



Institute of Development & Labour Law

DEVELOPMENT AND LABOUR MONOGRAPH SERIES

BLACK ECONOMIC EMPOWERMENT IN SOUTH AFRICA: A CRITICAL APPRAISAL

ANDREA M'PARADZI
&
EVANCE KALULA

Monograph
1 / 2007

UCT Faculty of Law



TABLE OF CONTENTS

Editorial Abstract	iv
AKNOWLEDGEMENTS	v
ABBREVIATIONS	vi
1. INTRODUCTORY REMARKS	1
1.1 INTRODUCTION	1
1.1.1 Black Economic Empowerment: A definition	1
1.1.2 Apartheid and disempowerment	1
1.2 ECONOMIC EMPOWERMENT OF THE AFRIKANER PEOPLE	2
2. A COMPARATIVE ASSESSMENT OF ECONOMIC EMPOWERMENT	4
2.1 EMPOWERMENT IN MALAYSIA	4
2.1.1 A history of preference: economic passivity of a majority	4
2.1.2 The New Economic Policy (NEP), 1970-1990	4
2.1.3 Evaluation of the preference policy	4
2.2 EMPOWERMENT IN THE UNITED STATES OF AMERICA	5
2.2.1 A history of segregation: economic disempowerment of a minority ⁵	5
2.2.2 Economic empowerment	5
2.2.3 Evaluation of the preference policy	5
3. BLACK ECONOMIC EMPOWERMENT	7
3.1 BEE: A REITERATION	7
4. THE BEE REGULATORY FRAMEWORK	8
4.1 BEE: A CONSTITUTIONAL IMPERATIVE	8
4.2 THE BROAD-BASED BLACK ECONOMIC EMPOWERMENT ACT 53 OF 2003 8	8
4.3 THE CODES OF GOOD PRACTICE	9
4.3.1 The structure and content of the Codes	10
4.3.2 The binding nature of the Codes of Good Practice	11
4.3.3 Implementation	14
4.3.4 Verification agencies	15
4.3.5 Conclusion on the Codes of Good Practice	16
4.4 THE SECTOR TRANSFORMATION CHARTERS	16
4.4.1 Legal status of the Sector Transformation Charters	16
4.4.2 The Sector Transformation Charters in perspective	16
4.5 THE BEE STRATEGY DOCUMENT	16
4.6 CONCLUSION ON THE REGULATORY FRAMEWORK	17
5. BEE PROGRESS: MARGINAL STRIDES	18
5.1 BEE DEALS	18
5.2 PROGRESS IN THE LISTED ENVIRONMENT	19
6. BLACK ECONOMIC EMPOWERMENT: THE CHALLENGES	21
6.1 CHALLENGES EVIDENT FROM THE REGULATORY FRAMEWORK	21
6.1.1 The Codes of Good Practice and the Sector Transformation Charters	21
6.1.2 Conclusion on the internal challenges	32
6.2 CHALLENGES OUTSIDE OF THE REGULATORY FRAMEWORK	32

6.2.1	Financing BEE	32
6.2.2	Broad-based BEE: the breadth of the matter	36
6.2.3	Fraudulence: the fronting barrier	41
6.2.4	Attitudinal constraints	42
6.3	CONCLUSION ON THE CHALLENGES	43
7.	CONCLUSION: TOWARDS A FINAL WORD	44
8.	APPENDICES	45
8.1	APPENDIX 1: THE BBEE CODES OF GOOD PRACTICE	45
8.2	APPENDIX 2: CODES OF GOOD PRACTICE ON BROAD-BASED BEE FOR QUALIFYING SMALL ENTERPRISES	46
8.3	APPENDIX 3: BBEE STATUS RATINGS	47
8.4	APPENDIX 4: THE SECTOR TRANSFORMATION CHARTERS IN PERSPECTIVE	47
8.5	APPENDIX 5: BEE DEALS CONCLUDED IN THE FINANCIAL SERVICES, MINING AND ICT SECTORS	51
8.6	APPENDIX 6: BLACK CONTROL ON THE JSE	55
8.7	APPENDIX 7: THE BEE SCORECARDS: A COMPARISON	56
8.8	APPENDIX 8: THE LEARNING PROGRAMME MATRIX	58
	ENDNOTES	55
	BIBLIOGRAPHY	82

List of Graphs

Graph 1: Total deal value since inception (1996)	16
Graph 2: Trends in black control, market capitalisation and number of firms on JSE	17
Graph 3: Number of black-controlled firms relative to the entire JSE	18

List of Tables

Table 1: The BEE scorecard	13
Table 2: Equity target inconsistencies	25
Table 3: BEE facilitation vehicles	30

Black Economic Empowerment in South Africa: A Critical Appraisal

Andrea M'Paradzi
Teaching and Research Assistant, Faculty of Law
University of Cape Town

Evance Kalula
Professor and Director, Institute of Development and Labour Law
University of Cape Town

Editorial Abstract:

This paper reflects on the evolution of Broad-Based Black Economic Empowerment (BBBEE/BEE) and evaluates the current state of the programme. BEE is one of the most topical subjects in current South African economic discourse. Born of a need to remedy the effects of apartheid, BEE has evolved, and indeed continues to evolve, into one of the most elaborate and ambitious empowerment endeavours the world over. BEE aims to integrate a broad base of previously disadvantaged persons into the mainstream economy and to redistribute control over the country's economic resources. An elaborate and comprehensive regulatory framework has been crafted to bring these aims to fruition. This paper provides an overview of this framework, and through a methodical analysis of the governing instruments, the function and legal status of each instrument is clarified and the interrelationship between them is illustrated. It is argued that while this governing structure has aided the progress of BEE, actual change has been marginal. This can be attributed to various factors that hinder the initiative. This paper further highlights the challenges that are both intrinsic and extrinsic to the regulatory framework, with a particular focus on the problems of financing, the broadness of broad-based BEE, fraud and attitudinal constraints. The authors conclude that BEE, as a work in progress, is a programme that holds great prospects, provided that the surmountable challenges are overcome.

Keywords:

Broad-Based/Black Economic Empowerment-Malaysia – United States of America –
South Africa – Regulatory Framework - Transformation

ACKNOWLEDGEMENTS

Our thanks go to:

Professor Mike Larkin, Graham Bradfield, Adam Ismail, Jacqueline Yeats, Kelly Phelps, Andrew Sekandi, Jeannette Safi, Thelma Zindoga, Maureen M'Paradzi, Ryan M'Paradzi, Brian M'Paradzi, Fungai M'Paradzi, Amanda Aliphon, Kundi Mberi and Kevin Musungu.

We are also grateful to Tameem Abdullah, Linda Van de Vijver and Faldielah Khan for their technical assistance.

ABBREVIATIONS

ANC	African National Congress
BBBEE Act	Broad Based Black Economic Empowerment Act 53 of 2003
BEECom	BEE Commission
BEE Strategy Document	The Strategy Document
BMF	Black Management Forum
The Codes	The Codes of Good Practice
DTI	Department of Trade and Industry
DTI GUIDE TO INTERPRETATION	The Department of Trade and Industry 'The Codes of Good Practice on Black Economic Empowerment – Phase One: A Guide to interpreting the First Phase of the Codes' (2005)
ICT	Information and Communications Technology
LRA	Labour Relations Act
NEP	New Economic Policy
NP	National Party
SAARF	South African Advertising Research Foundation
SDA	Skills Development Act
SETA	Sector Education Training Authority
SMME	Small to Medium and Micro-Enterprise
SRC	Security Regulation Code on Take-overs and Mergers
Transformation Charters	Sector Transformation Charters
USA	United States of America

1. INTRODUCTORY REMARKS

1.1 INTRODUCTION

Black Economic Empowerment or, alternatively, Broad Based Black Economic Empowerment (BEE/BBBEE) is an initiative that aims to spread economic benefits to a broad base of previously disadvantaged persons in South Africa. The objective of this paper is two fold: first, it intends to analyse critically the regulatory framework of BEE, and secondly, it will assess the challenges facing the initiative.

The points of departure will be an overview of the context giving rise to the need for BEE, and an overview of an earlier economic empowerment campaign undertaken in South Africa to uplift the Afrikaner community after the Boer War. A comparative assessment of the economic empowerment programmes undertaken in Malaysia and the United States of America (USA) will then follow. The value of such comparisons is not only to illuminate the general nature of such empowerment enterprises, but also to draw lessons for South Africa from these experiences. The paper will then turn to a general discussion of the regulatory framework, with particular focus on the key regulatory instruments, namely, the Codes of Good Practice (the Codes). The second half of the paper will deal with some challenges that are apparent within the regulatory framework, and then proceed to consider particularly stark challenges that stand to impede BEE in general. We conclude that BEE, as a work in progress, has made marginal strides, but still has the potential to ensure that a broad base of intended beneficiaries is empowered. However, should the challenges outlined in this paper not be surmounted, this goal may be elusive.

1.1.1 Black Economic Empowerment: A definition

Black Economic Empowerment (BEE) is an integrated socio-economic undertaking aimed at remedying the inequalities characteristic of apartheid.¹ The programme aims to transform the South African economic landscape by ensuring the participation of the majority of the population in the economy through the transfer of equity, and the redistribution of control over the country's economic resources.² The need for such an undertaking results from the constitutional imperative to rectify the gross economic disempowerment of the non-White people during apartheid that resulted in the current mainstream economy that excludes the majority of citizens.³ It is useful to start by briefly highlighting the economic disempowerment mechanisms employed by the apartheid Nationalist government.

1.1.2 Apartheid and disempowerment

Apartheid⁴ was a system of government predicated on policies of 'racial distinction',⁵ 'ethnic differentiation',⁶ and segregation.⁷ The professed rationale⁸ behind apartheid was that unified citizenship and the integration of South African society were not feasible.⁹ Under the guise of promoting 'the right to self-determination',¹⁰ the notion of separate development was considered not only desirable but necessary.¹¹ Ultimately each ethnic group was to be given its own geographical location with the objective of establishing a self-sufficient area.¹² This separation was purported to be a method of preventing racial clashes and friction.¹³

The actual rationale for the segregationist regime was the survival of White minority rule in South Africa.¹⁴ To this end, the National Party (NP) leaders pursued policies that systematically disempowered blacks, coloureds and Asians.¹⁵ We now turn to outline the nature of and effect of these mechanisms at an economic level.

1.1.2.1 A History of Segregation: Economic Disempowerment of a Majority
 'The dilemma at the heart of the NP policy [was] that what they most need[ed was] at the same time what they most fear[ed]. They need[ed] Black labour to create White prosperity; but fear[ed] the integration of White and Black in a common society'.¹⁶ As a solution to this conundrum, the NP sought to eradicate permanent black settlements¹⁷ within white areas and encouraged migratory labour instead.¹⁸ As a consequence of this policy, the homelands¹⁹ were established and the pass laws²⁰ were introduced.²¹ The pass laws together with a compendium of legislation²² had the detrimental effect of reducing the scope of employment options available to blacks²³ and diminishing the bargaining power of these workers.²⁴ This was compounded by the temporary nature of employment, which served to exclude prospects of promotion and proficiency in a particular job.²⁵ Generally, the jobs available to Africans in white areas were poorly paid²⁶ and required little or no skills.²⁷ Together with the statutory implementation of job reservation²⁸ and the institutionalisation of 'customary exclusions',²⁹ this meant that the plight of blacks was entrenched.

The BEE programme was initiated within this historical context. It is interesting to note that, BEE is not the first empowerment undertaking that South Africa has seen, as is apparent from the empowerment campaign geared to uplift the Afrikaner minority after the Boer War (1899 to 1902). This early initiative is an interesting case in point not only on account of its ingenious mechanisms, but also because of its success. A brief account of this endeavour will now be presented with a view to providing a holistic historical context to this paper.

1.2 ECONOMIC EMPOWERMENT OF THE AFRIKANER PEOPLE

Under the British colonial administration, particularly between the mid-1800s and early 1900s, Afrikaners had limited access to business opportunities and experience, with their participation restricted primarily to farming and the running of small rural business concerns.³⁰ Waves of disempowerment were experienced as a result of, first, the Great Trek undertaken in protest to colonial rule,³¹ secondly, the diamond and gold rush dominated by the British colonialists, thus excluding mining opportunities for the Afrikaners,³² and finally, the culmination of growing conflict between the two groups: the Anglo-Boer War.³³ The result of the war was mass devastation to farms and other rural infrastructure belonging to the Afrikaners,³⁴ with the secondary effect of increased unemployment and forced urbanisation.³⁵

Attempts were made by the Afrikaans churches and certain factions within the colonial administration to re-empower the disenfranchised group,³⁶ but the results of these efforts were marginal.³⁷ It is submitted that it was not until the establishment of Sanlam, which institutionally supported the empowerment of the Afrikaners, that economic advancement could be spoken of in any major way.

Sanlam was established from a realisation that, despite the poverty of the majority of Afrikaners, as a people they were in a position to alleviate their own hardship. Their ability was revealed by the 'Helpmekaar' (meaning 'to help one another') fund-raising initiative, which was a movement that encouraged the general public to make donations towards liberating Afrikaner Boer generals taken captive during the Rebellion.³⁸ Funds were collected in excess of those required,³⁹ and this endeavour showed that there was a potential capital source and that, should a mechanism be devised, it would be possible to mobilise and channel this available capital towards assisting Afrikaners in setting up businesses.⁴⁰

A practical mechanism to mobilise these funds was the use of capital pooling vehicles. These were funding structures that offered business start-up loans to Afrikaner entrepreneurs. An insurance/trust company was seen as the best capital pooling vehicle, and so in March 1918, Santam (*Suid-Afrikaanse Nasionale Trust en Assuransie Maatskappij*) was registered.⁴¹ However, before Santam was even established, it was decided that the life assurance department would be converted to a separate company, with a view to ensuring that long-term profits, payable to policyholders, would be separated from short-term profits, payable to shareholders.⁴² And thus the pioneering empowerment structure of this time was established. Incidentally, the capital to establish these companies was raised through equity finance, and resulted in an issued share capital of 200 000 £1 shares,⁴³ a more than considerable amount.

Such funding structures gained impetus over the years, and in 1940 Sanlam helped to establish another such vehicle, the Federale Volksbeleggings (FVB), which was subsequently registered, and has been hailed as the initiative that 'paved the way for Afrikaner investment in business enterprises'.⁴⁴ Later, in 1946, Sanlam formed another entity called Bonuskor, which was registered 'for the reinvestment of policy bonuses',⁴⁵ and the functioning of which is worthy of note. On establishing Bonuskor, Sanlam gave all its policy-holders the option of either receiving their annual policy bonuses or receiving Bonuskor shares in lieu of and with a value equivalent to the bonus amount. Most policyholders opted for the latter, and it was with this money that Bonuskor extended credit to aspiring business people.⁴⁶ The repayment of capital and interest on capital ensured Bonuskor's continued existence, and even generated marginal profits paid out as dividends to shareholders.⁴⁷ Bonuskor is the quintessential empowerment initiative of its time, and its success is reflected in its aggregate capital reaching R10 million by 1960,⁴⁸ as well as in the fact that Bonuskor had a share in several South African companies.⁴⁹ Sankor, established in 1960, succeeded Bonuskor in undertaking large development projects,⁵⁰ and Sankor was one of the last Afrikaner economic empowerment vehicles established.

Empowerment enterprises such as BEE and Sanlam are not peculiar to SA however, as is evident from the Malaysian and the US empowerment programmes. These foreign initiatives will now be examined for their comparative value.

2. A COMPARATIVE ASSESSMENT OF ECONOMIC EMPOWERMENT

The Malaysian and US programmes are particularly interesting because empowerment in Malaysia, as in South Africa, strives to uplift a majority and so provides a useful yardstick for comparison, while the US initiative seeks to empower a minority.⁵¹ A number of similarities and lessons can be garnered from these initiatives and these will be alluded to throughout the paper.

2.1 EMPOWERMENT IN MALAYSIA

2.1.1 A history of preference: economic passivity of a majority

The Malays and other indigenous people comprise 'the *Bumiputeras* or sons of the soil', and represent 61 per cent of the Malaysian population.⁵² The rest of the population comprises the Chinese (24 per cent) and the Indians (7 per cent).⁵³ Preferential treatment of the Malays has always been apparent, where from colonial times the Malays had less difficulty owning land, were educated for free and were afforded job preferences in the colonial administration.⁵⁴ Notwithstanding the preferences, the Bumiputeras have always played a limited role in the country's economic development.⁵⁵ This situation had its roots in the British colonial regime, in terms of which the Chinese and Indians provided most of the labour, particularly in the lucrative and major rubber plantation and mining industries.⁵⁶ This exposure as well as the economic ingenuity of the Chinese saw their eventual rise from the status of labourers to that of business entrepreneurs,⁵⁷ which resulted in Chinese domination in skilled employment, leaving the Malays to the impoverished recesses of unskilled work.⁵⁸ There was thus a dire need to remedy these economic imbalances, and as a result the New Economic Policy (NEP) was launched in 1970.⁵⁹ To circumvent any possible resistance to this policy, a multitude of government strategies were instituted to limit free speech primarily by prohibiting public questioning of governmental policies.⁶⁰

2.1.2 The New Economic Policy (NEP), 1970-1990

The NEP had two main objectives: first, to reduce the 49 per cent proportion of the Malaysian population living below the poverty line to 16 per cent by 1990 and, secondly, to remedy economic inequality.⁶¹ These goals were to be achieved by a redistribution of income to the Bumiputera in particular (who were the poorest of the population),⁶² and generally by improving the economic status of this group.⁶³ A number of strategies were pursued at many levels to realise these goals, for example, increased state intervention saw several government institutions formed to advance Malay-owned businesses.⁶⁴ Furthermore, government loans were issued to extend preferential credit to the indigenous people,⁶⁵ with these groups also enjoying employment preferences as well as the chance to acquire equity at below par value.⁶⁶

2.1.3 Evaluation of the preference policy

The Malaysian empowerment programme is one of the most successful in the world,⁶⁷ as is evident from the relative progress of the targeted group.⁶⁸ In respect of the NEP's first objective (poverty reduction), the level of poverty among the Bumiputera was reduced from 64.8 per cent in 1970 to 23.8 per cent in 1987.⁶⁹ With

regard to the second objective of restructuring economic society and employment, success was apparent from the fact that 21 per cent (of the targeted 30 per cent) of corporate stock had been transferred to the Malays by 1995,⁷⁰ which served to nurture the creation of a Bumiputera middle class.⁷¹ A shortcoming, however, was that the majority of the intended beneficiaries were confined to low-skilled, low-paying jobs.⁷²

These successes, laudable as they are, were not achieved without a price. The stifling of free speech as a result of oppressive laws and the shortage of technically trained labour resulting from the systematic exclusion of the groups historically seen to have excelled⁷³ are but a few of the negative consequences. Nevertheless, viewed holistically, the NEP was successful, and its effectiveness was largely attributable to the economic growth prevalent in Malaysia during the time of its implementation. It is evident that economic growth is a key ingredient in ensuring the success of BEE.⁷⁴

2.2 EMPOWERMENT IN THE UNITED STATES OF AMERICA

2.2.1 A history of segregation: economic disempowerment of a minority

In the USA, blacks make up a mere 12 per cent of the population.⁷⁵ Similar to the South African situation, the need to pursue an economic empowerment strategy was born out of a history of segregation.⁷⁶ Blacks were largely excluded from the mainstream economy as a result of 'job discrimination'.⁷⁷ They were also denied financial credit, prejudiced in the ownership of businesses, and marginalised in the procurement of government contracts.⁷⁸

2.2.2 Economic empowerment

Although the government provides loans and grants,⁷⁹ the primary empowerment mechanisms employed, at both federal and state level, have been preferential procurement policies structured in favour of minority groupings.⁸⁰ Such preferences manifest as 'set asides',⁸¹ 'bid price preferences'⁸² and 'goals programmes',⁸³ and advancement through these mechanisms has been buttressed by executive orders and judicial decisions generally decided in favour of minority empowerment.⁸⁴

2.2.3 Evaluation of the preference policy

The procurement preferences have been relatively successful in empowering minority businesses.⁸⁵ The 5 per cent participation target was reached at state level by 1993, and contracts to minority firms accounted for 6.4 per cent of the overall dollar value.⁸⁶ Furthermore, between 1982 and 1991, there was a 24 per cent increase of all 'federal procurement contracts' in excess of USD 25 000⁸⁷ with similar trends apparent at state level.⁸⁸ This statistical evidence is however, undermined by the realities on the ground that indicate a general inability of beneficiaries to cope with the contracts that they are awarded, thereby affecting the sustainability of minority enterprises.⁸⁹ Another insidious weakness is evident from the programme's failure to realise its subsidiary objective of unemployment reduction.⁹⁰ Due to these conflicting indicators, it is difficult to make a final evaluation of the US empowerment endeavour. What is clear, however, is that the US initiative has often been viewed as uncertain at best.⁹¹

In light of this historical and international context, this paper will now turn to focus on the nature of the Black Economic Empowerment programme in South Africa.

3. BLACK ECONOMIC EMPOWERMENT

3.1 BEE: A REITERATION

As highlighted above, BEE is seen as necessary to remedy the economic imbalances perpetuated during apartheid. When the first democratic elections were held in 1994, discussions took place about the best strategy to pursue BEE.⁹² After 1995, these discussions resulted in active involvement by the public and private sectors through which multiple initiatives sought to extend economic power to the black population.⁹³ By 1997, the Black Management Forum (BMF) perceived that BEE was not going well,⁹⁴ and the independent BEE Commission (BEECom) was consequently established in 1998⁹⁵ to identify the challenges hindering significant black participation and to propose a viable BEE strategy.⁹⁶ The BEECom subsequently released a comprehensive report on BEE in 2000,⁹⁷ prescribing an Integrated National BEE Strategy as a solution to the BEE complexities,⁹⁸ and recommended that national legislation be enacted to facilitate empowerment.⁹⁹ This recommendation culminated in the enactment of the Broad-Based Black Economic Empowerment Act 53 of 2003 (BBBEE Act) that is analysed below.

As it stands, BEE is a process aimed at strategically transforming the SA economy¹⁰⁰ by, *inter alia*, spreading equity holdings to incorporate previously disadvantaged South Africans,¹⁰¹ re-organising management structures,¹⁰² and ensuring greater participation of the majority in the economy to achieve 'economic justice'.¹⁰³

BEE is governed by several instruments and we now proceed to provide an overview of the BEE regulatory framework.

4. THE BEE REGULATORY FRAMEWORK

This section attempts a critical discussion of the constitutional imperative, the BBEE Act, the Codes of Good Practice (the Codes),¹⁰⁴ the Sector Transformation Charters (the Transformation Charters) and the BEE Strategy Document (the Strategy Document). As a precursor to this discussion a summary of the legal status of the instruments is necessary. It is submitted that the regulatory instruments governing BEE rest in the following hierarchy, listed from the most to the least binding: the Constitution;¹⁰⁵ the BBEE Act; the Codes; the Transformation Charters;¹⁰⁶ and, finally, the Strategy Document.

4.1 BEE: A CONSTITUTIONAL IMPERATIVE

BEE is a constitutional imperative; however, the pursuit of BEE poses a paradox that stems from the framing of the right to equality.¹⁰⁷ On the one hand, s 9(2) of the Constitution imposes an obligation on the state to undertake 'legislative and other measures to protect persons disadvantaged from unfair discrimination'. On the other hand, it has been argued that BEE amounts to reverse racism,¹⁰⁸ thus constituting a breach of s 9(3) of the Constitution, which prohibits the state from unfairly discriminating against any person on the listed grounds of, *inter alia*, race and gender. It is submitted that BEE *prima facie* amounts to unfair discrimination, but that it is seen as protection of the substantive right to equality,¹⁰⁹ and is thus reasonable and justifiable in terms of s 36 of the Constitution.¹¹⁰ In the Constitutional Court case of *Bato Star*,¹¹¹ Ngcobo J succinctly encapsulates the nature and implications of this constitutional imperative, stating that:

... transformation is required by ... the Constitution ... and change sometimes comes at a cost ... There are profound challenges facing our nation in meeting our constitutional commitment to transformation. The transformation process will inevitably have adverse effects on some individuals particularly those who have been advantaged ... [but] these are some of the challenges we will have to confront as a nation in transition.¹¹²

4.2 THE BROAD-BASED BLACK ECONOMIC EMPOWERMENT ACT 53 OF 2003

The BBEE Act is legislation as envisaged by s 9(2) of the Constitution and is the primary regulatory instrument of BEE. The BBEE Act provides a skeletal framework for the programme in general: it not only defines BEE, but also enables the instruments that rest beneath it in the regulatory hierarchy and establishes the BEE Advisory Council. Although the BBEE Act is framed in broad terms this is, in general, unproblematic because it is supplemented by the detailed directives contained in the Codes. The BBEE Act is relatively uncontroversial, but the 'definitions' section deserves some attention.

The term 'broad-based black economic empowerment' is defined as 'economic empowerment, ... through a non-exhaustive list of diverse but integrated socio-economic strategies'.¹¹³ It can be argued that the non-exhaustive list is compatible with the dynamism of BEE and the multi-dimensional socio-economic objective,¹¹⁴ and affords government the leeway to adopt additional strategies not

already enumerated in the Act.¹¹⁵ This open-ended list provides flexibility and may be said to be a clear strength of the Act.

The beneficiaries of the Act are 'black people' defined as Africans, Coloureds and Indians.¹¹⁶ This broad definition extends further to include 'women, workers, youth, people with disabilities and people living in rural areas'.¹¹⁷ It is clear that this definition specifically mentions groups 'historically [susceptible] to disempowerment'¹¹⁸ and thus reflects the intention of the legislature to spread preferences beyond the 'new black elite'.¹¹⁹ This definition has been qualified by the definition of 'black people' contained in Schedule 1 of the Main Codes,¹²⁰ which limits 'black people' to natural persons who are 'citizens of the Republic of South Africa by birth or descent...or by naturalisation before the [commencement of the interim Constitution in 1993]' or who, were it not for the pre-1993 apartheid regulations, would have been entitled to be naturalised prior to the commencement of the interim Constitution.¹²¹ This supplementation of the definition serves to counter previous arguments that the BBBEE Act failed to limit the scope of BEE to victims of apartheid, and also serves to illustrate the manner in which the Codes flesh out the space that the Act carves.

Two interesting issues arise from this definition of 'black people'. First, under apartheid, people were classified as either black, white, coloured or Asian.¹²² Although the Asian group mostly constituted Indians,¹²³ other races considered Asian,¹²⁴ for example Chinese people, are not covered by the Act. This is an apparent oversight on the part of the legislature. The second issue relates to the mention of communities who qualify as candidates for BEE. This is encouraging for those who support 'communitarianism',¹²⁵ however, whether communities will realistically materialise as beneficiaries (especially in light of the present preoccupation of empowerment through equity transfer and management control)¹²⁶ will depend on how well the BEE custodians organise and support them.¹²⁷

Apart from these concerns, the BBBEE Act can be seen as a commendable piece of legislation, and many potential shortcomings are more than likely compensated for by the comprehensive Codes of Good Practice.

4.3 THE CODES OF GOOD PRACTICE¹²⁸

Section 9 of the BBBEE Act empowers the Minister of Trade and Industry to issue Codes of Good Practice on BEE.¹²⁹ In issuing these Codes the Minister must take into account a strategy issued in terms of s 11,¹³⁰ which 'may specify targets consistent with objectives of the Act as well as the period within which those targets must be achieved'.¹³¹ The procedure for the issuance of the Codes entails the publication of a draft code for public comment in the Gazette, with a 60-day provision for interested persons to submit their input on the content of the draft.¹³²

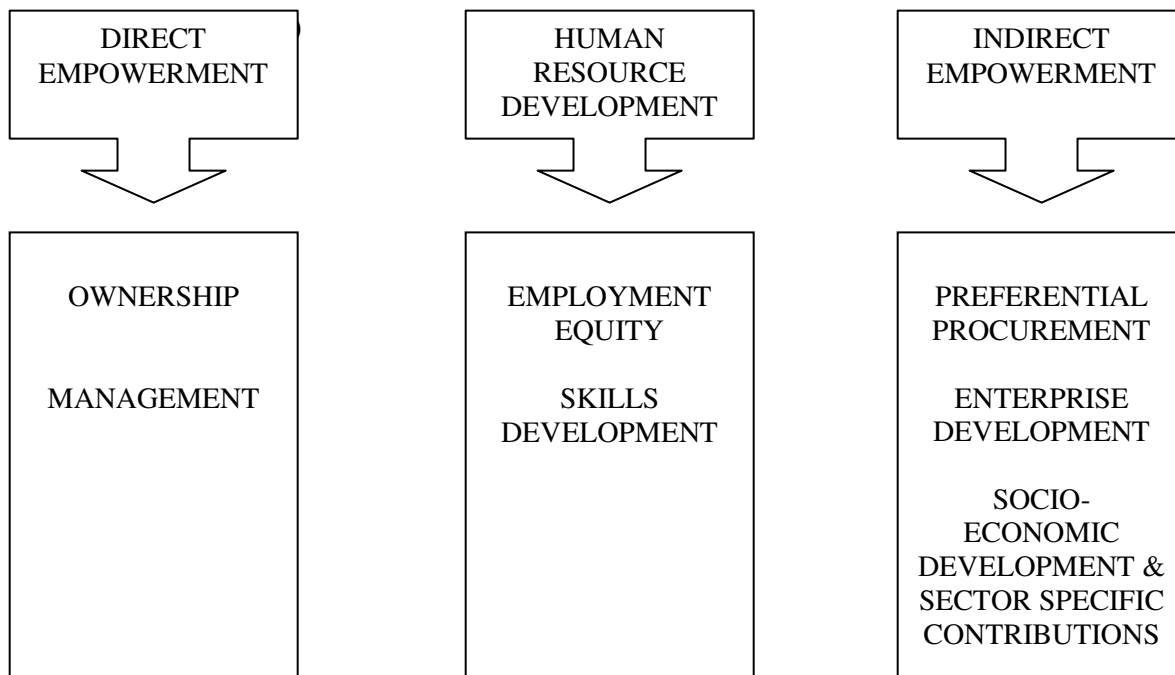
In substantial compliance with the above procedure, the first phase of the Codes was tabled and released for public comment by the Department of Trade and Industry (DTI) in December 2004 (the Phase One 2004 Codes).¹³³ The final draft of the first phase was released in November 2005 (the Phase One 2005 Codes).¹³⁴ Drafting of the second phase of the Codes commenced in April 2005, and the final draft was released in December 2005 (the Phase Two 2005 Codes).¹³⁵ Both phases

were subsequently approved by Cabinet, and the long-awaited gazetting of the Codes finally occurred on 9 February 2007 (the Final 2007 Codes).¹³⁶

Before the Codes were instituted, the Strategy Document¹³⁷ and several Transformation Charters¹³⁸ governed BEE, but these instruments fell short in several respects.¹³⁹ The Strategy Document did not provide practical guidelines for implementation, and disparities between the different sector Transformation Charters in relation to definitions, standards, and targets in the implementation of BEE resulted in disparate progress,¹⁴⁰ BEE deals falling short of the empowerment standard,¹⁴¹ and leeway for entities to evade the requirements of the BBEE Act.¹⁴² In an endeavour to counteract these systemic difficulties, the BBEE Act was enacted in 2004. Although the Act provided some clarity, it is couched in broad terms and thus did not serve in itself to remedy the lack of specificity in the framework. The Codes seek to address these shortcomings and intend to standardise the definition of 'broad-based BEE' as well as to benchmark measurement principles in the interests of clarity and certainty.¹⁴³ They are an endeavour to provide uniform regulations and indicators for empowerment transactions concluded in every sector, and to ensure that companies not accounted for by the Charters are included in the purview of empowerment.¹⁴⁴ An additional objective of the Codes is the institution of structures that facilitate the implementation and appraisal of the initiative. In this way, the Codes provide for the institution of verification and accreditation agencies that are intended to facilitate, standardise and validate BEE transactions.¹⁴⁵ In a nutshell the Codes were designed to ensure 'real empowerment'¹⁴⁶ by giving content to the regulatory framework and unifying the system.

