European Union – South Africa (EU-SA) Partners for Growth

FLASH REPORT[1]

August 2020

Proposed amendments to the Employment Equity Bill, 2020

EXECUTIVE SUMMARY

The Employment Equity Act No. 55 of 1998 sought to promote affirmative action and equal opportunity through the elimination of unfair discrimination in the workplace. Despite these efforts, many private sector companies remain 'untransformed', and historically disadvantaged individuals[2] are still underrepresented in senior and skilled positions. Whereas the number of Black African South Africans in the Economically Active Population (EAP) has increased from 74% to 79% between 2007 and 2018, the representation of Black African South Africans in Top Management has fallen from peaks of up to 20% between 2007 and 2013, to around 15% in 2018.

On 20 July 2020, the Department of Employment and Labour (prior to 2020 referred to as the "Department of Labour") published the Employment Equity Amendment Bill, 2020[3]. The main purpose of these amendments is to (i) Enable the Minister of Employment and Labour to set and regulate sector-specific Employment Equity (EE) targets; and (ii) Ensure that an EE compliance certificate is a prerequisite for accessing state contracts[4].

The intended implications of these amendments are clear: designated businesses (effectively any company with more than 50 employees) will no longer be given the space to set their own EE targets, but will be required to comply with sector targets that will be set by the Minister as he/she sees fit. Moreover, the penalty for non-compliance, especially for any business that is doing work for the State, will now be absolute. Companies that are unable to meet the Minister's requirements (at this stage unknown), will effectively be barred from doing business with Government.

For large and established businesses, whose employment profile is not yet representative of South Africa's national (or provincial or sector) demographics, these amendments pose a significant risk. There are also questions around the capacity of the Department of Employment and Labour to define appropriate targets, issue Certificates of Compliance, and review applications for exemptions. Any delays or disputes relating to the issuance of Certificates of Compliance, will impact on the effectiveness of the entire public procurement system.

The implementation of the Act is likely to be delayed by court challenges. But rather than wait for the Minister to impose inappropriate or unachievable targets, business should use this time to collate the evidence needed to engage constructively with Government on industry-specific opportunities and constraints; and to ensure that the proposed certification system works well and efficiently for both private and public sector participants.

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[1] This report was prepared by DNA Economics with specialist advice from SDF Corp

[2] Black South Africans, women and persons with disabilities. This group of individuals is referred to as the "designated group" in this note.

[3](Business Tech, 2020)

[4](Transcend, 2020)

1. The Employment Equity Act No. 55 of 1998 – how does it currently work?

The Employment Equity Act of 1998 provides the legal framework to guide designated[5]employers towards the achievement of an equitable and fair work environment, and more specifically, the establishment of a workforce that is broadly representative of the country's demographics. The duties of the designated employer, as they stand prior to the Amendment Bill 2020, extend across four processes: (i) Consulting with representative trade unions and employees; (ii) Auditing and analysing all employment policies and developing a demographic profile for the workforce; (iii) Preparing and implementing an Employment Equity (EE) Plan; and (iv) Reporting the progress made on the implementation of the Employment Equity Plan to the Department of Labour[6]. These four processes are core to the administration of the current legislation and are explained in more detail in Annexure B.

In order to strengthen the compliance, the Employment Equity Act was amended for the first time in August 2014.[7] Specifically, a number of provisions were revised to enable the Department of Labour to approach the Labour Court for the immediate imposition of financial penalties on designated employers on the grounds of non-compliance. These acts of non-compliance include instances where the preparation and/or implementation of EE Plans and the submission of annual employment equity reports was not undertaken by designated employers.

Following this amendment, the Department of Labour is now entitled to impose financial penalties through the Labour Court, without giving designated employers the opportunity to remedy these acts of non-compliance, even in instances of first-time offences. These fines are directly proportionate to the number of previous contraventions, and the timeframe between repeated contraventions. For a first offence, a fine of R1,5 million or 2% of the company's turnover (depending on which is greater) may be issued. For subsequent and more serious offences such as failing to comply with the Director-General's recommendations within 180 days, a fine of R1,8 million or 4% - 10% of annual turnover may be issued. Fines for breaching confidentiality, undue influence, obstruction and fraud in relation to the Act were also increased from R10 000 to R30 000. [8]

2. Implementation challenges and concerns

The Employment Equity Act undoubtedly and intentionally imposes additional reporting requirements on business in order to guide and monitor transformation in the workplace. In doing so, some concerns have been raised about the **administrative compliance cost** of the legislation. The cost of implementing Employment Equity is influenced by the size of the organisation in terms of the number of employees, the structure of the organisation and the severity of the changes needed to become compliant, and the extent to which companies can implement tasks in-house or need to hire in expert consultants.

The cost of implementing the Employment Equity Act is also impacted by the general scarcity of skills in South Africa. In many instances, positions are left vacant if a candidate of the right profile with matching qualifications cannot be found, and in those sectors and professions where the availability

[5]A designated employer is defined to include an employer who employs more than 50 employees, or has fewer than 50 employees but has a total annual turnover equal to, or above the applicable turnover of a small business in a specific sector, or is a municipality or Organ of State or is bound by a collective agreement in terms of the Labour Relations Act.

