that its annual total revenue falls within the required specification.⁷⁹²

⁷⁸⁴ B-BBEE Codes code series 000 in GG 36928 of 11 October 2013 para 8.2.1.

⁷⁸⁵ B-BBEE Codes code series 000 in GG 36928 of 11 October 2013 para 8.2.1.

⁷⁸⁶ B-BBEE Codes code series 000 in GG 36928 of 11 October 2013.

⁷⁸⁷ B-BBEE Codes code series 000 in GG 36928 of 11 October 2013 para 4.1.

⁷⁸⁸ B-BBEE Codes code series 000 in GG 36928 of 11 October 2013 para 4.2.

⁷⁸⁹ B-BBEE Codes code series 000 in GG 36928 of 11 October 2013 para 4.3.1.

⁷⁹⁰ B-BBEE Codes code series 000 in GG 36928 of 11 October 2013 para 4.3.2.

⁷⁹¹ Affidavit templates have been gazetted by the Department of Trade and Industry for both an EME and a QSE to obtain automatic recognition level without being measured by a verification agency. The affidavit is to be completed by an owner or an executive manager of the entity. The onus rests on the individual taking the oath to provide accurate information. Any misrepresentation on the affidavit is a criminal offence according to the Regulations.

⁷⁹² B-BBEE Codes code series 000 in GG 36928 of 11 October 2013 para 4.5.

A start-up enterprise is 'a recently formed or incorporated entity that has been in operation for less than one year and excludes entities that are merely a continuation of a pre-existing entity'.⁷⁹³ For the first year following its incorporation a start-up enterprise must be measured as an EME.⁷⁹⁴ A start-up enterprise is deemed to have a BEE recognition of 100% which is a BEE status of level 4.⁷⁹⁵ Start-up enterprises are required to use a QSE scorecard⁷⁹⁶ 'when tendering for any contract with a value between R10 million and R50 million'.⁷⁹⁷ Start-up enterprises are required to submit a Generic scorecard⁷⁹⁸ for contracts above R50 million.⁷⁹⁹ It is therefore easier for EMEs and start-up enterprises to obtain a BEE recognition of 100% without having to score high qualification points.

An enterprise with an annual total revenue of between R10 million and R50 million qualifies as a QSE.⁸⁰⁰ A QSE which is 100% black owned qualifies as a level 1 contributor⁸⁰¹ and a QSE which is at least 51% black owned qualifies as a level 2 contributor.⁸⁰² Every year a QSE is required to obtain a sworn affidavit confirming its level of black ownership and annual total revenue.⁸⁰³

An LE with an annual turnover exceeding R50 million must apply the Generic scorecard. The professional employees to whom this thesis relates are generally employed by QSEs and LEs and therefore this thesis focuses in greater detail on LEs and QSEs, with less emphasis on EMEs and start-up enterprises.

The Generic scorecard is set out in Code series 100 to 500,⁸⁰⁴ while the QSE scorecard is set out in Code series 600,⁸⁰⁵ 602,⁸⁰⁶ 603,⁸⁰⁷ 604⁸⁰⁸ and 605.⁸⁰⁹ Code series 100 and 600 are the Codes governing the ownership element. It measures the effective ownership of entities by black people.⁸¹⁰ Code series 200 and 602 governs the management control element which measures the management control and effective governance of entities by black people.⁸¹¹ Code series 300 and 603 governs the skills development element, which measures the extent to which a measured

⁷⁹³ B-BBEE Codes GG 36928 of 11 October 2013 Interpretation and Definitions.

⁷⁹⁴ B-BBEE Codes code series 000 in GG 36928 of 11 October 2013 para 6.1.

⁷⁹⁵ B-BBEE Codes code series 000 in GG 36928 of 11 October 2013 para 6.2.

⁷⁹⁶ See Table 4 above.

⁷⁹⁷ B-BBEE Codes code series 000 in GG 36928 of 11 October 2013 para 6.4.

⁷⁹⁸ See Table 3 above.

⁷⁹⁹ B-BBEE Codes code series 100 in GG 36928 of 11 October 2013 para 6.4.

⁸⁰⁰ B-BBEE Codes as amended code series 000 in GG 36928 of 11 October 2013 para 5.1.

⁸⁰¹ B-BBEE Codes code series 000 in GG 36928 of 11 October 2013 para 5.3.1.

⁸⁰² B-BEE Codes code series 000 in GG 36928 of 11 October 2013 para 5.3.2.

⁸⁰³ B-BBEE Codes code series 000 in GG 36928 of 11 October 2013 para 5.3.3.

⁸⁰⁴ See para 5.4.1.1, para 5.4.2.1, para 5.4.3.1, para 5.4.4.1 and para 5.4.5.2 below.

⁸⁰⁵ See para 5.4.1.2 below.

⁸⁰⁶ See para 5.4.2.2 below.

⁸⁰⁷ See para 5.4.3.2 below.

⁸⁰⁸ See para 5.4.4.2 below.

⁸⁰⁹ See para 5.4.5.2 below.

⁸¹⁰ Balshaw T & Goldberg J *Broad-Based Black Economic Empowerment Amended codes and scorecard* 3ed (2014) 20.

⁸¹¹ Balshaw T & Goldberg J *Broad-Based Black Economic Empowerment Amended codes and scorecard* 3ed (2014) 20.

entity carries out initiatives designed to develop the competencies of black people.⁸¹² Code 400 and 604 governs the enterprise and supplier development element which measures the extent to which entities buy goods or services from empowering suppliers with strong BEE recognition levels and the 'extent to which enterprises carry out supplier development intended to accelerate the growth of black enterprises'.⁸¹³ Code 500 and 605 governs the socio-economic development element which measures the 'extent to which entities implement initiatives that contribute towards socio-economic development or sector specific initiatives that promote access to the economy by black people'.⁸¹⁴

There are three priority elements: ownership,⁸¹⁵ skills development⁸¹⁶ and enterprise and supplier development.⁸¹⁷ There is a subminimum requirement of 40% for net value which is one of the categories which forms part of the ownership element (3.2 out of 8 points).⁸¹⁸ There is also a subminimum of 40% of the total weighting points in respect of skills development (8 out of 20 points in the Generic scorecard and 10 out of 25 points in respect of the QSE scorecard).⁸¹⁹ In terms of the enterprise and supplier development element, enterprises are required to obtain a subminimum of 40% in respect of each of the three categories which it consists of, namely, preferential procurement (10 out of 25 points for the generic scorecard and 8 out of 20 points for the QSE scorecard), supplier development (4 out of 10 points for the Generic scorecard and 2 out of 5 points for the QSE scorecard), and enterprise development (2 out of 5 points for both the Generic and QSE scorecards).⁸²⁰ An LE is required to comply with all the priority elements⁸²¹ while a requirement is placed on a QSE to comply with ownership as a compulsory element and then a QSE has the election to comply with either enterprise and supplier development or skills development.⁸²² Non-compliance with the 40% sub-minimum requirements of any of the priority elements in respect of both an LE and QSE results in a principle coming into effect known as the 'discounting principle'.⁸²³ The points which were actually scored by the measured entity and the level that the measured entity would have achieved had it complied with the 40% sub-minimum requirements will be recognised by the verification agency, which is known as the recognition level.⁸²⁴ However, 'the measured entity's BEE status level will be discounted by one level down until the next applicable verification period when the measured entity is able to demonstrate that it

⁸¹² Balshaw T & Goldberg J *Broad-Based Black Economic Empowerment Amended codes and scorecard* 3ed (2014) 20.

⁸¹³ Balshaw T & Goldberg J *Broad-Based Black Economic Empowerment Amended codes and scorecard* 3ed (2014) 20.

⁸¹⁴ Balshaw T & Goldberg J *Broad-Based Black Economic Empowerment Amended codes and scorecard* 3ed (2014) 21.

⁸¹⁵ B-BBEE Codes code series 000 in GG 36928 of 11 October 2013 para 3.3.1.1.

⁸¹⁶ B-BBEE Codes code series 000 in GG 36928 of 11 October 2013 para 3.3.1.2.

⁸¹⁷ B-BBEE Codes code series 000 in GG 36928 of 11 October 2013 para 3.3.1.3.

⁸¹⁸ B-BBEE Codes code series 000 in GG 36928 of 11 October 2013 para 3.3.1.1.1.

⁸¹⁹ B-BBEE Codes code series 000 in GG 36928 of 11 October 2013 para 3.3.1.2.1.

⁸²⁰ B-BBEE Codes code series 000 in GG 36928 of 11 October 2013 para 3.3.1.3.1.

⁸²¹ B-BBEE Codes code series 000 in GG 36928 of 11 October 2013 para 3.3.2.1.

⁸²² B-BBEE Codes code series 000 in GG 36928 of 11 October 2013 para 3.3.2.2.

⁸²³ B-BBEE Codes code series 000 in GG 36928 of 11 October 2013 para 3.3.3.1.

⁸²⁴ B-BBEE Codes code series 000 in GG 36928 of 11 October 2013 para 3.4.3.1.1.1.

complied with the 40% sub-minimum requirements, at which point the recorded level will become the applicable ratings level for that measured entity in that verification period',⁸²⁵ e.g. level 7 (recognition level) will become level 8 (recorded level).

The BEE compliance of an EME is measured according to the explanation above, while the Generic and QSE scorecards will apply to the other measured entities.⁸²⁶ The elements which form part of the Generic and the QSE scorecards are discussed below.⁸²⁷

5.4.1 Ownership

5.4.1.1 Generic scorecard code series 100: Ownership Element

In order to calculate a score for ownership, the Generic ownership scorecard is used which is reflected in B-BBEE Code series 100,⁸²⁸ annexed marked 'A'. A measured entity receives points for the black people who form part of the ownership structures of a measured entity by using the ownership scorecard.⁸²⁹ Black people may hold their ownership rights in a measured entity in one of two ways. Ownership rights may either be held as direct participants (natural persons) or via another entity, such as, a company, close corporation, trust, a partnership, co-operative, an employee share ownership programme, broad-based ownership scheme, or any other juristic person recognised by South African law.⁸³⁰ It is thus important to determine first the party whose ownership level is being determined and secondly the type of the entity or person that actually holds the shares in question.⁸³¹ The first party will be the measured entity, while the second party should be determined by identifying the shareholders who may either be a juristic person or a natural person.⁸³² For example, if company A's score for ownership is being determined, company A will be the measured entity. In order to determine the score for ownership of company A, an investigation should be conducted to establish whether shares in company A are held by natural persons who are direct participants or via a juristic person.

It is only the rights of natural persons that are relevant when measuring the rights of ownership of any category of black people in a measured entity.⁸³³ The flow-through principle⁸³⁴ and the modified

⁸²⁵ B-BBEE Codes code series 000 in *GG 36928* of 11 October 2013 para 3.4.3.1.1.2.

⁸²⁶ B-BBEE Codes code series 000 in *GG 36928* of 11 October 2013 para 3.2.2.

⁸²⁷ See para 5.4.1, para 5.4.2, para 5.4.3, para 5.4.4 and para 5.4.5 below.

⁸²⁸ B-BBEE Codes code series 100 in *GG 36928* of 11 October 2013 para 2.

⁸²⁹ B-BBEE Codes code series 100 in *GG 36928* of 11 October 2013 para 3.1.1.

⁸³⁰ B-BBEE Codes code series 100 in *GG 36928* of 11 October 2013 para 3.

⁸³¹ Marais F & Coetzee L 'The determination of black ownership in companies for the purpose of black economic empowerment (Part 2)' (2006) *Obiter* 505.

⁸³² Marais & Coetzee (2006) 505.

⁸³³ B-BBEE Codes code series 100 in *GG 36928* of 11 October 2013 Annexe 100 (E) para 3.3.1.

⁸³⁴ As far as the flow-through principle is concerned, when the rights of ownership of black people pass 'through a juristic person, then the rights of ownership of black people in that juristic person will be measurable'; B-BBEE Codes code series 100 in *GG 36928* of 11 October 2013 Annexe 100 (E) para 3.3.1. The same principle will apply 'across

flow-through principle⁸³⁵ applies when measuring points in respect of the ownership element.

The ownership element is divided into three categories: voting rights, economic interest and realisation points.⁸³⁶ By structuring black ownership based on voting rights and economic interest, measured entities have the ability to earn up to 17 points out of 25 points.⁸³⁷ Points are allocated by considering the participation of various categories of participants, such as, black people generally, black women, black designated groups, black participants in employee share ownership programmes, black people in broad-based ownership schemes, black participants in co-operatives and new entrants.⁸³⁸

The term 'black designated groups' refers to

'unemployed black people not attending and not required by law to attend an educational institution and not awaiting admission to an educational institution; black people who are youth as defined by the National Youth Commission Act of 1996; black people who are persons with disabilities as defined in the Codes of Good Practice on employment of people with disabilities issued under the [EEA]; black people living in rural and under-developed areas; a black military veteran who qualifies to be called a military veteran in terms of the Military Veterans Act 18 of 2011'.⁸³⁹

The EEA uses the phrase 'designated groups', while the B-BBEE Codes uses 'black designated groups'. Black designated groups in terms of BEE consists of the most vulnerable black participants in the labour market. The definition of black designated groups is important when making a strategic decision to allocate economic interest rights to such persons.⁸⁴⁰

New entrants are defined as

'black participants holding an aggregate in excess of 2% of the ownership in a measured entity and who have not prior to their equity interest in the measured entity held equity

every tier of ownership in a multi-tiered chain of ownership by juristic persons until that chain ends in a natural person who is a black person holding the rights of ownership'. B-BBEE Codes code series 100 in GG 36928 of 11 October 2013 Annexe 100 (E) para 3.3.1.

⁸³⁵ The modified flow-through principle is an exception to the flow-through principle and applies where 'in the chain of ownership black people have a flow through level of participation of at least 51%'; B-BBEE Codes code series 100 in GG 36928 of 11 October 2013 para 3.4.3. In terms of the modified flow through principle, when calculating exercisable voting rights and the economic interest of the ownership scorecard once in the entire ownership structure of the measured entity, such black participation may be treated as if it were 100% black. B-BBEE Codes code series 100 in GG 36928 of 11 October 2013 para 3.4.3.

⁸³⁶ B-BBEE Codes code series 100 in GG 36928 of 11 October 2013 para 2.

⁸³⁷ Balshaw T & Goldberg J *Broad-Based Black Economic Empowerment Amended codes and scorecard* 3ed (2014) 97. B-BBEE Codes code series 100 in GG 36928 of 11 October 2013 para 2.

⁸³⁸ B-BBEE Codes code series 100 in GG 36928 of 11 October 2013 para 2.

⁸³⁹ B-BBEE Codes in GG 36928 of 11 October 2013 Schedule 1 Part 2.

⁸⁴⁰ Balshaw T & Goldberg J *Broad-Based Black Economic Empowerment Amended codes and scorecard* 3ed (2014) 99.

instruments in any other entity which has a total value of more than R50 million, measured using a standard valuation method'.⁸⁴¹

A measured entity may obtain up to 2 points for the participation of new entrants.⁸⁴²

5.4.1.1.1 Voting rights

The first category of ownership, referred to in the Generic ownership scorecard, is voting rights.⁸⁴³ A voting right is the right to exercise a vote at a company's general meeting.⁸⁴⁴ Voting rights are attached to any equity instrument, for example shares, which is owned by, or held for the benefit of, black people.⁸⁴⁵ A measured entity can obtain up to 6 points in respect of voting rights: up to 4 points for voting rights in the hands of black people and up to 2 points for voting rights in the hands of black women.⁸⁴⁶ The measurement of ownership for voting rights is calculated by determining the ratio between the percentage of black people who hold exercisable voting rights of the voting rights held by all participants in the entity and the percentage compliance target for the specific ownership indicator in paragraph 2.1 of the ownership scorecard multiplied by the weighting points.⁸⁴⁷

The following hypothetical example is illustrative. Coloured females hold 20 votes, while the total number of votes of all the shareholders totals 100.

$$\text{Score} = \frac{20\% \text{ (The number of votes of coloured females is divided by total votes)}}{10\% \text{ (compliance target for black women)}} \times 2$$

Score = 4 (however the maximum points that may be achieved for black women are 2 points)

⁸⁴¹ B-BBEE Codes in GG 36928 of 11 October 2013 Schedule 1 Part 2.

⁸⁴² B-BBEE Codes code series 100 in GG 36928 of 11 October 2013 para 2.

⁸⁴³ B-BBEE Codes code series 100 in GG 36928 of 11 October 2013 para 2.

⁸⁴⁴ Marais & Coetzee (2006) 507.

⁸⁴⁵ Balshaw T & Goldberg J *Broad-Based Black Economic Empowerment Amended codes and scorecard* 3ed (2014) 100.

⁸⁴⁶ B-BBEE Codes code series 100 in GG 36928 of 11 October 2013 para 2.

⁸⁴⁷ B-BBEE Codes code series 100 in GG 36928 of 11 October 2013 Annexe 100 (E) para 1.1 states:

$$A = \frac{B}{C} \times D$$

Where

A is the score achieved for the entity;

B is the percentage that exercisable voting rights in the hands of the category of participants who are black people in that entity holds to all voting rights held by all participants of that entity;

C is the percentage compliance target for exercisable voting rights for the applicable measured ownership indicator in paragraph 2.1 of the ownership scorecard;

D is the weighting points allocated to the applicable measured ownership indicator in paragraph 2.1 of the ownership scorecard.'

⁸⁴⁸ Found in Generic ownership scorecard, marked 'A'.

As illustrated in the example above, the fact that a measured entity is able to obtain a maximum of points 2 points implies that there is no incentive for a measured entity to provide black women with more voting rights than what is provided for in the scorecard.

5.4.1.1.2 Economic Interest

The second category of ownership, referred to in the Generic ownership scorecard, is economic interest.⁸⁴⁹ Economic interest is the return on a participant's ownership.⁸⁵⁰ Usually economic interest takes the form of a dividend right and represents the return on ownership.⁸⁵¹ A measured entity can obtain a maximum of 11 points in respect of economic interest: up to 4 points for economic interest which black people are entitled to, up to 2 points for economic interest which black women are entitled to, up to 3 points for economic interest which black designated groups; black participants in employee share ownership programmes; black participants in broad-based ownership schemes or co-operatives are entitled to and up to 2 points for economic interest which new entrants are entitled to.⁸⁵² The measurement of ownership insofar as economic interest is concerned, is calculated by determining the ratio of the percentage of economic interest which black people hold to the economic interest of all participants of that entity and the percentage compliance target of the specific ownership indicator. The total is multiplied by the weighting points.⁸⁵³

The following example is provided. The economic interest of black people in the company totals R50 000.00 and the economic interest of all the participants totals R200 000.00.

$$\text{Score} = \frac{25\%(\text{value of economic interest of black people divided by total})}{25\%(\text{compliance target for black women})} \times 4$$

⁸⁴⁹ B-BBEE Codes code series 100 in GG 36928 of 11 October 2013 para 2.

⁸⁵⁰ Marais & Coetzee (2006) 507.

⁸⁵¹ Balshaw T & Goldberg J *Broad-Based Black Economic Empowerment Amended codes and scorecard* 3ed (2014) 101.

⁸⁵² B-BBEE Codes code series 100 in GG 36928 of 11 October 2013 para 2.

⁸⁵³ B-BBEE Codes code series 100 in GG 36928 of 11 October 2013 Annexe 100 (E) para 2.1 states:

$$A = \frac{B}{C} \times D$$

Where:

A is the recognisable percentage of black participant claim to economic interest in the entity;

B is the percentage of economic interest to which participants who fall within the category of black people in that entity holds to all economic interest of all participants of that entity;

C is the percentage compliance target for economic interest for the applicable measured ownership indicator in paragraph 2.2 of the ownership scorecard.

D is the weighting points allocated to the applicable measured ownership indicator in paragraph 2.2 of the ownership scorecard.'

⁸⁵⁴ Found in Generic ownership scorecard, marked 'A'.

Score = 4 (which is the maximum points that may be achieved for black people)

As illustrated in the example above, the maximum points which an enterprise is able to achieve is reflected in the Generic ownership scorecard. This implies that there is no incentive for a measured entity to increase the level of economic interest of black people in excess of what is required in the scorecard.

5.4.1.1.3 Realisation points

The third category of ownership referred to in the Generic scorecard, is realisation points. Realisation points recognises the value that accrues to black equity participants from their equity interest, after any third party right that restricts any ownership benefit is taken into consideration.⁸⁵⁵ Only third party rights created against a black participant to secure a lender's repayment of a loan advanced for financing the purchase of the black participant's equity instrument is applicable until such time as the acquisition debts incurred in financing the equity purchase are settled.⁸⁵⁶ A measured entity can obtain up to 8 points in respect of realisation points.⁸⁵⁷ A measured entity is required to achieve a minimum of 40% of net value points (i.e. 3.2 points out of 8).⁸⁵⁸ Non-compliance with this target will result in the achieved B-BBEE status being discounted by one level.⁸⁵⁹

5.4.1.2 Ownership for a QSE

The table reflected in code series 600 represents the manner in which a score for ownership is calculated for a QSE⁸⁶⁰ which is annexed marked 'B'. The principles which apply to the calculation of the ownership element when using the Generic scorecard, discussed in paragraph 5.4.1.1, apply to the QSE scorecard *mutatis mutandis*.

5.4.1.3 The significance of the ownership element

The importance of the ownership element was illustrated in *Coca-Cola Beverages Africa Ltd v Various Coca-Cola and related bottling operations*⁸⁶¹ where parties who were involved in a merger

⁸⁵⁵ Balshaw T & Goldberg J *Broad-Based Black Economic Empowerment Amended codes and scorecard* 3ed (2014) 101.

⁸⁵⁶ Balshaw T & Goldberg J *Broad-Based Black Economic Empowerment Amended codes and scorecard* 3ed (2014) 101.

⁸⁵⁷ B-BBEE Codes code series 100 in *GG 36928* of 11 October 2013 para 2.

⁸⁵⁸ B-BBEE Codes code series 100 in *GG 36928* of 11 October 2013 Annexe 100(E) para 3.2.1.

⁸⁵⁹ B-BBEE Codes code series 100 in *GG 36928* of 11 October 2013 Annexe 100(E) para 3.2.2.

⁸⁶⁰ B-BBEE Codes code series 601 in *GG 38766* of 6 May 2015 para 2.1.

⁸⁶¹ *Coca-Cola Beverages Africa v Various Coca-Cola and related bottling operations* 2016 (2) ZACT 68.

filed a larger merger transaction with the Competition Commission.⁸⁶² The Minister of Economic Development raised concerns of both a competition and a public interest nature and in response to these concerns the Competition Commission included a number remedies to address the concerns raised by the Minister.⁸⁶³ As a result, the merging parties undertook *inter alia* to implement a BEE transaction in terms of which they would increase their BEE ownership from 9% to 20% by the year 2020.⁸⁶⁴ In addition, a further undertaking was made that 20% of Appletiser SA would be sold to a qualifying black owned company.⁸⁶⁵ These were some of the undertakings which assisted the merging parties in ensuring that their merger transaction was approved.⁸⁶⁶ This shows that the participation of black people in the ownership of enterprises and undertakings to increase black ownership provides benefits to enterprises in addition to the benefits which they can obtain for having a good BEE rating.

The Minister of Trade and Industry, Rob Davies ('Minister Davies'), has stated that ownership, particularly share ownership, is an issue of contention during BEE debates.⁸⁶⁷ The trend has been for enterprises to fund their own BEE transactions,⁸⁶⁸ while preventing new BEE shareholders from trading their shares.⁸⁶⁹ There are black people who have been unable to realise returns on their deals as their dividends are being used to pay off debt and they are unable to cash out as a result of lock-in clauses.⁸⁷⁰ The possible reason for the inclusion of lock-in clauses may be to prevent a black shareholder from selling shares to a white person, thereby ensuring that an enterprise will retain the benefit of the black shareholding for the purposes of BEE points for a definite period. As a result, many black shareholders who obtained their shares to empower themselves financially, which is the goal of BEE, find themselves unable to sell their shares – all for the sake of another aspect of BEE. Minister Davies, acknowledging the aforementioned counterproductive aspect of BEE, confirms that he is aware of the practical implications of implementing the B-BBEE Codes, particularly with reference to the element of ownership. This awareness may result in possible future amendments to the B-BBEE Codes or to enterprises being prevented from including lock-in

⁸⁶² *Coca-Cola Beverages Africa v Various Coca-Cola and related bottling operations* 2016 (2) ZACT 68 5. The Competition Commission is a statutory body established in terms of the Competition Act 89 of 1998 who is empowered to investigate, control and evaluate mergers, restrictive business practices and the abuse of dominant positions to achieve equity in the South African economy and to maintain and promote competition.

⁸⁶³ *Coca-Cola Beverages Africa v Various Coca-Cola and related bottling operations* 2016 (2) ZACT 68 46.

⁸⁶⁴ *Coca-Cola Beverages Africa v Various Coca-Cola and related bottling operations* 2016 (2) ZACT 68 46.

⁸⁶⁵ *Coca-Cola Beverages Africa v Various Coca-Cola and related bottling operations* 2016 (2) ZACT 68 46.

⁸⁶⁶ *Coca-Cola Beverages Africa v Various Coca-Cola and related bottling operations* 2016 (2) ZACT 68 56.

⁸⁶⁷ Paton C 'Black economic empowerment: Should it be kept alive' available at <http://www.leader.co.za/article.aspx?s=1&f=1&a=2781> (accessed 31 October 2019).

⁸⁶⁸ This means that enterprises would make use of their own funds to enter into transactions which would provide them with points in respect of elements other than by complying with the ownership element or black people would be provided with shares which the enterprise would finance.

⁸⁶⁹ Paton C 'Black economic empowerment: Should it be kept alive' available at <http://www.leader.co.za/article.aspx?s=1&f=1&a=2781> (accessed 31 October 2019).

⁸⁷⁰ Paton C 'Black economic empowerment: Should it be kept alive' available at <http://www.leader.co.za/article.aspx?s=1&f=1&a=2781> (accessed 31 October 2019). A lock-in clause is a term in an agreement which prescribes a time period within which a contracting party cannot terminate the agreement.

clauses in such ownership deals.

Enterprises will be encouraged to comply with the ownership element due to it being a priority element and it having one of the highest points in terms of both the Generic and QSE scorecards. Since the ownership element is a priority element and an element to which high points have been allocated it is sufficiently regulated by the B-BBEE Codes. The issue that arises is whether this regulation of the ownership element is sufficient to achieve ownership transformation. This issue is discussed in chapters 7⁸⁷¹ and 8⁸⁷² in the context of the legal and financial professions respectively.

5.4.2 Management Control

5.4.2.1 Generic scorecard code series 200: Management Control Element

The recognition of management control seeks to ensure that black people have influence over the strategic direction and management of entities.⁸⁷³ Both the Generic and the QSE scorecards enable measured entities to obtain points in respect of management control.⁸⁷⁴

The formulas will be discussed in order to demonstrate the complicated nature of the calculations which enterprises are required to carry out to obtain points in respect of management control. The regulation of management control is important because a representative composition of the management structures of enterprises can influence the corporate culture of an enterprise.⁸⁷⁵

In order to calculate a score for management control, the Generic management control scorecard is used which is reflected in B-BBEE Code series 200,⁸⁷⁶ annexed marked 'C'.

A measured entity will receive points for management control by meeting the targets for the 'participation of black people and black women on the board and on the levels of executive management, senior management, middle management, junior management'.⁸⁷⁷ A measured entity will also receive points for management control for the participation of people with disabilities.⁸⁷⁸ To calculate a score in terms of the management control scorecard, measured entities should use its current payroll.⁸⁷⁹ All the compliance targets referred to in respect of senior management, middle management and junior management categories, found in paragraphs 2.3, 2.4 and 2.5 of the

⁸⁷¹ See para 7.6.3 below.

⁸⁷² See para 8.4.2.3 below.

⁸⁷³ Balshaw T & Goldberg J *Broad-Based Black Economic Empowerment Amended codes and scorecard* 3ed (2014) 117.

⁸⁷⁴ B-BBEE Codes code series 200 in *GG* 36928 of 11 October 2013 para 2.

⁸⁷⁵ See para 4.3.1 above.

⁸⁷⁶ B-BBEE Code series 200 in *GG* 36928 of 11 October 2013 para 2.

⁸⁷⁷ B-BBEE Codes code series 200 in *GG* 36928 of 11 October 2013 para 3.1.

⁸⁷⁸ B-BBEE Codes code series 200 in *GG* 36928 of 11 October 2013 para 3.1.

⁸⁷⁹ B-BBEE Codes code series 200 in *GG* 36928 of 11 October 2013 para 3.2.

Generic management control scorecard respectively, are 'based on the overall demographic representation of black people as defined in the Regulations of Employment Equity Act and Commission on Employment Equity report'.⁸⁸⁰ The targets must be broken down into the specific criteria according to the various race groups falling within the 'meaning of black as defined by the EEA on an equitable representation and then be weighted accordingly'.⁸⁸¹

Executive management positions include the 'chief executive officer, chief financial officer, the chief operating officer and other executive managers that serve on the board of directors'.⁸⁸² Other executive managers include all executive management who do not serve on the board, such as, transformation executive,⁸⁸³ human resource executive and other people holding similar positions.⁸⁸⁴ In this element emphasis is placed on increasing employment equity implementation at the top management level by allocating less points for junior levels of management.⁸⁸⁵

The measurement of management control of board participation, found in paragraph 2.1 of the Generic management control scorecard, and other executive management, found in paragraph 2.2 of the Generic management control scorecard, is calculated by determining the ratio of the percentage of voting rights in the hands of black members of the board, or the percentage of black people in the executive and other executive management, or the percentage of black employees in paragraphs 2.3, 2.4 and 2.5 of the Generic management control scorecard to the percentage compliance target in respect of the specific criteria. The total is multiplied by the weighting points.⁸⁸⁶

⁸⁸⁰ B-BBEE Codes code series 200 in GG 36928 of 11 October 2013 para 2.1.

⁸⁸¹ B-BBEE Codes code series 200 in GG 36928 of 11 October 2013 para 2.2.

⁸⁸² B-BBEE Codes code series 200 in GG 36928 of 11 October 2013 para 3.4.1.

⁸⁸³ A transformation executive is responsible for transformation within an enterprise. A black transformation executive would assist in creating and retaining a transformed corporate culture.

⁸⁸⁴ B-BBEE Codes code series 200 in GG 36928 of 11 October 2013 para 3.4.2.

⁸⁸⁵ Balshaw T & Goldberg J *Broad-Based Black Economic Empowerment Amended codes and scorecard* 3ed (2014) 121.

⁸⁸⁶ B-BBEE Codes code series 200 in GG 36928 of 11 October 2013 Annexe 200(A) provides that:

$$A = \frac{B}{C} \times D$$

Where

'A is the score achieved in respect of a measured entity subject to measurement control criteria specified in paragraph 2.1, 2.2;

B is the voting rights in the hands of black members of the board as a percentage of voting rights of all members of the board in the measured entity;

OR

B is the percentage of all employees in the executive and other executive management category that are black people of the measured entity

OR

B is the percentage of black employees as calculated in the formula [for calculation of the management control indicators in paragraphs 2.3.1; 2.3.2, 2.4.1; 2.4.2; 2.5.1 and 2.5.2 of the management control scorecard];

C is the percentage compliance target in respect of the applicable management control criteria being measured as specified in 2.1; 2.2.; 2.3; 2.4 and 2.5;

D means the weighting points allocated to the applicable management control criteria being measured as specified in paragraph 2.1; 2.2; 2.3; 2.4 and 2.5.'

The following hypothetical example is illustrative. The measured entity has 8 board members in total, the percentage representation being 100%. There are 8 votes in total, three are held by black males and one by a black female.

Table 6: Example

	Votes	Percentage
Total number of members	8	100%
Votes in total	8	100%
Black males	3	37.5%
Black females	1	12.5%

Total black voting rights is 37.5% + 12.5% = 50%

$$\text{Score} = \frac{50\% \text{ (obtained from the scenario)}}{50\% \text{ (compliance target for voting rights of black board members)}}^{887} \times 2$$

Score = 2 points (the maximum points: 2 points. This entity will obtain 2 points)

The measured entity will receive the maximum points.

There is no incentive for enterprises to strive for higher management control participation by black people than the compliance target.

The measurement of management control in respect of employees with disabilities, found in paragraph 2.6.1 of the Generic management control scorecard, is calculated by determining the ratio between the total number of black employees with disabilities on managerial levels as a percentage of all employees on such levels and the compliance target of employees with disabilities. The total is multiplied by the weighting points.⁸⁸⁸

⁸⁸⁷ Found in Generic management control scorecard, marked 'C'.

⁸⁸⁸ According to B-BBEE Codes code series 200 in GG 36928 of 11 October 2013 Annexe 200(A):

$$A = \frac{B}{C} \times D$$

Where

A is the score for the given criteria as referred to in paragraph 2.6.1 of the scorecard under statement 200.

B is the total number of black employees with disability as a percentage of all employees.

C is the target for the applicable criteria as referred to in the scorecard under statement 200.

D is the Weighting for the applicable criteria as referred in the scorecard under statement 200'.

For example; if a measured entity has 280 employees on management level in total of which 12 are black disabled employees, the score for having the black disabled employees is set out below.

$$\text{Total percentage of black disabled employees} = 12 \text{ employees of } 280 \text{ employees}$$

$$\text{Total percentage of black disabled employees} = 4.28\%$$

$$\text{Total} = \frac{4.28\%}{2\% \text{ (compliance target for black employees with disabilities)}}^{889} \times 2 \text{ points}$$

$$\text{Total} = 4.28 \text{ (maximum points: 2 points. This entity will only receive 2 points)}$$

The measurement of management control falling under the categories of senior management, middle management and junior management is calculated by making use of the sub-calculations which follow. The measurement criteria targets for black employees in senior management as a percentage of all senior management (found in paragraph 2.3.1 of the Generic management control scorecard), black employees in middle management as a percentage of all middle management (found in paragraph 2.4.1 of the Generic management control scorecard), and black employees in junior management as a percentage of all junior management (found in paragraph 2.5.1 of the Generic management control scorecard) are broken down according to the relevant Economically Active Population ('EAP') statistics. This implies that both the compliance targets and the points are split in proportion to the EAP statistics.⁸⁹⁰ The calculations, which consist of four equations, will have to be repeated for each race group due to the maximum score for each race group.⁸⁹¹ Statistics are reported in respect of the race groups.⁸⁹²

Since the application of the scorecards and the relevant formulas are quite complicated, the calculations are broken up into steps to be taken to determine a score.

Step 1: First the percentage of black employees in the measured entity for the specific criteria (senior, middle, junior) should be defined. In order to calculate the percentage of black employees in the measured entity on senior management, middle management and junior management levels the ratio should be determined between the number of employees on the specific management

⁸⁸⁹ Found in Generic management control scorecard, marked 'C'.

⁸⁹⁰ B-BBEE Codes code series 600 in GN 599 GG 38765 of 6 May 2015 Annexe 200(A).

⁸⁹¹ B-BBEE Codes code series 600 in GN 599 GG 38765 of 6 May 2015 Annexe 200(A).

⁸⁹² The abbreviations for the race groups are set out below.

Statistic	African Male	African Female	Coloured Male	Coloured Female	Indian Male	Indian Female	White Male	White Female
Abbreviation	AM	AF	CM	CF	IM	IF	WM	WF

level with reference to a specific race group and the total of all employees in all race groups on the specific management level. To determine the percentage of African males on middle management level, the ratio between the number of African males on that management level and the total number of employees in all race groups on that level should be determined.

Example:

$$\%Black\ AM = \frac{\text{Number of AM employees}}{\text{Total of all employees in all race groups}}$$

The formula to calculate this will have to be repeated six times for each of the six black EAP statistics.⁸⁹³

Step 2: As a result of the Code not awarding points for meeting the EAP statistics for white race groups, the EAP statistics should be adjusted to exclude the white categories. This is done by determining the ratio between the EAP statistic for a specific race group and the sum of the published EAP statistics for all black race groups.

Example:

$$ADJ\ EAP_{AM} = \frac{EAP\ (AM)}{EAP\ (Sum)}$$

The formula to calculate this will have to be repeated six times for each of the six black EAP statistics.⁸⁹⁴

⁸⁹³ B-BBEE Codes code series 600 in GN599 GG 38765 of 6 May 2015 Annexe 200(A) Formula 1 states:

$$\%Black\ AF = \frac{\text{Number of AF employees}}{\text{Total of all employees in all race groups}}$$

$$\%Black\ CM = \frac{\text{Number of CM employees}}{\text{Total of all employees in all race groups}}$$

$$\%Black\ CF = \frac{\text{Number of CF employees}}{\text{Total of all employees in all race groups}}$$

$$\%Black\ IM = \frac{\text{Number of IM employees}}{\text{Total of all employees in all race groups}}$$

$$\%Black\ IF = \frac{\text{Number of IF employees}}{\text{Total of all employees in all race groups}}$$

Where

‘%Black RG: Percentage of black employees in the measured entity for the specific race group

Number of RG Employees: Number of employees in the management level for the measured criteria.

Total of all race groups: Total of all employees in the management level for the measurement criteria (AM+AF+CM+CF+IM+IF+WM+WF)’.

⁸⁹⁴ B-BBEE Codes code series 600 in GN 599 GG 38765 of 6 May 2015 Annexe 200 (A) Formula 1 provides that:

$$ADJ\ EAP_{AF} = \frac{EAP\ (AF)}{EAP\ (Sum)}$$

Step 3: Since the calculation for each of the race groups is required to be done individually, the compliance target should be split in proportion to the EAP statistics. This is done by multiplying the adjusted EAP for the race group by the ratio of the compliance target to 100.

Example:

$$SCT_{AM} = ADJ EAP_{AM} \times \frac{Compliance\ target}{100}$$

The formula to calculate this will have to be repeated six times for each of the six black EAP statistics.⁸⁹⁵

Step 4: The weighting points allocated for the measurement criteria should also be split in proportion to the EAP statistics. The split points for the measurement criteria represent the maximum allowable points for each of the race groups. This is done by multiplying the adjusted EAP statistic for a specific race group by the weighting points.

$$ADJ EAP_{CM} = \frac{EAP (CM)}{EAP(Sum)}$$

$$ADJ EAP_{CF} = \frac{EAP (CF)}{EAP(Sum)}$$

$$ADJ EAP_{IM} = \frac{EAP (IM)}{EAP(Sum)}$$

$$ADJ EAP_{IF} = \frac{EAP (IF)}{EAP(Sum)}$$

Where

$ADJ EAP_{RG}$: Adjusted EAP for a specific race group

EAP (RG): EAP statistic for the calculated race group

EAP (Sum): Sum of published EAP statistics for all black race groups (AM+AF+CM+CF+IM+IF)'.⁸⁹⁵

⁸⁹⁵ B-BBEE Codes code series 600 in GN 599 GG 38765 of 6 May 2015 Annexe 200 (A) Formula 1:

$$'SCT_{AF} = ADJ EAP_{AF} \times \frac{Compliance\ target}{100}$$

$$SCT_{CM} = ADJ EAP_{CM} \times \frac{Compliance\ target}{100}$$

$$SCT_{CF} = ADJ EAP_{CF} \times \frac{Compliance\ target}{100}$$

$$SCT_{IM} = ADJ EAP_{IM} \times \frac{Compliance\ target}{100}$$

$$SCT_{IF} = ADJ EAP_{IF} \times \frac{Compliance\ target}{100} ,$$

Example:

$$MAP_{AM} = ADJ EAP_{AF} \times Points$$

The formula to calculate this will have to be repeated six times for each of the six black EAP statistics.⁸⁹⁶

Step 5: The achieved score per race group will be calculated by making use of the four formulas above. The calculation is done by making use of the four results as obtained from the formulas above in respect of each race group. The score is obtained by determining the ratio between the percentage of black employees in the measured entity for the specific race group and the split compliance target for the specific race group. This total is multiplied by the maximum points allowed for the race group.

Example:

$$Score_{AM} = \frac{\% Black_{AM}}{SCT_{AM}} \times MAP_{AM}$$

The formula to calculate this will have to be repeated six times for each of the six black EAP statistics.⁸⁹⁷

⁸⁹⁶ B-BBEE Codes code series 600 in GN 599 GG 38765 of 6 May 2015 Annexe 200 (A) Formula 1:

$$MAP_{AF} = ADJ EAP_{AF} \times Points$$

$$MAP_{CM} = ADJ EAP_{CM} \times Points$$

$$MAP_{CF} = ADJ EAP_{CF} \times Points$$

$$MAP_{IM} = ADJ EAP_{IM} \times Points$$

$$MAP_{IF} = ADJ EAP_{IF} \times Points'$$

Where

'MAP: the maximum points allowed for a race group

ADJ EAP_{RG}: Adjusted EAP for a specific race group (calculated in terms of step 2)

Points: weighting points as specified in 2.3.1; 2.4.1 and 2.5.1'.

⁸⁹⁷ According to B-BBEE Codes code series 600 in GN 599 GG 38765 of 6 May 2015 Annexe 200(A) Formula 1:

$$Score_{AF} = \frac{\% Black_{AF}}{SCT_{AF}} \times MAP_{AF}$$

$$Score_{CM} = \frac{\% Black_{CM}}{SCT_{CM}} \times MAP_{CM}$$

$$Score_{CF} = \frac{\% Black_{CF}}{SCT_{CF}} \times MAP_{CF}$$

The total score for black employees in senior management, middle management and junior management is calculated by totalling the scores of each race group in each category.

$$\text{Total score} = \text{Score}_{AM} + \text{Score}_{AF} + \text{Score}_{CM} + \text{Score}_{CF} + \text{Score}_{IM} + \text{Score}_{IF}^{898}$$

To demonstrate the manner in which the formulas are used the following hypothetical example is illustrative. If a measured entity has 16 senior managers in total of which 2 senior managers are Indian males, the measured entity's score for employing the 2 Indian males is calculated as set out below.

$$\%Black_{IM} = 2 \text{ Indian males of 16 senior managers}$$

$$\%Black_{IM} = 12.5\%$$

The 2016 - 2017 statistics, the split compliance targets and the maximum points allowed in respect of each occupational level are set out hereunder.

Table 7: National EAP statistics⁸⁹⁹

	MALE	FEMALE	TOTAL
African	42.8%	35.1%	78.0%
Coloured	5.3%	4.5%	9.8%
Indian	1.8%	1.0%	2.8%
White	5.3%	4.2%	9.5%
TOTAL	55.2%	44.8%	100%

$$\text{Score}_{IM} = \frac{\% \text{ Black}_{IM}}{SCT_{IM}} \times MAP_{IM}$$

$$\text{Score}_{IF} = \frac{\% \text{ Black}_{IF}}{SCT_{IF}} \times MAP_{IF}$$

Where

Score_{RG} : score obtained

$\% \text{ Black}_{RG}$: percentage of black employees in the measured entity for the specific race group (calculated in terms of step 1)

SCT_{RG} : split compliance target (calculated in terms of step 3)

MAP_{RG} : the maximum points allowed for a race group (calculated in terms of step 4).

⁸⁹⁸ B-BBEE Codes code series 600 in GN 599 GG 38765 of 6 May 2015 Annexe 200(A) Formula 1.

⁸⁹⁹ Department of Labour *Commission for Employment Equity Report (2016-2017)* 5.

The EAP statistics should be adjusted to exclude white categories by making use of the formula below:

$$ADJ EAP_{IM} = \frac{EAP (IM)}{EAP(Sum)}$$

$$ADJ EAP_{AM} = \frac{1.8\% (obtained from table above)}{90.5\% (the total EAP statistics of black race groups only)}$$

$$ADJ EAP_{AM} = 1.98\%$$

The table below includes the adjusted EAP statistic for Indian males. The same calculations have been conducted in order to include the adjusted EAP statistics for the other black race groups and are reflected in the table below.

The compliance target should also be split in proportion to the EAP statistics by making use of the formula below.

$$SCT_{IM} = ADJ EAP_{IM} \times \frac{Compliance\ target}{100}$$

$$SCT_{IM} = 1.98\% \times \frac{60\% (compliance\ target\ in\ respect\ of\ senior\ managers)^{900}}{100}$$

$$SCT_{IM} = 1.18\%$$

The table below includes the adjusted compliance target for Indian males. The table below also contains the results of the same calculations which have been carried out in order to include the adjusted compliance targets for the other black race groups.

The weighting points should also be split in proportion to the EAP statistics. The formula below is used for this purpose.

$$MAP_{AM} = ADJ EAP_{AF} \times Points$$

$$MAP_{AM} = 1.98\% \times 2 (points\ for\ senior\ managers\ obtained\ from\ generic\ scorecard)$$

$$MAP_{AM} = 0.0396$$

The table below includes the adjusted weighting points for Indian males. The same calculations

⁹⁰⁰ Found in Generic management control scorecard, marked 'C'.

have been carried out in order to include the adjusted weighting points for the other black race groups.

Table 8: Black senior management adjustments:

	Adjusted EAP	Split target of 60%	Split points of 2
African Male	47.30%	28.38%	0.946
African Female	38.80%	23.28%	0.776
Coloured Male	5.85%	3.51%	0.117
Coloured Female	4.97%	2.98%	0.0994
Indian Male	1.98%	1.18%	0.0396
Indian Female	1.10%	0.66%	0.022

Table 9: Black middle management adjustments:

	Adjusted EAP	Split target of 75%	Split points of 2
African Male	47.30%	35.4%	0.946
African Female	38.80%	29.1%	0.776
Coloured Male	5.85%	4.38%	0.117
Coloured Female	4.97%	3.72%	0.0994
Indian Male	1.98%	1.48%	0.0396
Indian Female	1.10%	0.82%	0.022

Table 10: Black junior management adjustments:

	Adjusted EAP	Split target of 88%	Split points of 1
African Male	47.30%	41.62%	0.473
African Female	38.80%	34.14%	0.388
Coloured Male	5.85%	5.15%	0.0585
Coloured Female	4.97%	4.37%	0.0497
Indian Male	1.98%	1.05%	0.0198
Indian Female	1.10%	0.97%	0.011

The score achieved is determined by making use of the formula below.

$$Score_{AM} = \frac{\% Black_{AM}}{SCT_{AM}} \times MAP_{AM}$$

$$\text{Score} = \frac{12.5\%}{1.18\%} \times 0.0396$$

Score = 0.42, however the measured entity is limited to 0.0396 points.

0.0396 points are the maximum number of points which may be achieved.

The fact that such a low score is obtained for employing 2 Indian males shows that in circumstances where employers employ black employees on managerial levels, it will be difficult for them to obtain a high score in respect of management control. The score would have been higher if additional black employees from the other black races groups were employed on the management level, such as African males.

The equations and sub-calculations above also apply when calculating scores for black female employees in senior management as a percentage of all senior management (found in paragraph 2.3.2 of the Generic management control scorecard), black female employees in middle management as a percentage of all middle management (found in paragraph 2.4.2 of the Generic management control scorecard) and black female employees in junior management as a percentage of all junior management (found in paragraph 2.5.2 of the Generic management control scorecard).⁹⁰¹

5.4.2.2 Management Control for a QSE

In order to calculate a score in respect of the management of a QSE, the QSE management control scorecard is used which is reflected in B-BBEE Code series 602,⁹⁰² annexed marked 'D'. When calculating the score for management control in respect of a QSE the demographic representation of black people⁹⁰³ is not applicable.⁹⁰⁴ Executive management includes other executive management,⁹⁰⁵ which includes all executive management who do not serve on the board, such as, human resource executive, transformation executive, and other people holding similar positions.⁹⁰⁶

The management control of a QSE is calculated by determining the ratio between the number of black executives or black senior, middle and junior management or black females in these categories as a percentage of the total number of executive management or senior or middle or

⁹⁰¹ B-BBEE Codes GG 38765 of 6 May 2015 Annex 200A.

⁹⁰² B-BBEE Codes code series 602 in GG 38766 6 May 2015 para 3.1.1.

⁹⁰³ As defined in the EEA regulations and the report of the Commission on employment equity.

⁹⁰⁴ B-BBEE Codes code series 600 in GG 38766 6 May 2015 para 3.2.2.

⁹⁰⁵ B-BBEE Codes code series 600 in GG 38766 6 May 2015 para 3.2.1.

⁹⁰⁶ B-BBEE Codes code series 200 in GG 36928 11 October 2013 para 3.4.2; See para 5.4.2.1.

junior management of the measured entity and the compliance target. The total is multiplied by the weighting points.⁹⁰⁷

For example; if a QSE has 20% black representation at the level of executive management, the score which the QSE will obtain will be determined in accordance with the calculation set out hereunder.

$$\text{Score} = \frac{20\%}{50\% (\text{compliance target})} \times 5(\text{weighting points})^{909}$$

$$\text{Score} = 2 \text{ points (Maximum points: 5 points)}^{910}$$

The aforementioned calculation shows that it is easier to calculate the score of a measured entity in terms of the QSE scorecard than when calculating a score in terms of the Generic scorecard.

5.4.2.3 Analysis of the management control element

The calculations which enterprises are required to carry out in terms of the Generic management control scorecard to obtain a score in respect of the categories of senior, middle and junior management levels are complicated, since the EAP statistics should be taken into consideration. While the consideration of the EAP statistics is a valuable component in obtaining an accurate score in respect of management control, the calculations which a measured entity is required to carry out are intricate nonetheless. The EAP statistics are not taken into consideration in circumstances where a QSE calculates a score for management control in respect of any of the management levels. This results in the calculations which a QSE is required to carry out in respect of senior, middle and junior management levels being easier than those which should be carried out by an enterprise who is required to use the Generic management control scorecard.

Enterprises would be less likely to comply with this element since management control is not a

⁹⁰⁷ B-BBEE Codes code series 600 in GN 599 GG 38766 of 6 May 2015 Annexe 602(A) states the formulas as:

$$A = \frac{B}{C} \times D$$

Where:

A is the score for the management indicator in paragraph 3.1

B is the number of the measurable category of black executive or black female executive or black senior, middle and junior management or black female senior, middle and junior management as a percentage of the total number of executive management or senior or middle or junior management of the measured entity.

C is the compliance target for the applicable criteria.

D is the weighting points for the applicable criteria'.

⁹⁰⁸ Found in QSE management control scorecard marked 'D'.

⁹⁰⁹ Found in QSE management control scorecard marked 'D'.

⁹¹⁰ Found in QSE management control scorecard marked 'D'.

priority element for both QSEs and LEs and in addition, is an element to which the legislature has allocated one of the lowest points. Measured entities may instead elect to comply with the priority elements to obtain a BEE rating. As a result of the corporate culture of enterprises being influenced by the persons who occupy positions on the management levels of the enterprises, measured entities election not to comply with management control may have a negative effect on the corporate culture of such enterprises.⁹¹¹ By virtue of the fact that management control is not a priority element and one of the elements to which low points have been allocated, the management of enterprises is not regulated sufficiently.

5.4.3 Skills Development

Measured entities that provide skills development to employees will in doing so be obtaining BEE points and in the event of such entities falling within the meaning of a designated employer, will simultaneously be complying with the affirmative action measure requiring employers to develop employees from designated groups.⁹¹² Skills development can also assist in the reduction of social closure practices which take place in some enterprises.⁹¹³

5.4.3.1 Generic scorecard code series 300: Skills Development Element

The presence of a separate element for skills development shows recognition of the skills shortage problem in South Africa. Providing training to people is one of the ways in which the skills shortage problem can be resolved and the inclusion of a separate element for skills development, provides enterprises with an incentive to assist in resolving this problem.

There is no accepted definition of a skills shortage or the manner in which the skills shortage problem should be resolved by government, and as a result, the severity of the skills shortage is often misunderstood.⁹¹⁴ While the term 'skills shortage' has been used when the quantity of the skills demand exceeds the supply of these skills,⁹¹⁵ it has also been said to be associated with professional qualifications or occupations. This implies that a skills shortage may be defined as workers who lack qualifications or a shortage of workers in a particular profession.⁹¹⁶ 'Training' on the other hand means 'investing in people to enable them to perform better and to empower them

⁹¹¹ See para 4.3.1 above.

⁹¹² See para 3.2.5 above.

⁹¹³ See para 4.3.1 above.

⁹¹⁴ Rasool F & Botha CJ 'The nature, extent and effect of skills shortages on skills migration in South Africa' (2011) 9(1) *SA Journal of Human Resource Management* 289.

⁹¹⁵ Trendle B 'Skills and labour shortages - definition, cause and implications' (2008) *Labour Market Research Unit. Queensland: Queensland Government Press* 54.

⁹¹⁶ Rasool F & Botha CJ 'The nature, extent and effect of skills shortages on skills migration in South Africa' (2011) 9(1) *SA Journal of Human Resource Management* 292.

to make the best use of their abilities'.⁹¹⁷

Subsequent to apartheid, legislation, such as, the Labour Relations Act 66 of 1995, the Skills Development Act 98 of 1999 ('Skills Development Act), the B-BBEEA and the EEA was enacted.⁹¹⁸ Labour law has been at the forefront of the state's agenda not only to eradicate unfair discrimination, but also to provide access to skills training and development.⁹¹⁹ The enactment of the Skills Development Act created a regulatory framework for increasing investment in training and education across sectors and established Sector Education and Training Authorities (SETAs) to promote skills development.⁹²⁰ SETAs are relevant, because the functions of SETAs include *inter alia* establishing learnerships,⁹²¹ monitoring training⁹²² and allocating funds to employers, training and education providers as well as employees.⁹²³

South Africa is faced with a crisis in human resources with a shortage of skilled employees which is aggravated 'by the high rate of unemployment among unskilled workers'.⁹²⁴ The competition for scarce skills and skills shortages is not unique to transitional political economies, such as South Africa.⁹²⁵ The skills shortage affects the 'level of economic productivity and reduces [South Africa's] capacity to develop a knowledgeable society'.⁹²⁶ Intensive skills training is required in order to provide enterprises with competent personnel who are able to improve productivity and performance.⁹²⁷ Government's national skills development strategy has included a focus on BEE enabling employers to obtain points for their contributions to skills development. This has been done not only by the skills development element being one of the elements to which the highest points in both the Generic and QSE scorecards have been allocated, but also by the skills development element being a priority element.⁹²⁸ A measured entity's compliance with the skills development element contributes to it obtaining a good BEE rating.

Skills development should contribute to the achievement of the country's goals of social development and economic growth. This will result in the creation of decent work, achievement of

⁹¹⁷ Jinabhai DC 'New Challenges for South African development and training - Linkages to Empirical research' (2005) 34(1) *Public Personnel Management* 91.

⁹¹⁸ See chapters 2 and 3 above.

⁹¹⁹ Horwitz (2013) 2436.

⁹²⁰ Rasool F & Botha CJ 'The nature, extent and effect of skills shortages on skills migration in South Africa' (2011) 9(1) *SA Journal of Human Resource Management* 287.

⁹²¹ Section 10(b)(i) of the Skills Development Act.

⁹²² Section 10(b)(iv) of the Skills Development Act.

⁹²³ Section 10(b)(iii) of the Skills Development Act.

⁹²⁴ Jinabhai DC 'New Challenges for South African development and training - Linkages to Empirical research' (2005) 34(1) *Public Personnel Management* 87.

⁹²⁵ Horwitz (2013) 2436.

⁹²⁶ Rasool F & Botha CJ 'The nature, extent and effect of skills shortages on skills migration in South Africa' (2011) 9(1) *SA Journal of Human Resource Management* 296.

⁹²⁷ Jinabhai DC 'New Challenges for South African development and training - Linkages to Empirical research' (2005) 34(1) *Public Personnel Management* 910.

⁹²⁸ See para 5.4.

sustainable livelihoods,⁹²⁹ and promotion of the development of an industrial skills base in critical sectors of production and value-added manufacturing.⁹³⁰ In addition, it will result in support for professional, technical and vocational, as well as academic learning programmes being achieved by means of professional placements, work integrated learning, apprenticeships, learnerships and internships that meet the critical needs for economic growth and development.⁹³¹ Measured entities who provide skills development to professionals will in so doing be assisting the professionals concerned to become suitably qualified for positions which become available.⁹³²

In order to calculate a score for skills development, the Generic skills development scorecard is used which is reflected in Code series 300,⁹³³ annexed marked 'E'. This scorecard represents the manner in which a score is obtained for skills development expenditure and the way in which bonus points can be obtained. Skills development expenditure consists of 'any legitimate expenses incurred for any learning programme offered by a measured entity to its employees evidenced by an invoice or appropriate internal accounting record.'⁹³⁴

The compliance targets in respect of the categories contained in 2.1.1.1, 2.1.2.1 and 2.1.2.2 of the Generic skills development scorecard are 'based on the overall demographic representation of black people as defined in the Regulations of the EEA and the Commission of Employment Equity report'.⁹³⁵ The targets are also broken down into specific criteria according to the various race groups within the definition of 'black' in accordance with the annual report of the Commission of Employment Equity and the EEA in determining the score of a measured entity.⁹³⁶ The demographic representation of black people set out in the EEA Regulations and employment equity report of the Commission does not apply when measuring skills development expenditure found in paragraph 2.1.1.2 of the Generic skills development scorecard (on learning programmes specified in the learning programme matrix for black employees with disabilities as a percentage of leviabable amount) and the skills development expenditure found in paragraph 2.1.3 of the Generic skills development scorecard (number of black people absorbed by the measured and industry entity at the end of the learnerships programme).⁹³⁷

In order to obtain points for the purposes of skills development, a measured entity should ensure that an annual training report, a pivotal report and a workplace skills plan⁹³⁸ is approved by the

⁹²⁹ B-BBEE Codes code series 300 in *GG 36928* of 11 October 2013 para 5.1.1.

⁹³⁰ B-BBEE Codes code series 300 in *GG 36928* of 11 October 2013 para 5.1.2.

⁹³¹ B-BBEE Codes code series 300 in *GG 36928* of 11 October 2013 para 5.1.3.

⁹³² See para 3.2.4 above.

⁹³³ B-BBEE Code series 300 in *GG36928* of 11 October 2013 para 2.1.

⁹³⁴ B-BBEE Codes code series 300 in *GG 36928* of 11 October 2013 para 5.2.

⁹³⁵ B-BBEE Codes *GG 38765* of 6 May 2015 Annex 300A Formula 1 and 2.

⁹³⁶ B-BBEE Codes *GG 38765* of 6 May 2015 Annex 300A Formula 1 and 2.

⁹³⁷ B-BBEE Codes code series 600 in *GN 599 GG 38765* of 6 May 2015 para (d).

⁹³⁸ 'Pivotal report' is defined by Broad-Based Black Economic Empowerment Code of Good Practice Schedule 1 in *GG*

SETAs,⁹³⁹ and that a priority skills programme generally and more specifically for black people is implemented.⁹⁴⁰ The category found in paragraph 2.1.1.1 of the Generic skills development scorecard is known as 'skills development expenditure on learning programmes specified in the learning programme matrix for black people as a percentage of leviable amount'.⁹⁴¹ In order for a measured entity to obtain points in respect of this category such expenditure includes 'external training expenditure for unemployed black people'.⁹⁴² A measured entity may obtain bonus points in respect of black people who are retained by the measured entity at the end of a learning programme.⁹⁴³ In the event of less than 100% of trainees being retained by the measured entity it will only be the percentage retained that will be recognised.⁹⁴⁴ In terms of the B-BBEE Codes 'a measured entity must achieve a minimum of 40% of the individual targets set out in the skills development element'.⁹⁴⁵ Non-compliance with the said minimum will result in the BEE level of the measured entity being discounted by one level.⁹⁴⁶

A learning programme matrix is reflected in code series 300⁹⁴⁷ which is annexed marked 'F. Skills development 'which arises from workplace and informal learning programmes or from learning programmes that fall under categories F and G of the learning programmes matrix (learning matrix) cannot represent more than 15% of the total value of skills development expenditure'.⁹⁴⁸ Legitimate training costs, such as, catering, accommodation and travelling, may not exceed more than 15% of the total skills development expenditure.⁹⁴⁹ In the event of salaries or wages being paid to an employee who participates as a learner in any of the learning programmes, such salaries or wages will constitute skills development expenditure 'if the learning programme is a learnership, internship and apprenticeship (category B, C and D of the learning programme matrix)'.⁹⁵⁰

Chapter 7 consists of a discussion on unfair discrimination, affirmative action and BEE in the legal profession. While discussing the learning programmes matrix it is important to highlight that a

36928 of 11 October 2013 as 'a report on professional, vocational, technical and academic learning programmes that meet the critical needs for economic growth and social development, generally combining course work at universities, universities of technology and colleges with structured learning at work'.

⁹³⁹ B-BBEE Codes code series 300 in GG 36928 of 11 October 2013 para 3.1.

⁹⁴⁰ Broad-Based Black Economic Empowerment Code of Good Practice as amended code series 300 in GG 36928 of 11 October 2013 para 3.1.2.

⁹⁴¹ 'Leviable amount' bears the same meaning as it is defined in the Skills Development Levies Act of 1999. In terms of the section 3(4) of the Skills Development Levies Act 'leviable amount' is defined as the total amount of remuneration, paid or payable, or deemed to be paid or payable by an employer to its employees in any month as determined in accordance with the provisions of the Fourth Schedule to the Income Tax Act for the purposes of determining the employer's liability for any employee's tax in terms of the Schedule.

⁹⁴² B-BBEE Codes code series 300 in GG 36928 of 11 October 2013 para 3.2.

⁹⁴³ B-BBEE Codes code series 300 in GG 36928 of 11 October 2013 para 2.1.3.

⁹⁴⁴ B-BBEE Codes code series 300 in GG 36928 of 11 October 2013 para 3.4.

⁹⁴⁵ B-BBEE Codes code series 300 in GG 36928 of 11 October 2013 para 4.1.

⁹⁴⁶ B-BBEE Codes code series 300 in GG 36928 of 11 October 2013 para 4.2.

⁹⁴⁷ B-BBEE Codes code series 300 in GG 36928 of 11 October 2013 Annexe 300(A).

⁹⁴⁸ B-BBEE Codes code series 300 in GG 36928 of 11 October 2013 para 5.3.

⁹⁴⁹ B-BBEE Codes code series 300 in GG 36928 of 11 October 2013 para 5.4.

⁹⁵⁰ B-BBEE Codes code series 300 in GG 36928 of 11 October 2013 para 5.5.

candidate attorney will fall within category D (learnerships or apprenticeships) of the learning programmes matrix. This is important, because the employment of candidate attorneys will enable law firms to obtain points in respect of skills development for training such persons.⁹⁵¹ In the event of a candidate attorney being retained by a measured entity at the end of the period of articles, the measured entity will receive bonus points as indicated in the Generic skills development scorecard.

Any amounts incurred in respect of scholarships and bursaries for employees will not constitute skills expenditure in circumstances where the measured entity is able to recover any portion of these amounts from the employee 'or if the grant of the scholarship or bursary is conditional'.⁹⁵² The grant of the scholarship or bursary is conditional in circumstances where an employee is obligated to meet a requirement or engage in an activity prescribed by the employer in exchange for the scholarship or bursary. However, the expenses are recognisable 'if the right of recovery or condition involves either the obligation of successful completion of the employee's studies within the time period allocated or the obligation of continued employment by the measured entity for a period following successful completion of the employee's studies'.⁹⁵³ The period of continued employment should not be more than the period of study of the employee concerned.⁹⁵⁴ Legitimate recognisable training expenses include the costs of: trainers,⁹⁵⁵ scholarships and bursaries, accommodation and travel⁹⁵⁶ course fees,⁹⁵⁷ training material,⁹⁵⁸ training facilities including catering,⁹⁵⁹ and administration.⁹⁶⁰ This shows that in circumstances where a measured entity grants a scholarship or bursary where the expenses are recognisable it will assist the measured entity in obtaining a good BEE rating even in circumstances where the measured entity has a low percentage of black employees who form part of the ownership or management structures of such enterprises.

As a result of a measured entity's compliance with skills development providing benefits to the measured entity,⁹⁶¹ the formulas which should be used to calculate a score for skills development are examined below to illustrate the complicated nature of the calculations which measured entities are required to conduct. A score in respect of skills development expenditure on learning

⁹⁵¹ See para 7.6.4 below.

⁹⁵² B-BBEE Codes code series 300 in *GG 36928* of 11 October 2013 para 5.6.

⁹⁵³ B-BBEE Codes code series 300 in *GG 36928* of 11 October 2013 para 5.6.

⁹⁵⁴ B-BBEE Codes code series 300 in *GG 36928* of 11 October 2013 para 5.6.

⁹⁵⁵ B-BBEE Codes code series 300 in *GG 36928* of 11 October 2013 para 6.1.2. Trainers are the persons who are responsible for the training.

⁹⁵⁶ B-BBEE Codes code series 300 in *GG 36928* of 11 October 2013 para 6.1.5.

⁹⁵⁷ B-BBEE Codes code series 300 in *GG 36928* of 11 October 2013 para 6.1.4.

⁹⁵⁸ B-BBEE Codes code series 300 in *GG 36928* of 11 October 2013 para 6.1.1.

⁹⁵⁹ B-BBEE Codes code series 300 in *GG 36928* of 11 October 2013 para 6.1.3.

⁹⁶⁰ B-BBEE Codes code series 300 in *GG 36928* of 11 October 2013 para 6.1.7.

⁹⁶¹ Benefits include the fact that a measured entity's compliance with skills development will constitute the compliance with a priority element, the compliance with an element to which one of the highest points have been allocated and in circumstances where the measured entity is a designated employer, such compliance would also amount to implementation of the affirmative action measure to develop people from designated groups.

programmes specified in the learning programme matrix for black people as a percentage of a leviab amount⁹⁶² is calculated by following the sub-calculations below. The measurement criteria targets in this category are broken down according to the relevant EAP statistics which implies that both the compliance targets and the points are split in proportion to the EAP statistics.⁹⁶³ This should be done in the same way in which a measured entity determines its score for management control in respect of the categories of senior, middle and junior management levels.⁹⁶⁴

Step 1: First the percentage of black employees in the measured entity as a percentage of the leviab amount should be defined. This will be calculated by determining the ratio between the rand value of skills development expenditure on learning programmes outlined in the learning programme matrix for a specific race group and the leviab amount.⁹⁶⁵

Example:

$$\%Spend_{AM} = \frac{Spend\ on\ AM\ employees}{Leviab\ amount}$$

The formula to calculate this will have to be repeated six times for each of the six black race groups.⁹⁶⁶

Step 2: As a result of the Code not awarding points for meeting the EAP statistics for white race groups, the EAP statistics should be adjusted to exclude the white categories. The same equation

⁹⁶² This category is found in paragraph 2.1.1.1 of the Generic skills development scorecard.

