UNIVERSITY OF CAPE TOWN
Faculty of Law

DISSERTATION TITLE:

BEE – BASIS, EVOLUTION, EVALUATION
A Critical Appraisal of Black Economic Empowerment in South Africa

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QUALIFICATION
POSTGRADUATE DIPLOMA IN COMMERCIAL LAW

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Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the Postgraduate Diploma in commercial law, in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of Postgraduate Diploma dissertation, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

Signature ……………………………… Date……………………………..
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ABSTRACT

This paper is a reflection of the evolution of Broad-Based Black Economic Empowerment (BBBEE/BEE) and an evaluation of the current state of the programme. BEE is one of the most topical subjects in current South African (SA) economic discourse. Born of a need to remedy the ravages 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 BEE progress, advancement has been marginal. This can be attributed to the various hurdles that stand to hinder the initiative. This paper further highlights challenges that are both intrinsic and extrinsic to the regulatory framework, with a particular focus on problems of: financing; the breadth of broad-based BEE; fraud and; constraints of attitude. This author concludes that BEE, as a work in progress, is a programme that holds great prospects, if only the surmountable hurdles are overcome.
AKNOWLEDGEMENTS

First and foremost, I would like to thank God above for giving me the keenness of understanding and the promptness to learn. I thank Him for showing me how to begin, and for holding me by the hand throughout this work. I would also like to extend thanks to my supervisor, Professor Evance Kalula, for his support and guidance. I would like to sincerely thank Professor Mike Larkin, Graham Bradfield, Adam Ismail, Kelly Phelps, Andrew Sekandi, Jeannette Safi and Thelma Zindoga for their advice, assistance and insight. I would like to express gratitude to my mother, Maureen M’paradzi, for being a constant anchor and source of encouragement. I could not have done it without you! Last but not least, I would like to thank Ryan M’paradzi, Brian M’paradzi, Fungai Mparadzi and Amanda Aliphon for their support.
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<td>African National Congress Empowerment</td>
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<td>SAARF</td>
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<td>SMME</td>
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1. INTRODUCTORY REMARKS

1.1 INTRODUCTION

Black Economic Empowerment (BEE/BBBEE) is an initiative geared towards spreading economic benefits to a broad base of previously disadvantaged persons. The objective of this paper is two fold - first, it intends to critically analyse the regulatory framework of BEE, and secondly it will assess the challenges facing the drive.

The point of departure will be to outline the historical context giving rise to the need for BEE. This will be followed by a comparative assessment of the economic empowerment programmes undertaken in Malaysia and the United States (US). The value of such comparison is not only to illuminate the general nature of such empowerment enterprises, but also to draw lessons for South Africa (SA) from these experiences. The paper will then turn to a general discussion of the regulatory framework, with a particular focus on the key regulatory instrument - the Codes of Good Practice (the Codes). The second half of the paper will deal with those challenges that manifest within the regulatory framework, and then proceed to consider particularly stark challenges that stand to impede BEE in general. This paper concludes 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 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. The programme aims to transform the South African (SA) economic landscape by ensuring participation of the majority of the population in the economy through the transfer of equity, and the

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redistribution of control over the country’s economic resources. The need for such an undertaking is born out of a constitutional imperative to rectify the gross economic disempowerment of the non-White majority during Apartheid that has resulted in a current mainstream economy that excludes the majority of citizens. As a point of departure, this paper will now briefly highlight the economic disempowerment mechanisms employed by the Apartheid Nationalist government.

1.1.2 Apartheid and Disempowerment

Apartheid was a system of government predicated on policies of ‘racial distinction’, ‘ethnic differentiation’, and segregation. The professed rationale behind Apartheid was that unified citizenship and integration of SA society was not feasible. Under the guise of promoting ‘the right to self-determination’, the notion of separate development was considered not only desirable but necessary. Each ethnic group was designated to its own

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2 BEE Commission (n 1) 2.
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’ The TRC: Commissioning the Past, Conference held 11-14 June 1999 University of the Witswatersrand unnumbered). 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 English 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 ends 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.)
7 Haasbroek (n 6) 37.

This segregation pervaded all spheres of life, including cultural, economic, social, political,…and territorial spheres. (Rhoadie 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.
geographical location with the objective of establishing a self-sufficient area. This separation was purported to be a method of preventing racial clashes and friction.

The actual rationale for the segregationist regime was the survival of the White Afrikaner minority in SA. To this end, the Nationalist Party (NP) leaders pursued policies that systematically disempowered Blacks, Coloureds and Asians. This paper will 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’. As a solution to this conundrum, the NP channelled its efforts towards eradicating permanent Black settlements within White areas and encouraged instead migratory labour. As a consequence of this policy, the homelands were established and the pass laws were

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12 Haasbroek (n 6) 5.
13 This was one of the reasons proffered by Prime Minister Strijdom of the Nationalist Party. 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.
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 home lands (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.) 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
introduced. The pass laws together with a compendium of legislation had the detrimental effect of reducing the scope of employment options available to Blacks and diminishing the bargaining power of these workers. This was compounded by the temporary nature of employment, which served to preclude prospects of promotion and proficiency in a particular job. Generally, the jobs available to Africans in the White areas were poorly paid and required no skills. Together with the statutory implementation of job reservations and the institutionalisation of ‘customary exclusions’, the plight of non-Whites was entrenched.

In light of this historical context the BEE programme was initiated. An enterprise of this type is not peculiar to SA however, as is evident from the Malaysian and the US empowerment programmes. These foreign experiences will now be discussed for their comparative value.


21 Nortje (n 5) 25.
23 This was so because the passes restricted free movement. (Bathish et al ‘Apartheid: Ancient, Past and Present’ 1999 The TRC: Commissioning the Past, Conference held 11-14 June 1999 University of the Witswatersrand unnumbered).

28 ‘Section 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 S.A (n 17) 87).

29 ‘Section 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 S.A (n 17) 87).


Job reservations were measures that reserved jobs for Whites, thus protecting White workers from possible competition from other races. They 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).
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 S.A (n 17) 88).
2. A COMPARATIVE ASSESSMENT OF ECONOMIC EMPOWERMENT

The Malaysian and US programmes are particularly interesting as, empowerment in Malaysia, like in SA, strives to uplift a majority and so provides a useful yardstick for comparison, whereas the US initiative looks to empower a minority. Several similarities and lessons can be teased out from these experiences 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% of the Malaysian population. The rest of the population comprises 24% Chinese and 7% Indian. 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. Notwithstanding the preferences, the Bumiputera’s have always played a limited role in the country's economic development. This situation has 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. 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, which resulted in Chinese domination in skilled employment,

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31 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 (33) 34). The scope of this paper will be limited to a discussion of empowerment of Blacks.
32 These are statistics as documented in 2004. (Sowell, T Affirmative Action Around the World: An Empirical Study 56.)
34 Sowell (n 33) 58.
35 Sowell (n 33) 56.
36 Sowell (n 33) 56.
37 Sowell ( n 33) 57.
leaving the Malays in the impoverished recesses of unskilled work. There was thus a dire need to remedy these economic imbalances and as a result the New Economic Policy (NEP) was launched in 1970. 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.

2.1.2 The New Economic Policy (NEP) 1970-1990

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

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39 Sowell (n 33) 60. See also Manning (n 38) 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 marginalization. Instead the NEP, under the guise of pursuing racial equalization, was really an attempt to rectify ‘embarrassing ethnic imbalances’ in the economy. (Sowell (n 33) 63).
40 Galenson Labour and Economic Growth in Five Asian Countries: South Korea, Malaysia, Taiwan, Thailand, and the Phillipines 18. See also Sowell (n 33) 60.
41 Manning (n 38) 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).
42 Manning (n 38) 4.
43 This would be done primarily by ‘increasing the numbers of Bumiputera in professional occupations’ and improving the 2% Malay corporate equity holdings by 1990. (Manning (n 38) 5).
44 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.
45 Sowell (n 33) 62.
46 Sowell (n 33) 61.
2.1.3 Evaluation of the Preference Policy

The Malaysian empowerment programme is one of the most successful in the world.\(^{47}\) This is evidenced by the relative progress of the targeted group.\(^{48}\) As regards the success of the NEP’s first objective (poverty reduction), the level of poverty among the Bumiputera had been reduced from 64.8% in 1970 to 23.8% by 1987.\(^{49}\) With regard to the second objective of restructuring the economic society and employment, success is apparent in that 21% (of the targeted 30%) of corporate stock had been transferred to the Malays by 1995,\(^{50}\) which served to nurture the creation of a Bumiputera middleclass.\(^{51}\) The shortcoming however, was that the majority of the intended beneficiary groups were confined to low skilled, low paying jobs.\(^{52}\)

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 excelled,\(^{53}\) 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.\(^{54}\)

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\(^{47}\) Emsley The Malaysian Experience Of Affirmative Action: Lessons for South Africa 7. See also Sowell (n 35) 75.

\(^{48}\) Sowell (n 33) 75.

\(^{49}\) Manning (n 38) 24.

\(^{50}\) Sowell (n 33) 61. The problem, however, was that such transfers were biased in favour of the elites.

\(^{51}\) Manning (n 38) 24.

\(^{52}\) Manning (n 38) 24.

\(^{53}\) Sowell (n 33) 75.

\(^{54}\) Emsley ( n 47) 7. Important aspects that facilitate such growth are economic stability, and poverty alleviation through government intervention. (Emsley (n 47) 8-9.)
2.2 EMPOWERMENT IN THE UNITED STATES OF AMERICA

2.2.1 A History of Segregation: Economic Disempowerment of a Minority

In the US, Blacks make up a mere 12% of the population. Similar to the SA situation, the need to pursue an economic empowerment strategy was born out of a history of segregation. Blacks were largely excluded from the mainstream economy as a result of ‘job discrimination’. They were also denied financial credit, prejudiced in the ownership of businesses and marginalised in the procurement of government contracts.

2.2.2 Economic Empowerment

Although the government provides loans and grants, the primary empowerment mechanism employed, at both federal and state level, has been preferential procurement policies structured in favour of minority groupings. Such preferences manifest as ‘set asides’, ‘bid price preferences’ and ‘goals programmes’, and advancement through these

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55 Sowell (n 33) 116. The scope of 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 33) 116.)


57 Weaver ‘The Impact of Ethnicity upon Urban America’ in Liebman (ed) Ethnic Relations in America 72.

58 Weaver (n 57) 71.


61 Lewis (n 59).


63 In terms of Bid Price Preferences, SDB’s are afforded a 10% bid preference. (Lewis (n 59).

mechanisms has been buttressed by executive orders and judicial decisions generally decided in favour of minority empowerment.\textsuperscript{65}

2.2.3 Evaluation of the Preference Policy

The procurement preferences have been relatively successful in empowering minority businesses.\textsuperscript{66} The 5\% participation target was reached at state level by 1993, and contracts to minority firms accounted for 6.4\% of the overall dollar value.\textsuperscript{67} Furthermore, between 1982 and 1991, there was a 24\% increase of all ‘federal procurement contracts’ in excess of USD 25 000\textsuperscript{68} with similar trends apparent at state level.\textsuperscript{69} 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.\textsuperscript{70} Another insidious weakness is evidenced by the programme’s failure to realise its subsidiary objective of unemployment reduction.\textsuperscript{71} 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 with a jaundiced eye.\textsuperscript{72}

In light of this historical and international context, this essay will now turn to focus on the nature of the SA Empowerment programme: Black Economic Empowerment.