[6](Department of Labour, 2005)

[7](Department of Labour, 2014)

[8](Werksmans Attorneys, 2017)

of skills is limited, companies may pay higher recruitment and wages in order to satisfy their Employment Equity Plan[9].

Specific challenges have arisen in the development of EE targets. Information on the Provincial and the National Economically Active Population (EAP) is contained in the Quarterly Labour Force Survey (QLFS) conducted and published by Statistics South Africa. The EAP includes people between the ages 15 to 64 years of age who are either employed or unemployed, and who are seeking employment. The EAP is used as a benchmark to assist employers in the analysis of their workforce to determine the degree of under-representation of the designated groups. The benchmark furthermore guides employers in the setting of self-imposed numerical goals and targets towards achieving an equitable and representative workforce.

A number of court cases have arisen in response to the interpretation of these benchmarks. In the prominent case of Kees Beyers Chocolates CC[10], the employer was found to employ too many Black African Women, and was consequently instructed to reduce the percentage of female employees in its workforce to reflect the provincial demographics of Gauteng. In *Solidarity v Department of Correctional Services*[11], the Constitutional Court ruled that the Department's "EE Plan was unlawful because it used national demographics to set targets for employment in the Department, regardless of which region the Plan was being implemented". The Act has since been changed to allow (but not compel) designated employers to use regional EAP demographics, allowing for greater flexibility but also for potential confusion (and abuse) in the determination of appropriate targets.

Some problems ascribed to Employment Equity in South Africa do not stem from the legislation itself, but rather, from the poor implementation of the Act by specific employers. When implemented diligently, Employment Equity can be a powerful tool for designated employers to transform and upskill their workforce. But where Employment Equity Plans are not aligned with a company's overall business and black-economic-empowerment strategies; are not developed openly and consultatively; and are not informed by the underlying realities of the industry or sector, they can readily lead to "token appointments", mistrust, fear and resentment [12].

Moreover, it is important to highlight that the South African Government has, thus far, largely applied a self-regulatory approach to the adoption of Employment Equity – designated employers are given scope to define and monitor their own targets, and as long as they submit the required reports to the Department of Labour, they are deemed to be compliant. It follows, that many companies have adopted a tick-box approach to Employment Equity; as compared to B-BBEE, where the framework and incentives for compliance are that much stronger.

The Department of Employment and Labour is however reasonably proficient in identifying companies that do not comply fully with the intent of the Act; for example, departmental inspectors can deduct from reviewing EE meeting minutes whether a company has consulted properly with employees and whether their strategies and policies are aligned with their EE Plan. In practice, an inspector will seldom simply fine a company for non-compliance. Companies that are found to be non-conforming

[9] Consultations with EE Consultants

[10] (Department of Labour, 2020) http://www.labour.gov.za/employment-and-labour-responds-to-misinformation-regarding-kees-beyers-chocolates-cc-employment-equity-plan

[11] (Constitutionallyspeaking.co.za, 2016) https://constitutionallyspeaking.co.za/constitutional-court-expands-scope-of-permissible-employment-equity-measures/

[12](Thomas, 2002); (Oosthuizen, 2010) https://sajip.co.za/index.php/sajip/article/view/836/960

will be placed under review, after which the Department of Employment and Labour will assist them in becoming compliant.

3. Performance of the Act

The 19th Commission for Employment Equity Annual Report (2019) highlights that work opportunities in South Africa "continue to be skewed along the historical racial, gender and disability lines"[13]. Males constitute 77% at the Top Management level and more than 2/3 of Top Managers are White. This despite the fact that White South Africans constitute just 9% of the Economically Active Population (EAP). Whereas the number of Black African South Africans in the EAP has increased from 74% to 79% between 2007 and 2018, the representation of Black African South Africans in Top Management has fallen from peaks of up to 20% between 2007 and 2013, to around 15% in 2018. These imbalances are most stark in the private sector, where 70% of Top Management employees are White. Conversely, 76% of Top Management employees in Government are Black African; and female representation in Top Management is roughly 10% higher in the public sector.

For more data and insights on the demographics in the South African workplace, see Annexure C.

These trends confirm the substantial structural impediments to transformation in South Africa, and highlight the need for ongoing change, most notably at the highest levels of management. It would seem that the Employment Equity Act has not (yet) been sufficient to overturn the extreme skewness that is reflected in South Africa's labour force. The data does however reveal some encouraging developments, especially amongst professional employees. Over time, it can be expected that the growing number of Black African professionals will move into Senior and Top Management positions.

4. The proposed amendments

As described above, South Africa clearly has a long way to go in terms of achieving employment equity; and the existing Employment Equity Act provides designated employers with substantial scope to determine and implement their own targets and plans and at their own pace. The Government is therefore looking to press for more rapid transformation across the private sector, and it argues that employers are using self-imposed and soft targets as a "shield" to evade the intent of the law.[14] Its response has been to propose a set of amendments which will enable the Minister of Employment and Labour to set employment equity targets, and will make employment equity compliance a requirement for the award of state contracts.