⁹⁶³ B-BBEE Codes code series 600 in GG 38765 of 6 May 2015 Annexe 300(A).

⁹⁶⁴ See para 5.4.2.1.

⁹⁶⁵ 'Leviab amount' is defined as the total amount of remuneration, paid or payable, or deemed to be paid or payable by an employer to its employees in any month as determined in accordance with the provisions of the Fourth Schedule to the Income Tax Act for the purposes of determining the employer's liability for any employee's tax in terms of the Schedule.

⁹⁶⁶

$$\%Spend_{AF} = \frac{Spend\ on\ AF\ employees}{Leviab\ amount}$$

$$\%Spend_{CM} = \frac{Spend\ on\ CM\ employees}{Leviab\ amount}$$

$$\%Spend_{CF} = \frac{Spend\ on\ CF\ employees}{Leviab\ amount}$$

$$\%Spend_{IM} = \frac{Spend\ on\ IM\ employees}{Leviab\ amount}$$

$$\%Spend_{IF} = \frac{Spend\ of\ IF\ employees}{Leviab\ amount}$$

RG: Race Group

⁹⁶⁶ $\%Spend_{RG}$: Percentage of spend on black employees in the measured entity for the specific race group

Spend on RG Employees: Rand value of Skills Development Expenditure on Learning Programmes specified in the Learning Programme Matrix for the specified Race Group for 2.1.1.1, B-BBEE Codes GG 38765 of 6 May 2015 Annex 300A Formula 1.

which is used to adjust the EAP statistics when measuring a measured entity's score for employing black employees on senior, middle and junior management levels should be followed to exclude white categories.⁹⁶⁷

Step 3: Since the calculation for each of the race groups is required to be done individually, the compliance target should be split in proportion to the EAP statistics. The same equation which is used to split the compliance target in proportion to the EAP statistics when measuring a measured entity's score for employing black employees on senior, middle and junior management levels should be used.⁹⁶⁸

Step 4: The points allocated for the measurement criteria should also be split in proportion to the EAP statistics. The split points for the measurement criteria represents the maximum points allowed for the race groups. The same equation which is used to split the points when measuring a measured entity's score for employing black employees on senior, middle and junior management levels should be used.⁹⁶⁹

Step 5: In order to obtain a score the same equation which is used to obtain a score in respect of senior, middle and junior management levels should be used.⁹⁷⁰ The only difference is that in measuring a measured entity's score for employing black employees on senior, middle and junior levels the score is calculated by determining the ratio between *the percentage of black employees in the measured entity for the specific criteria (senior, middle, junior)* and the split compliance target for the specific race group. This total is multiplied by the maximum points allowed for the race group. However, in determining the score for skills development it is calculated by determining the ratio between *the percentage spend on black employees in the measured entity for the specific race group* and the split compliance target for the specific race group. This total is multiplied by the maximum points allowed for the race group. The same formula should be completed in respect of each race group.

The total score for 2.1.1.1 is calculated by adding the scores of each race group together as indicated below.

$$\text{Total score} = \text{Score}_{AM} + \text{Score}_{AF} + \text{Score}_{CM} + \text{Score}_{CF} + \text{Score}_{IM} + \text{Score}_{IF}.^{971}$$

The aforementioned process of calculations used to calculate a score in respect of the category contained in paragraph 2.1.1.1 of the Generic skills development scorecard should also be

⁹⁶⁷ See para 5.4.2.1 above.

⁹⁶⁸ See para 5.4.2.1 above.

⁹⁶⁹ See para 5.4.2.1 above.

⁹⁷⁰ See para 5.4.2.1 above.

⁹⁷¹ B-BBEE Codes GG 38765 of 6 May 2015 Annex 300A Formula 1.

followed when calculating scores for the number of black people participating in learnerships, apprenticeships and internships as a percentage of total employees (contained in paragraph 2.1.2.1 of the Generic skills development scorecard) and the number of black unemployed people participating in training specified in the learning programme matrix as a percentage of the number of employees (contained in paragraph 2.1.2.2 of the Generic skills development scorecard).⁹⁷² The only differences are that the first and the fifth equations should be amended as set out hereunder and the compliance targets and weighting points which should be used are those reflected in paragraphs 2.1.2.1 and 2.1.2.2 of the Generic skills development scorecard.⁹⁷³ To calculate a score in respect of paragraph 2.1.1.1 equation 1 considers the expenditure as a percentage of the leviable amount.⁹⁷⁴ However, in the case of calculating a score in respect of categories 2.1.2.1 and 2.1.2.2 equation 1 consists of the number of black people participating in learnerships, apprenticeships and internships or the number of black unemployed people participating in training set out in the learnership programme matrix as a percentage of the total of all employees of all race groups.⁹⁷⁵ To calculate a score in respect of paragraph 2.1.1.1 equation 5 consists of the ratio of the percentage spend on black employees in the measured entity for the specific race group to the split compliance target. In the case of 2.1.2.1 and 2.1.2.2 equation 5 consists of the ratio between the percentage of black people for a specific race group and the split compliance target.⁹⁷⁶

Step 1: The same equation which is used to calculate the percentage of black employees in the measured entity for the specific criteria (senior, middle and junior management levels) should be followed here.⁹⁷⁷ The formula to calculate this will have to be repeated six times for each of the six black EAP statistics.

Step 5: The same equation which is used to calculate a score when measuring a measured entity's score for employing black employees on senior, middle and junior management levels should be followed.⁹⁷⁸

The total score for 2.1.2.1 or 2.1.2.2 is calculated by adding the scores of each race group.⁹⁷⁹

For example, if a measured entity has 1.3% black employees (of which 0.98% are Coloured male employees and 0.32% are African male employees) and the total percentage being 1.3% black employees are sent on a learnership, a score can be calculated in respect of the Coloured male

⁹⁷² B-BBEE Codes GG 38765 of 6 May 2015 Annex 300A Formula 2.

⁹⁷³ B-BBEE Codes GG 38765 of 6 May 2015 Annex 300A Formula 2.

⁹⁷⁴ B-BBEE Codes GG 38765 of 6 May 2015 Annex 300A Formula 1.

⁹⁷⁵ B-BBEE Codes GG 38765 of 6 May 2015 Annex 300A Formula 2.

⁹⁷⁶ B-BBEE Codes GG 38765 of 6 May 2015 Annex 300A Formula 2.

⁹⁷⁷ See para 5.4.2.1 above.

⁹⁷⁸ See para 5.4.2.1 above.

⁹⁷⁹ B-BBEE Codes GG 38765 of 6 May 2015 Annex 300A Formula 2.

and African male employees. The National EAP statistics are relevant in order to calculate a score.⁹⁸⁰ The split compliance targets and the split points are set out in the table below. While the adjusted EAP statistics are the same as indicated for the calculations to be performed in respect of the management control element, the split points and the split targets differ since the calculations which have been carried out in order to determine the split points and split targets below were carried out by using the values contained in the Generic skills development scorecard.

Table 11: Adjustments

	Adjusted EAP	Split points of 4	Split target of 2.5%
African Male	47.30%	1.892	1.1825%
African Female	38.80%	1.552	0.97%
Coloured Male	5.85%	0.234	0.146%
Coloured Female	4.97%	0.1988	0.124%
Indian Male	1.98%	0.0792	0.0495%
Indian Female	1.10%	0.044	0.0275%

A score in respect of the percentage of black employees participating in the learnerships, indicated in the scenario above is determined by following the calculations set out below.⁹⁸¹

$$A = \frac{B}{C} \times D$$

$$\text{Coloured males} = \frac{0.98\%(\text{obtained the from the scenario for Coloured males})}{0.146\%(\text{split compliance target})} \times 0.234(\text{split points})$$

$$\text{Coloured males} = 1.5 \text{ points out of 4}$$

$$A = \frac{B}{C} \times D$$

$$\text{African males} = \frac{0.32\%(\text{obtained from the scenario for African males})}{1.1825\%(\text{split compliance target})} \times 1.892(\text{split points})$$

$$\text{African males} = 0.51 \text{ points out of 4}$$

⁹⁸⁰ See para 5.4.2.1 above.

⁹⁸¹ These calculations are followed in order to calculate a score for the number of black people participating in learnerships, apprenticeships and internships as a percentage of total employees (para 2.1.2.1 of the Generic skills development scorecard).

$$\text{Total points} = 1.5 + 0.51$$

Score = 2 points (Maximum: 4 points. Entity will only receive 2 points)

The measurement of skills development falling under the categories of skills development expenditure on learning programmes specified in the learning programme matrix for black employees with disabilities as a percentage of leviab amount,⁹⁸² and the number of black people absorbed by the measured entity at the end of the learnerships programme,⁹⁸³ is calculated by determining the ratio of the percentage of spend on black disabled people or the percentage of people retained in a specific category that are black people to the compliance target. This number is then multiplied by the weighting points.⁹⁸⁴

For example, if the measured entity (such as a law firm) absorbs 5 out of 10 article clerks at the end of the period of articles, the score of the measured entity is set out below.

$$\text{Score} = \frac{50\% (\text{percentage of article clerks absorbed})}{100\% (\text{compliance target})} \times 5 \text{ points}$$

$$\text{Score} = 2.5 \text{ points (out of 5 points)}$$

5.4.3.2 Skills Development for a QSE

In order to calculate a score for skills development of a QSE, the QSE skills development scorecard is used which is reflected in B-BBEE Code series 603⁹⁸⁵ annexed marked 'G'.

The discounting principle, the sub-minimum requirements, as well as the learning programme

⁹⁸² This category is contained in paragraph 2.1.1.2 of the Generic skills development scorecard.

⁹⁸³ This category is contained in paragraph 2.1.3 of the Generic skills development scorecard.

⁹⁸⁴ B-BBEE Codes GG 38765 of 6 May 2015 Annex 200A Formula 3 states:

$$A = \frac{B}{C} \times D$$

Where

A is the score for the measurement category indicator

B is the percentage of spend in the measurement category that are black disabled people, or

B is the percentage of absorbed people in the measurement category that are black people.

C is the compliance target for the applicable criteria as referred to in the scorecard under statement 300.

D is the weighting points for the applicable criteria as referred to in the scorecard under statement 300'.

⁹⁸⁵ B-BBEE Code series 603 in GG 38766 of 6 May 2015 para 4.1.1.

matrix discussed in paragraph 5.4.3.1 above,⁹⁸⁶ annexed marked 'F' also applies to a QSE.⁹⁸⁷ When calculating a score in terms of the QSE scorecard, the demographic representation of black people is not applicable.⁹⁸⁸ A QSE calculates its score for skills development by determining the ratio of the percentage spend on black people or black females to the compliance target. The total is multiplied by the weighting points.⁹⁸⁹

A hypothetical example is illustrative. If a QSE's skills development expenditure on a learning programme specified in the learning programme matrix for black people is 1% of the leviable amount, the score of the measured entity is set out below.

$$A = \frac{1\% \text{ (obtained from the scenario)}}{3\% \text{ (compliance target)}} \times 15 \text{ (points)}$$

$$A = 5 \text{ points}$$

It would be easier for a QSE to comply with skills development than an LE. This is because the demographic representation of black people as defined in the EEA Regulations and the Commission's report would not apply where calculations are carried out in terms of the QSE scorecard. This implies that the number of calculations which a QSE would be required to carry out would be less than what is expected from an LE.

5.4.3.3 The significance of the skills development element

An enterprise which makes use of the Generic skills development scorecard to determine its score in respect of skills development is expected to make use of a number of formulas which are complicated, due to the EAP statistics having to be taken into consideration. With a QSE this is however not the case which may result in QSEs finding it easier to comply with this element.

Where employees participate in learning programmes as learners, their salaries or wages will be recognised as skills development expenditure. The effect of this recognition is that measured

⁹⁸⁶ B-BBEE Codes code series in 600 GG 38766 of 6 May 2015 para 4.2.6.

⁹⁸⁷ B-BBEE Codes code series in 600 GG 38766 of 6 May 2015 para 4.2.1.

⁹⁸⁸ B-BBEE Codes code series in 600 GG 38766 of 6 May 2015 para 4.2.2.

⁹⁸⁹ $A = \frac{B}{C} \times D$

'A is the score for the measured category

B is the percentage of spend in the measured category that are black people or black female;

C is the target for the applicable criteria;

D is the weighting points for the applicable criteria as referred to in the scorecard under statement 603'; B-BBEE Codes code series 600 GG38766 of 6 May 2015 para 4.2.8.

⁹⁸⁹ Found in QSE skills development scorecard, marked 'G'.

⁹⁹⁰ Found in QSE skills development scorecard, marked 'G'.

entities will be motivated to allow their employees to participate in such programmes. The fact that points may also be obtained by measured entities who grant scholarships or bursaries to employees under the circumstances discussed above will similarly have the effect of encouraging measured entities to obtain points in respect of skills development.

Entities will be further encouraged to comply with this element in obtaining good BEE ratings since skills development is a priority element for both a QSE and an LE, and one of the elements to which high points have been allocated in terms of the both the Generic and QSE scorecards.

5.4.4 Enterprise and Supplier development

5.4.4.1 Generic scorecard code series 400: Enterprise and Supplier Development Element

Since 1994, government initiatives have been introduced to provide opportunities for entrepreneurship and the development of small businesses. These initiatives include the White Paper on the National Strategy for the Development and Promotion of Small Business (1995), the National Small Business Act 102 of 1996 ('Small Business Act), the Preferential Procurement Policy Framework Act 5 of 2000 (PPPFA), the Integrated Strategy on the Promotion of Entrepreneurship and Small Enterprises (2005), and the establishment of a Ministry of Small Business Development in 2014. The objective of the Small Business Act was to create an environment in which small businesses could flourish, while the Integrated Strategy on the Promotion of Entrepreneurship and Small Business Enterprise (2005) sought to facilitate growth within small, medium and micro-enterprises.⁹⁹¹ The PPPFA required that a certain percentage of contract work be given to previously disadvantaged individuals or organisations.

Enterprise development is defined as 'the process of strengthening the integration of small firms with potential for growth and expansion into the economic mainstream'.⁹⁹² BEE aims to encourage measured entities to use preferential procurement to achieve the objectives of enterprise development, and to create opportunities for, as well as to invest in, enterprises within the value chain.⁹⁹³ Creating opportunities for small businesses to enter into the mainstream economy does not only benefit measured entities in obtaining BEE points.

'Entry of those that are marginalised and disadvantaged into the mainstream economy comes with other benefits such as enhancing the diversity of the participants thereby opening up new and added sources of innovation. These sentiments are at the heart of the BEE

⁹⁹¹ Pooe RID 'The latest 'big thing' for South African companies: Enterprise and supplier development - proposing an implementation framework' (2016) 10(1) *Journal of Transport and supply chain management* 235.

⁹⁹² Morales-Nieto J 'Globalisation of microfinance markets: some conditions for success' (2013) 4(1) *Sabinet* 6.

⁹⁹³ Pooe RID 'The latest 'big thing' for South African companies: Enterprise and supplier development - proposing an implementation framework' (2016) 10(1) *Journal of Transport and supply chain management* 236.

framework and this makes it understandable why enterprise development is such an important element.⁹⁹⁴

Supplier development is defined as 'any effort of a buying firm with its suppliers to increase the performance or capabilities of the suppliers with a view to meeting the buying firm's supply needs'.⁹⁹⁵ Enterprises should aim to maintain good relationships with their suppliers and to extract value from these relationships.⁹⁹⁶ The enterprise and supplier element has been included in the B-BBEE Codes due to the decision being made to adopt the maximalist approach.⁹⁹⁷

In order to calculate a score for enterprise and supplier development, the Generic enterprise and supplier development scorecard is used which is reflected in B-BBEE Code series 400⁹⁹⁸ annexed marked 'H'. The enterprise and supplier development element is not only one of the priority elements, but also the element to which the highest points have been allocated in terms of both the Generic and the QSE scorecards.

Enterprise and supplier development consists of preferential procurement⁹⁹⁹ as well as enterprise development and supplier development.¹⁰⁰⁰ A minimum of 40% for each of the targets: preferential procurement,¹⁰⁰¹ supplier development,¹⁰⁰² and enterprise development (excluding bonus points)¹⁰⁰³ must be achieved by a measured entity.¹⁰⁰⁴ In the event of non-compliance with the threshold targets the result of the overall achieved B-BBEE status level will be discounted.¹⁰⁰⁵ Paragraphs 2.1.1, 2.1.2, 2.1.4 and 2.1.5 of the Generic enterprise and supplier development scorecard represents the circumstances under which a measured entity can obtain points in respect of procurement spend on empowering suppliers. An 'empowering supplier' must be a good citizen which means that the entity must comply with all regulatory requirements to trade as a business within South Africa.¹⁰⁰⁶

As with the other scorecards discussed above, the points set out in the scorecard are the maximum number of points which a measured entity is able to obtain in respect of each category of

⁹⁹⁴ Pooe RID 'The latest 'big thing' for South African companies: Enterprise and supplier development - proposing an implementation framework' (2016) 10(1) *Journal of Transport and supply chain management* 237.

⁹⁹⁵ Krause DR & Ellram LM 'Success factors in supplier development' (1997) 27(1) *International Journal of Physical Distribution & Logistics Management* 39.

⁹⁹⁶ Pooe RID 'The latest 'big thing' for South African companies: Enterprise and supplier development - proposing an implementation framework' (2016) 10(1) *Journal of Transport and supply chain management* 237.

⁹⁹⁷ See para 5.2 above.

⁹⁹⁸ B-BBEE Code series 400 in GG36928 of 11 October 2013 para 2.

⁹⁹⁹ B-BBEE Codes code series 400 in GG 36928 of 11 October 2013 para 3.1.1.

¹⁰⁰⁰ B-BBEE Codes code series 400 in GG 36928 of 11 October 2013 para 3.1.2.

¹⁰⁰¹ Preferential procurement is set out in 2.1 of the Generic enterprise and supplier development scorecard

¹⁰⁰² Supplier development is set out in paragraph 2.2 of the Generic enterprise and supplier development scorecard.

¹⁰⁰³ Enterprise development is found in paragraph 2.3 of the Generic enterprise and supplier development scorecard.

¹⁰⁰⁴ B-BBEE Codes code series 400 in GG 36928 of 11 October 2013 para 3.2.1.

¹⁰⁰⁵ B-BBEE Codes code series 400 in GG 36928 of 11 October 2013 para 3.2.2.

¹⁰⁰⁶ B-BBEE Codes code series 400 in GG 36928 of 11 October 2013 para 3.3.

the enterprise and supplier development scorecard.¹⁰⁰⁷ This implies that even if a measured entity were to obtain more points than the maximum points, the additional points will not be taken into consideration.

Procurement of goods and services and any other activities that fall in the category of preferential procurement, found in paragraph 2.1 of the Generic enterprise and supplier development scorecard, will not qualify for scoring under the category of supplier development and in the category of enterprise development, found in paragraphs 2.2 and 2.3 of the Generic enterprise and supplier development scorecard respectively and vice-versa.¹⁰⁰⁸

There are a number of items which may be included in the total measured procurement spend and other amounts which must be excluded from the total measured procurement spend. B-BBEE procurement spend is the 'value of the procurement which may be included, but not excluded from the total measured procurement spend'.¹⁰⁰⁹ The procurement which falls in the total measured procurement spend includes the cost of sales,¹⁰¹⁰ operational expenditure,¹⁰¹¹ capital expenditure,¹⁰¹² empowerment related expenditure,¹⁰¹³ trade commissions,¹⁰¹⁴ monopolistic procurement,¹⁰¹⁵ pension and medical aid contributions,¹⁰¹⁶ public sector procurement,¹⁰¹⁷ third party procurement,¹⁰¹⁸ labour brokers and independent contractors being any procurement of the measured entity which is outsourced labour expenditure,¹⁰¹⁹ imports,¹⁰²⁰ and intra-group procurement.¹⁰²¹ The amounts which may be excluded from total measured procurement spend

¹⁰⁰⁷ B-BBEE Codes code series 400 in GG 36928 of 11 October 2013 para 3.4.

¹⁰⁰⁸ B-BBEE Codes code series 400 in GG 36928 of 11 October 2013 para 3.6.

¹⁰⁰⁹ B-BBEE Codes code series 400 in GG 36928 of 11 October 2013 para 7.1.

¹⁰¹⁰ Cost of sales refers to 'all goods purchased and services received that consist of the costs of sales of the measured entity'; B-BBEE Codes code series 400 in GG 36928 of 11 October 2013 para 5.1.

¹⁰¹¹ Operational expenditure refers to 'all goods and services procured that comprise the operational expenditure of the measured entity'; B-BBEE Codes code series 400 in GG 36928 of 11 October 2013 para 5.2.

¹⁰¹² Capital expenditure consists of 'all the capital expenditure incurred by the measured entity'; B-BBEE Codes code series 400 in GG 36928 of 11 October 2013 para 5.3.

¹⁰¹³ Empowerment related expenditure refers to 'all goods and services procured in carrying out BEE'; B-BBEE Codes code series 400 in GG 36928 of 11 October 2013 para 5.10.

¹⁰¹⁴ Trade commissions consist of 'any commission or similar payments payable by a measured entity to any other person pursuant to the business or trade of the measured entity'; B-BBEE Codes code series 400 in GG 36928 of 11 October 2013 para 5.9.

¹⁰¹⁵ Monopolistic procurement consists of 'all goods and services which have been procured from suppliers who enjoy a monopolistic position'. B-BBEE Codes code series 400 in GG 36928 of 11 October 2013 para 5.5.

¹⁰¹⁶ Pension and medical aid contributions refer to 'payments made to any post retirement funding scheme or medical aid, but which excludes any portions of payments made which are a contribution towards a capital investment of the employee'; B-BBEE Codes code series 400 in GG 36928 of 11 October 2013 para 5.8.

¹⁰¹⁷ Public sector procurement consists of all goods and services which have been procured from public entities and organs of state; B-BBEE Codes code series 400 in GG 36928 of 11 October 2013 para 5.4.1.

¹⁰¹⁸ B-BBEE Codes code series 400 in GG 36928 of 11 October 2013 para 5.6. Third party procurement consists of what is incurred for a client or third party where the costs of that procurement serves as 'an expense which is recorded in the financial statements of the measured entity'.

¹⁰¹⁹ B-BBEE Codes code series 400 in GG 36928 of 11 October 2013 para 5.7.

¹⁰²⁰ B-BBEE Codes code series 400 in GG 36928 of 11 October 2013 para 5.11. Imports refer to all goods and services that are imported or procured from a non-South African source.

¹⁰²¹ Intra-group procurement consists of all services and goods procured from subsidiaries or holding companies. B-

are taxation;¹⁰²² salaries, wages, remuneration and emoluments;¹⁰²³ pass-through third party procurement;¹⁰²⁴ empowerment related procurement,¹⁰²⁵ and imports.¹⁰²⁶ The fact that there is such a wide range of items which may be included in the total measured procurement spend and such a few amounts which should be excluded allows enterprises to obtain points easily in respect of this category.

Procurement spend is important for the purposes of this thesis, because it is one of the ways which enables enterprises to obtain good BEE ratings, despite the low percentage of black people who may form part of the ownership and management structures of enterprises. This is illustrated in chapter 7 of this thesis.¹⁰²⁷

The categories which form part of the preferential procurement section of the Generic enterprise and supplier development scorecard are discussed below.

5.4.4.1.1 Procurement Spend for all Empowering Suppliers

The first category contained in preferential procurement is procurement spend from all empowering suppliers based on their BEE recognition levels as a percentage of total measured procurement spend. The fact that all suppliers are included implies that LEs, QSEs and EMEs are included irrespective of the ownership status of the supplier in question. In order to obtain the 5 weighting points reflected in the Generic enterprise and supplier development scorecard, a measured entity's procurement spend should be 80%.¹⁰²⁸ This implies that in circumstances where all the suppliers of a measured entity have 100% BEE recognition level, the measured entity would only be required to obtain the BEE certificates of 80% of the suppliers in order to achieve the 5 points available.¹⁰²⁹ In circumstances where a measured entity makes it a condition that a supplier provides the measured entity with a BEE certificate reflecting a 100% BEE recognition level prior to requiring the supplier in question to render services to the measured entity, such a condition would make it possible for a measured entity to obtain the maximum points in respect of this category and ultimately contribute to such an enterprise obtaining a good BEE rating.

BBEE Codes code series 400 in *GG 36928* of 11 October 2013 para 5.12.

¹⁰²² B-BBEE Codes code series 400 in *GG 36928* of 11 October 2013 para 6.1.

¹⁰²³ B-BBEE Codes code series 400 in *GG 36928* of 11 October 2013 para 6.2.

¹⁰²⁴ B-BBEE Codes code series 400 in *GG 36928* of 11 October 2013 para 6.3.

¹⁰²⁵ Empowerment related procurement for the purposes of BEE includes investments in or loans to an associated enterprise, as well as investments, loans or donations which qualify for recognition in terms of the Generic enterprise and supplier development scorecard or the Generic socio-economic development scorecard; B-BBEE Codes code series 400 in *GG 36928* of 11 October 2013 para 6.4.1 & para 6.4.2.

¹⁰²⁶ B-BBEE Codes code series 400 in *GG 36928* of 11 October 2013 para 6.5.

¹⁰²⁷ See para 7.6.4 below.

¹⁰²⁸ B-BBEE Codes code series 400 in *GG 36928* of 11 October 2013 para 2.1.1.

¹⁰²⁹ B-BBEE Codes code series 400 in *GG 36928* of 11 October 2013 para 2.1.1.

5.4.4.1.2 Procurement Spend from all Empowering Suppliers that are QSEs

The second category found in preferential procurement is known as procurement spend from all empowering suppliers that are QSEs based on the BEE recognition levels as a percentage of the total measured procurement spend.¹⁰³⁰ All QSEs are included in this category irrespective of the ownership status of the supplier. By providing a separate category specifically for QSEs, the Codes encourages enterprises to use QSEs as suppliers who are BEE compliant. QSEs are assisted by way of measured entities being provided with incentives in the form of points. A measured entity with a percentage spend of 15% is able to achieve 3 points in respect of this category,¹⁰³¹ which may contribute to an enterprise obtaining a good BEE rating.

5.4.4.1.3 Procurement Spend from EMEs

The third category found in preferential procurement is procurement spend from EMEs as a percentage of the total measured procurement spend. Similar to the previous category, all EMEs are included irrespective of the ownership status of a supplier. As far as this category is concerned, a measured entity with a percentage procurement spend of 15% is able to achieve 4 points,¹⁰³² which may contribute to the measured entity obtaining a good BEE rating.

5.4.4.1.4 Procurement Spend from Empowering Suppliers that are at least 51% black owned

The fourth category contained in preferential procurement is procurement spend from empowering suppliers that are 51% black owned as a percentage of total measured procurement spend.¹⁰³³ An entity which is 51% black owned means that 'black people hold at least 51% of exercisable voting rights and economic interest in the supplier in question and that it earned all the points for net value'¹⁰³⁴ insofar as the ownership scorecard is concerned. Where the empowering suppliers are 51% black owned this enables a measured entity to obtain a maximum of 9 points,¹⁰³⁵ which may contribute to a measured entity obtaining a good BEE rating, if it chooses to use majority black owned suppliers.

¹⁰³⁰ B-BBEE Codes code series 400 in GG 36928 of 11 October 2013 para 2.1.2.

¹⁰³¹ B-BBEE Codes code series 400 in GG 36928 of 11 October 2013 para 2.1.2.

¹⁰³² B-BBEE Codes code series 400 in GG 36928 of 11 October 2013 para 2.1.3.

¹⁰³³ B-BBEE Codes code series 400 in GG 36928 of 11 October 2013 para 2.1.4.

¹⁰³⁴ B-BBEE Codes Schedule 1 in GG 36928 of 11 October 2013

¹⁰³⁵ B-BBEE Codes code series 400 in GG 36928 of 11 October 2013 para 2.1.4.

5.4.4.1.5 Procurement Spend from Empowering Suppliers that are at least 30% black women owned

The final category found in preferential procurement refers to procurement spend from all empowering suppliers that are 30% black women owned as a percentage of total measured procurement spend. In this category a measured entity is able to obtain 4 points.¹⁰³⁶ The empowering suppliers must be 30% black women owned which means that black women must hold more than 30% of exercisable voting rights and economic interest in the supplier in question.¹⁰³⁷ In addition it should have earned all the points for net value on the ownership scorecard.

The recognisable BEE procurement spend that can be attributed to a supplier in question is multiplied by a factor of 1.2 if any one of the requirements which follow are met. First, if a measured entity procures services and goods from a supplier that is a recipient of supplier development contributions from the measured entity which has a contract with the measured entity for a minimum period of 3 years.¹⁰³⁸ The second circumstance is where a black owned QSE or EME which is not a supplier development beneficiary, but has a contract with the measured entity for a minimum duration of 3 years¹⁰³⁹ or in circumstances where it is a first time supplier of the measured entity.¹⁰⁴⁰ This implies that under the aforementioned circumstances, the measured entity will obtain enhanced recognition.

Procurement spend is calculated by multiplying the value of the procurement spend with the recognition level of the supplier. The same formula is used repeatedly in respect of each supplier and the totals of all the suppliers are added together.¹⁰⁴¹

Insofar as the calculation of preferential procurement contributions to BEE are concerned, a measured entity receives a score for procurement in proportion to the extent that it meets the

¹⁰³⁶ B-BBEE Codes code series 400 in GG 36928 of 11 October 2013 para 2.1.5.

¹⁰³⁷ B-BBEE Codes code series 400 in GG 36928 of 11 October 2013 para 2.1.5.

¹⁰³⁸ B-BBEE Codes code series 400 in GG 36928 of 11 October 2013 para 3.5.1.

¹⁰³⁹ B-BBEE Codes code series 400 in GG 36928 of 11 October 2013 para 3.5.2.

¹⁰⁴⁰ B-BBEE Codes code series 400 in GG 36928 of 11 October 2013 para 3.5.3.

¹⁰⁴¹ B-BBEE Codes code series 400 in GG 36928 of 11 October 2013 para Annexe 400(A):

'A = the sum of (B × C)

Where:

A is the calculated total B-BBEE Procurement Spend for the measured entity. It is equal to the sum of the result of the product of B and C for each supplier of the measured entity not excluded under the exclusion from total measured procurement spend;

B is the value of procurement falling within total measured procurement spend and not excluded under the exclusion from total measured procurement spend from each supplier of the measured entity;

C is the B-BBEE Procurement Recognition Level of each supplier of the measured entity.'

The B-BBEE procurement spend for a measured entity in respect of a supplier is calculated by multiplying the spend in respect of that supplier by the supplier's B-BBEE recognition level.

compliance target.¹⁰⁴² The measurement of enterprise and supplier development in respect of procurement contributions for BEE is calculated by determining the the ratio between the total procurement spend as a percentage of the total procurement spend and the compliance target. The total is multiplied by the weighting points.¹⁰⁴³

A hypothetical example which makes use of both equations follows. The measured entity spends R815 000 on an empowering supplier A, which has a BEE recognition level of level 7. The measured entity has a service agreement with supplier A. The duration of the service level agreement is 9 years.¹⁰⁴⁴ The measured entity spends R1500 000 on empowering supplier B, which has a BEE recognition level of level 8. Supplier B is a first-time supplier.¹⁰⁴⁵ The results are reflected below for determining the procurement spend from all empowering suppliers as a percentage of total measured procurement spend.

Spend for A = spend × recognition level × enhanced recognition

$$A = R815\ 000 \times 50\% \text{ (for level 7 on Table 5)} \times 1.2$$

It is multiplied by 1.2 because the service level agreement is more than the 3 years minimum.

$$A = R489\ 000$$

Spend for B = spend × recognition level × enhanced recognition

$$B = R1500\ 000 \times 10\% \text{ (for level 8 on Table 5)} \times 1.2$$

It is multiplied by 1.2 because this supplier is a first time supplier.

$$B = R180\ 000$$

$$\textit{Total spend} = R489000 + R180\ 000$$

$$\textit{Total spend} = R669\ 000$$

$$\textit{Total spend converted to a percentage in accordance with the Codes} = 6.69\%$$

¹⁰⁴² B-BBEE Codes code series 400 in GG 36928 of 11 October 2013 para 8.1.

¹⁰⁴³ B-BBEE Codes code series 400 in GG 36928 of 11 October 2013 Annexe 400 (A):

$$A = \frac{B}{C} \times D$$

Where:

'A is the calculated preferential procurement spend score for 2.1.1, 2.1.2, 2.1.3, 2.1.4 and 2.1.5 in the scorecard for the measured entity;

B is the total B-BBEE Procurement Spend of the measured entity calculated under measurement of B-BBEE Procurement Spend as a percentage of Total Measured Procurement Spend of that measured entity;

C is the compliance target for each criteria specified;

D is the weighting points allocated to each criteria specified'.

¹⁰⁴⁴ See para 5.4.4.1 for the circumstances under which the recognisable BEE procurement spend that is attributed to a supplier is multiplied by 1.2. The duration of the service level agreement is relevant for this reason.

¹⁰⁴⁵ See para 5.4.4.1 for the circumstances under which the recognisable BEE procurement spend that is attributed to a supplier is multiplied by 1.2. The supplier being a first time supplier is relevant for this reason.

$$A = \frac{B \text{ (procurement spend)}}{C \text{ (compliance target)}} \times D \text{ (weighting points)}$$

$$A = \frac{6.69\%}{80\% \text{ (compliance target)}} \times 5 \text{ points (weighting points)}$$

$$A = 0.42 \text{ points}$$

Enterprise development contributions¹⁰⁴⁶ and supplier development contributions¹⁰⁴⁷ will be recognised as a percentage of annual Net Profit After Tax (NPAT).¹⁰⁴⁸ The beneficiaries of supplier development and enterprise development must be EMEs or QSEs which are at least 51% black owned or at least 51% black women owned.¹⁰⁴⁹ Measured entities receive recognition for any enterprise development and supplier development contributions that are quantifiable as a monetary value.¹⁰⁵⁰ Where the duration of programmes, contributions and/or initiatives span over a number of years, the total contribution amount must be divided by the number of years, and the average per year will then to be used as the annual contribution.¹⁰⁵¹ Measured entities will not receive recognition for the same activities undertaken in respect of categories 2.2 and 2.3 of the Generic enterprise and supplier development scorecard.¹⁰⁵² They will only get recognition for one of the two i.e. either 2.2 or 2.3.¹⁰⁵³

Enterprise development and supplier development contributions consist of a range of contributions which may be made by a measured entity.¹⁰⁵⁴ A measured entity receives a score for enterprise

¹⁰⁴⁶ Found in paragraph 2.3 of the Generic enterprise and supplier development scorecard.

¹⁰⁴⁷ Found in paragraph 2.2 of the Generic enterprise and supplier development scorecard.

¹⁰⁴⁸ B-BBEE Codes code series 400 in GG 36928 of 11 October 2013 para 3.1.3.

¹⁰⁴⁹ B-BBEE Codes code series 400 in GG 36928 of 11 October 2013 para 3.7.

¹⁰⁵⁰ B-BBEE Codes code series 400 in GG 36928 of 11 October 2013 para 4.7.

¹⁰⁵¹ B-BBEE Codes code series 400 in GG 36928 of 11 October 2013 para 4.11.

¹⁰⁵² B-BBEE Codes code series 400 in GG 36928 of 11 October 2013 para 4.13.

¹⁰⁵³ B-BBEE Codes code series 400 in GG 36928 of 11 October 2013 para 4.13.

¹⁰⁵⁴ B-BBEE Codes code series 400 in GG 36928 of 11 October 2013 para 9: the contributions may include investments in beneficiary entities, loans made to beneficiary entities, credit facilities made available to beneficiary entities, contributions granted to beneficiary entities, preferential credit terms granted by a measured entity to beneficiary entities, contributions made to settling service costs relating to the financial or operational capacity or efficiency levels of beneficiary entities, overhead costs of a measured entity directly attributable to enterprise development and supplier development contributions, discounts provided to beneficiary entities in respect of the acquisition and maintenance costs associated with the grant to those beneficiary entities of franchise, licence, agency, distribution or other similar business rights, facilitating access to credit for beneficiary entities without access to similar credit facilities through traditional means owing to a lack of credit history, high risk or lack of collateral and the provision of mentoring or training by 'qualified entities or individuals to beneficiary entities which will assist the beneficiary entities to increase their operational or financial capacity'. It may also include providing finance to beneficiary entities at lower than commercial rates of interest, relaxed security requirements or absence of security requirements for beneficiary entities unable to provide security for loans, the provision of mentoring or training to beneficiary communities, maintaining an enterprise development and supplier development unit by the measured entity and payments made by the measured entity to suitably qualified and experienced third parties to perform enterprise development and supplier development on the measured entity's behalf.

development and supplier development by determining the ratio between the annual value of all qualifying contributions made by the measured entity during the relevant period and the compliance target. This total is multiplied by the weighting points.¹⁰⁵⁵

Example: The measured entity has a Net Profit After Tax ('NPAT') of R5 000 000 and spends R20 000 on a beneficiary by way of a grant. The results are reflected below for determining the annual value of all supplier development contributions as a percentage of the target.

2% of NPAT (R5 000 000) is R100 000

(2% of NPAT is the compliance target)

$$A = \frac{B}{C} \times D$$

$$\text{Annual value of all supplier development contributions} = \frac{20\,000}{100\,000} \times 10 \text{ points}$$

$$\text{Annual value of all supplier development contributions} = 2 \text{ points}$$

5.4.4.2 Enterprise and Supplier Development for a QSE

In order to calculate the score of a QSE for enterprise and supplier development, the QSE enterprise and supplier development scorecard is used which is reflected in B-BBEE Code series 604¹⁰⁵⁶ annexed marked 'I'. The principles and sub-minimum requirements which apply to entities using the Generic scorecard apply to QSEs as well.¹⁰⁵⁷

5.4.4.3 The significance of the enterprise and supplier development element

As far as the Generic scorecards are concerned, the calculations which should be carried out by enterprises in order to obtain points for enterprise and supplier development are complicated,

¹⁰⁵⁵ B-BBEE Codes code series 400 in GG36928 of 11 October 2013 Annexe 400(B) states:

$$A = \frac{B}{C} \times D$$

Where:

A is the score achieved in respect of the Qualifying Contributions made by the measured entity;

B is the annual value of all Qualifying Contributions made by the measured entity measured from the commencement of this statement or the inception date to the date of measurement;

C is the compliance target in respect of the Qualifying Contributions as specified;

D is the weighting points allocated to the criteria under the scorecard for statement 400'.

¹⁰⁵⁶ B-BBEE Code series 604 in GG 38766 of 6 May 2015 para 5.1.1.

¹⁰⁵⁷ B-BBEE Code series 604 in GG 38766 of 6 May 2015 para 5.2.1.

however they are less complicated than those which should be carried out by enterprises who elect to obtain points by complying with the management control and skills development elements.

Measured entities may obtain points in respect of enterprise and supplier development by ensuring that they make use of suppliers with high BEE recognition levels. The B-BBEE Codes include a wide range of contributions which are recognised as enterprise and supplier development contributions. As a result of the wide range of contributions which are recognised, measured entities may find it relatively easy to comply with this element.

Enterprises' compliance with this element is incentivised by the fact that not only is enterprise and supplier element a priority element, but it is also the element to which the highest points have been allocated in terms of both the Generic and QSE scorecards. Enterprises will therefore gain more benefit from complying with this element in order to obtain good BEE ratings.

5.4.5 Socio-Economic Development

5.4.5.1 Generic scorecard code series 500: Socio-Economic Development Element

Measured entities receive recognition for any socio-economic development ('SED') contributions that are quantifiable as a monetary value using a standard valuation method.¹⁰⁵⁸ SED contributions¹⁰⁵⁹ are contributions made over and above normal business practices. In order to calculate a score for socio-economic development, the Generic socio-economic development scorecard is used which is reflected in B-BBEE Code series 500¹⁰⁶⁰ annexed marked 'J'.

SED contributions of a measured entity are recognisable on an annual basis.¹⁰⁶¹ SED contributions consist of non-monetary or monetary contributions which were actually initiated and implemented by a measured entity in favour of beneficiaries with the specific aim 'of facilitating income

¹⁰⁵⁸ B-BBEE Codes code series 500 in GG 36928 of 11 October 2013 para 3.1.1.

¹⁰⁵⁹ B-BBEE Code series 500 in GG 36928 of 11 October 2013 para 3.2.4: SED contributions include grant contributions to beneficiaries of SED contributions, security provided or guarantees given to beneficiaries, any costs incurred by a measured entity directly for the purpose of assisting beneficiaries, 'overhead costs of a measured entity directly attributable to SED contributions', any development capital which is provided to beneficiary communities, 'preferential terms granted by a measured entity for its supply of goods or services to beneficiary communities', 'payments made by a measured entity to the parties to perform socio-economic development on the measured entity's behalf', provision of training or mentoring to beneficiary communities which will assist them to increase their financial capacity, maintenance by the measured entity of a SED unit which focuses only on support of beneficiaries and beneficiary communities, providing training or mentoring to beneficiary communities by a measured entity (such contributions are measurable by quantifying the cost of time less travel or commuting time spent by staff or management of the measured entity in carrying out such initiatives). Contributions may also include maintaining a SED unit by the measured entity or any payments made by the measured entity to third parties to perform SED on the measured entity's behalf.

¹⁰⁶⁰ B-BBEE Code series 500 in GG 36928 of 11 October 2013 para 2.3.

¹⁰⁶¹ B-BBEE Codes code series 500 in GG 36928 of 11 October 2013 para 3.1.2.

generating activities for targeted beneficiaries'.¹⁰⁶² In circumstances where at least 75% of the beneficiaries are black people, the full value of the SED contributions which are made to beneficiaries is recognisable.¹⁰⁶³ In the event where less than 75% of the full value of SED contributions benefits black people directly, the value of the contribution should be multiplied by the percentage that benefits black people.¹⁰⁶⁴ SED contributions are calculated by determining the ratio between the value of all contributions and the compliance target. This amount is then multiplied by the weighting points.¹⁰⁶⁵

For example, if a measured entity's NPAT is R5 million, the target for socio-economic development (1% of NPAT) is R50 000, 100% of black beneficiaries are assisted and the measured entity made a payment to the value of R100 000 into the beneficiary's account, the effective contribution would be R60 000.

Contribution amount: R60 000

Black beneficiaries as a percentage: 100%

Benefit factor: 100%

$$A = \frac{60\,000 \text{ (contribution)}}{50\,000 \text{ (compliance target is 1\% of NPAT)}} \times 5 \text{ points}$$

$$A = 6 \text{ (maximum points: 5, entity will obtain 5 points)}$$

5.4.5.2 Socio-Economic Development for a QSE

In order to calculate a score for the socio-economic development of a QSE, the Generic socio-economic development scorecard reflected in B-BBEE Code series 605 is used¹⁰⁶⁶ annexed marked 'K'. The score for socio-economic development of a QSE is determined by following the same calculation as in the case of enterprises who make use of the Generic socio-economic development scorecard.

¹⁰⁶² B-BBEE Codes code series 500 in GG 36928 of 11 October 2013 para 3.2.1.

¹⁰⁶³ B-BBEE Codes code series 500 in GG 36928 of 11 October 2013 para 3.2.2.

¹⁰⁶⁴ B-BBEE Codes code series 500 in GG 36928 of 11 October 2013 para 3.2.3.

¹⁰⁶⁵ B-BBEE Codes code series 500 in GG 36928 of 11 October 2013 Annexe 500 (B):

$$A = \frac{B}{C} \times D$$

Where:

A is the score achieved in respect of the Qualifying Contributions made by the measured entity;

B is the value of all Qualifying Contributions made by the measured entity;

C is the compliance target;

D is the weighting points allocated to the measured enterprise development criteria'.

¹⁰⁶⁶ B-BBEE Code series 600 in GG38766 of 6 May 2015 para 6.2.

The calculations to be carried out by measured entities in order to obtain a score for socio-economic development are complicated. Socio-economic development is also the element with the lowest points in terms of the Generic and QSE scorecards and, similar to management control, does not form part of the priority elements.

5.4.6 Key issues extracted from the B-BBEE Codes

The question which is asked in this chapter is: what are the shortcomings of the legal framework that make it possible for enterprises to obtain good BEE ratings when there is a low percentage of black people who form part of the ownership and management structures of these enterprises. The role which the scorecards play in enterprises obtaining good BEE ratings is discussed below.

5.4.6.1 Complexity of scorecards in the B-BBEE Codes

The aforementioned discussion on the five elements contained in the B-BBEE Codes,¹⁰⁶⁷ illustrates just how complex the relevant scorecards are. There are separate sets of rules and formulas which measured entities are required to apply in order to determine their scores under each element, and even individual rules and formulas to be applied in order to calculate scores in respect of each of the categories within the five elements. Measured entities that employ experts at using these scorecards and formulas are able to make strategic decisions and adjustments in terms of their calculations allowing them to obtain financial benefits while escaping from some areas of compliance, which illustrates that it is possible for these measured entities to obtain good BEE ratings without keeping the spirit and purpose of BEE in mind. This also illustrates that the provisions contained in the B-BBEE Codes do not exist in isolation, but are dependent on the ways in which it is interpreted by people.

The formulas were discussed to illustrate their complexity and to demonstrate how focusing on certain elements while neglecting others enables enterprises to obtain good BEE ratings, despite there being a low percentage of black people who form part of ownership and management structures of the enterprises concerned. Ownership, skills development and enterprise and supplier development are the three priority elements which may result in enterprises opting to comply with these elements. It is also more likely that enterprises would be obtaining good BEE points by complying with enterprise and supplier development; not only due to the fact that the formulas are less complicated than those contained in the other elements, but also because it is the element to which the highest points have been allocated in terms of the Generic and QSE scorecards.

¹⁰⁶⁷ See para 5.4.1- para 5.4.5 above.

5.4.6.2 Maximum points for ownership and management structures

An enterprise is only allowed to obtain the maximum points reflected in respect of each category contained in the scorecards. This implies that in circumstances where enterprises provide black people with more voting rights or an increased level of economic interest in addition to what is required by the scorecard, the enterprises will not receive any additional credit for doing so. Similarly, there is no incentive provided to enterprises to increase the number of black employees who participate in the management structures of these enterprises higher than the compliance targets provide.

5.4.6.3 Distinction between BEE and the EEA

The compliance targets and the weighting points for the scorecards contained in certain categories of the Generic management control and skills development scorecards are based on the overall demographic representation of black people as defined in the Regulations of the EEA and the Commission of Employment Equity report. This inclusion shows that the legislature recognises that calculations should be based on values that are proportionate to the demographic representation of black people. By basing the compliance targets and the weighting points on the overall demographic representation of black people it also ensures that the formulas have been constructed in a way which recognises that non-beneficiaries of the B-BBEEA should be excluded. This is the reason for the EAP statistics, the compliance targets and the weighting points having to be adjusted.

One of the differences between the EEA and the B-BBEEA is that the requirement to submit data to the Department of Labour in terms of the EEA is only applicable to designated employers, however for the purposes of measurement under both the Generic and QSE scorecards, measured entities who choose to be BEE compliant are required to submit sufficient evidence for verification purposes even in circumstances where the entities employ less than 50 employees.¹⁰⁶⁸

The Employment Equity reports confirm that white males continue to dominate top and senior management positions.¹⁰⁶⁹ The situation is worse in the private sector than in the public sector.¹⁰⁷⁰

¹⁰⁶⁸ B-BBEE Codes code series 000 in GG 36928 of 11 October 2013 para 3.4.

¹⁰⁶⁹ Minister of Labour *Employment Equity report* (1999) 19. Minister of Labour *Employment Equity report* (1999) 20; Minister of Labour *Employment Equity report* (2003) 47. Minister of Labour *Employment Equity report* (2005) 30; Minister of Labour *Employment Equity report* (2007) 7. Minister of Labour *Employment Equity report* (2007) 8; Minister of Labour *Employment Equity report* (2009) Minister of Labour *Employment Equity report* (2011) 11; Minister of Labour *Employment Equity report* (2011) 16. Minister of Labour *Employment Equity report* (2013) 27; Minister of Labour *Employment Equity report* (2013) 34. Minister of Labour *Employment Equity report* (2015) 9; Minister of Labour *Employment Equity report* (2016) 12. Minister of Labour *Employment Equity report* (2016) 17.

¹⁰⁷⁰ Nkomo SM 'Why white men still dominate the top echelons of South Africa's private sector' *The Conversation* 4 August 2015 1.

There are three reasons for the slow pace of transition.¹⁰⁷¹ First, research shows that enterprises are merely complying with the provisions of the EEA since compliance is all that is expected from the EEA and failing to embrace the spirit of the statute and of affirmative action.¹⁰⁷² This may also be the situation with BEE where enterprises have good BEE ratings without empowering black people. This is particularly relevant in circumstances where fronting practices are committed by enterprises.¹⁰⁷³ Secondly, apartheid resulted in white male privilege and their domination of top positions, therefore changing the pace of transformation involves the recognition of this difficult starting point and the effects of oppression.¹⁰⁷⁴ This is the reason for the enactment of the provisions governing affirmative action¹⁰⁷⁵ and BEE. Finally, there are subtle barriers present within enterprises which reproduce inequalities, such as, the corporate culture of an enterprise.¹⁰⁷⁶ Opportunity hoarding will be discussed below to show how this practice perpetuates the inequalities which exist within enterprises.

5.5 OPPORTUNITY HOARDING

The advancement of black people within enterprises is reduced by the phenomenon known as opportunity hoarding.¹⁰⁷⁷ Opportunity hoarding means that those in the dominant positions preserve these positions for persons from their own race group.¹⁰⁷⁸ This implies that where white people are in dominant positions they would preserve those positions for white people only. This has a negative effect on the advancement of black people.

In the event of the legislature making management control a priority element and allocating more points to management control, this may provide enterprises with an incentive to include persons of other races in these dominant positions. Similar to opportunity hoarding, the commission of fronting practices, which is discussed below, also undermines the achievement of the goals contained in the B-BBEEA.¹⁰⁷⁹

¹⁰⁷¹ Nkomo SM 'Why white men still dominate the top echelons of South Africa's private sector' *The Conversation* 4 August 2015 1.

¹⁰⁷² Oosthuizen RM & Naidoo V 'Attitudes towards and experience of Employment Equity' (2010) 36 *South African Journal of Industrial Psychology* 836.

¹⁰⁷³ See para 5.6 below.

¹⁰⁷⁴ Booysen L 'Societal power shifts and changing societal identities in South Africa: workplace implications' (2013) 10(1) *South African Journal of Economics and Management Sciences* 13.

¹⁰⁷⁵ See chapter 3.

¹⁰⁷⁶ Thomas A 'Employment equity at selected companies in South Africa (2003) *South African Journal of Labour Relations: Spring/Summer* 28.

¹⁰⁷⁷ Nkomo SM 'Why white men still dominate the top echelons of South Africa's private sector' *The Conversation* 4 August 2015 1.

¹⁰⁷⁸ See para 4.3.1 above.

¹⁰⁷⁹ See para 5.3.2 above.

5.6 FRONTING PRACTICES

Some enterprises have been accused of contravening the B-BBEEA deliberately by misrepresenting facts about the extent of their compliance.¹⁰⁸⁰ In essence, fronting is seen as 'tokenism for the superficial inclusion of historically disadvantaged individuals with no actual transfer of wealth or control'.¹⁰⁸¹ What this implies practically is that regulatory requirements are manipulated to such an extent that it amounts to fraud.¹⁰⁸² Fronting could involve appointing or promoting black people to senior positions without them having the necessary skills or experience and without providing them with work while in such positions.¹⁰⁸³ Fronting practices are defined by the B-BBEEA as

'a transaction, arrangement or other act or conduct that directly or indirectly undermines or frustrates the achievement of the objectives of the B-BBEEA or the implementation of any of the provisions of the B-BBEEA, including but not limited to practices in connection with a BEE initiative -

- a) in terms of which black persons who are appointed to an enterprise are discouraged or inhibited from substantially participating in the core activities of that enterprise;
- b) in terms of which the economic benefits received as a result of the broad-based black economic status of an enterprise do not flow to black people in the ratio specified in the relevant legal documentation;
- c) involving the conclusion of a legal relationship with a black person for the purpose of that enterprise achieving a certain level of broad-based black economic compliance without granting that black person the economic benefits that would reasonably be expected to be associated with the status or position held by that black person; or
- d) involving the conclusion of an agreement with another enterprise in order to achieve or enhance broad-based black economic empowerment status in circumstances in which-
 - i) there are significant limitations whether implicit or explicit, on the identity of suppliers, service providers, clients or customers;
 - ii) the maintenance of business operations is reasonably considered to be improbable having regard to the resources available
 - iii) the terms and conditions were not negotiated at arm's length

¹⁰⁸⁰ Sibanda (2015) 24.

¹⁰⁸¹ MParadzi A & Kalula E *Black Economic Empowerment in South Africa: a critical appraisal* (2007) 41.

¹⁰⁸² MParadzi A & Kalula E (2007) 41.

¹⁰⁸³ MParadzi A & Kalula E (2007) 41.

and on a fair and reasonable basis.¹⁰⁸⁴

Fronting practices frustrate and undermine the achievement of the objectives set out in the B-BBEEA or its implementation. This is because the objective of an enterprise committing a fronting practice is to create the impression that the enterprise is BEE compliant when this is not in fact the case, or to create the impression that an enterprise has a BEE recognition level higher than what that enterprise is entitled to. In some cases, the reason for enterprises obtaining good BEE ratings, despite the low percentage of black people who form part of the ownership and management structures of these enterprises is the result of fronting practices being committed. In such circumstances the corporate culture of these enterprises will not be transformed, because no transformation has taken place on management level, where corporate culture transformation stems from.¹⁰⁸⁵

The wording used by the legislature in this definition is broad. It comprises the three most commonly known forms of fronting namely window dressing, benefit diversion and the use of opportunistic intermediaries.¹⁰⁸⁶ The meaning of window dressing is covered by the wording used in subsection (a) of the definition of fronting.¹⁰⁸⁷ Window dressing is where a black person is appointed to a position or the impression is provided that such a black person will be involved in certain work, however the black person is not provided with the opportunity to demonstrate their skills.¹⁰⁸⁸ Benefit diversion is covered by the wording used in subsection (b) and (c) of the definition of fronting.¹⁰⁸⁹ The meaning of opportunistic intermediaries is covered by the wording used in subsection (d) of the definition of fronting.¹⁰⁹⁰

BEE has been said to have become a system of redistribution of wealth as opposed to being a process which draws black people into productive activity as owners of capital.¹⁰⁹¹ Minister Davies has been quoted as stating that the

"initial intention was that if you are a newcomer, you go into partnership and that there is active learning. But in practice there are deals made on paper and black people are not involved in operations...Instead of an active partnership that empowers people to become real players, BEE has been for too few people and based too much on ownership. When people do a deal, they think they are getting a partnership. But when they look at the fine print they find out that they are not."¹⁰⁹²

¹⁰⁸⁴ Section 1 of the B-BBEEA.

¹⁰⁸⁵ See para 4.3.1 above.

¹⁰⁸⁶ Warikandwa & Osode (2017) 17.

¹⁰⁸⁷ Warikandwa & Osode (2017) 17.

¹⁰⁸⁸ See para 7.5.2.1.1 and para 7.6.7 below.

¹⁰⁸⁹ Warikandwa & Osode (2017) 17.

¹⁰⁹⁰ Warikandwa & Osode (2017) 17.

¹⁰⁹¹ See para 6.3.1 below.

¹⁰⁹² Paton C 'Black economic empowerment: Should it be kept alive' available at <http://www.leader.co.za/article.aspx?s=1&f=1&a=2781> (accessed 31 October 2019).

He refers to this as sophisticating fronting.¹⁰⁹³ Fronting practices affect the corporate cultures of enterprises negatively.¹⁰⁹⁴

Procurement officers, verification agencies¹⁰⁹⁵ and other corporate decision makers are encouraged to report any fronting behaviour to the DTI.¹⁰⁹⁶ The ability of enterprises to commit fronting practices is one of the shortcomings of the legal framework that make it possible for enterprises to obtain good BEE ratings, despite the low percentage of black people who form part of the ownership and management structures of these enterprises. This is because in circumstances where fronting practices are being committed these enterprises are obtaining good BEE ratings by including black people in transactions, arrangements and other acts while undermining the achievement of the objectives of the B-BBEEA.

The B-BBEEA does make provision for a number of enforcement measures which are available in the event of an enterprise being involved in the commission of fronting practices or not complying with the B-BBEEA. These measures are discussed below.

5.7 ENFORCEMENT AND COMPLIANCE MEASURES

The B-BBEEA establishes an advisory council¹⁰⁹⁷ and the Minister of Trade and Industry is obligated to establish a constitution for the council.¹⁰⁹⁸ The functions of the council are

*'to advise government on black economic empowerment, to review progress in achieving black economic empowerment, to advise on codes of good practice which the Minister intends to publish, to advise on the development, amendment or replacement of the strategy referred to in section 11 of the B-BBEEA, to advise on draft charters if so requested and to facilitate partnerships between organs of state and the private sector that will advance the objectives of the Act.'*¹⁰⁹⁹

The council reviews the progress in achieving black economic empowerment in order to make policy recommendations to address any challenges which are experienced by black people and

¹⁰⁹³ Paton C 'Black economic empowerment: Should it be kept alive' available at <http://www.leader.co.za/article.aspx?s=1&f=1&a=2781> (accessed 31 October 2019).

¹⁰⁹⁴ Fronting has an effect on the corporate culture of an enterprise, because the change in or retention of a historically developed 'white corporate culture' is dependent on the composition of management and the participation of black employees on managerial levels, see para 4.3.1 above. This is because fronting practices include initiatives where black people are appointed (to positions such as on management levels), however discouraged or inhibited from participating in the core activities of that enterprise.

¹⁰⁹⁵ See para 5.7 below.

¹⁰⁹⁶ Sibanda A (2015) 30.

¹⁰⁹⁷ Section 4 of the B-BBEEA.

¹⁰⁹⁸ Section 6 of the B-BBEEA.

¹⁰⁹⁹ Section 5a-f of the B-BBEEA.

enterprises insofar as BEE implementation is concerned.¹¹⁰⁰ The B-BBEEA also establishes a Broad-Based Black Economic Empowerment Commission ('the B-BBEE Commission')¹¹⁰¹ that has jurisdiction throughout South Africa.¹¹⁰² The functions of the B-BBEE Commission are to

'oversee, supervise and promote adherence with the B-BBEEA, to strengthen and foster collaboration between the public and the private sector in order to promote and safeguard the objectives of the B-BBEEA, to receive complaints relating to BEE, to investigate either on its own initiative or in response to complaints received any matter concerning BEE, to promote advocacy, access to opportunities and educational programmes and initiatives of BEE, to maintain a registry of major BEE transactions above a threshold determined by the Minister, to receive and analyse such reports as may be prescribed concerning BEE compliance from organs of state, public entities and private sector enterprises, to promote good governance and accountability by creating an effective environment for promotion and implementation of BEE and to exercise such powers which are not in conflict with the B-BBEEA.'¹¹⁰³

With reference to the functions of the B-BBEE Commission, a commissioner of the B-BBEE Commission has stated that 'we are here to fill the monitoring gap that existed since 2003¹¹⁰⁴ and to make sure that economic empowerment really does take place and that it benefits the many and not the few. We are also here to ensure that the mistakes of the recent past are not repeated'.¹¹⁰⁵ The B-BBEE Commission was established in 2016 with the main objective of combating fronting practices.¹¹⁰⁶

Compliance with the provisions governing BEE is voluntary, however organs of state, public entities¹¹⁰⁷ and all measured entities which undertake any financial activities with public entities are required to be BEE compliant.¹¹⁰⁸ The B-BBEEA places an obligation on spheres of government, public entities, organs of state,¹¹⁰⁹ public companies listed on the Johannesburg Stock Exchange¹¹¹⁰ and all Sectoral Educational and Training Authorities contemplated in the Skills Development Act 97 of 1998 to report to the Commission on their compliance with BEE.¹¹¹¹ In accordance with the B-BBEE Commission's function to monitor adherence and compliance with

¹¹⁰⁰ Department: Trade and Industry 'Economic Empowerment' available at https://www.thedti.gov.za/economic_empowerment/advisory_council.jsp (accessed on 11 September 2019).

¹¹⁰¹ Section 13(1)(b) of the B-BBEEA.

¹¹⁰² Section 13(3)(a) of the B-BBEEA.

¹¹⁰³ Section 13(F)(1)(a) - (i) of the B-BBEEA.

¹¹⁰⁴ In 2003, South Africa introduced black economic empowerment legislation for the first time.

¹¹⁰⁵ Ntuli Z 'Why South Africa needs a B-BBEE Commission' available at <https://city-press.news24.com/Voices/why-south-africa-needs-a-b-bbee-commission-20180821> (accessed on 11 September 2019).

¹¹⁰⁶ Ntuli Z 'Why South Africa needs a B-BBEE Commission' available at <https://city-press.news24.com/Voices/why-south-africa-needs-a-b-bbee-commission-20180821> (accessed on 11 September 2019).

¹¹⁰⁷ B-BBEE Codes code series 000 in GG 36928 of 11 October 2013 para 3.1.1.

¹¹⁰⁸ B-BBEE Codes code series 000 in GG 36928 of 11 October 2013 para 3.1.2.

¹¹⁰⁹ Section 13G(1) of the B-BBEEA. In terms of para 3.1.1 of B-BBEE Codes code series 000 in GG 36928 of 11 October 2013 organs of state are required to comply with the B-BBEE Codes of Good Practice.

¹¹¹⁰ Section 13G (2) of the B-BBEEA. In terms of para 3.1.1 B-BBEE Codes code series 000 in GG 36928 of 11 October 2013 public companies are required to comply with the B-BBEE Codes of Good Practice.

¹¹¹¹ Section 13G of the B-BBEEA.

the B-BBEEA, the B-BBEE Commission published a report during March 2019 based on BEE certificates which were captured on the B-BBEE Commission's BEE certificates portal system by accredited verification agencies and BEE compliance reports received from public companies listed on the JSE and spheres of government.¹¹¹² The report revealed that there is a slow pace of transformation with the priority elements barely being achieved.¹¹¹³ The report also revealed that the number of EMEs and QSEs that reported decreased from 2017 to 2018 due to the amendment to the B-BBEEA which now requires EMEs and QSEs that are more than 51% black owned to have sworn affidavits as opposed to being verified by a verification agency.¹¹¹⁴ The number of LEs who reported increased from 2017 to 2018 which shows that there has been an increased level of verifications for LEs.¹¹¹⁵ This is due to the fact that verification agencies are responsible for verifying the BEE status of measured entities.

In the event of contraventions of the B-BBEEA or any complaints regarding BEE, the B-BBEEA has included provisions relating to relief which may be obtained by aggrieved parties and the procedure to be followed to obtain the said relief. As regards the procedure, a complaint may be lodged with the B-BBEE Commission in a form prescribed by the B-BBEEA,¹¹¹⁶ together with evidence to justify an investigation by the B-BBEE Commission.¹¹¹⁷ Complaints may be investigated by the B-BBEE Commission both on receipt of a complaint and on the B-BBEE commission's own initiative.¹¹¹⁸ The procedure and format of the investigation must be determined by the B-BBEE Commission in which case the circumstances of the particular case are taken into consideration.¹¹¹⁹ The format and the procedure of the investigation may include the holding of a formal hearing.¹¹²⁰ The B-BBEE Commission may make a finding on whether any BEE initiative amounts to a fronting practice.¹¹²¹

Legal proceedings may be instituted in a court by the B-BBEE Commission to restrain any breach of the B-BBEEA, including any fronting practice, or to obtain appropriate remedial relief.¹¹²² In the event of the B-BBEE Commission being of the view that the investigated matter involves the commission of a criminal offence, the B-BBEE Commission must refer the matter to an appropriate division of the South African Police Service, or the National Prosecuting Authority.¹¹²³

The B-BBEE Commission may refer any concerns regarding behaviour or conduct that may be

¹¹¹² B-BBEE Commission *National status and trends on Broad-Based Black Economic Empowerment Report* (2019) 8.

¹¹¹³ B-BBEE Commission *National status and trends on Broad-Based Black Economic Empowerment Report* (2019) 8.

¹¹¹⁴ B-BBEE Commission *National status and trends on Broad-Based Black Economic Empowerment Report* (2019) 19.

¹¹¹⁵ B-BBEE Commission *National status and trends on Broad-Based Black Economic Empowerment Report* (2019) 19.

¹¹¹⁶ Section 13F(2)(a) of the B-BBEEA.

¹¹¹⁷ Section 13F(2)(b) of the B-BBEEA.

¹¹¹⁸ Section 13J(1) of the B-BBEEA.

¹¹¹⁹ Section 13J(2) of the B-BBEEA.

¹¹²⁰ Section 13J(2) of the B-BBEEA.

¹¹²¹ Section 13J(3) of the B-BBEEA.

¹¹²² Section 13J(4) of the B-BBEEA.

