



THE FW DE KLERK FOUNDATION
Upholding South Africa's National Accord

13 June 2013

Mr Andre Hermans,
Secretary,
Parliamentary Portfolio Committee
Trade and Industry
National Assembly
CAPE TOWN

Dear Mr Hermans

COMMENTS OF THE FW DE KLERK FOUNDATION REGARDING THE BROAD-BASED BLACK ECONOMIC EMPOWERMENT AMENDMENT BILL, 2013

INTRODUCTION

1. The FW De Klerk Foundation is a non-profit organization dedicated to upholding the Constitution. To this end, it seeks to promote the values, rights and principles in the Constitution, monitor developments, including draft legislation that might affect the Constitution, inform people and organizations of their constitutional rights and assist people and organizations to claim their constitutional rights.

THE PRINCIPLE OF PROMOTING EQUALITY

2. The FW de Klerk Foundation strongly endorses section 9 of the Constitution relating to the promotion of the constitutional value of equality. It also supports the provision in section 9(2) of the Constitution that "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 Foundation supports most of the goals of the Amendment Bill (although it questions whether the B-BBEE Act and the Amendment Bill are the best means to achieve them).
4. The Foundation's concerns relating to the Amendment Bill arise rather from the following considerations:
 - a. The Act and the Amendment Bill are unconstitutional because they conflict directly with the foundational value of non-racialism. They also conflict with section 9(3) which prohibits unfair discrimination by the State, and section 9(5) which states that discrimination is unfair unless it is established that it is fair.
 - b. The B-BBEE Act has demonstrably failed to promote equality and the proposed Amendment Bill will likewise fail to do so.
 - c. There are other more appropriate measures that the state can take to promote equality more successfully.
 - d. The Act and the Amendment Bill are open-ended in terms of their duration and their scope. As such they breach South Africa's treaty obligations in terms of

Article 1, Paragraph 4 of the International Convention on the Elimination of All Forms of Racial Discrimination which requires that remedial measures should be temporary and should "not be continued after the objectives for which they were taken have been achieved".

THE B-BBEE ACT AND THE AMENDMENT BILL ARE UNCONSTITUTIONAL

5. In considering the constitutionality of the B-BBEE Act and the Amendment Bill the Foundation believes that the points of departure should be
- a. the foundational value of non-racialism in Section I (b) of the Constitution;
 - b. Section 9(3) in terms of which "the State may not discriminate directly or indirectly against anyone on one or more grounds, including race...";
 - c. Section 9(5) in terms of which "discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that it is fair";
 - d. Section 36 which sets out the circumstances in which "the rights in the Bill of Rights (*including the right to non-discrimination in Section 9 (3)*) may be limited.
 - e. Section 37 which states that the right to equality in section 9 of the Constitution and protection against unfair discrimination, *inter alia* on the basis of race are of such cardinal importance that they are non-derogable even in a state of emergency.
 - f. The Constitutional Court's judgment in *Minister of Finance vs Van Heerden* which deals specifically with the application of section 9.¹

6. Non-Racialism

- a. Non-racialism is a foundational constitutional value that cannot be set aside by our courts (even by the Constitutional Court) and can be dispensed with by the legislature only by way of a constitutional amendment supported by 75% of the members of the National Assembly. A non-racial and non-sexist society is not a "long-term constitutional goal". It is a fundamental value that must be available to all South African citizens *ab initio* and must determine all executive action and legislation from the inception of our new dispensation.
- b. The very name of the Act and of the Amendment Bill indicate that is their objective to advance black South Africans in an undifferentiated manner as a racial group - whereas Section 9(2) does not refer to race at all but to "persons, or categories of persons, disadvantaged by unfair discrimination".
- c. The Constitution gives no recognition to racial groups and makes no provision for the classification of people according to their race. Accordingly, it does not create any possibility of devolving rights, advantages or penalties on racial groups as such. All rights in the Constitution are enjoyed by individuals and may not be limited or advanced simply because they belong to this or that race.
- d. The criterion laid down by section 9(2) is that those who may be advanced are persons, or categories or persons who are disadvantaged by unfair discrimination. Theoretically, there is no reason why this provision should not apply to South Africans of any race - or group - who can prove that they have been disadvantaged by past - or present - unfair discrimination.

