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INSTITUTIONAL RACISM AND ITS OPPRESSION OF THE BLACK EMPLOYEE'S ECONOMIC FREEDOM

AS APPROVED BY POSTGRADUATE STUDIES COMMITTEE

by

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I would like to give thanks and to dedicate this paper primarily to my Lord and Saviour, Jesus Christ. Without His grace and mercy I could never have finished this. Thank You God for giving me the strength and the courage to get to the end - especially when I wanted to give up, I knew I had nothing left to give and had no heart to do it! I am forever grateful.

Secondly, I dedicate this paper to myself. A very challenging component of my degree because research is not my strength. But I managed to walk through the valley and made it to the top of the mountain. This signifies the end of a victorious journey. What an emotional and sobering moment... I did it!

To my father, Dr. M Lubile, this is for you! Since I obtained my LLB in 2015 you always tried to convince me to do my Masters and I always bluntly declined, several years later we've done it! Thank you for giving me this opportunity. Thank you for understanding whenever it got tough. Thank you for assisting when I needed help. Thank you for encouraging me. Thank you for being invested in my success.

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ABSTRACT

Institutional racism can be identified as a prominent factor, amongst numerous others, in the slow progression of the black population in the South African workplace. Consequently, due to the perpetual undermining of the black race and their professional capabilities, this leads to the rather slow (socio-) economic growth and progress of the black workforce and population in the long run. This report considers the extent to which institutional racism still has an impact on the (socio-) economic emancipation of the black worker which ultimately limits their standard of living. The origin of institutional racism from the colonial and apartheid era lay the foundation for the report, the effectiveness of corrective policies and legal frameworks are explored together with the elements of Critical Race Theory and how they are relevant to the issues pertaining to institutional racism in the workplace. Two areas that are specifically looked into are institutional racism against women and black women particularly as well as its presence in the legal profession.

From a statistical perspective, theory is translated into numbers – the findings support and demonstrate how indeed there is a large gap between the saturation of the white race and the black race at different skills levels in the workplace as well as in business management and ownership in comparison to the economically active population of each race group. This corroborates the findings of the literary research in that systemic racism is still a major barrier to the elevation and progressions of the black population in the workplace and ultimately in their general standards of living.

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'Apartheid did not die; it was privatised.'[1]

I. INTRODUCTION

'Apartheid continues in new and unsuspecting guises, despite democracy's inception.'[2] It can be said that although apartheid, along with its laws, has been abolished, it is still evident that power still sits within the hands of the white minority in the private sector and regardless of any legislation enacted and implemented to empower and benefit the black majority population, that power still has influence as financial barriers and implicit discrimination have replaced legislation as the promoter of segregation.[3] '*De jure* segregation has vanished but *de facto* segregation persists.'[4] Systemic racism prevents people, especially black people, from making the most of their economic potential and it therefore comes with significant costs on the economy but more pertinently has significant economic costs on the race group that is subject to the disadvantage.[5]

One of the reasons for South Africa's violent crime rate for instance is economic inequality,[6] but more than twenty years post-apartheid there are still barriers to the promotion of access to the economy and to income. The purpose of this report is to illustrate that institutional racism is a form of oppression and segregation that exists in the workplace. The evaluation is carried out through literary research by first defining the concept, then acknowledging the historical origins of institutional racism, consideration is taken of the legal frameworks that have been implemented in an attempt to curb this common practice in the workplace and how this silent form of oppression is thriving in our democracy post-apartheid under the prescription and elements of Critical Race Theory that are in some places applicable. Although institutional racism happens across the board of the workforce, the prejudices that

[1] Sizwe Mpofu-Walsh *The New Apartheid* (2021) 159.
[2] Ibid.
[3] Ibid at 17.
[4] Ibid at 41.
[5] Joseph Losavio *International Monetary Fund – Finance & Development* 'The Economic Cost of Racism' September 2020 available at *https://www.imf.org/external/pubs/ft/fandd/2020/09/the-economic-cost-of-racism-losavio.htm,* accessed on 11 January 2021.
[6] Mpofu-Walsh op cit note 1 at 134.

are perpetuated specifically in the legal profession[7] and on women and black women in particular[8] will be considered.

II. WHAT IS INSTITUTIONAL RACISM?

At the core of corporate culture in many public and private South African organisations is what is known as institutional racism.[9] South African companies, especially those in existence prior to 1994, have had institutional racism entrenched in their daily functioning – disguised in its standard operating procedures, its policies and its organisational culture, and demonstrated in their criteria for appointment, promotion and retention.[10] The economic well-being and emancipation of black people under regimes of this kind is greatly oppressed and limited. These limitations can be even more severe for the black woman.[11] Consequently, this poses many economical and financial challenges for black people when their growth is stunted from the stages of recruitment, their retention, and their progression in an organisation.[12]

Institutional racism is a form of racism that resides in policies, procedures, operations and the culture of public or private institutions which reinforces individual prejudices. Some describe it simply as the 'routine ways in which organisations treat black people.'[13] Institutional racism is expressed in unfair policies, unfair practices, discriminatory treatment and unequal opportunities and outcomes[14] that become the norm in the way an organisation operates and that results on the one hand in an unfair advantage for one group of people and on the other

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[7] Centre for Applied Legal Studies (CALS) Research Report 'Transformation of the Legal Profession' August 2014.
[8] Carlos Gradín 'Occupational gender segregation in post-Apartheid South Africa' (2021) 27(3) *Feminist Economics*.
[9] William Gumede 'Institutional Racism' 06 February 2018 available at *https://www.sabcnews.com/sabcnews/institutional-racism/*, accessed on 29 December 2020.
[10] William Gumede 'Improve workplace democracy' 13 February 2017 available at *https://democracyworks.org.za/improve-workplace-democracy/,* accessed on 31 December 2020.
[11] Ibid.
[12] Geraldine Martin & Kevin Durrheim 'Racial recruitment in Post-Apartheid South Africa' (2006) 33 *Psychology in Society.*
[13] William Gumede 'Institutional racism is still alive and kicking in the workplace' 26 January 2018 available at *https://mg.co.za/article/2018-01-26-00-institutional-racism-is-still-alive-and-kicking-in-the-workplace/,* accessed on 15 November 2020.
[14] Claire Lechtenberg 'Defining Racial Justice Terms: Institutional Racism' 11 August 2020 available at *https://ywcacentralcarolinas.org/defining-racial-justice-terms-institutional-racism/*, accessed on 02December 2020.

hand unfair or harmful treatment of others based on race.[15] Consequently, by virtue of their unchosen race, black people earn less, live a lower quality and standard of life and consequently experience the burden of poverty more extensively than other race groups.[16] Institutional racism can be indirect, subtle or 'unconscious' and can be reinforced by individuals who are themselves not racist. It is therefore measured or experienced through the negative outcomes and effects of the organisational operations.[17] Although institutional racism is perpetuated by apparent non-racists, the system will by its nature be prejudicial against certain groups of people and make it difficult for them to work and make real socio-economic progress.

It can be understood that unlike individual racism as is commonly known, institutional racism is about the organisation and not about individuals. Further, it can be deemed to be a system of processes that blocks and disadvantages blacks from having access to goods, services and opportunities.[18] It uses race to determine many aspects of life 'from access to quality education, health care, and economic opportunities, to how much is spent developing and maintaining communities.'[19] Institutional racism features in many, if not every part of our society – be it social, medical, political, economic, education, labour systems. It develops and is adapted over time from history and culture that has allowed for privileges associated with 'whiteness' and disadvantages associated with 'people of colour'.[20] White privilege can be understood to be 'an institutional set of benefits granted to those who, by race, resemble the people who dominate the powerful positions in institutions.'[21] A primary privilege is access to power and resources to a larger extent than people of colour. White privilege still however

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[15] Cambridge Dictionary available *at https://dictionary.cambridge.org/dictionary/english/institutionalized-racism*, accessed on 10 November 2020.

[16] Statistics South Africa (Stats SA) 'How unequal is South Africa?' 4 February 2020 available at *http://www.statssa.gov.za/?p=12930*, accessed on 19 November 2020.

[17] Mary Frances O'Dowd 'Explainer: What is systemic racism and institutional racism?' 5 February 2020 available at *https://theconversation.com/explainer-what-is-systemic-racism-and-institutional-racism-131152*, accessed on 05 December 2020.

[18] Julian Glover & Ken Miguel 'What are structural, institutional and systemic racism?' 10 July 2020 available at *https://abc7news.com/systemic-racism-definition-structural-institutionalized-what-is/6292530/*, accessed on 02 January 2021.

[19] Lerato Mogoatlhe '4 Things the World Can Learn From South Africa About Racial Justice' June 18 2020 available at *https://www.globalcitizen.org/en/content/apartheid-lessons-racial-justice-south-africa/,* accessed on 11 January 2021.

[20] The Aspen Institute: Roundtable on Community Change 'Glossary for Understanding the Dismantling Structural Racism/Promoting Racial Equity Analysis' available at *https://www.aspeninstitute.org/wp-content/uploads/files/content/docs/rcc/RCC-Structural-Racism-Glossary.pdf*

[21] Frances E. Kendall, Ph.D 'Understanding White Privilege: Creating Pathways to Authentic Relationships Across Race' 2002 at 1.

does have intersectional disadvantages within itself – the privilege is dependent on factors such as gender, age, sexual orientation, socioeconomic status. For example, white men have more advantages than white women in terms of access to power and resources.[22]

III. LEGAL THEORY AROUND RACIAL OPPRESSION POST APARTHEID

The Critical Race Theory ('CRT') is a school of thought that 'seeks to examine, from a legal perspective, the ways in which prevailing conceptions of race perpetuate relations of domination, oppression and injustice.'[23] This legal framework commands equality of outcome and highlights the ways in which 'colour blind' laws still allows the persistence of racial oppression and inequality despite racism and segregation being outlawed.[24] It also critiques how the social construction of race and institutional racism encourage a racial class system that ends up relegating non-whites to the bottom tiers of society.[25] Critical race theorists believe that race is systemic, found in structures and institutions aimed at maintaining the dominance of white people in society that people are unaware of and it is not demonstrated by individuals and their racist acts.[26] South African critical race theorist Joel Modiri states that such a critical analysis of the engagement of race and law in South Africa is justified due to the long history of institutionalised white supremacy and white privilege which today still coexists with ongoing forms of anti-black racism and racial exclusion.[27]

Race and racism are not a natural and biological reality; they are social constructs that have become normalised and ingrained in society, which have real and tangible effects on black people when it comes to economic resources, education, professional opportunities and overall experiences with legal systems.[28] White supremacy and privilege can manifest in the form of a

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[22] Ibid.
[23] Joel M. Modiri 'The Colour of Law, Power and Knowledge: Introducing Critical Race Theory in (Post-) Apartheid South Africa' (2012) 28(3) *SAJHR* 405 at 405.
[24] Rebecca Bodenheimer 'What Is Critical Race Theory? Definition, Principles, and Applications' 11 June 2021 available at *https://www.thoughtco.com/critical-race-theory-4685094*, accessed on 21 July 2021.
[25] Janel George 'A Lesson on Critical Race Theory' 11 January 2021 available at *https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/civil-rights-reimagining-policing/a-lesson-on-critical-race-theory/,* accessed on 21 July 2021.
[26] Marisa Lati 'What is critical race theory and why do Republicans what to ban it in schools?' 29 May 2021 available at *https://www.washingtonpost.com/education/2021/05/29/critical-race-theory-bans-schools/, accessed* on 21 July 2021.
[27] Modiri op cit note 23 at 405.
[28] Bodenheimer op cit note 24.

system in which white people maintain control and power.[29] Critical race theorists believe that political liberalism emphasises on equal treatment of all races based on the law (termed 'colour blindness') and because of this only the most overt and obvious instances of racism are recognised and not those practices that are indirect, subtle and systemic.[30] It cannot be said that we live in a colour blind society where racial inequality or discrimination is no longer effective just because we have 'colour blind' laws.