5.1 The establishment of numerical targets

The amendments proposed in Section 15 of the Act will allow the **Minister to establish numerical targets (headcounts) for any identified sector, after consulting with the National Minimum Wage Commission (NMWC)**. Furthermore, the Minister will have the discretion to set *different* numerical targets across each of the six occupational levels or set specific targets for regions within an economic sector or set targets based on any other relevant factor.[15]

This sharply contrasts with the current situation; where employers are able to set their own targets as guided by the racial distribution of the Economically Active Population. The Minister can now prescribe his/her own criteria for identifying a sector (or sub-sector) to be targeted; and he/she can set targets

[13](Department of Labour, 2019)
[14](LabourNet, 2020)
[15] (LabourNet, 2020)

based on 'any relevant factor'. There is no guidance in the Act as to *how* the Minister will set such targets, except for the requirement to consult with the NMWC.

Interestingly, the **NMWC**'s mandate is to review working conditions and specifically the implementation of the national minimum wage.[16] It **is appointed by the Minister** and includes representatives of business, labour and labour experts, but it is **not clear why it would be the right body to consider the derivation of sector-specific employment equity targets**. To date, research and policy advice on the setting of sector goals has been a function of the Commission for Employment Equity; and neither of these bodies can be deemed to represent the interests of designate employers. As such, the **Minister only needs to consult with a small group of Commissioners; and he/she remains the sole decision maker**. No public consultation of any kind is required (though a notice must be Gazetted once the targets have already been set and the public can then comment).

5.2 The award of state contracts

Section 53 in the current Act requires companies to comply with the core provisions of the Act in order to do business with the State. However, this specific section of the Act has not been operationalised; government tenders do not require bidders to provide any evidence that they are compliant with the Employment Equity Act. Moreover, even if such evidence was requested, the Act allows for companies to make a declaration that they are compliant (i.e. certification from the Department of Labour is not specifically required, though the Department can verify whether this declaration is correct or not). [17]

The amendment to this section outlines when the Minister may issue a certificate of compliance with the Employment Equity Act.[18] Specifically, such a certificate will only be issued if the employer: complies with the numerical target set by the Minister (or provides reasonable grounds for non-compliance); has submitted all reports as required in terms of the Act; has not been found by the Commission for Conciliation, Mediation and Arbitration (CCMA) (in the last 3 years) to have breached the prohibition on unfair discrimination; and has not been found by the CCMA (in the last 3 years) to have failed to pay the prescribed minimum wage.

If this amendment leads to the operationalisation of Section 53 (which the Department has stated it will[19]); two substantive changes will be introduced**. Firstly, companies will now have to comply with externally set targets, not just the Employment Equity process, in order to obtain certification. And secondly, all designated companies will need to obtain a certificate from the Department of Employment and Labour, on an annual basis, in order to transact with the State**. Whereas the Amendment Act does not specifically require certification (i.e. a declaration may still be permissible), the accompanying "Memorandum on the Objects of the Employment Equity Amendment Bill, 2020" makes clear the Department's expectation that the issuing of a Certificate of Compliance is foreseen as a prerequisite for access to State contracts.

5. Implications for business

The intended implications of these amendments are clear: **designated businesses will no longer be given the space to set their own EE targets, but will be required to comply with sector targets that**

[16] (Department of Employment and Labour, 2020)
[17] (LabourNet, 2020)
[18] (LabourNet, 2020)
[19] https://www.mdacc.co.za/index.php/employment-equity-amendment-bill-to-bring-about-real-transformation/

will be set by the Minister as he/she sees fit. Moreover, **the penalty of non-compliance, especially for any business that is doing work for the State, will now be absolute**. Companies that are unable to meet the Minister's requirements (at this stage unknown), will effectively be barred from doing business with Government.

The degree of discretion given to the Minister to define an economic sector and to then set targets for any sub-sector, occupational level or region impacted by this sector, "on the basis of any other relevant factor", is extreme. The Act sets no substantive criteria against which such numerical targets may be set and provides no limits on the ability of the Minister to revise such targets, as often as he or she sees fit. In doing so, the Minister's only obligation is to consult with a Commission that he/she has appointed; and to publish a notice in the Government Gazette for public comment.

For large and established businesses, whose employment profile is not yet representative of South Africa's national (or provincial) demographics, these amendments pose a significant risk. The data presented above suggests that **most private sector companies are likely to be in this position and may therefore fall foul of the targets set by the Minister**. **Whereas the Minister can provide relief to companies that are unable to comply with the regulated target, the decision to grant such relief rests with the Minister, who must determine whether a "reasonable" justification for non-compliance has been provided.**

For new and especially smaller businesses, the Amendment Act does provide an important concession: in Section 1, the **definition of a designated employer has been revised to limit the application of the Act to companies with 50 or more employees**. Whereas this will provide significant flexibility to certain companies, it **may introduce potentially problematic distortions**. For example, smaller businesses might find it advantageous to cap their employment levels at 50 to avoid the administrative burden associated with Employment Equity; investing in mechanisation instead of employment creation. Moreover, certain sectors, where small businesses are more prevalent, may effectively be excluded from Employment Equity considerations.

There are also questions around the **capacity of the Department of Employment and Labour to implement these new provisions**. Whereas the administration of the current Act works well[20], upon the planned promulgation of Section 53, the Department will also need to issue Certificates of Compliance. This will require extensive consultations with the identified sectors (and sub-sectors), and then the careful scrutiny of individual plans against sector, sub-sector and regional targets; as well as a review of all previous reports and CCMA proceedings involving all applicants. Where companies are not able to meet the specified targets, any grounds for non-compliance will also need to be carefully reviewed.