4.3.1 The structure and content of the Codes

There are three core components and seven sub-elements of BBEE. These are shown diagrammatically below.¹⁴⁷



The first component is 'Direct Empowerment', which comprises the 'Ownership'¹⁴⁸ and 'Management'¹⁴⁹ elements; the second component is 'Human Resource Development', which comprises the 'Employment Equity'¹⁵⁰ and 'Skills Development'¹⁵¹ elements; and the last component is 'Indirect Empowerment', which comprises the 'Preferential Procurement',¹⁵² 'Enterprise Development'¹⁵³ and 'Socio-Economic Development and Sector Specific Contributions'¹⁵⁴ elements.¹⁵⁵ The overall structure of the Codes is based on these categories, with phase 1 containing the 'Direct Empowerment' component, and phase 2 detailing the 'Human Resource Development' and 'Indirect Empowerment' components.¹⁵⁶ Charts detailing the specifics of the Codes are attached as Appendix 1.¹⁵⁷

4.3.2 The binding nature of the Codes of Good Practice

Section 10 of the BBEE Act states that '[e]very organ of state and public entity *must*¹⁵⁸ take into account and, as far as is reasonably possible, apply any relevant Code of Good Practice issued in terms of [the] Act'.¹⁵⁹ The use of the word *must* indicates the mandatory obligation on the state and public entities to comply with the Codes when determining licences, concessions, procurement policies, 'the sale of state owned enterprises', and 'the entering into partnerships with the private sector'.¹⁶⁰ However, the BBEE Act is silent on the obligation of private enterprises to comply with the Codes. In order for the Codes to be implemented it is crucial that state and private entities interact and collaborate. Despite the importance of such co-operation, the Codes oddly bind only public entities. This unilateral binding nature of the Codes renders them *sui generis* and we now turn to investigate their precise legal nature.

The point of departure in determining the legal nature of the Codes will be to investigate the characteristics of the instruments. The Codes are regulatory instruments envisaged by the BBEE Act, and are issued by the Minister in the Gazette. Power has thus been delegated to the Minister by the legislature for their issuance and on this score the Codes meet the definition of the phenomenon of 'delegated legislation'.¹⁶¹ The purpose behind delegated legislation is to enable effective implementation of primary legislation, which is usually phrased in broad terms. In light of this, it appears that the Codes may be classified as delegated legislation.

This conclusion may be doubtful, however, when one considers the fact that delegated legislation usually takes the form of regulations or proclamations.¹⁶² Furthermore, s 14 of the Act¹⁶³ makes specific provision for the Minister to make regulations to ensure proper implementation of the Act. It is unlikely that the legislature would have made separate provision for the same species of instrument to regulate similar issues. This would be an unwarranted duplication unnecessarily adding to the complexity of the already labyrinthine regulatory framework. The duplication may perhaps be seen as legislative over-provision inserted *ex abundanti cautela*;¹⁶⁴ however, this conclusion is debatable. It is submitted that the Codes do, in so far as they relate to state entities, amount to delegated legislation as they fulfil the *essentialia* of delegated legislation. This submission is fortified by the fact that delegated legislation may exist in forms other than regulations or proclamations, the ultimate determination of delegated legislation being one of substance and not

form.¹⁶⁵ We therefore argue that the rationale for the provision of two ‘subordinate’ instruments of the same species is to add greater flexibility to the regulatory regime. Although s 9(1) and s 9(3) of the Act¹⁶⁶ list factors that *may*¹⁶⁷ be included in the Codes, they are in fact limited in their mandatory application to state entities.¹⁶⁸ It is submitted that the provision in the Act for the enactment of regulations over and above the Codes affords the Minister leeway not only to expound on issues that may amplify the efficacy of the framework, but, more pertinently, to cater for the enactment of rules that may be binding on the private sector.

The status of the Codes as they relate to the private sector is ambiguous because the Act is silent on the obligation of private entities to comply with them. According to the rules of statutory interpretation the starting point is that the ambit of the Act is restricted to that which is expressly stated.¹⁶⁹ Thus the Act’s failure to mention private entities in s 10 points to the fact that the Codes are not legally binding on them. However, provisions may sometimes be implied if the three stage ‘implied provision test’ is discharged. This test requires, first, that the implied provision must be *necessary* and not merely convenient,¹⁷⁰ secondly, that the provision must be *necessary to make the legislation effective*,¹⁷¹ and lastly, that the provision must be *capable of clear and precise formulation*.¹⁷² *In casu*, the last requirement appears unproblematic. The first two requirements are also met if one views the private sector as so integral to the implementation of BEE that without its compulsory inclusion, BEE would be unworkable. If this is accepted, then private entities are included within the ambit of s 10 by implication. This proposition is also reinforced by the fact that BEE is a constitutional imperative, the success of which requires the joint effort of public and private sectors. On this basis, it may be suggested that the Codes are legally binding on the private sector.

However, in light of the constitutional doctrine of separation of powers,¹⁷³ the implied provision test is not easily discharged. Furthermore, a trite canon of interpretation states that unless the interpretation of a provision leads to incongruity or absurdity, the express statutory meaning prevails.¹⁷⁴ The omission of private entities from the section cannot be viewed as absurd (notwithstanding the integral participation required by the private sector for the effective implementation of BEE) if one looks to the proposed intention of the legislature in omitting them. The intention is to respect the economic realm of free enterprise, which is necessary for the nurturing of entrepreneurial spirit as well as for economic growth.¹⁷⁵ To impose a mandatory obligation on private industry would stifle competition through the dictation of resource usage, and would result in an unsustainable (and unfeasible) empowerment endeavour.¹⁷⁶

Ultimately the implementation of BEE is a strategic business decision¹⁷⁷ made with the awareness of resource capacity, growth potential, market forces and, most importantly, survival imperatives. It should be noted however, that should private entities *choose* to embark on BEE strategies, the regulatory guidelines contained in the Codes become applicable.¹⁷⁸

This begs the following question: what then is the legal nature of the Codes as viewed from the private sector perspective? In investigating this issue, we shall look at other instruments that are termed Codes to ascertain whether the status

attributable to these instruments may be helpful in determining the legal nature of the BEE Codes.¹⁷⁹

The first Code to be considered is the Security Regulation Code on Takeovers and Mergers (SRC).¹⁸⁰ The Securities Regulation Panel established in terms of s 440B of the Companies Act¹⁸¹ is responsible for the issue of the SRC. The SRC provides an 'orderly framework'¹⁸² of rules and guidelines for takeover and merger activities and applies to all listed companies and to all persons involved in such transactions.¹⁸³ It aims to ensure fairness and equality between all security holders,¹⁸⁴ and expressly provides that it 'enjoys the force of law'.¹⁸⁵

An investigation of the King Code II¹⁸⁶ reveals that it constitutes a 'set of principles [that] does not purport to determine the detailed course of conduct of directors on any particular matter',¹⁸⁷ but merely to guide companies in determining the 'best available practice'¹⁸⁸ when considering other regulatory instruments which apply to them.¹⁸⁹ The King Code II applies to what are termed 'affected companies'¹⁹⁰ and all such companies are urged to duly consider the King Code insofar as its principles are relevant.¹⁹¹

Schedule 8 (the Labour Code) issued in terms of the Labour Relations Act (LRA)¹⁹² is another useful comparator. The definitions section of the LRA expressly excludes Schedule 8 as being a part of the 'Act' as defined.¹⁹³ The inference that can be drawn is that Schedule 8, in the absence of a clear articulation of its legal nature, may be regarded as a lower order instrument to those grouped together as forming part of the 'Act'. The Labour Code (aimed at promoting mutual respect in employer-employee relationships) outlines guidelines on dismissal issues in general terms,¹⁹⁴ and expressly permits deviation from the norms it contains.¹⁹⁵

What can be deduced from the above analysis is that the aspect common to all these Codes is that they are guidelines in the form of rules, principles or norms. What is also apparent is that in the absence of an express provision in the Codes attributing the binding force of law, the Codes appear to be mere guidelines that buttress regulatory frameworks. They may thus be regarded as what is termed 'soft law'.¹⁹⁶ 'Soft' law is not law proper¹⁹⁷ and thus is not enforceable in a court of law.¹⁹⁸ Soft law is made up of 'written instruments that are not intended to be legally binding',¹⁹⁹ but that are so central to the legal regulatory framework²⁰⁰ that they cannot merely be discarded as 'non-law'.²⁰¹ Figuratively speaking, '... there exists a considerable "grey area" of "soft law" between the white space of law and the black territory of non-law ... the "grey area" may greatly affect the white one and ... "soft law" can have legal effects'.²⁰²

This 'soft law' status of these Codes indisputably applies to the BEE Codes (as they relate to the private sector). The BEE Codes do not expressly confer the force of law unto themselves, but do serve as non-binding guidelines for the implementation of BEE by the private sector. Furthermore, they are of such importance and influence to the BEE regulatory structure that they warrant special attention.²⁰³ It can thus be concluded that the legal status of the Codes (from the private sector perspective) is that of 'soft law'.

In light of this conclusion, it is necessary to ascertain how the government has enforced these non-binding codes so as to regulate commerce and ensure compliance with BEE.

4.3.3 Implementation

4.3.3.1 The mechanism

A BBBEE scorecard has been issued by the Department of Trade and Industry (DTI) and is contained in the Codes of Good Practice.²⁰⁴ The scorecard is intended to gauge progress made towards BEE by enterprises subject to the Codes, and works on a weighted average, allocating points to seven criteria. The scorecard is shown below.²⁰⁵

Table 1: The BEE scorecard

ELEMENT	WEIGHTING	CODE
Ownership	20 points	100
Management Control	10 points	200
Employment Equity	15 points	300
Skills Development	15 points	400
Preferential Procurement	20 points	500
Enterprise Development	15 points	600
Socio-Economic Development	5 points	700

In terms of s10 of the Act, every organ of state and public entity²⁰⁶ is required to consider and apply this Code in: ‘determining the qualification criteria for the issuing of licences; concessions or other authorisations in terms of any law; developing and implementing a preferential procurement policy; determining the qualification criteria for the sale of state owned enterprises and; developing criteria for entering into [public or private partnerships]’.²⁰⁷ It is submitted that a ‘carrot-stick’ approach has been adopted to ensure compliance with the Codes, because adherence to the BEE standards stipulated in the Codes enhances prospects of success in tenders for government patronage, in applications for licences, in authorisations for projects or in the granting of concessions.²⁰⁸ This is the same approach that was adopted in Malaysia to enforce the restructuring programme.²⁰⁹

In instances where private entities do not transact directly with the state or with state entities, the ‘cascade effect’²¹⁰ pressurises private entities that transact *inter se* to comply with the Codes. This ‘cascade effect’ works as follows: enterprises that do transact directly with the state strive to attain the highest BEE score possible for the reasons mentioned above. One of the ways to improve this score is by procuring goods and services from BEE-compliant suppliers as this will count towards the procurer’s ‘preferential procurement’ score of the BEE scorecard.²¹¹ This process will replicate itself throughout the supply chains of most industries, this is to say it will ‘cascade’ downward.²¹² Thus, in the interests of survival and competitive advantage, all suppliers at different tiers of the value chain will be pressured to become BEE-compliant. Other factors that compel BEE compliance are, for example, that banks are weary of extending credit to unempowered enterprises because such enterprises are prone to becoming bad debtors.²¹³ A further risk is that directors of non-compliant companies may be burdened with claims for damages instituted by the company for breach of both their fiduciary obligations and their duties of care and skill.²¹⁴ Compliance with the Codes is thus effected, notwithstanding the non-binding status of the Codes on private sector entities.

4.3.4 Verification agencies

As stated above, an enterprise will be rated and accorded a BEE status²¹⁵ based on its overall weighted average score as determined by the application of the BEE scorecard. This rating is calculated by an accredited verification agency that will issue a valid verification certificate reflecting the BEE status of the measured entity.

Verification agencies were established in response to the problems encountered in the early 1990s.²¹⁷ During this period there were no standard measures to evaluate and compare BEE progress of different entities.²¹⁸ However, with the advent of verification agencies, a mechanism now exists to verify BEE contributions and to ascertain the accuracy of an entity's reported BEE status.²¹⁹ Despite this innovation, there is still the risk of disparate verification methodologies.²²⁰ To avert this danger, an accreditation body²²¹ must develop and maintain specified criteria in terms of which it 'may grant, revoke, or suspend an accreditation of a verification agency',²²² thereby ensuring uniform standards.²²³

4.3.5 Conclusion on the Codes of Good Practice

This section has detailed the nature and content of the Codes of Good Practice as well as analysed their legal nature. In light of the *sui generis* nature of the Codes, they are implemented through an ingenious 'carrot-stick' mechanism facilitated by accredited BEE rating agencies.

4.4 THE SECTOR TRANSFORMATION CHARTERS

The BEE Transformation Charters are sector-specific regulatory instruments voluntarily developed by stakeholders in a particular industry together with government departments.²²⁴ Transformation Charters reflect a sector's commitment to BEE²²⁵ and are gazetted 'for general information' purposes in terms of s 12 of the Act.²²⁶ Furthermore, they aim to guide transformation²²⁷ and to peg the benchmark for BEE compliance that entities in a particular sector should meet.²²⁸

4.4.1 Legal status of the Sector Transformation Charters

The status of the Transformation Charters is ascertainable by comparing their status to that of the Codes.²²⁹ We would argue that the Transformation Charters are legally subordinate to the Codes and by implication assume an inferior legal status to both delegated legislation and soft law. This can be gleaned from the bodies responsible for the enactment of the respective instruments, with the Codes issued by the Minister, and the Transformation Charters formulated by industry and only then gazetted on approval by the Minister.²³⁰ Furthermore, whereas the Codes are binding on organs of state and public entities, the Final 2007 Codes make it clear that the Transformation Charters do not bind these entities.²³¹ The Act confirms this inferior status by expressly stating that the Transformation Charters are simply 'for general information' purposes,²³² with the Final 2007 Codes confirming these instruments as mere evidence of a sector's 'commitment to promote B-BBEE ...'.²³³ Given the above considerations, it may be concluded that the Charters can be classified as voluntary partnership agreements that bind only private sector signatories.²³⁴

4.4.2 The Sector Transformation Charters in perspective

To illustrate the content of the Charters, we provide, in Appendix 4, a telescopic picture of the Transformation Charters governing the mining, financial services and information and communications technology (ICT) sectors.

4.5 THE BEE STRATEGY DOCUMENT

The Strategy Document was the initial regulatory instrument issued by the Minister and served as a general framework for BEE.²³⁵ It contained a basic scorecard with percentage weightings²³⁶ (and it is upon this scorecard that the present scorecard is modelled), but it did not outline governing principles, or how the scorecard was to be applied.²³⁷ Section 11 of the BBEE Act²³⁸ now specifically mandates the Minister to release a Strategy Document, which sets out the philosophical and policy backdrop of BEE,²³⁹ and although still framed in broad terms, this is no longer problematic in light of the specifics provided in the BBEE Act and the Codes. Interestingly, once resting at the apex of the BEE regulatory hierarchy, the Strategy Document has since been relegated to the nadir of the pyramid on account of the detailed principles contained in the BBEE Act, the Codes and the Transformation Charters.

4.6 CONCLUSION ON THE REGULATORY FRAMEWORK

In concluding this section on the regulatory framework, a final comment is salutary. On the one hand, the regulatory framework is extremely complex; however, on the other hand, the comprehensiveness of the framework admirably caters for the nuances of the enterprise and provides a solid foundation to facilitate the realisation of BEE objectives. As a result of the latter point, BEE has made some progress, and we shall now review these achievements.

5. BEE PROGRESS: MARGINAL STRIDES

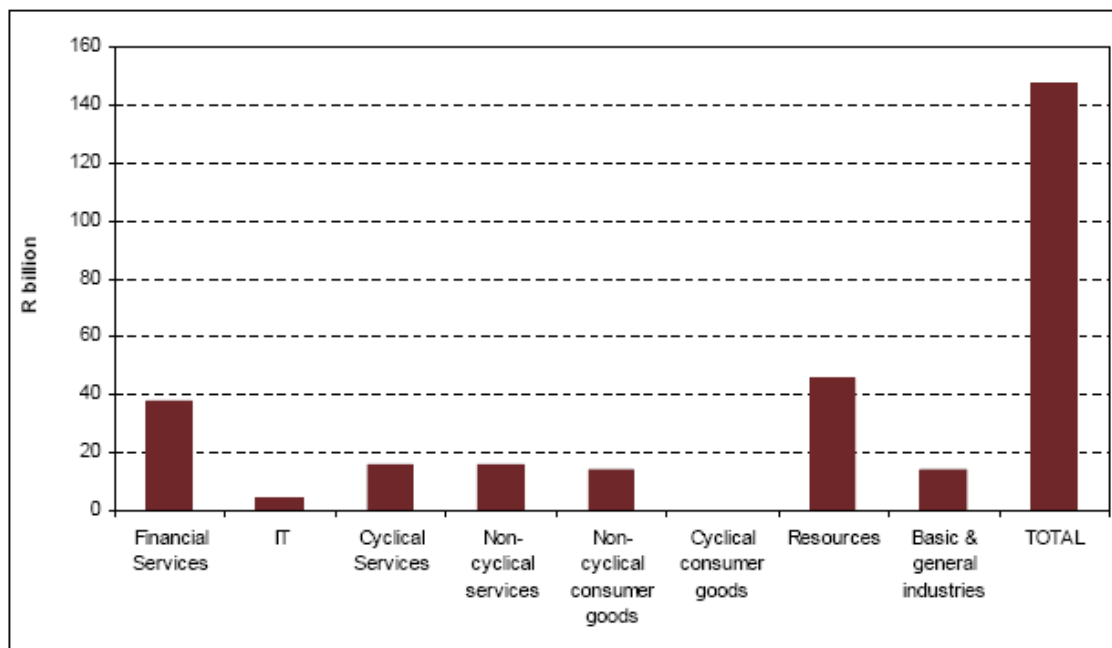
BEE as a work in progress has made marginal strides and this section of the paper intends to analyse this advancement. This assessment will be made by looking at a number of BEE deals that have been concluded in the mining, financial and ICT sectors, and by reviewing the extent of equity transfer in the listed environment.

5.1 BEE DEALS

A common method of gauging BEE progress is to look at BEE deals that have been concluded over the years. The Johnnic deal was the first large and 'visible buy-in by black businessmen'²⁴⁰ and was regarded as the 'symbolic birth of BEE',²⁴¹ and since then numerous deals have been closed. Mining successes include, among others, the deal concluded in 2000 between Anglo Coal and Billiton and Eyesizwe, which resulted in the creation of the fourth largest coal producer in South Africa.²⁴² In the financial sector, commendable schemes include the Old Mutual and the Nedbank deals, both concluded in 2005. The Old Mutual deal was valued at R7.2 billion, and entailed the sale of 12.75 per cent of Old Mutual plc's local businesses to black staff and black investors.²⁴³ The Nedbank deal comprised a bonus-share scheme with clients as the intended beneficiaries.²⁴⁴ In the ICT sector, a notable arrangement is the merger between Mthombo-IT (a black owned company) and EOH, a major player in the ICT field.²⁴⁵ For a more comprehensive outline of the deals concluded in these three sectors, see Appendix 5.

Graph 1 below illustrates the total value of BEE deals from inception until 1996. As is apparent, the value of these deals has been significant.

Graph 1: Total deal value since inception (1996)

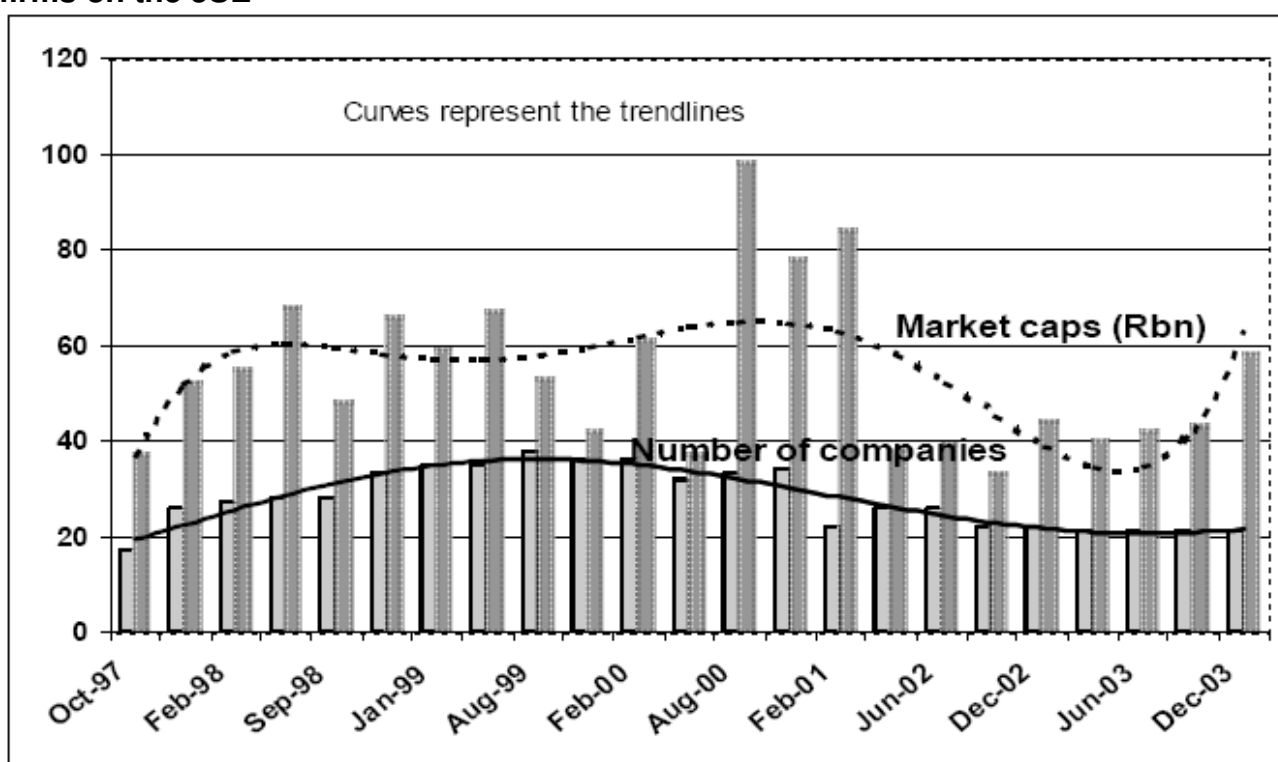


Source: Shubane, K and Reddy, C 'Behind the Deals' (2005) *Business Map Foundation: Economic Transformation and Empowerment* 11.

5.2 PROGRESS IN THE LISTED ENVIRONMENT

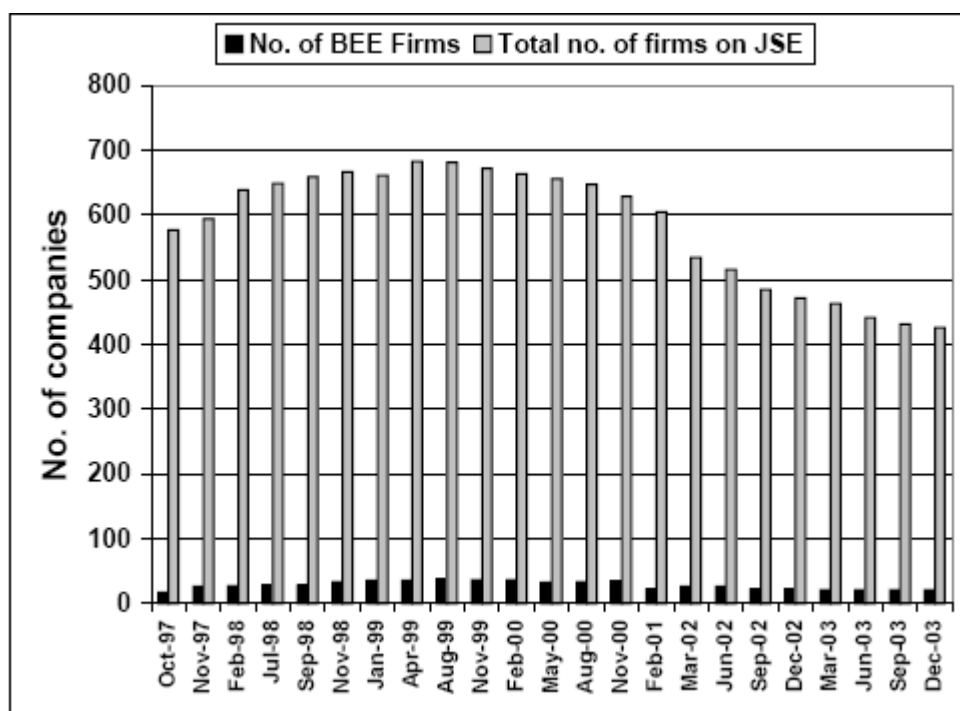
Another indicator of BEE progress is the extent of equity ownership. There has been a notable increase in black equity ownership and control of South African companies.²⁴⁶ Between 1993 and 1997, black ownership increased from under 1 per cent to 15 to 18 per cent in market capitalisation on the Johannesburg Stock Exchange (JSE).²⁴⁷ Further patterns of equity ownership, between 1997 and 2003, are reflected in Graph 2 below. (For a representation of figures in tabular form, see Appendix 6).

Graph 2: Trends in black control, market capitalisation and the number of firms on the JSE



Source: Reddy, C 'Empowerment on the JSE' (2004) *Empowerment 2004 Black Ownership: Risk or Opportunity in Business Map Foundation* 57.

Graph 2 above shows that notwithstanding the slight trough reflected in 2002 to 2003, the market capitalisation pattern reflects a trend towards increased black control on the JSE. This advancement should not be overstated however, as there are contrary indicators. For example, in relation to the intended target of 25 per cent for equity, direct black ownership on the JSE amounts to a mere 1.6 per cent.²⁴⁸ Furthermore, Graph 3 below indicates that relationally, the number of BEE firms on the JSE is miniscule.²⁴⁹ As an aside, it should be noted that these equity control indicators provide merely a telescopic view of BEE performance as statistics in the unlisted environment are not considered.

Graph 3: Number of black-controlled firms relative to the entire JSE

Source: Reddy, C 'Empowerment on the JSE' (2004) *Empowerment 2004 Black Ownership: Risk or Opportunity in Business Map Foundation* 56.

The above analysis reveals that notwithstanding relative successes, BEE progress is far from stellar. This is more than likely due to the numerous challenges facing the BEE drive. The next part of this paper will address some of these issues and, in the interests of clarity, these challenges will be divided into two broad categories: the first deals with challenges that are evident from the BEE regulatory framework itself and the second discusses those that are external to this framework.

6. BLACK ECONOMIC EMPOWERMENT: THE CHALLENGES

Black Economic Empowerment faces several challenges. Some of these challenges arise from within the regulatory framework, while several are external to the governing structure. We limit ourselves to a critical analysis of the Codes, the Transformation Charters, and the Sector Codes. The external challenges that will be addressed are the problems of financing, the broadness of broad-based BEE, fraud, and attitudinal constraints.

6.1 CHALLENGES EVIDENT FROM THE REGULATORY FRAMEWORK

6.1.1 The Codes of Good Practice and the Sector Transformation Charters

Since their inception, the Codes and Transformation Charters have undergone dramatic changes. Many of the original difficulties have been resolved, but several ambiguities linger. This section of the paper will consider certain aspects of this evolutionary trajectory. This critical analysis will involve a discussion of the content of the Codes, and an assessment of the interrelationship between the Codes, the Transformation Charters and the Sector Codes.

6.1.1.1 *The Codes of Good Practice: a critical analysis*

The BEE Codes are commendable on two main scores. First, the most obvious strength is the detailed consideration of vital aspects of the endeavour, as well as the inclusion of key entities within the ambit of application. The benefit of such detail is the reduced margin of appreciation of these rules and their relevance.²⁵⁰ Secondly, in providing cross-sector standards, the Codes unify the system²⁵¹ and thus ensure a more even and wider spread of empowerment.²⁵² Several commendable adjustments have been made to bolster these strengths. Nonetheless, certain problems remain, and worse still, new ones have been created. These issues will now be examined.

6.1.1.1.1 *Content of the Codes of Good Practice*

The flux in content of the Codes is manifested starkly in issues relating to the complexity of the Codes, changes effected to the scorecards; and certain factors relating to the ownership element of the scorecard.

6.1.1.1.1. a) Complexity of the Codes: a labyrinthine regime remedied?

One of the most striking changes is the extent to which the Codes have been simplified and condensed. For as long as the Codes have been in existence, dissidents argued that the Codes were complex to the point of inefficacy, standing to jeopardise the entire initiative and to impact negatively on the economy.²⁵³ Some analysts noted that adherence to the Codes would impose arduous financial and administrative burdens requiring extensive professional advisory support services.²⁵⁴ Germien du Plessis, an equity partner at debt and equity specialists Bravura, noted that 'the amount of information required in terms of preferential procurement, which forms only one component of the Scorecard, [was] comparable with tax law obligations and [came] down to an audit of a company's entire supply chain'.²⁵⁵

In response to these valid criticisms, the DTI has since attempted to alleviate the complexity of the Codes. The volume of the Final Codes has been drastically reduced, with several statements being cut down to almost half of what they were in the 2004 Codes.²⁵⁶ A further improvement is that the Codes are now apparently more reliable and understandable. This can largely be attributed to the fact that much philosophical and contextual detail has been removed, most definitions have been significantly abridged, and most commendably, the information which was previously conveyed in dense convoluted paragraphs, is now laid out succinctly in list form with numbered sub-paragraphs as guidance.²⁵⁷ These features have the effect of transforming the Codes into a document akin to a practitioner's manual. The DTI has further assisted by introducing a 'Guide to Interpreting the Codes'²⁵⁸ as part of the First Phase of the Codes, and an 'Overview' document,²⁵⁹ both of which serve as a valuable interpretative aids clarifying several rules in useful diagrammatic and tabular form. These modifications are extremely laudable in making the Codes more 'user-friendly' and address the complexity problem to a large degree.

