



**A summary of the**

**RACIAL DISPENSATION**

**in South Africa since 1994**



SOLIDARITY  
MOVEMENT

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## Executive Summary

South Africa committed to non-racialism during the 1994 transition. Unfortunately, this has not been realised as 30 years later South Africa is still one of the most race-regulated countries in the world.

The ANC has implemented three pieces of legislation that use race classification to try and redress the effects of apartheid – affirmative action, preferential procurement and black economic empowerment.

In practice, these policies have led to ever-increasing racialisation of every aspect of South African life. These policies have had no impact on reducing inequality, poverty or unemployment – but succeeded in creating a new type of racial rent-seeking through tenderpreneurs and cadre deployment.

Ultimately the racial requirements put up as part of these policies deter foreign investment and inhibit growth – leading to higher unemployment and poverty amongst all South African citizens.

The scourge of State Capture was largely driven by misusing race-based preferential procurement policies to charge exorbitant fees for services by B-BBEE middlemen to the government.

At grassroots level, these policies have manifested in absurdities like sports teams “losing” games because they were not demographically representative enough or the government implementing relief funds during COVID-19 that only black business owners can apply for.

Race-based legislation deters foreign investment and inhibits growth. Additionally, the government's extensive social engineering of the labour market makes it much more difficult to do business in South Africa than is necessary.

South Africa needs to attract investment to drive job creation and eliminate poverty and significant inequality. Race-based legislation makes this impossible.

“racial requirements”

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## Introduction

South Africa is a complex country with an extremely complex history. In 1994 South Africa transitioned from a racially discriminatory dispensation to a new, non-racial South Africa.

This peaceful transition was regarded as somewhat of a "miracle" at the time. A new South Africa would arise built on the bedrock of equality and non-racialism.

Unfortunately, 30 years later, this has not come to pass.

South Africa is the most race-regulated country in the world with more than 140 active laws referencing race. A far cry from non-racialism as race has consistently been the one aspect that the South African government focuses on.

This document attempts to give a cursory overview of the South African journey from non-racial miracle to morass.

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## Background

Article 1 of the South African Constitution expressly states that the Republic of South Africa is built on the values of non-racialism and non-sexism.<sup>1</sup>

Article 9 of the same constitution guarantees equal rights for all persons and expressly prohibits any discrimination based on race, sex, gender, pregnancy, marital status, ethnic origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. Unfortunately, subsection (5) of the same article states that discrimination on these grounds is unfair unless established that the discrimination is fair.<sup>2</sup>

It is through this exception that the ANC government has enacted legislation that expressly discriminates against citizens of certain races and genders through three main pieces of legislation. The justification for discriminating against people of certain races is that it is now done in the name of redress, restitution and equality.<sup>3</sup>

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<sup>1</sup> <https://www.gov.za/documents/constitution/constitution-republic-south-africa-04-feb-1997>

<sup>2</sup> <https://www.gov.za/documents/constitution/constitution-republic-south-africa-04-feb-1997>

<sup>3</sup> <https://www.anc1912.org.za/policy-documents-1994-affirmative-action-and-the-new-constitution/>

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## Employment Equity

The first piece of legislation the ANC imposed to racially redress the effects of apartheid was the Employment Equity Act. The act states that its goals are to promote equality, eliminate unfair discrimination, redress the impact of discrimination, achieve a broadly representative workforce, promote economic development and give effect to the obligations of the Republic as a member of the International Labour Organisation.<sup>4</sup>

What the act envisioned was, that all qualifying employers should report on the demographics of their workforce with a specific focus on race, gender and disability.

Along with each employer's own demographics, the Department of Labour was empowered to provide codes of good practice and regulations regarding the implementation of the act.

As enforcement, any employer who wishes to contract with the state must comply with the act along with labour inspectors who are empowered to fine non-compliance.

Although quotas and absolute barriers are expressly forbidden according to the act, in practice, the Employment Equity Act has created a situation where the state directly interferes and pressures companies to have and keep a certain demographic profile in their workforce.

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## Preferential Procurement

Another piece of legislation that is meant to racially redress the South African economy is the Preferential Procurement Act of 2000.<sup>5</sup>

The goal of this act is to give effect to section 217(3) of the Constitution allowing state procurement to protect and advance persons disadvantaged by unfair discrimination.

In effect, the implementation of this act resulted in all state tenders no longer being solely decided on price – with either an 80/20 or 90/10 split where price is the primary component – but rather race and gender making up the remainder of the points awarded for every government tender or contract.

Black-owned businesses could thus charge a 25% premium on certain contracts and be awarded the contract. Every organ of the state and several parastatals had to implement a preferential procurement policy.