These requirements will undoubtedly impose a substantial additional burden on the Department; yet according to the Department, just R1.2 million has been budgeted for the implementation of the Act and no additional funds are required over the MTEF period. This may explain why smaller enterprises will no longer be treated as designated employers; freeing the Department to focus its efforts on large companies. It is important to stress that **any delays or disputes relating to the issuance of Certificates of Compliance, will impact on the effectiveness of the entire public procurement system**.

Finally, the **potential overlaps between the provisions in the Employment Equity Act, and the implementation of other government policies and regulations, such as Broad-Based Black Economic Empowerment (B-BBEE), must be considered**. Take, for example, any new investment in the energy

[20] Consultations with EE Consultants

sector. Not only will investors need to comply with B-BBEE and the Renewable Energy Independent Power Producer Procurement (REIPPP) Programme local content requirements, but their ongoing ability to sell to Eskom will now also hinge on their ability to obtain an Employment Equity Certificate of Compliance from the Department of Employment and Labour on an annual basis, against targets which may not have been set and which can be changed by the Minister at any time by notice in the Gazette.

It is likely that the Department of Employment and Labour will run into multiple difficulties in trying to push through these changes. Already, a number of parties have indicated their intention to challenge the Amendments. The official opposition party, the Democratic Alliance, has publicly announced[21] their intent to oppose this bill in court, while Solidarity's Centre for Fair Labour Practices[22] has also stated their opposition to these changes. A South African law firm has suggested that the discretion given to the Minister in the determination of sectors and targets, and the lack of a clear exemption process, could lead to protracted legal disputes[23]. Regardless of the merits of any legal challenges, they are likely to delay implementation.

In their own analysis of the Bill, the Department indicates that consultations with the National Treasury (Chief Procurement Office) and the DTIC (B-BBEE Policy Unit) around the promulgation of Section 53 are ongoing. On the other hand, a public statement by the Chief Director of Labour Relations from the Department of Employment and Labour indicates that the Department does not intend to delay the process of implementation: "We are already busy with negotiations with different sectors in terms of the targets. We are not waiting for the Bill. The process has started already"[24]. Moreover, the recently published Draft Public Procurement Bill specifically requires that for a company to contract with the State, it must comply with the requirements of the Employment Equity Act.

6. Next steps and other considerations

The Minister of Employment and Labour is expected to table the Bill for debate and approval in the National Assembly later this year. Given the ANC's dominance within Parliament, the Bill will likely be passed and will then be submitted to the President for his assessment and signature. At this stage, numerous court challenges are likely to be launched, which may delay the introduction of these amendments into law. In parallel, the Department has indicated that it has begun consultations with industry to agree sector specific targets, which will then need to be Gazetted by the Minister before they enter into force. How these sectors will be defined, and who is involved in these negotiations, is unclear. Moreover, there is no obligation within the Act for the Minister to consult, except with the NMWC.

Thus, rather than wait for the Minister to impose uninformed or unachievable targets on business, **business should look to collate the evidence needed to engage constructively with the Department and potentially with the NMWC.** Specifically, it will be **important for sector organisations to initiate their own analysis to determine what level of transformation has taken place within their industry, to identify potential opportunities and constraints, and to determine what is possible and at what**

[21] (DA, 2020) https://www.da.org.za/2020/07/employment-equity-amendments-will-worsen-economic-crisis

[22] (Solidarity, 2020) https://solidariteit.co.za/en/solidarity-racial-legislation-stops-economic-growth/

[23] https://www.businesslive.co.za/bd/opinion/2020-08-03-employment-equity-bill-gives-labour-minister-far-wider-powers/

[24] https://www.sanews.gov.za/south-africa/employment-equity-amendment-bill-bring-about-real-transformation

pace. Such an assessment should take into account the likely economic and social costs and benefits of the proposed amendments, for companies of different sizes and across different regions and sub-sectors; and should quantify the likely impacts of targets at different levels on both industry and on government procurement.

Finally, given concerns about the capacity of the Department to implement a comprehensive certification regime – following the promulgation of Section 53 – **the ability of companies to make use of a formal declaration in lieu of a Certificate of Compliance may prove critical in ensuring that businesses are not prohibited from doing business with the State as a result of administrative delays or disputes**. Further representations to both the Department of Employment and Labour and the National Treasury (Office of the Chief Procurement Officer) may be necessary to ensure that this alternative and less burdensome option is permitted.

