South African Institute of Race Relations NPC
Petition to the President
of the Republic of South Africa
regarding the
Employment Equity Amendment Bill of 2020 [B14B-2020]

1 Introduction

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

Under Section 79 of the Constitution, the President may not give his assent to a bill which has been passed by the National Assembly and the National Council of Provinces (NCOP) if he 'has reservations about its constitutionality'. Instead, he 'must' refer such a bill 'back to the National Assembly for reconsideration'.[1]

The Employment Equity Amendment Bill of 2020 [B14B-2020] (the Bill), as adopted by Parliament, contains several provisions which are inconsistent with the Constitution. In addition, Parliament failed adequately to 'facilitate public involvement in the legislative process' on the Bill, as required by Sections 59 and 72 of the Constitution.[2] The Bill is therefore unconstitutional on both substantive and procedural grounds.

The founding provisions of the Constitution clearly state that the Constitution is 'the supreme law of the Republic' and must always be respected and upheld by all branches of the government. In addition, any law (or conduct) inconsistent with the Constitution 'is invalid' by virtue of this inconsistency.[3]

The obligation to uphold the Constitution is binding on both Parliament and the President. As the Constitutional Court stressed in the *Certification* case in 1996: 'Under our constitutional democracy, the Constitution is the supreme law. It is binding on all branches of government and no less on Parliament… Parliament "must act in accordance with, and within the limits of, the Constitution"'.[4] In addition, the President has an over-arching obligation to 'uphold, defend and respect the Constitution as the supreme law of the Republic'.[5]

---

1 Section 79(1), Constitution of the Republic of South Africa, 1996

2 Sections 59(1), 72(1), 1996 Constitution

3 Sections 1, 2, 1996 Constitution

4 *Certification of the Constitution of the Republic of South Africa*, 1996, 1996 (10) BCLR 1253 (CC), at para 109

5 Section 83(b), 1996 Constitution

Parliament should therefore not have adopted the Bill in its present form, while the President cannot lawfully give his assent to it. The IRR thus respectfully petitions the President to refer the Bill back to the National Assembly for reconsideration, as Section 79(1) of the Constitution requires.

2 Core provisions of the Bill

This petition focuses on the most problematic provisions in the Bill, which are as follows:

2.1 Determination of sectoral numerical targets

Under the revised 'B' version of the Bill, as adopted by Parliament, Clause 4 of the Bill adds a new Section 15A to the Employment Equity Act of 1998 (the EE Act). Section 15A(1) empowers the minister to 'identify national economic sectors for the purposes' of the amended EE Act.[6]

According to Section 15A(2): 'The minister may, after consulting the relevant sectors and with the advice of the Commission [for Employment Equity], for the purpose of ensuring the equitable representation of suitably qualified people from designated groups at all occupational levels in the workforce, by notice in the Gazette set numerical targets for any national economic sector' identified by him.[7]

Under Section 15A(3), 'a notice issued in terms of subsection (2) may set different numerical targets for different occupational levels, sub-sectors or regions within a sector or on the basis of any other relevant factor'.[8]

2.2 Reinforcing the compliance obligation

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

2.2.1 Content of employment equity plans

Under Section 20 of the 1998 Act, employers have previously had some flexibility in setting their own racial targets in their employment equity plans, provided they make 'reasonable progress' towards the statute's goal of demographic representivity at every level of the workforce.[9] But the Bill removes this flexibility by stating that 'the numerical goals set by an employer…must comply with any sectoral target in terms of Section 15A that applies to that employer'.[10]

---

6 Clause 4, Bill; Section 15A(1), amended EE Act

7 Clause 4, Bill; Section 15A(2), amended EE Act

8 Clause 4, Bill; Section 15A(3), amended EE Act

9 Sections 20, 15, and 19, EE Act

10 Clause 6, Bill; Section 20, amended EE Act

2.2.2 Increased powers for labour inspectors

All labour inspectors are empowered to obtain written undertakings from designated employers to 'prepare employment equity plans' that include the minister's sectoral targets.[11]

2.2.3 Assessment of compliance

According to the Bill, the director general of labour – in 'determining whether a designated employer is implementing employment equity' – must also assess 'whether the employer has complied with a sectoral target as set out in terms of Section 15A applicable to that employer'.[12]

2.3 Eligibility for state contracts

Section 53 of the EE Act – which has remained dormant to date but will be made operative once the Bill is enacted – provides that state contracts may be issued solely to employers that are in compliance with Chapters II and III of the 1998 statute.[13]

In changing the existing wording of Section 53, the Bill makes it clear that the minister will be able to issue a compliance certificate only if he is 'satisfied that the employer has complied with a numerical target set in terms of Section 15A', or has 'raised a reasonable ground to justify its failure to comply'.[14]

According to the Bill, compliance certificates must also be withheld from employers that have failed to submit required employment equity reports or have been found guilty, within the past 12 months, of either 'breaching the [EE Act's] prohibition on unfair discrimination' or 'failing to pay the minimum wage' stipulated under the National Minimum Wage Act of 2018.[15]

3 Unconstitutionality of the Bill

The Bill, like the 1998 Act it is intended to amend and extend, is inconsistent with various provisions of the Constitution:

3.1 Conflict with Section 1 of the Constitution

Section 1 of the 1996 Constitution expressly identifies 'non-racialism' as a core value on which the democratic state 'is founded'. It also guarantees 'the supremacy of the Constitution and the rule of law' and states that any legislation 'inconsistent' with its terms is 'invalid'.[16]

11 Clause 9 Bill, amended section 36, 1998 Act

12 Clause 11, Bill; Section 42(1)(aA), amended EE Act

13 Section 53(1), 1998 Act

14 Clause 12, Bill; Section 53(6)(a) and (b), amended EE Act

15 Clause 12, Bill; Section 53(6)(c) to (e), amended EE Act

16 Sections 1, 2, 1996 Constitution

The duty to uphold non-racialism is an immediate obligation, not one to be deferred until such time as the unrealistic and unattainable goal of demographic representivity – or 'equitable representation', as the EE Act puts it – has been achieved. Moreover, if the country's commitment to non-racialism is to be reduced by legislation of the kind contained in the Bill, such a statute implicitly amends Section 1 of the Constitution and must thus be adopted by a 75% majority in the House of Assembly, as set out in Section 74(1)(a) of the Constitution.[17]

In addition, in demanding that designated employers to comply with the minister's racial targets for different sectors, the Bill further requires those employers to identify their employees by race and then apply 'preferential treatment' to those identified as 'black', ie as 'African, Coloured, or Indian'.[18] Yet the apartheid era was marked by widespread public outrage at the Population Registration Act of 1950 (the 1950 Act), which required all South Africans to be classified into the similar broad categories of 'African', 'Coloured', 'Indian' and 'White'. This classification system was rightly viewed across the country and much of the world as an odious affront to human dignity and the intrinsic worth of every individual. One of the most important reforms implemented by the National Party (NP) government was therefore the repeal of the 1950 Act in June 1991.[19]

The Constitution's emphasis on non-racialism as a founding value was intended to ensure that South Africans would never again be subjected to race classification or unfairly discriminated against on the basis of their skin colour or other immutable physical characteristics. Moreover, the country's commitment to non-racialism remains so strong that the African National Congress (ANC) government has always shied away from re-enacting a statute which formally re-introduces the apartheid-era race categories; sets out relevant criteria to be used in the classification process; and creates an appeals procedure for reviewing and overturning disputed classification decisions.

Instead, the government has used ministerial regulations promulgated under the EE Act to smuggle an informal race classification system back into the law. This system uses the fictional device of 'voluntary self-classification' into the categories of 'White', 'Indian', 'Coloured', or 'African'.[20] However, all employees are expected to comply with this demand, giving the lie to its supposedly 'voluntary' nature.

