



**Comments on the Broad-based Black Economic
Empowerment Amendment Bill**

by

Solidarity Trade Union



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1. **INTRODUCTION**

- 1.1 In terms of the request for comments contained in General Notice no. 893 of 2011 (published in the Government Gazette of 9 December 2011 No. 34845), Solidarity hereby submits its written comments on the Broad-based Black Economic Empowerment Amendment Bill 2011 ('the Amendment Bill').
- 1.2 At the outset, it needs to be made clear that Solidarity supports rational and coherent measures to redress the imbalances of the past in the public administration as stipulated in section 195 (1)(i) of the Constitution and in the judiciary as stipulated in section 174 (2).
- 1.3 Additionally, we also look favourably upon broad and meaningful participation in the economy by black South Africans, including ownership of the spectrum of goods and resources in South Africa and their role in the management of private enterprises.
- 1.4 However, when evaluating legislation aimed at achieving racial transformation of society by interfering with the rights of private owners of property to alter the natural course of the economy, such legislation should continuously be scrutinised to establish whether it passes constitutional muster. In this regard, the founding provisions as well as sections 9, 174 and 195 of the Constitution are the yardstick for such an evaluation.
- 1.5 The focus of Solidarity's comments is threefold, namely on:
- The conflict between the Employment Equity Act¹ ('the EEA') and the Amendment Bill and the discriminatory effect thereof on white disabled persons and white women.
 - The possible effects of the Amendment Bill on the labour market.
 - The relevance of the amendments to the Preferential Procurement Policy Framework Act²: Preferential Procurement Regulations ('the PPPFA').

¹ Act No 55 of 1998

² Act No 5 of 2000

2. EVALUATION OF THE AMENDMENT BILL

2.1 The conflict between the EEA and the Amendment Bill and the discriminatory effect thereof on white disabled persons and white women

2.1.1 The EEA and the Broad-Based Black Economic Empowerment (BBBEE) Act of 2003 share the purpose/objective of achieving equitable representation in all occupational categories in the workforce. The recognition of this nexus is critical for the understanding of Solidarity's critique on the Amendment Bill. Table 1 sets out the wording that confirms the shared purpose/objective of these pieces of legislation.

Table 1

Act	Section	Wording
EEA	Section 2(b)	'2. The purpose of this Act is to achieve equity in the workplace by – (a) (b) implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups in order <i>to ensure their equitable representation in all occupational categories and levels in the workforce.</i> '
BBBEE	Section 1: Definition of 'broad-based black economic empowerment'	' broad-based black economic empowerment ' means ' ... the economic empowerment of all black people including women, workers, youth, people with disabilities and people living in rural areas, through diverse but integrated socio-economic strategies that include, but are not limited to – (a) (b) (c) (d) <i>achieving equitable representation in all occupational categories and levels in the workforce.</i> '

2.1.2 Importantly, both these pieces of legislation aim to achieve equitable representation in the workforce, but they differ in the measures that should be taken to achieve equitable representation.

2.1.3 When aiming to achieve this objective, the BBBEE Act focusses exclusively on the empowerment of black people³ when it comes to the racial composition of management structures and the skilled occupations of existing and new enterprises⁴. However, the purpose of the EEA is to achieve this objective through affirmative action measures aimed at redressing the disadvantages in employment experienced by designated groups. The EEA defines ‘*designated groups*’ as meaning ‘black people, women and people with disabilities’⁵. Table 2 explains the difference in a different fashion.

Table 2

Act	Measure to reach objective of equitable representation	Beneficiaries of legislation
BBBEE	Broad-based black economic empowerment	Exclusively Africans, Coloureds, Indians, including women, workers, youth, people with disabilities and people living in rural areas from these groups.
EEA	Affirmative action aimed at benefiting the designated groups	Africans, Coloureds, Indians, women and people with disabilities.