Annexure A: Summary of Major Amendments

Chapter	Description
Chapter 1: Definitions	- The definition of a designated employer has been amended by deleting paragraph (b); which classifies employers with less than 50 employees as being designated based on their annual turnover. This would suggest that the only factor on which designations will be determined is on the number of employees (50 or more). - Definition of sector is included; as an industry or service or part of an industry or service. - The definition of "serve or submit" has been deleted; this allows the Minister to prescribe, by regulation, the methods of communication, submission and service. - The definition of persons with disabilities has been extended; now includes intellectual and/or sensory impairment components which can further be affected as a barrier to employment. - The definition of "the state" is included as national or provincial departments; as per the Public Finance Management Act. This brings about clarity with the application of section 53 (state contracts).
Chapter 2: Prohibition of Unfair Discrimination	Section 8: which deals with Psychological testing and other assessments - This section excludes the requirement that psychological tests need to be certified by the HPCSA (as they do not have capacity to certify these assessments/ tests and that any disputes of assessments will be evaluated by the Labour Court)
Chapter 3: Affirmative Action	Section 14: which deals with voluntary Compliance to the EE Act, has been repealed. - This suggests that an employer who is currently deemed as "non-designated" cannot notify the Director-General that they will be complying with the act out of their own free will for any reason (such as for tender-related purposes). Chapter 3 will therefore only be applicable to employers with more than 50 employees under the amended definition. Section 15: which deal with affirmative action (inclusion of subsection 1-5) Subsection 1: - Will allow the Minister to identify and group national economic sectors for the purpose of administration of EE. Subsection 2: - Will allow the Minister to establish numerical targets (headcount) for employers in these sectors to ensure equitable representation of suitably qualified people from designated groups. - This suggests that designated employers covered by any targets set by the Minister will no longer be permitted to set their own targets in line with the Economically Active Population Subsection 3:

	- This enables the Minister to issue a notice in terms of subsection 2 (above) which may set different numerical targets for the 6 occupational levels, or set targets for regions within an economic sector, or set targets on the basis of any other relevant factor. Subsection 4: - States that a draft of any notice needs to be gazetted and parties must be allowed at least 30 days to comment on the draft notice. This effectively allows the public 30 days per notice to voice their concerns with the proposed notices and/ or legislative changes. Subsection 5: - Will allow the minister to issue regulations prescribing criteria to be considered when determining a numerical target in terms of subsection 2 above. The minister of labour thus sets the bar for how stringent or radically transformative these targets are and dispenses judgement on whether they were achieved or not. Section 16: which deals with clarifying who a designated employer is required to consult with - Where there is a representative trade union, the designated employer must only consult with the trade union Section 20: which deals with the EE Plan - The section has been amended with the proposed inclusion after subsection2 (2A) "The numerical goals set by an employer in terms of subsection (2) must comply with any sectoral target in terms of section 15A that applies to the employer ". This will ensure that the goals and targets to be set in the Employment Equity plan, are in line with the "set" targets proposed in section 15A. Section 21: which deals with the report deadline - The October deadline has been replaced with a vague section stating that a designated employer must submit a report once a year on such date and in such manner as may be prescribed. This doesn't leave much room for planning as the deadline is not made clear in the amendment bill. In addition to these subsections 3 and 4 have been deleted and subsection 4A, failure to submit, has been amended to exclude the October deadline. Section 27: which deals with income differentials - This has been amended to propose a transfer of duties from the Employment Conditions Commission to the National Minimum wage Commission
Chapter 5: Monitoring, Enforcement and Legal Proceedings	Section 36, which deals with an Undertaking to Comply - Has been amended to include the preparation of an employment equity plan as a criteria for issuing of a written

	undertaking to comply, should the designated employer fail to do so. Section 37, which deals with Compliance Orders - Has been amended to propose that the duties of a labour inspector may also be fulfilled by a person acting on behalf of a labour inspector, thus, permitting the Minister to prescribe the way compliance orders are served. Section 42, which deals with the Assessment of Compliance, - has been amended to clarify that an Employer's implementation of affirmative action may be measured against the demographic profile of either the national or the regional economically active population (EAP), and to measure whether the employer has achieved any sectoral target set by the Minister in terms of the proposed section 15A. - This indicates that if these Sectoral Targets are not met, the employer may be deemed Non-compliant with the act and face the corresponding consequences.
Chapter 6: General Provisions	Section 53, State Contracts - Once promulgated state contracts will only be awarded to Employers who have been certified as being compliant with the Employment Equity Act. An employer will be required to attach a certificate of compliance and/or a declaration by the employer that it complies with the relevant chapters of the act when applying for a contract with the state. Subsection (6) in section 53 - Regulates when the Minister may issue a certificate of compliance with the Employment Equity Act. As per the proposed subsection 6, the below criteria need to be met: ○ The Employer met the applicable sectoral targets in terms of section 15A or has provided reasonable and acceptable grounds for non-compliance ○ The Employer has submitted its most recent report (section 21) ○ The Employer has not been found (within the previous 36 months) to have breached the prohibition on unfair discrimination or failed to pay the national minimum wage in (National Minimum Wage Act, 2017) ○ Section 64, which allowed for the annual turnover thresholds in Schedule 4 to define employers with less than 50 employees as designated, has been repealed. ○ Schedule 4 – Turnover thresholds to determine if an employer is designated, has been repealed.

Source: Adapted from: (LabourNet, 2020)

Annexure B: Summary of the Employment Equity process

The Employment Equity Act of 1998 provides the legal framework to guide designated[25]employers towards the achievement of an equitable and fair work environment, and more specifically, the establishment of a workforce that is broadly representative of the country's demographics. The duties of the designated employer, as they stand prior to the Amendment Bill 2020, extend across four processes: (i) Consulting with representative trade unions and employees; (ii) Auditing and analysing all employment policies and developing a demographic profile for the workforce; (iii) Preparing and implementing an Employment Equity (EE) Plan; and (iv) Reporting the progress made on the implementation of the Employment Equity Plan to the Department of Labour[26].

