



# EQUALITY REPORT

2017/18

Achieving substantive economic equality  
through rights-based radical socio-economic  
transformation in South Africa



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## **Acknowledgments**

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# EQUALITY REPORT

## 2017/18

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# ABBREVIATIONS AND ACRONYMS

<b>ACHPR</b>	African Charter on Human and Peoples' Rights
<b>ANC</b>	African National Congress
<b>B-BBEEA</b>	Broad-Based Black Economic Empowerment Act, 53 of 2003
<b>BEE</b>	Black Economic Empowerment
<b>CBO</b>	Community-based Organisations
<b>CEDAW</b>	Convention on Elimination of All Forms of Discrimination against Women
<b>CERD</b>	United Nations Committee on the Elimination of Racial Discrimination
<b>CEE</b>	Commission for Employment Equity
<b>CGE</b>	Commission for Gender Equality
<b>CRPD</b>	Convention on the Rights of Persons with Disabilities
<b>DBE</b>	Department of Basic Education
<b>DHET</b>	Department of Higher Education and Training
<b>DOJCD</b>	Department of Justice and Constitutional Development
<b>DOL</b>	Department of Labour
<b>DPME</b>	Department of Planning, Monitoring and Evaluation
<b>DPW</b>	Department of Public Works
<b>DSBD</b>	Department of Small Business Development
<b>DSD</b>	Department of Social Development
<b>DTC</b>	Davis Tax Committee
<b>DTI</b>	Department of Trade and Industry
<b>EDD</b>	Economic Development Department
<b>EEA</b>	Employment Equity Act, 55 of 1998
<b>GDP</b>	Gross Domestic Product
<b>HIV</b>	Human Immunodeficiency Virus
<b>ICERD</b>	United Nations International Convention on the Elimination of All Forms of Racial Discrimination
<b>ICESCR</b>	International Covenant on Economic, Social and Cultural Rights
<b>JSE</b>	Johannesburg Stock Exchange
<b>LCC</b>	Land Claims Court
<b>MEC</b>	Member of the Executive Council
<b>MTSF</b>	Medium Term Strategic Framework
<b>NAP</b>	National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance
<b>NDP</b>	National Development Plan
<b>NIDS</b>	National Income Dynamics Study
<b>PEPUDA</b>	Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000
<b>PFMA</b>	Public Finance Management Act, 1 of 2000
<b>PPPFA</b>	Preferential Procurement Policy Framework Act, 5 of 2000
<b>SAHRC</b>	South African Human Rights Commission
<b>SAPS</b>	South African Police Service
<b>SEFA</b>	Small Enterprise Finance Agency
<b>SMMEs</b>	Small, Medium and Micro enterprises
<b>SPII</b>	Studies in Poverty and Inequality Institute
<b>Stats SA</b>	Statistics South Africa
<b>SDGs</b>	Sustainable Development Goals
<b>UN</b>	United Nations
<b>UNDP</b>	United Nations Development Programme
<b>VAT</b>	Value Added Tax

# EXECUTIVE SUMMARY

**POVERTY IN SOUTH AFRICA HAS INCREASED IN RECENT YEARS, WHEREAS INCOME AND WEALTH INEQUALITY REMAIN AMONGST THE HIGHEST IN THE WORLD. EXPEDITED TRANSFORMATION THROUGH THE IMPLEMENTATION OF RIGHTS BASED POLICIES IS THEREFORE URGENTLY NEEDED. THE EQUALITY REPORT 2017/18 EVALUATES GOVERNMENT'S PROGRAMME OF RADICAL SOCIO-ECONOMIC TRANSFORMATION FROM A RIGHTS-BASED PERSPECTIVE. IT EXPLORES GOVERNMENT'S PROGRAMME OF RADICAL TRANSFORMATION AND ESTABLISHES ITS ROOTS IN THE FREEDOM CHARTER. IT FURTHER SHOWS THAT RADICAL SOCIO-ECONOMIC TRANSFORMATION SHOULD AIM TO ACHIEVE SUBSTANTIVE SOCIO-ECONOMIC EQUALITY. WHEREAS THE MAJORITY OF EQUALITY-RELATED RESEARCH FOCUSES ON HORIZONTAL STATUS EQUALITY BETWEEN GROUPS SHARING CHARACTERISTICS THAT RENDER THEM PRONE TO UNFAIR DISCRIMINATION, THIS REPORT RESPONDS TO INTERNATIONAL CALLS TO ADDRESS GROSS ECONOMIC INEQUALITY. THE NEED TO EVALUATE GOVERNMENT'S PROGRAMME OF RADICAL TRANSFORMATION FROM AN EQUALITY PERSPECTIVE IS THEREFORE EXPLAINED.**

Poverty and economic inequality manifest in patterns that severely prejudice vulnerable individuals and groups based on their race, geographic location, gender and disability status. It is accordingly found that government's programme of radical socio-economic transformation is necessary, and should focus on addressing the extreme concentration of income and wealth in the top deciles of society. Tailored policies should aim to address economic inequality. However, horizontal or status inequality should simultaneously be addressed, since economic inequality results from structural patterns of discrimination in the economy and society more broadly. Redistributive fiscal policy choices should thus respond to vulnerable groups subject to patterns of unfair discrimination, and should not exacerbate inequality. The right to equality, the right to further education, and the right of equitable access to land, are potential key drivers of a process of radical socio-economic transformation. In investigating the potential of the right to equality to be utilised to catalyse radical transformation, the potential of remedial special measures or 'affirmative action' to effect radical change is emphasised.

Government's efforts to institute special measures in the context of the labour market, transformation of the economy more broadly, preferential procurement in particular, and small business development and the creation of work opportunities, are evaluated. Special measures in respect of funding increases in higher education, accessibility and equality in further education, and in the context of land, are further evaluated. It is found that special measures currently fail to respond

to socio-economic need. This may thus give rise to new economic imbalances and patterns of exclusion based on race or ethnic origin, gender and disability. Moreover, institutional-, legislative-, policy- and implementation fragmentation and misalignment are apparent in all contexts where special measures are applied. Finally, it is found that the private sector presently insufficiently contributes to government's programme of radical transformation through the implementation of special measures in various contexts.

Pressing equality related issues that the South African Human Rights Commission has sought to address are highlighted throughout the Report. Much of this work aims to promote horizontal or status equality, which is a necessary precondition for the achievement of substantive economic equality. Whereas emphasis is placed on work of the Commission that took place in 2017, reference is also made to previous work where related recommendations have not been implemented.

## KEY FINDINGS MADE IN THIS REPORT INCLUDE



Government's increase of Value-Added Tax seriously threatens the human rights of the poor, and is not constitutionally justifiable.



The Employment Equity Act, 55 of 1998's definition of 'designated groups' and South Africa's system of data disaggregation is not in compliance with constitutional or international law obligations. Government's failure to measure the impact of various affirmative action measures on the basis of need and disaggregated data, especially the extent to which such measures advance indigenous peoples and people with disabilities, likewise violates international law obligations.



The implementation of special measures in the employment equity sphere is currently misaligned to the constitutional objective of achieving substantive equality, to the extent that implementation may amount to rigid quotas and absolute barriers as opposed to flexible targets. This practice may inadvertently set the foundations for new patterns of future inequality and economic exclusion within and amongst vulnerable population groups.



The concept of special measures is rooted in the right to equality, but can and should be implemented across government's focus areas. Currently, in addition to employment equity special measures, Broad-Based Black Economic Empowerment special measures are instituted in the contexts of, amongst others, preferential procurement, small business development, and land. Special measures should be specifically designed for further education. However, it is found that severe institutional fragmentation exists in that no central coordinating body steers the implementation of special measures across varying contexts. It is accordingly found that there is a misalignment between institutions, legislation, policies and implementation in the broad B-BBEE context generally.



Government policy and conduct consistently neglect persons with disabilities, who constitute approximately 7.5 percent of the population, both in ensuring accessibility for such persons through universal design of goods, services, equipment and facilities, and through the failure to reasonably accommodate people with disabilities in specific contexts.



The private sector is not sufficiently contributing to the transformation of the labour market, transformation of the economy more broadly, further education in particular, or land reform.

Relevant recommendations are made in respect of government's increase in Value-Added Tax, the current legislation and implementation of special measures in the employment equity context, and the misalignment and absence of coordination for special measures through Broad-Based Black Economic Empowerment generally, preferential procurement in particular, and in the sphere of small business development and the creation of work opportunities. In the context of further education, recommendations from previous reports by the South African Human Rights Commission are repeated. It is further noted that whereas recent Constitutional Court jurisprudence has addressed certain language policy-related special measures in further education, government's increased funding of higher education conspicuously omits any reference to students with disabilities. Recommendations in this respect are thus targeted at ensuring accessibility for and reasonable accommodation of students with disabilities in higher education. Finally, although the crucial role of equitable access to land in achieving radical socio-economic transformation is acknowledged, the complexity of this issue implies that further research must be conducted before recommendations are made.



# CHAPTER 01

## INTRODUCTION

**SOUTH AFRICA REMAINS ONE OF THE MOST UNEQUAL COUNTRIES IN THE WORLD, MEASURED IN TERMS OF BOTH INCOME AND WEALTH. POVERTY HAS INCREASED IN RECENT YEARS, WHEREAS ECONOMIC GROWTH HAS GENERALLY SLOWED TO THE POINT WHERE THE ACHIEVEMENT OF THE OBJECTIVES SET OUT IN THE NATIONAL DEVELOPMENT PLAN SEEMS UNLIKELY. FURTHERMORE, INEQUALITY WITHIN POPULATION GROUPS HAS GROWN. THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION (SAHRC OR COMMISSION) HAS SIMULTANEOUSLY OBSERVED ONE OF THE MANIFESTATIONS OF SUCH INEQUALITY IN THE SURGE IN RACISM AND HATE SPEECH. ACCORDING TO CERTAIN SURVEYS, INCOME INEQUALITY – AND NOT RACE – CONSTITUTES THE MOST DIVISIVE FEATURE OF SOUTH AFRICAN SOCIETY.<sup>1</sup> INTERNATIONAL EXPERTS AND SUPRANATIONAL BODIES ACCEPT THAT ECONOMIC INEQUALITY SEVERELY ERODES SOCIAL COHESION, LEADS TO SOCIAL INSTABILITY, AND CONSTITUTES AN AFFRONT TO MEANINGFUL PARTICIPATION THROUGH DEMOCRATIC PROCESSES.<sup>2</sup> WHEREAS HUMAN RIGHTS ORGANISATIONS AND THE COMMISSION HAVE TRADITIONALLY FOCUSED ON THE STATE OF EQUALITY HORIZONTALLY AS BETWEEN DIFFERENT GROUPS SHARING SIMILAR IDENTITY TRAITS, THE URGENT NEED TO FOCUS ON VERTICAL, ECONOMIC INEQUALITY AS BETWEEN INDIVIDUALS AND HOUSEHOLDS, ARISES IN THE SOUTH AFRICAN CONTEXT.**

The Equality Report 2017/18 thus evaluates certain rights-based tools at government's disposal to effect radical socio-economic transformation, defined as aiming to achieve substantive socio-economic equality. Certain rights that hold exceptional potential to contribute to radical transformation are identified as the right to equality itself, the right to further education, and the right of equitable access to land. The right to equality, although not explicitly guaranteeing economic equality, empowers government to implement affirmative action, or special measures, in order to advance persons or groups subject to persistent patterns of discrimination. Given that both poverty and economic inequality continue to manifest along racial, gender and disability lines, it is shown that special measures must be instituted in various contexts, and be targeted at these particularly vulnerable groups.<sup>3</sup> Equality-based special measures can thus be expanded and implemented in

<sup>1</sup> Institute for Justice and Reconciliation *SA Reconciliation Barometer 2015 Briefing Paper 1: National Reconciliation, Race Relations and Social Inclusion* (8-12-2015) 16.

<sup>2</sup> UN Human Rights Council *Report of the Special Rapporteur on extreme poverty and human rights, Philip Alston A/HRC/29/31* (2015) paras 20, 45.

<sup>3</sup> SAHRC *Research Brief on Race and Equality in South Africa 2013-2017* (2017); SAHRC *Research Brief on Gender and Equality in South Africa 2013-2017* (2017); SAHRC *Research Brief on Disability and Equality in South Africa 2013-2017* (2017).

various policy areas that are central to government's programme of radical economic transformation, including in the areas of preferential procurement, small business development, further education, and land.

However, special measures are currently misaligned to constitutional objectives. Where special measures are not instituted on the basis of need, and taking into consideration socio-economic factors, they are incapable of achieving substantive equality. Moreover, there is a lack of coordination of sufficiently targeted special measures across various government departments and organs of state. Related legislation and policy are similarly fragmented. The potential of the rights to equality, further education and land cannot be realised until special measures are coherently coordinated across these areas. Whereas government should act promptly to rationalise and align fragmented legislation, policies and implementation practices in order to promote radical transformation and achieve substantive equality, the private sector must urgently be mobilised to contribute to this project. The full operationalisation of key pieces of legislation may facilitate the crucial involvement of the private sector.

This Report commences by setting out the mandate of the South African Human Rights Commission, the methodology adopted, and challenges encountered in producing this Report. Next, the South African, international and regional legal and policy frameworks governing the subject of radical transformation from an equality perspective are expounded. Thereafter, the meaning of government's strategic programme of radical socio-economic transformation is explored from an equality perspective. Significantly, the Report next demonstrates that poverty and inequality persist based on race, gender and disability. Moreover, inequality within population groups is worsening. After noting the importance of government's overarching fiscal policy choices for its programme of radical transformation, key rights-based drivers of this process are identified. First, the role of the right to equality is elucidated. The concept of remedial or special measures is identified in this context, and its potentially broad sphere of application is highlighted. Thereafter, challenges impeding the potential of the rights to further education and land to contribute to radical socio-economic transformation are highlighted.

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# CHAPTER 02

## MANDATE OF THE SAHRC

**THE SAHRC IS MANDATED BY SECTION 184 OF THE CONSTITUTION TO PROMOTE RESPECT FOR HUMAN RIGHTS AND A CULTURE OF HUMAN RIGHTS; TO PROMOTE THE PROTECTION, DEVELOPMENT AND ATTAINMENT OF HUMAN RIGHTS; AND TO MONITOR AND ASSESS THE OBSERVANCE OF HUMAN RIGHTS IN SOUTH AFRICA. THE COMMISSION DOES SO THROUGH A NUMBER OF MEANS, ONE OF WHICH IS BY CONDUCTING RESEARCH.<sup>4</sup>**

It should be noted that in respect of gender equality, the mandate of the SAHRC overlaps with that of the Commission for Gender Equality.<sup>5</sup> The important research conducted by Commission for Gender Equality merits attention.<sup>6</sup>

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<sup>4</sup> S 184(2)(c) of the Constitution.

<sup>5</sup> The Commission for Gender Equality is a constitutional body established in terms of s 181 of the Constitution. Its powers and functions are set out in s 187 of the Constitution.

<sup>6</sup> See generally <<http://www.cge.org.za/research-reports/#>>.

# CHAPTER 03

## METHODOLOGY AND LIMITATIONS

**THIS REPORT ADOPTS AN EQUALITY- AND RIGHTS-BASED APPROACH TO EVALUATE THE LEGISLATIVE AND POLICY FRAMEWORK, AS WELL AS IMPLEMENTATION PRACTICES, PERTAINING TO GOVERNMENT'S PROGRAMME OF RADICAL SOCIO-ECONOMIC TRANSFORMATION. THE EQUALITY REPORT USES A METHODOLOGY THAT INCLUDES DESKTOP RESEARCH AND ENGAGEMENT WITH STAKEHOLDERS AND EXPERTS. ALTHOUGH PRIMARILY A QUALITATIVE REPORT, THE EQUALITY REPORT NEVERTHELESS INCLUDES QUANTITATIVE DATA AND ANALYSIS, INCLUDING A CONSIDERATION OF EQUALITY-RELATED INDICATORS. THESE INDICATORS INCLUDE STATISTICS RELATED TO POVERTY AND ECONOMIC INEQUALITY. THIS EQUALITY REPORT SHOULD BE READ IN CONJUNCTION WITH THREE RELATED RESEARCH BRIEFS REGARDING EQUALITY AND RACE, EQUALITY AND GENDER, AND EQUALITY AND DISABILITY, RESPECTIVELY.<sup>7</sup> WHILE ALL THREE RESEARCH BRIEFS PROVIDE AN OVERVIEW OF STATUS AND ECONOMIC INEQUALITY IN RESPECT OF RACE, GENDER AND EQUALITY, THIS EQUALITY REPORT NARROWS ITS FOCUS TO EXPLORE ECONOMIC INEQUALITY IN GREATER DEPTH. NEVERTHELESS, THE NEED TO ADDRESS HORIZONTAL STATUS INEQUALITY AND VERTICAL ECONOMIC INEQUALITY COMPREHENSIVELY, IS ACKNOWLEDGED THROUGHOUT THIS REPORT.**

Whereas desktop research suffices to identify some of the key rights-based drivers of radical socio-economic transformation, government's insight is crucial for garnering a comprehensive understanding of strategic strengths and weaknesses. For purposes of this Report, the Commission requested information from the Department of Justice and Constitutional Development (DOJCD) regarding government's compliance with international law obligations in respect of the implementation of special measures.<sup>8</sup> However, the DOJCD only provided a response to the Commission's request for pertinent information, issued in September 2017, in March 2018.<sup>9</sup> At the time that the response was received, this Report had been substantially completed, and follow-up

<sup>7</sup> SAHRC *Research Brief on Race and Equality in South Africa 2013-2017* (2017); SAHRC *Research Brief on Gender and Equality in South Africa 2013-2017* (2017); SAHRC *Research Brief on Disability and Equality in South Africa 2013-2017* (2017).

<sup>8</sup> See further section 4.2 below. This information was requested after the DOJCD appeared before the UN Committee on the Elimination of Racial Discrimination in 2016 and the Commission subsequently received a petition from Solidarity to review government's compliance with the International Convention on the Elimination of All Forms of Racial Discrimination.

<sup>9</sup> SAHRC *Letter to the Deputy Minister of Justice Re: South African Government's Compliance with the International Convention on the Elimination of All Forms of Racial Discrimination* (27-09-2017); Deputy Minister of Justice and Constitutional Development *Response Letter Re: South African Government's Compliance with the International Convention on the Elimination of All Forms of Racial Discrimination* (04-03-2018).

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enquiries to different organs of state were no longer possible. Attempts to secure interviews with key public bodies likewise proved only partially successful.<sup>10</sup> These methodological limitations thus created the need to rely on information provided by experts in relevant fields, including in the areas of procurement,<sup>11</sup> higher education<sup>12</sup> and land.<sup>13</sup> The insight provided by these experts substantially contributed to the findings drawn in this Report, and is gratefully acknowledged.

Government non-responsiveness or significantly delayed responses to requests emanating from the Commission are concerning for various reasons. First, failure to cooperate with the Commission violates the constitutional duty incumbent on all organs of state to assist and protect the Commission in order to ensure its effectiveness.<sup>14</sup> A failure to assist the Commission furthermore constitutes a criminal offence.<sup>15</sup> Moreover, government non-responsiveness contradicts the foundational constitutional values of openness, responsiveness and accountability,<sup>16</sup> while negating the essence of the right of access to information.<sup>17</sup>

<sup>10</sup> Unfortunately, contact could not be timeously established with the Commission for Employment Equity at the time of drafting this Report. However, an interview was conducted with the Commissioner of the Broad-Based Black Economic Empowerment Commission on 7 February 2018. A further interview was conducted with acting Judge President Meer of the Land Claims Court, on 27 February 2018. The valuable insights provided are gratefully acknowledged.

<sup>11</sup> Professor Geo Quinot, Professor of Law and Vice Dean of Law, Stellenbosch University, Director: African Procurement Law Unit. See further <[www.africanprocurementlaw.org](http://www.africanprocurementlaw.org)>.

<sup>12</sup> Willene Holness, Lecturer at the University of Kwa-Zulu Natal School of Law, admitted attorney of the High Court of KwaZulu-Natal, board member (director) of the Community Law and Rural Development Centre; Funmilola Adeniyi, Doctoral Researcher, Socio Economic Rights Project (SERP), Dullah Omar Institute, Law Faculty, University of the Western Cape.

<sup>13</sup> Professor Juanita Pienaar, Professor in Private Law at Stellenbosch University, Extraordinary Professor at the North West University, acting judge in the Land Claims Court (2006-2007).

<sup>14</sup> S 181(3) of the Constitution; ss 4(2) and 13(4) of the South African Human Rights Commission Act, 40 of 2013 (SAHRC Act).

<sup>15</sup> S 22(h) of the SAHRC Act.

<sup>16</sup> S 1(d) of the Constitution.

<sup>17</sup> S 32.

# CHAPTER 04

## APPLICABLE LEGAL AND POLICY FRAMEWORKS

### 4.1 South African legal and policy framework

The Constitution makes the achievement of equality a foundational value of the Republic of South Africa, while section 9 of the Constitution guarantees the right to equality. It does so by providing for equality of all before the law, allowing for positive redress measures to advance previously disadvantaged persons, and by prohibiting unfair discrimination by the state and by individuals on several grounds, including race, gender and disability. In addition, the Constitution includes provisions that consider the need for the state to actively advance equitable access to land (section 25(5)); housing (section 26); health care services; food, water and social assistance (section 27); and education (section 29).

Various statutes aim to give effect to the constitutional right to equality. The Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000 (PEPUDA) is the national legislation mandated by section 9(4) of the Constitution, and thus enjoys special constitutional status. Significantly, the Act recognises the need to address systemic discrimination and specifically aims to achieve the ‘eradication of social and economic inequalities’.<sup>18</sup> Following a review of PEPUDA, numerous suggestions were made for its improvement. The Promotion of Equality and Prevention of Unfair Discrimination Amendment Bill is, at the time of writing, being drafted by the DOJCD. In the meantime, the urgent need exists to bring the promotional aspects enshrined in Chapter 5 of PEPUDA into commencement by proclamation. This legislative chapter imposes obligations upon the state and all persons to promote equality, and further requires that bodies contracting with the state, as well as all other companies and corporations, develop equality plans in proportion to factors such as size and resources. Importantly, these currently inoperative provisions require the state to submit equality plans to SAHRC for review in consultation with the Commission for Gender Equality (CGE).<sup>19</sup> The

<sup>18</sup> See Preamble to PEPUDA.

<sup>19</sup> Regulations in respect of this currently inoperative chapter have already been issued: GN R 563 in GG No 26316 of 30 April 2004.

operationalisation of these provisions will thus necessitate the allocation of additional resources to the SAHRC and CGE. An appropriate recommendation in this regard is accordingly made below.<sup>20</sup>

Another crucial Act that will be referred to throughout this Report is the Employment Equity Act, 55 of 1998 (EEA). The EEA was passed in order to promote equal opportunity and fair treatment in employment through the elimination of unfair discrimination. The EEA promotes substantive equality through the implementation of affirmative action (or ‘special measures’) to ensure redress and equitable representation in the workforce. The Broad-Based Black Economic Empowerment Act, 53 of 2003 and the Broad-Based Black Economic Empowerment Amendment Act, 55 of 2013 (B-BBEE Act) complement the EEA and aim to transform ownership patterns, control of and participation in the economy. Important aspects of these laws include the authorisation of special measures to empower marginalised and vulnerable groups, including Black people, women, the youth and people with disabilities, as well as people who live in rural areas.