In order to end the oppression by whites and for there to be an equal outcome across the races, CRT demands for there to be race-based policies which aims at achieving equality of outcome.[31] In the South African context, it is contended that post-apartheid CRT should entail an exploration of three points:

- A critique of law and legal institutions implicated in perpetuating racist ideology.[32]
- An analysis of the racialised patterns of wealth distribution, economic inequality and poverty and specifically how they are enabled by law and tolerated within the legal culture.[33]
- An engagement with the dynamics of race in 'post'-apartheid social and political life: The effects of apartheid cannot be rectified through the legislating and implementation of new laws and policies. Rather, the effects of racism need radical transformation as transformative constitutionalism must be lived not just 'lawed'.[34]

Modiri states that CRT has an activist dimension to it by virtue of its aspiration to transform the relationship between race, law and power and to reform how legal knowledge and approaches to rights have ignored the historically entrenched marginalisation of black people.[35] Elements of CRT relevant to this argument:

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[29] Modiri op cit note 23 at 406.
[30] Britannica, The Editors of Encyclopaedia 'Critical race theory' *Encyclopedia Britannica* 21 September 2021 available at *https://www.britannica.com/topic/critical-race-theory,* accessed on 16 October 2021.
[31] Dr Anthea Jeffery 'Letter: Critical race theory and its SA variant, NDR' *South African Institute of Race Relations* 01 July 2021 available at *https://irr.org.za/media/letter-critical-race-theory-and-its-sa-variant-ndr-businesslive*, accessed on 21 July 2021.
[32] Modiri op cit note 23 at 408.
[33] Ibid at 408 – 409.
[34] Ibid at 409-410.
[35] Ibid at 414.

a) Critique of liberalism

This element rejects the notion of colour-blind politics and exclusively right based approaches such as anti-discrimination legislation in order to resolve racial problems. It also rejects the narrow way of looking at racism as just individual incidents of intolerable treatment, behaviours and prejudice. But rather highlights that racism is systemic and entrenched in social culture for instance by subordination practices which are endorsed by the law and legal institutions that essentially trap black people into poverty, discrimination and exclusion.[36] This goes to say that the corrective legislations and policies that have been enacted and currently in force are inefficient and are not the correct approach in addressing the ills of systemic racism that goes further and far beyond the borders of individual racism.

b) Anti-essentialism

This element highlights that an identity category cannot be fixed, categorised, or boxed into one common experience. CRT rejects the attempt to define one specific black community and one unitary black experience because there are different needs and concerns existent within a race group.[37] For instance, born frees argue that they should not be classified as previously disadvantaged as a larger number of this generation than the previous one have better educational opportunities than their parents, grew up in a different social class, have more privileges amongst other things that place them at the same level and playing field as their white counterparts and therefore do not need special treatment in the workplace,[38] and this could stand to reason that corrective measures should not be applicable in the current generation in order to do away with institutional racism.

c) Intersectionality

CRT understands that people are simultaneously raced, classed and gendered. There are various identity categories that intersect and consequently influence various forms of discrimination and oppression, namely: race, gender, class, nationality, sexual orientation, religious and cultural beliefs, (dis)ability, etc. This analysis becomes

[36] Ibid at 415.
[37] Ibid at 416.
[38] Rudolph M. Oosthuizen, Louise Tonelli & Claude-Hélène Mayer 'Subjective experiences of employment equity in South African organisations' (2019) 17 *SA Journal of Human Resource Management* at 7 available at *https://sajhrm.co.za/index.php/sajhrm/article/view/1074/1674*, accessed on 05 October 2021.

relevant in identifying the different types of disadvantages and discrimination, evaluating their individual impact and considering remedies.[39] Intersectionality affects employees in many ways, in addition to being black, there is an intersection between being black and a woman, being black and of a particular social class, being black and of a particular educational background – all of these different intersections adding on to the disadvantage or discrimination of the black candidate.

IV. THE HISTORY AND ORIGINS OF INSTITUTIONAL RACISM

The history and foundation of employment in South Africa was first built on colonial rule then apartheid rule and had been shaped by capitalist exploitation of an inferior racial group. This was supported by legislative means implemented such as: Regulations of the Mines and Works Act 12 of 1911, Industrial Conciliation Act 11 of 1924, Mines and Works Amendment Act 25 of 1926, and Bantu Labour Amendment Act 26 of 1970. These Acts aided in securing and reserving jobs and skilled positions and afforded automatic privileges to white workers. In the 1970s to 1980s there were reforms that were introduced still under the apartheid rule with the purpose of deregulating discrimination in employment. Due to white resistance however, this yielded no tangible results or change.[40] 'Henceforth, race would become the definitive criterion for South Africans' access to privilege and opportunity, further restricting the social and economic mobility of black South Africans through a battery of legislative, administrative and other coercive measures.'[41]

Racial and gender discrimination manifested itself in different forms and at different levels of the workplace – sometimes subtle, sometimes harsh, for example:

- Occupational discrimination (according to race);
- discrimination in wage rates;
- with respect to benefits and conditions of employment;
- in education and training; and

[39] Modiri op cit note 23 at 418.
[40] Martin & Durrheim op cit note 12 at 1.
[41] James Taylor 'Struggles against systems that impoverish: South African civil society at the crossroads' (2013) 23(5/6) *Development in Practice*, [SPECIAL ISSUE: Civil societies at crossroads: eruptions, initiatives, and evolution in citizen activism] at 619.

- other labour market regulations – example pass laws and exclusion of women.[42]

These forms of discrimination – some of which subtly still exist and are operational today – formed part of the government's dual labour market policy which consisted of a primary and secondary sector. The primary sector regulated the employment of whites who had a privileged status in the labour market. The secondary sector regulated black workers in a way that infringed on their rights and freedoms. Workplace discrimination can be attributed to the interests of the employer, white workers and the state during the industrial development and apartheid era of South Africa, founded on white superiority and black inferiority dating back to early colonialism.[43]

White superiority meant that no white person could work under the guidance or supervision of a black person or be a subordinate of a black person. This indefinitely kept black workers in subordination of all whites. It's in this way that cheap labour and the oppression of blacks was made a possibility – control measures were implemented to ensure that black workers had no rights and remained powerless. Those control measures were then reinforced by control mechanisms implemented and enforced by state agencies like the police and the courts.[44]

V. CORRECTIVE POLICIES AND LEGISLATION

Corrective policies and legislation can be understood to be formal measures that the state developed and implemented after the outlawing of apartheid in order to redress the injustices of the past, which amongst other things obliged previously racial organisations to employ black people and to invest in their development.[45] Further, they can also be seen as attempts to achieve substantive equality of opportunity and equality of outcome. Equality of opportunity can be understood to be equality sought by seeking to equalise the starting points and access to resources irrespective of a candidate's background or status – every candidate is given an equal

[42] Padraig O'Malley 'The racial workplace' O'Malley the Heart of Hope available at *https://omalley.nelsonmandela.org/omalley/index.php/site/q/03lv02167/04lv02264/05lv02303/06lv02317/07lv02318/08lv02321.htm,* accessed on 05 November 2020.
[43] Ibid.
[44] Ibid.
[45] Mogoatlhe op cit note 19.

chance to participate.[46] Equality of outcome on the other hand is a little bit more politically controversial in its interpretations but it can be understood to be a measure of where candidates actually end up and/or how successful they are.[47]

a) The Constitution[48]

The Equality Clause provided for by Section 9 of the Constitution under the Bill of Rights, provides for what constitutes equality and discrimination.[49]

Amongst various other factors, the section proscribes discrimination on the grounds of race. But it is also based on this provision or prohibition that a legislative measure such as the Employment Equity Act was enacted – specifically looking at subsection (2). The Equality clause is especially important because policies and legislation of the apartheid regime were primarily based on inequality and discrimination, placing one race above another. It is however important to note that the mere abolishment of unequal and discriminatory apartheid laws does not outrightly solve every problem of inequality and discrimination simply by legislating and implementing transformative and inclusive laws as this does not effectively confront and deal with the pertinent issues that remain after the outlawing of apartheid.

There is also a labour relations clause in the Bill of Rights under Section 23 that states that 'everyone has the right to fair labour practices. This clause is important because although black people could work and earn a living, there were many limitations to that. Black people were limited to a certain level of the organisational hierarchy they could reach and were usually kept at the bottom of it. Low skilled and low paying jobs meant that black people could not

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[46] Zdenko Kodelja 'Equality of Opportunity and Equality of Outcome' (2016) 6(2) *C E P S Journal* at 16-19.
[47] Joe Caccavale 'The Truth About Equality of Opportunity vs Equality of Outcome' 16 April 2021 available at *https://www.beapplied.com/post/the-truth-about-equality-of-opportunity-vs-equality-of-outcome*, accessed on 02 Sept 2021.
[48] Constitution of the Republic of South Africa, 1996.
[49] *(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.*
(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
(3) ….
(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
(5) ….

grow in experience and as a result could not afford a better standard of living. Black people were strategically limited to remain financially and economically stagnant for generations to come, and in contemporary times it can be said that this disempowerment continues with modern day segregation in the form of institutional racism.

b) The Employment Equity Act, 55 of 1998 ('EEA')

The EEA aims to 'achieve equity in the workplace by promoting equal opportunity and fair treatment in employment through elimination of unfair discrimination and implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure equitable representation in all occupational categories and levels in the workforce' (Section 2). The Preamble of the Act recognises that there are large and noticeable differences and disadvantages for specific groups of people in employment, occupation and income within the national labour market as a hard consequence of the apartheid regime and related discriminatory laws and practices, which cannot be redressed only by outlawing discriminatory laws and policies. Racism and institutional racism that still exist and persist in our society and in our institutions ensure that the gap between the different races either remain or the gap narrows at a rather slow rate.[50] There is so much more to be done, which is why this legislation was drafted.

i. Affirmative Action

Affirmative action (also known as positive discrimination or reverse discrimination)[51] in South Africa is a corrective policy instrument provided for and defined in the EEA as 'measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer (Section 15(1)).' Designated groups are defined as black people, women and people with disabilities (Section 1). It is through implementing employment equity and the enforcement of affirmative action that barriers are identified that oppose the recruitment, promotion and retention of people in the designated groups. In other words, institutional racism as an active barrier to transformation means that

[50] Liz Mineo 'Racial wealth gap may be a key to other inequities' 03 June 2021 available at *https://news.harvard.edu/gazette/story/2021/06/racial-wealth-gap-may-be-a-key-to-other-inequities/*, accessed on 01 September 2021.

[51] Kodelja op cit note 46 at 16.

the employment, promotion or retention of members of the designated group will not always materialise.

The recent case of *Solidarity obo Labuschagne v Commissioner of the South African Revenue Services*[52] has shed more light on the concept of affirmative action and how it is conceptualised in terms of the Act. The case dealt with a white female who claimed that she was unfairly discriminated against by her employer in that, instead of appointing her to a position, her employer extended the interview and selection process and appointed an African female. The aggrieved employee, in approaching the Labour Court with her claim, argued that because her employer's Employment Equity Plan had not been revised or updated since expiry, it rendered the application of affirmative action in the selection process irrational and unfair. The court emphasized that, if applied correctly and in line with the Act, affirmative action does not amount to discrimination. According to the Labour Court, the Employment Equity Plan was validly extended according to Section 23 of the EEA – therefore, the fact that the extended plan was not formally adopted, revised or amended, did not in the court's view, mean that the application of affirmative action was irrational.[53]

c) The Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000 (''PEPUDA'')

The PEPUDA was enacted as a result of Section 9(4) of the Constitution. The guiding principles recognises that for the country's democracy to be strengthened and solidified, social and economic inequalities will have to be completely removed, however, due consideration and recognition must simultaneously be given to these factors in applying the Act – especially inequalities that are systemic in nature and prompted by the country's history of colonialism, apartheid and patriarchy (Section 4(2)(a)). It also recognises that despite the changes and progress that has taken place in the reconstruction and transformation of the new South African society, its institutions, systemic inequalities and its unfair discrimination has remained deeply entrenched in the social structures and practices, as stated in the Preamble. Measures however must be taken at all levels of society to eliminate such oppression (Section 4(2)(b)).