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<sup>4</sup> <https://www.labour.gov.za/DocumentCenter/Acts/Employment%20Equity/Act%20-%20Employment%20Equity%201998.pdf>

<sup>5</sup> <https://www.gov.za/documents/acts/preferential-procurement-policy-framework-act-5-2000-03-feb-2000>

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## Black Economic Empowerment (BEE)

The third piece of legislation was only adopted in 2003 and is called the Broad-Based Black Economic Empowerment Act.<sup>6</sup>

Objectives of the Act are to enable meaningful participation of black people in the economy and to achieve a substantial change in the racial composition of ownership structures in existing and new enterprises amongst other goals.

The Act assigns a certain B-BBEE level to companies based on several racial factors, including the percentage of black shareholders, the B-BBEE level of suppliers and vendors and socio-economic development that promotes access to the economy for black people.<sup>7</sup>

Although theoretically completely voluntary it is extremely difficult for any company to function in South Africa without attaining a certain B-BBEE level. Entering into any contract with the government or even supplying companies that have a contract with the government will be almost impossible. Several licensing and permitting processes governed by the South African government also include B-BBEE requirements in order to attain said licence or permit.

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## In practice

Although the intentions behind Affirmative Action and Black Economic Empowerment seemed noble the outcomes have been vastly different from the stated intentions.

In the ANC policy document outlining the need for Affirmative Action, it is expressly stated that South Africa should not “become a nation of groups all walking around with calculators doing head counts”.<sup>8</sup> However, practically this is exactly what has happened regarding these pieces of legislation – with South Africa in 2025 having whole departments in government and private sector companies devoted to constantly calculating headcounts.

**Some examples of the transformation of non-racial intentions to race-obsessed outcomes follow:**

### Eskom

The clearest example of the practical effect of this legislation has been the impact on Eskom. After the implementation of the Employment Equity Act, South Africa's sole electricity provider, Eskom, undertook an aggressive campaign of Employment Equity.

To change the demographic profile of its workforce – the retirement age for white workers was lowered to 45 years. In, what was called “Space Creation”, Eskom aggressively drove demographic targets rather than engineering targets.<sup>9</sup> White engineers were made to understand that they were no longer wanted or needed and persuaded to leave with compensation.

The effect was predictable – a massive outflow of skills and institutional knowledge followed. Ultimately this was instrumental in the power crisis South Africa entered in 2008 that lasted until 2023.<sup>10</sup>

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<sup>6</sup> [https://www.saflii.org/za/legis/consol\\_act/bbeea2003311.pdf](https://www.saflii.org/za/legis/consol_act/bbeea2003311.pdf)

<sup>7</sup> <https://www.bowmanslaw.com/wp-content/uploads/2020/10/B-BBEE-Guide-1-21.10.2020.V2.pdf>

<sup>8</sup> <https://www.anc1912.org.za/policy-documents-1994-affirmative-action-and-the-new-constitution/>

<sup>9</sup> <https://www.iol.co.za/business-report/economy/eskom-defends-its-equity-policy-794292>

<sup>10</sup> [https://www.gsb.uct.ac.za/files/1736\\_Worch\\_etal\\_2019.pdf](https://www.gsb.uct.ac.za/files/1736_Worch_etal_2019.pdf)

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Despite failing to meet targets regarding electricity generation managers at Eskom were reportedly given large bonuses for meeting equity targets.<sup>11</sup>

Despite the prohibition on absolute barriers and quotas, Eskom still refused to shortlist white engineers for certain advertised vacant posts as recently as 2024.<sup>12</sup>

To compact the desperate situation – Eskom was required to implement a preferential procurement policy to comply with B-BBEE legislation. The effect was two-fold – Eskom paid a premium for BEE compliance of at least 30%.<sup>13</sup> With electricity as the primary input-cost of the whole economy, these costs were ultimately paid by the South African consumer.

Additionally, BEE procurement has been the gateway through which massive corruption has spread in South Africa. Eskom constructed two new power plants under BEE procurement rules – Medupi and Kusile. Both these projects were extensively over budget and late<sup>14</sup> primarily due to corruption committed under the guise of B-BBEE procurement.<sup>15</sup>

### Water and other licencing

Recently the Department of Water and Sanitation announced that all new water licences would be subject to B-BBEE requirements.<sup>16</sup> These regulations required 75% black ownership for any new water use allocation.<sup>17</sup> Although currently only applicable to new water licence applications<sup>18</sup> – the government's intention is clearly to attach B-BBEE requirements to almost all forms of licensing or permitting as shown in leaked internal government memos.<sup>19</sup>

Probably the most known example of the government's obsession with race-based ownership requirements is that of Starlink not being able to operate in South Africa without giving 30% equity to black shareholders.<sup>20</sup>

Despite the benefits of having cheaper internet access, especially in poor and rural areas, the government has insisted that Starlink should sell 30% of its equity to a black investor to comply with South Africa's BEE laws.<sup>21</sup>

Starlink might be the most well-known example of international investors not being able to enter the South African market due to race-based regulations regarding ownership, but it is certainly not the only company in the last two decades.<sup>22 23</sup>