---

17 Sections 1(c), 74(1)(a), 1996 Constitution

18 Clause 4, Bill; Section 15A, amended EE Act, read together with Sections 19, 15, 1, EE Act

19 Anthea Jeffery, *BEE: Hurting or Helping?* Tafelberg, Cape Town and Johannesburg, 2014, p2]

20 Section 1, EE Act; Anthea Jeffery and Martin Schönteich, 'The Employment Equity Bill', *Issue Alert*, South African Institute of Race Relations, No. 1/98, January 1998; 1999/2000 *Survey*, p250; Anthea Jeffery, 'Employment Equity begins to bite', *Fast Facts*, July 2000, pp. 4-8; 2008/09 *Survey*, p208; Anthea Jeffery, 'A wider net with mainly smaller holes', *Fast Facts*, August 1998, pp5-6, at p. 6; MMS Mdladlana, Amendments to the Employment Equity Regulations, Government Notice R841, *Government Gazette* No. 29130, 18 August 2006, amending earlier regulations promulgated on 23 November 1999

No formal appeals process with clear procedural rules and a decision-making tribunal has been created, as under the 1950 Act. Instead, if employees refuse to classify themselves or provide 'inaccurate information', designated employers must take over the task of racial classification, using for this purpose 'reliable historical and existing data', whatever that might mean.[21]

Employers that refuse to assume this racial classification task, or which carry it out incorrectly, in the government's view, face fines of up to R1.5m or 2% of annual turnover, whichever is the greater, for a first 'offence' of this kind. Penalties for repeat offences of this type may rise as high as R2.7m or 10% of annual turnover, again whichever is the greater.[22]

Fines of this magnitude are extraordinarily severe and could bankrupt many businesses. In addition, that designated employers are expected to apply vague criteria and an opaque process in overturning the supposedly 'voluntary' self-classifications of their employees is contrary to the rule of law – the supremacy of which is guaranteed by the Constitution's founding values.[23]

Three decades after the NP repealed the 1950 Act, the ANC government has used the EE Act to breathe new life into a race classification system that would otherwise have ended more than 30 years ago. In demanding that designated employers in different sectors comply with the minister's racial targets, the Bill perpetuates and enforces that race classification system still more strongly. Yet this race classification system is clearly inconsistent with the commitment to 'non-racialism' in the founding values of the Constitution. This puts the Bill in conflict with those founding values and renders it unconstitutional.

3.2 Conflict with Section 9 of the Constitution

Section 9 (the equality clause) states that 'everyone is equal before the law and has the right to equal protection and benefit of the law'. It also prohibits unfair discrimination, whether by the state or private persons on racial (and other listed) grounds. It further states that any discrimination on a listed ground 'is unfair' unless the contrary is proved.[24]

In demanding that designated employers fulfil the minister's racial targets, the Bill requires that these employers apply 'preferential treatment' to those employees who are classified as 'African', 'Coloured' or 'Indian'. The Bill also sanctions the raising of 'barriers' – provided these are not 'absolute' – against the appointment or advancement of those employees who fall outside the designated groups (white males, in particular).[25]

---

21 Ibid

22 Schedule 1, EE Act

23 Section 1(c), Constitution

24 Section 9(1), (3), (4), (5), 1996 Constitution

25 Clause 4, Bill; Section 15A, amended EE Act; Section 15, EE Act

In the *Barnard* case (where, in essence, a white police captain with decades of experience was repeatedly refused promotion to a more senior post), the Supreme Court of Appeal (SCA) ruled that Ms Barnard had been discriminated against because 'she was a white female'. [SCA, para 52] This in turn meant that the onus lay on the police to show that this was fair.

The SCA then examined whether the SAPS had succeeded in establishing that its discrimination against Barnard was 'fair'. Here, it applied the *Harksen* test, which states that 'the test of unfairness focuses primarily on the impact on the complainant and others in his or her situation'.[26] (In *Harksen* v *Lane NO and others*, the Constitutional Court laid down various principles for determining when differentiation amounts to unfair discrimination under Section 9(3) of the Constitution.)[27]

In this instance, the negative impact on Ms Barnard was clear, while the SAPS had provided 'scant justification for her non-appointment'. It had stressed that her appointment would not aid representivity, but had 'never contended…that numerical targets and representivity are absolute requirements for appointment…[as] that attitude would turn numerical targets into quotas, which are prohibited by the EE Act'.

In addition, although the Constitution required 'broad representivity' in the public service (as further discussed below), it also stressed the need to maintain efficiency and to base appointments on 'ability, objectivity, and fairness', said Judge Mohamed Navsa, acting deputy president of the SCA. [*Solidarity obo Barnard* v *SAPS* [2013] ZASCA 177, paras 70-72] Moreover, though the SAPS had argued that the post Ms Barnard had been denied was not 'critical' and could justifiably be left unfilled, this explanation was 'contrived' and untrue. Overall, thus, Judge Navsa concluded, the SAPS had failed to establish that 'the discrimination complained of was fair'. [28]

The SCA ruling was based on the clear wording of Section 9, read together with Section 195, as further described below. It was nevertheless overturned by the Constitutional Court on unconvincing grounds.

According to the majority judgment handed down by Acting Chief Justice Dikgang Moseneke, the SCA 'misconceived the issue before it as well as the controlling law'. This, said the Constitutional Court, was 'because the [police] employment equity plan was never impugned as unlawful and invalid'. This in turn meant that 'it was not open to the [SCA] to employ the *Harksen* test of unfair discrimination, which presumed the application of the

26 *Solidarity obo Barnard* v *SAPS* [2013] ZASCA 177, para 55; [check, omit from here, rather insert as new footnote at the end of this para, where marked, this footnote should be as followscheck turn the rest into another footnote, in the second place marked *SAPS* v *Solidarity obo Barnard* [2014] ZACC 23, para 50]

27 *Harksen* v *Lane NO and others* [1997] ZACC 12; Pierre de Vos and Warren Freedman (eds), *South African Constitutional Law in Context*, Oxford University Press, 2nd ed, 2021, p545

28 Jeffery, *BEE: Helping or Hurting?* p96; *Business Day* 29 November 2013; *Solidarity obo Barnard* v *South African Police Service* [2013] ZASCA 177, paras 73, 79

employment equity plan to be suspect and unfair'. Hence, 'the appeal in the [SCA] was decided on the wrong principle.'[29]

However, Ms Barnard had challenged something far more fundamental than the validity of the police employment equity plan. She had alleged that she had been unfairly discriminated against on the basis of her race, contrary to Section 9 of the Constitution. This meant the *Harksen* test of whether Section 9 had been infringed was precisely what was required.

The Constitutional Court also erred in disregarding the clear wording of:

- Section 9(3), which provides that 'the state may not unfairly discriminate against anyone…on race' or other listed or analogous grounds; and
- Section 9(5), which provides that 'discrimination' on race or other listed grounds 'is unfair unless it is established that the discrimination is fair'.

Based on this flawed analysis, the Constitutional Court ruled that the SCA should have approached the *Barnard* case solely 'through the prism of Section 9(2) of the Constitution'. Section 9(2) says that 'to promote the achievement of equality, legislative and other measures designed to promote or protect persons…disadvantaged by unfair discrimination may be taken'.[30]

Yet the SCA took full account of this provision, saying: 'The starting point for enquiries of [this] kind is to determine whether the conduct complained of constitutes discrimination and, if so, to proceed to determine whether it is unfair. When a measure is challenged as violating the Constitution's equality clause, its defender could meet the claim by showing that it was adopted to promote the achievement of equality as contemplated by section 9(2), and was designed to protect and advance persons disadvantaged by prior unfair discrimination.' [31]

Hence, if the SAPS had appointed one of the African male candidates whom the interviewing committee had found less suitable than Ms Barnard – and had justified this on the facts as an affirmative action appointment of a sufficiently qualified candidate – then the SAPS 'might have established that the discrimination was fair' and the current dispute might never have arisen. [check add footnote: *Solidarity obo Barnard* v *SAPS* [2013] ZASCA 177, paras 50-53]

There is thus no 'misconception' of the issues or 'the controlling law' in the SCA judgment. Rather it is the Constitutional Court's rejection of the SCA ruling that fails to take account of *all* the relevant sub-sections in Section 9 of the Constitution – and which pretends that Section 9(2) was overlooked by the SCA, when clearly it was not.