2.1.4 The ambit of the EEA when it comes to redress of previously disadvantaged persons or categories of persons is therefore wider than that of the BBBEE Act, as it also includes white women and white disabled people.

2.1.5 Up to this point, nothing new is mentioned, as this has been the case since the BBBEE was passed into law in 2004 in circumstances where the EEA has been enacted since 1998. However, the proposed introduction of section 23(1) of the Amendment Bill, stating that if any conflict arises between the BBBEE Act and the provisions of any other law save the Constitution, the provisions of the BBBEE Act will prevail, will create untenable conflict between the BBBEE Act and the EEA.

³ A generic term which means Africans, Coloureds and Indians

⁴ Section 2(b) of the BBBEE Act

⁵ Section 1 of the EEA

2.1.6 The Amendment Bill proposes the introduction of Section 23 (1) to the BBBEE Act, which is worded as follows:

- ‘1. If any conflict relating to the matters dealt with in this Act arises between this Act and the provisions of any other law save the Constitution and/or any Act expressly amending this Act, the provisions of this Act will prevail.’

Example A

Broad-based Trucking, a privately owned trucking company in the Road Freight Industry, falls within the scope of the Road Freight Sub-Sector Code for BBBEE. In terms of this code, the private sector is committed to having a minimum of 2% of black disabled employees as a percentage of all employees. The code specifically states that points for black employees living with disability will only be scored after enterprises achieve a target of 0,8%. Broad-based Trucking is obliged to adhere to these provisions of the code when it comes to the appointment of personnel. The code gives effect to the objective of the BBBEE Act and seeks to achieve equitable representation in the Road Freight Sector, but seeks this exclusively for black people.

At the same time, Broad-based Trucking, being a designated employer as contemplated by the EEA, must adhere to the imperatives of the EEA that states that every designated employer must, in order to achieve employment equity, implement affirmative action measures for people from designated groups in terms of the EEA⁶. The EEA seeks to achieve equitable representation in the Road Freight Sector, but not exclusively for black people. Therefore, in terms of the definition of ‘designated groups’ in the EEA, it must implement affirmative action measures for the appointment of white disabled persons and white women and not exclusively for black people as is the case with the BBBEE Act.

Broad-based Trucking has a vacancy in middle management and advertises the same. A black disabled man and a white disabled man apply. No other applications are received. Following a series of interviews with the two applicants, it is clear that the white male is the better candidate and the most suitable for the position.

⁶ See section 13(1) of the EEA

The directors of Broad-based Trucking are aware that they must reach the target of 0,8% of black employees living with disability in order to score points in accordance with the Road Freight Sub-Sector Broad-based BEE Scorecard. They need all the points that they can get in order to improve their BEE rating with the aim of clinching a transport contract with a state organ. The appointment of the white disabled male will not assist them in this regard at all as the BBBEE act is exclusively aimed at empowering black people. In conjunction herewith, the appointment of a black person will ensure that Broad-based Trucking reaches the level of 13% of middle management consisting of black people. This will also enable them to score points in terms of the BEE scorecard.

On the other hand, the directors are also aware that the white disabled male forms part of the designated group in terms of the EEA and is therefore a beneficiary of affirmative action. As a designated employer, Broad-based Trucking is aware of its obligations in this regard as well as its targets in terms of its employment equity plan. If it differentiates on the basis of race only and appoints the black disabled male on the basis of his race, there is furthermore a possibility that the white disabled applicant, as the better candidate, may refer a case of unfair discrimination which might end up in the Labour Court.

The directors consult a law firm specialising in labour law in order to find guidance out of their predicament. They are advised that section 23(1) of the BBBEE Act was included as part of the amendments to the act proposed by government. In terms of this section, if a conflict between the provisions of the BBBEE Act and the EEA regarding measures to be taken to achieve equitable representation in the workforce should arise, the provisions of the BBBEE Act will prevail. This means that Broad-based Trucking is obliged to decide that the provisions of the BBBEE Act trump that of the EEA and should go ahead and appoint the black disabled male without fear of reprisal on account of the EEA.

