

**THE PURPOSE AND FUNCTIONALITY OF LEGISLATION  
REGARDING SKILLS DEVELOPMENT WITHIN THE FORMAL  
SECTOR VIEWED AGAINST THE BACKGROUND OF THE  
HISTORICAL CAUSES OF THE SKILLS DEFICIT IN SOUTH AFRICA**

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## DECLARATION

By submitting this dissertation electronically, I declare that the entirety of the work contained therein is my own, original work, that I am the authorship owner thereof (unless to the extent explicitly otherwise stated) and that I have not previously in its entirety or in part submitted it for obtaining any qualification.

Date: March 2018

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## SUMMARY

More than 20 years after South Africa's democratic transition, and amid slow economic growth, the government faces increasing political pressure to demonstrate progress on socio-economic transformation. Skills development is viewed as an essential tool to redress socio-economic inequalities that resulted from pre-1994 discriminatory legislation. However, despite the existence of a comprehensive skills development policy, improvements in this sphere have been inadequate to address these concerns. This study aims to show that one of the reasons for the slow progress is the fact that the legislative framework does not facilitate an inclusive broad-based skills development approach since it *de facto* excludes many low skilled vulnerable employees, who are arguably most in need of assistance. In this study, recommendations are made to broaden the reach of the legislative framework while keeping supportive institutions intact. It is argued that the significance of skills development, underscored by the Constitution and public international law, supports the recognition of skills development as a basic condition of employment.

## **OPSOMMING**

Meer as 20 jaar na Suid-Afrika se oorgang na demokrasie, en te midde van stadige ekonomiese groei, staar die regering toenemende politieke druk om vordering met sosio-ekonomiese transformasie te maak, in die gesig. Vaardigheidsontwikkeling word beskou as 'n noodsaaklike instrument om sosio-ekonomiese ongelykhede, wat voortspruit uit diskriminerende wetgewing voor 1994, reg te stel. Ten spyte daarvan dat 'n omvattende vaardigheidsontwikkelingsbeleid bestaan, is vordering op hierdie gebied egter onvoldoende om hierdie probleme aan te spreek. Hierdie studie het ten doel om aan te toon dat een van die redes vir die stadige vordering die feit is dat die wetgewende raamwerk nie 'n inklusiewe breë vaardigheidsontwikkelingsbenadering fasiliteer nie, aangesien dit in werklikheid baie lae geskoolde, kwesbare werknemers uitsluit, wat waarskynlik hulp die meeste benodig. In hierdie studie word aanbevelings gemaak om die omvang van die wetgewende raamwerk te verbreed, en terselfdertyd ondersteunende instansies ongeskonde te laat. Daar word geargumenteer dat die belang van vaardigheidsontwikkeling, ondersteun deur die Grondwet en openbare internasionale reg, die erkenning van vaardigheidsontwikkeling as 'n basiese voorwaarde van indiensneming begrond.

**LIST OF ABBREVIATIONS**

ANC	African National Congress
AsgiSA	Accelerated and Shared Growth Initiative of South Africa
B-BBEE	Broad Based Black Economic Empowerment
BCEA	Basic Conditions of Employment Act 75 of 1997
CCMA	Commission for Conciliation Mediation and Arbitration
COTT	Central Organisation for Technical Training
CSAR	Central South African Railways
DHET	Department of Higher Education and Training
DTI	Department of Trade and Industry
EEA	Employment Equity Act 55 of 1998
EMEs	Exempted Micro Enterprises
GEAR	Growth, Employment and Redistribution
HRD-SA	Human Resource Development Strategy for South Africa
HSRC	Human Sciences Research Council
ICU	Industrial and Commercial Workers' Union
ILO	International Labour Organization
ISCOR	African Iron and Steel Industrial Corporation
Jipsa	Joint Initiative on Priority Skills Acquisition
LMIP	Labour Market Intelligence Partnership
LOHD	List of Occupations in High Demand
LP	Labour Party
LRA	Labour Relations Act 66 of 1995
NDP	National Development Plan
NECC	National Education Crisis Committee
NEET	Not in Employment, Education or Training
NP	National Party
NQF	National Qualifications Framework
NSA	National Skills Authority
NSDS	National Skills Development Strategy
NSF	National Skills Fund
NSSL	National Scarce Skills List
PIVOTAL	Professional, Vocational, Technical and Academic Learning

RDP	Reconstruction and Development Programme
SALDRU	Southern Africa Labour - Development Research Unit
SAP	South African Party
SARS	South African Revenue Service
SDA	Skills Development Act 97 of 1998
SDLA	Skills Development Levies Act 9 of 1999
SEDA	Small Enterprise Development Agency
SETA	Sector Education and Training Authorities
SSP	Sector Skills Plans
StatsSA	Statistics South Africa
STCW	Standards of training, certification and watchkeeping
WNLA	Witwatersrand Native Labour Association
WSP	Workplace Skills Plans

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## CHAPTER 1: OVERVIEW OF RESEARCH

### 1 Introduction

Skills development is an important dynamic and catalyst for progress within society and the economy. Inclusive and forward-thinking skills development has the potential to assist South Africa to advance past the legacy of colonialism and Apartheid and forge a global presence within the international economy.

However, because of the systematic segregation and suppression of blacks in South Africa, over time, a two-tiered labour force was created with a severe disparity in skills; where white workers were earmarked for supervisory and management positions and black workers largely performed low skilled work. Despite more than two decades of government policy aimed at rebalancing South African society and the economy, steep inequality arguably remains one of the biggest threats to political stability. Inequality has been weaved into the fabric of South African society through centuries of discriminatory practices, government policy, and legislation. What the new pattern should be and what elements are required to accomplish an acceptable redistribution are not easily discernible. In 1994, higher skills were mainly concentrated within the white segment of the labour market, while black labour predominantly occupied the lower skilled segment of the workforce. In 2017, despite a long-term concerted effort to transform the labour market through affirmative action, this is still the *status quo*.

It is important to note that skills development cannot be viewed in isolation. Failings in the public education system result in discouraged learners who leave the system ill-equipped to best utilise the opportunities at their disposal. Skills development efforts cannot flourish where a culture of self-improvement and ambition, pride and confidence in own abilities and human dignity, has been diminished and deteriorated through poverty, a lack of quality education and limited training and work opportunities. Although National Skills Development Strategies have focused on the improvement of access to learnerships for youth entering the labour market, the ability and performance of learners entering such training are profoundly influenced by an inadequate public education system and the low number of available learnerships due in part to suboptimal economic growth. South Africa has a two-tier economy with an extensive informal sector wherein small businesses function as the backbone of economic activity. Within the formal sector, small

businesses make a valuable contribution to job growth. Although skills development policy, together with employment equity policy, has largely concentrated on larger businesses within the formal sector, businesses have not optimally supported government policy objectives. Government policy regularly acknowledges the significance of the small business sector, yet skills development programmes aimed at small businesses have been *ad hoc* with a very limited reach. Research shows that small business employees generally have not completed secondary schooling. As a result, these employees' access to job opportunities is limited, and informal employment often offers the only source of income. Extending the reach of skills development to those employed in small businesses, will assist in supporting a vulnerable, but socially and economically valuable, segment of the labour market to improve their economic prospects.

## **2 Research aims**

This thesis has the following research aims:

- 1 To explore how legislation enacted during colonialism and apartheid have been instrumental in contributing to the current skills deficit.
- 2 To consider and critically evaluate the legal framework and corresponding government policy on skills development in order to determine whether it is succeeding in its goal of providing a skilled workforce in South Africa capable of meeting industry needs and sustaining economic growth.
- 3 To analyse whether skills development meaningfully contributes to provide redress in regard to socio-economic inequalities that resulted from past discriminatory legislation.
- 4 To explore how greater access to skills development could be achieved through the application of the Constitution of the Republic of South Africa, 1996 ("Constitution"), the Labour Relations Act 66 of 1995 ("LRA") and collective bargaining.
- 5 To formulate reform proposals for improving the efficiency and functionality of the current legislative framework that underlies skills development policy.