---

29 *Solidarity obo Barnard* v *South African Police Service* [2014] ZACC 23, paras 51, 53

30 *SAPS* v *Solidarity obo Barnard* [2014] ZACC 23, para 51; Section 9(2), 1996 Constitution

31 *Solidarity obo Barnard* v *SAPS* [2013] ZASCA 177, para 50; *SAPS* v *Solidarity obo Barnard* [2014] ZACC 23, para 49

However, the Constitutional Court was on slightly stronger ground in saying that the SCA had failed to give sufficient consideration to the *Van Heerden* tests for the validity of affirmative action measures under Section 9(2). Perversely, however – and despite its criticism of this defect in the SCA ruling – the Constitutional Court then itself failed to apply the *Van Heerden* tests.

3.2.1 The Van Heerden *tests under Section 9(2)*

The *Van Heerden* case, which dealt with the validity of differing pension rules for pre- and post-1994 MPs under the equality clause, was decided by the Constitutional Court in 2004. The judgment in the case is fundamentally flawed in that it repudiated and treated as *pro non scripto* (as if never written) the plain wording of Section 9(5). This sub-section says that discrimination on race and other listed grounds 'is unfair unless it is established that the discrimination is fair'.[32]

Instead of heeding this provision, the Court in *Van Heerden* ruled that affirmative action measures cannot be presumed to be unfair because they are 'authorised remedial measures'. Hence, it said, the only tests to be applied in considering their validity are (1) whether they target the disadvantaged, (2) whether they are designed to advance them, and (3) whether they promote the achievement of equality.[33]

As the Constitutional Court stressed in the *Barnard* case, 'once the measure in question passes [this threefold] test, it is neither unfair nor presumed to be unfair'. Yet the Constitutional Court in the *Barnard* case made no attempt to apply the three *Van Heerden* tests to the facts of the case. Instead, it simply assumed (as stated in the concurring judgment of Judge Johan van der Westhuizen), that the EE Act 'passes constitutional muster' because its 'implementation promotes equality in our society'.[34] Whether the EE Act has that effect is doubtful, however, as further described in due course.

Despite having laid down the three *Van Heerden* tests more than 17 years ago, the Constitutional Court has never tried to apply them to the practical outcomes of race-based affirmative action laws. Were it to do so, the Bill – like the EE Act it is intended to strengthen and expand – would fail on all three grounds.

3.2.1.1 The first *Van Heerden* test: targeting 'the disadvantaged'

As regards the first *Van Heerden* test*,* most beneficiaries of the Bill will again (as under the EE Act) come from the most advantaged group within the black population: the roughly 15% with the best skills and often the best political connections. Like similar affirmative action

32 Section 9(5), 1996 Constitution

33 *Minister of Finance and Other* v *Van Heerden* [2004] SACC 3, para 37; De Vos and Freedman, *South African Constitutional Law in Context*, p536;Dave Steward, 'Tightening the screws: the true significance of the Employment Equity Amendment Bill', *Politicsweb.co.za*, 14 December 2018

34 *SAPS* v *Solidarity obo Barnard* [2014] ZACC 23, paras 37, 36, 195

interventions all around the world, the Bill will help only a relatively small elite within the previously disadvantaged group: what India calls 'the creamy layer'.[35]

In the *Van Heerden* case, the Constitutional Court acknowledged that there might be 'exceptional' or 'windfall' beneficiaries within the 'favoured' class. This did not matter, the court went on, provided 'an overwhelming majority of members of the favoured class are designated as disadvantaged by unfair exclusion'.[36]

In practice, however, the 'favoured' class under the Bill (as under the EE Act) will not extend to the 'overwhelming majority' of black South Africans. Instead, it will again be limited to a small percentage of better skilled and more politically connected people, who will draw considerable benefit from the stricter enforcement of racial targets in the private sector in particular. By contrast, the 'overwhelming majority' of black people – and particularly the 11.2 million black individuals who are currently unemployed and often lack even a matric – will have no realistic prospect of being appointed to professional or management posts, which generally tertiary training/or significant years of on-the-job experience.

Worse still, the 'overwhelming majority' of black people have already been actively harmed by the rapid implementation of affirmative action in the public service, where racial targets have long been strictly applied. This is evident from the actual outcomes of the second *Van Heerden* test.

3.2.1.2 The second *Van Heerden* test: 'advancing' the disadvantaged

Under the second *Van Heerden* test, an affirmative action measure is valid if it is 'designed to advance' the disadvantaged. The Bill – like EE Act it aims to ratchet up – fails this test too, as it has little capacity to 'advance' the black majority and will hurt it instead. This is crystal clear from the enormous harm that a rigid insistence on racial targets in the public service has already done to poor black people by undermining state efficiency and delivery in almost every sphere.

Under the EE Act, the target for black representation at all management levels in the public service has long been set at close on 80%. This target has been chosen on the basis that black people make up 80% of the economically active population (EAP) and ought therefore to have this level of representation in all professional and management posts in the public service, including the most senior.

However, the EAP is defined as including all those people between the ages of 15 and 64 who either work or would like to do so. It therefore includes the 11.2 million black people who are now unemployed and many of whom have never worked at all. In addition, the black population is a youthful one: so much so that almost half of all black South Africans are

35 *Business Day* 7 May 2010, 21, 30 September 2010

36 *Minister of Finance* v *Van Heerden*, paras 39, 40; see also De Vos and Freedman, *South African Constitutional Law*, p537

under the age of 25.[37] Yet people aged 25 or less are unlikely to have the significant experience needed for management posts and cannot be considered eligible for positions of this kind.

The poor quality of schooling available to most black people must also be taken into account. Recent assessments have shown that roughly 78% of South Africa's Grade 4 pupils cannot read for meaning in any language, while 61% of Grade 5 pupils are unable to add and subtract whole numbers. This helps explain why some 60% of pupils either drop out of school each year or fail their final examinations. Of the relatively few who manage to pass matric, only a third do so with grades good enough to go to university, while a mere 20% pass mathematics with 50% or more.[38]

Completion rates at universities are dismal too, averaging a mere 17% for undergraduate degrees in 2019. Completion rates in STEM subjects are particularly low: 13% for computer and information sciences in 2019 as well as for mathematics and statistics, 17.1% for physical sciences, and 21.9% for engineering.[39] The proportion of black people with degrees thus remains small: in 2019 only 5.1% of Africans over the age of 20 (fewer than 1.5m people) had a degree. At the same time, more than half these individuals were recent graduates without the years of experience required for management jobs.[40]

Relevant factors of this kind – and particularly the employment, age, and skills profile of the black population – should have been taken into account in determining racial targets for the public service if these were to be set at realistic levels. Yet this has not been done. Instead, the target for black representation in management positions in the public service has been set at 80% for the simple reason that this mirrors the black share of the EAP. Astonishingly, moreover, this unrealistic target has already been met – even at the top management level – where black representation stood at 79.3% in March 2021, according to the most recent report of the Commission for Employment Equity.[41]

The 2021 figures for black representation in the public service underscore the extraordinarily rapid pace at which racial targets under the existing EE Act have been enforced. This has been achieved in three main ways: first, by implementing rigid racial quotas rather than the more flexible 'numerical goals' mandated by the EE Act; secondly, by leaving important posts vacant where suitable black candidates cannot be found; and, thirdly, by appointing black people without the necessary skills and experience.[42]

---

37 IRR, *2021 South Africa Survey* , p9

38 IRR, *2021 South Africa Survey*, p436

39 IRR, *2021 South Africa Survey*, p 465

40 IRR, *2021 South Africa Survey*, pp273, 438

41 21st Commission for Employment Equity Report 2020-2021, p25

42 Jeffery, *BEE: Helping or Hurting?* p88

The appointment of unqualified people has been encouraged in practice by a provision in the EE Act that allows black people to be selected not for their proven capacity, but rather for their 'capacity to acquire...the ability to do the job'.[43] According to Professor Peter Franks of the School of Public Leadership at the University of Stellenbosch, 'this [rule] has become the favoured loophole behind which kin, friends, and comrades have been favoured over more competent applicants'. EE – along with the ANC policy of cadre deployment it has helped facilitate – have thus generated 'a perfect storm...of poor management, deficient and partial decision-making, excessive staff turnover, and high levels of...corruption'.[44]

