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THE TRUE SIGNIFICANCE OF THE *EMPLOYMENT EQUITY AMENDMENT BILL*

By Dave Steward: Chairman, FW de Klerk Foundation

The *Employment Equity Amendment Bill*, now before Parliament, is the latest move in a long process that is progressively diminishing the economic space within which minorities can operate.

It is, of course, essential that the economy must be open to all South Africans at all levels - but this can be achieved far more effectively through natural economic evolution and by prohibiting unfair discrimination than by imposing a system in which appointments, promotions and tenders are based on race rather than on individual merit and effort.

The Amendment Bill will give the Minister of Labour the power to establish sectoral numerical targets to ensure *“equitable representation of suitably qualified people from designated groups (black South Africans, women and persons with disabilities) at all occupational levels in the workforce.”* “Designated employers” - i.e. those that employ more than 50 people - will have to ensure that the “numerical goals” in their employment equity plans comply with the applicable sectoral numerical target.

The Amendment Bill must, like so much else in South Africa, be viewed within the context of the ANC’s National Democratic Revolution and its latest iteration known as Radical Economic Transformation. “Radical Economic Transformation” is defined as *“a fundamental change in the structure, systems, institutions and patterns of ownership, management and control of the economy in favour of all South Africans...”*

One of the ANC’s principal tools to achieve this goal is the requirement that the workforce, at all levels, must reflect the demographic profile of the economically active population - i.e. 79% black, 9% Coloured, 9% White and 3% Indian.

The government has already succeeded in achieving demographic representivity in the public service, SOEs and the security forces - usually to the immense detriment of the organisations involved. It has long wanted to achieve demographic representivity in the private sector as well. In 2012, Minister Rob Davies insisted that *“we need to make sure that in the country’s economy, control, ownership and leadership are reflective of the demographics of the society in the same way the political space does”*.

The requirement for demographic representivity in the private sector is rooted in ANC ideology and not in the Constitution - which does not require any institutions other than the Public Service and the judiciary to be *“broadly representative of the South African people”* - and even there, employment practices must also *“be based on ability, objectivity and fairness”*.

If it had been the intention of the drafters of the Constitution to impose demographic representivity on other sectors of the economy and society they would certainly have made



specific provision for such a measure - particularly in view of its far-reaching implications for the economy, for society and for the future of minorities. But there is no such provision.

The other justification of demographic representivity lies in the Constitutional Court's interpretation of section 9(2) of the Constitution, which permits the promotion of the achievement of equality through *"legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination"*.

In its 2004 judgment in *Minister of Finance v Van Heerden* the Court ruled that *"If a measure properly falls within the ambit of section 9(2) it does not constitute unfair discrimination"* (my emphasis) and need not therefore be subjected to scrutiny in terms of sections 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.

In his separate judgment, Sachs J disagreed with Court's approach. Although he concurred in the judgment, he insisted that

"...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" and added that *"it would be illogical to say that unfair discrimination by the state is permissible provided that it takes place under section 9(2)."*

The *Van Heerden* judgment has since then provided the judicial foundation for most subsequent affirmative action measures - including the imposition of demographic representivity - and it has done so on the basis - irreconcilable with the Rule of Law - that it was no longer necessary to test the fairness of such measures.

In terms of *Van Heerden*, section 9(2) affirmative action measures are automatically fair provided only that they comply with the following three internal tests:

- *"whether the measure targets persons or categories of persons who have been disadvantaged by unfair discrimination"*;
- whether the *"measure is designed to protect or advance such persons or categories of persons"*; and that
- the measure *"must promote the achievement of equality"*.

The ANC's concept of demographic representivity - and its further extension in the Amendment Bill - fails on all three grounds.

Firstly, many of the beneficiaries of affirmative action measures can no longer be regarded as disadvantaged. Most come from the top 10% to 15% of the black population and some are members of the super-advantaged black elite. The great majority of really disadvantaged black South Africans have not benefited at all.



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In 2016, the UN Committee that monitors compliance with the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD) expressed concern regarding South Africa's lack of "*comprehensively disaggregated data on the impact of special measures*". The South African Human Rights Commission (SAHRC) in its 2017-18 Equality Report also recommended that the EE Act be amended to "*target more nuanced groups on the basis of need and taking into account social and economic indicators*".

Such disaggregation is essential. It is absurd to bind affirmative action measures to the demographic profile of South Africa's economically active population without considering the pool of available expertise, the circumstances of each case and the levels of actual advantage or disadvantage of the individuals involved.

Similarly, it is irrational to measure senior and top management levels solely on the basis of demographic representivity. By definition, most top and senior managers will be in the 45 to 65 age group, with a university qualification. Their demography will differ substantially from that of the national economically active population and would explain the present over-representation of whites in top and senior management positions. Also, many of those in top and senior management positions would have attained those positions because they had played significant roles in founding and building the companies that they now own or manage.