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<sup>11</sup> <https://www.biznews.com/energy/2024/12/15/sas-electricity-crisis-andrew-kenny>

<sup>12</sup> <https://www.moneyweb.co.za/news/south-africa/eskom-lashed-by-labour-court-over-employment-equity-implementation/>

<sup>13</sup> <https://irr.org.za/reports/occasional-reports/files/breaking-the-bee-barrier-to-growth-1-1.pdf>

<sup>14</sup> <https://mybroadband.co.za/news/energy/443784-medupi-and-kusile-eight-years-late-and-r300-billion-over-budget.html>

<sup>15</sup> <https://www.dailymaverick.co.za/article/2019-11-26-top-eskom-contractors-in-fresh-r75m-kusile-slush-fund-scandal/>

<sup>16</sup> <https://www.bee.co.za/post/race-quotas-for-water-use-licences-would-be-fatal>

<sup>17</sup> <https://press-admin.voteda.org/wp-content/uploads/2023/06/Screenshot.jpeg>

<sup>18</sup> <https://www.cliffedekkerhofmeyr.com/news/publications/2023/Sectors/Agriculture/agriculture-aquaculture-and-fishing-alert-26-june-2023-dws-clarifies-the-transformation-requirements-in-the-proposed-new-water-license-regulations>

<sup>19</sup> <https://www.sakeliga.org.za/en/sakeliga-releases-department-of-agricultures-confidential-plans-for-unlawful-bee-enforcement/>

<sup>20</sup> <https://bowmanslaw.com/insights/south-africa-new-ownership-rules-for-telecoms-operators-and-broadcasters/>

<sup>21</sup> <https://www.biznews.com/sa-investing/2025/02/18/bee-rules-block-starlink>

<sup>22</sup> <https://mg.co.za/article/2004-08-27-investors-concerned-about-bee-policies/>

<sup>23</sup> <https://www.news24.com/fin24/economy/sa-to-tweak-bee-ownership-rules-for-foreign-firms-as-it-frets-about-global-trade-war-20241031>

## Effects of legislation

Milton Friedman said: “One of the great mistakes is to judge policies and programs by their intentions rather than their results”.

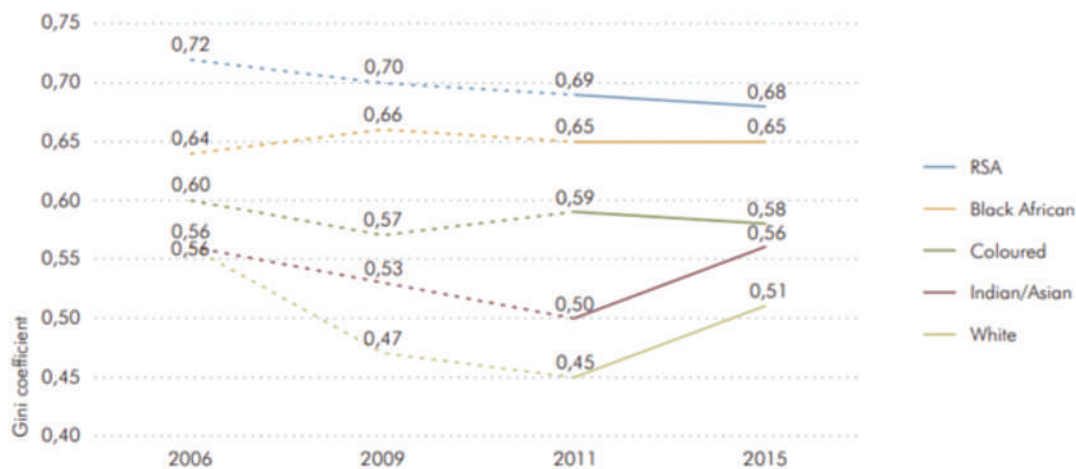
South Africa has more than 140 laws that still reference race in one form or another. The self-stated aim of several pieces of this legislation is to undo the economic exclusion of black people by the apartheid government. When looking at the results rather than the intentions, clearly these policies have not achieved their aims at all.

### Inequality

South Africa is widely known as the most unequal country in the world with a Gini coefficient of 0,67 in 2020.