[52] *Solidarity obo Labuschagne v Commissioner of the South African Revenue Services* [2015] ZALCJHB 151.
[53] Ibid at para 34 & 44-48.

The PEPUDA recognises discrimination as a criminal offence and in contrast to previous reforms is a little more forceful and paves a way for drastic changes in policies to take shape, however, although there have been some changes it still has not yielded significant changes in practice – mostly in the private sector where the State has limited control on how the organisation is run.[54]

There is however the PEPUDA Amendment Bill, 2021 tabled before Parliament where the definition of discrimination is expanded, the fault requirement of intention falls away and not only are the State and public entities obligated to promote equality and prohibit unfair discrimination, but this will also be imposed on private entities (Clause 1-2). As things stand, the Act does not include a section on employers and employees, the Amendment Bill would however hold employers vicariously liable for contraventions of the Act by their employees in any form of discrimination, harassment or hate speech (Clause 20). The aim of the amendment is to eradicate unfair discrimination and structural inequalities, but it has reasonably been argued by critics that the Bill's new proposed and expanded definition of discrimination and the removal of the fault requirement will make it difficult for employers to prove that the discrimination is not unfair and would make almost every act prosecutable.[55]

d) Broad Based Black Economic Empowerment Act, 53 0f 2003 ('B-BBEE')

The B-BBEE was enacted for the purposes of black economic empowerment and is a government policy developed with the primary purpose and objective of advancing and promoting economic transformation and increasing meaningful economic participation of black people in the South African economy amongst other objectives (Section 2(a)). The definition of black people in this context includes women, the youth, people with disabilities and people living in rural South Africa (Section 2). This policy was later expanded and formalised into an Act of legislation. In certain industries especially for private entities, it is a requirement to have a certain percentage of black ownership, or to be at a certain BEE level, or show their transformation initiatives to be able to obtain and maintain a licence to operate, to be able to buy state-owned assets, and for entities intending to do business with the

[54] Martin & Durrheim op cit note 12 at 2.

[55] Chrispin Phiri 'Anthea Jeffery and the Institute of Race Relations don't understand the demands of justice' 11 July 2021 available *at https://www.dailymaverick.co.za/opinionista/2021-07-11-anthea-jeffery-and-the-institute-of-race-relations-dont-understand-the-demands-of-justice/,* accessed 03 September 2021.

government, etc.[56] Racism and institutional racism however prevent the purpose of this Act from being fulfilled for instance by private entities employing black people in executive and managerial positions, however with few responsibilities and power as opposed to their white counterparts, based on a misrepresentative practice called 'fronting' (Section 1). These black employees in these positions act as the face of the company, creating an illusion of the true state of the entity, whereas looking at it from a skills perspective for instance the black manager or executive has not truly made any progress.[57] This is a form of racism as they are being used and taken advantage of based on their race group and not their skills or merit.

For an entity to have good B-BBEE status, there are five pillars/elements that it would need to contribute to:

- Ownership (direct empowerment): in the form of shares and voting rights;
- Management control (indirect empowerment): black people participating in the control and decision making from the board level to junior management level;
- Skills development: training of black people and those with disabilities;
- Enterprise and supplier development: development of entities which are black owned, including preferential procurement;
- Socio-economic development: contributions made to black people in rural and underdeveloped areas as a means to providing access to the mainstream economy.[58]

i. Black Economic Empowerment ('BEE')

The BEE policy is not affirmative action and is not merely focused on the redistribution of wealth, it is also not only a moral initiative aimed at redressing the ills of the past - but a 'pragmatic growth strategy that aims to realise the country's full economic potential, while helping to bring the black majority into the economic mainstream.'[59]

The difference between BEE (policy) and B-BBEE (legislation) is that the former is aimed at righting the wrongs of the past, whereas the latter seeks to distribute the nation's wealth across all races and genders.[60]

[56] Cadine Pillay SME South Africa 'Brush up on your BEE knowledge' 03 July 2020 available at https://smesouthafrica.co.za/Brush-up-on-your-BEE-knowledge/, accessed on 19 January 2021.
[57] Sanlam Gauge Report May 2021 at 16.
[58] Department of Labour: 20th Commission for Employment Equity (CEE) Annual Report 2019 - 2020 at 5.
[59] Pillay op cit note 56.
[60] Ibid.

Amongst others, some of the objectives of BEE that government aims to achieve:

- Empower more black people to own and manage enterprises. Black ownership amounts to 51% of an entity being owned by black people and having substantial management control of the business.
- A substantial change in the racial composition of ownership and management of enterprises and in the skilled occupations of existing and new enterprises.
- Promoting access to finance for the economic empowerment of black people.[61]

The EEA and B-BBEE both have the aim of redressing past inequalities by creating an inclusive economy by promoting inclusivity in employment and ownership in business. The purpose of the EEA is to outlaw all forms of discrimination in the workplace. The B-BEEE in contrast promotes the economic participation of black people (and the designated groups) in the mainstream South African economy. The EEA covers the labour market, whereas the B-BBEE covers issues in relation to ownership, management control, skills development, and investment in the economy and economic self-determination.[62]

The EEA and the B-BBEE overlap or intersect at a practical level when it comes to the Management Control Element of the B-BBEE, as the EEA is also operational in this regard. The Management Control element's purpose is for the numbers of black people managing to increase and for there to be a fair and non-discriminatory representation of black people in every sphere of occupation of an organisation (operational, professional and executive levels). The overlap of the two policies requires entities to make use of the Economically Active Population ('EAP') demographics to enforce the set targets for senior, middle and junior management in order to promote a fair representation of the demographics per population group.[63] Additionally, B-BBEE allows for company audits and scrutinization of income differentials across different occupational levels across genders and races.[64] In accordance with Section 27 of the EEA, should discrepancies be found in salaries based on race and gender, these incidences are to be investigated as some of these incidents may amount to fronting.

[61] Ibid.
[62] 20th CEE Report op cit note 58 at 4.
[63] Ibid at 5.
[64] Ibid at 9.

e) Skills Development Act, 97 of 1988.

In the past whites had always been opposed to the training of black workers; it was either very limited or non-existent.[65] Whereas now it is policy for employers to give training to all employees and in some cases to support the further education of their employees, also in compliance with BEE standards. Improving the quality of life of workers, their prospects of work as well as their labour mobility; and to improving prospects of employment for persons previously disadvantaged by unfair discrimination and to redress those disadvantages through training and education are listed amongst the purposes of this Act (Section 2(a)(i) & (e)).

VI. WHAT IS INSTITUTIONAL RACISM IN THE WORKPLACE?

Many years after the outlawing of apartheid, the stereotype of black people as inferior is still entrenched – not only at an organisational level but in all facets of daily happenings. White people still perceive black workers as candidates for low pay, low skill, and minimum benefits.[66] Although black people occupy senior positions they still are entrusted with fewer responsibilities, they are afforded less benefits and less pay than their white counterparts.[67] Black applicants are also required to have higher qualifications to be deemed more competent or as competent as white employees in the same position who may be less qualified.[68] Despite the fact that job reservation under apartheid was abolished, racism outlawed, and affirmative action has been introduced, there are still striking differences and gaps in racial employment patterns.

Black people in organisations receive different or less favourable treatment than whites, as a result of organisational policies, culture and the processes attached to their recruitment, retention and progression.[69] The difference in treatment and the difference in effect and outcomes between the races can be deemed to be a part of organisational culture deeply rooted and stemming from the history of the past injustices, in other words an unjust norm.[70] White

[65] O'Malley op cit note 42.
[66] Gumede op cit note 13.
[67] Ibid.
[68] Ibid.
[69] Gumede op cit note 13.
[70] Gumede op cit note 9.

employees across many different fields and sectors of the economy and in many organisations – especially the private sector are beneficiaries of white privilege. White privilege does not only relate to benefits and opportunities, but also automatically attributes competency to the white employee and undermines the competency of the black employee. There is a perception that the black employee is less competent and prone to corruption.[71] The black employee also has to work harder than his white counterpart to receive recognition or to get a promotion.[72]

White privilege confers the ability to 'discount the worth' of people of colour and to change the course of their future based on the assessments conducted by white people with the privilege. Damage can be done to a person of colour just by a comment as simple as 'I don't think she's a good fit for our organisation.'[73] It is based on something as trivial as such statements that promotions have been denied and ultimately the economic promotion and emancipation of people of colour held hostage.

Management culture in the workplace has also been tainted with racial prejudices. It is evident that in practice senior, managerial and executive positions are reserved for the white 'competent' employees, at this level under-representation of black people is common (illustrated in ***Annexure A*** & ***B***). The lesser unskilled positions however such as administrative, call centre positions, amongst many others are reserved for the 'less competent' black employees with but only the odd one or two white employees filling the gaps in – but not for too long.[74] This institutional racism phenomenon has termed 'blackness' – the deliberate or unconscious marginalisation of a person because they are black.[75] Examples of such situations are environments where every manager and executive is white but every cleaner and every sales person is black, requiring qualifications for a job that are not necessary or requiring employees to have obtained a degree just to be employed in a sales or an administrative position.[76] Training and future leader training is reserved for select supervisors and management, who are mostly white and black employees being excluded from meetings by

[71] Ibid.
[72] Gumede op cit note 13.
[73] Kendall op cit note 21 at 7.
[74] Department of Labour: 21st Commission for Employment Equity (CEE) Annual Report (2020-2021) at 25-44.
[75] Gumede op cit note 9.
[76] Oosthuizen op cit note 38 at 9.

management but white employees included where the matters discussed and decisions taken affect them all equally.[77]

The corrective policies and legislation have since been considered to be failures as whites still constitute the majority (64.7% in 2020)[78] of top management in all sectors of the labour force, yet they are statistically the least economically active population (9% in 2020).[79] On the other hand, black people who form 79.3%[80] of the economically active population only constituted 15.2%[81] of top management. All black-owned businesses were at 3% on the Johannesburg Stock Exchange in 2019,[82] and 43.63% of black representation at board level of the JSE.[83]

The distribution of earnings in South Africa illustrates how heavily racialised and gender-biased inequality is in the labour market.[84] Black employees earn the lowest wages, while white employees earn substantially higher wages in comparison to all the other population groups. In 2017, it was found that white South African employees earned five times more than black employees,[85] which was later confirmed by Statistics South Africa in 2020.[86] For example, this is how the employed different race groups earned on average per month between 2011 and 2015:

- Average earning of black Africans per month was R6 899
- Coloureds earned R9 339 per month
- Indians/Asians earned R14 235 per month
- Whites earned R24 646 per month.[87]

[77] CALS report op cit note 7 at 50.
[78] 21st CEE Report op cit note 74 at 25, Figure 4.
[79] Ibid at 15, Table 3.
[80] Ibid.
[81] Ibid at 25, Figure 4.
[82] Thanti Mthanti 'Systemic racism behind South Africa's failure to transform its economy' 31 January 2017 available *at https://theconversation.com/systemic-racism-behind-south-africas-failure-to-transform-its-economy-71499*, accessed on 10 January 2021.
[83] B-BBEE Commission Report: National Status and Trends on Broad – Based Black Economic Empowerment 10 June 2020 at 56.
[84] Stats SA op cit note 16.
[85] Business Tech 'Whites earn 5 times more than blacks in South Africa' 30 January 2017 available at *https://businesstech.co.za/news/wealth/153485/whites-earn-5-times-more-than-blacks-in-south-africa-stats-sa/,* accessed on 20 January 2021.
[86] Stats SA op cit note 16.
[87] Ibid.