**THE EEA PROMOTES  
SUBSTANTIVE EQUALITY  
THROUGH THE IMPLEMENTATION  
OF AFFIRMATIVE ACTION (OR  
‘SPECIAL MEASURES’) TO ENSURE  
REDRESS AND EQUITABLE  
REPRESENTATION IN THE  
WORKFORCE.**

The National Development Plan<sup>21</sup> (NDP) is a key policy initiative which sets out government’s plans to eliminate poverty and reduce inequality by 2030. Significantly, inclusive growth of the economy is one of the central objectives of the NDP. The Medium Term Strategic Framework<sup>22</sup> (MTSF) is government’s framework for achieving the goals set out in the NDP. According to the MTSF, ‘[r]adical economic transformation, rapid economic growth and job creation’ constitute the primary priority of the 2014-2019 electoral mandate of the ruling party.<sup>23</sup>

## 4.2 International and regional legal and policy framework

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) defines racial discrimination as including discrimination that causes the unequal enjoyment of rights and freedoms in the economic sphere.<sup>24</sup> The ICERD further establishes the Committee on the Elimination of Racial Discrimination (CERD) and explains that ‘special measures’ (such as affirmative action) taken to ensure the equal enjoyment of rights are not considered unfair discrimination. However, special measures should not create permanent separate rights for different race groups, and should be discontinued once equality is realised.<sup>25</sup> In November 2014, South Africa deposited its fourth to eighth periodic reports to the CERD Committee, noting that while significant progress had been made in advancing formal equality in South Africa, these had not translated into substantive equality. South Africa’s report to the CERD further stated that issues of unfair discrimination intersected

<sup>20</sup> Section 6.1A Recommendation (v) below.

<sup>21</sup> National Planning Commission *National Development Plan* (2012).

<sup>22</sup> Republic of South Africa *Medium Term Strategic Framework 2014-2019* (2014).

<sup>23</sup> Ibid 6.

<sup>24</sup> Art 1 of the ICERD.

<sup>25</sup> Arts 1(4) and 2(2).

considerably with challenges relating to economic and social inequality and land reform, noting that indigenous peoples, sexual minorities and HIV positive individuals were especially vulnerable to discrimination and marginalisation.<sup>26</sup>

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) likewise holds that temporary special measures do not constitute discrimination, but that separate rights should not be maintained where de facto equality between women and men is achieved in a specific context. The Committee on the Elimination of Discrimination Against Women further notes that temporary special measures must address multiple forms of discrimination that many women face.<sup>27</sup>

The Convention on the Rights of Persons with Disabilities (CRPD) similarly provides that ‘specific measures’ that are necessary to advance or achieve substantive equality for persons with disabilities do not constitute discrimination.<sup>28</sup> Moreover, the CRPD acknowledges the fact that women with disabilities face multiple forms of discrimination, and accordingly obliges States Parties to adopt measures to ensure the equal enjoyment of rights and freedoms for this vulnerable group.<sup>29</sup>

The African Charter on Human and Peoples’ Rights (ACHPR) explicitly prohibits unfair discrimination, while equality before the law and equal benefit and protection of the law are provided for in Article 3. For purposes of this Report, it is noteworthy that the ACHPR obliges all States Parties to ‘undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources’.<sup>30</sup> Moreover, the right to development specifically includes the right of peoples to enjoy economic development.<sup>31</sup>

At a global policy level, the Sustainable Development Goals (SDGs) seek to build on the Millennium Development Goals, and enshrine the global community’s commitment to pursue certain pertinent development goals in an effort to achieve greater socio-economic justice.<sup>32</sup> Significantly, SDG 10 aims to reduce inequalities within and amongst countries, and explicitly recognises the need to address vertical economic inequalities. The inclusion of an SDG that overtly deals with inequality of wealth and income constitutes a remarkable break from previous sustainable development discourse that focused exclusively on the elimination of poverty. However, targets included under SDG 10 continue to focus on the bottom 40 percent of the population,<sup>33</sup> and do little to examine wealth and income inequality as experienced by approximately 90 percent of the population compared to the wealthiest 10 percent, or the excessive concentration of wealth at the top one percent of society.<sup>34</sup>

<sup>26</sup> CERD *Consideration of reports submitted by States parties under article 9 of the Convention - South Africa* CERD/C/ZAF/4-8 (2014) 223-225.

<sup>27</sup> Art 4(1) of the CEDAW. See further Committee on the Elimination of Discrimination against Women *General Recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on Temporary Special Measures* (2004).

<sup>28</sup> Art 5(4) of the CRPD.

<sup>29</sup> Art 6(1).

<sup>30</sup> Art 21(5) of the ACHPR.

<sup>31</sup> Art 22(1).

<sup>32</sup> UN General Assembly *Transforming our World: the 2030 Agenda for Sustainable Development* (2015) A/RES/70/1.

<sup>33</sup> SDG 10 Target 10.1 states:

By 2030, progressively achieve and sustain income growth of the bottom 40 per cent of the population at a rate higher than the national average.

<sup>34</sup> G MacNaughton ‘Vertical Inequalities: Are the SDGs and Human Rights up to the Challenges?’ (2017) 21 *The International Journal of Human Rights* 1050, 1056-1058.



# CHAPTER 05

## RADICAL SOCIO-ECONOMIC TRANSFORMATION

### 5.1 Government's programme of radical economic transformation

The unfair discrimination based on race routinely practised by the apartheid government resulted in vertical inequality in the economic, political, social and cultural structures of South African society. As a result, government identified 'radical socio-economic transformation' as a key priority policy area for the period 2014-2019. This programme is encapsulated in Government's MTSF, which reflects the governing party's election manifesto and commitment to implement the NDP. The MTSF defines radical economic transformation as 'placing the economy on a qualitatively different path that ensures more rapid, sustainable growth, higher investment, increased employment, reduced inequality and deracialisation of the economy'.<sup>35</sup>

However, government's policy in this respect is not new. The achievement of substantive equality in terms of wealth has its roots in the Freedom Charter of 1955,<sup>36</sup> which declared, amongst other goals, that:

**The national wealth of our country, the heritage of South Africans, shall be restored to the people;**

**The mineral wealth beneath the soil, the Banks and monopoly industry shall be transferred to the ownership of the people as a whole;**

**All other industry and trade shall be controlled to assist the wellbeing of the people...**

<sup>35</sup> Government of the Republic of South Africa *Medium Terms Strategic Framework 2014-2019* (2014) 6.

<sup>36</sup> C Ramaphosa 'Radical Economic Transformation has its Roots in the Freedom Charter' (26-06-2017) *ANC Today* <<http://anc.today.org.za/radical-economic-transformation-roots-freedom-charter/>>.

Since the advent of democracy, transformation has been painstakingly slow, with the redistribution of wealth and job creation not meeting expectations held in 1994.<sup>37</sup> Today, the 'triple challenges' of inequality, unemployment and poverty continue to plague our society. This prompted the governing party to resolve in 2012 to enter a second phase of the transition from apartheid and colonialism to democracy, which was to be characterised by radical socio-economic policies and continued democratic transformation, while rooting out corruption, factionalism and improper conduct.<sup>38</sup> The African National Congress (ANC) accordingly planned to 'transform the structure of the economy through industrialisation, broad-based black economic empowerment, addressing the basic needs of our people, including women and youth, strengthening and expanding the role of the state and the role of state owned enterprises'.<sup>39</sup> The ruling party's strategy is based on fifteen pillars, central to which is the creation of decent work for all, which is in turn predicated on inclusive economic growth. Additional pillars of economic transformation include transforming structures of production

**THE RULING PARTY'S STRATEGY IS BASED ON FIFTEEN PILLARS, CENTRAL TO WHICH IS THE CREATION OF DECENT WORK FOR ALL, WHICH IS IN TURN PREDICATED ON INCLUSIVE ECONOMIC GROWTH.**

and ownership; creating programmes to absorb the unemployed; expanding the social wage; investing in cooperatives and micro-enterprises; investing in priority skills and education; and sustainable macro-economic policies aimed at growth and poverty eradication.<sup>40</sup>

Following incorporation of this programme into government's official policy framework, socio-economic transformation has garnered renewed attention. Radical socio-economic transformation has been linked to inclusive growth.<sup>41</sup> Radical socio-economic transformation is furthermore related to expedited

land reform.<sup>42</sup> Recently, the National Assembly adopted a resolution that 'Government would continue the land reform programme that entails expropriation of land without compensation, making use of all mechanisms at the disposal of the State, implemented in a manner that increases agricultural production, improves food security and ensures that the land is returned to those from whom it was taken under colonialism and apartheid and undertake a process of consultation to determine the modalities of the governing party resolution'.<sup>43</sup> This resolution was foreshadowed in the new President's State of the Nation address, where it was further stated that '[r]adical economic transformation requires that we fundamentally improve the position of black women and communities in the economy, ensuring that they are owners, managers, producers and financiers'.<sup>44</sup>

<sup>37</sup> ANC 53<sup>rd</sup> National Conference Resolutions (2012) 20.

<sup>38</sup> Ibid 4-5.

<sup>39</sup> Ibid 20.

<sup>40</sup> Ibid.

<sup>41</sup> Parliamentary Standing Committee on Finance 'Treasury & SARS Annual Performance Plans; Concerns about SARS; with new Minister: 9 May 2017' (09-05-2017) *Parliamentary Monitoring Group* <<https://pmg.org.za/page/National%20Treasury%20%26%20SARS%20Annual%20Performance%20Plans%3B%20Concerns%20about%20SARS%3B%20with%20Minister?via=homepage-feature-card>>.

<sup>42</sup> C Ramaphosa 'Closing Address by ANC President Cyril Ramaphosa to the 54th National Conference of the African National Congress' (20-12-2017) *ANC* <<http://www.anc.org.za/content/closing-address-anc-president-cyril-ramaphosa-54th-national-conference-african-national>>. The replacement of the 'willing buyer, willing seller' model of land expropriation with the 'just and equitable principle' enshrined in s 25 of the Constitution has long been ANC policy, whereas expropriation without compensation was previously only advocated where land had been acquired through unlawful means or used for illegal purposes. See ANC 53<sup>rd</sup> National Conference Resolutions (2012) 25.

<sup>43</sup> News24 'NA adopts EFF motion, amended by ANC, on EWC' (27-02-2018) *Politics Web* <<http://www.politicsweb.co.za/news-and-analysis/na-adopts-eff-motion-amended-by-anc-on-ewc>>.

<sup>44</sup> President of the Republic of South Africa *State of the Nation Address* (16-02-2018).

Although there is not complete consensus on the meaning of radical socio-economic transformation, it is clear that government's long-standing strategy is reconcilable with the achievement of various constitutional and international human rights, including the right to work,<sup>45</sup> labour rights,<sup>46</sup> socio-economic rights,<sup>47</sup> property and land rights,<sup>48</sup> and – ultimately – the rights to equality<sup>49</sup> and human dignity.<sup>50</sup> Government's progress in achieving radical transformation can therefore be evaluated through the prism of human rights generally, and the achievement of substantive socio-economic equality, in particular.

## 5.2 The need for radical socio-economic transformation

Trends in poverty, income inequality and wealth inequality demonstrate that poverty and inequality continue to manifest along the fault lines of race, gender and disability. Patterns of discrimination therefore exclude people from the economy and labour market based on certain identity traits. Moreover, new patterns of inequality *within* these groups point to an urgent need to radically transform the economy, in order to temper the concentration of income and wealth to the benefit of only a small percentage of the South African population.

Although poverty has decreased since 2009, the percentage of the population living below the upper bound poverty line of R992 per person per month increased from 53.2 percent in 2011 to 55.5 percent in 2015.<sup>51</sup> Whereas the NDP aims to reduce the percentage of the population living below the lower bound poverty line to 0 percent by 2030, this number has grown from approximately 36 percent in 2011 to 40 percent in 2015.<sup>52</sup>

Moreover, poverty egregiously affects people based on traditional grounds for unfair discrimination, including race, gender, geographic location, age and disability status. According to Stats SA, those most affected by poverty are generally Black African females; children younger than 17 years; those living in rural areas, the Eastern Cape and Limpopo; and those without education.<sup>53</sup> For

example, approximately 64 percent of the Black African population and 40 percent of the Coloured population group are poor, contrasted to a mere six percent of the Indian/Asian population group and just one percent of the White population group:

**ACCORDING TO STATS SA, THOSE MOST AFFECTED BY POVERTY ARE GENERALLY BLACK AFRICAN FEMALES; CHILDREN YOUNGER THAN 17 YEARS; THOSE LIVING IN RURAL AREAS, THE EASTERN CAPE AND LIMPOPO; AND THOSE WITHOUT EDUCATION.**

<sup>45</sup> Art 6 of the International Covenant on Economic, Social and Cultural Rights (1966).

<sup>46</sup> S 23 of the Constitution.

<sup>47</sup> Ss 24-29.

<sup>48</sup> S 25.

<sup>49</sup> S 9.

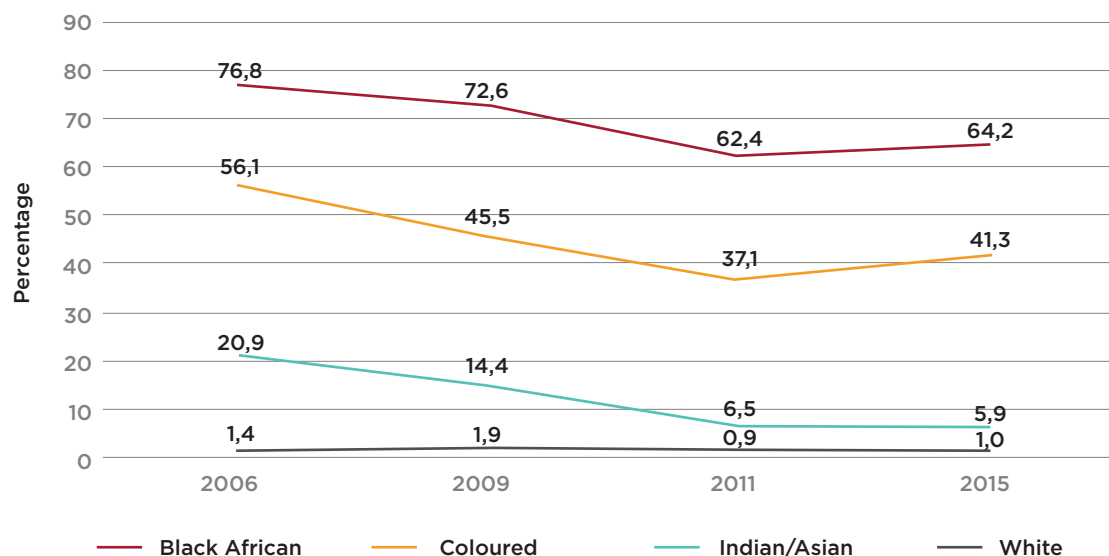
<sup>50</sup> S 10.

<sup>51</sup> Stats SA *Poverty Trends in South Africa: An Examination of Absolute Poverty between 2006 and 2015* (2017) 14.

<sup>52</sup> *Ibid* 17.

<sup>53</sup> *Ibid* 18.

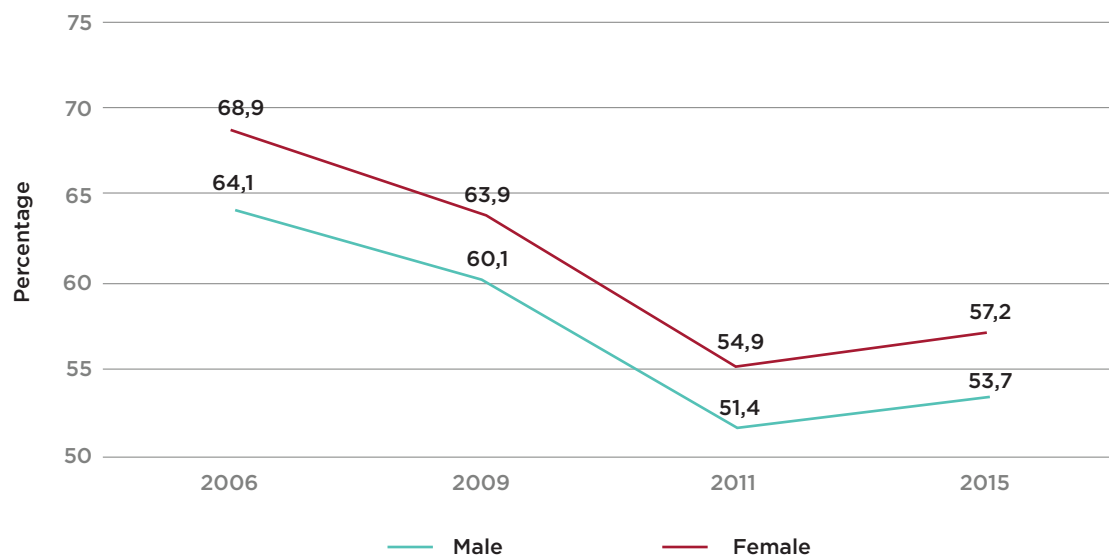
POVERTY HEADCOUNT BY POPULATION GROUP<sup>54</sup>



The disproportionate prevalence of poverty according to racial group underscores the fact that economic inequality manifests along racial lines. These findings accordingly support the need for radical socio-economic transformation to ensure more equal distribution of wealth, income and socio-economic goods such as housing, health care and education amongst different population groups.

Poverty likewise affects women more severely than men, further pointing to the need for socio-economic and cultural transformation where cultural practices marginalise women:

POVERTY HEADCOUNT BASED ON SEX<sup>55</sup>



<sup>54</sup> Figure reproduced from Stats SA *Poverty Trends in South Africa: An Examination of Absolute Poverty between 2006 and 2015* (2017) 58. See further SAHRC *Research Brief on Race and Equality in South Africa 2013-2017* (2017) 12.

<sup>55</sup> Figure reproduced from Stats SA *Poverty Trends in South Africa: An Examination of Absolute Poverty between 2006 and 2015* (2017) 56. See further SAHRC *Research Brief on Gender and Equality in South Africa 2013-2017* (2017) 14.

Although data is not available regarding the prevalence of poverty amongst people with disabilities, it is accepted that poverty and disability are closely linked.<sup>56</sup> Furthermore, unemployment exacerbates both poverty and inequality, and people with disabilities are grossly underrepresented in the labour market. The employment of persons with disabilities has not reached the two percent mark at any level in the private sector, nor in the public sector. Where people with disabilities are represented at the top and senior management levels, they are predominantly White males, whereas males with disabilities enjoy greater representation than females with disabilities at all levels and across all population groups.<sup>57</sup>

Besides increasing levels of poverty in South Africa, *income inequality* measured according to the Gini coefficient (where a value of 0 represents complete equality and a value of 1 represents complete inequality) stood at 0.68 in 2015.<sup>58</sup> The NDP aims to reduce this exceptionally high rate of income inequality to 0.6 by 2030, which Stats SA regards as unlikely given a mere 0.01 point decrease over a four year period.<sup>59</sup> Radical economic transformation is thus urgently needed in the context of income inequality:

#### NDP POVERTY AND INEQUALITY-RELATED TARGETS<sup>60</sup>

NDP TARGET	BASELINE	2030 TARGET	MOST RECENT STATUS
1. Reducing the proportion of persons living below the lower-bound poverty line from 39 per cent (in 2009) to zero by 2030	39,0% (2009)	0%	40,0% (2015)
2. Reduce income inequality from 0,7 in 2010 to 0,6 by 2030	0,70 (2010)	0,60	0,68 (2015)
3. The share of income going to the bottom 40 per cent of income earners should rise from 6 per cent to 10 per cent	6,0% (2010)	10,0%	8,3% (2015)
4. Reduce poverty-induced hunger to 0% by 2030	21,4%	0%	25,2% (2015)

<sup>56</sup> SAHRC *Research Brief on Disability and Equality in South Africa 2013-2017* (2017) 13.

<sup>57</sup> Ibid with reference to Commission for Employment Equity *Annual Report 2016-2017* (2017).

<sup>58</sup> Stats SA *Poverty Trends in South Africa: An Examination of Absolute Poverty between 2006 and 2015* (2017) 17.

<sup>59</sup> Ibid 21.

<sup>60</sup> Figure reproduced from Stats SA *Poverty Trends in South Africa: An Examination of Absolute Poverty between 2006 and 2015* (2017) 17.

Furthermore, in addition to the figures representing *income* inequality between population groups and genders cited above, radical *wealth* inequality is similarly apparent amongst and within population groups and genders. Although various methodological challenges exist when measuring wealth inequality,<sup>61</sup> research conducted for the Davis Tax Committee (DTC) that was based on income tax and survey data, shows that 10 percent of South Africans own 90-95 percent of all wealth in the country. Compared with the fact that 60 percent of income is earned by 10 percent of South Africans, these findings support a global trend in that inequality in wealth distribution usually exceeds inequality in income distribution.<sup>62</sup> Moreover, the Gini coefficient for wealth inequality in South Africa is incredibly high at approximately 0.95.<sup>63</sup>

Gross wealth inequality based on race remains prevalent in South Africa due to structural injustices inherited from apartheid-era law and policy. According to National Income Dynamics Study (NIDS) based research, an average Black household holds about four percent of wealth held by an average White household, while an average Coloured household holds about six percent of the wealth held by its White counterparts. Put differently, 'for every R1 held by typical Black, and Coloured households, a typical White household will hold R22.84 and R16.0, respectively'.<sup>64</sup> As a result, many Black households are unable to transmit wealth to future generations, which perpetuates wealth inequality through inequality in inheritance.<sup>65</sup> Furthermore, wealth inequality is greater *within* the Black African population group than in comparison to any other racial group.<sup>66</sup> In terms of gender, income tax-based research includes a greater percentage of men than women (60 percent male and 40 percent female), which suggests that men receive greater investment income than women.<sup>67</sup> Wealth inequality is similarly apparent within age groups, with the most extreme inequality occurring within the youth category most affected by unemployment. Within separate age groups, wealth is concentrated in the top 10 percent with the bottom 50 percent holding almost no wealth.<sup>68</sup> Moreover, wealth inequality appears to be increasing at a much faster rate than income inequality.<sup>69</sup>

**WEALTH INEQUALITY IS GREATER  
WITHIN THE BLACK AFRICAN  
POPULATION GROUP THAN IN  
COMPARISON TO ANY OTHER  
RACIAL GROUP.**

Based on the statistics and research cited above in respect of poverty, income inequality and wealth inequality, it is clear that an urgent need for radical socio-economic transformation exists in South Africa. However, it is equally important

to define the objective of radical transformation as substantive socio-economic equality, and to pursue transformation through rights-based (as opposed to purely economic or utilitarian) means.