The **consultation** process between employers, employees, and trade unions is intended to ensure that realistic Employment Equity Plans are prepared. According to the *Code of Good Practice on the Integration of Employment Equity* the involvement of trade unions during this process is insufficient on its own. Employers are encouraged to consult with employees across all occupational levels and categories. There may be a need to adopt transformation committees or other structures to act as a vehicle for consultation between employees and management. Attempts should be made to ensure that these structures are as representative as possible. The criteria for appointment of representatives to these structures, the number of representatives, their roles and responsibilities and mandates must be clearly set out. Moreover, representatives on these structures should be trained on understanding and implementing the key components of the Employment Equity Act.

Designated employers are expected to develop Employment Equity Plans that are realistic, workplace specific, and capable of measurement. These plans should be informed by the execution of a comprehensive **audit and analysis** of existing and potential unfair discriminatory practices or barriers. The purpose of this analysis is to; (i) Determine the extent of under-representation and over-representation of employees in different occupational levels in terms of race, gender, and disability; and (ii) To identify barriers, practices, and employment conditions that contribute to the under-representation and over-representation of designated groups or the lack of diversity within the workplace. Policies and practices can be analysed through the collection of information, which includes identifying and listing documentation or barriers which are directly/indirectly discriminatory or may stifle the advancement of the designated groups. The employer should then formulate strategies to overcome the identified barriers, detailing appropriate timeframes and responsibilities. Employers should communicate the outcomes of the audit and analysis with employees in a transparent manner.

Developing and executing an **EE Plan** should come after a workforce profile is drawn up. The workforce profile provides a snapshot of employee race, gender, and disability distributions across occupational levels and categories. The collection and reporting of this information is done by completing the EEA12 Form (labelled Template for Reporting on Analysis) as provided by the Department of Employment and Labour, and this analysis provide an indication of under-representation and over-representation across occupational levels for different employee profiles. The results of the workforce profile should be compared to distributions of the Economically Active Population (EAP) at national, provincial, regional, or metropolitan level or other appropriate benchmarks for an *ideal* distribution. In this way the workforce profile will reveal the extent of under-representation or over-representation reflected

[25]A designated employer is defined to include an employer who employs more than 50 employees, or has fewer than 50 employees but has a total annual turnover equal to, or above the applicable turnover of a small business in a specific sector, or is a municipality or Organ of State or is bound by a collective agreement in terms of the Labour Relations Act.

[26](Department of Labour, 2005)

as a percentage for each occupational category and level in that workplace. The employer is then tasked with setting numerical employment targets for each occupational category and level, informed by the extent of under-representation and over-representation, with the most under-represented groups to be prioritised. It is important to take note that in this implementation, and according to the Basic Conditions of Employment Act (BCEA), an employee can only be appointed if they meet the minimum requirements for the position. This prevents employers from appointing unqualified candidates into positions purely for the purpose of achieving employment equity. The designated employer must assign one or more senior managers to implement and monitor the EE Plan. The designated employer must display, at its workplace where employee can read, a notice regarding the provisions of the EE Act. [27]

Employers are required to make reasonable progress towards achieving these numerical goals and targets set out in their EE Plan. Progress should therefore be monitored and tracked on a regular basis to continuously reflect demographic changes. The designated employer is expected to submit their Employment Equity Reports to the Director-General of the Department of Labour on an annual basis. This annual submission period stretches from 1 September when the online submission system opens, until 15 January the following year. When reporting, a statement of remuneration and benefits received at each occupational level must be provided. [28]Prior to this annual submission the employer must consult with its employees or employee representatives through established EE forums. It is important to note that the EEA4 form (the Income Differential Statement) does not form part of discussions with employees or employee representatives, as only authorised persons such as Management, Accountants, and Bookkeepers may access such confidential information. The EE Report must then also be used to inform future implementation strategies and successive plans, in this way acting as a monitoring and evaluation tool for the business.[29]

Inspectors from the Department of Labour are tasked with monitoring whether designated employers are implementing EE Plans and applying affirmative action measurements. The inspectors also monitor company workforce profiles in relation to the national Economic Active Population demographics.[30]If the labour inspector has reasonable grounds to believe that the designated employer has failed to comply with the duties outlined above, then the labour inspector must request and obtain a written undertaking from the designated employer to comply within a specific period. [31]

If a designated employer fails to comply with the provisions of the Act and refuses to give a written undertaking when requested to do so, the Department of Labour may issue an EEA6 form (Compliance Order). These compliance orders must set out the employer or workplace details, the provisions of the Act which the employer has not complied with, details of the conduct constituting non-compliance, steps that must be taken by the employer in correcting these acts of non-compliance, the timeframe in which these steps must be taken, and details of the maximum fine, if any, that are imposed on the employer for failing to comply with the order. [32]

The designated employer may object to a compliance order by making written representations to the Director-General within 21 days of receiving the order. The employer may justify their failure to comply on reasonable grounds in the court proceedings. Reasonable grounds include labour market