The private sector's lack of contribution to transformation has caused a significant obstacle and limitation to achieve substantive equality. The private sector still largely appoints white males to senior positions and black representation is said to have decreased to pre-2005 levels.[88] The South African Human Rights Commission (the 'Commission') in its Annual Equality Report for the period 2017/2018 recommended that employers should give more attention to training and developing employees from designated groups and allocate more resources to accomplishing that as is required by the Skills Development Act. This would be beneficial for the individuals and communities being upskilled in that they can qualify and take advantage of opportunities offered in the workplace and eventually this translates into socio-economic development.[89]

a) Equal Pay for Work of Equal Value ('EPWEV')

This concept states that 'work of an employee is substantially the same as the work of another employee employed by that employer, if the work performed by the employee is sufficiently similar that they can reasonably be considered to be performing the same job'[90] - also fully defined in Regulation 4 of the EEA.[91] Section 6(4) of the EEA prohibits unfair discrimination in terms and conditions of employment between employees performing the same or substantially the same work or work of equal value. Employment Equity Regulations of 2014 set out the factors to evaluate when considering whether two different jobs are of equal value. Additionally, there is a Code of Good Practice on EPWEV[92] issued with the aim of providing guidance on the application of this principle. Employees who believe they are being discriminated against on this basis of remuneration can lay a claim based on section 10 of the EEA and make use of the information submitted in the EEA4 form as evidence. The employer,

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[88] Cara Furniss 'South African Human Rights Commission identifies issues with affirmative action and employment equity provisions' 17 October 2018 available at https://www.golegal.co.za/human-rights-affirmative-action/, accessed on 30 March 2021.

[89] International Certifications for Business 'Training and development benefits for BEE points' 28 January 2020 available at *https://www.icb.org.za/training-and-development-benefits-for-bee-points/*, accessed on 25/08/2021.

[90] 20th CEE Report op cit note 58 at 8.
Shamier Ebrahim 'Equal Pay for Work of Equal Value in Terms of the Employment Equity Act 55 of 1998: Lessons from the International Labour Organisation and the United Kingdom' (2016) 19 *PER / PELJ* at 4.

[91] GN R595 in GG 37873 of 1 August 2014 *(Employment Equity Regulations).*

[92] GN 448 in GG 38837 of 1 June *2015 (Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value).*

however, will need to justify the discrimination by using the grounds listed in Regulations 6 & 7.[93]

South Africa was criticised by the International Labour Organisation ('ILO') for its failure to include equal pay provisions in the EEA.[94] It has since ratified two ILO Conventions in this regard, namely:

- Equal Remuneration Convention[95] which requires member states to promote the principle of EPWEV for both male and female employees by way of national statutes and other sources since 2000. On a regional level, this has been endorsed by the SADC Protocol on Gender and Development,[96] which South Africa signed on 17 August 2008.
- Discrimination (Employment and Occupation) Convention[97] which aims to do away with discrimination which occurs in terms of opportunities and treatment in employment, which also promotes EPWEV, ratified in 1997.

The wage gap or the earning power between white and black employees can be directly maintained by discriminatory ways of determining wages and indirectly by job reservation, limitation and denial to access to skills, education, certification and higher paying positions.[98] As international law informs national legislation, the Employment Equity Regulations (Regulation 6) provides for criteria to assess work of equal value in accordance with case law and international provisions.

Section 27 of the EEA provides for income differentials and provides that designated employers are required to hand in a report on 'remuneration and benefits received in each occupational category and level of that employer's workforce' which is known as the Income Differentials Statement which is to be completed in the EEA4 form and must be handed to the Department of Labour annually. The objective of this form is to collect information reported in the EEA2 for the purposes of assessing the remuneration gap between the highest paid and lowest paid employees of the organisation and to assess inequalities and gaps in remuneration

[93] Johan Olivier & Shane Johnson 'Employment equity update – new EEA4 form' 19 September 2019 available at *https://www.webberwentzel.com/News/Pages/employment-equity-update-new-eea4-form.aspx*, accessed 16 July 2021.
[94] Ebrahim op cit note 90 at 2.
[95] International Labour Organisation *Equal Remuneration Convention*, 1951 (No. 100).
[96] SADC Protocol on Gender and Development (2008).
[97] International Labour Organisation *Discrimination (Employment and Occupation) Convention,* 1958 (No.111).
[98] O'Malley op cit note 42.

in relation to race and gender in the various occupational levels of the organisation.[99] This allows for the Department to monitor if the principal of EPWEV is being upheld by employers. Failure to submit such a report may lead to penalties being imposed and fines being incurred.[100] For the period of March 2020 to February 2021 there were 428 EEA referrals for EPWEV disputes to the CCMA across all sectors.[101] It is not clear how many entities were held accountable for failing to comply with EPWEV, however it is a significant decrease in contrast to the previous period which recorded 826 referrals.[102]

b) Case Law

In *Sun International Limited v SACCAWU obo Ramerafe and others*[103] the court accepted the employer's justification that the comparator had higher qualifications and experience in comparison to the complainant employee and that in order to secure his services, it had to meet his existing net pay. This is referred to as the market forces' defence.

In *National Union of Metalworkers of South Africa obo Members / Feltex (Pty) Ltd*[104] - the three applicants were employees of the respondent, and all were team leaders. They claimed that they were being unfairly discriminated against on the ground of race because they were being paid less than the comparator Indian team leader. The Commissioner ruled the reason for the difference in remuneration was not based on race and the respondent had provided a rational reason for paying the Indian team leader more than his colleagues being that he had previously acquired skills that they didn't have.

In *Independent Municipal & Allied Trade Union obo Nengovela and another / Tshwane Metropolitan Municipality*[105] two applicants, a black male and a white female, both administration officers, claimed that they were unfairly discriminated because a colleague, also an administration officer, earned more than they did. The respondent claimed that in terms of

[99] Olivier & Johnson op cit note 93.
[100] Levanya Reddy 'Management Control & The Verification Process' 4 March 2021 available at *https://www.msctbee.com/post/management-control-the-verification-process*, accessed on 14 July 2021.
[101] 21st CEE Report op cit note 74 at 12.
[102] 20th CEE Report op cit note 58 at 7.
[103] *Sun International Limited v SACCAWU obo Ramerafe and others* (2019) 40 ILJ 1873 (LC).
[104] *National Union of Metalworkers of South Africa obo Members / Feltex (Pty) Ltd* [2020] 8 BALR 885 (CCMA).
[105] *Independent Municipal & Allied Trade Union obo Nengovela and another / Tshwane Metropolitan Municipality* [2016] 4 BALR 336 (CCMA).

its remuneration policy the salaries of applicant employees were determined with reference to the pay they had received in their previous jobs – if it was higher than the top notch of the grade concerned, the employee was paid at the highest notch on the grade; if less, the employee was placed on the lowest notch. Experience and qualifications were also considered factors. In this case the comparator earned more than the highest notch when she was employed, while the applicant employees earned less, and the comparator was more experienced. The onus rested on the applicants to prove that the difference between their salaries and the comparator's amounted to unfair discrimination, which they failed to prove. Consequently, the application failed.

An inference can be made from the above examples that many South African cases or arbitrations based on this principle are unsuccessful as the complainant(s) is unable to prove unfair or arbitrary discrimination and the comparator has usually been in the employ for longer than the complainant, they have higher qualifications, more experience, and any other relevant factor provided for by the assessment criteria under Regulation 6 of the EEA. This stands to reason that past injustices which led to disparities in education and obtaining expertise and qualifications is still evident today, in that candidates of certain race groups still have more opportunities than black employees by getting appointed for positions and getting paid higher remuneration, unless employment equity gives the black candidate a chance. This perpetuates the reign of institutional racism in the workplace.

VII. INSTITUTIONAL RACISM AGAINST WOMEN AND THE BLACK WOMAN IN PARTICULAR

Under the apartheid regime black women employees were victims of a triple oppression – being black, being a worker and being a woman, which is still an ongoing oppression to date. In the present day, black women are still victims of white supremacy and patriarchy.[106] This triple oppression can be referred to as an intersectional disadvantage. Intersectionality is defined as 'the interconnected nature of social categorizations such as race, class, and gender as they apply to a given individual or group, regarded as creating overlapping and interdependent systems of

[106] Chris McConnachie 'Affirmative Action and Intensity of Review: South African Police Service v Solidarity obo Barnard' (2015) 7 *Constitutional Court Review* 163 at 194.

discrimination or disadvantage.'[107] Intersectionality takes people's overlapping identity categories and experiences affected by discrimination into account in order to understand the different prejudices faced by them. This theory takes cognisance that there is more than one source or ground of discrimination that people are disadvantaged by and that these grounds do not exist independently of one another,[108] which is similarly recognised by CRT.[109] Further, Intersectional disadvantage can be described as 'the idea that discrimination on the basis of multiple grounds signifies a distinct disadvantage which is both similar to and different from that based on individual grounds.'[110] An example of this would be the position of a disabled black woman – there are three spheres or types of discrimination which intersect namely, disability; race and gender.

An illustration of intersectional discrimination can be found in *Hassam v Jacobs (NO)*[111] there was a constitutional challenge on the validity of statutory provisions which excluded widows from Muslim polygynous marriages from intestate succession. The Constitutional Court found that the provision constituted unfair discrimination under section 9(3) of the Constitution based on gender, marital status, and religion. South African courts do not consider comparators as factors in establishing unfair discrimination it makes use of a contextual approach to establish it.[112]

Kimberle Crenshaw said that the theory of intersectionality is a way to illuminate the dynamics within discrimination law that the courts weren't addressing.[113] The foundation of the theory is that individuals have various identities that intersect in ways that influence how the individuals are viewed, understood, and treated. The effects of being a black woman (black and a woman) is having to endure specific forms of discrimination that white women or black men might not endure – 'black women are the same and harmed by being treated differently,

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[107] *https://www.lexico.com/definition/intersectionality*
[108] YW Boston 'What is intersectionality, and what does it have to do with me?' 29 March 2017 available at *https://www.ywboston.org/2017/03/what-is-intersectionality-and-what-does-it-have-to-do-with-me/*, accessed on 30 April 2021.
[109] George op cit note 25.
[110] Shreya Atrey 'Comparison in Intersectional Discrimination' (2018) 38(3) *Legal Studies: The Journal of the Society of Legal Scholars* 379 at 380.
[111] *Hassam v Jacobs (NO)* 2009 (5) SA 572 (CC).
[112] Atrey op cit note 110 at 391.
[113] Kimberle Crenshaw 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) 1989(1), Article 8 *University of Chicago Legal Forum* at 141.

or are different and harmed by being treated the same.'[114] In the labour force it has created a general norm where women are commonly employed in jobs that are perceived to be typical female jobs – mostly in the services industry. Low-income bracket and flexible and unskilled labour are highly saturated with women (see ***Annexure A*** below).

It is common cause that a very small percentage of women form part of management and an even smaller percentage at the executive level and much less black woman.[115] In practice we may find women at management level – but not so much black women and sometimes not even a single black female manager throughout the entire organisation. The legacy that apartheid left behind is that a woman's race will rank her differently in the occupational hierarchy of an organisation. When it comes to the executive tier of an organisation – there are only white men to be found. Most especially in private companies who have control over how they choose to run their company, who they want to employ and in what particular position.[116] In these private set ups highly qualified black people especially women are overlooked, and their progression is consequently stifled because it is preferred to appoint either friends and family with lesser qualifications or experience. If not friends or family then it suffices that the candidate is white.[117] This being said though, a difference of experience in discrimination cannot take away from another race's experience with discrimination. This was ruled on in the separate concurring judgment of Cameron J, Froneman J and Majiedt AJ in the Constitutional Court judgement of *South African Police Service v Solidarity obo Barnard*[118] that there is a difference in experience of disadvantage even within a designated group.[119]

In Crenshaw's analysis and coining of the theory of intersectionality, she analysed three cases in which the issues of racial discrimination and gender discrimination were dealt with. In each of the cases she argued that the courts had a narrow view of discrimination which was an example of the limitations that came with single issue analysis in terms of how the law looks at sexism and racism.[120] In the case of black women the courts looked passed the fact that black women are both black and female and therefore subjected to discrimination on both race and

[114] Ibid 145-149.
[115] O'Malley op cit note 42.
[116] Ibid.
[117] Mthanti op cit note 82.
[118] *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC).
[119] Ibid para 114 & 152-155.
[120] Crenshaw op cit note 113 at 148-149.

gender. She argued that the courts treating black women as only women or only black meant the challenges faced specifically by black women were not addressed. [121] One of the objectives of intersectionality however is to create a space for more advocating and remedial practices to create a more egalitarian system.[122]

Women are generally discriminated against when it comes to pay, promotion and recruitment as they have the glass ceiling to still fight against.[123] Black women are overly burdened because they have to take on traditionally masculine responsibilities.[124] The limitation in employment opportunities for women in various sectors is deemed to be influenced by women's responsibility for unpaid work outside the workplace such as bearing and rearing children, caring for a home, caring for the sick and the elderly, amongst various others. This is seen to cause a limit to women's opportunities and their full participation in the formal labour force.[125] Employers very commonly and often use a women's responsibility for unpaid work as a means of justification for the unfair discrimination.[126] There is a general perception that a woman's salary is supplementary or secondary to her husband's or her partner's but the reality in South Africa is that nearly 38% of South African households are headed by women and have women as the primary breadwinners, sometimes as a sole breadwinner – no supplementation by a man's earnings.[127] On average, women earn approximately 30% less than male employees.[128] The false perception of a woman's income supplementing that of her partner's therefore strengthens the unfair discrimination.