However, inequality in South Africa has changed from being primarily between population groups to being mostly contained within the black population group. In fact, in 2019 inequality within groups contributed to 69% of the total inequality while inequality between groups dropped significantly.<sup>24</sup>

Figure 2.8: Gini coefficient (income per capita) by population group (2006, 2009, 2011 and 2015)



Source: Poverty Trends in South Africa – Stats SA<sup>25</sup>

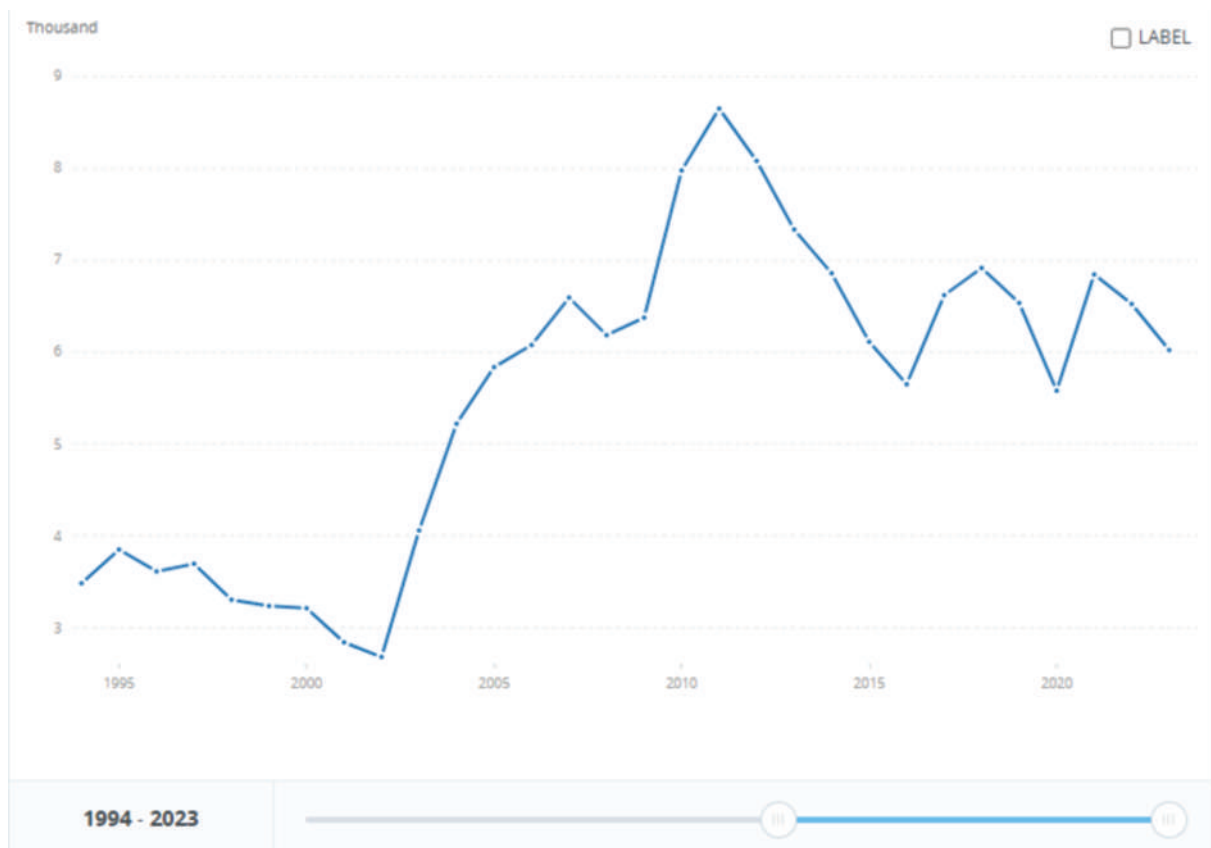
Race-based redress policies have thus succeeded in reducing inequality between population groups but have increased inequality within the black population group to such an extent that this now makes up the bulk of inequality in South Africa. The policies have thus created a small, black elite that has done exceedingly well – whilst not reducing inequality overall.

<sup>24</sup> <https://www.statssa.gov.za/publications/Report-03-10-19/Report-03-10-192017.pdf>

<sup>25</sup> <https://www.statssa.gov.za/publications/Report-03-10-06/Report-03-10-062015.pdf>

## Poverty

South Africa has seen a stagnation in GDP per capita growth for the past 30 years. When comparing GDP per capita in US dollar, South Africa is currently below the levels of 2008.



Source: World Bank Data<sup>26</sup>

Although South Africa showed significant growth in the early 2000s, this has slowed to a crawl. The country realistically never fully recovered from the 2008 recession and was already in a technical recession even before the COVID-19 pandemic hit.