### 3 Qualifying the aims of the study

Due to the wide reach of the topic, it not a simple task to delineate the scope of the research aims needed to provide a meaningful overview of the topic. This thesis aims to provide a concrete reference to the legal framework – in particular in relation to labour law – through which skills development is implemented. This thesis does not attempt to provide an economic analysis of the skills shortfall. It neither aims to provide suggestions regarding the means with which public administration efficiency could be improved upon or how the public education system could be reformed to deliver acceptable standards of education to all.<sup>1</sup> The research in this thesis is limited to analysing the legal sphere that enables government policy on skills development, and to provide recommendations on improvement thereof.

During the research process for Chapters 2 and 3, original material gathered in the archives of the JS Gericke Library in Stellenbosch was utilised. At times this material delivered interesting facts, which beg for further exploration. However, due to the nature of the sources it is generally not possible to ascertain more without an in-depth historical analysis that would require research outside of the scope of the research aims of this thesis.

A general consensus<sup>2</sup> exists that there is insufficient data available to determine, with clarity, the direction skills development (in regard to type and numbers of skills required) should be spurred towards and to efficiently monitor the impact of current initiatives. This lack of data and usable information hampers the ability to draw conclusions from statistics. Therefore, to ascertain why trends within the focus areas of skills development policy, for example learnership enrolments, occur over time are complex. This thesis does not attempt to analyse and interpret economic data in order to draw conclusions. Trends have been identified primarily using official government reports. Thus, the limited source of information restricts the ability to perform an objective analysis of policies and outcomes.

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<sup>1</sup> As a result, discussions will not be extended to the possible applications of section 29(1)(b) of the Constitution.

<sup>2</sup> See V Reddy, H Bhorat, M Powell, M Visser, A Arends *Skills Supply and Demand in South Africa* (2016); S Archer *Key Issues in the Assessment of Seta Performance in South Africa's National Skills Development Strategy* (2010).

## **4 Methodology**

Although skills development is a dynamic area of research within the social sciences, the field is characterised by a general lack of legal research. An analysis of legislation (both historical and current) relevant to skills development within the formal sector, and corresponding governmental policies and official documents, form the foundation of the research. A literature review of applicable social science research regarding skills development will supplement this.

This thesis' singular focus is South Africa and does not contain a comparative study with another jurisdiction. The unique historical and current factors that shape skills development policy in South Africa justify this singular focus, and will be emphasised. The study aims to show that the recognition of skills development as a basic condition of employment could mitigate the detrimental impact of the legacy of historical discriminatory legislation and current adverse economic conditions. It will be argued that an amendment to the Basic Conditions of Employment Act 75 of 1997 ("BCEA") to facilitate such recognition would strengthen the application, and extend the reach of the Skills Development Act 97 of 1998 ("SDA"), while keeping the institutions created to implement skills development policy unaltered.

## **5 Chapter structure**

In Chapter 2 it will be discussed how the incidence of poverty among Afrikaners in the late nineteenth century was a contributing factor in establishing a legislated labour hierarchy that would form a cornerstone of Apartheid. The consequence of the legislated labour hierarchy was to establish white labour in a privileged position within the top echelons of the workforce, while black labour was restricted to elementary and supportive work. The chapter aims to show that skills development can be utilised to meet political and economic objectives. As these objectives alter over time, so does the requisite skills needed to attain them. Skills development is therefore a fluid process that should adapt to the existing circumstances in order to remain relevant. Chapter 3 follows on the themes explored in Chapter 2 by discussing the means through which black labour was constrained to low skilled work through limited and substandard public education provision and the systematic denial of training opportunities that would allow access to higher skilled occupations. The consequences of these policies are still evident today as there remains a strong

correlation between race and skill level, with black labour skewed towards the lower end of the skill spectrum.

Chapter 4 will discuss the legislative and policy framework used to implement and promote skills development of the employed post-1994. The enactment of legislation relevant to skills development is classified according to policy-periods in order to provide context. The focus within each policy period is highlighted and trends are identified. Chapter 4 provides the foundation from which Part 1 of Chapter 5 will analyse the functionality of the SDA and the Employment Equity Act 55 of 1998 (“EEA”), as the basis of skills development policy. Thereafter, the chapter will consider in what manner employees may access skills development outside of the application of the SDA and EEA. It will argue that the constitutional right to fair labour practices<sup>3</sup> may be interpreted to include a right to skills development. Subsequently, instances where the denial of training may constitute an unfair labour practice or an unfair dismissal in terms of the LRA will be discussed. Part 1 of Chapter 5 will conclude with a consideration as to whether employees could include skills development within collective agreements as a means to access training.

Part 2 of Chapter 5 will argue that a significant portion of employees are excluded from the benefits of skills development, as the reach of the legal framework that governs skills development, the SDA and EEA, is limited. Given the socio-economic importance of skills development, it will be recommended that skills development should be recognised as a minimum condition of employment through an amendment to the BCEA. It will be argued that the constitutional right to fair labour practices, underscored by public international law; and the recognition that the denial of training could constitute an unfair labour practice, and in some instances an unfair dismissal in terms of the LRA, supports such an amendment. Chapter 6 will conclude the thesis with a summary of the findings of this study.

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<sup>3</sup> S 23(1) of the Constitution.

## CHAPTER 2: THE INCIDENCE OF POVERTY AMONG AFRIKANERS IN THE LATE NINETEENTH CENTURY AS A CONTRIBUTING INFLUENCE ON THE ESTABLISHMENT OF A LEGISLATED LABOUR HIERARCHY AS A CORNERSTONE OF APARTHEID

“It is impossible to deny that the colour bar ... in the Government regulations ... imposes an artificial restriction on the advancement of the coloured and native population. But far more important than the Government ... regulations is the force of custom.”<sup>4</sup>

– Formal position of National Party (*circa* 1922)

### 1 Introduction

As Beinart remarks, “[a]ny author writing ... on South Africa must decide whether to start with whites or with blacks”.<sup>5</sup>

The severity of income inequality and the clearly visible demarcation between historically black and white public schools demonstrate a rift within the South African population. A significant cause of this divide is the historical denial of quality education and formal recognition of skills and capabilities to black South Africans in order to support white economic enterprise and upliftment. Public education provided by the colonial and Apartheid administrations served as means to establish a labour hierarchy, that would simultaneously entrench the dominant position of white labour, while providing the economy with the manpower needed to support white industrial pursuits. The poor white Afrikaners did not fit within the paradigm of the Apartheid labour hierarchy. These “poor whites” were often marginalised members of society who had fallen by the social and economic wayside, and as such served as a visible sign of the fallacy of white superiority – a fallacy upon which a society and an economy was being built.

White Afrikaner poverty in the late nineteenth and early twentieth centuries arose due to a myriad of factors. Antiquated farming practices and a lack of exposure to capitalism, combined with devastating losses suffered during the Anglo-Boer War, resulted in unavoidable urbanisation for many rural Afrikaners – many of whom were

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<sup>4</sup> Federal Council of the National Party of South Africa *The Government and the Strike: Plain Answers to Simple Questions* (undated) 7.

<sup>5</sup> W Beinart *Twentieth Century South Africa* (2001) 9.

ill-equipped to productively function within South Africa's newly industrialised modern economy.