Example B

BEE Transport, a privately-owned trucking company in the Road Freight Industry, falls within the scope of the Road Freight Sub-sector Code for BBBEE. In terms of the Code, the private sector is committed to having a minimum of 63% black people as a percentage of all employees at middle management level. The Code specifically states that points for black employees at middle management level will only be scored after enterprises have achieved a target of 13%. BEE Transport is obliged to comply with these provisions of the Code when it comes to the appointment of personnel. The purpose of the Code is to give effect to the

objectives of the BBBEE Act and to achieve equitable representation in the road freight sector, but seeks such representation exclusively for black people.

At the same time BEE Transport, being a designated employer as contemplated by the EEA, must comply with the imperatives of the EEA, according to which every designated employer must, in order to achieve employment equity, implement affirmative action measures in respect of persons from designated groups⁷. The EEA seeks to achieve equitable representation in the Road Freight Sector, but not exclusively for black people. Therefore, in terms of the definition of 'designated groups' in the EEA, the company must implement affirmative action measures with respect to the employment of white disabled persons and white women and not exclusively in respect of black people as is the case with the BBBEE Act.

BEE Transport has a vacancy at middle management level and advertises the position. A black man and a white disabled woman apply for the job. No other applications are received. Following a series of interviews with the two applicants, it is clear that the white disabled woman is the better candidate and the most suitable person for the position.

The directors of BEE Transport are aware that they must reach the target of 13% of black people in middle management in order to score points in accordance with the Road Freight Sub-sector Broad-based BEE Scorecard. The company needs all the points it can get to improve its BEE rating that will improve its chances of clinching a transport contract with a state organ. The appointment of the white disabled woman will not assist them in this regard at all, as the BBBEE Act is exclusively aimed at empowering black people. In conjunction with this, the appointment of a black man in middle management will ensure that BEE Transport reaches the target of 13% black people in middle management, enabling them to score points in terms of the BEE Scorecard.

On the other hand, the directors are also aware that the white disabled women forms part of the designated group in terms of the EEA and is therefore a beneficiary of affirmative action. As a designated employer, BEE Transport is aware of its obligations in this regard as well as its targets in terms of its employment equity plan. The company is aware that if it differentiates between the two candidates on the basis of race and gender and appoints the black man on the grounds of his race, the white disabled applicant, as the better candidate, may lodge a complaint of unfair discrimination which might end up in the Labour Court.

⁷ See section 13(1) of the EEA

The company consults a law firm specialising in labour law in order to find a way out of this predicament. The law firm advises it that section 23(1) of the BBBEE Act was included in the amendments to the Act proposed by government. In terms of this section, should a conflict arise between the provisions of the BBBEE Act and the EEA regarding measures to be taken to achieve equitable representation in the workforce, the provisions of the BBBEE Act will prevail. Consequently, BEE Transport realises that the provisions of the BBBEE Act trump those of the EEA and that it should appoint the black man without fear of reprisal on account of the EEA.

2.1.7 It is patently clear that in practice white disabled persons and white women will lose the protection they enjoy as part of the designated group, as the provisions of the BBBEE Act (focussing exclusively on black people) will prevail because of section 23(1) of the Amendment Bill. The definition of black economic empowerment in the BBBEE Act will supersede the provisions of the EEA.

2.1.8 If this provision is allowed to realise, white disabled persons and white women will again be placed at a disadvantage – as was the case prior to the introduction of the EEA. This is lamentable as disabled persons form part of the designated group in terms of the EEA on the basis of disability. Race has nothing to do with the protection afforded to disabled persons in the EEA. The Amendment Bill, if passed, will change this and will create a situation where white disabled persons will completely lose the protection they have on account of their disabilities and white women will completely lose the protection they have on account of their gender.