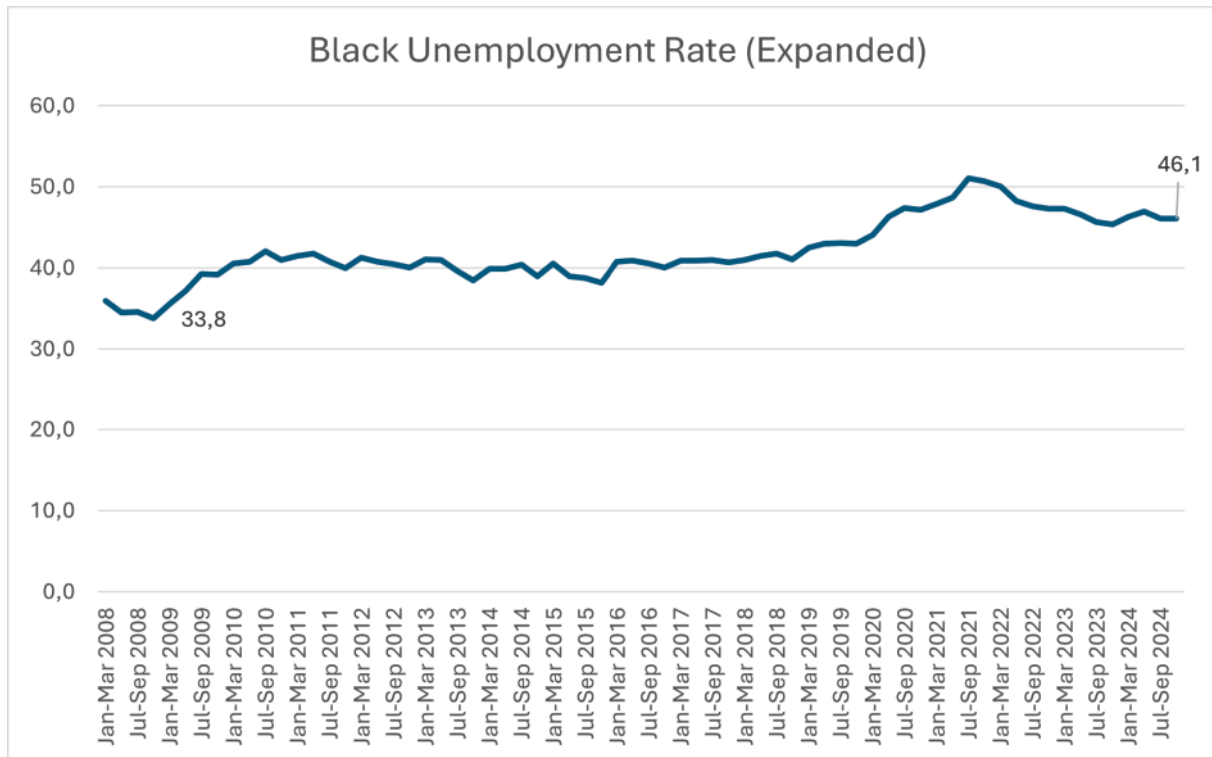
Despite significant challenges attracting growth the ANC government has steadily intensified race-based legislation and made entrance into the South African market even more challenging for foreign investors.

## Unemployment

South Africa has some of the world's highest unemployment rates. Currently, it is at 31,9% on the narrow definition and 41,9% when discouraged work seekers are included as unemployed.

Significantly, however, unemployment has increased in the past three decades and when looking at black unemployment specifically, the picture is particularly grim.





Source: QLFS 2024 Quarter 4 – Stats SA <sup>27</sup>

What is readily apparent is that black unemployment has not decreased despite legislation that expressly aims at increasing black economic participation.

Ultimately, the low-growth reality in South Africa has meant that the unemployment crisis has only deepened. Affirmative Action and Black Economic Empowerment have done nothing to decrease black unemployment and by extension black poverty.

With the implementation of Affirmative Action that has too readily become white workers having to make space for black workers the policy simply cannot make an impact on unemployment and poverty. If every single white worker had their job replaced by an unemployed black worker, the black unemployment rate would only drop from 46% to 38% (expanded).

Policies that prioritise redistribution rather than growth will simply not solve the problems of black poverty, inequality and unemployment.

### Corruption

South Africa has endemic corruption. The phenomenon of State Capture is well documented with the Zondo-commission publishing a six-volume report detailing the extent of corruption in the South African state apparatus.

One of the key findings of the report is that the preferential procurement policy that utilises B-BBEE criteria was ripe for misuse and corruption.<sup>28</sup>

Quite simply put, the insistence on maintaining race-based legislation has allowed a nefarious class of tenderpreneurs to thrive. Tenderpreneurship is simply race-based rent-seeking.<sup>29</sup>

<sup>27</sup> [https://www.statssa.gov.za/?page\\_id=1854&PPN=P0211&SCH=73895](https://www.statssa.gov.za/?page_id=1854&PPN=P0211&SCH=73895)

<sup>28</sup> <https://www.corruptionwatch.org.za/public-procurement-is-the-space-to-watch/>

<sup>29</sup> <https://www.dailymaverick.co.za/article/2024-07-28-sas-new-public-procurement-act-takes-aim-at-tenderpreneurs/>

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## Intensifying racial legislation

Despite ample evidence that these policies have not achieved their goals at all – in fact, it has only had the opposite effect – the South African government has intensified race-based legislation with each passing year.

### Race-fund

In the 2025 State of the Nation Address, President Ramaphosa announced that the government plans to spend R100 billion over the next five years setting up a fund that will be exclusively used to fund black-owned businesses.<sup>30</sup>

The fund will purportedly use existing B-BBEE codes of good practice and an additional tax on mergers and acquisitions to solicit funds for the race-based transformation fund.<sup>31</sup>

Despite resistance from organised business, the ANC-led government has simply rushed on with the race-based fund.