These so-called "poor white" Afrikaners were often uneducated and unskilled – unprepared for the pressures of capitalism and industry. Although marginalised within the larger Afrikaner community, their considerable significance in shaping the political and social spheres is evident. As a class, their economic vulnerability posed a threat to the interests of the Afrikaner community as a whole, while their potential voting power simultaneously represented a powerful opportunity to be exploited in the post-war scramble for political power.

The discovery of gold irrevocably changed the skill set required to prosper within the South African economy. Initially these skills were obtained from white foreigners who consequently monopolised the skilled trades. As custom and economy dictated that white workers could not be utilised as unskilled labour, black labour had to be sourced to fulfil the unskilled labour complement. Failed attempts to supplement the insufficient supply of black unskilled labour included the unskilled white labour experiments and the importation of Chinese labour.

Gradual deskilling as a result of the division and delegation of tasks, combined with increased mechanisation on the shop floor, eventually resulted in perceived undue competition between white and black labour as black labour steadily gained the productive skills which white labour had begun to lose. The Rand Revolt of 1922 brought this growing tension to the fore in a manner that the governing South African Party ("SAP") could not ignore. The result was the enactment of the Apprenticeship Act 26 of 1922 ("1922 Apprenticeship Act") and the Industrial Conciliation Act 11 of 1924 ("1924 Industrial Conciliation Act"), the goal of which was to improve the skill levels of white workers while simultaneously repressing the interests of black workers.

These measures were however not enough to safeguard a victory for the SAP in the 1924 elections, which was subsequently won by an electoral pact between the National Party ("NP") and the Labour Party ("LP") campaigning a new "civilised labour" policy. The Pact government's "civilised labour" policy resulted in the Wage Act 27 of 1925 ("Wage Act"); the Amendment Act 25 of 1926 ("Amendment Act") to the Mines and Works Act 12 of 1911 ("1911 Mines and Works Act"); and the Vocational Education and Special Schools Act 29 of 1928 ("Vocational Education

and Special Schools Act”). All designed to artificially create and support a white labour aristocracy.

By the late 1940’s, “poor white” unemployment had largely become a problem of the past. Afrikaners had attained a commanding and privileged labour position relative to black labour – dictated by custom and secured through legislation.

This chapter aims to show that the incidence of white Afrikaner poverty in the late nineteenth and early twentieth century coalesced with the prevailing racial prejudices and a dynamic political environment, to legally entrench the assumption that a person’s degree of skill corresponds to his or her race. By the 1948 NP electoral victory that would culminate in the introduction of the “Apartheid” policy, white labour had attained an advantaged position over black labour on an artificially established labour hierarchy. The labour hierarchy was integral to the implementation of Apartheid as a policy – it created a foundational differential that would be mirrored in physical spaces. More than two decades after 1994, the legacy of the labour hierarchy clearly reverberates in the labour force as the majority of black labour remain low skilled.

## **2 The advent of white poverty as a significant element in the socio-political sphere**

### **2 1 “Poor white” subclass as an emerging concept within the Afrikaner designation**

Although the Dutch Reformed Church noted elements of white poverty since the 1850s, white poverty was only identified in the 1890s as an imminent problem within its congregation, in the midst of a growing consciousness regarding the phenomenon in newspapers and government reports.<sup>6</sup> White poverty was predominantly associated with Afrikaners and first manifested in the rural areas. The combined effect of the scarcity of arable land and the use of uninformed farming practices to cultivate the available land, within the predominant culture of subsistence farming (in contrast to commercial farming), contributed to the incidence of rural Afrikaner poverty.<sup>7</sup>

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<sup>6</sup> H Giliomee *The Afrikaners: Biography of a People* (2003) 316.

<sup>7</sup> 320-321.

O'Meara explains that prior to the discovery of diamonds, Afrikaner farming was predominantly based on the "extraction of surplus in the form of rent (in kind and labour) from African tenants", rather than based on commercial commodity production.<sup>8</sup> After the discovery of gold on the Witwatersrand, a considerable number of Afrikaner farmers sold their farms to mining companies or started prospecting themselves.<sup>9</sup>

In the aftermath of the Anglo-Boer war, the transformation and development of agriculture from subsistence to commercial farming became a priority for the British colonial administration, since nearly all foodstuffs that were needed to sustain the mining sector had to be imported prior to the war.<sup>10</sup> Commercial farming became an increasingly expensive enterprise where capital had to be raised, regularly through mortgaging, to expand farming operations and implement new technology.<sup>11</sup> In this context, *bywoners*<sup>12</sup> became an uneconomical source of labour often substituted with cheaper black labour.<sup>13</sup> Displaced *bywoners*, unable to offer land as security, struggled to obtain credit from banks to buy their own farms and often became destitute and directionless drifting between the towns and the countryside.<sup>14</sup> The Carnegie Corporation Commission's 1932 report directly linked the increase in Afrikaner poverty to the development of capitalist agriculture.<sup>15</sup>

The poor white problem was intensified by the devastating effect of the British scorched earth policy during the Anglo-Boer War of 1899 to 1902, when an approximate 30 000 farmhouses were burned down and thousands of farm owners and their *bywoners* were forced to leave the farms they were reliant on for

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<sup>8</sup> D O'Meara *Volkskapitalisme: Class, Capital and Ideology in the development of Afrikaner Nationalism, 1934-1948* (1983) 24.

<sup>9</sup> 24.

<sup>10</sup> 24-25.

<sup>11</sup> R Morrel "The poor whites of Middelburg, Transvaal, 1900-1930: Resistance, accommodation and class struggle" in R Morrel (ed) *White but Poor: Essays on the History of Poor Whites in Southern Africa 1880-1940* (1992) 5.

<sup>12</sup> 6. Land owners often allowed *bywoners* on their land, in return for assistance on the farm. Initially these *bywoners*' contribution to the farming activities was appreciated as mutually beneficial to the farm owner.

<sup>13</sup> 5.

<sup>14</sup> 7.

<sup>15</sup> O'Meara *Volkskapitalisme* 26.

subsistence.<sup>16</sup> In the immediate aftermath of the Anglo-Boer War some urban Afrikaners found menial work as drivers, brick makers, messengers, newspaper sellers, or worked at hand-laundries.<sup>17</sup> Some preferred unemployment to perceived unbecoming work, while others turned to prostitution and crime.<sup>18</sup> Descendants of the white farming community held a strong prejudice against manual labour, which they perceived as servant's work, and were reluctant to obtain education and skills training associated with trades requiring physical work.<sup>19</sup>

By the end of the nineteenth century, a growing class of unskilled urban white had formed that in terms of employability compared unfavourably with coloured and black labourers who had already been established for a considerable time in the manufacturing and commercial sectors and were prepared to work for much lower wages.<sup>20</sup> In addition, English-speaking locals and immigrants – who often had access to better education; more experience of commerce; and who were more likely to be organised in trade unions – were preferred for the civil service and professions.<sup>21</sup>

Morrel defines “poor white” as a derogatory term broadly used to refer to “whites who were poor” in “colonial contexts where blacks were in the vast majority”.<sup>22</sup> The poor white designation implied more than a low economic status, it also suggested a low social standing, coinciding with a degree of alienation from the more affluent white community.<sup>23</sup> Giliomee expands on this notion when he describes the context wherein the phrase “poor white” developed as:

“The white elite did not define poverty in terms of physical or economic data, but relationally – how a white person by virtue of being white *ought* to live in comparison to non-whites.”<sup>24</sup>

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<sup>16</sup> 25.

<sup>17</sup> Giliomee *The Afrikaners* 324.

<sup>18</sup> 324.

<sup>19</sup> 319.

