Ulawulo Lomthetho/Ngokomthetho
Puso ya Molao
Oppergesag van die Reg

RULE OF LAW PROJECT
FREE MARKET FOUNDATION

May 2018

SUBMISSION TO THE DEPARTMENT OF TRADE AND INDUSTRY ON THE CODES OF GOOD PRACTICE ON BROAD-BASED BLACK ECONOMIC EMPOWERMENT, 2018

Attn: Jacques Manus, BEE Unit, Department of Trade and Industry

Johannesburg PO Box 4056 | Cramerview 2060 | **Tel** 011 884 0270 | **Email** martinvanstaden@fmfsa.org
NPO No 020-056-NPO | PBO & Section 18A(1)(a) No 930-017-343

www.RuleofLaw.org.za

Contents

1. Executive summary

The discourse on racial transformation overlooks the fact that any widespread advancement, especially Broad-Based Black Economic Empowerment, is possible only if there is increased aggregate wealth and prosperity. Interventions such as the 2018 BBBEE Codes of Good Practice, thus cannot possibly achieve their objectives unless accompanied by related policies that result in high rates of economic growth which is (a) sustainable and (b) reaches most citizens.

In other words, BBBEE interventions on their own run the risk of creating a misleading impression that it can achieve empowerment, whereas it is inherently incapable of doing so in the absence of policies not addressed in the particular law or regulation itself.

The world's experience leaves no doubt that the only policies likely to succeed are for the government to revert to a broad-based paradigm of pro-market reforms.

The FMF has consistently questioned the constitutionality of BEE-related laws in light of section 1(b) of the Constitution's prohibition on racialism, and section 1(c)'s commitment to the Rule of Law. Whereas the FMF supports the intention behind BEE – broad-based empowerment of the nation's previously disadvantaged – it must be done in line with the law.

The absence of a socio-economic impact assessment accompanying the codes is also worrying. Such an assessment would clearly indicate the pros and cons of the intervention and show policymakers where to bring about modifications, to ensure that the welfare of ordinary South Africans is not compromised as a result of the intervention. In its absence, the economy could be detrimentally affected by operation of the law of unintended consequences.

Government should pursue policies that are not only unambiguously lawful, but are also more likely to achieve stated and laudable objectives.

That better human wellbeing is the outcome of higher economic growth is illustrated by the findings published in the *Economic Freedom of the World* report. The report ranks countries according to measurement of their level of economic freedom. South Africa currently features at position 95 out of 159 countries (*Economic Freedom of the World: 2017 Annual Report*). After being placed 46th in 2000, South Africa's measure of economic freedom has gone into a sorry decline, hitting 70th in 2005 and 82nd in 2010.

Economic freedom is defined in terms of the fundamental principles of protection of private property, voluntary exchange and freedom to compete. Policies collectively defined within these parameters would launch this country on a trajectory of high economic growth and overall happiness, especially for those targeted by empowerment policies.

Prepared by:

Martin van Staden
Legal Researcher
Free Market Foundation

2. Free Market Foundation and Rule of Law Project

The Free Market Foundation (FMF)[1] is an independent public benefit organisation founded in 1975 to promote and foster an open society, the Rule of Law, personal liberty, and economic and press freedom as fundamental components of its advocacy of human rights and democracy based on classical liberal principles. It is financed by membership subscriptions, donations, and sponsorships.

Most of the work of the FMF is devoted to promoting economic freedom as the empirically best policy for bringing about economic growth, wealth creation, employment, poverty reduction, and greater human welfare.

The FMF's Rule of Law Project is dedicated to promoting a climate of appreciation throughout South Africa, among the public and government, for the Rule of Law; continually improving the quality of South African law; identifying problematic provisions in existing and proposed laws, and, where feasible, advocating rectification.

3. Introduction

On 29 March 2018, the Minister of Trade and Industry, Rob Davies, introduced the Codes of Good Practice on Broad-Based Black Economic Empowerment (BBBEE) for public commentary. This submission will outline the general principles of economics, constitutionalism, and transparent governance that should inform any empowerment policy pursued by government, with a specific focus on BBBEE and transforming South African society.

Black Economic Empowerment (BEE), and by extension BBBEE, are initiatives by the South African government to realise the country's full economic potential by incorporating the marginalised majority (historically disadvantaged black South Africans) into the economic mainstream. To date the emphasis has been on transformation of shareholding ownership rather than the creation of new and sustainable jobs or increased business activity.