\textsuperscript{66} Lewis (n 59).

\textsuperscript{67} \textit{Ibid}.

\textsuperscript{68} \textit{Ibid}.

\textsuperscript{69} ‘Agency-level data show that for example between 1985 and 1994, contracting with SDB’s grew from 2.1\% of Department of Defence procurement to 5.5\%, an increase of more than 3 billion’. (Lewis (n 59))


\textsuperscript{72} Sweet (n 71) 180.
3. BLACK ECONOMIC EMPOWERMENT

3.1 BEE: A REITERATION

As highlighted above, BEE is necessary to remedy the economic imbalances perpetuated during Apartheid. At the introduction of democracy, discussions were held as to the best strategy to pursue BEE. After 1995, these discussions resulted in active involvement by the public and private sectors through which multiple initiatives sought to spread economic power within the Black population. By 1997, the Black Management Forum (BMF) perceived that BEE was not going well, and the independent BEE Commission (BEECom) was consequently established in 1998 to ascertain the challenges hindering significant Black participation and propose a viable BEE strategy. The BEECom subsequently released a comprehensive report on BEE in 2000 prescribing an Integrated National BEE Strategy as a solution to the BEE complexities, and recommended that national legislation be enacted to facilitate empowerment. This recommendation culminated in the enactment of the Broad Based Black Economic Empowerment Act 53 of 2003 (BBBEE Act) to be analysed below.

As it stands, BEE is a process aimed at strategically transforming the SA economy by, inter alia, spreading equity holdings to incorporate previously disadvantaged South

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73 The first democratic elections were held in 1994.
74 Osode (n 3)108.
75 Ibid.
76 Ibid.
77 Ibid.
78 Ibid.
80 Osode (n 3) 109.
81 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.
Africans, and re-organising management structures, and ensuring greater participation of the majority in the economy in order to ensure ‘economic justice’.  

BEE is governed by several instruments and this paper will now turn to provide an overview of the BEE regulatory framework.
4. THE BEE REGULATORY FRAMEWORK

This section of the paper will entail a critical discussion of the constitutional imperative, the BBBEE Act,\textsuperscript{86} the Codes of Good Practice (the Codes),\textsuperscript{87} 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 in order. It is submitted that the regulatory instruments governing BEE rest in the following hierarchy, listed from most to least binding: The Constitution;\textsuperscript{88} the BBBEE Act;\textsuperscript{89} the Codes; the Transformation Charters,\textsuperscript{90} 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.\textsuperscript{91} On the one hand s 9 (2) imposes an obligation on the state to undertake ‘legislative and other measures to protect persons disadvantaged from unfair discrimination’.\textsuperscript{92} On the other hand, it has been argued that BEE

\begin{itemize}
\item \textsuperscript{86} Act 53 of 2003.
\item \textsuperscript{87} Cliffe Dekker Attorneys uses ‘the following format to describe individual statements in the Codes: C000S000 represents Code 000 Statement 000, and C100S100 represents Code 100 Statement 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).) I will adopt this same format in this paper.
\item \textsuperscript{88} The Constitution of the Republic of South Africa, Act 108 of 1996.
\item \textsuperscript{89} Act 53 of 2003.
\item \textsuperscript{90} Van der Merwe for Werksmans Attorneys ‘BEE and the Regulatory Environment’ (2004) Empowerment 2004 Black Ownership: Risk or Opportunity in Business Map Foundation 32.
\item \textsuperscript{91} The right to equality is embodied in Section 9 of the Constitution. Section 9 provides:
\begin{itemize}
\item (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
\item (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.
\item (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.
\item (4) No person may unfairly discriminate directly or indirectly against anyone one or more grounds listed in terms of sub section
\item (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
\item (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair'.
\end{itemize}
\item \textsuperscript{92} 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.
\item \textsuperscript{82} Section 9 (2) of The Constitution of the Republic of South Africa, Act 108 of 1996.
\end{itemize}
amounts to reverse racism\textsuperscript{93} 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,\textit{ inter alia}, race and gender.\textsuperscript{94} It is submitted that BEE \textit{prima facie} amounts to unfair discrimination, but that it is seen as protection of the substantive right to equality\textsuperscript{95} and is thus reasonable and justifiable in terms of s 36 of the Constitution.\textsuperscript{96} In the Constitutional Court case of \textit{Bato Star},\textsuperscript{97} Ngcobo J succinctly encapsulates the nature and implications of this constitutional imperative, stating that

\begin{quote}
\ldots transformation is required by\ldots the Constitution\ldots and change sometimes comes at a cost\ldots 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\ldots [but] these are some of the challenges we will have to confront as a nation in transition.\textsuperscript{98}
\end{quote}

\section*{4.2 THE BROAD-BASED BLACK ECONOMIC EMPOWERMENT ACT 53 OF 2003}

The BBBEE Act\textsuperscript{99} is legislation as envisaged by s 9(2) of the Constitution and is the primary regulatory instrument of BEE. The BBBEE Act\textsuperscript{100} 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

\begin{itemize}
\item \textsuperscript{93} ‘Mbeki Speaks out on BEE racism’ at http://www.skillsportal.co.za/black_economic_empowerment/415010.htm (Accessed on 14/04/05).
\item \textsuperscript{94} Section 9 (3) of The Constitution of the Republic of South Africa, Act 108 of 1996.
\item \textsuperscript{95} 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 \textit{The Bill of Rights Handbook} 184.)
\item \textsuperscript{96} Section 36 of the Constitution provides:
\begin{itemize}
\item '(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-
\begin{itemize}
\item the nature of the right;
\item the importance of the purpose of the limitation;
\item the nature and extent of the limitation;
\item the relation between the limitation and the its purpose; and
\item less restrictive means to achieve the purpose.
\end{itemize}
\item (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'.
\end{itemize}
\item \textsuperscript{97} \textit{Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others} 2004 (4) SA 490 (CC) at para 106.
\item \textsuperscript{98} Ibid.
\item \textsuperscript{99} Act 53 of 2003.
\item \textsuperscript{100} Ibid.
the BBBEE Act\textsuperscript{101} is framed in broad terms this is, in general, unproblematic because it is supplemented by the detailed directives contained in the Codes. The BBBEE Act\textsuperscript{102} is relatively uncontroversial, however 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’.\textsuperscript{103} It is submitted that the non-exhaustive list is compatible with the dynamism of BEE and the multi- dimensional socio-economic objective,\textsuperscript{104} and affords government the leeway to adopt additional strategies not already enumerated in the Act.\textsuperscript{105} This open-ended list provides flexibility and is a clear strength of the Act.\textsuperscript{106}

The beneficiaries of the Act\textsuperscript{107} are ‘Black people’ defined as Africans, Coloureds and Indians.\textsuperscript{108} This broad definition extends further to include ‘women, workers, youth, people with disabilities and people living in rural areas’.\textsuperscript{109} It is clear that this definition specifically mentions groups ‘historically [susceptible] to disempowerment’\textsuperscript{110} and thus reflects the intention of the legislature to spread preferences beyond the ‘new Black elite’.\textsuperscript{111} This definition has been qualified by C000S000,\textsuperscript{112} 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]’\textsuperscript{113} or who, were it not for

\begin{footnotesize}
\begin{enumerate}
\item \textit{Ibid.}
\item \textit{Ibid.}
\item Section 1 of the BBBEE Act 53 of 2003 and Osode (n 3) 110. S 1 provides that ‘These strategies include but are not limited to –
\begin{enumerate}
\item increasing the number of black people that manage, own and control enterprises and productive assets;
\item facilitating ownership and management of enterprises and productive assets by communities, workers, cooperatives and other collective enterprises;
\item human resources and skills development;
\item achieving equitable representation in all occupational categories and levels in the workforce;
\item preferential procurement; and
\item investment in enterprises that are owned or managed by black people’.
\end{enumerate}
\item Osode (n 3) 111.
\item Osode (n 3) 111.
\item Act 53 of 2003.
\item \textit{Ibid.}
\item Section 1 of the BBBEE Act 53 of 2003 and Osode (n 3) 112.
\item \textit{Ibid.}
\item Osode (n 3) 112.
\item Osode (n 3) 111.
\item C000S000 of 2005 (n 112) para 1.3.1 and para 1.3.2.
\end{enumerate}
\end{footnotesize}
the pre-1993 Apartheid regulations, would have been entitled to be naturalised prior to the commencement of the Interim Constitution, but only acquired citizenship after its enactment.\textsuperscript{114} This supplementation of the definition by C000S000\textsuperscript{115} serves to counter previous arguments that the BBBEE Act\textsuperscript{116} 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\textsuperscript{117} carves.

Two interesting issues arise from this definition of ‘Black people’. First, under Apartheid people were classified as either Black, White, Coloured or Asian.\textsuperscript{118} Although the Asian group mostly constituted Indians,\textsuperscript{119} other races considered Asian,\textsuperscript{120} for example Chinese people, are not covered by the Act.\textsuperscript{121} This is a clear oversight on the part of the legislature. The second issue relates to the mention of communities as qualified candidates of BEE. This is encouraging for those who support ‘communitarianism’,\textsuperscript{122} however, whether communities will realistically materialise as beneficiaries (especially in light of the present preoccupation of empowerment through equity transfer and management control)\textsuperscript{123} will depend on how well the BEE custodians organise and support them.\textsuperscript{124}

Apart from these concerns, the BBBEE Act\textsuperscript{125} is a commendable piece of legislation, and many potential shortcomings are more than likely compensated for by the comprehensive Codes of Good Practice.

\begin{footnotesize}
\begin{itemize}
  \item[\textsuperscript{114}] C000S000 of 2005 (n 112) para 1.3.3.
  \item[\textsuperscript{115}] C000S000 of 2005 (n 112).
  \item[\textsuperscript{116}] Act 53 of 2003.
  \item[\textsuperscript{117}] \textit{Ibid.}
  \item[\textsuperscript{118}] ‘History of Apartheid in South Africa’ at \url{http://en.wikipedia.org/wiki/Apartheid#Colour_classification} (Accessed on 04/02/07).
  \item[\textsuperscript{119}] \textit{Ibid.}
  \item[\textsuperscript{120}] For example the ‘Chinese were classified [under Apartheid] as either non-European or non-white’. Danwei ‘Chinese Fight to be Black’ \url{http://www.danwei.org/china_and_africa/chinese_fight_to_be_black.php} (Accessed on 05/02/07).
  \item[\textsuperscript{121}] Act 53 of 2003.
  \item[\textsuperscript{122}] Osode (n 3) 111.
  \item[\textsuperscript{123}] Balshaw et al \textit{Cracking Broad-Based Black Economic Empowerment: Codes and Scorecard unpacked} 76.
  \item[\textsuperscript{124}] Osode (n 3) 111.
  \item[\textsuperscript{125}] Act 53 of 2003.
\end{itemize}
\end{footnotesize}
4.3 THE CODES OF GOOD PRACTICE

Section 9 of the Act empowers the Minister of Trade and Industry to issue Codes of Good Practice on BEE. In issuing these Codes the Minister must take into account a strategy issued in terms of s 11 which ‘may specify targets consistent with objectives of the Act as well as the period within which those targets must be achieved’. In terms of s 9, 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.