<sup>20</sup> 319 and 322.

<sup>21</sup> 318 and 323.

<sup>22</sup> Morrel “The poor whites of Middelburg, Transvaal, 1900-1930” in *White but Poor* 1.

<sup>23</sup> 15-16.

<sup>24</sup> Giliomee *The Afrikaners* 318.

Morrel points out that “poor white” was not a reference to a uniform group, but a collective term used to describe white Afrikaans-speaking poor in general.<sup>25</sup> Norval reiterates this when she argues –

“It is important to emphasise that the point is not that Afrikaner nationalists found a community in place ... but precisely that no such community ever existed ...”; and “ ... the primary terrains of struggle on which the battle for the heart of the ... ‘community’ was fought [were] those of the ‘Native question’ and the ‘poor white problem’.”<sup>26</sup>

The so-called “poor white problem”, with the associated issue of white labour protection, became a critical concern within white republican politics. The poor whites were viewed as the Achilles’ heel of the Afrikaner nation that could disturb – or even overturn – the racial hierarchy.<sup>27</sup> The upliftment of the poor whites was therefore critical in order to sustain the social order that had been inherited from the nineteenth century.<sup>28</sup> These issues ultimately directed the policies of the republican NP towards the establishment of a labour hierarchy, which proffered a privileged labour position upon white workers to the detriment of black workers.

## 2.2 The Dutch Reformed Church aided scheme to alleviate Afrikaner poverty through manual labour

In 1894, the Dutch Reformed Church, after an investigation into white poverty within its congregation, approved the establishment of work colonies in order to provide a safe haven in which to facilitate the economic, moral and spiritual rehabilitation of “deserving” impoverished white families.<sup>29</sup> The Church hoped that the colonies would instil in its occupants an appreciation for the value of manual labour, while simultaneously providing the children with the stability needed to

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<sup>25</sup> Morrel “The poor whites of Middelburg, Transvaal, 1900-1930” in *White but Poor 2*.

<sup>26</sup> AJ Norval *Deconstructing Apartheid Discourse* (1996) 13-14.

<sup>27</sup> L Koorts “‘The Black Peril would not exist if it were not for a White Peril that is a hundred times greater’: D.F. Malan’s Fluidity on Poor Whiteism and Race in the Pre-Apartheid Era, 1912–1939” (2013) 65 *South African Historical Journal* 555-576 556 and 559.

<sup>28</sup> 563 and 565

<sup>29</sup> N Roos “Work colonies for white men and the historiography of apartheid” (01-04-2010) *WITS Institute for Social and Economic Research* 7<<http://wiserweb.wits.ac.za/PDF%20Files/Roos%20work%20colonies%20paper.pdf>> (accessed 11-10-2017).

acquire an adequate education that would allow them to adapt to the modern economy.<sup>30</sup> As Roos explains:

“These ... colonies were based on the assumption that ‘back-to-the-land’ strategies could best rehabilitate and protect white Afrikaner families at a time of great social stress. At the same time, the emphasis placed ... on education represented an acknowledgement that the Boer agrarian world was disappearing and that the future survival and success of Afrikaners depended on their capacity to acquire the skills and dispositions needed for the modern economy.”<sup>31</sup>

The first colony, established in 1898 at Kakamas in the Northern Cape, and the various colonies in other congregations that followed, were all based on an agricultural model.<sup>32</sup> Each family was allocated one and a half hectares of land that they could rent annually at a nominal cost from the church.<sup>33</sup> The church also assisted the families in purchasing the necessary farming implements.<sup>34</sup> The Dutch Reformed Church eventually assisted 800 families through work colonies.<sup>35</sup>

### 2.3 The absorption of poor white workers in railway construction

In 1903, the Central South African Railways (“CSAR”) employed 3000 unskilled white workers as part of a post-war relief programme instituted by the government.<sup>36</sup> The workers were employed in earthworks on the Klerksdorp-Fourteen Streams, Kimberley-Bloemfontein, Krugersdorp-Zeerust, Rustenburg, Kroonstad-Bethlehem and Breyton-Ermelo railways; and paid on a piecework basis.<sup>37</sup>

A debate regarding the justification for the elevated cost of employing unskilled white workers instead of unskilled black workers continued up until 1907 when the Volksrust depot began to gain prominence.<sup>38</sup> Natal, especially, which had employed

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<sup>30</sup> 8.

<sup>31</sup> 11.

<sup>32</sup> 8.

<sup>33</sup> 8.

<sup>34</sup> 8.

<sup>35</sup> 9.

<sup>36</sup> G Pirie “White railway labour in South Africa, 1873-1924” in R Morrel (ed) *White but Poor: Essays on the History of Poor Whites in Southern Africa 1880-1940* (1992) 104.

<sup>37</sup> 104.

<sup>38</sup> 104-105.

large numbers of Indian and black workers, was initially reluctant to substitute their Indian and black complement with white workers.<sup>39</sup>

In 1907, as a response to representations from the Dutch Reformed Church, poor whites were employed in jobs, previously occupied by blacks, at the Volksrust railway depot in the Transvaal.<sup>40</sup> At the Volksrust depot, preference was given to “married men with families who had resided in Volksrust for at least two years”.<sup>41</sup> Employing white labour in favour of black labour proved very costly, as provision for insurance to cover liability for injury on duty had to be made in addition to the relative higher cost of white to black wage labour.<sup>42</sup> The Volksrust Aid Society assisted the Municipal Council’s scheme by “paying half the difference between the pay of white and black labour”.<sup>43</sup> Notwithstanding the additional financial burden that coincided with the substitution of white for black labour, other depots in the Transvaal and Orange River Colony soon followed the Volksrust example. As a result the CSAR created an internal White Labour Department and Inspectorate to administer its White Labour policy”.<sup>44</sup>

Although unskilled white workers were employed in the railway service since the turn of the century, “it was only after 1924 that the ‘civilised labour policy’ came to represent a massive operation in social engineering, designed to repair and maintain the racially hierarchical division of labour”.<sup>45</sup>

In an effort to protect South African labour against competition from immigrants, the Railways and Harbours Service Act 23 of 1925 (“Railways and Harbours Service Act”) was enacted by the Pact-government “*om ons eie seuns te beskerm*” (to protect our own sons).<sup>46</sup> The act required that, in order to be considered for employment within the railway service, employees had to be British subjects who

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<sup>39</sup> 104-105.

<sup>40</sup> 105.

<sup>41</sup> DN Miller *Short History of Volksrust* (1934) 77.

<sup>42</sup> 77.

<sup>43</sup> 76

<sup>44</sup> Pirie “White railway labour in South Africa, 1873-1924” in *White but Poor* 106. The CSAR administration was replaced by the Department of Railways and Harbours of the Union in 1910. S 1 Interpretation of “old Administration” of the Railways and Harbours Service Act.

<sup>45</sup> J Lewis *Industrialisation and Trade Union Organisation in South Africa* (1984) 75.

<sup>46</sup> JH Conradie *Die Vrug van Vier Jare: ‘n Korte opsomming van die werk van die Hertzog-regering, 1924-1928* (undated) 1.

had resided in South Africa for at least three years prior to appointment.<sup>47</sup> In addition, clerical employees had to pass examinations in Afrikaans and English language proficiency.<sup>48</sup> An exception could be made for skilled immigrants with professional and technical qualifications.<sup>49</sup> In an effort to enhance the employability of young whites, a scheme was introduced to provide young men between the ages of 16 and 21 years with the opportunity to receive training as railway servants, with the option of being placed in vacant positions as they became available.<sup>50</sup>

The application of the Pact government's civilised labour policy, between 1924 and 1928, continued to strengthen white labour's position (compared to black labour) within the railway service as is indicated in the table below.<sup>51</sup> It is noteworthy that the administration claimed that 25 000 "poor whites" were employed within the railway service by 1929.<sup>52</sup> That number correlates to an increase of more than 300% in the number of poor white labourers employed. In 1929, the NP won the election and Hertzog was reappointed as Prime Minister.