### Sectoral Employment Equity Targets

In 2023 the Department of Labour published sectoral targets for Employment Equity (Affirmative Action).<sup>32</sup>

The effect of these targets is that all qualifying businesses have to comply with government-set demographic targets. The government did not consult with the vast majority of sectors – simply opting to gazette centralised targets based on the Economic Active Population in a particular province. Non-compliance could be liable to fines amounting to 10% of turnover according to law.

If implemented, the sectoral targets could potentially lead to the loss of employment for 600 000 minority workers (White, Indian and Coloured).<sup>33</sup>

After massive resistance from the Solidarity Trade Union and others, the government temporarily retracted the sectoral targets only to republish similar targets in 2024.<sup>34</sup>

Employment Equity targets also do not allow any regression in representation – meaning that once you hit a target for a certain race as employer, you have to maintain that level of representativeness indefinitely.<sup>35</sup>

This has led to a situation where certain occupational levels, such as semi-skilled and unskilled labour, have an overrepresentation of black workers in terms of the racial Economic Active Population. However, these occupational levels are still not exempt from the legislation.

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## Grassroots Consequences

Ultimately, these policies have led South Africa far from being non-racial. In fact, in South Africa at grassroots level, race is currently infused into almost every aspect of life.

A couple of examples of the extent of race-based policy interfering in everyday life follow:

### Department of Correctional Services

Ten coloured applicants, who are not considered “black” under South African legislation, applied for

various positions at the Department of Correctional Services. They were not considered for appointment because their employment would have negatively affected the racial targets that had been set. National racial targets were used as the standard, regardless of the demographic composition of the specific geographical area. In 2016, Solidarity obtained a Constitutional Court ruling that the department was applying racial legislation unfairly.<sup>36</sup>

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<sup>30</sup> <https://www.news24.com/fin24/economy/ramaphosa-new-transformation-fund-will-unlock-sas-economic-potential-20250206>

<sup>31</sup> <https://www.news24.com/fin24/economy/govts-proposed-r100bn-transformation-fund-heres-what-we-know-20250123>

<sup>32</sup> <https://www.labour.gov.za/DocumentCenter/Regulations%20and%20Notices/Regulations/Employment%20Equity/Employment%20Equity%20Sector%20Targets%20Regulations%20Combined.pdf>

<sup>33</sup> <https://www.netwerk24.com/netwerk24/nuus/politiek/raswet-da-wil-voortbou-op-solidariteit-se-sukses-20230629>

<sup>34</sup> <https://www.cliffedekkerhofmeyr.com/news/publications/2025/Practice/Employment-Law/employment-law-alert-17-february-Update-on-the-Introduction-of-Sectoral-Targets-under-the-Employment-Equity-Act-Amendments>

<sup>35</sup> <https://journals.co.za/doi/pdf/10.10520/EJC-89e7c4128>

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### Renate Barnard

Former Captain Renate Barnard applied for a promotion within the South African Police Service (SAPS) while being employed there. Six other individuals also applied for the position. The interview panel awarded her a score of 86,7% and unanimously recommended her appointment. However, the regional commissioner indicated that she should not be appointed due to her race and the fact that she was not “representative”. She performed 17,5% better than the second-best candidate, and the interview panel itself noted that if the position were not filled, it would have a significant impact on service delivery.

A year later, the position was re-advertised, and Barnard applied again. She was once again recommended by the interview panel, this time with a score of 85,33%. On this occasion, the regional commissioner indicated that she should be appointed, but the national commissioner did not approve the appointment, despite her being the best candidate. The national commissioner stated that the position should rather be scrapped due to the lack of a suitable black candidate.

The position was re-advertised once more. Barnard applied again, but her application was removed before the interview process even took place. Solidarity represented Barnard in the Labour Court and later in the Constitutional Court. The ruling determined that the employer, SAPS, had acted within the framework of South African affirmative action legislation.<sup>37</sup>

### Yes4Youth

In 2018 the Yes4Youth youth unemployment initiative did not allow young unemployed white people to register on its website. A message explicitly stated that the program was only open to young, unemployed individuals who were coloured, black or Indian.

Thus, the program directly discriminates against unemployed white individuals in the name of redress.

Following pressure from Solidarity, Yes4Youth initially stated that the program was open to all races. However, since the program is rooted in existing Broad-Based Black Economic Empowerment (B-BBEE) legislation, they could not avoid prioritizing unemployed black individuals over unemployed white individuals.