¹ *Minjster of Finance and Other v Van Heerden* (CCT 63/03) (29 July 2004);

7. Non-Discrimination

Section 9(3) prohibits the state from unfairly discriminating against anyone on the basis, *inter alia* of race. Although the B-BBEE Act and the Amendment Bill make broad provision for racial discrimination they contain no provision to test whether the discriminatory steps that they mandate are fair or not - as required by section 9(5).

- a. It is clearly impossible to assess the fairness or unfairness of discrimination - as required in section 9(5) - without taking into account the actual circumstances of the individuals involved in any situation. The international Convention Against All forms of Racial Discrimination also require "a realistic appraisal of the current situation of the individuals and communities concerned."
- b. For example, a substantial proportion of white South Africans now have lower education qualifications and incomes than a substantial proportion of black South Africans. By 2009 there were 2.5 million black, coloured and Indian South Africans who earned more than 2 million whites² and 2.9 million who had higher education qualifications than 1.7 million whites.³
- c. How can the achievement of equality possibly be promoted in a situation where an advantaged black person is favoured over a disadvantaged white person - as can easily happen in terms of the provisions of the B-BBEE and the Amendment Bill?
- d. The premise underlying the B-BBEE Act and the Amendment Bill is that racial discrimination can be justified on the basis that the aggregated black population gains in relation to the aggregated white population - without any concern whatsoever for the interests or rights of the individuals involved. However, such a scheme is entirely alien to our Constitution which gives no recognition to, nor devolves rights on, groups.

8. The Limitation of Rights

- a. According to section 36 of the Constitution "the rights in the Bill of Rights (including the rights in sections 9(3) and 9(5)) may be limited only in terms of a law of general application to the extent that the limitation is justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all the relevant factors, including
 - i. The nature of the right;
 - ii. The importance of the purpose of the limitation;
 - iii. The nature and extent of the limitation;
 - iv. The relation between the limitation and its purpose; and
 - v. Less restrictive means to achieve its purpose."
- b. The B-BBEE Act and the Amendment Bill do not comply with these requirements. Although they clearly limit the rights of white South Africans - particularly in terms of section 9(3) - the B-BEE Act is not "a law of general application" in as far as it limits the rights of only one section of the population. It also impinges directly on the "human dignity, equality and freedom" of the targeted group. The Act and the Amendment Bill do not take into account the foundational nature of the right of white South Africans to non-racialism and non-

² SA Institute of Race Relations, South Africa Survey 2010-2011, p289

³ StatsSA General Household Survey, 2009, p.54

discrimination; they do not properly weigh this right against the purpose of the limitation; they leave open the nature and extent of the limitation in terms of its duration and severity; they do not consider the relation between the limitation and its purpose; and they do not consider less restrictive means to achieve the purpose.

9. Minister of Finance vs Van Heerden

a. The Foundation agrees with Sachs J in *Minister of Finance vs Van Heerden* in which he stated that section 9(2) must be read seamlessly together with sections 9(3) and (5).

"...it is important to ensure that the process of achieving equity is conducted in such a way that the baby of non-racialism is not thrown out with the bath-water of remedial action. While I fully concur with Moseneke J that it would be illogical to permit a presumption of unfairness derived from section 9(3) (read with section 9(5)), to undermine and vitiate affirmative action programmes clearly authorised by section 9(2), by the same token I believe it would be illogical to say that unfair discrimination by the state is permissible provided that it takes place under section 9(2)."

b. However, even in terms of the internal tests established by Moseneke J in *Minister of Finance vs Van Heerden* the B-BBEE Act and the Amendment Bill fail to pass muster. The internal tests that he identified were whether the measure "... targets persons or categories of persons who have been disadvantaged by unfair discrimination; ... is designed to protect or advance such persons or categories of persons; and ... promotes the achievement of equality." Multi-millionaire members of the black elite who have been among the main beneficiaries of B-BBEE measures can hardly be described any longer as "persons or categories of persons who have been disadvantaged by unfair discrimination." Also, as has been shown above, 10 years after the adoption of the B-BBEE Act the measures that it has instituted have demonstrably failed to promote equality.