On the other hand, several features raise the concern that perhaps the Codes have been oversimplified. One incidence is that the original generic scorecard has been stripped down to a mere indication of raw score points for each BEE element without mention of corresponding targets, indicators or percentage weightings.²⁶⁰ In both these scorecards, the targets and indicators are now included only in the individual element scorecards as contained in the respective statements. It can be asserted that even if the removal of indicators and targets from the generic scorecard was done with a view to simplification, the omission of these crucial aspects of BEE measurement renders the primary BEE scorecard inadequate and misleading, necessitating cumbersome cross-referral. The broad overview provided by the old scorecard was useful, and in its previous form was relatively uncomplicated. It can therefore be argued that the DTI has erred in altering the scorecard to this extent.

6.1.1.1.1. b) The generic scorecard

A commendable alteration to the generic scorecard has been the change in the calculation method when determining the total number of points earned, from a percentage weighted average to a raw point weighted average. The original method of converting the raw point score to a percentage score was a complicated and superfluous step in light of the fact that the total point calculation is out of a possible 100 points. This means that irrespective of whether a percentage or raw score is used, the statistical outcome will be the same.

Possibly the most interesting change to the generic scorecard is a redistribution of weighting points within the Human Resource and Indirect Empowerment components. Whereas the Employment Equity and Skills Development components were previously awarded 10 and 20 points respectively, this 30 point total has now been divided evenly between the two elements. Similarly a point reallocation has been effected between the Enterprise Development element and the Socio-Economic Development element, with the former sitting at 15 points, changed from 10 points, and the latter now reflecting a 5 point weighting from its previous 10 point allocation.

It is submitted that in light of the broad-based philosophy upon which BEE is predicated, this reallocation is counter-intuitive. Skills and Socio-Economic Development, it is argued, are possibly the two most fundamental elements that underlie the bedrock of a broad-based initiative. This is because, in the absence of skills, the prospect of two of the other elements being realised, namely the issues of effective management control and the sustainability of newly developed enterprises, is severely undermined, if not entirely thwarted.²⁶¹ It is further argued that although the aspect of enterprise development is central to a broad-based drive, reducing the Socio-Economic Development element to a mere 5 points (the lowest point allocation of the entire Scorecard) hinders the objective of promoting access to the economy by *all* black people, which is the ultimate notion of what it means for empowerment to be truly broad-based. We would therefore suggest that the redistribution of points in this manner is misdirected. The DTI would have done better to lower the equity ownership points in light of the current fixation in the economic landscape with this element of BEE, which although important, is primarily geared toward a narrow interpretation of empowerment. Interrelated issues that will now be considered are the targets and stipulated timeframes contained in the individual element scorecards.

6.1.1.1.1. b) i) Individual element scorecard: management control scorecard

When one turns to investigate the individual element scorecards, alterations can also be noted. The amendments relate to compression of theme 'indicators', which take internal account of gender proportions by use of prescribed formulae, as opposed to the previous repetition of theme indicators that required a separate calculation to cater for gender considerations.²⁶² At face value this simplifies and condenses the scorecards, while not fundamentally altering the net results. What is interesting, however, is that such compression introduces a few nuances that can have implications. The 'black executive board membership' indicator of the management control scorecard, which is structured as explained in footnote 292, will be used as a reference point to illustrate some implications of this alteration in the management control element.

Central to BEE is the 'enhanced recognition for certain categories of black people', with women being one such category.²⁶³ In terms of the old formula, one point is specifically designated to a female board presence which must be at least 25 per cent. This is not the case with the new formula where, if an entity increases black male presence, it is possible to earn both points even if there are less than 25 per cent women on the board. In theory what this means is that it is possible not to have a single woman on the board and still earn both points, if 100 per cent of the board are black men. This clearly runs counter to the philosophy of preferential weighting for the empowerment of women. In light of the realities on the ground however, attaining an entirely black male board is highly unlikely, and this fact will inevitably compel entities to place black women. This reality thus stands to pre-empt the implications of this flaw in the new formula.

While the realities on the ground seem to save the new formula in this regard, it is these same realities that render the new formula too stringent, for the fact is that there is a scarcity of qualified black professionals in the labour market. This new

formula results in an unfair 'all or nothing' situation, where even if an entity manages to attain a 50 per cent black board presence (with black men comprising the entire 50 per cent), the enterprise will not be awarded any points despite the fact that this is no mean achievement. The situation under the old formula was more palatable, where credit was given for having a 50 per cent black board. The current formula is thus loaded against entities striving to comply with BEE imperatives.

This being so, the new formula does have two redeeming features. At least in theory, it gives entities a chance to earn both points even if no black women can be found. The formula enables a see-saw effect where fewer women can be compensated for by placing more men. This differs from the old formula where, if no black women could be found, there was no possible way to earn the second point, even if the entire board was black. This was a curious situation, for it seems counter-intuitive to say, for example, that a 90 per cent black board presence does not qualify an entity as BEE-compliant in terms of this indicator. The new formula commendably presents some sort of compromise situation in the event of inability to find women.

The second redeeming feature is the limitation of the value of 'C'²⁶⁴ in the formula. Were it not for the fact that C is limited to a maximum of half of the overall target of 50 per cent, a glaring loophole would arise. The absence of limitation would allow entities to employ less black people altogether (that is less than the 50 per cent overall target) and still earn both points. What this means in numerical terms is that an entity could employ up to 34 per cent black people (all women) and yet still reach the 50 per cent overall board participation target²⁶⁵ worth 2 points. The implications of this would be that entities could fiddle with the new formula to limit black board participation, and yet still reap the benefits of full BEE points. It is clear that this limitation is a good pre-emptive mechanism.

It is submitted that the old formula, weighted against the new one, is more realistic and compatible with BEE objectives. By splitting the point awards, the old formula credited entities for making some progress, whereas the new one, with its 'all or nothing' approach, provides no incentive to strive because the target prescribed is unrealistic. Also, the old formula acknowledged the 'enhanced recognition' for women principle by allocating a specific point for an adequate black female presence. The approach of the new formula, in theory, stands to potentially subvert this goal, although the realities on the ground may inadvertently compel the inclusion of black women. It can therefore be argued that in light of the centrality given to the empowerment of women, inadvertence is not good enough, and a system that compels greater effort by specifically awarding points for the proactive recruitment of black women is preferred.

The overarching problem that seems to emerge from this discussion is one that arises throughout the BEE endeavour: the issue of realistic targets.

6.1.1.1.1. b) ii) Targets and timing: are they realistic?

A common criticism of the Codes has been that the scorecard targets are regarded as 'unrealistically high' and are unlikely to be attained in the stipulated timeframe.²⁶⁶ A review by Empowerdex in 2005 of measurable listed entities showed that only one

company reached the 'excellent contributor' rank, and only 26 per cent of these entities were in a position to show even minimal compliance.²⁶⁷ In a recent report it was cogently argued that the 25 per cent direct ownership target is ill conceived as it is unreasonable to expect black people to acquire 25 per cent of all companies, even the commercially unsound ones.²⁶⁸ The scorecard targets remain more or less unchanged despite these concerns, but it is hoped that difficulties may be alleviated by the target leeway afforded by the Sector Codes, to be discussed in para 6.1.1.1.2 below. The DTI has eased anxiety on the timing issue by professing to relax the timeframes stipulated for the elements comprising the Human Resource and Indirect Empowerment components of BEE.²⁶⁹ However, only time will reveal whether this leniency is sufficient.

6.1.1.1.1. c) Ownership element

6.1.1.1.1. c) i) The 'once empowered always empowered principle': perpetual recognition

During the developmental process, the DTI released a document that introduced a new dimension to the equity ownership element of the BEE scorecard.²⁷⁰ The gist was that a measured entity would still be able to earn empowerment points on account of black equity participation even after these black shareholders sold their interest in the entity.²⁷¹ This notion generated the idea that once a company was empowered on the equity score, it would remain empowered. This 'once empowered always empowered principle' caused waves of controversy across the board, and this debate will be now be briefly reviewed.

The initial stance taken by the Codes was that sale of black equity resulted in the loss of BEE ownership points by the company concerned,²⁷² the logic being to nurture long-term ownership by black investors.²⁷³ To secure these ownership points then, companies tend to institute 'lock-in' provisions to ensure that black equity remains in black hands.²⁷⁴ However, the negative implications of this are two-fold. First, the scarcity of black capital means that shareholders who wish to sell their shares to other black shareholders are often unable to find liquid black purchasers.²⁷⁵ This has the secondary effect of 'forc[ing] black shareholders [to remain in the company] and ... see their paper wealth rise and fall without the ability to cash in'.²⁷⁶ It is argued that the 'once empowered always empowered' principle will obviate the need for such 'lock-ins', enabling black shareholders to sell their equity to previously advantaged persons, while ensuring that companies are still able to earn BEE ownership points.²⁷⁷

The problem with this principle, so understood, is clear. Its application will inevitably result in short-term black ownership, thus defeating the objectives of the Codes,²⁷⁸ and will also reduce black influence considerably.²⁷⁹ A further concern is that investee companies are usually responsible for engineering BEE deal structures and, in terms of this principle, companies eager to expeditiously rid themselves of BEE shareholders may arrange deals that are disadvantageous to BEE partners.²⁸⁰

The 'once empowered always empowered principle' seems to swing the focus from the undesirable extreme of 'lock-in' provisions to another undesirable extreme of subverting the aims of BEE. The 2007 Codes attempt to reach a middle ground between these poles by permitting partial recognition of BEE points after black

partners have departed from entities, subject to limiting factors.²⁸¹ Continued recognition is only possible where 'value ... [has] been created in the hands of black people',²⁸² and where there is a notable level of transformation within the entity.²⁸³ In addition, the black shareholders must have held shares in the entity for at least three years before exiting.²⁸⁴ Should these conditions be fulfilled, an entity will be entitled to retain part of their BEE points even once black shareholders have left, but the extent of this recognition is limited to 40 per cent of the ownership scorecard score.²⁸⁵

The implications of this are that only those entities that have attained a level of effective value added and empowerment can enjoy the benefit of continued recognition, which, it is submitted, is a reasonable condition to impose. The provision also addresses the concern about the high turnover of black shareholders, by instituting a three- year time limit before shares can be sold. This ensures long-term ownership, which is vital in the BEE design, and has the added benefit of affording entities sufficient time to construct and conclude other BEE equity deals in order to maintain their BEE status.²⁸⁶

A potential cause for concern, however, is that the three-year time period seems to detract from freedom of equity trade, so reverting to the undesirable 'lock-in' mechanism as a way of ensuring continued recognition. The DTI justifies this inclusion on the grounds that capping the time period at three years, argued to be a reasonable period of time, will encourage enterprises to desist from imposing more lengthy lock-ins, which are thought to undermine the dispersion of liquidity into black hands.²⁸⁷

In our opinion a more pragmatic compromise lay in an earlier proposal where, in order to score ownership points, companies would have to maintain a minimum share requirement by permitting black investors to 'cash in' only part of their investment.²⁸⁸ This would enable long-term ownership, afford black investors the freedom of equity trade, and allow companies to retain points depending on the 'level of transformation achieved by the company prior to the partial sell-off of equity'.²⁸⁹

Whichever approach is adopted, the problem remains that the media continues to broadcast that the 'once empowered, always empowered principle' is the tenet upon which the ownership scorecard centres. The DTI needs to dispel this misconception by widely publicising the correct working of the rule in sufficient detail to pre-empt interpretative disputes.²⁹⁰

6.1.1.1.1 c) ii) Measurement of the ownership element of BBBEE: recognition of equity equivalents for multinationals

For a long time a controversial question centred around the effect of empowerment criteria on foreign investment in South Africa.²⁹¹ The concern was that 'empowerment criteria in general (ownership criteria in particular), associated with accessing business opportunities in SA'²⁹² were deterring direct foreign investors, thus forcing them to search for investment opportunities elsewhere.²⁹³ The choice for South Africa therefore, was either to modify empowerment criteria in those areas

where foreign investment would be tactical, or to accept the fact that South Africa would be competitively disadvantaged in this regard.²⁹⁴

After much debate, drafting and re-drafting, the Final Codes reflect a decision to modify. C100S103²⁹⁵ exempts multinational companies (MNCs), in particular those with 'a global policy of sole ownership of their subsidiaries in other countries',²⁹⁶ from complying with the equity element of the generic scorecard, provided these MNCs institute alternative measures termed 'equity equivalent programmes'.²⁹⁷ The flexibility afforded by this framing enables South Africa to maintain its globally competitive standard, while ensuring that the BEE objective is in no way undermined.

6.1.1.1.2 Interrelationship between the Codes of Good Practice, the Sector Transformation Charters and the Sector Codes

The strength of the Transformation Charters is ironically also a weakness for BEE generally. The sector specificity of the Transformation Charters affords the opportunity for the particular empowerment needs of each sector to be catered for individually,²⁹⁸ but it is this same specificity that causes disparate empowerment progress in BEE as a whole. Advocates of the Charter system argue that the 'codes over-centralise issues',²⁹⁹ and ignore both the specific strengths and weaknesses in need of redress,³⁰⁰ while proponents of the Codes emphasise the need for uniformity. The flare of this debate is fuelled by the inter-relational bifurcation of the instruments which provide a basis for each of the polar arguments.

The inconsistencies between the Codes and Transformation Charters have been a longstanding and highly contentious issue. The disparities in indicators, targets and weightings arose primarily because several Transformation Charters were developed before the institution of the Codes, the BEE Act, and even before the introduction of the Strategy on BBEE,³⁰¹ leaving these Charters with little point of reference.³⁰² Even Charters instituted after the Strategy were either loosely modelled on the scorecard as it appeared in the Strategy, or were a mere statement of a general commitment to the BBEE philosophy.³⁰³ At the time of writing, disparities in equity targets were noted and are shown in Table 2 below.

Table 2: Equity target inconsistencies

	THE CODES	ICT CHARTER	FINANCIAL SECTOR CHARTER	MINING INDUSTRY CHARTER

EQUITY	25% plus one vote gets the full ownership score but the shares must be paid up in full.	35 % by 2010; 30% by 2015 subject to a range of conditions.	10% equity, provided that the financial institution has a target of 33% of black directors on its board. A target of 25% black ownership at holding company level is set for 2010.	26% equity within 10 years.
--------	---	---	--	-----------------------------

Source: Singh, S & Jekwa, S et al 'Cracking the Codes' (April 15, 2005) *Financial Mail* at 19. Statistics correct at time of writing.

Such inconsistencies between the Codes and the Transformation Charters create uncertainty in the different sectors, thus impeding empowerment transactions³⁰⁴ and deterring potential foreign investors.³⁰⁵

In response to the overwhelming proposals that the Transformation Charters be harmonised with the Codes, C00S010 of the Phase One 2004 Codes³⁰⁶ outlined a mechanism to unify the system while maintaining a degree of flexibility. The default position was that the Transformation Charters were to contain the same indicators, targets and weightings as depicted in the Codes.³⁰⁷ However, subject to a number of conditions, these pointers and values could be deviated from. Sectors could set their own indicators if they could demonstrate that:

a) the suggested indicator can best measure the sector's contribution to that element of broad-based BEE; b) the suggested indicator reflects the key drivers within the sector related to that element of broad-based BEE; c) the suggested indicator is in line with sound economic principles; and d) [there are] reasons to support how the currently required indicator, as per the Code of Practice, does not measure the particular element of broad-based BEE adequately.³⁰⁸

In addition, Statement 010 mandated that 'adequate justification' be given if a sector target 'differ[ed] significantly' from that in the generic scorecard.³⁰⁹ Lastly, weightings attributed to each BEE element³¹⁰ could vary up to 10 per cent from those reflected in the Codes, although such variance was subject to a sub-minimum weighting of 5 per cent.³¹¹ Again, 'adequate justification' for deviation had to be provided.³¹² A further qualification for this weighting variation to obtain was that 'the total weighting for each individual component, that is to day direct empowerment, human resources and indirect empowerment, [had to] remain constant as per the generic scorecard ...'.³¹³ This scheme was an interesting attempt to reach a compromise between the two instruments. It sought to enable standardisation and

consolidation of the regulatory system, while accommodating a degree of flexibility through the statistical allowances.

Over and above these quantitative considerations in Charter formulation, extensive enumeration of qualitative characteristics were also evident. The paragraph detailing the contents of the Transformation Charters expressly directed the inclusion of, *inter alia*, the vision of the specific sector, present and foreseeable challenges, mechanisms to achieve targets, institutional management and co-ordination structures, and issues relating to financing of BEE within the sector - all subject to the objectives of broad-based BEE.³¹⁴

The 2005 Codes, in discussing Transformation Charters,³¹⁵ do not expressly mention any of the above substantive aspects and focus almost exclusively on the procedural aspects that relate to the gazetting of Transformation Charters.³¹⁶ The same is true of the Final Codes.³¹⁷ This shift in focus could be a result of the recognition of the dual life of the Charters. On the one hand they, *in and of themselves*, serve to convey a commitment to BEE and, on the other hand, they are *instrumental* in that Sector Codes are often born of Transformation Charters. The cursory treatment of Transformation Charters in both instruments may be attributed to the capacity in which the Charters are being viewed that is, *in and of themselves*, and as such scant substance is not fatal. Substantive matters of inter-relationship and content become crucial when one views the Charters in their *instrumental* capacity and it is this that will now be explored.

Paragraph 6 of C000S010³¹⁸ of the 2005 Codes permitted the Minister 'to develop Sector Codes or convert a Transformation Charter into a Sector Code' provided a number of conditions were fulfilled.³¹⁹ The process required sectors to apply in writing to the Minister attaching both an analysis of the Transformation Charter or proposed Sector Code drawn up by an 'independent party appointed in consultation with the Minister', as well as a copy of the Charter or proposed Sector Code that had been signed by sector stakeholders and by the Ministry in charge of that sector.³²⁰ Subject to public comment and ultimately the approval of the Minister, the final step was official publication of either instrument in the Gazette in terms of s 9 of the BBEE Act.³²¹ Once gazetted therefore, Sector Transformation Charters were converted to Codes of Good Practice,³²² elevated from mere partnership agreements to delegated legislation from the public sector perspective and soft law status from the private sector perspective.³²³

Entities governed by a specific Sector Code were to be measured in accordance with the sector specific scorecard as it appeared in that Code.³²⁴ Despite the elevation of status to Codes of Good Practice, if any 'uncertainty [were to arise] in the interpretation of a Sector Code', the generic Codes were to take precedence.³²⁵ Furthermore, the generic Codes applied to sectors that were ungoverned by a Sector Code, notwithstanding the existence of a Sector Transformation Charter issued in terms of s 12 of the BBEE Act.³²⁶

A shortcoming of the framing was that these 2005 generic Codes were only inadvertently instructive to drafters when it came to matters of substance that sectors were to consider in the formulation of their Sector Codes. Information

relating to what was required in terms of the content of the instruments was only referred to as part of what the 'independent party' was required to look for in formulating its analysis,³²⁷ and was not overtly directive to Sector Code drafters in this regard.

More specifically, these Codes did not *expressly* inform drafters, as was the case in the 2004 Codes, that target and weighting deviations from the generic Codes were permitted. It is only by inference that one could deduce that variations were allowed if one looked to the explanations that the 'independent party' needed to provide in their analysis, which included an indication and explanation of any deviations apparent in the proposed Sector Code,³²⁸ showing that any such divergences were 'not inconsistent with the objectives of the Act', did not 'distort the operation of the Generic Codes' and were 'adequately justified by sound commercial principles and/or developmental grounds pertaining to the sector'.³²⁹ As opposed to the numerical parameters reflected in the 2004 Codes, the new statement seemed to be predicated on principled restrictions. This principled approach was carried through to the 2007 instruments, but in a slightly different form.

The starting point under the 2007 Codes is that the proposed Sector Code must address all elements contained in the generic scorecard,³³⁰ must use the same definitions of beneficiaries as in the generic Codes,³³¹ and must adhere to the same calculation methodologies for measuring compliance as reflected in the main Codes.³³² Flexibility is however catered for by *expressly* permitted deviations.

One such deviation is that, like the 2005 Codes, the 2007 Codes allow for the introduction of 'new additional element(s) for measurement'.³³³ With regard to indicators, the 2004 Codes permitted deviation,³³⁴ while the 2005 Codes were silent on the issue. Interestingly, the Final Codes re-introduce leeway for variation in indicators, but limit this liberty to Codes 200 and 300.³³⁵ This is a curious limitation and it could be argued that in the interests of flexibility, indicators across the board should be variable. It could be counter-argued, however, that this exemplifies an attempt on the part of the DTI to balance interests of consistency and flexibility, with all but Codes 200 and 300 being unchangeable. It is surmised that the rationale for affording this scope to only these two Codes is because of their direct intersection with the Employment Equity Act (the EEA).³³⁶ In terms of the EEA, entities are required to institute employment equity initiatives at all levels of the organisational hierarchy. If enterprises have adopted suitable methods to advance the equity objective, and have chosen workable indicators to assess progress, then these should be counted towards the BBBEE aim even if they differ from those contained in the generic Codes 200 and 300.

The most important permission for the purpose of this discussion is that paragraph 3.1.5 of C000S003 *expressly* mentions that targets and weightings may be deviated from.³³⁷ This remedies the shortcoming of the 2005 Codes, where allowance to vary was only apparent by inference. The leeway to diverge is subject to the qualification that the deviations are 'justifiable based on sound economic principles, sectoral characteristics or empirical research'.³³⁸ The noteworthy point is that the new Codes mirror the principled approach taken in the 2005 Codes.

A principled approach is commendable in that it accommodates a greater degree of flexibility in light of the peculiarities of each sector. The danger, however, of such principled demarcations is first, that they may be open to abuse and inconsistencies given the discretion required in making such determinations and, secondly, that they may potentially defeat the quantitative unification function that the generic Codes strive to fulfil.

It is submitted that in the 2005 Codes, the moderation function played by the 'independent party' and the ultimate approval of the Sector Codes by the Minister stood to potentially avert this danger. The complaint with this quality control mechanism, however, was that the qualifications for an independent third party, to be appointed as such by the Minister, were not spelt out, which left the competence of this body as a moderator in issue. The 2007 Codes make no mention of this independent body, and we think that this amendment is laudable on three fronts. First, as has been mentioned, the composition of this body was left unspecified and thus what would render it worthy of the title 'independent' is a mystery. Secondly, paragraph 6.2 imposed an undue financial burden on the applicable sector to pay the costs and expenses incurred by the body in the formulation of its analysis.³³⁹ Thirdly, when one considers the broader BBEE bureaucratic structure, there already exist an Advisory Council,³⁴⁰ Charter Councils,³⁴¹ Charter Steering Committees,³⁴² Working Groups,³⁴³ Accreditation Bodies,³⁴⁴ Industry Bodies³⁴⁵ and Verification Agencies.³⁴⁶ In light of this, it is submitted that the inclusion of this independent body would have unnecessarily added to the bureaucratic maze, especially given the fact that its role was similar to that of the Charter Councils.³⁴⁷ The excision of the independent body from the Codes leaves the Minister as the sole moderator, and it can be argued that the Minister is best placed to fulfil this function as the entire BBEE initiative is a national mandate charged to the DTI.

What is evident from the above discussion is that whether statistical or principled parameters are used in the Sector Codes, achieving the middle ground between standardisation and flexibility is a delicate matter. We are of the opinion that although principles should root formulation, statistics must not diverge too greatly, a level of standardisation is indispensable in comparing progress across sectors and measuring BEE progress as a whole.

The final issue for discussion under this section is the dual capacity of Transformation Charters. We project that in light of the role that Sector Codes are to play, Sector Transformation Charters are, *in and of themselves*, likely to become redundant. This is because the onerous procedure to establish a Transformation Charter in terms of s 12 of the BBEE Act is not commensurate with the aim of simply illustrating a commitment to BEE.³⁴⁸ The time and resources employed for the mere formal declaration of devotion would be better expended on implementation. The case for redundancy was strengthened by the provision of 'Enterprise Charters and Black Economic Empowerment Plans' in both the 2004 and 2005 Codes,³⁴⁹ which afforded a simpler and more economical alternative to achieve the same purpose. These Enterprise Charters and BEE Plans are no longer present in the Final Codes, which perhaps justifies retention of the Transformation Charters in this declaratory capacity. The cost of this expression of commitment, however, far

outweighs any benefit, and we could argue that commitment should translate into action as opposed to potentially hollow declarations.

The costs involved in Transformation Charter formulation may only be justified when their *instrumental* role is considered. The position under the 2005 Codes seemed to be that a Sector Code could either be born of a Transformation Charter, or be an instrument in its own right from inception.³⁵⁰ It is now clear from the Final Codes however, that the creation of a Transformation Charter is a mandatory step in the development of a Sector Code.³⁵¹ This being so, the onerous s 12 procedure then becomes justified. The time and resource demands are commensurate with the greater aim of institutionalising a long-standing, sector-governing instrument. That Transformation Charters are to be a necessary precondition in this process also explains the detailed recommendations contained in paragraph 5 on how Transformation Charters are to be developed.³⁵² The added benefit of formulating a Sector Code is that it is incidentally declaratory and will reassure those who advocate a documentary medium to express commitment.

6.1.2 Conclusion on the internal challenges

In conclusion, the steps taken by the DTI to simplify and restructure the Codes are praiseworthy. The evolution of the regulatory instruments is an incremental process and has come a long way in providing certainty and clarity on a myriad of issues. However the elusive balance that would make them user-friendly and yet informative enough to facilitate implementation, as well as standardised and yet specific enough, is yet to be achieved. Ultimately, practice will reveal the pragmatic challenges and solutions.

6.2 CHALLENGES OUTSIDE OF THE REGULATORY FRAMEWORK

6.2.1 Financing BEE

6.2.1.1 Source of funds

The financing of BEE is a particularly thorny issue,³⁵³ mainly because beneficiaries of BEE usually have insufficient savings or obtain credit at extremely high interest on account of being viewed as high-risk clients by any potential financiers.³⁵⁴ BEE entrepreneurs are therefore severely restricted in accessing business opportunities.³⁵⁵ A further contributing factor is that debt instruments are usually used to purchase equity and as a result profits made by black companies are channelled toward servicing these debts.³⁵⁶

The BBBEE Act does not outline exactly how BEE is to be financed, but does mention that the Minister is obliged to 'develop a plan for financing broad-based black economic empowerment'.³⁵⁷ The question arises as to whether the state is obliged to actually provide finance for BEE and if so, to what extent?³⁵⁸ It has been submitted that the obligation in s 11(2)(b) imposes a duty on the state to devise a workable plan envisaged by the section, and not necessarily a duty to finance BEE directly from state funds.³⁵⁹ Through this plan, the state can formulate a mechanism whereby private sector participants or international funding houses can finance BEE.³⁶⁰ Failing the mobilisation of non-state funds, it has been submitted that the government would then be obliged to deploy state resources.³⁶¹

The Strategy Document³⁶² and state practice reveal that the government has proceeded on the understanding that it is legally obliged to source funds from both the public and private sector.³⁶³ With the DTI as co-coordinator, some mechanisms have been set up to ensure the financing of BEE, for example, the Industrial Development Corporation (IDC),³⁶⁴ Khula Enterprise Finance,³⁶⁵ the National Empowerment Fund (NEF),³⁶⁶ the Development Bank of Southern Africa (DBSA),³⁶⁷ the Public Investment Commissioners (PIC),³⁶⁸ Ntsika Enterprise Promotion Agency, and the Isibaya and Umsombomvu funds.³⁶⁹

We would suggest that the high liquidity of financial institutions renders the financial sector an ideal BEE financier.³⁷⁰ Contributions by the sector would not only facilitate BEE, but would make good business sense in light of the points that entities could earn for the 'enterprise development' element of the scorecard. To date, the finance sector has shown some initiative in this regard as illustrated in Table 3 below.

Table 3: BEE facilitation vehicles³⁷¹

INSTITUTION	PURPOSE OF FUND	BEE FACILLITATION VEHICLES
Sanlam Development Fund	The Development Fund makes it possible for institutional investors and retirement funds to contribute towards growth and reconstruction, and the more equitable distribution of economic benefits, whilst earning yield concomitant to the development risk of the investment.	Large infrastructure projects, through public/private partnerships. Urban infrastructure projects, through structured finance deals. Small and medium business and housing projects, through investing in retail intermediaries. Unlisted financing vehicles supporting economic empowerment of previously disadvantaged groups. Private equity funds with development focus.
Metropolitan Life Futurebuilder Funds	Futurebuilder offers the investor an opportunity to contribute to the development of the country and to support projects, which contribute towards improved economic growth and social stability. Futurebuilder aims to obtain consistently high real returns for its clients.	Trident Institute-Basic business skills development, through provision of seed capital and financial support. Small business development, through provision of start up loans. Private unlisted financing vehicles supporting economic empowerment of previously disadvantaged individuals or groups. Infrastructure development, through private sector investments.

Furthermore, an investigation of the Financial Sector Charter shows that the sector has dedicated billions to 'targeted investment in support of small and medium enterprises, low-income housing, resource-poor farmers and developmental infrastructure'.³⁷² The Charter also establishes mechanisms to facilitate affordable access to banking, and a success story in this regard is the Mzansi bank started in October 2004, where over 3.3 million bank accounts have since been opened,³⁷³ and where funds have been sustainably provided to low-income groups.³⁷⁴ Furthermore, Minister Trevor Manuel has stated that 'South Africa's financial institutions [have] collectively committed themselves to provide R25 billion worth of funding for transformational infrastructure by the end of 2008'.³⁷⁵ This is apparently promising indeed, and enhances the prospects of sustainable BEE enterprises.

Although progress is evident, issues of financing BEE still pose a significant concern, and alternatives need to be continually explored across sectors. The Brenthurst Initiative (the Initiative)³⁷⁶ has suggested additional sources of funding that include nurturing basic black-owned equity through tax-friendly Employee Share Option Programmes (ESOPs) or requiring mandatory levels of savings.³⁷⁷ The Initiative also suggests devising incentives to encourage not only individuals to invest in BEE companies, but also companies to provide 'special purpose financing instruments'.³⁷⁸ All structures to this financing end must however be geared towards sustainable empowerment, an issue which will now be examined.