<b>Number of workers employed within the railway service</b>	<b>July 1924</b>	<b>July 1928</b>
Black, Indian and Convict	42651	31865
Coloured	4294	7031
White	5232	15846

### **3 The position of Afrikaner workers in the labour hierarchy during early industrialisation relative to English-speaking white and black workers**

#### **3 1 The complexity of obtaining a sufficient balance of skilled and unskilled labour to work on the gold mines**

The 1886 discovery of the Witwatersrand gold reef, following the discovery of diamonds in the previous decade, irrevocably changed the course of the South African economy. The discovery of gold on the Witwatersrand was the catalyst for

<sup>47</sup> S 4(1) and 4(3) of the Railways and Harbours Service Act.

<sup>48</sup> S 8(2).

<sup>49</sup> S 4(3).

<sup>50</sup> Conradie *Die Vrug van Vier Jare* 27.

<sup>51</sup> 26.

<sup>52</sup> Lewis *Industrialisation and Trade Union Organisation in South Africa* 76.

the industrialisation of the economy. Even though the reef was producing vast quantities of gold,<sup>53</sup> the depth of the reef; the low average gold content of the ore; the internationally fixed price for gold and the high initial capital investment needed “meant that profits could only be secured through a very low level of costs and a high level of output”.<sup>54</sup> The mines therefore operated on a cost structure highly sensitive to variances in its main operating cost, namely wage labour.

The goldmines required a complement of skilled and unskilled labour.<sup>55</sup> Experienced immigrants, who gained their knowledge of mining through hands-on work back home, predominantly provided skilled labour.<sup>56</sup> As the gold mining industry was a newly developed sector, South African-born white workers had no comparable knowledge or training in the field and therefore largely comprised an unskilled workforce.<sup>57</sup>

Although skilled craft work as artisans was mostly inaccessible to white South African-born workers (often due to insufficient education which precluded them from entering apprenticeships),<sup>58</sup> white workers were generally excluded by mine managers to perform unskilled work, since the rate of white labour was three to four times more expensive than black labour.<sup>59</sup>

As Lewis explains –

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<sup>53</sup> H Giliomee & B Mbenga *New History of South Africa* (2007) 200.

<sup>54</sup> P Richardson “The Recruiting of Chinese Indentured Labour for the South African Gold-Mines, 1903-1908” (1977) 18 *Journal of African History* 85-108 88.

<sup>55</sup> EN Katz “The Underground Route to Mining: Afrikaners and the Witwatersrand Gold Mining Industry from 1902 to the 1907 Miners’ Strike” (1995) 36 *The Journal of African History* 467-489 467.

<sup>56</sup> 467.

<sup>57</sup> 467.

<sup>58</sup> 467, 474.

<sup>59</sup> 467. The rationale behind the wage difference was that the resources from the rural reserves to which they returned, would supplement black migrant labourers’ wages. In contrast, unskilled urbanised white labourers were completely reliant on their wages to maintain themselves and their families. In addition, the compound system brought about economies of scale that further reduced the cost of maintenance for black labourers. Lewis *Industrialisation and Trade Union Organisation in South Africa* 14.

“From the earliest days of the mining industry ..., a division of labour developed on the basis of skills and this coincided with divisions along lines of race, with unskilled white labour being squeezed out.”<sup>60</sup>

A miner’s skill consisted of a comprehensive knowledge of a broad range of tasks that had to be performed on the mine.<sup>61</sup> The individual tasks however did not necessarily require a high level of skill in itself and could easily be delegated to unskilled black mineworkers.<sup>62</sup> This was often the case with arduous manual tasks, and as a result led to white miners’ responsibilities becoming increasingly supervisory and less productive.<sup>63</sup> A photographic documentary of South Africa published by the *ZuidAfrikaansche Fotografiënuitegewers-maatschappij* provides the following telling caption to a group photo of white and black mineworkers on the Witwatersrand –

*“De blanken mijnwerker in Transvaal heeft een leven zeer verschillend van dat zijner medebroeders in Engeland. In plaats van dagelijks hard te werken, is hij hier de ‘baas’ over een troep kafirs.”*<sup>64</sup>

(The white mineworker in Transvaal lives differently than his counterpart in England. Instead of working hard every day, here he is the “boss” of a group of blacks.)

Production on the mines was fuelled to such an extent by black labour that South African gold-mining shares were referred to as “Kafirs” at the London stock exchange.<sup>65</sup>

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<sup>60</sup> 15.

<sup>61</sup> 15.

<sup>62</sup> 15.

<sup>63</sup> 15.

<sup>64</sup> ZuidAfrikaansche Fotografiënuitegewers-maatschappij *Fotografiën van Zuid-Afrika* (undated) 135.

<sup>65</sup> W Beinart *Twentieth Century South Africa* (2001) 29. The term “kafirs” is a derogatory term used to refer to blacks.

### 3.2 The threat of insufficient numbers of unskilled black labour to the viability of the mining industry, coinciding with the suppression of black competition for skilled labour

Amid fears that black labour would encroach upon semi-skilled jobs, the first job colour bar was instituted in the mining sector in 1893 by means of a safety regulation that exclusively reserved the job of blasting for whites.<sup>66</sup> Although the regulation was amended in 1896 to omit the racial barrier to entry, the assumption was that in practice only whites would be competent enough to be granted blasting certificates.<sup>67</sup> In the same year “additional colour bars were introduced to cover the semi-skilled positions of banksman [,] ... onsetter, and ... engine driver.”<sup>68</sup>

Although there was a high demand for black labour on the mines, the supply of willing unskilled black labour was scarce.<sup>69</sup> It is in this context that the practice of “touting” developed.<sup>70</sup> White recruiters, employed by individual or groups of mines, who could persuade labourers to enrol in the mines, were paid per head of black labour supplied to a mine – not uncommonly to the highest bidder.<sup>71</sup> The practice was flawed and inefficient as the recruiters were often unreliable employees and unscrupulous in their recruiting methods.<sup>72</sup>

To actively encourage the migration of black workers to the mines, the Glen Grey Lands and Local Affairs Act 25 of 1894 (“Glen Gray Act”) instituted a labour tax payable by black males only, “fit and capable of labour”<sup>73</sup> who were in possession of land within the district of Glen Grey in the Cape Colony. The tax would be waived if the person could prove that he had worked outside the borders of the district for a minimum of three months in the twelve months preceding the date on which the tax was due.<sup>74</sup> If a person could prove that he had worked outside of the district for a

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<sup>66</sup> Lewis *Industrialisation and Trade Union Organisation in South Africa* 16.

<sup>67</sup> 17.

<sup>68</sup> 17.

<sup>69</sup> CE Davel *Die werk van die Witwatersrand Native Labour Association, 1900-1910* Magister Artium thesis, University of South Africa (1969) 2.

<sup>70</sup> 3.

<sup>71</sup> 3.

<sup>72</sup> 3,4.

<sup>73</sup> Part IV S 33 of the Glen Grey Act 25 of 1894.