The predictable upshot has been a crippling loss of experience and institutional memory in the public service. Examples of the resulting malaise are legion: some 80% of public schools are dysfunctional; at least 85% of public clinics and hospitals cannot comply with basic norms and standards, even on such essentials as hygiene and the availability of medicines; roughly 87% of RDP houses are badly built 'high-risk' structures needing extensive repairs if not complete reconstruction; essential infrastructure cannot be expanded because the state (in the words of former finance minister Trevor Manuel) lacks 'the capacity to get projects off the ground'; and vital financial controls are persistently disregarded because inadequately skilled people have been appointed to crucial positions.[45]

The negative effect on state-owned enterprises (SOEs) has also been acute. At Eskom, for example – which repeatedly resorts to rolling blackouts to stop the grid collapsing – human error accounts for some 40% of breakdowns. Pravin Gordhan, minister of public enterprises, has acknowledged that many of the problems at the parastatal stem from the fact that 'good people were lost and incompetent people put in their place'.[46]

At the municipal level, an EE-induced exodus of engineers from many municipalities has crippled their capacity to manage their wastewater plants. Hundreds of these plants have broken down, while some 4 billion litres of raw or partially treated sewage are discharged into the country's rivers and dams every day. Along the Vaal River, sewage has for many years been spilling 'at record levels' into 'townships, suburbs, central business districts, schools, clinics, council buildings, apartment blocks and roads', as a local business chamber noted in 2019.[47]

---

43 Section 20(3)(d), EE Act

44 Ibid, p87

45 *Business Report* 7 June 2012.
https://www.iol.co.za/business-report/economy/manuel-shoots-down-wage-argument-1313331

46 Briefing by the Department of Public Enterprises, Summary by Gareth van Zyl, BizNews, 14 February 2019, p3; Business Day 12 February 2019, Business Day 30 January 2019; John Kane-Berman, 'Will the ANC learn from its demolition job at Eskom', Politicsweb.co.za, 17 February 2019; Natasha Mazzone, 'Gordhan should condemn Eskom's anti-white retrenchment plans', Politicsweb.co.za, 18 February 2019

47 *Weekend Argus* 7 April 2019

So bad is the situation in the Vaal area that the South African Human Rights Commission (HRC) decided to examine for itself 'the flow of raw sewerage on to public streets, paths, and into homes'. In February 2021 the HRC concluded that the cause of this dangerous pollution lay in the failure of the Emfuleni Municipality to maintain and operate its 'dilapidated wastewater treatment plants'. Moreover, though the municipality had been warned ten years earlier that it lacked the skills to sustain its wastewater management systems – and that 'the necessary skills were [in fact] available in South Africa' – it had nevertheless failed to 'appoint skilled workers and/or develop capacity for employees to be able to provide the necessary services'.[48]

A similar collapse in delivery is evident throughout the floundering public service – and it is the overwhelming majority of black South Africans who bear the brunt of this. Most black people cannot afford private sector provision, so they have no choice but to rely on failing state schools, inefficient state hospitals, erratic state electricity, defective state housing, collapsing state sanitation, indifferent state policing, and so on.

The inefficiency of the public service has also become a major barrier to direct investment in the economy. Reduced private sector investment has predictably restricted growth to well below average rates attained in other emerging markets. This in turn has helped increase unemployment and poverty to crisis levels.

The enforcement of the EE Act's racial targets in the public service – which operated more efficiently before these rules were introduced – has thus worsened the disadvantages confronting millions of black South Africans for more than two decades. It has certainly not helped the majority of the population obtain skills, jobs, essential services, or better living conditions.[49]

All South Africans have paid a heavy price for this erosion of state competence, but the damage to the poor black majority has been particularly severe. As RW Johnson, a journalist and former don at Oxford University, has pointed out, EE rules have 'absolutely nothing to offer the vast majority of Africans, from mineworkers to domestics'. For these individuals, the EE legislation has simply resulted in worse service delivery by the public service and SOEs, lower economic growth, and fewer prospects of employment.[50]

The main effect of the Bill will be to extend the failures already evident in the public service into the private sector too. This will exacerbate the harm already being experienced by most black South Africans. Far from helping to 'advance' them, it will do precisely the opposite.

---

48 Anthony Turton, 'Sitting on the Horns of a Dilemma: Water as a Strategic Resource in South Africa, *@Liberty*, Issue 22, November 2015, p17; *Weekend Argus* 7 April 2019; South African Human Rights Commission, Final Report of the Gauteng Provincial Inquiry into the Sewage Problem of the Vaal River, 17 February 2021, *Politicsweb.co.za*, 17 February 2021, pp2-4

49 RW Johnson, 'The end of the apartheid alibi', Politicsweb.co.za 2 December 2021

50 W Johnson, 'The DA: How did we get here? (2)', *www.politicsweb.co.za*, 12 November 2013

3.2.1.3 The third *Van Heerden* test: promoting the achievement of equality

According to the third *Van Heerden* test, an affirmative action measure is valid if it 'promotes the achievement of equality'. The Bill fails this test as well, just as the EE Act it aims to ratchet up has already done.

If the EE Act was capable of helping to achieve equality for the overwhelming majority of black people, this would have become apparent over the more than 20 years of its implementation. Instead, income inequality, as measured on the Gini coefficient, has increased significantly in this period. This is largely because the EE Act (and other black economic empowerment or BEE rules) have widened inequality within the black majority by helping a small and often politically connected group to forge ahead, even as some 11.2 million black South Africans have remained jobless and mired in destitution.

The South African Communist Party (SACP) has pointed out the extent to which inequality is growing among black South Africans. As the party has pointed out, inequality is now highest *within* the black population, which constitutes by far the biggest group within the country. This is the key reason why South Africa is now an even more unequal country that it was in 1994. Then its Gini co-efficient was 59. Now it stands at 63, making South Africa one of the most unequal nations in the world.[51]

Intra-black inequality is significantly greater than the racial inequality that the EE Act has also helped to foster. The white minority has essential and scarce skills which remain in high demand. Since 1994, by contrast, many millions of black people have emerged from the country's failing public schools with low levels of functional literacy and numeracy. These poorly skilled individuals have little opportunity for upward mobility – and especially not in the low-investment, low-growth, and low-employment economy the EE Act has helped to generate.

Official figures on shifts in South Africa's income distribution further confirm that the EE Act has not helped to achieve equality for the overwhelming majority of black people. In 2015, according to Statistics South Africa, the bottom 40% among black South Africans obtained a mere 3.7% of national income. This small share of national income was almost identical to the meagre 3.4% this group had gained in 2006.[52]

By contrast, the top 10% among blacks gained 26% of national income in 2015, up from 19% in 2006, while the remaining 50% of blacks obtained 22% of the total (up from 16% in 2006). If so-called coloureds and Indians are counted too, the top 10% among black South Africans

51 Editorial, *The African Communist*, 1st Q 2017, Issue 116, February 2017; Steward, 'Tightening the screws', 14 December 2018

52 Gabriel Crouse, 'Why race is not a proxy for disadvantage', *The Daily Friend*, 12 November 2020

obtained 32% of national income in 2015. By contrast, the top 10% among whites gained 11% (down from 18% in 2006) – or three times less.[53]

This decline among the white top 10% is generally ignored by the government as it contradicts its preferred narrative of unbroken white economic power and privilege since 1994. The ANC has also declined to acknowledge that the EE Act and other transformation policies have clearly not worked for the bottom 40% of black South Africans – whose share of national income has stagnated even as the EE Act and other BEE rules have been ever more stringently applied.[54]

3.2.1.4 The Bill and the three *Van Heerden* tests in overview

As this analysis shows, the Bill and its intensified race targets –like the EE Act it aims to ratchet up – will never fulfill the three V*an Heerden* tests. The race targets the Bill will enforce against the private sector will help only the most advantaged black South Africans and not the 'overwhelming majority' of black people. The Bill is also not 'designed to advance' this overwhelming majority and will instead bring additional harm it. Some of this harm will result from the further crippling of public service and SOE capacity, as outlined below. The remaining harm will come from choking off potential private sector investment, thereby restricting growth and curtailing employment. A small proportion of black people, mostly ANC cadres, may benefit from the Bill – but the overwhelming majority of black people will fall yet deeper into joblessness and poverty. The Bill will thus worsen intra-black inequality, in particular, and will fail to 'promote the achievement of equality', as the *Van Heerden* tests require.