¹¹²³ Section 13J(5) of the B-BBEEA.

prohibited or regulated by legislation to the South African Revenue Service¹¹²⁴ or any regulatory body where the B-BBEE Commission has conducted an investigation and justifiable reasons exist for the B-BBEE Commission to do so.¹¹²⁵ The B-BBEE Commission has the power to publish any recommendation or finding on the investigation which was conducted.¹¹²⁶ The B-BBEE Commission may issue a summons to any person who is believed to be able to furnish information on the investigation conducted or to be in possession of any book or document that has any bearing on the investigation, to appear before the B-BBEE Commission.¹¹²⁷ The B-BBEE Commission may also issue a summons to such a person to deliver the said book, document or other object at a time and place specified in the summons.¹¹²⁸

A person commits an offence by intentionally either misrepresenting or attempting to misrepresent the BEE status of a measured entity.¹¹²⁹ It is also an offence to misrepresent or provide false information to a BEE verification professional to secure a BEE status¹¹³⁰ or to misrepresent or provide false information in assessing the BEE status of an enterprise to any organ of state or public entity¹¹³¹ or to engage in a fronting practice.¹¹³² Criminal liability is also extended to other parties, which include procurement officers, verification agencies, or officials of a public entity or an organ of state who become aware of the commission or attempt to commit any offence and fails to report it to an appropriate law enforcement agency.¹¹³³ As regards sanctions, for contravening section 13(O)(1) of the EEA, a person convicted of an offence is liable for payment of a fine or for imprisonment not exceeding 10 years or to both a fine and imprisonment, or if the convicted person is not a natural person, to a fine not exceeding 10% of its annual turnover.¹¹³⁴ In the event of there being a contravention of section 13(O)(2), a person is liable to pay a fine or may be imprisoned for a period not exceeding 12 months or both a fine and imprisonment.¹¹³⁵

The B-BBEEA provides a number of punitive measures against enterprises who choose to circumvent its objectives. A legislative framework has been provided to combat fronting. One of the most important features of the B-BBEEA is its criminalisation of fronting in terms of section 13O(1). The provisions of section 13O(1) must be read in conjunction with section 1 of the B-BBEEA which provides a non-exhaustive list of transactions that amount to fronting.¹¹³⁶ The legislature can be

¹¹²⁴ Section 13J(6)(a) of the B-BBEEA.

¹¹²⁵ Section 13J(6)(b) of the B-BBEEA.

¹¹²⁶ Section 13J(7)(a) of the B-BBEEA.

¹¹²⁷ Section 13K(1)(a) of the B-BBEEA.

¹¹²⁸ Section 13K(1)(b) of the B-BBEEA.

¹¹²⁹ Section 13O(1)(a) of the B-BBEEA.

¹¹³⁰ Section 13O(1)(b) of the B-BBEEA.

¹¹³¹ Section 13O(1)(c) of the B-BBEEA.

¹¹³² Section 13O(1)(d) of the B-BBEEA.

¹¹³³ Section 13O(2) of the B-BBEEA.

¹¹³⁴ Section 13O(3)(a) of the B-BBEEA.

¹¹³⁵ Section 13(O)(3)(b) of the B-BBEEA.

¹¹³⁶ See para 5.6 above.

commended for the heavy sanctions which are provided in section 13O(3) against persons or businesses that are found guilty of contravening sections 13O(1) and (2). The legislative provisions which provide for the criminal liability of additional parties where they fail to report to the appropriate law enforcement agency in the event of their knowledge of the commission or attempted commission of an offence, has been described as being an effective deterrent.¹¹³⁷ This is because these parties¹¹³⁸ are positioned to detect contraventions of the B-BBEEA.¹¹³⁹ However, this may not be an effective deterrent in all circumstances. This is because fronting has become sophisticated, where black people may occupy executive positions, without obtaining any control or benefits and are unaware that they are being used for fronting.¹¹⁴⁰ The additional parties to whom criminal liability has been extended will seldomly be aware of the fact that while black people are occupying such positions the black people are not obtaining the benefits and control which usually flows from these positions.

5.8 IS BEE ACHIEVING ITS OBJECTIVES?

There are a number of views which have been expressed in response to the question whether BEE is in fact successful in achieving its objectives. This question is answered in the affirmative by some, while critics disagree.

5.8.1 Arguments against BEE

BEE is criticised as a result of it not being sufficiently broad-based, in the sense that it does not alleviate poverty.¹¹⁴¹ BEE has resulted in the creation of a small number of very wealthy black business people while the masses have been left in poverty.¹¹⁴² In response to this criticism it has been argued that BEE stimulates economic growth, the creation of jobs, and also leads to meaningful participation of black people in the South African economy.¹¹⁴³

An additional criticism that has been raised is that in October 2013 the overall estimate of all BEE ownership deals was estimated at R600 billion.¹¹⁴⁴ This shows that while BEE is placing resources

¹¹³⁷ Sibanda (2015) 38.

¹¹³⁸ These include verification agencies, procurement officers or other any official of an organ of state or public entity.

¹¹³⁹ Sibanda (2015) 38.

¹¹⁴⁰ Smith C 'BEE fronting becoming more sophisticated, holding back transformation – commission' available at <https://www.fin24.com/Economy/bee-fronting-becoming-more-sophisticated-holding-back-transformation-commission-20190627-2> (accessed on 11 September 2019).

¹¹⁴¹ Macozoma S *Black Economic Empowerment: de-racialising the economy* (2007) 178.

¹¹⁴² Kruger LP 'South African managers' perceptions of black economic empowerment (BEE): A 'sunset' clause may be necessary to ensure future sustainable growth' (2014) 18(1) *Southern African Business Review* 94.

¹¹⁴³ Kruger LP 'South African managers' perceptions of black economic empowerment (BEE): A 'sunset' clause may be necessary to ensure future sustainable growth' (2014) 18(1) *Southern African Business Review* 94.

¹¹⁴⁴ Jeffery A *BEE: Helping or hurting?* (2014) 349.

in the hands of black people, it has the negative effect of being costly for black people.

BEE has also been accused of reducing economic freedom.¹¹⁴⁵ Economic freedom is based on five pillars: the soundness of a country's currency, a country's freedom to trade internationally, the extent of the regulation it imposes on the private sector, the size of the country's government and the respect for property rights.¹¹⁴⁶ Critics speak of the 'over-regulation of the labour market, coupled with government's role as watchdog, resulting in a decrease in overseas investments'.¹¹⁴⁷ It has been argued that South Africa's diminished level of economic freedom has been as a result of increased business regulation of which BEE has been a large component.¹¹⁴⁸ This argument is questionable, because as indicated in this chapter, the B-BBEE Codes allow enterprises to focus on certain elements of the scorecards while neglecting others,¹¹⁴⁹ still resulting in enterprises obtaining good BEE ratings. This implies that from a BEE perspective, businesses may not be as regulated as it is claimed. Jeffery argues that it would be interesting to determine what could have been achieved if hiring decisions over the past two decades on all levels of enterprises in both the private and the public sectors were based on merit rather than on racial targets.¹¹⁵⁰ The said author reasons that compromising on merit in appointing staff has long-term effects on efficiency.¹¹⁵¹ It has also been argued that 'owing to the pressure in becoming black economic empowerment compliant, the quality of the staff appointed is not only often compromised in the lack of experience, but also in the total lack of commitment'.¹¹⁵² In response to the aforementioned arguments, the chapter that follows will demonstrate that policies and practices built on merit perpetuates the dominance of white people.¹¹⁵³ There are also perceptions that BEE amounts to 'reverse racism' against white people,¹¹⁵⁴ however as indicated in chapter 2 this is not the case.¹¹⁵⁵

There is also a potential limitation on the ability of black shareholders of enterprises to sell shares as a result of lock-in clauses included in agreements. Lock-in clauses may be included in order to prevent shareholders from selling to white persons.¹¹⁵⁶ This inability of black shareholders to sell their shares has the effect of reducing their economic freedom.

¹¹⁴⁵ Jeffery A *BEE: Helping or hurting?* (2014) 349.

¹¹⁴⁶ Jeffery A *BEE: Helping or hurting?* (2014) 352.

¹¹⁴⁷ Oosthuizen RM & Naidoo V 'Attitudes towards and experience of Employment Equity' (2010) 36 *South African Journal of Industrial Psychology* 836.

¹¹⁴⁸ Jeffery A *BEE: Helping or hurting?* (2014) 352.

¹¹⁴⁹ See para 5.4.6.1 above.

¹¹⁵⁰ Jeffery A *BEE: Helping or hurting?* (2014) 353.

¹¹⁵¹ Jeffery A *BEE: Helping or hurting?* (2014) 353.

¹¹⁵² Oosthuizen & Naidoo (2010) 836.

¹¹⁵³ See para 6.3.1 below.

¹¹⁵⁴ Kruger LP 'South African managers' perceptions of black economic empowerment (BEE): A 'sunset' clause may be necessary to ensure future sustainable growth' (2014) 18(1) *Southern African Business Review* 94.

¹¹⁵⁵ See para 2.2.2.3 above.

¹¹⁵⁶ See para 5.4.1.3 above.

5.8.2 Arguments in favour of BEE

Those who agree that BEE has achieved its objectives state that the inequalities caused by apartheid have resulted in black people not always taking advantage of the opportunities which BEE presents,¹¹⁵⁷ because black people are not always suitably qualified for positions and that more time and energy should be spent on enabling the beneficiaries of BEE to take advantage of these opportunities.¹¹⁵⁸

An advantage of BEE is that resources are placed in the hands of black people.¹¹⁵⁹ BEE has had an important benefit, namely, the stimulation of the growth of a black middle class. According to the Unilever Institute at the University of Cape Town, in 2008 there were 3 million Africans in what was known as the 'black diamond' class with a spending power of R250 billion a year as a collective.¹¹⁶⁰ By 2014 these figures increased to 4.2 million with a spending power of R400 billion a year as a collective.¹¹⁶¹ Opinions have been expressed that the black middle class would not have grown as rapidly had it not been for BEE. In response to the National Assembly's debate on President Cyril Ramaphosa's ('President') budget vote during July 2019, the President stated that BEE will not be abandoned and that 'it has brought real benefits to blacks, women and to persons living with disabilities. It has contributed to the significant growth of a black middle class, boosted employment equity and it has enabled black people and women to become owners and managers of businesses.'¹¹⁶²

Some argue that BEE should be abolished in its entirety.¹¹⁶³ There are contrasting views from the beneficiaries of BEE. There are those who believe that BEE undermines black achievement by making it difficult to distinguish between people who have reached their positions on merit and those who have been put in them to fill racial targets.¹¹⁶⁴ Beneficiaries expressed the view that they 'made it' notwithstanding employment equity legislation, but that they tend to be lumped together with those who have achieved success through racial preferencing.¹¹⁶⁵ Graham McIntosh, a former MP for the Congress of the People,¹¹⁶⁶ said: "Many blacks who are doing well and who have risen well above their circumstances because of their own acumen and hard work are uncomfortable

¹¹⁵⁷ Macozoma S *Black Economic Empowerment: de-racialising the economy* (2007) 177.

¹¹⁵⁸ Macozoma S *Black Economic Empowerment: de-racialising the economy* (2007) 178.

¹¹⁵⁹ Macozoma S *Black Economic Empowerment: de-racialising the economy* (2007) 177.

¹¹⁶⁰ Jeffery A *BEE: Helping or hurting?* (2014) 385.

¹¹⁶¹ Jeffery A *BEE: Helping or hurting?* (2014) 386. The white middle class remained the same during this period.

¹¹⁶² Magubane K 'We will not abandon B-BBEE – Ramaphosa' available at <https://www.fin24.com/Economy/we-will-not-abandon-b-bbee-ramaphosa-20190718> (accessed 16 August 2019).

¹¹⁶³ Jeffery A 'BEE is flawed and should be scrapped' available at <http://mg.co.za/article/2013-01-18-bee-is-flawed-and-should-be-scrapped> (accessed 9 May 2017).

¹¹⁶⁴ Jeffery A *BEE: Helping or hurting?* (2014) 369.

¹¹⁶⁵ Jeffery A *BEE: Helping or hurting?* (2014) 369.

¹¹⁶⁶ A minority party in the legislature.

about BEE legislation and some see it as insulting."¹¹⁶⁷ However, in 2013 Nicholas Mawenti, the former managing director of the Black Management Forum, was quoted as stating: "Often black people feel like they have achieved everything through their own efforts and that their success has nothing to do with BEE, but that is not correct. It is important for people to acknowledge that they have benefitted from BEE, because we are looking for success stories."¹¹⁶⁸

Then there is the issue of the presence of a culture of entitlement. In 2009, Moeletsi Mbeki ('Mbeki'), the brother of the former president urged for an end to BEE.¹¹⁶⁹ Mbeki stated that BEE entrenched South Africa's economic inequalities by creating a culture of entitlement and cronyism which discouraged black entrepreneurship by telling blacks "you don't have to build your own business, you don't have to take risks, the whites will give you a job."¹¹⁷⁰

Although there are enterprises that are not complying with BEE since the provisions of the B-BBEEA are not peremptory, their non-compliance results in the consequence that these enterprises may find it difficult to enter into business transactions and to retain business long-term. These consequences act as an incentive to comply with the B-BBEEA and with the Codes. However, the Minister of Trade and Industry has acknowledged that even though enterprises are required to support new enterprises in order to obtain points in respect of the enterprise and supplier development element of the Codes, these enterprises merely hand money over to the new enterprises instead.¹¹⁷¹ This is relevant in the case of enterprise development where the measured entity would pay the enterprise in order to obtain BEE points, as opposed to creating a real partnership between the measured entity and the enterprise in question.¹¹⁷² This means that the enterprise would be unable to learn from the measured entity which results in the enterprise not being empowered to become a real participant in the economy. This shows that measured entities have the option of obtaining a good BEE rating without keeping the purpose and spirit of BEE in mind.

¹¹⁶⁷ McIntosh G 'B-BBEE Amendment bill: thoughts from inside the parliamentary group' Politicsweb 7 May 2013 available at <https://www.politicsweb.co.za/news-and-analysis/bbbee-amendment-bill-thoughts-from-inside-the-parl> (accessed 31 October 2019).

¹¹⁶⁸ Jeffery A *BEE: Helping or hurting?* (2014) 369.

¹¹⁶⁹ Harrison R 'Moeletsi Mbeki: Black empowerment has failed' *Mail & Guardian* 19 June 2009 available at <http://mg.co.za/article/2009-06-19-moeletsi-mbeki-black-empowerment-has-failed> (accessed 31 October 2019).

¹¹⁷⁰ Harrison R 'Moeletsi Mbeki: Black empowerment has failed' *Mail & Guardian* 19 June 2009 available at <http://mg.co.za/article/2009-06-19-moeletsi-mbeki-black-empowerment-has-failed> (accessed 31 October 2019).

¹¹⁷¹ Paton C 'Black economic empowerment: Should it be kept alive' available at <http://www.leader.co.za/article.aspx?s=1&f=1&a=2781> (accessed 31 October 2019).

¹¹⁷² Paton C 'Black economic empowerment: Should it be kept alive' available at <http://www.leader.co.za/article.aspx?s=1&f=1&a=2781> (accessed 31 October 2019).

5.9 CONCLUSION

Pursuant to the dismantling of apartheid, legislation was enacted to promote transformation, the B-BBEEA being one such piece of legislation with its aim being to facilitate BEE. The objective of BEE is to redress the inequalities caused by apartheid by providing black people with economic opportunities which were previously not available to them. This chapter revealed that there is a low percentage of black employees in managerial positions and that change in the racial composition of management structures of enterprises has taken place at a slow pace. Since the control over whether a historically developed 'white corporate culture' is retained or changed in a workplace is influenced by the representation of black people who occupy positions on managerial levels, the fact that there is a low percentage of black employees in management positions perpetuates a white corporate culture.

This chapter aims to determine what the shortcomings are of the legal framework that make it possible for enterprises to obtain good BEE ratings when there is a low percentage black people who form part of their ownership and management structures. The first factor which makes it possible for enterprises to obtain good BEE ratings under such circumstances is the fact that there are five elements which an enterprise can choose to comply with, all contributing towards points on the BEE scorecards. Of these five elements there are three priority elements: ownership, skills development and enterprise and supplier development. An LE is required to comply with all three priority elements, while a QSE is required to comply with ownership as a compulsory element and either skills development or enterprise and supplier development. Despite ownership being a compulsory element for both an LE and a QSE, management control is not a compulsory element in respect of either an LE or a QSE. Management control also does not form part of either one of the two priority elements with which a QSE is required to comply. This would enable an LE and QSE to obtain points in respect of the remaining elements without having regard for management control. It is thus important for management control to form part of the priority elements and that skills development or enterprise and supplier development be replaced.

The second shortcoming is that while high weighting points have been allocated to the ownership element, the points which have been allocated to skills development and enterprise and supplier development are higher than those of management control. This implies that enterprises will be encouraged to comply with the compulsory elements (or with the required elements in the case of a QSE) and may even obtain points under the socio-economic element without much consideration for the management control element. It is thus recommended that the legislature should allocate points to management control which are higher than either skills development or enterprise and supplier development. A third shortcoming is that the scorecards contain the maximum points that an enterprise can achieve. This implies that there are no incentives for enterprises to provide black

people with more voting rights, increased economic interest or more participation in management positions in excess of what is required in the scorecards.

The shortcomings outlined above show that the management of enterprises has not been regulated sufficiently. This is due to the fact that management control is not a priority element or an element to which one of the highest points have been allocated. This would not have been the case had the minimalist approach been adopted as opposed to the maximalist approach. While the maximalist approach is important, because it concentrates on the generation and redistribution of resources to empower the majority of black people, adopting the minimalist approach would have had the effect of transforming management structures of enterprises. This is because the minimalist approach places emphasis on the advancement of black professionals.¹¹⁷³ Had management transformation of structures been regulated sufficiently this may have had an effect on the corporate cultures of enterprises, since a transformed corporate culture is dependent on the racial composition of management structures.

Contrary to management control, the ownership element is both a priority element and an element to which one of the highest points have been allocated. This indicates that the ownership structures of enterprises are regulated sufficiently.

A fourth shortcoming contributing to the slow pace of transformation within the ownership and management structures of enterprises relates to the aspect of opportunity hoarding where dominant positions are preserved for persons from a particular race group. This aspect goes hand in hand with social closure practices and the corporate culture of an enterprise which may similarly have the effect of preventing the advancement of black people in the enterprise.¹¹⁷⁴ Opportunity hoarding may be reduced in the event of the B-BBEE Codes being amended to make management control a priority element and allocating more points to management control. This may have the effect of providing enterprises with an incentive to include persons of other races in dominant positions.

An additional shortcoming of the legal framework which makes it possible for enterprises to obtain good BEE ratings, despite the low percentage of black people who form part of the ownership and management structures of an enterprise, is due to enterprises' involvement in fronting practices. Fortunately, the legislature has included a number of severe sanctions in the event of fronting practices taking place. There are commendable features of the B-BBEEA which are indicative of the state's stance to reduce fronting practices. Where fronting practices take place to the effect that it affects the composition and/or role of management the corporate culture of these enterprises will

¹¹⁷³ See para 5.2 above.

¹¹⁷⁴ See para 4.3.1 above.

be affected, as corporate culture transformation originates from the management structures of enterprises.

The final shortcoming of the legal framework relates to the BEE scorecards that were discussed above in depth. The complexity of these scorecards and the calculations that a measured entity is required to perform results in most measured entities struggling to make sense of the scorecards without assistance from experts. The fact that the actions of the measured entities are based on their own understanding or on the expertise of third parties, could result in errors being made and in outcomes where measured entities choose to make use of the equations of elements which are less complicated than others, while not necessarily the ones which they prefer. The converse is also true. The measured entities who are or who employ experts in making use of the scorecards and the equations, are able to make strategic decisions and adjustments to their calculations allowing them to reap huge benefits while at the same time allowing them to escape from certain areas of compliance. This illustrates that the provisions contained in the B-BBEE Codes do not exist in isolation, but are dependent on the ways in which it is experienced by people. The complex nature of the scorecards and the calculations involved in obtaining a specific BEE status raises the question whether the scorecards will be simplified in the future and whether such simplifications will have a more beneficial effect on the advancement of black professional employees in South Africa.

This chapter identified the shortcomings of the legal framework that make it possible for enterprises to obtain good BEE ratings despite the low percentage of black people who form part of the ownership and management structures of enterprises. Chapters 7 and 8 will test which of the shortcomings identified are dominant in the legal profession and in the financial professions respectively. Chapters 7 and 8 will provide recommendations on the ways in which such shortcomings may be reduced.

This chapter revealed that the ownership structures of enterprises are regulated sufficiently. This is because the ownership element is a priority element and an element to which one of the highest points have been allocated. Chapters 7 and 8 determine whether this regulation of ownership is able to achieve ownership transformation in enterprises.

The recommendations suggested in this chapter may assist black professional employees with their advancement within enterprises. Even if the recommendations are put in place, the challenges experienced by black professionals may possibly be reduced, however these challenges will not be removed in their entirety. It is thus necessary to determine whether the legal framework for addressing the inequalities caused by apartheid can be examined through an alternative theoretical framework. It is for this reason that critical race theory is introduced as a

theoretical framework for chapters 7 and 8 in the chapter that follows. The focus of this thesis therefore now shifts from analysing the current law (the text of the law), to questioning the role of any law, and specifically the current equality legislation in achieving racial transformation and addressing the challenges of black professional employees.

CHAPTER 6

CRITICAL RACE THEORY

6.1 INTRODUCTION

The relevant provisions of the EEA have been discussed in chapters 2 and 3 to determine whether black professional employees in the private sector benefit from the legislation aimed at addressing racial discrimination. Chapter 2 revealed that black professional employees are protected as a result of the provisions governing unfair discrimination and chapter 3 revealed that black professional employees benefit from the provisions governing affirmative action. The shortcomings of the legal framework were identified in Chapter 3. One of the shortcomings identified in chapter 3 was that despite there being provisions in place governing affirmative action, and setting out the outcomes to be achieved when implementing affirmative action measures, the legislation merely requires compliance with the affirmative action measures in the Act. For this reason, Louw argues that the affirmative action framework contained in the EEA lends itself to embracing impersonal tick-boxes.

The role which the corporate culture plays in the process of racial transformation was discussed in chapter 4. Chapter 4 revealed that the implementation of the provisions contained in the EEA does not exist in isolation, but that it is influenced by the way in which it is experienced by the people the provisions aim to benefit. Chapter 4 also revealed that amendments to the EEA that merely deal with technical issues cannot solve the way in which discrimination and affirmative action is experienced by people and that even if an employer applies all the provisions of the EEA successfully, it may have little effect on the challenges which black employees experience.

Chapter 5 identified the shortcomings of the legal framework that make it possible for enterprises to obtain good BEE ratings despite the low percentage of black professional employees who form part of the ownership and management structures of these enterprises. Recommendations were provided in chapters 3 and 5 with the aim of reducing the shortcomings identified. It was acknowledged in chapters 3 and 5 that even if the recommendations are put in place, the challenges experienced by black professionals in the form of racial discrimination and unequal opportunities which restrict their growth within these enterprises, may be reduced, however it will not be removed in its entirety. It is necessary to determine whether the legal framework for addressing the inequalities which exist can be examined through an alternative theoretical

framework. For this reason, the insights which critical race theory brings may be instructive, in determining whether the equality legislation outlined in the chapters above are the appropriate vehicles to change how black professional employees are treated by their employers.

Critical race theory is a theoretical framework through which the statutory attempts to promote equality and address racial discrimination can be examined. The objective of this chapter is to determine whether critical race theory as a theoretical framework can add a new dimension to the analysis of unfair discrimination, affirmative action and BEE. In order to make this determination this chapter consists of a brief overview of the historical background of critical race theory and an examination of what critical race theory entails.

6.2 THE HISTORICAL BACKGROUND OF CRITICAL RACE THEORY

A movement known as Critical Legal Studies (CLS) argued that the law was not neutral and that the law reflected power relationships.¹¹⁷⁵ CLS consisted primarily of white persons; however rifts developed among CLS adherents.¹¹⁷⁶ Critical race theory was developed in response to the shortcomings of CLS in acknowledging that race is a central component to the very legal systems being challenged¹¹⁷⁷ and in addressing the legal system's perpetuation of racism.¹¹⁷⁸ The principal shortcoming of CLS was that it failed to place emphasis on 'race and racism which resulted in the absence of strategies for social transformation of the oppressive social structure created by the existing legal system'.¹¹⁷⁹

Critical race theory evolved during the 1970s¹¹⁸⁰ as a result of the work of legal scholars who were drawn to re-examining the continuation of racial discrimination in America and the absence of racial reform in legislation.¹¹⁸¹ Scholars, such as, Patricia Williams, Richard Delgado, and Mai Matsuda aimed to determine how the oppression of people of colour and white supremacy had begun and 'perpetuated while putting race and racial discrimination at the centre of the scholarship'.¹¹⁸²

¹¹⁷⁵ Subotnik D 'What's wrong with critical race theory: reopening the case for middle class values' (1998) 7(3) *Cornell Journal of Law and Public Policy* 684.

¹¹⁷⁶ Subotnik D 'What's wrong with critical race theory: reopening the case for middle class values' (1998) 7(3) *Cornell Journal of Law and Public Policy* 684.

¹¹⁷⁷ Martinez AJ 'Critical race theory: its origins, history and importance to the discourses and rhetorics of race' (2014) *Frame No. 27.2* 17.

¹¹⁷⁸ Bergerson AA 'Critical race theory and white racism: is there room for white scholars in fighting racism in education?' (2003) 16(1) *International Journal of Qualitative Studies in Education* 52.

¹¹⁷⁹ Allen ME 'The Relevance of Critical Race Theory: Impact on Students of Color' (2017) 4 (2) *Urban Education Research & Policy Annuals* 34.

¹¹⁸⁰ Delgado R & Stefancic J *Critical race theory: an introduction* 2ed (2012) 4.

¹¹⁸¹ Allen ME 'The Relevance of Critical Race Theory: Impact on Students of Color' (2017) 4 (2) *Urban Education Research & Policy Annuals* 34.

¹¹⁸² Allen ME 'The Relevance of Critical Race Theory: Impact on Students of Color' (2017) 4 (2) *Urban Education Research & Policy Annuals* 34.

Critical race theory has been defined as 'a body of legal scholarship... a majority of whose members are both existentially people of colour and ideologically committed to the struggle against racism, particularly as institutionalised in and by law'.¹¹⁸³ Critical race theory provided a critique of the legal system based on the experiences of black people and incorporated black people's scepticism of a legal system that repeatedly failed to provide for social justice.¹¹⁸⁴

6.3 CRITICAL RACE THEORY

Critical race theory is based on the fact that race is central to the discussion of racial discrimination and that no explanation is required to explain that racism persists.¹¹⁸⁵ It is based on the premise that law alone cannot ensure the complete removal of racial discrimination.¹¹⁸⁶ It argues that by ignoring racial difference the 'status quo with all its deeply institutionalised injustices to racial minorities is perpetuated and insists that 'dismissing the importance of race is a way to guarantee that institutionalised and systematic racism continues and even prospers'.¹¹⁸⁷ Critical race theory requires aggressive colour conscious efforts to change the status quo¹¹⁸⁸ which calls for 'race-conscious decision making as a routine, non-deviant mode, a more or less permanent norm to be used in distributing positions of wealth, prestige and power'.¹¹⁸⁹

White privilege as well as the concepts of colour blindness, race neutrality, equal opportunity, objectivity and meritocracy are challenged by critical race theory.¹¹⁹⁰ Critical race theory views the idea that the law can and should treat all persons equally irrespective of their race as being a vehicle for privilege and power.¹¹⁹¹ 'The myth of meritocracy is merely a tool to perpetuate the existing power structures that are based on white supremacy'¹¹⁹² and white privilege and therefore this myth of meritocracy marginalises people of colour.¹¹⁹³ Critical race theory sees 'whiteness'¹¹⁹⁴

¹¹⁸³ Bell D 'Who's afraid of critical race theory?' (1995) *University of Illinois Law Review* 888.

¹¹⁸⁴ Bergerson AA 'Critical race theory and white racism: is there room for white scholars in fighting racism in education?' (2003) 16(1) *International Journal of Qualitative Studies in Education* 52.

¹¹⁸⁵ Bergerson AA 'Critical race theory and white racism: is there room for white scholars in fighting racism in education?' (2003) 16(1) *International Journal of Qualitative Studies in Education* 52.

¹¹⁸⁶ Conradie MS 'Critical race theory and the question of safety in dialogues on race' (2016) 36 (1) *Acta Theologica* 8.

¹¹⁸⁷ Martinez AJ 'Critical race theory: its origins, history and importance to the discourses and rhetorics of race' (2014) *Frame No. 27.2* 17. This argument translates equally well into the South African context where black people are the majority of the population.

¹¹⁸⁸ Delgado R & Stefancic J *Critical race theory: an introduction* 2ed (2012) 27.

¹¹⁸⁹ Barlow B 'Racism, Justified: A Critical Look at Critical Race Theory' (2016) *The Harvard Law Record* 1.

¹¹⁹⁰ Allen ME 'The Relevance of Critical Race Theory: Impact on Students of Color' (2017) 4 (2) *Urban Education Research & Policy Annuals* 35.

¹¹⁹¹ Barlow B 'Racism, Justified: A Critical Look at Critical Race Theory' (2016) *The Harvard Law Record* 1.

¹¹⁹² In critical race theory "white supremacy" refers to the operation of much more subtle and extensive forces that saturate the everyday mundane actions and policies that shape the world in the interests of white people; Gillborn D 'Intersectionality, Critical Race Theory, and the Primacy of Racism: Race, Class, Gender and Disability in Education' 21 (3) *Qualitative Inquiry* 278.

¹¹⁹³ Barlow B 'Racism, Justified: A Critical Look at Critical Race Theory' (2016) *The Harvard Law Record* 1.

¹¹⁹⁴ "Whiteness" refers to a racial discourse, whereas the category of white people represents a socially constructed

as referring to a set of beliefs, practices and assumptions which places the perspectives, needs and interests of white people at the centre of what is considered to be normal.¹¹⁹⁵ Harris argues that 'whiteness' is a form of property.¹¹⁹⁶ 'Property' includes the rights to use, right to transfer and the right to exclude others. Harris argues that 'whiteness' meets these requirements. She argues that 'whiteness' is capable of moving 'from a passive characteristic as an aspect of identity to an active entity that, like other types of property, is used to fill the will and to exercise power', thus white people are able to use and enjoy 'whiteness' whenever they choose to take advantage of the privileges which white people are provided with.¹¹⁹⁷ She argues that 'whiteness' encompasses the right to transfer, also referred to as alienability, arguing that in certain cases the alienability of property is limited and that the 'inalienability of whiteness should not preclude the consideration of whiteness as property'.¹¹⁹⁸ 'Whiteness' also includes the right to exclude, because the 'possessors of whiteness were granted the legal right to exclude others from privileges inhering in whiteness'.¹¹⁹⁹ Affirmative action aims to 'undermine the property interest in whiteness' and to remove the legal protections which were once accorded to white people.¹²⁰⁰

In her article, 'The Relevance of Critical Race Theory: Impact on Students of Color', Allen discusses the ways in which critical race theory can be applied in the US education system¹²⁰¹ and encourages educators to examine teaching and learning, curriculum and pedagogy through a critical race lens.¹²⁰² She argues that despite the fact that efforts have been made to level the playing field for marginalised students, the efforts have been unsuccessful and that 'critical race theory provides many tools to help educators take to social justice activism, in order to create an environment that demonstrates that learning is valued for all students and ensures that all students are given an equal opportunity to obtain a quality education'.

She argues further that 'critical race theory provides educators with tools to identify ways to transform current practices in curriculum, pedagogy, teaching and learning into ones that remove

identity based on skin colour; Gillborn D 'Intersectionality, Critical Race Theory, and the Primacy of Racism: Race, Class, Gender and Disability in Education' 21 (3) *Qualitative Inquiry* 278.

¹¹⁹⁵ Gillborn D 'Intersectionality, Critical Race Theory, and the Primacy of Racism: Race, Class, Gender and Disability in Education' 21 (3) *Qualitative Inquiry* 278.

¹¹⁹⁶ Harris CI 'Whiteness as property' in Crenshaw K *Critical Race Theory: The Key Writings that Formed the Movement* (1996) 276.

¹¹⁹⁷ Harris CI 'Whiteness as property' in Crenshaw K *Critical Race Theory: The Key Writings that Formed the Movement* (1996) 282.

¹¹⁹⁸ Harris CI 'Whiteness as property' in Crenshaw K *Critical Race Theory: The Key Writings that Formed the Movement* (1996) 282.

¹¹⁹⁹ Harris CI 'Whiteness as property' in Crenshaw K *Critical Race Theory: The Key Writings that Formed the Movement* (1996) 283.

¹²⁰⁰ Harris CI 'Whiteness as property' in Crenshaw K *Critical Race Theory: The Key Writings that Formed the Movement* (1996) 288.

¹²⁰¹ Allen ME 'The Relevance of Critical Race Theory: Impact on Students of Color' (2017) 4 (2) *Urban Education Research & Policy Annuals* 37.

¹²⁰² Allen ME 'The Relevance of Critical Race Theory: Impact on Students of Color' (2017) 4 (2) *Urban Education Research & Policy Annuals* 38.

colorblindness and meritocracy and allow interest convergence and experiential knowledge into the curriculum'.¹²⁰³ She notes that attitudes of educators should not mimic the system of white supremacy, because this prevents educators from teaching in manners which are culturally relevant and which result in the impact of racism being minimised.¹²⁰⁴ As a result of school finance and public policy affecting marginalised groups disproportionately in comparison to white communities, it was argued that critical race theory be used to challenge and expose these disparities.¹²⁰⁵

Efforts have been made in South Africa by way of the enactment of the EEA and the B-BBEEA to level the playing field between black and white people.¹²⁰⁶ It is thus important to determine, as suggested by Allen in the US education context, whether the tools of critical race theory can also be used to assist black professional employees in South Africa.

While it is acknowledged that critical race theory does not consist of a single unchanging set of rules and perspectives, its scholarship is marked by certain tenets which have been maintained throughout the literature. For the purposes of this chapter, the tenets that will be reviewed are those discussed by authoritative commentaries which include: 1) critique of liberalism; 2) anti-essentialism; 3) structural determinism; 4) social science insights, historical analysis and multidisciplinary thinking; 5) intersectionality; 6) storytelling, narrative and naming one's own reality and 7) cultural nationalism/separatism.¹²⁰⁷ These tenets will be discussed individually below in order to illustrate what critical race theory entails and how it is relevant to the position in South Africa.

6.3.1 Critique of liberalism

Liberalism involves 'an enthusiasm for freedom, toleration, individualism and reason on the one hand, and a disapproval of power, authority and tradition on the other'.¹²⁰⁸ The individual and individual rights are at the centre of liberalism.¹²⁰⁹ Liberalism also focuses on the fact that government regulation should be minimal; however, minimal government regulation may be problematic since the involvement of government is required at times in order to ensure the

¹²⁰³ Allen ME 'The Relevance of Critical Race Theory: Impact on Students of Color' (2017) 4 (2) *Urban Education Research & Policy Annuals* 36.

¹²⁰⁴ Allen ME 'The Relevance of Critical Race Theory: Impact on Students of Color' (2017) 4 (2) *Urban Education Research & Policy Annuals* 38.

¹²⁰⁵ Allen ME 'The Relevance of Critical Race Theory: Impact on Students of Color' (2017) 4 (2) *Urban Education Research & Policy Annuals* 38.

¹²⁰⁶ See paras 7.5.2.1 and 8.3.2.1 below.

¹²⁰⁷ Delgado R & Stefancic J 'Critical race theory: an annotated bibliography' (1993) *Virginia Law Review* 462.

¹²⁰⁸ Alexander J 'The major ideologies of Liberalism, Socialism and Conservatism' (2014) *Political Studies* 4.

¹²⁰⁹ Costagno AE 'Commonsense understandings of equality and social change: a critical race theory analysis of liberalism at Spruce Middle School' (2009) 22 (6) *International Journal of Qualitative Studies in Education* 755.

stability of liberal values.¹²¹⁰

Critical race theory rejects liberalism because rights can be said to alienate one person from another, 'stay away, I've got my rights',¹²¹¹ as opposed to encouraging people to form close communities.¹²¹² Critical race theory rejects liberalism's approach to transformation in terms of which there is an insistence on an exclusively rights-based approach to resolving racial problems.¹²¹³ A liberal interpretation of unfair discrimination, affirmative action and BEE in South Africa is problematic and a communitarian interpretation should be used instead.

The communitarian approach is based on the fact that rights and duties of an individual should be determined in accordance with the community who the individual forms part of.¹²¹⁴ The reason why a liberal interpretation of unfair discrimination, affirmative action and BEE is problematic is because emphasis is placed on individual rights as opposed to the collective objectives. The collective objectives of South Africa are, *inter alia* to 'heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights' and to build a united and democratic South Africa'.¹²¹⁵ A liberal interpretation of unfair discrimination, affirmative action and BEE negatively affects the achievement of these collective objectives and results in section 9(2) of the Constitution,¹²¹⁶ becoming redundant.

Critical race theory's opposition to liberalism is caused by various factors which include: liberalism's understanding of racism, its concentration on individual rights, its narrow interpretation of equality, its approach to disparities, and its acceptance of the slow pace of social change.¹²¹⁷ The aforementioned factors 'result in a system of whiteness that grants power and privilege disproportionately while purporting a level playing field'.¹²¹⁸ This is relevant to BEE in South Africa where BEE legislation was developed during a time when white people controlled the majority of the business world in South Africa. The decision was made to adopt the maximalist approach which focuses on improving the conditions of the majority of the South African population as

¹²¹⁰ Costagno AE 'Commonsense understandings of equality and social change: a critical race theory analysis of liberalism at Spruce Middle School' (2009) 22 (6) *International Journal of Qualitative Studies in Education* 756.

¹²¹¹ Delgado R & Stefancic J *Critical race theory: an introduction* 2ed (2012) 29; Barlow B 'Racism, Justified: A Critical Look at Critical Race Theory' (2016) *The Harvard Law Record* 1.

¹²¹² Barlow B 'Racism, Justified: A Critical Look at Critical Race Theory' (2016) *The Harvard Law Record* 1.

¹²¹³ Modiri JM 'The colour of the law, power and knowledge: introducing critical race theory in (post-) apartheid South Africa' (2012) 28 *SAJHR* 415.

¹²¹⁴ Saaremael- Stoilov K 'Liberal Communitarian interpretation of Social and Equality rights: a balanced approach' (2006) *Juridica International* 87.

¹²¹⁵ Preamble Constitution of the Republic of South Africa, 1996.

¹²¹⁶ Section 9(2) of the Constitution promotes the achievement of equality. See para 2.1 above.

¹²¹⁷ Costagno AE 'Commonsense understandings of equality and social change: a critical race theory analysis of liberalism at Spruce Middle School' (2009) 22 (6) *International Journal of Qualitative Studies in Education* 755.

¹²¹⁸ Costagno AE 'Commonsense understandings of equality and social change: a critical race theory analysis of liberalism at Spruce Middle School' (2009) 22 (6) *International Journal of Qualitative Studies in Education* 755.

opposed to promoting the empowerment of black professionals.¹²¹⁹ BEE has become a system where wealth is redistributed instead of black people becoming owners of capital.¹²²⁰

The liberalist approach views racism from the perpetrator's perspective where racism is viewed as an 'irrational, aberrational act committed by a conscious wrongdoer often deviating from fair and impartial ways of treating fellow humans, distributing jobs, power, prestige and wealth'.¹²²¹ The supporters of critical race theory argue that racism should be viewed as being 'systemic and ingrained in the social culture and reinforced through the reproduction of political power and legal reasoning'.¹²²²

Critical race theory is sceptical of neutrality, merit and colourblindness.¹²²³ Many of the 'liberals' believe in neutral principles of law and colourblindness.¹²²⁴ They believe that all persons should be treated equally without regard to a person's past experiences of discrimination.¹²²⁵ The premise that the law occupies a rational and 'neutral position in relation to social power negates the fact that politics embed the doctrinal categories and normative assumptions with which law organises and represents social reality and responds to social ills'.¹²²⁶ Critical race theory challenges the arguments that law is colourblind and neutral.¹²²⁷ The idea of colourblindness allows racial discrimination to subsist, but in more subtle ways.¹²²⁸ The liberalist's

'emphasis on universal and abstract theories and on law as objective and determinate results in race-neutral laws which can only address the most blatant acts of racial discrimination, but do not offer any insight into the structural nature of racial power, the ingrained and banal nature of anti-black racism and the role of law in reinforcing unearned white privileges'.¹²²⁹

Corporate cultures in South Africa play a role in racial discrimination and has also been identified as an employment barrier which the EEA is required to address.

¹²¹⁹ See para 5.2 above.

¹²²⁰ See para 5.6 above.

¹²²¹ Modiri JM 'The colour of the law, power and knowledge: introducing critical race theory in (post-) apartheid South Africa' (2012) 28 *SAJHR* 415.

¹²²² Modiri JM 'The colour of the law, power and knowledge: introducing critical race theory in (post-) apartheid South Africa' (2012) 28 *SAJHR* 415.

¹²²³ Bergerson AA 'Critical race theory and white racism: is there room for white scholars in fighting racism in education?' (2003) 16(1) *International Journal of Qualitative Studies in Education* 53.

¹²²⁴ Delgado R & Stefancic J *Critical race theory: an introduction* 2ed (2012) 26.

¹²²⁵ This is known as formal equality. See para 3.2 above. Delgado R & Stefancic J *Critical race theory: an introduction* 2ed (2012) 26.

¹²²⁶ Modiri JM 'The colour of the law, power and knowledge: introducing critical race theory in (post-) apartheid South Africa' (2012) 28 *SAJHR* 415.

¹²²⁷ Bergerson AA 'Critical race theory and white racism: is there room for white scholars in fighting racism in education?' (2003) 16(1) *International Journal of Qualitative Studies in Education* 53; Martinez AJ 'Critical race theory: its origins, history and importance to the discourses and rhetorics of race' (2014) *Frame No.* 27.2 20.

¹²²⁸ Bergerson AA 'Critical race theory and white racism: is there room for white scholars in fighting racism in education?' (2003) 16(1) *International Journal of Qualitative Studies in Education* 53.

¹²²⁹ Modiri JM 'The colour of the law, power and knowledge: introducing critical race theory in (post-) apartheid South Africa' (2012) 28 *SAJHR* 416.

The view that the law is neutral is problematic, because white people consider whiteness to be the norm and therefore neutrality is perceived as being equivalent to being white.¹²³⁰ Bergerson states that a white person can walk in a white area and no one asks any questions about that person being there and because 'we are not aware of our own whiteness, we may think that we are colourblind'.¹²³¹ Critical race theory argues that racial discrimination continues as a result of policies and structures not only being built on the notion of colourblindness, but also on individual merit which perpetuates the dominance of white people.¹²³² Merit is defined as 'individual worthiness [and] critical race scholars question the view that people may be ranked by merit and that distribution of benefits is rational and just'.¹²³³ Delgado argues that 'merit sounds like white people's affirmative action... a way of keeping their own deficiencies neatly hidden while assuring that only people like them get it'.¹²³⁴

6.3.2 Anti-essentialism

In terms of anti-essentialism an identity category, such as, a black person or a male, cannot be fixed, but instead is relational in nature.¹²³⁵ Critical race theory scholars criticise the attempts to define one black community.¹²³⁶

Anti-essentialism is relevant to the EEA and to the B-BBEEA, because both of these statutes are premised on representativity. The EEA describes the meaning of people from designated groups and both the B-BBEEA and the EEA contain descriptions of the meaning of black people.¹²³⁷ Black people includes Africans, Coloureds, Indians and Chinese people in terms of the EEA,¹²³⁸ and in terms of the B-BBEEA.¹²³⁹ This description seems to assert a singular black experience where the particularities, differences and experiences of Africans, Coloureds, Indians and the Chinese are not considered.¹²⁴⁰ Modiri refers to the manner in which people from designated groups is described in

¹²³⁰ Bergerson AA 'Critical race theory and white racism: is there room for white scholars in fighting racism in education?' (2003) 16(1) *International Journal of Qualitative Studies in Education* 53.

¹²³¹ Bergerson AA 'Critical race theory and white racism: is there room for white scholars in fighting racism in education?' (2003) 16(1) *International Journal of Qualitative Studies in Education* 53.

¹²³² Bergerson AA 'Critical race theory and white racism: is there room for white scholars in fighting racism in education?' (2003) 16(1) *International Journal of Qualitative Studies in Education* 53.

¹²³³ Delgado R & Stefancic J *Critical race theory: an introduction* (2001) 150.

¹²³⁴ Delgado R 'Affirmative action as a Majoritarian Device: Or, Do you really want to be a role model?' (1991) *Michigan Law Review* 1223.

¹²³⁵ Modiri JM 'The colour of the law, power and knowledge: introducing critical race theory in (post-) apartheid South Africa' (2012) 28 *SAJHR* 416.

¹²³⁶ Delgado R & Stefancic J 'Critical race theory: an annotated bibliography' (1993) *Virginia Law Review* 463; Modiri J M 'The colour of the law, power and knowledge: introducing critical race theory in (post-) apartheid South Africa' (2012) 28 *SAJHR* 416.

¹²³⁷ See para 2.2.1 above.

¹²³⁸ See para 2.2.1 above.

¹²³⁹ See para 5.3.1 above.

¹²⁴⁰ Modiri JM 'The colour of the law, power and knowledge: introducing critical race theory in (post-) apartheid South

the EEA and states that the separation of race and gender assumes that gender can be separated from race.¹²⁴¹ The approach that race and gender can be separated has been criticised since the EEA fails to recognise the unstable nature of identity.¹²⁴² The fact that the EEA fails to consider the unstable nature of identity results in the EEA being flawed.

6.3.3 Structural determinism

Critical race theory places emphasis on the manner in which legal culture and legal thought influences and determines law's content and therefore also whose interests it reflects and who benefits from the law.¹²⁴³ Modiri submits that the reason for South African law being so conservative is due to the fact that it is largely based on Roman-Dutch law.¹²⁴⁴ This is also because the Constitution has been drafted in a liberal way.

It has been argued that despite the fact that the common law is 'saturated in a white, male, western and colonial perspective', the view that it can still provide access to a neutral meaning remains.¹²⁴⁵ This is inaccurate. The EEA and the provisions governing BEE have been drafted from a white perspective and it cannot provide access to a neutral meaning. Delgado argues that affirmative action measures were 'designed by others to promote their purposes, not ours'.¹²⁴⁶ As far as affirmative action is concerned, Delgado argues that if white people invented something that made them feel virtuous and made black people grateful they must be happy with themselves and if that program was placed in the hands of the very people who caused the problematic situation, society would be satisfied.¹²⁴⁷ As a result, Delgado is of the opinion that affirmative action should not be supported by black people.¹²⁴⁸ The BEE scorecards contain a maximum number of points which enterprises can obtain. This implies that there is no incentive to increase the percentage of black people who form part of the ownership and management structures of enterprises. The absence of such incentives shows that the slow pace of racial transformation is acceptable. This is further confirmed by the legislature allowing the duration of employment equity plans to be for a period of

Africa' (2012) 28 *SAJHR* 417.

¹²⁴¹ Modiri JM 'The colour of the law, power and knowledge: introducing critical race theory in (post-) apartheid South Africa' (2012) 28 *SAJHR* 417.

¹²⁴² Modiri JM 'The colour of the law, power and knowledge: introducing critical race theory in (post-) apartheid South Africa' (2012) 28 *SAJHR* 417.

¹²⁴³ Delgado R & Stefancic J 'Critical race theory: an annotated bibliography' (1993) *Virginia Law Review* 463; Modiri JM 'The colour of the law, power and knowledge: introducing critical race theory in (post-) apartheid South Africa' (2012) 28 *SAJHR* 419.

¹²⁴⁴ Modiri JM 'The colour of the law, power and knowledge: introducing critical race theory in (post-) apartheid South Africa' (2012) 28 *SAJHR* 419.

¹²⁴⁵ Modiri JM 'The colour of the law, power and knowledge: introducing critical race theory in (post-) apartheid South Africa' (2012) 28 *SAJHR* 419.

¹²⁴⁶ Delgado R 'Affirmative action as a Majoritarian Device: Or, Do you really want to be a role model?' (1991) *Michigan Law Review* 1226.

¹²⁴⁷ Delgado R & Stefancic J *Critical Race Theory: the cutting edge* (2000) 398.

¹²⁴⁸ Delgado R & Stefancic J *Critical Race Theory: the cutting edge* (2000) 399.

five years.¹²⁴⁹ Systems, as a result of their cultures, structures and language, cannot rectify injustices such as those of a racial nature.¹²⁵⁰

6.3.4 Social science insights, historical analysis and multidisciplinary thinking

Critical race theory is based on interdisciplinary research in order to produce updated knowledge about the processes that produce race.¹²⁵¹ This multidisciplinary approach considers the fact that the law is insufficient and that it cannot formulate solutions to racial discrimination on its own.¹²⁵² Critical race theory encourages research into the manner in which race acquires meaning through everyday practices.¹²⁵³ Critical race theory draws on other disciplines, such as, philosophy, political science, historical and cultural studies and anthropology, 'to develop a politicised and socially relevant account of racial power and its manifestations in legal institutions'.¹²⁵⁴ Critical race theory emphasises the need to understand racial discrimination within its economic, social and historical context.¹²⁵⁵

Historical context is important in theorising the relationship between race and legal discourse.¹²⁵⁶ This draws on various methods in social science which focus on narrative data.¹²⁵⁷ This multidisciplinary approach is based on the fact that

- 'a) the law itself is a product of the interdisciplinary effects of history, language, politics, culture and society;
- b) it is only through an interdisciplinary approach that we can understand how race is constructed, rationalised and experienced in society; and
- c) the kind of large-scale social change envisaged by scholars who operate within the critical stream should not, and cannot, be limited to or constrained by law, legal processes and legal enquiry'.¹²⁵⁸

Narrative data drawn from interdisciplinary research will be used in chapters 7 and 8 of this thesis to illustrate the manner in which race acquires meaning through everyday practices.

¹²⁴⁹ See para 3.3.3 above.

¹²⁵⁰ Delgado R & Stefancic J *Critical race theory: an introduction* 2ed (2012) 33.

¹²⁵¹ Conradie MS 'Critical race theory and the question of safety in dialogues on race' (2016) 36 (1) *Acta Theologica* 12.

¹²⁵² Wing AK 'Is there a future for critical race theory?' (2016) 66(1) *Journal of Legal Education* 48.

¹²⁵³ Conradie MS 'Critical race theory and the question of safety in dialogues on race' (2016) 36 (1) *Acta Theologica* 11.

¹²⁵⁴ Modiri JM 'The colour of the law, power and knowledge: introducing critical race theory in (post-) apartheid South Africa' (2012) 28 *SAJHR* 420.

¹²⁵⁵ Gillborn D 'Intersectionality, critical race theory and the primacy of racism: race, class, gender and disability in education' (2015) 21(3) *Qualitative Inquiry* 278.

¹²⁵⁶ Modiri JM 'The colour of the law, power and knowledge: introducing critical race theory in (post) apartheid South Africa' (2012) 28 *SAJHR* 420.

¹²⁵⁷ Conradie MS 'Critical race theory and the question of safety in dialogues on race' (2016) 36 (1) *Acta Theologica* 11.

¹²⁵⁸ Modiri JM 'The colour of the law, power and knowledge: introducing critical race theory in (post-) apartheid South Africa' (2012) 28 *SAJHR* 420.

6.3.5 Intersectionality

The concept of intersectionality presupposes that black people do not only experience oppression as a result of race, but also as a result of the other identities which they possess, such as, gender, religion, sexual orientation and class.¹²⁵⁹ Intersectionality recognises the fact that perceived group membership may allow people to be subjected to bias, yet as a result of such persons also being members of other groups simultaneously, the complex identities of those subjected to the bias shapes the manner in which bias is experienced.¹²⁶⁰ Critical race theory recognises that a person is not only defined by race, but also by characteristics such as gender and class.¹²⁶¹ Intersectionality addresses the issue of how various forms of identity and inequality inter-relate in various contexts.¹²⁶² It is thus important to assess how the intersection of the various characteristics, such as, race, gender, sexual orientation, religion, class, cultural beliefs and nationality, induces multiple forms of discrimination.¹²⁶³ For example, women and men can experience racism differently just as women who form part of different races can experience sexism differently.¹²⁶⁴ This is important in identifying different types of discrimination, assessing their individual impact, and understanding the remedies that can respond to a particular discrimination.¹²⁶⁵

Critical race theory rejects essentialist processes and approaches that deny difference and assume sameness.¹²⁶⁶ Intersectionality is relevant to the the EEA and the B-BBEEA, because these statutes rely on essentialist approaches. While the EEA and the B-BBEEA recognises that people may be subjected to prejudice as a result of them forming part of a certain group, they fail to assess the manner in which the intersection of characteristics such as religion, cultural beliefs and sexual orientation induces multiple forms of discrimination.

¹²⁵⁹ Allen ME 'The Relevance of Critical Race Theory: Impact on Students of Color' (2017) 4 (2) *Urban Education Research & Policy Annuals* 36.

¹²⁶⁰ Gillborn D 'Intersectionality, critical race theory and the primacy of racism: race, class, gender and disability in education' (2015) 21(3) *Qualitative Inquiry* 278.

¹²⁶¹ Modiri JM 'The colour of the law, power and knowledge: introducing critical race theory in (post-) apartheid South Africa' (2012) 28 *SAJHR* 418.

¹²⁶² Gillborn D 'Intersectionality, critical race theory and the primacy of racism: race, class, gender and disability in education' (2015) 21(3) *Qualitative Inquiry* 278.

¹²⁶³ Modiri JM 'The colour of the law, power and knowledge: introducing critical race theory in (post-) apartheid South Africa' (2012) 28 *SAJHR* 418.

¹²⁶⁴ Gillborn D 'Intersectionality, Critical Race Theory, and the Primacy of Racism: Race, Class, Gender and Disability in Education 21 (3) *Qualitative Inquiry* 278.

¹²⁶⁵ Modiri JM 'The colour of the law, power and knowledge: introducing critical race theory in (post-) apartheid South Africa' (2012) 28 *SAJHR* 418.

¹²⁶⁶ Modiri JM 'The colour of the law, power and knowledge: introducing critical race theory in (post-) apartheid South Africa' (2012) 28 *SAJHR* 418.

6.3.6 Storytelling, narrative and naming one's own reality

Storytelling is a central feature of critical race theory.¹²⁶⁷ Richard Delgado argues that 'the use of narratives by outgroups is transformative, in part because it invades the consciousness of the dominant majority and attacks their complacency'.¹²⁶⁸ Initially the stories sought to restructure legal scholarship and were 'intended to illuminate, by contrast, the majoritarian story represented by the law'.¹²⁶⁹

The use of stories is based on a social constructivist paradigm which, in turn, is based on the premise that reality is constructed by individuals.¹²⁷⁰ Stories and narration are used in order to 'probe the convolutions and recesses of our thinking about race'.¹²⁷¹ It is important to have knowledge of the experiences of marginalised groups. Critical race theory draws on the lived experiences of people from marginalised groups by including methods of storytelling, biographies, family histories and narratives.¹²⁷² A narrative need not be true in order to prove a point.¹²⁷³ Stories are used to show that the world is not static, but that it is constructed by the stories, words as well as the silences of people.¹²⁷⁴ Narrative analysis may be used for the purposes of revealing 'the circular, self-serving nature of particular legal doctrines'.¹²⁷⁵ This is illustrated in the stories of black professional employees which are discussed in chapters 7 and 8 of this thesis.

Hansford illustrates the power of a narrative in 'Jailing a Rainbow: the Marcus Garvey Case' in which he speaks about the rise of Marcus Garvey (Garvey)¹²⁷⁶ and the efforts made by Garvey's opponents to cause his demise.¹²⁷⁷ Hansford speaks about the fact that during Garvey's lifetime Garvey observed that 'black people were "kicked" about in all the communities where he found them around the world, always situated at the bottom of the social hierarchy',¹²⁷⁸ and the fact that

¹²⁶⁷ Subotnik D 'What's wrong with critical race theory: reopening the case for middle class values' (1998) 7(3) *Cornell Journal of Law and Public Policy* 687.

¹²⁶⁸ See Hansford J 'Jailing a Rainbow: The Marcus Garvey Case' (2009) 2 *Georgetown Journal of Modern Critical Race Perspectives* 47.

¹²⁶⁹ Allen ME 'The Relevance of Critical Race Theory: Impact on Students of Color' (2017) 4 (2) *Urban Education Research & Policy Annuals* 36.

¹²⁷⁰ Bergerson AA 'Critical race theory and white racism: is there room for white scholars in fighting racism in education?' (2003) 16(1) *International Journal of Qualitative Studies in Education* 54.

¹²⁷¹ Modiri JM 'The colour of the law, power and knowledge: introducing critical race theory in (post-) apartheid South Africa' (2012) 28 *SAJHR* 421.

¹²⁷² Allen ME 'The Relevance of Critical Race Theory: Impact on Students of Color' (2017) 4 (2) *Urban Education Research & Policy Annuals* 36.

¹²⁷³ Barlow B 'Racism, Justified: A Critical Look at Critical Race Theory' (2016) *The Harvard Law Record* 1.

¹²⁷⁴ Martinez AJ 'Critical race theory: its origins, history and importance to the discourses and rhetorics of race' (2014) *Frame No. 27.2* 18.

¹²⁷⁵ Barlow B 'Racism, Justified: A Critical Look at Critical Race Theory' (2016) *The Harvard Law Record* 1.

¹²⁷⁶ Marcus Garvey was the founder of the Universal Negro Improvement Association and African Communities League.

¹²⁷⁷ Hansford J 'Jailing a Rainbow: The Marcus Garvey Case' (2009) 2 *Georgetown Journal of Modern Critical Race Perspectives* 1.

¹²⁷⁸ Hansford J 'Jailing a Rainbow: The Marcus Garvey Case' (2009) 2 *Georgetown Journal of Modern Critical Race Perspectives* 3.

this observation of Garvey 'still rings true nearly a century later'.¹²⁷⁹ Hansford's narrative identifies the 'three strategies which gained footing amongst African-American leadership' at the time: the lobbyist reformers, who believed that change could be accomplished by way of legal reform and to whom 'integration was the central goal of the African-American liberation movement, because it would secure the dignity of being seen as equal to Whites'¹²⁸⁰; the black socialists, who believed that if socialism was 'widely adopted it could change the dynamics of racial and economic oppression in the United States',¹²⁸¹ and the communal self-helpers, to whom Garvey subscribed,¹²⁸² and who 'believed that blacks should use industrial education and economic communal self-help to maximise their own wealth and economic independence'.¹²⁸³ Garvey believed that increasing their wealth prior to seeking integration and civil rights, would be the way in which black people throughout the world would achieve racial justice.¹²⁸⁴ At a time when the communal self-helpers were successful, the lobbyist reformers and the black socialists formed a coalition and lobbied the government to remove Garvey from the marketplace of ideas.¹²⁸⁵ Opposition resulted in Garvey being charged with mail fraud.¹²⁸⁶ In the narrative, Hansford discusses the role which Judge Julian Mack played in Garvey's conviction, the fact that the judge failed to recuse himself, despite his affiliation with the NAACP¹²⁸⁷, Garvey's opponents, and the fact that the judge failed to address the perjured testimony of a witness for the State.¹²⁸⁸ Hansford states that 'a re-telling of the Garvey narrative may provide a salve for the psychic wounds of those who believe that true liberation comes not from lobbyist political goals or a commitment to the civil rights discourse, but instead from creating a more communal sense of self and fighting against global poverty among third world peoples'.¹²⁸⁹

Hansford's narrative provides readers with knowledge of the experiences of a member of a

¹²⁷⁹ Hansford J 'Jailing a Rainbow: The Marcus Garvey Case' (2009) 2 *Georgetown Journal of Modern Critical Race Perspectives* 4.

¹²⁸⁰ Hansford J 'Jailing a Rainbow: The Marcus Garvey Case'(2009) 2 *Georgetown Journal of Modern Critical Race Perspectives* 7.

¹²⁸¹ Hansford J 'Jailing a Rainbow: The Marcus Garvey Case' (2009) 2 *Georgetown Journal of Modern Critical Race Perspectives* 10.

¹²⁸² Hansford J 'Jailing a Rainbow: The Marcus Garvey Case' (2009) 2 *Georgetown Journal of Modern Critical Race Perspectives* 16.

¹²⁸³ Hansford J 'Jailing a Rainbow: The Marcus Garvey Case' (2009) 2 *Georgetown Journal of Modern Critical Race Perspectives* 11.

¹²⁸⁴ Hansford J 'Jailing a Rainbow: The Marcus Garvey Case' (2009) 2 *Georgetown Journal of Modern Critical Race Perspectives* 17.

¹²⁸⁵ Hansford J 'Jailing a Rainbow: The Marcus Garvey Case' (2009) 2 *Georgetown Journal of Modern Critical Race Perspectives* 21.

¹²⁸⁶ The crime of mail fraud requires that the existence of a scheme to defraud be present and requires the use of the U.S mail to effectuate or attempt to effectuate the scheme; Hansford J 'Jailing a Rainbow: The Marcus Garvey Case' (2010) 48.

¹²⁸⁷ The National Association for the Advancement of Colored People is a civil rights organisation in the United States which was established during 1909 in order to advance justice of African Americans.

¹²⁸⁸ Hansford J 'Jailing a Rainbow: The Marcus Garvey Case' (2009) 2 *Georgetown Journal of Modern Critical Race Perspectives* 44.

¹²⁸⁹ Hansford J 'Jailing a Rainbow: The Marcus Garvey Case' (2009) 2 *Georgetown Journal of Modern Critical Race Perspectives* 37.

marginalised group as well as of the strategies which existed at the time. Similar to the lobbyist reformers, in South Africa there is a belief that change can be accomplished by way of legal reform with legislation such as the EEA and the B-BBEEA. However, if this were true, the challenges which black professional employees experience in South Africa would have been resolved by now. Narratives of experiences of oppression, such as, sexism and racism are important in order to analyse and understand the 'plight of marginalised groups'.¹²⁹⁰ Narratives of the experiences of oppression in the context of black professional employees in the legal and financial professions will be relayed in chapters 7 and 8 of this thesis.

6.3.7 Cultural nationalism

In terms of cultural nationalism black people can promote themselves and their interests better by separating themselves from mainstream.¹²⁹¹ Nationalists are of the view that black people should develop their own businesses, institutions, schools and universities.¹²⁹² This aspect of critical race theory has been applied in the South African legal profession by way of advocates forming a new bar association known as the Pan-African Bar Association of South Africa (Pabasa).¹²⁹³ Pabasa was formed by black advocates who were tired of being marginalised by the predominantly white bars.¹²⁹⁴ The objective of Pabasa is to transform the legal profession since it is currently being dominated by white males.¹²⁹⁵ Pabasa consists of black and female advocates only and will not fall under the General Council of the Bar.¹²⁹⁶ The founders of Pabasa believe that the General Council of the Bar is untransformed, which results in black legal professionals being subordinate to their white colleagues.¹²⁹⁷ One of the founders of Pabasa, Muzi Sikhakhane, stated that 'we are creating an atmosphere where black people and women do not need to explain themselves; do not need to seek white male validation to be recognised'.¹²⁹⁸

6.4 CONCLUSION

Critical race theory is based on the premise that race is central to the discussion on racial discrimination and that law alone is unable to ensure that racial discrimination is completely

¹²⁹⁰ Allen ME 'The Relevance of Critical Race Theory: Impact on Students of Color' (2017) 4 (2) *Urban Education Research & Policy Annuals* 36.

¹²⁹¹ Delgado R & Stefancic J 'Critical race theory: an annotated bibliography' (1993) *Virginia Law Review* 463.

¹²⁹² Delgado R & Stefancic J *Critical Race Theory: the cutting edge* (2000) 387.

¹²⁹³ Dlamini M 'Black Bar Association a positive step to fight racism in the legal fraternity' *News24* 7 November 2018 1.

¹²⁹⁴ Dlamini M 'Black Bar Association a positive step to fight racism in the legal fraternity' *News24* 7 November 2018 1.

¹²⁹⁵ Dlamini M 'Black Bar Association a positive step to fight racism in the legal fraternity' *News24* 7 November 2018 1.

¹²⁹⁶ Dlamini M 'Black Bar Association a positive step to fight racism in the legal fraternity' *News24* 7 November 2018 1.

¹²⁹⁷ Dlamini M 'Black Bar Association a positive step to fight racism in the legal fraternity' *News24* 7 November 2018 1.

¹²⁹⁸ Maughan K 'SA Advocates form Bar Association with the aim of tackling white male supremacy' *Sunday Times* 31 October 2018 available at <https://www.timeslive.co.za/news/south-africa/2018-10-31-sa-advocates-form-bar-association-with-aim-of-tackling-white-male-supremacy/> (accessed on 21 August 2019).

eradicated. Critical race theory represents a departure from notions, such as, equal opportunity, meritocracy, colourblindness and race neutrality. Critical race theory argues that one of the reasons for racial discrimination continuing is due to policies and institutions being built on notions of colourblindness and that individual merit perpetuates the dominance of white people.¹²⁹⁹ Critical race theory rejects liberalism. The view of liberals that the principles of law are neutral is a problem, because white people consider whiteness to be the norm and neutrality is therefore perceived to be equivalent to being white. A liberal interpretation to unfair discrimination, affirmative action and BEE will be problematic, because it would result in emphasis being placed on individual rights as opposed to collective objectives.

In terms of anti-essentialism, an identity category cannot be fixed. The EEA and the B-BBEEA's description of black people and the EEA's description of people from designated groups is flawed, because it fails to recognise the unstable nature of identity. As far as structural determinism is concerned critical race theory focuses on the manner in which legal culture and legal thought determines law's content as well as the persons who benefit from the law and whose interests are reflected and protected. The EEA and the provisions governing BEE have been drafted from a white perspective. Delgado argues that affirmative action should not be supported by black people and that systems, as a result of their structures, language and cultures, cannot rectify racial injustices. The EEA by its own admission allows scope for a slow rate of racial transformation by the duration of employment equity plans being up to five years.

Critical race theory is also based on a multidisciplinary approach, which draws on other disciplines such as political science, philosophy, historical and cultural studies. This interdisciplinary approach considers the fact that the law is insufficient and that it cannot formulate solutions to racial discrimination on its own.