Funding provided by banks for these purposes have not contributed materially to the job creation in general or specifically for the previously disadvantaged. The introduction of BEE Codes of Good Practice and the relevant sector charters turned the focus on employment equity, management control, skills development, enterprise development and preferential procurement for black-owned businesses.

Funding advanced to BEE special purpose vehicles (SPVs) which acquired shares in "white-owned" companies were used to transfer ownership from existing shareholders to black shareholders. Empowerment transactions did not require the injection of direct equity by empowerment shareholders to fund expansion and acquisitions that would enhance shareholder returns and create employment. In most instances, the position of BEE shareholders and/or beneficiary groups was passive with limited to no operational involvement. It is thus difficult to conclude that to date there has been a meaningful contribution to job creation for previously disadvantaged South Africans or the fulfilment of the country's potential. Funds have generally been used to compensate existing shareholders. Most BEE transactions have resulted in shareholders, including a growing number of direct and indirect black shareholders, incurring significant economic costs and dilution of assets in in order to facilitate empowerment transactions.

[1] www.freemarketfoundation.com

The creation of black-controlled entities such as Exxaro and ARM created black industrialists who became wealthy individuals by global standards. This has to some extent delivered on the government's objective of redressing economic imbalances. It should be acknowledged that BEE was set up to create a black middle class and not sustainable jobs for South Africa's working class where black unemployment has increased substantially and where economic imbalances between white and black people persist.

There have been BEE holding company structures such as RBH and Wiphold where shareholdings in operating entities resulted in material cashflows through dividends and investment disposals. These cashflows were effectively channelled to communities for skills development and BEE entrepreneurial seed capital, thus indirectly contributing to future job creation. The Sishen Iron Ore Scheme and the FirstRand Foundation have also invested into job creating ventures. However, these are exceptions as the cashflows from investments are in most instances not significant. The need for distributions to beneficiaries for general consumption typically outweighs the investment and skills development rationale.

If, on the other hand, debt funding is advanced by banks and financial institutions to empowerment structures who in turn deploy that capital to re-invest directly in an underlying operating entity for growth, there is a stronger likelihood of meaningful job creation. There are companies that have successfully raised new capital for growth as part of a BEE shareholding transaction. The government's new approach of supporting black industrialism targeted at investment of growth capital in a specified labour-intensive sector can, if successfully implemented, contribute more directly to sustainable job creation.

A separate point is that the fall in commodity prices, the general global and domestic economic slowdown, and uncertainties have been conducive to neither capital investment growth nor job creation. This submission explores these and related issues and recommendations which, we believe, merit dispassionate analysis and discussion with a view to positive legislative reform.

4. Empowerment policy

What characterises the formulation of specific policies and laws dealing with relatively narrow aspects of the bigger picture is that truly effective determinants of desired outcomes are easily overlooked. This is captured in the idea of *not seeing the wood for the trees*.

The discourse on racial transformation in South Africa tends to overlook a simple yet profound fact, namely that all widespread advancement, especially Broad-Based Black Economic Empowerment, is possible only if there is increased aggregate wealth and prosperity.

Applied to South Africa, this means that there cannot be meaningful advancement for 80% of the population (would-be beneficiaries of BBBEE policy) unless there is general prosperity. Laws and regulations of this nature cannot possibly achieve its objectives unless accompanied by related policies that result in high rates of economic growth which is (a) sustainable and (b) reaches most citizens.

In other words, BBBEE laws and regulations on their own run the risk of creating a misleading impression that it can achieve empowerment, whereas it is inherently incapable of doing so in the absence of policies not addressed in the particular law or regulation itself.

The world's experience shows that high rates of growth, and *only* high growth, promote broad-based empowerment and enrichment spontaneously, even without special measures such as this. High growth is naturally egalitarian.[2]

Policies that are likely to result in general prosperity, including BBBEE, and ones that are unlikely to do so, are not "rocket science". The empirical evidence worldwide is straightforward and incontestable: general prosperity will result from, and only from, freer market policies (as defined by recognised criteria cited below). Conversely, it is clear that broad-based prosperity and empowerment are extremely unlikely if the economy is relatively unfree.

Notwithstanding rhetoric to the contrary, there are virtually no exceptions. It is mistakenly believed, for instance, that the world's celebrated winners such as China, Sweden, Singapore, South Korea, Uganda, Botswana and Mauritius are examples of non-market prosperity due to successful government intervention in the economy. The fact is that such countries are either amongst the freest economies on Earth (according to recognised and independent indices), or are transforming rapidly towards free market policies. This is not an ideological statement, it is simply a fact.