In substantial compliance with the above procedure, the first phase of the Codes were tabled and released for public comment by the Department of Trade and Industry (DTI) in December 2004 (The Phase One 2004 Codes). The final draft of phase one was released in November 2005 (The Phase One 2005 Codes). 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). Both phases have since been approved by Cabinet and, at time of writing, it was projected that both sets of Codes would be gazetted early 2007 which will render them official.

Before the Codes were instituted, the Strategy Document and several Transformation Charters governed BEE, but these instruments fell short in several respects. The Strategy did not provide practical guidelines for implementation, and disparities between the Transformation Charters in relation to definitions, standards, and

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126 These will be referred to as the Codes.
127 Act 53 of 2003
128 Section 9 (1) of Act 53 of 2003 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…’.
129 S 9 (2) of the BBBEE Act 53 of 2003.
130 S 9 (3) of the BBBEE Act 53 of 2003. Phraseology extracted from (Osode (n 3) 114.
133 The DTI Guide to Interpretation (n 132) 5.
136 Discussed in para 4.5 below.
137 Discussed in para 4.4 below.
138 The DTI Guide to Interpretation (n 132) 2.
targets in the implementation of BEE resulted in disparate progress,\(^{139}\) BEE deals falling short of the empowerment standard,\(^{140}\) and leeway for entities to evade the requirements of the BBBEE Act.\(^{141}\) In an endeavour to counteract these systemic difficulties, the BBBEE Act\(^ {142}\) was enacted in 2004. Although the Act\(^ {143}\) 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.\(^ {144}\) They are an endeavour to provide uniform regulations and indicators for empowerment transactions concluded in every sector,\(^ {145}\) and ensure that companies not accounted for by the Charters are included in the purview of empowerment.\(^ {146}\) An additional objective of the Codes is the institution of structures that facilitate the implementation and appraisal of the initiative. In this vein, the Codes make provision for the institution of verification and accreditation agencies that are intended to facilitate, standardise, and validate BEE transactions.\(^ {147}\) In a nutshell the Codes were designed to ensure ‘real empowerment’\(^ {148}\) by giving content to the regulatory framework and unifying the system.

\(^{139}\) The DTI Guide to Interpretation (n 132)3.
\(^{140}\) Singh & Jekwa et al ‘Cracking the Codes’ (2005) *Financial Mail* April 15 at 19.
\(^{141}\) The DTI Guide to Interpretation (n 132) 3.
\(^{142}\) Act 53 of 2003.
\(^{143}\) *Ibid.*
\(^{144}\) The DTI Guide to Interpretation (n 132) 3.
\(^{145}\) Singh (n 140) 19.
\(^{146}\) *Ibid*
\(^{147}\) The DTI Guide to Interpretation (n 132) 3. Verification and Accreditation Agencies are discussed in para 4.3.4 below.
\(^{148}\) Singh (n 140) 19. Real empowerment means that beneficiaries should be able to service their debt and thus take ownership of shares allocated to them. (Singh (n 140) 19).
4.3.1. The Structure and Content of the Codes

There are three core components and seven sub-elements of BBBEE. These are reflected diagrammatically below.149

![Diagram showing the structure of the BBBEE codes]

The first component is that of ‘Direct Empowerment’, which comprises the ‘Ownership’ and ‘Management’ elements; secondly, the ‘Human Resource Development’ component, which comprises the ‘Employment Equity’ and ‘Skills Development’ elements; and lastly ‘Indirect Empowerment’, which comprises the ‘Preferential Procurement’, ‘Enterprise Development’ and ‘Residual’ elements.150 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’ ones.151 Charts detailing the specifics of the Codes are attached as APPENDIX 1.152

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149 Balshaw (n 123) 76.
150 CO00S000 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 123) 75-76. As a matter of interest, the residual element includes Corporate Social Development.
151 The DTI Guide to Interpretation (n 132) 6.
152 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.
4.3.2 The Binding Nature of the Codes of Good Practice

Section 10 of the BBBEE Act\textsuperscript{153} states that ‘Every organ of state and public entity \textit{must}\textsuperscript{154} take into account and, as far as is reasonably possible, apply any relevant Code of Good Practice issued in terms of [the] Act’.\textsuperscript{155} The use of the word \textit{must} indicates the mandatory obligation on the state and public entities to comply with the Codes when determining licences, concessions, procurement policies,\textsuperscript{156} ‘the sale of state owned enterprises’,\textsuperscript{157} and ‘the entering into partnerships with the private sector’.\textsuperscript{158} However, the BBBEE Act\textsuperscript{159} 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 only bind public entities. This unilateral binding nature of the Codes renders them \textit{sui generis} and this paper will 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 BBBEE Act,\textsuperscript{160} 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 recent phenomenon termed ‘delegated legislation’.\textsuperscript{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.

\textsuperscript{153} Act 53 of 2003.
\textsuperscript{154} My emphasis.
\textsuperscript{155} Section 10 of the BBBEE Act 53 of 2003 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’.
\textsuperscript{156} Section 10 (a) and (b) of the BBBEE Act 53 of 2003
\textsuperscript{157} Section 10 (c) of the BBBEE Act of 53 of 2003.
\textsuperscript{158} Section 10 (d) of the BBBEE Act 53 of 2003.
\textsuperscript{159} Act 53 of 2003.
\textsuperscript{160} \textit{Ibid.}
This conclusion may be doubtful however, when one considers the fact that delegated legislation usually takes the form of regulations or proclamations.\textsuperscript{162} Furthermore, s14 of the Act\textsuperscript{163} 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 \textit{ex abundanti cautela},\textsuperscript{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 \textit{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.\textsuperscript{165} This paper argues 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 Act\textsuperscript{166} list factors that \textit{may}\textsuperscript{167} be included in the Codes, they are in fact limited in their mandatory application to state entities.\textsuperscript{168} It is submitted that the provision in the Act\textsuperscript{169} 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.

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\textsuperscript{162} Hofman (n 161) 27.
\textsuperscript{163} Section 14 of the BBBEE Act 53 of 2003 provides: ‘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’.
\textsuperscript{164} \textit{Navidas (Pty) Ltd} v \textit{Essop; Metha v Essop} 1994 (4) SA 141 (A).
\textsuperscript{165} Hofman (n 161) 27.
\textsuperscript{166} Section 9 (1) of Act 53 of 2003 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-
\begin{itemize}
\item[(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;
\item[(b)] qualification criteria for preferential purposes for procurement and other economic activities;
\item[(c)] indicators to measure broad-based economic empowerment;
\item[(d)] the weighting to be attached to broad-based black economic empowerment indicators referred to in paragraph (c);
\item[(e)] guidelines for stakeholders in the relevant sectors of the economy to draw up transformation charters for their sector; and
\item[(f)] any other matters necessary to achieve the objectives of this Act’.
\end{itemize}
Section 9 (3) of Act 53 of 2003 provides: ‘A Code of Good Practice issued in terms of subsection (1) may specify-
\begin{itemize}
\item[(a)] targets consistent with the objectives of this Act; and
\item[(b)] the period within which those targets must be achieved’.
\textsuperscript{167} Discretion is indicated by use of the word \textit{may}.
\textsuperscript{168} Section 10 of the BBBEE Act 53 of 2003.
\textsuperscript{169} Act 53 of 2003.
\end{flushleft}
The status of the Codes as they relate to the private sector is ambiguous because the Act\textsuperscript{170} 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.\textsuperscript{171} 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,\textsuperscript{172} secondly, that the provision must be necessary to make the legislation effective,\textsuperscript{173} and lastly, that the provision must be capable of clear and precise formulation.\textsuperscript{174} 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 requiring joint effort between public and private sectors to bring it to fruition. 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,\textsuperscript{175} 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.\textsuperscript{176} 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

\textsuperscript{170}\textit{Ibid.}
\textsuperscript{171} Refer in general to s 1 (c) of the Constitution on the Rule of Law. Also see \textit{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).
\textsuperscript{172} \textit{Lekhari v Johannesburg City Council} 1956 (1) SA 552 (A).
\textsuperscript{173} \textit{Taj Properties (Pty) Ltd v Bobar} 1952 (1) 723 (N) at 729 Holmes AJ ‘Thus 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’.
\textsuperscript{174} \textit{The Firs Investments (Pty.) Ltd v Johannesburg City Council} 1967 (3) SA 549 (W) at 577.
\textsuperscript{175} \textit{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.
\textsuperscript{176} \textit{Canca v Mount Frere Municipality} 1984 (2) SA 830 (TK) 832 F-G [approved in \textit{Hoban v Absa Bank Ltd t/a United Bank and Others} 1999 (2) SA 1036 (SCA) at 1044]. Also see \textit{Namibian Minerals Corp Ltd v Benguela Concessions Ltd} 1997 (2) SA 548 (A) at 566.
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. 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.

Ultimately the implementation of BEE is a strategic business decision 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.

This begs the question - what then is the legal nature of the Codes as viewed from the private sector perspective? In investigating this issue, this paper will look at other instruments that are termed ‘codes’ to ascertain whether the status attributable to these instruments may be instructive in determining the legal nature of the BEE Codes.