As far as intersectionality is concerned it is important to assess how various characteristics such as race, sexual orientation, religion and gender induce multiple forms of discrimination. Intersectionality is relevant to the EEA and to the provisions governing BEE. This is because while the EEA and the B-BBEEA recognises that people may be subjected to bias as a result of them forming part of a certain group, it fails to assess the manner in which the intersection of other characteristics induces multiple forms of discrimination.

Storytelling is a central feature of critical race theory. Critical race theory draws on the lived experiences of people. The number of black people who have experienced challenges relating to racial inequalities is irrelevant as emphasis is placed on the stories of people. This means that a

¹²⁹⁹ Bergerson AA 'Critical race theory and white racism: is there room for white scholars in fighting racism in education?' (2003) 16(1) *International Journal of Qualitative Studies in Education* 53.

study such as this thesis does not need to rely solely on empirical data to argue that the current legal framework is not an appropriate vehicle to deal with the challenges faced by black professional employees. Stories of the experiences of oppression of professional employees employed in the legal profession and in the financial profession will be discussed in chapters 7 and 8 respectively.

Insofar as cultural nationalism is concerned black people can promote their interests better by separating themselves from mainstream. Black people should be encouraged to create their own institutions and businesses. This was done in South Africa with the establishment of Pabasa, who has separated themselves from the General Council of the Bar.

In South Africa the law is used with the objective of accomplishing transformation. However, if this were possible, the problems which black professional employees experience in South Africa would have been resolved by now. Critical race theory recognises that legislation, such as the EEA and the B-BBEEA cannot promote racial transformation. This is because the EEA and the B-BBEEA is aimed at achieving equal opportunity to fit into 'white' professions. The shortcomings of the EEA and the B-BBEEA will be contextualised in the legal and financial professions in the two chapters which follow.

CHAPTER 7

THE LEGAL PROFESSION: RACIAL DISCRIMINATION AND BROAD-BASED BLACK ECONOMIC EMPOWERMENT

7.1 INTRODUCTION

Chapters 2 and 3 consist of discussions demonstrating how legislation aimed at addressing racial inequalities protects and benefits black professional employees within the private sector. Included in the EEA are provisions that govern unfair discrimination and affirmative action measures, which benefit black professional employees in the private sector. Chapter 3 contains a discussion of the shortcomings of the current legal framework. One of the shortcomings identified in chapter 3 was that despite there being provisions in place governing affirmative action, and setting out the outcomes to be achieved when implementing affirmative action measures, the affirmative action framework is problematic. This is because, as argued by Louw, the affirmative action framework contained in the EEA lends itself to embracing impersonal tick-boxes. Employers only aim to comply with the minimum which is required from them in terms of the EEA (and that does not even include all employers) since compliance is all that legislation requires.¹³⁰⁰

The role which the corporate culture plays in racial transformation was discussed in chapter 4. Chapter 4 revealed that the provisions contained in the EEA do not exist in isolation, but that it is influenced by the manner in which it is experienced by people. Chapter 4 also revealed that in the event of management consisting of a representative composition of black people they would play an important role in influencing the corporate culture of an enterprise.

Chapter 5 considered the provisions of the B-BBEEA and the B-BBEE Codes. Chapter 5 identified the shortcomings of the legal framework that make it possible for enterprises to obtain good BEE ratings despite the low percentage of black professional employees who form part of the ownership and management structures of these enterprises. Chapter 5 revealed further that the management structures of enterprises are not regulated sufficiently. Recommendations were provided with the aim of reducing the shortcomings which were identified.

Chapter 6 consists of a discussion of critical race theory to illustrate which insights critical race theory brings to the slow pace of racial transformation in South Africa. It was found that if viewed

¹³⁰⁰ Department of Labour *Commission for Employment Equity Report (2015 - 2016)*.

through the lens of critical race theory, one has to recognise that equality legislation cannot promote racial transformation. This is because the EEA and the B-BBEEA are aimed at achieving equal opportunity to fit into 'white' professions.

This chapter consists of a discussion of racial discrimination, affirmative action, the corporate culture and BEE in the legal profession. The main objective of the chapter is to determine whether the legislative framework which is currently in place is an appropriate vehicle to address the challenges which are faced by black attorneys in the legal profession if evaluated through the lens of critical race theory. This main objective consists of two ancillary purposes.

The first purpose is to determine whether there is a slow pace of racial transformation in the legal profession and aims to test which of the shortcomings of the legal framework advanced in chapter 3 are dominant in the legal profession. This chapter aims to determine whether recommendations can be made on the manners in which the shortcomings can be reduced.

The second purpose is to determine whether law firms are obtaining good BEE ratings and whether there is a low percentage of black people who form part of the ownership and management structures of law firms. In this event, this chapter will test which of the shortcomings of the legal framework, advanced in chapter 5 for enterprises' ability to obtain good BEE ratings despite the low percentage of black people who form part of the ownership and management structures, are dominant in the legal profession. This chapter aims to determine whether recommendations can be advanced on the manners in which the shortcomings may be reduced.

This chapter contains a presentation of the stories of black professional employees in order to contextualise the findings uncovered in chapters 2 to 5 of this thesis. While the stories presented may not be the experiences of all black professional employees, the narratives themselves carry weight in terms of critical race theory. Narrative analysis may be used for the purposes of revealing 'the circular, self-serving nature of particular legal doctrines'.¹³⁰¹

This chapter commences with a discussion of the historical background of the legal profession. The legal profession subsequent to apartheid is then discussed. The relevant sections of the Legal Practice Act 28 of 2014 ('Legal Practice Act') are also considered. This is followed by a discussion in which the private sector of the legal profession is defined. Some of the experiences (stories) of members of the legal profession on the basis of the literature available on the issues of racial discrimination, affirmative action and the corporate culture are relayed and discussed, which is followed by a presentation of the stories of members of the legal profession on the basis of literature available insofar as BEE is concerned. The literature used is based on studies conducted

¹³⁰¹ See para 6.3.6 above.

by other researchers and is not presented as *evidence* of slow transformation and shortcomings of anti-discrimination, affirmative action and BEE legislation, nor has any empirical research been conducted. The chapter concludes with the writer's views and recommendations.

7.2 HISTORICAL BACKGROUND

Racial discrimination is a controversial phenomenon which, despite more than two decades of democracy having passed by, still shows its face in the legal profession. When it comes to racial discrimination claims, the responsibility rests on legal practitioners to represent their clients;¹³⁰² however at times it is these very legal practitioners who are the victims of racial discrimination.¹³⁰³

The historical context of South Africa is the reason for the state in which the legal profession currently finds itself.¹³⁰⁴ It has been argued that during the years of apartheid, white judges and legal practitioners practised and applied apartheid laws for one of the following three reasons: because they agreed with them, or because they applied the apartheid laws that they never thought of questioning them, or because they overcame their discomfort with the laws by arguing that their task was merely to accept and apply the law.¹³⁰⁵

Apartheid education policies were instrumental in ensuring that the ideology of apartheid, which was to exclude black people from meaningful participation in all sectors of society, was maintained.¹³⁰⁶ During apartheid, separate education was provided to students according to their race group with separate institutions established for African, Indian, White and Coloured people.¹³⁰⁷ The vastly different educational opportunities which were provided for black people, particularly African people, in comparison to those provided for white people constituted an important feature of apartheid.¹³⁰⁸

The Bantu Education scheme, the education scheme provided to Africans, was aimed at ensuring

¹³⁰² Whitear-Nel N & Freedman W 'A historical review of the development of the post-apartheid South African LLB degree- with particular reference to legal ethics' (2015) 21(2) *Fundamina* 236.

¹³⁰³ Centre for Applied Legal Studies *Transformation of the Legal Profession* (2014) 42.

¹³⁰⁴ Pruitt LR 'No black names on the letterhead? Efficient Discrimination and the South African Legal Profession' (2002) *Michigan Journal of International Law* 563. Pruitt's findings were based on information obtained through more than seventy-five interviews conducted between March 1999 to July 2000.

¹³⁰⁵ Van der Westhuizen J 'A few reflections on the role of courts, government, profession, universities, the media and civil society in a constitutional democracy' (2008) 8(2) *African Human Rights Law Journal* 252.

¹³⁰⁶ Whitear-Nel N & Freedman W 'A historical review of the development of the post-apartheid South African LLB degree- with particular reference to legal ethics' (2015) 21(2) *Fundamina* 238.

¹³⁰⁷ Greenbaum L 'The four year undergraduate LLB: progress and pitfalls (2010) *Journal for Juridical Science* 7.

¹³⁰⁸ Pruitt LR 'No black names on the letterhead? Efficient Discrimination and the South African Legal Profession' (2002) *Michigan Journal of International Law* 563. In Pruitt's study African people are referred to as black people. When discussing the findings of Pruitt's study in this chapter where Pruitt refers to African people as black people these submissions are made with reference to African people.

that the subordinate position of Africans or 'Bantus', as they were referred to during apartheid, was maintained. The education given to Africans was limited to preparing them for positions such as domestic workers and manual labourers and not to prepare them for positions such as attorneys or other professionals.¹³⁰⁹ Due to this limited education provided to African people, by the secondary level of education some African people were not adequately prepared for university which was actually fitting, because the universities that most African people were allowed to attend failed to provide for professional training.¹³¹⁰

The legal profession was not closed to black people, but apartheid made it difficult for black people to undertake a career in law.¹³¹¹ In 1959 the segregated education scheme was extended to tertiary institutions.¹³¹² The University Education Act 45 of 1959 restricted access to universities on the ground of race.¹³¹³ In order to limit the number of applications made by black people to 'white' universities, a number of universities were established to provide tertiary education to black people.¹³¹⁴ The tertiary experience provided by what was previously known as 'bush colleges', now referred to as 'historically disadvantaged' universities, was undermined by the lack of resources.¹³¹⁵ In order for a black person to gain access to a 'white' university he or she was required to obtain a special ministerial permit, which certified that there were no equivalent programmes, offered at the 'black' universities.¹³¹⁶

During the years of apartheid, universities offered a range of degrees in law. Similar to 'white' universities, the 'historically disadvantaged' universities offered an undergraduate qualification in law known as the four-year Baccalaureus Procuratoris (B. Proc) degree.¹³¹⁷ A few historically disadvantaged universities also offered the graduate Baccalaureus Legum (LLB) degree similarly to what was offered at 'white' universities. However very few African people were able to study for the LLB due to financial constraints.¹³¹⁸ Due to the fact that commercial law firms preferred candidates with a graduate degree,¹³¹⁹ this multiple degree scheme was a barrier to entry by

¹³⁰⁹ Pruitt LR 'No black names on the letterhead? Efficient Discrimination and the South African Legal Profession' (2002) *Michigan Journal of International Law* 563.

¹³¹⁰ Pruitt LR 'No black names on the letterhead? Efficient Discrimination and the South African Legal Profession' (2002) *Michigan Journal of International Law* 563.

¹³¹¹ Broun KS 'Black lawyers under apartheid: The soul of South African law' (2001) 27(2) *Millennium* 33.

¹³¹² Pruitt LR 'No black names on the letterhead? Efficient Discrimination and the South African Legal Profession' (2002) *Michigan Journal of International Law* 564.

¹³¹³ Godfrey S 'The Legal Profession: Transformation and skills' (2009) 126 *The South African Law Journal* 98.

¹³¹⁴ Godfrey S 'The Legal Profession: Transformation and skills' (2009) 126 *The South African Law Journal* 98.

¹³¹⁵ Pruitt LR 'No black names on the letterhead? Efficient Discrimination and the South African Legal Profession' (2002) *Michigan Journal of International Law* 564.

¹³¹⁶ Greenbaum L 'The four year undergraduate LLB: progress and pitfalls' (2010) *Journal for Juridical Science* 7; Godfrey S 'The Legal Profession: Transformation and skills' (2009) 126 *The South African Law Journal* 98.

¹³¹⁷ Pruitt LR 'No black names on the letterhead? Efficient Discrimination and the South African Legal Profession' (2002) *Michigan Journal of International Law* 564.

¹³¹⁸ Pruitt LR 'No black names on the letterhead? Efficient Discrimination and the South African Legal Profession' (2002) *Michigan Journal of International Law* 565.

¹³¹⁹ The reason for commercial law firms preferring candidates with a LLB degree was because until 1989 only

African people to the legal profession,¹³²⁰ as they were unable to afford to study for the LLB.

African attorneys were only allowed to practise law in the 'homelands' and in the township areas as a result of the government policy which required separate trading areas for each racial group.¹³²¹ The legal profession became dominated by white people, particularly white men.¹³²² Black legal practitioners 'had criminal law practices and some were involved in human rights matters, while 'white law firms' monopolised the lucrative branches of legal practice.'¹³²³

Between the 1960s and the mid-80s, the number of black attorneys in South Africa had increased tenfold. In 1962, of the 3000 attorneys who were practising at the time, 13 were African, 26 were Indian and 5 were Coloured.¹³²⁴ By the mid-80s, of the country's 6500 attorneys who practiced at the time, 650 of them were black attorneys, and by 1994, of the country's 8368 attorneys who practised, 1178 were black.¹³²⁵

7.3 THE CURRENT LEGAL PROFESSION

7.3.1 Post-apartheid development of the legal profession

As a result of the introduction of the 1996 Constitution, the situation in the legal profession changed in comparison to what it had been during the years of apartheid. In terms of section 2 of the Constitution, the 'Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid and the obligations imposed by it must be fulfilled.' In terms of section 29 of the Constitution today:

'Everyone has the right

- a) to basic education, including adult basic education, and
- b) to further education, which the state, through reasonable measures must make progressively available and accessible.'

In addition, the Constitution provides South Africa with founding values which were not in existence

candidate attorneys with a LLB degree could appear in magistrate's courts.

¹³²⁰ Pruitt LR 'No black names on the letterhead? Efficient Discrimination and the South African Legal Profession' (2002) *Michigan Journal of International Law* 565.

¹³²¹ Greenbaum L 'The four year undergraduate LLB: progress and pitfalls (2010) *Journal for Juridical Science* 9.

¹³²² Godfrey S 'The Legal Profession: Transformation and skills' (2009) 126 *SALJ* 98.

¹³²³ Godfrey S 'The Legal Profession: Transformation and skills' (2009) 126 *SALJ* 98.

¹³²⁴ Pruitt LR 'No black names on the letterhead? Efficient Discrimination and the South African Legal Profession' (2002) *Michigan Journal of International Law* 562.

¹³²⁵ Pruitt LR 'No black names on the letterhead? Efficient Discrimination and the South African Legal Profession' (2002) *Michigan Journal of International Law* 562.

during the years of apartheid, such as, human dignity,¹³²⁶ equality¹³²⁷ and non-racialism.¹³²⁸ These values aim to remove the features of apartheid which once affected the legal profession by, for example, reducing unequal education opportunities. The reduction of the impact of apartheid on the legal profession remains a challenge facing South Africa.¹³²⁹

Subsequent to the abolition of apartheid, the system of higher education which contributed to the maintenance of apartheid commenced a process of transformation. The importance of the transformation of the higher education system for the transformation of the legal profession cannot be overstated. In 1994 approximately 85% of the legal profession consisted of white attorneys.¹³³⁰ Greenbaum states: 'Beyond dispute was the necessity of addressing the underrepresentation of black people, more particularly of Africans in all areas of the legal profession and of establishing a single affordable academic qualification.'¹³³¹ In 1996 a policy was developed by the National Commission for Higher Education which identified redress of inequalities, equity and reconstruction and development as pivotal issues.¹³³² This report resulted in the enactment of the Higher Education Act 101 of 1997 which established the Council for Higher Education ('CHE').

In 1998, the undergraduate LLB degree was introduced.¹³³³ In 1999 the CHE undertook a review of the institutional landscape of higher education¹³³⁴ and in 2012 a national review of the LLB degree commenced which provided an opportunity for self-reflection on the part of law faculties.¹³³⁵ The review required every law faculty in South Africa to draft a self-assessment report responding to a range of questions, with its focus on the impact of the Constitution on the legal education programme.¹³³⁶ The review process also entailed teams visiting all the law faculties in South Africa to determine whether the information provided in the self-evaluation reports was accurate.¹³³⁷ The accreditation status of each law faculty has been released by the CHE. Law faculties were allowed to select the sequence of content lectured as well as the electives which they would offer to students and allowance was also given to law faculties to develop niche areas within their

¹³²⁶ Section 1(a) of the Constitution of the Republic of South Africa, 1996.

¹³²⁷ Section 1(a) of the Constitution of the Republic of South Africa, 1996. The equality clause contained in section 9 of the Constitution is discussed in paragraph 2.1.

¹³²⁸ Section 1(b) of the Constitution of the Republic of South Africa, 1996; Van der Westhuizen J 'A few reflections on the role of courts, government, profession, universities, the media and civil society in a constitutional democracy' (2008) 2 *African Human Rights Law Journal* 252.

¹³²⁹ Andrews P *Race, inclusiveness and transformation of Legal Education in South Africa* (2017) 230.

¹³³⁰ Greenbaum L 'The four year undergraduate LLB: progress and pitfalls (2010) *Journal for Juridical Science* 8.

¹³³¹ Greenbaum L 'The four year undergraduate LLB: progress and pitfalls (2010) *Journal for Juridical Science* 8.

¹³³² Whitear-Nel N & Freedman W 'A historical review of the development of the post-apartheid South African LLB degree- with particular reference to legal ethics' (2015) 21(2) *Fundamina* 238.

¹³³³ The four-year undergraduate LLB was introduced in terms of the Qualification of Legal Practitioner's Amendment Act 78 of 1997.

¹³³⁴ Whitear-Nel N & Freedman W 'A historical review of the development of the post-apartheid South African LLB degree- with particular reference to legal ethics' (2015) 21(2) *Fundamina* 239.

¹³³⁵ Andrews P *Race, inclusiveness and transformation of Legal Education in South Africa* (2017) 240.

¹³³⁶ Andrews P *Race, inclusiveness and transformation of Legal Education in South Africa* (2017) 241.

¹³³⁷ Andrews P *Race, inclusiveness and transformation of Legal Education in South Africa* (2017) 241.

faculties.¹³³⁸

One of the important consequences of the abolition of apartheid with regard to higher education was that students had the option of enrolling at a university of their choice. White students began to attend the 'historically disadvantaged' universities and black students began attending the traditionally 'white' universities; however, large scale de facto segregation remains.¹³³⁹ The four-year undergraduate LLB was introduced to provide a more affordable manner in which the qualification as a legal practitioner could be obtained to address the historical legacy of under-representivity of blacks, particularly Africans thus transforming the demographics of the legal profession.¹³⁴⁰ However, this objective was not achieved; despite the increase in the diversity of LLB graduates, it in itself did not translate into a significant change in the demographics of the private sector of the legal profession.¹³⁴¹

Transformation of the legal profession is considered to be an important component of South Africa's social, political and economic transformation.¹³⁴² The Planning Unit of the South African Department of Justice published a strategic plan for transformation of the justice system in 1995, known as Justice Vision 2000 in which strategic goals for the law profession were set out.¹³⁴³ One of the express goals of Justice Vision 2000 was to make the legal profession more representative of South African society.¹³⁴⁴ Justice Vision 2000 'called on the legal profession to develop policies that support procedures for entry into all branches of the legal profession, to remove the constraints that make access to the legal profession unduly difficult, to improve professional training programmes and to strengthen the capacity of existing training institutions.'¹³⁴⁵ The next step taken with regard to transformation was to draft a legal services charter known as the Third Draft Legal Services Charter (October 2007).¹³⁴⁶ Challenges which are identified by the Third Draft Legal Services Charter include ensuring that the legal profession is representative insofar as race is concerned.¹³⁴⁷ Subsequent to the drafting of the Third Draft Legal Services Charter, the Law Society of South Africa drafted scorecards to implement the Third Draft Legal Services Charter and

¹³³⁸ Greenbaum L 'The four year undergraduate LLB: progress and pitfalls (2010) *Journal for Juridical Science* 11.

¹³³⁹ Bazana S & Mogotsi OP 'Social identities and racial integration in historically white universities: A literature review of the experiences of black students' (2017) 2 *Transformation in higher education* 11.

¹³⁴⁰ Greenbaum L 'The four year undergraduate LLB: progress and pitfalls (2010) *Journal for Juridical Science* 2.

¹³⁴¹ Whitear-Nel N & Freedman W 'A historical review of the development of the post-apartheid South African LLB degree- with particular reference to legal ethics' (2015) 21(2) *Fundamina* 245. Greenbaum L 'The four year undergraduate LLB: progress and pitfalls (2010) *Journal for Juridical Science* 13.

¹³⁴² Law Society of South Africa 'Key Principles underpinning the transformation of the legal profession' (2017) 2 available at http://www.lssa.org.za/upload/documents/Key_Principles_of_the_LPB.pdf (accessed on 29 August 2018).

¹³⁴³ South African Department of Justice *Justice Vision 2000* (1995) 108.

¹³⁴⁴ South African Department of Justice *Justice Vision 2000* (1995) 110.

¹³⁴⁵ South African Department of Justice *Justice Vision 2000* (1995) 110; Godfrey S 'The Legal Profession: Transformation and skills' (2009) 126 *SALJ* 98.

¹³⁴⁶ Godfrey S 'The Legal Profession: Transformation and skills' (2009) 126 *SALJ* 100.

¹³⁴⁷ Godfrey S 'The Legal Profession: Transformation and skills' (2009) 126 *SALJ* 100.

to measure compliance with transformation within the legal profession.¹³⁴⁸ While these scorecards have been drafted, law firms who choose to be BEE compliant should use the scorecards contained in the B-BBEE Codes,¹³⁴⁹ which similarly aims to achieve transformation.

In May 2016, the Black Lawyers Association ('BLA') held a national general meeting with the theme: 'The culture of racism and its effects on black legal practitioners' where the then Public Protector, Thuli Madonsela ('Madonsela'), stated that after 39 years since the formation of the BLA, the theme was relevant considering the fact that racist utterances regularly take place in South Africa which is unacceptable and that all forms of inequality should be dismantled.¹³⁵⁰

Segregation on the basis of race within the legal profession has not been the only division in the legal profession. In South Africa the legal profession consists of attorneys and advocates. There has also been a division of the profession between attorneys and advocates, which has on occasion raised arguments for the amalgamation of the two groups.

Arguments were raised by the respondent in *General Council of the Bar of South Africa v Van der Spuy*¹³⁵¹ and by Gillespie¹³⁵² in 1999 and 2007, respectively, for and against the fusion of the two groups of attorneys and advocates. Due to the fact that attorneys are regarded as being general practitioners and advocates as being experts, it has been argued that a fusion will result in the loss of the expertise of specialist fields.¹³⁵³ It has also been argued that one legal practitioner as opposed to a legal team would result in a faster legal process.¹³⁵⁴ However in opposition to this argument it has been argued by Wildenboer that in South Africa the delays which are experienced during the legal process are not attributable to the number of legal practitioners who represent a client, but are a result of the problems with the administration of the judicial system in general.¹³⁵⁵ A further argument that has been raised in the *Van der Spuy* case is that the divided system results in double costs being charged to the client.¹³⁵⁶ However, in response to this argument Wildenboer avers that this too fails to carry any weight, because attorneys and advocates carry out different tasks and as a result they charge for different aspects of the legal process.¹³⁵⁷ During 2014, the

¹³⁴⁸ Daya R 'Legal Profession transformation: Law Society of South Africa briefing' (2010). <https://pmg.org.za/committee-meeting/11800/> (accessed on 30 August 2018).

¹³⁴⁹ Legal Education and Development 'Black Economic Empowerment (BEE) Amended Codes of Good Practice Applying the revised codes makes good business sense' (2016) available at http://www.lssalead.org.za/upload/BEE_Simplified_for_Your_PracticeLEAD2016.docx (accessed on 7 October 2018).

¹³⁵⁰ Thebe M 'The culture of racism and its effects on black legal practitioners' (2016) July *De Rebus* 17.

¹³⁵¹ *General Council of the Bar of South Africa v Van der Spuy* 1999 (1) SA 577 (T) 588.

¹³⁵² Gillespie A *The English Legal System* (2007) 242.

¹³⁵³ Gillespie A *The English Legal System* (2007) 242.

¹³⁵⁴ Gillespie A *The English Legal System* (2007) 242.

¹³⁵⁵ Wildenboer L 'The origins of the division of the legal profession in South Africa: A brief overview (2010) 16(2) *Fundamina* 222.

¹³⁵⁶ *General Council of the Bar of South Africa v Van der Spuy* 1999 (1) SA 577 (T) 588.

¹³⁵⁷ Wildenboer L 'The origins of the division of the legal profession in South Africa: A brief overview (2010) 16(2) *Fundamina* 222.

Legal Practice Act 28 of 2014 (the 'Legal Practice Act') was promulgated to regulate both advocates as well as the attorneys' profession. This is a positive development since the same provisions now apply to advocates and attorneys.

7.3.2 The Legal Practice Act 28 of 2014 (Legal Practice Act)

Prior to the enactment of the Legal Practice Act the attorneys' profession was regulated by the Attorneys Act 53 of 1979 (the 'Attorneys Act'), while advocates were regulated by the Admission of Advocates Act 74 of 1964 (the 'Admission of Advocates Act'). The Legal Practice Act repeals the Admission of Advocates Act and the Attorneys Act.¹³⁵⁸ The Legal Practice Act was enacted *inter alia* to 'provide a legislative framework for the transformation and restructuring of the legal profession that embraces the values underpinning the Constitution and ensure that the rule of law is upheld,¹³⁵⁹ to broaden access to justice by putting measures in place that provide equal opportunities for 'all aspirant legal practitioners in order to have a legal profession that broadly reflects the demographics of the Republic'¹³⁶⁰ and to provide for the development of adequate training programmes for legal practitioners.¹³⁶¹ It therefore creates an additional framework for transformation of the profession.

The Legal Practice Act establishes the South African Legal Practice Council.¹³⁶² The Council has become the body that is responsible for the supervision of the qualifications, training and conduct of both attorneys and advocates. The objectives of the Council are *inter alia* to, *facilitate the realisation of the goal of ensuring a transformed legal profession*,¹³⁶³ to promote access to the legal profession in pursuit of the goal that the legal profession reflects the demographics of South Africa,¹³⁶⁴ and to promote high standards of legal education and training.¹³⁶⁵ The fact that the Council aims to ensure a transformed legal profession and to promote access to the legal profession to ensure that the legal profession reflects the demographics of South Africa confirms that the issue of transformation of the profession is central to the Council's activities.

The Council is required to establish provincial councils in each province¹³⁶⁶ and to determine the minimum procedures and conditions for the administration and registration of practical vocational

¹³⁵⁸ Schedule to the Legal Practice Act.

¹³⁵⁹ Section 3(a) of the Legal Practice Act.

¹³⁶⁰ Section 3(b)(iii) of the Legal Practice Act.

¹³⁶¹ Section 3(g) (iii) of the Legal Practice Act.

¹³⁶² Section 4 of the Legal Practice Act.

¹³⁶³ Section 5(a) of the Legal Practice Act.

¹³⁶⁴ Section 5(i) of the Legal Practice Act.

¹³⁶⁵ Section 5(h) of the Legal Practice Act.

¹³⁶⁶ Section 23(1) of the Legal Practice Act.

training of legal practitioners.¹³⁶⁷

Prior to the promulgation of the Legal Practice Act, attorneys were regulated by the provincial law societies which were brought together by the Law Society of South Africa, together with the BLA and the National Association of Democratic Lawyers who were also members of the Law Society of South Africa.¹³⁶⁸ Prior to the promulgation of the Legal Practice Act the regulatory bodies for advocates were the Bar Councils.¹³⁶⁹ As a result of the Legal Practice Act, the Law Society of South Africa and the provincial law societies ceased to exist.¹³⁷⁰ A National Forum has been established by the Legal Practice Act to regulate the legal profession.¹³⁷¹ For the first time legal practitioners in South Africa are governed by a single national regulatory body.¹³⁷² This implies that one set of rules applies to both attorneys and advocates. The Legal Practice Act does not distinguish between 'attorneys'¹³⁷³ or 'advocates',¹³⁷⁴ but includes both groups in the meaning of 'legal practitioners'. The Legal Practice Act applies to all legal practitioners as well as to all candidate legal practitioners.¹³⁷⁵ In terms of the Legal Practice Act, a legal practitioner is defined as an advocate or attorney admitted and enrolled as such in terms of sections 24 and 30 [of the Legal Practice Act] respectively.¹³⁷⁶

Traditionally advocates have been regarded as specialists, responsible for the provision of expert advice on legal matters,¹³⁷⁷ while attorneys on the other hand have been regarded as being responsible for preparatory and administrative work in relation to litigation.¹³⁷⁸ There have been a number of other aspects which also distinguish an attorney from an advocate and some of which have been removed as a consequence of the enactment of the Legal Practice Act. The first difference was that prior to the enactment of the Legal Practice Act an attorney always had direct contact with a client while an advocate had no such contact; however in terms of the Legal Practice Act an advocate may render legal services upon receipt of a request directly from a member of the

¹³⁶⁷ Section 27(1) of the Legal Practice Act.

¹³⁶⁸ The members of the then Law Society of South Africa were the Cape Law Society, the KwaZulu Natal Law Society, the Law Society of the Free State, the Law Society of the Northern Provinces, the BLA and the National Association of Democratic Lawyers.

¹³⁶⁹ Godfrey S 'The Legal Profession: Transformation and skills' (2009) 126 *SALJ* 94.

¹³⁷⁰ Schedule to Legal Practice Act.

¹³⁷¹ Section 96(1) of the Legal Practice Act

¹³⁷² Law society website 'History of the Legal Practice Act' available at www.lssa.org.za (accessed on 29 June 2018).

¹³⁷³ Section 1 of the Legal Practice Act defines an attorney as a legal practitioner who is admitted and enrolled as such under the Legal Practice Act.

¹³⁷⁴ Section 1 of the Legal Practice Act defines an advocate as a legal practitioner who is admitted and enrolled as such under the Legal Practice Act.

¹³⁷⁵ Section 2 of the Legal Practice Act.

¹³⁷⁶ Section 1 of the Legal Practice Act.

¹³⁷⁷ The Law Society of South Africa 'Career Guide to the Legal Profession' (2016) available at www.justice.gov.za (accessed on 29 June 2018).

¹³⁷⁸ Wildenboer L 'The origins of the division of the legal profession in South Africa: A brief overview' (2010) 16(2) *Fundamina* 200.

public.¹³⁷⁹ Secondly, prior to the Legal Practice Act, an attorney was required to have a trust account while no such requirement was imposed on an advocate; however today such obligation rests on an advocate as well.¹³⁸⁰ The third difference between an attorney and an advocate was that prior to the enactment of the Legal Practice Act and even prior to the Right of Appearance in Courts Act 62 of 1995, advocates had the exclusive right to appear in the High Court, the Supreme Court of Appeal and the Constitutional Court. However in terms of the Legal Practice Act attorneys are able to apply to the Registrar of the Provincial Division of the High Court in which they were admitted to acquire such a right of appearance¹³⁸¹ and once this right of appearance is provided, the attorney will have the right to appear in any court in South Africa.¹³⁸² A further difference between an attorney and an advocate was that prior to the enactment of the Legal Practice Act an attorney was the one who was required to recover all fees and disbursements from the client while advocates were not allowed to have any direct financial dealings with the client; however, as a result of the Legal Practice Act now authorising advocates to render services to members of the public directly this distinction between attorneys and advocates has fallen away.¹³⁸³

The final distinction between an attorney and an advocate which has been retained by the Legal Practice Act is that an attorney has the option of practising with other directors or partners,¹³⁸⁴ while an advocate practises for his or her own account and does not have the option of practising alongside other advocates.¹³⁸⁵ In terms of the Legal Practice Act a legal practitioner may apply to the Council to convert his or her enrolment as an attorney to that of an advocate, and *vice versa*.¹³⁸⁶

The fact that the Legal Practice Act aims to provide a legislative framework for transforming the legal profession and aims to bring about a legal profession that reflects the demographics of South Africa shows that it creates an additional framework for transforming the profession.

7.4 THE LEGAL PROFESSION: THE PRIVATE SECTOR

The legal profession consists of two sectors, the private sector and the public sector. The narrow definition of the private sector legal profession consists of attorneys and advocates, while the

¹³⁷⁹ Section 34(2)(a)(ii) of the Legal Practice Act.

¹³⁸⁰ Provision 36.1 of the National Forum of the Legal Profession Legal Practice Act: Code of Conduct for legal practitioners, candidate legal practitioners and juristic entities *GN40610* of 10 February 2017; Wildenboer L 'The origins of the division of the legal profession in South Africa: A brief overview (2010) 16(2) *Fundamina* 200.

¹³⁸¹ Section 25(3) of the Legal Practice Act.

¹³⁸² Section 25(1) of the Legal Practice Act.

¹³⁸³ Section 34(2)(a)(ii) of the Legal Practice Act.

¹³⁸⁴ Section 34(5)(b) of the Legal Practice Act.

¹³⁸⁵ Section 34(6) of the Legal Practice Act.

¹³⁸⁶ Section 32(1)(a) of the Legal Practice Act.

public sector definition refers to prosecutors, state attorneys, magistrates and judges.¹³⁸⁷ The wider definition of the private sector includes legal advisers.¹³⁸⁸ This thesis is limited to a discussion of the challenges experienced by black professional employees working within the private sector.¹³⁸⁹ The narrow definition of the private sector legal profession will be used which excludes legal advisers, as a result of the fact that in most cases legal advisers work alongside other professionals in the same enterprise. In the legal profession only one category of employer falls within the private sector, namely law firms.¹³⁹⁰ Law firms are the employers of attorneys, but they are not the employers of advocates.¹³⁹¹ An attorney's employer is the law firm that employs the attorney for the duration of his or her period of employment.

Racial transformation should take place within the legal profession. Black attorneys experience racial discrimination at the behest of their employers.¹³⁹²

It has been argued that 'as long as the upper echelons of the profession remain occupied by white men who do not recognise the problem, it will be very difficult for transformation to be taken seriously and to advance.'¹³⁹³ A participant in the research conducted by the Centre for Applied Legal Studies¹³⁹⁴ stated that she did not believe that she would see real transformation in her lifetime, that not enough is being done to transform the profession, and that skills-transfer and training is inadequate.¹³⁹⁵ It was also noted that 'interventions in support of transformation will not come from the law firms, there is no commitment, there are no penalties, no negative press, no accountability.'¹³⁹⁶ Legal practitioners have expressed doubt about the possibility of meaningful transformation.¹³⁹⁷ Despite this doubt expressed by legal practitioners, transformation of the legal profession must take place. It is imperative that directors and partners of law firms and other senior figures in the legal profession understand the importance of employment equity and BEE, to ensure that some of the challenges faced by black professional employees are reduced. The section of this chapter which follows consists of a discussion on the experiences of attorneys insofar as racial discrimination, affirmative action and BEE is concerned, as reported in the

¹³⁸⁷ Godfrey S 'The Legal Profession: Transformation and skills' (2009) 126 *SALJ* 92.

¹³⁸⁸ Godfrey S 'The Legal Profession: Transformation and skills' (2009) 126 *SALJ* 92.

¹³⁸⁹ See para 1.1.3 above.

¹³⁹⁰ Law firms are businesses who engage in the practice of law. Due to the fact that legal advisors merely provide advice as opposed to practising law, legal advisors are not law firms.

¹³⁹¹ In terms of section 34(6) of the Legal Practice Act advocates may only practise for their own account, as part of a law clinic, as part of Legal Aid or in the full-time employment of the state. As a result of the aforementioned, a law firm cannot be the employer of an advocate.

¹³⁹² Centre for Applied Legal Studies *Transformation of the Legal Profession* (2014) 38.

¹³⁹³ Manyathi-Jele N 'Report: Transformation of the legal profession' (2014) *De Rebus* 21.

¹³⁹⁴ The findings of the Centre for Applied Legal Studies were based on discussion groups, individual interviews and electronic surveys. The individual interviews comprised of 15 one-on-one interviews. As far as the electronic surveys are concerned, 95 respondents responded of which after analysis, the total sample size was 62.

¹³⁹⁵ Centre for Applied Legal Studies *Transformation of the Legal Profession* (2014) 52.

¹³⁹⁶ Centre for Applied Legal Studies *Transformation of the Legal Profession* (2014) 53.

¹³⁹⁷ Manyathi-Jele N 'Report: Transformation of the legal profession' (2014) *De Rebus* 21.

literature on the lack of transformation in the profession.

7.5 APPLYING THE EEA TO THE LEGAL PROFESSION

7.5.1 Main parts of the EEA

The EEA is divided into two main parts.¹³⁹⁸ Chapter 2 of the EEA, governing the elimination and prohibition of unfair discrimination, applies to all employers and to all employees.¹³⁹⁹ Chapter 3 of the EEA contains the provisions relating to affirmative action which only apply to designated employers and to people from designated groups.¹⁴⁰⁰ This section of the chapter discusses the legal profession with reference to unfair discrimination and affirmative action.¹⁴⁰¹ This will be discussed in order to contextualise the findings of chapters 2 to 4 in the legal profession. Unfair discrimination and affirmative action in the legal profession will be evaluated through the lens of critical race theory to determine whether the EEA is an appropriate vehicle to address the challenges faced by black attorneys in the legal profession.

7.5.2 Unfair Discrimination in the Legal Profession

Since discrimination¹⁴⁰² and unfairness¹⁴⁰³ of discrimination are independent concepts, they will be discussed separately below.

7.5.2.1 Discrimination

The experiences of racial discrimination which black professional employees are subjected to will be discussed below in order to contextualise the findings uncovered in chapters 2 and 4. This part of the chapter consists of a discussion of direct discrimination and indirect discrimination in the legal profession. This will be done with a view to illustrating whether the EEA is an appropriate vehicle to address the challenges which black attorneys face in the legal profession.

7.5.2.1.1 Direct Discrimination in the Legal Profession

Disparate treatment of people from different races will amount to direct discrimination if race is the

¹³⁹⁸ See para 2.2.1 above.

¹³⁹⁹ See para 2.2.1 above.

¹⁴⁰⁰ See para 2.2.1 above.

¹⁴⁰¹ The headings in this part of the chapter were deliberately kept as close as possible to those of chapters 2 and 3 of this thesis, for ease of reference.

¹⁴⁰² See para 2.2.2.1 above.

¹⁴⁰³ See para 2.2.2.2 above.

reason for the disparate treatment.¹⁴⁰⁴ Black legal practitioners have reported that the legal profession is far from transformed. There are some instances of direct discrimination present within the legal profession.

Black legal practitioners have reported being faced with attitudes and preconceived notions that assumed blacks are lazy, incompetent or token appointees without substantive skills and knowledge.¹⁴⁰⁵ The stories of black professionals show that due to racial discrimination they are required to prove themselves, to show that they can do the work, or are required to work harder and longer than their white colleagues in order to receive recognition and in order to be respected by their leaders.¹⁴⁰⁶ This implies that at times the presumption of intelligence does not apply to black professionals.¹⁴⁰⁷ Legal practitioners in senior positions within law firms question the intelligence or prior experience of black legal practitioners.¹⁴⁰⁸ Some black professionals are of the opinion that they are generally viewed as being unequal until such time that these black legal practitioners prove otherwise.¹⁴⁰⁹ According to the stories of black legal practitioners the opposite is true when it comes to white legal practitioners.¹⁴¹⁰ Some black legal practitioners are of the opinion that their white colleagues are always presumed to be capable and competent until such time as or unless they prove otherwise.¹⁴¹¹

A mid-level legal practitioner mentioned that 'black candidate attorneys need to work extra hard and understand that the playing field is not level'.¹⁴¹² A black legal practitioner also stated that 'these young professionals should not be naive about the reality of who stays and who departs after articles'.¹⁴¹³ According to the same black legal practitioner: 'as a general rule, the majority of white candidate attorneys obtain offers and stay while the majority of black candidate attorneys depart, because they are not invited to continue with the large firms once they have completed their articles'.¹⁴¹⁴ Instances where employer law firms are required to select one or more from a number of candidate attorneys and black candidate attorneys are not retained by the firms as a

¹⁴⁰⁴ See para 2.2.2.1 above.

¹⁴⁰⁵ Matlala, the former president of the Black Lawyers Association and the Law Society of the Northern Province, is reported to have mentioned that 'apartheid damaged South African citizens, both white and black psychologically, making society believe that white people are better than black people.' Manyathi-Jele N 'Report: Transformation of the legal profession' (2014) *De Rebus* 20.

¹⁴⁰⁶ Centre for Applied Legal Studies *Transformation of the Legal Profession* (2014) 33.

¹⁴⁰⁷ Manyathi-Jele N 'Report: Transformation of the legal profession' (2014) *De Rebus* 19; Centre for Applied Legal Studies *Transformation of the Legal Profession* (2014) 44.

¹⁴⁰⁸ Manyathi-Jele N 'Report: Transformation of the legal profession' (2014) *De Rebus* 20.

¹⁴⁰⁹ Centre for Applied Legal Studies *Transformation of the Legal Profession* (2014) 44.

¹⁴¹⁰ Manyathi-Jele N 'Report: Transformation of the legal profession' (2014) *De Rebus* 20; Centre for Applied Legal Studies *Transformation of the Legal Profession* (2014) 44.

¹⁴¹¹ Centre for Applied Legal Studies *Transformation of the Legal Profession* (2014) 44. Instances where white advocates are preferred over black advocates also continue to take place. Attorneys tend to brief advocates who fall within the same race group as what they do.

¹⁴¹² Centre for Applied Legal Studies *Transformation of the Legal Profession* (2014) 45.

¹⁴¹³ Manyathi-Jele N 'Report: Transformation of the legal profession' (2014) *De Rebus* 20; Centre for Applied Legal Studies *Transformation of the Legal Profession* (2014) 45.

¹⁴¹⁴ Centre for Applied Legal Studies *Transformation of the Legal Profession* (2014) 45.

result of their race amounts to direct discrimination.

A black legal practitioner stated that 'a mistake made by black colleagues seems to be of far greater significance and to have greater consequences. Similar mistakes made by white colleagues are shrugged off as an innocent mistake'.¹⁴¹⁵ This position suggests that when a white professional makes a mistake it is viewed as if it happened as a result of an error of judgment.¹⁴¹⁶ When a black legal practitioner makes a mistake on the other hand, this one mistake 'confirms that black colleagues are on the whole, unable to do the work'.¹⁴¹⁷ Negativity towards black attorneys in comparison to their white counterparts is not only experienced by black attorneys in South Africa,¹⁴¹⁸ but also in the United States. Lorraine Mc Gowan, a member of the legal profession in the United States who spoke at the internal affiliates meeting held by the National Bar Association (NBA), the Law Society of South Africa (LSSA) and the BLA in May 2015, provided an example of negativity towards black attorneys in the United States.¹⁴¹⁹

Racial discrimination is a factor when work is allocated to legal practitioners.¹⁴²⁰ It is for this reason that change should come from the persons who occupy senior positions at law firms. In order to ensure that transformation takes place law firms must be deliberate when it comes to the allocation of work.

Racial discrimination is also present when it comes to the types of work which black attorneys obtain in comparison to their white counterparts. It has been reported that 'the more lucrative commercial fields are skewed towards white attorneys and black attorneys tend to be found in the less lucrative fields such as criminal law and labour law'.¹⁴²¹ This has contributed to the growth of white law firms that are in certain instances able to make alliances with international law firms.¹⁴²² Law firms should expose black attorneys to all forms of legal work.¹⁴²³

The stories of black female attorneys have revealed that 'window dressing'¹⁴²⁴ takes place in law

¹⁴¹⁵ Centre for Applied Legal Studies *Transformation of the Legal Profession* (2014) 46.

¹⁴¹⁶ Centre for Applied Legal Studies *Transformation of the Legal Profession* (2014) 46.

¹⁴¹⁷ Centre for Applied Legal Studies *Transformation of the Legal Profession* (2014) 46.

¹⁴¹⁸ Manyathi-Jele N 'Report: Transformation of the legal profession' (2014) *De Rebus* 21.

¹⁴¹⁹ Two documents which contained spelling errors were circulated to 100 partners of large law firms where the one document was drafted by a black person and the other a white person. The comments which were made to the white person were motivational and he was welcomed into the profession and it was merely suggested that he do some reading in order to improve his language while the black person was informed that practice was not for him due to the fact that his poor writing was unacceptable. As reported by Manyathi-Jele N 'Lack of advancement of black and female lawyers in the spotlight' (2015) July *De Rebus* 13.

¹⁴²⁰ Manyathi-Jele N 'Lack of advancement of black and female lawyers in the spotlight' (2015) July *De Rebus* 13.

¹⁴²¹ Greenbaum L 'The four year undergraduate LLB: progress and pitfalls (2010) *Journal for Juridical Science* 9.

¹⁴²² Manyathi-Jele N 'Lack of advancement of black and female lawyers in the spotlight' (2015) July *De Rebus* 13.

¹⁴²³ South African Government 'Transformation of the Legal Profession: Discussion Paper' available at <http://www.gov.za/documents/transformation-legal-profession-discussion-paper> (accessed on 22 August 2018).

¹⁴²⁴ Window dressing is where an employer provides the impression that an employee is or will be included in work,

firms.¹⁴²⁵ This amounts to direct discrimination, because the attorneys involved are included in legal matters as a result of their gender and race, however are not always provided with the opportunity to demonstrate their skills.

When attorneys are believed to be incompetent or token appointees without substantive skills and knowledge or are required to work harder or are not retained by their employers as was discussed above, this will amount to direct discrimination if race is the reason for the disparate treatment.

Madonsela¹⁴²⁶ confirms that 'structural racism exists in the legal profession.'¹⁴²⁷ This, together with the stories told by black legal practitioners show that there is a slow pace of racial transformation in the legal profession. These experiences of direct discrimination continue despite the provisions of the EEA prohibiting unfair discrimination. This shows that the measures contained in the EEA which aim to eliminate unfair discrimination do not seem to be a sufficient deterrent to eliminate direct racial discrimination. This is because the law alone is unable to eradicate racial discrimination entirely.¹⁴²⁸

7.5.2.1.2 Indirect Discrimination in the Legal Profession

Instances of indirect discrimination have also been reported by some black legal practitioners. Despite the fact that completion of studies in law may result in well-paying opportunities, black law graduates are in the unfortunate position where they have huge loans and enormous family obligations.¹⁴²⁹ The precarious financial position which some black law graduates find themselves in is compounded by their inability to obtain positions to serve as candidate attorneys as a result of them not having their own motor vehicle and driver's licences.¹⁴³⁰ The requirement that law firms expect candidate attorneys to have a driver's licence and their own motor vehicle may be a form of indirect racial discrimination due to the fact that as a result of this requirement people from designated groups who are unable to afford their own motor vehicles are automatically excluded from those candidates who are eligible to apply for such positions. The requirement to have a motor vehicle and driver's licence is one which has been created by white people. This requirement may seem reasonable, because white people consider whiteness to be the norm.¹⁴³¹

however they are not actually allowed to participate in the work.

¹⁴²⁵ Manyathi-Jele N 'Lack of advancement of black and female lawyers in the spotlight' (2015) July *De Rebus* 20.

¹⁴²⁶ Thuli Madonsela was the previous Public Protector for the period 19 October 2009 to 14 October 2016.

¹⁴²⁷ As reported by Thebe M 'The culture of racism and its effects on black legal practitioners' (2016) July *Derebus* 17. This statement was made at the Black Lawyer's Association's national general meeting on 21 May 2016.

¹⁴²⁸ See para 6.3 above.

¹⁴²⁹ Centre for Applied Legal Studies *Transformation of the Legal Profession* (2014) 60.

¹⁴³⁰ Centre for Applied Legal Studies *Transformation of the Legal Profession* (2014) 60.

¹⁴³¹ See para 6.3.1 above.

Exclusion and prejudice may not always be intentional or even conscious.¹⁴³² The prevailing corporate culture at a law firm may also be a source of discrimination.¹⁴³³ The corporate culture may not only be a form of indirect discrimination,¹⁴³⁴ but may also be an employment barrier which adversely affects people from designated groups.¹⁴³⁵ Black legal practitioners have told stories of what they viewed as being forms of sub-conscious prejudice in the legal profession which falls within the racial context. These include playing golf as the manner in which legal practitioners socialise as well as social conversations being about rugby or cricket which on a national level are generally historically white sports in South Africa.¹⁴³⁶ For most black South Africans soccer (football) is their favourite sport. A legal practitioner raised the longstanding practice where white males watch rugby, and told a story of an incident where black associates were only invited to the rugby as an after thought, which served to confirm that there was alienation on the basis of race.¹⁴³⁷ In circumstances where an apparently neutral criterion such as the corporate culture within an enterprise has a disproportionate impact on black people and cannot be justifiable in terms of objective employment related criteria, the corporate culture will be the source of indirect discrimination.¹⁴³⁸

If legal practitioners spend time together outside of working hours it is more likely that they will have a more compatible relationship during the week.¹⁴³⁹ This is seen as an unintended, but real, barrier to development for those who do not form part of these groups.¹⁴⁴⁰ Black people have one of three options in the event of such circumstances of latent discrimination: they can alter their own behaviour and not be offended by the discrimination, or they can attempt to assimilate the dominant culture, or they can 'challenge the institutional culture that perpetuates white culture with possible consequences of alienation and eventually leaving the profession'.¹⁴⁴¹ The fact that these options have been advanced confirms the fact that whiteness is considered to be the norm¹⁴⁴² where black employees are required to fit into white cultures.

Black attorneys may benefit from sections 5 and 6 of the EEA to a certain extent; however, the experiences of indirect discrimination which black attorneys are subjected to, continue despite the

¹⁴³² See para 2.2.2.1.2 above. Centre for Applied Legal Studies *Transformation of the Legal Profession* (2014) 36.

¹⁴³³ See para 2.2.2.1.2 above.

¹⁴³⁴ See para 4.2 above.

¹⁴³⁵ See para 4.3.1 above.

¹⁴³⁶ Centre for Applied Legal Studies *Transformation of the Legal Profession* (2014) 37.

¹⁴³⁷ Centre for Applied Legal Studies *Transformation of the Legal Profession* (2014) 38. Another participant of the same study stated that some black advocates feel that they are required to show an interest in these sports and in other interests of their white colleagues in order to participate in conversations, however the same is not done for them by their white colleagues.

¹⁴³⁸ See para 4.2 above. The situation in which the corporate culture can amount to an employment barrier is discussed in para 7.5.3.2.1 below.

¹⁴³⁹ Centre for Applied Legal Studies *Transformation of the Legal Profession* (2014) 38.

¹⁴⁴⁰ Centre for Applied Legal Studies *Transformation of the Legal Profession* (2014) 38.

¹⁴⁴¹ Centre for Applied Legal Studies *Transformation of the Legal Profession* (2014) 36.

¹⁴⁴² See para 6.3.1 above.

provisions of the EEA prohibiting unfair discrimination. This shows that insofar as the measures to deal with unfair discrimination are concerned, it does not seem to be a sufficient deterrent to deal with indirect racial discrimination. This is because systems and legislation, such as the EEA, are unable to rectify racial injustices.¹⁴⁴³

7.5.2.2 Unfairness

After discrimination is proved to be present, it is necessary to determine whether the discrimination is unfair.¹⁴⁴⁴ When an attorney proves that discrimination is based on a listed ground, such as race, discrimination is presumed to be unfair.¹⁴⁴⁵ Where a claim of discrimination is raised by an attorney on the ground of race, the onus will rest on the employer in terms of section 11(1) of the EEA to prove that such discrimination did not take place; or is rational and not unfair, or is otherwise justifiable.¹⁴⁴⁶ For this reason the attorney will have to specify the ground on which the discrimination took place in order to determine on whom the onus will rest. In practice white law firms would be in an advantageous position having to apply the provisions of the EEA since the EEA has been drafted from a white perspective.¹⁴⁴⁷ As a result of the EEA being drafted from a white perspective,¹⁴⁴⁸ the EEA is not an appropriate vehicle to eliminate racial discrimination.

The aforementioned discussion has established that the provisions contained in the EEA which govern unfair discrimination are not a sufficient deterrent to eliminate unfair discrimination. The EEA also governs the provisions governing affirmative action. Affirmative action in the legal profession is discussed below in order to contextualise the findings in chapter 3 and to determine whether the EEA is an appropriate vehicle to address the challenges faced by black attorneys in the legal profession and achieve racial transformation of the profession.

7.5.3 Affirmative Action

7.5.3.1 Scope of application of affirmative action measures

Only designated employers are required to implement affirmative action measures.¹⁴⁴⁹ This implies that in the event of law firms not falling within the definition of a designated employer, they will not be required to implement any affirmative action measures in terms of the EEA. Statistics obtained

¹⁴⁴³ See para 6.3.3 above.

¹⁴⁴⁴ See para 2.2.2.2 above.

¹⁴⁴⁵ See para 2.2.2.2 above.

¹⁴⁴⁶ See para 2.2.2.2 above.

¹⁴⁴⁷ See para 6.3.3 above.

¹⁴⁴⁸ See para 6.3.1 above.

¹⁴⁴⁹ See para 2.2.1 above.

in 2016 showing the number of law firms who have employed a specific number of attorneys, are set out below.

Table 12: Types of firms: data obtained from the LSSA¹⁴⁵⁰

Types of firms	Number of such firms
Sole practitioners	10 182
2 to 9 attorneys	2 084
10 to 19 attorneys	75
20 to 49 attorneys	15
More than 50 attorneys	17

The statistics above show that the majority of law firms employ less than 50 attorneys. While it is acknowledged that the statistics above reflect the number of attorneys employed by law firms and do not include the administrative staff which law firms employ, it is submitted that even if up to 3 administrative staff is employed for every attorney, the majority of law firms would be employing less than 50 employees thereby falling outside the definition of a designated employer, unless they are appointed as designated employers in terms of a collective agreement.¹⁴⁵¹ A law firm would not be appointed as a designated employer in terms of a collective agreement, because attorneys are not represented by trade unions. Attorneys who are employed by law firms that are not designated employers will not be afforded the benefits which the affirmative action provisions afford employees. It is for this reason that it is recommended that the meaning of a designated employer be extended. It must however be acknowledged that attorneys who are employed by law firms who are designated employers may find it difficult to engage with their employers during the consultation phase as a result of attorneys not being represented by trade unions.¹⁴⁵²

Black attorneys' experiences of affirmative action will be discussed below in order to contextualise the findings uncovered in chapters 3 and 4. The definition of 'affirmative action measures' reveals that affirmative action measures have two objectives: first, to ensure that there are equal opportunities available for members of designated groups who are suitably qualified; and, secondly, to ensure equitable representation.¹⁴⁵³ The discussion of affirmative action in the legal profession that follows will be structured with reference to the aforementioned two objectives. This discussion on affirmative action will only be relevant to law firms who fall within the meaning of

¹⁴⁵⁰ The Law Society of South Africa 'LSSA website - About us - Statistics for the attorneys' profession' available at <http://www.lssa.org.za> (accessed 31 October 2019).

¹⁴⁵¹ See para 2.2.1 above. A collective agreement is a written agreement concluded by one or more trade unions on the one hand and one or more employers or employers organisations on the other which concerns any matter of mutual interest between the parties to the agreement.

¹⁴⁵² See para 3.3.1 above.

¹⁴⁵³ See para 3.1 above.

designated employers.

7.5.3.2 Equal opportunities

7.5.3.2.1 Measures to identify and eliminate employment barriers

In the research on the legal profession conducted by the Centre for Applied Legal Studies it was stated that

'transformation is not a case of facilitating the appointment of less qualified black lawyers to senior positions, rather it is about the removal of barriers that impede talented lawyers from opportunities to develop and gain skills, experience and knowledge within the legal profession, because they are black, women, lesbian, living with a disability or disease or in some way non-compliant with the dominant homogenous culture.'¹⁴⁵⁴

The affirmative action measures which designated employers are required to implement requires black employees to receive equal opportunities in circumstances where the black employees are suitably qualified.¹⁴⁵⁵

Barriers to employment equity exist within the legal profession. The stories of black legal practitioners show that these barriers include the corporate culture of law firms. This includes cultural alienation where black attorneys face 'invisible' rules which are determined by social interaction of attorneys outside work such as sport and engagement during weekends.¹⁴⁵⁶ The social interaction of attorneys outside work hours creates alienating cultural practices.¹⁴⁵⁷

There is a historically white culture within the legal profession¹⁴⁵⁸ Networking is important within the legal profession. The support which is obtained from networking provides certain advantages when it comes to career progression.¹⁴⁵⁹ Work is obtained and retained as a result of networking¹⁴⁶⁰ making it 'important to become familiar with the way in which socialising should take place'.¹⁴⁶¹ A black legal practitioner, who participated in the study conducted by the Centre for Applied Legal Studies, stated that legal practitioners who are attuned to the way in which socialising should take

¹⁴⁵⁴ Centre for Applied Legal Studies *Transformation of the Legal Profession* (2014) 9.

¹⁴⁵⁵ See para 3.2.4 above.

¹⁴⁵⁶ See para 4.3.1 above. Centre for Applied Legal Studies *Transformation of the Legal Profession* (2014) 10.

¹⁴⁵⁷ Centre for Applied Legal Studies *Transformation of the Legal Profession* (2014) 10.

¹⁴⁵⁸ Centre for Applied Legal Studies *Transformation of the Legal Profession* (2014) 41.

¹⁴⁵⁹ Centre for Applied Legal Studies *Transformation of the Legal Profession* (2014) 41.

¹⁴⁶⁰ Manyathi-Jele N 'Report: Transformation of the legal profession' (2014) *Derebus* 21.

¹⁴⁶¹ Centre for Applied Legal Studies *Transformation of the Legal Profession* (2014) 41.

place, mostly white male legal practitioners, are in an advantageous position as a result.¹⁴⁶² It was also stated that 'success is therefore easier for those who fit the culture'.¹⁴⁶³ This culture is problematic, because its preservation really amounts to an acceptance of whiteness as being the norm.¹⁴⁶⁴

When speaking about the networking that takes place among white legal practitioners and the work which is obtained as a result, a legal practitioner reported that 'white legal practitioners look after the interests of other white legal practitioners often subconsciously'.¹⁴⁶⁵ As a result of the social interaction of attorneys outside work creating alienating cultural practices and work being obtained by way of this social interaction these circumstances would amount to social closure practices since it would have the effect of limiting the advancement of people from designated groups.¹⁴⁶⁶

Barriers also include limited connections to established members of the profession which are important when entering the profession. An additional barrier is racial discrimination where black women are reportedly referred to as 'window dressing' which speaks to the person's race and gender. This is a barrier because the black women are not provided with the opportunity to demonstrate their experience and skills. This is also a direct form of racial and gender discrimination since these black females are included in legal matters as a result of their race and gender.¹⁴⁶⁷

Many employers at the law firms with more than 50 employees and therefore designated employers spend funds on evaluations and surveys to be completed by employees. The purposes of these evaluations and surveys are twofold. First, they serve the purpose of determining what the problems are which employees face; and secondly, they aim to identify the barriers to employment equity at workplaces. However, some employees have questioned the willingness of these law firms to 'take matters beyond the information-gathering stage'.¹⁴⁶⁸ Such efforts made by employer law firms which fail to translate into practice or to correct the status quo become pointless.¹⁴⁶⁹ The fact that law firms are conducting evaluations and surveys confirms that employer law firms are complying with their obligation to conduct an analysis, as required by the EEA.¹⁴⁷⁰ The fact that employers are spending funds on gathering information which fail to translate into practice confirms that while the analyses which law firms are conducting may not be problematic as they are doing so by way of evaluations and surveys, the translation of the affirmative action measures in terms of

¹⁴⁶² Centre for Applied Legal Studies *Transformation of the Legal Profession* (2014) 41.

¹⁴⁶³ Centre for Applied Legal Studies *Transformation of the Legal Profession* (2014) 42.

¹⁴⁶⁴ See para 6.3.1 above.

¹⁴⁶⁵ Centre for Applied Legal Studies *Transformation of the Legal Profession* (2014) 41.

¹⁴⁶⁶ See para 4.3.1 above.

¹⁴⁶⁷ See para 2.2.2.1.1 above.

¹⁴⁶⁸ Centre for Applied Legal Studies *Transformation of the Legal Profession* (2014) 53.

¹⁴⁶⁹ Centre for Applied Legal Studies *Transformation of the Legal Profession* (2014) 53.

¹⁴⁷⁰ See para 3.3.2 above.

the employment equity plan into firm policies may be problematic. This confirms Louw's view that the affirmative action measures framework contained in the EEA lend themselves to embracing impersonal tick-boxes.¹⁴⁷¹ Recommendations were made in chapter 3 to provide employees as a collective with an opportunity to conduct their own analysis¹⁴⁷² and to provide employees as a collective with an opportunity to report to the Director-General. However, it has been illustrated that compliance with EEA provisions is not a problem, and thus the problem lies with the implementation thereof, therefore these recommendations will not assist black professional employees with racial transformation.

The provisions contained in the EEA and in the Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans are important in providing guidelines to designated employers to comply with their procedural duties and are thus used by law firms who fall within the meaning of designated employers. These provisions have been drafted in a manner that caters more for employees who are represented by trade unions.¹⁴⁷³ This would be a challenge for attorneys who are not represented by trade unions, especially during the consultation phase where their voices should be heard. The EEA with its focus on unionised employees makes it an unsuitable vehicle for transformation in the legal profession.

Those in leadership positions in law firms should set the tone when it comes to transformation and diversity.¹⁴⁷⁴ It has been reported that in circumstances where the leadership views transformation in a positive light, this has a noticeable effect on the working environment of law firms.¹⁴⁷⁵

7.5.3.2.2 Measures to retain and develop people from designated groups

In terms of section 15(2)(d)(ii) of the EEA, the affirmative action measures which designated employers are required to implement must include measures to retain and develop people from designated groups.¹⁴⁷⁶ It is important to understand what the reasons are for black attorneys not being retained by law firms.

Pruitt asks the question: Why is black attrition at white firms so high and why, in a legal environment that offers economic incentives to integrate, are firms not doing what is required in order to achieve integration by retaining black attorneys? One of the reasons for black attrition, as provided by black attorneys who participated in Pruitt's study consists of factors such as low

¹⁴⁷¹ See para 3.3.3 above.

¹⁴⁷² See para 3.3.2 above.

¹⁴⁷³ See para 3.3.2 above.

¹⁴⁷⁴ Centre for Applied Legal Studies *Transformation of the Legal Profession* (2014) 57.

¹⁴⁷⁵ See para 3.2.2 above. Centre for Applied Legal Studies *Transformation of the Legal Profession* (2014) 58.

¹⁴⁷⁶ See para 3.2.5 above.

salaries, professional isolation and cultural alienation in these law firms.¹⁴⁷⁷ This is 'caused partially by the racist attitudes of certain individuals and partially as a consequence of institutional structures which permit such biases to go undetected and as a result undeterred'.¹⁴⁷⁸ This is because systems, as a result of its structures, language and cultures are unable to rectify injustices of a racial nature.¹⁴⁷⁹

Black attorneys are reported to leave law firms as a result of perceptions of lack of opportunities, which is often linked to lesser training and mentoring which they receive in comparison to their white colleagues, as well as due to the belief of black attorneys that they will never be accepted as equal colleagues.¹⁴⁸⁰ Institutional structures should be changed in order for employers who support racial transformation in law firms to exert greater control over the training and mentoring of black attorneys.¹⁴⁸¹ The change in institutional structures should focus on curbing individuals acting on their preferences to train white attorneys.¹⁴⁸² Efforts at greater internal oversight of skills transfer may nevertheless be futile, because those averse to mentoring and training black attorneys are unlikely to be influenced greatly by oversight of a committee or a designated individual seeking to enforce the firm's policy of skills transfer to, and retention and promotion of black attorneys.¹⁴⁸³ For this reason it is important not only to change the institutional structures, but also for black attorneys to take responsibility for their own training and mentoring by reporting those responsible for their training and mentoring, but fail to do so. It is however doubtful whether such reporting by employees would be effective as a result of systems and institutions not being able to rectify racial injustices.¹⁴⁸⁴

White law firms are reported to argue that black under-representation is caused by the perceived shortcomings of black attorneys which include deficits of human capital¹⁴⁸⁵ as well as intellectual inferiority.¹⁴⁸⁶

The low salaries which are paid to young attorneys and the opportunities for equal or better paid

¹⁴⁷⁷ Pruitt LR 'No black names on the letterhead? Efficient Discrimination and the South African Legal Profession' (2002) 23 *Michigan Journal of International Law* 647.

¹⁴⁷⁸ Pruitt LR 'No black names on the letterhead? Efficient Discrimination and the South African Legal Profession' (2002) 23 *Michigan Journal of International Law* 658.

¹⁴⁷⁹ See para 6.3.3 above.

¹⁴⁸⁰ Pruitt LR 'No black names on the letterhead? Efficient Discrimination and the South African Legal Profession' (2002) 23 *Michigan Journal of International Law* 651.

¹⁴⁸¹ Pruitt LR 'No black names on the letterhead? Efficient Discrimination and the South African Legal Profession' (2002) 23 *Michigan Journal of International Law* 658.

¹⁴⁸² Pruitt LR 'No black names on the letterhead? Efficient Discrimination and the South African Legal Profession' (2002) 23 *Michigan Journal of International Law* 622.

¹⁴⁸³ Pruitt LR 'No black names on the letterhead? Efficient Discrimination and the South African Legal Profession' (2002) 23 *Michigan Journal of International Law* 658.

¹⁴⁸⁴ See para 6.3.3 above.

¹⁴⁸⁵ Human capital consists of the experience and skills of an employee.