On the other hand, countries whose economies are objectively classified as less free, or transforming from more towards less economic freedom, stagnate or contract *at the direct expense of broad-based empowerment*. That the poor are the primary victims of low economic growth and interventionism explains why they always and everywhere risk and often lose their lives to flee from less to more economic freedom. The poor in Cuba and Mexico flee to America, whereas the poor in America (who are amongst the richest people on Earth) never flee the other way. No one escaped from West to East Germany, and no one flees from South to North Korea, India to Pakistan, or Botswana to Zimbabwe.

The empirical and independent evidence for these observations is readily and freely available.[3]

---

[2] There is an erroneous assumption that a bigger income "gap" (which is an inevitable part of high growth) means the poor are getting poorer, whereas all that's happening, as a matter of simple arithmetic, is that the *nominal* gap widens when the rich get richer and the poor get richer faster.

[3] The single most important lesson from the world's experience is that countries with high or rising scores on the following policy indices tend to outperform countries with low or falling scores:

- Competitiveness Index (WEF) www.weforum.org/reports/the-global-competitiveness-report-2017-2018
- Corruption Perceptions Index (TI) https://www.transparency.org/news/feature/corruption_perceptions_index_2017
- Democracy Index (EIU) https://infographics.economist.com/2018/DemocracyIndex/
- Doing Business Index (WB) http://www.doingbusiness.org/rankings
- Economic Freedom Index (WSJ-Heritage) http://www.heritage.org/index/
- Economic Freedom of the World Index (Fraser-EFN) https://www.fraserinstitute.org/studies/economic-freedom-of-the-world-2017-annual-report
- Freedom in the World Index (FH) https://freedomhouse.org/report-types/freedom-world
- International Country Risk Guide (ICRG) https://epub.prsgroup.com/products/international-country-risk-guide-icrg
- International Property Rights Index (IPRA) http://www.internationalpropertyrightsindex.org/
- Habits of Highly Effective Countries, Lessons for SA (Habits) http://web.archive.org/web/20101221174651/http://www.policynetwork.net/development/publication/habits-highly-effective-countries-lessons-south-africa

  These indices draw on about fifty recognised measures of what governments do, covering such issues as how big they are, to what extent they control and redistribute wealth, how much tax they extract, and whether they apply the rule of law. Indicators of success and failure are scores on recognised

During the twilight years of apartheid, South Africa's score on all indices measuring personal, social and economic freedom declined. Accordingly, and predictably, the economy stagnated so that per capita incomes in 1994 were, in inflation-adjusted currency, the same as they were a generation before – the majority of South Africans had experienced no improvement in living standards for 25 years.

After 1994, as would be expected, the freedoms gained by all South Africans led to a surge in production and economic growth. The government, to its credit, pursued policies that modestly improved our scores on all relevant indices and we were rewarded by a decade of growth, including an impressive rate of broad-based black economic advancement. Unfortunately, positive trends on all relevant indices plateaued and started declining around 2007. This, as opposed to the so-called international financial crisis, is the most probable explanation for retarded growth and increased unemployment in this country. Amongst the reasons why the financial crisis cannot be regarded as a determinant is that it is a crisis confined to a minority of the world's countries, namely (a) those few that were heavily invested in sub-prime mortgage derivatives and (b) a few European countries with a "sovereign debt crisis" (that is to say countries whose governments are insolvent due to profligate financial policies).

It is important to note that most BBBEE achieved to date cannot be attributed to legislation or regulations, and can plausibly be attributed only to improved economic performance due to the post-1994 shift towards market-based policies. This is clear from the only substantive empirical research on the issue.[4]

Regardless of the provisions of BBBEE laws and regulations, there is no positive outlook for BBBEE unless the government reinstates the post-1994 trend towards pro-market policies. To implement BBBEE without reinstating that trend would be futile and misleading. In short, if the government is serious about BBBEE, it should set as a firm national goal the attainment of improved scores on the indices listed in the footnote above. To do that, the government should reverse the deluge of regulation and red tape that has characterised the past few years, familiarise itself with the specific components of the indices, and resolutely implement reforms shown to be statistically significant in the definitive analysis that compares the decisive determinants of prosperity internationally with South Africa.[5]

5. The Constitution

That the constitutionality of race-based preferential policies has not yet been widely challenged does not mean that such policies are constitutional. It is widely believed, probably mistakenly, that the prohibition in section 1(b) and 1(c) of the Constitution[6] on (general but in particular racial) discrimination is largely nullified by section 9(2) in the Bill of Rights, and that what the section allows for government applies horizontally (as between citizens/enterprises). We draw attention to the fact

measures of outcomes, namely, human and environmental welfare. There are about two hundred such measures, and countries with high scores on policy indices – that is countries with more political, civil and economic freedom – tend to have high scores on welfare indices. Worldwide, prosperity and freedom tend to coincide.