In theory, the program is now open to young people of all races. However, businesses can only earn B-BBEE points through the program if they employ unemployed black, coloured, or Indian youth.<sup>38 39</sup>

### Sports interference

South Africa has a long history of racial quotas and regulations being enforced on the composition of sports teams. The first example of absurdity was in 2014 when Fikile Mbalula, then Minister of Sport, threatened to ban South African sports teams from participating in international competitions if they were not “black enough”.<sup>40</sup>

This interference in sports reached the height of absurdity during the 2020 Telkom Netball League when several netball teams “lost” their matches simply because, for an entire quarter, they had the incorrect racial composition of players on the court.<sup>41</sup> In the case of the Mpumalanga Sunbirds, the absurdity was that they had too many black players on the court.<sup>42</sup>

Unfortunately, this form of social engineering also filters down to school sports. A striking example was seen in 2023 when the Western Province U16 rugby team forfeited their place in the final of the Grant Khomo Rugby Week because, due to injuries, their racial composition no longer met the required quota.<sup>43</sup>

### COVID Racial Relief

A former Minister of Tourism, Mmamoloko Kubayi-Ngubane, announced in 2021 during the COVID-19 lockdown that the Tourism Relief Fund, which was established to assist businesses facing enormous economic pressure at the time, would be available only to black people. Loans and grants for COVID-19 relief were granted only to businesses with a black ownership of 51% or higher.

Solidarity and AfriForum challenged these criteria set by the department in court. The Court of Appeal in Bloemfontein ruled that the Department of Tourism's implementation of Black Economic Empowerment (B-BBEE) as a criterion for its relief fund was unlawful.<sup>44</sup>

<sup>36</sup> <https://www.saflii.org/za/cases/ZACC/2014/23.html>

<sup>37</sup> <https://www.yes4youth.co.za/faqs/youth>

<sup>38</sup> <https://www.yes4youth.co.za/bbee-gazette-and-practice>

<sup>39</sup> [https://www.timeslive.co.za/news/south-africa/2014-04-07-hard-line-taken-on-white-sport/#google\\_vignette](https://www.timeslive.co.za/news/south-africa/2014-04-07-hard-line-taken-on-white-sport/#google_vignette)

<sup>40</sup> <https://www.facebook.com/netballsa/posts/telkom-netball-league-division-a-and-b-semi-final-teams-confirmed-the-kingdom-sta/10158624505133788/>

<sup>41</sup> [https://www.pressreader.com/namibia/new-era/20201030/282059099505049?srsId=AfmBOorW\\_ovlxlcf4ZFKV4jCE3-slZMOBe-6t30xYmpGRLpfKmC6kw](https://www.pressreader.com/namibia/new-era/20201030/282059099505049?srsId=AfmBOorW_ovlxlcf4ZFKV4jCE3-slZMOBe-6t30xYmpGRLpfKmC6kw)

<sup>42</sup> <https://www.news24.com/sport/rugby/wp-under-16s-booted-from-grant-khomo-week-final-after-failing-transformation-targets-report-20230629>

<sup>43</sup> <https://www.saflii.org/za/cases/ZAGPPHC/2021/257.html>

### University Racial Entrance Criteria

South Africa has had racially exclusive admission measures in place at several universities for several years.

Some examples are the University of Pretoria which explicitly states that 50% of the student body for LLB studies must be black African, coloured or Indian.<sup>44</sup> If the racial target is not met, the admission process should be adjusted.

The University of Cape Town has a disadvantage factor system whereby all applicants will have their Admission Point Score adjusted based on their race.<sup>45</sup>

In South Africa, it is not at all an uncommon phenomenon for a university to have an admission policy that states the university should take measures to reflect a student body that is representative of the diversity of the country's demographics. In practice, this leads to targets that expressly stipulate the racial makeup that a university's student body should consist of. The North-West University for example stipulates that there should be 44% black African, 5,6% coloured and 1,4% Indian students on the Potchefstroom campus by 2025.<sup>46</sup>

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<sup>44</sup> [https://www.up.ac.za/media/shared/368/Faculty%20Brochures/2024/up\\_fb-law-2024\\_devv13\\_web-2.zp228656.pdf](https://www.up.ac.za/media/shared/368/Faculty%20Brochures/2024/up_fb-law-2024_devv13_web-2.zp228656.pdf)

<sup>45</sup> [https://uct.ac.za/sites/default/files/media/documents/2025\\_National-Senior-Certificate-NSC\\_Guidelines-for-Admissions.pdf](https://uct.ac.za/sites/default/files/media/documents/2025_National-Senior-Certificate-NSC_Guidelines-for-Admissions.pdf)

<sup>46</sup> <https://maroelamedia.co.za/nuus/sa-nuus/dis-als-oor-wit-en-swart-by-die-puk/>

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## Agreement between Government and Solidarity

*“For the reasons provided above, the Harvard and UNC admissions programs cannot be reconciled with the guarantees of the Equal Protection Clause. Both programs lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points. We have never permitted admissions programs to work in that way, and we will not do so today.”<sup>48</sup>*

Section 39, section 232 and section 233 of the Constitution of the Republic of South Africa state that South Africa is bound by international law.<sup>49</sup>