According to The Commission of Employment Equity Report and the National Status and Trends on Broad-Based Black Economic Empowerment Report for the 2019 period,[129]

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[121] Ibid at 149-150.
[122] Jane Coaston 'The intersectionality wars' 28 May 2019 available at *https://www.vox.com/the-highlight/2019/5/20/18542843/intersectionality-conservatism-law-race-gender-discrimination*, accessed on 11 July 2021.
[123] Buhle Charlotte Khwela *The invisible glass ceiling: a comparative study of women in management positions in private and public sector in Kwazulu-Natal, South Africa* (unpublished MCom thesis, University of Kwazulu-Natal, 2019) at 14.
[124] Crenshaw op cit note 113 at 156.
[125] Mariette Coetzee & Maryam Moosa 'Leadership contingencies in the retention of women in higher education' (2020) 18 *SA Journal of Human Resource Management.*
[126] O'Malley op cit note 42.
[127] Bianca Parry 'What South African women told us about being the main breadwinner' 21 October 2020 available at *https://theconversation.com/what-south-african-women-told-us-about-being-the-main-breadwinner-147059,* accessed on 10 January 2021.
[128] Stats SA op cit note 16.
[129] B-BBEE Report op cit note 83.

black women own only a mere 12% of the South African economy and their representation at top management level stands at 24.9%.[130] These figures do not reflect the country's demographic figures, or the economically active population as illustrated in ***Annexures A*** and ***B*** below. Oxfam, a global NGO with a South African arm, in its report stated that South Africa is apparently the most unequal country in the world.[131] To give a more practical perspective of the inequality gap between the black woman and the white man, the Oxfam South Africa report[132] found that the average South African CEO earns as much as 461 times more than the black women from the bottom 10% of earners in the country. Further, on average a black woman earns a quarter of her white counterpart.[133]

Item 6 of the Code of Good Practice on EPWEV provides for the comparing and evaluating of male and female dominated jobs. However, implementing job evaluations does not ensure the absence of unfair discrimination based on the bias of the provisions of this section.

VIII. INSTITUTIONAL RACISM IN THE LEGAL PROFESSION

The legal profession is an example of a sector largely affected by institutional racism. Private law is dominated by historically white law firms which to date have not fully embraced transformation as private law firms and the advocates' profession is plagued with issues related to racism and unequal distribution of briefs.[134] Black legal practitioners (attorneys and advocates) are experiencing difficulties from training stages to recruitment and finally to retention of employment and the growing or the advancement in their careers or practices. This is as a result of black practitioners not getting a fair share of briefs because traditional white firms and practitioners are preferred and entrusted over them.[135] There is said to be an order of preference when legal services are sought after: first the white males, white females, then black males and lastly black females. Black firms and black chambers are considered amongst the

[130] 21st CEE Report op cit note 74 at 26, Figure 5.
[131] Oxfam South Africa Report : 'Reclaiming Power: Womxn's Work and Income Inequality in South Africa' (2020) at 8, 12.
[132] Ibid at 3, 12.
[133] Ibid at 12, 65.
[134] Mpofu-Walsh op cit note 1 at 78.
[135] CALS report op cit note 7 at 11, 44-45.

last ones, this further perpetuating the already existing discrimination within the profession of black practitioners.[136] The practice of fronting is also very much alive in the legal profession.[137] This will evidently have a strong effect on the economic and financial growth, expansion and advancement of black practitioners, as opposed to their white counterparts as they are always getting left behind by having little to no consideration to be given work.[138] Unfortunately, black female practitioners are burnt twice by racial and gender discrimination, making them the most vulnerable group.[139]

Former Public Protector, Advocate Thuli Madonsela, when speaking on the impact of racism on black legal practitioners at a Black Lawyers Association national general meeting, said that 'structural racism exists in the legal profession, due to the number of black legal practitioners in the profession there are less chances of a black candidate attorney securing employment and less chances of black legal practitioners getting briefed.'[140]

In 2014, The Centre for Applied Legal Studies (CALS) in partnership with the Foundation for Human Rights released a research report on the Transformation of the Legal Profession Project.[141] The research was aimed at identifying some key obstacles to progressing in the profession and identifying potential ways of intervention that could possibly mitigate the identified barriers. In engaging directly with some members of the profession across Gauteng who were at different stages of their careers (practising and non-practising), the research indicated that legal practitioners are experiencing hostility and exclusionary conduct based on race and gender. According to CALS, this is hindering excellence and supressing talent in the profession. Although the evidence was not conclusive, it was a means to test and verify the accuracy of the assumptions and allegations identified in the process. Amongst the evidence collected, it was found that gender and race discrimination is a factor that creates a barrier to progressing in the legal profession. As in many different sectors, according to the report, many black legal practitioners are certain that they have to work twice as hard as their white

[136] Ibid at 36-37, 45-46.
[137] Ibid at 43.
[138] Ibid at 49.
[139] Nolwandle Zondi 'Unfair practices against black and female lawyers are 'plain for everybody to see' 18 July 2017 available at *https://mg.co.za/article/2017-07-18-unfair-practices-against-black-and-female-lawyers-are-plain-for-everybody-to-see/,* accessed on 15 November 2020.
[140] Mapula Thebe 'The culture of racism and its effects on black legal practitioners' 01 July 2016 available at *http://www.derebus.org.za/culture-racism-effects-black-legal-practitioners/*, accessed 15 November 2020.
[141] CALS report op cit note 7.

counterparts to disprove the perceptions and preconceived notions created by racism and prejudice of the lack of competence.[142]

When it comes to the intersection of race and gender discrimination in the legal profession, discrimination experienced based on race is different to that experienced based on gender. Black women experience the same gender discrimination as their white female colleagues, but in addition to that they also experience a different and an additional kind of discrimination based on race. In contrast, black women experience the same racial discrimination as their black male colleagues, but also in addition they experience discrimination based on gender.[143] A result of this intersectional discrimination is that black woman are at a major disadvantage – there are far less successful black women in contrast to white women, and this is evident on the courts benches. For a black woman who has double the responsibility of a white comparator in the name of black tax,[144] who has to work twice as hard to get half as far, financial emancipation and socio-economic progress seem to be far out of reach.

IX. OPPOSITION TO THE NOTION OF INSTITUTIONAL RACISM

Some are of the opinion that quoting statistics and relying on them alone to claim institutional racism is a form of propaganda. It has been said that statistics alone cannot be sole evidence that the low rate of blacks in executive, senior and top management in the private sector is due to racism and that many more factors would have to be looked into to get a better understanding of the cause.[145] It is common cause that the private sector operates very differently to the public sector, where in the private sector emphasis is placed on merit and competition is fierce. According to Statistics South Africa, the majority of whites in South Africa are middle class which implies that they are more competent and better educated than blacks. On the management level, whites remain more competitive than blacks due to being better equipped with skills and experience. It is therefore argued that this cannot imply racism, instead it is the

[142] Ibid at 33.
[143] Ibid at 32-33.
[144] 'Black Tax is an African law that imposes a legal duty on a child who is financially stable to do so to maintain their needy parents.' *Fosi v Road Accident Fund* 2008 (3) SA 560 (C) para 16.
[145] Phumlani M. Majozi 'Reflections on 'systemic racism'' 26 June 2020 available at *https://www.politicsweb.co.za/opinion/reflections-on-systemic-racism*, accessed on 29 December 2020.

reality of the country's socio-economic setting which has been influenced and formed by various factors including its racial history. It is claimed that the experience and qualifications of white people puts them ahead of blacks who are underrepresented in 'sophisticated' labour sectors, and this consequently rules out the argument that institutional racism is the cause of the slow pace of transformation in the private sector.[146] Surely the above argument can be agreed to after all these years post democracy, at least to a certain extent. Although accountability must be taken by the government for the misfortunes and failures attributed to poor governance, it cannot be ignored that the oppression of decades on black people cannot be eradicated as expeditiously as we would anticipate. Based on the discussions above, this argument cannot stand in every sector of the workplace or the economy as there is more than just being educated or better experienced that plays as a factor to institutional racism and the socio-economic position of black people.

X. EVIDENCE OF THE EXISTENCE AND THE EFFECTS OF INSTITUTIONAL RACISM THROUGH STATISTICS

a) Employment Equity Trends

On average black South African households earn less than 20 per cent of white South Africans' average earnings.[147] Trends in the South African workforce were analysed over a three-year period which as a result provided insight into whether progress was made in equitable representation of the different population groups (race, gender and disability) at different occupational levels.[148] An inference can be drawn that white South Africans are consistently overrepresented in centres of economic privilege despite Black South Africans being the demographic majority.[149] The statistics presented in ***Annexure A*** depict the workforce representation in contrast to the national provincial demographics of the EAP over a three-year period of 2018-2020. The EAP includes people between the ages 15 to 64 years, who are employed or unemployed, but actively searching for employment and is presented by population (race) and gender groups at a national and provincial level, depicted in the tables and graphs below. The EAP assists employers to determine over or under representation of

[146] Ibid.
[147] Oxfam Report op cit note 131 at 65.
[148] 20th CEE Report op cit note 58 at 15.
[149] Mpofu-Walsh op cit note 1 at 41.

designated groups in their workforce and guides them in the setting of goals and targets in the achieving of an equitable and representative workforce.[150]

****** Statistics illustrated under Annexure A***

b) Black Economic Empowerment Trends

The Broad-Based Black Economic Empowerment Commission (B-BBEE Commission) released its annual broad-based black economic empowerment (B-BBEE) trends report for the year 2019 which also assesses the five elements of BEE. The report is compiled based on compliance reports submitted by 150 JSE listed companies, 43 organs of state and 5818 other entities who submitted B-BBEE certificates to the Commission.[151] Some relevant findings and trends: [152]

- Black ownership increased from 25% in 2018 to 29% in 2019.
- 100% black-owned JSE listed entities increased from 1.2% in 2018 to 3.3% in 2019.
- Black South Africans holding directorships nationally decreased from 45% in 2018 to 39% in 2019, whereas black South Africans holding directorships in JSE-listed entities increased from 38.3% in 2018 to 43.6% in 2019 – with black female directors making up 20.55% of that amount.
- Contributions towards skills development, enterprise and supplier development and socio-economic development decreased in 2019.
- Despite improvements in ownership this was not a reflection of management scores as there was no improvement in the involvement of black people in the control and core daily operations of enterprises. In other words, parts of companies had been sold to black people, but this is different to management positions where executive decisions are made and where most of the power is held on the advancement of a company. This can be interpreted to be a lack of trust of the black person at an executive level and the argument that there is a lack of suitably qualified black candidates and it's for this

[150] 21st CEE Report op cit 74 at 15-16.
[151] B-BBEE Report op cit note 83 at 9.
[152] Safiyya Patel & Cindy Leibowitz 'The B-BBEE Commission's latest report on empowerment trends in 2019 shows an increase in black ownership, but this is not necessarily reflected in management control scores' 04 August 2020 available *at https://www.polity.org.za/article/b-bbee-commission-releases-2019-national-status-and-trends-report-2020-08-04*, accessed on 24 January 2021.

reason that executive and top management positions are reserved for old white males.[153] To this end, some entities would also argue succession planning for not appointing black people, especially in small to medium sized companies which are family run to ensure the future of future generations and to ensure that the company is being led by the most suitable candidate to continue the longevity and success of the legacy.[154] This way of operating continues to lend a hand to institutional racism as the black workforce is continually overlooked,[155] yet they are not trained and upskilled to fill these top and executive positions.