4 Atud V. "Black Economic Empowerment and Job Creation" in Nolutshungu T (ed). *Jobs Jobs Jobs.* (2011). Johannesburg: Free Market Foundation. 213. Available online: http://www.freemarketfoundation.com/article-view/jobs-jobs-jobs.

5 Louw L. *Habits of Highly Effective Countries*. (2006). Johannesburg: Law Review Project. Available online: http://www.freemarketfoundation.com/publications-view/habits-of-highly-effective-countries/.

6 Constitution of the Republic of South Africa, 1996.

that this may not be so for two reasons. Firstly, there is no basis in South African law (*sans* the aberration of apartheid, which has been removed from the law) for race classification, and there are therefore no justiciable criteria for interpretation and enforcement.

The definition, for example, of "black people" in South Africa's empowerment legislation, refers to "Africans, coloureds and Indians". Even formal, elaborate and convoluted attempts to define these terms in ways that were jurisprudentially sound under apartheid, failed. This is not the place to elaborate, but a moment's reflection shows, for instance, that "Indians" is an extremely amorphous term, perhaps void for vagueness, given the term's wide range of ethnic, genetic, cultural, origin and other meanings.

Definitional problems also arise for other groups, such as Malays. One of the problems with xenophobia is that there is no distinction between citizens, lawful residents and illegal immigrants.

As the law stands, the number of South Africans who do *not* fall within the definition of "black people" is surprisingly few. Possibly only Anglo-Saxon whites, Jews, Chinese, Arabs and the like – less than 5% of the population. Since provision is made for gender preferences as well, the number excluded from the law is even fewer. This is why the only way to achieve the objective of broad-based advancement is generalised national prosperity as stated above.

The only provision in the Constitution that could possibly permit race-based policies is in section 9. This provision must be read with the rest of the section and section 1 to be properly understood. According to section 1:

> "Republic of South Africa
>
> 1. The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
>
> (b) Non-racialism and non-sexism.
>
> (c) Supremacy of the constitution and the rule of law.
>
> (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

Section 9 is as follows:

> "Equality
>
> 9. (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
>
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
>
> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or

social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

The first observation is that the second sentence in section 9(2) is the only provision that could be construed as permitting race-based discrimination or preferences. This is a much narrower provision than is generally recognised. It should be noted, *inter alia*, that it makes no reference to race. The wording apparently applies (by virtue of surrounding provisions and content) only to measures that may be taken by the government. In other words, it does not appear to allow for "horizontal" preferential policies as between citizens or within the private sector.

The second observation is that it provides for measures to "protect and advance" people who "are" (i.e. presently) disadvantaged and whose disadvantage is due to unfair discrimination. Accordingly, the provision applies, by way of illustration, to a gay or physically-disabled person discriminated against unfairly at any time (past or future), regardless of race or historical factors. Measures may be taken by the government (probably not private people) to protect and advance such people.

We repeat our emphasis that drawing attention to the apparent contradiction between this legislation and the Constitution carries no implication that we are opposed to measures specifically aimed at and likely to achieve transformation. On the contrary, our concern is the absence of policies that are likely to make a real difference expeditiously for ordinary black South Africans – the millions of victims of apartheid and their children. We are concerned about the fact that conditions for many black South Africans have deteriorated while many – perhaps more than generally realised – have experienced substantial progress, not through race-based policies in most cases, but through spontaneous participation in the market economy thanks to their liberation from the crime against humanity of apartheid. We repeat and stress the importance and significance of Vivian Atud's research in this regard (cited above).

We also repeat by way of emphasis that narrowly focussed laws as opposed to a positive general economic policy paradigm are not only destined to fail, but may create unrealistic, misleading and potentially destabilising expectations.

The measures envisaged in BBBEE laws and regulations may well benefit very few people substantially, or many people inconsequentially, but they cannot possibly achieve their stated objective of broad-based empowerment unless accompanied by a purposeful and resolute return to a pro-market paradigm that informs all government economic policy.