B-BBEE DOES NOT PROMOTE EQUALITY IN PRACTICE

10. It is a shameful fact that 19 years after the advent of our new constitutional democracy, which is dedicated *inter alia* to the achievement of equality, South Africa is an even more unequal society than it was in 1994. South Africa's dismal failure to achieve greater income equality is reflected in the fact that our Gini index has deteriorated from 66 in 1996, to 70 in 2008.⁴ This makes us, according to the World Bank, the second most unequal country in the world after Namibia⁵.

11. Inequality has also increased within all our population groups - from 54 to 62 among black South Africans, and from 43 to 50 among whites.⁶ These high levels of inequality within the black and white communities, when measured by international standards, point to the unfairness and impossibility of treating all blacks and whites in an undifferentiated manner when dealing with questions of equality.

⁴ Dr Max Price; Presentation to the Cape Town Press Club, 27 August, 2012; "What has happened to inequality and poverty in post-apartheid South Africa?"

⁵ "List of Countries by Income Inequality"; Wikipedia; http://en.wikipedia.org/wiki/List_of_countries_by_income_equality

⁶ Dr Max Price; *loc.cit*

12. One of the contributing causes of continuing inequality is the fact is that some of the measures adopted by the state in terms of section 9(2), including the B-BEEE Act, have benefited only a relatively small minority of the black population comprising in general those elements that are, in practice, the least disadvantaged members of the community. Indeed, many BBBEE deals have disproportionately and massively enriched a very small and elite group within the black community that cannot in any manner be regarded as disadvantaged.
13. The measures have in practice done little or nothing to advance equality among the poorest quintiles of the black population who are the most disadvantaged members of society.
14. In fact, the measures adopted by the State may have diminished the prospects for equality for the poorest quintiles of the black community. This is because the B-BBEE Act interferes with normal market forces that require that tenders should be allocated in an open and competitive process based on price, quality and delivery time. Because of the interference of BBBEE processes in these market forces, the goods and services allocated to the poorest sectors of our society have too often been over-priced, of poor quality and behind schedule. For example, this often means that fewer homes are built for the poor; their quality is generally below standard and the homeless frequently have to wait an inordinate time for delivery. All this exacerbates the inequality of those involved.
15. The B-BBEE Act and the Amendment Bill undermine the economy and therefore the prospects for growth and employment which are essential to combat inequality. South Africa's cumbersome regulatory environment - including B-BBEE - is a disincentive to local and foreign investment. B-BBEE interferes with fundamental priorities of running any business - including the appointment of key personnel; the ownership of shareholding; the nature and identity of business partners and decisions relating to the procurement of goods and services.
16. Experience also indicates that the interference of B-BBEE processes in the normal tender procedures has often opened the way to "tenderpreneurs" and corruption which has, indirectly, further undermined the prospects for equality of the most disadvantaged members of society.

OTHER MEASURES TO PROMOTE EQUALITY

17. There are alternative measures that would, on the one hand, more effectively promote equality, and on the other not require unfair racial discrimination.
18. It is generally accepted that sound education is the primary basis for the empowerment of any people. It is precisely in this area that the new South Africa has failed disadvantaged communities most lamentably. It is perfectly consistent with section 9(3) for the state - as already happens - to allocate more funding and disproportionate resources to advance disadvantaged communities through the provision of good education.
19. Secondly, one of the main causes of inequality and disempowerment is the unacceptably high levels of unemployment among the black population and particularly among black youth. Once again, all reasonable people would support effective action - such as a youth wage subsidy - and the disproportionate expenditure of resources to address this unacceptable situation.
20. Thirdly, since equality is defined in section 9(2) of the Constitution as including "the full and equal enjoyment of all rights and freedoms" disproportionate resources should also

be expended to ensure that disadvantaged communities should as quickly as possible be enabled to enjoy equally all these rights and freedoms.