The first set of ‘codes’ to be considered is the Security Regulation Code on Take-overs and Mergers (SRC). The Securities Regulation Panel established in terms of s 440 B of the Companies Act is responsible for the issue of the SRC. The SRC provides an ‘orderly framework’ of rules and guidelines for takeover and merger activities and applies to all listed companies and to all persons involved in such transactions. It aims to ensure

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177 Balshaw (n 123) 33.
178 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.
179 Balshaw (n 123) 18.
180 C000s000 of 2005 (n 112) para 3.
181 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’.
184 Section 1 ‘Nature and Purpose of the Code’: the Securities Regulation Code on Take-Overs and Mergers (n 182) 356.
185 Section 1 ‘Code Responsibilities’: the Securities and Regulation Code on Take-Overs and Mergers: (n 182) 357.
fairness and equality between all security holders\textsuperscript{186} and expressly provides that it ‘enjoys the force of law’.\textsuperscript{187}

An investigation of the King Code II\textsuperscript{188} 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’,\textsuperscript{189} but merely to guide companies in determining the ‘best available practice’\textsuperscript{190} when considering other regulatory instruments which apply to them.\textsuperscript{191} The King Code II applies to what are termed ‘affected companies’\textsuperscript{192} and all such companies are urged to duly consider the King Code insofar as its principles are relevant.\textsuperscript{193}

Schedule 8 (the Labour Code) issued in terms of the Labour Relations Act (LRA)\textsuperscript{194} is another useful comparator. The Definitions section of the LRA\textsuperscript{195} expressly excludes Schedule 8 as being a part of the ‘Act’ as defined.\textsuperscript{196} The inference that can be drawn is that

\textsuperscript{186} Section 1 ‘Nature and Purpose of the Code: The Securities Regulation Code on Take-Overs and Mergers (n 182) 356.
\textsuperscript{187} Section 1 ‘Enforcement of the Code’: The Securities Regulation Code on Take-Overs and Mergers (n 182) 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).
\textsuperscript{188} King Committee on Good Corporate Governance, ‘King Report on Corporate Governance 2002 (King II)’.
\textsuperscript{189} King Committee on Good Corporate Governance (n 188) at Para 1 sub-para 1.5.
\textsuperscript{190} King Committee on Good Corporate Governance ( n 188) at Para 1 sub-para 1.5.
\textsuperscript{191} For example, ‘statutes, regulations, and other authoritative directives regulating their conduct and operation’ (King Committee on Good Corporate Governance (n 188) at Para 1 sub-para 1.5)
\textsuperscript{192} King Committee on Good Corporate Governance ( n 188) 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…’.
\textsuperscript{193} King Committee on Good Corporate Governance ( n 188) at Para 1 sub-para 1.2.
\textsuperscript{194} Labour Relations Act 66 of 1995, schedule 8: Code of Good Practice: Dismissal.
\textsuperscript{195} Section 213 of the LRA Act 66 of 1995.
\textsuperscript{196} Section 213 of the LRA Act 66 of 1995 provides ‘ 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.
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\(^1\) and expressly permits deviation from the norms contained therein.\(^2\)

What can be deduced from the above analysis is that the highest common factor of 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’.\(^3\) ‘Soft’ law is not law proper\(^4\) and thus is not enforceable in a court of law.\(^5\) Soft law is made up of ‘written instruments that are not intended to be legally binding,’\(^6\) but that are so central to the legal regulatory framework\(^7\) that they cannot merely be discarded as ‘non-law’.\(^8\) 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’.\(^9\)

This ‘soft law’ status of these ‘codes’ indisputably obtains 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

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\(^1\) Section 1(1) Schedule 8, and s 1(3) of the LRA Act 66 of 1995.

\(^2\) Section 1(1) of Schedule 8 of the LRA Act 66 of 1995.

\(^3\) Soft Law is an international law notion connoting ‘non-binding instruments or documents’. (Shaw, M International Law 110). Notwithstanding that this is a notion birthed from the international law arena, soft law has become accepted as a species of legal instrument in domestic law.

\(^4\) Shaw, M International Law 110-111.

\(^5\) Harris, DJ Cases and Materials on International Law 62.

\(^6\) Harris (n 201) 61.

\(^7\) Shaw (n 200) 110-111.

\(^8\) 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 Hjerner (1990) 550-551 as cited in Harris (n 201) 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 201) 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 201) 62).

\(^9\) Harris (n 201) 61. Soft Law is ‘significant in signalling the evolution and establishment of guidelines which may ultimately be converted into legally binding rules’. Shaw (n 200)111.
private sector. Furthermore, they are of such importance and influence to the BEE regulatory structure that they warrant special attention.\textsuperscript{206} 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. It is to this end that this paper will now turn.

\section*{4.3.3 Implementation}

\subsection*{4.3.3.1 The Mechanism}

A BBBEE Scorecard has been issued by the Department of Trade and Industry (DTI) as a Code of Good practice.\textsuperscript{207} The Scorecard is intended to gauge progress made towards BEE by enterprises subject to the Codes. The Scorecard works on a weighted average, and allocates points to seven criteria: (i) Ownership (20 points); (ii) Management (10 points); (iii) Employment Equity (10 points); (iv) Skills development (20 points); (v) Preferential Procurement (20 points); (vi) Enterprise Development (10 points), and (vii) Residual element (10 points).\textsuperscript{208}

In terms of s10 of the Act,\textsuperscript{209} every organ of state and public entity\textsuperscript{210} 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

\textsuperscript{206}Shaw (n 200)110-111.
\textsuperscript{207}C000S000 of 2005 (n 112) para 8.
\textsuperscript{208}\textit{Ibid}.
\textsuperscript{209}Act 53 of 2003.
\textsuperscript{210}Definitions Section of the BBBEE Act 53 of 2003 provides ‘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; and
(e) A constitutional institution listed in Schedule 1 to the Public Finance Management Act 1999 (Act No. 1 of 1999).

Public Entity means 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.
sale of state owned enterprises and; developing criteria for entering into [public or private partnerships]. It is submitted that a ‘carrot-stick’ approach has been adopted to ensure compliance with the Codes in that 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. This is the same approach that was adopted in Malaysia to enforce the restructuring programme.

In instances where private entities do not transact directly with the state or with state entities, the ‘cascade effect’ 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 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. This process will replicate itself throughout the supply chains of most industries, that is to say it will ‘cascade’ downward. 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. 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. Compliance with the Codes is thus effected, notwithstanding the non-binding status of the Codes on private sector entities.

211 Section 10 (a) – (d) of the BBBEE Act 53 of 2003 and Osode (n 3)115.
212 Osode (n 3)116.
213 Sowell (n 33) 61.
214 Balshaw (n 123 ) 25.
215 Balshaw (n 123)19; 20 & 25.
216 ‘An example of the cascade effect is DaimlerChrysler 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 Daimler Chrysler South Africa would like to score procurement points to contribute towards their broad-based score’. (Balshaw (n 123) 25-26.
217 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 and Janisch Keep in Step: Broad-Based BEE for Small Businesses 62.)
218 Janisch Keep in Step: Broad-Based BEE for Small Businesses 62.
4.3.4. Verification Agencies

As stated above, an enterprise will be rated and accorded a BEE status based on its overall weighted average score as determined by 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.\(^{219}\)

Verification Agencies were established in response to the problems encountered in the early 1990’s.\(^{220}\) During this period there were no standard measures to evaluate and compare different entities BEE progress,\(^{221}\) 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.\(^{222}\) Despite this innovation, there is still the risk of disparate verification methodologies.\(^{223}\) To avert this danger, the Minister in collaboration with an Accreditation Body\(^{224}\) must ‘accredit only those verification agencies which meet…[specified] criteria\(^{225}\)…, thereby ensuring that standards are uniform’.\(^{226}\)

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. The penultimate instruments to be addressed are the Sector Transformation Charters.

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\(^{220}\) The DTI Guide to Interpretation (n 132) 19.

\(^{221}\) Ibid.

\(^{222}\) Ibid.

\(^{223}\) Ibid.

\(^{224}\) C000S020 of 2005 (n 219) para 1.1 & para 5. An ‘Accreditation Body’ means (in terms of para 1.1.1 & para 1.1.2) the South African National Accreditation System, a company registered under s 21 of the Companies Act of 1973 and affiliated to the Department of Trade and Industry; or any other body authorised by the Minister to undertake accreditation of Verification Agencies’. ( C000S020 of 2005 (n 219) para 1.1).

\(^{225}\) For an enumeration of the specified criteria see C000S020 of 2005 (n 219) para 7.5.4

\(^{226}\) The DTI Guide to Interpretation (n 132) 19.
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. Transformation Charters reflect a sector’s commitment to BEE and are gazetted ‘for general information’ purposes in terms of s 12 of the Act. Furthermore, they aim to guide transformation and to prescribe the benchmark for BEE compliance that entities in a particular sector must meet.

4.4.1 Legal Status of the Sector Transformation Charters

The status of the Transformation Charters is ascertainable through a comparative evaluation with the status of the Codes. It is submitted 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. The Codes are issued by the Minister, whereas the Transformation Charters are formulated by industry and only then gazetted on approval by the Minister. Furthermore, the Act expressly states that the Transformation Charters are simply ‘for general information’ purposes. The Guide to Interpreting the Code reiterates this and also states that Transformation Charters are merely an expression of an industry’s ‘commitment to transformation’. In light of the above considerations, it is submitted that

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227 Section 12 of the BBBEE Act 53 of 2003 and Osode (n 3) 114. ‘The Department of Minerals and Energy (DME) initiated the first Charters in the Petroleum and Mining sectors. These were followed by the Financial, ICT, Tourism, Transport, Agriculture, Advertising, Construction and Property Sector Charters’. Balshaw (n 123) 90.
229 Section 12 of the BBBEE Act 53 of 2003 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’.
230 C000S010 of 2005 (n 228) para 4.
231 Osode (n 3) 114.
232 It was submitted under paragraph 4.3.1that the Codes are soft law.
235 The DTI Guide to Interpretation (n 132).
236 The DTI Guide to Interpretation (n 132) 16.
the Charters can be classified as voluntary partnership agreements binding only private sector signatories.\textsuperscript{237}

\subsection*{4.4.2 The Sector Transformation Charters in Perspective}

In an attempt to illustrate the content of the Charters this paper provides, in APPENDIX 3, a telescopic picture of the Transformation Charters governing the Mining, Financial Services and Information and Communications Technology (ICT) sectors. The last instrument to be discussed is the BEE Strategy Document.

\subsection*{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.\textsuperscript{238} It contained a basic scorecard with percentage weightings\textsuperscript{239} (and it is upon this Card that the present Scorecard is modelled), but it did not outline governing principles, or how the scorecard was to be applied.\textsuperscript{240} Section 11 of the BBBEE Act\textsuperscript{241} now specifically mandates the Minister to release a Strategy Document, and it has been submitted that the initial Strategy is likely to be re-issued in terms of s 11.\textsuperscript{242} 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 BBBEE Act,\textsuperscript{243} the Codes and the Transformation Charters.

\begin{itemize}
\item \textsuperscript{237} Balshaw (n 123 ) 84 & 91.
\item \textsuperscript{238} The DTI Guide to Interpretation (n 132 ) 2.
\item \textsuperscript{239} 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 132) 4).
\item \textsuperscript{240} The DTI Guide to Interpretation (n 132 ) 2.
\item \textsuperscript{241} Section 11 of the BBBEE Act entitled ‘Strategy for broad-based black economic empowerment’ provides:
\item \textsuperscript{243} Act 53 of 2003.
\end{itemize}
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. On the other hand, the comprehensiveness of the framework admirably caters for the nuances of the enterprise as well as provides a solid foundation to facilitate the realisation of BEE objectives. As a result of the latter point, BEE has been made some progress, and this paper will now turn to review these strides.
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 big and ‘visible buy-in by black businessmen’ and was regarded as the ‘symbolic birth of BEE’, 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. 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% of Old Mutual plc’s local businesses to black staff and black investors. The Nedbank deal comprised a bonus-share scheme with clients as the intended beneficiaries. 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. For a more comprehensive outline of the deals concluded in these three sectors see APPENDIX 4.

245 Ibid.
248 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).
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.

**Graph1: Total deal value since inception (1996)**

![Graph showing total deal value since inception (1996)](image)


### 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 SA companies.\(^{251}\) Between 1993 and 1997, Black ownership increased from under 1% to 15-18% in market capitalisation on the Johannesburg Stock Exchange (JSE).\(^{252}\) 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 5).

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\(^{250}\) This graph has been sourced from Shubane et al ‘Behind The Deals’ (2005) BusinessMap Foundation:Economic Transformation and Empowerment 11.

\(^{251}\) Kennedy (n 244) 30.