6.2.1.2 Sustainability of BEE transactions

A major problem that arises in the field of financing is the effect of funding structures on the sustainability of BEE transactions. The reliance on erratic share prices as a gauge of performance often presents a distorted picture of BEE progress,³⁷⁹ and hinders BEE companies from undertaking strategic long-term planning, thus increasing the risk of economic failure.³⁸⁰ A further problem is that the indebtedness of BEE entities means that economic benefits tend to lie in the hands of the financier, as opposed to adding economic value to the BEE partners.³⁸¹

It is suggested that deals be structured with sustainability as the primary focus. Where debt finance is used, a key ingredient for success is the funding of empowerment transactions by use of long-term debt (5 to 12 year time horizon) as opposed to short repayment periods of between 3 to 5 years.³⁸² This would give the BEE partner a chance to establish itself, instead of being shackled by onerous debt repayment obligations in the early years of operation. The Afrikaner model, devised by Sanlam, is a viable empowerment structure, as the pooling of personal savings through intermediaries results in long-term asset growth.³⁸³ Ultimately economic growth is the key driver in ensuring sustainability, and government therefore needs to adopt measures that encourage such growth.³⁸⁴ The last issue that deserves some attention in this discussion of BEE and finance is s 38 of the Companies Act.³⁸⁵

6.2.1.3 Section 38 of the Companies Act

It has been argued that vendor financing is a particularly viable financing option.³⁸⁶ The problem with this suggestion is that, at time of writing, it stands in potential contravention of the Companies Act. Section 38(1) provides that:

No company shall give, whether directly or indirectly by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose or in connection with a purchase or subscription made or to be made by any person of or for any shares of the company, or where the company is a subsidiary, of its holding company.

When companies enter into a BEE transaction aimed at transferring ownership and control to a BEE enterprise through the acquisition of shares by the BEE company, these companies will in many instances look to facilitate the purchase of its shares.³⁸⁷ The problem is that s 38 precludes the company from financing the BEE enterprise's share purchase, which in most circumstances would be the most practicable financing option.³⁸⁸ The consequences of non-compliance with s 38 are that the transaction will be deemed void and the directors and the company will be guilty of an offence.³⁸⁹ Furthermore, shareholder, creditor or court approval cannot cure such a contravention.³⁹⁰ It is clear that s 38 poses an almost insurmountable challenge to the financing of BEE.

A possible way to avoid contravening the section is through the use of Special Purpose Vehicles (SPVs): the BEE company acquires shares through a SPV, and an external financier provides the SPV with the necessary funds for the purchase of the shares.³⁹¹ The BEE partner would then be required by the financier to furnish its shareholding in the SPV as security for the SPV's obligations,³⁹² thus increasing the risks and costs of the transaction for the BEE company.³⁹³ Furthermore, these deals are highly leveraged, with the success of the entity depending largely on unpredictable market performance of share prices,³⁹⁴ which results in unsustainable transactions.³⁹⁵

An alternative to SPVs is the use of 'deferred shares'.³⁹⁶ This would be in line with the rationale underlying the Malaysian strategy of issuing no-par value shares,³⁹⁷ which is essentially to bring increased equity within the range of beneficiary groups at a lower cost than ordinary shares, thus rendering them cheaper and more accessible.³⁹⁸ Furthermore, the issue of deferred shares would tend to increase investor confidence.³⁹⁹ The disadvantage with deferred shares however is that benefits derived from them are deferred benefits.⁴⁰⁰ Nevertheless, the issue of deferred shares may prove valuable if they mature into something more, which may happen if BEE companies prove themselves as productive entities. This in turn would have a knock-on benefit of increased value addition to the economy.

Recently companies have engineered innovative and complex financing structures to overcome the s 38 obstacle. An example of such an elaborate structure is the 2006 Standard Bank deal, which has been hailed as one of the largest BEE deals to date.⁴⁰¹ The Standard Bank deal comprised two stages.⁴⁰² First, Standard Bank issued ordinary shares to its wholly-owned subsidiary and financed the purchase of these shares by this SPV through a subscription of preference shares in the SPV. The second stage of the transaction involved the sale of the Standard Bank ordinary shares held by the SPV to a number of BEE investors at a nominal value.⁴⁰³ This nominal price brought the shares within affordable range and meant that the BEE entities were able to self-fund this purchase without relying on vendor finance, which stands to contravene s 38. The argument is that this transaction does

not amount to a breach of s 38 because of its two tiered nature: the first part falling into the s 38(2)(d) exemption,⁴⁰⁴ and there having been no financial assistance to any party in the second part.

We would argue that the transaction should be viewed as the sum of its parts. When so viewed, the transaction does in fact amount to a contravention of s 38 as Standard Bank has *in fact* provided financial assistance for the subscription of its own shares, notwithstanding the use of the SPV as a conduit. Despite this generally accepted view on the 'illegality' of the Standard Bank deal, there has been a tendency to turn a blind eye to such s 38 breaches in light of the hindrance it poses to BEE progress. In the final instance, as creative as such structures are, they are extremely complex, expensive to implement,⁴⁰⁵ and considerable tax implications are usually associated with such arrangements.⁴⁰⁶

Whichever way it is viewed, s 38 is highly problematic and needs to be amended with a view to achieving a balance between the 'share buy-back provisions and associated capital adequacy rules in terms of the Companies Act' and 'the need to facilitate BEE'.⁴⁰⁷ It has been suggested that the general prohibition on financial assistance be maintained with the amendment taking the form of an additional exemption that deals with empowerment transactions and details capital maintenance requirements in the form of provisos.⁴⁰⁸ The Corporate Laws Amendment Act,⁴⁰⁹ which at the time of writing is published but not yet promulgated, adopts a more commendable alternative providing that companies are *not* prohibited from 'giving financial assistance for the purchase of or subscription of shares of that company or its holding company',⁴¹⁰ provided the solvency and liquidity requirements are met.⁴¹¹ It can be argued that the 'solvency and liquidity' test is preferable as it is less cumbersome and more flexible than the 'exemption and proviso' construction. Furthermore, the additional protection afforded to shareholders by the special resolution requirement is welcome.

6.2.1.4 Conclusion on financing

As is apparent from the above, the financing of BEE poses many significant challenges to the BEE enterprise. However, as illustrated by the initiative taken so far, these challenges are not insurmountable. The same is true for many aspects of BEE, as will become evident in the following discussion which deals with the broadness of broad-based BEE.

6.2.2 Broad-based BEE: the breadth of the matter

6.2.2.1 Defining the ambit of BEE

A crucial issue is how far the arms of empowerment are to reach. Viewed from a benevolent perspective, BEE can be regarded as a move to ensure transformation that will improve 'the lives of all South Africans'.⁴¹² A contrary perspective would be to regard BEE as an initiative directed towards the creation of a critical mass of black middle-class persons.⁴¹³ The latter approach appears to be more realistically attainable, where a focus on expanding ownership through equity transfer and increasing levels of management control⁴¹⁴ is easier to facilitate, as is reflected by the tendency of South African businesses to empower via these channels.⁴¹⁵ Furthermore, this narrow approach to empowerment is a trend reflected in the long-

standing and relatively successful economic empowerment approach adopted in Malaysia.⁴¹⁶

It is clear from the generic scorecard, however, that BEE is intended to extend further than equity ownership and management, and should include employment equity, skills development, preferential procurement, enterprise development and corporate social development. Out of a possible 100 points that can be scored, 70 of those points are directed towards a broad base of black people, including employees, workers with minimal or no skills, entrepreneurs, small to medium and micro-enterprises (SMMEs) and rural communities.⁴¹⁷ BEE is clearly intended to be an all-inclusive enterprise serving to empower a broad spectrum of the black population, but several factors thwart this vision. We examine three of the most glaring of these factors, namely 'elite bias', sporadic skills development, and poor trade union involvement.

6.2.2.2 'Elite bias'

The first wave of BEE, as identified by the South African Advertising Research Foundation (SAARF),⁴¹⁸ seems to have afforded benefits to only a few people, particularly businessmen within the ANC,⁴¹⁹ creating a 'new black bourgeoisie'.⁴²⁰ This elite bias is not unique to South Africa however, as preferences in Malaysia stood primarily to benefit coalition members, their relatives and those who were already privileged.⁴²¹ Similarly, preferential policies in the USA have largely benefited the already wealthy members of the minority grouping,⁴²² with little empowerment reaching lower levels of intended beneficiaries.⁴²³

In defence of the South African system, it can be argued that BEE, like the development of the Codes, is an incremental process, and the empowerment drive will take place in stages. The SAARF⁴²⁴ has identified a pattern, finding that the first wave of BEE has been characterised by the empowerment of a few. The second phase of BEE, it is argued, has seen the rise of young upcoming black professionals termed 'buppies', with the third stage characterised by 'buppies'- 'booming, aspirational and previously poor' entrepreneurs.⁴²⁵ It is hoped that the fourth wave will be characterised by increased skills deployment and rural community upliftment but, as this paper emphasises, these factors are prone to incremental implementation.⁴²⁶

Given this argument, it can be said that it is too early to judge BEE progress.⁴²⁷ Furthermore, the final Codes were gazetted only in February 2007, and consequently it is only once they have been applied over time that an informed assessment can be made.⁴²⁸ Along these lines, Empowerdex commented that 'to say [the Codes] do not work at this time would be a bit premature.'⁴²⁹ Ultimately, practice will reveal the pragmatic challenges and solutions.

An immediate solution to the elite bias would perhaps be the imposition of BEE transaction restrictions, which would limit the total number of BEE transactions that any individual beneficiary can conclude,⁴³⁰ and in turn encourage a more broad-based approach. It is suggested that companies should use their initiative to design methods that will expedite the achievement of the broad-based goal, and a feasible

starting point would be to focus on the critical issue of skills development, which is essential for sustainable economic empowerment.

6.2.2.3 Skills development

There is a dire need to develop broad-based skills in South Africa.⁴³¹ Inadequate skills transfer results in the inability of black people to perform sufficiently well, thus extending undue reliance on previously advantaged partners.⁴³² In addition, inadequate human resource development may disadvantage South Africa's competitive standing in global markets.⁴³³ Skills transfer is thus crucial to ensuring effective empowerment, but progress on this front has been sporadic. The main problem rests in poor implementation, where apathy and a shortage of resources hamper action.

C400S400 governs skill development,⁴³⁴ and enterprises can earn up to 15 points depending on the level of 'skills development expenditure on programmes specified in the Learning Programmes Matrix'⁴³⁵ and learnership participation by black employees.⁴³⁶ In order to earn points, measured entities must be 'registered with the applicable [Sector Education Training Authority (SETA)] ...'⁴³⁷ and have devised a Workplace Skills Plan.⁴³⁸ Furthermore, eligibility on the scorecard depends on whether the entity in question has 'implemented programmes targeted at developing Priority Skills generally, and specifically for black employees'.⁴³⁹ C400S400 is buttressed by, and is compatible with, the Skills Development Act (SDA)⁴⁴⁰ as well as with the Skills Development Levies Act (SDLA),⁴⁴¹ and their combination provides an excellent framework for skills deployment, which is arguably the most important aspect in ensuring the long-term empowerment of workers.

Because the SDA⁴⁴² is indispensable in attaining the BEE skills development vision, an inquiry into the progress achieved under this Act is important. It has been noted that although the SDA provides potential benefits for workers in its concentration on vocational training, namely, Adult Basic Education (ABE) programmes and Recognition of Prior Learning (RPL), these factors are not taking root in companies. A survey in 2004 revealed that, by and large, employers had done the bare minimum in these regards, leaving workers to resort to union assistance in trying to mobilise employers.⁴⁴³ Another survey carried out in the engineering industry shows that even though several companies provided 'on-the-job and basic/generic training', very few engaged in critical/advanced training skills,⁴⁴⁴ reasoning that such undertakings are expensive.⁴⁴⁵ It has also been noted that SETAs have not aided workers in so far as RPL and ABE are concerned.⁴⁴⁶

Another survey conducted in 2005 on behalf of the National Union of Metalworkers of SA (NUMSA) as part of a study on BEE, reflected a similar trend highlighting that 'unskilled and semi-skilled workers receive very little training that can be classified as upgrading of skills',⁴⁴⁷ and even though many companies acknowledge 'the need for upgrading skills of shop-floor workers, few have coherent strategies to achieve this objective'.⁴⁴⁸ This was not true across the board however, with motor and tyre manufacturers reflecting policies geared toward the upgrading of skills⁴⁴⁹ - a positive step forward. Such positive developments are not isolated occurrences either; in the broader economic environment, several successful

learnerships have been established, for example, the 'Employment Skills Development Lead Employer Pilot Project'⁴⁵⁰ that was instituted to hasten 'learnership intake within the small and medium business sector.'⁴⁵¹

Identifying these successes is important so that lessons can be learnt with a view to improving skills development strategies generally. The progress in the motor and tyre manufacturing industries can be attributed to the adoption of high-level human resource strategies and the prevalence of collective bargaining agreements, which aid 'skills training and development in terms of operational needs'.⁴⁵² What also seems to be a key driver is the institution of private-public partnerships (PPPs), and in line with this, Minister Trevor Manuel pronounced that government will 'continue to drive empowerment in every facet of PPPs because [government is aware] that these projects hold huge potential ... to develop ... skills'.⁴⁵³

Other possible solutions include the use of a stringent differentiated grant system, in terms of which SETA grants are to be given in strict relation to the level of training carried out in a particular enterprise.⁴⁵⁴ This stands to encourage employers to train more people and concentrate on advanced training skills in the interests of securing larger grants.⁴⁵⁵ The difficulty however is that what tends to happen is that grants so obtained are often not spent on the skills advancement of *black* employees.⁴⁵⁶ A related problem with the grant system is that many companies view the 1 per cent of annual payroll contribution to the South African Revenue Service (SARS), made in terms of the SDLA,⁴⁵⁷ as a straight tax and do not bother to reclaim the grant entitlements that attach to these contributions.⁴⁵⁸ Hence the effectiveness of a differentiated grant system as a solution is questionable.

A proposed practical solution for facilitating skill empowerment is a sector-unified effort. What this would entail is for each sector to pool resources and focus on developing skills within their respective sectors. Such a move is apparent in the ICT sector, where the Black Information Technology Forum (BITF)⁴⁵⁹ embarked on a skills deployment initiative,⁴⁶⁰ which is gradually gaining momentum.⁴⁶¹ Sector-oriented skills development⁴⁶² has the advantage of being able to combine capital and other resources towards nurturing skills specifically required in the respective sectors. It would appear that the initiative for sector-focused schemes rests with individual sector industry bodies.

On a micro-level, workshop stewards must engage in proactive capacity-building exercises to enable them to transform the prevalent dynamic in the contestation of training committee procedures, where employers often dominate these processes and suppress effective engagement.⁴⁶³ Essentially '[w]here gains have been made by workers, they were the result of a strong shop steward push and strong organisation'.⁴⁶⁴ Unions need to assume more responsibility for the advancement of skills 'but [ultimately] this ... depends on capacity and commitment'.⁴⁶⁵

6.2.2.4 Empowerment through union involvement

Unions are particularly well placed to facilitate broad-based empowerment. Despite the fact that there are several avenues that unions can pursue to enable the empowerment of workers, progress has been marginal.

One way that unions contribute to the empowerment of workers is through the use of 'union investment companies'. The Naledi Report of 2005⁴⁶⁶ notes that in order for unions to exercise effective oversight in respect of union investment companies, matters of capacity within the unions need to be addressed.⁴⁶⁷ The report states that to neglect these issues will mean ineffective administration and policing, which may potentially 'expose the union movement to grave financial, socio-political and reputational risks'.⁴⁶⁸

In terms of progress, the Naledi Report reveals that union members have not gained much from these investment companies because of the manner in which the deals are structured.⁴⁶⁹ The report also indicates that apart from two major investment companies associated with the National Union of Mineworkers (NUM) and the South African Clothing and Textiles Workers Union (SACTWU), most of the other companies verge on the insignificant.⁴⁷⁰

Sithebe,⁴⁷¹ commenting on union contributions to empowerment in general, accepts that unions have been unsuccessful in securing benefits for their members largely because of a failure to influence deal-structuring in a way that would encourage the inclusion of a broad staff base.⁴⁷² Drawing attention to the ICT sector in particular, he concedes that 'union ... influence has been minimal'.⁴⁷³

It has been contended that unions need to proactively explore the effective use of investment companies as well as investigate the use of other mediums to extend empowerment to workers.⁴⁷⁴ Alternative kinds of empowerment that can be pursued are worker and community co-operatives.⁴⁷⁵ Another suggestion that has been made is that more can and should be done to channel workers' money into 'job-creation [and] socially useful projects'.⁴⁷⁶ The Labour Job Creation Trust is one such instance where workers' money has been pooled as capital for the empowerment of other unemployed labourers, and for the upliftment of communities.⁴⁷⁷

Unions could perhaps also step in to exert pressure on employers to pursue more inclusive initiatives, for example, the institution of employee share ownership schemes (ESOPs). It would appear that commerce is amenable to ESOPs as is evident from initiatives such as the impressive Edcon⁴⁷⁸ ESOP type scheme, in terms of which an employee trust was established to hold R445m worth of shares and to facilitate the twice-yearly dividend payout to the 18 000 beneficiaries of the scheme.⁴⁷⁹

Ultimately, trade unions have great potential to influence the means and pace of empowerment, but 'a qualitative leap in theory, organising and practice [is] needed'⁴⁸⁰ to ensure benefits to a broader base of beneficiaries.

6.2.2.5 Conclusion on broad-based BEE

BEE is clearly intended to be an all-inclusive enterprise serving to empower a broad spectrum of the black population, but the lived realities reflect a relative divergence from this goal. The primary responsibility rests on the shoulders of the Minister of Trade and Industry and the BEE Advisory Council to pursue the outcomes-based

implementation of both the Act and the Codes, in order to ensure that broad-based BEE becomes a reality in South Africa.⁴⁸¹ Private entities also have a part to play, as by broadening their perspective on the empowerment aim, considering not only returns on investment but also the broader BEE ideology, they assist in making broad-based BEE tangible. A factor that serves as a barrier to not only the broad-based pursuit, but also to the BEE initiative in general, is the prevalent occurrence of fronting, which limits the prospects of sustainable⁴⁸² empowerment. It is to fronting that we now briefly turn.

6.2.3 Fraudulence: the fronting barrier

Fronting is in essence 'tokenism [or the] superficial inclusion of historically disadvantaged individuals',⁴⁸³ with no actual transfer of wealth or control.⁴⁸⁴ It is a cynical manipulation of regulatory requirements that amounts to defrauding the government, and defeats the aims of BEE.⁴⁸⁵ Fronting is most commonly understood as 'window dressing', which involves either promoting inexperienced and unskilled black people to senior managerial positions, or employing black people without providing them with any work to do.⁴⁸⁶ All this is done with a view to appearing to be BEE-compliant. More insidious fronting forms include, but are not limited to, what are termed 'fronts on paper',⁴⁸⁷ 'fictitious companies',⁴⁸⁸ 'fronts in joint ventures',⁴⁸⁹ and lastly 'front companies'.⁴⁹⁰ Our assessment will be limited to a discussion of 'front companies' as this is particularly prevalent in both Malaysia and the USA, the comparative experiences addressed above.

Front companies misrepresent their status as empowerment companies in an endeavour to gain preferential benefits⁴⁹¹ and thus disadvantage authentic entities.⁴⁹² In Malaysia these are termed 'Ali Baba' enterprises where Malays (Ali) are the face of what are in reality Chinese (Baba) owned companies.⁴⁹³ Similarly in South Africa, a frequent occurrence in the construction industry is for contracts awarded to BEE companies to be sub-contracted to white-owned enterprises, where 'all white minority shareholders in the BEE company are in fact majority shareholders in the white company'.⁴⁹⁴ The impact of fronting is apparent from the probe by the Department of Public Works in August 2005,⁴⁹⁵ which revealed an estimated loss of R 444,1 million from fronting scams.⁴⁹⁶ In the USA similar frauds were perpetrated by Tyco Manufacturing and 'Automated Data Management', which were both companies masquerading as minority entities to gain preferences.⁴⁹⁷ What this pattern reveals is that this form of fraud seems to be inextricable from empowerment programmes. Given this inseparability, at first blush it seems odd and alarming that the Final Codes make no express mention of preventative measures as was the case under the 2005 Codes.

C000S001⁴⁹⁸ of the 2005 Codes was specifically geared toward combating fronting, and indicated that verification agencies were to play a central role in this exercise. The responsibilities of verification agencies in this regard were specifically laid out and included identifying 'Fronting Risk Indicators',⁴⁹⁹ determining fronting scores,⁵⁰⁰ and reporting on their findings.⁵⁰¹ This statement also provided for the blacklisting of a company and its directors in the event of fraud or misrepresentation.⁵⁰²

The new Codes do not deal with the fronting issue in such an express manner, but verification agencies are still provided for, albeit with a very broad mandate.⁵⁰³ The very nature of verification is to ascertain the correctness and accuracy of an entity's reported BEE status, and thus it seems that fronting will more than likely be catered for when the DTI and industry bodies formulate verification methodology in terms of paragraph 10.7 of C000S000.⁵⁰⁴ This verification approach mirrors that of the USA, where reliance is placed on certification and accreditation audits as a preventative measure.⁵⁰⁵

Certain consequences follow from this type of deviant behaviour by companies, and one such repercussion is that any entity engaging in fronting practices stands to be prosecuted, because fronting amounts to fraud and as such it is a criminal offence.⁵⁰⁶ A further misfortune that would befall such miscreant companies is that any contracts entered into would be voidable.⁵⁰⁷ It is submitted that the blacklisting penalty present in the 2005 Codes be reinstated as it would probably be an extremely effective deterrent because of its long-term and crippling effect.

6.2.3.1 Conclusion on fronting

The fronting barrier needs to be broken through if BEE is to have any hope of success. This cynical manipulation of the regulatory framework results from a microscopic attitude towards BEE. Attitude is a crucial aspect in determining the direction that BEE will take, and we shall now turn to consider certain attitudes that may misdirect the enterprise.

6.2.4 Attitudinal constraints

The most constraining attitude that stands to cripple the entire BEE initiative, and that underlies several hindrances mentioned in this paper, is apathy. A lack of interest and proactivity on the part of government, business, and trade unions will have dire consequences. Apathy is not the only dangerous attitude. A 'culture of entitlement'⁵⁰⁸ amongst previously disadvantaged groups, which is also a mindset evident in the Malay population,⁵⁰⁹ may result in groups feeling that, because benefits are assured, they are not compelled to perform.⁵¹⁰ This in turn may generate a 'culture of resentment' among previously advantaged groups who leave the country (resulting in 'brain drain'),⁵¹¹ resist the philosophy, or simply become disillusioned.⁵¹² In the USA, frustration is evident from the numerous preferential schemes that have been constitutionally challenged,⁵¹³ and more dramatically, by spates of violence as a result of 'public racial intolerance'.⁵¹⁴

In terms of redress, the Malaysian government dealt with public intolerance by instituting several laws aimed at limiting free speech,⁵¹⁵ but this solution is untenable in a democratic South Africa. The recommended manner to counter these attitudinal constraints is to nurture a 'culture of mutual understanding'. This could be facilitated through open dialogues and other such forums. Furthermore, educating the nation on the real need for BEE, the co-operation required for its success, and the knock-on benefits for the economy would assist in broadening myopic vision. Although not an ideal method, a constant reminder that BEE is not intended to be an indefinite enterprise⁵¹⁶ could possibly jolt those who feel entitled into real action,

while contemporaneously providing those who feel disadvantaged with a sense of eventual respite.

6.3 CONCLUSION ON THE CHALLENGES

This subsection of the paper has illustrated the kinds of challenges that face BEE. It is clear that BEE still has a long way to go in addressing the problems that stand to thwart the entire initiative.

7. CONCLUSION: TOWARDS A FINAL WORD

The aim of this paper has been to assess the BEE regulatory framework and to discuss critically the challenges facing the BEE endeavour. This undertaking involved an introduction of the BEE philosophy couched within both a historical and international context. The paper then highlighted the comprehensive and yet complex regulatory framework governing BEE, and the body of the paper elucidated the current challenges hindering BEE implementation. It is our tentative conclusion of this paper that BEE, as a work in progress, has made marginal strides and has the potential to ensure that a broad base of intended beneficiaries are empowered. However, should the challenges outlined in this paper not be overcome, the empowerment goal may be elusive. As have sought to illustrate, these barriers are not insurmountable and with dedication and ingenuity, BEE has the potential to be one of the most successful empowerment strategies the world over.

8. APPENDICES

8.1 APPENDIX 1: THE BBBEE CODES OF GOOD PRACTICE THE FINAL 2007 CODES

CODE SERIES / Statement Number	Descriptions	Date Gazetted
CODE 000	Framework for measuring Broad-Based Black Economic Empowerment	9 February 07
Statement 000	General Principles and the Generic Scorecard	9 February 07
Statement 003	Guidelines for the development and gazetting of Transformation Charters and Sector Codes	9 February 07
Statement 004	Scorecards for specialised Enterprises	9 February 07
CODE 100	Measurement of the Ownership Element of Broad-Based Black Economic Empowerment	9 February 07
Statement 100	The General Principles for Measuring Ownership	9 February 07
Statement 102	Recognition of the Sale of Assets	9 February 07
Statement 103	The Recognition of Equity Equivalents For Multinationals	9 February 07
CODE 200	Measurement of Management Control Element of Broad-Based Black Economic Empowerment	9 February 07
Statement 200	The General Principles for Measuring Management Control	9 February 07
CODE 300	Measurement of the Employment Element of Broad-Based Black Economic Empowerment	9 February 07
Statement 300	The General Principles for measuring Employment Equity	9 February 07
CODE 400	Measurement of the Skills Development Element of Broad-Based Black Economic Empowerment	9 February 07
Statement 400	The General Principles for measuring Skills Development	9 February 07
CODE 500	Measurement of the Preferential Procurement Element of Broad-Based Black Economic Empowerment	9 February 07
Statement 500	The General Principles for Measuring Preferential Procurement	9 February 07
CODE 600	Measurement of the Enterprise Development Element of Broad-Based Black Economic Empowerment	9 February 07
Statement 600	The General Principles for Measuring Enterprise Development	9 February 07

CODE 700	Measurement of the Socio-Economic Development Element of Broad-Based Black Economic Empowerment	9 February 07
Statement 700	The General Principles for Measuring Socio-Economic Development	9 February 07

Information sourced from DTI website at www.dti.gov.za/bee/generic_code_p1.pdf (accessed on 22/03/07).

8.2 APPENDIX 2: CODES OF GOOD PRACTICE ON BROAD-BASED BEE FOR QUALIFYING SMALL ENTERPRISES THE FINAL 2007 CODES

CODE SERIES / Statement Number	Descriptions	Date Gazetted
CODE 800	Measurement of Qualifying Small Enterprises of Broad-Based Black Economic Empowerment	9 February 07
Statement 800	The Qualifying Small Enterprises Scorecard and Exempted Micro-Enterprises	9 February 07
Statement 801	Ownership of Qualifying Small Enterprises	9 February 07
Statement 802	Management Control for Qualifying Small Enterprises	9 February 07
Statement 803	Employment Equity for Qualifying Small Enterprises	9 February 07
Statement 804	Skills Development for Qualifying Small Enterprises	9 February 07
Statement 805	Preferential Procurement for Qualifying Small Enterprises	9 February 07
Statement 806	Enterprise Development for Qualifying Small Enterprises	9 February 07
Statement 807	Socio-Economic Development for Qualifying Small Enterprises	9 February 07

8.3 APPENDIX 3: BBBEE STATUS RATINGS⁵¹⁷

B-BBEE Status	Qualification	B-BBEE recognition level
Level One Contributor	≥100 points on the Generic Scorecard	135%
Level Two Contributor	>85 but <100 points on the Generic Scorecard	125%
Level Three Contributor	≥75 but <85 on the Generic Scorecard	110%
Level Four Contributor	≥65 but <75 on the Generic Scorecard	100%
Level Five Contributor	≥55 but <65 on the Generic Scorecard	80%
Level Six Contributor	≥45 but <55 on the Generic Scorecard	60%
Level Seven Contributor	>40 but <45 on the Generic Scorecard	50%
Level Eight Contributor	≥30 but <40 on the Generic Scorecard	10%
Non-Compliant Contributor	<30 on the Generic Scorecard	0%

8.4 APPENDIX 4: THE SECTOR TRANSFORMATION CHARTERS IN PERSPECTIVE

	MINING SECTOR	FINANCIAL SECTOR	ICT SECTOR (Final Draft Version 2005)
Characteristics	The mining industry is the longest standing industry in South Africa, and has in the past been funded by White capital and characterized by a Black majority of cheap labour.	The financial sector is central to the South African economy, and is a key financier in the BEE initiative. This sector has been characterized by a lack of Black equity holding, Black management and Black control.	The ICT sector is a fairly new sector in the South Africa economy and is a dynamic and fast-paced sector. Constraints limiting Black participation in the ICT sector are inadequate business skills, and difficulties in accessing capital on account of limited credit facilities available to Black businesses.
Vision of the Charter	To create a globally competitive mining industry that draws on the human and financial resources of all South Africans and [that] offer[s] real benefits to all South Africans [in an endeavour to reach the charter goal of	To actively promote a transformed, vibrant, and globally competitive financial sector that reflects the demographics of South Africa, and contributes to the establishment of an equitable society' through the pursuit of sustainable growth combined with skills and asset base development.	To promote effective implementation of the BBBEE Act in the ICT sector, as well Bridge the "digital divide" by actively promoting access to ICT's . Further to contribute towards the reduction of unemployment and poverty alleviation as well as to support skills development, training initiatives and the fostering of equity.

Intended Beneficiaries	<p>a] non-racial South Africa, through equity transfer and skills development.</p> <p>Historically Disadvantaged South Africans (HDSA) refers to any person, category of persons or community, disadvantaged by unfair discrimination before the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993) came into operation.</p>	<p>All black people, including women, workers, youth, people with disabilities and people living in rural areas</p> <p>Black people means all Africans, Coloureds and Indians who are South African citizens and includes black companies.</p> <p>However, in paragraphs 5 and 11 the term shall include permanent residents of the Republic of South Africa. The word "black" when used in conjunction with other words shall have the same implications.</p>	<p>All black people, including black women, workers, youth, people with disabilities and people living in rural areas</p>
Equity Target (Ownership and Control)	<p>26% by 2012. Considers active and passive involvement.</p>	<p><u>Ownership:</u> 25% Black ownership at holding company level is set for 2010; 10% direct ownership.</p> <p><u>Management/Control:</u> Black directors 33% of Black directors on its board by 2008. Black women directors 11% by 2008. Black Executives 25% by 2008.</p>	<p><u>Ownership:</u> 30% equity subject to a range of conditions.</p> <p><u>Management/Control:</u> 60% black people in the governing body with black women comprising 50% of the former.</p>
Employment Equity	<p>40% HDSA (Historically Disadvantaged South Africans) by 2007</p> <p>10% women by 2007</p>	<p>Black top management 20-25% by 2008</p> <p>Black women top management 4% by 2008</p> <p>Black middle management 30% by</p>	<p>65% black people in senior management positions with 30% black women as a % of the former.</p> <p>30% of black people in other management</p>

		<p>2008 Black junior management 40-50% by 2008 Women junior management 15% by 2008</p>	<p>positions with black women being 30% of the former.</p>
Procurement	<p>From HDSA over 3-5 years</p>	<p>50% by 2008 70% by 2014 Further targets per company categories</p>	<p>70% of eligible procurement from excellent, good and satisfactory BEE contributors (A minimum of 30% of the 70% procurement spend should be directed towards black owned, black empowered and black engendered SMME's that are excellent and good contributors to BEE)</p>
Enterprise Development	<p>Not addressed</p>	<p>Develop new and foster existing BEE companies (specifics provided))</p>	<p>Make quantifiable support equal to 5% of eligible procurement spend; in black owned, black empowered and black engendered SMME's that are excellent and good contributors to BEE.</p>
Skills Development	<p>Functionally & numerate literate by 2005 Career paths and Mentoring</p>	<p>1.5 % (as % of payroll spend) p.a. on skills development of black employees.</p>	<p>2% (as % of payroll spend) in addition to Skills Development Levy. Provision of learnerships equivalent to 5% of employees.</p>
Residual/Other	<ul style="list-style-type: none"> -Licensing -Mine community and rural development -Housing & living conditions (hostels) -Nutrition -Migrant labour 	<ul style="list-style-type: none"> -Access to financial services -Corporate social investment/involvement: 0.5% (of operating profit after tax) by 2008 -HR development 	<ul style="list-style-type: none"> -Provision of ICT's in education, district health systems and those set out in licence conditions -General corporate social investment that enhances the lives of black people.