<sup>61</sup> R Daniels & T Augustine (Southern Africa Labour and Development Research Unit) *The Measurement and Distribution of Household Wealth in South Africa using the National Income Dynamics Study (NIDS) Wave 4* NIDS Discussion Paper 2016/10 (2016) 2; A Orthofer *Wealth Inequality in South Africa: Insights from Survey and Tax Data*. REDI3x3 Working Paper 15 (2016) 3.

<sup>62</sup> For example, non-representivity of high net-worth individuals in survey samples or, where data is based on tax filings, non-taxable forms of wealth such as pensions or owner-occupied homes. R Daniels & T Augustine (Southern Africa Labour and Development Research Unit) *The Measurement and Distribution of Household Wealth in South Africa using the National Income Dynamics Study (NIDS) Wave 4* NIDS Discussion Paper 2016/10 (2016) 3.

<sup>63</sup> A Orthofer *Wealth Inequality in South Africa: Insights from Survey and Tax Data* REDI3x3 Working Paper 15 (2016) 23.

<sup>64</sup> S Mbewe & I Woolard (South African Labour and Development Research Unit) *Cross-Sectional Features of Wealth Inequality in South Africa: Evidence from The National Income Dynamics Study* NIDS Discussion Paper 2016/12 (2016) 12.

<sup>65</sup> Ibid 13, referring to the concept of 'patrimonial capitalism' developed in T Piketty *Capital in the 21st Century* (2014), according to which wealth generates more wealth, rendering the wealthy wealthier while the poor remain poor or become worse off.

<sup>66</sup> A Orthofer *Wealth Inequality in South Africa: Insights from Survey and Tax Data* REDI3x3 Working Paper 15 (2016) 20.

<sup>67</sup> Ibid 21.

<sup>68</sup> S Mbewe & I Woolard (South African Labour and Development Research Unit) *Cross-Sectional Features of Wealth Inequality in South Africa: Evidence from The National Income Dynamics Study* NIDS Discussion Paper 2016/12 (2016) 17.

<sup>69</sup> Ibid.

## 5.3 Understanding radical socio-economic transformation from an equality perspective

The South African political discourse calling for radical socio-economic transformation emerges in a context where inequality is increasingly being recognised as a global crisis. According to Oxfam, eight men own wealth equivalent to that possessed by the poorest half of the world, in the next two decades 500 people will transfer over \$2 trillion dollars to their heirs, income growth has been miniscule for most of the world's population while ballooning for the wealthiest one percent, and corporate executives enjoy severely disproportionate income compared to workers.<sup>70</sup> In addition, Oxfam estimates that nine out of ten billionaires are men.<sup>71</sup> Furthermore, the Credit Suisse Global Wealth Report starkly shows that one percent of the world population owns 50.1 percent of all household wealth globally.<sup>72</sup>

**VERTICAL ECONOMIC INEQUALITY  
MOREOVER NECESSITATES  
GOVERNMENT PROGRAMMES  
THAT REDISTRIBUTE INCOME  
AND WEALTH.**

Regarded as the most unequal country in the world, South Africa represents a microcosm of the injustice posed by a grossly skewed economy and concentrated wealth. In South Africa, White-headed households earn roughly four times that of Black-headed households,<sup>73</sup> whereas the wealthiest 10 percent of the population earns approximately seven times more than the bottom 40 percent.<sup>74</sup> According to the International Labour Organisation, the bottom 50 percent of wage earners in South Africa receive only 12 percent of all wages paid, whereas the top 10 percent receives 49.2 percent of all wages, and the top one percent receives a staggering 20 percent of wages.<sup>75</sup> Moreover, the enjoyment of social goods such as health, education and housing are unequally distributed. These figures represent inequality between households and individuals, termed *vertical inequality*. Vertical economic inequality moreover necessitates government programmes that redistribute income and wealth.

In contrast to vertical, economic inequality between households or individuals, human rights practitioners have traditionally focused on *horizontal inequality* between different groups that share characteristics such as sex, gender, sexual orientation or race. International, regional and South African human rights provisions aim to eliminate status inequality resulting from direct or indirect discrimination. In this context, equality can be thought of in a 'formal' or 'substantive' sense. *Formal equality* refers to laws and policies that appear neutral by treating everyone the same. Such laws and policies may in fact cement existing race-based inequalities since they do not seek to change an unequal status quo. *Structural or systemic inequalities* – in other words,

<sup>70</sup> Oxfam *Economy for the 99%* (2017) 2. Oxfam's representation of data was criticised by free-market think tanks such as the Cato Institute, but ultimate findings regarding gross economic inequality are supported by other sources such as Credit Suisse *Global Wealth Report 2017: Where are we Ten Years after the Crisis?* (2017) and C Lakner & B Milanovic (World Bank) *Global Income Distribution: From the Fall of the Berlin Wall to the Great Recession* (2013) 30, which is based on older data, but illustrates that '44% of the increase of global income between 1988 and 2008 went to the top 5% of world population'. See Oxfam 'Oxfam and the Argument around Inequality' (2017) Oxfam <<http://www.oxfam.org.za/oxfam-and-the-argument-around-inequality/>>.

<sup>71</sup> Oxfam *Reward Work, Not Wealth* (2018) 8.

<sup>72</sup> Credit Suisse *Global Wealth Report 2017: Where are we Ten Years after the Crisis?* (2017) 3.

<sup>73</sup> SAHRC *Research Brief on Race and Equality in South Africa 2013-2017* (2017) 14.

<sup>74</sup> Development Finance International & Oxfam *The Commitment to Reducing Inequality Index* (2017) 12. Various media reports quote Oxfam South Africa as stating that three billionaires in South Africa hold wealth equivalent to the bottom 50 percent of the country, and that one percent of South Africans own 42 percent of the country's wealth. However, these statistics are not contained in Oxfam *Economy for the 99%* (2017) as purported by the media. See, for example, Business Day 'SA's rich-poor gap is far worse than feared, says Oxfam inequality report' (16-01-2017) *Business Day* <<https://www.businesslive.co.za/bd/national/2017-01-16-sas-rich-poor-gap-is-far-worse-than-feared-says-oxfam-inequality-report/>>.

<sup>75</sup> International Labour Organisation *Global Wage Report 2016/17: Wage Inequality in the Workplace* (2017) xvii, 42.

unequal structures, hierarchies and power relationships that underlie our society and economy – are therefore left unaddressed. As the Constitutional Court has stated, ‘[a]lthough the long term goal of our constitutional order is equal treatment, insisting upon equal treatment in established inequality may well result in the entrenchment of that inequality’.<sup>76</sup> Formal equality is accordingly incapable of addressing structural inequalities inherited from the apartheid era, which are currently reflected in South Africa’s huge income gap and grossly unequal distribution of wealth and land.

*Substantive equality* partially fills this gap by aiming to achieve *equal outcomes* by treating people and groups differently.<sup>77</sup> Different treatment is justified where some people are discriminated against on the basis of their identities or characteristic. This is reflected in the constitutional endorsement of positive redress measures, or ‘affirmative action’, in section 9(2), which places an

**SINCE FUNDAMENTAL  
INEQUALITIES EXIST IN  
SOCIETY AND THE ECONOMY,  
IT IS CRUCIAL THAT PRIVATE  
ACTORS WORK TOGETHER  
WITH THE STATE TO ACHIEVE  
SUBSTANTIVE EQUALITY.**

obligation on the state to adopt legislative and other measures aimed at creating equal opportunities and achieving equal outcomes particularly with regard to employment and education.<sup>78</sup> Since fundamental inequalities exist in society and the economy, it is crucial that private actors work together with the state to achieve substantive equality. Finally, the concept of *intersectionality* is important in the context of equality. Intersectionality refers to cases where people face multiple forms of discrimination, based on their identities and character traits. For example, whereas a Black man may face direct and indirect discrimination,

a Black woman may be discriminated against on the bases of gender *and* race, whereas a Black homosexual woman faces discrimination based on gender, race and sexual orientation.<sup>79</sup> Horizontal or status inequality usually points to economic vulnerability.

As shown above, radical economic inequality manifests itself along lines of race, gender, disability status, age, and geographic location, amongst others. Vertical economic inequality is thus directly related to patterns of structural discrimination on these grounds. It is therefore imperative to tackle horizontal and vertical inequality comprehensively.<sup>80</sup> Furthermore, just as patterns of discrimination cause economic inequality, economic inequality also causes further discrimination. According to the International Monetary Fund, ‘excessive inequality can erode social cohesion, lead to political polarization, and ultimately lower economic growth’.<sup>81</sup> In addition, extreme economic inequality such as that witnessed in South Africa violates the right to equality itself (which ‘includes the full and equal enjoyment of all rights and freedoms’),<sup>82</sup> exacerbates extreme poverty and thereby violates various socio-economic rights, and causes social instability that leads to crime and the

<sup>76</sup> *President of the Republic of South Africa v Hugo* 1997 (4) SALR 1 (CC) 41 para 112 (per Justice O’Regan).

<sup>77</sup> This is supported by the definition of ‘equality’ in PEPUDA: “‘equality’ includes the full and equal enjoyment of rights and freedoms as contemplated in the Constitution and includes *de jure* and *de facto* equality and also equality in terms of outcomes’.

<sup>78</sup> Closely related to affirmative action is the concept of *reasonable accommodation*. Reasonable accommodation is defined in the EEA as ‘any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to or participate or advance in employment’. In terms of PEPUDA, failure to reasonably accommodate vulnerable groups amounts to unfair discrimination on the ground of, amongst others, race, gender or disability.

<sup>79</sup> Regarding equality and gender, the important work of the Commission for Gender Equality merits further attention. See generally <<http://www.cge.org.za/research-reports/#>>.

<sup>80</sup> D Barrett ‘Tackling Economic Inequality with the Right to Non-Discrimination’ (2016) *Open Democracy* <<https://www.opendemocracy.net/openglobalrights/david-barrett/tackling-economic-inequality-with-right-to-non-discrimination>>.

<sup>81</sup> International Monetary Fund *Fiscal Monitoring: Tackling Inequality* (2017) ix.

<sup>82</sup> S 9(2) of the Constitution.



consequent violation of civil and political rights. Given that extreme inequality often correlates to political capture, the equal enjoyment of democratic rights is likewise threatened.<sup>83</sup>

Furthermore, the notion of *distributive justice* means that government must redistribute resources in order to ensure substantive socio-economic equality, which includes substantive equality in *economic outcomes*. Thus, rather than focusing exclusively on the bottom deciles of society, attention must urgently be paid to redistributing extreme wealth accumulated by the very few at the top decile of society.<sup>84</sup> This strategic focus may be the most 'radical' shift in terms of government's socio-economic policy. Moreover, it is a policy shift that is economically justified based on the fact that gross inequality inhibits economic growth. As noted by the United Nations Development Programme (UNDP):

**If high levels of inequality constrain growth, and limit its pro-poor impacts, then reducing inequality may be a prior and necessary condition for a sustainable decrease in poverty. Going for growth as a means of addressing poverty in the absence of policies to address inequality or the underlying factors through which inequality is reproduced may yield limited returns. Instead, reducing inequality may be a necessary condition for the kinds of growth required for optimal impacts on poverty. This has important implications for policy, casting into doubt the received wisdom of a trade-off between redistributive policies and growth.<sup>85</sup>**

This Report accordingly examines the ability of the rights to equality, further education, and equitable access to land, to catalyse radical socio-economic transformation and thereby achieve substantive economic equality. In doing so, the Report further identifies gaps in legislation, policy, implementation and contribution by the private sector that impede the realisation of this objective. However, these rights-based drivers of radical transformation must be viewed in the context of government's over-arching redistributive fiscal policy choices.

## 5.4 Redistributive fiscal policy choices

SDG 10 Target 10.4 urges governments to adopt fiscal policies and to progressively reduce inequalities. Despite the limited scope of this Report, macro-economic and fiscal policy choices are central to effecting rights-based radical socio-economic transformation. At a macro-economic level, government has identified its developmental challenges as poverty, inequality and unemployment.<sup>86</sup> Government must therefore use its fiscal policies to redistribute income and wealth in order to realise key rights-based drivers of transformation, and thereby address the triple challenges of poverty,

<sup>83</sup> UN Human Rights Council *Report of the Special Rapporteur on extreme poverty and human rights, Philip Alston A/HRC/29/31* (2015) paras 17-23, 26-32.

<sup>84</sup> K Donald 'Tackling Inequality: The Potential of the Sustainable Development Goals' (2017) *Open Global Rights* <<https://www.openglobalrights.org/tackling-inequality-potential-of-sustainable-development-goals/>>.

<sup>85</sup> United Nations Development Programme *The Impact of Socio-economic Inequality on Economic Development in South Africa* (2014) 7.

<sup>86</sup> Government of the Republic of South Africa *Medium Term Strategic Framework 2014-2019* (2014) 4.

inequality and unemployment. The UN Special Rapporteur on Extreme Poverty has congruently noted that ‘tax policy is, in many respects, human rights policy’.<sup>87</sup>

However, government faces a significant obstacle in that unemployment, poverty and inequality operate in a complex cycle and often exacerbate each other.<sup>88</sup> This is evidenced by increasing levels of inequality and constrained growth of just 0.6 percent in the 2016/17 financial year,<sup>89</sup> despite the NDP setting growth targets at five percent per year to reach its objectives.<sup>90</sup> Moreover, the former Minister of Finance has observed that the 2017/18 financial year ‘was characterised by slow economic growth, recession, ratings downgrades, and heightened concerns regarding the governance and sustainability of key state-owned companies’.<sup>91</sup> Government must thus carefully

**GOVERNMENT MUST THUS CAREFULLY CRAFT AND USE VARIOUS POLICY TOOLS, INCLUDING TAXATION, IN AN ATTEMPT TO REALISE KEY RIGHTS AND THEREBY ADDRESS RADICAL INEQUALITY, PROMOTE INCLUSIVE GROWTH AND SPUR JOB CREATION.**

craft and use various policy tools, including taxation, in an attempt to realise key rights and thereby address radical inequality, promote inclusive growth and spur job creation. However, the misuse of any of these tools – or the mere fact of policy uncertainty – can lead to perverse consequences such as capital flight and disinvestment, which would in turn aggravate inequality, unemployment and poverty.<sup>92</sup>

Given the crucial role that the tax system plays in generating revenue for socio-economic expenditure, the DTC was formed in 2013 to ensure that South Africa’s tax system promotes inclusive economic growth, job creation, development and fiscal sustainability, while contributing to the long-term objectives of the

NDP. Part of the DTC’s mandate is to investigate the feasibility of different forms of wealth taxes, including reform in respect of estate duties and donations tax; and the possible introduction of land taxes, a tax based on the value of property over and above municipal rates, and an annual wealth tax.<sup>93</sup> Currently, wealth taxes only contribute about one percent of tax revenue. The DTC accordingly found that the current estate duty system should be reformed to abolish the current inter-spouse exemption, as this may amount to discrimination based on marital status. The DTC further proposed that estate duty should be increased from 20 percent to 25 percent for estates valued at over R30 million. Whereas the latter reform would contribute roughly R150 million to estate duty revenue, the DTC emphasises that estate duties will never amount to a panacea for South Africa’s fiscal needs in a context of radical inequality and massive unemployment.<sup>94</sup> The DTC’s recommendation should in any event be subjected to scrutiny. Nevertheless, the DTC’s proposal in this regard was taken up in the 2018 Budget Speech.<sup>95</sup> The DTC should furthermore act swiftly to release its report

<sup>87</sup> UN Human Rights Council *Report of the Special Rapporteur on extreme poverty and human rights, Philip Alston A/HRC/29/31* (2015) para 53.

<sup>88</sup> United Nations Development Programme *The Impact of Socio-economic Inequality on Economic Development in South Africa* (2014) 6.

<sup>89</sup> Economic Development Department *Annual Report 2016/17* (2017) 10.

<sup>90</sup> National Planning Commission *National Development Plan 2030* (2012) 39: ‘Transforming the economy and creating sustainable expansion for job creation means that the rate of economic growth needs to exceed 5 percent a year on average.’

<sup>91</sup> Minister of Finance *2018 Budget Speech* (21-02-2018).

<sup>92</sup> United Nations Development Programme *The Impact of Socio-economic Inequality on Economic Development in South Africa* (2014) 67, 70.

<sup>93</sup> The DTC regards Capital Gains Tax as a form of income tax, and not a wealth tax. See DTC ‘Media Statement: Call on Written Submissions on Possible Wealth Taxes for South Africa’ (25-05-2017) *The Davis Tax Committee* <<http://www.taxcom.org.za/docs/20170425%20Call%20for%20submissions%20on%20wealth%20taxes.pdf>>.

<sup>94</sup> DTC *Second and Final Report on Estate Duty* (2016) 19, see further 17-19.

<sup>95</sup> Minister of Finance *2018 Budget Speech* (21-02-2018).

on wealth taxes, as well as proposals on land and property taxes, since such taxes redistribute wealth from the top decile of society to the rest of the population. Even steeper taxation rates for top earners, as well as the introduction of higher corporate taxes, furthermore merit urgent attention. Redistribution from the top to the majority of the population is congruent with a rights-based approach to radical socio-economic transformation aimed at the achievement of substantive economic equality. Furthermore, empirical evidence does not support the argument that significant tax progressivity at the top deciles inhibits economic growth.<sup>96</sup>

The DTC has also released an interim report on Value Added Tax (VAT), in which it was found that from a macro-economic perspective, an increase in VAT would be less distortionary in terms of gross domestic product (GDP) and unemployment in the long run than increases in personal income tax and corporate tax.<sup>97</sup> However, as the DTC acknowledged, this would have a negative impact on equality and the poor. According to the DTC, additional social grants or the strengthening of school nutrition programmes would need to be investigated as compensatory measures.<sup>98</sup> Given the social assistance gap in South Africa (in that poor, young able-bodied adults without care-giving responsibilities receive no grants) coupled with incredibly high unemployment rates (with severe youth unemployment and a glaring social protection gap in this context),<sup>99</sup> any increase in VAT is highly concerning as the burden thereof would effectively be carried by the poor.

Increased VAT threatens various rights, including the socio-economic rights of access to health care services, sufficient food and water, adequate housing, social assistance, and the right to education. Although government has announced an increase in VAT by one percentage point while adjusting social grants at rates above inflation, effective grant increases will not exceed R100 per month.<sup>100</sup> Furthermore, the basket of tax exempt or 'zero rated' goods will have to be expanded to minimise the effect of this fiscal policy choice on the standard of living of the poor.<sup>101</sup> The feasibility of mitigating the effects of a VAT increase for the poor, including the expansion of zero-rated goods and the expansion of social protection, should have been investigated by all relevant organs of state prior to the announcement of an increase in VAT. Government's conduct in this respect thus points to a failure to perceive fiscal policy choices including taxation as being integral to human rights policy, as opposed to being distinct therefrom. To the extent that proposed increases in VAT are intended to fund the R57 billion rand necessary to provide free tertiary education for the poor, it is a perverse fiscal policy choice. Having the poor carry the cost of free tertiary education in order to promote radical transformation and thereby achieve substantive economic equality, has deep impacts for the human rights of poor people and does not appear to be reasonable.

**INCREASED VAT THREATENS VARIOUS RIGHTS, INCLUDING THE SOCIO-ECONOMIC RIGHTS OF ACCESS TO HEALTH CARE SERVICES, SUFFICIENT FOOD AND WATER, ADEQUATE HOUSING, SOCIAL ASSISTANCE, AND THE RIGHT TO EDUCATION.**

<sup>96</sup> International Monetary Fund *Fiscal Monitoring: Tackling Inequality* (2017) ix-x.

<sup>97</sup> DTC *First Interim Report on Value Added Tax* (2015) 10. Subsequent to the finalisation of this Report, the DTC released its final report on VAT. See DTC *Final Report on VAT* (March 2018).

<sup>98</sup> Ibid.

<sup>99</sup> United Nations Development Programme *The Impact of Socio-economic Inequality on Economic Development in South Africa* (2014) 58.

<sup>100</sup> Minister of Finance *2018 Budget Speech* (21-02-2018); National Treasury *Budget Review 2018* (2018) 28.

<sup>101</sup> ANC 'Statement of the African National Congress following the Special National Executive Committee held on the 25th February 2018' (25-02-2018) ANC <<http://www.anc.org.za/content/statement-african-national-congress-following-special-national-executive-committee-held-25th>>.



## SAHRC REMINDS GOVERNMENT THAT THE NATIONAL BUDGET SHOULD ADVANCE HUMAN RIGHTS, ESPECIALLY FOR THE POOR

On 22 February 2018, the Commission released a [media statement](#) regarding the 2018 Budget Speech. The Commission expressed its concern that the Budget Speech indicated that VAT would be increased by 1 percent to 15 percent. This announcement by the Finance Minister constitutes the first such increase since the advent of democracy in 1994. The Commission noted that an increase in VAT most egregiously impacts the poor. The SAHRC furthermore expressed its concern regarding the increase in the fuel price through the introduction of a 52 cents per litre fuel levy. This increase in fuel price particularly impacts on the poor as it affects the price of public transport and the price of goods, since most goods sold to the public are transported on the road. Such increases impact on the poor by limiting their enjoyment of socio-economic rights such as the right to food, water, and education. Price increases limit the enjoyment of social security safety nets, despite the fact that social grants were modestly increased.

The Commission is of the view that a significant portion of the economic challenges currently experienced by South Africa could have been averted if government had demonstrated better management of the economy and greater intolerance of corruption, inefficiency and maladministration. According to the Auditor General (a fellow Chapter 9 Institution), public and private corruption costs the nation billions of Rands on an annual basis. The Commission is deeply disappointed by the fact that these funds have been lost, rather than used in the realisation of rights and services. Nevertheless, the Commission commends government's burgeoning efforts to address looting and corruption.

Ultimately, government must focus fiscal policy efforts at redistributing income and wealth from the top deciles of society to the people of South Africa. The poor cannot be expected to bear the burden of catalysing radical socio-economic transformation. Before regressive measures such as an increase in VAT can be justified, government must demonstrate that it expends its resources proportionately to socio-economic need, effectively and efficiently.<sup>102</sup> Wide-spread findings of irregular and corrupt expenditure at various levels of government<sup>103</sup> render fiscal policy decisions such as an increase in VAT constitutionally suspect.

<sup>102</sup> S van der Berg 'Ensuring Proportionate State Resource Allocation in Socio-economic Rights Cases' (2017) 3 *South African Law Journal* 576-615.

<sup>103</sup> Public Protector *State of Capture* Report No 6 of 2016/17 (2016); Auditor-General *PFMA 2016-17: Consolidated General Report on National and Provincial Audit Outcomes* (2017).

## 5.4A. FINDINGS AND RECOMMENDATIONS

The proposed increase in VAT seriously threatens the human rights of the poor. It is therefore found that it is unjustifiable to expect the poor to effectively finance radical socio-economic transformation and the achievement of substantive socio-economic equality.

- (i) It is accordingly recommended that government continues its review of South Africa's tax. Given government's increase of VAT, it is recommended that the social grant system be further expanded to accommodate able-bodied, poor adults – including unemployed youth – who do not currently qualify for a specific social grant or social security. National Treasury must report to the Commission on measures considered or taken to increase tax revenue in an effort to achieve substantive socio-economic equality, while minimising any detrimental impact on the rights of the poor, within three months of the release of this Report.