\(^{252}\) *Ibid.*
Graph 2: Trends in Black Control, Market Capitalisation and the Number of Firms on the JSE

Graph 2 above shows that notwithstanding the slight trough reflected in 2002-2003, the market capitalization 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% for equity, direct Black ownership on the JSE amounts to a mere 1.6%. Furthermore, the Graph 3 below indicates that relationally, the number of BEE firms on the JSE is miniscule. 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.

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254 Ibid.


256 Reddy (n 253) 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, dealing with challenges that are evident from the BEE regulatory framework itself and the second, discussing those that are external to this framework.
6. THE CHALLENGES: APPARENT HURDLES

There are several hurdles facing BEE. Some of these challenges arise from within the regulatory framework, however several are external to the governing structure. This paper will be limited 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 constraints of attitude.

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 change. Many of the original difficulties have been resolved, however several ambiguities linger. This section of the paper will turn to 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 apparent 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 detail is the reduced margin of appreciation of these rules and their relevance.258 Secondly, in providing cross-sector standards, the Codes unify the system259 and thus ensure a more even and wider spread of empowerment.260 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 canvassed.

259 Shubane (n 250) 12.
260 Shubane (n 250)12.
6.1.1.1.1 Content of the Codes of Good Practice

Prior to the release of the approved Codes, changes made to them have never been more apparent. Prominent features of the Codes that reflect these changes are: the complexity of the Codes; the Scorecard targets, and the ‘Once Empowered Always Empowered Principle’.

6.1.1.1.1 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 inefficaciousness, standing to jeopardize the entire initiative and negatively impact on the economy. Some analysts noted that adherence to the Codes would impose arduous financial and administrative burdens requiring extensive professional advisory support services. 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’.

In reaction to these valid criticisms, the DTI has since attempted to alleviate the complexity of the Codes. The volume of the Codes has been drastically reduced, with several Statements being cut down to almost half of what they were before. A further notable trait is that the readability and understandability of the codes has increased immensely. 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.

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262 Ibid.

263 Ibid.

264 Code 000S000 of 2005 (n 112) is a good illustration of this condensation.

265 These adjustments are well illustrated in C000S000 of 2005 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 at www.dti.gov.za (Accessed on 12/12/06) have been deleted; A table 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
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’ as part of the First Phase of the Codes, which serves as a valuable interpretative aid 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.

Several features, on the other hand, 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. (See APPENDIX 6 which reflects the 2004 comprehensive Scorecard in relation to the 2005 simplified Scorecard). The targets and indicators are now included only in the individual Element Scorecards as contained in the respective Statements. It is submitted 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 is submitted that the DTI has erred gravely in altering the Scorecard to this extent.

A commendable alteration to the Generic Scorecard however, has been the change in 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 complicating 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. Interrelated issues that will now be considered are the targets and stipulated timeframes contained in the individual Element Scorecards.

more than a single sentence for each element, where as before each element was assigned no less than two dense paragraphs.

266 DTI Guide to Interpretation (n 132).
267 C000S000 of 2005 (n 112) para 8.
6.1.1.1.2 Targets and Timing: An Issue of Realism

A common criticism of the Codes has been that the targets are considered to be ‘unrealistically high’ and are unlikely to be attained in the stipulated timeframe. A 2005 Empowerdex Review of measurable listed entities showed that only one company reached the ‘excellent contributor’ rank, and only 26% of these entities were in a position to show even minimal compliance. In a recent report it was cogently argued that the 25% direct ownership target is ill conceived as it is unreasonable to expect black people to acquire 25% of all companies; even the commercially unsound ones. The Scorecard targets remain 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; however only time will reveal the sufficiency of this leniency.

6.1.1.1.3 The ‘Once Empowered Always Empowered Principle’: Perpetual Recognition

The DTI has released a document that introduces a new dimension to the equity ownership element of the BEE Scorecard. The principle, coined the ‘once empowered always empowered principle’, is broadly predicated on the idea that a measured entity will still earn empowerment points on account of black equity participation even after these Black shareholders sell their interest in the entity. This idea has caused waves of controversy across the board and it is this ferocious debate that will be now be attended to.

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, the logic being to nurture long-term

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268 Mathabo le Roux (n 261).
271 Wray ‘Cabinet-Approved BEE Codes are Drawing Criticism’ Dec 8 2006 Business Report at www.busrep.co.za (Accessed on 08/12/06)
272 Rumney (n 270).
273 Vuyo Jack ‘Long Term BEE Ownership must build in liquidity’ (12/122006) Business Report atwww.busrep.co.za/index.php?fArticleId=3530845&fSectionId=2512&fSetId=622 (Accessed on 29/01/07)
274 Ibid.
ownership by Black investors. To secure these ownership points then, companies tend to institute ‘lock-in’ provisions to ensure that Black equity remains in Black hands.

However, the negative implications of this are two-fold. First, the scarcity of Black capital means that shareholders desirous to sell their shares to other Black shareholders are often unable to find liquid Black purchasers. 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’. 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.

The problem with this principle, so understood, is clear. Its application will inevitably result in short-term Black ownership defeating the objectives of the Codes, and ‘dilut[e] black influence’ considerably. 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 ‘structure deals that [are] unfavourable to the BEE partner’.

In an attempt to counter these adverse effects, the DTI proposes only partial recognition of BEE points by such companies. This would mean that 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. This pragmatic compromise 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’. The problem remains however that, notwithstanding the suggested partial recognition middle-ground, the media

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275 Ibid.
276 "‘Lock-in’ clauses prevent black people from selling their shares to non-black people’ Vuyo Jack (n 273).
277 Vuyo Jack (n 273).
278 Ibid.
279 Ibid.
280 Ibid.
281 Wray (n 271).
282 Ibid.
283 Rumney (n 270).
284 Vuyo Jack (n 273) and Rumney (n 270).
285 Vuyo Jack (n 273).
continues to broadcast that the ‘once empowered, always empowered principle’ is the tenet upon which the ownership scorecard centres. The responsibility rests with the DTI to dispel this misconception by widely publicizing the correct working of the rule in sufficient detail to pre-empt interpretative disputes.\textsuperscript{286}

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,\textsuperscript{287} 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’,\textsuperscript{288} and ignore both the specific strengths and weaknesses in need of redress,\textsuperscript{289} 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 BBBEE,\textsuperscript{290} leaving these Charters with little point of reference.\textsuperscript{291} 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 BBBEE philosophy.\textsuperscript{292} At the time of writing, disparities in equity targets were noted and are depicted in Table 1 below.

\textsuperscript{286} Rumney (n 270).
\textsuperscript{287} Shubane (n 250)12.
\textsuperscript{288} Ibid.
\textsuperscript{289} Ibid.
\textsuperscript{290} DTI Guide to Interpretation (n 132) 2.
\textsuperscript{291} DTI Guide to Interpretation (n 132) 2.
\textsuperscript{292} DTI Guide to Interpretation (n 132) 2.
Table 1: EQUITY TARGET INCONSISTENCIES

<table>
<thead>
<tr>
<th>EQUITY</th>
<th>THE CODES</th>
<th>ICT CHARTER</th>
<th>FINANCIAL SECTOR CHARTER</th>
<th>MINING INDUSTRY CHARTER</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>25% plus one vote gets the full ownership score but the shares must be paid up in full.</td>
<td>35% by 2010; 30% by 2015 subject to a range of conditions.</td>
<td>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.</td>
<td>26% equity within 10 years.</td>
</tr>
</tbody>
</table>


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

In response to the overwhelming proposals that the Transformation Charters be harmonised to the Codes, C000S010 of the Phase One 2004 Codes 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

293 Singh (n 140) 19.
294 Singh (n 140) 18.
depicted in the Codes. 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) 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’.

In addition, Statement 010 mandated that ‘adequate justification’ be given if a Sector target ‘differ[ed] significantly’ from that in the Generic Scorecard. Lastly, *weightings* attributed to each BEE element could vary up to 10% from those reflected in the Codes, however such variance was subject to a sub-minimum weighting of 5%. Again, ‘adequate justification’ for deviation had to be provided. A further qualification for this weighting variation to obtain was that ‘the total weighting for each individual component, ie direct empowerment, human resources and indirect empowerment, [had to] remain constant as per the Generic Scorecard…’.

This scheme reached a comfortable compromise between the two instruments. It enabled standardisation and consolidation of the regulatory system, while accommodating a degree of flexibility through the variation allowances.

The 2005 Codes, in discussing Transformation Charters, make no mention of any of the above substantive aspects and focus almost exclusively on the procedural aspects that relate to the gazetting of Transformation Charters. 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

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297 C000S010 of 2004 (n 296) para 28-30 & 32.
298 C000S010 of 2004 (n 296) para 29.
299 C000S010 of 2004 (n 296) para 31.
300 As a useful reminder, the BEE element weightings: (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%).
301 C000S010 of 2004 (n 296) para 33-34.
302 C000S010 of 2004 (n 296) para 33.
303 C000S010 of 2004 (n 296) para 35.
304 C000S010 of 2005 (n 228) para 5.
Transformation Charters in paragraph 5 of C000S010\textsuperscript{305} may, it is submitted, be attributed to the capacity in which the Charters are being viewed that is, \textit{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 \textit{instrumental} capacity and it is this that will now be explored.

Paragraph 6 of C000S010\textsuperscript{306} of the new Codes permits the Minister ‘to develop Sector Codes or convert a Transformation Charter into a Sector Code’ provided a number of conditions are fulfilled.\textsuperscript{307} Fundamentally, the process requires 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 has been signed by sector stakeholders and by the Ministry in charge of that sector.\textsuperscript{308} Subject to public comment and ultimately the approval of the Minister, the final step is the official publication of either instrument in the gazette in terms of S 9 of the BEE Act.\textsuperscript{309} Once gazetted therefore, Sector Transformation Charters are converted to Codes of Good Practice,\textsuperscript{310} elevated from mere partnership agreements to, on the one end, delegated legislation from the public sector perspective and, on the other end, soft law status from the private sector perspective.\textsuperscript{311}

Entities governed by a specific Sector Code will be measured in accordance with the Sector specific scorecard as it appears in that Code.\textsuperscript{312} Despite the elevation of status to Codes of Good Practice, when any ‘uncertainty arises in the interpretation of a Sector Code’ the Generic Codes take precedence.\textsuperscript{313} Furthermore, the Generic Codes apply to sectors that are ungoverned by a Sector Code, notwithstanding the existence of a Sector Transformation Charter issued in terms of s 12 of the BEE Act.\textsuperscript{314}

\begin{itemize}
\item[\textsuperscript{305}] Ibid.
\item[\textsuperscript{306}] C000S010 of 2005 (n 228) para 6.
\item[\textsuperscript{307}] Ibid.
\item[\textsuperscript{308}] C000S010 of 2005 (n 228) para 6.1; para 6.2and para 6.3.
\item[\textsuperscript{309}] C000S010 of 2005 (n 228) para 6.
\item[\textsuperscript{310}] C000S010 of 2005 (n 228) para 6.10 & para 7.3.
\item[\textsuperscript{311}] See para 4.3.2 above for more detail on the legal status of the Codes of Good Practice. From hereon in the Transformation Charters in their instrumental capacity will be referred to as Sector Codes to avoid confusion.
\item[\textsuperscript{312}] Balshaw (n 123) 84 and 92.
\item[\textsuperscript{313}] C000S010 of 2005 (n 228) para 7.4.
\item[\textsuperscript{314}] C000S010 of 2005 (n 228) para 7.2
\end{itemize}
A shortcoming of the framing is that the new Generic Codes are only inadvertently instructive to drafters when it comes to matters of substance that sectors are to consider in the formulation of their Sector Codes. Information relating to what is required in terms of the content of the instruments is only referred to as part of what the ‘independent party’ is required to look for in formulating its analysis, and is not overtly directive to the Sector Code drafters in this regard.