6. The Rule of Law

Section 1(c) of the Constitution provides that South Africa is founded upon the supremacy of the Constitution and the Rule of Law. Section 2 provides that any law or conduct that does not accord with this reality is invalid. This co-equal supremacy between the text of the Constitution and the doctrine of the Rule of Law remains underemphasised in South African jurisprudence, but it is important to note for the purposes of this submission.

One of the Constitutional Court's most comprehensive descriptions of what the Rule of Law means was in the case of *Van der Walt v Metcash Trading Ltd*. In that case, Madala J said the following:

> "[65] The doctrine of the rule of law is a fundamental postulate of our constitutional structure. This is not only explicitly stated in section 1 of the Constitution but it permeates the entire Constitution. The rule of law has as some of its basic tenets:
>
> > 1. the absence of arbitrary power – which encompasses the view that no person in authority enjoys wide unlimited discretionary or arbitrary powers;
> >
> > 2. equality before the law – which means that every person, whatever his/her station in life is subject to the ordinary law and jurisdiction of the ordinary courts.
> >
> > 3. the legal protection of certain basic human rights.
>
> [66] The concept of the rule of law has no fixed connotation but its broad sweep and emphasis is on the absence of arbitrary power. In the Indian context Justice Bhagwati stated that:
>
> > 'the rule of law excludes arbitrariness and unreasonableness.'
>
> I would also add that it excludes unpredictability. In the present case that unpredictability shows clearly in the fact that different outcomes resulted from an equal application of the law."[7]

The Rule of Law thus:

- Permeates the entire Constitution.
- Prohibits unlimited arbitrary or discretionary powers.
- Requires equality before the law.
- Excludes arbitrariness and unreasonableness.
- Excludes unpredictability.

The Good Law Project's *Principles of Good Law* report largely echoed this, saying:

> "The rule of law requires that laws should be certain, ascertainable in advance, predictable, unambiguous, not retrospective, not subject to constant change, and applied equally without unjustified differentiation."[8]

The report also identifies four threats to the Rule of Law,[9] the most relevant of which, for purposes of this submission, is the following:

> "[The Rule of Law is threatened] when laws are such that it is impossible to comply with them, and so are applied by **arbitrary discretion** […]"

---

7 *Van der Walt v Metcash Trading Ltd* 2002 (4) SA 317 (CC). At paras 65-66. Citations omitted.

8 Good Law Project. *Principles of Good Law.* (2015). 14.

9 Good Law Project (footnote above) 29.

Friedrich August von Hayek wrote:

> "The ultimate legislator can never limit his own powers by law, because he can always abrogate any law he has made. The rule of law is therefore not a rule of the law, but a rule concerning what the law ought to be, a meta-legal doctrine or a political ideal." [10]

What is profound in Von Hayek's quote is that he points out that *the* Rule of Law is not the same as *a* rule of *the* law. Indeed, any new Act of Parliament or municipal by-law creates and repeals multiple 'rules of law' on a regular basis. The Rule of Law is a doctrine, which, as the Constitutional Court implied in *Van der Walt*, permeates all law, including the Constitution itself.

Albert Venn Dicey, known for his *Introduction to the Study of the Law of the Constitution*, and considered a father of the concept of the Rule of Law, wrote that the Rule of Law is "the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even wide discretionary authority on the part of the government".[11]

Dicey writes "the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint".[12] He continues, saying the Rule of Law means "the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government".[13]

The opposition to arbitrary power should not be construed as opposition to discretion in and of itself. Officials use discretion to determine which rules to apply to which situation, and thus some discretionary power is a natural consequence of any system of legal rules. However, the discretion must be exercised per criteria which accord with the principles of the Rule of Law, and the decision itself must also accord with those principles.

A common example of arbitrary discretion is when a statute or regulation empowers an official to make a decision "in the public interest". What is and what is not "in the public interest" is a topic of much debate, and empowering officials to apply the force of law in such a manner bestows upon them near-absolute room for arbitrariness. The "public interest", however, can be one criterion among other, more specific and unambiguous criteria.