Van Heerden's second test also fails. The measures that the State has adopted in terms of section 9(2) have demonstrably failed to advance truly disadvantaged persons. The roots of inequality in South Africa lie - apart from the legacy of historic inequality - overwhelmingly in:

- the dismal failure of our schools to provide decent education;
- catastrophic levels of unemployment caused by the government's rigid labour policies; its interventionist regulations; and its failure to achieve high levels of economic growth since 2007;
- poor levels of health, social, and policing service delivery; and
- the fact that more than 65% of children grow up in single-parent families.

Much greater progress would have been made in achieving equality had the State designed measures to address these critical problems.

Thirdly, the race-based measures adopted by the State have failed to promote equality.

South Africa is now an even more unequal country than it was in 1994. In 1994 its GINI index was 59.3: now it stands at 63 - making it, according to the World Bank, the most unequal country in the world.



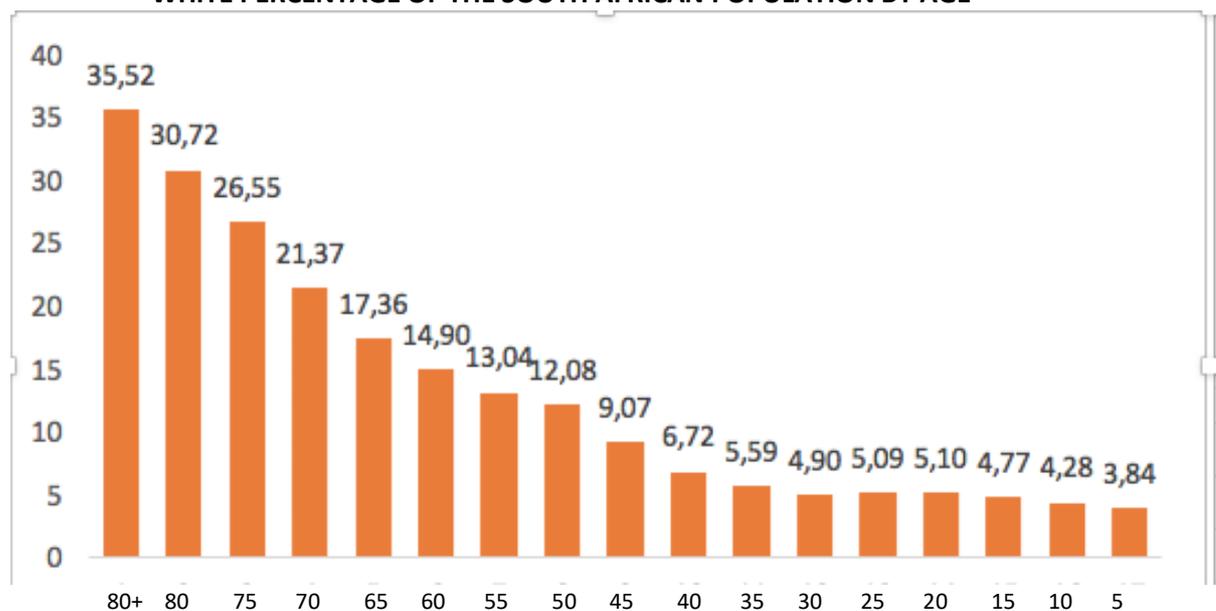
There are now 1.7 million Black, Coloured and Indian households with higher monthly expenditure than 449 000 white households. At the same time, there are 3.94 million Black, Coloured and Indian South Africans with higher educational qualifications than 1.83 million whites. On what basis of equity can Blacks, Coloureds and Indians from more advantaged income and educational backgrounds possibly be given automatic preference over less advantaged whites? And how would such discrimination promote equality?

Finally, the *Van Heerden* judgment sets another important limitation on section 9(2) measures: it warns that

“a measure should not impose such substantial and undue harm on those excluded from its benefits that our long-term constitutional goal (of a non-racial, non-sexist society) would be threatened.”

Whites and Indians comprise respectively 15.5% and 3.76% of the South African population over 40 - but only 3.8% and 1.6% of the population below the age of five. In a situation where jobs, tenders and economic benefits are allocated on the basis of racial percentages and not individual merit - demographic representivity clearly presents whites and Indians not only with the prospect of “substantial and undue harm” but also with a potential existential crisis. This crisis will be exacerbated if the white and Indian populations are further reduced by emigration forced on them by the escalating implementation of measures based on demographic representivity and the growing perception that their children have no future in South Africa.

WHITE PERCENTAGE OF THE SOUTH AFRICAN POPULATION BY AGE





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Whites and Indians comprise respectively 37.7% and 7.05% of the South African population with graduate or post-graduate qualifications. If jobs at all levels in the private sector are allocated to them in accordance with their percentages of the economically active population, what then would become of the 76% surplus white, and 57% surplus Indian, graduates and post-graduates?

The implementation of demographic representivity in the private sector with the same rigour that has characterised its implementation in the public sector will as a matter of mathematical certainty have potentially catastrophic implications for the future viability of South Africa's minority communities.

This is the true significance of the *Employment Equity Amendment Bill*.