The inability of the EE Act to comply with the *Van Heerden* tests has been evident for more than 20 years. The Bill's inability to comply with those tests will be even more marked. Forcing business to meet unrealistic racial targets on pain of draconian penalties will choke off investment, limit growth, and reduce employment even more. This negative impact will be doubly damaging in the dire economic conditions that have already been brought about by Covid-19 lockdowns and nearly 28 years of ANC misrule.

Since the Bill cannot meet the *Van Heerden* tests, any presumption of fairness in its favour must fall away. Hence, it cannot be saved from unconstitutionality by Section 9(2), while it is clearly inconsistent with:

- Section 9(1), the right to equality before the law;
- Section 9(3), the prohibition on unfair discrimination by the state on racial (and other) grounds; and
- Section 9(4), the bar on unfair race (and other) discrimination by business and private persons.

3.2.2 The limitations clause in the Bill of Rights

53 Ibid

54 Ibid

The Bill's contraventions of Section 9 cannot be justified under Section 36 of the Bill of Rights, as the core provisions of the Bill do not satisfy the proportionality tests laid down in this limitations clause.

Take, for example, the test whether 'less restrictive means' are available to meet the Bill's ostensible purpose of providing redress to the overwhelming majority of black South Africans. Less restrictive – and far more effective – ways of meeting this objective are readily available (as set out in *Section 5* of this petition. Unlike the Bill, these alternative policies comply with all the provisions of Section 9. They will fulfil the *Van Heerden* tests as they target the overwhelming majority of black South Africans, are properly 'designed to advance them', and will soon succeed in 'achieving equality' both within the black population and as between black and white South Africans.

3.3 Conflict with Section 195 of the Constitution

Section 195 of the Constitution sets out the 'basic values and principles governing public administration' in South Africa. The section calls, among other things, for a public administration that is 'broadly representative of the South African people', but also makes it clear that this objective cannot trump a host of other important needs.[55]

Section 195 thus provides that employment and personnel management practices in state entities must be 'based on ability, objectivity, and fairness', as well as 'the need to redress the imbalances of the past'. In addition, public administration must 'promote the efficient, economic, and effective use of resources', encourage 'accountability' and 'transparency', and ensure that 'people's needs are responded to' by a public service that is 'development-oriented'.[56]

For more than 20 years now, these binding constitutional obligations have been brushed aside and repeatedly breached in the government's rush to meet the EE Act's racial targets in the public service. The upshot, as earlier outlined, has been a crippling loss of experience, institutional memory, and competence. This in turn has led to a comprehensive breakdown in efficient and cost-effective delivery by the state. Contrary to Section 195, the public service is already increasingly unable to meet people's needs for core goods and services, or to maintain a 'development-oriented' focus. In allowing the minister to set binding racial targets for all designated employers – including those in the public service and in SOEs – the Bill will exacerbate the problems the existing EE Act has already caused.

Two other considerations are also important in weighing the constitutionality of the Bill against the provisions of Section 195. First, the 'demographic' representivity the Bill seeks to impose on all designated employers via the minister's racial targets is far more rigid than the 'broad' representivity sanctioned by Section 195.

---

55 Section 195(1)(i), 1996 Constitution

56 Section 195(1),1996 Constitution

Second, the Constitution's call for 'broad representivity' in Section 195 is confined to the 'public administration' and does not extend to the businesses on which the minister's racial targets are also to be imposed under the Bill. That Section 195's (limited) call for 'broad' representivity does not apply to the private sector is clear from generally accepted principles of statutory interpretation. The relevant rule is summed up in the Latin maxim *expressio unius est exclusio alterius*. In loose translation from Latin, this means that the express mention of the one thing implies the exclusion of the other thing – which could also have been mentioned but has not been.

Applying the *expressio unius* principle to Section 195, the specific mention of 'broad representivity' as an objective for the public service – but not the private sector – confirms that the intention of the drafters was to confine the goal of broad representivity to the public administration.

This correctness of this interpretation is further strengthened by the wording of Section 9. In this equality clause, the prohibition of unfair discrimination on racial (and other) grounds is expressly made binding on the private sector as well as all state entities. Where the drafters thought it appropriate, a clause expressly binding the private sector was thus included in the Constitution. However, when it came to achieving 'broad representivity', this obligation was expressly confined to the public administration. This further demonstrates – again in keeping with the *expressio unius* principle – that the latter obligation stands in a different category and does not apply to business.

These considerations are particularly relevant in assessing the unconstitutionality of the Bill. The Bill seeks to empower the minister to impose racial targets on business in specified national economic sectors. But Section 195 of the Constitution shows that the obligation to achieve 'broad' (not demographic) representivity is confined to the public service. The Bill is plainly in breach of Section 195 in seeking to impose this obligation on the private sector.

3.4 Conflict with Section 217 of the Constitution

Under the Bill, businesses that fail to comply with the minister's EE targets – or to justify their failure to do so on reasonable grounds – will be barred from concluding agreements for the supply of goods and services with all organs of state. In addition, companies which already have contracts with state entities could have those agreements cancelled for non-compliance with the Bill.[57]

These provisions in the Bill significantly change the procurement rules applicable to state entities. They are also inconsistent with Section 217 of the Constitution, which deals with the state's procurement obligations.

3.4.1 Framework legislation and the 'subsidiarity' principle

57 Clause 12, Bill; Section 53, amended EE Act

Under Section 217, all organs of state must contract for goods and services 'in accordance with a system which is fair, equitable, transparent, competitive, and cost-effective'.[58] Though this over-arching obligation does not prevent state entities from implementing procurement policies providing for 'categories of preference in the allocation of contracts', these preferences must 'protect or advance' those 'disadvantaged by unfair discrimination'. In addition, any preferential procurement policy must be implemented within the bounds of 'a framework' laid down in 'national legislation'.[59]

The necessary 'framework' has been set out in the Preferential Procurement Policy Framework Act (PP) of 2000. The PPPFA provides, in essence, that BEE firms tendering for state contracts must be allocated either 10 or 20 empowerment points (depending on the contract's value), while the remaining 90 or 80 points must be allocated on the basis of price and efficiency. What this means in practice is that firms with at least 25% black ownership may charge 10% more on contracts with a value above a specified threshold (currently R50 million) and 20% more on contracts with a value below that threshold – and still win contracts in preference to companies with lower prices.

Since the PPPFA has already been adopted and brought into law as the 'framework' legislation required by the Constitution, the principle of subsidiarity applies. Hence, what the Constitution requires as regards preferential procurement must primarily be determined – not by referring to Section 217(2) itself – but rather under PPPFA, which provides the legislative framework required by Section 217(3). It is only if the PPPFA is shown to be unconstitutional that the Section 217(2) itself becomes the reference point. The framework set out in the PPPFA must thus prevail until such time as the PPPFA has been replaced or struck down as inconsistent with Section 217.