Financing	-Beneficiation State assets R100 billion by 2007 for HDSA	R 75 billion for HDSA participation	The ICT Charter Council to make proposals for the establishment of a special BEE fund to finance the acquisition of equity from established companies in the ICT industry.
Scorecard	None	Financial Sector Scorecard.	ICT sector Scorecard.

The information in this table reflects the status at time of writing.

Information sourced from: <http://www.dti.gov.za/bee/beecharTERS.htm> (accessed on 2 December 2006).

8.5 APPENDIX 5: BEE DEALS CONCLUDED IN THE FINANCIAL SERVICES, MINING AND ICT SECTORS

MINING SECTOR BEE DEALS

Industrial Sector	Sub Sector	Target Company	Source Company	Stake (%)	Value (Rm)
Oil and Gas	Oil Services	Uhambo Oil Limited	Tshwarisano and partners	25	5000
Mining	Platinum	Lonplats	Incwala Resources	18	3361.4
Mining	Other Mineral Extractors and Mines	Xstrata-SA Chrome	SA Chrome/Xstrata SA	17.5	1435
Mining	Other Mineral Extractors and Mines	JCI Ltd	OrlyFunt Holding	0	1400
Mining	Other Mineral Extractors and Mines	Idwala Industrial Holdings Limited	Tiso Group	52	938
Mining	Gold Mining	Western Areas Ltd (WAL)	Inkwenkwezi Consortium	13	515.2
Mining	Other Mineral Extractors and Mines	Khumama Platinum	Mvelaphanda Resources Ltd	50	313
Mining	Gold Mining	Randgold & Exploration Company Ltd	OrlyFunt Holding	not disclosed	144.9
Mining	Coal	Mooiplats and Holfontein	Luvhomba Mining	51	130
Mining	Other Mineral Extractors and Mines	Nozalela Mineral Sands	Ingonyama Trust/Dube & Mkwana Tribal Authorities	5	75
Mining	Coal	Spitzkop Colliery	Ilanga Mining Corporation Pty Ltd	100	70
Mining	Diamond	Etruscan Resources Incorporated	Mvelaphanda Exploration	0	41
Mining	Platinum	Anglo Platinum and Platinum Group Metals	Africa Wide Mineral Prospecting and Exploration	26	35
Mining	Coal	Anglo Coal	Eyesizwe Coal (Pty) Limited	50	13
Mining	Other Mineral Extractors and Mines	Yomhlaba Resources Ltd (formerly Zenith Concessions)	New Africa Mining Fund (NAMF)	50.1	10.8
Mining	Other Mineral Extractors and Mines	Anooraq Resources Corporation	Pelawan Investments	63	9.25
Mining		Life Diamonds	Jomo Sono		not disclosed
Mining	Other Mineral Extractors and Mines	Imerys South Africa Limited	Nghala Mining	26	not disclosed
Mining	Coal	Sasol Mining	Eyesizwe Coal (Pty) Limited	15	not disclosed
Mining	Other Mineral Extractors and Mines	Assore LTD	Mampa Investment Holdings	46	not disclosed
Mining	Coal	Riverside Anthracite Colliery	Khulani Resources/Wave Capital	26	not disclosed
Mining	Other Mineral Extractors and Mines	Atscote	African Rainbow Minerals (ARMGold)	50.3	not disclosed
Oil and Gas	Oil Integrated	Lubrication Equipment	Links Capital	51	not disclosed

FINANCIAL SERVICES SECTOR BEE DEALS

Industrial Sector	Sub Sector	Target Company	Source Company	Stake (%)	Value (Rm)
Banks	Banks	FirstRand Ltd	FirstRand Empowerment Trust	10	6800
Banks	Banks	ABSA Group Ltd	Batho Bonke Consortium	10	5000
Banks	Banks	Standard Bank Group Ltd	Tutuwa Consortium and partners	10	4100
Insurance	Insurance Brokers	Liberty Group Ltd	Tutuwa Consortium and partners	10	1300
Insurance	Insurance Brokers	Metropolitan Holdings Ltd	Kagiso Trust Investment Company	10.25	540
Speciality and Other Finance	Asset Managers	Stanlib Asset Management	Quantum Leap Investments	25.2	350
Investment Companies	Investment Companies Eligible	Fabcos Investment Holdings (FIH)	Johnnic Holdings	50	295
Investment Companies	Investment Companies Eligible	Qakazana Investment Holdings	Four Arrows	12	238.08
Life Assurance	Life Assurance	African Life Assurance Company Ltd	Mvelaphanda Consortium	10	235
Speciality and Other Finance	Asset Managers	Mzi Khumalo	African Harvest Capital (Pty) Limited	70	200
Investment Companies		Four Arrows	Tiso Group	75	178
Speciality and Other Finance	Asset Managers	Coronation Investment Management	Imvula Trust	10	153
Speciality and Other Finance	Asset Managers	Frater Asset Management	Sakhikamva Investments	9	136
Investment Companies	Investment Companies Eligible	Brait SA	African Vanguard Consortium	26	123.8
Investment Companies	Investment Companies Eligible	IPS	The Bidvest Group Ltd	100	55.2
Investment Companies	Investment Companies Eligible	Cadiz Holdings Limited	Worldwide Capital (WWC)	10	55.175
Real Estate		PA Group	New deal trust	26	52
Real Estate	Real Estate Holding and Development	Capital Property Fund	Shanduka Properties	5	50
Investment Companies	Investment Companies Eligible	Mettle Ltd	Meryl Investments (Pty) Ltd	38	48.7
Speciality and Other Finance	Asset Managers	Cadiz Holdings Limited	Makana Financial Services	10	41.1
Life Assurance	Life Assurance	Channel Life	Arch Equity	37	31
Investment Companies	Investment Companies Eligible	Iliad Africa Investment (Pty) Ltd	Women Private Equity Fund 1 (WPEF)	10	26.9
Speciality and Other Finance	Other Financial	Computershare South Africa	Black Management Forum Investment Company (BMFI)	26	26
Investment Companies	Investment Companies Eligible	PSG Group Ltd	Arch Equity	10	24.2
Investments		Sterling FS	BEE consortium	40	20
Insurance	Insurance Brokers	Apex investment Corporation Ltd	Brimstone Investment Corporation Limited	18	15.51
Speciality and Other Finance	Other Financial	PSG Group Ltd	Arch Equity	2.9	14.68
Banks	Banks	Capitec Bank Holdings Ltd	Arch Equity	1.15	9.48
Life Assurance	Life Assurance	Bensure Management Services	Sekunjalo Investments Limited (SKJ)	not disclosed	9.1
Banks	Banks	Brimstone Investment Corporation Limited	Peoples Bank	10	6.7
Insurance	Other Insurance	Lion of Africa Insurance	Brimstone Investment Corporation Limited	9	3.6

Industrial Sector	Sub Sector	Target Company	Source Company	Stake (%)	Value (Rm)
Real Estate	Property Agencies	Key Letting CC	Mathomo Group Limited	100	2.3
Speciality and Other Finance	Other Financial	Faranani Risk Solutions	Vukani Mafrika Investments Consortium	20	0.25
Real Estate	Real Estate Holding and Development	Ovland Real Estate	Encha Properties	32	not disclosed
Real Estate	Real Estate Holding and Development	CB Richard Ellis (CBRE) SA	Broll Property Group	100	not disclosed
Insurance	Other Insurance	Sanlam Ltd	Basebenzi Investments	60	not disclosed
Speciality and Other Finance	Other Financial	Credit Management Solutions	Mineworkers' Investment Company (MIC)	25	not disclosed
Real Estate	Real Estate Holding and Development	Engel & Volkers	Moshebi Investments	30	not disclosed
Speciality and Other Finance	Asset Managers	Prescient Investment Management	Bonitas Consortium	35.8	not disclosed
Real Estate	Real Estate Holding and Development	Gensec Property Services	Montsi Consortium	45	not disclosed
Speciality and Other Finance	Other Financial	Aucor South	Ikamva Labantu	50	not disclosed
Investment Companies	Investment Companies Eligible	Stanlib Asset Management	Ditkeni Investment Company Limited	1.625	not disclosed
Investment Companies	Investment Companies Eligible	Property Fund Managers	Shanduka Properties	50.4	not disclosed
Speciality and Other Finance	Asset Managers	Nedbank Treasury Asset Management	Taquanta Consortium	30	not disclosed
Speciality and Other Finance	Other Financial	NiB Securities	Taquanta Consortium	29	not disclosed
Speciality and Other Finance	Other Financial	Lereko-Metier Capital Growth	Lereko Investment / Metier Fund	51	not disclosed
Speciality and Other Finance	Other Financial	Nedcor Treasury Management Services	Taquanta Consortium	30	not disclosed
Real Estate	Real Estate Holding and Development	JHI Real Estate	Phatsima and Mpande	35	not disclosed
Speciality and Other Finance	Other Financial	Decillion Capital	African General Equity (AGE)	60	not disclosed
Speciality and Other Finance	Other Financial	Ethos Private Equity	Sphere Investment Holdings	24.25	not disclosed
Real Estate	Real Estate Holding and Development	Oasis Property Management	Broll Property Group	50	not disclosed
Life Assurance	Life Assurance	Safrican Insurance Co Ltd	Sanlam Life	55	not disclosed
Real estate	Real Estate Holding and Development	McCormick Property Development Ltd	Shanduka Properties	not disclosed	not disclosed

ICT SECTOR BEE DEALS

Industrial Sector	Sub Sector	Target Company	Source Company	Stake (%)	Value (Rm)
Software and Computer Services	Internet	Dimension Data SA (Pty) Ltd (DDSA)	Ngcaba Consortium	25.01	380
Software and Computer Services	Computer Services	BytesTechnology Group Ltd	Kagiso Trust Investment Company (KTI)	27	228
Software and Computer Services	Computer Services	AST Group Ltd	Gijima Technologies Group (Pty) Ltd	30	108
Software and Computer Services	Internet	DataPro Group Ltd (Formerly Casey Investments)	Casey Investment Holdings	100	53.77
Software and Computer Services	Computer Services	Prism Holdings Ltd	Mineworkers' Investment Company (MIC)	16.89	36
Information Technology Hardware	Telecommunications Equipment	Spescom Ltd	Vantage Capital Group	25.4	24
Software and Computer Services	Internet	DataPro Group Ltd (Formerly Casey Investments)	Vantage Capital Group	23	22
Software and Computer Services	Computer Services	Phambili Information Technologies	Gijima Technologies Group (Pty) Ltd	50	12
Information Technology Hardware	Computer Hardware	Pinnacle Technologies	Rakunda Investments Holdings	26	12
Software and Computer Services	Computer Services	Mthombo IT Services (M-IT)	Khumalo Brothers	35	11
Information Technology Hardware	Telecommunications Equipment	CCI	CCI's employees	51	6
Software and Computer Services	Software	Striata	J & J Group Ltd	25.1	4.5
Software and Computer Services	Computer Services	Bryant Technology Ltd	Zamori 243 (Pty) Ltd	85.22	0.24
Software and Computer Services	Computer Services	Alcatel	New Seasons	30	not disclosed
Software and Computer Services	Software	Square One Solutions Group	Utho Technologies	56.4	not disclosed
Software and Computer Services	Software	Izazi	Mineworkers' Investment Company (MIC)	25	not disclosed
Software and Computer Services	Computer Services	Allied Technologies (Altech)	Pamodzi Investment Holdings	25	not disclosed
Information Technology Hardware	Computer Hardware	Advanced Consumables Technology	Mthombo IT Services (M-IT)	26	not disclosed
Software and Computer Services	Computer Services	Technology Corporate Management	Management	25.01	not disclosed
Software and Computer Services	Software	Computer Science Corporation (CSC)	Nokusa and Comastone	0	not disclosed
Software and Computer Services	Computer Services	EPI-USE Systems	Avalanche Consortium	45	not disclosed
Software and Computer Services	Computer Services	CommsCo	Circle Capital Ventures	50	not disclosed
Software and Computer Services	Computer Services	IST Group Ltd	Swanvest 320 (Pty) Ltd	25	not disclosed
Software and Computer Services	Computer Services	Enterprise Outsourcing Holdings (EOH)	BEE Employee Trust	25	not disclosed
Software and Computer Services	Computer Services	Masterskill	Employees	26	not disclosed

Industrial Sector	Sub Sector	Target Company	Source Company	Stake (%)	Value (Rm)
Software and Computer Services	Software	Tecor Group (Pty) Ltd	Lithalelanga Connections Holdings	63	not disclosed
Software and Computer Services		Lawyers Access Web (L@W)	Vantage Capital Group	10	not disclosed
Software and Computer Services	Software	Kindle Insurance Technologies (Pty) Ltd	PDI Groups	30	not disclosed
Software and Computer Services	Computer Services	DataPro Group Ltd (Formerly Casey Investments)	Vantage Capital Group	23	not disclosed

Tables Sourced from Shubane & Reddy 'Behind The Deals' (2005) *Business Map Foundation: Economic Transformation and Empowerment* at 17-19 and 28.

Also visit http://www.southafrica.info/doing_business/trends/empowerment/ for an update of the most recent BEE deals.

8.6 APPENDIX 6: BLACK CONTROL ON THE JSE

	NO FIRMS	MAR CAP (Rbn)	Portion of JSE (%)
Oct-97	17	37	3
Nov-97	26	52	4
Feb-98	27	55	5
Jul-98	28	68	6
Sep-98	28	48	4
Nov-98	33	66	7
Jan-99	35	59	6
Apr-99	35	67	6
Aug-99	38	53	4
Nov-99	36	42	3
Feb-00	36	61	4
May-00	32	37	3
Aug-00	33	98	6
Nov-00	34	78	5
Feb-01	22	84	5
Mar-02	26	38	2
Jun-02	26	39	2
Sep-02	22	33	2
Dec-02	22	44	3
Mar-03	21	40	3
Jun-03	21	42	3
Sep-03	21	43	3
Dec-03	21	58	3

Table extracted from Reddy, C 'Empowerment on the JSE' (2004) *Business Map* 55 at 56.

8.7 APPENDIX 7: THE BEE SCORECARDS: A COMPARISON THE 2004 COMPREHENSIVE SCORECARD⁵¹⁸

Core Components	BEE Elements	Code Ref.	Weighting	Indicators	Indicator Weighting	Targets	Sub-minimum	Bonus/ Preferential Weighting Provisions
Direct Empowerment	Ownership	BEE 100	20%	Unrestricted Voting Rights in the Enterprise in the hands of Black people	3%	25.% + 1 vote		Introduction of new entrants and BEE ownership in excess of target
				Unrestricted Voting Rights in the Enterprise in the hands of Black women	2%	10%		
				Economic Interest in the Enterprise to which Black people are entitled	4%	25%		
				Economic Interest in the Enterprise to which Black women are entitled	2%	10%		
				Economic Interest in the Enterprise to which Black designated groups are entitled	1%	2.5%		
				Level of Unrestricted entitlement of Black people to receive their Economic Interest in the Enterprise (as percentage of total ownership)	8%	25%		
	Management	BEE 200	10%	Weighted Management Representation Scorecard (See BEE 200)	10%	40%		Women Management, Different management positions weighed according to seniority and executive involvement
Human Resources Development	Employment Equity	BEE 300	10%	Weighted Employment Equity Scorecard (See BEE 300)	10%	50%		Women representation
	Skills Development	BEE 400	20%	Investment in Skills Development (In addition to skills development levy), as a percentage of payroll	15%	3%		Fast-track programs for black employees and management. Provision of skills development programs and learnership in priority skill areas.
				Learnership- learnership positions (as a percentage of employees)	5%	3%		
Indirect Empowerment	Preferential Procurement	BEE 500	20%	Affirmative Procurement from Excellent BEE Contributors (BEE Percentage Score as per scorecard, between 80 and 100 points)	18%	50%		- Procurement from excellent contributors (recognized at R 1.25 for every R1 of spend) - Procurement from good contributors (recognized at R 1 for every R1 of spend) - Procurement from satisfactory contributors (recognized at 50c for every R1 of spend)
				Affirmative Procurement from Good BEE Contributors (BEE Percentage Score between 65 and 79)				
				Affirmative Procurement from Satisfactory BEE Contributors (BEE Percentage Score between 45 and 65)				
				Implementation of robust, independent verification and reporting mechanism to avoid fronting	2%	Mechanism which verify BEE status of suppliers reported under preferential procurement and utilization of dti approved accreditation agencies		
	Enterprise Development	BEE 600	10%	Monetary Investment in SMME with excellent or good BEE contributions (as percentage of Net Asset Value/EBITDA/Total Procurement)	8%	5% - 10% (depending on base used)		The sum percentage score achieved through monetary investment and quantifiable non-monetary support are summed to arrive at the enterprise development points. (The maximum achievable percentage score for enterprise development is 10)
				Quantifiable non-monetary support to SMME with excellent or good BEE contributions (as percentage of Net Asset Value/EBITDA/Total Procurement)	2%	2% - 5% (depending on base used)		
Residual Element	BEE 700	10%	Industry specific initiatives to facilitate the inclusion of black people in the sector (as a percent of net profit)	10%	3%		Total contribution towards these initiatives are summed relative to net profit of an enterprise. The total achievable percentage score for these initiatives is 10. (Initiatives that does not promote the empowerment of black people are specifically excluded)	
			Industry specific initiatives to promote black economic empowerment (as a percent of net profit)					
			Corporate social investment initiatives in health, education, poverty alleviation and community development(as a percent of net profit)					
Total	Element Weighting		100%	Indicator Weighting	100%		Sub-Minimum	

THE 2005 SIMPLIFIED SCORECARD⁵¹⁹

Element	Weighting	Primary Codes Reference
Ownership	20 points	Code 100
Management control	10 points	Code 200
Employment equity	10 points	Code 300
Skills development	20 points	Code 400
Preferential procurement	20 points	Code 500
Enterprise development	10 points	Code 600
Residual	10 points	Code 700

THE 2007 SIMPLIFIED SCORECARD⁵²⁰

Element	Weighting	Code series reference
Ownership	20 points	100
Management control	10 points	200
Employment equity	15 points	300
Skills development	15 points	400
Preferential procurement	20 points	500
Enterprise Development	15 points	600
Socio-Economic Development initiatives	5 points	700

8.8 APPENDIX 8: THE LEARNING PROGRAMME MATRIX⁵²¹

Annexe 400A - Learning Programme Matrix

Cat	Narrative Description	Delivery Mode	Learning Site	Learning Achievement
A	Institution-based theoretical instruction alone – formally assessed by the institution	Institutional instruction	Institutions such as universities and colleges, schools, ABET providers	Recognised theoretical knowledge resulting in the achievement of a degree, diploma or certificate issued by an accredited or registered formal institution of learning
B	Institution-based theoretical instruction as well as some practical learning with an employer or in a simulated work environment – formally assessed through the institution	Mixed mode delivery with institutional instruction as well as supervised learning in an appropriate workplace or simulated work environment	Institutions such as universities and colleges, schools, ABET providers and workplace	Theoretical knowledge and workplace experience with set requirements resulting in the achievement of a degree, diploma or certificate issued by an accredited or registered formal institution of learning
C	Recognised or registered structured experiential learning in the workplace that is required after the achievement of a qualification – formally assessed by a statutory occupational or professional body	Structured learning in the workplace with mentoring or coaching	Workplace	Occupational or professional knowledge and experience formally recognised through registration or licensing
D	Occupationally-directed instructional and work-based learning programme that requires a formal contract – formally assessed by an accredited body	Institutional instruction together with structured, supervised experiential learning in the workplace	Institution and workplace	Theoretical knowledge and workplace learning, resulting in the achievement of a South African Qualifications Authority registered qualification, a certificate or other similar occupational or professional qualification issued by an accredited or registered formal institution of learning
E	Occupationally-directed instructional and work-based learning programme that does not require a formal contract – formally assessed by an accredited body	Structured, supervised experiential learning in the workplace which may include some institutional instruction	Workplace and some institutional as well as ABET providers	Credits awarded for registered unit standards
F	Occupationally-directed informal instructional programmes	Structured information sharing or direct instruction involving workshops, seminars and conferences and short courses	Institutions, conferences and meetings	Continuing professional development, attendance certificates and credits against registered unit standards (in some instances)
G	Work-based informal programmes	Informal training	Workplace	Increased understand of job or work context or improved performance or skills

ENDNOTES

1. BEE Commission 'A National Integrated Black Economic Empowerment Strategy' *BEE Commission Report* 2001 at 2 and also see <http://www.yokogawa.com/za/cp/overview/za-bee.htm> (accessed on 30/07/2005).
2. BEE Commission (n 1) 2.
3. Osode 'The New Broad-Based Economic Empowerment Act: A Critical Evaluation' (2004) vol 18 no 1 *Speculum Juris* 108.
4. 'The lexical meaning of apartheid is "apart-ness" ... "separateness" or "separation"'. (Nortje 'The Origins of Apartheid' in *La Guma Apartheid Collection of Writing on South African Racism By South Africans* 19.)
 The term denotes 'physically repressive, economically exploitative and ideologically racist or ethnicist segregation'. (Bathish et al 'Apartheid: Ancient, Past and Present', paper presented at *The TRC: Commissioning the Past*, conference held 11-14 June 1999, University of the Witwatersrand, unpaginated).
 The scope of the historical contextualisation of this paper is restricted to the Nationalist Government's apartheid regime. It should be noted as an aside, that in order to fully understand the evolution of political apartheid, attention must be given to those policies that the British element initiated in order to remain politically dominant over the Africans and the Coloureds. Those policies were afterwards adopted by Afrikaners, and they can be classified as follows:
 'a) 'Equal' political rights irrespective of colour or race but subject to such constitutional safeguards which left political dominance in the hands of the English minority; b) Total exclusion of coloureds from the franchise; c) Territorial separation of the English districts of the Cape Colony; d) Federation of certain territories in order to get new federal safeguards and local self-government for the English element; e) Separate representation for Africans in the Upper or Lower House of Parliament (The Natal Policy (1874-1893); f) Total social, economic and political segregation of Africans and g) Ethnic Differentiation'. (Haasbroek *Apartheid: A Constitutional Analysis: Ethnic diversity and the struggle for Political Supremacy* 36-37).
5. Nortje 'The Origins of Apartheid' in *La Guma Apartheid Collection of Writing on South African Racism By South Africans* 19.
6. Haasbroek *Apartheid: A Constitutional Analysis: Ethnic diversity and the struggle for Political Supremacy* 5.
7. Haasbroek (n 6) 37.
 'This segregation pervaded all spheres of life, including cultural, economic, social, political, ... and territorial spheres.' (Rhodie et al *Apartheid: Socio-historical Exposition of the Origin and Development of The Apartheid Idea* 25.)
8. Nortje (n 5) 21.
9. Nortje (n 5) 21. Also see International Labour Office *Apartheid and Labour: A critical review of the effects of Apartheid on Labour Matters in South Africa* 13.
10. Nortje (n 5) 21.

-
11. Nortje (n 5) 21.
 12. Haasbroek (n 6) 5.
 13. Nortje (n 5) 22.
 14. Haasbroek (n 6) 37. This goal of ensuring white supremacy and survival is starkly apparent in the following statement by Mr Minister Strijdom (soon to become Prime Minister): 'Our Policy is that the Europeans must stand their ground and must remain *baas* (boss) in South Africa ... if the non-Europeans are developed on the same basis as the Europeans, how can the Europeans remain *baas* ... Our view is that in every sphere the Europeans must retain the right to rule the country and to keep it a White man's country'. (Nortje (n 5) 22-24).
 15. Nortje (n 5) 21.
 16. Nortje (n 5) 24.
 17. Business International SA 'Apartheid and Business: An analysis of the rapidly evolving challenges facing companies with investments in South Africa' (1980) *Business International* 86.
 18. Nortje (n 5) 25. This migratory labour regime would ensure only temporary integration of Africans into the 'White economic structure'. (Rhodie et al *Apartheid: Socio-historical Exposition of the Origin and Development of the Apartheid Idea* 26).
 19. Whyte 'Apartheid and Other Policies' (undated) no. 17 *New South Africa Pamphlet* 8. The homelands (also called the reserves) were areas designated specifically for African settlement. These reserves were impoverished areas largely because of 'overcrowding, overstocking and soil erosion', and remained under developed with subsistence farming as the predominant occupation. (Higgs "The Bantusans": South Africa's "Bantu Homelands" Policy' in La Guma *Apartheid: A Collection of Writings on South African Racism by South Africans* 79-90.)
 20. The pass laws were a form of 'restriction of movement and influx control'. (Higgs "The Bantusans": South Africa's "Bantu Homelands" Policy' in La Guma *Apartheid: A Collection of Writings on South African Racism by South Africans* 88.)
 The pass laws were important in the regulation of 'supply of native labour in the interests of the European'. (Roskam *Apartheid and Discrimination: Some Remarks with regard to the relationships between the white and respective non-white groups in the Union of South Africa* 68.)
 These laws required that all blacks over the age of 16 years of age hold a reference ('pass') book. (International Labour Office, *Apartheid and Labour: A critical review of the effects of Apartheid on Labour Matters in South Africa* 14.) Any African not in possession of one of these pass books could not be employed. Furthermore, 'any authorised officer may at any time call upon a native to produce his reference book, and failure to produce the reference book on demand of such an officer [was] punishable with a fine of up to £10 or imprisonment for up to one month'. (International Labour Office, *Apartheid in Labour Matters: I.L.O Policy Statements and Reports concerning "Apartheid" in Labour Matters in the Republic of South Africa, 1964-1966* 20-21).
 21. Nortje (n 5) 25.

-
22. The legislation enacted to effect influx control included, *inter alia*, the Black (Urban Areas) Acts, the Black Labour Act and its regulations, the Black Law Amendment Act and the Black Affairs Administration Act. (International Labour Office *Apartheid and Labour: A critical review of the effects of Apartheid on Labour Matters in South Africa* 13-14.)
 23. This was so because the passes restricted free movement. (Bathish et al 'Apartheid: Ancient, Past and Present', paper presented at *The TRC: Commissioning the Past*, conference held 11-14 June 1999, University of the Witwatersrand, unpaginated).
 24. Kotz *Social Structures of Accumulation: The Political Economy of Growth and Crisis* 267.
 25. International Labour Office *Apartheid and Labour: A critical review of the effects of Apartheid on Labour Matters in South Africa* 17.
 26. Bathish et al 'Apartheid: Ancient, Past and Present', paper presented at *The TRC: Commissioning the Past*, conference held 11-14 June 1999, University of the Witwatersrand, unpaginated.
 27. Higgs "'The Bantusans": South Africa's "Bantu Homelands" Policy' in La Guma *Apartheid: A Collection of Writings on South African Racism by South Africans* 89.
 28. International Labour Office *Apartheid in Labour Matters: I.L.O Policy Statements and Reports concerning "Apartheid" in Labour Matters in the Republic of South Africa, 1964- 1966* 6.
 Job reservation was a measure that reserved jobs for whites, thus protecting white workers from possible competition from other races. It prohibited blacks from doing these reserved jobs, ... and 'seriously restricted the range of jobs open to Blacks, [as well as limiting their] scope for advancement within a particular industry'. (International Labour Office (n 25) 18). For example, '[s] 77 of the Industrial Conciliation Act gave the Minister of Manpower Utilisation the power to issue a decree reserving any particular job to any particular race, ... [furthermore] specific laws such as the Mines and Works Act, which [prohibited] blacks from performing mining jobs that require blasting certificates, and the Black Building Worker's Act, which ... denied them the right to do skilled building work outside black areas'. (Business International SA (n 17) 87).
 29. Customary exclusions resulted from company managerial attitudes. For example, a black law graduate would not be employed as an articled clerk 'because it would be awkward if the [white] typist had to take dictation from him'. (Business International SA (n 17) 88).
 30. Botha 'Notes on the Phenomena of empowerment as practices as established by Afrikaner business communities - Case Study: SANLAM' (unpublished) 1. Also see Giliomee, H *The Afrikaners: Biography of a People* 320-322.
 31. Giliomee *The Afrikaners: Biography of a People* 166-169.
 32. Giliomee (n 31) 236; Botha (n 30) 1.
 33. Giliomee (n 31) 322; Botha (n 30) 1.
 34. Giliomee (n 31) 322; Botha (n 30) 1.
 35. Giliomee (n 31) 322-324; Botha (n 30) 1.
 36. Giliomee (n 31) 325-328.
 37. Giliomee (n 31) 325.