- Many measured entities failed to file their reports for the 2019 calendar year, as required. Which is in contravention of Section 13G of the B-BBEE Act. This is an indication of the resistance and non-compliance with the policy and legislative requirements that organisations are mandated to comply with in order to facilitate the equality, equity and empowerment initiatives for black people. The entities that did however file their reports showed minimal improvement in their performance on average.[156]

****** Statistics illustrated under Annexure B***

XI. RECOMMENDATIONS

The aim is to achieve a state of equality between white and black employees in the workplace. Therefore, on legal but also moral grounds, black employees must be treated with dignity, equality and respect and 'whiteness' and white privilege need to be eradicated so that black employees must also be financially remunerated at the same rate, be given the same benefits and opportunities, and be entrusted with the same workloads and complex issues as their white counterparts. Additionally, making whiteness the reference point and standard framework for

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[153] Steven Ratuva ''Black Empowerment' Policies: Dilemmas of Affirmative Action in South Africa.' *Politics of Preferential Development: Trans-Global Study of Affirmative Action and Ethnic Conflict in Fiji, Malaysia, and South Africa* 2013, 219 at 236.
Also available at *https://www.jstor.org/stable/j.ctt46n2xc.12*, accessed on 29 August 2021.
[154] Suzette Claase & Dr. Rishaad Ebrahim 'An Investigation into the Factors that Determine Successful Succession Planning in Small to Medium-Sized Family-Owned Businesses in Johannesburg, South Africa' (2019) 7(1) *International Journal of Managerial Studies and Research* 39 at 46-47.
[155] Mthanti op cit note 82.
[155] Patel & Leibowitz op cit note 152.
[156] Ibid.

competency needs to be eliminated, as it eliminates individual merit. Although black people may not directly be excluded, there is an automatic stereotype of white competence to which candidates are measured against that puts them to an automatic disadvantage.[157]

Private companies in particular, but not limited to them alone, should conduct race climate surveys and audits of organisational culture to better identify and measure institutional racism.[158] Audits of organisational culture must focus on organisational policies, practices and informal cultures. These must be regularly monitored and its effect and impact also to be measured.[159] And ultimately all workforces are to be diversified from general employees, to management, directorship and to shareholding to aid in boosting the economic and financial advancement and emancipation of the black workforce.

Institutional racism should not only be exposed in public sector institutions, but initiative should be taken for the exposure of entities in the private sector. Private sector executives get mega bonuses and the opportunity to improve their livelihoods, while the same executives are retrenching employees to secure a profit and most of these employees are black workers looking for a decent living wage and a basic standard of living.

The South African government also needs to be held accountable for its poor governance, corruption, lack of accountability and failure to execute its mandates, duties and obligations as well as its failure to reinforce the corrective measures as the leader of the people since the end of the apartheid era. Their failures play a negative role in the ongoing fight in racism and the racial stereotypes attached to black people.

There should be policies or legislations in place that make provision for 'whistle-blowing' of institutional racism or discrimination in the workplace and managers and executives should not be able to retaliate, intimidate or stand against individuals that blow the whistle on occurrences.[160] Organisations need to be committed to taking action against

[157] Martin & Durrheim op cit note 12 at 8 – 9.
[158] Gumede op cit note 9.
[159] Ibid.
[160] William Gumede 'The media and systemic racism' 24 October 2016 available at *https://democracyworks.org.za/the-media-and-systemic-racism/,* accessed on 31 December 2020.

employees and management who display or practise racist behaviour. Alternatively, the CCMA is tasked with arbitrating over discrimination complaints in the workplace.[161]

Workplace democracy is the application of democratic principles to the workplace, such as voting, referenda, public debate, etc.[162] Workplace democracy has the ability to potentially decrease social inequalities that are based on race, class and gender. This movement is a means to empower previously disadvantaged and currently disadvantaged groups and gives them a voice in decision-making and participation.[163]

Black economic empowerment where certain individuals in beneficial positions benefit by being given a share in white-owned companies is not yielding positive results. Rather, employee economic empowerment where employees are empowered by attaining shares, skills training, profit sharing, and asset transfers such as housing would be better empowering. Agreements between employees, trade unions and management productivity targets, industrial relations and a return of rewards can encourage workplace democracy.[164]

XII. CONCLUSION

The existence and detrimental impact of institutional racism on the black population in the workplace was explored in this research paper. It has been established that its continued existence in organisational culture perpetuates the limitations and barriers that stand before the black majority in their attempt to rise in the ranks of the different levels of skill and employment in the workplace and ultimately through their professional progression being allowed to progress economically and raise their standards of living. The research is supported by statistics illustrated under Annexure A and B, which are evident of the ongoing notions of institutional racism and discrimination which translates into the economic oppression of black people. Attaining racial equity cannot be achieved by being passive, making statements of values and simply developing policies. There must be a call to action and active measures taken to acknowledge, understand and eradicate this type of structural racism. Organisations can no

[161] 20th CEE Report op cit note 58 at 7.
[162] HRZone 'What is workplace democracy?' available at *https://www.hrzone.com/hr-glossary/what-is-workplace-democracy,* accessed on 23 January 2021.
[163] Gumede op cit note 10.
[164] Ibid.

longer continue to pretend that institutional racism does not exist and persist and taking a 'colour-blind' stance. Systemic racism prevents people from making the most of their economic potential and for this reason has significant economic costs not only on the affected individuals but the country's economy and society at large. It can therefore be concluded that 'a less racist economy can potentially be an economically stronger one.'[165]

[165] Losavio op cit note 5.

ANNEXURE A

Employment Equity Trends[166]

5.1 National Economically Active (EAP) by Population Group and Gender

Table 3: National EAP By Population And Gender Group* (*Source: Statistics South Africa, (QIfs, Quarter 3, 2020)						
Male			**Female**			**TOTAL**
AM	African Male	43.7%	AF	African Female	35.6%	79.3%
CM	Coloured Male	4.8%	CF	Coloured Female	4.1%	8.9%
IM	Indian Male	1.8%	IF	Indian Female	1.0%	2.8%
WM	White Male	5.1%	WF	White Female	3.9%	9.0%
TOTAL		**55.4%**			**44.6**	**100.0%**

5.2 Provincial Economically Active (EAP) Population Group and Gender

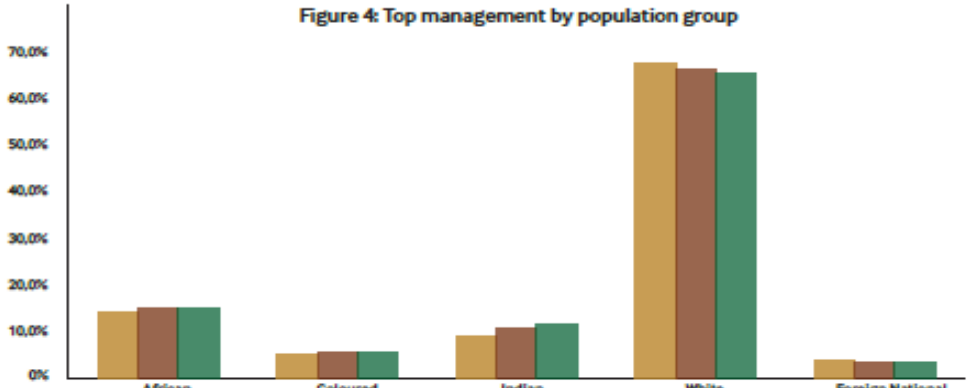
Table 4: Provincial EAP By Population And Gender Groups* (*Source: Statistics South Africa, (QIfs, Quarter 3 2020)						
Province	**Gender**	**African**	**Coloured**	**Indian**	**White**	**TOTAL**
Eastern Cape	Male	43.9%	4.6%	1.0%	3.1%	52.6%
	Female	41.7%	3.6%	0.0%	2.1%	47.4%
	TOTAL	**85.6%**	**8.2%**	**1.0%**	**5.2%**	**100.0%**
Free State	Male	48.5%	2.2%	0.3%	3.2%	54.2%
	Female	41.5%	1.3%	0.2%	2.9%	45.9%
	TOTAL	**90.0%**	**3.5%**	**0.5%**	**6.1%**	**100.0%**
Gauteng	Male	46.0%	1.5%	1.9%	7.2%	56.6%
	Female	34.8%	1.5%	1.3%	5.7%	43.3%
	TOTAL	**80.8%**	**3.0%**	**3.2%**	**12.9%**	**100.0%**
KwaZulu-Natal	Male	45.7%	0.7%	5.2%	2.4%	54.0%
	Female	40.4%	0.8%	3.2%	1.6%	46.0%
	TOTAL	**86.1%**	**1.5%**	**8.4%**	**4.0%**	**100.0%**
Limpopo	Male	54.6%	0.1%	1.0%	0.8%	56.5%
	Female	42.6%	0.1%	0.2%	0.5%	43.4%
	TOTAL	**97.2%**	**0.2%**	**1.2%**	**1.3%**	**100.0%**
Mpumalanga	Male	48.5%	0.1%	0.7%	4.9%	54.2%
	Female	43.7%	0.0%	0.0%	2.0%	45.7%
	TOTAL	**92.2%**	**0.1%**	**0.7%**	**6.9%**	**100.0%**
North West	Male	54.1%	0.8%	0.7%	4.1%	59.7%
	Female	36.3%	0.4%	0.2%	3.4%	40.3%
	TOTAL	**90.4%**	**1.2%**	**0.9%**	**7.5%**	**100.0%**

Table 4: Provincial EAP By Population And Gender Groups* (*Source: Statistics South Africa, (QIfs, Quarter 3 2020)						
Province	**Gender**	**African**	**Coloured**	**Indian**	**White**	**TOTAL**
Northern Cape	Male	30.7%	24.2%	0.0%	6.0%	60.9%
	Female	17.2%	17.9%	0.0%	4.0%	39.1%
	TOTAL	**47.9%**	**42.1%**	**0.0%**	**10.0%**	**100.0%**
Western Cape	Male	21.7%	23.3%	0.5%	8.5%	54.0%
	Female	17.8%	20.5%	0.3%	7.4%	46.0%
	TOTAL	**39.5%**	**43.8%**	**0.8%**	**15.9%**	**100.0%**

[166] All statistics under Annexure A collected from 21st CEE Report op cit note 74 at 15-16, 29-49.