The Bill is very different from the PPPFA. For one, it disregards the extent of black ownership and instead makes the extent of black management the key criterion. In addition, it bars companies lacking the required degree of black management (as decided by the minister of employment and labour, rather than the finance minister, as the PPPFA envisages) from concluding any procurement contracts with state entities at all. By contrast, the PPPFA allows companies – irrespective of the extent of their black ownership or management – to contract with all state entities. It simply prevents those without the specified black ownership from charging the 10% or 20% price premiums that are available to firms that meet this black ownership requirement.[60]

In seeking to introduce a new framework for preferential procurement, the Bill differs fundamentally from the PPPFA. Yet under the principle of subsidiarity the PPPFA must prevail as the relevant expression of what Section 217 of the Constitution requires until such

58 Section 217(1), 1996 Constitution

59 Section 217(2), (3), 1996 Constitution

60 Section 2, Preferential Procurement Policy Framework Act; Business Day 28 August 2009; Jeffery, *BEE:Helping or Hurting*, p128

time as the PPPFA has been amended by Parliament or struck down by the Constitutional Court.

3.4.2 The separation of powers

Section 217 clearly gives the task of deciding on the appropriate framework for preferential procurement to Parliament, not the minister of employment and labour. Hence, even if the minister's laying down of racial targets for management posts in different economic sectors could be seen as a valid 'framework' for preferential procurement – despite its conflict with the PPPFA – the minister's purported exercise of power would still be unconstitutional.

According to the Constitutional Court in the *Justice Alliance* case in 2011, 'Parliament may not ordinarily delegate its essential legislative functions' to the executive.[61] Parliament can allow ministers to fill in the details of the rules that it adopts, but it cannot give a cabinet minister the power to establish an entirely new procurement 'framework'. This is particularly so when Section 217(3) of the Constitution expressly reserves the task for deciding on this framework on the legislature and not the executive.

In addition – and quite apart from the provisions of Section 217 – the Constitution as a whole is based on the doctrine of the separation of powers. Under this doctrine, the executive branch of government cannot lawfully encroach on the powers accorded the legislature and judiciary. This further confirms that the minister of employment and labour cannot lawfully adopt new rules imposing new procurement obligations on the state – or new racial targets for black management in the private sector – when this rule-making function belongs to Parliament and not the executive. The Bill is thus also unconstitutional because it fails to uphold the separation of powers.

3.4.3 A maze of contradictory 'trumping' provisions

According to the Broad-Based Black Economic Empowerment Act (BEE Act) of 2003, as amended in 2013, the empowerment rules and racial targets set out in the BEE Act must prevail over all conflicting legislation, other than the Constitution and a bill expressly amending the BEE Act itself.[62]

According to this trumping clause, the preferential procurement rules in the BEE Act must prevail over the preferential procurement provisions in the Bill. But the EE Act also has a trumping clause, under which the rules and racial targets set out in this statute must prevail over any conflicting legislation other than the Constitution or a bill expressly amending the EE Act.[63]

---

61 http://www.saflii.org/za/cases/ZACC/2011/23.html Para 65

62 https://www.gov.za/sites/default/files/gcis_document/201409/37271act46of2013.pdf Section 3 (b)

63 Section 63, EE Act

These conflicting trumping clauses generate great uncertainty as to which rules and targets are in fact to prevail. This conflicts with the certainty required by the rule of law and further confirms the unconstitutionality of the Bill – as well as of the BEE and EE Acts.

At the same time, the (mutually contradictory) preferential procurement requirements in both the BEE Act and the EE Act are also in conflict with the PPPFA, which is, of course, the prevailing 'framework' statute envisaged in Section 217(3). It follows that the preferential procurement rules in the BEE Act, like those in the Bill, must yield to the contrary provisions of the 2000 statute.

3.4.4 Competitive and cost-effective state procurement

Also relevant is the overarching requirement, as set out in Section 217(1) of the Constitution, that public procurement – even when subject to valid preferential procurement rules – must still be 'fair, equitable,…competitive, and cost-effective'. By contrast, the unrealistic racial targets to be enforced on the private sector under the Bill are likely to prohibit many unavoidably non-compliant businesses from entering into procurement contracts with state entities at all.

This is likely to exclude from state tenders many companies with a proven capacity for the 'competitive' and 'cost-effective' delivery of goods and services. Worse still, as Democratic Alliance (DA) shadow minister for employment and labour Michael Cardo has warned, the Bill could be used 'capriciously' by the minister and his officials to 'benefit selected companies in the allocation of state tenders'.[64] Says Mr Cardo: 'This is a textbook ANC manoeuvre. It allows it to manipulate outcomes – by rigging tenders or funnelling contracts – in the guise of righting past wrongs and redressing racial inequalities. Yet, after more than two decades of employment equity and black economic empowerment legislation, we now know beyond any reasonable doubt that these legislative lynchpins of racial transformation are really a fig leaf for crony enrichment.'[65]

The minister's capacity to exclude the best qualified companies – and to manipulate lucrative tenders to the benefit of ANC cadres – is inconsistent with Section 217 of the Constitution. This further underscores the unconstitutionality of the Bill. It also provides yet more reason why the Bill fails the *Van Heerden* tests for the validity of all affirmative action measure. Far from helping to secure the fair and cost-effective delivery of essential goods and services, the Bill will encourage cronyism, fraud, and inflated pricing in state tenders. In doing so, it will further harm the overwhelming majority of black South Africans. This will put it in clear breach of the Van Heerden tests. It will also contradict the express wording of Section 217(2), which requires any procurement preferences to 'advance' those disadvantaged by unfair discrimination.

4 Inadequate public consultation, contrary to constitutional requirements

64 Statement by Michael Cardo MP, DA Shadow Minister for Employment and Labour, 8 September 2021

65 Ibid

The Bill's adoption has been marred by a major procedural defect in that Parliament has failed adequately to 'facilitate public involvement in the legislative process', as the Constitution requires.

The key constitutional provisions here are Sections 59 and 72. According to Section 59(1) of the Constitution, the National Assembly 'must facilitate public involvement in the legislative…processes of the Assembly and its committees'. Section 72 imposes the same obligation, in almost exactly the same words, on the National Council of Provinces.[66]

When the *New Clicks* case came before the Constitutional Court, Mr Justice Albie Sachs noted that there were many ways in which proper public participation could be facilitated. He also laid down a key test for assessing the adequacy of the mechanisms in fact adopted, saying: 'What matters is that…a reasonable opportunity is offered to members of the public and all interested parties *to know about the issues* and to have an adequate say'. This passage was later quoted with approval in both *Doctors for Life* and in the *Land Access* case.[67]

According to the Memorandum on the Objects of the Bill, the proposed amendments in the Bill were discussed and negotiated at the National Economic Development and Labour Council (Nedlac) from October 2017 to April 2018. The Bill was then published for public comment, while public hearings were held in all nine provinces in October 2018. Comments received during this consultation process were taken into account in finalising the Bill.[68]

The Memorandum implies that this public consultation process – all of which was carried out in 2018 – was sufficient in crafting the current version of the Bill. However, this approach fails to take account of the fundamentally different economic environment in which the country now finds itself as it grapples with the Covid-19 pandemic. This economic crisis – recently made worse by the destruction resulting from the July 2021 riots in Gauteng and KwaZulu-Natal – must be fully considered, not brushed aside.