# CHAPTER 06

## KEY RIGHTS-BASED DRIVERS OF RADICAL SOCIO-ECONOMIC TRANSFORMATION

RADICAL SOCIO-ECONOMIC TRANSFORMATION WITH THE PURPOSE OF ACHIEVING GREATER VERTICAL, ECONOMIC EQUALITY IS AN AMBITIOUS AND FAR-REACHING POLICY AGENDA.<sup>104</sup> THIS REPORT IDENTIFIES SOME OF THE KEY RIGHTS-BASED DRIVERS OF RADICAL SOCIO-ECONOMIC TRANSFORMATION, DEFINED AS AIMING TO ACHIEVE SUBSTANTIVE ECONOMIC EQUALITY. SINCE ALL RIGHTS ARE INTERDEPENDENT AND MUTUALLY REINFORCING, THIS REPORT DOES NOT GIVE A COMPREHENSIVE ACCOUNT OF THE CONTRIBUTION THAT EACH RIGHT CAN MAKE TO THE AGENDA OF RADICAL SOCIO-ECONOMIC TRANSFORMATION AND THE CONCOMITANT REDUCTION OF RADICAL INEQUALITY. INSTEAD, FOCUS IS PLACED ON THE RIGHT TO EQUALITY ITSELF, AS WELL AS ON THE IMPLEMENTATION OF EQUALITY-BASED SPECIAL MEASURES IN THE CONTEXT OF THE RIGHTS TO FURTHER EDUCATION AND LAND.

### 6.1 The right to equality

Equality can be conceptualised as a key *objective* of radical socio-economic transformation. Simultaneously, the constitutional right to equality and related legislative framework can be used to *contribute* to government's programme of radical socio-economic transformation. In what follows, the role of the equality framework in catalysing radical transformation will be examined: First, the crucial concept of 'affirmative action' or 'special measures' will be investigated. Next, the extent to which the EEA can be utilised to provide vulnerable groups with economic opportunities and thereby transform the structure of the labour market along more egalitarian lines will be determined. Thereafter, focus will turn to the potential of Black economic empowerment programmes to transform the control and ownership of the economy, while simultaneously contributing to government's focus

<sup>104</sup> Achieving vertical equality implicates both *pre-distributive* and *redistributive* policies in order to both fundamentally alter socio-economic structures and ensure that the results of just institutions are more equally distributed amongst all members of society. Pre-distributive policies refer to those laws, policies and systems that set market rules, for example labour laws. In contrast, redistributive policies redistribute market gains in policy areas such as taxation, education, health and social assistance. Center for Economic and Social Rights *From Disparity to Dignity: Tackling Economic Inequality through the Sustainable Development Goals* (2016) 15, 20.

on the accelerated rollout of socio-economic infrastructure. Furthermore, it will be emphasised that in cases where the EEA and B-BBEE Act may not apply, it is vital for the promotional aspects of PEPUDA to be brought into operation so as to encourage the realisation of equality by the private sector and all members of society.

### 6.1.1 The meaning of 'affirmative action' or 'special measures'

South Africa is founded on the values of human dignity, equality and the advancement of fundamental rights and freedoms.<sup>105</sup> Section 9(2) of the Constitution further stipulates that equality includes the full and equal enjoyment of all rights and freedoms, and permits the adoption of affirmative action measures for this purpose. Affirmative action therefore aims to radically transform society in order to achieve substantive equality in all spheres of life, including in terms of the equitable distribution of income, wealth, land, and skills obtained through education. Affirmative action measures should not be viewed as an exception to equality, but instead as an essential component thereof. Inevitably, the adoption of affirmative action will give rise to 'transformative tension' between certain constitutional rights and values.<sup>106</sup> The Constitutional Court has accordingly provided cautionary guidance for the implementation of special measures:

**Measures that are directed at remedying past discrimination must be formulated with due care not to invade unduly the dignity of all concerned. We must remain vigilant that remedial measures under the Constitution are not an end in themselves. They are not meant to be punitive nor retaliatory. Their ultimate goal is to urge us on towards a more equal and fair society that hopefully is non-racial, non-sexist and socially inclusive... We must be careful that the steps taken to promote substantive equality do not unwittingly infringe the dignity of other individuals – especially those who were themselves previously disadvantaged.**<sup>107</sup>

The Constitutional Court has developed a three-pronged test to determine whether affirmative action measures fall within the bounds of section 9(2) of the Constitution. The test asks whether such measures (i) target persons or categories of persons who have been disadvantaged by unfair discrimination; (ii) are designed to protect or advance such persons or categories of persons; and (iii) promote the achievement of equality.<sup>108</sup> The efficacy of remedial or restitutionary measures fall to be judged on the basis of whether the 'overwhelming majority' of a particular group is subject to unfair discrimination or exclusion.<sup>109</sup> Furthermore, affirmative action or restitutionary measures must be 'reasonably capable' of achieving the desired ends.<sup>110</sup>

<sup>105</sup> S 1(a) of the Constitution.

<sup>106</sup> *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC) paras 77-81 (separate concurring judgment per Cameron J, Froneman J and Majiedt AJ). Transformative tension exists between the foundational constitutional value of non-racialism and a focus on race to achieve substantive equality through affirmative action. Such tension further arises between the dignity and equality of those benefited by remedial measures, and the dignity of those who are not members of designated groups.

<sup>107</sup> *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC) paras 30-31 (majority judgment per Moseneke ACJ).

<sup>108</sup> *Minister of Finance and Another v Van Heerden* 2004 (6) SA 121 (CC) para 37.

<sup>109</sup> Para 40.

<sup>110</sup> Para 41.

As alluded to above,<sup>111</sup> international law allows for ‘special measures’ to advance persons subject to discrimination, in various contexts including those pertaining to transformation of the labour market and economy, further education, and land distribution.<sup>112</sup> The ICERD explicitly endorses the adoption of special measures ‘to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms’. However, the ICERD further specifies that ‘[t]hese measures shall in no case entail as a consequence the *maintenance* of unequal or separate rights for different racial groups *after* the objectives for which they were taken have been achieved’.<sup>113</sup> Affirmative action measures should therefore be temporary, tailored to the needs of the groups or individuals concerned,<sup>114</sup> and should cease once substantive equality is achieved.

The ICERD should always be interpreted in its context<sup>115</sup> and thus, when implementing special measures, the characteristics of groups must be considered. Anyone implementing special measures must accordingly be able to show an objective and reasonable justification for differential treatment. According to the CERD, ‘[t]o treat in an equal manner persons or groups whose situations are objectively different will constitute discrimination in effect, as will the unequal treatment of persons whose situations are objectively the same’.<sup>116</sup> The CERD has summarised the meaning of special measures:

**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.**<sup>117</sup>

Importantly, need must be determined on the basis of data disaggregated by ‘race, colour, descent and ethnic or national origin and incorporating a gender perspective, on the socio-economic and cultural status and conditions’ of the group concerned.<sup>118</sup> Preferably, classification of individuals should take place through a process of self-identification, unless imposed classification can be justified.<sup>119</sup> Finally, in order to ensure that special measures remain temporary, States Parties must engage in a ‘continuing system’ of monitoring the application and results of such measures.<sup>120</sup>

<sup>111</sup> Section 4.2 above.

<sup>112</sup> The Convention on the Elimination of All Forms of Discrimination against Women (1979) (CEDAW) stipulates in Art 4(1) that special measures should not be considered to amount to discrimination. Focus will be placed on the concept of special measures as contained in the ICERD, given that the UN CERD recently reviewed South Africa’s combined periodic reports and issued concluding observations on South Africa’s compliance with the ICERD. See CERD *Concluding Observations on the Combined Fourth to Eighth Periodic Reports of South Africa* (2016) CERD/C/ZAF/CO/4-8. Furthermore, the Commission received a petition from Solidarity to determine government’s compliance with certain provisions of the ICERD. See Solidarity ‘Affirmative Action – Solidarity’s visit to the UN’ (19-09-2017) *Solidarity* <<https://solidariteit.co.za/en/44004/>>.

<sup>113</sup> Art 2(2) of the ICERD (emphasis added). The ICERD clarifies that the adoption of special measures does not constitute discrimination. Art 1(4) of the ICERD states:

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.

<sup>114</sup> CERD *General Recommendation No 32: The meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination* CERD/C/GC/32 (2009) para 27.

<sup>115</sup> *Ibid* para 5.

<sup>116</sup> *Ibid* para 8.

<sup>117</sup> *Ibid* para 16 (emphasis added).

<sup>118</sup> *Ibid* para 17.

<sup>119</sup> *Ibid* para 34.

<sup>120</sup> *Ibid* para 35.



## 6.1.2. Special measures to radically transform an unequal labour market

Recent research by the Commission has demonstrated that the labour market remains segregated in terms of race, gender and disability status – especially at highly skilled management levels.<sup>121</sup> Underrepresentation by vulnerable groups at these levels is a direct consequence of apartheid policy that excluded the Black majority from education and skills development in order to exploit them for cheap labour.<sup>122</sup> Today, the structure of the economy has developed to the point where demand for skilled labour has increased whereas demand for unskilled labour has decreased.<sup>123</sup>

In order to radically change the structure of the economy, structural discrimination based on prohibited grounds<sup>124</sup> of discrimination such as race, gender and disability must be addressed as a matter of priority. Although there has been some transformation of the labour market – especially in the public sector – management levels in the private sector continue to be dominated by White males and those without disabilities.<sup>125</sup> The primary tool for government to achieve its task of radically transforming the labour market is through the use of ‘special measures’ or ‘affirmative action’. Whereas the Constitution explicitly empowers government to adopt legislative and other measures to ‘protect or advance persons, or categories of persons, disadvantaged by unfair discrimination’,<sup>126</sup> the EEA concretises this obligation in the specific context of the workplace.

The EEA both prohibits unfair discrimination and regulates affirmative action.<sup>127</sup> Both chapters of the Act interact with each other in an attempt to transform the labour market. Specifically, the EEA aims to address patriarchal structures of the labour market by prohibiting discrimination based on, amongst other grounds, ‘family responsibility’.<sup>128</sup> This ground expands the prohibited grounds listed in the Constitution and PEPUDA, and can help support those who have caring responsibilities outside of the workplace. Moreover, in prohibiting unfair discrimination, the EEA was amended in 2014 to prohibit unequal terms and conditions of employment for persons performing substantially the same work, where unequal treatment is based on one of the prohibited grounds. This amendment signifies a positive progression in government policy in respect of gender-focused employment equity.

<sup>121</sup> SAHRC Report: *National Hearing on Unfair Discrimination in the Workplace* (2017) 16; SAHRC Research Brief on *Race and Equality in South Africa 2013-2017* (2017); SAHRC Research Brief on *Gender and Equality in South Africa 2013-2017* (2017); SAHRC Research Brief on *Disability and Equality in South Africa 2013-2017* (2017).

<sup>122</sup> United Nations Development Programme *The Impact of Socio-economic Inequality on Economic Development in South Africa* (2014) 21-22, 50-51.

<sup>123</sup> *Ibid* 32, 51.

<sup>124</sup> S 9(2) and (3) of the Constitution prohibit discrimination by the state and any person on several listed grounds. S 1 of PEPUDA expands the definition of ‘prohibited grounds’ for discrimination by incorporating a test to determine unfair discrimination, drawn from Constitutional Court jurisprudence:

‘prohibited grounds’ are-

- (a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; or
- (b) any other ground where discrimination based on that other ground-
  - (i) causes or perpetuates systemic disadvantage;
  - (ii) undermines human dignity; or
  - (iii) adversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a)...

<sup>125</sup> SAHRC Research Brief on *Race and Equality in South Africa 2013-2017* (2017) 13-14; SAHRC Research Brief on *Gender and Equality in South Africa 2013-2017* (2017) 15-16; SAHRC Research Brief on *Disability and Equality in South Africa 2013-2017* (2017) 16 (in the context of disability, the public sector has not achieved its goal of two percent employment of people with disabilities).

<sup>126</sup> S 9(2) of the Constitution.

<sup>127</sup> Chapter 2 of the EEA prohibits discrimination, whereas Chapter 3 deals with affirmative action. Since affirmative action is necessary to address patterns of structural discrimination, these chapters are closely related.

<sup>128</sup> S 6(1) of the EEA.



## SAHRC CONTINUES TO PROMOTE THE RIGHTS OF PERSONS WITH DISABILITIES

As noted in this Report, vertical economic equality cannot be achieved without addressing instances of direct and indirect horizontal discrimination. Therefore, the SAHRC continuously endeavours to promote the rights of persons with disabilities. Where people with disabilities are included in society, their inclusion in the workplace and economy will be facilitated.

In 2015, the SAHRC launched a toolkit entitled [Promoting the Right to Work of Persons with Disabilities: A Toolkit for the Private Sector](#) along with a Monitoring Framework. The Toolkit is intended to raise awareness of the rights to work in the private sector of persons with disabilities.

In November 2017, the Commission launched its report, entitled [Unfair Discrimination in the Workplace](#), following its National Hearing on this subject in 2016. The Report finds that people with disabilities face disproportionately high levels of unemployment, or are employed in low-status jobs and receiving below average remuneration. It is estimated that on average, eight in ten persons with disabilities are unemployed. The Report further finds that most persons with disabilities in South Africa who have been excluded from engaging fully in the economy are likely to experience severe poverty, deprivation, lack of access to most essential services, social marginalisation, and a high-level vulnerability to HIV/AIDS infection. Black Africans have the highest proportion of people with disability, with disability amongst females more prevalent than amongst men. Furthermore, the SAHRC finds that instances of unfair discrimination on the ground of disability are frequently restricted to a question of reasonable accommodation. Other factors, such as a lack of capacity development or opportunities for progress and the perpetuation of negative stereotypes in the workplace, may therefore be overlooked.

Moreover, the SAHRC has engaged in various awareness-raising initiatives regarding the rights of persons with disabilities. In 2017, SAHRC's Provincial Office in Kwa-Zulu Natal hosted two separate awareness-raising initiatives, one of which dealt with albinism in particular, and the other with right of persons with disabilities more [generally](#). Finally, the Commission successfully mediated a public sector employment dispute in 2017. The complainant, who made use of a wheelchair, alleged that the municipality for which he worked failed to reasonably accommodate him due to the absence of a proper wheelchair ramp. A settlement agreement was reached in July 2017.

A comprehensive approach must therefore be adopted by all members of society to ensure that persons of disabilities are included in all aspects of society and the economy.

The EEA defines affirmative action measures as ‘measures designed to ensure that suitably qualified employees from designated groups have equal employment opportunities and are equitably represented in all occupational levels of the workforce of a designated employer’.<sup>129</sup> ‘Designated groups’ means Black people, women or people with disabilities, thereby recognising structural and direct discrimination faced by these groups.<sup>130</sup> Closely related to affirmative action is the obligation of ‘reasonable accommodation’, which is defined in the EEA as ‘any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to or participate or advance in employment’. It is therefore clear that affirmative action and reasonable accommodation are designed to both provide *initial* economic opportunities to disadvantaged groups by prioritising their appointment, but continue to apply once people from such groups have entered the workforce. Thus, the duty to implement affirmative action measures extends to the retention and development of people from designated groups, through the implementation of training measures and skills development programmes.<sup>131</sup>

Importantly, numerical goals are required whereas quotas are prohibited,<sup>132</sup> and employers are not required to adopt policies that would establish an ‘absolute barrier’ to the prospective or continued employment or advancement of people who are not from the designated groups.<sup>133</sup> After an employer adopts an employment equity plan that will make reasonable progress towards employment equity in the workplace,<sup>134</sup> it may not discriminate against a job candidate solely on the ground of a lack of relevant experience.<sup>135</sup> This provision opens the door to combat widespread youth unemployment in South Africa.<sup>136</sup>

### Targeted special measures based on need

As has been noted by the Commission on several occasions, transformation of the labour market at management levels through the implementation of the EEA has been unacceptably slow.<sup>137</sup> Given that economic inequality between and within population groups in South Africa has worsened, the question arises as to whether the EEA itself or its implementation is leading to new imbalances.<sup>138</sup> The EEA accordingly stands to be evaluated against the constitutional and international law obligations implied by the ICERD, read with the CERD’s relevant general recommendations and concluding observations in respect of South Africa.

<sup>129</sup> S 15(1), as amended by the Employment Equity Amendment Act 47 of 2013.

<sup>130</sup> ‘Designated employers’ refers to employers that employ more than 50 employees, or that employ less than 50 employees but that exceed specified turnover thresholds.

<sup>131</sup> S 15(2)(d)(ii) of the EEA.

<sup>132</sup> S 15(3).

<sup>133</sup> S 15(4).

<sup>134</sup> S 20(1).

<sup>135</sup> S 20(5).

<sup>136</sup> According to Stats SA, youth (ages 15-34) unemployment stood at 38.6 percent in the third quarter of 2017, which is 10 points higher than the national average. Stats SA ‘Quarterly Labour Force Survey – QLFS Q3:2017’ (31-10-2017) Stats SA <<http://www.statssa.gov.za/?p=10658>>.

<sup>137</sup> SAHRC *Research Brief on Race and Equality in South Africa 2013-2017* (2017) 13-14; SAHRC *Research Brief on Gender and Equality in South Africa 2013-2017* (2017) 15-16; SAHRC *Research Brief on Disability and Equality in South Africa 2013-2017* (2017) 16; SAHRC *Report: National Hearing on Unfair Discrimination in the Workplace* (2017) 16; SAHRC *Research Brief on Race and Equality in South Africa 2013-2017* (2017) 31.

<sup>138</sup> CERD *General Recommendation No 32: The meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination* CERD/C/GC/32 (2009) para 22.

Special measures or affirmative action must be targeted at groups and individuals in need of advancement due to persisting patterns of discrimination and disadvantage. According to the CERD, beneficiaries should be classified as belonging to a certain group through a process of self-identification, unless a justification for the contrary exists.<sup>139</sup> As noted above, the EEA classifies beneficiaries of affirmative action according to 'designated groups' that correspond to the racial classification system used by apartheid government,<sup>140</sup> while expanding its scope to additionally include women and persons with disabilities. Whereas the population is provided with the opportunity to self-classify when statistical data is gathered for the population census,<sup>141</sup> self-classification does not translate into legislation that provides for special measures. Indigenous peoples, those whose ethnic descent may be from mixed race marriages, and linguistic or tribal minorities within the designated groups are therefore not accommodated by the EEA.

Furthermore, socio-economic data is similarly disaggregated according to the apartheid-era classification system of population groups. The CERD has on two occasions requested government to provide more exhaustive statistical demographic data that includes social and economic indicators, and furthermore accounts for indigenous groups and non-citizens.<sup>142</sup> As expanded on below, government plans to gather more comprehensive data from various departments before its next periodic review by the CERD in 2020.<sup>143</sup> However, it remains uncertain whether data will be disaggregated based on ethnic origin, since government has stated:

**South Africa's vision is that of a united people, united in our diversity, and not divided along ethnic and tribal groups. We are thus not in a position to provide disaggregated statistical data regarding ethnic groups.<sup>144</sup>**

Government's approach in this regard, as reflected in the EEA, is problematic for several reasons. Affirmative action measures must be targeted at groups and individuals who are subject to unfair discrimination, in order to eventually achieve substantive equality and a society based on non-racialism and non-sexism.<sup>145</sup> Decisions based on insufficiently disaggregated data fail to target persons or categories of persons who have been disadvantaged by unfair discrimination, as required by the three-pronged test for affirmative action.<sup>146</sup> Without first taking the characteristics of groups into account,<sup>147</sup> varying degrees of disadvantage and the possible intersectionality of multiple forms of discrimination (based on race, ethnicity, gender or social origin) faced by members of vaguely categorised groups, cannot be identified. Moreover, the current classificatory system and

<sup>139</sup> Ibid para 34.

<sup>140</sup> The EEA defines Black people as 'Africans, Coloureds and Indians'.

<sup>141</sup> Deputy Minister of Justice and Constitutional Development *Response Letter Re: South African Government's Compliance with the International Convention on the Elimination of All Forms of Racial Discrimination* (04-03-2018).

<sup>142</sup> CERD *Concluding Observations of the Committee on the Elimination of Racial Discrimination: South Africa* (2006) CERD/C/ZAF/CO/3 paras 11, 13, 15; CERD *Concluding Observations on the Combined Fourth to Eighth Periodic Reports of South Africa* (2016) CERD/C/ZAF/CO/4-8 paras 6-7.

<sup>143</sup> Deputy Minister of Justice and Constitutional Development *Response Letter Re: South African Government's Compliance with the International Convention on the Elimination of All Forms of Racial Discrimination* (04-03-2018).

<sup>144</sup> RSA *National Statement in Introduction of the South African Periodic Report (Combined 4-8 Periodic Reports) to the Committee on the Elimination of Racial Discrimination (CERD)* (09-08-2016) 8.

<sup>145</sup> S 1(b) of the Constitution.

<sup>146</sup> *Minister of Finance and Another v Van Heerden* 2004 (6) SA 121 (CC) para 37.

<sup>147</sup> CERD *General Recommendation No 32: The meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination* CERD/C/GC/32 (2009) para 8.

disaggregation of data fails to acknowledge multiple forms of discrimination faced *within* population groups. For example, given that inequality between members of the Black African population group is higher than in any other racial group, it is foreseeable that current practice might result in a job opportunity for a wealthy Black man of Zulu origin, rather than a poor Black woman from an ethnic minority.<sup>148</sup> Special measures accordingly do not account for socio-economic differences within broadly defined population groups. The CERD's requirement for the implementation of special measures on the basis of need, and a related 'realistic appraisal of the current situation of the individuals and communities' concerned, cannot be met without a more nuanced disaggregation of data.

### Special measures designed to advance vulnerable groups

In terms of the EEA, designated employers must adopt affirmative action measures that are designed to ensure the equitable representation of suitably qualified candidates at all levels of the workforce, and to retain and develop employees from designated groups through training initiatives and skills development.<sup>149</sup> Due to the fact that designated groups are bluntly classified and data is insufficiently disaggregated, measures are not capable of being targeted at the most vulnerable groups in society, and can likewise not be designed to respond to new forms of discrimination,<sup>150</sup> or to compounded discrimination.

Importantly, such measures may be designed to include preferential treatment and numerical goals or targets, but may not amount to quotas.<sup>151</sup> The Constitutional Court has sought to clarify the distinction between targets and quotas by noting that quotas are rigid, whereas numerical targets should be capable of flexible implementation.<sup>152</sup> Moreover, absolute barriers to employment may not be created for people who are not members of designated groups.<sup>153</sup> Special measures must therefore be flexibly designed in order to be reasonably likely<sup>154</sup> to advance people based on need, and thereby achieve the ultimate objective of substantive equality.