A further change is that the new Codes do not expressly inform drafters, as was the case in the 2004 Codes, that target and weighting deviations from the Generic Codes are permitted. It is only by inference that one can deduce that variations are allowed if one looks to the explanations that the ‘independent party’ needs to provide in their analysis, which includes an indication and explanation of any deviations apparent in the proposed Sector Code\textsuperscript{315} showing that any such divergences are ‘not inconsistent with the objectives of the Act’, do not ‘distort the operation of the Generic Codes’ and are ‘adequately justified on sound commercial principles and/or developmental grounds pertaining to the sector’.\textsuperscript{316} As opposed to the numerical parameters reflected in the 2004 Codes, the new Statement seems to be predicated on principled restrictions. This is commendable in that it accommodates a greater degree of flexibility in light of the peculiarities of each sector. However the danger of such principled demarcations is first, that they may be open to abuse and inconsistencies given the discretion required in making such determinations, and also that they may potentially defeat the quantitative unification function that the Generic Codes fulfil.

It is submitted that the moderation function played by the ‘independent party’ and the ultimate approval of the Sector Codes by the Minster may avert this danger. Nevertheless, the middle-ground between standardisation and flexibility is a delicate balance to achieve, and it is submitted that although principles should root formulation, statistics must not branch too far apart, as a level of standardisation is indispensable in comparing progress across sectors and measuring BEE progress as a whole. The last complaint is that the qualifications for an independent third party to be appointed as such by the Minister are not spelt out which is an unfortunate omission.

\textsuperscript{315} C000S010 of 2005 (n 228) para 6.1; para 6.2 & para 6.3
\textsuperscript{316} C000S010 of 2005 (n 228) para 6.3.
This paper projects 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 Act\(^\text{317}\) is incommensurate with the aim of simply illustrating a commitment to BEE.\(^\text{318}\) The time and resources employed for the mere formal declaration of devotion would be better utilised in the construction of Sector Codes. In addition, ‘Enterprise Charters and Black Economic Empowerment Plans’\(^\text{319}\) provide a simpler and more economical alternative to achieve the same purpose. It must be remembered however, that Sector Transformation Charters may still prove useful when their *instrumental* role is considered in the development of Sector Codes.

### 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 peculiar enough, is yet to be achieved. Ultimately, practice will reveal the pragmatic challenges and solutions.

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\(^\text{317}\) Act 53 of 2003.

\(^\text{318}\) Balshaw (n 123) 91.

\(^\text{319}\) C000S010 of 2005 (n 228) para 8. Provides: ‘All entities are encouraged to develop their own enterprise plans as part of their commitment to BEE; para 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 sill not be gazetted under the Act’. 
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 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. BEE entrepreneurs are therefore severely restricted in accessing business opportunities. 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.

To compound the situation, the Act does not outline exactly how BEE is to be financed. The only mention of financing is in s 11 (2) (b) where, in terms of the strategy issued by the Minister in terms of s 11 (1) (a), the Minister is obliged to ‘develop a plan for financing broad-based black economic empowerment’. The question arises whether the state is obliged to provide financing for BEE and if so, to what extent? It has been submitted that the obligation imposed by s 11 (2) (b) imposes on the State a duty to devise a workable plan envisaged by the section, and not necessarily a duty to finance BEE directly from state funds. Through this plan, the state can formulate a mechanism whereby participants of the private sector or international funding houses can finance BEE. Failing the mobilisation of non-state funds, it has been submitted that the government would then be obliged to deploy state resources.

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320 Osode (n 3) 117.
321 Ibid.
322 Ibid.
323 Kennedy (n 244) 42.
325 Section 11 (2) (b) of the BBBEE Act 53 of 2003.
326 Osode (n 3) 117.
327 Ibid.
330 Osode (n 3) 117.
The Strategy Document\textsuperscript{330} 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.\textsuperscript{331} With the DTI as co-coordinator, some mechanisms have been set up to ensure financing of BEE for example, the Industrial Development Corporation (IDC),\textsuperscript{332} Khula Enterprise Finance,\textsuperscript{333} the National Empowerment Fund (NEF),\textsuperscript{334} the Development Bank of Southern Africa (DBSA),\textsuperscript{335} the Public Investment Commissioners (PIC),\textsuperscript{336} Ntsika Enterprise Promotion Agency, the Isibaya and Umsombomvu funds.\textsuperscript{337}


\textsuperscript{331} Osode (n 3 ) 117.

\textsuperscript{332} 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) \textit{Business Map, Empowerment 2003: State and Market Initiatives Gain Momentum} 40-45).

\textsuperscript{333} ‘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 (RFI’s) 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 328) 21-22.

\textsuperscript{334} ‘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 as cited in Burger (n 328) 21-22 and (Mthembo I.T Services Pamphlet (2005) Brainstorm unnumbered).

\textsuperscript{335} 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.


\textsuperscript{337} Osode (n 3 ) 117.
It is submitted that the high-liquidity of financial institutions renders the financial sector an ideal BEE financier. 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 2 below.

Table 2: BEE FACILLITATION VEHICLES

<table>
<thead>
<tr>
<th>INSTITUTION</th>
<th>PURPOSE OF FUND</th>
<th>BEE FACILLITATION VEHICLES</th>
</tr>
</thead>
</table>
| Sanlam      | Development Fund| • 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 | • 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. |

339 Table extracted from Morar (n 338 ) 14 and 16.
The Brenthurst Initiative (The Initiative)\textsuperscript{340} 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.\textsuperscript{341} 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’.\textsuperscript{342}

6.2.1.2 Section 38 of the Companies Act

It has been argued that vendor financing is a particularly viable financing option.\textsuperscript{343} The problem with this suggestion is that it stands in potential contravention of the Companies Act.\textsuperscript{344} Section 38 provides that

\begin{quote}
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.\textsuperscript{345}
\end{quote}

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, in many instances these companies will look to facilitate the purchase of its shares.\textsuperscript{346} 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 viable financing option.\textsuperscript{347} 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.\textsuperscript{348} Furthermore, such a contravention cannot be

\textsuperscript{340} 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 328) 24.)
\textsuperscript{341} This was the method adopted in Australia and in Chile. (Burger (n 328) 24.)
\textsuperscript{342} Burger (n 328) 24.
\textsuperscript{344} 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 (n 343) 48.)
\textsuperscript{345} Companies Act 61 of 1973.
\textsuperscript{346} Section 38 (1) of the Companies Act 61 of 1973.
\textsuperscript{347} Van der Merwe (n 90) 32.
\textsuperscript{348} Ibid.
\textsuperscript{349} S 38 (1) of the Companies Act 61 of 1973.
cured by shareholder, creditor or court approval. 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. The BEE partner will then be required by the financier to furnish as security for the SPV’s obligations, its shareholding in the SPV, thus increasing the risks and costs of the transaction for the BEE company. Furthermore, these deals are highly leveraged with success depending largely on market performance of share prices, which results in unsustainable transactions.

An alternative to SPV’s is the use of ‘deferred shares’. This would be in line with the rationale underlying the Malaysian strategy of issuing no-par value shares, 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. Furthermore, the issue of deferred shares would tend to increase investor confidence. The disadvantage with deferred shares however is that benefits derived from them are deferred benefits. 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.

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350 Van der Merwe (n 90 ) 32.
351 Ibid.
352 Ibid.
353 ‘Move to Company-facilitated transactions is paying off’ at http://www.realbusiness.co.za/Article.aspx?articleID=3574&typeID=9 (accessed on 25/03/06).
354 Ibid.
355 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 16/09/05.
356 Sowell (n 33) 61.
357 Interview with Mr Graham Bradfield, Commercial Law lecturer, University of Cape Town, South Africa. Interview conducted on 16/09/05.
358 Ibid.
359 Ibid.
Recently Companies have moved to engineering 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. The Standard Bank deal comprised two stages. 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. 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, and there having been no financial assistance to any party in the second part.

It is submitted 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, and considerable tax implications are usually associated with such arrangements.

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’. It has been suggested that the general prohibition on financial assistance be maintained with the

360 Davids (n 349).
361 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 13/03/06.
362 Davids (n 349).
363 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’.
364 Davids (n 349).
365 Ibid.
366 Van der Merwe (n 90) 33.
amendment taking the form of an additional exemption that deals with empowerment transactions and details capital maintenance requirements in the form of provisos.\footnote{367} The Corporate Laws Amendment Bill, to be enacted in early 2007, adopts a more commendable alternative providing that companies are\textit{not} prohibited from ‘giving financial assistance for the purchase of or subscription of shares of that company or its holding company’\footnote{368} provided the solvency and liquidity requirements are met.\footnote{369} It is submitted that the ‘solvency and liquidity’ test is preferable as it is less cumbersome and more flexible than the ‘exemption and proviso’ construction.

\textbf{6.2.1.3 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,\footnote{370} and hinders BEE companies from undertaking strategic long-term planning thus increasing the risk of economic failure.\footnote{371} 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.\footnote{372}

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.\footnote{373} 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.

\footnote{367} ‘Empowerment finance hurdles can be lowered’ \textit{Business Day} August 19 2005 at 13.
\footnote{368} Section 9 of the Corporate Laws Amendment Bill: Amendment of s38 of Act 61 of 1973.
\footnote{369} Corporate Laws Amendment Bill: Amendment of s38 of Act 61 of 1973. Section 9 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’.
\footnote{370} Burger (n 328) 10.
\footnote{371} \textit{Ibid}.
\footnote{372} Burger (n 328) 57.
\footnote{373} Burger (n 328) 58.
Afrikaner model, devised by Sanlam, is a viable empowerment structure, as the pooling of personal savings through intermediaries results in long-term asset growth. Ultimately economic growth is the key driver in ensuring sustainability, and government therefore needs to adopt measures that encourage such growth.

**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 recommendations proffered above, these challenges are not insurmountable. The same is true for many aspects of BEE as will become evident in the discussion to follow that 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. BEE, viewed from a benevolent perspective, can be regarded as a move to ensure transformation that will improve ‘the lives of all South Africans’. A contrary perspective would be to regard BEE as an initiative directed towards the creation of a critical mass of Black middle class. The latter approach appears to be more realistically attainable, where a focus on expanding ownership through equity transfer and increasing levels of management control is easier to facilitate, as is reflected by the tendency of SA businesses to empower via these channels. Furthermore, this narrow approach to empowerment is a trend reflected in the long-standing and relatively successful economic empowerment approach adopted in Malaysia.