¹⁴⁸⁶ Pruitt LR 'No black names on the letterhead? Efficient Discrimination and the South African Legal Profession' (2002) 23 *Michigan Journal of International Law* 637.

jobs elsewhere increases the challenge for firms who seek to retain black attorneys.¹⁴⁸⁷

An additional reason for law firms' failure to retain black attorneys among the ranks of senior attorneys is due to their belief that black people could never be effectively integrated into white institutions.¹⁴⁸⁸ It has been argued that this may be due to the desire of white people to maintain the status quo.¹⁴⁸⁹ One of the reasons for the ability of white people to maintain the status quo is because of policies and structures being built on notions of individual merit and colourblindness, which perpetuates white dominance.¹⁴⁹⁰ The liberalist's focus on law as objective does not offer insight into the role of the law in reinforcing white privileges.¹⁴⁹¹

Pruitt identifies another possible reason for law firms' failure to retain black attorneys as being a perception on law firms' part that it will be more costly to integrate black attorneys, because many require more training and mentoring.¹⁴⁹²

The EEA requires designated employers to implement measures to develop people from designated groups.¹⁴⁹³ Training and mentorship is important insofar as the advancement of attorneys is concerned. The EEA places an obligation on designated employers to implement appropriate training measures.¹⁴⁹⁴ In certain cases law firms have training policies in place; however, at times these policies have been reported to fail to 'translate into practice'.¹⁴⁹⁵ There is thus a need for all law firms to be monitored and to be held accountable where policies provide for training, but where the training programme fails to meet objective standards.¹⁴⁹⁶

In addition to the EEA, provisions relating to training of legal practitioners have also been included in the legislation that regulates legal practitioners. In terms of the Attorneys Act, which once regulated the attorneys profession, a candidate attorney was required to be in possession of the LLB degree obtained from a university in South Africa and was required to complete articles over a period of two years or for a shortened period in the event of the candidate completing a practical training course.¹⁴⁹⁷ In the event of an aspiring attorney attending the School for Legal Practice,¹⁴⁹⁸

¹⁴⁸⁷ Pruitt LR 'No black names on the letterhead? Efficient Discrimination and the South African Legal Profession' (2002) 23 *Michigan Journal of International Law* 647.

¹⁴⁸⁸ Pruitt LR 'No black names on the letterhead? Efficient Discrimination and the South African Legal Profession; (2002) 23 *Michigan Journal of International Law* 663.

¹⁴⁸⁹ Pruitt LR 'No black names on the letterhead? Efficient Discrimination and the South African Legal Profession; (2002) 23 *Michigan Journal of International Law* 674.

¹⁴⁹⁰ See para 6.3.1 above.

¹⁴⁹¹ See para 6.3.1 above.

¹⁴⁹² See para 7.5.2.1.1 above. Pruitt LR 'No black names on the letterhead? Efficient Discrimination and the South African Legal Profession' (2002) 23 *Michigan Journal of International Law* 665.

¹⁴⁹³ See para 3.2.5 above.

¹⁴⁹⁴ See para 3.2.5 above.

¹⁴⁹⁵ Centre for Applied Legal Studies *Transformation of the Legal Profession* (2014) 56.

¹⁴⁹⁶ Centre for Applied Legal Studies *Transformation of the Legal Profession* (2014) 56.

¹⁴⁹⁷ Section 2 of the Attorneys Act. In terms of the Admission of Advocates Act a candidate was required to satisfy the

which forms part of the Legal Education and Development (LEAD) section, the period of articles is shortened by one year.¹⁴⁹⁹ The option of attorneys attending the School of Legal Practice was created, because the attorneys' profession recognised that the inability to obtain articles prevented a high percentage of law students from becoming attorneys.¹⁵⁰⁰ The School for Legal Practice was thus seen as an alternative and quicker route to the attorneys' profession. The Attorneys Act also required a candidate to pass the attorneys admission examination.¹⁵⁰¹

The Legal Practice Act makes changes to the contents of the Attorneys Act.¹⁵⁰² In terms of the Legal Practice Act a person may be admitted as a legal practitioner if that person is in possession of the LLB obtained from any university in South Africa,¹⁵⁰³ undergoes all the practical vocational training requirements as a candidate legal practitioner as prescribed by the Minister of Justice and Constitutional Development which include community service,¹⁵⁰⁴ a legal practice management course,¹⁵⁰⁵ and has passed an examination.¹⁵⁰⁶ LEAD provides an extensive range of vocational training courses. LEAD also provides a course in practice management¹⁵⁰⁷ which has become compulsory for legal practitioners in terms of the Legal Practice Act.

In South Africa there are four phases for a standard legal professional career. Phase one consists of the years of legal education as a law student; the second phase consists of training where the legal professional serves articles or pupillage prior to admission as a legal practitioner;¹⁵⁰⁸ phase three consists of the period of time from admission up until five years of experience; and phase four consists of the period from five years of experience to senior status in the legal profession.¹⁵⁰⁹

Mentorship is an important component in ensuring that an attorney progresses from the first phase to the fourth phase. Legal practitioners who find themselves on junior or mid-levels of law firms progress well where they are in the fortunate position of being mentored by senior practitioners. Mentorship is not only beneficial in that it provides attorneys with training when it comes to the

court that the candidate is twenty one years old, was a fit and proper person, was a South African citizen or a permanent resident and has obtained the necessary qualifications being an LLB degree. In order to become a member of the Bar, a person was required to do a pupillage for a period of one year and to pass an examination set by the General Council of the Bar of South Africa. There was no requirement that the person should become a member of the Bar in order to practise as an advocate, in which case such person is only required to have an LLB.

¹⁴⁹⁸ The School provides vocational training courses which run for a period of six (6) months.

¹⁴⁹⁹ Godfrey S 'The Legal Profession: Transformation and skills' (2009) 126 *SALJ* 94.

¹⁵⁰⁰ South African Government 'Transformation of the Legal Profession: Discussion Paper' available at <http://www.gov.za/documents/transformation-legal-profession-discussion-paper> (accessed on 22 August 2018).

¹⁵⁰¹ Section 15(b)(cc) of the Attorneys Act.

¹⁵⁰² See para 7.3.2 above.

¹⁵⁰³ Section 26(1)(a) of the Legal Practice Act.

¹⁵⁰⁴ Section 26(1)(c)(i) of the Legal Practice Act.

¹⁵⁰⁵ Section 26(1)(c)(ii) of the Legal Practice Act.

¹⁵⁰⁶ Section 26(1)(d) of the Legal Practice Act.

¹⁵⁰⁷ Godfrey S 'The Legal Profession: Transformation and skills' (2009) 126 *SALJ* 96.

¹⁵⁰⁸ Greenbaum L 'The four year undergraduate LLB: progress and pitfalls (2010) *Journal for Juridical Science* 5.

¹⁵⁰⁹ Centre for Applied Legal Studies *Transformation of the Legal Profession* (2014) 18.

drafting of legal documents and guidance in the preparation of court proceedings, but it also builds an attorney's confidence and results in clients being obtained from the mentor in the process.¹⁵¹⁰ Training of attorneys during the period in which they are candidate attorneys is not the same for all the candidate attorneys in a law firm.¹⁵¹¹ Legal practitioners have mentioned that there is a 'tendency for mentorship to be disbursed along racial lines'.¹⁵¹² Dumisa Ntsebeza¹⁵¹³ has mentioned that law firms must share work which comes in with candidate attorneys to ensure that candidate attorneys are provided with the necessary exposure and to ensure that candidate attorneys benefit from the period of articles.¹⁵¹⁴

The Legal Practice Act provides an additional framework for transforming the legal profession. The Legal Practice Act, unlike the EEA, only applies to one profession. While the Legal Practice Act includes *inter alia* the requirements which a candidate attorney should comply with in order to be admitted as a legal practitioner and has been enacted to transform the legal profession, similar to the EEA, it not an appropriate vehicle to address the challenges faced by black attorneys. This is because black attorneys are experiencing challenges relating to the lack of transformation in the profession, despite the Legal Practice Act being enacted *inter alia* to transform the profession. The EEA and the Legal Practice Act are unable to address the challenges experienced by black professionals, because the law alone is unable to remove racial injustices.¹⁵¹⁵

7.5.3.3 Equitable representation

In terms of section 15(2)(d)(i) of the EEA, affirmative action measures must also include measures to ensure the equitable representation of suitably qualified people from designated groups at all occupational levels.¹⁵¹⁶ The objective of this part of the chapter is to determine whether the legal profession is representative of the South African population and what the reasons are for the current position.

In 2016, the LSSA released a report with statistics for the period 2004 - 2015 which provides insight into the lack of transformation of the legal profession insofar as candidate attorneys admitted are concerned:

¹⁵¹⁰ Centre for Applied Legal Studies *Transformation of the Legal Profession* (2014) 57.

¹⁵¹¹ Manyathi-Jele N 'Lack of advancement of black and female lawyers in the spotlight' (2015) July *De Rebus* 13.

¹⁵¹² Centre for Applied Legal Studies *Transformation of the Legal Profession* (2014) 57.

¹⁵¹³ Dumisa Ntsebeza is a senior counsel.

¹⁵¹⁴ As reported by Manyathi-Jele N 'Lack of advancement of black and female lawyers in the spotlight' (2015) July *De Rebus* 13.

¹⁵¹⁵ See para 6.3 above.

¹⁵¹⁶ See para 3.2.4 above.

Table 13: Candidate attorneys admitted: data obtained from the LSSA¹⁵¹⁷

	African	Coloured	Asian	White
2004	390	92	85	632
2005	476	84	77	705
2006	408	151	101	627
2007	432	58	82	864
2008	510	84	213	744
2009	613	96	279	1081
2010	491	33	228	775
2011	442	132	163	846
2012	450	96	186	797
2013	475	113	160	758
2014	856	207	247	1185
2015	795	152	266	1043

Statistics have also been obtained for the year 2016, despite them not being included in the 2015/2016 report of the LSSA. In 2016, 1973 white candidate attorneys and 2936 black candidate attorneys were admitted.¹⁵¹⁸ The statistics above show that over the period 2012 - 2016 there has been a steady increase in the number of black¹⁵¹⁹ candidate attorneys who have been admitted (with the exception of Coloured candidate attorneys in 2015 and Asian candidate attorneys in 2013 and 2015). However, the statistics also show that there has been a corresponding year-on-year increase in the number of white candidate attorneys who have been admitted with the exception of those who were admitted in 2010, 2012, 2013 and 2015.

Insofar as attorneys are concerned, in 2012 there were 13509 white and 7079 black (African, Coloured and Indian) attorneys practising in South Africa.¹⁵²⁰ In 2014 there were 14 694 white, 5336 African, 1200 Coloured and 2129 Asian attorneys, while in 2016 there were 14638 white attorneys and 9692 black (African, Coloured and Indian) attorneys practising in South Africa.¹⁵²¹ Similar to the number of admitted candidate attorneys, the statistics also show that there has been a steady increase in the number of black attorneys and white attorneys practising in South Africa; however white attorneys far exceed the number of black attorneys practising in South Africa.

¹⁵¹⁷ The Law Society of South Africa 'LSSA website - About us - Statistics for the attorneys' profession' received by the Law Society of South Africa from the individual provincial law society (2015/2016) 35.

¹⁵¹⁸ The Law Society of South Africa 'LSSA website - About us - Statistics for the attorneys' profession' received by the Law Society of South Africa from the individual provincial law societies (2015/2016) 48.

¹⁵¹⁹ Black candidate attorneys consist of Africans, Coloureds and Asians (Indian and Chinese candidate attorneys).

¹⁵²⁰ Manyathi N 'Statistics reflect pace of transformation in the attorneys' profession' (2012) September *De Rebus* 3.

¹⁵²¹ The Law Society of South Africa 'LSSA website - About us - Statistics for the attorneys' profession' received by the Law Society of South Africa from the individual provincial law societies (2015/2016) 48.

The figures reflected above show that the legal profession is not yet representative of the diverse South African population. The fact that the legal profession is not representative of the South African population has also been confirmed by the South African government.¹⁵²²

Every year the law graduates produced by universities in South Africa become more representative of the South African society.¹⁵²³ Despite the fact that transformation is taking place insofar as candidate attorneys admitted and practising attorneys are concerned, it is taking place at a slow pace in comparison to the National EAP statistics¹⁵²⁴ which is published by the Department of Labour on an annual basis.

Over the last ten years there has been an increase in the number of black students who are studying law.¹⁵²⁵ Ntsebeza has highlighted the objective to speed up the process of getting more black law students qualified by changing the five-year LLB to a four-year degree.¹⁵²⁶ In terms of section 15(2)(d)(i) of the EEA, affirmative action should not only ensure equitable representation, but equitable representation of *suitably qualified people* from designated groups. The change from the five-year LLB to a four-year LLB has resulted in complaints from persons occupying senior positions in the legal profession and law academics about the calibre of the skills and education with which students are equipped.¹⁵²⁷ Law graduates have been described as being deficient in literacy and numeracy skills.¹⁵²⁸ The efforts made to speed up the process of getting law students qualified may not assist designated employers in implementing this measure since the available candidates are not always 'suitably qualified'. This explains why one of the possible reasons for law firms' failure to retain black attorneys is that many may require more mentoring and training.¹⁵²⁹ However, this reason for not retaining black attorneys should also result in white candidate attorneys not being retained, because many white candidate attorneys also came through the four-year LLB programme. The justification for the failure to retain black attorneys that they require more mentoring and training is a possible way in which law firms are able to perpetuate the dominance of white people in the profession.¹⁵³⁰

Equitable representation is also affected by attorneys who leave the legal profession. Attorneys may leave law firms for various reasons such as unequal distributions of work or their inability to

¹⁵²² South African Government 'Transformation of the Legal Profession: Discussion Paper' available at <http://www.gov.za/documents/transformation-legal-profession-discussion-paper> (accessed on 31 October 2019).

¹⁵²³ South African Government 'Transformation of the Legal Profession: Discussion Paper' available at <http://www.gov.za/documents/transformation-legal-profession-discussion-paper> (accessed on 31 October 2019).

¹⁵²⁴ See national EAP statistics in para 5.4.2.1.

¹⁵²⁵ Centre for Applied Legal Studies *Transformation of the Legal Profession* (2014) 60.

¹⁵²⁶ As reported by Manyathi-Jele N 'Lack of advancement of black and female lawyers in the spotlight' (2015) *July D Rebus* 13.

¹⁵²⁷ Greenbaum L 'The four year undergraduate LLB: progress and pitfalls (2010) *Journal for Juridical Science* 7.

¹⁵²⁸ Greenbaum L 'The four year undergraduate LLB: progress and pitfalls (2010) *Journal for Juridical Science* 13.

¹⁵²⁹ See para 7.5.3.2 above.

¹⁵³⁰ See para 6.3.1 above.

obtain clients of their own. Work distribution has improved; however, the distribution of work is still inequitable.¹⁵³¹ White law firms are still being offered and receiving most of the lucrative legal work from both the public and the private sectors.¹⁵³² This is partially due to the fact that even though these law firms are white, they have good BEE ratings¹⁵³³ which serve to attract clients.

Law firms also place a responsibility on attorneys to find work for themselves. The stories of black legal practitioners show that it is challenging for black attorneys to obtain clients and to progress in their careers.¹⁵³⁴ This is due to work being obtained and retained by way of networking¹⁵³⁵ and due to the perception that some clients are sceptical about the abilities of black legal practitioners.¹⁵³⁶ The stories of some black directors show that they are treated as if they are at associate level which in their view prevents them from obtaining clients¹⁵³⁷ This may cause them to leave the law firms which reduces the representation of black people.

The legal profession is not yet representative of the South African population despite one of the aims of affirmative action being to ensure equitable representation of people from designated groups in all occupational levels of the workforce.¹⁵³⁸ The EEA is therefore not an appropriate vehicle to rectify injustices of a racial nature.¹⁵³⁹

7.6 BEE IN THE LEGAL PROFESSION

7.6.1 Introduction

The objective of this part of the chapter is to determine whether law firms are obtaining good BEE ratings and whether there is a low percentage of black people who form part of the ownership and management structures of law firms. In the event of this being the case, this part of the chapter will determine which of the shortcomings identified in chapter 5 of this thesis enabling enterprises to obtain good BEE ratings under such circumstances are dominant in the legal profession. This part of the chapter will also determine whether the law can be amended in order to reduce the shortcomings identified. BEE will be evaluated through the lens of critical race theory to determine whether BEE legislation is an appropriate vehicle to achieve transformation in this particular

¹⁵³¹ Centre for Applied Legal Studies *Transformation of the Legal Profession* (2014) 53.

¹⁵³² Manyathi-Jele N 'Lack of advancement of black and female lawyers in the spotlight' (2015) July *De Rebus* 13.

¹⁵³³ See para 7.6.2 below.

¹⁵³⁴ Centre for Applied Legal Studies *Transformation of the Legal Profession* (2014) 55.

¹⁵³⁵ See para 7.5.3.2.1 above.

¹⁵³⁶ Attorneys also experience racial discrimination at the behest of clients. Centre for Applied Legal Studies *Transformation of the Legal Profession* (2014) 45.

¹⁵³⁷ Centre for Applied Legal Studies *Transformation of the Legal Profession* (2014) 55.

¹⁵³⁸ See para 3.1 above.

¹⁵³⁹ See para 6.3.3 above.

profession.

7.6.2 The BEE ratings of law firms

During 2016 a survey of the BEE ratings of law firms was conducted. It was determined that 10% of law firms were rated at level 1, 8% at level 2, 9% at level 3, 24% at level 4, 3% at level 5, 1% at level 6, 0% at level 7, 1% at level 8 and 45% of law firms were not compliant.¹⁵⁴⁰ The survey shows that 54% of law firms have BEE ratings from level 1 to level 5. As a result of the BEE ratings of law firms being in the range from level 1 to level 5 as opposed to the lower levels (level 6 to level 8) this shows that generally law firms have good BEE ratings.

7.6.3 Demographic representation in law firms

The objective of transformation must be to have a legal profession which represents the diverse South African population at all levels of the legal profession.¹⁵⁴¹ It has been stated that 'black people are almost entirely absent from the ranks of senior partners and directors in large firms of attorneys'.¹⁵⁴² A survey was conducted in 2013 which showed that 80 percent of the chief executives of the 12 law firms who participated in the survey were white men and so were 72% of all managing partners.¹⁵⁴³ As far as the ownership and remuneration structures of the firms are concerned, 53% of the equity partners were also males and white.¹⁵⁴⁴ The chief finding of the survey was that South Africa's large corporate law firms were still dominated by white men.¹⁵⁴⁵

The research also shows that top positions in the legal profession 'from senior partners at law firms, to senior counsel at the Bar and senior members of the judiciary remain homogenous'.¹⁵⁴⁶ In 2014 these positions were still dominated by white men.¹⁵⁴⁷ The aforementioned shows that there is a low percentage of black people who form part of the ownership and management structures of law firms. It is submitted that this low percentage of black professional employees who form part of management structures in law firms is one of the main reasons for the untransformed corporate

¹⁵⁴⁰ The Law Society of South Africa 'Attorneys' Profession in South Africa Report' (2016) 22 available at <https://www.lssa.org.za/upload/LSSA-LexisNexis---Infographic-Report-2016-Survey-of-the-Attorneys-Profession.pdf> (accessed on 26 January 2019).

¹⁵⁴¹ South African Government 'Transformation of the Legal Profession: Discussion Paper' available at <http://www.gov.za/documents/transformation-legal-profession-discussion-paper> (accessed on 31 October 2019).

¹⁵⁴² South African Government 'Transformation of the Legal Profession: Discussion Paper' available at <http://www.gov.za/documents/transformation-legal-profession-discussion-paper> (accessed on 31 October 2019).

¹⁵⁴³ Centre for Applied Legal Studies *Transformation of the Legal Profession* (2014) 5.

¹⁵⁴⁴ Centre for Applied Legal Studies *Transformation of the Legal Profession* (2014) 5.

¹⁵⁴⁵ South African Legal Fellows Network *Demographic survey of large corporate law firms, South Africa* (2013). The survey canvassed 12 of the 51 law firms in South Africa that employ 20 or more attorneys; Centre for Applied Legal Studies *Transformation of the Legal Profession* (2014) 5.

¹⁵⁴⁶ Centre for Applied Legal Studies *Transformation of the Legal Profession* (2014) 5.

¹⁵⁴⁷ Centre for Applied Legal Studies *Transformation of the Legal Profession* (2014) 5.

cultures in enterprises.¹⁵⁴⁸

7.6.4 Priority elements

The B-BBEE Codes prescribe the methodology to be used by enterprises to obtain their BEE status, and applies to law firms.¹⁵⁴⁹ An LE is required to comply with all three priority elements: ownership, skills development, and enterprise and supplier development, while a QSE is required to comply with ownership as a compulsory element and either skills development or enterprise and supplier development.¹⁵⁵⁰

Law firms are required to train candidate attorneys who they employ for the purposes of articles. As a result, both LEs and QSEs will easily be able to comply with skills development by employing candidate attorneys. This will assist them in obtaining points for the purposes of achieving good BEE ratings.¹⁵⁵¹

It should also be easy for law firms to comply with enterprise and supplier development by instructing black advocates to act on their behalf, as this will similarly provide these law firms with points in order to obtain good BEE ratings.¹⁵⁵² Minister Masutha, a former Minister of Justice, is reported to have stated that the aspect of racial transformation in briefing patterns must be addressed.¹⁵⁵³ In order 'to ensure that racial transformation takes place law firms must be deliberate when it comes to briefing patterns in order to address transformation'.¹⁵⁵⁴

As a result of management control not forming part of the priority elements on the BEE scorecards, law firms are able to obtain points without compliance with the management control element, provided they achieve high points on the priority elements. This implies that there is no incentive provided to law firms to promote black attorneys to managerial positions. This enables law firms to obtain good BEE ratings, despite the low percentage of black people who form part of their management structures.

Ownership is a compulsory element and an element to which high points have been allocated. This may be a positive step, however, there is a low percentage of black people who own law firms

¹⁵⁴⁸ This is due to the fact that the control over whether there is a historically developed 'white corporate culture' is dependent on the composition of management, see para 4.3.1 above.

¹⁵⁴⁹ See para 5.4 above.

¹⁵⁵⁰ See para 5.4 above.

¹⁵⁵¹ See para 5.4.3.1 above

¹⁵⁵² See para 5.4.4.1 above.

¹⁵⁵³ As reported by Manyathi-Jele N 'Lack of advancement of black and female lawyers in the spotlight' (2015) July *De Rebus* 13.

¹⁵⁵⁴ Centre for Applied Legal Studies *Transformation of the Legal Profession* (2014) 49.

despite the ownership element being a compulsory element. This shows that BEE legislation is unable to achieve ownership transformation.

Management control has not been prioritised, because the legislation governing BEE has been drafted from a white perspective.¹⁵⁵⁵ By management not being prioritised the dominance of white people is perpetuated, because in terms of BEE legislation enterprises are not required to appoint or promote black people into managerial positions. The recommendation was made in chapter 5 that management control should form part of the priority elements replacing either skills development or enterprise and supplier development.¹⁵⁵⁶ However, since BEE legislation is unable to achieve ownership transformation despite ownership being sufficiently regulated by the B-BBEE Codes, making management control a priority element would not assist in advancing black professionals into managerial positions. This illustrates that the legislation governing BEE is not an appropriate vehicle to address the challenges faced by black attorneys and that the interests of black attorneys would be promoted better by black attorneys creating law firms of their own.¹⁵⁵⁷

7.6.5 Levels of weighting points

Law firms are required to make use of the Generic, alternatively the QSE scorecards contained in the B-BBEE Codes¹⁵⁵⁸ should they choose to be BEE compliant. While high weighting points have been allocated to the ownership element, the points which have been allocated to skills development and enterprise and supplier development are higher than those which have been allocated to management control.¹⁵⁵⁹ This implies that enterprises will be encouraged to comply with the priority elements and may even obtain points under the socio-economic element without much consideration for the management control element. The recommendation was made in chapter 5 that the points which are allocated to management control should be higher than either skills development or enterprise and supplier development.¹⁵⁶⁰ However, this would not necessarily assist black attorneys, because law firms are already incentivised to comply with the ownership element since high points have been allocated to ownership; however, this has failed to achieve ownership transformation.

The objective of the B-BBEEA is to achieve transformation, however by providing enterprises with an election to comply with a wide range of elements it enables enterprises to obtain good BEE ratings without achieving any real transformation. The B-BBEE Codes enable enterprises to obtain

¹⁵⁵⁵ See para 6.3.3 above.

¹⁵⁵⁶ See para 5.9 above.

¹⁵⁵⁷ See para 6.3.7 above.

¹⁵⁵⁸ See para 5.4 above.

¹⁵⁵⁹ See para 5.4 above.

¹⁵⁶⁰ See para 5.4 above.

high points while employees work for management structures which are untransformed.

This shows that the current legislation governing BEE is unable to change the racial composition of the management structures of law firms which affect that corporate cultures within law firms. This is an additional reason for BEE legislation not being an appropriate vehicle to remove the challenges faced by black attorneys. It is for reasons such as these where black professionals are not assisted by legislation that makes their separation from mainstream understandable.¹⁵⁶¹ Black attorneys should be encouraged to create their own law firms to ensure that their interests are promoted.¹⁵⁶²

7.6.6 Maximum points for ownership and management structures

Since the B-BBEE Codes apply to law firms, the shortcoming that the scorecards contain the maximum points that an enterprise can achieve is relevant to law firms. This shortcoming implies that there are no incentives for law firms to provide black attorneys with more voting rights, increased economic interest or more participation in management positions in excess of what is required in the scorecards.¹⁵⁶³

7.6.7 Complex nature of the scorecards

Chapter 5 revealed that there are separate sets of rules and formulas for each of the elements which measured entities, such as law firms, are required to apply in order to determine their scores under each of the elements, and even individual rules and formulas which measured entities are required to apply when calculating their scores for each of the categories within each of the five elements.¹⁵⁶⁴ The complex nature of the scorecards and the formulas was illustrated in chapter 5¹⁵⁶⁵ and it is those scorecards and formulas which law firms are required to make use of in order to obtain a BEE rating. Law firms with access to experts at using these scorecards and formulas are able to make strategic decisions and adjustments to their calculations allowing them to obtain financial benefits while avoiding areas of compliance. This illustrates that it is possible for law firms to obtain good BEE ratings without keeping the spirit and purpose of BEE in mind. This also illustrates that the provisions contained in the B-BBEE Codes do not exist in isolation, but are dependent on the ways in which it is interpreted by black professionals. The legislation governing BEE is thus not an appropriate vehicle to achieve racial transformation in the legal profession.

¹⁵⁶¹ See para 6.3.7 above.

¹⁵⁶² See para 6.3.7 above.

¹⁵⁶³ See para 5.6.2 above.

¹⁵⁶⁴ See para 5.4 above.

¹⁵⁶⁵ See para 5.4.6 above.

7.6.8 Fronting practices

The concept of fronting¹⁵⁶⁶ is relevant in the legal profession. The stories of some black legal practitioners' experiences reported in academic literature reveal that they are being 'used in expedient and opportunistic ways' by their law firms.¹⁵⁶⁷ These black legal practitioners report being invited to participate in meetings during which their respective law firms solicit work from potential clients, and that they are actively recruited to participate in these sessions.¹⁵⁶⁸ Weeks or even months after these meetings they would be informed that the law firms in question had been hired and been engaged in the work, but that the black attorneys who were 'used to attract the client' had not have been included in the work.¹⁵⁶⁹ It is for reasons such as these that some capable black attorneys choose to leave the law firms they work for¹⁵⁷⁰ as they are not prepared to be reduced to 'tokens'. Black people therefore choose to separate themselves from the mainstream so that their interests can be better promoted.¹⁵⁷¹

BEE ratings of enterprises are taken into consideration when it comes to enterprises' applications for government tenders. A legal practitioner spoke about 'the dishonesty of using black identities to solicit business from government entities such as Eskom, but then not including them in the work once the firm was appointed.'¹⁵⁷² This shows that one of the possible reasons for firms' ability to obtain good BEE ratings, despite the low percentage of black people who form part of their ownership and management structures, is due to fronting which takes place in law firms. Despite the fact that legislative efforts have been made¹⁵⁷³ to prevent fronting practices, fronting practices still occur and black attorneys are negatively affected in the process. This shows not only that BEE legislation is not the appropriate vehicle to address the challenges faced by black legal practitioners, but also that equality legislation is unable to rectify injustices of a racial nature.¹⁵⁷⁴

¹⁵⁶⁶ See para 5.7 above.

¹⁵⁶⁷ Centre for Applied Legal Studies *Transformation of the Legal Profession* (2014) 43.

¹⁵⁶⁸ Manyathi-Jele N 'Report: Transformation of the legal profession' (2014) *De Rebus* 20.

¹⁵⁶⁹ Manyathi-Jele N 'Report: Transformation of the legal profession' (2014) *De Rebus* 20; Centre for Applied Legal Studies *Transformation of the Legal Profession* (2014) 43. A participant in the research conducted by the Centre for Applied Legal Studies reported that she was included in the pitch to solicit work from a particular client to the extent that her name and photograph was included in the team profile which was presented. Months later she learned inadvertently that the law firm was hired by the client, but that she was never included in the work which had been obtained from the client.

¹⁵⁷⁰ Centre for Applied Legal Studies *Transformation of the Legal Profession* (2014) 43.

¹⁵⁷¹ See para 6.3.7 above.

¹⁵⁷² Centre for Applied Legal Studies *Transformation of the Legal Profession* (2014) 43.

¹⁵⁷³ See para 5.7 above.

¹⁵⁷⁴ See para 6.3.3 above.

7.7 CONCLUSION

The main objective of this thesis is to determine whether the current legislative framework is an appropriate vehicle to address the challenges faced by black employees in the legal profession if viewed through the lens of critical race theory. The main objective consists of two ancillary purposes. The first purpose is to determine the pace of racial transformation in the legal profession and sought to test which of the shortcomings in the legal framework advanced in chapter 3 of this thesis are dominant in the legal profession. This chapter also aimed to determine whether the provisions of the EEA can be amended or supplemented to reduce the shortcomings.

Chapter 2 of the EEA governing the elimination and prohibition of unfair discrimination which includes racial discrimination, applies to all employers and to all employees. This chapter illustrates that racial discrimination is still prevalent in the legal profession. The stories of black legal practitioners reported in the literature show that structural racism exists in the legal profession. Commentators, like Madonsela, also highlighted the slow pace of racial transformation within the legal profession. The fact that black employees experience racial discrimination despite the EEA prohibiting unfair discrimination, shows that the measures to deal with unfair discrimination do not seem to be a sufficient deterrent to deal with racial discrimination. This is because the law alone is unable to remove racial discrimination.

The Legal Practice Act aims to provide a legislative framework for transforming the legal profession and aims to bring about a legal profession that reflects the demographics of South Africa. It thereby creates an additional framework for transforming the profession. The Legal Practice Act, unlike the EEA, is profession specific. Black attorneys are experiencing challenges, despite the Legal Practice Act being enacted to transform the profession. Time will tell whether the Legal Practice Act is an appropriate vehicle to address the challenges faced by black attorneys. However, at present this seems to be unlikely, because that the law is unable to rectify racial injustices.

Insofar as the shortcomings of the equality legislation in the context of the legal profession are concerned, the first shortcoming may be attributed to the limited application of the provisions relating to affirmative action. In the legal profession most law firms do not fall within the meaning of a designated employer due to the number of employees they employ. Chapter 3 of the EEA, which consists of the provisions relating to affirmative action measures, only applies to designated employers and to people from designated groups. This has the effect that attorneys who are employed by employers who do not fall within such category are not being provided with the same opportunities as those who work for designated employers. Attorneys who are not employed by designated employers are not benefitting from their employers being required to identify and eliminate employment barriers, make reasonable accommodation for people from designated

groups or implement measures designed to further diversity. It is for this reason that it is recommended that the meaning of a designated employer be extended. It must be acknowledged however that as a result of attorneys not being represented by trade unions, even attorneys who are employed by law firms who are designated employers may find it difficult to engage with their employers during the consultation phase. It can thus be argued that whether an attorney is employed by a designated employer or not, the attorney may in both cases be unable to reap the benefits which affirmative action promises. The view expressed in terms of critical race theory that affirmative action should not be supported by black people thus becomes more understandable, if black professionals, such as attorneys cannot benefit from affirmative action.¹⁵⁷⁵ For this reason the EEA is not an appropriate vehicle to achieve racial transformation in the legal profession.

The second shortcoming stems from attorneys speaking of law firms spending funds on evaluations and surveys to be completed by employees, however at times such effort by employers fail to translate into practice.¹⁵⁷⁶ This shows that while the analyses which law firms are conducting may not be problematic as they are doing so by way of evaluations and surveys, the implementation of the affirmative action measures may be problematic. This confirms Louw's argument that the nature of the affirmative action measures contained in the EEA lends itself to embracing impersonal tick-boxes. The shortcoming here is that the EEA only requires designated employers to comply with the minimum requirements of the EEA which are generally being complied with, but not with corresponding results. The fact that the EEA only requires compliance from the already low number of law firms falling under the scope of application of the EEA's affirmative action provisions, illustrates that the EEA is not an appropriate vehicle to address the challenges faced by black attorneys.

The third shortcoming of the legal framework relates to the legislative omissions identified in chapter 3. Recommendations were made in chapter 3 to provide employees as a collective with an opportunity to conduct their own analysis and to provide employees as a collective with an opportunity to report to the Director-General of Labour. As a result of this chapter illustrating that compliance with EEA provisions is not a problem, adding additional ways in which the EEA should be complied with, will not assist black attorneys with racial transformation.

The final shortcoming stems from the fact that attorneys are not represented by trade unions. The provisions contained in the EEA and in the Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans governing designated employers' procedural duties have been drafted in such a way that they cater more for employees who are represented by trade unions. The EEA with its focus on unionised employees makes it an inappropriate vehicle to

¹⁵⁷⁵ See para 6.3.3.

¹⁵⁷⁶ See para 7.5.3.2.1.

transform the legal profession.

The second ancillary purpose of this chapter is to determine whether law firms are obtaining good BEE ratings and whether there is a low percentage of black professional employees who form part of the ownership and management structures of law firms. This chapter also aimed to test whether in the event of this being the case, which of the shortcomings of the legal framework advanced in chapter 5 are dominant in the legal profession. In addition, this chapter aimed to determine whether the law can be amended in order to reduce the shortcomings.

This chapter reveals that the majority of law firms have good BEE ratings and that there is a low percentage of black attorneys who forms part of the ownership and management structures of law firms. Since the control over whether a historically developed 'white corporate culture' exists in a workplace is dependent on the composition of management, with the low percentage of black professional employees who form part of management structures of law firms it is understandable that the corporate culture of law firms has been identified as both a source of indirect discrimination and an employment barrier.

This chapter reveals that there are shortcomings of the legal framework which are dominant and that make it possible for law firms to obtain good BEE ratings, despite the low percentage of black people who form part of their ownership and management structures.

One of the shortcomings relates to the priority elements in the BEE scorecards. As a result of law firms being required to train candidate attorneys, law firms can easily comply with the skills development element. It will also be easy for law firms to comply with enterprise and supplier development by instructing black advocates to act on behalf of predominantly white law firms as this will similarly provide these law firms with points in order to obtain good BEE ratings. The ability of law firms to obtain good BEE ratings despite the low percentage of black people who form part of the management structures is caused by skills development and enterprise and supplier development being priority elements as opposed to management control. Management control has not been prioritised by the legislature, because BEE legislation has been drafted from a white perspective.¹⁵⁷⁷ By management control not being prioritised the dominance of white people is perpetuated, because enterprises are not required to appoint or promote black people into managerial positions. In chapter 5 it was recommended that management control be made one of the priority elements, replacing either skills development or enterprise and supplier development. However, due to the failure of ownership as a priority element to achieve ownership transformation, making management control a priority element will not assist black attorneys with their progression into managerial positions.

¹⁵⁷⁷ See para 6.3.3.

The same argument applies to the relatively low points allocated to the management control element relative to skills development and enterprise and supplier development. Merely allocating higher points to the management control element would not necessarily encourage law firms to promote black attorneys to managerial positions, since the high points which have been allocated to ownership has not led to a corresponding transformation in ownership.

This chapter revealed that a further shortcoming of the legal framework is that since the B-BBEE Codes provide maximum points there are no incentives for law firms to provide black attorneys with more voting rights, increased economic interest or more participation in management positions in excess of what is required in the scorecards.

The regulation of management is important, because the racial composition of management influences the corporate culture of enterprises. The fact that certain shortcomings relating to the management control element have been identified shows that the management of enterprises is not regulated sufficiently in the BEE framework. As current legislation is unable to assist black attorneys with their progression to managerial positions, it is suggested that it would be more beneficial for black attorneys to develop their own law firms so that their interests can be promoted. The legislation governing BEE is therefore not an appropriate vehicle to address the challenges experienced by black attorneys.

An additional shortcoming of the legal framework relates to the complexity of the scorecards and the calculations. By virtue of the fact that law firms are required to make use of the same scorecards and formulas discussed in chapter 5, law firms may make little or no sense of the scorecards without the assistance of experts. It may also result in law firms making use of the elements which contain formulas that are easier, thereby allowing law firms to obtain good BEE ratings without placing black attorneys in their ownership and management structures. This illustrates that it is possible for law firms to obtain good BEE ratings without keeping the spirit and purpose of BEE in mind. This also illustrates that the legislation governing BEE is not an appropriate vehicle to achieve racial transformation.

The final shortcoming of the legal framework is that despite legislative efforts to prevent fronting practices, fronting practices are still committed by law firms. Fronting practices result in black attorneys being negatively affected. This illustrates that while the B-BBEEA prohibits the commission of fronting practices, BEE is unable to address the challenges faced by black attorneys. This shows that systems and legislation are not necessarily effective vehicles to rectify racial injustices.

There is a low percentage of black people who own law firms despite the ownership of enterprises being regulated sufficiently by the BEE framework. The persistent inability to achieve meaningful ownership transformation in law firms, despite the emphasis on ownership in the BEE framework, shows that equality legislation, such as the current BEE framework, is unable to rectify injustices of a racial nature.

This thesis aims to determine whether the slow pace of racial transformation when it comes to black professional employees in the private sector is an issue which the law can address and if so, whether the current legislation is the appropriate way to transform the profession and to deal with the challenges faced by black professional employees. The recommendations for legislative reform advanced above may assist in reducing the racial discrimination which black attorneys are subjected to and may also assist in removing the barriers which restrict the growth of black attorneys in law firms; however, the challenges that black professional employees, such as attorneys, experience will not be eliminated completely. Seen through the lens of critical race theory it can be concluded that the EEA and the provisions governing BEE are not appropriate vehicles to achieve racial transformation in the profession. This is largely as a result of the fact that equality legislation has been drafted from a white perspective and because laws and systems are unable to rectify racial injustices.¹⁵⁷⁸ It is for this reason that Pabasa was formed by black advocates.¹⁵⁷⁹ Black people are able to promote their interests better by separating from mainstream.¹⁵⁸⁰

¹⁵⁷⁸ See para 6.3.3.

¹⁵⁷⁹ See para 6.3.7.

¹⁵⁸⁰ See para 6.3.7.

CHAPTER 8

THE FINANCIAL PROFESSIONS: RACIAL DISCRIMINATION AND BROAD-BASED BLACK ECONOMIC EMPOWERMENT

8.1 INTRODUCTION

The financial sector has been identified as being one of the sectors with the slowest progress when it comes to transformation.¹⁵⁸¹ Chapters 2 and 3 contain discussions on the provisions governing unfair discrimination and affirmative action respectively to demonstrate how legislation aimed at addressing racial transformation benefits black professional employees within the private sector. Chapter 3 identifies the shortcomings of the current legal framework.

Chapter 4 contains a discussion on the role which the corporate culture plays in racial transformation. Chapter 4 revealed that a representative composition of management can play an important role in influencing the corporate culture of an enterprise. Chapter 4 also revealed that the provisions contained in the EEA do not exist in isolation, but that its implementation is affected by the way in which it is experienced by people. This shows that amendments to the EEA that merely deal with technical issues will not solve this central issue being the way in which discrimination and affirmative action is experienced by people. The current chapter aims to take this argument further and contextualises the findings in chapter 4 by assessing the experiences of black professionals in the financial professions.

Chapter 5 identified shortcomings of the current legal framework that make it possible for enterprises to obtain good BEE ratings, despite the low percentage of black professional employees who form part of the ownership and management structures of enterprises. Chapter 5 also revealed that the management structures of enterprises are not sufficiently regulated in terms of the B-BBEEA. This chapter aims to contextualise the findings in chapter 5 as far as the effect of the BEE framework in the financial sector is concerned.

Critical race theory is discussed in chapter 6 to demonstrate the insights which critical race theory brings to the slow pace of racial transformation in South Africa. In chapters 2, 3 and 5 the legal text

¹⁵⁸¹ Morapela K 'Lack of transformation in SA workplaces cause for concern' *Bloemfontein Courant* 27 August 2019 available at <https://www.bloemfonteincourant.co.za/lack-of-transformation-in-sa-workplaces-cause-for-concern/> (accessed on 5 October 2019).

was examined to identify the shortcomings of the current legal framework. Critical race theory is used in the current chapter to determine whether the current legal framework for addressing the inequalities which exist in the financial professions is appropriate.

The stories of members of the legal profession on the basis of literature available insofar as it relates to racial discrimination, affirmative action and BEE were discussed in chapter 7.

This chapter consists of a discussion on racial discrimination, affirmative action and BEE in the financial professions. The main objective of the chapter is to determine whether the current legislative framework is an appropriate vehicle to address the challenges faced by black professionals in the financial professions. This main objective consists of two ancillary purposes, similar to those in chapter 7. The first purpose is to determine whether there is a slow pace of racial transformation in the financial professions. The chapter aims to test which of the shortcomings of the legal framework identified in chapter 3 are dominant in the financial professions. It aims to determine whether recommendations can be made on the manners in which the shortcomings may be reduced.

The second purpose of this chapter is to determine whether enterprises within the financial professions have good BEE ratings and whether there is a low percentage of black professional employees who form part of the ownership and management structures of enterprises in the financial professions. If this is found to be the case, this chapter will test which of the shortcomings of the legal framework advanced in chapter 5 which make it possible for enterprises to obtain good BEE ratings under such circumstances are dominant in the financial professions. It aims to determine whether recommendations can be made on the manners in which the shortcomings may be reduced.

This chapter contains a presentation of the stories of black professional employees in order to contextualise the findings uncovered in chapters 2 to 5 of this thesis in the financial professions. While the stories presented may not be the experiences of all black professional employees, the fact that these stories can be presented carries weight in terms of critical race theory. This is so, because stories may be used for the purposes of revealing 'the circular, self-serving nature of particular legal doctrines',¹⁵⁸² including affirmative action and BEE.

This chapter commences with a discussion on the regulation of the financial professions. This is followed by a discussion of the experiences of members of the financial professions on the basis of literature available insofar as racial discrimination, affirmative action and the corporate culture are concerned, and of the literature on the experiences of members of the financial professions with

¹⁵⁸² See para 6.3.5 above.

regard to BEE. The literature used is based on studies conducted by other researchers and is not presented as *evidence* of slow transformation and shortcomings of anti-discrimination, affirmative action and BEE legislation, nor has any empirical research been conducted for the purposes of this thesis.

The FSC¹⁵⁸³ is discussed in order to illustrate how the calculations which enterprises are required to carry out determines their BEE ratings, and how these differ from the calculations which enterprises should carry out to whom the B-BBEE Codes apply. The regulation of management control is important, because the racial composition of management influences the corporate culture of enterprises in the financial sector. It is for this reason that it will be determined whether management structures of enterprises are regulated sufficiently by the FSC.

8.2 THE REGULATION OF THE FINANCIAL PROFESSIONS IN THE PRIVATE SECTOR

The financial professions include accountants, auditors, financial advisors, investment and asset managers, and those employed by insurance companies, banks and the South African Revenue Service.¹⁵⁸⁴ This thesis is limited to a discussion on the challenges experienced by black professional employees in the private sector. As a result, the experiences of employees employed by the South African Revenue Service fall outside the scope of this thesis.

8.2.1 Accountants

There are three types of accountants: a financial accountant is responsible for the financial records of companies that are not publicly listed,¹⁵⁸⁵ a chartered accountant (CA) is responsible for drafting financial documents, financial reporting and implementing accounting systems and processes which may be undertaken within public companies and a management accountant uses past figures of a business to predict future performance.¹⁵⁸⁶

With regard to chartered accountants, there are four professional accounting bodies: the Association of Chartered Certified Accountants (ACCA), the Chartered Institute of Management

¹⁵⁸³ The FSC is used by enterprises in the financial professions to determine their BEE ratings.

¹⁵⁸⁴ Archer S *The Financial Services Sector and its skills development issues relevant to the South African economy* (2008) Department of Labour 3.

¹⁵⁸⁵ Public companies are companies whose shares trade freely on the stock exchange, while the shares of private companies may not be offered for sale to the public.

¹⁵⁸⁶ IRP5 tax consultants' website available at <http://irp5.co.za/saipa-vs-saica-vs-cima-whats-the-difference/> (accessed on 26 December 2018).

Accountants (CIMA),¹⁵⁸⁷ the South African Institute of Chartered Accountants (SAICA),¹⁵⁸⁸ and the South African Institute of Professional Accountants (SAIPA).¹⁵⁸⁹ A chartered accountant is an individual that is registered with the SAICA.¹⁵⁹⁰ In terms of the Chartered Accountants Designation (Private) Act 27 of 1993, only persons who are members of the SAICA may validly use the CA(SA) designation.¹⁵⁹¹ Candidates who have obtained a BCom (Accounting) degree are required to pass two sets of qualifying examinations and to undergo practical training (a period of articles) before being eligible to apply for membership to the SAICA.¹⁵⁹²

8.2.2 Auditors

The auditing profession is regulated by the Auditing Profession Act 26 of 2005 (Auditing Profession Act). The Auditing Profession Act has established the Independent Regulatory Board for Auditors¹⁵⁹³ whose functions are *inter alia* to

- i) prescribe minimum requirements for accreditation of professional bodies in addition to those provided for in the Act,¹⁵⁹⁴
- ii) prescribe minimum qualifications, competency standards and requirements for registration of auditors in addition to those provided for in the Act,¹⁵⁹⁵
- iii) 'recognise or withdraw the recognition of educational qualifications or programmes or continued education, training and professional development programmes in the auditing profession of educational institutions and accredited professional bodies',¹⁵⁹⁶
- vi) 'prescribe requirements for and conditions relating to and the nature and extent of continued education, training and professional development'¹⁵⁹⁷ and
- v) 'prescribe training requirements'.¹⁵⁹⁸

In order for an individual to register as an auditor, he or she should satisfy the Regulatory Board

¹⁵⁸⁷ CIMA is the professional body governing management accountants with a UK based qualification recognised in South Africa. IRP5 tax consultants' website available at <http://irp5.co.za/saipa-vs-saica-vs-cima-whats-the-difference/> (accessed on 26 December 2018).

¹⁵⁸⁸ The SAICA was established in 1927 and is the largest professional accounting body in South Africa. SAICA is one of the leading accounting institutions internationally. For the period of articles, training should be done with a SAICA accredited employer.

¹⁵⁸⁹ Hoeppli T *The Regulation of the Accountancy Profession in South Africa* (2013) Forum of Accounting Bodies.

¹⁵⁹⁰ Section 1 of the Chartered Accountants Designation (Private) Act 67 of 1993; Odendaal EM & de Jager H 'Independent reviews: perceptions of chartered accountants (South Africa)' (2011) 12 *South African Journal of Accountability and Auditing Research* 26.

¹⁵⁹¹ Section 1(1) of the Chartered Accountants Designation (Private) Act 27 of 1993.

¹⁵⁹² SAICA's website available at <https://www.saica.co.za/Training/BecomingaCA/tabid/157/language/en-ZA/Default.aspx> (accessed on 27 October 2019).

¹⁵⁹³ Section 3(1) of the Auditing Profession Act.

¹⁵⁹⁴ Section 5(a) of the Auditing Profession Act.

¹⁵⁹⁵ Section 6(1)(a) of the Auditing Profession Act.

¹⁵⁹⁶ Section 7(1)(a) of the Auditing Profession Act.

¹⁵⁹⁷ Section 7(1)(c) of the Auditing Profession Act.

¹⁵⁹⁸ Section 7(1)(d) of the Auditing Profession Act.

that he or she has complied with the required education, training and competency requirements,¹⁵⁹⁹ has arranged for professional development should the said person not be a member of an accredited professional body,¹⁶⁰⁰ is a resident of South Africa¹⁶⁰¹ and is a fit and proper person.¹⁶⁰²

8.2.3 Financial advisers and investment and asset managers

With regard to financial advisers as well as investment and asset managers, the Financial Sector Conduct Authority (FSCA) is relevant. The objectives of the FSCA set out in the Financial Sector Regulation Act 9 of 2017 include *inter alia* providing financial education, promoting fair customer treatment by financial institutions, assisting in maintaining financial stability, and enhancing the integrity of financial markets.¹⁶⁰³ The FSCA regulates the conduct of financial institutions.¹⁶⁰⁴ The FSCA also regulates the persons and functions of persons who form part of such institutions.¹⁶⁰⁵

8.2.4 Banking and insurance

With regard to employees working in insurance companies, the body responsible for their regulation is the Insurance Institute of South Africa (IISA). The IISA is the South African qualifications authority which awards professional designations to qualifying individuals within the short-term insurance sector.¹⁶⁰⁶ The IISA is a registered non-profit organisation which was established to advance the short-term insurance sector.¹⁶⁰⁷ The IISA focuses on skills development and exposure in insurance as a profession.¹⁶⁰⁸ The IISA confers membership status upon persons who possess the academic qualifications and skills required by it.¹⁶⁰⁹

The Banking Association of South Africa, which represents the banks in South Africa, is responsible *inter alia* for policy influence, guiding transformation, as well as research and

¹⁵⁹⁹ Section 37(1)(a) of the Auditing Profession Act.

¹⁶⁰⁰ Section 37(2)(b) of the Auditing Profession Act.

¹⁶⁰¹ Section 37(2)(c) of the Auditing Profession Act.

¹⁶⁰² Section 37(2)(d) of the Auditing Profession Act.

¹⁶⁰³ Preamble to Financial Sector Regulation Act 9 of 2017.

¹⁶⁰⁴ Section 58(2) of the Financial Sector Regulation Act 9 of 2017.

¹⁶⁰⁵ Financial Sector Conduct Authority *Regulation Strategy of the Financial Sector Conduct Authority: October 2018 to September 2021* (2018) 11.

¹⁶⁰⁶ The Insurance Institute of South Africa website available at <https://www.iisa.co.za/about-us/history-of-the-iisa> (accessed on 6 September 2018).

¹⁶⁰⁷ The Insurance Institute of South Africa website available at <https://www.iisa.co.za/about-us/history-of-the-iisa> (accessed on 6 September 2018).

¹⁶⁰⁸ The Insurance Institute of South Africa website available at <https://www.iisa.co.za/about-us/history-of-the-iisa> (accessed on 6 September 2018).

¹⁶⁰⁹ The Insurance Institute of South Africa website available at <https://www.iisa.co.za/about-us/history-of-the-iisa> (accessed on 6 September 2018).

development.¹⁶¹⁰

It has been argued that transformation of an organisation should be initiated by those in top positions. Godongwana and Manuel stated that 'voluntary transformation is needed in South Africa's financial sector.'¹⁶¹¹ In certain cases employers in the financial professions are transforming voluntarily in addition to being bound by the EEA. However, for employees who are employed in the financial sector where voluntary transformation is not taking place in the workplace, the EEA requires employers to adhere to its provisions. The relevant sections of the EEA will be discussed below.

8.3 APPLYING THE EEA TO THE FINANCIAL PROFESSIONS

8.3.1 Main parts of the EEA

Chapter 2 of the EEA governs the elimination and prohibition of unfair discrimination, while chapter 3 contains the provisions relating to affirmative action.¹⁶¹² The section of this chapter which follows consists of a discussion on the financial professions with reference to unfair discrimination and affirmative action.¹⁶¹³ This will be discussed in order to contextualise the findings of chapters 2 to 4 in the financial professions. Unfair discrimination and affirmative action in the financial professions will be evaluated through the lens of critical race theory to illustrate whether the EEA is an appropriate vehicle to address the challenges which are experienced by black employees in the financial professions.

8.3.2 Unfair Discrimination in the Financial Professions

8.3.2.1 Direct Discrimination in the Financial Professions

In 2001 a study was conducted by Sadler into the working environment of chartered accountants in South Africa. While it is acknowledged that the study was conducted more than 15 years ago, its findings are still relevant today since it provides insight into the reality that the implementation of the provisions governing unfair discrimination contained in the EEA are dependent on the manner

¹⁶¹⁰ Bank SETA *Banking Sector Skills Plan* (2017/2018) 19.

¹⁶¹¹ Godongwana E & Manuel T 'Voluntary transformation needed in financial sector' (2017) 1 *Moneymarketing* 1. This statement was made by Godongwana at a conference hosted by the Association of Black Securities and Investment Professionals (ABSIP). Enoch Godongwana was the Deputy Minister of Economic Development of South Africa from 2010 to 2012.

¹⁶¹² See para 2.2.1 above.

¹⁶¹³ The headings in this part of the chapter were deliberately kept as close as possible to those of chapters 2 and 3 for ease of reference.

in which it is experienced by people. In the study 207 questionnaires were sent to black chartered accountants in South Africa and a total of 69% usable responses were received.¹⁶¹⁴ The stories of black employees contained in the survey showed that employees are subjected to racial bias¹⁶¹⁵ illustrating that despite there being progress within the accounting profession, discrimination persists.¹⁶¹⁶ These stories are outlined further in paragraph 8.3.3.2.1.

In 2003 another study was conducted by Sadler and Erasmus on the views of black trainee accountants on matters related to a career in accountancy.¹⁶¹⁷ This study was also conducted more than 15 years ago; however the findings uncovered in the study are still important, as a result of it also providing insight into the lack of racial transformation in the profession and the fact that the implementation of the provisions governing unfair discrimination is influenced by the way in which it is experienced by people. The employees who participated in this study reported that restrictions were placed on the type of work given to black trainee accountants.¹⁶¹⁸ Employees' experiences of racial bias were also reported in the study,¹⁶¹⁹ which will be discussed in more detail in paragraph 8.3.3.2.1 below due to the overlap between direct discrimination and barriers to employment equity.

Twelve years ago a study was conducted by Jongens into discrimination and affirmative action in a financial corporation,¹⁶²⁰ one of the largest financial institutions in South Africa which had 13 600 employees at the time.¹⁶²¹ The stories of employees in the study show that it was implied by the employer that all black employees need training and development.¹⁶²² Black employees also reported being required to prove themselves by working twice as hard in comparison to their white counterparts in order to prove that they are capable.¹⁶²³ This implies that at times there is a presumption of incompetence which is applied to black professional employees.

Gillis, Gomes, Valliere *et al* argue that black employees in the financial professions are generally

¹⁶¹⁴ Sadler E 'A profile and the work environment of black chartered accountants in South Africa' (2002) 10 *Meditari Accountancy Research* 163. Only 69% usable responses were received, because even though a larger percentage of responses were received, only 69% of the responses received were complete.

¹⁶¹⁵ Sadler E 'A profile and the work environment of black chartered accountants in South Africa' (2002) 10 *Meditari Accountancy Research* 170.

¹⁶¹⁶ Sadler E 'A profile and the work environment of black chartered accountants in South Africa' (2002) 10 *Meditari Accountancy Research* 171.

¹⁶¹⁷ The study consisted of 755 black trainee accountants who were registered with the SAICA at the time of the study.

¹⁶¹⁸ Sadler E & Erasmus BJ 'Views of black trainee accountants in South Africa on matters related to a career as a chartered accountant' (2003) 11 *Meditari Accountancy Research* 141.

¹⁶¹⁹ Sadler E & Erasmus BJ 'Views of black trainee accountants in South Africa on matters related to a career as a chartered accountant' (2003) 11 *Meditari Accountancy Research* 141.

¹⁶²⁰ This study is used, because there are no newer sources available on unfair discrimination in the financial profession.

¹⁶²¹ Jongens C 'Perceptions of employment equity implementation at a major South African multi-national financial corporation' (2006) 2(1) *Postamble* 32.

¹⁶²² Jongens C 'Perceptions of employment equity implementation at a major South African multi-national financial corporation' (2006) 2(1) *Postamble* 39.

¹⁶²³ Jongens C 'Perceptions of employment equity implementation at a major South African multi-national financial corporation' (2006) 2(1) *Postamble* 38.

seen as lacking initiative, having no work ethic, lacking assertiveness, having high fault tolerance, having lower standards, having unrealistic expectations and having an unproductive work culture.¹⁶²⁴ African senior managers have reported their experiences of discrimination and have also spoken about the lack of support of some employers in the profession.¹⁶²⁵

Disparate treatment of people from different races will amount to direct discrimination if race is the reason for the disparate treatment.¹⁶²⁶ The experiences of racial bias identified by the employees, the restriction on the type of work given to black trainee accountants, the implication that all blacks need training and development, black employees lacking initiative, having no work ethic, lacking assertiveness, having high fault tolerance, having lower standards, having unrealistic expectations and having an unproductive work culture will amount to direct discrimination if race is the reason for the disparate treatment.¹⁶²⁷

The IRBA¹⁶²⁸ has stated that there is a need to expose discriminatory practices that limit opportunities and career path possibilities for black accountants.¹⁶²⁹ The IRBA confirms the accounts of black employees which indicates that racial discrimination is prevalent in the financial professions. These experiences of direct racial discrimination continue despite the provisions of the EEA prohibiting unfair discrimination. This shows that the current measures which are in place to eliminate unfair discrimination do not seem to be a sufficient deterrent to deal with direct racial discrimination. This is because the law alone is unable to remove racial discrimination.¹⁶³⁰

8.3.2.2 Indirect Discrimination in the Financial Professions

In circumstances where an apparently neutral criterion, such as the corporate culture within an enterprise, has a disproportionate impact on black people and cannot be justifiable in terms of objective employment related criteria, it will be the source of indirect discrimination.¹⁶³¹ In the research conducted by Jongens a significant portion of the participants reported their perceptions of subtle forms of discrimination in the financial professions.¹⁶³² One of the forms of indirect

¹⁶²⁴ Gillis RE, Gomes R, Valliere R & Doyne J 'The politics of affirmative action' (2001) *University of Rhodes Island* 8.

¹⁶²⁵ Nzukuma KCC & Bussin M 'Job-hopping amongst African black senior management in South Africa' (2011) 9(1) *SAJHRM* 365.

¹⁶²⁶ See para 2.2.2.1.1 above.

¹⁶²⁷ See para 2.2.2.1.1 above.

¹⁶²⁸ The Independent Regulatory Board for Auditors (IRBA) made this statement, among others in Parliament at a hearing of the Standing Committee on Finance (SCOF) on 21 June 2017

¹⁶²⁹ IRBA 'IRBA says additional measures required to promote transformation of audit profession' (2017) 1 available at www.irba.co.za (accessed on 13 September 2018).

¹⁶³⁰ See para 6.3 above.

¹⁶³¹ See para 4.2 above.

¹⁶³² Jongens C 'Perceptions of employment equity implementation at a major South African multi-national financial corporation' (2006) 2(1) *Postamble* 38.

discrimination which were identified in the study was the corporate culture.¹⁶³³ Since black employees gave accounts of their experiences of indirect discrimination, despite the provisions in the EEA prohibiting unfair discrimination, the provisions contained in the EEA do not seem to prevent such discrimination from taking place. It is therefore not an appropriate vehicle to address the challenges experienced by black professional employees. Seen through the lens of critical race theory this is because the law alone is unable to ensure the complete removal of racial discrimination.¹⁶³⁴

8.3.2.3 Unfairness of discrimination

In terms of the EEA, once discrimination is proven to be present, unfairness is the next step to consider.¹⁶³⁵ The onus rests on the employer when claims of discrimination are raised on the ground of race.¹⁶³⁶ An employee in the financial professions will be required to specify the ground(s) on which he or she alleges that the discrimination took place in order to determine on whom the onus rests. Discrimination is presumed to be unfair when unfair discrimination is alleged on a specified ground such as race.¹⁶³⁷

In circumstances where the corporate culture is identified as a form of indirect discrimination, as it was in the study conducted by Jongens, the employer may defend such a claim if it can demonstrate that the conduct complained of did not take place as alleged, or is rational and not unfair or is otherwise justifiable.¹⁶³⁸ It would be difficult for an employer, such as a financial institution in the study of Jongens, to be successful in defending itself in such a case, because the defences which are available to an employer are limited to affirmative action measures taken by the employer and an inherent requirement of the job. A corporate culture which excludes black employees cannot be defended on the basis of it being an affirmative action measure, nor can it constitute an inherent requirement of the job.¹⁶³⁹

Affirmative action in the financial professions is discussed below in order to contextualise the findings in chapter 3 and to determine whether the EEA is an appropriate vehicle to address the challenges experienced by black professionals in the financial professions.

¹⁶³³ Jongens C 'Perceptions of employment equity implementation at a major South African multi-national financial corporation' (2006) 2(1) *Postamble* 37.

¹⁶³⁴ See para 6.3 above.

¹⁶³⁵ See para 2.2.2.2 above.

¹⁶³⁶ See para 2.2.2.2 above.

¹⁶³⁷ See para 2.2.2.2 above.

¹⁶³⁸ See para 2.2.2.2 above.

¹⁶³⁹ See para 2.2.2.3 above.

8.3.3 Affirmative action

8.3.3.1 Introduction

Only designated employers are required to implement affirmative action measures.¹⁶⁴⁰ This implies that in the event of a financial institution not falling within the definition of a designated employer it will not be required to implement affirmative action measures. Statistics obtained showed that, in general, financial institutions fall within the meaning of a designated employer by employing more than 50 employees. Statistics showed that ABSA employed 34 244 employees, FNB employed 36 398 employees, Nedbank employed 28 494 employees and Standard Bank employed 45 755 employees.¹⁶⁴¹ The fact that employers in the financial professions are bound by the affirmative action provisions of the EEA is what differentiates this discussion from the discussion on the legal profession contained in chapter 7.

Black professional employees' experiences of the limits of affirmative action will be discussed in order to contextualise the findings uncovered in chapters 3 and 4. The definition of affirmative action measures reveal that they have two objectives: first, to ensure that there are equal opportunities available for people from designated groups who are suitably qualified; and, secondly, affirmative action measures are required to ensure equitable representation.¹⁶⁴² Similarly to the objectives of affirmative action measures (and to the discussion in chapter 7) this discussion on affirmative action measures in the financial professions will be structured in relation to the aforementioned objectives.

8.3.3.2 Equal opportunities

8.3.3.2.1 Measures to identify and eliminate employment barriers

In terms of section 15(2)(a) of the EEA, designated employers are required to identify and eliminate employment barriers experienced by people from designated groups.¹⁶⁴³ The black trainee accountants who participated in the study conducted by Sadler on the experiences of chartered accountants identified cultural differences and the lack of black mentors as being employment barriers.¹⁶⁴⁴ The corporate culture within an enterprise may be an employment barrier

¹⁶⁴⁰ See para 3.2 above.

¹⁶⁴¹ Western Cape Government Economic Development and Tourism *Financial Services Sector Assessment Report 2014 Growth, Regulation Compliance, Skills and Recruitment in South Africa* (2014) 36.

¹⁶⁴² See para 3.1 above.

¹⁶⁴³ See para 3.2.1 above.

¹⁶⁴⁴ Sadler E & Erasmus BJ 'Views of black trainee accountants in South Africa on matters related to a career as a chartered accountant' (2003) 11 *Meditari Accountancy Research* 141. See paragraph 3.2.2 above where it is stated that in terms of provision 6.1.3.3 Code of Good Practice: Preparation, Implementation and Monitoring of Employment

which can adversely affect people from designated groups.¹⁶⁴⁵

Black chartered accountants also identified cultural differences¹⁶⁴⁶ as being an employment barrier.¹⁶⁴⁷ It has been argued that black trainees in auditing firms are 'expected to adapt to the culture in these firms or to find a position elsewhere'.¹⁶⁴⁸ The fact that black trainees are either expected to adapt to the culture or leave the enterprises shows that racial difference is ignored at times which results in the *status quo* being maintained with its institutionalised injustices being perpetuated.¹⁶⁴⁹

An employment barrier that was identified by black professional employees who participated in the study conducted by Jongens was that employers should assist black professional employees with their development,¹⁶⁵⁰ however the employer in this study responded to the employment barrier by stating that

'the philosophy is largely based on what individuals aspire for themselves. So, they're putting the ball into the lap of the individual asking what they want to do with their life and career. Managers can help to develop a plan around that but it's got to be self-driven, self-generated and self-monitored. It's not for "us" to tell employees what they must go on, it's for them to be part of their development. Management provides the supportive environment around that and the encouragement, help with finance within specific defined areas, and monitor the development as part of the performance appraisals.'¹⁶⁵¹

This is an important statement, because it is a view from the perspective of an employer. The expectation of the employer that employees should be self-driven and responsible for their own development may result in the corporate culture being an employment barrier or a source of indirect discrimination in circumstances where such a culture would be difficult for black employees to adjust to if the employees' culture taught them never to address a senior person, unless spoken

Equity Plans GN R424 in GG 40817 of 12 May 2017 the analysis conducted by designated employers should include a critical examination of established policies, practices, procedures and the working environment which should include those relating to recruitment and selection which indicates that barriers may also be identified in respect of trainee accountants.

¹⁶⁴⁵ See para 4.3.1 above.

¹⁶⁴⁶ Cultural differences differ from the corporate culture since cultural differences include the practices, beliefs and languages of people which are unique to a particular race group or ethnicity.

¹⁶⁴⁷ Sadler E 'A profile and the work environment of black chartered accountants in South Africa' (2002) 10 *Meditari Accountancy Research* 174.

¹⁶⁴⁸ Sadler E 'A profile and the work environment of black chartered accountants in South Africa' (2002) 10 *Meditari Accountancy Research* 174.

¹⁶⁴⁹ See para 6.3 above.

¹⁶⁵⁰ Jongens C 'Perceptions of employment equity implementation at a major South African multi-national financial corporation' (2006) 2(1) *Postamble* 39.