<sup>74</sup> S 33.

minimum of three years, he would be issued a certificate that would exempt him of all future labour tax.<sup>75</sup>

The labour tax collected was allocated to the “establishment and maintenance of schools for ... education ... in trades and agricultural labour” in the Glen Grey district.<sup>76</sup> The penalties for default ranged from the sale of a person’s assets (to raise the amount due) for a first contravention to a maximum of a year’s imprisonment with hard labour for multiple contraventions.<sup>77</sup> The Glen Gray Act provided the template for further proclamations of areas designated to black persons, known as “locations”, and the corresponding system of labour taxation within those territories.<sup>78</sup>

The Rand Native Labour Association was established in 1896 to serve as an overarching body to control the recruitment of black labour.<sup>79</sup> Individual mines could however still recruit independently and competition continued to escalate the cost of labour.<sup>80</sup> In 1900, it was decided by mining and governmental stakeholders to replace the Rand Native Labour Association with a new cooperative called the Witwatersrand Native Labour Association (“WNLA”).<sup>81</sup> The WNLA initially recruited from Mozambique and later “north of latitude 22 degrees South ..., including the Caprivi Strip, Angola, Zambia ... and Malawi ... .”<sup>82</sup> The WNLA would exclusively control the recruitment for and subsequent distribution of black mineworkers to its members.<sup>83</sup> It nonetheless still struggled to obtain sufficient numbers of workers.<sup>84</sup>

The Native Labour Regulation Act 15 of 1911 (“Native Labour Regulation Act”) regulated the recruitment and employment of black labour. The act made provision for the issuing of licenses to employers, labour agents, conductors and compound

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<sup>75</sup> S 33.

<sup>76</sup> S 35.

<sup>77</sup> Part IV S 36.

<sup>78</sup> S 1.

<sup>79</sup> Davel *Die werk van die Witwatersrand Native Labour Association* 9.

<sup>80</sup> 10.

<sup>81</sup> 14.

<sup>82</sup> Anonymous TEBA NRC Finding Aid: Native Recruiting Corporation, Mine Labour Organisations (NRC) Ltd; The Employment Bureau of Africa Ltd (TEBA) (21-07-2010) *UJ Library and Information Centre* <<http://ujdigispace.uj.ac.za/handle/10210/3353>> (accessed 28-10-2011).

<sup>83</sup> Davel *Die werk van die Witwatersrand Native Labour Association, 1900-1910* 17.

<sup>84</sup> 116.

managers; and permits to runners involved in the recruitment of black labour.<sup>85</sup> In 1912, The Native Recruiting Corporation was established “to recruit mine labour south of 22 degrees South [namely the] former Ciskei and Transkei as well as Lesotho ..., Botswana ..., Swaziland and KwaZulu-Natal.”<sup>86</sup>

FHP Cresswell (who would become parliamentary leader for the South African Labour Party in 1910) initiated various white labour experiments in 1897 and between 1902 and 1904 where white workers were employed in unskilled jobs on the mines.<sup>87</sup> His aim was to prove that white workers’ efficiency would negate the additional cost of their wages.<sup>88</sup> Cresswell’s plan was initially intended to provide former members of the British irregular troops with a means for earning an income in the post-war depression, but was soon extended to include all white workers – including poor white Afrikaners – when insufficient numbers of the former troops joined.<sup>89</sup> Margaret Cresswell, wife of FHP Cresswell, commented in response to objections to the higher relative cost of white labour that –

“To ... [FHP Cresswell’s] mind the fundamental fallacy in the argument for employing cheap indentured labour ... lay in the belief that there is a rigid line between skilled and unskilled labour. The roughest work can be done skilfully or unskillfully (sic).”<sup>90</sup>

In support of the experiments John X. Merriman argued “... the lesson [would be] that labour was a credit and not a disgrace to a European ...”.<sup>91</sup> He thought “poor

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<sup>85</sup> S 8 of the Native Labour Regulation Act. A labour agent recruited black labourers on behalf of an employer. The agent could make use of a runner (“mean[ing] any native employed ... to canvass or collect natives ... or to act as a messenger ...”) or a conductor (“mean[ing] any person employed ... for the purpose of supervising or escorting native labourers ... to their destinations) to assist him during recruitment. A compound manager was responsible for the overall administration and organisation of the black labourers within his labour district. See s 2.

<sup>86</sup> Anonymous “TEBA NRC Finding Aid: Native Recruiting Corporation, Mine Labour Organisations (NRC) Ltd; The Employment Bureau of Africa Ltd (TEBA)” (21-07-2010) *UJ Library and Information Centre*.

<sup>87</sup> Katz (1995) *The Journal of African History* 475.

<sup>88</sup> 475.

<sup>89</sup> 475.

<sup>90</sup> M Cresswell *An Epoch of the Political History of South Africa in the life of Frederic Hugh Page Cresswell* (1956) 49.

<sup>91</sup> 48.

whites” would be especially suited to the experiment, as he believed they had the will to better their circumstances.<sup>92</sup> Although mine managers were sceptical of the experiments, they supported it due to a critical shortage of available black labour on the mines.<sup>93</sup> Nevertheless, the experiments were unsuccessful. Reasons for the failure included the comparatively low white unskilled wage rate in relation to the high cost of “respectable” living on the Witwatersrand;<sup>94</sup> and many of the applicants’ inexperience of taxing, and often dangerous, manual labour.<sup>95</sup>

The Prisons and Reformatories Act 13 of 1911 made provision for state-governed work colonies, under direction of the Directorate of Prisons in the Department of Justice, to incarcerate idle or alcoholic impoverished whites – the “undeserving” poor, previously excluded from the church colonies.<sup>96</sup> The courts however lacked appropriate guidelines to decide who should be sentenced to work in the colonies, with the result that criminals and elderly homeless men –whose rehabilitation and reintegration into society were not feasible – were often sent to the colonies and undermined its operations.<sup>97</sup>

The value of gold, relative to other commodities, declined persistently after 1900, and would only recover again at the start of the First World War.<sup>98</sup> In addition, the critical shortage in black and white labour resulted in wage inflation.<sup>99</sup> As mining profits fell, the mining houses conceived a plan to import low-cost Chinese labour to reduce operating costs.<sup>100</sup>

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<sup>92</sup> 48.

<sup>93</sup> Katz (1995) *The Journal of African History* 475.

<sup>94</sup> 476.

<sup>95</sup> 477.

<sup>96</sup> Roos “Work colonies for white men and the historiography of apartheid” (01-04-2010) *WITS Institute for Social and Economic Research* 18.

<sup>97</sup> Roos “Work colonies for white men and the historiography of apartheid” (01-04-2010) *WITS Institute for Social and Economic Research* 20. Although the Work Colonies Act 20 of 1927 clearly stipulated who ought to be sent to the colonies and under which circumstances, the tendency to send unsuitable offenders to the colonies continued and ultimately resulted in the closure of most of the colonies. Roos “Work colonies for white men and the historiography of apartheid” (01-04-2010) *WITS Institute for Social and Economic Research* 21 and 22.

<sup>98</sup> Richardson (1977) *Journal of African History* 87.

<sup>99</sup> 87.

<sup>100</sup> 88.