[27](EE Assist, 2015)
[28](EE Assist, 2015)
[29](Department of Labour, 2005)
[30](Watkins, 2013)
[31](Department of Labour, 1998)
[32](Department of Labour, 1998)

related conditions such as skills shortages within the industry.[33] The Director-General may confirm, vary, or cancel all or part of the order to which the employer has objected. The Director-General will then specify a time period within which the employer must comply with any part of the order that is confirmed or varied. A copy of the Director-General's decision must be sent to that employer within 60 days of receiving the employer's representation. [34]

[33](Patel, 2013)

[34](Department of Labour, 1998)

Annexure C: Workplace demographics in South Africa

Figures 1 to 3 below show the proportion of South Africans employed in Top Management, Senior Management and Professionally Qualified positions in both the public and private sectors, by race; compared to the racial composition of the National Economically Active Population (EAP). The graphs were compiled using the respective *Commission for Employment Equity Reports,* from 2007 to 2018 (earlier data was not publicly available). The main findings are as follows:

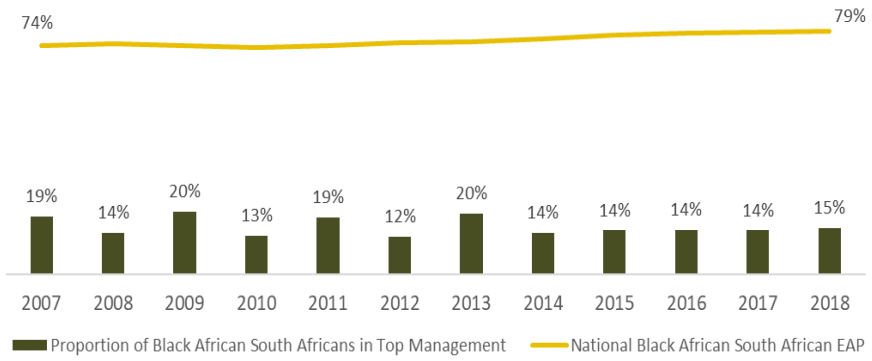
- Whereas the number of Black African South Africans in the EAP has increased from 74% to 79% over this period, the representation of Black African South Africans in Top Management has fallen from peaks of up to 20% between 2007 and 2013, to around 15% in 2018. On the other hand, the number of Black African South Africans in Senior Management has increased from 18% to 23%, while the number of Black African Professionals has jumped from 24% in 2007 to 40% in 2018.

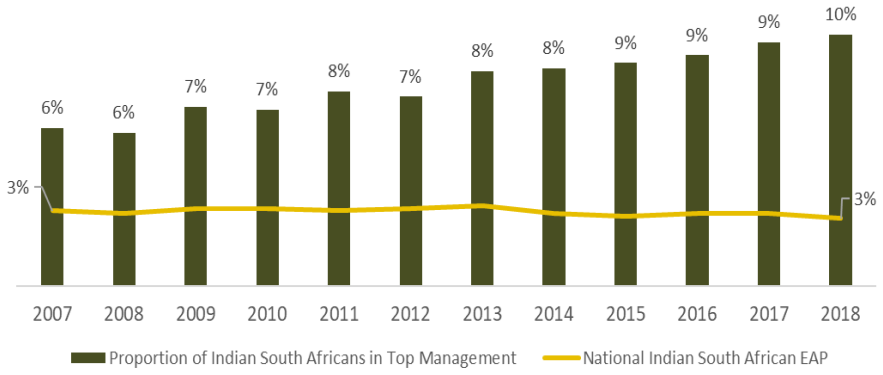
- The Coloured population has remained relatively constant at 10% of the EAP, with the number of Coloured South Africans in Top Management equally consistent at around 5% of the total. Coloured South Africans are better represented at Senior Management and amongst Professionals, at 8% and 10% respectively.

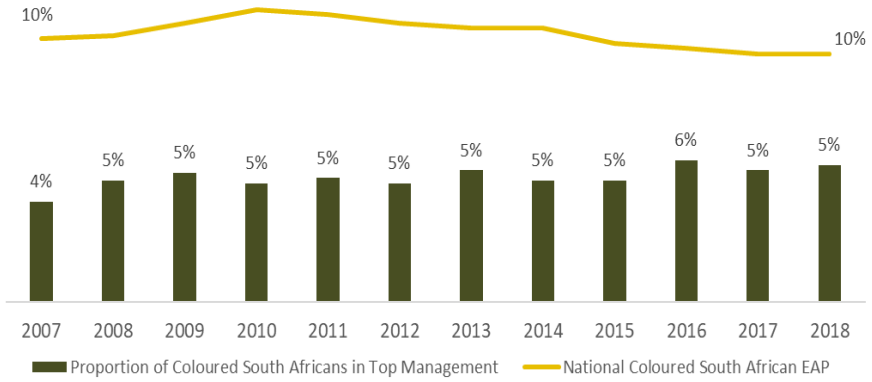
- South Africa's White population has fallen from 13% to 9% of the EAP between 2007 and 2018, but continues to account for just under 70% of Top Management positions and more than 50% of Senior Management positions. The number of White professionals has dropped markedly from 57% to 37% over this period.

- Indian South Africans currently constitute just 3% of the National EAP, but make up 10% and 11% of Top and Senior Management positions respectively. Their share of Professionals has remained constant at 9% over this period.