21. It is, in fact, precisely through the allocation of disproportionately greater resources to disadvantaged communities that the greatest advances in combating inequality have been made. The provision of 3.3 million homes, of electricity, sanitation and water to more than 75% of households and the extension of pensions, children's allowances and disability allowances to more than 16 million South Africans have significantly reduced absolute poverty and the most severe levels of inequality.
22. Fourthly, it would also be appropriate for the State to take measures to dismantle any conscious or unconscious obstacles to the appointment and promotion of people with equally qualifications and equal merit regardless of their race.
23. Finally, it would also be appropriate for the State to provide tax or other incentives to companies that meet equity targets and have shareholder schemes for their employees.
24. The Foundation is confident that the disproportionate provision of decent education, employment and effective services to disadvantaged communities would accelerate the achievement of equality. It also believes that such measures together with the dismantling of any conscious or unconscious obstacles to the appointment and promotion of black South Africans and the introduction of effective incentives would lead to the achievement of the goals of the B-BBEE Act and the Amendment Bill far more quickly and fairly than the cumbersome, artificial and discriminatory provisions that they now mandate.

SOUTH AFRICA'S OBLIGATIONS IN TERMS OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

25. According to Article 1 Paragraph 4 of the International Convention on the Elimination of All Forms of Racial Discrimination

"Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved"(emphasis added).

26. It will not be possible to know when "the objectives for which (remedial actions in terms of the Act and the Amendment Bill) were taken have been achieved" because the objectives are undefined and open-ended. The goals in the various B-BBEE Charters can theoretically be ratcheted up indefinitely in terms of black ownership, management and employment targets. They accordingly also breach the requirement in Paragraph 1.4 of the Convention that prohibits "the maintenance of separate rights for different racial groups" in as far as they create a permanent regime in terms of which the rights of white South Africans can be limited, regardless of whether they are advantaged or disadvantaged.
27. In 2008 the United Nations Committee on the Elimination of Racial Discrimination provided guidance on the interpretation of the Convention in a document entitled "The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination". Paragraph 16 of the document reads as follows:
"Special measures should be appropriate to the situation to be remedied, be legitimate, necessary in a democratic society, respect the principles of fairness and

proportionality, and be temporary. The measures should be designed and implemented on the basis of need, grounded in a realistic appraisal of the current situation of the individuals and communities concerned (emphasis added)."

The Convention clearly requires "respect for the principles of fairness and proportionality"; that measures should be temporary; that they should be designed on the basis of need (and not to further enrich already advantaged individuals); and that they should be grounded in a realistic appraisal of the current situation of the individuals involved. The B-BBEE Act and the Amendment Bill meet none of these requirements.

28. Paragraphs 26 and 27 set out two limitations to Article 1. Paragraph 4.

"The first limitation is that the measures 'should not lead to the maintenance of separate rights for different racial groups'." "The second limitation on special measures is that 'they shall not be continued after the objectives for which they have been taken have been achieved'."

Once again, the B-BBEE Act and the Amendment Bill, fail on both counts. They create *de facto* separate rights for black and white South Africans with regard to employment, property and the ability to compete fairly in an open economic system. They also do so on an apparently permanent basis because they provide no cut-off dates or final goals.

CONCLUSION AND RECOMMENDATION

29. The Foundation is accordingly of the opinion that B-BBEE Act and the Amendment Bill are fatally flawed in as far as they negate the foundational value of non-racialism and in as far as they thereby undermine the foundational rights to equality and human dignity of South African citizens on the basis of their race.

30. It is also of the opinion that B-BBEE Act has not, and the Amendment Bill will not, promote equality for the great majority of disadvantaged black South Africans.

31. It accordingly recommends that the Act and the Bill should be scrapped and should be replaced with measures that - on the one hand - will effectively promote the equality of all South Africans and, on the other, will avoid unfair discrimination against citizens on the basis of their race.



D W Steward
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FW DE KLERK FOUNDATION