The International Labour Organisation (hereinafter referred to as the “ILO”) sets out conventions that are legally binding international treaties with the purpose of stipulating basic principles and rights at work. South Africa has, inter alia, ratified ILO Convention C111. Article 5(2) of the Convention introduces affirmative action in the form of special measures—

*“Any Member may, after consultation with representative employers’ and workers’ organisations, where such exist, determine that other special measures designed to meet the particular requirements of persons who, for reasons such as sex, age, disablement, family responsibilities or social or cultural status, are generally recognised to require special protection or assistance, shall not be deemed to be discrimination.”*

To ensure that special measures are legal and rational an ILO Report, released in 2003, states as follows:<sup>50</sup>

*“197. The expression “affirmative action” refers to: a coherent packet of measures, of a temporary character, aimed specifically at correcting the position of members of a target group in one or more aspects of their social life, in order to obtain effective equality”....*

and;

*“199. A common feature of affirmative action measures is their temporary nature. This presupposes a regular and objective evaluation of affirmative action programmes at ascertaining their effectiveness, redefining regularly their scope and content and determining when to bring them to an end. In some countries, however, they may be discontinued, or their effectiveness reduced as a result of cuts in social spending, economic downturns or economic restructuring.*

Under the guidance of the Committee on the Elimination of Racial Discrimination (hereinafter referred to as “CERD) the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter referred to as “ICERD”), also ratified by South Africa, states in article 1 paragraph 1 and 4, read with General Recommendation 32 of 2009 that:

*“Special measures may not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.”*

International best practices, as evidenced by ILO, CERD and court cases such as *Fair Admissions, Inc.* underline that affirmative action should be temporary in nature.

In 2022 Solidarity made representations in terms of article 24 of the ILO indicating that the Republic of South Africa is in non-adherence with its international law obligation, more specifically Convention C111.

Thereupon, Solidarity and the Republic of South Africa entered a mediation process of the ILO which was facilitated by the Commission for Conciliation, Mediation and Arbitration (hereinafter referred to as the “CCMA”).

Solidarity and the Republic of South Africa settled the dispute on numerous grounds; however, we wish to highlight the following salient clause in the settlement agreement—

*Affirmative action is a coherent packet of measures, of a temporary nature in line with the Constitution, aimed specifically at correcting the position of members of a target group as defined in the Employment Equity Act in the workplace, in order to obtain effective equality*

Although the abovementioned settlement agreement was made an order of the court, we submit that the South African government blatantly disregards its international obligation as well as the settlement agreement which dictates meaningful ends for affirmative action.

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<sup>47</sup> *Fair Admissions, Inc. v. President and Fellows of Harvard College* is 600 U.S. 181 (2023). Own emphasis.

<sup>48</sup> Constitution of the Republic of South Africa.

<sup>49</sup> Time for equality at work, *Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Right at Work*, International Labour Conference, 91st session 2003, pp 63-64. Emphasis added.

<sup>50</sup> Own emphasis

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## The Way Forward

Proportional representation of every population group at every level and in every conceivable field is emphasised and enforced in South Africa as the only purpose of employment equity. It is not necessarily “equitable representation” as envisaged in international conventions. The determination of what is “equitable” is not a simple exercise of considering the make-up of the economically active population (EAP).

Currently, the South African government measures affirmative action compliance and target-setting against the EAP. Thus, the EAP is used in isolation; no factor other than the percentage of race is utilised. This unlawfully and unfairly makes affirmative action in South Africa an indefinite pursuit of statistical representativity, which is clearly an affront to the principle that special measures should be temporary.

These measures deter investment and inhibit growth in the South African economy – ultimately only benefiting a small elite at a significant cost to the rest of the country.

Possible interventions that would benefit the entire South African economy:

- Remove B-BBEE restrictions completely on international investors. There is no rationale behind forcing international investors to abide by measures that are meant to redress South Africa's discriminatory past. South Africa desperately requires foreign investment to drive growth – any policy that hinders foreign investment should be scrapped
- Implement a failsafe that automatically suspends all preferential procurement policies if economic growth in South Africa decreases below a certain percentage, e.g. 3%. Without sufficient economic growth tax income will lag and the government cannot afford any inefficiencies. The suspension should be lifted once growth increases above a certain percentage. That way growth is used for redress – rather than redistributing dwindling resources along racial lines.
- Implement a sunset clause for Affirmative Action in the labour market. Using the Economic Active Population (EAP) as the only target is an ever-changing goalpost that will never be reached. In effect, that would imply that the regulations regarding the demographic makeup of the labour force are no longer temporary in nature but permanent. The median age in South Africa is currently 28 years – implying half the country was born after the end of apartheid. A cutoff date for Affirmative Action is necessary. Broad demographic representation in the labour market should be reached through increased education levels and economic growth – rather than extensive social engineering.



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MOVEMENT