The current economic crisis – the worst in more than 70 years – should have loomed large in an up-to-date and comprehensive socio-economic impact assessment aimed at assessing the full costs of the Bill and its likely effect on the economy. This is no less than government policy requires, as set out in the Guidelines for the Socio-Economic Impact Assessment System (SEIAS) adopted by the Department of Planning, Monitoring, and Evaluation in 2015. [69]

---

66 Section 59(1), 72(1), 1996 Constitution

67 Section 59(1), Constitution of the Republic of South Africa, 1996; *Minister for Health and another* v *New Clicks South Africa (Pty) Ltd and others*, [2005] ZACC 14, at para 630, emphasis supplied by the IRR; *Doctors for Life*, at para 145; *Land Access* judgment, at para 59

68 Memorandum on the Objects of the Employment Equity Amendment Bill of 2020, paras 3.1, 3.2

69 Department of Planning, Monitoring and Evaluation, 'Socio-Economic Impact Assessment System (SEIAS), Revised Impact Assessment: National Health Insurance Bill', 26 June 2019 (2019 SEIAS Assessment); *SEIAS Guidelines*, p3, May 2015

According to these Guidelines, the SEIA system must be applied at all stages of the policy-making process. Once new legislation has been proposed, 'an initial assessment' must be conducted to identify different 'options for addressing the problem' and make 'a rough evaluation' of their respective costs and benefits. Thereafter, 'appropriate consultation' is needed, along with 'a continual review of the impact assessment as the proposals evolve'.[70]

A 'final impact assessment' must then be developed which 'provides a detailed evaluation of the likely effects of the [proposed law] in terms of implementation and compliance costs as well as the anticipated outcome'. When a bill is published 'for public comment and consultation with stakeholders', this final assessment must be attached to it. According to the Guidelines, a particularly important need is to 'identify when the burdens of change loom so large that they could lead to excessive costs to society, for instance through disinvestment by business or a loss of skills to emigration'.[71]

The Bill is likely to trigger precisely such 'excessive costs', in the form of both disinvestment and emigration. It will also deter new direct investment, limit growth, reduce employment, add to inequality, and make recovery from both the Covid-19 lockdown and the July 2021 riots even harder to achieve.

A comprehensive SEIA report objectively assessing all the economic and other costs of the Bill should therefore have been appended to the Bill when it was released for public comment. This would have given members of the public and other interested parties a reasonable opportunity to 'know about the issues' raised by the Bill, as the *New Clicks* judgment of the Constitutional Court requires.

But no such SEIA report has been made available. According to Thembenkosi Mkalipi, chief director for labour relations in the Department of Employment and Labour, 'two socio-economic assessments on the Bill have been conducted' (though when this was done remains uncertain). However, says Mr Mkalipi, 'these [assessments] were used for internal government processes and there was no need for them to be published'.[72] This approach conflicts not only with the government's own Guidelines but also with what the Constitution requires for proper public consultation.

4.1 Helping the public to 'know about the issues'

A comprehensive SEIA assessment was necessary to help the public 'know about the issues' – as the Constitution requires – on many important points. Among other things, such as assessment should have interrogated the stated rationale for the Bill and whether this is true.

---

70 *SEIAS Guidelines* p7

71 *SEIAS Guidelines*, p11

72 Business Day 25 May 2021

According to the minister of employment and labour, Thulas Nxesi, the Bill is essential because 'self-regulation has not worked' and the government must now 'be very hard' on recalcitrant employers via fines and other punishments.[73] The minister's 'self-regulation' claim derives from the current wording of the EE Act, under which all designated employers must make 'reasonable progress' towards the goal of demographic representivity at all levels of the workforce. Though this final objective has been set by the state, employers have considerable discretion as to the racial targets they set for themselves each year.[74]

The system of 'self-regulation', added Mr Nxesi in September 2021, also helps explain why progress towards demographic representation in senior posts in the private sector has been so slow. According to the minister, many businesses use self-regulation to 'covertly fight the implementation of employment equity while paying lip service to the need for transformation'.[75]

However, this analysis is unconvincing (as a proper SEIA report would have revealed) and overlooks three important factors. First, business was strongly committed to black advancement even during the apartheid era and has still more reason to endorse and support this goal under a black majority government. Second, both the Bill and the EE Act assume that demographic representivity is 'the norm' when in fact it is unattainable in all heterogeneous societies. Third, Mr Nxesi's emphasis on 'prosecution' and punishment for supposedly recalcitrant employers overlooks a host of practical barriers to black upward mobility which cannot simply be legislated away.

4.1.1 Black upward mobility even under apartheid

The ANC has long denied the extent of black upward mobility in the apartheid period. It prefers to overlook this phenomenon, partly because it undermines its stated rationale for EE and BEE laws – and partly because the ruling party cannot credibly claim the credit for positive changes that took place before it came to power.

The ANC prefers to claim that 'the black middle class is the product of ANC policy', as ANC secretary general Gwede Mantashe stated in 2014. According to Mr Mantashe, the ANC has 'a duty to explain' to black South Africans the extent of their dependence on empowerment policies. The ruling party also expects the black middle class strongly to 'defend' the EE (and BEE) policies which are supposedly 'responsible for its existence'.[76]

The ANC's implicit message is that black South Africans cannot rise without the help of EE. This is plainly false. It is also debilitating in that it encourages even the 'born-free' generation to see itself as EE-dependent. Yet black entrepreneurs and managers flourished in various

73 https://www.biznews.com/thought-leaders/2019/08/29/employment-equity-act-anthea-jeffery

74 Notes of press briefing by the minister of labour, Tito Mboweni, on the release of the Employment Equity Bill, Pretoria, 26 November 1997; Jeffery, 'Employment Equity begins to bite', p6

75 Business Day 15 September 2021

76 *The Star* 9 June 2014

spheres prior to 1994, even under apartheid's pervasive restrictions. The multibillion-rand minibus taxi industry is the best-known example of this. However, the growth of black business under Nafcoc – the National African Federated Chamber of Commerce and Industry, established in 1964 – was also a singular achievement.

Black upward mobility in the apartheid era accelerated after the late 1960s, moreover, when a decade of rapid growth made it clear that the white minority was too small to meet the needs of the economy. As the skills shortage worsened, business repeatedly urged the National Party (NP) government to ease restrictions on black employment and advancement. In 1973 prime minister John Vorster finally yielded to this pressure, saying his government would no longer stand in the way of blacks moving into higher jobs. This resulted in considerable advances for black South Africans and a significant narrowing of racial inequality.[77]

The skills shortage also pushed the NP government into embarking on a series of reforms. From the early 1970s onwards, it improved the quality of 'Bantu' education, expanded black trade union rights, abolished influx control, and promoted black home ownership in urban townships. These policy shifts reflected the increasing economic interdependence of black and white South Africans and helped pave the way for the transition to black majority rule.[78]

After that transition took place in 1994, business had still more reason to embrace black advancement in the workplace. By September 1997, shortly before the initial EE bill was published, 90% of the 150 large employers surveyed by a human resources consultancy, FSA-Contact, had affirmative action programmes in place, even though this was not required by law.[79]

Within the surveyed firms, the proportion of black people in senior management had already increased from 5% in 1995 to 12% in 1998. It was also projected to rise further to 21% in 2001, making for an overall increase in black representation of some 325%. Among middle managers, the proportion of black people had increased from 10% to 21% in the same period and was expected to rise to 29% by 2001.[80]

However, the skills shortage among black people was so acute that more than 60% of companies complained of the 'poaching' of their black managers by firms willing to pay significant premiums to lure them away. This level of poaching, backed by the payment of premiums well above normal salaries, testified to an enormous unmet demand for black managers in the private sector – not a racist refusal to employ them.[81]

---

77 Daniel Pienaar, 'South Africa's rich show their true colours', Fast Facts, June 2000, pp. 2-3, at p. 3; Kane-Berman, South Africa's Silent Revolution, pp8-10

78 Ibid

79 *Sunday Times Business Times* 7 September 1997, *Business Day* 25 November 1998

80 Ibid

81 Ibid

There was thus no need for legislation to force the private sector to hire blacks, as the IRR commented in 1998. The real obstacle to black advancement lay rather in the major skills deficit within the black population. Hence, the key requirement was to increase black skills through excellent education, while simultaneously fostering high rates of direct investment and economic growth. The faster the economy grew, the more demand there would be for skilled people of all colours.

4.1.2 Demographic representivity is never 'the norm'

According to Thomas Sowell of Stanford University's Hoover Institution in his 1994 book on *Race and Culture*: 'The even distribution or proportional representation of groups in occupations or institutions [is] an intellectual construct defied by reality in society after society.' Moreover, the 'imbalances' evident between groups cannot be attributed to 'employer discrimination', as this ignores 'the manifest effects of differences in educational achievement, family upbringing, cultural traditions, [and] marital patterns.'[82]

Age is a key variable too, adds Professor Sowell, as the people appointed to senior management posts generally require both tertiary qualifications and long years of work experience. Hence, where members of a group are mostly young – and almost half of black South Africans are under the age of 25 – demographic representivity is even more difficult to attain.