The fact that some discretion should be allowed is a truism; however, the principle that officials may not make decisions of a substantive nature still applies. Any decision by an official must be of an enforcement nature, i.e. they must do what the legislation *substantively* requires. For instance, an official cannot impose a sectoral minimum wage. The determination of a minimum wage is properly a legislative responsibility because it is of a substantive nature rather than mere enforcement. Unfortunately, the Basic Conditions of Employment Act gives the Minister of Labour the authority to

---

10 Von Hayek FA. *The Constitution of Liberty.* (1960). 206.
11 Dicey AV. *Introduction to the Study of the Law of the Constitution.* (1959, 10th edition). 202-203.
12 Dicey (footnote above) 184.
13 Dicey (footnote above) 198.

make "sectoral determinations" – which includes determining a minimum wage – which is a clear violation of the Rule of Law and the separation of powers.[14]

7. Non-racialism

7.1 The right to equality

Section 7 of the Constitution provides that government must "respect, protect, promote and fulfil the rights in the Bill of Rights". Government cannot create new fundamental rights from thin air, especially if they potentially conflict with existing rights in the Constitution. Indeed, section 39(2) provides that when legislation is interpreted the spirit, purport, and objects of the Bill of Rights must be promoted. Thus, government has the constitutional obligation to protect and fulfil *those rights which appear in the text of the Bill of Rights as it stands*, which span sections 7 to 39.

Section 9 of the Constitution, which contains the right to equality, along with legislation like the Promotion of Equality and Prevention of Unfair Discrimination Act[15] and the Employment Equity Act,[16] provide the basis upon which racial policy interventions are apparently built in South Africa.

Section 9(1) is the foundation of the provision and provides the general principle: Legal equality between all people of whatever race and whatever sex.

Section 9(2) provides that the government must ensure that there is full and equal enjoyment of all rights and freedoms. The "rights" and "freedoms" this provision refers to are those rights which *already appear* in the Constitution, as the discussion on section 7 above indicates.

Section 9(2) also provides that the government must enact "legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination".

The following provision, section 9(3), provides that government may not discriminate unfairly against anyone based on race, sex, and various other grounds. "National legislation must be enacted to prevent or prohibit unfair discrimination", according to section 9(4), and discrimination based on race or sex "is unfair unless it is established that the discrimination is fair", according to section 9(5).

7.2 Constitutionality of racial discrimination

Many people argue that affirmative action is unconstitutional because it violates the right to equality in section 9 of the Constitution.

This, however, amounts to reading the Constitution under the haze of confirmation or selection bias.

Section 9(2) of the Constitution unequivocally gives government the power, and indeed the obligation, to engage in positive intervention in society to achieve substantive – rather than merely formal – equality. In the 2004 case of *Minister of Finance v Van Heerden*, Moseneke J said for the majority of the Constitutional Court that without such a positive obligation on government "to eradicate socially

[14] Section 51 of the Basic Conditions of Employment Act (75 of 1997).
[15] Promotion of Equality and Prevention of Unfair Discrimination Act (4 of 2000).
[16] Employment Equity Act (55 of 1998).

constructed barriers to equality and to root out systematic or institutionalised under-privilege, the constitutional promise of equality before the law and its equal protection and benefit must, in the context of our country, ring hollow".[17]

If affirmative action is regarded as unconstitutional, section 9(2) of the Constitution becomes redundant. This would mean a complete misinterpretation of the Constitution and amount to the court or reader of the document replacing what the Constitution provides with their own opinion; and will amount to the rule of man rather than the Rule of Law.

Where in this elaborate scheme, however, are the Founding Provisions – the Rule of Law and South Africa's section 1(b) commitment to non-racialism and non-sexism?

As Madala J implied, the Founding Provisions permeate the Constitution, including the section 9 right to equality. Non-racialism is *engrained within the fabric of section 9*, as it is within the rest of the Constitution. When the legislature set out to define what "unfair discrimination" means in the Equality Act, it should have understood that it cannot remove section 9 from the blanket of non-racialism within which it was wrapped by default.

The Constitutional Court has in various cases affirmed this principle.

In *SAPS v Solidarity*, Moseneke J said that South Africa's "quest to achieve equality must occur within the discipline of our Constitution".[18] And in *Bel Porto v Premier of the Western Cape,* Chaskalson J said that the "process of transformation must be carried out in accordance with the provisions of the Constitution and its Bill of Rights".[19]

The Constitutional Court has, however, often made leaps of logic without further ado. The very next line by Chaskalson J was that "in order to achieve the goals set in the Constitution, what has to be done in the process of transformation will at times inevitably weigh more heavily on some members of the community than others".

Nowhere does the Constitution provide or imply that the achievement of equality for some must necessarily or "inevitably" come at the expense of others. This is an example of the leap in logic known as the zero-sum fallacy. It is clearly implicit in Chaskalson's statement that equality is a limited resource which must be distributed. To make the have-nots equal with the haves, the haves must in some way be disadvantaged.