TOP MANAGEMENT LEVEL

Figure 4: Top management by population group



	African	Coloured	Indian	White	Foreign National
2018	15,1%	5,3%	9,7%	66,5%	3,4%
2019	15,2%	5,6%	10,3%	65,6%	3,3%
2020	15,8%	5,7%	10,6%	64,7%	3,1%

Figure 5: Top management by gender

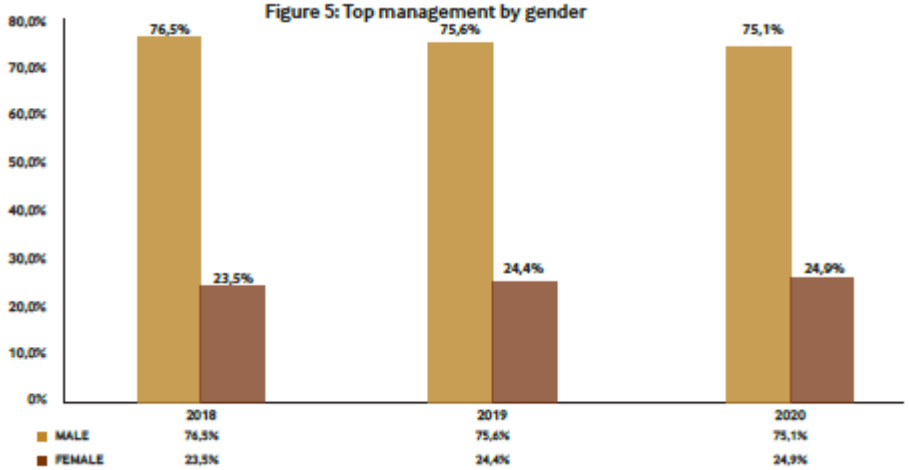
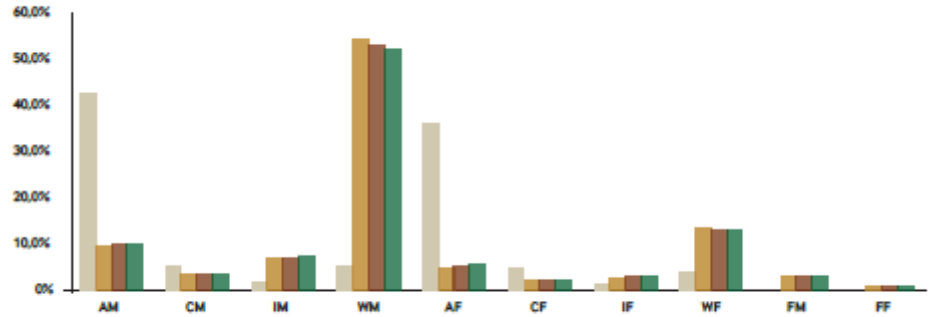


Figure 6: Top management by population group and gender



	AM	CM	IM	WM	AF	CF	IF	WF	FM	FF
EAP	43,7%	4,8%	1,8%	5,1%	35,6%	4,1%	1,0%	3,9%	0,0%	0,0%
2018	10,0%	3,4%	6,9%	53,3%	5,1%	2,0%	2,9%	13,1%	2,9%	0,5%
2019	9,9%	3,4%	7,1%	52,4%	5,4%	2,1%	3,2%	13,2%	2,8%	0,5%
2020	10,1%	3,5%	7,3%	51,6%	5,7%	2,2%	3,4%	13,1%	2,6%	0,5%

The statistics referred to are a confirmation of the essence and effect of institutional racism. Figure 6 depicts the intersection of both race and gender representation at top management level and it appears to be more in favour of the white population group for both female and male genders. Even white females have a higher rate of representation than African males at the executive level. This makes it clear that racial discrimination and institutional racism (which ultimately becomes racial discrimination) will even favour a white woman over a black man. The competition is not necessarily between black female and white female, but the statistics show that black men have to compete with white woman more than they have to compete with an Indian counterpart.

Table 13: Workforce Profile At The Top Management Level By Business Type, Population Group And Gender

Business Type	Male				Female				Foreign National		
	AM	CM	IM	WM	AF	CF	IF	WF	FM	FF	TOTAL
EAP	43.7%	4.8%	1.8%	5.1%	35.6%	4.1%	1.0%	3.9%	n/a	n/a	100%
National Government	35.7%	5.7%	6.0%	12.9%	25.1%	4.3%	3.9%	5.3%	1.0%	0.2%	100.0%
Provincial Government	44.6%	5.6%	2.7%	5.1%	31.8%	3.8%	2.2%	3.9%	0.4%	0.0%	100.0%
Local Government	50.0%	9.4%	5.0%	5.8%	23.8%	1.8%	1.6%	2.4%	0.2%	0.0%	100.0%
Private Sector	8.1%	3.4%	7.5%	54.6%	4.6%	2.1%	3.4%	13.2%	2.7%	0.5%	100.0%
Non-Profit Organisations	26.5%	4.7%	3.9%	21.1%	14.3%	4.3%	3.9%	15.7%	3.1%	2.5%	100.0%
State Owned Enterprises	42.9%	4.1%	4.1%	8.3%	26.2%	3.6%	2.9%	6.5%	1.3%	0.2%	100.0%
Educational Institutions	10.8%	3.1%	4.5%	35.2%	6.5%	1.9%	2.5%	31.4%	2.4%	1.6%	100.0%

Table 13 illustrates that the private sector still preserves white privilege and appoints white males to the executive positions alternatively white females, whereas the public and government/state sectors create more opportunities for black males and females.

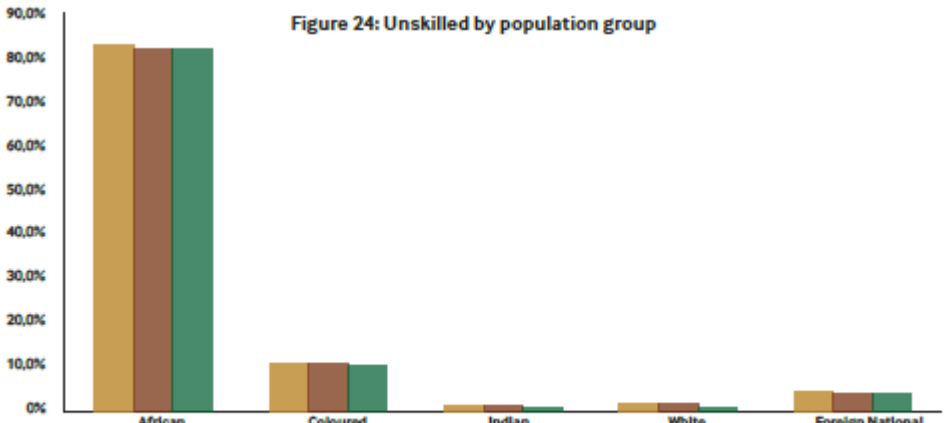
Table 14: Workforce movement at the Top Management level by Population Group and Gender (All Employers)

	Male				Female				Foreign National		
	AM	CM	IM	WM	AF	CF	IF	WF	FM	FF	TOTAL
EAP	43.7%	4.8%	1.8%	5.1%	35.6%	4.1%	1.0%	3.9%	n/a	n/a	100%
Workforce profile-all employees	10.1%	3.5%	7.3%	51.6%	5.7%	2.2%	3.4%	13.1%	2.6%	0.5%	100.0%
Recruitment	17.2%	4.2%	6.4%	38.2%	12.3%	3.0%	4.5%	9.9%	3.8%	0.6%	100.0%
Promotion	12.8%	4.3%	6.7%	36.3%	9.5%	5.1%	6.0%	15.6%	2.6%	1.0%	100.0%
Terminations	16.2%	3.2%	5.9%	46.0%	7.0%	2.1%	2.8%	11.5%	4.3%	0.9%	100.0%
Skills Development	14.6%	4.6%	8.6%	38.4%	10.5%	3.9%	5.1%	14.2%	n/a	n/a	100.0%

When it pertains to recruitment, retention and progression of the workforce Table 10 illustrates that the white and Indian population groups for both male and female are the ones most likely to be recruited, trained, and promoted at top management level, they appear to be the preferred groups.

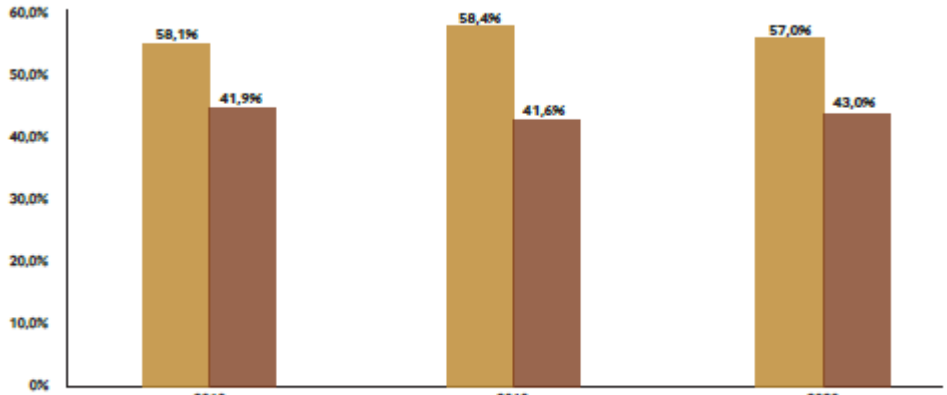
UNSKILLED LABOUR LEVEL

Figure 24: Unskilled by population group



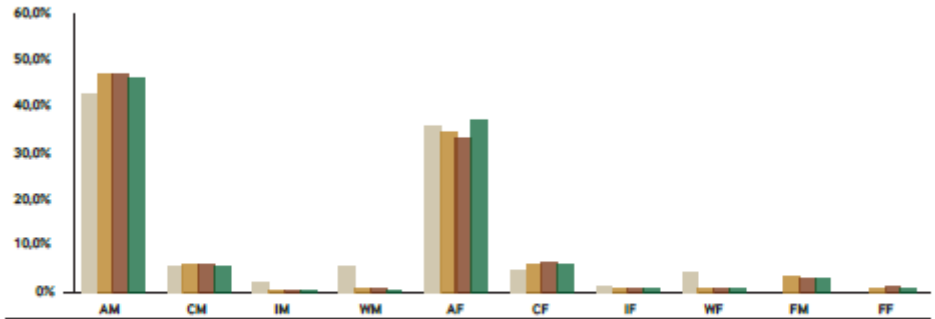
	African	Coloured	Indian	White	Foreign National
2018	83,2%	11,4%	0,8%	1,2%	3,4%
2019	82,9%	11,4%	0,8%	1,0%	3,9%
2020	83,7%	10,9%	0,7%	0,9%	3,7%

Figure 25: Unskilled by gender



	2018	2019	2020
MALE	58,1%	58,4%	57,0%
FEMALE	41,9%	41,6%	43,0%

Figure 26: Unskilled - population group and gender



	AM	CM	IM	WM	AF	CF	IF	WF	FM	FF
EAP	43,7%	4,8%	1,8%	5,1%	35,6%	4,1%	1,0%	3,9%	0,0%	0,0%
2018	48,4%	5,7%	0,5%	0,7%	35,3%	5,3%	0,3%	0,4%	2,8%	0,7%
2019	48,3%	5,9%	0,5%	0,7%	34,6%	5,5%	0,3%	0,3%	3,0%	0,9%
2020	47,4%	5,6%	0,4%	0,6%	36,3%	5,3%	0,2%	0,3%	2,9%	0,8%

In contrast to top management levels as depicted above, the statistics are inversed for the population groups in the unskilled occupational level. In other words, the statistics show that just as institutional racism prescribes, the executive/top and senior positions are reserved for the white population group first and the designated groups last. On the other hand, the designated population groups are recruited a lot more in lower / semi-skilled and unskilled positions as opposed to a much lower rate of recruitments for the white population group. This is evident of the barriers and limitations faced by the black population to evolve economically.

Table 28: Workforce profile at the Unskilled level by Business Type, Population Group and Gender

BUSINESS TYPE	Male				Female				Foreign National		
	AM	CM	IM	WM	AF	CF	IF	WF	FM	FF	TOTAL
EAP	43.7%	4.8%	1.8%	5.1%	35.6%	4.1%	1.0%	3.9%	n/a	n/a	100%
National Government	40.9%	4.0%	0.1%	0.4%	49.5%	4.7%	0.1%	0.3%	0.0%	0.0%	100.0%
Provincial Government	39.8%	3.4%	0.1%	0.6%	51.5%	3.8%	0.1%	0.6%	0.0%	0.0%	100.0%
Local Government	52.7%	10.2%	0.6%	0.5%	31.8%	3.8%	0.2%	0.1%	0.0%	0.0%	100.0%
Private Sector	48.7%	5.6%	0.5%	0.6%	34.3%	5.4%	0.3%	0.3%	3.4%	1.0%	100.0%
Non-Profit Organisations	34.8%	5.5%	0.2%	0.5%	52.1%	6.1%	0.2%	0.6%	0.1%	0.1%	100.0%
State Owned Enterprises	41.4%	3.2%	0.1%	0.9%	50.1%	4.1%	0.0%	0.2%	0.0%	0.1%	100.0%
Educational Institutions	31.5%	2.5%	0.1%	0.7%	58.3%	4.5%	0.1%	0.9%	0.8%	0.5%	100.0%

Table 28 shows the opposite of Table 13 above - how the African male and female population groups are over-represented and dominate every sector at the unskilled occupational level.