It is clear from the Generic Scorecard however, that BEE is intended to extend further than equity ownership and management, and is to 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

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374 Burger (n 328) 58.
375 Burger (n 328) 67.
376 Kennedy (n 244) 45.
377 Shubane (n 250) 15.
378 Balshaw (n 123) 89 and Shubane (n 250) 15.
380 Sowell (n 33) 61Manning (n 38) 24.
skills, entrepreneurs, Small to Medium and Micro-Enterprises (SMME’s) and rural communities.\(^{381}\) BEE is clearly intended to be an all-inclusive enterprise serving to empower a broad spectrum of the black population, however, several factors thwart this vision. This paper will canvass two of the most glaring of these factors, namely ‘elite bias’ and skills development.

\subsection*{6.2.2.2. ‘Elite Bias’}
The first wave of BEE, as identified by the South African Advertising Research Foundation (SAARF),\(^{382}\) seems to have afforded benefits to only a few people, particularly businessmen within the ANC,\(^{383}\) creating a ‘new Black bourgeoisie’.\(^{384}\) This elite bias is not unique to SA however, as preferences in Malaysia stood primarily to benefit coalition members, their relatives and those who were already privileged.\(^{385}\) Similarly, preferential policies in the US have largely benefited the already wealthy members of the minority grouping,\(^{386}\) with little empowerment reaching lower levels of intended beneficiaries.\(^{387}\) It has been suggested that a solution to the SA dilemma would be the imposition of BEE transaction restrictions which would limit the total number of BEE transactions that any individual beneficiary can conclude.\(^{388}\)

The second wave of BEE has seen the rise of young upcoming black professionals termed ‘buppies’, with the third wave characterized by ‘bappies’ - ‘booming, aspirational and previously poor’ entrepreneurs.\(^{389}\) It is hoped that the fourth wave will be characterized by increased skills deployment and rural community upliftment, however, these factors are prone to incremental implementation.\(^{390}\) It is submitted that companies use their initiative to design means that will expedite the achievement of the broad-based goal, and a feasible

\begin{itemize}
\item \(^{384}\) Osode (n 3) 107 and Kennedy (n 244) 32.
\item \(^{385}\) Sowell (n 33) 62.
\item \(^{386}\) Sowell (n 33) 120 also see Nesiah, D Discrimination with Reason?: The Policy of Reservations in the United States, India and Malaysia.30 & 32.
\item \(^{387}\) Nesiah Discrimination with Reason?: The Policy of Reservations in the United States, India and Malaysia. 32.
\item \(^{388}\) Osode (n 3)119.
\item \(^{389}\) ‘The Emerging Black Middle Class-True Black Economic Empowerment?’ (n 382).
\item \(^{390}\) Balshaw (n 123) 89.
\end{itemize}
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 SA. Inadequate skill transfer results in the consequent inability of Black managers and entrepreneurs to manage capital assets thus extending undue reliance on previously advantaged partners. Furthermore, inadequate human resource development may disadvantage South Africa’s competitive standing in the global markets. Skills transfer is thus crucial to ensuring effective empowerment.

C400S400 governs skill development, and enterprises can earn up to 20 points depending on, *inter alia*, the level of ‘skills development spend’ on ‘critical and/or core skills for black employees’ and on learnerships administered by Sector Education Training Authorities (SETAs). This Code is buttressed by, and is compatible with, the Skills Development Act (SDA) and their combination provides an excellent framework for skill deployment. The problem rests in the implementation, where apathy together with resource shortages hamper action. A proposed practical solution for facilitating skill empowerment is for each sector to focus on developing skills within their respective sectors. Such a move is apparent in the ICT sector, where the Black Information Technology Forum (BITF) has assumed a lead role in skills deployment, which is proving to be successful.

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391 Woolley (n 82) 69.
392 Kennedy (n 244) 45.
393 Ibid.
395 C400S400 of 2005 (n 394) para 5.
396 Skills Development Act 97 of 1998 and C4000S4000 of 2005 (n 123) 125.
397 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.)
399 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 For Black Economic Empowerment’ (2000) *IT Training* Issue 2 at 7.)
399 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 For Black Economic Empowerment’ (2000) *IT Training* Issue 2 at 6 & 7)
oriented skills development has the advantage of being able to pool resources towards focusing on skills specifically required in the respective sectors. It is submitted that the Codes should be the instrument mandating this initiative, and that by failing to mention this, or other such collaborative resource mobilisation schemes, the Codes fall short.

6.2.2.4 Conclusion on Broad-based BEE

As noted, the fact that empowerment is to be broad-based is undisputed however, the lived realities reflect a 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 ‘outcomes-based implementation’ of both the Act and the Codes, in order to ensure that broad-based BEE becomes a reality in South Africa. Private entities too have a part to play though, as by broadening their perspective on the empowerment aim, considering not only return 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 sustainable empowerment. The next part of this paper will elaborate further.

6.2.3 Fraudulence: The Fronting Barrier

Fronting is in essence ‘tokenism [or the] superficial inclusion of historically disadvantaged individuals’, with no actual transfer of wealth or control. It is a cynical manipulation of regulatory requirements that amounts to defrauding the government, and defeats the aims of BEE. 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

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400 Such development should include the use of learnerships, (which are programs where ‘you learn while you work’) (Woolley (n 82) 12.) Furthermore, professional management skills can be transferred to black managers through a process of mentoring. Such mentoring ensures ‘intellectual empowerment’ and enables black managers to manage the assets under their charge. (Kennedy (n 244) 39.)

401 Osode (n 3) 120.


404 Singh (n 140) 19.

do. 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’, ‘fictitious companies’, ‘fronts in joint ventures’ and lastly ‘front companies’. This paper will be limited to a discussion of ‘Front Companies’ as this is particularly prevalent in both Malaysia and the US, the comparative schemes addressed above.

Front companies misrepresent their status as empowerment companies in an endeavour to gain preferential benefits and thus disadvantage authentic entities. In Malaysia these are termed ‘Ali Baba’ enterprises where Malays (Ali) are the face of what are in reality Chinese (Baba) owned companies. Similarly in SA, 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’. The impact of fronting is apparent from the probe by the Department of Trade and Works in August 2005, which revealed an estimated loss of R 4441,1 million from fronting scams. In the US similar frauds were perpetrated by Tyco Manufacturing and ‘Automated Data Management’, which were both companies masquerading as minority entities to gain preferences. What this pattern

406 Ibid.
407 ‘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).
408 ‘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).
409 ‘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).
413 Sowell (n 3) 137.
414 Moloi (n 410) 32.
416 Statement by Minister of Public Work Ms Stella Sigcau (n 411). Also see Masondo, S ‘Fronting costing taxpayers millions’ at http://www.netassets.co.za/include/dynamicContentDetailPrint.asp?websiteContentIt (Accessed on 19/08/2005).
417 Lewis (n 59).
reveals is that this form of fraud seems to be inextricable from empowerment programmes, and the question then turns to what preventative measures are available.

C000S001\textsuperscript{418} is specifically geared toward combating fronting. Verification Agencies are to play a central role in this exercise and are responsible for identifying ‘Fronting Risk Indicators’,\textsuperscript{419} determining fronting scores,\textsuperscript{420} and reporting on their findings.\textsuperscript{421} Similarly, the US system relies on certification and accreditation audits as a preventative measure.\textsuperscript{422}

Any entity that engages in fronting practices stands to be prosecuted as fronting amounts to fraud and as such it is a criminal offence.\textsuperscript{423} Should such a company be ‘found guilty of fraud or misrepresentation…[it ] and its directors may be black listed’ in terms of C000S001 para 10.5.\textsuperscript{424} A further misfortune that will befall such miscreant companies is that any contracts entered into are voidable.\textsuperscript{425}

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 this paper will now turn to consider certain attitudes that may misdirect the enterprise.


\textsuperscript{419} ‘Indicators of Fronting risk may be either high-risk or moderate risk in nature’. (C000S001 of 2005 (n 418) para 7).

\textsuperscript{420} For an enumeration of these indicators, see C000S001 of 2005 (n 418) para 7.2 & para 7.3

\textsuperscript{421} See C000S001 of 2005 (n 418) 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’.

\textsuperscript{422} See C000S001 of 2005 (n 418) paras 7; 8 ; 9 & 10.

\textsuperscript{423} Lewis (n 59).

\textsuperscript{424} Daly ‘A Recipe for Woe’ in Black Economic Empowerment (May 2003) Business Day Survey at 8 and Moloi (n 410)32.

\textsuperscript{425} C000S001 of 2005 (n 418) at para 10.5.

\textsuperscript{426} Daly (n 423) 8 and Moloi (n 410) 33.
6.2.4. Attitudinal Constraints: ‘A Culture of Entitlement’ and ‘A Culture of Resentment’

Certain attitudes hinder true transformation and may even go so far as to nurture a hostile environment. One such attitude is the growing ‘culture of entitlement’ amongst previously disadvantaged groups, which is also a mindset evident in the Malay population. Groups feel that because benefits are assured they are not compelled to perform. This in turn may generate a ‘culture of resentment’ amongst previously advantaged groups who leave the country (resulting in ‘brain drain’), resist the philosophy, or simply become disillusioned. In the US, frustration is evidenced by the numerous preferential schemes that have been constitutionally challenged, and more dramatically, by spates of violence as a result of ‘public racial intolerance’.

In terms of redress, the Malaysian government dealt with public intolerance by instituting several laws aimed at limiting free speech, however, 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 can 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, will assist in broadening myopic vision. Although not an ideal method, a constant reminder that BEE is not intended to be an indefinite enterprise could possibly jolt those who feel entitled into real action, while contemporaneously providing those who feel disadvantaged with a sense of eventual respite.