The Anglo-Chinese Labour Convention was signed in May 1904 and in June 1904, the first ship of Chinese labourers, destined for unskilled work on the goldmines, arrived in Durban as part of Lord Miler's policy for the post-war reconstruction of the Transvaal.<sup>101</sup> The Chamber of Mines Labour Importation Agency ("Chamber of Mines"), a limited company, was responsible for the recruitment of labour from China until 1908 when the agency merged with and subsequently became a department of the WNLA.<sup>102</sup> In response to the influx of Chinese labour into the mining sector, the Labour Importation Ordinance of 1904 established a comprehensive set of colour bars to protect the superior position of white miners within the labour market.<sup>103</sup> The importation of Chinese labour ended with the 1907 Transvaal election of *Het Volk*.<sup>104</sup> Their "repatriation and replacement" policy on Chinese labour reflected the fear of rising white indigence among its supporters.<sup>105</sup> *Het Volk* was however not indifferent to the labour shortage that would be caused by the Chinese repatriation and the ensuing economic harm it could cause the mining industry.<sup>106</sup> In exchange for the abolition of Chinese labour, the government ensured the mining houses that they would improve the system of recruitment and organisation of the black labour supply.<sup>107</sup>

By 1907, the skills of the former "skilled miner" had eroded to such a degree that the Report of the Government Mining Engineer concluded, "that the mines are independent to a great extent of the skilled miner".<sup>108</sup> Afrikaners now comprised nearly one-third of the "skilled" white miners (as opposed to unskilled mineworkers), employed as specialist pitmen or supervisors, working underground in the Witwatersrand.<sup>109</sup>

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<sup>101</sup> P Richardson "Coolies and Randlords: The North Randfontein Chinese Miners' Strike' of 1905" (1976) 2 *Journal of Southern African Studies* 151-177, 152-153.

<sup>102</sup> 86.

<sup>103</sup> Lewis *Industrialisation and Trade Union Organisation in South Africa* 17.

<sup>104</sup> A Jeeves *Het Volk and the Gold Mines: The Debate on Labour Policy 1905-1910* (1980) unpublished paper presented at the *African Studies Institute University of the Witwatersrand* 12 (copy on file with author).

<sup>105</sup> 12.

<sup>106</sup> 30.

<sup>107</sup> 24.

<sup>108</sup> Lewis *Industrialisation and Trade Union Organisation in South Africa* 15.

<sup>109</sup> Katz (1995) *The Journal of African History* 467-468. The use of "poor white" Afrikaners as strike-bearers in the 1907 strike emphasised the viability of employing Afrikaners in

#### 4 The 1922 Rand Revolt's solidifying effect on the racialised skills hierarchy

In 1921, in the midst of a substantial number of mining companies facing closure due to the falling gold price,<sup>110</sup> the gold mining industry had to devise a strategy to reduce costs to increase profitability.<sup>111</sup> The outcome was a decision (to be implemented on 1 February 1922) by the Chamber of Mines, supported by the Jan Smuts-led SAP,<sup>112</sup> to eliminate the job colour bar in semi-skilled work.<sup>113</sup> As a consequence of the decision, more than 15 000 white miners would potentially lose their jobs and be replaced by less expensive black labour.<sup>114</sup> In January 1922, a violent strike – under the slogan “Workers of the World unite for a White South Africa”<sup>115</sup> – began on the Witwatersrand.<sup>116</sup> The strike, which would become known as the Rand Revolt, could only be quelled in March of that year using military force.<sup>117</sup>

The SAP government, with Jan Smuts as prime minister, favoured improved training and the establishment of a superior industrial bargaining position, as a better alternative to the colour bar, in the pursuance of promoting white worker interests.<sup>118</sup> The 1922 Apprenticeship Act was enacted to regulate apprenticeship agreements. It provided that “any minor who ... [was] over the age or *standard* up to which compulsory attendance at a school is prescribed by law ...”[own emphasis] could with the assistance of his guardian enter into an apprenticeship contact with an employer.<sup>119</sup> In addition to the minimum educational requirements relating to formal schooling, the Minister could prescribe “the qualifications upon which apprenticeship

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supervisory positions on the mines. Lewis *Industrialisation and Trade Union Organisation in South Africa* 16.

<sup>110</sup> During the 1920s, after failed efforts by Great Britain and France to restore the gold standard in the period leading up to the Great Depression, the gold standard was abandoned – which in turn resulted in the stressed gold price. RA Arnold *Economics* (2001) 787.

<sup>111</sup> Giliomee & Mbenga *New History of South Africa* 245.

<sup>112</sup> Federal Council of the National Party of South Africa *The Government and the Strike* 7.

<sup>113</sup> 245.

<sup>114</sup> 245.

<sup>115</sup> Morrel “The poor whites of Middelburg, Transvaal, 1900-1930” in *White but Poor* 19.

<sup>116</sup> Giliomee & Mbenga *New History of South Africa* 246.

<sup>117</sup> 247.

<sup>118</sup> 252.

<sup>119</sup> S 8(1) of the 1922 Apprenticeship Act.

shall commence ...".<sup>120</sup> A statement made in 1923 by the Minister of Mines and Industries illustrates the significance and necessity of skills training which had the ability to uplift the poor white segment and could facilitate an overall white labour aristocracy -

"The white race can only survive by reason of ... its superior skill and training ... the technical and scientific training of the white population is of the first importance to ensure its survival as a ruling race."<sup>121</sup>

In 1919, Clements Kadali established the Industrial and Commercial Workers' Union ("ICU") as the first black trade union.<sup>122</sup> The ICU originated as a trade union for black and coloured dockworkers in Cape Town but soon grew to include both skilled and unskilled workers from the industrial and agricultural sectors.<sup>123</sup> In 1924, the Industrial Conciliation Act was passed which denied blacks admission to trade unions and therefore excluded them from industrial bargaining.<sup>124</sup> In the same year, the 1922 Apprenticeship Act was amended to allow apprentices to join trade unions.<sup>125</sup>

With the aim of supplanting the SAP in the 1924 election, the NP and the LP formed a coalition to win the election.<sup>126</sup> During the Pact parties' political campaign, the promotion of the interests of "civilised labour" (meaning white and coloured labour)<sup>127</sup> was used to solicit votes from workers dissatisfied with the SAP government's accommodating stance towards the interests of the mining houses and the resulting competition from black labour.

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<sup>120</sup> S 13(1).

<sup>121</sup> "Department of Labour ARB 1339 Address to the Apprenticeship Committee 26.6.53" in Lewis *Industrialisation and Trade Union Organisation in South Africa* 25.

<sup>122</sup> Giliomee & Mbenga *New History of South Africa* 248.

<sup>123</sup> 248.

<sup>124</sup> 252.

<sup>125</sup> S 3 of the 1922 Apprenticeship Act Amendment Act 15 of 1924.

<sup>126</sup> Giliomee & Mbenga *New History of South Africa* 252.

<sup>127</sup> J Seekings "'Not a single white person should be allowed to go under': *Swartgevaar* and the origins of South Africa's welfare state, 1924-1929" (2007) 48 *The Journal of African History* 375-394 381.

## 5 The systemic entrenchment of a legislated labour hierarchy with white labour at the top

### 5.1 The emergence of labour policies founded in the notion of “civilised labour”

In 1924, Prime Minister Hertzog defined the concept of “civilised labour” as follows:

“The Prime Minister desires it to be understood by all Departments of State that it has been decided as a matter of definite policy that, wherever practicable, civilized labour should be substituted in all employment by the Government for that which may be classified as uncivilized. Civilized labour is to be considered as the labour rendered by persons, whose standard of living conforms to the standard of living generally recognized as tolerable from the usual European standpoint. Uncivilized labour is to be regarded as the labour rendered by persons whose aim is restricted to the bare requirements of the necessities of life as understood among barbarous and undeveloped peoples.”<sup>128</sup>

The new Pact government moved swiftly to protect the position of white labour by enacting the Wage Act.<sup>129</sup> Section 8 of this Act provided for uniform minimum wages for both black and white in order to protect white labour against undercutting from cheaper black labour.<sup>130</sup> Increased numbers of white poor moved to the towns to take advantage of the employment opportunities created by the Amendment Act to the 1911 Mines and Works Act).<sup>131</sup> The act established a colour bar, which reserved a broad range of mining jobs, classified as skilled or semi-skilled, exclusively for “Europeans”, “Cape Coloured”, “Cape Malays”, “Mauritius Creoles” and “St. Helena persons”.<sup>132</sup> Morrell notes that “(t)he 1925 Wage Act, [and] the 1926 Mines and Works Amendment Act ... helped to entrench white workers in their jobs...”<sup>133</sup> by blurring “... the original divide between skilled and unskilled workers ... [and replacing it with] ... divisions reflecting different ... political positions.”<sup>134</sup> Lewis similarly maintains “that the ‘civilised labour policy’ came to represent a massive

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<sup>128</sup> 382 quoting Circular No 5 of 31 Oct 1924 quoted in (1924) 9 *Year Book of the Union of South Africa* 203.