¹⁶⁵¹ Jongens C 'Perceptions of employment equity implementation at a major South African multi-national financial corporation' (2006) 2(1) *Postamble* 39.

to first.¹⁶⁵² This implies that even if management provides encouragement and a supportive environment black employees will be hesitant to initiate the process in furthering their development. The fact that an employer expects all employees to be self-driven and responsible for their own development stems from the fact that white people are generally perceived to be self-driven and whiteness is considered to be the norm.¹⁶⁵³

In the study conducted by the Insurance Sector Education and Training Authority, the stories of black employees revealed that the cost of obtaining additional qualifications for the purposes of applying for promotion is an employment barrier.¹⁶⁵⁴ It is recommended that employers should assist in these circumstances, and may even include a clause in employees' contracts that bursaries be provided to employees conditional upon the employee's completion of studies within a prescribed period or an obligation that such employees remain in the employer's employment for a prescribed period. The employer's payment of the bursary will be recognised as skills development expenditure for the purposes of BEE and BEE points will thus be obtained by the employer in this manner.¹⁶⁵⁵

Employees have also identified the limited nature of the work being given to black accountants as being an employment barrier.¹⁶⁵⁶ This results in limited work experience¹⁶⁵⁷ which has a deleterious effect on any promotions for which they may apply for in the future.

At times the level of communication between the employers and the employees relating to affirmative action issues may be problematic. The study conducted by Jongens revealed that when the EEA was first implemented by the employer covered by the study, there were a number of communications by the employer regarding employment equity; however those interviewed in the study mentioned that this was no longer the case and that employment equity committees were ineffective.¹⁶⁵⁸ In chapter 3 it was recommended that the legislature should provide details on the specific topics to be discussed during the consultations held between employees and employers so that designated employers will be required to obtain employee input where it may be of value.¹⁶⁵⁹ However, if the legislature provides the specific topics which employers and employees should discuss during the consultation this would merely entrench the 'tick-box' mentality by providing

¹⁶⁵² See para 4.2 above.

¹⁶⁵³ See para 6.3.1 above.

¹⁶⁵⁴ Insurance Sector Education and Training Authority *Status of skills in the Insurance Industry Part 2: Focus on the short-term insurance sector* (2017) 10.

¹⁶⁵⁵ See para 8.4.3.2.6.1 below.

¹⁶⁵⁶ Sadler E 'A profile and the work environment of black chartered accountants in South Africa' (2002) 10 *Meditari Accountancy Research* 171.

¹⁶⁵⁷ Sadler E 'A profile and the work environment of black chartered accountants in South Africa' (2002) 10 *Meditari Accountancy Research* 171.

¹⁶⁵⁸ Jongens C 'Perceptions of employment equity implementation at a major South African multi-national financial corporation' (2006) 2(1) *Postamble* 36.

¹⁶⁵⁹ See para 3.3.1 above.

employers with additional boxes to tick.

The fact that employment barriers have been identified by black professional employees despite employers being obligated to identify and remove employment barriers experienced by people from designated groups, shows that the EEA is not an appropriate vehicle to address the challenges faced by black professional employees.

8.3.3.2.2 Measures designed to ensure further diversity in the workplace

The affirmative action measures which a designated employer is required to implement must include measures designed to further diversity in the workplace based on equal dignity and respect of all people.¹⁶⁶⁰ In the study conducted by Jongens it was reported that 'despite the statements of diversity training in the employment equity plan, there appeared to be no formal diversity training'.¹⁶⁶¹ Individual managers were left to interpret diversity by means which they deemed fit.¹⁶⁶² It was reported that while some managers were successful in doing so, the senior managers failed to fulfil this task.¹⁶⁶³

In the study conducted by Sadler into the work environment of black chartered accountants in South Africa, cultural differences and ethnic preconceptions were identified as being challenges within enterprises.¹⁶⁶⁴ Issues relating to cultural differences should be discussed during the consultation between the designated employer and the employees¹⁶⁶⁵ and may also be identified during the analysis which a designated employer is required to conduct.¹⁶⁶⁶ The fact that cultural differences have been identified as being challenges may be attributed to the fact that white people consider whiteness to be the norm.¹⁶⁶⁷ This may also be attributed to the provisions contained in the EEA not existing in isolation, but that its impact is affected by the way in which people experience it.

8.3.3.2.3 Making reasonable accommodation for people from designated groups

In terms of section 15(2)(c) of the EEA the affirmative action measures which a designated

¹⁶⁶⁰ See para 3.2.2 above.

¹⁶⁶¹ Jongens C 'Perceptions of employment equity implementation at a major South African multi-national financial corporation' (2006) 2(1) *Postamble* 36.

¹⁶⁶² Jongens C 'Perceptions of employment equity implementation at a major South African multi-national financial corporation' (2006) 2(1) *Postamble* 36.

¹⁶⁶³ Jongens C 'Perceptions of employment equity implementation at a major South African multi-national financial corporation' (2006) 2(1) *Postamble* 36.

¹⁶⁶⁴ Sadler E 'A profile and the work environment of black chartered accountants in South Africa' (2002) 10 *Meditari Accountancy Research* 170.

¹⁶⁶⁵ See para 3.3.1 above.

¹⁶⁶⁶ See para 3.3.2 above.

¹⁶⁶⁷ See para 6.3.1 above.

employer is required to implement must include making reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce of a designated employer.¹⁶⁶⁸ Employees in the institution who were the subjects of the study conducted by Jongens have stated that reasonable accommodation is not made for people from designated groups. The example that was provided is that a language is spoken when communicating with employees which they are unable to understand. Employees mentioned that Afrikaans is spoken in meetings.¹⁶⁶⁹ They mentioned that when their problem with the use of Afrikaans in meetings is disclosed 'the reaction is incredulous from Afrikaans speakers, however in instances where blacks have spoken their language the reaction is outrage from those that cannot understand'.¹⁶⁷⁰

Despite employers being required to make reasonable accommodation for people from designated groups, there is no way of the EEA ensuring that this is done in all such circumstances. Section 42 of the EEA provides the Director-General with the power to determine whether a designated employer is implementing employment equity in terms of the EEA,¹⁶⁷¹ however determining whether a designated employer is making reasonable accommodation for people from designated groups is not a specified consideration in the review process which shows that there is no way of the EEA ensuring that reasonable accommodation is made. This shows that the law is unable to rectify racial injustices¹⁶⁷² and that the EEA may not be an appropriate vehicle to address the challenges faced by black professional employees in the private sector.

8.3.3.2.4 Measures to retain and develop people from designated groups

In terms of section 15(2)(d)(ii) of the EEA, the affirmative action measures which designated employers are required to implement must include measures to retain and develop people from designated groups and to implement appropriate training measures.¹⁶⁷³ With reference to the retention of employees, the reasons for employees leaving a place of employment may be divided into two categories. The first category refers to environmental factors, which are factors that exist outside the boundaries of the organisation, such as technological factors¹⁶⁷⁴ (for example, circumstances in which technology replaces the responsibilities of employees to a certain extent) and political factors (for example where the employer in charge of a workplace changes depending

¹⁶⁶⁸ See para 3.2.3 above.

¹⁶⁶⁹ Jongens C 'Perceptions of employment equity implementation at a major South African multi-national financial corporation' (2006) 2(1) *Postamble* 38.

¹⁶⁷⁰ Jongens C 'Perceptions of employment equity implementation at a major South African multi-national financial corporation' (2006) 2(1) *Postamble* 38.

¹⁶⁷¹ See para 3.5 above.

¹⁶⁷² See para 6.3.3 above.

¹⁶⁷³ See para 3.2.5 above.

¹⁶⁷⁴ This includes changes in technology.

on the political party which is in control).¹⁶⁷⁵ The second category of factors refers to the organisation and individual factors which are 'a source of discomfort and push the individual to desire to leave the organisation.'¹⁶⁷⁶ Organisation and individual factors may include the corporate culture of an enterprise or the lack of mentorship. Job satisfaction has an impact on African senior managers leaving enterprises, similar to employees in general. Greater commitment is shown by employees who have job satisfaction.¹⁶⁷⁷ The nature of the work performed by employees has an effect on their level of satisfaction which, in turn has an effect on whether the employee leave the organisation.¹⁶⁷⁸ One of the reasons for employers being unable to retain employees is that employers are unable to keep up with salary increase expectations of some black employees.¹⁶⁷⁹

Similar to employees in general, for black professional employees, personal achievement is an important objective.¹⁶⁸⁰ For this reason black professional employees should be assisted with their development. Employers could identify potential candidates for promotion and this identification could go hand in hand with supporting the employees in question through internships, scholarships and ongoing mentorships.¹⁶⁸¹ Employers who participated in the study conducted by the Insurance Sector Education and Training Authority in 2017 raised the high cost of training programmes within the insurance profession as being a barrier to transformation.¹⁶⁸² It has been argued that in some cases once funds have been spent on training employees, employers are poached by competitors which results in employers spending money on employees who they are unable to retain.¹⁶⁸³

Similar to employees within the legal profession, training and mentorship is important to the growth of employees within the financial professions. Mentorship and specialised training is important in obtaining the practical knowledge of the profession concerned. Insofar as accountants are concerned, the mentorship level is particularly important as 'the mentor is pivotal in shortening the learning curve between theoretical book knowledge and business application'.¹⁶⁸⁴ For young black chartered accountants who are just entering the industry black mentors are vital, because black mentors assume the position of role models that the young black chartered accountants can relate

¹⁶⁷⁵ Nzukuma KCC & Bussin M 'Job-hopping amongst African black senior management in South Africa' (2011) 9(1) *SAJHRM* 363. Political factors include changes in politics over which the employer does not have direct control.

¹⁶⁷⁶ Nzukuma & Bussin (2011) 363.

¹⁶⁷⁷ Nzukuma & Bussin (2011) 364.

¹⁶⁷⁸ Nzukuma & Bussin (2011) 364.

¹⁶⁷⁹ Insurance Sector Education and Training Authority *Status of skills in the Insurance Industry Part 2: Focus on the short-term insurance sector* (2017) 10.

¹⁶⁸⁰ Nzukuma & Bussin (2011) 369.

¹⁶⁸¹ Insurance Sector Education and Training Authority *Status of skills in the Insurance Industry Part 2: Focus on the short-term insurance sector* (2017) 10.

¹⁶⁸² Insurance Sector Education and Training Authority 'Status of skills in the Insurance Industry Part 2: Focus on the short-term insurance sector' (2017) 9.

¹⁶⁸³ Insurance Sector Education and Training Authority 'Status of skills in the Insurance Industry Part 2: Focus on the short-term insurance sector' (2017) 9.

¹⁶⁸⁴ Accountancy South Africa 'Special Report - Employees' (2014) available at <https://www.accountancysa.org.za/special-report-employees/> (accessed on 4 September 2018) 1.

to directly.¹⁶⁸⁵ The issue that arises however is that even though black mentors may add value in this way, legislation cannot prescribe the quality of the mentorship that should be provided, nor can it specify from which race group mentors should be appointed.

The level of mentoring provided to employees may have an effect on the employees' level of loyalty to the business, which may in turn have an effect on the employer's ability to retain the employees in question. Employers who mentor their employees encourage the retention of the employees.¹⁶⁸⁶ In order to ensure that employers are able to retain black professional employees an environment should be created that enables black managers to have transparent discussions with their employers about the abilities which would enable them to advance in their careers.¹⁶⁸⁷

It was reported that there is a lack of transfer of skills from white to black managers.¹⁶⁸⁸ A barrier which has also been identified by black chartered accountants is the failure to transfer skills from the senior professionals to other employees.¹⁶⁸⁹ The Insurance Sector Education and Training Authority released a report on the status of skills in the short-term insurance profession.¹⁶⁹⁰ The study revealed that there were some instances of senior professionals within the insurance industry retiring without the employers ensuring that there has in fact been a transfer of skills to suitable candidates.¹⁶⁹¹ This type of limitation of access to knowledge would amount to a social closure practice, because it has the effect of limiting the advancement of people from designated groups.¹⁶⁹² Employees within the insurance industry perceive that there is resistance to the transfer of skills and have argued that incentives should be provided to seniors to mentor junior employees prior to their departure from these insurance companies.¹⁶⁹³

Black employees expect development as well as exposure to higher decision-making roles.¹⁶⁹⁴ It

¹⁶⁸⁵ Accountancy South Africa 'Special Report - Employees' (2014) available at <https://www.accountancysa.org.za/special-report-employees/> (accessed on 4 September 2018) 1.

¹⁶⁸⁶ Nzukuma & Bussin (2011) 364.

¹⁶⁸⁷ Nzukuma & Bussin (2011) 371.

¹⁶⁸⁸ Jongens C 'Perceptions of employment equity implementation at a major South African multi-national financial corporation' (2006) 2(1) *Postamble* 36.

¹⁶⁸⁹ Sadler E 'A profile and the work environment of black chartered accountants in South Africa' (2002) 10 *Meditari Accountancy Research* 171. See para 3.2.2 above where it is stated that in terms of provision 6.1.3.3 Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans GN R424 in GG 40817 of 12 May 2017 designated employers should conduct an analysis which should include a critical examination of established policies, practices, procedures and the working environment which should include those relating to succession and experience planning.

¹⁶⁹⁰ The findings of the report was based on data obtained from 22 face to face interviews with Human Resource Directors from leading industry brokers, short-term insurers and underwriting managers and reinsurers as a well as 70 structured telephonic interviews with companies with 50 or more employees.

¹⁶⁹¹ Insurance Sector Education and Training Authority *Status of skills in the Insurance Industry Part 2: Focus on the short-term insurance sector* (2017) 9.

¹⁶⁹² See para 4.3.1 above.

¹⁶⁹³ Insurance Sector Education and Training Authority *Status of skills in the Insurance Industry Part 2: Focus on the short-term insurance sector* (2017) 9.

¹⁶⁹⁴ Nzukuma & Bussin (2011) 364.

has been argued that some experienced managers in the financial professions are reluctant to mentor employees without an economic incentive.¹⁶⁹⁵ An economic incentive will however be futile in circumstances where predominantly white financial corporations prefer to maintain the *status quo*. Maintaining the *status quo* is possible, because in certain cases policies and structures are built on individual merit which perpetuates the dominance of white people.¹⁶⁹⁶

In addition to designated employers being required to develop people from designated groups in terms of the EEA, specialised training should also be provided to employees falling within the financial profession depending on the area of specialisation. The Audit Development Programme (ADP) is a period of specialisation which accountants are required to undertake in the event of them wanting to become registered auditors.¹⁶⁹⁷ It is during this period when skills developed in the training programme can be refined and where more senior roles to those undertaken in the training contract can be performed.¹⁶⁹⁸ In these circumstances registered candidate auditors (RCAs)¹⁶⁹⁹ are provided with the opportunity to specialise.¹⁷⁰⁰ The ADP provides RCAs with increasingly more complex work.¹⁷⁰¹ The Independent Regulatory Board for Auditors has replaced the Public Practice Examination¹⁷⁰² with the ADP as its final assessment for professional competence. Professional accountants who have qualified through the programmes of a professional body accredited by the Independent Regulatory Board for Auditors may register for the ADP.¹⁷⁰³ The Independent Regulatory Board and registered auditors' firms are jointly responsible for the ADP which builds on the competence of a professional accountant.¹⁷⁰⁴ The Independent Regulatory Board of Auditors prescribes that the minimum term of development for the purposes of the ADP is 18 months from the date of registration as a RCA.¹⁷⁰⁵ Specialised training assists auditors in becoming suitably qualified for future promotions.

Black employees have reported that inadequate career advancement opportunities constitutes a reason for them not being retained by their employer.¹⁷⁰⁶ In the study conducted by Jongens it was reported that there is a lack of commitment to succession planning, because some senior employees fear that they will lose their position in circumstances where the juniors they mentor

¹⁶⁹⁵ Nzukuma & Bussin (2011) 364.

¹⁶⁹⁶ See para 6.3.1 above.

¹⁶⁹⁷ The Independent Regulatory Board for Auditors (IRBA) 'The audit development programme booklet' (2015) 2.

¹⁶⁹⁸ The Independent Regulatory Board for Auditors (IRBA) 'The audit development programme booklet' (2015) 2.

¹⁶⁹⁹ A registered candidate auditor is a person who has obtained a professional accountant qualification from a professional body who has been accredited by the Independent Regulatory Board of Auditors and who is registered with the Independent Regulatory Board for Auditors for the purposes of becoming a registered auditor.

¹⁷⁰⁰ The Independent Regulatory Board for Auditors (IRBA) 'The audit development programme booklet' (2015) 2.

¹⁷⁰¹ The Independent Regulatory Board for Auditors (IRBA) 'The audit development programme booklet' (2015) 2.

¹⁷⁰² The Public Practice Examination was discontinued in 2014.

¹⁷⁰³ The Independent Regulatory Board for Auditors (IRBA) 'The audit development programme booklet' (2015) 4.

¹⁷⁰⁴ The Independent Regulatory Board for Auditors (IRBA) 'The audit development programme booklet' (2015) 3.

¹⁷⁰⁵ The Independent Regulatory Board for Auditors (IRBA) 'The audit development programme booklet' (2015) 7.

¹⁷⁰⁶ Nzukuma & Bussin (2011) 369.

become suitable for the positions which the senior employees occupy.¹⁷⁰⁷ The study also revealed that black employees leave the workplace due to the presumption of intelligence being against them.¹⁷⁰⁸ From a critical race theory perspective black professionals who are not retained due to inadequate career opportunities, a lack of commitment to succession planning and the presumption of intelligence being against them should be encouraged to develop their own businesses since black people would be able to promote their own interests better by separating from mainstream.¹⁷⁰⁹

8.3.3.3 Equitable representation

In terms of section 15(2)(d)(i) of the EEA, affirmative action measures must also ensure the equitable representation of suitably qualified people from designated groups in all occupational levels. The objective of this part of the chapter is to determine whether the composition of the financial profession is representative of the South African population. This part of the chapter will outline the actual representivity in the financial professions and will thereafter address the representivity issues which are relevant to the professions.

In 2003 the SAICA had 20 000 members: less than 2% were black (African, coloured and Indian).¹⁷¹⁰ In 2014 there were 36 300 chartered accountants: 21% were black.¹⁷¹¹ The SAICA and other professional bodies are working hard to develop black chartered accountants.¹⁷¹² An acceleration of the pace of transformation can only take place by increasing the number of young black people who choose to become chartered accountants.¹⁷¹³ In 2003 SAICA undertook to raise funds for black students to study full time and to assist them with distance-education if they intended to become chartered accountants,¹⁷¹⁴ which was done by the SAICA.¹⁷¹⁵ The IRBA revealed that in 2017, 74.8% of the 4300 registered auditors were white and 10.5% were African

¹⁷⁰⁷ Jongens C 'Perceptions of employment equity implementation at a major South African multi-national financial corporation' (2006) 2(1) *Postamble* 36.

¹⁷⁰⁸ Jongens C 'Perceptions of employment equity implementation at a major South African multi-national financial corporation' (2006) 2(1) *Postamble* 38.

¹⁷⁰⁹ See para 6.3.7 above.

¹⁷¹⁰ Sadler E & Erasmus BJ 'Views of black trainee accountants in South Africa on matters related to a career as a chartered accountant' (2003) 11 *Meditari Accountancy Research* 130.

¹⁷¹¹ Accountancy South Africa 'Special Report - Employees' (2014) available at <https://www.accountancysa.org.za/special-report-employees/> (accessed on 4 September 2018) 1.

¹⁷¹² Accountancy South Africa 'Special Report - Employees' (2014) available at <https://www.accountancysa.org.za/special-report-employees/> (accessed on 4 September 2018) 1; Sehoole, SAICA's erstwhile executive president stated that it is one of the long-term strategies of SAICA to boost the number of South Africa's black chartered accountants.

¹⁷¹³ Accountancy South Africa 'Special Feature -transformation report' (2015) available at <https://www.accountancysa.org.za/special-feature-the-new-auditors-report-2/> (accessed on 9 September 2018) 1.

¹⁷¹⁴ Sadler E & Erasmus BJ 'Views of black trainee accountants in South Africa on matters related to a career as a chartered accountant' (2003) 11 *Meditari Accountancy Research* 131.

¹⁷¹⁵ SAICA 'Impact report' (2016) available at https://www.saica.co.za/portals/0/documents/2016_SAICA_Thuthuka_Integrated_Report.pdf (accessed on 24 December 2018) 1.

people.¹⁷¹⁶

The figures reflected above show that the financial profession is not representative of the South African population. This is the case, despite the fact that one of the aims of affirmative action is to ensure that suitably qualified people from designated groups are equitably represented in each occupational level of the workforce.¹⁷¹⁷ This shows that the EEA is not an appropriate vehicle to achieve equitable representation. This is because laws and systems are unable to rectify injustices of a racial nature.¹⁷¹⁸

One of the challenges to transforming the financial professions is the quality of mathematics education in South Africa.¹⁷¹⁹ Mathematics is a requirement for employees in the financial professions. The fact that the quality of mathematics education in South Africa currently is poorer than what it was in the past,¹⁷²⁰ has an obvious effect on whether black professional employees will be successful in obtaining positions in the financial professions.

The report compiled by the Insurance Sector Education and Training Authority revealed that transformation difficulties appear to relate mostly to the challenge of finding skilled black candidates¹⁷²¹ with the management or specialised skills required within the profession.¹⁷²² Employers stated that along with the rest of the private sector they have been criticised for their slow adoption of employment equity; however they attributed this to the small recruitment pool available to them, stating that the lack of suitable candidates is one of the largest problems facing short-term insurance companies.¹⁷²³ The study revealed that often the employees who are promoted to senior positions are ill-equipped; however, employers are pressured to ensure equitable representation.¹⁷²⁴ It has been argued that the challenge faced by designated employers to effect transformation in the financial professions is the perceived culture of entitlement among young job seekers and those applying for promotion within the insurance industry when it comes to

¹⁷¹⁶ Ensor L 'Transformation must mean truly empowering black auditors IRBA says' *BusinessDay* 14 March 2017 1.

¹⁷¹⁷ See para 3.1 above.

¹⁷¹⁸ See para 6.3.3 above.

¹⁷¹⁹ Motshekga, the Basic Education Minister of South Africa stated that 'at least one on four schools around the country does not offer mathematics for grades 10 to 12'; Accountancy South Africa 'Special Feature -transformation report' (2015) available at <https://www.accountancysa.org.za/special-feature-the-new-auditors-report-2/> (accessed on 9 September 2018) 1.

¹⁷²⁰ Motshekga, the Basic Education Minister of South Africa stated that 'at least one on four schools around the country does not offer mathematics for grades 10 to 12'; Accountancy South Africa 'Special Feature -transformation report' (2015) available at <https://www.accountancysa.org.za/special-feature-the-new-auditors-report-2/> (accessed on 9 September 2018) 1.

¹⁷²¹ Black candidates include Africans, coloureds, Indians and the Chinese.

¹⁷²² Insurance Sector Education and Training Authority *Status of skills in the Insurance Industry Part 2: Focus on the short-term insurance sector* (2017) 9.

¹⁷²³ Insurance Sector Education and Training Authority *Status of skills in the Insurance Industry Part 2: Focus on the short-term insurance sector* (2017) 9.

¹⁷²⁴ Insurance Sector Education and Training Authority *Status of skills in the Insurance Industry Part 2: Focus on the short-term insurance sector* (2017) 9.

salaries and employment positions, and that as a result it is difficult to find suitable candidates for managerial positions.¹⁷²⁵ The question may be raised whether this is indeed the case or whether white insurance companies are merely making these excuses in order to maintain the *status quo*.

Black trainee accountants who participated in the study conducted by Sadler and Erasmus provided possible reasons for the low number of black chartered accountants at the time. These reasons included: lack of funding for education and bursaries, lack of career guidance, lack of role models, lack of exposure to business, and lack of knowledge in schools about the profession.¹⁷²⁶

Employers have mentioned that in certain sectors of the financial profession, such as the insurance industry, it is difficult to attract suitable candidates as a result of the insurance industry not being perceived as being attractive since payment is commission based in certain cases.¹⁷²⁷ It may be useful for employers in the insurance industry to approach tertiary institutions to facilitate recruitment drives by way of direct contact sessions with students in finance departments in order to market the insurance industry's image with a view to attract more black employees. Employers within the insurance industry have also revealed that headhunting, due to the pressure to transform, results in them having to pay employees who form part of designated groups higher salaries than employees from non-designated groups, which results in the latter being dissatisfied.¹⁷²⁸ This then has an effect on the corporate culture of the business since the morale of some of the staff is negatively affected.

In terms of the EEA a designated employer is required to conduct an analysis which should include a profile of the designated employer's workforce.¹⁷²⁹ In the event of people from designated groups being underrepresented, this should be remedied during the preparation of the employment equity plan and implementation thereof. The financial professions are not representative of the South African population even though the EEA places duties on designated employers to conduct an analysis, and to prepare and implement an employment equity plan to achieve equitable representation. This shows that the EEA with its focus on compliance with procedural obligations placed on employers is not an appropriate vehicle to address the challenges faced by black professional employees in the financial professions.

One of the barriers which were identified above is the corporate culture of enterprises. The

¹⁷²⁵ Insurance Sector Education and Training Authority *Status of skills in the Insurance Industry Part 2: Focus on the short-term insurance sector* (2017) 10.

¹⁷²⁶ Sadler E & Erasmus BJ 'Views of black trainee accountants in South Africa on matters related to a career as a chartered accountant' (2003) 11 *Meditari Accountancy Research* 136.

¹⁷²⁷ Insurance Sector Education and Training Authority *Status of skills in the Insurance Industry Part 2: Focus on the short-term insurance sector* (2017) 10.

¹⁷²⁸ Insurance Sector Education and Training Authority *Status of skills in the Insurance Industry Part 2: Focus on the short-term insurance sector* (2017) 9.

¹⁷²⁹ See para 3.3.2 above.

corporate culture of an enterprise is influenced by the composition of the management structures of the enterprise concerned. It is for this reason that the management control element was introduced into the BEE framework. BEE in the financial professions will be discussed below with one of the objectives being to determine whether the management structures of enterprises in the financial professions are sufficiently regulated by BEE legislation.

8.4 BEE IN THE FINANCIAL PROFESSIONS

8.4.1 Introduction

The purpose of this part of the chapter is to determine whether enterprises in the financial professions are obtaining good BEE ratings and whether there is a low percentage of black people who form part of the ownership and management structures of enterprises in the financial professions. In the event of this being the case, this part of the chapter will test which of the shortcomings of the legal framework advanced in chapter 5 for enterprises being able to obtain good BEE ratings under such circumstances, are dominant in the financial professions. It also seeks to determine whether the law can be amended in order to reduce the ability of enterprises to obtain good BEE ratings under such circumstances. BEE is evaluated through the lens of critical race theory to determine whether the legislation governing BEE is an appropriate vehicle to achieve transformation in the professions.

8.4.2 The Financial Sector Code (FSC)

8.4.2.1 Background and application of the FSC

At the Financial Sector Summit in 2002, the National Economic Development and Labour Council (NEDLAC)¹⁷³⁰ negotiated the Financial Sector Summit Agreement in order to transform the financial sector.¹⁷³¹ The financial sector was committed to promoting a transformed and globally competitive financial sector that reflected the demographics of South Africa. NEDLAC was committed to developing a BEE Charter to remove inequalities within the financial sector.¹⁷³² In 2004, the Financial Sector Charter came into effect.¹⁷³³ The Financial Sector Charter is a

¹⁷³⁰ NEDLAC is the multilateral social dialogue forum formed to approve economic, social and labour policies.

¹⁷³¹ Finance Standing Committee 'Financial Sector Charter on the status of transformation of the financial sector' (2010) available at <https://pmg.org.za/committee-meeting/11822/> (accessed on 29 August 2018) 2.

¹⁷³² The Banking Association of South Africa 'Financial service sector code' available at <http://www.banking.org.za/what-we-do/inclusive-economy/financial-services-charter> (accessed on 3 September 2018) 1.

¹⁷³³ Preamble to Financial Sector Code 2017 statement FS100 GG 41287 of 1 December 2017.

transformation charter developed by the financial sector voluntarily.¹⁷³⁴ It represents the entire sector's commitment to transform the financial services sector. The FSC applies to enterprises within the financial professions and not the B-BBEE Codes, because the B-BBEE Codes are not demanding enough for financial professions. What one would therefore expect from an analysis of the FSC is that it would require greater steps towards transformation by enterprises than what is expected in terms of the B-BBEE Codes, as well as a corresponding positive effect on the experiences of black professionals in the financial professions (relative to professional employees in professions covered by the B-BBEE Codes).

The FSC was issued in terms of section 9(1) of the B-BBEEA. The FSC's elements are 'derived from similar initiatives which were at the core of the original Financial Sector Charter.'¹⁷³⁵ The FSC; represents 'a comprehensive approach by the financial sector to address black economic empowerment'.¹⁷³⁶ The purpose of the FSC is to promote a transformed, globally competitive financial sector that reflects the demographics of South Africa. The FSC does this by establishing principles for BEE implementation in the financial sector and providing mechanisms to ensure that such implementation is taking place. Enterprises are required to make use of the FSC which implies that the B-BBEE Codes do not apply to enterprises that fall within the financial professions.¹⁷³⁷ The FSC states expressly that the gazetting of the FSC 'means that it is binding and takes precedence over any other Code, including the [BEE] Codes of Good Practice.'¹⁷³⁸ The FSC applies to any juristic person or natural person conducting a business in the South African financial profession including but not limited to

'banking; long-term insurance; short-term insurance; re-insurance; retirement fund administration; the management of collective investment assets; financial services intermediation and brokerage; public entities involved in the financial sector; asset management, consulting and administration; private equity, venture capitalist and impact investors; management of investments on behalf of the public; underwriting management agents and industry trade associations operating in the sector.'¹⁷³⁹

It therefore applies to all the financial professions that are the focus of this chapter.¹⁷⁴⁰ Similar to the B-BBEE Codes,¹⁷⁴¹ the FSC also contains two scorecards namely the Generic scorecard and the Qualifying Small Financial Institution (QSFI) scorecard which are set out below.

¹⁷³⁴ Finance Standing Committee 'Financial Sector Charter on the status of transformation of the financial sector' (2010) available at <https://pmg.org.za/committee-meeting/11822/> (accessed on 29 August 2018) 2.

¹⁷³⁵ Preamble to FSC series FS100 in *GG 41287* of 1 December 2017.

¹⁷³⁶ Finance Standing Committee 'Financial Sector Charter on the status of transformation of the financial sector' (2010) available at <https://pmg.org.za/committee-meeting/11822/> (accessed on 29 August 2018) 2.

¹⁷³⁷ Preamble to FSC series FS100 in *GG 41287* of 1 December 2017. The Banking Association South Africa 'The financial services charter code' available at <http://www.banking.org.za/what-we-do/inclusive-economy/financial-services-charter> (accessed 1 September 2018) 1.

¹⁷³⁸ Preamble to FSC series FS100 in *GG 41287* of 1 December 2017.

¹⁷³⁹ Preamble to FSC in *GG 41287* of 1 December 2017.

¹⁷⁴⁰ A Chartered Accountancy Sector Code has been drafted. At the time of submission of this thesis the Chartered Accountancy Sector Code was open for public comment. At the moment the FSC applies to chartered accountants.

¹⁷⁴¹ See para 5.4 above.

Table 14: The Generic scorecard as reflected in the FSC in GG 41287 of 1 December 2007 para 8.1:

ELEMENT	Banks and Life offices	Short term Insurers	Stock exchange and stock exchange members	Other institutions scorecard	Code series reference
Ownership	23	23	23	25	FS100
Management control	20	20	20	20	FS200
Skills development	20	20	20	20	FS300
Procurement and ESD ¹⁷⁴²	15	35	35	35	FS400
Socio Economic Development and Consumer Education	5	5	5	5	FS500
Empowerment Financing and ESD	25	0	0	0	FS600
Access to Financial services	12	12	0	0	FS700
TOTAL	120	115	103	105	

Table 15: The QSFI scorecard as reflected in the FSC 800 in GG 41287 of 1 December 2007 para 3.1:

Element	Weighting	Code series reference
Ownership	25 points	FS801
Management	15 points	FS802
Skills Development	25 points	FS803
Enterprise and supplier development	30 points	FS804
Socio-Economic development	5 points	FS806

The main difference between the Generic and the QSFI scorecards is that the Generic scorecard makes provision for two elements which do not form part of the QSFI scorecard: Empowerment Financing and ESD; and Access to Financial Services. The table below sets out the manner in which the BEE status of a measured entity is determined. It consists of eight contribution levels and their respective recognition levels.¹⁷⁴³ Based on the overall performance of a measured entity

¹⁷⁴² Enterprise and Supplier development.

¹⁷⁴³ FSC in GG 41287 of 1 December 2017 para 8.2.1.

by making use of either the Generic scorecard or the QSFI scorecard, the measured entity will receive points which will determine its corresponding BEE recognition level and contribution level (BEE status).¹⁷⁴⁴ As is evident from the table below, an entity which scores less than 40 points is a non-compliant contributor.

Table 16: B-BBEEA Recognition levels as reflected in the FSC in GG 41287 of 1 December 2017 para 8.2.1:

CONTRIBUTION LEVEL	QUALIFICATION POINTS	BEE RECOGNITION LEVEL
Level 1 contributor	≥100/109	135%
Level 2 contributor	≥95/109 but < 100/109	125%
Level 3 contributor	≥90/109 but < 95/109	110%
Level 4 contributor	≥80/109 but < 90/109	100%
Level 5 contributor	≥75/109 but < 80/109	80%
Level 6 contributor	≥70/109 but < 75/109	60%
Level 7 contributor	≥55/109 but < 70/109	50%
Level 8 contributor	≥40/109 but < 55/109	10%
Non-compliant contributor	<40/109	0%

Similar to the B-BBEE Codes, the FSC distinguishes between four types of enterprises: an EME, a start-up enterprise, a Qualifying Small Financial Institution (QSFI) which is similar to a QSE, and an LE.¹⁷⁴⁵ The meanings of each enterprise in terms of the FSC insofar as the annual turnovers of the enterprises are concerned are the same as the B-BBEE Codes.¹⁷⁴⁶ Each enterprise in terms of the FSC also qualifies for the same BEE ratings as enterprises in terms of the B-BBEE Codes under the same conditions.¹⁷⁴⁷ The compulsory and priority elements in terms of the B-BBEE Codes¹⁷⁴⁸ and the FSC are also identical. Similar to the B-BBEE Codes, despite the fact that ownership is a compulsory element, management control does not form part of the priority elements in terms of the FSC in respect of either an LE or a QSFI. This is one of the shortcomings of the legal framework that make it possible for enterprises to obtain good BEE ratings, despite the low percentage of black people who form part of the ownership and management structures of enterprises within the financial professions. In the event of an enterprise's failure to achieve the subminimum requirements in one or more of the priority elements, the score will be discounted by one level until the next verification period (such as in the case of an enterprise having a level 5 contributor, it will be discounted to a level six contributor).¹⁷⁴⁹ The BEE ratings of enterprises in the financial professions are discussed below in order to illustrate whether enterprises in the financial

¹⁷⁴⁴ FSC in GG 41287 of 1 December 2017 para 8.2.1.

¹⁷⁴⁵ See para 5.4 above.

¹⁷⁴⁶ See para 5.4 above.

¹⁷⁴⁷ See para 5.4 above.

¹⁷⁴⁸ See para 5.4 above.

¹⁷⁴⁹ FSC in GG 41287 of 1 December 2017 para 3.3.32.

professions are obtaining good BEE ratings.

8.4.2.2 The BEE ratings of enterprises in the financial professions

The 2016 annual report of the Financial Sector Transformation Council revealed that the average BEE rating for the financial professions during 2013 was at level 4 and that there was little change in that rating up until 2016.¹⁷⁵⁰ The financial professions obtained an average rating of 4.2 during 2015 and an average rating of 3.9 during 2016.¹⁷⁵¹ During 2016, short-term insurers achieved an average BEE rating of level 4, long-term insurers achieved a rating of level 3.9, non-bank lenders obtained a rating of 5.9, and asset management companies obtained a BEE rating of 2.9.¹⁷⁵² As a result of the BEE ratings of enterprises in the financial professions being in the range from level 1 to level 5 as opposed to the lower levels (level 6 to non-compliant) this shows that during the period 2013 to 2016 generally the financial professions had good BEE ratings. The report published by the B-BBEE Commission revealed the BEE ratings of the financial professions in respect of the enterprises that reported,¹⁷⁵³ as set out below.

Table 17: BEE ratings of LEs in the financial sector for the period 2017 to 2018: ¹⁷⁵⁴

	2017	2018
Level 1	1	-
Level 2	5	6
Level 3	3	4
Level 4	4	5
Level 5	2	2
Level 6	1	4
Level 7	-	1
Level 8	-	5
Non-compliant	-	7

The report compiled by the B-BBEE Commission revealed that there is a difference between the BEE ratings of enterprises who obtained ratings between 1 and 4 and those who obtained ratings between 5 and non-compliant during 2017 relative to 2018. While it may seem as if the ratings in 2018 deteriorated since 2017, this is not the case. This is because during 2017 only 16 enterprises submitted their BEE certificates, while in 2018 there were 34 enterprises who submitted BEE

¹⁷⁵⁰ Financial Sector Charter Council *Transformation of the South African Financial Sector* (2016)19.

¹⁷⁵¹ Financial Sector Charter Council *Transformation of the South African Financial Sector* (2016) 19.

¹⁷⁵² Financial Sector Charter Council *Transformation of the South African Financial Sector* (2016) 20.

¹⁷⁵³ 16 LEs reported in 2017, while 34 LEs reported in 2018. 14 QSFI's reported in 2017, while 3 QSEs reported in 2018. 16 EMEs reported in 2017, while 0 EMEs reported in 2018.

¹⁷⁵⁴ B-BBEE Commission *National Status and Trends on Broad-Based Black Economic Empowerment Report* (2019)

certificates.

Table 18: BEE ratings of QSFIs in the financial sector for the period 2017 to 2018:¹⁷⁵⁵

	2017	2018
Level 1	1	-
Level 2	4	1
Level 3	1	-
Level 4	1	-
Level 5	2	-
Level 6	3	-
Level 7	1	-
Level 8	-	-
Non-compliant	1	2

The reason for the difference between the BEE ratings of enterprises in the financial professions during 2017 and 2018 is that the financial sector was one of the sectors where the lowest number of BEE certificates were submitted for capturing. During 2017, 14 QSFIs submitted BEE certificates for capturing, while in 2018 only 3 enterprises submitted their BEE certificates.¹⁷⁵⁶ In 2019 the BEE ratings of enterprises in the financial professions are as follows: ABSA Group Ltd's rating is 2;¹⁷⁵⁷ Firststrand Ltd's rating is level 1,¹⁷⁵⁸ Nedbank Group Ltd's rating is level 1,¹⁷⁵⁹ Standard Bank of South Africa Ltd's rating is level 1,¹⁷⁶⁰ Investec Ltd's rating is level 1,¹⁷⁶¹ Allan Gray (Pty) Ltd's rating is level 3,¹⁷⁶² Coronation Fund Managers Ltd's rating is level 2,¹⁷⁶³ Momentum Metropolitan Holdings Ltd's rating is level 1,¹⁷⁶⁴ Sanlam Ltd's rating is level 1;¹⁷⁶⁵ Old Mutual Life Assurance

¹⁷⁵⁵ B-BBEE Commission *National Status and Trends on Broad-Based Black Economic Empowerment Report* (2019) 32.

¹⁷⁵⁶ B-BBEE Commission *National Status and Trends on Broad-Based Black Economic Empowerment Report* (2019) 19.

¹⁷⁵⁷ ABSA's website available at <https://www.absa.co.za/content/dam/south-africa/absa/pdf/compliance/B-BBEE-Certificate.pdf> (accessed on 28 October 2019).

¹⁷⁵⁸ FNB's website available at <https://www.rmb.co.za/files/pdf/other/bee-certificate.pdf> (accessed on 28 October 2019).

¹⁷⁵⁹ Nedbank's website available at <https://www.nedbank.co.za/content/dam/nedbank/site-assets/AboutUs/About%20Nedbank%20Group/Corporate%20Governance/Governance%20and%20Ethics/Nedbank%20Limited%20and%20subsidiaries%20BBBEE%20Certificate%202019.pdf> (accessed on 28 October 2019).

¹⁷⁶⁰ Standard Bank's website available at https://www.standardbank.co.za/static_file/South%20Africa/PDF/Legal%20and%20Regulatory/Standard_Bank_Group_Limited_BBBEE_Certificate.pdf (accessed on 28 October 2019).

¹⁷⁶¹ Investec's website available at https://www.investec.com/content/dam/investor-relations/dti-rating/2019/elc8779_investec_bee-certificate_final-June2019.pdf (accessed on 28 October 2019).

¹⁷⁶² Allan Gray's website available at <https://www.allangray.co.za/globalassets/about-us/b-bbee-certificate---allan-gray-proprietary-limited.pdf> (accessed on 28 October 2019).

¹⁷⁶³ Coronation Fund Managers Ltd's website available at <https://www.coronation.com/globalassets/repository/transformation/coronation-fund-managers-bee-certificate-2019.pdf> (accessed on 28 October 2019).

¹⁷⁶⁴ Momentum's website available at <https://www.momentummetropolitan.co.za/wps/wcm/connect/mmiholdings-za/9f30696c-3174-4b62-9382-3b8e2142b6f9/B-BBEE-Certificate-Annexures-A-B-MMI-Holdings-Limited->

Company (South Africa) Ltd's rating is level 2¹⁷⁶⁶ and Stanlib Ltd's rating is level 2.¹⁷⁶⁷ The BEE ratings of enterprises in the financial professions are good since it falls in the range from level 1 to level 5 as opposed to the lower levels (level 6 to non-compliant).

Table 19: BEE ratings of EMEs in the financial sector for 2017 - 2018:¹⁷⁶⁸

	2017
Level 1	1
Level 2	-
Level 3	12
Level 4	-
Level 5	-
Level 6	-
Level 7	-
Level 8	-
Non-compliant	-

As indicated in the table above, there was a decrease in the number of EMEs who reported. No certificates were submitted during this period.¹⁷⁶⁹ This is due to EMEs no longer being required to be verified by a verification agency and should instead merely be required to be in possession of a sworn affidavit. The figures above show that the BEE rating of enterprises in the financial sector is good. The percentage of black people relative to white people in the financial professions is outlined below in order to determine whether there is a low percentage of black people in comparison to white people in the management and ownership structures of enterprises in the financial professions.

8.4.2.3 Demographic representation in the financial professions

One of the objectives of this chapter is to determine whether there is a low percentage of black people who form part of the ownership and management structures of enterprises within the

[v2.1.pdf?MOD=AJPERES](#) (accessed on 28 October 2019).

¹⁷⁶⁵ Sanlam's website available at https://www.sanlam.com/about/responsiblebusiness/Documents/B-BBEE_Certificate.pdf (accessed on 28 October 2019).

¹⁷⁶⁶ Old Mutual's website available at <https://www.oldmutual.co.za/docs/default-source/about-us-document-library/transformation/bee-certificates/bbbee-certificate---omlacs.pdf?sfvrsn=0> (accessed on 28 October 2019).

¹⁷⁶⁷ Stanlib's website available at http://www2.stanlib.com/AboutSTANLIB/Documents/BEE_Certificate/StanlibBBEECertificate.pdf (accessed on 28 October 2019).

¹⁷⁶⁸ B-BBEE Commission *National Status and Trends on Broad-Based Black Economic Empowerment Report* (2019) 39.

¹⁷⁶⁹ B-BBEE Commission *National Status and Trends on Broad-Based Black Economic Empowerment Report* (2019) 19.

financial professions. The representation of black ownership and the representation of black people relative to white people in management is set out below.

Table 20: Representation of black ownership of LEs in the financial sector: ¹⁷⁷⁰

2017	2018
42.82%	22.81%

Table 21: Representation of black ownership of QSFIs in the financial sector: ¹⁷⁷¹

2017	2018
19.18%	8.37%

Tables 20 and 21 above show that the representation of black people in the ownership structures of LEs and QSFIs were higher in 2017 than in 2018. In addition the tables reveal that in both LEs and QSFIs black people remain under-represented in comparison to white people. This shows that there is a low percentage of black people who form part of the ownership structures of enterprises in the financial professions. The tables below reflect the representation of race groups in top management and senior management levels in the financial professions.

Table 22: Representation of race groups in top management of the financial sector: ¹⁷⁷²

	White	African	Coloured	Indian
2011	66.2%	16%	4.9%	9.1%
2012	73.4%	11.3%	4%	9.6%
2013	63.4%	17.5%	5.2%	9.4%
2014	70.4%	13.4%	4.3%	7.8%
2016	68.2%	14.4%	4.7%	8.3%
2018	66.5%	15.1%	5%	9.2%

¹⁷⁷⁰ B-BBEE Commission *National Status and Trends on Broad-Based Black Economic Empowerment Report* (2019) 23.

¹⁷⁷¹ B-BBEE Commission *National Status and Trends on Broad-Based Black Economic Empowerment Report* (2019) 34.

¹⁷⁷² Department of Labour *Commission for Employment Equity Report* (2011 - 2012) 13; Department of Labour *Commission for Employment Equity Report* (2012 - 2013) 15; Department of Labour *Commission for Employment Equity Report* (2013 - 2014) 24; Department of Labour *Commission for Employment Equity Report* (2014 - 2015) 20; Department of Labour *Commission for Employment Equity Report* (2016 - 2017) 15; Department of Labour *Commission for Employment Equity Report* (2018 - 2019) 23.

Table 23: Representation of race groups in senior management of the financial sector: ¹⁷⁷³

	White	African	Coloured	Indian
2011	63%	15.9%	6.4%	11.1%
2012	63.5%	15.1%	10.1%	8.4%
2013	60.8%	17%	6.4%	11.9%
2014	62.8%	15.6%	6.3%	11.3%
2016	60%	16.9%	6.9%	12.2%
2018	57%	17.8%	7.1%	13.5%

Tables 22 and 23 above show that the representation of white people has exceeded black people in each of the years reflected in the tables. This shows that there is a low percentage of black people who form part of management structures in the financial professions. This is one of the reasons for the existence of historically developed ‘white corporate cultures’.¹⁷⁷⁴ This is so because the corporate culture of an enterprise is affected by the composition of the management structure of an enterprise.¹⁷⁷⁵

The aforementioned figures also show that there is a need for racial transformation. BEE ratings can be obtained by financial institutions by complying with the FSC. The FSC is discussed below in order to test which shortcomings of the legal framework advanced in chapter 5 of this thesis for enterprises being able to obtain good BEE ratings, despite the low percentage of black people who form part of the ownership and management structures of enterprises are dominant in the financial professions. The scorecards are discussed in order to illustrate how the calculations which enterprises are required to carry out determines the BEE ratings of such enterprises in terms of the FSC, to illustrate how the formulas contained in the FSC compares with the formulas contained in the B-BBEE Codes to determine whether there are any differences in the ways in which enterprises in the two groups would be obtaining good BEE ratings, as well whether there is a positive effect on black professional employees in the financial professions as a result of a sector specific Code being used.

¹⁷⁷³ Department of Labour *Commission for Employment Equity Report* (2011 - 2012) 17; Department of Labour *Commission for Employment Equity Report* (2012 - 2013) 19; Department of Labour *Commission for Employment Equity Report* (2013 - 2014) 31; Department of Labour *Commission for Employment Equity Report* (2014 - 2015) 23; Department of Labour *Commission for Employment Equity Report* (2016 - 2017) 20; Department of Labour *Commission for Employment Equity Report* (2018 - 2019) 28.

¹⁷⁷⁴ This is due to the fact that the control over whether there is a historically developed ‘white corporate culture’ is dependent on the composition of management, see para 4.3.1.

¹⁷⁷⁵ See para 4.3.1 above.

8.4.2.4 Ownership

8.4.2.4.1 Generic scorecard: Ownership Element

In terms of the FSC black people¹⁷⁷⁶ may hold their rights of ownership in the measured entity as direct participants or via a juristic person.¹⁷⁷⁷ In order to calculate a score for ownership, the Generic ownership scorecard is used which is reflected in FS100,¹⁷⁷⁸ annexed marked 'L'.

Similar to the B-BBEE Codes, the FSC consists of three indicators: voting rights, economic interest and net value. In terms of the B-BBEE Codes, a measured entity is able to obtain a maximum of 6 points in respect of voting rights,¹⁷⁷⁹ which is also the case where a measured entity makes use of the FSC. In terms of the B-BBEE Codes, a measured entity is able to obtain a maximum of 11 points in respect of economic interest,¹⁷⁸⁰ which is also the case where a measured entity makes use of the FSC. In the event of a measured entity making use of the FSC it is able to obtain a maximum of 6 points in respect of net value, which is less than the maximum of 8 points which an entity may obtain when using the B-BBEE Codes. A measured entity is required to achieve a minimum of 40% of the net value points and non-compliance with the subminimum will result in the achieved BEE status being discounted.¹⁷⁸¹ The formulas which an enterprise is required to use to calculate the ownership categories (voting rights and economic interest) are discussed below to illustrate how the scorecards and the calculations are used in order for enterprises to obtain a BEE rating.

8.4.2.4.1.1 Voting rights

The first category referred to in the Generic ownership scorecard is voting rights referred to in the Generic ownership scorecard'.¹⁷⁸² The measurement of ownership in respect of voting rights in terms of the FSC; is calculated by using the same formula as contained in the B-BBEE Codes.¹⁷⁸³

The maximum points for each of the categories contained in the ownership scorecard are reflected in the Generic ownership scorecard. The formula which is used by enterprises to determine their scores for the measured ownership indicator does not encourage an enterprise to obtain more than the maximum number of points.

¹⁷⁷⁶ See para 5.3.1 above.

¹⁷⁷⁷ FSC series FS100 in *GG 41287* of 1 December 2017 para 3.1.1. See para 5.4.1.1 above.

¹⁷⁷⁸ FSC series FS100 in *GG 41287* of 1 December 2017 para 2.

¹⁷⁷⁹ See para 5.4.1.1 above.

¹⁷⁸⁰ See para 5.4.1.1 above.

¹⁷⁸¹ FSC series FS100 in *GG 41287* of 1 December 2017 para 3.2.2. See para 5.4 above.

¹⁷⁸² The Generic ownership scorecard is attached marked 'L'.

¹⁷⁸³ See para 5.4.1.1.1 above. FSC 2017 statement FS100 *GG 41287* of 1 December 2017 Annexe FS100(C).

8.4.2.4.1.2 Economic Interest

The second category referred to in the Generic ownership scorecard¹⁷⁸⁴ is economic interest. The formula for measurement of ownership in respect of economic interest in terms of the FSC is identical to the equivalent formula in the B-BBEE Codes.¹⁷⁸⁵

8.4.2.4.2 QSFI scorecard: Ownership Element

In order to calculate a score for ownership, the QSFI ownership scorecard is used which is reflected in FS801¹⁷⁸⁶ annexed marked 'M'. The formula and the principles stipulated above in the context of FS100 also apply in the event of the QSFI scorecard being used.¹⁷⁸⁷

8.4.2.4.3 The role of the FSC in transformation of ownership of enterprises in the financial sector

When calculating a score in respect of the ownership element in terms of the FSC, enterprises are required to make use of the same formulas as those contained in the B-BBEE Codes. This shows that the level of complexity of the calculations is the same irrespective of the Codes which an enterprise uses. However, some aspects of ownership contribute fewer points in the FSC than in the B-BBEE Codes, which may prove counterproductive given that the FSC aims to be more demanding than the B-BBEE Codes.¹⁷⁸⁸

The B-BBEE Commission's report revealed that in 2016 the black ownership average in the financial professions was 38%¹⁷⁸⁹. The representation of black people in ownership structures in 2017 and 2018 has been outlined above.¹⁷⁹⁰ These figures illustrate that from 2016 to 2018 there was a decline in black ownership within the financial professions, and also shows that there is a low percentage of black people who own enterprises in the financial professions. These figures also demonstrate that the FSC has failed to achieve ownership transformation. The FSC pays sufficient attention to ownership since ownership is a compulsory element and one of the elements to which high points have been allocated. While the FSC pays sufficient attention to ownership, this regulation is unable to achieve ownership transformation. This indicates that the law is unable to rectify injustices of a racial nature.¹⁷⁹¹ As a result, the FSC may not be the most appropriate vehicle to achieve transformation of ownership in financial enterprises.

¹⁷⁸⁴ The Generic ownership scorecard is attached marked 'L'.

¹⁷⁸⁵ See para 5.4.1.1.2 above.

¹⁷⁸⁶ FSC series FS801 in *GN 41287* of 1 December 2017 para 1.

¹⁷⁸⁷ FSC series FS801 in *GN 41287* of 1 December 2017 para 2.1 and 2.2.

¹⁷⁸⁸ See para 8.4.2.1 above.

¹⁷⁸⁹ B-BBEE Commission *National Status and Trends on Broad-Based Black Economic Empowerment Report* (2019) 68.

¹⁷⁹⁰ See para 8.4.2.3 above.

¹⁷⁹¹ See para 6.3.3 above.

8.4.2.5 Management Control

8.4.2.5.1 Generic scorecard: Management Control Element

In order to calculate a score for management control, the Generic management control scorecard is used which is reflected in FS200¹⁷⁹² annexed marked 'N'. The formulas are outlined briefly in order to compare the calculations which enterprises are required to carry out in terms of the B-BBEE Codes and in terms of the FSC to determine whether there are differences in the ways in which financial institutions obtain good BEE ratings in comparison to enterprises who apply the B-BBEE Codes. The management control scorecards are discussed to ascertain whether black professionals benefit from their employer's compliance with this element. The regulation of management control is important, because the racial composition of management influences the corporate culture of enterprises.¹⁷⁹³

Similar to the B-BBEE Codes,¹⁷⁹⁴ in relation to the management control element, the FSC consists of six categories: board participation, other executive management, senior management, middle management, junior management and black employees with disabilities. In respect of board participation, a measured entity is able to obtain a maximum of 6 points in respect of the B-BBEE Codes,¹⁷⁹⁵ however only 5 points in respect of the FSC. This illustrates that even if the maximum number of black executive directors and/or black female executive directors are appointed, a measured entity may be disadvantaged merely for making use of the FSC as opposed to the B-BBEE Codes. A measured entity is able to obtain a maximum of 3 points in respect of other executive management when using both the B-BBEE Codes¹⁷⁹⁶ and the FSC.

Insofar as senior management is concerned, a measured entity can obtain a maximum of 3 points when making use of the B-BBEE Codes,¹⁷⁹⁷ however if it uses the FSC a measured entity can obtain a maximum of 4 points. With regard to middle management a measured entity is able to obtain a maximum of 3 points in terms of the B-BBEE Codes,¹⁷⁹⁸ while it is able to obtain a maximum of 4 points in terms of the FSC. In the event of a measured entity making use of the B-BBEE Codes, it is able to obtain a maximum of 2 points in respect of junior management,¹⁷⁹⁹ while 4 points is the maximum which it is able to obtain in terms of the FSC. Insofar as black people with disabilities are concerned a measured entity is able to obtain a maximum of 2 points in terms of the

¹⁷⁹² FSC series FS200 in *GG 41287* of 1 December 2017 para 2.

¹⁷⁹³ See para 4.3.1 above.

¹⁷⁹⁴ See para 5.4.2.1 above.

¹⁷⁹⁵ See para 5.4.2.1 above.

¹⁷⁹⁶ See para 5.4.2.1 above.

¹⁷⁹⁷ See para 5.4.2.1 above.

¹⁷⁹⁸ See para 5.4.2.1 above.

¹⁷⁹⁹ See para 5.4.2.1 above.

B-BBEE Codes,¹⁸⁰⁰ however only 1 point where a measured entity makes use of the FSC. The differences identified between the FSC and the B-BBEE Codes illustrate that it would be more advisable for measured entities using the FSC to concentrate on obtaining their points in respect of senior management, middle management and junior management where more points can be obtained as opposed to focusing on board participation and black employees with disabilities.

The board is the governing body which may consist of independent, non-executive and executive directors of the enterprise¹⁸⁰¹ while board participation refers to the 'level of control exercised by a person over the decisions of the board.'¹⁸⁰² The meaning of 'other executive management' in terms of the FSC is the same as is outlined in the B-BBEE Codes.¹⁸⁰³

The measurement of management control is calculated by determining the ratio between the voting rights of black directors as a percentage of the voting rights of all directors (in the case of paragraph 2.1 of the Generic management control scorecard), or the percentage of black employees in any other executive management category (in the case of paragraph 2.2 of the Generic management control scorecard), or the percentage of black employees (in the case of paragraphs 2.3, 2.4 or 2.5 of the Generic management control scorecard), or the percentage of black employees with disabilities in management of all employees (in the case of paragraph 2.6 of the Generic management control scorecard) and the compliance target multiplied by the weighting points.¹⁸⁰⁴

For example; if a measured entity has 50% black representation at the board level, the score which the measured entity will obtain will be determined in accordance with the calculation set out hereunder:

¹⁸⁰⁰ See para 5.4.2.1 above.

¹⁸⁰¹ FSC series FS200 in *GG 41287* of 1 December 2017 para 3.8.1.

¹⁸⁰² FSC series FS200 in *GG 41287* of 1 December 2017 para 3.8.2.

¹⁸⁰³ See para 5.4.2.1 above.

¹⁸⁰⁴ $A = \frac{B}{C} \times D$

Where:

A is the score achieved by the measured entity in respect of the measurement of the criteria specified in paragraphs 2.1, 2.2, 2.3, 2.4, 2.5 and 2.6 of the management control scorecard.

B in the case of paragraph 2.1 is the voting rights of black directors as a percentage of voting rights of all directors in the measured entity; or

B in the case of 2.2 is the percentage of black employees in the other executive management category of the measured entity; or

B in the case of 2.3, 2.4 and 2.5 is the percentage of black employees for each of the indicators in those paragraphs; or

B in the case of 2.6 is the percentage of black employees with a disability as a percentage of all employees.

C is the percentage compliance target in respect of the applicable criteria measured as specified in paragraphs 2.1, 2.2, 2.3, 2.4, 2.5 and 2.6 of the management control scorecard

D means the weighting point allocated to the applicable criteria being measured as specified in paragraphs 2.1, 2.2, 2.3, 2.4, 2.5 and 2.6 of the management control scorecard'. FSC series FS200 in *GG 41287* of 1 December 2017 Annexe FS200(A).

$$\text{Score} = \frac{50\% (\text{obtained from the scenario})}{50\% (\text{compliance target})} \times 1(\text{weighting points})$$

$$\text{Score} = 1 \text{ point (out of 5 points)}$$

The maximum points for each of the categories of the management control element are contained in the Generic management control scorecard. The formula above does not allow an enterprise to obtain more than the maximum number of points provided in the scorecard, which implies that there is no incentive to improve once the maximum number of points have been obtained in respect of a particular category.

8.4.2.5.2 QSFI scorecard: Management Control element

In order to calculate a score for management control of a QSFI, the QSFI management control scorecard is used which is reflected in FS802¹⁸⁰⁵ annexed marked 'O'. The calculations which should be carried out by enterprises who apply the Generic ownership scorecard, discussed above,¹⁸⁰⁶ also apply to measured entities making use of the QSFI scorecard.¹⁸⁰⁷

Similar to the Generic management control scorecard, the demographic representation of black people set out in the EEA Regulations and the Employment Equity report of the Commission is not applicable when making use of the QSFI scorecard.¹⁸⁰⁸ Since the demographic representation does not apply to QSFIs, this means that QSFIs (who are required to apply the FSC) and QSEs (who are required to apply the B-BBEE Codes) apply the same formula when calculating their scores in respect of management control.

8.4.2.5.3 Analysis of the management control element

There is an important difference between the calculation of management control in terms of the Generic management control scorecard when calculating scores in respect of the categories of senior management, middle management and junior management in terms of the FSC as opposed to using the B-BBEE Codes. This is that the demographic representation of black people does not apply¹⁸⁰⁹ when a score is obtained in terms of the FSC as it does in circumstances where scores are obtained in terms of the B-BBEE Codes. In terms of the B-BBEE Codes, the compliance targets and the weighting points in respect of senior management, middle management and junior

¹⁸⁰⁵ FSC series FS802 in GG 41287 of 1 December 2017 para 1.

¹⁸⁰⁶ See para 8.4.2.5.1 above.

¹⁸⁰⁷ FSC series FS802 in GG 41287 of 1 December 2017 para 2.4 and 2.5.

¹⁸⁰⁸ FSC series FS802 in GG 41287 of 1 December 2017 para 2.6

¹⁸⁰⁹ FSC series FS200 in GG 41287 of 1 December 2017 para 3.10.

management are based on the overall demographic representation of black people as defined in the Regulations of the EEA and the Commission on Employment Equity reports.¹⁸¹⁰ This is important because by the compliance targets and weighting points in the FSC not being based on the overall demographic representation of black people, the equations have not been constructed in a manner that recognises that non-beneficiaries should be excluded. While this is a shortcoming of the calculations contained in the FSC, it does make the calculations simpler than the calculations which enterprises should carry out when measuring a score for management control in terms of the B-BBEE Codes. Despite the calculations in the FSC being easier to carry out than those in the B-BBEE Codes, there is no incentive for enterprises that are required to apply the FSC to comply with this element since management control is not a priority element. The position is the same in the B-BBEE Codes where management control is similarly not a priority element.¹⁸¹¹

In chapter 5 it was recommended that management control be made a priority element replacing either enterprise and supplier development or skills development.¹⁸¹² However, similar to what was illustrated in chapter 7 in the context of the legal profession, making management control a priority element would not necessarily achieve management transformation.

The points which have been allocated to management control in the Generic and QSE scorecards of the B-BBEE Codes are the same as what has been allocated to management control in terms of the QSFI scorecard. However, the points allocated to the Generic scorecard contained in the FSC are higher than what has been allocated to the Generic and QSE scorecards of the B-BBEE Codes. While this may be an incentive for an enterprise that applies the Generic management control scorecard in the financial professions to comply with the management control element, this is not always happening which is evident from the fact that there is a low percentage of black employees who form part of the management structures of enterprises in the financial professions. In chapter 5 the recommendation was made that the points allocated to management control should be higher than those allocated to skills development or enterprise and supplier development.¹⁸¹³ However, similar to chapter 7, ownership transformation has not been achieved despite high points being allocated to the ownership element in terms of the FSC. This illustrates that a higher number of points being allocated to management control will not necessarily benefit black professionals with their advancement into managerial positions. The FSC is not the appropriate mechanism to achieve transformation in the financial professions, since thus far it has been unable to translate into black employees' advancement to managerial positions. Black people should develop their own businesses instead to ensure that their own interests are promoted.¹⁸¹⁴

¹⁸¹⁰ See para 5.4.2.1 above.

¹⁸¹¹ See para 5.4 above.

¹⁸¹² See para 5.9 above.

¹⁸¹³ See para 5.4 above.

¹⁸¹⁴ See para 6.3.7 above.

8.4.2.6 Skills Development

8.4.2.6.1 Generic scorecard: Skills Development Element

Recognisable skills development expenditure in terms of the FSC includes 'any legitimate training expenses incurred for any learning programme offered by a measured entity to its black employees and black people evidenced by an invoice or appropriate internal accounting record'.¹⁸¹⁵ The expenses included in legitimate training expenses in terms of the FSC are the same as those which are included in terms of the B-BBEE Codes.¹⁸¹⁶ In order to calculate a score for skills development, the Generic skills development scorecard is used which is reflected in FS300¹⁸¹⁷ annexed marked 'P'.

The legitimate expenses which fall under the categories of catering for learners, accommodation of learners and travelling of learners may not exceed 15% of the measured entity's total value of the skills development expenditure.¹⁸¹⁸ Bursaries or scholarships may constitute skills development expenditure under the same conditions as it may constitute skills development expenditure in terms of the B-BBEE Codes.¹⁸¹⁹ By the FSC allowing a measured entity to claim the bursary or scholarship under these circumstances it encourages employers to invest in the education of black employees who may otherwise not have had the opportunity to study further. This is because by providing employees with a bursary or scholarship with a condition or right of recovery involving an obligation that the employee completes the studies within a prescribed period or continues with employment for a period following the successful completion of studies, the employer will in doing so be employing an employee who is suitably qualified. If the bursary or scholarship is provided on condition that the employee continues with employment for a period following successful completion of studies, the employer would also be implementing the affirmative action measure to retain people from designated groups.

In order for a measured entity to obtain points in respect of skills development, it is required to have an annual training report, a pivotal report and a workplace skills plan which are approved by the SETA.¹⁸²⁰ In the event of the measured entity retaining less than 100% of the trainees, the percentage of trainees retained will be recognised in respect of the category found in paragraph 2.7¹⁸²¹ of the Generic skills development scorecard.¹⁸²²

¹⁸¹⁵ FSC series FS300 in *GG 41287* of 1 December 2017 para 5.2.

¹⁸¹⁶ See para 5.4.3.1 above for the meaning of legitimate training expenses.

¹⁸¹⁷ FSC series FS300 in *GG 41287* of 1 December 2017 para 2.

¹⁸¹⁸ FSC series FS300 in *GG 41287* of 1 December 2017 para 5.4.

¹⁸¹⁹ See para 5.4.3.1 above.

¹⁸²⁰ FSC series FS300 in *GG 41287* of 1 December 2017 para 3.1.1. The SETA which is applied must provide authority. For the financial sector this would be the Financial and Accounting Services Sector Education and Training Authority (FASSET) and for insurance this would be Insurance Sector Education and Training Authority (INSETA).

¹⁸²¹ This category is the number of black people (employed or unemployed) who participate in apprenticeships,

Skills development expenditure on black people who are counted on the skills development scorecard may not be counted again in any other BEE element of the QSFI or Generic scorecard.¹⁸²³ This provision has been included in the FSC, however interestingly enough it has not been included in the Generic scorecard and QSE scorecards which apply to enterprises generally (those to whom the FSC does not apply).