-
38. Books, documents and other material located in the archives of Sanlam Life Insurance Limited, 2 Strand Road, Bellville, Cape Town, South Africa.
 39. Ibid.
 40. Ibid.
 41. Ibid.
 42. Ibid.
 43. Ibid.
 44. Ibid.
 45. Ibid.
 46. Ibid.
 47. Ibid.
 48. Ibid.
 49. Ibid.
 50. Ibid.
 51. It should be noted that the minority groups in the United States extend beyond blacks/African Americans and include, for example, Hispanics and women (Sowell, T Affirmative Action Around the World: An Empirical Study 34). The discussion in this paper will be limited to the empowerment of blacks.
 52. These are statistics as documented in 2004. (Sowell, T Affirmative Action Around the World: An Empirical Study 56.)
 53. Sowell, T Affirmative Action Around the World: An Empirical Study 55.
 54. Sowell (n 53) 58.
 55. Sowell (n 53) 56.
 56. Sowell (n 53) 56.
 57. Sowell (n 53) 57.
 58. Manning 'Affirmative Action in Malaysia between 1970 and 1990: how successful was it, and what are the lessons for South Africa?' (1993) Friedrich Ebert Stiftung: Issues in Development No. 1 4.
 59. Sowell (n 53) 60. See also Manning (n 58) 4. What distinguishes the Malaysian empowerment experience is that unlike the empowerment programmes in South Africa and the United States, it was not born out of historical racial marginalisation. Instead, the NEP, under the guise of pursuing racial equalisation, was really an attempt to rectify 'embarrassing ethnic imbalances' in the economy. (Sowell (n 53) 63).
 60. Galenson Labour and Economic Growth in Five Asian Countries: South Korea, Malaysia, Taiwan, Thailand, and the Philippines 18. See also Sowell (n 53) 60.
 61. Manning (n 58) 4. The economic imbalances related to 'imbalances in income, in employment, and in ownership and control of wealth'. (Snodgrass Inequality and Economic Development in Malaysia 66 and 59-60).
 62. Manning (n 58) 4.
 63. This would be done primarily by 'increasing the numbers of Bumiputera in professional occupations' and improving the 2 per cent Malay corporate equity holdings by 1990. (Manning (n 58) 5).
 64. Jomo Growth and Structural Change in the Malaysian Economy 155. Such institutions included the Bumiputera Assistance Unit in the Malaysian

-
- Industrial Development Finance (MIDF) and the Credit Guarantee Corporation.
65. Sowell (n 53) 62.
 66. Sowell (n 53) 61.
 67. Emsley The Malaysian Experience of Affirmative Action: Lessons for South Africa 7. See also Sowell (n 53) 75.
 68. Sowell (n 53) 75.
 69. Manning (n 58) 24.
 70. Sowell (n 53) 61. The problem however, was that such transfers were biased in favour of the elites.
 71. Manning (n 58) 24.
 72. Ibid.
 73. Sowell (n 53) 75.
 74. Emsley (n 67) 7. Important aspects that facilitate such growth are economic stability, and poverty alleviation through government intervention. (Emsley (n 67) 8-9.)
 75. Sowell (n 53) 116. The discussion in this paper will be limited to the empowerment of African Americans/blacks. It should be noted however that 'affirmative action programs have expanded over the years to include not only other racial or ethnic groups, but also women, so that such policies now apply to a [fair proportion] of the American population'. (Sowell (n 53)116.)
 76. Encarta Encyclopedia 'The United States of America', Microsoft ® Encarta ® Online Encyclopedia 2005 <http://Encarta.msn.com> © 1997-2005 Microsoft Corporation (accessed on 30/07/2005).
 77. Weaver 'The Impact of Ethnicity upon Urban America' in Liebman (ed) Ethnic Relations in America 71-72.
 78. Lewis 'Women's History: Affirmative Action Review' Part 9 (2003): http://womenhistory.about.com/library/etext/gov/bl_gov_aa_09.htm (accessed on 06/09/2005). The general problems hindering minorities were reiterated in the decision of Fullilove v Klutznick, 448 U.S. 448 (1979) 'The Chief Justice summarised the congressional findings regarding the difficulties confronting minority businesses as "deficiencies in working capital, inability to meet bonding requirements, disabilities caused by an inadequate track record, lack of awareness of bidding opportunities, unfamiliarity with bidding procedures, pre-selection before the formal advertising process, and the exercise of discretion by government procurement officers to disfavour minority businesses"' at 467.
 79. Sharp 'Minority-owned businesses' available at <http://www.referenceforbusiness.com/encyclopedia/Man-Mix/Minority-Owned-Businesses.html> (accessed on 20/06/2006).
 80. Lewis (n 78).
 81. Set asides, also termed 'sheltered markets', are where 'only targeted groups can compete for government contracts'. (Sweet 'Minority Business Enterprise Programmes in the United States of America: An Empirical Investigation' (2006) vol 33 no 1 Journal of Law and Society 162).
 82. In terms of Bid Price Preferences, SDBs are afforded a 10 per cent bid preference. (Lewis (n 78).

-
83. With 'goal programmes', the government attempts to contract with minority-owned businesses without using set-asides or bid enhancements-most often requiring prime contractors to make good faith efforts in subcontracting with [minority owned businesses]'. (Sweet, M 'Minority Business Enterprise Programmes in the United States of America: An Empirical Investigation' (2006) Vol 33 No. 1 Journal of Law and Society 162).
84. For example see, Executive Order 11246 of 1965, the Philadelphia Order of 1969; Fullilove v Klutznick, 448 U.S. 448 (1979); United States v Paradise 48 US 149 (1987) and Grutter v Bolinger 539 US 306 (2003) as cited in Brunner 'Timeline of Affirmative Action Milestones': <http://www.infoplease.com/spot/affirmativetimeline1.html> (accessed 30/07/05).
85. Lewis (n 78).
86. Ibid.
87. Ibid.
88. 'Agency-level data shows that for example, between 1985 and 1994, contracting with SDBs grew from 2.1% of Department of Defence procurement to 5.5%, an increase of more than 3 billion'. (Lewis (n 78)).
89. Bates et al cited in Chay and Fairlie 'Minority business set-asides and black self-employment' (1998) at 6 at <http://econ.ucsc.edu/~fairlie/papers/setaside.pdf#search=%22preferential%20procurement%20the%20USA%20for%20minorities%22> (accessed on 21/06/2006) as cited in Safi 'How Broad is Broad-Based Black Economic Empowerment: A Critical Analysis of the Challenges facing BEE' Unpublished LLB mini-dissertation, University of Cape Town (2006) at 10. Also see Sweet 'Minority Business Enterprise Programmes in the United States of America: An Empirical Investigation' (2006) vol 33 no 1 Journal of Law and Society 169.
90. Sweet 'Minority Business Enterprise Programmes in the United States of America: An Empirical Investigation' (2006) vol 33 no 1 Journal of Law and Society 180.
91. Ibid.
92. Osode (n 3) 108.
93. Ibid.
94. Ibid.
95. Ibid.
96. Ibid.
97. http://www.southafrica.info/pls/procs/iac.page?p_t1=692&p_t2=3185&p_t (accessed on 14/04/05).
98. Osode (n 3) 109.
99. The Act would be 'specifically aimed at the achievement of four goals: i) [the provision] of an unambiguous definition of BEE ...; ii) [the provision] of uniform guidelines ... against which the public and private sectors could measure their [BEE] performance ..., iii) [the provision] of procurement targets of public sector departments [and lastly, the setting out of a requirement that] all government departments submit an annual BEE report.' (Osode (n 3) 109).

-
100. Woolley 'Everyone's Guide to Black Economic Empowerment and how to implement it' (2005) Financial Mail 12 and 31.
 101. BEE as defined by Old Mutual extracted from Kennedy 'Black Economic Empowerment in the South African Business Community: A Beginning of Economic Empowerment of Black South Africans' (1997) MBA thesis, Graduate School of Business, University of Cape Town 61.
 102. <http://www.busrep.co.za/index.php?fSectionId=553&fArticleID=2605708> (accessed on 30/07/2005).
 103. Osode (n 3) 107.
 104. Cliffe Dekker Attorneys uses 'the following format to describe individual statements in the Codes: C000S000 represents Code Series 000 Statement Number 000, and C100S100 represents Code Series 100 Statement Number 100' and so on. (Cliffe Dekker 'The Way to BEE' at http://bee.sabinet.co.za?CD_Way2BEE_guide.pdf (accessed on 29/01/07).) This same format will be used in this paper.
 105. The Constitution of the Republic of South Africa, Act 108 of 1996.
 106. Van der Merwe for Werksmans Attorneys 'BEE and the Regulatory Environment' (2004) Empowerment 2004 Black Ownership: Risk or Opportunity in Business Map Foundation 32.
 107. The right to equality is embodied in Section 9 of the Constitution. Section 9 provides:
 - '(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
 - (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
 - (3) The State may not unfairly discriminate directly or indirectly against anyone on one of more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
 - (4) No person may unfairly discriminate directly or indirectly against anyone on or more grounds listed in terms of sub section (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
 - (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair'.The right to equality has been dealt with extensively in the constitutional cases of Harksen v Lane NO 1998 (1) SA 300 (CC) and National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC) paras 60-1.
 108. 'Mbeki Speaks out on BEE racism' at http://www.skillsportal.co.za/black_economic_empowerment/415010.htm (Accessed on 14/04/2005).
 109. Formal equality requires 'the law to treat all individuals the same regardless of their actual social and economic circumstances', whereas substantive equality takes these circumstances into account. (De Waal et al The Bill of Rights Handbook 184.)
 110. Section 36 of the Constitution provides:

-
- ‘ (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all the relevant factors, including-
- (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and the its purpose; and
 - (e) less restrictive means to achieve the purpose.
- (2) Except as provided in subsection (1) or any other provision in the Constitution, no law may limit any right entrenched in the Bill of Rights’.
111. Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others 2004 (4) SA 490 (CC) at para 106.
112. Ibid.
113. Section 1 of the BBBEE Act 53 of 2003 and Osode (n 3) 110. Section 1 provides that ‘These strategies include but are not limited to –
- (a) increasing the number of black people that manage, own and control enterprises and productive assets;
 - (b) facilitating ownership and management of enterprises and productive assets by communities, workers, cooperatives and other collective enterprises;
 - (c) human resources and skills development;
 - (d) achieving equitable representation in all occupational categories and levels in the workforce;
 - (e) preferential procurement; and
 - (f) investment in enterprises that are owned or managed by black people’.
114. Osode (n 3) 111.
115. Osode (n 3) 111.
116. Section 1 of the BBBEE Act 53 of 2003 and Osode (n 3) 112.
117. Ibid.
118. Osode (n 3) 112.
119. Osode (n 3) 111.
120. Schedule 1: Part 2 Definitions of the Broad Based Black Economic Empowerment Act Section 9 (1) Codes of Good Practice, Government Gazette No 29617 (Main Codes) at www.dti.gov.za/bee/schedule1.pdf (accessed on 22/03/07).
121. Ibid.
122. Nortje (n 5) 21; ‘History of Apartheid in South Africa’ at http://en.wikipedia.org/wiki/Apartheid#Colour_classification (accessed on 04/02/07).
123. Ibid.
124. For example the ‘Chinese were classified [under Apartheid] as either non-European or non-white’. Danwei ‘Chinese Fight to be Black’ http://www.danwei.org/china_and_africa/chinese_fight_to_be_black.php (accessed on 05/02/07).
125. Osode (n 3) 111.
126. Balshaw et al Cracking Broad-Based Black Economic Empowerment: Codes and Scorecard unpacked 76.

-
127. Osode (n 3) 111.
 128. These will be referred to as the Codes.
 129. Section 9(1) of the BBBEE Act provides: 'In order to promote the purposes of the Act, the Minister may by notice in the Gazette issue codes of good practice on black economic empowerment ...'.
 130. Section 9(2) of the BBBEE Act.
 131. Section 9(3) of the BBBEE Act. Phraseology extracted from Osode (n 3) 114.
 132. Section 9 of the BBBEE Act.
 133. The Department of Trade and Industry 'The Codes of Good Practice on Black Economic Empowerment – Phase One: A Guide to interpreting the First Phase of the Codes' (2005) p 5 at http://www.dti.gov.za/bee/Chapterone_1_11.pdf (accessed on 26/06/2006). This will be referred to as the DTI Guide to Interpretation from hereon.
 134. The DTI Guide to Interpretation (n 133) 5.
 135. 'Black Economic Empowerment: Regulatory Article' (15 Feb 2006) at http://bee.sabinet.co.za/bee_regulatory_article2.html (accessed on 05/02/07).
 136. <http://www.dti.gov.za/bee/beecodes.htm> (accessed on 22/03/07).
 137. Discussed in para 4.5 below.
 138. Discussed in para 4.4 below.
 139. The DTI Guide to Interpretation (n 133) 2.
 140. The DTI Guide to Interpretation (n 133) 3.
 141. Singh et al 'Cracking the Codes' (April 2005) Financial Mail 15 at 19.
 142. The DTI Guide to Interpretation (n 133) 3.
 143. The DTI Guide to Interpretation (n 133) 3.
 144. Singh et al (n 141) 19.
 145. The DTI Guide to Interpretation (n 133) 3. Verification and accreditation agencies are discussed in para 4.3.4 below.
 146. Singh et al (n 141) 19. One notion of 'real empowerment' is that beneficiaries should be able to service their debt and thus take ownership of shares allocated to them. (Singh et al (n 141) 19).
 147. C000S000 of 2004: Department of Trade and Industry (Phase One 2004 Codes): Code 000 'BBBEE Framework': Statement 000 'Principles and Definitions of BBBEE' at paras 41-55 at www.dti.gov.za (accessed on 19/12/06). Also see Balshaw (n 126) 75-76.
 148. 'The Ownership Element, as set out in Code series 100, measures the effective ownership of enterprises by black people'. (C000S000 of 2007: Department of Trade and Industry (Final 2007 Codes): Code 000 'Framework for Measuring Broad-Based Black Economic Empowerment': Statement 000 'General Principles and the Generic Scorecard' at para 7.1 at www.dti.gov.za/bee/generic_code_p1.pdf (accessed on 22/03/07)).
 149. 'The Management Control Element, as set out in Code series 200, measures the effective control of enterprises by black people'. (C000S000 of 2007: Department of Trade and Industry (Final 2007 Codes): Code 000 'Framework for Measuring Broad-Based Black Economic Empowerment': Statement 000 'General Principles and the Generic Scorecard' at paras 7.2 at www.dti.gov.za/bee/generic_code_p1.pdf (accessed on 22/03/07)).
 150. 'The Employment Equity Element, as set out in Code series 300, measures initiatives intended to achieve equity in the work place under the Act, and the

-
- Employment Equity Act'. (C000S000 of 2007: Department of Trade and Industry (Final 2007 Codes): Code 000 'Framework for Measuring Broad-Based Black Economic Empowerment': Statement 000 'General Principles and the Generic Scorecard' at paras 7.3 at www.dti.gov.za/bee/generic_code_p1.pdf (accessed on 22/03/07)).
151. 'The Skills Development Element, as set out in Code series 400, measures the extent to which employers carry out initiatives designed to develop the competencies of black employees'. (C000S000 of 2007: Department of Trade and Industry (Final 2007 Codes): Code 000 'Framework for Measuring Broad-Based Black Economic Empowerment': Statement 000 'General Principles and the Generic Scorecard' at paras 7.4 at www.dti.gov.za/bee/generic_code_p1.pdf (accessed on 22/03/07)).
152. 'The Preferential Procurement Element, as set out in Code series 500, measures the extent to which the enterprises buy goods and services from suppliers with strong B-BBEE procurement recognition levels'. (C000S000 of 2007: Department of Trade and Industry (Final 2007 Codes): Code 000 'Framework for Measuring Broad-Based Black Economic Empowerment': Statement 000 'General Principles and the Generic Scorecard' at paras 7.5 at www.dti.gov.za/bee/generic_code_p1.pdf (accessed on 22/03/07)).
153. 'The Enterprise Development Element, as set out in Code Series 600, measures the extent to which Enterprises carry out initiatives intended to assist and accelerate the development and sustainability of enterprises'. (C000S000 of 2007: Department of Trade and Industry (Final 2007 Codes): Code 000 'Framework for Measuring Broad-Based Black Economic Empowerment': Statement 000 'General Principles and the Generic Scorecard' at paras 7.6 at www.dti.gov.za/bee/generic_code_p1.pdf (accessed on 22/03/07)).
154. 'The Socio-Economic Development and Sector Specific Contributions Element, as set out in Code series 700, measures the extent to which enterprises carry out initiatives that contribute towards Socio-Economic Development or Sector Specific initiatives that promote access to the economy for black people'. (C000S000 of 2007: Department of Trade and Industry (Final 2007 Codes): Code 000 'Framework for Measuring Broad-Based Black Economic Empowerment': Statement 000 'General Principles and the Generic Scorecard' at paras 7.7 at www.dti.gov.za/bee/generic_code_p1.pdf (accessed on 22/03/07)). Note that the Socio-Economic Development and Sector Specific Contributions element, as it appears in the Final 2007 Codes, was previously termed the residual element in both the 2004 Codes and the Phase One 2005 Codes. Although the current substance mirrors that of both the 2004 and 2005 Codes, the formulation of the 2004 Codes differs slightly in that it reflects a list of specific factors that entities are encouraged to consider when undertaking such initiatives.
155. C000S000 of 2007: Department of Trade and Industry (Final 2007 Codes): Code 000 'Framework for Measuring Broad-Based Black Economic Empowerment': Statement 000 'General Principles and the Generic Scorecard' at paras 7.1-7.7 at www.dti.gov.za/bee/generic_code_p1.pdf (accessed on 22/03/07)).

-
156. The DTI Guide to Interpretation (n 133) 6.
157. It should be noted that separate Codes apply to Qualifying Small Enterprises. A discussion of these Codes falls outside the ambit of this paper. However, in the interests of providing a holistic picture, a chart depicting these Codes is reflected in Appendix 2.
158. Emphasis supplied.
159. Section 10 of the BBBEE Act provides: 'Every organ of state and public entity must take into account and, as far as is reasonably possible, apply any relevant code of good practice issued in terms of this Act in--
- (a) determining qualification criteria for the issuing of licences, concessions or other authorisations in terms of any law;
 - (b) developing and implementing a preferential procurement policy;
 - (c) determining qualification criteria for the sale of state owned enterprises; and
 - (d) developing criteria for entering into partnerships with the private sector'.
160. Section 10 (a)-(d) of the BBBEE Act.
161. Hofman 'Legislators and legislation', chapter 2 in a forthcoming work Interpreting Legislation in South Africa to be published by Ampersand Press in 2007 at 25–26. 'The Constitution refers to delegated legislation as "subordinate legislation" or "laws made in terms of an Act of Parliament or provincial Act"'. (Hofman 26).
162. Hofman (n 161) 27.
163. Section 14 of the BBBEE Act provides that: 'The Minister may make regulations with regard to any matter that it is necessary to prescribe in order to ensure the proper implementation of this Act'.
164. Navidas (Pty) Ltd v Essop; Metha v Essop 1994 (4) SA 141 (A).
165. Hofman (n 161) 27.
166. Section 9(1) of the BBBEE Act provides: 'In order to promote the purposes of the Act, the Minister may by notice in the Gazette issue codes of good practice on black economic empowerment that may include--
- (a) the further interpretation and definition of broad-based black economic empowerment and the interpretation and definition of different categories of black economic empowerment entities;
 - (b) qualification criteria for preferential purposes for procurement and other economic activities;
 - (c) indicators to measure broad-based economic empowerment;
 - (d) the weighting to be attached to broad-based black economic empowerment indicators referred to in paragraph (c);
 - (e) guidelines for stakeholders in the relevant sectors of the economy to draw up transformation charters for their sector; and
 - (f) any other matters necessary to achieve the objectives of this Act'.
- Section 9(3) of the BBBEE Act provides: 'A Code of Good Practice issued in terms of subsection (1) may specify--
- (a) targets consistent with the objectives of this Act; and
 - (b) the period within which those targets must be achieved'.
167. Discretion is indicated by the use of the word may.
168. Section 10 of the BBBEE Act.

-
169. See generally s 1(c) of the Constitution on the rule of law. Also see *Dawood and Another v Minister of Home Affairs and Others*; *Shalabi and Another v Minister of Home Affairs and Other*; *Thomas and Another v Minister of Home Affairs and Others* 2000 (1) SA 997 (C).
 170. *Lekhari v Johannesburg City Council* 1956 (1) SA 552 (A).
 171. In *Taj Properties (Pty) Ltd v Bobat* 1952 (1) 723 (N) at 729 Holmes AJ stated '[t]hus in the case of statutes, there is a necessary implication only if effect cannot be given to the statute as it stands unless the provision sought to be implied is read into the statute'.
 172. *The Firs Investments (Pty) Ltd v Johannesburg City Council* 1967 (3) SA 549 (W) at 577.
 173. *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) at para 46 per O'Regan J. Inherent in the doctrine of separation of powers is the respect that the judiciary needs to show for the other arms of government.
 174. *Canca v Mount Frere Municipality* 1984 (2) SA 830 (TK) 832 F-G (approved in *Hoban v Absa Bank Ltd t/a United Bank and Others* 1999 (2) SA 1036 (SCA) at 1044). Also see *Namibian Minerals Corp Ltd v Benguela Concessions Ltd* 1997 (2) SA 548 (A) at 566.
 175. *Balshaw* (n 126) 33.
 176. As an aside, even if the legislature had intended for the private sector to be bound by the Codes, it is unlikely that they would have failed to mention this if one looks at the detail and contingencies provided for in the Act that point to a thoroughly considered piece of legislation.
 177. *Balshaw* (n 126) 18.
 178. C000S000 of 2005: Department of Trade and Industry (Phase One 2005 Codes) Code 000 'Framework for the Measurement of Broad-Based Black Economic Empowerment: Statement 000 'The Organisation of the Codes of Good Practice, The Elements of Broad Based Black Economic Empowerment' at para 3 www.dti.gov.za (accessed on 29/01/07).
 179. It should be noted that the originating source of these codes may not be a Minister of the executive as in the case of the BEE Codes. The value of the comparative analysis lies in ascertaining the highest common substance shared by instruments termed 'codes'.
 180. Subsidiary legislation of the Companies Act 61 of 1973 'The Securities Regulation Code on Take-Overs and Mergers Explanatory Notes' in Strydom EML (ed) *Company Legislation Handbook* 2007 356.
 181. 61 of 1973.
 182. Section 1 'Nature and Purpose of the Code': the Securities Regulation Code on Take-Overs and Mergers (n 180) 356.
 183. Section 1 'Code Responsibilities': the Securities and Regulation Code on Take-Overs and Mergers (n 180) 357.
 184. Section 1 'Nature and Purpose of the Code': The Securities Regulation Code on Take-Overs and Mergers (n 180) 356.
 185. Section 1 'Enforcement of the Code': The Securities Regulation Code on Take-Overs and Mergers (n 180) 357. This is in contrast to the City Code (upon which the SRC is modelled) which is not legally binding. The City Code

-
- on Take over and Mergers is issued by the London Panel on Take-overs and Mergers. (Blackman et al Commentary on the Companies Act 15A-153).
186. King Committee on Good Corporate Governance 'King Report on Corporate Governance 2002 (King II)'.
 187. King Committee on Good Corporate Governance (n 186) at para 1 sub-para 1.5.
 188. Ibid.
 189. For example, 'statutes, regulations, and other authoritative directives regulating their conduct and operation' (King Committee on Good Corporate Governance (n 186) at para 1 sub-para 1.5).
 190. King Committee on Good Corporate Governance (n 186) at para 1:
 - '1. Application of Code
 - 1.1 The Code applies to the following enterprises (hereinafter referred to as 'affected companies'):
 - 1.1.1 All companies with securities listed on the JSE Securities Exchange in South Africa.
 - 1.1.2 Banks, financial and insurance entities as defined in the various legislation regulating the South African financial services sector.
 - 1.1.3 Public sector enterprises and agencies that fall under the Public Finance Management Act and the Local Government: Municipal Finance Management Bill (still to be promulgated) including any department of State or administration in the national, provincial or local sphere of government or any other functionary or institution:
 - exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
 - exercising a public power or performing a public function in terms of any legislation, but not including a Court or a judicial officer, Unless otherwise prescribed by legislation.
 - 1.2 All companies, in addition to those falling within the categories listed above should give due consideration to the application of this Code insofar as the principles are applicable...'
 191. King Committee on Good Corporate Governance (n 186) at para 1 sub-para 1.2.
 192. Labour Relations Act 66 of 1995, schedule 8: Code of Good Practice: Dismissal.
 193. Section 213 of the LRA Act 66 of 1995 provides that ' this Act' includes the section numbers, the Schedules, except Schedules 4 and 8, and any regulations made in terms of section 208, but does not include the page headers, the headings or footnotes.
 194. Section 1(1) of Schedule 8, and s 1(3) of the LRA Act 66 of 1995.
 195. Section 1(1) of Schedule 8 of the LRA Act 66 of 1995.
 196. Soft law is an international law notion connoting 'non-binding instruments or documents'. (Shaw, M International Law 110). Notwithstanding that this is a notion from the international law arena, soft law has become accepted as a species of legal instrument in domestic law.
 197. Shaw International Law 110-111.
 198. Harris Cases and Materials on International Law 62.
 199. Harris (n 198) 61.

-
200. Shaw (n 197) 110-111.
201. Hofman argues that 'strictly speaking there is no such thing as soft law'. (Hofman (n 161) 42.) This proposition is supported by Sztucki (in Festkrift Hjernner (1990) 550-551 as cited in Harris (n 198) 62 who states that 'Primo, the term is inadequate and misleading. There are no two levels or "species of law" – something is law or is not law. Seundo, the concept is counterproductive and even dangerous. On the one hand it creates illusory expectations of (perhaps even insistence on) compliance with what no one is obliged to comply; and on the other hand, it exposes binding legal norms for risks of neglect, and ...law as a whole for risks of erosion, by blurring the threshold between what is legally binding and what is not'. (cited in Harris (n 198) 550-551). Harris counter-argues convincingly that 'while it may be paradoxical and confusing to call something law when it is not law, the concept is nonetheless useful to describe instruments that clearly have an impact...and that may later harden into [law]...'. (Harris (n 198) 62).
202. Harris (n 198) 61. Soft law is 'significant in signalling the evolution and establishment of guidelines which may ultimately be converted into legally binding rules'. (Shaw (n 197) 111).
203. Shaw (n 197) 110-111.
204. C000S000 of 2007: Department of Trade and Industry (Final 2007 Codes): Code 000 'Framework for Measuring Broad-Based Black Economic Empowerment': Statement 000 'General Principles and the Generic Scorecard' at para 8 at www.dti.gov.za/bee/generic_code_p1.pdf (accessed on 22/03/07).
205. Ibid.
206. The definitions section of the BBBEE Act provides that 'organ of state' means
- (a) a national or provincial department as defined in the Public Finance Management Act, 1999 (Act No.1 of 1999);
 - (b) a municipality as contemplated in the Constitution;
 - (c) Parliament;
 - (d) a provincial legislation;
 - (e) a constitutional institution listed in Schedule 1 to the Public Finance Management Act 1999 (Act No. 1 of 1999).
- A 'public entity' means a public entity listed in Schedule 2 or 3 to the Public Finance Management Act, 1999 (Act No. 1 of 1999'.
- 'It is clear from these definitions that the government has included those government departments responsible for issuing licences, the Independent Communications Authority of South Africa (ICASA), the Development Bank of Southern Africa, the Industrial Development Corporation, the Accounting standards Board, the South African Tourism Board, the Medical Schemes Council, the Financial Services Board, and the National Electricity Regulatory'. (Osode (n 3) 116).
207. Section 10 (a)–(d) of the BBBEE Act and Osode (n 3) 115.
208. Osode (n 3) 116.
209. Sowell (n 53) 61.
210. Balshaw (n 126) 25.
211. Balshaw (n 126) 19; 20-25.

-
212. 'An example of the cascade effect is Daimler Chrysler South Africa. They will not be fined or penalized directly for not implementing the Act through legislation. They do, however, do business with the government insofar as the sale of vehicles and trucks is concerned and further rely on government incentives for their exports. It is in this regard that when government deals with them, it applies the legislation to impose direct pressure on DaimlerChrysler South Africa to comply with the broad-based BEE regulations. Further down the supply chain a consultancy wanting to do business with DaimlerChrysler South Africa will be required to comply because DaimlerChrysler South Africa would like to score procurement points to contribute towards their broad-based score'. (Balshaw (n 126) 25-26).
213. The operation of the 'cascade effect' will impact on the profitability of these non-compliant companies, making them high-risk clients. (Daly 'Black Economic Empowerment' (May 2005) Business Day Survey 14; Janisch Keep in Step: Broad-Based BEE for Small Businesses 62.)
214. Janisch Keep in Step: Broad-Based BEE for Small Businesses 62.
215. See Appendix 3 for a chart depicting BBEE status ratings.
216. C000S000 of 2007 (n 204) paras 10.1 & 10.8. This is more starkly articulated in C000S020 of 2005: Department of Trade and Industry (Phase One 2005 Codes) Code 000 'Framework for the Measurement of Broad-Based Black Economic Empowerment: Statement 020 'The Approval, Accreditation and Regulation of BEE Verification Agencies' at para 5.3 at www.dti.gov.za (accessed on 29/01/07).
217. The DTI Guide to Interpretation (n 133) 19.
218. Ibid.
219. Ibid.
220. Ibid.
221. An 'Accreditation Body' means the South African National Accreditation System (SANAS) or any other entity appointed by the Minister from time to time: a. accrediting Verification Agencies; and b. developing, maintaining and enforcing the Verification Standards. (Schedule 1: Part 2 Definitions of the Broad Based Black Economic Empowerment Act Section 9 (1) Codes of Good Practice, Government Gazette No 29617 (Main Codes) at www.dti.gov.za/bee/schedule1.pdf (accessed on 22/03/07)).
222. C000S000 of 2007 (n 204) at paras 10.3 and 10.4.
223. The DTI Guide to Interpretation (n 133) 19.
224. Section 12 of the BBEE Act 53 of 2003 and Osode (n 3) 114.
225. C000S000 of 2007 (n 204) at para 4.1.
226. Section 12 of the BBEE Act mandates the Minister to 'publish in the Gazette for general information and promote a Transformation Charter for a particular sector of the economy, if [he] is satisfied that the Charter-
(a) has been developed by major stakeholders in that sector;
(b) advances the objectives of [the] Act'.
227. C000S010 of 2005: The Department of Trade and Industry (Phase One 2005) Code 000 'Framework for the Measurement of Broad-Based Black Economic Empowerment: Statement 010 'Guidelines for the Development and Gazetting of Transformation Charters' at para 4 at www.dti.gov.za (accessed on 29/01/07).