However, the Constitutional Court has been sharply divided in determining whether the implementation of purported numerical targets by certain government departments amounts to rigid quotas.<sup>155</sup> Moreover, the Court has inadvertently created the risk that members of designated groups – and especially those individuals who suffer multiple forms of discrimination – may be prejudiced by the rigid implementation of targets, thereby raising the spectre of new imbalances

**SPECIAL MEASURES MUST THEREFORE BE FLEXIBLY DESIGNED IN ORDER TO BE REASONABLY LIKELY TO ADVANCE PEOPLE BASED ON NEED, AND THEREBY ACHIEVE THE ULTIMATE OBJECTIVE OF SUBSTANTIVE EQUALITY.**

<sup>148</sup> Ethnicity and language are closely related. The Zulu group constitutes the largest group based on ethnicity in South Africa. Where a dominant cultural group exists, the risk of discrimination against ethnic minorities arises. See SA History 'Race and Ethnicity in South Africa' (23-03-2015) *SA History* <<http://www.sahistory.org.za/article/race-and-ethnicity-south-africa>>. See further M Baton 'South Africa as a Party to the ICERD: A briefing paper' (2013) 83 *Transformation* 86-92.

<sup>149</sup> S 15(2)(d) of the EEA.

<sup>150</sup> SAHRC Report: *National Hearing on Unfair Discrimination in the Workplace* (2017) 67.

<sup>151</sup> S 15(4) of the EEA.

<sup>152</sup> *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC) para 42; *Solidarity and Others v Department of Correctional Services and Others* 2016 (5) SA 594 (CC) paras 50-61.

<sup>153</sup> *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC) para 42.

<sup>154</sup> *Minister of Finance and Another v Van Heerden* 2004 (6) SA 121 (CC) paras 42-43.

<sup>155</sup> See the marked difference in opinion of Zondo J for the majority and Nugent AJ for the minority in *Solidarity and Others v Department of Correctional Services and Others* 2016 (5) SA 594 (CC) paras 50-64 and paras 102-118, respectively.

arising.<sup>156</sup> In *South African Police Service v Solidarity obo Barnard*,<sup>157</sup> the Constitutional Court held that a designated employer was entitled not to promote a White woman given that White women were over-represented at that employment level, despite the fact that women are included in the EEA's definition of designated groups. Subsequently, in *Solidarity and Others v Department of Correctional Services and Others*,<sup>158</sup> the same Court confirmed that the so-called *Barnard* principle applies to African, Coloured and Indian persons and to different genders. This effectively means that where, for example, African females are sufficiently represented at a certain employment level, a wealthy, heterosexual White man could be granted preferential treatment to the detriment of a poor, African, homosexual woman.

The latter application of the *Barnard* principle therefore conflicts with the CERD's requirement for special measures to be adopted on the basis of a realistic appraisal of need, taking into account the social and economic circumstances of the group or individual concerned. It furthermore stands in opposition to the approach reflected in the National Development Plan, whereby preference should be accorded on the basis of race 'for at least the next decade' when defining historical disadvantage.<sup>159</sup> Where special measures may result in new imbalances or exacerbate current inequality viewed in the labour context more broadly, it is doubtful that such measures are 'designed' to advance people in need of remedial measures. Worryingly, it can lead to perverse consequences and 'token' affirmative action where minority status, or new patterns of discrimination and inequality within designated groups, is not properly considered.<sup>160</sup>

### Special measures must promote the achievement of equality

Once the objective of affirmative action, namely substantive equality, is achieved, temporary special measures should cease.<sup>161</sup> However, given the persistence of gross inequality in South Africa – and despite policies aimed at radical socio-economic transformation – much remains to be done before this goal is reached. Currently, special measures in the employment equity context raise several concerns in respect of the requirement for affirmative action to promote equality.

First, due to challenges in classification and data disaggregation identified above, equality of outcomes cannot be achieved for marginalised individuals who do not fit comfortably within the crass categories of African, Coloured or Indian population groups. Furthermore, to the extent that measures are targeted at people without assessing need or recognising intersecting forms of discrimination and disadvantage, special measures will fail to promote substantive equality. In any event, it is not possible to measure the impact of special measures on the most vulnerable persons or groups, if those persons or groups are not identified based on accurate data in the first instance. Although government has committed to provide more detailed quantitative and qualitative data to the CERD in its next periodic review of South Africa in 2020, this process

<sup>156</sup> CERD *General Recommendation No 32: The meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination* CERD/C/GC/32 (2009) para 22.

<sup>157</sup> 2014 (6) SA 123 (CC) para 62.

<sup>158</sup> 2016 (5) SA 594 (CC) para 40.

<sup>159</sup> National Planning Commission *National Development Plan* (2012) 467.

<sup>160</sup> H Papacostantis & M Mushariwa 'The Impact of Minority Status in the Application Affirmative Action: NAIDOO v MINISTER of SAFETY and SECURITY 2013 5 BLLR 490 (LC)' (2016) 19 *PER* 1 15, 19, 21-22.

<sup>161</sup> CERD *General Recommendation No 32: The meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination* CERD/C/GC/32 (2009) para 16.

has not yet begun. Furthermore, whereas government suggests that this data will be gathered from various implementing government departments and collated, more proactive steps are necessary to qualitatively assess both the need for and impact of special measures on vulnerable individuals and groups based on current socio-economic need.<sup>162</sup> For example, the Commission for Employment Equity (CEE) recently announced that it is in the process of qualitatively assessing the impact of special measures in the labour market on vulnerable groups.<sup>163</sup> This is a laudable development, which should be sufficiently resourced, and coordinated amongst various relevant government departments. Second, due to polycentric<sup>164</sup> consequences that may result from the application of the *Barnard* principle, existing patterns of disadvantage may be exacerbated or new patterns of disadvantage may arise, thereby prejudicing the achievement of substantive equality.

**PROACTIVE STEPS ARE NECESSARY TO QUALITATIVELY ASSESS BOTH THE NEED FOR AND IMPACT OF SPECIAL MEASURES ON VULNERABLE INDIVIDUALS AND GROUPS BASED ON CURRENT SOCIO-ECONOMIC NEED.**

In the context of the need to radically transform the labour market, the objective of affirmative action is for a given workplace to be 'broadly representative' of the people of South Africa.<sup>165</sup> A third pressing issue in relation to the achievement of substantive equality in the workforce is thus the question as to how 'broad representivity' should be measured. In *Solidarity and Others v Department of Correctional Services and Others*, the Constitutional Court held that a government department's implementation of its employment equity plan failed to consider regional demographics, and exclusively focused on representivity as a reflection of the *national* economically active population. As a result, the designated employer's implementation of affirmative action measures to achieve representivity at all levels was based on incorrect demographic data and benchmarks.<sup>166</sup> The requirement to consider regional demographic data in setting representivity targets makes sense given the uneven distribution of different population groups across South Africa. For example, the vast majority of Coloured people live in the Western Cape and Northern Cape, whereas they constitute less than 10 percent in the Eastern Cape and less than one percent in Limpopo.<sup>167</sup> A context-sensitive approach is thus congruent with the CERD's guidance on the interpretation and implementation of the ICERD and its requirement for special measures.

At the time that the *Solidarity* matter was adjudicated, section 42(a)(i) of the EEA mandated anyone implementing the Act to consider representivity in relation to both the national and regional economically active population. Subsequently, section 42 was amended and now renders the consideration of regional demographics discretionary.<sup>168</sup> A failure to consider regional demographics not only stands in conflict with the CERD's position on context-sensitive implementation of special measures, but may simultaneously severely prejudice members of certain designated groups

<sup>162</sup> Deputy Minister of Justice and Constitutional Development *Response Letter Re: South African Government's Compliance with the International Convention on the Elimination of All Forms of Racial Discrimination* (04-03-2018).

<sup>163</sup> Commissioner A Gildenhuys, Commission for Employment Equity *Address at the SAHRC Business and Human Rights Dialogue*, 13-14 March 2018.

<sup>164</sup> L Fuller 'The Forms and Limits of Adjudication' (1978) 92 *Harv LR* 353 394 coined the term 'polycentricity' to describe complex disputes in which a decision on one issue could potentially result in unknown ramifications for myriad interrelated issues.

<sup>165</sup> *Solidarity and Others v Department of Correctional Services and Others* 2016 (5) SA 594 (CC) para 40.

<sup>166</sup> Paras 78-82.

<sup>167</sup> Para 127; H Papacostantis & M Mushariwa 'The Impact of Minority Status in the Application Affirmative Action: NAIDOO v MINISTER of SAFETY and SECURITY 2013 5 BLLR 490 (LC)' (2016) 19 *PER* 20.

<sup>168</sup> Employment Equity Amendment Act, 47 of 2013.

in provinces where they are more significantly represented. Furthermore, considering the huge problem constituted by unemployment in South Africa, the legislative amendment and consequent implementation of affirmative action measures may provoke urban migration and thereby exacerbate existing spatial injustices.

**THE INSUFFICIENT CONTRIBUTION OF THE PRIVATE SECTOR TO TRANSFORMATION SERIOUSLY IMPEDES THE ACHIEVEMENT OF SUBSTANTIVE EQUALITY IN THE LABOUR MARKET.**

Finally, the insufficient contribution of the private sector to transformation seriously impedes the achievement of substantive equality in the labour market. The private sector continues to employ mostly White men at senior management levels, with Black representation dipping alarmingly to pre-2005 levels in recent years.<sup>169</sup> Painstakingly slow transformation points to a failure by the private sector to understand both South Africa's overarching constitutional project of radically transforming society and the economy to achieve substantive equality, as well as the requirements imposed by the EEA.

The EEA places emphasis on the need to reasonably accommodate, retain and develop members of the designated groups.<sup>170</sup> Designated employers must therefore continuously consult with employees and analyse their skill sets and needs, in order to pursue development and training initiatives in addition to achieving numerical targets. Accurate targeting of skills development initiatives and subsequent promotion would comply with the CERD's requirement for special measures to be implemented on the basis of need. Furthermore, government has indicated that too little resources are spent by employers on the development and training of staff, thereby impeding the transformation of the labour market. As a result, the Economic Development Department (EDD) entered into a skills accord with various business and government stakeholders, in which these actors commit to using existing training facilities more fully.<sup>171</sup> Adequate development programmes will moreover ensure that designated employers do not fall foul of the EEA's prohibition against discrimination based solely on a candidate's lack of experience.<sup>172</sup> However, institutional fragmentation is identified as between the DOL as administrator of the EEA, the Department for Economic Development as a catalyst for the skills accord, and the National Skills Authority, which is undertaking research to determine the impact of the National Skills Development Strategy on beneficiaries, but is institutionally positioned as part of the Department of Higher Education and Training (DHET).

Slow transformation, especially within the private sector, may also indicate the private sector's lack of understanding regarding the importance of achieving a more equal society. Greater equality would spur economic growth, thereby benefiting the private sector at various levels. However, South Africa's transformation project is unlikely to succeed without the collaboration of the private sector, which does bear constitutional obligations in appropriate circumstances.<sup>173</sup> Chapter 5 of PEPUDA, if fully operationalised, might partially address this challenge given the obligation imposed upon bodies contracting with the state, as well as all other companies and corporations, to develop equality plans in proportion to factors such as size and resources.<sup>174</sup>

<sup>169</sup> Commission for Employment Equity *Annual Report 2016/17* (2017) 18; SAHRC *Research Brief on Race and Equality in South Africa 2013-2017* (2017) 13.

<sup>170</sup> Ss 15, 19, 20 of the EEA.

<sup>171</sup> See Economic Development Department *National Skills Accord* (2011) and National Planning Commission *National Development Plan* (2012) 467.

<sup>172</sup> S 20(5) of the EEA.

<sup>173</sup> S 8(2) of the Constitution states:

A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

<sup>174</sup> Ss 26-27 of PEPUDA.



## 6.1A. Findings and Recommendations

It is therefore found that the EEA's definition of 'designated groups' and South Africa's system of data disaggregation are not in compliance with constitutional or international law obligations imposed by the ICERD read in conjunction with the CERD's general recommendations and concluding observations. Government's failure to measure the impact of various affirmative action measures on the basis of need and disaggregated data, especially the extent to which such measures advance indigenous peoples and people with disabilities, likewise violates the obligations imposed by the ICERD and the CERD.

- (i) It is accordingly recommended that the EEA be amended to target more nuanced groups on the basis of need, and taking into account social and economic indicators. It is further recommended that government – through the DOJCD, the Department of Labour (DOL) and the Department of Planning, Monitoring and Evaluation (DPME) – collaborates with Stats SA to gather data disaggregated by ethnic origin, language, and disability, and that includes social and economic indicators. The DOJCD in consultation with the DOL, CEE, DPME, Department of Basic Education (DBE), DHET and other relevant departments should thereafter proceed to gather 'detailed qualitative and quantitative information ... on the impact of the special measures it has taken in employment, education and public and political affairs'.<sup>175</sup> These departments must jointly report back to the Commission within six months of the release of this Report on steps taken or intended to be taken to amend the EEA, to disaggregate data, and to measure the impact of affirmative action on vulnerable groups, including indigenous peoples and people with disabilities.<sup>176</sup>
- (ii) It is further found that the EEA and its implementation, as well as the design of special measures, are currently misaligned to the constitutional objective of achieving substantive equality. It is accordingly recommended that in qualitatively assessing the impact of affirmative action measures on vulnerable groups, including indigenous peoples and people with disabilities, the DOL, in collaboration with the CEE and in consultation with National Treasury, undertakes a representative assessment of the implementation of employment equity plans of designated employers in order to ensure that targets are flexibly pursued and do not amount to rigid quotas.



<sup>175</sup> CERD Concluding Observations on the Combined Fourth to Eighth Periodic Reports of South Africa (2016) CERD/C/ZAF/CO/4-8 para 15.

<sup>176</sup> The DOJCD has indicated that steps will be taken to provide detailed statistical data to the CERD in 2020. Deputy Minister of Justice and Constitutional Development *Response Letter Re: South African Government's Compliance with the International Convention on the Elimination of All Forms of Racial Discrimination* (04-03-2018). However, a more detailed action plan should be provided in this regard.

- (iii) It is further found that institutional fragmentation exists as between the DOL and CEE, EDD, and the National Skills Authority and DHET, especially in respect of skills development initiatives. It is thus recommended that the DOL, in collaboration with the CEE and the National Skills Authority, includes a representative assessment of development and training initiatives of designated employers, and especially those designated employers in the private sector, when assessing the implementation of employment equity plans. Focus should be placed on training initiatives designed for persons with disabilities, and to what extent people from this group are granted opportunities to progress in the workplace.
- (iv) The DOJCD, in consultation with the DOL and CEE, should determine whether and how the EEA can be amended to require a qualitative and context-sensitive assessment of need when employment equity plans are implemented. The EEA should be further amended to revert to the position where the consideration of the regional economically active population in relation to representation levels is mandatory and not discretionary.

The DOJCD, DOL and CEE must jointly report to the Commission within six months of the release of this Report on information considered and steps intended to be taken to address these recommendations.

- (v) Finally, it is found that the private sector is not sufficiently contributing to the transformation of the labour market. It is accordingly recommended that the DOJCD expedites the process necessary to bring Chapter 5 of PEPUDA into commencement. The operationalisation of the Chapter must be accompanied by the allocation of additional resources to both the SAHRC and the CGE in order for these institutions to effectively perform their functions in terms of these legislative provisions and accompanying regulations. The DOJCD should report to the Commission within one month of release of this report on steps taken to fully operationalise Chapter 5 of PEPUDA.

### 6.1.3 Radically transforming ownership of the economy

Radically transforming the structures and patterns of ownership of the economy forms a central component of government's programme of radical socio-economic transformation. According to the MTSF, radical socio-economic transformation must provide opportunities for historically excluded and vulnerable groups, such as women and people with disabilities.<sup>177</sup> Furthermore, government has attempted to promote small enterprises, cooperatives and entrepreneurs, as well as increasing employee and community share ownership, through the implementation of various programmes and policies.<sup>178</sup> The private sector again plays a crucial role in radically transforming the economy.



## SAHRC HOSTS DIALOGUE ON BUSINESS AND HUMAN RIGHTS

Since 2013, the SAHRC has undertaken a number of initiatives to promote awareness and understanding of the impact of business on human rights in South Africa. The SAHRC hosted a Dialogue on Business and Human Rights on 13-14 March 2018 in an effort to build on these initiatives to progressively strengthen the responsibility that business carries in respect of human rights. The Dialogue sought to further the SAHRC's mandate in promoting and protecting human rights by improving collaboration between the state, business and civil society on pressing business and human rights issues in South Africa. The Dialogue focused on the role of business in equality and development; corporate accountability and state-owned enterprises; business and community engagement; and employment equity. The SAHRC will produce a report following the Dialogue, and will further update its Human Rights and Business Country Guide. Moreover, the SAHRC will continue to engage with the business sector as well as other key stakeholders in order to ensure the promotion, protection and enforcement of human rights.

Government possesses a vast array of tools through which discriminatory patterns of ownership in, and control of, the economy can be transformed. At an overarching level, government's programmes of Broad-Based Black Economic Empowerment (B-BBEE) constitute special measures in the context of the broader economy. Whereas the B-BBEE legislative and policy framework generally incentivises companies that wish to do business with or receive concessions from government to ensure Black economic empowerment compliance, procurement regulations concretise these special measures in the lucrative government tender industry context. However, special measures cannot focus exclusively on those corporations that are large enough to transact with government, or otherwise accept sub-contracts from large tenderers. As a result, special measures are also implemented to develop small businesses, cooperatives and entrepreneurs and are closely related to the promotion of the right to work.

<sup>177</sup> Republic of South Africa *Medium Term Strategic Framework 2014-2019* (2014) 11.

<sup>178</sup> National Planning Commission *National Development Plan* (2012) 468.

## Black Economic Empowerment special measures

The B-BBEE Act, while rooted in the right to equality, has a broad sphere of application. The special measures contained in the Act can thus be applied in various contexts, including procurement, industrialisation more broadly, and land. These special measures, or affirmative action, must comply with both constitutional and international requirements regardless of their specific sphere of application. The B-BBEE Commission enjoys broad powers to ensure compliance with BEE legislation and Codes of Good Practice, including the initiation of investigations, the making of findings, or referrals of cases of non-compliance for prosecution.<sup>179</sup>

### a. Targeted special measures based on need

The B-BBEE Act defines Black economic empowerment (BEE) as the ‘viable economic empowerment of all black people, in particular women, workers, youth, people with disabilities and people living in rural areas, through diverse but integrated socio-economic strategies’. The B-BBEE Act thus constitutes a special measure, or affirmative action, in the sphere of economic management and ownership structures. To the extent that youth, workers, people with disabilities and those people living in rural areas are targeted by BEE special measures, the legislation responds to current need and considers socio-economic factors. However, the B-BBEE Act defines ‘Black people’ in the same way that the EEA does, and therefore again fails to base classification on sufficiently disaggregated data.

According to the B-BBEE Commission, fronting<sup>180</sup> constitutes the main impediment to the successful implementation of B-BBEE transformation schemes. Fronting practices, where Black people do not benefit from transactions, therefore lead to special measures not being targeted at vulnerable groups on the basis of need. Instead, powerful population groups continue to benefit from measures that are not designed to advance them. The B-BBEE Commission attempts to combat fronting by providing feedback on corporate structuring in order to bring any proposed ownership schemes in line with B-BBEE imperatives. Where corporations do not incorporate the B-BBEE Commission’s feedback, investigations may be initiated. Currently, the B-BBEE Commission is investigating several alleged cases of fronting, and will publicise its findings in due course.

### b. Special measures designed to advance vulnerable groups

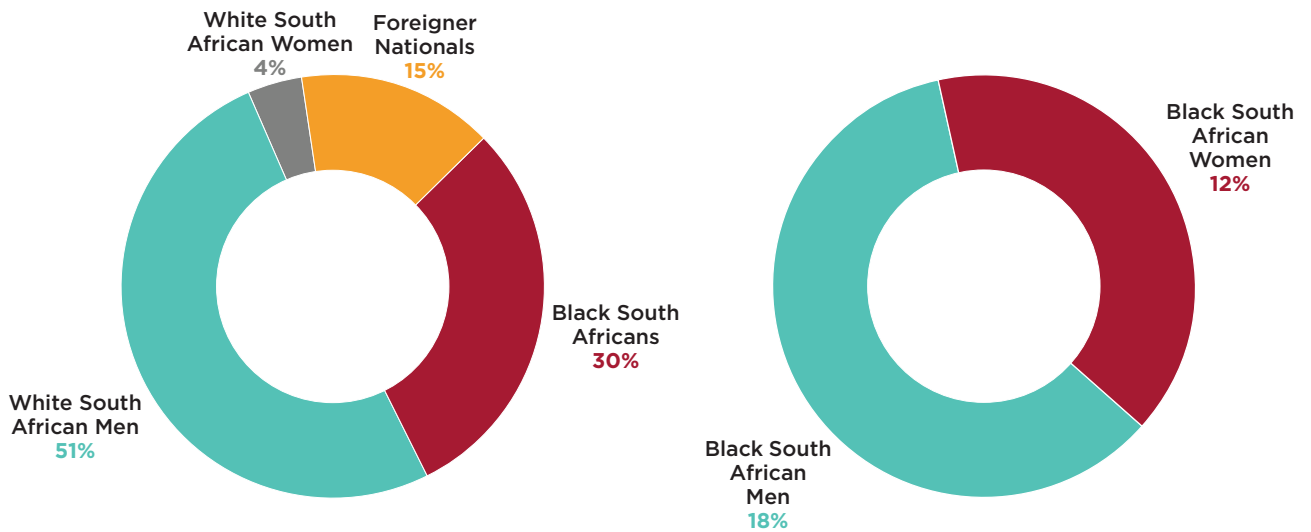
According to the B-BBEE Commission, approximately 51 percent of directorships in Johannesburg Stock Exchange (JSE) listed companies are held by White males, a mere four percent are held by White women, 18 percent are held by Black males, and 12 percent are held by Black women:<sup>181</sup>

<sup>179</sup> S 13J of the B-BBEE Act.

<sup>180</sup> In terms of the B-BBEE Act, the Department of Trade and Industry’s Codes of Good Practice and regulations, companies who wish to receive licences, other concessions or tenders from government must be B-BBEE compliant and score well under B-BBEE scorecards. Where a company is BEE-compliant, a BEE certificate is issued. Since the revision of B-BBEE Codes of Good Practice in 2015, compliance is calculated in terms of five elements, namely ownership; management control (which includes employment equity); skills development; enterprise development; and socio economic development. Many companies have used dishonest means to obtain favourable B-BBEE ratings, which exercise is referred to as ‘fronting’. Fronting is defined in the B-BBEE Act as including practices whereby Black persons are excluded from participation in companies, where Black persons do not enjoy the economic benefits received as a result of B-BBEE status, or where otherwise unfair or unreasonable agreements are entered into with Black people.

<sup>181</sup> B-BBEE Commission *National State of Transformation and Trend Analysis National Report* (2016) 10.

DIRECTORSHIPS IN JSE-LISTED COMPANIES<sup>182</sup>



The fact that only four percent of directorships are held by White women, points to the emergence of new imbalances, in contrast to the CERD's recommendation that special measures should prevent exactly such imbalances from arising.<sup>183</sup> Furthermore, it indicates that special measures in this context may amount to an 'absolute bar' to members of non-designated groups from benefiting from economic development. Due to the fact that 'Black people' are restrictively classified according to insufficiently disaggregated data, the risk again arises that BEE special measures are not designed so as to be reasonably likely to advance vulnerable persons on the basis of need, while preventing new patterns of inequality from emerging.