This, of course, is not only legally false, but economically false as well. The achievement of equality need not be at anyone's expense because wealth can be created anew. More importantly, however, the achievement of equality *may not be* at anyone's expense on the basis of race or sex.

If the Constitutional Court is essentially incorrect in this interpretation, then what does the Constitution *actually* provide in section 9(2), and does it prohibit affirmative action entirely?

---

17 *Minister of Finance and Other v Van Heerden* 2004 (6) SA 121 (CC). At para 31.

18 *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC). At para 30.

19 *Bel Porto School Governing Body and Others v Premier of the Western Cape Province and Another* 2002 (3) SA 265 (CC). At para 7.

The Constitution is not a classical liberal constitution, unlike that of the United States. This is evident from the welfare rights provided for in the Bill of Rights. This fundamentally means that the Constitution does envision a role for government to try to uplift the poor and marginalised in society, whereas a classical liberal constitution would leave that in the hands of the people themselves and market forces.

Section 9(2), furthermore, clearly allows government to positively intervene in society to achieve "full and equal enjoyment of all rights and freedoms" in the Bill of Rights. The Constitution, however, expressly provides, not once, not twice, but *thrice*, that such intervention cannot be of a racial or sexist character. It goes to great lengths to condemn racialism.

In section 1(b), the Constitution provides that South Africa is *founded* on the value of non-racialism. Section 7(1) provides that the Bill of Rights *enshrines* the rights of *all* people and *affirms* the value of equality. Section 9(3) provides that unfair discrimination based on race is prohibited unless the discrimination is fair. And the determination of the fairness of discrimination *cannot* take place without due regard to the founding value of non-racialism.

Section 9(2), on this understanding, enables the State to engage in affirmative action on non-racial and non-sexist grounds – in other words, affirmative action for *anyone* and *everyone* who has been prejudiced by unfair discrimination.

This will, at the end of the day, still be overwhelmingly beneficial for black South Africans, but it cannot exclude white South Africans or South Africans of whatever other race who have similarly been victims of unfair discrimination.

Furthermore, this understanding of pursuing equality will ensure that it does not benefit some at the expense of others.

The allowance of government interventions based on race renders section 1(b) of the Constitution completely redundant, as it loses all meaning if government and the Constitutional Court can simply 'interpret' it as allowing such interventions.

Racial policy intervention is precluded not only by the Rule of Law principle that all must be bound by the same law, but by the very text of the Constitution itself, despite the Constitutional Court having interpreted it otherwise.

8. Socio-economic impact assessment

The opposite of arbitrariness – the principal phenomenon the Rule of Law stands against – is reasonableness. Reasonableness consists of two elements, namely, rationality and proportionality. Proportionality means that there must not be an imbalance between the adverse consequences of a policy and the beneficial consequences.[20] Rationality means that evidence must support the policy. Stated differently, there must be a rational connection between the purpose of the policy and the

[20] Hoexter C. *Administrative Law in South Africa*. (2012). 344.

solutions proposed.[21] It has also been said that a third element, effectiveness, is a part of reasonableness.

It stands to reason that the requirement of rationality, read together with section 195(1)(g) of the Constitution, which provides that transparency "must be fostered by providing the public with timely, accessible and accurate information", requires that policy or legislative interventions must be supported by demonstrable evidence. To determine whether a policy will have the consequence intended by the enacting authority, a study must be done as a matter of course, and must be publicly available to satisfy the principle of transparency. If a study is not conducted, it means the intervention is not supported by evidence, and is therefore irrational and unconstitutional, and if a study is not released to the public, government is failing to comply with section 195(1)(g), and thus, the process is unconstitutional.

In *Principles of Good Law*, the Good Law Project writes:[22]

> "Although widely divergent, all the international assessment models amount ultimately to institutionalised procedures for determining the need for a law and its expected benefits. They are also concerned with the cost to government of implementation, as well as the capacity of government to police and enforce the law and the cost to the public of compliance. Other aspects considered are the economic and other likely impacts, the prospect of unexpected or unintended consequences; and the behaviour modifications likely to be promoted by the law and distortions that might flow from them."