Table 29: Workforce movement at the Unskilled level by Population Group and Gender

	Male				Female				Foreign National		
	AM	CM	IM	WM	AF	CF	IF	WF	FM	FF	TOTAL
EAP	43.7%	4.8%	1.8%	5.1%	35.6%	4.1%	1.0%	3.9%	n/a	n/a	100%
Workforce profile-all employees	47.4%	5.6%	0.4%	0.6%	36.3%	5.3%	0.2%	0.3%	2.9%	0.8%	100.0%
Recruitment	45.9%	6.7%	0.4%	1.0%	36.4%	6.6%	0.2%	0.4%	1.7%	0.7%	100.0%
Promotion	49.3%	7.9%	0.5%	0.8%	33.3%	5.6%	0.2%	0.3%	1.4%	0.7%	100.0%
Terminations	48.0%	7.0%	0.5%	0.9%	33.8%	6.6%	0.3%	0.5%	1.8%	0.6%	100.0%
Skills Development	48.3%	6.3%	0.6%	0.9%	38.1%	5.3%	0.3%	0.3%	n/a	n/a	100.0%

Table 29 demonstrates that majority of the recruitment, retention and advancement opportunities were offered to black workers. White workers are scantily employed or recruited at this level of occupation.

Table 31.1						
Categories	**Barriers**			**Affirmative Action Measures**		
	Yes	**No**	**TOTAL**	**Yes**	**No**	**TOTAL**
Recruitment procedures	7514	19121	26635	7121	19514	26635
	28.2%	71.8%	100.0%	26.7%	73.3%	100.0%
Advertising positions	5249	21386	26635	4955	21680	26635
	19.7%	80.3%	100.0%	18.6%	81.4%	100.0%
Selection criteria	4442	22193	26635	4172	22463	26635
	16.7%	83.3%	100.0%	15.7%	84.3%	100.0%
Appointments	5427	21208	26635	5125	21510	26635
	20.4%	79.6%	100.0%	19.2%	80.8%	100.0%
Job classification and grading	3127	23508	26635	2829	23806	26635
	11.7%	88.3%	100.0%	10.6%	89.4%	100.0%
Remuneration and benefits	4576	22059	26635	4241	22394	26635
	17.2%	82.8%	100.0%	15.9%	84.1%	100.0%
Terms & conditions of employment	1354	25281	26635	1182	25453	26635
	5.1%	94.9%	100.0%	4.4%	95.6%	100.0%

Table 31.1 implies that 90% of employers had no challenges in attracting and employing people from designated groups and therefore the change in demographics should happen at a faster pace than what has been recorded.

Table 31.2						
Categories	**Barriers**			**Affirmative Action Measures**		
	Yes	**No**	**TOTAL**	**Yes**	**No**	**TOTAL**
Job assignments	928	25707	26635	749	25886	26635
	3.5%	96.5%	100.0%	2.8%	97.2%	100.0%
Work environment and facilities	4363	22272	26635	3823	22812	26635
	16.4%	83.6%	100.0%	14.4%	85.6%	100.0%
Training and development	6817	19818	26635	6381	20254	26635
	25.6%	74.4%	100.0%	24.0%	76.0%	100.0%
Performance and evaluation systems	4070	22565	26635	3737	22898	26635
	15.3%	84.7%	100.0%	14.0%	86.0%	100.0%
Promotions	2060	24575	26635	1801	24834	26635
	7.7%	92.3%	100.0%	6.8%	93.2%	100.0%
Transfers	543	26092	26635	455	26180	26635
	2.0%	98.0%	100.0%	1.7%	98.3%	100.0%
Succession and experience planning	5884	20751	26635	5503	21132	26635
	22.1%	77.9%	100.0%	20.7%	79.3%	100.0%

Table 31.2 illustrates that 80% of employers had reported that they have no barriers in job transfers, job assignments and job promotions. This creates the perception that advancing the designated group to higher occupational levels should be easier for most of the employers. However, it demonstrates the contrary to what the employers have submitted in their reports.

Summary

- Top Management level: white and Indian groups remain dominant and over-represented in comparison to their EAP and they seem to be the preferred group in terms of recruitment and promotions. The trend for gender transformation shows an annual average increase of 1% for female representation at this occupational level.

- Senior Management level: similar trends to top management.

- Professionally Qualified / Middle Management level: the only group that was under-represented in comparison to its EAP was the African population group. Despite this though, there was an equitable distribution of opportunities in the recruitment and promotion of all the population groups as well as gender representation.

- Skilled Technical/ Junior Management level: as opposed to the higher occupational levels, the African population group was more equitably represented at over 60% but however still under-represented in relation to its EAP. Gender representation is quite equitable.

- Semi-Skilled level: there is an under-representation of the white population group below their EAP. Biggest beneficiaries are the African male group regarding recruitment, promotion and skills development opportunities. Equitable gender representation.

- Unskilled level: at the lowest level of workforce occupation, the white population group is significantly under-represented. It is evident that the main beneficiaries are the African population group, benefiting from recruitment, promotion and possible skills development.[167]

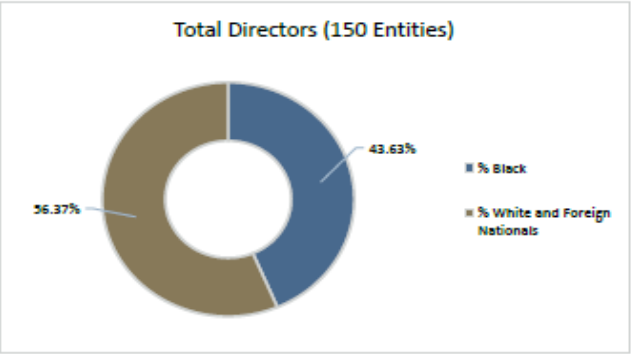
[167] Ibid at 51-52.

ANNEXURE B

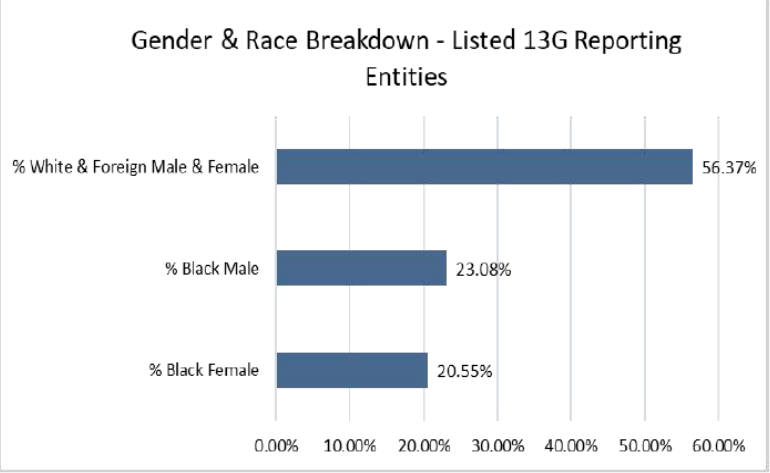
BEE Trends[168]

Table 21: Percentage of Black vs. Non-Black at board level on the JSE

Directors	2019	2018
% Black	43.63%	38%
% White and Foreign Nationals	56.37%	62%
Grand Total	**100,00%**	**100.00%**



Graph 18: Percentage of Black vs. Non-Black at board level on the JSE



Graph 19: Race and Gender breakdown on 2019 Listed 13G Reporting entities

Table 21 and Graph 18 & 19 above depict the demographic representation at board level of JSE listed entities. According to the B-BBEE Commission the percentage of black directorship of 43.63% (made up of Black Male 23.08% and Black Women 20.55%) as opposed to the non-black directorship constituting 56.37% is indicative of a low level of economic transformation at board level.[169]

[168] All statistics under Annexure B collected from B-BBEE Report op cit note 83.
[169] Ibid at 56 – 57.

It is different to have many black people owning companies as opposed to black people being directors on the board. An owner can have shares in a company and not control the way the company operates and the daily operations thereof, however, a director has that kind of control. That is the white population's way of potentially staying in control of the core operations of the company that includes the recruitment, promotion and advancement of an employee.

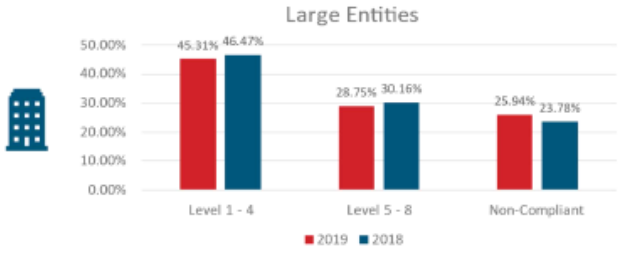
The below statistics illustrate the concluded trends from the submitted reports to the BEE Commission and the concluded B-BBEE levels achieved.[170]

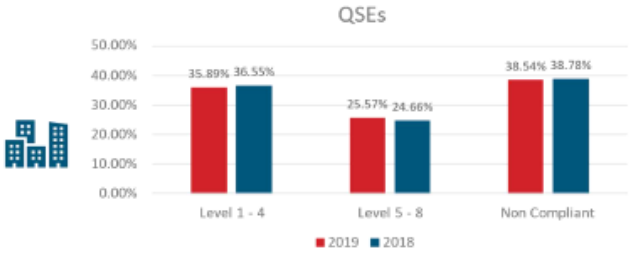


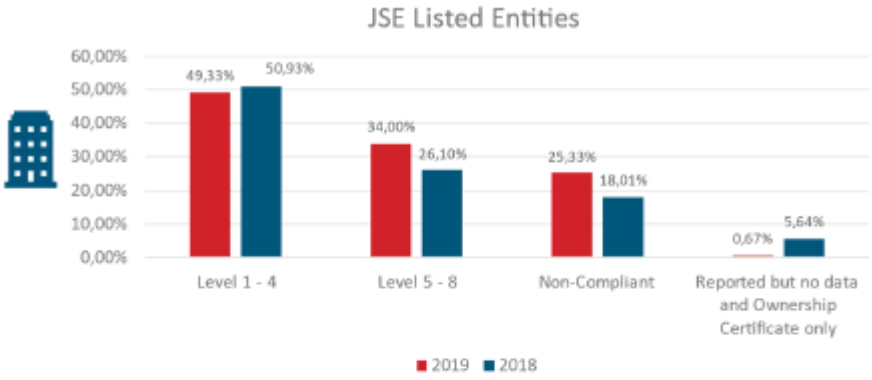
[170] Ibid at 11-15.

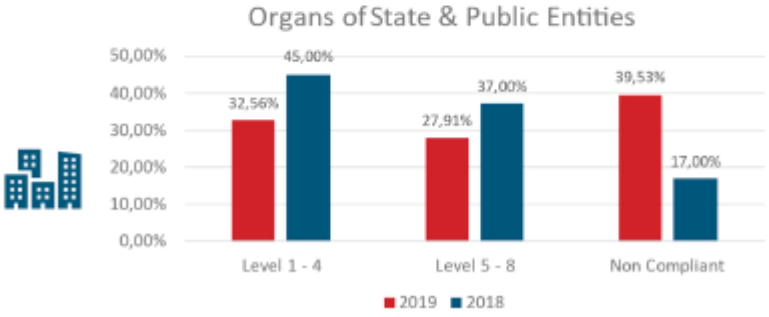
B-BBEE Levels Achieved

An analysis of the B-BBEE levels achieved by Large entities and QSEs as percentage for 2019 and 2018.









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