2.1.9 The *Code of Good Practice: key aspects on the employment of people with disabilities* is important for purposes of this discussion. The foreword to this code is quoted in its totality below as this casts new light on why disabled persons, regardless of race, must be protected in terms of legislation and are also protected in the EEA:

FOREWORD

The **Employment Equity Act, No. 55, 1998** constitutes one of the key legislative and policy interventions within the ethos of South Africa's new constitution to give effect to the provisions relating to removal of policies which result in inequalities in the country. Specific emphasis is placed to ensure equity, the right to equal protection and benefit of the law, inter alia, by people with disabilities.

Although many barriers such as widespread ignorance, fear and stereotypes have caused people with disabilities to be unfairly discriminated against in society and in employment, South Africa can take pride in its efforts to formulate policies to protect the rights of people with disabilities.

Unfair discrimination against the disabled is perpetuated in many ways, including the following:

- Unfounded assumptions about the abilities and performance of job applicants and employees with disabilities;
- Advertising and interviewing arrangements which either exclude people with disabilities or limit their opportunities to prove themselves;
- Using selection tests which discriminate unfairly;
- Inaccessible workplaces; and
- Inappropriate training for people with disabilities.

The Disability Code of Good Practice on the employment of people with disabilities is thus part of a broader equality agenda for people with disabilities to have their rights recognised in the labour market where they experience high levels of unemployment and often remaining in low status jobs or earn lower than average remuneration.

This is particularly important since disability is a natural part of the human experience and in no way diminishes the rights of individuals to belong and contribute to the labour market. When opportunities and reasonable accommodation is provided, people with disabilities can contribute valuable skills and abilities to every workplace, and contribute to the economy of our society.'

2.1.10 When the implications of the Amendment Bill as set out in this document, are assessed through the prism of the Constitution, it is our submission that the Amendment Bill falls foul of the founding provisions as well as Sections 9, 174 and 195 of the Constitution. Section 1 of the Constitution inter alia states that the Republic of South Africa is one, sovereign, democratic state, founded on the values of non-racialism and non-sexism.⁸ Section 9(3) of the Constitution inter alia states that the state may not unfairly discriminate directly or indirectly against anyone on the grounds of race and gender. The Amendment Bill will allow for a situation where unfair discrimination on the basis of race and gender may come to

⁸ Section 1(b) of the Constitution.

pass due to the provisions of the Amendment Bill as discussed in this document. As for 'equitable representation', a stated aim of both the EEA and BBEEE acts, only two passages from the Constitution seem to possibly allow for such a goal: Section 174(2) provides for the 'need for the judiciary to reflect broadly the racial and gender composition of South Africa' to be considered; and Section 195(1)(i) provides only for the public administration to be 'broadly representative of the South African people.'

2.2 The possible effects of the Amendment Bill on the labour market.

- 2.2.1 If the provisions of the BBBEE Act, as discussed above, were to supersede the EEA, it would have a negative effect on the possibility of creating new, viable job opportunities. The same goes for many of the other new, stringent conditions and penalties proposed in the Amendment Bill. There would be a chilling effect on entrepreneurship, as a prospective business owner would have to adhere to even more stringent conditions than before to be able to legally operate a business and create wealth. Current affirmative action measures and penalties already place a heavy administrative burden on any current or prospective entrepreneur and employer. If disabled white people and white women are excluded entirely, the pool of possible employees that can be employed without restrictions would become even smaller than it already is. Coupled with harsh, turnover-based fines and the possibility of imprisonment for up to 10 years and a fine for practices deemed to be a 'Fronting BBBEE Practice', this could even result in the closure of existing enterprises, accompanied by job losses.
- 2.2.2 There is already a heavy regulatory burden on South African businesses. For example, respondents to the 2011 Grant Thornton International Business Report rated excessive regulations and red tape as the most oppressive constraint on their ability to expand their businesses in South Africa. These proposed legislative changes will further constrain the growth engine of the South African economy – private businesses. In a country that has been struggling with one of the highest unemployment rates in the world for many years now, it is unfortunate that businesses have to jump through such a myriad of regulatory hoops just in order to expand their businesses and bring more South Africans into the formal economic sphere.