It goes on to describe what a SEIA would encompass:[23]

> "2. **Socio Economic Impact Assessment** (SEIA). Multi-faceted analysis *and quantification* of:
>
> 2.1 The purposes of laws – precisely what 'mischief' they are addressing;
>
> 2.2 Desired consequences;
>
> 2.3 Estimated secondary and unintended effects, including impacts on the economy or society in general;
>
> 2.4 Feasibility and efficacy – prospects in practice of the law being observed, and if not, enforced by officialdom, police and the courts;
>
> 2.5 Costs and benefits – accurate and comprehensive estimates of costs of administration and implementation, enforcement and policing, compliance and avoidance/evasion/resistance;
>
> 2.6 Inter-departmental considerations – the extent to which other departments are implicated;
>
> 2.7 Administration and budget – advance provision for all budgetary, staffing, training and related needs; diversion or dilution of resources and capacity."

The Department of Planning, Monitoring and Evaluations' (DPME) SEIA System (SEIAS) guidelines describe the purpose of SEIA as follows:[24]

---

[21] Hoexter (footnote above) 340.

[22] Good Law Project (footnote above) 34.

[23] Good Law Project (footnote above) 35.

[24] Department of Planning, Monitoring and Evaluation. "Socio-Economic Impact Assessment System (SEIAS): Guidelines." (2015). 4.

"**3 The role of SEIAS**

SEIAS aims:

- To minimise unintended consequences from policy initiatives, regulations and legislation, including unnecessary costs from implementation and compliance as well as from unanticipated outcomes.
- To anticipate implementation risks and encourage measures to mitigate them."

The DPME regards SEIA as more than a mere cost-benefit analysis. SEIA, instead, must contribute to improving policy, rather than measuring their net value. It must, furthermore, "help decision makers to understand and balance" the impact of policy on different groups within society.[25]

That regulations or legislation can lead to unintended consequences is acknowledged by government. It may happen as a result of inefficiency, excessive compliance costs, overestimation of the benefits associated with the regulation, or an underestimation of the risks involved with following through with the regulation.[26]

The SEIA System applies to legislation and regulations, as well as policy proposals, like BBBEE codes.[27]

9. Conclusion

We fully support the objective of BBBEE and realise how easily this submission may create a profoundly false impression of being "negative" or "reactionary". We make a passionate plea to the government to implement policies that are not only unambiguously lawful, but go much further than what is envisaged, and are therefore much more likely to achieve stated and laudable objectives. The world's experience leaves no doubt that the only policies likely to succeed are for the government to revert to a broad-based paradigm of pro-market reforms. In our work, we provide a great deal of detail and specifics of which we mention only one by way of illustration, namely the unambiguous abolition of the legacy of apartheid land tenure.

The absence of socio-economic impact assessments accompanying BBBEE laws, regulations, and policies is further worrying. Government should feel confident that its intervention in private affairs will produce the laudable results it seeks to achieve, and, as a consequence, government must not shy away from doing the necessary evidence-based research to determine whether or not this is the case. A SEIA would clearly indicate the pros and cons of an intervention and show policymakers where to bring about modifications, to ensure the welfare of ordinary South Africans is not compromised as a result of the intervention.

By far the biggest, most dramatic, most politically popular and most effective single action (from a BBBEE perspective) the government can implement is the summary conversion of all land permanently occupied by black South Africans in "townships", "locations" and "informal settlements" (including RDP housing) to full unambiguous freely tradable title at zero cost to beneficiaries.

By 'zero cost', we mean no requirement to pay any arrear rents or rates, conveyancing, land survey, town planning, or electricity compliance, etc. No one knows how many pieces of land black South Africans already hold. According to informed estimates it may be as many as 5 million. At an average

[25] DPME (footnote above) 7.
[26] DPME (footnote above) 4.
[27] DPME (footnote above) 8.

value of, say, R100,000 each, that implies one trillion rand – the quickest, biggest and cheapest single source of BBBEE imaginable. Not only will dead capital be converted to dynamic capital in the hands of millions of households, but the country will in effect be a trillion rand wealthier.

That better human wellbeing is the outcome of higher economic growth is illustrated by the findings published in the *Economic Freedom of the World* report. The report ranks countries according to measurement of their level of economic freedom. South Africa currently features at position 95 out of 159 countries (*Economic Freedom of the World: 2017 Annual Report*). After being placed 46th in 2000, South Africa's measure of economic freedom has gone into a sorry decline, hitting 70th in 2005 and 82nd in 2010.

Economic freedom is defined in terms of the fundamental principles of protection of private property, voluntary exchange and freedom to compete. Policies collectively defined within these parameters would launch this country on a trajectory of high economic growth and overall happiness, especially for those targeted by empowerment policies.

Prepared by:

Martin van Staden
Legal Researcher
Free Market Foundation