Furthermore, aligned legislation and policies, as well as coordinating oversight bodies, are necessary to ensure that special measures are reasonably likely to fulfil their objectives. Despite collaborating with the CEE and other key bodies such as competition authorities, the B-BBEE Commission's role is rendered reactionary by the absence of a central oversight body. Furthermore, the B-BBEE Commission is often hamstrung by the over-criminalisation apparent from the B-BBEE Act: serious cases must be referred to the National Prosecuting Authority, after which criminal fronting activities must be proven beyond a reasonable doubt in order to trigger the B-BBEE Act's penalty provisions.<sup>184</sup>

**c. Special measures must promote the achievement of equality**

To date, B-BBEE programmes have been unsuccessful in radically transforming management and ownership structures of large corporations. The fact that White men still manage the largest companies in the economy further demonstrates the failure of BEE special measures to target vulnerable groups based on need. Impediments to the success of BEE special measures include a lack of capital by Black enterprises, fronting in procurement processes, and insufficient focus on

<sup>182</sup> Figure reproduced from B-BBEE Commission *National State of Transformation and Trend Analysis National Report (2016)* 10.

<sup>183</sup> CERD *General Recommendation No 32: The meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination* CERD/C/GC/32 (2009) para 22.

<sup>184</sup> See ss 13O and 13P.

local procurement.<sup>185</sup> Elite capture has also been identified as a shortcoming of BEE programmes.<sup>186</sup> Finally, without the earnest contribution of all organs of state and the private sector, equality in the economy cannot be achieved. The B-BBEE Commission has noted endemic non-compliance by organs of state. Whereas all organs of state are obliged to report to the B-BBEE Commission,<sup>187</sup> the Commission has only received a handful of reports since its inception. The B-BBEE Commission has further observed that various organs of state continue to transact with non-compliant corporations. Successful B-BBEE implementation requires that all organs of state must be capacitated to identify fronting practices. Where government fails to comply with its own legislation and policies, it appears to endorse the sentiment that meaningful transformation is unnecessary.<sup>188</sup> Furthermore, in such instances, special measures do not promote substantive equality.

### Preferential procurement special measures

One key aspect through which BEE is operationalised is through government's procurement policies. Preferential procurement policies thus constitute special measures. Infrastructure development, which likewise forms a core component of government's programme of radical socio-economic transformation, requires large-scale procurement and is therefore intricately linked to BEE.<sup>189</sup>

#### a. Targeted special measures based on need

According to the Department of Trade and Industry (DTI), BEE did not feature sufficiently in government procurement practices prior to the enactment of preferential procurement regulations. This is due to the fact that the Preferential Procurement Policy Framework Act, 5 of 2000 (PPPFA) was passed prior to B-BBEE legislation.<sup>190</sup> Although the PPPFA includes contracts with vulnerable groups based on race, gender and disability as a procurement objective,<sup>191</sup> the subsequent regulations attempt to better align the procurement system with B-BBEE imperatives.

Whereas the initially promulgated 2011 regulations entailed a mechanical application of a formula to govern government tenders, new preferential procurement regulations that took effect in April 2017 aim to better align procurement practices with government's BEE and radical socio-economic transformation policies.<sup>192</sup> Furthermore, the new regulations aim to give effect to the constitutional imperative for government procurement to be 'fair, equitable, transparent, competitive and cost-effective' while allowing for procurement policies that advance persons or categories of persons disadvantaged by unfair discrimination.<sup>193</sup> The 2017 regulations attempt to facilitate BEE by

<sup>185</sup> National Planning Commission *National Development Plan* (2012) 468.

<sup>186</sup> D McKinley 'State capture goes to the roots of post-94 SA' (07-2017) *Your Right2Know* 7 <<http://www.r2k.org.za/wp-content/uploads/Right2Know-03072017007CPTIS.pdf>>; B Maharaj 'BEE: A conduit for cabals, clans, cliques, coteries and crooks?' (23-10-2017) *Daily Maverick*.

<sup>187</sup> S 13G.

<sup>188</sup> Information regarding the challenges faced by the B-BBEE Commission was provided by the Commissioner of the B-BBEE Commission during a telephonic interview on 7 February 2018. The valuable insights provided by the Commissioner are gratefully acknowledged.

<sup>189</sup> According to Republic of South Africa *Medium Term Strategic Framework 2014-2019* (2014) 7, infrastructure development forms a critical aspect of radical economic transformation, and should provide employment opportunities for women and the youth, while promoting black economic empowerment. Furthermore, State-Owned Entities are expected to play a critical role in this process.

<sup>190</sup> Department of Trade and Industry *Leveraging Public Procurement. Annual Small Business Summit* (2011) 9.

<sup>191</sup> S 2(1)(d) of the PPPFA.

<sup>192</sup> Preferential Procurement Regulations, 2017 in GG No 40553 of 20 January 2017.

<sup>193</sup> S 217 of the Constitution.

introducing 'pre-qualification criteria', whereby government may set aside tenders to tenderers with a minimum B-BBEE status level of contributor, emerging or small enterprises; or to tenderers that will subcontract a minimum of 30 percent to companies that are owned by 51 percent Black people, or Black women, or Black people in rural areas, or Black people with disabilities.<sup>194</sup>

The regulations further introduce a requirement that where the DTI has established minimum local production thresholds in designated sectors, any invitation for tenders must specify that 'only locally produced goods or locally manufactured goods, meeting the stipulated minimum threshold for local production and content, will be considered'.<sup>195</sup> The preferential considerations remain at a ratio of 20/80 or 10/90 vis-à-vis price considerations.<sup>196</sup> Nevertheless, to the extent that preferential considerations are aimed at vulnerable groups, they constitute targeted special measures.

### **b. Special measures designed to advance vulnerable groups**

However, the pre-qualification criteria are discretionary in nature.<sup>197</sup> Moreover, the regulations provide no guidance to government departments to establish which vulnerable group is most in need of a particular sub-contract in a particular instance. Likewise, no guidance is provided to government departments in order to determine whether sub-contracting is 'feasible'.<sup>198</sup> As a result, this regulatory provision does not comply with the constitutional requirement to design measures to advance vulnerable groups, or the CERD's recommendation that special measures must be instituted on the basis of a realistic appraisal of need that includes the consideration of socio-economic factors. The absence of guidance points to institutional misalignment, which could be rectified by capacitating the B-BBEE Commission to fulfil this role.<sup>199</sup>

Currently, the regulations manifest a tension between transformation and cost efficiency considerations, as well as institutional misalignment amongst the DTI and National Treasury. For example, whereas the regulations evince a clear intention to accelerate socio-economic transformation through BEE, price considerations are duplicated. Thus, even after the 20/80 or 10/90 points system formula is applied, a tender may not be awarded where a price is 'not market-related'.<sup>200</sup> This provision therefore effectively double counts price as a consideration, to the detriment of preferential considerations. Whereas the B-BBEE Commission (if sufficiently capacitated) holds enormous potential to alleviate this tension through the cross-cutting coordination of government's programme of radical transformation, additional reform is necessary to address the current highly fragmented nature of the procurement system. The repositioning of the Office of the Chief Procurement Officer<sup>201</sup> to serve as a central, coordinated regulatory focal point, may be a viable option in this regard.<sup>202</sup>

<sup>194</sup> Tenderers may also subcontract to companies that are owned by 51 percent Black military veterans; emerging micro-enterprises; or small qualifying businesses. Reg 4 of the Preferential Procurement Regulations, 2017.

<sup>195</sup> Reg 8 of the Preferential Procurement Regulations, 2017.

<sup>196</sup> G Quinot 'This is how new BEE Rules on public procurement impact businesses' (20-09-2017) *Fin24* <<https://www.fin24.com/Opinion/this-is-how-new-bee-rules-on-public-procurement-impact-businesses-20170920>>.

<sup>197</sup> Reg 4(1) of the Preferential Procurement Regulations, 2017.

<sup>198</sup> Reg 9(1).

<sup>199</sup> Information regarding the challenges permeating South Africa's procurement system was provided by Professor Geo Quinot, a leading expert in procurement and Director of the African Procurement Law Unit, during a telephonic interview on 9 February 2018. The valuable insights provided are gratefully acknowledged. See further <[www.africanprocurementlaw.org](http://www.africanprocurementlaw.org)>.

<sup>200</sup> Reg 6(9) of the Preferential Procurement Regulations, 2017.

<sup>201</sup> The Office of the Chief Procurement Officer currently resides in the National Treasury.

<sup>202</sup> G Quinot (African Public Procurement Regulation Research Unit) *Research Report on the Feasibility of Specific Legislation for National Treasury's Newly Established Office of the Chief Procurement Officer* (2014) xv.

### c. Special measures must promote the achievement of equality

Besides legislative, policy and institutional misalignment in the procurement system, transformation programmes cannot be sustainably achieved where corruption and irregular expenditure persist in government procurement practices. According to the Auditor-General, an estimated R128 billion was lost to irregular expenditure in supply chain processes during the past four years.<sup>203</sup> In particular, corruption has manifested in the highest levels of government and across various State-Owned Entities. Importantly, it must be borne in mind that private actors are complicit in activities where corruption or 'state capture' is alleged.<sup>204</sup> Where such resources could be better utilised to implement socio-economic policies, irregular expenditure seriously jeopardises a project of

**AS NOTED BY THE AUDITOR-GENERAL, 'AN ENVIRONMENT THAT IS WEAK ON CONSEQUENCE MANAGEMENT IS PRONE TO CORRUPTION AND FRAUD AND THE COUNTRY CANNOT ALLOW MONEY INTENDED TO SERVE THE PEOPLE TO BE LOST'.**

radical rights-based socio-economic transformation. As noted by the Auditor-General, 'an environment that is weak on consequence management is prone to corruption and fraud and the country cannot allow money intended to serve the people to be lost'.<sup>205</sup>

Currently, the Auditor-General enjoys insufficient powers where an adverse finding relating to irregular, wasteful or corrupt expenditure is made. As a result, the Standing Committee on the Auditor-General initiated the Draft Public Audit Amendment Bill, which seeks to empower the Auditor-General to refer adverse findings to specialised bodies (such as the Special Investigating Unit or the Hawks) for investigation, as well as to authorise the Auditor-General to recover funds lost through irregular, fruitless, or wasteful expenditure.<sup>206</sup> Public commentary on the Bill suggests that these powers might duplicate both existing criminal justice and civil recovery processes, while potentially jeopardising the independence of the constitutionally mandated Auditor-General. Furthermore, it remains unclear how losses will be recovered from the private sector.<sup>207</sup>

Furthermore, transparency constitutes a necessary (but insufficient) precondition for accountability where irregular, wasteful or fruitless expenditure occurs, and there is a need for the Office of the Accountant-General and the Office of the Chief Procurement Officer to collaborate in order to ensure that transparency prevails in procurement practices at all levels of government. However, a skills audit of all staff of the Auditor-General is necessary before this legislation is passed. A skills audit should seek to ensure that relevant staff enjoy adequate legal training to draw qualitative distinctions between compliant procurement practices and irregular procurement practices.

<sup>203</sup> Auditor-General *PFMA 2016-17: Consolidated General Report on National and Provincial Audit Outcomes* (2017) 95-96.

<sup>204</sup> Public Protector *State of Capture* Report No 6 of 2016/17 (2016).

<sup>205</sup> Auditor-General *PFMA 2016-17: Consolidated General Report on National and Provincial Audit Outcomes* (2017) 119; see also S van der Berg 'Strengthening Access to Information Institutions to Promote a Culture of Transparency' (2017) 33 *SAJHR* 167-192.

<sup>206</sup> See clause 5(1A) of the Draft Public Audit Amendment Bill, 2017.

<sup>207</sup> Corruption Watch *Submission on Draft Public Audit Amendment Bill, 2017* (2018); National Treasury *Comments on Draft Public Audit Amendment Bill* (2018); Accountability Now *Comments on Draft Public Audit Amendment Bill* (2018).



## Special measures targeted at small business development and the right to work

According to Stats SA, youth (ages 15-34) unemployment stood at 38.6 percent in the third quarter of 2017, which is 10 points higher than the national average.<sup>208</sup> The President has confirmed that job creation for the youth constitutes a central pillar of national policy for 2018.<sup>209</sup> Tackling unemployment is furthermore critical for the success of government's programmes aimed at radically transforming the society. This can be achieved through various means, including the creation of new entrants to the economy, and the creation of work opportunities or entry into the labour force. Furthermore, these means can be implemented in various contexts, including in efforts to revitalise industrialisation and manufacturing, with an emphasis on beneficiation of mineral resources, or in renewing the agricultural industry. These endeavours are linked to other government focus areas, such as local procurement. However, the problem of the absence of a central coordinating authority again arises, and thereby hampers the implementation of coherent and effective special measures.

### a. Targeted special measures based on need

The Department of Small Business Development (DSBD) was established in 2014 to support small enterprises and cooperatives and thereby facilitate radical economic transformation.<sup>210</sup> Despite significant shortcomings, the DSBD has made small strides in facilitating small enterprises and cooperatives. For example, it instituted special measures in the guise of the Black Business Supplier Development Programme, in terms of which 136 Black-owned small, medium and micro enterprises (SMMEs) were supported, thereby exceeding its numerical target of 100 SMMEs for the first quarter. Of these SMMEs, 46 were female owned and 31 were owned by youths. It is furthermore important that special measures implemented by the DSBD target people in rural areas, who may experience multiple forms of discrimination and disadvantage. In this respect, the DSBD has implemented programmes to develop micro- and small businesses in rural areas and townships, for example by entering into a memorandum of understanding with a multi-national corporation to source and develop rural micro-distributors.<sup>211</sup> It is not clear on what data targeted special measures are based, or whether measures are being targeted at entrepreneurs with disabilities. Nevertheless, programmes targeted at Black people, youth and women do constitute special measures.

### b. Special measures designed to advance vulnerable groups

The Portfolio Committee on Small Business Development has made several recommendations to improve the efficiency of the DSBD, including the need to coordinate, monitor and guide all departments in promoting SMMEs; include comprehensive support beyond funding of SMMEs and cooperatives; improve intergovernmental cooperation; eliminate the prevalence of corruption; and intensify its efforts to reduce red tape that currently impedes the development of SMMEs and

<sup>208</sup> Stats SA 'Quarterly Labour Force Survey - QLFS Q3:2017' (31-10-2017) *Stats SA* <<http://www.statssa.gov.za/?p=10658>>.

<sup>209</sup> President of the Republic of South Africa *State of the Nation Address* (16-02-2018).

<sup>210</sup> Department of Small Business Development *Annual Report 2015/16* (2016) 34. The DSBD's Annual Report 2016/17 is currently inaccessible, and attempts to procure this information directly from the Department were unsuccessful.

<sup>211</sup> Nestlé 'Nestlé South Africa and Department of Small Business Development Sign MOU for Enterprise Development' (4-05-2017) *Nestlé* <<https://www.nestle.co.za/media/pressreleases/nestle-south-africa-and-department-of-small-business-development-sign-mou-for-enterprise-development>>.

cooperatives.<sup>212</sup> If these recommendations are heeded, it will contribute to the reasonable likelihood of effective special measures.

A potentially vital agency falling under the purview of the DSBD, namely the Small Enterprise Finance Agency (SEFA), has also significantly underperformed. SEFA failed to establish its Enterprise Development Fund due to the fact that the DTI declined to provide the agency with BEE facilitator status. The DTI made this decision on the basis that should SEFA enjoy such status, companies that invested in the Fund would expect BEE accreditation.<sup>213</sup> In the light of the essential role that small business development plays in contributing to radical socio-economic transformation, these institutional obstacles are concerning. Moreover, institutional fragmentation and misalignment jeopardise effective special measures.



## SAHRC HOSTS NATIONAL INVESTIGATIVE HEARING ON MIGRATION, XENOPHOBIA AND SOCIAL COHESION

The SAHRC hosted a National Investigative Hearing on Migration, Xenophobia and Social Cohesion on 7 and 8 February 2018. During the course of submissions, the role that foreign nationals play in promoting small-scale economic development in communities was repeatedly noted. In some instances, foreign nationals have conducted workshops with local residents, to share skills and entrepreneurial best practices. Currently, it is unclear whether the DSBD is capitalising on the potential of foreign nationals to catalyse community-based small businesses, especially in informal human settlements. Moreover, the contribution that small-scale enterprises of this nature can make to bottom-up radical socio-economic transformation is severely imperilled by the [proposed limitation of foreign nationals' right to work](#) under the Refugees Amendment Act, 11 of 2017. The SAHRC previously expressed its concern regarding this provision in submitting comments on the Bill. The Act, including the probably unconstitutional limitation of the right to work, will come into operation immediately after the commencement of the Refugees Amendment Act, 33 of 2008 and the Refugees Amendment Act, 12 of 2011.

<sup>212</sup> Parliamentary Monitoring Group 'Department of Small Business Development remedial plans on Oversight Reports Recommendations' (15-11-2017) *PMG* <<https://pmg.org.za/committee-meeting/25514/>>.

<sup>213</sup> Parliamentary Monitoring Group 'Portfolio Committee on Small Business Development: Enterprise Development Fund establishment; transfer of payments: DSBD progress report; SEFA on its Business Rescue Strategy; with the Minister' (14-02-2018) *PMG* <<https://pmg.org.za/committee-meeting/25803/>>.

### c. Special measures must promote the achievement of equality

The DSBD has underperformed in crucial areas. Whereas the Department aimed to support 70 cooperatives through its Cooperative Incentive Scheme, only 31 cooperatives were supported in the first quarter.<sup>214</sup> Although small business development is crucial to radical transformation, the ability of special measures instituted by the DSBD to achieve substantive economic equality is open to doubt. By targeting special measures to coherently develop new entrants into the economy and labour force, government could promote the right to work. Although the right to work is not explicitly guaranteed in the Constitution, it is included in the ICESCR, which South Africa ratified in 2015.<sup>215</sup> Government is therefore obliged under international law to create decent work opportunities. It can do so through the promotion of new entrants and entrepreneurs under the auspices of the DSBD, as well as through programmes such as the Expanded Public Works Programme. According to the Studies in Poverty and Inequality Institute (SPII), the 'Expanded Public Works Programme now creates more than 1 million work opportunities per year, while the Community Works Programme is creating more than 200,000 work opportunities annually'.<sup>216</sup> Whereas such programmes constitute special measures and have been relatively successful in ensuring economic opportunities for vulnerable persons including women, the youth, and people with disabilities,<sup>217</sup> the temporary and precarious nature of economic opportunities thus created implies that these special measures, if implemented in isolation, will ultimately fail to transform the economy. Moreover, the Expanded Public Works Programme falls under the Department of Public Works (DPW), and is thus not aligned to the DSBD's efforts to create economic opportunities for new entrants to the economy (as opposed to the labour force) or the DTI's implementation of BEE special measures more generally.

**GOVERNMENT IS THEREFORE OBLIGED UNDER INTERNATIONAL LAW TO CREATE DECENT WORK OPPORTUNITIES.**

Institutional misalignment is thus again apparent in that no central oversight body exists to coordinate BEE special measures across the DOL, DTI, DSBD and DPW. The Parliamentary Portfolio Committee on Small Business Development has specifically noted that, currently, the DPME falls short of assessing progress in terms of the NDP across all relevant departments, of ensuring that departments do not operate in silos, and in providing relevant indicators where assessments are performed. Institutional misalignment and a lack of coordination is thus of crucial concern in respect of the successful implementation of radical transformation programmes and the achievement of substantive economic equality. The DOJCD has indicated that it is in the process of considering proposals for the establishment of a National Reporting Mechanism for Reporting and Follow-Up on South Africa's compliance with international treaty body obligations. A similar, dedicated coordinating body is required in respect of special measures and radical socio-economic transformation.<sup>218</sup>

<sup>214</sup> Parliamentary Monitoring Group 'Portfolio Committee on Small Business Development: Department of Small Business Development Quarter 1 & 2 performance' (8-11-2017) *PMG* <<https://pmg.org.za/committee-meeting/25446/>>.

<sup>215</sup> Art 6 of the ICESCR states:

1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.
2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.


<sup>216</sup> D McLaren (SPII) *Indicators to Monitor the Progressive Realisation of the Right to Decent Work in South Africa* (2017) 24.

<sup>217</sup> *Ibid* 58.

<sup>218</sup> Deputy Minister of Justice and Constitutional Development *Response Letter Re: South African Government's Compliance with the International Convention on the Elimination of All Forms of Racial Discrimination* (04-03-2018).

## 6.1B. FINDINGS AND RECOMMENDATIONS

It is accordingly found that there is a misalignment between institutions, legislation, policies and implementation in the broad B-BBEE context generally. This renders special measures in this context ineffective, and thus incapable of promoting radical socio-economic transformation and substantive equality.

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- (i) It is therefore recommended that the Presidency establishes a central regulatory authority to oversee B-BBEE compliance across all government departments, or adequately capacitates the B-BBEE Commission to execute such a broad mandate. It is strongly recommended that National Treasury provides sufficient resources to the DTI, in collaboration with the B-BBEE Commission or a coordinating regulatory authority, to train all organs of state to identify fronting practices in order to ensure that government refrains from transacting with B-BBEE non-compliant companies.
  - (ii) It is further recommended that the B-BBEE Act be amended to introduce a dual system of both criminal and administrative penalties.
  - (iii) It is recommended that the Auditor-General qualitatively audits the financial statements of all organs of state for B-BBEE compliance and promptly shares relevant findings with the B-BBEE Commission.

The DPME, in consultation with the Presidency, must report to the Commission on steps taken or intended to be taken to align BEE across the DOL, DTI, DSB, DPW, and National Treasury, and to provide comprehensive training to organs of state, within six months of the release of this Report. The DTI, National Treasury, the DOJCD, the DPME and the Auditor-General, must jointly report back to the Commission on steps taken or intended to be taken to implement recommendations (ii) - (iii) within six months of the release of this report.

- (iv) The Preferential Procurement Regulations, 2017, should urgently be amended to provide guidance to organs of state when deciding whether to apply pre-qualification criteria, and to determine whether sub-contracting is feasible. Guidance should be based on an assessment of need in various sectors, and should be formulated in close collaboration with the B-BBEE Commission.
- (v) It is further recommended that the Preferential Procurement Regulations, 2017 be amended to emphasise preferential considerations vis-à-vis price considerations, through the deletion of regulatory provisions regarding non-market-related price.
- (vi) It is again found that there is a misalignment between institutions, legislation, policies and implementation in the procurement context, specifically. It is accordingly recommended the DPME, in consultation with the Presidency, urgently evaluate institutional alignment, and specifically the institutional

positioning of the Office of the Chief Procurement Officer. National Treasury and the DTI, in collaboration with the B-BBEE Commission and the Office of the Chief Procurement Officer, must jointly report back to the Commission on steps taken to ensure legislative, policy and institutional alignment in the procurement system, within six months of the release of this Report.