The measurement of skills development is calculated by determining the percentage of skills development expenditure of the relevant leviable amount,¹⁸²⁴ or the percentage of black people who are participating in learnerships, apprenticeships and internships of the total number of employees of the measured entity,¹⁸²⁵ or the percentage of black people who were previously unemployed who completed a learnership programme and who have been retained by the measured entity or industry of the total number of black people enrolled in learnership programmes¹⁸²⁶ and the compliance target multiplied by the weighting points.¹⁸²⁷

For example, at the end of the period of articles the measured entity appoints 7 out of 10 accounting staff who have been employed by the measured entity for the purposes of articles. The score of the measured entity in respect of bonus points is set out below:

$$\text{Score} = \frac{70\% (\text{percentage accounting staff})}{100\%(\text{compliance target})} \times 3 (\text{weighting points})$$

internships, learnerships or categories B, C or D programmes contained in the learning programmes matrix.

¹⁸²² FSC series FS300 in GG 41287 of 1 December 2017 para 3.4.

¹⁸²³ FSC series FS300 in GG 41287 of 1 December 2017 para 3.5.

¹⁸²⁴ In the case of paragraphs 2.1, 2.2, 2.3, 2.4 and 2.5 of the Generic skills development scorecard. See para 5.4.3.1 above for the meaning of 'leviable amount'.

¹⁸²⁵ In the case of paragraph 2.6 of the Generic skills development scorecard.

¹⁸²⁶ In the case of paragraph 2.8 of the Generic skills development scorecard.

¹⁸²⁷ 'A = $\frac{B}{C} \times D$

Where:

A is the score achieved by a measured entity in respect of the measurement of skills development criteria specified in paragraph 2;

B in the case of paragraphs 2.1, 2.2, 2.3, 2.4 and 2.5 is the amount of skills development expenditure expressed as a percentage of the relevant leviable amount of the occupational level or the measured entity; or

B in the case of paragraph 2.6 is the number of black people who are doing learnerships, apprenticeships and internships expressed as a percentage of the total number of employees of the measured entity; or

B in the case of paragraph 2.7 is the number of previously unemployed black people who completed a learnership programme during the measurement period and who have been subsequently absorbed by the measured entity or the industry expressed as a percentage of the total number of learnership programmes that black people were enrolled for and that ended during the measurement period.

C is the percentage compliance target in respect of the applicable criteria being measured as specified in the skills development scorecard;

D is the weighting for the applicable criteria being measured as specified in the skills development scorecard.' FSC series FS300 in GG 41287 of 1 December 2017 Annexe FS300(B).

Score = 2.1 points (out of 3 points)

A learning programme matrix has also been included in the FSC,¹⁸²⁸ as is the case in the B-BBEE Codes. Salary or wages which the measured entity pays to the employee who participates in the learning programme may only be claimed as skills development expenditure in the event of the learning programme being an apprenticeship, internship or learnership.¹⁸²⁹ This implies that where an accountant is serving articles, the employer will be able to claim the salary or wages and thus obtain points under the skills development element during the period of articles. The employer that retains such employees after the period of articles has ended will receive additional points.

The demographic representation of black people applies when a measured entity calculates its score for skills development in respect of the category in paragraph 2.1.1.1 of the Generic skills development scorecard of the B-BBEE Codes. The demographic representation of black people does not apply to the FSC at all. While this is a shortcoming of the FSC, this does make the calculations in terms of the FSC simpler than the calculations which enterprises should perform in terms of the B-BBEE Codes. Enterprises can improve their FSC scores by complying with this element, which contributes to enterprises obtaining good BEE ratings.

8.4.2.6.2 QSFI scorecard: Skills Development Element

In order to calculate a score for the skills development of a QSFI, the QSFI skills development scorecard is used which is reflected in FS803,¹⁸³⁰ annexed marked 'Q'. The formula and learning programme matrix reflected in code series FS300 also applies when a score for skills development is calculated under the QSFI scorecard.¹⁸³¹

As far as the FSC is concerned, skills development is both a priority element and one of the elements to which high points have been allocated in terms of the Generic and QSFI scorecards. For this reason, it is more likely that enterprises who apply the FSC will focus on complying with skills development over the other elements in their drive to obtain good BEE ratings, similar to the position in which enterprises are who apply with B-BBEE Codes.

¹⁸²⁸ FSC series FS300 in GG 41287 of 1 December 2017 Annexe FS 300(A).

¹⁸²⁹ FSC series FS300 in GG 41287 of 1 December 2017 para 5.5.

¹⁸³⁰ FSC series FS803 in GG 41287 of 1 December 2017 para 1.

¹⁸³¹ FSC series FS803 in GG 41287 of 1 December 2017 para 2.5 and 2.6.

8.4.2.7 Enterprise and Supplier Development

8.4.2.7.1 Generic scorecard: Enterprise and Supplier Development Element

The scorecard and formula used to calculate a score for enterprise and supplier development is discussed below in order to determine whether enterprises would be likely to elect to comply with this element to obtain good BEE ratings. A comparison will be made between the calculations which enterprises are required to carry out in terms of the FSC and those contained in the B-BBEE Codes. Similar to the B-BBEE Codes, the enterprise and supplier element consists of preferential procurement, enterprise development and supplier development.¹⁸³² In order to calculate a score for enterprise and supplier development, the Generic enterprise and supplier development scorecard is used which is reflected in FS400,¹⁸³³ annexed marked 'R'.

In the B-BBEE Codes, a measured entity is able to obtain a maximum of 27 points in respect of preferential procurement,¹⁸³⁴ a maximum of 10 points in respect of supplier development,¹⁸³⁵ and a maximum of 5 points in respect of enterprise development.¹⁸³⁶ In the FSC, on the other hand, a measured entity is able to obtain a maximum of 20 points in respect of procurement, a maximum of 10 points in respect of supplier development, and a maximum of 5 points in respect of supplier development. A measured entity is thus able to obtain 7 more points for preferential procurement when using the B-BBEE Codes than measured entities using the FSC.

Similar to the B-BBEE Codes, a measured entity must achieve a minimum of 40% for each of the total weighting points, excluding the bonus points.¹⁸³⁷ This means that 8 points must be achieved for preferential procurement, 4 points for supplier development, and 2 points for enterprise development.¹⁸³⁸ Where measured entities, fail to meet the targets, the discounting principle will apply.¹⁸³⁹ A measured entity may not claim for the same activities under both supplier development¹⁸⁴⁰ and enterprise development.¹⁸⁴¹ A measured entity may also not claim bonus

¹⁸³² FSC series FS400 in *GG 41287* of 1 December 2017 para 3.1.

¹⁸³³ FSC series FS400 in *GG 41287* of 1 December 2017 para 2.

¹⁸³⁴ See para 5.4.4.1 above.

¹⁸³⁵ See para 5.4.4.1 above.

¹⁸³⁶ See para 5.4.4.1 above.

¹⁸³⁷ FSC series FS400 in *GG 41287* of 1 December 2017 para 3.3.1.

¹⁸³⁸ FSC series FS400 in *GG 41287* of 1 December 2017 para 3.3.1.

¹⁸³⁹ FSC series FS400 in *GG 41287* of 1 December 2017 para 3.3.2. In terms of the discounting principle the measured entity's BEE status level will be discounted by one level down until the next applicable verification period in which the measured entity can demonstrate compliance at which point the recorded level will become the applicable ratings level for that measured entity in that verification period e.g. level 7 (recognition level) will become level 8 (recorded level).

¹⁸⁴⁰ Category 2.2 of the table representing the manner in which a score for enterprise and supplier development is calculated.

¹⁸⁴¹ FSC series FS400 in *GG 41287* of 1 December 2017 para 4.13.

points under both 2.4.3(a) and 2.4.3(b) of the Generic enterprise and supplier development scorecard, it will only receive recognition for one of the two categories.¹⁸⁴²

The Generic enterprise and supplier development scorecard¹⁸⁴³ provides enterprises with points in the event of the measured entity procuring goods and/or services from an empowering supplier and from designated group suppliers that are at least 51% black owned.

Procurement spend is the value of all amounts which fall within the meaning of total measured procurement spend.¹⁸⁴⁴ In order for a measured entity to determine its score in terms of the FSC, the same formula is applied as in the case of the measured entities who apply the B-BBEE Codes.¹⁸⁴⁵

In order to determine a measured entity's score for the purposes of preferential procurement the ratio should be determined between the percentage procurement spend (in respect of 2.1.1, 2.1.2, 2.1.3, 2.1.4 and 2.1.5 of the Generic enterprise and supplier development scorecard) of the total procurement spend and the compliance target. The total is multiplied by the weighting points.¹⁸⁴⁶

For example, a measured entity spends R200 000 on an empowering supplier A, who has a BEE recognition level of level 5. The measured entity spends R650 000 on empowering supplier B, who has a BEE recognition level of level 7. The results are reflected below for determining the procurement spend from all empowering suppliers as a percentage of total measured procurement

¹⁸⁴² FSC series FS400 in GG 41287 of 1 December 2017 para 4.16

¹⁸⁴³ FSC series FS400 in GG 41287 of 1 December 2017 para 2.

¹⁸⁴⁴ See para 5.4.4.1 above for the amounts which fall within the meaning of total measured procurement spend and the amounts which should be excluded.

¹⁸⁴⁵ See para 5.4.4.1 above ' $A = \text{the sum of } (B \times C)$

Where:

A is the total BEE procurement spend for the measured entity. It is equal to the sum of the result of the product of B and C for each supplier of the measured entity not excluded in the exclusion from total measured procurement spend;

B is the value of procurement falling within total measured procurement spend and not excluded in the exclusion from total measured procurement spend;

C is the latest BEE recognition level of each supplier of the measured entity that can be supported by a BEE verification certificate'. FSC series FS400 in GG 41287 of 1 December 2017 Annexe FS400(A).

¹⁸⁴⁶ ' $A = \frac{B}{C} \times D$

Where:

A is the score for paragraphs 2.1.1, 2.1.2, 2.1.3, 2.1.4, 2.1.5 and 2.1.6;

B is the total BEE procurement spend of the measured entity calculated for each of the indicators of the preferential procurement scorecard (2.1.1, 2.1.2, 2.1.3, 2.1.4, 2.1.5 and 2.1.6) expressed as a percentage of the total measured procurement spend of that measured entity;

C is the compliance target for each of the indicators of the preferential procurement scorecard (2.1.1, 2.1.2, 2.1.3, 2.1.4, 2.1.5 and 2.1.6);

D is the weighting points allocated to each of the indicators (2.1.1, 2.1.2, 2.1.3, 2.1.4, 2.1.5 and 2.1.6) '. FSC series FS400 in GG 41287 of 1 December 2017 Annexe FS400(B).

spend:

Spend for A = spend × recognition level

$$A = R200\,000 \times 80\% \text{ (for level 5)}$$

$$A = R160\,000$$

Spend for B = spend × recognition level

$$B = R650\,000 \times 50\% \text{ (for level 7)}$$

$$B = R325\,000$$

Total spend = R160 000 + R325 000

$$\text{Total spend} = R485\,000$$

Total spend as a percentage = 4.85%

$$A = \frac{B \text{ (procurement spend)}}{C \text{ (compliance target)}} \times D \text{ (weighting points)}$$

$$A = \frac{4.85\%}{75\% \text{ (compliance target)}} \times 5 \text{ points (weighting points)}$$

$$A = 0.32 \text{ points}$$

Enterprise and supplier development in terms of the FSC includes, all the contributions which fall within the category of enterprise and supplier development for the purposes of the B-BBEE Codes.¹⁸⁴⁷

The score of a measured entity in respect of enterprise and supplier development (2.2 and 2.3 of the Generic enterprise and supplier development scorecard) is determined by calculating the ratio between the annual value of all qualifying enterprise and supplier development contributions payable by the measured entity during the measured period and the compliance target. The total is multiplied by the weighting points.¹⁸⁴⁸

¹⁸⁴⁷ See para 5.4.4.1 above.

¹⁸⁴⁸ $A = \frac{B}{C} \times D$

Where:

For example, the measured entity has a NPAT of R15 000 000.00 and spends R35 000 on a beneficiary. The results are reflected below for determining the annual value of all supplier development contributions as a percentage of the target:

*2% of NPAT (R15 000 000) is R300 000
(2% of NPAT is the compliance target)*

$$A = \frac{B}{C} \times D$$

$$\text{Annual value of all supplier development contributions} = \frac{35\,000}{300\,000} \times 10 \text{ points}$$

$$\text{Annual value of all supplier development contributions} = 1.17 \text{ points}$$

8.4.2.7.2 QSFI scorecard: Enterprise and Supplier Development Element

In order to calculate a score for the enterprise and supplier development of a QSFI, the QSFI enterprise and supplier development scorecard is used which is reflected in FS804, annexed marked 'S'.¹⁸⁴⁹ The formulas in code series FS400 apply to measured entities that calculate their scores in terms of the QSFI scorecard.¹⁸⁵⁰

The calculations which should be carried out by enterprises to which the FSC applies are the same as those which should be carried out by enterprises in terms of the B-BBEE Codes. This implies that whether enterprises apply the calculations contained in the FSC or the B-BBEE Codes, the calculations are of equal complexity. Similar to the B-BBEE Codes, an enterprise that applies the FSC is incentivised to comply with the enterprise and supplier development element as a result of it being a priority element and since it is one of the elements to which the highest points have been allocated. Enterprises will thus be in a position to obtain good BEE ratings by complying with this element, whilst neglecting other elements, such as management control which is of greater

A is the score achieved for the enterprise and supplier development indicators (paragraphs 2.2 and 2.3) in respect of the qualifying enterprise and supplier development contributions made by the measured entity;

B is the annual value of all qualifying enterprise and supplier development contributions that have become payable by the measured entity during the measured period.

C is the compliance targets for the enterprise and supplier development indicators (paras 2.2 and 2.3)

D is the weighting points allocated to enterprise and supplier development indicators (paras 2.2 and 2.3)'. FSC series FS400 in GG 41287 of 1 December 2017 Annexe FS400(C).

¹⁸⁴⁹ FSC series FS804 in GG 41287 of 1 December 2017 para 1.

¹⁸⁵⁰ FSC series FS804 in GG 41287 of 1 December 2017 para 2.3.

importance to black professional employees than enterprise and supplier development.

8.4.2.8 Socio-Economic Development and Consumer Education

8.4.2.8.1 Generic scorecard: Socio-Economic Development and Consumer Education

The formulas used to calculate a score for socio-economic development and consumer education is discussed below to illustrate whether focusing on this element would be an easy way for enterprises to inflate their score. Qualifying socio-economic development and consumer education contributions are recognised as a percentage of the previous year's NPAT.¹⁸⁵¹ In order to calculate a score for socio-economic development and consumer education, the Generic socio-economic development and consumer education scorecard is used which is reflected in FS500, which is annexed marked 'T' ¹⁸⁵²

Socio-economic development programmes may include job creation, sport, training, education and arts and culture. Socio-economic development may consist of both non-monetary and monetary contributions initiated by the measured entity in favour of a beneficiary.¹⁸⁵³ In circumstances where at least 75% of the value of the contributions benefits black people directly 'the full value of socio-economic development contribution is recognisable'.¹⁸⁵⁴ In the event of less than 75% of the full value of the socio-economic contributions directly benefitting black people, the value of the contribution made multiplied by the percentage that benefits black people is recognisable.¹⁸⁵⁵ The measured entity's qualifying contributions are recognised on an annual basis.¹⁸⁵⁶

Consumer education contributions include non-monetary or monetary contributions initiated in favour of beneficiaries by a measured entity with the aim of providing consumer education.¹⁸⁵⁷ Only in the event of at least 75% of the value of the consumer education contributions directly benefitting black people will the contributions be recognisable.¹⁸⁵⁸ While the BEE Codes contains an element known as socio-economic development, no specific mention is made of consumer education contributions.

In terms of the B-BBEE Codes, a measured entity is able to obtain a maximum of 5 points, while in terms of the FSC a measured entity is able to obtain 5 points together with 3 additional bonus

¹⁸⁵¹ FSC series FS500 in GG 41287 of 1 December 2017 para 3.1.

¹⁸⁵² FSC series FS500 in GG 41287 of 1 December 2017 para 2.

¹⁸⁵³ FSC series FS500 in GG 41287 of 1 December 2017 para 5.1.

¹⁸⁵⁴ FSC series FS500 in GG 41287 of 1 December 2017 para 5.2

¹⁸⁵⁵ FSC series FS500 in GG 41287 of 1 December 2017 para 5.2.1.

¹⁸⁵⁶ FSC series FS500 in GG 41287 of 1 December 2017 para 4.2.

¹⁸⁵⁷ FSC series FS500 in GG 41287 of 1 December 2017 para 6.3.2.

¹⁸⁵⁸ FSC series FS500 in GG 41287 of 1 December 2017 para 6.4.

points. The score of the measured entity in respect of socio-economic development and consumer education is calculated by determining the ratio between the value of all qualifying socio-economic development or consumer education contributions of the measured entity and the compliance target. The total is multiplied by the weighting points.¹⁸⁵⁹

In order to illustrate the above, the following example is provided. A measured entity's NPAT is R2 million. The measured entity made a contribution of R23 000 and 100% of black beneficiaries benefited from the contribution. The score obtained by the measured entity is set out below:

Contribution amount: R23 000

Black beneficiaries as a percentage: 100%

Benefit factor: 100%

$$A = \frac{R23000(\text{contribution})}{R12\ 000\ (\text{compliance target is } 0.60\% \text{ of NPAT})} \times 3\ \text{points}$$

$$A = 5.75\ (\text{maximum points: } 3\ \text{points, entity will obtain } 3\ \text{points})$$

This example illustrates that the Generic socio-economic scorecard provides maximum points which an enterprise can achieve. This implies that there is no incentive provided to an enterprise to obtain more points than provided for in the scorecard. The calculation which should be carried out by a measured entity who chooses to comply with this element is complicated. Similar to the B-BBEE Codes, the socio-economic element is not a priority element and is also the element to which the lowest points have been allocated.

8.4.2.8.2 QSFI scorecard: Socio-Economic Development and Consumer Education Element

In order to calculate a score for socio-economic development and consumer education of a QSFI, the QSFI socio-economic development and consumer education scorecard is used which is

¹⁸⁵⁹ $A = \frac{B}{C} \times D$

Where:

'A is the score achieved in respect of the socio-economic development scorecard;

B is the value of all qualifying socio-economic or consumer education contributions of the measured entity that have become payable during the measurement period;

C is the compliance target in respect of the qualifying socio-economic or consumer education contributions as specified in the scorecard;

D is the weighting points allocated to the indicator in the socio-economic and consumer education scorecard.' FSC series FS500 in GG 41287 of 1 December 2017 Annexe 500(B).

reflected in FS100, annexed marked 'U'.¹⁸⁶⁰ The calculations set out in code series FS500 apply in circumstances where the QSFI scorecard is used.¹⁸⁶¹

The points which enterprises are able to obtain in terms of the FSC when complying with this element are higher than in the case of enterprises who apply the B-BBEE Codes. This implies that it would be easier for a financial institution to obtain a good BEE rating by complying with this element than what it will be for an enterprise who applies the B-BBEE Codes. However, as a result of the legislature allocating the lowest points to this element in comparison to the other elements in respect of the FSC and due to it not being a priority element, enterprises would be less likely to comply with this element.

8.4.2.9 Empowerment Financing and ESD and Access to financial services

There two additional elements which are contained in the FSC known as empowerment financing and enterprise and supplier development and access to financial services. These elements will not be discussed since they only apply to certain enterprises, as opposed to all the professions which this thesis focuses on.¹⁸⁶²

8.4.2.10 Complexity of scorecards in the FSC

The above discussion on the elements, the formulas and the rules relating thereto contained in the FSC illustrates just how complicated the formulas and the scorecards are. Similar to the B-BBEE Codes, there are formulas in the FSC which measured entities are required to apply in order to determine their scores under each of the elements. Measured entities in the financial professions that are or employ experts at using these scorecards and formulas are able to make strategic decisions and adjustments to their calculations allowing them to obtain financial benefits while escaping from areas of compliance. This illustrates that it is possible for these measured entities to obtain good BEE ratings without advancing black professional employees in the financial professions.

8.5 CONCLUSION

Nzukuma and Bussin argue that the EEA and the B-BBEEA has 'disrupted the labour market in

¹⁸⁶⁰ FSC series FS805 in *GG 41287* of 1 December 2017 para 1.3.

¹⁸⁶¹ FSC series FS 805 in *GG41287* of 1 December 2017 para 2.

¹⁸⁶² See Table 15 above.

South Africa by accelerating the legislative need to appoint African black managers¹⁸⁶³ While this is one of the benefits of the EEA and the B-BBEEA, these statutes have a number of shortcomings. The main objective of this chapter is to determine whether the current legislative framework is an appropriate vehicle to address the challenges faced by black professionals in the financial professions.

The first ancillary objective of this chapter is to determine whether there is a slow pace of racial transformation in the financial professions and aims to test which of the shortcomings of the legal framework advanced in chapter 3 of this thesis are dominant in the financial professions. In addition, this chapter aims to determine whether recommendations may be provided to reduce the shortcomings.

The literature documenting the experiences of members of the financial professions indicates that racial discrimination is prevalent in the financial professions, despite the fact that racial discrimination is prohibited by section 6 of the EEA. This has also been confirmed by the IRBA.¹⁸⁶⁴ The EEA is thus not a sufficient deterrent to eliminate racial discrimination and not an appropriate vehicle to address the challenges faced by black professionals in the financial professions. This corresponds with the view of adherents to critical race theory that the law alone is unable to eliminate racial discrimination.¹⁸⁶⁵

This chapter has revealed that employers in the financial professions who fall within the private sector generally employ more than 50 employees. This shows that the limited scope of the provisions relating to affirmative action is not a shortcoming which is relevant to the financial professions, as is the case with the legal profession. This implies that employers in the financial professions are required to comply with the provisions relating to affirmative action.

In chapter 3 it was recommended that the legislature should provide more details on what the consultations held between employees and employers should entail. However, it was acknowledged that in the event of the legislature enacting the specific topics which employers and employees should discuss during the consultation this would merely reinforce the 'tick-box' mentality by providing employers with additional boxes to tick.

The second ancillary objective of this chapter is to determine whether employers within the financial professions are obtaining good BEE ratings and whether there is a low percentage of black people who form part of the ownership and management structures of enterprises in the

¹⁸⁶³ Nzukuma & Bussin (2011) 360.

¹⁸⁶⁴ See para 8.3.2.1.1 above.

¹⁸⁶⁵ See para 6.3 above.

financial professions. In the event of this being established the chapter aimed to test which of the shortcomings of the legal framework identified in chapter 5 of this thesis are dominant in the financial professions and whether the law can be amended in order to reduce the shortcomings.

This chapter revealed that employers in the financial professions have good BEE ratings, despite there being a low percentage of black people who form part of the ownership and management structures of enterprises within the financial professions. Since the control over whether a historically developed 'white corporate culture' is retained or changes in an enterprise is dependent on the composition of management, the low percentage of black people who form part of the management structures of enterprises within the financial professions clarifies why the corporate culture has been identified as being both a source of indirect discrimination and a barrier to employment equity.

One of the differences between the B-BBEE Codes and the FSC is that the B-BBEE Codes contain five elements: ownership, management control, skills development, enterprise and supplier development, and socio-economic development. The FSC, on the other hand, contains seven elements: ownership, management control, skills development, procurement and ESD, socio-economic development and consumer education, empowerment financing and ESD and access to financial services, which are contained in the generic scorecard. The QSFI scorecard however also contains the same five elements which are contained in the B-BBEE Codes. Similar to the B-BBEE Codes, the priority elements in terms of the FSC are ownership, skills development, and enterprise and supplier development. An LE is required to comply with all the priority elements, while a QSFI is required to comply with ownership as a priority element and then has the option of selecting either skills development or enterprise and supplier development as a priority element. It will be easy for accounting enterprises to obtain points in respect of skills development for training trainee accountants. As a result, racial transformation at junior level can be encouraged by complying with the skills development element.

Ownership is a priority element in respect of both an LE and QSFI, however management control is not a priority element in respect of either an LE or a QSFI. A shortcoming of the legal framework which is dominant in the financial professions is thus the fact that management control does not form part of the priority elements which enables both an LE and a QSFI to obtain points in respect of the remaining elements without any regard for management control. Even if management control is made a priority element as opposed to skills development or enterprise and supplier development, this will not necessarily assist black professionals with their appointment or promotion into managerial positions. This is because despite ownership being a priority element it has not led to ownership transformation being achieved in the financial professions.

An additional shortcoming is that the FSC provides maximum points which financial institutions in the financial professions may achieve. This implies that there are no incentives for financial institutions to provide black people with more voting rights, increased economic interest or more participation in management positions in excess of what is required in the scorecards.

The next shortcoming of the legal framework that makes it possible for enterprises to obtain good BEE ratings despite the low percentage of black people who form part of the ownership and management structures of the enterprises within the financial professions, is that while high weighting points have been allocated to the ownership element, high points have also been allocated to enterprise and supplier development as opposed to management control. This implies that enterprises may be encouraged to comply with the priority elements (ownership, skills development, and enterprise and supplier development), without much consideration for management control. It is disappointing that fewer points have been allocated to management control than what has been allocated to other elements.

The regulation of management is important, because a representative composition of management influences the corporate culture of enterprises. The shortcomings relating to the management control element show that the management of enterprises who apply the FSC is not regulated sufficiently. Since the law is unable to rectify racial injustices even if management control was regulated sufficiently, it would not be able to achieve management transformation. This shows that legislation is unable to rectify racial injustices.¹⁸⁶⁶ BEE legislation is therefore not an appropriate vehicle to achieve transformation in the financial professions. From a critical race theory perspective, it will be more appropriate for black people to separate themselves from mainstream and to develop their own businesses so that their interests can be promoted. This way the advancement of black people can be assured.

The final shortcoming relates to the complexity of the scorecards in the FSC and the calculations which a measured entity is required to carry out. The fact that a financial institution's score is based on their own understanding of the FSC could result in outcomes where financial institutions choose to make use of equations in elements which are less complicated than others and in financial institutions choosing to make use of elements that allow them to obtain good BEE ratings without black professional employees forming part of the ownership and management structures of these institutions. The discussion on the scorecards and the calculations illustrates that enterprises to whom the FSC apply are not in a better position to obtain good BEE ratings in comparison to enterprises who apply the B-BBEE Codes. Since the formulas are complicated, it is open to abuse and manipulation and as a result, the scorecard system is not the appropriate mechanism to achieve transformation.

¹⁸⁶⁶ See para 6.3.3 above.

It is important to highlight that the challenges which black professional employees in the private sector experience continue despite the EEA and the provisions governing BEE being enacted *inter alia* to address the inequalities which are faced by black people. Even if the recommendations suggested in this chapter are put in place, the challenges experienced by black employees in the financial professions may be reduced, but they will not be entirely removed. Having evaluated the statutory framework that is the subject matter of this chapter through the lens of critical race theory, it may be concluded that the EEA and the provisions governing BEE are not appropriate vehicles to achieve racial transformation in the professions. This is because even though this legislation has been enacted, black professional employees continue to experience racial injustices. The FSC will not be able to resolve the problems experienced by black professionals, because the FSC has been drafted from a white perspective. The FSC was built on the notion of including black people in a white system which is based on a system where privilege and power is granted disproportionately while purporting a level playing field.¹⁸⁶⁷

¹⁸⁶⁷ See para 6.3.1 above.

CHAPTER 9

CONCLUSION

9.1 THE RATIONALE FOR EQUALITY LEGISLATION

During apartheid black people were suppressed as a result of apartheid laws which were enacted and applied, legalising racial segregation and promoting white supremacy. Apartheid's institutionalised system of racial discrimination ended in 1994, which also marked the beginning of a constitutional democracy in South Africa. Despite the dissolution of apartheid, some of the effects of apartheid, such as unequal opportunities and unequal treatment of black people, are still present today.¹⁸⁶⁸ The EEA, the EEA Regulations and its Codes of Good Practice, together with the B-BBEEA and its Codes of Good Practice, were enacted to remove the inequalities that were caused by apartheid.¹⁸⁶⁹ The EEA and the B-BBEEA, both having been enacted in terms of section 9(2) of the Constitution, contain provisions to protect and advance black people, with the former aiming *inter alia* to achieve employment equity in the workplace¹⁸⁷⁰ and the latter, regulating BEE, to level the economic playing field between black and white people in South Africa.¹⁸⁷¹

Apartheid made it difficult for black people to undertake professional careers.¹⁸⁷² The enactment of the Constitution, equality legislation and industry specific legislation such as the Legal Practice Act¹⁸⁷³ and the FSC,¹⁸⁷⁴ aim to address the impediments that affect the ability of black people to form part of certain professions. The experiences and reactions to employment equity legislation differ among the different race groups. Employees from designated groups are concerned about being victims of white manipulation and professional employees who fall within these groups dislike labels associated with employment equity such as 'incompetent' or 'less qualified'.¹⁸⁷⁵ Some employees who do not form part of

¹⁸⁶⁸ See para 2.1 above.

¹⁸⁶⁹ See para 2.1 above.

¹⁸⁷⁰ See para 2.1 above.

¹⁸⁷¹ See para 5.3.2 above.

¹⁸⁷² See para 7.3.1 above.

¹⁸⁷³ See para 7.3.2 above.

¹⁸⁷⁴ See para 8.4.2 above.

¹⁸⁷⁵ See para 3.3.1 above.

designated groups fear retribution and revenge from people from designated groups.¹⁸⁷⁶

The objective of this thesis is to determine whether the slow pace of racial transformation in South Africa when it comes to black professional employees employed within the private sector is an issue which the law can address, with emphasis being placed on racial discrimination and affirmative action on the one hand; and BEE on the other. The two parts that follow consist of the main findings in respect of these two concerns.

9.2 ADDRESSING RACIAL DISCRIMINATION AND AFFIRMATIVE ACTION

9.2.1 Racial discrimination

Chapter 2 consists of a discussion on the statutory framework for dealing with racial discrimination. Chapter 2 determined whether black employees are protected as a result of the legislation aimed at addressing racial discrimination. In terms of section 5 of the EEA employers are required to take steps to promote equal opportunity in the workplace by eliminating unfair discrimination. In terms of section 6 of the EEA unfair discrimination is prohibited on grounds which include on the basis of race. Since sections 5 and 6 fall within chapter 2 of the EEA it applies to all employers and all employees. Black professional employees in the private sector are therefore protected against racial discrimination by the enactment of these provisions. Black professional employees are also protected by the remedies which are available in the event of their success with unfair discrimination claims against their employer.¹⁸⁷⁷ These remedies include *inter alia* the payment of compensation and the payment of damages.¹⁸⁷⁸

Despite provisions being enacted to address racial discrimination, which should therefore protect black professional employees in the private sector against racial discrimination, there is a slow pace of racial transformation. This was revealed in chapters 7 and 8, which consist *inter alia* of accounts by black professional employees in the legal and the financial professions respectively of their experiences of racial discrimination. Madonsela is just one of the voices confirming that 'structural racism exists in the legal profession'.¹⁸⁷⁹ This, together with the stories of black attorneys, show that there is a slow pace of racial transformation in the legal profession. This is similarly the case in the financial professions,

¹⁸⁷⁶ See para 3.3.1 above.

¹⁸⁷⁷ See para 2.2.2.4 above.

¹⁸⁷⁸ See para 2.2.2.4 above.

¹⁸⁷⁹ See para 7.5.2.1 above.

which is evident from the stories of black professional employees in the financial professions gathered from the literature covered in chapter 8 and the fact that the IRBA alluded to instances of racial discrimination still existing in the financial professions.¹⁸⁸⁰

There are objectives contained in the EEA¹⁸⁸¹ and while these objectives of the EEA are admirable, and indicate that the legislature may have had good intentions when enacting it, these objectives are not always achieved. The EEA presupposes that the law is neutral and that all that is required to address racial discrimination is to provide employees with a legal remedy when they experience racial discrimination. It presupposes that both parties are merely required to present their case and that the law will determine whether the discrimination experienced was unfair or not. The EEA's inability to protect black professionals sufficiently is evident from the fact that black professional employees in the private sector are still subjected to racial discrimination: Black attorneys perceive that they are assumed to be incompetent, lazy and token employees and that due to racial discrimination they are required to work longer and harder than what white attorneys are required to.¹⁸⁸² Employers in the financial professions have also stated that all black professional employees need training and development, thereby implying that no such training is required by white professional employees.¹⁸⁸³ Race is also a factor which is taken into consideration when work is allocated to attorneys¹⁸⁸⁴ as well as to employees employed in the financial professions.¹⁸⁸⁵

The requirement that law firms expect candidate attorneys to have their own motor vehicle may be a form of indirect discrimination as a result of the fact that people from designated groups who are unable to afford their own motor vehicles would automatically be excluded from those eligible to apply for these positions.¹⁸⁸⁶ The requirement to have a motor vehicle seems reasonable, however it seems this way, because it's a requirement created by white people and white people consider whiteness to be the norm.¹⁸⁸⁷ Black professional employees' experiences of racial discrimination continue despite the provisions contained in the EEA which prohibits unfair discrimination thereby demonstrating the inability of legislative provisions to achieve racial transformation.¹⁸⁸⁸ This shows that the EEA is not an appropriate

¹⁸⁸⁰ See para 8.3.2.1 above.

¹⁸⁸¹ See para 2.2.1 above.

¹⁸⁸² See para 7.5.2.1.1 above.

¹⁸⁸³ See para 8.3.2.1 above.

¹⁸⁸⁴ See para 7.5.2.1.1 above.

¹⁸⁸⁵ See para 8.3.2.1 above.

¹⁸⁸⁶ See para 7.5.2.1.2 above.

¹⁸⁸⁷ See para 6.3.1 above.

¹⁸⁸⁸ See paras 7.5.2.1.1 and 8.3.2.1 above.

vehicle to address the racial discrimination experienced by black professional employees. This is because legislation, such as the EEA, is drafted from a white perspective and because legislation is unable to rectify racial injustices.¹⁸⁸⁹

In addition to being required to comply with sections 5 and 6 of the EEA, the EEA also aims to achieve racial transformation by requiring designated employers to implement affirmative action measures.

9.2.2 Affirmative action

Black professional employees who are employed by designated employers benefit as a result of their employers being required to implement affirmative action measures. Affirmative action measures include measures to identify and eliminate employment barriers, implement measures designed to further diversity in the workplace, to make reasonable accommodation for people from designated groups, to ensure equitable representation of people from designated groups, and to retain and develop people from designated groups.¹⁸⁹⁰ It has been argued in terms of critical race theory that affirmative action measures were created by white people to promote their own interests and not those of black people.¹⁸⁹¹ While these measures may have some effect on racial transformation, they only apply to designated employers and to people from designated groups. Seen from a critical race theory perspective, the fact that many employers are not designated employers and therefore are not required to implement affirmative action measures is no accident; it is a deliberate choice, limiting the impact of affirmative action on a still overwhelmingly white private sector.

The EEA contains definitions of people from designated groups and black people.¹⁸⁹² In terms of ant-essentialism, an identity category such as a female or black person cannot be fixed.¹⁸⁹³ The EEA has been criticised for the way in which designated groups have been described for the fact that there is a separation of race and gender assuming that the two can be separated from each other.¹⁸⁹⁴ The EEA has also be criticised for its description of black people in that it asserts a single black experience insofar as it relates to the differences

¹⁸⁸⁹ See para 6.3.3 above.

¹⁸⁹⁰ See para 3.2 above.

¹⁸⁹¹ See para 6.3.3 above.

¹⁸⁹² See para 2.2.1 above.

¹⁸⁹³ See para 6.3.2 above.

¹⁸⁹⁴ See para 6.3.2 above.

and particularities of Coloureds, Indians, Chinese and Africans.¹⁸⁹⁵ The manner in which people from designated groups have been described assumes that gender can be separated from race.¹⁸⁹⁶ The whole basis of using black people and designated groups is an additional reason for the EEA not being an appropriate vehicle to achieve racial transformation.

Designated employers are also required to comply with procedural duties in terms of the EEA. In the event of black professional employees in the private sector being employed by designated employers, these employees may benefit from the procedural obligations which their employers are required to comply with. Black professional employees employed by designated employers benefit from the fact that their employers are required to consult with them since this consultation may be used by black professional employees to provide input on matters relating to affirmative action which affect them.¹⁸⁹⁷ This can also be beneficial to black professional employees, especially those subjected to racial discrimination, since it provides them with an opportunity to speak their minds.¹⁸⁹⁸ It is, however, questionable whether black professional employees will make use of these opportunities especially given the fact that they are not represented by trade unions.¹⁸⁹⁹

Black professional employees may benefit from the analysis which their employers are required to conduct into the designated employer's policies, practices, working environment and workforce due to the fact that by way of the analysis, designated employers are not only required to determine the degree of underrepresentation of people from designated groups in the various occupational levels of the workforce, but are also required to identify employment barriers which adversely affect people from designated groups. This may however not always offer much assistance to black professional employees, because it has been shown that employers are complying with their duty to conduct an analysis, however their willingness to take matters beyond the information gathering stage has been questioned.¹⁹⁰⁰

The employment equity plan is the implementation programme which is prepared by a designated employer with the aim of achieving fair treatment and equitable representation of people from designated groups.¹⁹⁰¹ Therefore black professional employees in the private sector who are employed by designated employers benefit from their employers being

¹⁸⁹⁵ See para 6.3.2 above.

¹⁸⁹⁶ See para 6.3.2 above.

¹⁸⁹⁷ See para 3.3.1 above.

¹⁸⁹⁸ See para 3.3.1 above.

¹⁸⁹⁹ See para 3.3.1 above.

¹⁹⁰⁰ See para 7.5.3.2.1 above.

¹⁹⁰¹ See para 3.3.3 above.

required to implement this plan and to take steps to transform.¹⁹⁰² Such employees may also benefit from their employers being required to report to the Director-General, who oversees the processes implemented by their employers.¹⁹⁰³ The problem which surfaces however is that in circumstances where employers are conducting the analysis, but their willingness to take matters beyond the information gathering stage is questioned, it shows that the implementation by employers of the affirmative measures in terms of the employment equity plan is where the problem lies.¹⁹⁰⁴ Critical race theory's critique of liberalism is based on the view of liberals that the law is neutral. The EEA assumes that the law is neutral, that all that is required is to create procedural steps for employers to comply with and once accomplished workplaces will be transformed. This thesis illustrates that this is not the reality of black professionals. This confirms, as was established in chapter 4, that the provisions relating to unfair discrimination and affirmative action do not exist in isolation, but are dependent the actual transformation of black employees' lived experiences.¹⁹⁰⁵ Black professional employees in the private sector have identified the corporate culture as being not only a source of indirect discrimination,¹⁹⁰⁶ but also a barrier to the achievement of employment equity.¹⁹⁰⁷

Chapter 3 analysed the standards applied by courts to determine whether there is one single appropriate standard to assess affirmative action measures taken in terms of the EEA.¹⁹⁰⁸ The outcome of the analysis revealed that none of the standards applied to date are by themselves appropriate to assess affirmative action measures taken in terms of the EEA.¹⁹⁰⁹ The fact that to date, the courts have not handed down a judgment in which certainty has been achieved regarding the standard to use to assess affirmative action measures taken by the employer, shows that even the courts have difficulty in assessing affirmative action measures taken in terms of the EEA.¹⁹¹⁰ Since even the courts struggle to reconcile the statutory framework for affirmative action created by the EEA with section 9(2) of the Constitution, this shows that the EEA is not an appropriate vehicle to achieve transformation.

¹⁹⁰² See para 3.3.3 above.

¹⁹⁰³ See para 3.3.4 above.

¹⁹⁰⁴ See para 7.5.3.2.1 above.

¹⁹⁰⁵ See para 4.2 above.

¹⁹⁰⁶ See paras 7.5.2.1.2 and 8.3.2.2 above.

¹⁹⁰⁷ See paras 7.5.3.2.1 and 8.3.3.2.1 above.

¹⁹⁰⁸ See para 3.4 above.

¹⁹⁰⁹ See para 3.4.2.5 above.

¹⁹¹⁰ See para 3.4.2.5 above.

9.2.3 Shortcomings of the legal framework

Chapter 3 identified the shortcomings of the current legal framework insofar as affirmative action is concerned. Chapters 7 and 8 consists *inter alia* of a discussion on unfair discrimination and affirmative action in the legal profession and the financial professions respectively in order to contextualise the findings of chapters 2 to 4. These chapters determined which shortcomings identified in chapters 3 are dominant in the legal profession and financial professions respectively.

The first shortcoming which was identified is attributed to the limited application of the provisions relating to affirmative action. Since the EEA deliberately requires that the provisions relating to affirmative action measures only to apply to employers who fall within the meaning of 'designated employers', the employees who work for employers who do not fall within this definition are not afforded the same opportunities as employees are who work for designated employers.¹⁹¹¹ There are employees who are working for employers who are not obligated *inter alia* to identify and eliminate employment barriers and are not obligated to retain and develop people from designated groups.¹⁹¹² In order to remedy this it was recommended that the scope of the application of the provisions relating to affirmative action be extended.¹⁹¹³ This shortcoming was identified as being dominant in the legal profession due to the limited number of employees who are employed by law firms.¹⁹¹⁴ This shortcoming is not relevant to the financial professions, because employers in the financial professions generally employ more than 50 employees.¹⁹¹⁵ This implies that most employers in the financial professions are required to implement affirmative action measures in terms of the EEA.¹⁹¹⁶ This illustrates that the EEA is better suited to enterprises, such as those in the financial professions who have a high number of employees and fail to cater to smaller enterprises, such as law firms. The EEA failing to cater to all enterprises was a deliberate election to exclude some employees from being afforded the opportunities which are provided to employees who work for designated employers. This election provides power to some while allowing white people to maintain the status quo. This illustrates that the EEA is not an appropriate vehicle to address the challenges faced by all black professional employees.

¹⁹¹¹ See para 3.2 above.

¹⁹¹² See para 3.2 above.

¹⁹¹³ See para 7.7 above.

¹⁹¹⁴ See para 7.5.3.1 above.

¹⁹¹⁵ See para 8.3.3.1 above.

¹⁹¹⁶ See para 8.3.3.1 above.

The second shortcoming of the current legal framework is that while legislative efforts have been made to ensure that affirmative action is implemented, these efforts are ineffective. Louw is of the opinion that the affirmative action framework lends itself to impersonal tick-boxes.¹⁹¹⁷ Louw's view is confirmed by the fact that law firms are spending funds on evaluations and surveys to be completed by their employees, which do not always translate into practice.¹⁹¹⁸ This shows that some employers only aim to comply with the minimum which is required from them in terms of the EEA since compliance is all that the legislation requires. It seems as if the EEA was deliberately drafted on the basis of a number of steps that are required to be taken by overwhelmingly white law firms and financial institutions to incorporate black people into white enterprises and once these steps are taken it is viewed as a positive step towards transformation. This is not the case, because compliance with these steps does not achieve the racial transformation goals set out in the EEA. The fact that the EEA is compliance driven only is a further reason why the EEA is unsuitable for achieving racial transformation.

The next shortcoming of the current legal framework which was identified in chapter 3 relates to the lack of detailed direction that has been provided on the specific aspects which should be discussed during the consultation between employers and employees, and the fact that employees as a collective should be provided with the opportunity to conduct an analysis and report to the Director-General. Chapter 8 revealed, however, that if the specific topics which employers and employees should discuss during the consultation is legislated this would merely reinforce the 'tick-box' mentality of employers since this would provide employers with additional boxes to tick.¹⁹¹⁹ Chapter 7 revealed that the problem does not lie with compliance with EEA provisions, but that in fact it is the framework that is problematic.¹⁹²⁰ Additional technical amendments which employees should comply with would not assist with racial transformation. Employers can choose which of the broad topics for consultation should be focused on when they consult with employees. Black employees having no voice is reinforced by the inability to conduct their own analysis and to report to the Director-General.

The final shortcoming of the current legal framework is that the provisions governing designated employers' procedural duties have been drafted in a manner which caters mainly

¹⁹¹⁷ Louw AM 'The Employment Equity Act, 1998 (and other myths about the pursuit of "equality", "equity" and "dignity" in post-apartheid South Africa)' (2015) 18(3) *PER* 633. See para 3.3.3 above.

¹⁹¹⁸ See para 7.5.3.2.1 above.

¹⁹¹⁹ See paras 7.5.3.2.1 and 8.3.3.2.2 above.

¹⁹²⁰ See para 7.5.3.2.1 above.

to employees who are represented by trade unions.¹⁹²¹ Judged from a critical race perspective it is remarkable that the EEA caters mainly to unionised employees. For the rest, such as those employed in the legal and financial professions, black employees are relegated to spectators to the affirmative action process from which they are required to benefit. The EEA with its focus on unionised employees makes it an unsuitable vehicle for transformation in such professions.

9.3 BROAD-BASED BLACK ECONOMIC EMPOWERMENT

9.3.1 Introduction

BEE, governed by the B-BBEEA, is a government initiative that was created in order to promote economic transformation to enable black people to participate in the economy and to remedy the economic imbalances which were caused by apartheid.¹⁹²² Unlike other legislation, compliance with the B-BBEEA is voluntary, which means that enterprises in the private sector have the choice to comply with its provisions and with the B-BBEE Codes.¹⁹²³ The B-BBEEA aiming to facilitate black economic empowerment, makes voluntary compliance for enterprises in the private sector counter-productive. This is because if there was really a serious intention to facilitate the empowerment of black people compliance would not be optional.

Similar to the EEA, the B-BBEEA contains a definition of black people.¹⁹²⁴ The B-BBEEA's definition of black people can be criticised in terms of anti-essentialism, for the fact that it asserts a single black experience insofar as it relates to the differences and particularities of Coloureds, Indians, Chinese and Africans.¹⁹²⁵ The B-BBEEA providing enterprises with an option to comply with the legislation governing BEE and its whole basis of using black people are two reasons for it not being the appropriate vehicle to achieve racial transformation.

Chapters 7 and 8 revealed that employers in the legal and in the financial professions are obtaining good BEE ratings¹⁹²⁶ and that there is a low percentage of black people who form

¹⁹²¹ See para 3.3.1 above.

¹⁹²² See para 5.2 above.

¹⁹²³ See para 5.3.1 above.

¹⁹²⁴ See para 5.3.1 above.

¹⁹²⁵ See para 6.3.2 above.

¹⁹²⁶ See paras 7.6.2 and 8.4.2.2 above.

part of the ownership and management structures of enterprises in these professions.¹⁹²⁷ The low percentage of black professional employees who form part of management structures in both the legal and the financial professions makes it understandable that the corporate cultures in these professions have been identified as being both a source of indirect discrimination and an employment barrier. This is because in the event of management consisting of a large number of black people they would have played an important role in influencing the corporate culture of an enterprise.¹⁹²⁸

9.3.2 B-BBEE Codes and the FSC

The B-BBEE Codes provide a standard manner in which the BEE status of enterprises can be calculated as it sets out both the rules and the formulas which should be used when calculating the BEE status of an enterprise.¹⁹²⁹ Law firms are examples of enterprises who are required to determine their BEE status by using the rules and formulas contained in the B-BBEE Codes,¹⁹³⁰ while enterprises in the financial professions determine their BEE rating by using the rules and formulas contained in the FSC.¹⁹³¹

Chapter 5 considered the provisions of the B-BBEEA and the B-BBEE Codes enacted in terms of thereof with a view to determining how it is possible for enterprises to obtain good BEE ratings, despite the low percentage of black people who form part of the ownership and management structures of these enterprises.¹⁹³²

9.3.3 Shortcomings of the legal framework

Chapter 5 identified the shortcomings of the current legal framework that make it possible for enterprises to obtain good BEE ratings under these circumstances.¹⁹³³ Chapters 7 and 8 consist of discussions on BEE in order to contextualise the findings of chapters 5. Chapters 7 and 8 determined which shortcomings of the legal framework identified in chapters 5 are dominant in the legal profession and financial professions respectively.¹⁹³⁴ While law firms are examples of enterprises to which the B-BBEE Codes apply and the financial profession is an example of enterprises to which different codes apply, the shortcomings that were

¹⁹²⁷ See paras 7.6.3 and 8.4.2.3 above.

¹⁹²⁸ See para 4.3.1 above.

¹⁹²⁹ See para 5.4 above.

¹⁹³⁰ See para 7.6.4 above.

¹⁹³¹ See para 8.4.2 above.

¹⁹³² See para 5.4 above.

¹⁹³³ See para 5.9 above.

¹⁹³⁴ See paras 7.7 and 8.5 above.

identified in chapter 5 are still relevant to the financial professions since the FSC is drafted similar to the way in which the B-BBEE Codes have been drafted.

One of the shortcomings of the legal framework that make it possible for enterprises to obtain good BEE ratings despite the low percentage of black people who form part of the ownership and management structures of these enterprises, relates to the priority elements. An LE is required to comply with all three priority elements, while a QSE is required to comply with ownership as a compulsory element and then has a choice to comply with either skills development or enterprise and supplier development.¹⁹³⁵ While ownership is a priority element in respect of an LE and a QSE, management control is not a compulsory element for either an LE or a QSE. This allows a QSE and LE to obtain points without any significant racial transformation in management control.¹⁹³⁶ Similar to it being argued in terms of critical race theory that affirmative action measures were created by white people to promote their own interests and not those of black people,¹⁹³⁷ the same can be said for BEE where white people are achieving points without significant management control transformation.

The aforementioned shortcoming also applies in law firms since law firms are required to apply the B-BBEE Codes if they choose to have a BEE rating.¹⁹³⁸ Law firms are in a position to comply with skills development easily to obtain a good BEE rating since law firms are required to train candidate attorneys. Law firms would also be able to comply with enterprise and supplier development to obtain good BEE ratings by instructing black advocates to act on behalf of predominantly white law firms.¹⁹³⁹ Due to this, it would be possible for law firms to obtain good BEE ratings without much consideration for management control. Making skills development and enterprise and supplier development priority elements as opposed to management control has an obvious effect on the ability of enterprises, such as law firms, to obtain good BEE ratings, despite the low percentage of black people who form part of the management structures. The framework deliberately allows elements other than management control to dominate thereby allowing law firms to be managed by whites, while still achieving good BEE ratings. This allows white law firms to maintain the status quo while simultaneously giving the impression that transformation is taking place. This is an example where the framework deliberately does not emphasise racial transformation of enterprises such as law firms.

¹⁹³⁵ See para 5.4 above.

¹⁹³⁶ See para 5.4 above.

¹⁹³⁷ See para 6.3.3 above.

¹⁹³⁸ See para 7.6.4 above.

¹⁹³⁹ See para 7.6.4 above.

Similar to the B-BBEE Codes, in terms of the FSC, an LE is required to comply with all three priority elements, while a QSFI is required to comply with ownership as a compulsory element and either skills development or enterprise and supplier development.¹⁹⁴⁰ By training article clerks and trainee accountants, this would allow accounting enterprises to obtain points in respect of skills development.¹⁹⁴¹ Since management control is not a priority element, financial institutions are also able to obtain good BEE ratings without any regard for management control. For this reason, it was recommended in chapter 5 that, in both the B-BBEE Codes and in the FSC, management control should be made one of the priority elements and that either skills development or enterprise and supplier development be replaced. The FSC is meant to be more demanding than the B-BBEE Codes. Yet it also deliberately relegates management control to a non-priority. It therefore does not illustrate a significant step towards addressing the 'whiteness' of management in the financial sector.

The next shortcoming which is relevant to both the legal profession and to the financial professions is that the B-BBEE Codes and the FSC stipulates the maximum points which an enterprise can achieve. This implies that enterprises will not be encouraged to obtain more points in respect of ownership and management control than what the scorecards provide. This shows that there is an acceptance of the slow pace of racial transformation when it comes to including black people in the ownership and management structures of enterprises.

An additional shortcoming of the B-BBEE Codes is that while the highest BEE points have been allocated to the ownership element, the points that have been allocated to skills development and enterprise and supplier development are higher than those which have been allocated to management control.¹⁹⁴² Since law firms are required to apply the B-BBEE Codes, in circumstances where they choose to be BEE compliant, this shortcoming is relevant to the legal profession.¹⁹⁴³ As far as the financial profession is concerned, while high points have been allocated to the ownership element, the highest points have also been allocated to enterprise and supplier development.¹⁹⁴⁴ The points which have been allocated to the priority elements are higher than the points allocated to management control as far as the QSFI scorecard is concerned.¹⁹⁴⁵ In the Generic scorecard, the points which have been allocated to ownership and enterprise and supplier development are higher than

¹⁹⁴⁰ See para 7.4.2.1 above.

¹⁹⁴¹ See para 8.4.2.6.1 above.

¹⁹⁴² See para 5.4 above.

¹⁹⁴³ See para 7.6.5 above.

¹⁹⁴⁴ See para 8.4.2.1 above.

¹⁹⁴⁵ See para 8.4.2.1 above.

management control, however the points of skills development is the same as management control.¹⁹⁴⁶ This may still result in management control not being considered much and in enterprises in the financial professions choosing to comply with the priority elements instead.¹⁹⁴⁷ It was recommended in chapter 5 that management control be given higher points than skills development and enterprise and supplier development in the B-BBEE Codes and the FSC. The B-BBEEA assumes that the law is neutral and that where points are provided to enterprises, the achievement of high points would indicate that racial transformation is being achieved. However, this thesis has indicated that remarkably high BEE points do not constitute ownership transformation. In actual fact there is no real link between obtaining good BEE points and the advancement of black professionals. This is because BEE legislation has been drafted from a white perspective¹⁹⁴⁸ with the aim of perpetuating the dominance of white people.¹⁹⁴⁹

The regulation of management control is important, because a representative composition of management influences the corporate culture of enterprises.¹⁹⁵⁰ One would have expected the management structures of enterprises to be well-regulated by the provisions governing BEE. The aforementioned shortcomings relating to the management control element show that the management control of enterprises to which the B-BBEE Codes and the FSC apply is not prioritised. This is because management control is neither a priority element, nor an element to which high points have been allocated. This is due to the deliberate decision to adopt the maximalist approach as opposed to the minimalist approach.¹⁹⁵¹ It must be acknowledged however that even if the management control of enterprises was regulated sufficiently, it is questionable whether it would achieve management transformation. This is because even though the ownership element is a compulsory element and one of the elements to which high points have been allocated, chapters 7 and 8 have revealed that despite regulating ownership, BEE legislation is unable to achieve ownership transformation.¹⁹⁵² This illustrates that making management control a priority element or providing management control with higher points will not achieve management transformation. Management control has not been prioritised, because BEE legislation has been drafted from a white perspective,¹⁹⁵³ placing no requirement on enterprises to comply with the management control element to ensure that white people continue to dominate

¹⁹⁴⁶ See para 5.4 above.

¹⁹⁴⁷ See para 5.4 above.

¹⁹⁴⁸ See para 6.3.3 above.

¹⁹⁴⁹ See para 6.3.2 above.

¹⁹⁵⁰ See para 5.4 above.

¹⁹⁵¹ See para 5.2 above.

¹⁹⁵² See paras 7.6.4 and 8.4.2.4.3 above.

¹⁹⁵³ See para 6.3.3 above.

managerial positions.¹⁹⁵⁴ Since legislation is unable to assist black professionals with their progression to managerial positions or assist with ownership transformation, this demonstrates that it would be more beneficial for black attorneys to develop their own businesses and institutions so that their interests can be promoted.¹⁹⁵⁵ This shows once again that the legislation governing BEE is not an appropriate vehicle to address the challenges faced by black professional employees.

An additional shortcoming of the current legal framework relates to legislation's inability to prevent opportunity hoarding from taking place within enterprises.¹⁹⁵⁶ This has a negative effect on the advancement of black people within the enterprises which employ them. The fact that legislation has made no attempt to prevent opportunity hoarding seems unusual, however in a society where white people would prefer to maintain the status quo it seems logical that these practices would remain unregulated. Even if legislative efforts were made to prevent opportunity hoarding these efforts would be futile, because the legislature has made attempts to eliminate fronting practices with little success. Since legislation is incapable of preventing opportunity hoarding this shows once again that employment equality legislation is not the appropriate vehicle to address the challenges faced by black professional employees.

It was illustrated that some enterprises are still involved in fronting practices, which assist them in obtaining higher points in terms of BEE than what they would legally be entitled to.¹⁹⁵⁷ The inability of the BEE framework to address fronting practices is an additional shortcoming of the legal framework.¹⁹⁵⁸ The literature on the experiences of attorneys in the legal profession revealed that fronting practices occur within the profession.¹⁹⁵⁹ Some black attorneys are being used by their employers to solicit work from potential clients, but once the work is acquired, these black attorneys are not included in the work which is obtained.¹⁹⁶⁰ This shows that BEE legislation is unable to rectify racial injustices as far as fronting practices is concerned.¹⁹⁶¹

The complexity of the scorecards and the formulas which enterprises are required to use is

¹⁹⁵⁴ See para 7.6.4 above.

¹⁹⁵⁵ See para 7.6.5 above.

¹⁹⁵⁶ See para 5.5 above.

¹⁹⁵⁷ See para 5.6 above.

¹⁹⁵⁸ See para 5.6 above.

¹⁹⁵⁹ See para 7.6.7 above.

¹⁹⁶⁰ See para 7.6.7 above.

¹⁹⁶¹ See para 6.3.3 above.

the final shortcoming of the BEE framework.¹⁹⁶² The measured entities who are experts at using the scorecards and the equations, are able to make strategic decisions and adjustments to their calculations, allowing them to reap huge benefits while at the same time allowing them to escape from certain areas of compliance. The scorecards contained in the FSC are also complicated and so are the calculations which enterprises are required to carry out.¹⁹⁶³ This shortcoming of the current legal framework is dominant in the legal profession¹⁹⁶⁴ and in the financial professions.¹⁹⁶⁵ Since the formulas are complicated, it is open to manipulation and abuse, which makes the scorecard system the inappropriate vehicle to achieve racial transformation.

BEE legislation is required to bring about meaningful participation by black people in the economy. The BEE framework is not achieving this objective as far as black professionals are concerned. The fact that BEE legislation allows enterprises to remain dominated by white people, while rewarding them with points to acknowledge their efforts to transform is done openly. Enterprises are obtaining good BEE ratings in circumstances where black people are not advancing. This shows that BEE legislation is not an appropriate vehicle to address the challenges faced by black professionals in the private sector.

9.4 CONCLUDING REMARKS

Recommendations have been suggested in order to reduce the shortcomings of the current legal framework which have been identified insofar as racial discrimination, affirmative action and BEE is concerned. The suggested recommendations may benefit black professional employees with the reduction of the racial discrimination which they are subjected to and may also assist in removing the barriers which restrict their growth within enterprises. The problem is that even if the recommendations are put in place, the challenges experienced by black professionals may be reduced, however it will not be entirely removed. The reason for this is that there is a problem with the entire legal system and the EEA as well as the B-BEEA forms part of that legal system.¹⁹⁶⁶

Chapter 4 revealed that amendments to the EEA that merely deal with technical issues cannot solve the way in which discrimination and affirmative action is experienced by people

¹⁹⁶² See paras 5.4.6.1 and 8.4.1.10 above.

¹⁹⁶³ See para 8.4.1.10 above.

¹⁹⁶⁴ See para 7.6.6.

¹⁹⁶⁵ See para 8.4.1.10 above.

¹⁹⁶⁶ See para 6.3 above.

and even if an employer applies all the provisions of the EEA successfully, it may have little effect on the challenges which black professional employees experience.¹⁹⁶⁷

Black professional employees in the private sector are also still affected by employment barriers, such as being expected to fit into historically 'white corporate cultures'. Instances of cultural alienation have been reported by black attorneys in the legal profession where attorneys face 'invisible rules' which are determined by the social interaction of attorneys outside work.¹⁹⁶⁸ In auditing firms it has been stated that black trainees are 'expected to adapt to the culture in these firms or to find a position elsewhere'.¹⁹⁶⁹ These options provided to black employees demonstrate that racial difference is ignored and whiteness is viewed as the norm which results in the *status quo* being maintained with its institutionalised injustices being perpetuated.¹⁹⁷⁰ Circumstances of unequal treatment may be even worse for black professional employees, such as attorneys and those who are employed in financial institutions, who are in the unfortunate position of not being represented by trade unions to assist them.¹⁹⁷¹

Black professional employees such as attorneys and those employed in the financial professions are not equitably represented in all occupational levels while these positions are being dominated by white males.¹⁹⁷² It has been argued that black professional employees are not retained by employers due to the desire of white people to maintain the *status quo*.¹⁹⁷³ One of the reasons for the ability of white people to maintain the *status quo* and for racial discrimination continuing is because structures and policies are built on the notions of individual merit and colourblindness which perpetuates the dominance of white people.¹⁹⁷⁴ This is the case while employers are successful in obtaining good BEE ratings.

The literature on the experiences of employees in both the financial and the legal professions show that these black professional employees are able to attest to their experiences of subtle forms of racial discrimination.¹⁹⁷⁵ The findings in this thesis supports Modiri's argument that the emphasis on the law being objective can only address the most blatant forms of racial discrimination, while failing to provide any insight into the structural

¹⁹⁶⁷ See para 4.2 above.

¹⁹⁶⁸ See para 7.5.3.2.1 above.

¹⁹⁶⁹ Sadler E 'A profile and the work environment of black chartered accountants in South Africa' (2002) 10 *Meditari Accountancy Research* 174. See para 8.3.3.2.1 above.

¹⁹⁷⁰ See para 6.3 above.

¹⁹⁷¹ See para 7.5.3.2.1 above.

¹⁹⁷² See paras 7.5.3.3 and 8.3.3.3 above.

¹⁹⁷³ See para 7.5.3.2.2 above.

¹⁹⁷⁴ See para 6.3.1 above.

¹⁹⁷⁵ See paras 7.5.2.1.1 and 8.3.2.1.1 above.

nature of racial power and the fact that the law reinforces white privilege.¹⁹⁷⁶

Black professional employees experience racial discrimination and a lack of opportunities despite more than a decade having passed by since the enactment of the EEA and the BBEEA, which aims to eradicate unfair discrimination and advance black people. The acceptance of the slow pace of racial transformation in South Africa is evident from the legislature allowing the duration of an employment equity plan to be for a period of five years.¹⁹⁷⁷

A large number of the challenges experienced by black professional employees are attributable to the corporate cultures within enterprises.¹⁹⁷⁸ Since the control over whether a historically developed 'white corporate culture' exists in a workplace is dependent on a representative composition of management, the inclusion of a higher percentage of black people in management would play an important role in influencing the corporate culture within a workplace and in turn the experiences of black professional employees.¹⁹⁷⁹ The problem in South Africa, however, is that there is a low percentage black professional employees who form part of the management structures of enterprises.¹⁹⁸⁰ The B-BBEE Codes are not even assisting in improving the representation of black professional employees in management, since management control does not form part of one of the priority elements, nor is it an element to which high points have been allocated.¹⁹⁸¹

The first reason for the decision to concentrate on the legal and the financial professions is that the legal profession is an example of a profession which applies the B-BBEE Codes, while enterprises in the financial professions apply the FSC. This research illustrates that whether enterprises are obtaining their BEE ratings in terms of the B-BBEE Codes or in terms of the FSC, there is no real difference in the manner in which enterprises are obtaining good BEE ratings. In addition, this research illustrates that whether enterprises use the B-BBEE Codes or the FSC, there are no positive effects on black professionals either way. This confirms that BEE legislation is not an appropriate vehicle to address the challenges of black people insofar as their progression into ownership and management positions is concerned. The second reason for the selection of these professions is that generally enterprises in the financial professions fall within the meaning of a designated employer who

¹⁹⁷⁶ See para 6.3.1 above.

¹⁹⁷⁷ See para 3.3.3 above.

¹⁹⁷⁸ See paras 7.5.2.1.2, 7.5.3.2.1, 8.3.2.1.1 and 8.3.3.2.1 above.

¹⁹⁷⁹ See para 4.3.1 above.

¹⁹⁸⁰ See paras 7.6.3 and 8.4.2.3

¹⁹⁸¹ See paras 7.6.4 and 8.4.2.1 above.

are required to comply with affirmative action provisions, while generally law firms do not fall within the meaning of a designated employer and are consequently not required to comply with these provisions. If it was found that racial transformation in the financial professions was faster, this would have illustrated that affirmative action measures are successful in achieving racial transformation. However, since there is a slow pace of racial transformation in both the legal and financial professions this illustrates that equality legislation is not successful in achieving racial transformation.

The problem with the provisions contained in the EEA and those governing BEE is that it was created using language reflecting communitarian values (the EEA focusing on designated groups and the B-BBEEA referring to the empowerment of black people generally), however it is applied and interpreted in a manner that reflects liberal values (the fairness standard which courts use to assess affirmative action measures).

Critical race theory's opposition to liberalism is caused by factors which 'results in a system of whiteness that grants power and privilege disproportionately while purporting a level playing field'.¹⁹⁸² BEE legislation was developed subsequent to apartheid when white people controlled the majority of the business world in South Africa. The goals of the B-BBEEA are thus the views of white people who were in power at the time. A conscious decision was made to adopt the maximalist approach which focuses on improving conditions of the majority of black people as opposed to focusing on the advancement of black professionals.¹⁹⁸³ The fact that BEE is broad-based implies that the achievement of the goals of BEE are viewed from a broad perspective where BEE's failure to empower black professionals is less apparent.

The challenges experienced by black professional employees exist due to the fact that the provisions contained in the EEA governing unfair discrimination and affirmative action, the B-BBEEA, the B-BBEE Codes and the FSC do not exist in isolation, but are dependent on the ways in which they are experienced by people. This shows that amendments to the EEA will not solve this central issue. There is thus a need for an alternative to legislation. Critical race theory assumes that the law is unable to address racial transformation. Critical race theory is based on the fact that race is central and that no explanation is required to explain that racism persists.¹⁹⁸⁴ Critical race theory rejects the notion that the law is colourblind and

¹⁹⁸² Costagno AE 'Commonsense understandings of equality and social change: a critical race theory analysis of liberalism at Spruce Middle School' (2009) 22 (6) *International Journal of Qualitative Studies in Education* 755.

¹⁹⁸³ See para 5.2 above.