-
228. Osode (n 3) 114.
229. It was submitted under paragraph 4.3.2 that the Codes are soft law.
230. Section 12 of the BBEE Act.
231. C000S003 of 2007: Department of Trade and Industry (Final 2007 Codes): Code 000 'Framework for Measuring Broad-Based Black Economic Empowerment': Statement 003 'Guidelines for Developing and Gazetting of Transformation Charters and Sector Codes' at para 4.1 www.dti.gov.za/bee/generic_code_p1.pdf (accessed on 22/03/07).
232. Section 12 of the BBEE Act.
233. C000S003 of 2007 (n 231) at para 4.1.
234. Balshaw (n 126) 84 and 91.
235. The DTI Guide to Interpretation (n 133) 2.
236. The Scorecard 'worked on a weighted average, and allocated percentage points to seven criteria (i) Ownership (20%), (ii) Management (10%), (iii) Employment Equity (10%), (iv) Skills development (20%), (v) Preferential Procurement (20%), (vi) Enterprise Development (10%) and (vii) Variable Criteria (10%) (The DTI Guide to Interpretation (n 133) 4).
237. The DTI Guide to Interpretation (n 133) 2.
238. Section 11 of the BBEE Act entitled 'Strategy for broad-based black economic empowerment' provides:
' 11(1) The Minister-
- (a) must issue a strategy for broad-based black economic empowerment;
 - (b) may change or replace a strategy issued in terms of this section.
- (2) A strategy in terms of this section must-
- (a) provide for an integrated co-ordinated and uniform approach to broad-based black economic Empowerment ...;
 - (b) develop a plan for financing broad-based black economic empowerment;
 - (c) provide a system for organs of state, public entities and other enterprises to prepare broad-based black economic empowerment plans and to report on compliance with those plans; and
 - (d) be consistent with this Act'.
239. The Department of Trade and Industry: The Black Economic Empowerment Strategy Document at <http://www.dti.gov.za/bee/complete.pdf> (accessed on 13/06/2007).
240. Kennedy 'Black Economic Empowerment in the South African Business Community: A Beginning of Economic Empowerment of Black South Africans' (1997) MBA thesis, Graduate School of Business, University of Cape Town 31.
241. Ibid.
242. AngloAmerican plc Black Economic Empowerment Report 2002.
243. 'Old Mutual unveils R7.2bn BEE deal' 20 April 2005 at <http://business.iafrica.com/iacnews/433925.htm> (accessed on 29/08/2005).
244. The scheme is known as the 'Nedbank Eyethu Ownership Plan', and is part of a bigger deal aimed at issuing 41.3 million new ordinary Nedbank shares, in an endeavour to see '11.5% of Nedbank's South African operations become black-owned'. 'Nedbank BE share-scheme goes live' Mail & Guardianonline at <http://www.mg.co.za/article> (accessed on 19/08/2005).

-
245. Mthombo IT Services Pamphlet Brainstorm (2005).
 246. Kennedy (n 240) 30.
 247. Ibid.
 248. Balshaw (n 136) 97 citing empowerdex as cited in Safi 'How Broad is Broad-Based Black Economic Empowerment: A critical Analysis of the Challenges facing BEE' Unpublished LLB Mini-Dissertation, University of Cape Town (2006) at 40.
 249. Reddy 'Empowerment on the JSE' (2004) Empowerment 2004 Black Ownership: Risk or Opportunity in Business Map Foundation 56.
 250. Chirwa 'The Long March to Binding Obligations of Corporations in International Human Rights Law' (2006) Vol 22 Issue 1 South African Journal on Human Rights 91.
 251. Shubane, K and Reddy, C 'Behind the Deals' (2005) BusinessMap Foundation: Economic Transformation and Empowerment 12.
 252. Shubane and Reddy (n 251) 12.
 253. Mathabo le Roux 'Mpahlwa, business to clarify BEE codes' Business Day 11 July 2006 at <http://www.businessday.co.za/articles/topstroties.aspx?ID=BD4A230554> (accessed on 11/07/2006).
 254. Ibid.
 255. Ibid.
 256. Code 000S000 of 2007 is a good illustration of this condensation.
 257. These adjustments to the 2004 Codes are well illustrated in C000S000 of 2007 where the abstract has been removed; the lengthy introduction to the Statement has been deleted; definitions have been shortened; several of the qualitative guidelines previously in para 21-34 of the Code 000S000 of 2004 have been deleted; an index illustrating the organisation of the Codes has been inserted, which gives a convenient overview; and lastly, the nature of each individual element is now only briefly enumerated in no more than a single sentence for each element, whereas before each element was assigned no less than two dense paragraphs.
 258. DTI Guide to Interpretation (n 133) & Interpretive Guide to the B-BBEE Codes (June 2007) at <http://www.dti.gov.za/bee/beecodes.htm> (accessed on 20/07/2007).
 259. '2006 - Cabinet Approval and Overview' at <http://www.dti.gov.za/bee/beecodes.htm> (accessed on 10/05/07).
 260. C000S000 of 2007 (n 204) para 8. See Appendix 6 which shows the 2004 comprehensive scorecard in relation to the simplified 2005 and 2007 scorecards.
 261. A useful diagram illustrating the interrelationship between the elements of the scorecard can be found in the '2006 - Cabinet Approval and Overview' (n 259) 6.
 262. For example, the 2005 management control scorecard, with regard to the black executive board member indicator, stated that 'executive members to the board who are black people' earned one weighted point for an entity, and pegged the compliance target for this indicator at 50 per cent of the board composition. The scorecard then reflected, as a separate indicator, the 'executive members of the board who are black women' as worth one

- weighted point, with a compliance target set at 25 per cent. (See C200S200 of 2005: Department of Trade and Industry (Phase One 2005 Codes) Code 200 'Measurement of the Management and Control Element of Broad-Based Black Economic Empowerment: Statement 200 'The General Recognition of Management Control' at 5 at www.dti.gov.za (accessed on 29/01/07).
- The 2007 management control scorecard, however, compresses both of these indicators into one termed the 'Black Executive Directors using the Adjusted Recognition for Gender'. Here the weighted points earnable are set at 2, and the compliance target is posted at 50 per cent. The required gender proportion of this 50 per cent is then factored in by the use of a prescribed formula.
- The formula is $A = B/2 + C$; where A is the Adjusted Recognition for Gender (ARG); B is the percentage of employees in the measurement category that are black people, and C is the percentage of employees in the measurement category that are black women. C is limited to a maximum of 50 per cent of the target (the target being 50 per cent of the entire board).
- The 2005 scorecard method will be termed the 'old formula', and the 2007 scorecard will be termed the 'new formula' for ease of distinction.
263. C000S000 of 2007 (n 204) para 9.
 264. The percentage of employees in the measurement category that are black women. See footnote 262 above for the composition of the formula.
 265. $A = 34\%/2 + 34\%$. A is therefore 51%.
 266. Mathabo le Roux (n 253).
 267. Lester 'Weightings in favour of black women' (May 2005) Black Economic Empowerment: Business Day Survey.
 268. Rumney 'The end-all of BEE-all' (18 January 2007) Mail and Guardian at www.mg.co.za/articlePage.aspx?articleid=296226&area=/insight/insight_economy_business/ (accessed on 29/01/2007).
 269. Wray 'Cabinet-Approved BEE Codes are Drawing Criticism' (8 December 2006) Business Report at www.busrep.co.za (accessed on 08/12/2006).
 270. Rumney (n 268).
 271. Vuyo Jack 'Long Term BEE Ownership must build in liquidity' (12 December 2006) Business Report at www.busrep.co.za/index.php?fArticleId=3530845&fSectionId=2512&fSetId=622 (accessed on 29/01/07).
 272. Ibid.
 273. Ibid.
 274. "Lock-in" clauses prevent black people from selling their shares to non-black people' Vuyo Jack (n 271).
 275. Ibid.
 276. Ibid.
 277. Ibid.
 278. Ibid.
 279. Wray (n 269).
 280. Ibid.
 281. C100S100 of 2007: Department of Trade and Industry (Final 2007 Codes): Code 100 'The Measurement of The Ownership Element of Broad-Based Black Economic Empowerment: Statement 100 'The General Principles for

-
- Measuring Ownership' at para 3.5.1 at
www.dti.gov.za/bee/generic_code_p1.pdf (accessed on 22/03/07).
282. C100S100 of 2007 (n 281) para 3.5.1.2.
283. C100S100 of 2007 (n 281) para 3.5.1.3.
284. C100S100 of 2007 (n 281) para 3.5.1.1.
285. C100S100 of 2007 (n 281) para 3.5.2 at
www.dti.gov.za/bee/generic_code_p1.pdf (accessed on 22/03/07).
286. '2006 - Cabinet Approval and Overview' (n 259) 18.
287. '2006 - Cabinet Approval and Overview' (n 259) 18.
288. Vuyo Jack (n 271) and Rumney (n 268).
289. Vuyo Jack (n 271).
290. Rumney (n 268).
291. Ritchken 'Calling Things By Their Name: BEE in a Globalising Market Economy (2004) Empowerment 2004 Black Ownership: Risk or Opportunity in Business Map Foundation 8.
292. Ibid.
293. Ibid.
294. Ritchken (n 291) 8.
295. C100S103 of 2007: Department of Trade and Industry (Final 2007 Codes): Code 100 'The Measurement of the Ownership Element of Broad-Based Black Economic Empowerment': Statement 103 'The Recognition of Equity Equivalents for Multinationals' at www.dti.gov.za/bee/generic_code_p1.pdf (accessed on 22/03/07).
296. Mathabo le Roux 'Revised BEE codes offer relief to small businesses' at <http://www.bday.co.za> (accessed on 19/12/06).
297. C100S103 of 2007 (n 295) paras 3, 4 and 5.
298. Shubane and Reddy (n 251) 12.
299. Ibid.
300. Ibid.
301. DTI Guide to Interpretation (n 133) 2.
302. Ibid.
303. Ibid.
304. Singh et al (n 141) 18.
305. Ritchken (n 291) 8.
306. C000S010 of 2004: Department of Trade and Industry (Phase One 2004 Codes) Code 000: 'Broad-Based Black Economic Empowerment Framework: Statement 010 'Sector Transformation Charters' at www.dti.gov.za (accessed on 19/12/2006).
307. C000S010 of 2004 (n 306) paras 28-30 and 32.
308. C000S010 of 2004 (n 306) para 29.
309. C000S010 of 2004 (n 306) para 31.
310. As a useful reminder, the BEE element weightings in the 2004 Codes are: (i) Ownership (20%), (ii) Management (10%), (iii) Employment Equity (10%), (iv) Skills Development (20%), (v) Preferential Procurement (20%), (vi) Enterprise Development (10%) and (vii) Residual element (10%).
311. C000S010 of 2004 (n 306) paras 33-34.
312. C000S010 of 2004 (n 306) para 33.
313. C000S010 of 2004 (n 306) para 35.

-
314. C000S010 of 2004 (n 306) para 27.
315. C000S010 of 2005 (n 227) para 5.
316. Ibid.
317. C000S003 of 2007 (n 231) para 2.
318. C000S010 of 2005 (n 227) para 6.
319. Ibid.
320. C000S010 of 2005 (n 227) paras 6.1, 6.2 and 6.3.
321. C000S010 of 2005 (n 227) para 6, especially para 6.10.
322. C000S010 of 2005 (n 227) paras 6.10 and 7.3.
323. See para 4.3.2 above for more detail on the legal status of the Codes of Good Practice. From hereon the Transformation Charters in their instrumental capacity will be referred to as Sector Codes to avoid confusion.
It should also be noted that under the 2004 Codes it was also possible to convert Transformation Charters to Codes of Good Practice in terms of para 44 of C000S010 of 2004.
324. Balshaw (n 126) 84 and 92.
325. C000S010 of 2005 (n 227) para 7.4.
326. C000S010 of 2005 (n 227) para 7.2.
327. C000S010 of 2005 (n 227) para 6.2 especially para 6.2.10.
328. C000S010 of 2005 (n 227) paras 6.1, 6.2 and 6.3.
329. C000S010 of 2005 (n 227) para 6.3.
330. C000S003 of 2007 (n 231) para 3.1.2 at www.dti.gov.za/bee/generic_code_p1.pdf (accessed on 22/03/07).
331. C000S003 of 2007 (n 231) para 3.1.3.
332. C000S003 of 2007 (n 231) para 3.1.4.
333. C000S003 of 2007 (n 231) para 3.1.6. The introduction of a new additional element must be 'justifiable based on sound economic principles, sectoral characteristics or empirical research'. C000S003 of 2007 (n 255) para 3.1.6.
334. C000S010 of 2004 (n 306) para 29.
335. C000S003 of 2007 (n 231) para 6. Code 200 deals with Management Control, and Code 300 with Employment Equity.
336. 55 of 1998.
337. C000S003 of 2007 (n 231) para 3.1.5.
338. Ibid.
339. C000S010 of 2005 (n 227) para 6.2.
340. Sections 4 to 8 of the BBBEE Act.
341. C000S003 of 2007 (n 231) para 5.4.
342. C000S003 of 2007 (n 231) para 5.2.2.3.
343. C000S003 of 2007 (n 231) para 5.2.2.4.
344. C000S000 of 2007 (n 204) para 10.
345. C000S000 of 2007 (n 204) paras 10.6 and 10.7.
346. C000S000 of 2007 (n 204) para 10.
347. C000S003 of 2007 (n 231) para 5.4.3.
348. Balshaw (n 126) 91.
349. C000S010 of 2005 (n 227) para 8 provides: 'All entities are encouraged to develop their own enterprise plans as part of their commitment to BEE; 8.2 An enterprise plan serves as evidence of the voluntary commitment of an enterprise towards achieving those objectives; 8.3 An enterprise BEE plan

-
- does not enjoy any recognition under the Code and will not be gazetted under the Act'. Also see C000S010 of 2004 (n 306) para 48 for the previous wording.
350. C000S010 of 2005 (n 227) para 6.
 351. C000S003 of 2007 (n 231) paras 3.2.2 and 3.2.3.
 352. C000S003 of 2007 (n 231) para 5.
 353. Osode (n 3) 117.
 354. Ibid.
 355. Ibid.
 356. Kennedy (n 240) 42.
 357. Section 11(2)(b).
 358. Osode (n 3) 117.
 359. Ibid.
 360. Burger et al 'Black Economic Empowerment: A review of the impact of funding structures on sustainable BEE transactions' (2003) MBA thesis, Graduate School of Business, University of Cape Town 9; Osode (n 3) 117.
 361. Osode (n 3) 117.
 362. The Department of Trade and Industry: The Black Economic Empowerment Strategy Document at <http://www.dti.gov.za/bee/complete.pdf> (accessed on 13/06/2007).
 363. Osode (n 3) 117.
 364. The IDC 'is a self-financing, state-owned development finance institution with the mandate to be the driving force of commercially sustainable industrial development and innovation, to the benefit of South Africa and the rest of the African continent. The IDC's Empowerment Strategic Business Unit (SBU) and the Wholesale and Bridging Financing Unit are almost exclusively dedicated to financing historically disadvantaged entrepreneurs and contributing to the rapid advancement of empowerment. Investments realised by means of the Risk Capital Facility (RCF) are also aimed at broad-based empowerment initiatives and facilitating development initiatives in rural areas. The key challenge facing the IDC is the growth of the SMME sector to stimulate sustainable development and encourage greater equity in the economy'. (Fubu 'Financial Development initiative: role and future perspectives' (2003) Business Map, Empowerment 2003: State and Market Initiatives Gain Momentum 40-45).
 365. 'Khula Enterprise Finance Limited is an agency of the DTI, established in 1996 to facilitate access to credit for SMME's through various delivery mechanisms. These include commercial banks, retail financial intermediaries (RFIs) and micro credit outlets (MCOs). Khula also provides mentorship services to guide and counsel entrepreneurs in various aspects of managing a business. Khula is a wholesale finance institution, which means that entrepreneurs do not get assistance directly from Khula but through various institutions'. (Khula 2003 cited in Burger (n 360) 21-22).
 366. 'The main objective of the NEF Corporation is to facilitate the redressing of economic inequality, which resulted from the past unfair discrimination against historically disadvantaged persons. It aims to do this by:

-
- Providing historically disadvantaged persons with the opportunity of, directly or indirectly, acquiring shares of interest in the State Owned Commercial Enterprises that are being restructured, or in private business enterprises.
 - Encouraging and promoting savings, investments and meaningful economic participation by historically disadvantaged persons.
 - Promoting and supporting business ventures pioneered and run by historically disadvantaged persons.
 - Promoting the universal understanding of equity ownership among historically disadvantaged persons.
 - Encouraging the development of a competitive and effective equities market inclusive of all persons in the Republic.
 - Contributing to the creation of employment opportunities.'
- NEF 2003 cited in Burger (n 360) 21-22 and Mthombo IT Services Pamphlet (n 245).
367. The DBSA's 'key purpose is to address socio-economic imbalances and help improve the quality of life of the people of South Africa. The core business of the DBSA is the financial and facilitative support for the creation of infrastructure. In addition to the primary focus on infrastructure, the DBSA also attends to short and medium-term rural finance requirements'.
More comprehensively its mandate is to:
- Invest in infrastructure and facilitate the provision of infrastructure development finance.
 - Finance sustainable development in partnership with the public and private sectors.
 - Respond to development demands and act as a catalyst for investment.
- (Fubu 'Financial Development initiative: role and future perspectives' Business Map, Empowerment 2003: State and Market Initiatives Gain Momentum 43).
368. 'The PIC is responsible for the administration and investment of public sector pension and provident funds'.
(Fubu 'Financial Development initiative: role and future perspectives' Business Map, Empowerment 2003: State and Market Initiatives Gain Momentum 40-45).
369. Osode (n 3) 117.
370. Morar 'An analysis of Black Economic Empowerment (BEE): Is BEE being facilitated by the financial service sector?' (1998) MBA thesis, Graduate School of Business, University of Cape Town 14.
371. Table extracted from Morar (n 370) 14 and 16.
372. Mahlangu 'SA Finance sector reaches out' 15 August 2006 at http://www.southafrica.info/doing_business/trends/empowerment/financialcharacter-150806.htm (accessed on 1/06/2007).
373. Mahlangu (n 372).
374. Ibid.
375. Ibid.
376. The Brenthurst Initiative 'is an initiative created by the Oppenheimer family and publicized in 2003. It is a forum to openly discuss issues surrounding the transformation and economic advancement of South Africa. It specifically looks to address three key challenges:

-
- Transformation requirements on a national scale, thereby providing investors with certainty as a result of clear, realistic targets for transformation.
 - The creation of investment incentives that are linked to transformation performance.
 - The closing of the BEE funding gap.’
(Burger (n 360) 24).
377. This was the method adopted in Australia and in Chile. (Burger (n 360) 24).
378. Burger (n 360) 24.
379. Burger (n 360) 10.
380. Ibid.
381. Burger (n 360) 57.
382. Burger (n 360) 58.
383. Burger (n 360) 58.
384. Burger (n 360) 67.
385. 61 of 1973.
386. Desi ‘A Case Study on New South Africa Investment Limited and Black Economic Empowerment Funding Mechanisms in The New South Africa’ (1998) MBA thesis, Graduate School of Business, University of Cape Town 48.
- In terms of a vendor financing scheme, the company selling the equity finances the purchase of shares. The benefit of this scheme is that it eliminates ‘the middle man’ and reduces many finance costs. (Desi 48.)
387. Van der Merwe (n 106) 32.
388. Ibid.
389. Section 38(1) of the Companies Act.
390. Davids ‘The Black Economic Empowerment Phenomenon’ at <http://www.bowman.co.za/Law -Article.asp?id=- 1037871731> (accessed on 16/04/2006).
391. Van der Merwe (n 106) 32.
392. Ibid.
393. Ibid.
394. ‘Move to Company-facilitated transactions is paying off’ at <http://www.realbusiness.co.za/Article.aspx?articleID=3574&typeID=9> (accessed on 25/03/2006).
395. Ibid.
396. With deferred shares, shareholder rights to dividends are deferred until preference shareholders and ordinary shareholders have received their dividend entitlement. These shares may or may not carry different voting rights. Interview with Mr Graham Bradfield, Commercial Law lecturer, University of Cape Town, South Africa. Interview conducted on 16/09/2005.
397. Sowell (n 53) 61.
398. Interview with Mr Graham Bradfield, Commercial Law lecturer, University of Cape Town, South Africa. Interview conducted on 16/09/2005.
399. Ibid.
400. Ibid.
401. Davids (n 390).

-
402. Details of the structure of the Standard Bank deal obtained from an interview with Adam Ismail, partner of Sonnenberg Hoffmann Galombik Attorneys. Interview conducted on 13/03/2006.
403. Davids (n 390).
404. Section 38(2)(d) of the Companies Act 61 of 1973 provides: 'The provisions of subsection (1) shall not be construed as prohibiting...the provision of financial assistance for the acquisition of shares in a company by the company or its subsidiary in accordance with the provisions of section 85 for the acquisition of shares'.
405. Davids (n 390).
406. Ibid.
407. Van der Merwe (n 106) 33.
408. 'Empowerment finance hurdles can be lowered' (August 19 2005) Business Day at 13.
409. Corporate Laws Amendment Act 24 of 2006.
410. Section 9 of the Corporate Laws Amendment Act 24 of 2006.
411. Section 9 of the Corporate Laws Amendment Act 24 of 2006 provides: 'Section 38 of the Companies Act is hereby amended by the insertion after subsection (2) of the following sub-sections:
'(2A) Subsection (1) does not prohibit a company from giving financial assistance for the purchase of or subscription for shares of that company or its holding company, if-
(a) the company's board is satisfied that-
(i) subsequent to the transaction, the consolidated assets of the company fairly valued will be more than its consolidated liabilities; and
(ii) subsequent to providing the assistance, and for the duration of the transaction, the company will be able to pay its debts as they become due in the ordinary course of business; and
(b) the terms upon which the assistance is to be given is sanctioned by a special resolution of members.
(2B) For the purposes of paragraph (2A)(a), the directors must account for any contingent liabilities which may arise to the company, including any contingent liability which may result from giving the assistance'.
412. Kennedy (n 240) 45.
413. Shubane and Reddy (n 251) 15.
414. Balshaw (n 126) 89; Shubane and Reddy (n 251) 15.
415. 'Black Economic Empowerment: Focus on a broad-based philosophy' (May 2005) BusinessDay Survey at 7.
416. Sowell (n 53) 61; Manning (n 58) 24.
417. Safi 'How Broad is Broad-Based Black Economic Empowerment: A Critical Analysis of the Challenges facing BEE' Unpublished LLB mini-dissertation, University of Cape Town (2006) at 39.
418. 'The Emerging Black Middle Class: True Black Economic Empowerment?' at www.sagoodnews.co.za/newsletter/previous_newsletters/24June2005.htm (accessed on 23/09/2006).
419. 'Is South African Black Economic Empowerment a Mining Myth?' at <http://www.minesandcommunities.org/Action/press435.htm> (accessed on 23/04/2005).

-
420. Osode (n 3) 107 and Kennedy (n 240) 32.
 421. Sowell (n 53) 62.
 422. Sowell (n 53) 120. Also see Nesiah Discrimination with Reason?: The Policy of Reservations in the United States, India and Malaysia 30 and 32.
 423. Nesiah Discrimination with Reason?: The Policy of Reservations in the United States, India and Malaysia. 32.
 424. 'The Emerging Black Middle Class: True Black Economic Empowerment?' (n 418).
 425. Ibid.
 426. Balshaw (n 126) 89.
 427. Labour Bulletin 'BEE: What about the workers?' (June/July2005) vol 29 no 3 South African Labour Bulletin 10 at 11.
 428. 'Empowerment: Too Soon to Review BEE - analysts' (12 April 2007) Issue 1803 Legal Brief; Abdul Milazi 'Manuel's criticisms stir BEE controversy' 11 April 2007 at <http://www.businessday.co.za/articles/topstories.aspx?ID=BD4A434341> (accessed 27/04/07).
C000S000 of 2007 (n 204) para 13.2 actually makes provision for continuous review.
 429. 'Empowerment: Too Soon to Review BEE - analysts' (n 428).
 430. Osode (n 3) 119.
 431. Woolley (n 100) 69.
 432. Kennedy (n 240) 45.
 433. Ibid.
 434. C400S400 of 2007 Department of Trade and Industry (Final 2007 Codes) Code 400: 'Measurement of the Skills Development Element of the Broad-Based Black Economic Empowerment: Statement 400 'The General Principles for Measuring Skills Development' at http://www.dti.gov.za/bee/generic_codes_2.pdf (accessed on 22/03/07).
 435. C400S400 of 2007 (n 434) para 2.1.1. See Appendix 8.
 436. C400S400 of 2007 (n 434) para 2.1.2.
 437. C400S400 of 2007 (n 434) para 3.1.2.
 438. C400S400 of 2007 (n 434) para 3.1.3.
 439. C400S400 of 2007 (n 434) para 3.1.4.
 440. Skills Development Act 97 of 1998; C4000S4000 of 2007 (n 434) para 3.1.1; Balshaw (n 126) 125.
 441. Act 9 of 1999.
 442. Act 97 of 1998.
 443. Maserumule and Madikane 'Is the Skills Act working for workers?' (June 2004) vol 28 no 3 June South African Labour Bulletin 30 at 30. This survey forms part of a review of Numsa's collective bargaining strategy.
 444. Maserumule and Madikane (n 443) 31.
 445. Maserumule and Madikane (n 443) 30.
 446. Maserumule and Madikane (n 443) 33.
 447. Bardien 'Is metal getting a colour rinse?' (October/November 2005) vol 29 no 5 South African Labour Bulletin 22 at 23. This article draws on a project titled 'An investigation of BEE in the metals sector of the economy'. The study commissioned by NUMSA is intended to contribute to the union's position on BEE in the sector.

-
448. Ibid.
 449. Bardien (n 447) 23.
 450. Labour Bulletin 'Learnerships gain momentum, but is that enough?' (April 2004) vol 28 no 2 South African Labour Bulletin 46 at 46.
 451. Ibid.
 452. Bardien (n 447) 23.
 453. Mahlangu (n 372).
 454. Maserumule and Madikane (n 443) 32. 'An employer that prepares and submits to the SETA a workplace skills development plan and an implementation report is entitled to a mandatory grant. This grant is equivalent to 15% of its levies in respect of the skills plan and 45% of its levies in respect of the implementation report. Employers may also apply for discretionary grants in respect of learnerships and other occupational skills programmes.' (Cheadle, Thompson and Haysom Black economic empowerment: commentary, legislation and charters 1-19 as cited in Safi (n 417) 34).
 455. Maserumule and Madikane (n 443) 32.
 456. Balshaw (n 126) 123-4, interpreting the 'qualified Empowerdex BEE ratings' cited in Safi (n 417) 34.
 457. Act 9 of 1999.
 458. Balshaw (n 126). 'The SDA is complemented by the Skills Development Levies Act 9 of 1999, which obliges certain employers to contribute 1% of their annual payroll to the South African Revenue Service (SARS). (Balshaw (n 126) 124.) 'SARS in turn distributes 20% of this to the National Skills Fund and 80% to Sector Education Training Authorities (SETAs). The National Skills Fund is employed in training and development programmes. Levies can be reclaimed by contributors in relation to actual expenditure on training'. (Cheadle Black economic empowerment: commentary, legislation and charters 1-19 & Scholtz 'BEE Service Empowerment' (2006) para 1.4. Site hosted by LexisNexis Butterworths (accessed on 20/07/2006) as cited in Safi (n 417) 34).
 459. The BITF is a voluntary association that was established in 1995. It comprises black entrepreneurs and professionals within the ICT industry. ('Blueprint for Black Economic Empowerment' (2000) IT Training Issue 2 at 6.)
 460. 'Blueprint for Black Economic Empowerment' (2000) IT Training Issue 2 at 6. The BITF has instituted a skills development programme which covers, inter alia, technical and business training, sales, marketing and mentorship programmes. 'The BITF believes that by pooling resources, and with support of major corporate industries, it will be possible to create a development infrastructure that will revolutionise the level of black participation within the IT industry'. ('Blueprint' 7).
 461. This success is apparent in that major players in the ICT industry have committed their support to the accredited members of the BITF Institute. These major players include Datatec, Microsoft, and Novell SA. ('Blueprint' (n 460) 6 and 7).
 462. Such development should include the use of learnerships. (Woolley (n 100) 12). A process of mentoring may also be useful, and would ensure a degree of 'intellectual empowerment'. (Kennedy (n 240) 39).

-
463. Maserumule and Madikane (n 443) 32.
464. Maserumule and Madikane (n 443) 30.
465. Maserumule and Madikane (n 443) 33.
466. The Naledi Report was commissioned by Cosatu to investigate investment companies. Labour Bulletin 'The Colour of Money' (June/July 2005) vol 29 no 3 South African Labour Bulletin 4 at 5.
467. Ibid.
468. Ibid.
469. Labour Bulletin (n 466) 7.
470. Ibid.
471. Sithebe is the head of communications for the Communication Workers Union (CWU). ('BEE Deals Overlook Black Staff' (03 May 2007) BusinessDay at <http://www.businessday.co.za/article/technology.aspx?ID=BD4A451766> (accessed on 22/05/2007)).
472. Ibid.
473. Ibid.
474. Labour Bulletin (n 466) 7.
475. Madisha 'The BEEhive empowers the drones not the workers' (June/July 2005) vol 29 no 3 South African Labour Bulletin 8 at 9.
476. Ibid.
477. Ibid.
478. 'Edcon is the holding company that owns Edgars, Jet and others' (Labour Bulletin (n 118) 7).
479. Labour Bulletin (n 466) 7.
480. Ebrahim-Khalil Hassen 'The BEE-hive swarm-if you've got the money, honey' (June 2004) vol 28 no 3 South African Labour Bulletin 26.
481. Osode (n 3) 120.
482. Pinnock 'The ins and outs of structuring deals in South Africa' at <http://www.cliffedekker.co.za/literature/pets/index.htm> (accessed on 16/05/06).
483. 'What is Fronting?' August 2004 at http://www.foundation-development-africa.org/afica_black_business/fronting.htm (accessed on 19/08/2005). Originally at <http://www.capegateway.gov.za>.
484. Singh et al (n 141) 19.
485. 'Sigau guns for BEE "wolves"' in The Mercury Business Report at <http://www.themercury.co.za/index.php?fSEctionId=282&fArticleId=2814616> (accessed on 19/08/2005).
486. Ibid.
487. "Fronts on paper": The documents are legitimate, but the "owners" are unaware of being shareholders, have no control in the company and do not manage any aspect of the company'. (Moloi 'Combating Corruption and Fronting' (Dec/Jan 2006) Government: Building Women 32).
488. "Fictitious companies" are established for the benefit of procuring contracts and on the ground fees accrue to a white company which does all the work'. (Statement by Minister of Public Work Ms Stella Sigcau on the findings of a probe on the extent of fronting in the construction industry at <http://www.info.gov.za/speechless/2005/05080512151001.htm> (accessed on 19/08/2005)).