- (vii) It is further recommended that the Office of the Accountant-General in the National Treasury, in collaboration with the Office of the Chief Procurement Officer, assess and improve accountability mechanisms in supply chain processes to minimise irregular, wasteful and corrupt expenditure in the procurement processes of all organs of state, including State-Owned Entities, and in all spheres of government.

The Office of the Accountant-General and the Office of the Chief Procurement Officer must jointly report to the Commission on steps taken to assess and improve accountability mechanisms within six months of the release of this report.

- (viii) The Standing Committee on the Auditor-General is commended for its initiation of legislative reform in respect of the Auditor-General's powers. However, it is recommended that public comments on the Draft Public Audit Amendment Bill, 2017 be considered and a skills audit be conducted for all relevant staff of the Auditor-General, to ensure that all such staff members benefit from adequate legal training to make accurate determinations regarding procurement practices.

## 6.2 The right to further education

Special measures aimed at transforming the labour market and economy are of little use where the youth do not enjoy the skills necessary to meaningfully participate in the economy. Education, including further education, thus constitutes a central pillar of government's programme of radical socio-economic transformation.<sup>219</sup> Education is one of the most powerful tools at government's disposal for the eradication of poverty and achievement of substantive equality.<sup>220</sup> The Presidency accordingly recently decided to increase subsidies paid to universities from 0.68 percent of GDP to 1 percent of GDP, 'in order to kick-start a skills revolution towards and in pursuit of the radical socio-economic transformation programme'.<sup>221</sup>

<sup>219</sup> Republic of South Africa *Medium Term Strategic Framework 2014-2019* (2014) 9; National Planning Commission *National Development Plan* (2012) 315-316, 466.

<sup>220</sup> HA Patrinos & S Sosale (World Bank) *Mobilising the Private Sector for Public Education: A View from the Trenches* (2007) 6, 9, 68.

<sup>221</sup> The Presidency 'The President's response to the Heher Commission of Inquiry into Higher Education and Training' (16-12-2017) *The Presidency* <<http://www.thepresidency.gov.za/press-statements/president%E2%80%99s-response-heher-commission-inquiry-higher-education-and-training>>. Free tertiary education was confirmed in President of the Republic of South Africa *State of the Nation Address* (16-02-2018).

Radical socio-economic transformation can be promoted through the utilisation of the constitutional right to further education, ‘which the state, through reasonable measures, must make progressively available and accessible’.<sup>222</sup> The fact that the right is accorded to ‘everyone’ indicates that the right to equality,<sup>223</sup> and the associated mechanism of special measures or affirmative action, inform the right to further education.<sup>224</sup> The state is therefore obliged to implement special measures in order to ensure both equal access to further education, as well as equality *in* further education, for those individuals and groups who suffer disadvantage due to structural discrimination based on grounds such as race, gender, gender identity, and disability. Recognising patterns of discrimination in the education sphere, the ICERD,<sup>225</sup> CEDAW<sup>226</sup> and CRPD<sup>227</sup> furthermore all explicitly oblige the state to prohibit and eliminate discrimination in education based on the grounds of race, gender and disability, respectively.

## 6.2.1 Special measures to advance access to further education

**THE SYSTEMIC UNDERFUNDING BY GOVERNMENT OF UNIVERSITIES AND TECHNICAL VOCATIONAL EDUCATION AND TRAINING (TVET) COLLEGES, CONSTITUTES A MAJOR OBSTACLE TO EQUALITY IN ACCESSING FURTHER EDUCATION, AND CONSEQUENTLY TO A PROJECT OF RIGHTS-BASED RADICAL SOCIO-ECONOMIC TRANSFORMATION.**

The systemic underfunding by government of universities and technical vocational education and training (TVET) colleges, constitutes a major obstacle to equality in accessing further education, and consequently to a project of rights-based radical socio-economic transformation.<sup>228</sup> Due to insufficient government funding and subsidisation – which do not correspond to inflation and rising operational costs of universities and TVET colleges – costs are shifted onto students in the form of fees, fee increases, as well as related costs pertaining to accommodation, transport, study materials, printing costs, internet use costs<sup>229</sup> and food costs. This, in turn, presents barriers to poor and middle-class students’ initial access to further education, as well as to their completion of further studies.<sup>230</sup>

<sup>222</sup> S 29(1)(b) of the Constitution.

<sup>223</sup> In *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* 2004 (6) SA 505 (CC) para 42, the Constitutional Court recognised that ‘[e]quality in respect of access to socio-economic rights is implicit in the reference to “everyone” being entitled to have access to such rights...’.

<sup>224</sup> The CERD explicitly recognises that special measures include those measures necessary to advance vulnerable persons or groups in the education context. See CERD *General Recommendation No 32: The meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination* CERD/C/GC/32 (2009) para 13.

<sup>225</sup> Art 5(e)(v) of the ICERD obliges the state to prohibit and eliminate racial discrimination, and to ensure the equal enjoyment of the right to education and training.

<sup>226</sup> Art 10 of the CEDAW similarly obliges the state to ensure that women enjoy equal rights to men in the field of education.

<sup>227</sup> Art 24 of the CRPD obliges the state to provide inclusive education to people with disabilities at all levels, and includes the duty to reasonably accommodate people with disabilities through the use of appropriate teaching mechanisms, including learning in Braille or sign language.

<sup>228</sup> National Planning Commission *National Development Plan* (2012) 317, 320.

<sup>229</sup> Regarding the right of access to the internet as an emerging right in international law, see Association for Progressive Communications *Perspectives on Universal Free Access to Online Information in South Africa: Free Public Wifi and Zero Rated Content* (2017).

<sup>230</sup> SAHRC *Transformation at Public Universities in South Africa* (2016) 52.



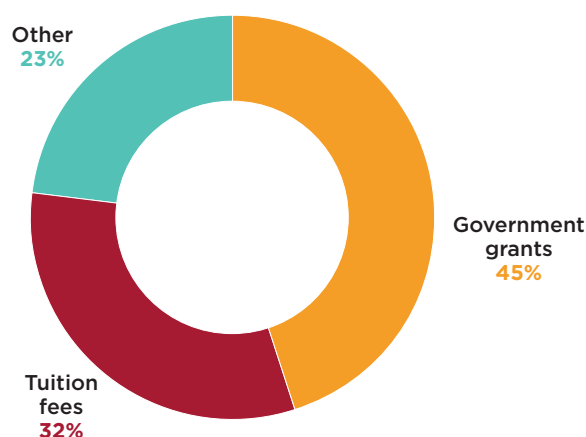
## THE SAHRC'S NATIONAL HEARING ON TRANSFORMATION AT PUBLIC UNIVERSITIES IN SOUTH AFRICA

The Commission hosted a [National Hearing on Transformation at Public Universities in South Africa](#) in 2014, a year prior to the commencement of #RhodesMustFall and #FeesMustFall movements and related protest action. Through its Hearing process, the Commission found that a funding crisis existed in respect of public universities, and that this constituted a serious barrier to access to and success in further education, while egregiously impeding transformation of the university sector. The Commission relied on the Department of Higher Education and Training's (DHET) Report of the Ministerial Committee for the Review of the Funding of Universities (2013) in finding that at the time of the Hearing, the university sector was underfunded by approximately R15 billion. Moreover, the Commission found that government underspent in the further education sector, in comparison to both Organisation for Economic Co-operation and Development (OECD) member countries and the rest of the world. Retrogressive funding practices were also identified, in that government's funding in real terms per full-time equivalent (FTE) enrolled student fell by 1.1 percent annually between 2000 and 2010, whereas student tuition fees increased by 2.5 percent per FTE student per year. In addition, expenditure on further education constituted approximately 12 percent of total government expenditure on education in 2011, compared to 20 percent as the average for Africa and 19.8 percent as the world average.

The Commission further found, with reliance on work produced by the DHET's Working Group on Fee Free University Education for the Poor in South Africa, that university education for the poor has the potential to lift communities out of poverty and unemployment, while simultaneously facilitating good citizenship. The Commission observed various shortcomings in government's National Student Financial Aid Scheme (NSFAS), including underfunding of the scheme, a concentrated focus on funding first year students to the detriment of senior students, and the reduction of funding allocations per student in an attempt to fund a greater number of students. Insufficient funding has a direct impact on attrition rates, since students cannot afford cost of living, including accommodation, food and transport. The Hearing further allowed the Commission to identify the existence of a 'gap market', consisting of students from middle-income families who cannot afford further education, yet do not qualify for NSFAS funding. Finally, the Commission also noted funding disparities between historically Black and White universities, with reference to research conducted by the Financial and Fiscal Commission.

Between 2015 and 2017, the #RhodesMustFall and #FeesMustFall movements highlighted the need for free, decolonial education in an effort to radically transform society and the economy. Only approximately 10 percent of students from the poorest 70 percent of the population access higher education, whereas over 40 percent of students from the wealthiest 10 percent of the population are able to access further education. Incongruously, the wealthiest 20 percent of households receive 68 percent of government subsidies, whereas the poorest 50 percent of households only receive 11 percent of university subsidies.<sup>231</sup> In response, government announced in 2015 that fees would not increase in 2016, and subsequently committed an addition R17.6 billion in 2016 to fund higher education over the following three years.<sup>232</sup> The Presidency furthermore established a Commission of Inquiry into Higher Education and Training, which investigated the feasibility of fee-free higher education and training in the light of the transformational imperative as well as the reliance by further education institutions on tuition fees:

BREAKDOWN OF TOTAL REVENUE FOR SOUTH AFRICA'S HIGHER EDUCATION INSTITUTIONS<sup>233</sup>



Stats SA subsequently reported a R5 billion (or 20 percent) increase in government grants to higher education institutions in 2016, but added that higher education institutions and government would be 'hard-pressed to find money to fill that R22 billion [funding] gap if tuition fees no longer apply'.<sup>234</sup> The absence of private sector engagement in the funding crisis experienced in higher education is cause for concern.<sup>235</sup> According to the DTC, the financial markets play almost no role in funding of higher education for the poorest 80 percent of students.<sup>236</sup> The Commission of Inquiry into Higher Education and Training recommended that all students studying at both public and private universities and TVET colleges, regardless of family background, be funded through a cost-

<sup>231</sup> DTC Report on Funding of Tertiary Education (2016) 2.

<sup>232</sup> SAHRC Research Brief on Race and Equality in South Africa 2013-2017 (2017) 18.

<sup>233</sup> Figure reproduced from Stats SA 'Jump in Government Higher Education Spending' (30-10-2017) Stats SA <<http://www.statssa.gov.za/?p=10652>>.

<sup>234</sup> Ibid.

<sup>235</sup> Commission of Inquiry into Higher Education and Training *Interim Report of the Commission into the Feasibility of Fee-Free Higher Education and Training* (2016) para 4:

There has been regrettably little participation by the resource-rich entities such as corporates, industry, the banking sector or organized labour, all of which might have been expected to contribute as the production of graduates and an academically prepared workforce is to their direct benefit.

<sup>236</sup> DTC Report on Funding of Tertiary Education (2016) 4.



sharing model of government-guaranteed Income-Contingent Loans sourced from commercial banks. Through this cost-sharing model, the Commission of Inquiry recommended that commercial banks issue government-guaranteed loans to students, which loans would become payable by the student upon graduation and attainment of a specific income threshold. Should the student fail to reach the required income threshold, government would bear secondary liability.<sup>237</sup> This method, subsequently rejected by the Presidency, illustrates one way in which the private sector could have contributed to the realisation of the right to further education.

### Targeted special measures based on need

In December 2017, the Presidency confirmed that education constituted an 'apex priority' for government. In addition to announcing a substantial increase in the percentage of GDP expended on further education over the next five years, the Presidency announced the expansion of free and fully subsidised education for poor and working class TVET college students. Government-subsidised grants will cover tuition fees, study materials, meals, accommodation and transport. Furthermore, the Presidency announced that first year undergraduate university students from households earning a combined income of up to R350,000 will receive fully subsidised higher education, which will include resources to address food insecurity on campuses.<sup>238</sup> As per previous government commitments, students from households earning up to R600,000 per year will not be liable for fee increases. Government has furthermore recognised the urgent need to build new, and refurbish old, student accommodation. The Presidency added that '[t]he immediate implementation of free higher education for poor and working class South African youth is part of Government's Radical Socio-Economic Transformation programme aimed at safeguarding the future of our country in pursuit of the goals of our National Development Plan...'<sup>239</sup>

### Special measures designed to advance vulnerable groups

The fact that free higher education will be funded only for first year university students in 2018, conflicts with the SAHRC's recommendation that 'special attention should be given to the funding of senior students to enable them to complete their studies, thereby decreasing high attrition rates as a result of financial exclusions'.<sup>240</sup> Moreover, the Presidency's announcement does not appear to constitute special measures that are specifically targeted at disadvantaged groups such as women, Black students, or students with disabilities.<sup>241</sup> However, socio-economic need is central to the

<sup>237</sup> Commission of Inquiry into Higher Education and Training *Report on Funding of Tertiary Education* (2017) 508-557.

<sup>238</sup> The inclusion of food security on campuses as a central component of government's funding commitment is laudable. The Commission participated in a Roundtable Discussion on Access to Food for Students in South African Tertiary Institutions convened by the Socio-Economic Rights Project (SERP), Dullah Omar Institute, University of the Western Cape, on 5 October 2017. During this roundtable discussion, the pressing problem of food insecurity across various campuses was highlighted. Following the Presidency's announcement, the Commission again garnered insights from Funmilola Adeniyi, Doctoral Researcher, Socio Economic Rights Project (SERP), Dullah Omar Institute, Law Faculty, University of the Western Cape, during a telephonic interview on 26 January 2018. These insights are gratefully acknowledged. Significant funding increases for higher education was confirmed in Minister of Finance *2018 Budget Speech* (21-02-2018), during which the Minister of Finance stated:

The largest reallocation of resources towards government's priorities was on higher education and training, amounting to additional funding of R57 billion over the medium term. As a result, this is the fastest-growing spending category, with an annual average growth of 13.7 per cent.

<sup>239</sup> The Presidency 'The President's response to the Heher Commission of Inquiry into Higher Education and Training' (16-12-2017) *The Presidency* <<http://www.thepresidency.gov.za/press-statements/president%E2%80%99s-response-heher-commission-inquiry-higher-education-and-training>>.

<sup>240</sup> SAHRC *Transformation at Public Universities in South Africa* (2016) 71 Recommendation 8.11.5.

<sup>241</sup> *Ibid* Recommendation 8.11.5.1.

provision of free further education, and therefore congruent with the CERD's guidance on special measures to this extent.

The manner in which the decision and announcement were made is incongruent with the SAHRC's previous recommendation that 'the current funding mechanisms should be reviewed by the *DHET together with the National Treasury*, to make special provision for the development of *historically disadvantaged universities*'.<sup>242</sup> Based on media reports, it appears that the DHET was not consulted prior to the announcement, whereas it remains uncertain whether National Treasury was kept apprised of policy changes.<sup>243</sup> This may render this special measure less effective and thus less likely to advance people based on need.

### Special measures must promote the achievement of equality

The fact that the Presidency's announcement explicitly includes funding provision for costs associated with studying is commendable, and may go some way towards addressing attrition rates and achieving substantive equality.<sup>244</sup> It moreover complies with the Commission's previous recommendation that 'funding mechanisms should ensure that students are provided with sufficient financial assistance in order to maintain a decent and adequate standard of living that is conducive to progress and success at institutions of higher learning'.<sup>245</sup> However, fiscal trade-offs necessary to fund this ambitious project have arguably resulted in an increase in VAT for the first time since 1993. A regressive fiscal policy choice of this nature is highly unlikely to promote socio-economic equality in the long term.

## 6.2.2 Special measures to advance equality in further education

### Language

#### a. Targeted special measures based on need

Despite the fact that government's funding plan, if carefully implemented, will improve access to further education and mitigate attrition rates to some extent, the basic education sector remains grossly unequal.<sup>246</sup> As a result, special measures in higher education should target students who attended poor quality, no-fee schools, and reasonably accommodate their additional learning needs. Whereas women currently outperform men in the higher education sector,<sup>247</sup> Black, non-Afrikaans speaking students (as well as students with disabilities) continue to face serious challenges in

<sup>242</sup> Ibid 70 Recommendation 8.11.3 (emphasis added).

<sup>243</sup> H Magwedze 'Nzimande: Can SA Afford Free Higher Education?' (6-01-2018) *EWN* <<http://ewn.co.za/2018/01/06/nzimande-can-sa-afford-free-higher-education>>.

<sup>244</sup> A mere 36.9 percent of students completed undergraduate studies over a period of four years. H van Broekhuizen, S van der Berg & H Hofmeyr *Higher Education Access and Outcomes for the 2008 National Matric Cohort* Stellenbosch Economic Working Papers: 16/16 (2016) 8. Nevertheless, females consistently outperform males in completion of higher education undergraduate studies (35-39). Black learners enjoy the lowest rates of access to universities, the lowest percentage of completion within four years, and the highest rate of drop-outs. White students performed better than any other population group (42-43).

<sup>245</sup> SAHRC *Transformation at Public Universities in South Africa* (2016) 71 Recommendation 8.11.4.

<sup>246</sup> *Minister of Basic Education v Basic Education For All (BEFA)* [2016] 1 All SA 369 (SCA) para 49. *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (2) SA 415 (CC) paras 45-47, noting apartheid era segregation policies as well as systemic underfunding of Black schools.

<sup>247</sup> H van Broekhuizen, S van der Berg & H Hofmeyr *Higher Education Access and Outcomes for the 2008 National Matric Cohort* Stellenbosch Economic Working Papers: 16/16 (2016) 35-39.

accessing equal, quality further education. Special measures in terms of language policy must therefore be directed to advance poor, predominantly Black African students.

### **b. Special measures designed to advance vulnerable groups**

Universities that were traditionally White and Afrikaans have increasingly formed the subject of scrutiny in the light of section 29(2) of the Constitution,<sup>248</sup> which provides:

**Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account -**

**(a) equity;**

**(b) practicability; and**

**(c) the need to redress the results of past racially discriminatory laws and practices.**

In December 2017, the Constitutional Court delivered judgment in the matter of *AfriForum and Another v University of the Free State*.<sup>249</sup> The Court was called upon to consider whether the University of the Free State's (UFS) adoption of a language policy that discontinued the use of Afrikaans as primary language of instruction, was constitutionally valid and in compliance with the Ministerial Language Policy Framework.<sup>250</sup> The Court per Mogoeng CJ noted at the outset that the demand for radical transformation necessitates the transformation of historically well-resourced Afrikaans universities, given gross disparities compared to African universities that were systematically deprived of resources and capacity by apartheid government.<sup>251</sup> Having noted the privilege accorded to Afrikaans by apartheid government, Mogoeng CJ acknowledged that Afrikaans had a 'past record as a virtual synonym to "racism and racially based practices"'.<sup>252</sup>

The Court went on to scrutinise the Ministerial Language Policy Framework, which – while ultimately supporting the retention of Afrikaans as a medium of instruction – set the condition that the use of Afrikaans must not unjustly deprive others of access to higher education, nor become an instrument for the furtherance of racial or narrow cultural discrimination.<sup>253</sup> The Court accordingly interpreted the policy as well as the constitutional right to receive education in one's language of choice where 'reasonably practicable' to do so. Given that UFS's previous dual medium language policy had caused racial segregation between classrooms while exacerbating racial tensions on campus, the

<sup>248</sup> *Gelyke Kanse and Others v Chairman of the Senate of the Stellenbosch University and Others* 2018 (1) BCLR 25 (WCC).

<sup>249</sup> CCT101/17 [2017] ZACC 48 (29 December 2017).

<sup>250</sup> Ministry of Education *Language Policy for Higher Education* (2002) <<http://www.dhet.gov.za/Management%20Support/Language%20Policy%20for%20Higher%20Education.pdf>>.

<sup>251</sup> *AfriForum and Another v University of the Free State* (CCT101/17) [2017] ZACC 48 (29 December 2017) para 2.

<sup>252</sup> Para 5.

<sup>253</sup> Para 13.

Court held that the adoption of a new language policy was determined ‘subject to’ the ministerial policy, and was valid.<sup>254</sup> Whereas the provision of Afrikaans instruction might be ‘practicable’, the Court held that given its effect of promoting racism, it was not ‘reasonably’ practicable to retain the policy.<sup>255</sup>

**The use of Afrikaans has unintentionally become a facilitator of ethnic or cultural separation and racial tension. And this has been so from around 2005 to 2016. Its continued use would leave the results of white supremacy not being redressed but kept alive and well. It is for that reason that a policy revision or intervention has since become necessary. The link between racially segregated lectures and racial tensions has not been denied. While it may be practicable to retain Afrikaans as a major medium of instruction, it certainly cannot be “reasonably practicable” when race relations is poisoned thereby...<sup>256</sup>**

The Court accordingly dismissed AfriForum and Solidarity’s application for leave to appeal.<sup>257</sup> As a result, the UFS is entitled to institute its new language policy as a special measure designed to advance Black African students.

### c. Special measures must promote the achievement of equality

Ultimately, the judgment is to be welcomed for its congruence with calls for ‘decolonised’ or ‘decolonial’ higher education.<sup>258</sup> The judgment thus interprets government policy on language in higher education in a manner that aligns it with decolonial and transformative imperatives. Recognising that language constitutes a race-based barrier to equality in further education serves to utilise constitutional language rights in order to enhance South Africa’s project of radical socio-economic transformation. Where equality in access to quality education is achieved, the radical transformation of society and the economy becomes feasible.

<sup>254</sup> Paras 70-79.

<sup>255</sup> Paras 46, 48, 53, 55, 62.

<sup>256</sup> Para 63.

<sup>257</sup> A dissenting judgment per Froneman J (Cameron J and Pretorius AJ concurring) noted that the majority judgment failed to consider the status of Afrikaans as a minority language deserving of protection in terms of foreign and international law (para 124) and that the majority of Afrikaans people are not White (para 131). Importantly, the dissenting judgment observed the following in respect of the applicants, AfriForum and Solidarity (para 134):

[W]hat is singularly lacking in [AfriForum and Solidarity’s] founding affidavit is any recognition of the complexity of the language rights of others and the unequal treatment of oppressed people of other races in the past, let alone the continued existence of historic privilege. No practical suggestions were apparently made to accommodate the needs of other race groups and facilitate language instruction during the University’s extensive inquiry into the problem. There is no apparent insight into these realities, nor any realisation of the perception that this creates in others. These failures entrench the caricature of Afrikaners as intransigent and insensitive to the needs of others. The applicants need to ask themselves whether their manner of attempting to protect language rights advances the cause of Afrikaans or hinders it.

<sup>258</sup> Whereas White Afrikaans and British colonisation and domination sought to assimilate Black South Africans into its own colonial discourse and knowledge paradigm, decoloniality seeks to reposition intellectual discourse with Black subjects at its centre. N Maldonado-Torres ‘Outline of Ten Theses on Coloniality and Decoloniality’ (2016) *Frantz Fanon Foundation* 10 <<http://frantzfanonfoundation-fondationfrantzfanon.com>>.