¹⁹⁸⁴ See para 6.3 above.

neutral.¹⁹⁸⁵ The premise of colourblindness allows racial discrimination to subsist, although in more subtle ways.¹⁹⁸⁶ The EEA and the provisions governing BEE have been drafted from a white perspective and can therefore not provide access to a neutral meaning.

The objective of this thesis is to determine whether the slow pace of racial transformation when it comes to black professional employees in the private sector is an issue which the law can address. As is evident from this thesis, legislative efforts to eliminate racial discrimination, and to advance black people have been made; however, despite statutory intervention there is a slow pace of racial transformation with regard to black professional employees in the private sector. The recommendations suggested above may make changes insofar as racial transformation is concerned, however these changes will be incremental. Black people can promote their interests better by developing their own institutions and businesses.¹⁹⁸⁷ This is evident from the actions of Pabasa who recently separated themselves from the General Council of the Bar.¹⁹⁸⁸ The Legal Practice Act is an example of a statute that is profession specific. The Legal Practice Act aims to provide a legislative framework for transforming the legal profession and aims to bring about a legal profession that reflects the demographics of South Africa.¹⁹⁸⁹ It does create an additional framework for transforming the profession, however, despite its enactment the challenges experienced by black attorneys in the legal profession continue.¹⁹⁹⁰ Amendments to the Legal Practice Act will not change the system.

It can thus be concluded that seen through the lens of critical race theory, there are limitations to what the law and definitely the current equality legislation can do to address the challenges faced by black professional employees in the private sector and there is thus a need for aggressive colour conscious efforts, similar to the actions of Pabasa,¹⁹⁹¹ to change the *status quo*.

(word count total: 99278)

¹⁹⁸⁵ See para 6.3.1 above.

¹⁹⁸⁶ See para 6.3.1 above.

¹⁹⁸⁷ See para 6.3.7 above.

¹⁹⁸⁸ See para 6.3.7 above.

¹⁹⁸⁹ See para 7.3.2 above.

¹⁹⁹⁰ See paras 7.5.2.1 and 7.5.3 above.

¹⁹⁹¹ See para 6.3.7 above.

A: Generic ownership scorecard

B-BBEE Element	Indicator	Description	Weighting points	Compliance target	
Ownership	Voting Rights	2.1.1 Exercisable voting rights in the entity in the hands of black people	4	25% + 1 vote	
		2.1.2 Exercisable voting rights in the entity in the hands of black women	2	10%	
	Economic Interest	2.2.1 Economic interest in the entity to which black people are entitled	4	25%	
		2.2.2 Economic interest in the entity to which black women are entitled	2	10%	
		Economic interest of any of the following black natural people in the measured entity			
		2.2.3.1 Black designated groups; 2.2.3.2 Black participants in employee share ownership programmes; 2.2.3.3 Black people in Broad-based ownership schemes; 2.2.3.4 Black participants in co-operatives	3	3%	
		2.2.4 New Entrants	2	2%	
	Realisation points	2.3.1 Net value	8	Refer to Annex C	

B: QSE ownership scorecard

Category and ownership indicator	Weighting points	Compliance target
2.1.1 Voting rights		
2.1.1.1 Exercisable voting rights in the Enterprise in the hands of black people	5	25% + 1 vote
2.1.1.2 Exercisable voting rights in the hands of black women	2	10%
2.1.2 Economic interest:		
2.1.2.1 Economic interest of black people in the Enterprise	5	25%
2.1.2.2 Economic interest of black women in the Enterprise	2	10%
2.1.2.1 New Entrants or Black Designated Groups	3	2%
2.1.3 Realisation points:		
2.1.3.1 Net Value	8	Refer to Annex 100 (E)

C: Generic management control scorecard

Measurement category and criteria	Weighting points	Compliance targets
2.1 Board participation:		
2.1.1 Exercisable voting rights of black board members as a percentage of all board members	2	50%
2.1.2 Exercisable voting rights of black female board members as a percentage of all board members	1	25%
2.1.3 Black Executive directors as a percentage of all executive directors	2	50%
2.1.4 Black female Executive directors as a percentage of all executive directors	1	25%
2.2 Other Executive Management:		
2.2.1 Black Executive Management as a percentage of all executive directors	2	60%
2.2.2 Black female Executive Management as a percentage of all executive directors	1	30%
2.3 Senior Management:		
2.3.1. Black employees in Senior Management as a percentage of all senior management	2	60%
2.3.2. Black female employees in Senior Management as a percentage of all senior management	1	30%
2.4 Middle Management:		
2.4.1 Black employees in Middle Management as a percentage of all middle management	2	75%
2.4.2 Black female employees in Middle Management as a percentage of all middle management	1	38%
2.5 Junior Management:		
2.5.1 Black employees in Junior Management as a percentage of all junior management	1	88%
2.5.2 Black female employees in Junior Management as a percentage of all junior management	1	44%
2.6 Employees with disabilities:		

2.6.1 Black employees with disabilities as a percentage of all employees	2	2%
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D: QSE management control scorecard

Criteria	Weighting points	Compliance Target
3.1.1.1 Executive Management		
3.1.1.1.1 Black representation at Executive Management	5	50%
3.1.1.1.2 Black female representation at Executive Management	2	25%
3.1.1.2 Senior, Middle and Junior Management		
3.1.1.2.1 Black representation at Senior, Middle and Junior Management	6	60%
3.1.1.2.2 Black female representation at Senior, Middle and Junior Management	2	30%

E: Generic skills development scorecard

Skills Development Element	Weighting points	Compliance target
2.1.1 Skills development Expenditure on any programme specified in the learning programme matrix for black people as a percentage		
2.1.1.1 Skills Development Expenditure on Learning Programmes specified in the Learning Programme Matrix for black people as a percentage of Leviable Amount	8	6%
2.1.1.2 Skills Development Expenditure on Learning Programmes specified in the Learning Programme Matrix for black employees with disabilities as a percentage of Leviable Amount	4	0.3%
2.1.2. Learnerships, Apprenticeships and Internships		
2.1.2.1 Number of black people participating in learnerships, apprenticeships and internships as a percentage of total employees	4	2.5%
2.1.2.2 Number of black unemployed people participating in training specified in the learning programme matrix as a percentage of number of employees	4	2.5%
Bonus points		
2.1.3 Number of black people absorbed by the measured and industry entity at the end of the learnerships programme	5	100%

F: Learning programme matrix

Cat	Programme	Narrative Description	Delivery Mode	Learning site	Learning achievement
A	Buraries	Institution-based theoretical instruction alone- formally assessed by the institution	Institutional instruction	Institutions such as universities and colleges, schools, ABET providers	Recognised theoretical knowledge resulting in the achievement of a degree, diploma or a certificate issued by an accredited or registered formal institution of learning
B	Internships	Institution based theoretical instruction as well as some practical learning with an employer or in a simulated work environment- formally assessed through institution	Mixed mode delivery with institutional instruction as well as supervised learning in an appropriate workplace or simulated work environment	Institutions such as universities and colleges, schools, ABET providers and workplace	Theoretical knowledge and workplace experience with set requirements resulting in the achievement of a degree, diploma or certificate issued by an accredited or registered formal institution of learning
C	Learnerships	Recognised or registered structured experiential learning in the workplace that is required after the achievement of a	Structured learning in the workplace with mentoring or coaching	Workplace	Occupational or professional knowledge and experience formally recognised through registration or licensing

		qualification - formally assessed by a statutory occupational or professional body			
D	Learnerships or Apprenticeships	Occupationally directed instructional and work-based learning programme that required a formal contract-formally assessed by an accredited body	Institutional instruction together with structured supervised experiential learning in the workplace	Institution and workplace	Theoretical knowledge and workplace learning resulting in the achievement of a South African Qualifications Authority registered qualification, a certificate or other similar occupational or professional qualification issued by an accredited or registered formal institution of learning
E	Work-integrated learning	Occupationally directed instructional and work-based learning programme that does not require a formal contract - formally assessed by an accredited body	Structured supervised experiential learning in the workplace which may include some institutional instruction	Workplace, institutional as well as ABET providers	Credits awarded for registered unit standards, continued professional development, improved performance or skills (e.g. evidence of outputs based on performance development programme
F	Informal	Occupationally-	Structured	Institutions,	Continuing

	training	directed informal instructional programmes	information sharing or direct instruction involving workshops, seminars, conferences and short courses	conferences and meetings	professional development, attendance certificates and credits against registered unit standards (in some instances)
G	Informal training	Work-based informal programmes	Informal training	Workplace	Increased understanding of job or work context or improved performance or skills

G: QSE skills development scorecard

4.1.1.1 Skills Development Element	Weighting points	Compliance Target
4.1.1.1.1 Skills development expenditure on learning programmes specified in the learning programme matrix for black people as a percentage of leviabale amount.	15	3%
4.1.1.1.2 Skills development expenditure on learning programmes specified in the learning programme matrix for black female as a percentage of leviabale amount.	7	1%
4.1.1.1.3 Skills development expenditure on learning programmes specified in the learning programme matrix for black people with disabilities as a percentage of leviabale amount.	3	0.15
Bonus Points		
4.1.1.2 Number of black people absorbed by the measured entity and industry at the end of the learning programme	5	100%

H: Generic enterprise and supplier development scorecard

Criteria	Weighting points	Compliance targets
2.1 Preferential procurement		
2.1.1 B-BBEE Procurement spend for all empowering suppliers based on the B-BBEE Procurement Recognition Levels as a percentage of Total Measured procurement spend	5	80%
2.1.2 B-BBEE Procurement spend from all Empowering Suppliers that are Qualifying Small Enterprises based on the applicable B-BBEE Procurement Recognition Levels as a percentage of Total Measured Procurement Spend	3	15%
2.1.3 B-BBEE Procurement Spend from all Exempted Micro-Enterprises based on the applicable B-BBEE Procurement Recognition Levels as a percentage of Total Measured Procurement Spend	4	15%
2.1.4 B-BBEE Procurement Spend from Empowering Suppliers that are at least 51% black owned based on the applicable B-BBEE Procurement Recognition Levels as a percentage of Total Measured Procurement Spend	9	40%
2.1.5 B-BBEE Procurement Spend from Empowering Suppliers that are at least 30% black women based on the applicable B-BBEE Procurement Recognition Levels as a percentage of Total Measured Procurement Spend	4	12%
Bonus Points		
B-BBEE Procurement Spend from Designated Group Suppliers that are at least 51% Black owned.	2	2%
2.2 Supplier development		
2.2.1 Annual value of all Supplier Development Contributions made by the Measured Entity as a	10	2% of NPAT

percentage of the target.		
2.3 Enterprise development		
2.3.1 Annual value of Enterprise Development Contributions and Sector Specific Programmes made by the Measured Entity as a percentage of the target.	5	1% of NPAT
2.4 Bonus Points		
2.4.1 Bonus Points for graduation of one or more Enterprise Development beneficiaries to graduate to the Supplier Development level.	1	
2.4.2 Bonus point for creating one or more jobs directly as a result of Supplier Development and Enterprise Development initiatives by the Measured Entity.	1	

I: QSE enterprise and supplier development scorecard

Criteria	Weighting Points	Compliance Targets
5.1.1.1 Preferential Procurement		
5.1.1.1.1 BEE Procurement spend from all Empowering Suppliers based on the B-BBEE Procurement Recognition Levels as a percentage of Total Measured Procurement Spend	15	60%
5.1.1.1.2 BEE Procurement Spend from Empowering Suppliers that are at least 51% black owned based on the applicable B-BBEE Procurement recognition Levels as a percentage of Total Measured Procurement Spend	5	15%
5.1.1.2 Bonus Points		
BEE Procurement Spend from Designated Group Suppliers that are at least 51% black owned based on the B-BBEE Recognition Level	1	1%
5.1.1.3 Supplier Development		
5.1.1.3.1 Annual value of all Supplier Development Contributions made by the Measured Entity as a percentage of the target	5	1% of Net Profit After Tax (NPAT)
5.1.1.4 Enterprise development		
5.1.1.4.1 Annual value of Enterprise Development Contributions and sector Specific Programmes made by the Measured Entity as a percentage of the target	5	1% of NPAT
5.1.1.5 Bonus Points		
5.1.1.5.1 Bonus Point for graduation of one or more Enterprise Development beneficiaries to graduate to the Supplier Development level	1	
5.1.1.5.2 Bonus Point for creating one or more jobs directly as a result of Supplier Development and Enterprise Development initiatives by the Measured Entity	1	

J: Generic socio-economic development scorecard

Criteria	Weighting points	Compliance target
Annual value of all Socio-Economic Development Contributions by the measured entity as a percentage of the target	5	1% of NPAT

K: QSE socio-economic development scorecard

Criteria	Weighting points	Compliance target
Annual value of all Socio-Economic Contributions and Qualifying Socio-Economic Development Contributions made by the Measured entity as a percentage of the target	5	1% of NPAT

L: FSC Generic ownership scorecard

		Description	Points	Target
2.1	2.1.1	Exercisable voting rights in the measured entity in the hands of black people	4	25% + 1 vote
	2.1.2	Exercisable voting rights in the measured entity in the hands of black women	2	10%
2.2	2.2.1	Economic interest rights in the measured entity to which black people are entitled	3	25%
	2.2.2	Economic interest rights in the measured entity to which black women are entitled	2	10%
	2.2.3	Economic interest in the hands of black designated groups; black participants in employee share ownership programmes; black people in broad-based ownership schemes and black participants in co-operatives	3	3%
	2.2.4	New entrants	3	2%
2.3		Net value	6	Formula Annex 100 (C)
		Total before bonus	23	
2.4		Bonus: Direct/Indirect ownership in excess of 15%	3	10%
2.5		Bonus: Economic interest and voting rights above 32.5%	2	1 point @ 32.5% and 1 point @ 40%

M: FSC QSFI ownership scorecard

Category and ownership indicator	Weighting points	Compliance target
1.1 Voting rights		
1.1.1 Exercisable voting rights in the enterprise by black people	5	25% +1 votes
1.1.2 Exercisable voting rights in the enterprise by black women	2	10%
1.2 Economic Interest		
1.2.1 Economic Interest by black people in the enterprise	5	25%
1.2.2 Economic interest by black women in the enterprise	2	10%
1.2.3 Economic interest of new entrants or black designated groups	3	2%
1.3 Net value	8	Refer to Annexe FS100
Total	25	
1.4 Bonus Points		
1.4.1 Bonus: Direct/Indirect ownership in excess of 15%	2	10%
1.4.2 Bonus: interest and voting rights above 25%	2	1 @ 32.5% and 1 @ 40%

N: FSC Generic management control scorecard

	Description	Points	Target
2.1	Board Participation	5	
2.1.1	Exercisable voting rights of black board members as a percentage of all board members	1	50%
2.1.2	Exercisable voting rights of black female board members as a percentage of all board members	1	25%
2.1.3	Black executive directors as a percentage of all executive directors	2	50%
2.1.4	Black female executive directors as a percentage of all executive directors	1	25%
2.2	Other Executive Management	3	
2.2.1	Black executive management as a percentage of all executive management	2	60%
2.2.2	Black female executive management as a percentage of all executive management	1	30%
2.3	Senior Management	4	
2.3.1.	Black employees in senior management as a percentage of all such employees	2	60%
2.3.2	Black female employees in senior management as a percentage of all senior managers	1	30%
2.3.3.	African senior managers as a percentage of all senior managers	1	EAP%
2.4	Middle Management	4	
2.4.1	Black employees in middle management as a percentage of all middle management	2	75%
2.4.2	Black female employees in middle management as a percentage of all middle management	1	38%
2.4.3	African middle managers as a percentage of all middle managers	1	EAP%
2.5	Junior management	4	
2.5.1	Black employees in junior management as a percentage of all junior management	1	88%
2.5.2	Black female employees in junior management as a percentage of all junior management	1	44%
2.5.3	African junior managers as a percentage of all junior managers	1	EAP%

2.6	Black employees with disabilities as a percentage of all employees	1	2%
	TOTAL	20	

O: FSC QSFI management control scorecard

Criteria	Weighting points	Compliance Target
1.1 Executive management		
1.1.1 Black representation in executive management	5	50%
1.1.2 Black female representation in executive management	2	25%
1.2 Senior, Middle and Junior management		
1.2.1 Black representation in Senior, Middle and Junior Management	6	60%
1.2.2 Black female representation in Senior, Middle and Junior Management	2	30%
Total	15	

P: FSC Generic skills development scorecard

		Description	Points	Target
2.1	Senior management		2	
	2.1.1	Skills development expenditure on learning programmes specified in the learning programme matrix for black senior and executive managers as a percentage of the leviabale amount applicable to this level	1	2%
	2.1.2	Skills development expenditure on learning programmes specified in the learning programme matrix for black women senior and executive managers as a percentage of the leviabale amount applicable to this level	0.5	1%
	2.1.3	Skills development expenditure on learning programmes specified in the learning programme matrix for African senior and executive managers as a percentage of the leviabale amount applicable to this level	0.5	EAP%
2.2	Middle management			
	2.2.1	Skills development expenditure on learning programmes specified in the learning programme matrix for black middle managers as a percentage of the leviabale amount applicable to this level	1	3%
	2.2.2	Skills development expenditure on learning programmes specified in the learning programme matrix for black women middle managers as a percentage of the leviabale amount applicable to this level	0.5	1.5%
	2.2.3	Skills development expenditure on learning programmes specified in the learning programme matrix for African middle managers as a percentage of the leviabale amount applicable to this level.	0.5	EAP%

2.3	Junior management			
	2.3.1	Skills development expenditure on learning programmes specified in the learning programme matrix for black junior managers as a percentage of leviabale amount applicable to this level	1	5%
	2.3.2	Skills development expenditure on learning programmes specified in the learning programme matrix for black women junior managers as a percentage of the leviabale amount applicable to this level	1	2.5%
	2.3.3	Skills development expenditure on learning programmes specified in the learning programme matrix for African junior managers as a percentage of the leviabale amount applicable to this level.	1	EAP%
2.4	Non-management staff			
	2.4.1	Skills development expenditure on learning programmes specified in the learning programme matrix for black non-management staff as a percentage of the leviabale amount applicable to this level	2	8.00%
	2.4.2	Skills development expenditure on learning programmes specified in the learning programme matrix for black women non-management staff as a percentage of the leviabale amount applicable to this level	1	4.00%
	2.4.3	Skills development expenditure on learning programmes specified in the learning programme matrix for African non-management staff as a percentage of the leviabale amount applicable to this level	1	EAP%
	2.5	Skills development expenditure on learning programmes specified in the learning programme matrix for black unemployed people	4	1.5%

		as a percentage of the leviable amount		
	2.6	Skills development expenditure on learning programmes specified in the learning programme matrix for black people with disabilities as a percentage of the leviable amount	1	0.30%
	2.7	Number of black people (employed/unemployed) participating in learnerships, apprenticeships, internships or category B, C or D programmes as a percentage of total employees	4	5%
		Total	20	
	2.8	Bonus Points: Number of previously unemployed black people absorbed by the measured entity/industry at the end of learnerships, apprenticeships, internships or category B, C or D programmes	3	100%

Q: FSC QSFI skills development scorecard

Skills development element	Weighting points	Compliance target
1.1 Skills development expenditure on learning programmes specified in the learning programme matrix for black people as a percentage of the leviable amount	20	3%
1.2 Skills development expenditure on learning programmes specified in the learning programme matrix for black females as a percentage of leviable amount	5	1%
Total	25	

R: FSC Generic enterprise and supplier development scorecard

	Description	Others	Banks and Life Officers	Targets year 1-3	Targets year 3+
		Weighting	Weighting	Targets	Targets
2.1	Procurement	20	15		
2.1.1	BEE procurement spend from all empowering suppliers based on the BEE procurement recognition levels as a percentage of total measured procurement spend	5	4	75%	80%
2.1.2	BEE procurement spend from empowering suppliers who are QSEs based on the applicable BEE procurement recognition levels as a percentage of total measured procurement spend	3	2	14%	18%
2.1.3	BEE procurement spend from empowering suppliers who are EMEs based on the applicable BEE procurement recognition levels as a percentage of total measured procurement spend	2	2	8%	12%
2.1.4	BEE procurement spend from empowering suppliers that are at least 51% black owned based on the applicable BEE	7	5	20%	30%

	procurement recognition levels as a percentage of total measured procurement spend				
2.1.5	BEE procurement spend from empowering suppliers that are at least 30% black women based on the applicable BEE procurement recognition levels as a percentage of total measured procurement spend	3	2	9%	10%
2.2	Supplier development	10	0		
2.2.1	Annual value of all supplier development contributions made by the measured entity	10	0	2% of NPAT	2% of NPAT
2.3	Enterprise and supplier development	5	0		
2.3.1	Annual value of enterprise development contributions and sector specific programmes made by the measured entity	5	0	1% of NPAT	1% of NPAT
	Total	35	15		
2.4	Bonus Points				
2.4.1	Graduation of one or more enterprise development beneficiaries to graduate to the supplier development level	1	0	1	1
2.4.2	For creating one or more jobs directly as a result of supplier development and enterprise development	1	0	1	1

	initiatives by the measured entity				
2.4.3	BEE procurement spend intermediated black professional service providers who are empowering suppliers based on the BEE procurement recognition levels as a percentage of intermediated spend	2	2	5%	5%
Or	Or	Or	Or	Or	Or
2.4.3 (b)	BEE procurement spend from black stockbrokers or black fund managers who are empowering suppliers based on the BEE recognition levels as a percentage of total value of all trade allocated	2	2	5%	5%
2.4.4	BEE procurement spend from designated group suppliers that are at least 51% black owned as a percentage of the total measured spend	2	2	2%	2%
2.4.5	Enterprise development support of black stockbrokers, black fund managers or intermediaries	2	2	0.5% of NPAT	0.5% OF NPAT
	Total bonus points	8	4		

S: FSC QSFI enterprise and supplier development scorecard

Criteria	Weighting points	Compliance target
1.1 Preferential Procurement		
1.1.1 BEE procurement spend from all empowering suppliers based on the BEE procurement recognition levels as a percentage of total measured procurement spend	15	60%
1.1.2 BEE procurement spend from empowering suppliers that are at least 51% black owned based on the applicable BEE procurement recognition levels as a percentage of total measured procurement spend	5	15%
1.2 Supplier Development		
1.2.1 Annual value of all supplier development contributions made by the measured entity as a percentage of NPAT	5	1%
1.3 Enterprise Development		
1.3.1 Annual value of enterprise development contributions and sector specific programmes made by the measured entity as a percentage of NPAT	5	1%
Total	30	

T: FSC Generic socio-economic development and consumer education score-card

	Element	Target for foreign branches of international banks, SAVCA members and reinsurers	Target for other institutions	Points
2.1	Annual value of all qualifying socio-economic development contributions by the measured entity as a percentage of NPAT	0.7%	0.60%	3
2.2	Annual value of all qualifying Consumer Education contributions by the measured entity as a percentage of NPAT	0	0.40%	2
	Total	0.7%	1.00%	5
2.3	Bonus Points			
2.3.1	Additional CE contributions made by the measured entity as a percentage NPAT	0.10%	0.10%	1
2.3.2	Grant contribution to Fundisa Retail Fund and other similar initiatives	0.20%	0.2%	2

U: FSC QSFI socio-economic development and consumer education scorecard

1.3.1	Criteria	Weighting Points	Compliance Target
1.3.1.1	Annual value of all SED by the measured entity as a percentage of NPAT	3	0.60%
1.3.1.2	Annual value of all qualifying CE contributions made by the measured entity as a percentage of NPAT	2	0.40%
	Total	5	
1.3.2	Bonus Points		
1.3.2.1	Additional SED contributions made by the measured entity as a percentage of NPAT	1	0.20%
1.3.2.2	Additional CE contributions made by the measured entity as a percentage of NPAT	1	0.10%
1.3.2.3	Contributions to the Fundisa Retail Fund or to other similar initiatives made by the measured entity as a percentage of NPAT	2	0.20%

BIBLIOGRAPHY

THE CONSTITUTION

- Constitution of the Republic of South Africa, Act 200 of 1993
- Constitution of the Republic of South Africa, 1996

STATUTES, REGULATIONS AND CODES

- Auditing Profession Act 26 of 2005
- Basic Conditions of Employment Act 75 of 1997
- Broad-Based Black Economic Empowerment Act 53 of 2003
- Broad Based Black Economic Empowerment Amendment Act 46 of 2013
- Broad Based Black Economic Empowerment Codes code series 0000 GG 29617 of 9 February 2007
- Broad Based Black Economic Empowerment Code of Good Practice GG 36928 of 11 October 2013
- Broad Based Black Economic Empowerment Codes code series 000 GG 36928 of 11 October 2013
- Broad Based Black Economic Empowerment Codes code series 100 GG 36928 of 11 October 2013
- Broad Based Black Economic Empowerment Codes code series 200 GG 36928 of 11 October 2013
- Broad Based Black Economic Empowerment Codes code series 300 GG 36928 of 11 October 2013
- Broad Based Black Economic Empowerment Codes code series 400 GG 36928 of 11 October 2013

- Broad Based Black Economic Empowerment Codes code series 500 GG 36928 of 11 October 2013
- Broad Based Black Economic Empowerment Codes code series 400 GG 38765 of 6 May 2015
- Broad Based Black Economic Empowerment Codes code series 600 GG 38766 of 6 May 2015
- Broad Based Black Economic Empowerment Codes code series 604 GG 38766 of 6 May 2015
- Chartered Accountants Designation (Private) Act 67 of 1993
- Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices GN27866 of 4 August 2005
- Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value GG 38837 of 1 June 2015
- Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans GN R424 in GG 40840 of 12 May 201
- Employment Equity Act 55 of 1998
- Employment Equity Amendment Act 47 of 2013
- Employment Equity Regulations in GN R595 GG 37873 of 1 August 2014
- Financial Sector Code 2017 in GN 41287 of 1 December 2017
- Financial Sector Code 2017 series FS000 in GN 41287 of 1 December 2017
- Financial Sector Code 2017 series FS100 in GN 41287 of 1 December 2017
- Financial Sector Code 2017 series FS200 in GN 41287 of 1 December 2017

- Financial Sector Code 2017 series FS300 in *GN 41287* of 1 December 2017
- Financial Sector Code 2017 series FS400 in *GN 41287* of 1 December 2017
- Financial Sector Code 2017 series FS500 in *GN 41287* of 1 December 2017
- Financial Sector Code 2017 series FS600 in *GN 41287* of 1 December 2017
- Financial Sector Code 2017 series FS702 in *GN 41287* of 1 December 2017
- Financial Sector Code 2017 series FS703 in *GN 41287* of 1 December 2017
- Financial Sector Code 2017 series FS800 in *GN 41287* of 1 December 2017
- Financial Sector Code 2017 series FS802 in *GN 41287* of 1 December 2017
- Financial Sector Code 2017 series FS803 in *GN 41287* of 1 December 2017
- Financial Sector Code 2017 series FS804 in *GN 41287* of 1 December 2017
- Financial Sector Code 2017 series FS805 in *GN 41287* of 1 December 2017
- Financial Sector Regulation Act 9 of 2017
- Higher Education Act 101 of 1997
- International Labour Organisation Convention (No 11) Concerning Discrimination in respect of Employment and Occupation 1958
- Labour Relations Act 66 of 1995
- Labour Relations Amendment Act 6 of 2014
- Legal Practice Act 28 of 2014
- Legal Practice Amendment Act 16 of 2017
- Preferential Procurement Policy Framework Act 5 of 2000

- Protection of Personal Information Act 4 of 2013
- Promotion of Access to Information Act 2 of 2000
- Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

CASES

- *Alexandre v Provincial Administration of the Western Cape Department of Health* (2005) 26 ILJ 765 (LC)
- *Allied Workers Union v Greater Louis Trichardt Transitional Local Council* 2000 (21) ILJ 119 (LC)
- *Association of Professional Teachers & another v Minister of Education & Others* (1995) 16 ILJ 1048 (IC)
- *Atlantis Diesel Engines (Pty) Ltd v NUMSA* 1995 (1) BLLR 1 (A)
- *Baxter v National Commissioner: Correctional Services & another* (2006) 9 BLLR 844 (LC)
- *Chinese Association of South Africa and others v Minister of Labour* 59251/2007 (2008) ZAGPHC 174
- *City Council of Pretoria v Walker* 1998 (3) BCLR 257 (CC)
- *Coco-Cola Beverages Africa v Various Coco-Cola and related bottling operations* 2016 (2) ZACT 68 10 May 2016
- *Coetzer & others v Minister of Safety & Security & another* (2003) 24 ILJ 163 (LC)
- *Director General of Department of Labour v Jinghua* 2006 ZALC 100 (LC)
- *Dudley v City of Cape Town* (2004) 25 ILJ 305 (LC)
- *General Council of the Bar of South Africa v Van der Spuy* 1999(1) SA 577 (T)

- *Gordon v Department of Health, Kwazulu-Natal* (2004) 25 ILJ 1431
- *Govender and Umgungundlovu District Municipality* (2016) 37 ILJ 724 (CCMA)
- *Harmse v City of Cape Town* (2003) 24 ILJ 1130 (LC)
- *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC)
- *Hopwood v Spaanjaard Ltd* 1996 (2) BLLR 187 (IC)
- *Independent Municipal & Allied Workers Union v Greater Louis Trichardt Transitional Local Council* (2000) 21 ILJ 119 (LC)
- *Jabari v Telkom SA (Pty) Ltd* 2006 (10) BLLR 924 (LC)
- *Joslin v Olivetti Systems and Networks Africa (Pty) Ltd* (1993) 14 ILJ 227 (IC)
- *Khosa and Others v Minister of Social Development and Others* 2004 (6) SA 505 (CC)
- *Lagadien v University of Cape Town* 2001 (1) BLLR 76 (LC)
- *Larbi-Odam and Others v Member of the Executive Council of Education (North-West Province) and Another* 1998 (1) SA 745 (CC)
- *Larcombe v Natal Nylon Industries (Pty) Ltd* (1986) 7 ILJ 326 (IC)
- *Leonard Dingler v Employee Representative Council & others v Leonard Dingler (Pty) Ltd & others* 1997 (11) BLLR 1438 (LC)
- *Leonard Dingler v Employee Representative Council & others v Leonard Dingler (Pty) Ltd & others* 1998 (19) ILJ 285 (LC)
- *Louw v Golden Arrow Bus Services* (2000) 21 ILJ 188 (LC)
- *Lubke v Protective Packaging (Pty) Ltd* (1994) 15 ILJ (IC)
- *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews & Another* 2009(9) SA 529 (CC)

- *Mahlanyana v Cadbury (Pty) Ltd* (2000) 21 ILJ 2274 (LC)
- *McPherson v University of Kwazulu-Natal & another* (2008) 29 ILJ 674 (LC)
- *Mgijima v Member of Executive Council Gauteng Department of Education and others* 2014 ZALCJHB 414 27 October 2015
- *Minister of Finance and Other v Van Heerden* 2004 (6) SA 121 (CC)
- *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and others* 2006 (2) SA 311 (CC)
- *Neotel (Pty) Ltd v Telkom Soc Ltd and others* (605/2016) [2017] ZASCA 47 (31 March 2017)
- *Nehawu v University of Cape Town & others* 2003 (24) ILJ 95 (CC)
- *Ntai & Others v South African Breweries Ltd* 2001 (2) BLLR 186 (LC)
- *Pioneer Foods (Pty) Ltd v Workers against Regression & others* case no C687/15
- *President of the Republic of South Africa and Another v Hugo* (1997) 6 BCLR 708 (CC)
- *Pretoria City Council v Walker* 1998 (3) BCLR 257 (CC)
- *PSA obo AH Mbiza v Office of the Presidency* (2014) 35 ILJ 1628 (LC)
- *Reynhardt v Minister of South Africa* (2008) 29 ILJ 725 (LC)
- *S v Makwanyane* 1995 (6) BCLR 665 (CC)
- *Solidarity and Others v Department of Correctional Services and Others* 2016 (10) BCLR 1349 (CC)
- *Solidarity obo Barnard v South African Police Service* (2010) 31 ILJ 742 (LC)

- *Solidarity obo Barnard v South African Police Service* (2014) 35 ILJ 416 (SCA)
- *South African Police Service v Solidarity obo Barnard* (2013) 34 ILJ 590 (LAC)
- *South African Police Service v Solidarity obo Barnard* (2014) 35 ILJ 2981 (CC)
- *Stojce v University of KZN (Natal) & another* 2007 (3) BLLR 246 (LC)
- *Stokwe v MEC, Department of Education, Eastern Cape* 2005 (8) BLLR 822 (LC)
- *Stokwe v MEC, Department of Education, Eastern Cape* (2019) 4 ILJ 773 (CC)
- *Stoman v Minister of Safety and others* (2002) 23 ILJ 1020 (T)
- *University of Cape Town v Auf der Heyde* 2001 (22) ILJ 2647 (LAC)
- *University of South Africa v Reynhardt* (2010) 31 ILJ 2368 (LAC)
- *Walters v Transitional Local Council of Port Elizabeth* 2001 (1) BLLR 98 (LC) 110
- *Woolworths (Pty) Ltd v Whitehead* 2000 (6) BLLR 640 (LAC)

BOOKS

- Andrews P *Race, inclusiveness and transformation of Legal Education in South Africa* (2017) Cambridge University Press
- Balshaw T & Goldberg J *Broad-Based Black Economic Empowerment Amended Codes and Scorecard* 3ed (2014) NB Publishers
- Chisholm L & September J *Gender Equity in South African Education 1994-2004: Perspectives from Research, Government and Unions; conference proceedings* (2005) HRSC Press
- Christophers B & Leyson A *Money and finance after crisis: critical thinking for uncertain times* (2017) Wiley Blackwell
- Daniel J & Southall R *State of the Nation: South Africa: 2004 - 2005* (2006) HSRC Press

- Delgado R & Stefancic J *Critical race theory: an introduction* (2001) New York University Press
- Delgado R & Stefancic J *Critical race theory: an introduction* 2ed (2012) New York University Press
- Delgado R & Stefancic J *Critical race theory: the cutting edge* (2000) Temple University Press
- De Waal J, Currie I & Erasmus G *The Bill of Rights Handbook* 4ed (2001) Juta
- Du Plessis JV & Fouche MA *A Practical guide to labour law* 6ed (2007) LexisNexis
- Dupper O & Garbers C *Equality in the Workplace Reflections from South Africa and Beyond* (2009) Juta
- Du Toit D, Godfrey S & Cooper C *et al Labour Relations Law: A Comprehensive Guide* 6ed (2015) LexisNexis
- Du Toit D & Potgieter M *Unfair Discrimination in the workplace* (2014) Cape Town: Juta
- Flebner H & Potts L *Societies in Transition – challenges to women’s and gender studies* (2013) Springer Fachmedien Wiesbaden
- Frahm-Arp M *Professional Women in South African Pentecostal Charismatic Churches* (2010) IDC Publishing
- Gillespie A *The English Legal System* (2007) Oxford University Press
- Gqubule E *Making mistakes righting wrongs: Insights into black economic empowerment* (2006) Jonathan Ball Publishers
- Griffen RW *Management* 12ed (2015) South-Western Cengage Learning
- Grobler P & Warnich S *Human Resource Management in South Africa* 3ed (2006) Thompson
- Grogan J *Employment Rights* 2ed (2015) Juta

- Grogan J *Workplace Law* 11ed (2014) Juta
- Harker S & Waite M *Oxford Dictionary* 3ed (2007) Oxford University Press
- Hudson A *New perspectives on property law: obligations and restitution* (2013) Taylor & Francis
- Jeffrey A *BEE: helping or hurting?* (2014) Tafelberg Publishers Ltd
- M'Paradzi A & Kalula *Black Economic Empowerment in South Africa: a critical appraisal* (2007)
- Musahara H *Inclusive Growth and Development: Issues in Eastern and Southern Africa* (2016) OSSREA Ethiopia
- Rao A & Sandler J *Gender at work Theory and Practice for the 21st century organization* (2016) Routledge
- Robbins SP & Odendaal A *Organizational Behaviour: Global and Southern African perspectives* (2003) Pearson South Africa
- Tinarelli S *Employers' guide to the Employment Equity Act* 7ed (2012) Van Schaik
- Van de Lanotte J, Sarken J & Haeck Y Van der Lanotte et al *The principle of equality: A South African and Belgian perspective* (2001) Maklu Antwerpen Appeldoorn
- Van Niekerk, Christianson MA Mc Gregor M, E Smith & Van Eck BPS *Law@work* (2008) LexisNexis

CHAPTERS IN BOOKS

- Du Toit 'The prohibition of unfair discrimination: Applying s 3(d) of the Employment Equity Act 55 of 1998' in Dupper OC & Garbers C *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) Juta 1 – 15
- Harris CI 'Whiteness as property' in Crenshaw K *Critical Race Theory: The Key Writings*

that Formed the Movement (1996) 276 - 291

- Hepple B 'Can discrimination ever be fair?' in Malherbe K and Sloth-Nielsen J *Labour Law into the Future: Essays in honour of D'Arcy du Toit* (2012) Juta 1-17

JOURNAL ARTICLES

- Albertyn CH 'Adjudicating affirmative action within a normative framework of substantive equality and the Employment Equity Act – an opportunity missed? *South African Police Service v Solidarity obo Barnard*' (2015) 132 (4) *SALJ* 711 – 768
- Alexander J 'The major ideologies of Liberalism, Socialism and Conservatism' (2014) *Political Studies* 1 – 15
- Alexander N 'Affirmative action and the perpetuation of racial identities in post-apartheid South Africa' (2007) 63 *Transformation* 92 – 108
- Allen ME 'The Relevance of Critical Race Theory: Impact on Students of Color' (2017) 4 (2) *Urban Education Research & Policy Annuals* 33 - 44
- Barrie G 'The application of the doctrine of proportionality in South African courts' (2013) 28 *SAPL* 40 - 57
- Barlow B 'Racism, Justified: A Critical Look at Critical Race Theory' (2016) *The Harvard Law Record* 1 - 6
- Bazana S & Mogotsi OP 'Social identities and racial integration in historically white universities: A literature review of the experiences of black students' (2017) 2 *Transformation in higher education* 1- 3
- Bell D 'Who's afraid of critical race theory?' (1995) *University of Illinois Law Review* 888 - 910
- Bergerson AA 'Critical race theory and white racism: is there room for white scholars in fighting racism in education?' (2003) 16(1) *International Journal of Qualitative Studies in Education* 51 - 63
- Blackett A 'Follow the Drinking Gourd: Our road to teaching Critical Race Theory and

Slavery and the Law, Contemplatively, at McGill' (2017) 62:4 *McGill LJ* 1251 - 1277

- Booyesen L 'Barriers to Employment equity implementation and retention of Blacks in management in South Africa' (2007) 21 *South Africa Journal of Labour Relations* 47 - 71
- Booyesen L 'Societal power shifts and changing societal identities in South Africa: workplace implications' (2013) 10(1) *South African Journal of Economics and Management Sciences* 1 - 20
- Broun KS 'Black lawyers under apartheid: The soul of South African law' (2001) 27(2) *Millennium* 33 - 38
- Budeli-Nemakonde M 'Employment equity and affirmative action in South Africa: A review of the Jurisprudence of the courts since 1994' (2016) 3 *African Journal of Democracy and Governance* 75 – 106
- Budlender G '20 Years of Democracy: The state of human rights in South Africa' (2014) 3 *Stell LR* 439 – 450
- Butler J, Craig SF, Garza MA, Quinn SC & Thomas SV 'Commentary: Critical Race Theory training to eliminate racial and ethnic health disparities: The Public Health Critical Race Praxis Institute' (2018) 28 *Ethnicity & Disease* 279 - 284
- Castagno AE 'Commonsense understandings of equality and social change: a critical race theory analysis of liberalism at Spruce Middle School (2009) 22 (6) *International Journal of Qualitative Studies in Education* 755 - 768
- Charles GE 'Affirmative action and colorblindness from the original position' (2009) 78 *Tulane Law Review* 2009 - 2036
- Coetzee M & Bezuidenhout M 'The fairness of affirmative action: In the eye of the beholder' (2011) 15 *South African Business Review* 75 – 96
- Coetzee M 'The perceived treatment of employees from designated groups in the workplace' (2015) 1 *SAJEMS* 56 – 69
- Coetzer N 'Affirmative action: The sword versus shield debate continues' (2009) 21 *SA*

Merc LJ 92 – 101

- Conradie MS 'Critical race theory and the question of safety in dialogues on race' (2016) 36 (1) *Acta Theologica* 5-26
- Cooper C 'The boundaries of equality in labour law' (2004) 25 *ILJ* 813 - 852
- Dean T 'The Regulation of Affirmative Action in the Employment Equity Act 55 of 1998' (2006) 18 *SA Merc LJ* 381 – 388
- Delgado R 'Affirmative action as a Majoritarian Device: Or, Do you really want to be a role model?' (1991) *Michigan Law Review* 1222 – 1231
- Delgado R 'The Imperial Scholar: Reflections on a Review of Civil Rights Literature' (1984) 132 *University of Pennsylvania Law Review* 561 – 578
- Delgado R & Stefancic J 'Critical race theory: an annotated bibliography' (1993) *Virginia Law Review* 461 – 516
- Dupper O 'Affirmative action and substantive equality: The South African experience' (2002) 14 *SA Merc LJ* 275 - 292
- Du Toit D 'Industrial democracy in South Africa's transition' (1997) 1(5) *Law, Democracy and Development* 39 - 67
- Du Toit D 'Protection against unfair discrimination in the workplace: are the courts getting it right?' (2007) *LDD* 1- 15
- Du Toit D 'The evolution of the concept of 'unfair discrimination' in South African Labour Law' (2006) 27 *ILJ* 1311 - 1341
- Du Toit D 'The right to equality versus employer 'control' and employee 'subordination': Are some more equal than others?' (2016) 37 *ILJ* 1-28
- Du Toit D 'When does affirmative action in favour of certain employees become unfair discrimination against others?' (2001) 5 *International Journal of Discrimination and the Law* 147 -166

- Fergus E 'Towards Unity - Reconciling fairness and rationality in affirmative action disputes (2015) 36 *ILJ* 40
- Ferreira N & Coetzee M 'The influence of job embeddedness on black employees' organisational commitment' (2013) 17 (3) *South African Business Review* 239 - 255
- Ford CL & Collins OA 'Commentary: Just what is critical race theory and what's it doing in a Progressive Field like Public Health' (2018) 28 *Ethnicity & Disease* 223 - 230
- Gillborn D 'Intersectionality, critical race theory and the primacy of racism: race, class, gender and disability in education' (2015) 21(3) *Qualitative Inquiry* 277 - 298
- Godongwana E & Manuel T 'Voluntary transformation needed in financial sector' (2017) 1 *Moneymarketing* 1-2
- Godfrey S 'The Legal Profession: Transformation and skills' (2009) 126 *SALJ* 91 - 123
- Greenbaum L 'The four year undergraduate LLB: progress and pitfalls (2010) *Journal for Juridical Science* 1-27
- Hall S & Woermann M 'From inequality to equality: evaluating normative justifications for affirmative action as racial redress' (2014) 8(2) *African Journal of Business Ethics* 59 – 73
- Hansford J 'Jailing a Rainbow: The Marcus Garvey Case' (2009) 2 *Georgetown Journal of Modern Critical Race Perspectives* 1- 69
- Hansford J 'The whole system is guilty as hell: interrupting a legacy of racist police culture through a human rights lens' (2015) 13 *Harvard Journal of African American Public Policy* 4-19
- Hatcher DL 'Remembering Anti-Essentialism: Relationship Dynamics Study and Resulting Policy Considerations Impacting Low-Income Mothers, Fathers and Children (2017) 35 (2) *Law and Equality: A Journal of Theory and Practice* 239 – 253
- Henrico R 'South African constitutional and legislative framework on equality: how effective is it in addressing religious discrimination in the workplace?' (2015) *Obiter* 275 – 292
- Henry PJ 'The role of group-based status in job-satisfaction: workplace respect matters

more for the stigmatized' (2011) 24 *Soc Just Res* 231 – 238

- Hinks T 'Job satisfaction and employment equity in South Africa' (2009) 19 (2) *Journal of African Economies* 237 - 255
- Horwitz FM 'An analysis of skills development in a transitional economy – The case of the South African labour market' (2013) 24 *International Journal of Human Resource Management* 2435 – 2451
- Horwitz FM & Jain H 'An assessment of Employment Equity and Broad-Based Black Economic Empowerment developments in South Africa' (2011) 30 *Equality, Diversity and Inclusion: An International Journal* 297 - 316
- Irene BNO 'Women entrepreneurship in South Africa: understanding the role of competencies in business success' (2017) 9(1) *South African Journal of Entrepreneurship and Small Business Management* 121 - 129
- João TF & Coetzee M 'Perceived career mobility and preference, job satisfaction and organisational commitment in the financial sector: an exploratory study' (2011) 35 (1) *South African Journal of Labour Relations* 38 - 59
- Jongens C 'Perceptions of employment equity implementation at a major South African multi-national financial corporation' (2006) 2(1) *Postamble* 30 – 45
- Jinabhai DC 'New challenges for South African development and training – Linkages to Empirical research' (2005) 34(1) *Public Personnel Management* 85 – 101
- Kalula & M'Papadzi 'Black economic empowerment: Can there be a trickle-down benefits for workers?' (2008) *Speculum Juris* 108 – 130
- Kloppers H 'Driving corporate social responsibility through black economic empowerment' (2014) 18 *LDD* 58 – 79
- Krause DR & Ellram LM 'Success factors in supplier development' (1997) 27(1) *International Journal of Physical Distribution & Logistics Management* 39 - 52
- Kruger LP 'South African managers perceptions of black economic empowerment (BEE): A sunset clause may be necessary to ensure future sustainable growth' (2014) 18(1)

- Kruger LP 'The impact of black economic empowerment (BEE) on South African businesses: Focusing on ten dimensions of business performance' (2011) 15(3) *South African Business Review* 207 – 233
- Liu T 'Ethnic studies as antistatutory education: a critical race theory approach to employment discrimination remedies' (2019) 11(1) *Washington University Jurisprudence Review* 165 - 190
- Louw AM 'Extrapolating 'equality' from the Letter of the Law: Some thoughts on the limits of Affirmative Action under the Employment Equity Act 55 of 1998' (2006) *SA Merc LJ* 336 - 354
- Louw AM 'The Employment Equity Act, 1998 (and other myths about the pursuit of "equality", "equity" and "dignity" in post-apartheid South Africa)' (2015) 18(3) *PER* 594 - 667
- Manyathi-Jele N 'Lack of advancement of black and female lawyers in the spotlight' (2015) July *De Rebus* 12-16.
- Manyathi-Jele N 'Report: Transformation of the legal profession' (2014) *De Rebus* 18 - 23
- Manyathi N 'Statistics reflect pace of transformation in the attorneys' profession' (2012) September 2 *De Rebus* 3
- Marais F & Coetzee L 'The determination of black ownership in companies for the purpose of black economic empowerment (Part 1)' *Obiter* (2006) 111 – 127
- Marais F & Coetzee L 'The determination of black ownership in companies for the purpose of black economic empowerment (Part 2)' (2006) *Obiter* 502 – 538
- Martinez AJ 'Critical race theory: its origins, history and importance to the discourses and rhetorics of race' (2014) *Frame No. 27.2* 9 - 27
- Mazibuko JV & Govender KK 'Exploring workplace diversity and organisational effectiveness: A South African exploratory case study' (2017) 15 *SAJHRM* 865 - 874

- McConnachie C 'Affirmative action and intensity of review: South Africa Police Service v Solidarity obo Barnard' (2015) 7(1) *Constitutional Court Review* 163 – 197
- McGregor M 'Affirmative action for South African citizens: the role of the Department of Labour' (2005) *Obiter* 657 - 664
- McGregor M 'Blowing the whistle on affirmative action: the future of affirmative action in South Africa (Part 1) (2014) 21 *SA Merc LJ* 60 – 92
- McGregor M 'Blowing the whistle on affirmative action: the future of affirmative action in South Africa (Part 2) (2014) 26 *SA Merc LJ* 282 - 306
- McGregor M 'The nature of affirmative action: a defence or a right' (2003) 15 *SA Merc LJ* 421 - 436
- Modiri J M 'The colour of the law, power and knowledge: introducing critical race theory in (post-) apartheid South Africa' (2012) 28 *SAJHR* 405 – 436
- Morales-Nieto J 'Globalisation of microfinance markets: some conditions for success' (2013) 4(1) *Sabinet* 6 - 8
- Ncwadi R & Onceya S 'Economic Empowerment Policies and Economic Growth in the Post-Apartheid South Africa- A Cointegration and Granger Causality' (2014) 5(10) *Mediterranean Journal of Social Sciences* 268 - 284
- Nicolson D 'Affirmative action in the Legal Profession' (2006) 33(1) *Journal of Law and Society* 109 - 125
- Nkomo S 'Moving from the letter of the law to the spirit of the law: the challenges of realising the intent of employment equity and affirmative action' (2011) 77 *Transformation* 132 - 145
- Nzukuma KCC & Bussin M 'Job-hopping amongst African black senior management in South Africa' (2011) 9 (1) *SAJHRM* 360 – 372
- Odedaal EM & de Jager H 'Independent reviews: perceptions of chartered accountants (South Africa)' (2011) 12 *South African Journal of Accountability and Auditing Research* 25 - 36

- Oosthuizen R & Naidoo V 'Attitudes towards and experience of employment equity' (2010) 36 *SAJIP* 836 – 844
- Osode PC 'The new Broad-Based Economic Empowerment Act: a critical evaluation' (2004) 18 *Speculum Juris* 114
- Partington J & Van Der Walt A 'The development of defences in unfair discrimination cases (part 2)' 2005 (26) *Obiter* 595- 608
- Pooe RID 'The latest 'big thing' for South African companies: Enterprise and supplier development - proposing an implementation framework' (2016) 10(1) *Journal of Transport and supply chain management* 235 – 246
- Premdas R 'Social Justice and affirmative action' (2016) 39 (3) *Ethnic and Racial Studies Review* 449 – 462
- Pretorius JL 'Accountability, Contextualisation and the standard of judicial review of affirmative action: *Solidarity obo Barnard v South African Police Services*' (2013) 130 *SALJ* 31 - 44
- Pretorius JL 'Constitutional standards for affirmative action in South Africa: a comparative overview' (2001) 403 - 457
- Pretorius JL 'Fairness in transformation: A critique of the Constitutional Court's affirmative action jurisprudence' (2010) 26 *SAJHR* 536 – 570
- Pretorius JL 'Legal evaluation of affirmative action in South Africa' (2001) 26(3) *Journal of Juridical Science* 12 - 28
- Pruitt LR 'No black names on the letterhead? Efficient Discrimination and the South African Legal Profession' (2002) 23 *Michigan Journal of International Law* 547 - 676
- Ramohai J 'A black woman's perspective on understanding transformation and diversity in South African higher education' (2019) 4(1) *Transformation in Higher Education* 1-10
- Rasool F & Botha CJ 'The nature, extent and effect of skills shortages on skills migration in

South Africa' (2011) 9(1) *SA Journal of Human Resource Management* 287 – 298

- Reuben S & Bobat S 'Constructing racial hierarchies of skill – Experiencing affirmative action in a South African organisation: A qualitative review (2014) 40 (1) *SA Journal of Industrial Psychology* 1158 - 1169
- Roberts B, Weir-Smith G & Reddy V 'Minding the gap: attitudes toward affirmative action in South Africa' (2011) 77 *Transformation* 1 - 30
- Saaremael- Stoilov K 'Liberal Communitarian interpretation of Social and Equality rights: a balanced approach' (2006) *Juridica International* 85 - 92
- Sadler E 'A profile and the work environment of black chartered accountants in South Africa' (2002) 10 *Meditari Accountancy Research* 159 - 185
- Sadler E & Erasmus BJ 'Views of black trainee accountants in South Africa on matters related to a career as a chartered accountant' (2003) 11 *Meditari Accountancy Research* 129 - 149
- Seate BM & Pooe RID 'The relative importance of managerial competencies for predicting the perceived job performance of Broad-Based Black Economic Empowerment verification practitioners' (2016) 14(1) *South African Journal of Human Resource Management* 696 – 705
- Selby K & Sutherland M "“Space creation”": a strategy for achieving employment equity at senior management level' (2006) 30(2) *South African Journal of Labour Relations* 42 – 65
- Sempene ME, Rieger HS & Roodt G 'Job satisfaction in relation to organisational culture' (2002) 28(2) *SA Journal of Industrial Psychology* 23 - 30
- Shung King M & Gilson L 'Leadership experiences and Practices of South African health managers: what is the influence of gender? – a qualitative exploratory study' (2018) 17 *International Journal for Equity in Health* 148 - 158
- Sibanda A 'Weighing the cost of BEE fronting on the best practices of corporate governance in South Africa' (2015) 29 *Speculum Juris* 23 – 40
- Siebers H "Race" versus "ethnicity"? Critical race essentialism and the exclusion and

oppression of migrants in the Netherlands (2017) 40 *Ethnic and Racial Studies Review* 369 - 387

- Steyn R & Jackson L 'Gender based discrimination in South Africa: a quantitative analysis of fairness in remuneration' (2015) 18 (2) *South African Journal of Economic and Management Sciences* 190 - 205
- Subotnik D 'What's wrong with critical race theory: reopening the case for middle class values' (1998) 7(3) *Cornell Journal of Law and Public Policy* 681 - 756
- Thebe M 'The culture of racism and its effects on black legal practitioners' (2016) July *DeRebus* 17
- Thomas A 'Employment equity practices at selected companies in South Africa' (2003) 27(3) *South African Journal of Labour Relations: Spring/Summer* 6 - 40
- Thomas DA & Ely RJ 'Making differences matter: a new paradigm for managing diversity' (1999) *Harvard Business Review* 79 – 90
- Van der Bank CM, Mphahlanani J & Moloi KC 'Affirmative action application or Black and White in South African Higher Education Institutions: Is it the way forward or not?' (2015) 9(4) *Journal of Education and Learning* 288 – 295
- Van der Walt AJ 'Legal history, legal culture and transformation in a constitutional democracy' (2006) 12(1) *Fundamina* 1 - 47
- Van der Westhuizen J 'A few reflections on the role of courts, government, profession, universities, the media and civil society in a constitutional democracy' (2008) 8(2) *African Human Rights Law Journal* 251 - 272
- Vermeulen LP & Coetzee M 'Perceptions of the dimensions of the fairness of affirmative action: a pilot study' (2006) 37(2) *S. Afr.J.Bus.Mange* 53 - 65
- Warikandwa TV & Osode PC 'Regulating against business “fronting” to advance black economic empowerment in Zimbabwe: Lessons from South Africa' (2017) *PER* 1 – 27
- Whitear-Nel N & Freedman W 'A historical review of the development of the post-apartheid South African LLB degree- with particular reference to legal ethics' (2015) 21(2)

Fundamina 234 – 250

- Whyte MK 'From discourse to struggle: a new direction in critical race theory' (2005) 11(1) *Michigan Journal of Race and Law* 1- 7
- Wildenboer L 'The origins of the division of the legal profession in South Africa: A brief overview (2010) 16(2) *Fundamina* 199 – 225
- Wing AK 'Is there a future for critical race theory?' (2016) 66(1) *Journal of Legal Education* 44 - 54
- Wright EO 'Understanding class towards an integrated analytical approach (2009) 60 *New Left Review* 101 - 116
- Zulu PS & Parumasur SB 'Employee perceptions of the management of cultural diversity and workplace transformation' (2009) 35(91) *SAJIP* 49-57

NEWSPAPERS

- Dlamini M 'Black Bar Association a positive step to fight racism in the legal fraternity' *News24* 7 November 2018 1
- Ensor L 'Transformation must mean truly empowering black auditors IRBA says' *BusinessDay* 14 March 2017
- Henderson R 'Labour Department mulls harsher punishment for non-compliance with employment equity laws' *Times Live* 9 May 2017
- Nkomo SM 'Why white men still dominate the top echelons of South Africa's private sector' *The Conversation* 4 August 2015 1

REPORTS

- Archer S *The Financial Services Sector and its skills development issues relevant to the South African economy* (2008) Department of Labour

- Bank SETA *Banking Sector Skills Plan* (2017/2018)
- Bezuidenout A & Bischoff C *Tracking the Progress on the Implementation and Impact of the Employment Equity Act since its inception* (2008)
- B-BBEE Commission *National status and trends on Broad-Based Black Economic Empowerment* (2019)
- Centre for Applied Legal Studies *Transformation of the Legal Profession* (2014)
- Department of Labour *Commission for Employment Equity Report* (1999 - 2000)
- Department of Labour *Commission for Employment Equity Report* (2003 - 2004)
- Department of Labour *Commission for Employment Equity Report* (2005 - 2006)
- Department of Labour *Commission for Employment Equity Report* (2007 - 2008)
- Department of Labour *Commission for Employment Equity Report* (2009 - 2010)
- Department of Labour *Commission for Employment Equity Report* (2011 - 2012)
- Department of Labour *Commission for Employment Equity Report* (2012 - 2013)
- Department of Labour *Commission for Employment Equity Report* (2013 - 2014)
- Department of Labour *Commission for Employment Equity Report* (2014 - 2015)
- Department of Labour *Commission for Employment Equity Report* (2015 - 2016)
- Department of Labour *Commission for Employment Equity Report* (2016 - 2017)
- Department of Labour *Commission for Employment Equity Report* (2017 - 2018)
- Department of Labour *Commission for Employment Equity Report* (2018 - 2019)
- Financial Sector Charter Council *Transformation of the South African Financial Sector* (2016)

- Financial Sector Conduct Authority *Regulation Strategy of the Financial Sector Conduct Authority: October 2018 to September 2021* (2018)
- Hoeppli T *The Regulation of the Accountancy Profession in South Africa* (2013) Forum of Accounting Bodies
- Insurance Sector Education and Training Authority *Status of skills in the Insurance Industry Part 2: Focus on the short-term insurance sector* (2017)
- South African Department of Justice *Justice Vision 2000* (1995)
- South African Legal Fellows Network *Demographic survey of large corporate law firms, South Africa* (2013)
- The Independent Regulatory Board for Auditors (IRBA) *The audit development programme booklet* (2015)
- The Law Society of South Africa 'LSSA website - About us - Statistics for the attorneys' profession' (2015/2016)
- The World Bank Group *Gender at work* (2014)
- Trendle B 'Skills and labour shortages – definition, cause and implications' (2008) Labour Market Research Unit Queensland: Queensland Government Press
- Western Cape Government Economic Development and Tourism *Financial Services Sector Assessment Report 2014 Growth, Regulation Compliance, Skills and Recruitment in South Africa* (2014)

INTERNET REFERENCES

- ABSA's website available at <https://www.absa.co.za/content/dam/south-africa/absa/pdf/compliance/B-BBEE-Certificate.pdf> (accessed on 28 October 2019)
- Allan Gray's website available at <https://www.allangray.co.za/globalassets/about-us/b-bbee-certificate---allan-gray-proprietary-limited.pdf> (accessed on 28 October 2019).

- Accountancy South Africa 'Special Feature -transformation report' (2015) available at <https://www.accountancysa.org.za/special-feature-the-new-auditors-report-2/> (accessed on 9 September 2018)
- Accountancy South Africa 'Special Report - Employees' (2014) available at <https://www.accountancysa.org.za/special-report-employees/> (accessed on 4 September 2018)
- Coronation Fund Managers Ltd's website available at <https://www.coronation.com/globalassets/repository/transformation/coronation-fund-managers-bee-certificate-2019.pdf> (accessed on 28 October 2019)
- Daya R 'Legal Profession transformation: Law Society of South Africa briefing' (2010) <https://pmg.org.za/committee-meeting/11800/> (accessed on 30 August 2018)
- Department: Trade and Industry 'Economic Empowerment' available at https://www.thedti.gov.za/economic_empowerment/advisory_council.isp (accessed on 11 September 2019)
- FNB's website available at <https://www.rmb.co.za/files/pdf/other/bee-certificate.pdf> (accessed on 28 October 2019)
- Finance Standing Committee 'Financial Sector Charter on the status of transformation of the financial sector' (2010) available at <https://pmg.org.za/committee-meeting/11822/> (accessed on 29 August 2018)
- Harrison R 'Moeletsi Mbeki: Black empowerment has failed' *Mail & Guardian* 19 June 2009 available at http://mg.co.za/article/2009-06-19-moeletsi-mbeki-black_empowerment-has-failed (accessed 31 October 2019)
- Investec's website available at https://www.investec.com/content/dam/investor-relations/dti-rating/2019/elc8779_investec_bee-certificate_final-June2019.pdf (accessed on 28 October 2019)
- IRBA 'IRBA says additional measures required to promote transformation of audit profession' (2017) available at www.irba.co.za (accessed on 13 September 2018)
- IRP5 tax consultants' website available at <http://irp5.co.za/saipa-vs-saica-vs-cima-whats->

[the-difference/](#) (accessed on 26 December 2018).

- Jeffery A 'BEE is flawed and should be scrapped' available at <http://mq.co.za/article/2013-01-18-bee-is-flawed-and-should-be-scrapped> (accessed 9 May 2017)
- Legal Education and Development 'Black Economic Empowerment (BEE) Amended Codes of Good Practice Applying the revised codes makes good business sense' (2016) available at http://www.lssalead.org.za/upload/BEE_Simplified_for_Your_PracticeLEAD2016.docx (accessed on 7 October 2018)
- Magubane K 'We will not abandon B-BBEE – Ramaphosa' available at <https://www.fin24.com/Economy/we-will-not-abandon-b-bbee-ramaphosa-20190718> (accessed 16 August 2019)
- Maughan K 'SA Advocates form Bar Association with the aim of tackling white male supremacy' *Sunday Times* 31 October 2018 available at <https://www.timeslive.co.za/news/south-africa/2018-10-31-sa-advocates-form-bar-association-with-aim-of-tackling-white-male-supremacy/> (accessed on 21 August 2019)
- McIntosh G 'B-BBEE Amendment bill: thoughts from inside the parliamentary group' *Politicsweb* 7 May 2013 available at <https://www.politicsweb.co.za/news-and-analysis/bbbee-amendment-bill-thoughts-from-inside-the-parl> (accessed 9 November 2018)
- Momentum's website available at <https://www.momentummetropolitan.co.za/wps/wcm/connect/mmiholdings-za/9f30696c-3174-4b62-9382-3b8e2142b6f9/B-BBEE-Certificate-Annexures-A-B-MMI-Holdings-Limited-v2.1.pdf?MOD=AJPERES> (accessed on 28 October 2019)
- Morapela K 'Lack of transformation in SA workplaces cause for concern' *Bloemfontein Courant* 27 August 2019 available at <https://www.bloemfonteincourant.co.za/lack-of-transformation-in-sa-workplaces-cause-for-concern/> (accessed on 5 October 2019)
- Nedbank's website available at <https://www.nedbank.co.za/content/dam/nedbank/site-assets/AboutUs/About%20Nedbank%20Group/Corporate%20Governance/Governance%20and%20Ethics/Nedbank%20Limited%20and%20subsidiaries%20BBBEE%20Certificate%202019.pdf> (accessed on 28 October 2019)
- Ntuli Z 'Why South Africa needs a B-BBEE Commission' available at <https://city->

press.news24.com/Voices/why-south-africa-needs-a-b-bbee-commission-20180821

(accessed on 11 September 2019)

- Old Mutual's website available at <https://www.oldmutual.co.za/docs/default-source/about-us-document-library/transformation/bee-certificates/bbbee-certificate---omlacs.pdf?sfvrsn=0> (accessed on 28 October 2019)
- Paton C 'Black economic empowerment: Should it be kept alive' available at <http://www.leader.co.za/article.aspx?s=1&f=1&a=2781> (accessed on 31 October 2019)
- SAICA 'Impact report' (2016) available at https://www.saica.co.za/portals/0/documents/2016_SAICA_Thuthuka_Integrated_Report.pdf (accessed on 24 December 2018)
- SAICA's website available at <https://www.saica.co.za/Training/BecomingaCA/tabid/157/language/en-ZA/Default.aspx> (accessed on 27 October 2019).
- Sanlam's website available at https://www.sanlam.com/about/responsiblebusiness/Documents/B-BBEE_Certificate.pdf (accessed on 28 October 2019)
- South African Government 'Transformation of the Legal Profession: Discussion Paper' available at <http://www.gov.za/documents/transformation-legal-profession-discussion-paper> (accessed on 22 August 2018)
- Smith C 'BEE fronting becoming more sophisticated, holding back transformation – commission' available at <https://www.fin24.com/Economy/bee-fronting-becoming-more-sophisticated-holding-back-transformation-commission-20190627-2> (accessed on 11 September 2019)
- Standard Bank's website available at https://www.standardbank.co.za/static_file/South%20Africa/PDF/Legal%20and%20Regulatory/Standard_Bank_Group_Limited_BBBEE_Certificate.pdf (accessed on 28 October 2019)
- Stanlib's website available at http://ww2.stanlib.com/AboutSTANLIB/Documents/BEE_Certificate/StanlibBEECertificate.p

df (accessed on 28 October 2019)

- The Banking Association of South Africa 'Financial service sector code' available at <http://www.banking.org.za/what-we-do/inclusive-economy/financial-services-charter> (accessed on 3 September 2018)
 - The Insurance Institute of South Africa website available at <https://www.iisa.co.za/about-us/history-of-the-iisa> (accessed on 6 September 2018)
 - The Law Society of South Africa 'Attorneys' Profession in South Africa Report' 22 available at <https://www.lssa.org.za/upload/LSSA-LexisNexis---Infographic-Report-2016-Survey-of-the-Attorneys-Profession.pdf> (accessed on 26 January 2019)
 - The Law Society of South Africa 'Career Guide to the Legal Profession' (2016) available at www.justice.gov.za (accessed on 29 June 2018)
 - The Law Society of South Africa 'Key Principles underpinning the transformation of the legal profession' (2017) 2 available at http://www.lssa.org.za/upload/documents/Key_Principles_of_the_LPB.pdf (accessed on 29 August 2018)
-