2.2.3 Remedies to the disparities observed in employment patterns of different racial, gender and disability groupings are only possible with an approach that recognises existing differences in the preferences, abilities and aptitudes of both employers and employees in the private sphere. Such a recognition would guide a legislator into the much more fruitful avenue of adopting legislative and policy measures that encourage improvements in the skills levels of prospective employees through educational measures, and to abolish those policies and pieces of legislation that stand in the way of such educational attainments. The answers to the problems facing South Africa do not lie in further division, discrimination and classification, but in encouraging and allowing an ever larger pool of qualified and competent people able to meaningfully contribute to the South African economy, reducing the perceived need for harsh affirmative action and empowerment measures that are exclusionary in character and are enforced punitively.

2.3 The relevance of the amendments to the PPPFA

The possible consequences of the Amendment Bill for white disabled persons and white women were recently mirrored in the enactment of the PPPFA: Preferential Procurement Regulations, 2011 and the repeal of the PPPFA: Preferential Procurement Regulations, 2001. In terms of the 2001 regulations, an organ of state had to apply a preferential procurement system when evaluating tenders. A preference points system existed in terms whereof equity ownership of historically disadvantaged individuals (HDIs) in tendering entities resulted in preference points for the tendering entity. The 2001 regulations defined HDI as '*...a South African citizen -*

(1) who, due to the apartheid policy that had been in place, had no franchise in national elections prior to the introduction of the Constitution of the Republic of South Africa, 1983 (Act 110 of 1983) or the Constitution of the Republic of South Africa, 1993 (Act 200 of 1993) ('the Interim Constitution'); and / or

(2) who is a female; and/ or

(3) who has a disability'

It is clear that in terms of the 2001 regulations, the ownership of equity by white females and white persons who have a disability also contributed to scoring preference points when tendering at a state organ. The 2011 regulations changed the aforesaid position of white women and white persons living with a disability. In terms of the 2011 regulations, which

now enjoy full force and effect, preference points for tendering companies are scored by taking the broad-based black economic empowerment status of such an entity into account. As stated earlier in this document, the BBBEE Act's provisions favour black persons exclusively. Once again, white women and white disabled persons lose the support that was afforded to them by virtue of their disabilities and/or gender, as a result of their race.

3. CONCLUSION

- 3.1 The BBBEE Act and the EEA have a common objective of ensuring that equitable representation is achieved in all occupational categories and levels in the workforce. However, these two Acts differ on which groups and categories of persons should be advanced through special measures in order to reach this objective.
- 3.2 The question of whether equitable representation, where 'equitable representation' seemingly refers to demographic aggregates, is constitutional and sensible is the subject of an ongoing and thorough separate legal investigation by Solidarity. As the outcome of this investigation is still pending, the Solidarity Research Institute concentrates in this commentary on the consequences of conflicts between the BBBEE Act and the EEA on white disabled people and white women, as well as the substitution of the definition of 'historically disadvantaged individual' in the Preferential Procurement regulations by allusions to the BBBEE Act.
- 3.3 Since the enactment of the BBBEE Act in 2004, the provisions of this act relating to which groups and categories of persons should be advanced through special measures, have been in conflict with the provisions of the EEA (enacted in 1998) relating to which groups and categories of persons should be advanced through affirmative action.
- 3.4 The BBBEE Act seeks to fulfil the objective of equitable representation in all categories and levels in the workforce by broad-based black economic empowerment of which black people (Africans, Coloureds and Indians) are the beneficiaries. Included in this are black women, workers, youth, people with disabilities and people living in rural areas.