The underlying reality is that people are not 'blank slates'. Since they are not all essentially the same, they cannot simply be slotted into any position regardless of age, education, aptitude, experience, and capacity for leadership. Adds American analyst Samuel Kronen: 'Virtually no two ethnic groups in history have ever achieved equal outcomes on all measures, anywhere, ever. Equal outcomes and proportional representation are the exception, not the rule'.[83]

Bad schooling and other barriers to black advancement

South Africa spends some 7% of GDP on education, which is high by international standards. However, as earlier noted, the state's centralised and top-down delivery system is so mismanaged that outcomes are extraordinarily poor. Pass and completion rates at both schools and universities are so poor that hundreds of thousands of pupils and students fail or drop out of their studies every year. Most then join the ranks of the 11.2 million black South Africans now unemployed.

Other barriers to upward mobility for black people include not only poor skills and escalating joblessness but also:

- high rates of often violent crime;

82 Jeffery, *BEE: Helping or Hurting*, p33

83 Samuel Kronen, 'On Race and Inequality – A Reply to Nathan J Robinson', Quillette.com, 27 June 2020

- an increasing dependency on social welfare;
- a preponderance of absent fathers;
- a mistaken reliance on EE and BEE, which benefit a relative elite while harming the great majority; and
- the ANC's false assertion that 'demographic representivity' is the norm in all heterogeneous societies and would be evident in South Africa as well were it not for racism in the private sector and elsewhere.

4.1.3 Propaganda in place of evidence and analysis

Socio-economic factors of this kind give the lie to Mr Nxesi's claim that business is 'covertly fighting' to exclude black people from senior posts. It also underscores the absurdity of Cosatu's emotive accusation that what critics of the Bill really want is to keep 'treating workers like glorified slaves'.[84]

Legislation – particularly of a kind as intrusive as the current Bill – should be based on fact, not propaganda. The absence of a comprehensive and objective SEIA report has helped to prop up false claims that should swiftly have been exposed and discredited. It also means that the public has been deprived of the opportunity to 'know about the issues' raised by the Bill and then to have 'an adequate say' as to what its content should be. The resulting shortfall in evidence-based analysis has undermined the quality of public consultation on the Bill. It has also prevented Parliament from complying with its constitutional obligation to 'facilitate public involvement in the legislative process'.

5 'Less intrusive means' to promote upward mobility and provide redress

As earlier noted, there is no need for the Bill and its unconstitutional provisions when 'less intrusive means' of promoting upward mobility and providing redress for past injustices are readily available.

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

5.1 An EED scorecard that rewards key business contributions

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

- capital inflows attracted,
- fixed investments made,

84 Business Day 15 September, Matthew Parks, Cosatu statement, 14 September 2021

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

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

In 2018 a study by the Bureau for Economic Research at the University of Stellenbosch showed that 'the SA economy could have been up to 30% or R1-trillion larger and created 2.5 million more jobs had the country kept pace with other emerging markets and Sub-Saharan African economies over the past decade'.[85] This would have done far more than EE to expand opportunities and build prosperity among disadvantaged South Africans. The current burden of public debt could also have been significantly reduced, thereby allowing more revenue to be allocated to education and other vital needs.

5.2 The voucher element in EED

EED seeks to reach right down to the grassroots by equipping poor households with the sound schooling, housing, and healthcare they need to help them get ahead. According to the National Treasury's *Medium Term Budget Policy Statement* in November 2021, some R660bn has been budgeted for basic schooling, healthcare, and housing/community development in the 2020/21 financial year, rising to R700bn by 2024/25. But the state's centralised and top-down delivery system is so inefficient and mismanaged – often because of the EE's insistence on putting racial targets before skills and experience – that outcomes have generally been extraordinarily poor.

As regards education, 'most primary and secondary schooling is, by some metrics, even worse than it was previously', in the apartheid era. Hence, even the relatively few that pass their final matric examinations are often functionally illiterate and innumerate. They thus lack a sound foundation either for on-the-job training – for those lucky enough to find employment – or success in tertiary studies.

In the housing sphere, the state's 'free' RDP (Reconstruction and Development Programme) homes are tiny and often badly built, while delivery has flagged to the point where the housing backlog (at 2.2 million units) is bigger than it was in 1994 (1.5 million). In public health care, most hospitals and clinics are so badly managed that only about 15% adequately

85 John Endres, *Growth & Recovery: A strategy to #GetSAWorking*, IRR, 2020, p4

meet minimum standards on such essentials as infection control and the availability of medicines.[86]

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

In the schooling sphere, dysfunctional public schools would have to up their game, while many more independent schools would be established to help meet burgeoning demand. In the housing arena, people could stop waiting endlessly on the state to provide and start building or upgrading their own homes. In the health sphere, people could join low-cost medical schemes or take out primary health insurance policies, giving them access to sound private care.[87]

Unlike EE (and other aspects of BEE), these vouchers would truly empower the poor – as ordinary South Africans seem to be well aware. In December 2020, for example, some 75% of black respondents in an IRR field survey supported the idea of schooling, health care and housing vouchers. In addition, 74% of black respondents said these vouchers would be more effective than BEE in helping them to get ahead. [88]

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

5.3 A non-racial focus in keeping with the Constitution

EED, like the social grants system, would rely on a means test to determine disadvantage and stop using race as a proxy for this. EED would thus extend to disadvantaged whites, but this group is so small (less than 1% of those living in poverty) that the benefits of EED would still go overwhelmingly to black South Africans. At the same time, EED's non-racial approach would resonate with the Constitution's founding values and bring an end to obnoxious race classification.[89]

---

86 *Business Day* 6 December 2017, *Sunday Times* 6, 14 January 2018, *The Citizen* 19 September 2018; IRR, *2019 South Africa Survey*, p761; *Financial Mail* 19 July 2018; Office of Health Standards Compliance, *Annual Inspection Report 2016/17*, p31

87 Anthea Jeffery, 'EED is for real empowerment, whereas BEE has failed', *@Liberty*, IRR, Issue 31, April 2017, pp5-8

88 IRR, 2020 Race Relations Survey

89 Statistics South Africa, 'Mid-Year Population Estimates 2018', *Statistical Release P0302*, 23 July 2018, Table 6, p10; Sara Gon, '"Disadvantage" is the best proxy for disadvantage', *Politicsweb.co.za* 19 February 2019; William Gumede, 'The DA's campaign battle plan was simply wrong', *News24.com*, 19 May 2019

6 Conclusion

Many of the public comments on the Bill have warned that the measure is unconstitutional on both substantive and procedural grounds. The Department of Employment and Labour has nevertheless rejected this view, Mr Mkalipi waving away it away as unfounded but without providing any reasons.[90] In reality, the Bill is clearly unconstitutional in its content, as earlier outlined, while the procedures used in its adoption were also constitutionally defective.

As the Constitution's founding provisions make clear, the Constitution is 'the supreme law of the Republic' and must therefore be respected and upheld by all branches of the government. Parliament thus erred in adopting the Bill in its present form, given the extent to which its provisions are inconsistent with the Constitution.

The President also has an over-arching obligation to 'uphold, defend and respect the Constitution as the supreme law'. Hence, if he 'has reservations about the constitutionality' of a bill, he is obliged, under Section 79(1) of the Constitution, to 'refer it back to National Assembly for reconsideration', rather than give his assent to it.[91]

The IRR thus respectfully petitions the President to use his powers under Section 79(1) to refer the Bill back to the National Assembly so that all provisions in conflict with the Constitution can be removed – and an EED system of providing redress and expanding opportunity for the overwhelming majority of black South Africans can instead be introduced.

South African Institute of Race Relations NPC

90 *Business Day* 26 May 2021

91 Sections 1(c), 83(b), 79(1), 1996 Constitution