-
489. "Fronts in Joint Ventures" involve joint ventures being formed between non-BEE contractors and BEE contractors for a specific project in terms of which the BEE company has no responsibilities or control over the project'. (Statement by Minister of Public Work Ms Stella Sigcau on the findings of a probe on the extent of fronting in the construction industry at <http://www.info.gov.za/speechless/2005/05080512151001.htm> (accessed on 19/08/2005).
 490. Moloi 'Combating Corruption and Fronting' (Dec/Jan 2006) Government: Building Women 32.
 491. Statement by Minister of Public Work Ms Stella Sigcau on the findings of a probe on the extent of fronting in the construction industry at <http://www.info.gov.za/speechless/2005/05080512151001.htm> (accessed on 19/08/2005).
 492. Start Up Journal, The Wall Street Journal 'New "Minority" Definition Splits Black Owners' at <http://startup.wsj.com/howto/minorityissues/200002170915-wynter.html> (accessed on 05/02/2007).
 493. Sowell (n 53) 137.
 494. Moloi (n 490) 32.
 495. Ntuli 'Government Gets Tough on BEE Fronting' (August 2005) at http://safrica.info/doing_business/trends/empowerment/bee-public-works-030805htm. (accessed on 19 August 2005).
 496. Statement by Minister of Public Work Ms Stella Sigcau (n 526). Also see Masondo, S 'Fronting costing taxpayers millions' at <http://www.netassets.co.za/include/dynamicContentDEtailPrint.asp?websiteContentlite> (accessed on 19/08/2005).
 497. Lewis (n 78).
 498. C000S001 of 2005: Department of Trade and Industry (Phase Two 2005 Codes) Code 000 'Framework for the Measurement of Broad-Based Black Economic Empowerment': Statement 001 'Fronting Practices and Other Misrepresentation of BEE Status' at www.dti.gov.za (accessed on 29/01/2007).
 499. 'Indicators of fronting risk may be either high-risk or moderate risk in nature'. (C000S001 of 2005 (n 498) para 7).
For an enumeration of these indicators, see C000S001 of 2005 (n 498) paras 7.2 and 7.3.
 500. See C000S001 of 2005 (n 498) para 10. 'The fronting risk indicators will allow Verification Agencies ... to classify Enterprises according to four different levels of Fronting Status ... namely: 10.4.1 Fraud; 10.4.2 Excessive Fronting risk; 10.4.3 High Fronting risk; 10.4.4 Low Fronting Risk'.
 501. See C000S001 of 2005 (n 498) paras 7, 8, 9 and 10.
 502. C000S001 of 2005 (n 498) at para 10.5.
 503. C000S000 of 2007 (n 204) at 10.
 504. C000S000 of 2007 (n 204) at 10.7.
 505. Lewis (n 78).
 506. Daly 'A Recipe for Woe' in Black Economic Empowerment (May 2003) Business Day Survey at 8; Moloi (n 490) 32.
 507. Daly (n 506) 8; Moloi (n 490) 33.
 508. Kennedy (n 240) 32.

-
509. 'The Malaysian Prime Minister, Mahatir bin Mahomed, one of the advocates and architects of the country's affirmative action policies, said in August 2002: '[Receiving preferences] is considered a matter of right and is not valued anymore ... they don't seem to appreciate the opportunities that they get ... they learn nothing about business and become even less capable of doing business and earning an income from their activities.' Sowell (n 53) 74-75.
510. Sowell (n 53) 74.
511. Janisch 'Returning Expats and the Future of South Africa' (15 January 2007) at <http://www.entrepreneur.co.za/BEE/home.aspx> (accessed on 29/01/07).
512. Sowell (n 53) 14 and 187; Safi (n 417) 48.
513. Sweet (n 90) 162-164.
514. Encarta (n 76). Also see Nesiah (n 423) 33.
515. Galenson Labour and Economic Growth in Five Asian Countries: South Korea, Malaysia, Taiwan, Thailand, and the Philippines 18. See also Sowell (n 53) 60 and 76.
516. Balshaw (n 126) 86.
517. C000S000 of 2007: Department of Trade and Industry (Final 2007 Codes): Code 000 'Framework for Measuring Broad-Based Black Economic Empowerment': Statement 000 'General Principles and the Generic Scorecard' at para 8.2 at www.dti.gov.za/bee/generic_code_p1.pdf (accessed on 22/03/07)
518. C000S000 of 2004 (n 158) para 57.
519. C000S000 (n 12) para 8.
520. C000S000 of 2007: Department of Trade and Industry (Final 2007 Codes): Code 000 'Framework for Measuring Broad-Based Black Economic Empowerment': Statement 000 'General Principles and the Generic Scorecard' at para 8.1.3 at www.dti.gov.za/bee/generic_code_p1.pdf (accessed on 22/03/07).
521. C400S400 of 2007 Department of Trade and Industry (Final 2007 Codes) Code 400: 'Measurement of the Skills Development Element of the Broad-Based Black Economic Empowerment: Statement 400 'The General Principles For Measuring Skills Development' at para 6 at http://www.dti.gov.za/bee/generic_codes_2.pdf (accessed on 22/03/07).

BIBLIOGRAPHY

PRIMARY SOURCES

STATUTES

Broad Based Black Economic Empowerment Act 53 of 2003.

Companies Act 16 of 1973.

Constitution of the Republic of South Africa Act 200 of 1993 (interim Constitution).

Constitution of the Republic of South Africa Act 108 of 1996 (final Constitution).

Co-operatives Act 14 of 2005.

Corporate Laws Amendment Bill: Amendment of Act 61 of 1973.

Executive Order 11246 of 1965.

Labour Relations Act 66 of 1995.

Philadelphia Order of 1969.

Skills Development Act 97 of 1998.

Skills Development Levies Act 9 of 1999.

Subsidiary Legislation of the Companies Act 61 of 1973 'The Securities Regulation Code on Take-Over and Mergers: Explanatory Notes' in Strydom EML (ed) *Company Legislation Handbook 2007* 356.

GOVERNING INSTRUMENTS

'A Guide to interpreting the First Phase of the Codes' (2005) at http://www.dti.gov.za/bee/Chapterone_1_11.pdf (accessed on 26/06/06) and Interpretive Guide to the B-BBEE Codes (June 2007) at <http://www.dti.gov.za/bee/beecodes.htm> (accessed on 20/07/2007).

Codes of Good Practice, available at <http://www.dti.gov.za/bee/beecodes.htm> (accessed on 26/01/2007).

Sector Transformation Charters, available at <http://www.dti.gov.za/bee/beecharter.htm> (accessed on 13/02/07).

'South Africa's Transformation: A Strategy for Broad Based Economic Empowerment' available at <http://www.dti.gov.za/bee/bee.htm> (accessed on 12/01/06) and Department of Trade and Industry: The Black Economic Empowerment Strategy Document at <http://www.dti.gov.za/bee/complete.pdf> (accessed on 13/06/2007).

CASES

Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others 2004 (4) SA 490 (CC).

Canca v Mount Frere Municipality 1984 (2) SA 830 (TK) 832 .

Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Other; Thomas and Another v Minister of Home Affairs and Others 2000 (1) SA 997 (C).

The Firs Investments (Pty.) Ltd v Johannesburg City Council 1967 (3) SA 549 (W).

Fullilove v Klutznick, 448 U.S 448 (1979).

Grutter v Bolinger 539 US 306 (2003).

Harksen v Lane NO 1998 (1) SA 300 (CC).

Hoban v Absa Bank Ltd t/a United Bank and Others 1999 (2) SA 1036 (SCA).

Lekhari v Johannesburg City Council 1956 (1) SA 552 (A).

Namibian Minerals Corp Ltd v Benguela Concessions Ltd 1997 (2) SA 548 (A).

National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC).

Navidas (Pty) Ltd v Essop; Metha v Essop 1994 (4) SA 141 (A).

Taj Properties (Pty) Ltd v Bobat 1952 (1) 723 (N).

United States v Paradise 48 US 149 (1987).

SECONDARY SOURCES**BOOKS**

Balshaw et al *Cracking Broad-Based Black Economic Empowerment: Codes and Scorecard unpacked* (2005) Human and Rousseau, Cape Town.

Blackman, MS et al *Commentary on the Companies Act* (2002) Juta, Cape Town.

Cheadle, H et al (with contributions by Paul Benjamin, Tefo Raditapole and Mandy Taylor) *Black economic empowerment: commentary, legislation and charters* (2005) Juta Law, Lansdowne.

De Waal, J et al *The Bill Of Rights Handbook* 3ed (2000) Juta and Co Ltd, Kenwyn.

Drabble, JH *An Economic History of Malaysia, c. 1800-1990: The Transition to modern Economic Growth* (2000) St. Martin's Press, LLC, New York.

Du Plessis, L *An Introduction to Law* (1999) Juta & Co Limited, Western Cape.

Emsley, I *The Malaysian Experience of Affirmative Action: Lessons for South Africa* (1996) Human and Rousseau (PTY) Ltd, Cape Town.

Galenson, W *Labour and Economic Growth in Five Asian Countries: South Korea, Malaysia, Taiwan, Thailand, and the Philippines* (1992) Praeger, New York, West Port, Connecticut London.

Giliomee, H *The Afrikaners: Biography of a People* (2003) Tafelberg Publishers Limited, South Africa & Virginia Press, United States of America.

Haasbroek, DJ *Apartheid: A Constitutional Analysis: Ethnic diversity and the struggle for Political Supremacy* (1981) University of Zululand, South Africa.

Harris, DJ *Cases and Materials on International Law* (2004) Sweet and Maxwell, London.

Higgs, B “‘The Bantusans’: South Africa’s ‘Bantu Homelands’ Policy’ in *La Guma Apartheid: A Collection of Writings on South African Racism By South Africans* (1985) International Publishers, New York.

Hofman, J ‘Legislators and legislation’ chapter 2 in *Interpreting legislation in South Africa* (forthcoming 2007) Ampersand Press.

International Labour Office *Apartheid and Labour: A critical review of the effects of Apartheid on Labour Matters in South Africa* (1985) International Labour Office, Geneva.

International Labour Office *Apartheid in Labour Matters: ILO Policy Statements and Reports concerning ‘Apartheid’ in Labour Matters in the Republic of South Africa, 1964-1966* (1966) International Labour Office, Geneva.

Janisch, P *Keep in Step: Broad-Based BEE for Small Businesses* (2006) Frontrunner Publishing, Northcliff.

Jomo, KS *Growth and Structural Change in the Malaysian Economy* (1990) Cambridge Macmillan Press Limited, London.

Kotz, D et al *Social Structures of Accumulation: The Political Economy of Growth and Crisis* (1994) Cambridge University Press, New York.

Kushner, J *Apartheid In America: A Historical and Legal Analysis of Contemporary Racial Segregation in the United States* (1981) Associated Faculty Press Inc.

Nesiah, D *Discrimination with Reason?: The Policy of Reservations in the United States, India and Malaysia* (2000) Oxford University Press, New Delhi.

Nortje, A 'The origins of Apartheid' in La Guma *Apartheid: A Collection of Writings on South African Racism By South Africans* (1985) International Publishers, New York.

Rhodie, NJ & Venter, HJ *Apartheid: A Socio-historical Exposition of the Origin and Development of the Apartheid Idea* (1959) Haum, Cape Town, Pretoria.

Roskam, KL *Apartheid and Discrimination: Some Remarks with regard to the relationships between the white and respective non-white groups in the Union of South Africa* (1960) Leyden, AW Sythoff, Netherlands.

Shaw, M *International Law* 5 ed. (2003) Cambridge University Press, United Kingdom.

Snodgrass, D S *Inequality and Economic Development in Malaysia* (1980) Oxford University Press, Oxford, New York, Melbourne.

Sowell, T *Affirmative Action Around the World: An Empirical Study* (2004) Yale University Press, New Haven & London.

Swanepoel, B et al *South African Human Resource Management: Theory and Practice* 2ed Juta, Cape Town.

Weaver, R 'The Impact of Ethnicity upon Urban America' in Liebman (ed) *Ethnic Relations in America* (1982) Prentice-Hall Inc., New Jersey.

JOURNAL ARTICLES

Bardien 'Is metal getting a colour rinse?' (October/November 2005) vol 29 no 5 *South African Labour Bulletin* 22.

Bathish & Lowstedt 'Apartheid: Ancient, Past and Present' 1999 *The TRC: Commissioning the Past*, paper presented at conference held 11-14 June, University of the Witwatersrand, unpaginated.

'Black Economic Empowerment: Focus on a broad-based philosophy' (May 2005) *Business Day Survey*.

Botha, A 'Notes on the Phenomena of empowerment as practices as established by Afrikaner business communities-Case Study: SANLAM' (unpublished).

Business International SA 'Apartheid and Business: An Analysis of the Rapidly Evolving Challenge facing Companies with Investments in South Africa' 1980 *Business International* 1.

Cargill 'The Implementation of Broad-Based BEE Models' (2004) *Empowerment 2004 Black Ownership: Risk or Opportunity in Business Map Foundation* 1.

Chirwa, D 'The Long March to Binding Obligations of Corporations in International Human Rights Law' (2006) vol 22 issue 1 *South African Journal on Human Rights* 76.

Crankshaw, O 'Apartheid and Economic Growth: Craft Unions, Capital and the State in the South African Building Industry 1945-1975' (1990) vol 16 no 3 *Journal of Southern African Studies* 503.

Daly 'A Recipe for Woe' in Black Economic Empowerment (May 2003) *Business Day Survey* 8.

Daly 'Black Economic Empowerment' (May 2005) *Business Day Survey* 14.

Ebrahim-Khalil Hassen, 'The BEE-hive swarm-if you've got the money, honey' (June 2004) vol 28 no 3 *South African Labour Bulletin* 26.

Edigheji, O 'The Evolution of Black Economic Empowerment in South Africa: From the lenses of business, the tripartite alliance, community groups, and the apartheid and post-apartheid governments (1985-1990)' (2000) *National Labour and Economic Development Institute* 1.

'Empowerment finance hurdles can be lowered' *Business Day* 19 August 2005.

'Empowerment: Too Soon to Review BEE-analysts' (12 April 2007) Issue 1803 *Legal Brief*.

Labour Bulletin 'BEE: What about the workers?' (June/July 2005) vol 29 no 3 *South African Labour Bulletin* 10.

Labour Bulletin 'Learnerships gain momentum, but is that enough?' (April 2004) vol 28 no 2 *South African Labour Bulletin* 46.

Labour Bulletin 'The colour of money' (June/July 2005) vol 29 no 3 *South African Labour Bulletin* 4.

Lester 'Weightings in favour of black women' (May 2005) *Black Economic Empowerment: Business Day Survey*.

Manning 'Affirmative Action in Malaysia between 1970 and 1990: how successful was it, and what are the lessons for South Africa?' (1993) no 1 *Friedrich Ebert Stiftung: Issues in Development* 1.

Madisha 'The BEEhive empowers the drones not the workers' (June/July 2005) vol 29 no 3 *South African Labour Bulletin* 9.

Maserumule & Madikane 'Is the Skills Act working for workers?' (June 2004) vol 28 no 3 *South African Labour Bulletin* 30.

Osode 'The New Broad-Based Black Economic Empowerment Act: A Critical Evaluation' (2004) vol 18 no 1 *Speculum Juris* 107.

Reddy, C 'Empowerment on the JSE' (2004) *Empowerment 2004 Black Ownership: Risk or Opportunity in Business Map Foundation* 55.

Ritchken, E 'Calling Things By Their Name: BEE in a Globalising Market Economy' (2004) *Empowerment 2004 Black Ownership: Risk or Opportunity in Business Map Foundation* 6.

Scholtz ,W 'BEE Service Empowerment' (2006), site hosted by LexisNexis Butterworths (accessed on 20/07/2006).

Shubane, K & Reddy, C 'Behind the Deals' (2005) *BusinessMap Foundation: Economic Transformation and Empowerment* 1.

Singh, S et al 'Cracking the Codes' (15 April 2005) *Financial Mail* 17.

Sweet, M 'Minority Business Enterprise Programmes in the United States of America: An Empirical Investigation' (2006) vol 33 no 1 *Journal of Law and Society* 162.

Van der Merwe for Werksmans Attorneys 'BEE and the Regulatory Environment' (2004) *Empowerment 2004 Black Ownership: Risk or Opportunity in Business Map Foundation* 31.

Woolley, R 'Everyone's Guide to Black Economic Empowerment and how to implement it' (2005) *Financial Mail* 1.

THESES

Burger, E et al 'Black Economic Empowerment: A review of the impact of funding structures on sustainable BEE transactions' (2003) MBA thesis, Graduate School of Business, University of Cape Town.

Desi 'A Case Study on New South Africa Investments Limited And Black Economic Empowerment Funding Mechanisms in The New South Africa' (1998) MBA thesis, Graduate School of Business, University of Cape Town.

Fubu, Z 'Financial Development initiative: role and future perspectives' (2003) *Business Map, Empowerment 2003: State and Market Initiatives Gain Momentum*.

Kennedy, P 'Black Empowerment in the South African Business Community: A Beginning for Economic Empowerment of Black South Africans' (1997) MBA thesis, Graduate School of Business, University of Cape Town.

Kruger, W G 'Black Empowerment: An Economic Evaluation of Future Investor Attractiveness' (1998) MBA thesis, Graduate School of Business, University of Cape Town.

Morar 'An Analysis of Black Economic Empowerment (BEE): Is BEE being facilitated by the financial service sector?' (1998) MBA thesis, Graduate School of Business, University of Cape Town.

Safi, J 'How Broad is Broad-Based Black Economic Empowerment: A critical Analysis of the Challenges facing BEE' (2006) Unpublished LLB mini-dissertation, University of Cape Town.

REPORTS, PAMPHLETS AND NEWSPAPER ARTICLES

AngloAmerican plc Black Economic Empowerment Report 2002.

BEE Commission 'A National Integrated Black Economic Empowerment Strategy' 2000 *BEE Commission Report*.

'Blueprint For Black Economic Empowerment' (2000) Issue 2 *IT Training* Issue 2.

Books, documents and other material from the archives of Sanlam Life Insurance Limited, located at 2 Strand Road, Bellville, Cape Town, South Africa.

'Empowerment finance hurdles can be lowered' *Business Day* 19 August 2005.

Moloi 'Combating Corruption and Fronting' (Dec/Jan 2006) *Government: Building Women*.

'Mthombo IT Services' Pamphlet (2005) *Brainstorm* unpaginated.

Whyte 'Apartheid and Other Policies' (undated) no. 17 *New Africa Pamphlet* 8 (1947) The Natal Witness Ltd, Pietermaritzburg.

'2006 - Cabinet Approval and Overview' at <http://www.dti.gov.za/bee/beecodes.htm> (accessed on 10/05/07).

INTERNET SOURCES

Abdul Milazi 'Manuel's criticisms stir BEE controversy' 11 April 2007 at <http://www.businessday.co.za/articles/topstories.aspx?ID=BD4A434341> (accessed 27/04/07).

'BEE Deals Overlook Black Staff' (03/05/2007) *BusinessDay* at <http://www.businessday.co.za/article/technology.aspx?ID=BD4A451766> (accessed on 22/05/07)

'Black Economic Empowerment': <http://www.yokogawa.com/za/cp/overview/za-bee.htm> (accessed on 30/07/2005).

'Black Economic Empowerment: Regulatory Article' (15 Feb 2006) at http://bee.sabinet.co.za/bee_regulatory_article2.html (accessed on 05/02/2007).

Brunner 'Timeline of Affirmative Action Milestones' at <http://www.infoplease.com/spot/affirmatvetimeline1.html> (accessed on 30/07/2005).

'Cabinet gives green light to Codes of Good Practice' 7 December 2006 at <http://www.gov.za/article/articleview.asp?current+1&artypeid=1&artid=1350> (accessed on 19/12/2006).

Chay, K and Fairlie, R 'Minority business set-asides and black self-employment' (1998) at <http://econ.ucsc.edu/~fairlie/papers/setaside.pdf#search=%22preferential%20procurement%20the%20USA%20for%20minorities%22> (accessed on 21/06/2006).

Cliffe Dekker 'The Way to BEE' at http://bee.sabinet.co.za?CD_Way2BEE_guide.pdf (accessed on 29/01/2007).

Danwei 'Chinese Fight to be Black' at http://www.danwei.org/china_and_africa/chinese_fight_to_be_black.php (accessed on 05/02/2007).

Dauids, E et al 'The Black Economic Empowerment Phenomenon' at <http://www.bowman.co.za/Law-Article.asp?id=-1037871731> (accessed on 16/04/2006).

'The Emerging Black Middle Class-True Black Economic Empowerment?' at www.sagoodnews.co.za/newsletter/previous_newsletters/24June2005.htm (accessed on 23/09/2006).

Empowerdex 'The Codes Process' at <http://www.empowerdex.co.za/content/Default.aspx?ID=24> (accessed on 06/09/2005).

Encarta Encyclopaedia 'The United States of America', Microsoft ® Encarta ® Online Encyclopaedia 2005 at [http:// Encarta.msn.com](http://Encarta.msn.com) © 1997-2005 Microsoft Corporation. (accessed on 30/07/2005).

'The Evolution of Black Economic Empowerment' *Impumelelo* at <http://www.top300.co.za/Impumelelo/features/feature1.htm> (accessed on 23/04/2005).

'History of Apartheid in South Africa' at http://en.wikipedia.org/wiki/Apartheid#Colour_classification (accessed on 04/02/2007).

'Is South African Black Economic Empowerment A Mining Myth?' at <http://www.minesandcommunities.org/Action/press435.htm> (accessed on 23/04/2005).

Janisch, P 'Returning Expats and the Future of South Africa' (15 January 2007) at <http://www.entrepreneur.co.za/BEE/home.aspx> (accessed on 29/01/2007).

'Key Empowerment Charters' 29 October 2004 at http://www.southafrica.info/doing_business/trends/empowerment/charters.htm (accessed on 19/08/2005).

Lee, A 'What's All the Buzz About?' *Publications* January 2005 at http://www.clasa.co.za/artk_buzz.html (accessed on 30/07/2005).

Lewis 'Women's History: Affirmative Action Review' Part 9 (2003) at http://women.history.about.com/library/etext/gov/bl_gov_aa_09.htm. (accessed on 06/09/2005).

Mahlangu 'SA Finance sector reaches out' 15 August 2006 at http://www.southafrica.info/doing_business/trends/empowerment/financialcharter-150806.htm (accessed on 1/06/2007).

Mathabo le Roux, 'Mpahlwa, business to clarify BEE codes' *Business Day* 11 July 2006 at <http://www.businessday.co.za/articles/topstroties.aspx?ID=BD4A230554> (accessed on 11 July 2006).

Masondo, S 'Fronting costing taxpayers millions' at <http://www.netassets.co.za/include/dynamicContentDEtailPrint.asp?websiteContentID=9> (accessed on 19/08/2005).

'Mbeki Speaks out on BEE, racism' at http://www.skillsportal.co.za/black_economic_empowerment/415010.htm (accessed on 14/04/2005).

'Move to Company-facilitated transactions is paying off' at <http://www.realbusiness.co.za/Article.aspx?articleID=3574&typeID=9> (accessed on 25/03/2006).

Nedbank BEE share-scheme goes live' *Mail & Guardianonline* at <http://www.mg.co.za/article> (accessed on 19/08/2005).

Ntuli, Z 'Government gets tough on BEE fronting' at http://safrica.info/doing_business/trends/empowerment/bee-public-works-030805.htm (accessed on 19/08/2005).

'Old Mutual unveils R7.2bn BEE deal' 20 April 2005 at <http://business.iafrica.com/iacnews/433925.htm> (accessed on 29/08/2005).

Pinnock et al 'The ins and outs of structuring deals in South Africa' at <http://www.cliffedekker.co.za/literature/pets/index.htm> (accessed on 16/05/2006).

Rumney 'The end-all of BEE-all' Mail and Guardian 18 January 2007 at www.mg.co.za/articlePage.aspx?articleid=296226&area=/insight/insight_economy_business/ (accessed on 29/01/2007).

Sharp 'Minority-owned businesses' at <http://www.referenceforbusiness.com/encyclopedia/Man-Mix/Minority-Owned-Businesses.html> (accessed on 20/06/2006).

'Sigau guns for BEE 'wolves' in The Mercury Business Report at <http://www.themercury.co.za/index.php?fSEctionId=282&fArticleId=2814616> (accessed on 19/08/2005).

Start Up Journal, The Wall Street Journal 'New "Minority" Definition Splits Black Owners' at <http://startup.wsj.com/howto/minorityissues/200002170915-wynter.html> (accessed on 05/02/2007).

Statement by Minister of Public Work Ms Stella Sigcau on the findings of a probe on the extent of fronting in the construction industry at <http://www.info.gov.za/speechless/2005/05080512151001.htm> (accessed on 19/08/2005).

Vuyo Jack 'Long Term BEE Ownership must build in liquidity' 12 November 2006 Business Report at www.busrep.co.za/index.php?fArticleId=3530845&fSectionId=2512&fSetId=622 (accessed on 29/01/2007).

'What is Fronting?' August 2004: http://www.foundation-development-africa.org/afica_black_business/fronting.htm (accessed on 19/08/2005). Originally at <http://www.capegateway.gov.za> .

Wray 'Cabinet-Approved BEE Codes are Drawing Criticism' Dec 8 2006 Business Report at www.busrep.co.za (accessed on 08/12/2006)

Untitled, <http://www.busrep.co.za/index.php?fSectionId=553&fArticleId=2605708> (accessed on 30/07/2005).

Untitled, <http://www.richinstyle.com/masterclass/smallerblack/interpretaion.html> (accessed on 19/08/2005).

Untitled, http://www.southafrica.info/pls/procs/iac.page?p_t1=692&p_t2=3185&p_t (accessed on 14/04/2005).

Untitled, <http://www.yokogawa.com/za/cp/overview/za-bee.htm> (accessed on 30/07/2005).

INTERVIEWS

Bradfield, G, Commercial Law Lecturer at the University of Cape Town, South Africa. Interview conducted on 16/09/2005.

Ismail, partner of Sonnenberg Hoffmann Galombik Attorneys, Cape Town, South Africa. Interview conducted on 13/03/2006.

Yeats, J, Commercial Law Lecturer, University of Cape Town, South Africa. Interview conducted on 04/06/2007.

DEVELOPMENT AND LABOUR MONOGRAPHS
(Incorporating Southern African Labour Monographs)

General Editors

D Collier E Kalula R le Roux R van Voore

MONOGRAPHS AND OCCASIONAL PAPERS IN STOCK

- 2/92 Workers in small business: a challenge for the unions by *Darcy du Toit with Deena Bosch* (Occasional paper)
- 1/93 Small businesses: the scope for worker participation by *Rowena Fester and Darcy du Toit* (Occasional paper)
- 1/95 Legal regulation of industrial relations in Tanzania Past experience and future prospects by *Bonaventure Rutinwa*
- 3/95 Labour migrancy in Southern Africa: Prospects for post-apartheid transformation by *Jonathan Crush & Wilmot James Fion de Vletter David Coplan*
- 4/95 Constitutional review of social reform legislation in South Africa: 'A civil society' model by *Theunis Roux*
- 1/96 Occupational health and safety legislation in Southern Africa: Current trends by *Rene Loewenson*
- 1/98 Terms of Employment by *Jan Theron* (Occasional paper)
- 1/99 Labour standards versus job creation? An investigation of the likely impact of the new Basic Conditions of Employment Act on small businesses by *Shane Godfrey with Jan Theron*
- 2/99 Labour standards and regional integration in Southern Africa: Prospects for harmonisation by *Marlea Clarke, Tom Feys and Evance Kalula*
- 1/00 Protecting workers on the periphery by *Jan Theron and Shane Godfrey*
- 1/00 The role of international labour standards in Southern African labour courts by *Joost Kooijmans* (Occasional paper)
- 2/01 The CCMA and small business: The impact of the labour dispute resolution system by *Jan Theron and Shane Godfrey*
- 1/01 Trends in occupational health and safety policy and regulation – issues and challenges for South Africa by *May Hermanus*
- 1/02 Agricultural Workers: A historical and contemporary perspective by *Rochelle Le Roux* (Occasional paper)
- 2003 Le Roux, R & Cornelius, S. *Sport the Right to Participate and Other Legal Issues* Selected papers from the Sports Law Conference held at the University of Cape Town 6-7 February 2003.
- 1/04 Solo, K. Discipline and dismissals in the Botswana public service (*Monograph*)
- 1/04 Professor H Arthurs & Professor Sir Bob Hepple. Constitutionalization of Labour Rights. (*Occasional Paper*)
- 2/04 Law and Labour Market Regulation in East Asia and Southern Africa: Comparative Perspectives by *Colin Fenwick and Evance Kalula* (Monograph).
- 1/05 Bamu, P & Collier, D. Reforming the Microcredit Industry in South Africa: will the proposed National Credit Bill address existing problems and developmental concerns? (*Occasional Paper*).
- 02/05 On the outskirts of fashion: homeworking in the South African clothing industry: the challenge to organisations and regulation. *By Shane Godfrey, Marlea Clarke and Han Theron, with Jennifer Greenburg.* (Monograph)

DEVELOPMENT AND LABOUR MONOGRAPH SERIES
Notes for Contributors

Editorial policy

The *Development and Labour Monograph Series* is an interdisciplinary forum for research and debate. It welcomes contributions on development and labour issues in Southern Africa.

Form and style of submissions:

1. The title of the paper, author's name and address, and a biographical note on her/him should be typed on a coversheet which can be detached from the article. The article can then be sent anonymously to our readers. The biographical notes should be brief and should include such relevant information as your name and institutional affiliation.
2. Abstract: An abstract of up to 200 words should be included. It should be labelled 'Abstract' and should be double-spaced on a separate sheet of paper.
3. Body: All copy should be double-spaced on A4 white bond paper, on one side of each sheet. Margins should be at least 2cms on all sides. The pages should be numbered. Two copies of the paper should be submitted. These will not be returned to the author. Section headings and sub-headings should be clearly indicated.
4. Endnotes: These should be at the end of the text, before the bibliography. They should be indicated by numerals placed in the text. Endnotes are for explanation and comments, not references; they may themselves refer the reader to the bibliography.
5. Bibliography: Either the MLA style or the Harvard style are acceptable. The author will be responsible for submitting the paper in one of these two forms, should a paper be accepted for publication. Once you have chosen one of these styles, you must be consistent throughout the paper.
6. Spelling: Spelling practices should be consistent throughout the paper and should follow the Oxford English Dictionary.
7. If a paper is accepted for publication, authors MUST submit their work on disk in MSWord. Files may be submitted via email to the following address:
faldielah.khan@uct.ac.za

Copyright/authors' copies

1. Authors retain copyright and may reproduce their papers elsewhere as long as acknowledgement is made.
2. Contributors will receive five free copies of the monograph.

Further guidelines are available upon request from the Institute of Development and Labour Law

THE INSTITUTE OF DEVELOPMENT AND LABOUR LAW
University of Cape Town

The Institute of Development and Labour Law was established through the merger of the Labour Law Unit and the Institute of Development Law.

The Institute's objectives are:

- To conduct and commission research into development and labour law issues in Southern Africa;
- To produce and disseminate publications arising out of the research undertaken;
- To convene conferences, seminars and workshops;
- To provide educational and advisory services;
- To establish and foster collaborative links in the region and elsewhere, and provide a reference point for policy and scholarship.

The Institute adopts a "law in context" approach which properly reflects the interdisciplinary character of its work.

The *Development and Labour Monograph Series* is an interdisciplinary forum for research and debate on development and labour issues in Southern Africa. The Institute also publishes occasional papers and reports about ongoing research as well as other types of publications.

Copies of publications and further information may be obtained from

The Institute of Development and Labour Law

University of Cape Town

Private Bag

Rondebosch 7701

South Africa

Tel: 27-21-650 5634

Fax: 27-21-650 5660

Email: faldielah.khan@uct.ac.za

<http://www.labourlaw.uct.ac.za>

Published by the Institute of Development and Labour Law

University of Cape Town, 7701

ISBN 978 0 7992 2334 7

Price in Southern Africa (including VAT and postage): R40.00

Printed by University Document Management Services, Observatory, Cape Town.