- 3.5 The EEA seeks to fulfil the objective of equitable representation in all categories and levels in the workforce by affirmative action measures for the designated groups. “Designated groups” means black people (Africans, Coloureds, Indians), women and people with disabilities.
- 3.6 The important difference between these two acts is that the EEA seeks to protect and advance women and persons living with a disability of all races, while the BBBEE seeks to do so only for black people.
- 3.7 Although this conflict has existed since the enactment of the BBBEE Act in 2004, the proposed introduction of section 23(1) of the Amendment Bill seeks to end this conflict by pronouncing that if the provisions of the EEA (or any act for that matter, save the Constitution) are in conflict with that of the BBBEE Act, the provisions of the latter will prevail.
- 3.8 The effect of the provisions of section 23(1) of the Amendment Bill will be that the provisions of the BBBEE Act will supersede the provisions of the EEA when it comes to fulfilling the objective of equitable representation in all categories and levels in the workforce.
- 3.9 A strong possibility exists that white persons living with disability and white women who form part of the designated groups in terms of the EEA will lose the protection of affirmative action, as provisions of the BBBEE Act defining broad-based black economic empowerment will prevail when these two acts come into conflict.
- 3.10 Furthermore, black people living with a disability and black women will continue to enjoy the benefit of special measures in terms of the BBBEE Act. The effect thereof is the possibility that white people living with a disability and white women may be subjected to unfair discrimination on the basis of their race.
- 3.11 The reasons for the inclusion of people with disabilities in the designated groups have not changed. The discrimination that faces disabled people, regardless of race, is perpetuated in a number of ways. This is acknowledged in the *Code of Good Practice: key aspects on the employment of people with disabilities*. Allowing the provisions of the BBBEE Act to prevail at the expense of white disabled persons is unconscionable.

- 3.12 Similarly, white women form part of the designated groups, not by virtue of their race, but because of the acknowledgement of the disadvantage that they suffered on account of their gender. Allowing the provisions of the BBBEE Act to prevail at the expense of white women is unconscionable.
- 3.13 The tendency of government to increasingly exclude white people with disabilities and white women from special measures through legal engineering is worrisome. Government's intention in this regard was confirmed by the enactment of the PPPFA: Preferential Procurement Regulations, 2011. These regulations replaced the Preferential Procurement Regulations enacted in 2001 and drastically changed the support that white women and white disabled persons enjoyed in terms of the 2001 Regulations.
- 3.14 Previously, the a preference points system existed in terms whereof equity ownership of HDIs, which included white disabled persons and white women, in tendering entities resulted in preference points for the tendering entity. The 2011 Regulations award preference points for tendering companies by taking the broad-based black economic empowerment status of such an entity into account.
- 3.15 White women and white disabled persons have lost the support that was afforded to them by virtue of their disabilities and/or gender, as a result of their race.
- 3.16 Solidarity hereby requests that government take all the necessary steps to ensure that white people with disabilities and white women form part of all legislation and other measures aimed at preventing unfair discrimination. We are extremely concerned about government's apparent objective to exclude these groups from empowering legislation. Government must ensure that this conduct is stopped by including these groups in all legislation regulating the empowerment of previously disadvantaged groups.
- 3.17 These proposed legislative changes will further constrain the growth engine of the South African economy – private businesses. In a country that has been struggling with one of the highest unemployment rates in the world for many years now, it is unfortunate that businesses have to jump through such a myriad of regulatory hoops just in order to expand their businesses and bring more South Africans into the formal economic sphere.

3.18 Remedies to the disparities observed in employment patterns of different racial, gender and disability groupings are only possible with an approach that recognises existing differences in preferences, abilities and aptitudes of both employers and employees in the private sphere. Such a recognition would guide a legislator into the much more fruitful avenue of adopting legislative and policy measures that encourage improvements in the skills levels of prospective employees through educational measures, and to abolish those policies and pieces of legislation that stand in the way of such educational attainments.