Figure 1: Racial Decomposition of EAP Target Performance for Top Management Positions (2007-2018)







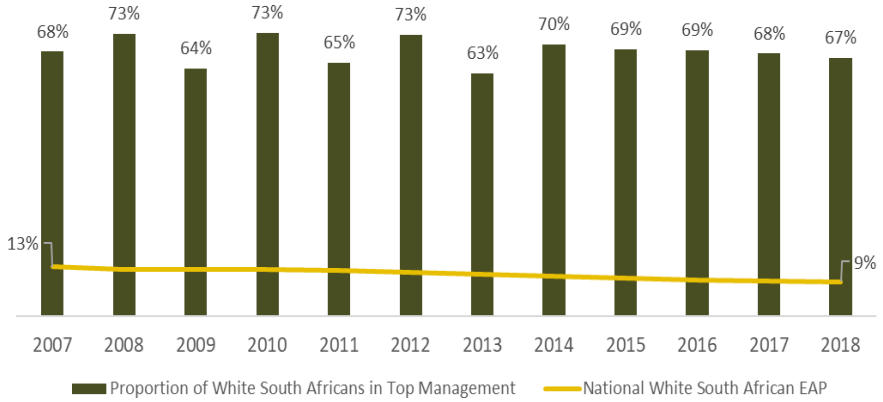


Figure 2: Racial Decomposition of EAP Target Performance for Senior Management Positions (2007-2018)

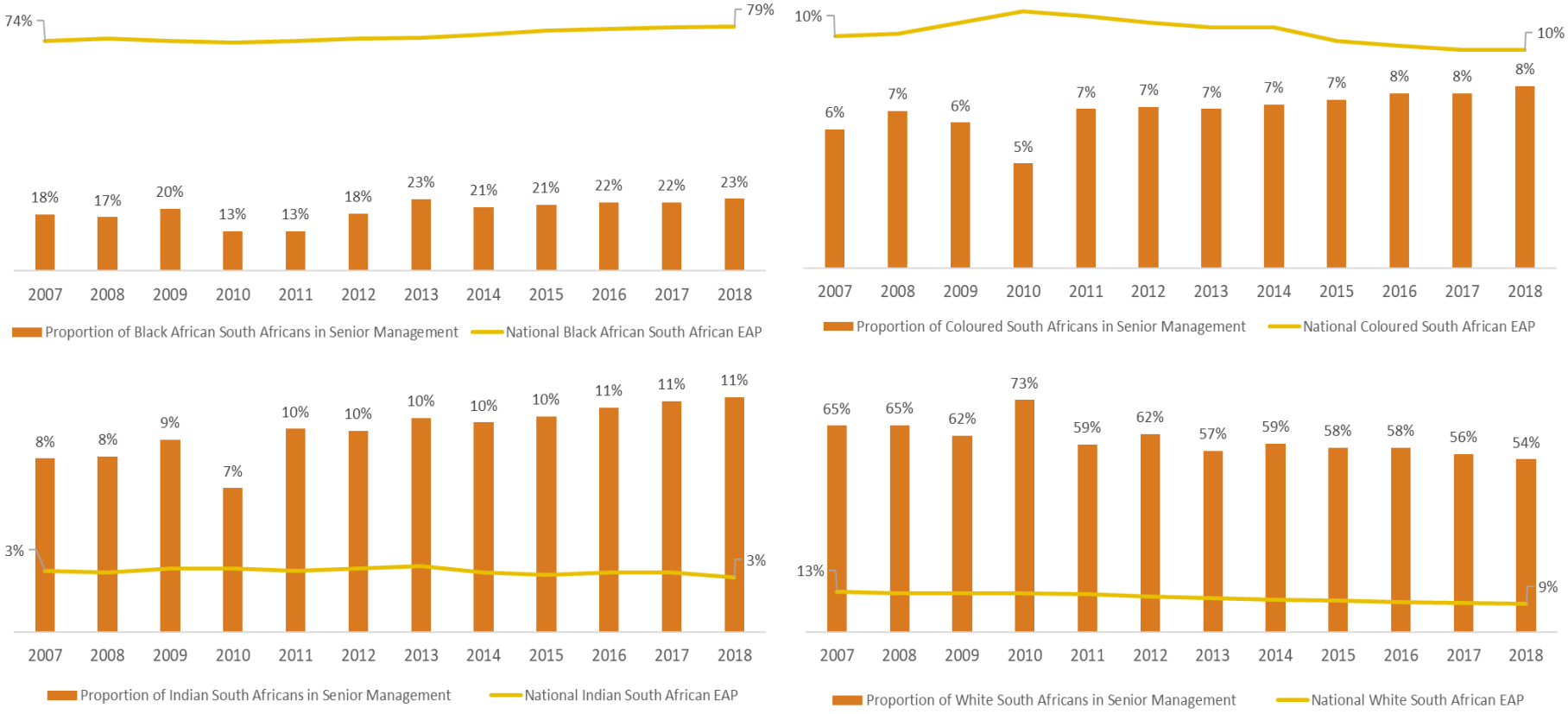


Figure 3: Racial Decomposition of EAP Target Performance for Professionally Qualified Individuals (2007-2018)

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