## SAHRC GAUTENG PROVINCIAL OFFICE HOSTS HEARING ON ALLEGATIONS OF RACISM, SEXISM AND HARASSMENT AT UNISA

The SAHRC Gauteng provincial office hosted a three day [investigative hearing](#) from 20-22 February 2018 to address a complaint received from a UNISA staff member on 11 December 2017. The complaint alleged racial tension and harassment in the College of Law. After a careful assessment of the complaint, the Commission found that the issues alluded to above fell within the jurisdiction of the Commission as there was a prima facie violation of rights. The Commission will seek to provide a lasting resolution to the allegations of racism and harassment at the College of Law. The Commission seeks to encourage the forging of human relations at the College of Law that are premised on respect, care and compassion, and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom.

### Disability

Another significant barrier to equality in further education is the lack of accessibility for, as well as inconsistent reasonable accommodation of, students with disabilities.<sup>259</sup> Despite the CRPD's requirement for inclusive education at all levels, many university and TVET college lecturers are ill-equipped to teach students with disabilities, whereas appropriate infrastructure and learning materials remain a concern in certain instances.<sup>260</sup> Whereas the DPW should ensure physical accessibility, programmes promoting universal design should be consistently implemented to ensure broad accessibility, including through the training of all staff in the higher education sector.<sup>261</sup>

<sup>259</sup> Information regarding the challenges permeating the higher education sector in respect of students with disabilities, was provided by Willene Holness, Lecturer at the University of Kwa-Zulu Natal School of Law, admitted attorney of the High Court of KwaZulu-Natal, board member (director) of the Community Law and Rural Development Centre, during a telephonic interview on 7 February 2018. The valuable insights provided are gratefully acknowledged.

<sup>260</sup> Reasonable accommodation in further education falls to be distinguished from accessibility. The CRPD relates accessibility to 'the physical, social, economic and cultural environment, to health and education and to information and communication, in enabling persons with disabilities to fully enjoy all human rights and fundamental freedoms', whereas it defines reasonable accommodation as 'necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms'. See further O Mutanga 'Students with Disabilities' Experience in South African Higher Education - A Synthesis of Literature' (2017) 31 *South African Journal of Higher Education* 135.

<sup>261</sup> Art 4(1)(f) of the CRPD imposes a general obligation on States Parties to universally design goods, services, equipment and facilities so as to minimise adaptations necessary to meet the needs of persons with disabilities. See further SAHRC *Promoting the Right to Work of Persons with Disabilities: Toolkit for the Private Sector* (2015) 37-40.



## SAHRC PROTECTS THE RIGHTS OF PERSONS WITH DISABILITIES

Access to inclusive education, as well as reasonable accommodation, must be ensured at the level of basic education in order to guarantee higher enrolment numbers of people with disabilities in higher education institutions.

The SAHRC recently finalised its [Investigative Report](#) in respect of the fire in a hostel for the North West School for the Deaf, which resulted in the death of three high school learners. The Commission found that no reasonable accommodation was made for these learners, in that fire alarms were audible, and thus not tailored to the needs of the very students for which the facility was supposedly designed. Insufficient safety measures and a failure to reasonably accommodate these learners, violate various rights, including the right to equality. It is severely problematic that the Commission found that the alternative accommodation provided to survivors of the fire, similarly fails to reasonably accommodate these learners' needs. Government is thus violating the equality rights of these learners, since a failure to reasonably accommodate persons with disabilities amounts to unfair discrimination in terms of section 9(c) of PEPUDA.

Government's obligation to ensure accessibility through universal design, while making provisions for reasonable accommodation in particular instances, must therefore be met throughout the education sector that comprises basic and further education.

### a. Targeted special measures based on need

The Commission has repeatedly found that universities have not transformed sufficiently to accommodate students with disabilities. In particular, higher education institutions do not adequately consider the needs of students with disabilities in formulating language and residence placement policies.<sup>262</sup> This constitutes a failure to meet the obligation to ensure accessibility of institutions of higher learning through universal design, as required by the CRPD. Consequently, only 20 percent of students with 'severe difficulties across all functional domains' attends tertiary institutions, and most students who do access higher education are from the White population group.<sup>263</sup>

### b. Special measures designed to advance vulnerable groups

Furthermore, the proportion of adults with disabilities not attending post-school institutions is highest in the Coloured population group, while the White population group has the highest percentage of students attending, thereby evidencing multiple forms of discrimination in this respect:

<sup>262</sup> SAHRC *Transformation at Public Universities in South Africa* (2016) 26, 67, 60, 61, 67, 68.

<sup>263</sup> Department of Higher Education *Draft Policy Framework for Disability in the Post-School Education and Training System* (2016) 5.

PERCENTAGE DISTRIBUTION OF POPULATION AGED 20–24 YEARS ATTENDING AND NOT ATTENDING TERTIARY LEVEL EDUCATION BY DISABILITY TYPE, DEGREE OF DIFFICULTY AND POPULATION GROUP<sup>264</sup>

TYPE AND DEGREE OF DIFFICULTY		BLACK AFRICAN			COLOURED			INDIAN/ASIAN			WHITE			TOTAL		
		Attending	Not attending	Total	Attending	Not attending	Total	Attending	Not attending	Total	Attending	Not attending	Total	Attending	Not attending	Total
Seeing	None	28,5	71,5	100,0	14,1	85,9	100,0	30,6	69,4	100,0	39,4	60,6	100,0	28,0	72,0	100,0
	Mild	33,5	66,5	100,0	21,5	78,5	100,0	40,3	59,7	100,0	41,4	58,6	100,0	33,6	66,4	100,0
	Severe	31,5	68,5	100,0	16,0	84,0	100,0	30,8	69,2	100,0	35,0	65,0	100,0	30,7	69,3	100,0
Hearing	None	28,7	71,3	100,0	14,3	85,7	100,0	31,3	68,7	100,0	39,6	60,4	100,0	28,3	71,7	100,0
	Mild	26,9	73,1	100,0	14,0	86,0	100,0	28,3	71,7	100,0	33,1	66,9	100,0	26,5	73,5	100,0
	Severe	27,6	72,4	100,0	13,0	87,0	100,0	24,2	75,8	100,0	25,0	75,0	100,0	26,6	73,4	100,0
Communication	None	28,7	71,3	100,0	14,3	84,7	100,0	31,4	68,6	100,0	39,6	60,4	100,0	28,3	71,7	100,0
	Mild	27,1	72,9	100,0	15,9	84,1	100,0	26,5	73,5	100,0	32,1	67,9	100,0	26,7	73,3	100,0
	Severe	20,5	79,5	100,0	12,3	87,7	100,0	15,1	84,9	100,0	21,4	78,6	100,0	19,8	80,2	100,0
Walking	None	28,7	71,3	100,0	14,4	85,6	100,0	31,3	68,7	100,0	39,6	60,4	100,0	28,3	71,7	100,0
	Mild	27,2	72,8	100,0	14,8	85,2	100,0	29,4	70,6	100,0	32,1	67,9	100,0	26,	73,2	100,0
	Severe	22,6	77,4	100,0	10,5	89,5	100,0	22,3	77,7	100,0	21,9	78,1	100,0	21,6	78,4	100,0
Remembering	None	28,7	71,3	100,0	14,4	85,6	100,0	31,3	68,7	100,0	39,6	60,4	100,0	28,3	71,7	100,0
	Mild	27,4	72,6	100,0	15,4	84,6	100,0	31,2	68,8	100,0	36,4	63,6	100,0	27,4	72,6	100,0
	Severe	21,2	78,8	100,0	11,7	88,3	100,0	19,2	80,8	100,0	26,1	73,9	100,0	20,7	79,3	100,0
Self-care	None	28,7	71,3	100,0	14,4	85,6	100,0	31,3	68,7	100,0	39,6	60,4	100,0	28,3	71,7	100,0
	Mild	30,0	70,0	100,0	17,9	82,1	100,0	29,8	70,2	100,0	33,6	66,4	100,0	29,4	70,6	100,0
	Severe	22,3	77,7	100,0	14,8	85,2	100,0	19,1	80,9	100,0	20,6	79,4	100,0	21,5	78,5	100,0

The data provided above is in itself problematic. First, data disaggregated on the ground of disability is rare, as is demonstrated by the fact that data in the context of higher education was compiled in 2014. Furthermore, Stats SA has been criticised for using a medical approach to define disability, instead of the approach espoused by the CRPD that places a greater focus on disability as a result of the lack of an enabling environment than on individual capability. In order to be effective, special measures must be designed based on updated, and qualitatively adequate, data.


**c. Special measures must promote the achievement of equality**

Moreover, the Presidency’s announcement of free higher education exhibits a glaring omission to the extent that it does not explicitly provide for additional funding to reasonably accommodate students with disabilities, or provide necessary access through universal design that includes the training of lecturers and other support staff. This omission symbolises the consistent failure by government to address the plight of persons with disabilities, including students. Neglect of the issue of disability

<sup>264</sup> Figure reproduced from Stats SA *Profile of Persons with Disabilities in South Africa* (2014) 81.

is further evinced by the fact that, currently, only White Papers and draft policies pertaining to people with disabilities exist.<sup>265</sup> Such policies should urgently be translated into binding legislation. Where special measures in the form of funding are not targeted at students with disabilities, and legislation does not exist to embody related special measures, substantive equality in education cannot be achieved. This, in turn, limits the transformative potential of further education to catalyse substantive economic equality.

## 6.2A. Findings and recommendations

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- (i) It is recommended that the Presidency consults with the DHET, DSD, National Treasury, and other relevant Departments to ensure that its proposed funding model for higher education makes specific provision for students with disabilities from poor and working class families. This must include the provision of physical access, inclusive infrastructure, accommodation, transport, study materials and sufficient training of lecturers and other support staff through universal design of goods, services, facilities and equipment. It is further recommended that all universities and TVET colleges implement the Commission's 2016 recommendation to public universities that 'the language and disability policies at institutional and/or regional inter-university level must specifically accommodate persons with disabilities, including but not limited to deaf, partially sighted and blind persons, to ensure that access to higher education is not inhibited to persons with disabilities. Moreover, all policies should also take cognisance of learning disabilities'.<sup>266</sup> The Presidency, together with National Treasury and the DHET, must jointly report back to the Commission on steps taken to provide adequate funding for students with disabilities within six months of the release of this report.
- (ii) The DHET must further finalise the Draft Policy Framework for Disability in the Post-School Education and Training System and, in consultation with the DOJCD, take steps to urgently develop binding legislation in this regard.

<sup>265</sup> See Department of Basic Education *White Paper 6 on Inclusive Education* (2001) and Department of Higher Education *Draft Policy Framework for Disability in the Post-School Education and Training System* (2016).

<sup>266</sup> SAHRC *Transformation at Public Universities in South Africa* (2016) 67 Recommendation 8.4.5.



## 6.3 The right of equitable access to land

The dispossession of the majority of the population's land by colonial and apartheid-era government constitutes one of the key drivers of persistent wealth inequality in South Africa.<sup>267</sup> Section 25(5) of the Constitution accordingly provides that '[t]he state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.' It is thus clear that special measures may be instituted in respect of land reform to ensure substantive equality in this context.<sup>268</sup> Moreover, equitable land reform constitutes a critical component of radical socio-economic transformation, to the extent that it aims to achieve substantive equality both in terms of ownership patterns and land use practices.

### 6.3.1 Targeted special measures based on need

The Presidency recently confirmed that expropriation of land, without compensation, will be pursued.<sup>269</sup> In so doing, the President noted that development of the agricultural sector is central to South Africa's economy, and thus to government's programme of radical socio-economic transformation. However, expropriation policy must take place without jeopardising the economy, agricultural production or food security.<sup>270</sup> A Parliamentary motion to review section 25 of the Constitution was accordingly adopted on 27 February 2018.<sup>271</sup> According to the newly released report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, government has failed to exercise and implement its existing land reform powers and policies effectively, thereby casting doubt on the feasibility of a new expropriation policy that may spur further investment- and capital flight, especially in the agricultural sphere.<sup>272</sup> The report notes:

**[T]hose who do receive redistribution land are made tenants of the state, rather than owners of the land. Experts advise that the need to pay compensation has not been the most serious constraint on land reform in South Africa to date – other constraints, including increasing evidence of corruption by officials, the diversion of the land reform budget to elites, lack of political will, and lack of training and capacity have proved more serious stumbling blocks to land reform.<sup>273</sup>**

Instead of pursuing expropriation without compensation for the sole purpose of revitalising the agricultural economy, expropriation without compensation should constitute a special measure. Expropriation strategies should therefore be pursued with a view to redistribute and restore land based on need, with a focus on race, gender and disability.

<sup>267</sup> Oxfam *The Commitment to Reducing Inequality Index* (2017) 7; United Nations Development Programme *The Impact of Socio-economic Inequality on Economic Development in South Africa* (2014) 27.

<sup>268</sup> S 9(2) of the Constitution, read with the ICERD and the CEDAW. See further Department of Trade and Industry Amended AgriBEE Sector Code GN 1354 in GG No. 41306 of 8 December 2017.

<sup>269</sup> President of the Republic of South Africa *State of the Nation Address* (16-02-2018).

<sup>270</sup> C Ramaphosa 'Closing Address by ANC President Cyril Ramaphosa to the 54th National Conference of the African National Congress' (20-12-2017) *ANC* <<http://www.anc.org.za/content/closing-address-anc-president-cyril-ramaphosa-54th-national-conference-african-national>>.

<sup>271</sup> 'NA adopts EFF motion, amended by ANC, on EWC' *Politics Web* <<http://www.politicsweb.co.za/news-and-analysis/na-adopts-eff-motion-amended-by-anc-on-ewc>>.

<sup>272</sup> United Nations Development Programme *The Impact of Socio-economic Inequality on Economic Development in South Africa* (2014) 27.

<sup>273</sup> High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change *Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change* (2017) 300.

### 6.3.2 Special measures designed to advance vulnerable groups

Leading experts<sup>274</sup> have long since pointed out the misalignment of land reform legislation, policies and practices.<sup>275</sup> Furthermore, a lack of communication and coordination amongst various relevant departments impede the efficacy of special measures instituted in the course of land reform projects. In particular, the efficacy of special measures intended to benefit women and persons with disabilities in the land reform context, is doubtful. This is especially so where transfer of ownership by the state is dependent on land reform beneficiaries possessing sufficient resources to productively use agricultural land.<sup>276</sup>

The Land Claims Court (LCC) is a crucial institution meant to ensure that special measures in the land reform context are reasonably capable of advancing vulnerable groups.<sup>277</sup> However, the Land Claims Court currently faces severe challenges in the context of the land reform project. First, in *Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others*<sup>278</sup> the validity of the Restitution of Land Rights Amendment Act, 15 of 2014 was challenged by civil society organisations on the basis that Parliament failed to conduct public participation in the manner required by the Constitution. The Constitutional Court upheld the challenge, and declared the Amendment Act invalid, effective from 28 July 2016. Significantly, this Act provides the Land Claims Court with the power necessary to appoint permanent judges. The LCC made representations to the DOJCD to take interim legislative measures to enable permanent judges to be appointed, to no avail. As a result, the LCC has been unable to appoint permanent judges for the past five years. There is thus an urgent need for continuity in the LCC. Next, land claimants' right of access to justice is routinely infringed. Although direct access to the LCC is possible, few claimants possess the resources necessary to approach the court directly. Instead, claimants must wait for the Land Claims Commission to refer cases to the court. Currently, referrals take up to a staggering twelve years to reach the LCC. The LCC is thus effectively prevented from fulfilling its critical mandate, and is thus unable to ensure that special measures are designed and implemented to advance vulnerable persons in the land reform context.

### 6.3.3 Special measures must promote the achievement of equality

Given the complexity involved in land reform, no recommendations will be issued at this stage. Instead, the release of the long-awaited government land audit report contains findings that illustrate that current special measures in the land reform context have failed to promote substantive equality.

<sup>274</sup> Information regarding the challenges permeating South Africa's land reform project was provided by Professor Juanita Pienaar, Professor in Private Law at Stellenbosch University, Extraordinary Professor at the North West University, acting judge in the Land Claims Court (2006-2007), during a telephonic interview on 9 February 2018. The valuable insights provided are gratefully acknowledged. See further JM Pienaar *Land Reform* (2014); JM Pienaar 'Reflections on the South African land reform programme: characteristics, dichotomies and tensions (Part 1)' (2014) *TSAR* 425-446; JM Pienaar 'Reflections on the South African land reform programme: characteristics, dichotomies and tensions (Part 2)' (2014) *TSAR* 689-705.

<sup>275</sup> SAHRC *Monitoring and Investigating the Systemic Challenges Affecting the Land Restitution Process in South Africa* (2014) 45-49.

<sup>276</sup> High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change *Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change* (2017) 208.

<sup>277</sup> Information regarding the challenges permeating the functioning of the Land Claims Court was provided by acting Judge President Meer of the Land Claims Court, during a telephonic interview on 27 February 2018. The valuable insights provided are gratefully acknowledged.

<sup>278</sup> 2016 (5) SA 635 (CC).

The land audit finds that 90 percent of land registered with the Deeds Office is privately owned. 39 percent of this land is owned by private individuals, whereas companies, trusts, and community-based organisations (CBO) own the remaining registered privately owned land, which includes both rural land and urban erven. According to the Department of Rural Development and Land Reform, '[t]he same individuals own most of these companies, trusts and CBOs'.<sup>279</sup> Of the farm and agricultural land holdings owned by private individuals, Black South Africans directly own a mere 4 percent of rural land,<sup>280</sup> while the White population group owns 72 percent of such land. Gender inequality is similarly rife, with women owning 13 percent of individually owned private farm and agricultural land, while men own 72 percent of this land, and couples own 11 percent of such land. Government's strategy of expropriation without compensation must thus be carefully designed in order to ensure that it constitutes a special measure targeted at groups in need, considers socio-economic factors prior to acquisition and subsequent distribution of land, and does not give rise to new imbalances.



## SAHRC CONTINUES TO ENGAGE WITH FARM COMMUNITIES

In addition to the gross inequality based on race, gender and disability that manifests in land ownership patterns and practices, agricultural land use patterns also give rise to the violation of various human rights. For example, farm dwellers often lack security of tenure, or are unaware of relevant legislation protecting their rights. Regardless of security of tenure, the fact is that communities have a deep connection with land, and that community life revolves around land. Evictions and relocations – even when conducted in technical compliance with legislation – is therefore severely problematic.

Site visits by the Free State Office of the Commission to rural communities highlighted the need to intensify human rights awareness campaigns in the rural and farming communities of the province. During the visits it was established that farm evictions are on the rise in the eastern and southern parts of the Free State. Farm workers and farm dwellers in the visited areas are evicted illegally, and their homes are often subsequently destroyed.

Forced evictions threaten a number of human rights, including the right to human dignity, security of the person, privacy, religion, culture, health, adequate housing, and life. Evictions have a drastic effect on people's social, economic, physical, and psychological wellbeing.

<sup>279</sup> Department of Rural Development and Land Reform *Land Audit Report* (2017) 2.

<sup>280</sup> In contrast, land ownership of urban erven is more congruent with national demographics, with Black Africans owning the majority of urban erven in most provinces. However, the Land Audit Report does not indicate the value or settlement quality of this land. Department of Rural Development and Land Reform *Land Audit Report* (2017) 13.

Another pressing issue that merits further attention is the question of land held by traditional authorities. Communal property schemes raise complex questions regarding the conceptualisation and equitability of living – as opposed to formal – customary law ownership paradigms.<sup>281</sup> Moreover, concerns regarding communal land ownership likewise manifests in the context of the socio-economic challenges faced by mining communities.<sup>282</sup> Some communities that enjoy the least secure forms of tenure, ironically reside on land that contains incredible mineral wealth.<sup>283</sup> Government has been criticised for implementing policies that consolidate traditional forms of ownership, in conflict with legislation and jurisprudence. Moreover, this has been perceived as a tendency to focus on formal – rather than living – customary law.<sup>284</sup> As a result, current policy in this regard does not promote equality.

However, these critical problems, along with government's proposals regarding changes in expropriation policies, possible amendment of section 25 of the Constitution, the nationalisation of land to be held in custodianship by the state, and the establishment of a land administration commission to gather land ownership data, falls beyond the scope of this Report. Nevertheless, these burning issues undoubtedly merit close scrutiny from a human rights perspective, and forms the focus of current and future activities and research by the Commission.

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<sup>281</sup> *Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority and Others* 2015 (6) SA 32 (CC).

<sup>282</sup> The SAHRC hosted a National Hearing on the Underlying Socio-economic Challenges of Mining-Affected Communities in South Africa in 2016, during which the plight of certain communities living on land held by traditional authorities was ventilated.

<sup>283</sup> M Clark & N Luwaya (Land and Accountability Research Centre) *Communal Land Tenure 1994-2017: Commissioned Report for High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, an initiative of the Parliament of South Africa* (2017) 19.

<sup>284</sup> High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change *Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change* (2017) 201.

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# CHAPTER 07

## CONCLUSION

**THIS REPORT HAS SOUGHT TO EVALUATE THE ABILITY OF CERTAIN RIGHTS-BASED LEGISLATION, POLICIES AND PRACTICES TO CATALYSE A PROCESS OF RADICAL SOCIO-ECONOMIC TRANSFORMATION IN ORDER TO ACHIEVE SUBSTANTIVE ECONOMIC EQUALITY. IT WAS DEMONSTRATED THAT CURRENT POVERTY AND INEQUALITY TRENDS MANIFEST TO SEVERELY PREJUDICE VULNERABLE PEOPLE AND GROUPS BASED ON THEIR RACE, GEOGRAPHIC LOCATION, GENDER AND DISABILITY STATUS. IT WAS FURTHER FOUND THAT THE RIGHT TO EQUALITY ENSHRINED IN SECTION 9 OF THE CONSTITUTION, IN CONJUNCTION WITH INTERNATIONAL TREATIES, EMPOWERS GOVERNMENT TO IMPLEMENT SPECIAL MEASURES IN VARIOUS CONTEXTS IN ORDER FACILITATE RADICAL TRANSFORMATION AND ADDRESS GROSS ECONOMIC INEQUALITY.**

However, it was found that various statutes, policies and implementation practices are currently misaligned to constitutional objectives. Affirmative action in the employment equity context fails to target the most vulnerable members of society, due to the fact that socio-economic factors are not taken into account in implementing special measures. Special measures in the B-BBEE sphere, including in the context of preferential procurement, small business development, further education and land contexts, suffer from the same deficiencies. As a result, there are indications that new imbalances and patterns of economic exclusion are arising.

Moreover, there is extreme institutional fragmentation and incoherence across all rights-based focused areas that hold the potential to promote radical economic transformation. There is accordingly an urgent need to coordinate need-based special measures across various government departments, specialised bodies and organs of state generally. Legislative and policy misalignment and fragmentation should similarly be addressed.

Finally, it was noted throughout the Report that radical socio-economic transformation and the achievement of substantive economic equality cannot be achieved without the contribution of the private sector. Government should thus act swiftly to bring the promotional aspects of PEPUDA into operation, in order to ensure that all members of society support South Africa's project of rights-based radical socio-economic transformation. Ultimately, a more equal society benefits all South Africans.







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