Kennedy (n 244) 32.
427 ‘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…I feel disappointed because I achieved too little in my principal task of making my race a successful race, a race that is respected.’ Sowell (n 33) 74-75.
428 Sowell (n 33) 74.
430 Sowell (n 33) 14 & 187 and Safi (n 381) 48.
431 Sweet (n 71) 162-164.
432 Encarta (n 56). Also see Nesiah (n 387) 33.
433 Galenson Labour and Economic Growth in Five Asian Countries: South Korea, Malaysia, Taiwan, Thailand, and the Philippines 18. See also Sowell (n 33) 60 and 76.
434 Balshaw (n 123) 86 also see C000S000 of 2005 (n 112) para 11. In terms of this paragraph, the Codes are set to run for a period of 10 years, and will be reviewed at the end of this period with the chance that they may be renewed.
6.3 CONCLUSION ON THE CHALLENGES

This subsection of the paper has illustrated the general kinds of challenges that face BEE. It is clear that BEE still has a long way to go in ironing out these problems that stand to thwart the entire initiative.
7. CONCLUSION: THE FINAL WORD

The aim of this paper has been to assess the BEE regulatory framework and to critically discuss the challenges facing the BEE drive. 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 crux of the paper elucidated the current challenges hindering BEE implementation. It is the 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 this paper illustrates, these hurdles 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 BEE CODES OF GOOD PRACTICE

#### THE PHASE ONE 2005 CODES

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<th>Descriptions</th>
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<td>Framework for the measurement of Broad Based Black Economic Empowerment</td>
<td>1 November 05</td>
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<tr>
<td>Statement 000</td>
<td>The Organisation of the Codes of Good Practice, the elements of Broad Based Black Economic Empowerment and the Generic Scorecard</td>
<td>1 November 05</td>
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<td>The General Ownership Scorecard and the Recognition of Ownership Arising from the Sale of Equity Instruments</td>
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## THE PHASE TWO 2005 CODES

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<td>Statement 001</td>
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8.2  APPENDIX 2:  CODES OF GOOD PRACTICE ON BROAD-BASED BEE FOR QUALIFYING SMALL ENTERPRISES

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### 8.3 APPENDIX 3: THE SECTOR TRANSFORMATION CHARTERS IN PERSPECTIVE

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<th>MINING SECTOR</th>
<th>FINANCIAL SECTOR</th>
<th>ICT SECTOR (Final Draft Version 2005)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>The mining industry</strong> 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.</td>
<td>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.</td>
<td>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.</td>
<td></td>
</tr>
<tr>
<td><strong>Vision of the Charter</strong></td>
<td>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 a] non-racial South Africa, through equity transfer and skills development.</td>
<td>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.</td>
<td>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.</td>
</tr>
<tr>
<td><strong>Intended Beneficiaries</strong></td>
<td>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.</td>
<td>All black people, including women, workers, youth, people with disabilities and people living in rural areas. Black people means all Africans, Coloureds and Indians who are South African citizens and includes black companies. 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.</td>
<td>All black people, including black women, workers, youth, people with disabilities and people living in rural areas.</td>
</tr>
<tr>
<td><strong>Equity Target</strong>&lt;br&gt;(Ownership and Control)</td>
<td>26% by 2012.&lt;br&gt;Considers active and passive involvement.</td>
<td>Ownership: 25% Black ownership at holding company level is set for 2010; 10% direct ownership.&lt;br&gt;Management/Control:&lt;br&gt;Black directors 33% of Black directors on its board by 2008.&lt;br&gt;Black women directors 11% by 2008.&lt;br&gt;Black Executives 4% by 2008.</td>
<td>Ownership: 30% equity subject to a range of conditions.&lt;br&gt;Management/Control:&lt;br&gt;60% black people in the governing body with black women comprising 50% of the former.</td>
</tr>
<tr>
<td><strong>Employment Equity</strong></td>
<td>40% HDSA (Historically Disadvantaged South Africans) by 2007&lt;br&gt;10% women by 2007</td>
<td>Black top management 20-25% by 2008&lt;br&gt;Black women top management 4% by 2008&lt;br&gt;Black middle management 30% by 2008&lt;br&gt;Black junior management 40-50% by 2008&lt;br&gt;Women junior management 15% by 2008</td>
<td>50% black people in senior management positions with 30% black women as a % of the former.&lt;br&gt;65% of black people in other management positions with black women being 30% of the former.</td>
</tr>
<tr>
<td><strong>Procurement</strong></td>
<td>From HDSA over 3-5 years</td>
<td>50% by 2008&lt;br&gt;70% by 2014&lt;br&gt;Further targets per company categories</td>
<td>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)</td>
</tr>
<tr>
<td><strong>Enterprise Development</strong></td>
<td>Not addressed</td>
<td>Develop new and foster existing BEE companies (specifics provided))</td>
<td>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</td>
</tr>
<tr>
<td><strong>Skills Development</strong></td>
<td>Functionally &amp; numerate literate by 2005&lt;br&gt;Career paths and Mentoring</td>
<td>1.5 % (as % of payroll spend)</td>
<td>2% (as % of payroll spend)&lt;br&gt;Provision of learnerships equivalent to 5% of employees.</td>
</tr>
</tbody>
</table>
| Residual/Other | -Licensing  
-Mine community and rural development  
-Housing & living conditions (hostels)  
-Nutrition  
-Migrant labour  
-Beneficiation  
-State assets | -Access to financial services  
-Corporate social investment/involvement: 0.5% (of operating profit after tax) by 2014  
-HR development | -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. |
<table>
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<th></th>
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<td>R100 billion by 2007 for HDSA</td>
<td>R 75 billion for HDSA participation</td>
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<td>Scorecard</td>
<td>None</td>
<td>Financial Sector Scorecard.</td>
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The information in this table reflects the status at time of writing.

## 8.4 APPENDIX 4: BEE DEALS CONCLUDED IN THE FINANCIAL SERVICES, MINING AND ICT SECTORS

### MINING SECTOR BEE DEALS

<table>
<thead>
<tr>
<th>Industrial Sector</th>
<th>Sub Sector</th>
<th>Target Company</th>
<th>Source Company</th>
<th>Stake (%)</th>
<th>Value (Rm)</th>
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<td>Inowala Resources</td>
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<td>SA Chrome/Xstrata SA</td>
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<td>Gold Mining</td>
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<td>Inkwenkwez Constituion</td>
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<td>Value (Rbn)</td>
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<td>Value (Rm)</td>
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<td>Industrial Sector</td>
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<td>Target Company</td>
<td>Source Company</td>
<td>Stake (%)</td>
<td>Value (Rm)</td>
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<td>----------------------------</td>
<td>--------------</td>
<td>---------------------------------------</td>
<td>---------------------------------------</td>
<td>-----------</td>
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<td>Lithfieldsen Connections Holdings</td>
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<td>Software and Computer Services</td>
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<td>Lawyers Access Web (L@W)</td>
<td>Vantage Capital Group</td>
<td>10</td>
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<td>Kindle Insurance Technologies (Pty) Ltd</td>
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<td>Computer Services</td>
<td>DataPro Group Ltd (Formerly Casey Investments)</td>
<td>Vantage Capital Group</td>
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### APPENDIX 5: BLACK CONTROL ON THE JSE

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<td>Nov-97</td>
</tr>
<tr>
<td>Feb-98</td>
</tr>
<tr>
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<td>Feb-00</td>
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<td>Jun-03</td>
</tr>
<tr>
<td>Sep-03</td>
</tr>
<tr>
<td>Dec-03</td>
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<table>
<thead>
<tr>
<th>MAR CAP (Rbn)</th>
<th>Portion of JSE (%)</th>
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<tr>
<td>Oct-97</td>
<td>37</td>
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<td>Nov-97</td>
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<td>Jul-98</td>
<td>68</td>
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<td>Sep-98</td>
<td>48</td>
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<td>Nov-98</td>
<td>66</td>
</tr>
<tr>
<td>Jan-99</td>
<td>59</td>
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<tr>
<td>Apr-99</td>
<td>67</td>
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<tr>
<td>Aug-99</td>
<td>53</td>
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<td>Nov-99</td>
<td>42</td>
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<td>Feb-00</td>
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<td>May-00</td>
<td>37</td>
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<tr>
<td>Aug-00</td>
<td>98</td>
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<td>Feb-01</td>
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<td>Mar-02</td>
<td>38</td>
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<tr>
<td>Jun-02</td>
<td>39</td>
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<td>Sep-02</td>
<td>33</td>
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<td>Dec-02</td>
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<tr>
<td>Mar-03</td>
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<tr>
<td>Jun-03</td>
<td>42</td>
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<tr>
<td>Sep-03</td>
<td>43</td>
</tr>
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<td>Dec-03</td>
<td>58</td>
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</table>

Table extracted from Reddy, C ‘Empowerment on the JSE’ (2004) BusinessMap 55 at 56.
### 8.6 APPENDIX 6: THE BEE SCORECARDS: A COMPARISON

**THE 2004 COMPREHENSIVE SCORECARD**

<table>
<thead>
<tr>
<th></th>
<th></th>
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<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Ownership</td>
<td>EBE 100</td>
<td>20%</td>
<td>Unrestricted Voting Rights in the enterprises to which Black people are entitled</td>
<td>3%</td>
<td>25% (1 vote)</td>
<td>Induction of new directors and all managerial employees to ensure target is met</td>
<td></td>
<td></td>
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<tr>
<td></td>
<td></td>
<td></td>
<td>Unrestricted Voting Rights in the enterprises to which Black people are entitled</td>
<td>2%</td>
<td>15%</td>
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<tr>
<td></td>
<td></td>
<td></td>
<td>Economic Interest in the enterprises to which Black people are entitled</td>
<td>4%</td>
<td>25%</td>
<td></td>
<td></td>
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<tr>
<td></td>
<td></td>
<td></td>
<td>Economic Interest in the enterprises to which Black people are entitled</td>
<td>2%</td>
<td>15%</td>
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<td></td>
<td></td>
<td></td>
<td>Economic Interest in the enterprises to which Black people are entitled</td>
<td>1%</td>
<td>25%</td>
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<td></td>
<td></td>
<td>Economic Interest in the enterprises to which Black people are entitled</td>
<td>6%</td>
<td>25%</td>
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<tr>
<td>Management</td>
<td>EBE 200</td>
<td>10%</td>
<td>折腾/管理 (Management Representation Scorecard) (Note 1: 2009)</td>
<td>10%</td>
<td>10%</td>
<td>Bonus management: different management positions weighed according to essentiality and executive movement</td>
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<tr>
<td>Employment Equity</td>
<td>EBE 300</td>
<td>10%</td>
<td>折腾/管理 (Management Representation Scorecard) (Note 1: 2009)</td>
<td>10%</td>
<td>10%</td>
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<tr>
<td>Human Resources Development</td>
<td>EBE 400</td>
<td>10%</td>
<td>折腾/管理 (Management Representation Scorecard) (Note 1: 2009)</td>
<td>15%</td>
<td>15%</td>
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<tr>
<td>Professional Procurement</td>
<td>EBE 500</td>
<td>10%</td>
<td>折腾/管理 (Management Representation Scorecard) (Note 1: 2009)</td>
<td>10%</td>
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<tr>
<td>Indirect Empowerment</td>
<td>EBE 600</td>
<td>10%</td>
<td>折腾/管理 (Management Representation Scorecard) (Note 1: 2009)</td>
<td>10%</td>
<td>10%</td>
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<tr>
<td>Enterprise Development</td>
<td>EBE 700</td>
<td>10%</td>
<td>折腾/管理 (Management Representation Scorecard) (Note 1: 2009)</td>
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<td>10%</td>
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**Total Element Weighting**: 100%

**Indicator Weighting**: 100%

**Sub-Minimum**:

---

435 C000S000 of 2004 (n 158) para 57.
<table>
<thead>
<tr>
<th>Element</th>
<th>Weighting</th>
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<td>Management control</td>
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<tr>
<td>Employment equity</td>
<td>10 points</td>
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</tr>
<tr>
<td>Skills development</td>
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<td>Code 400</td>
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<td>Preferential procurement</td>
<td>20 points</td>
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<td>Code 600</td>
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<td>Residual</td>
<td>10 points</td>
<td>Code 700</td>
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436 C000S000 (n 12) para 8.
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- Ismail, A partner of Sonnenberg Hoffmann Galombik Attorneys, Cape Town, South
  Africa. Interview conducted on 13/03/2006.