<sup>129</sup> Giliomee & Mbenga *New History of South Africa* 252.

<sup>130</sup> 252.

<sup>131</sup> Morrel “The poor whites of Middelburg, Transvaal, 1900-1930” in *White but Poor* 12.

<sup>132</sup> S 4 (p)(i)-(ii) of the 1911 Mines and Works Act.

<sup>133</sup> Morrel “The poor whites of Middelburg, Transvaal, 1900-1930” in *White but Poor* 26.

<sup>134</sup> 20.

operation in social engineering, designed to repair and maintain the racially hierarchical division of labour.”<sup>135</sup>

The Carnegie Commission of Investigation on the Poor White Question in South Africa (“Carnegie Commission”) Report of 1932, following an investigation in 1927, recommended in relation to the protection of unskilled white workers, against competition from black workers, through the institution of a colour bar that –

“... a policy of protection by reservation of work to the European should be treated as merely *a measure of transition* for a period *during which the poor white* is given the opportunity to adapt himself to new conditions in South Africa.” And “... the protection *should be made one* during which they are *trained to greater efficiency* than they often have now, and during which their children are trained *to become good* and, as far as possible, *skilled workers*.” [own emphasis added]<sup>136</sup>

The Pact-government viewed the lack of sufficient vocational skills training for Afrikaners, who were not adept to farming or a professional occupation, as one of the most significant causes of Afrikaner poverty.<sup>137</sup> Consequently, as seen in the table below, spending on technical, professional and industrial training increased noticeably within the period between 1924 and 1929.<sup>138</sup>

	<b>Technical training (£)</b>	<b>Professional and Industrial training (£)</b>
1923-1924	41370	-
1924-1925	42150	-
1925-1926	48800	188000
1926-1927	157350	127415
1927-1928	185555	156000
1928-1929	204825	158730

<sup>135</sup> Lewis *Industrialisation and Trade Union Organisation in South Africa* 75.

<sup>136</sup> Report of the Carnegie Commission *The Poor White Problem in South Africa* (1932) xx.

<sup>137</sup> 45.

<sup>138</sup> Conradie *Die Vrug van Vier Jare* 45.

In 1928, the Vocational Education and Special Schools Act permitted certain schools to be designated for vocational education.<sup>139</sup> The act defined “vocational education” as “instruction and training in commerce, agriculture, or housecraft or in any trade or industry”.<sup>140</sup>

During the 1930's, poor white-ism continued as a crises within the Afrikaner community with 17% of the white population estimated to be poor whites – correlating to an estimated 25% of Afrikaners.<sup>141</sup> By the end of the decade, notwithstanding political influence, Afrikaners were still in a dismal position within the labour market – with a high concentration of Afrikaners working as unskilled labour and only a small number attaining professional occupations.<sup>142</sup> In 1937, the South African Iron and Steel Industrial Corporation (“ISCOR”) (a state-financed corporation) had to revise its “civilised labour” policy to sustain profitability.<sup>143</sup> The policy had resulted in increased labour costs, which lead to a surge in prices and consequently negatively affected ISCOR's international competitiveness.<sup>144</sup> Although ISCOR dismissed 875 white workers in semi-skilled positions and replaced them with lower-wage earning black workers, the “white-black labour ratio remained high compared with private industry”.<sup>145</sup>

By the start of the Second World War in 1939, the Union Education Department had still been “unable to change learner and employer perceptions of the merit of industrial and vocational provision” and the country faced a shortage of suitable skilled workers to address the industrial expansion that resulted from the war.<sup>146</sup> In

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<sup>139</sup> These schools were: Trade School, Knysna; Trade School, Karreedouw; Industrial School, (boys) Adelaide; Industrial School, (girls) Adelaide; Industrial School, Oudtshoorn; Industrial School, Uitenhage; Industrial School, Potchefstroom; School of Domestic Science, Johannesburg; Weston Farm Training School; Trade School, Bloemfontein; Trade School, Ficksburg; Trade School, Jacobsdal; Trade School, Kroonstad; Trade School Ladybrand; School of Agriculture and Domestic Craft, Tweespruit; School of Domestic Science, Bethlehem. Vocational Education and Special Schools Act Sch.

<sup>140</sup> S 20 of the Vocational Education and Special Schools Act.

<sup>141</sup> Giliomee & Mbenga *New History of South Africa* 280.

<sup>142</sup> 279-280.

<sup>143</sup> Lewis *Industrialisation and Trade Union Organisation in South Africa* 80.

<sup>144</sup> 80.

<sup>145</sup> 80.

<sup>146</sup> S McGrath, A Badroodien, A Kraak & A Unwin (eds) *Shifting Understandings of Skills in South Africa: Overcoming the historical imprint of a low skills regime* (2004) 32.

response to the skills shortage, the Central Organisation for Technical Training (“COTT”) was established in 1940, which sought to train 5 000 male students between the ages of 18 and 40 as fitters, machine tool operators, welders, blacksmiths, tool repairers, electricians and sheet metal workers.<sup>147</sup>

During the Second World War, there was a drive to maximise shop floor efficiency in order to ensure that there was sufficient production to supply the war effort and meet domestic supply.<sup>148</sup> This led to new technological developments in the industrial process that divided the traditional encompassing skill set of the skilled artisans into individual mechanised functions which could be performed by workers with limited skill – resulting in the systematic “deskilling” of the traditional skilled artisan.<sup>149</sup>

The Apprenticeship Act 37 of 1944 (1944 Apprenticeship Act)<sup>150</sup>, made provision for a person fifteen years or older, who was not legally required to attend school, to bind himself contractually as an apprentice to an employer within any trade, excluding – agriculture, domestic work in private households and the defence force.<sup>151</sup> The Minister could prescribe the qualifications and educational standard required for a person to be permitted to enter into an apprenticeship contract.<sup>152</sup> Although the act does not expressly disqualify blacks from obtaining apprenticeships, up until 1948 most blacks were excluded from formal education.<sup>153</sup> Therefore, a black worker would rarely have the qualifying educational standard required for entering an apprenticeship.

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<sup>147</sup> 37. By the end of 1943, nearly 22 000 black workers had been trained, however by 1945 the Union Education Department had taken over all the COTT centres and started training predominantly white workers “often in the same trades as previous black trainees”.

<sup>148</sup> N Clark *Labor at the State Corporations During World War II* (6-10 February 1990) unpublished paper presented at the *Wits History Workshop: Structure and Experience in the Making of Apartheid*, 6 to 10-02-1990 1-3 (available at <http://mobile.wiredspace.wits.ac.za/bitstream/handle/10539/7746/HWS-58.pdf?sequence=1&isAllowed=y>).

<sup>149</sup> 1-3.

<sup>150</sup> The 1922 Apprenticeship Act repealed the 1944 Apprenticeship Act.

<sup>151</sup> Ss 1, 2 and 22 of the 1944 Apprenticeship Act.

<sup>152</sup> S 16(2)(a).

<sup>153</sup> See ch 3, s 2.

A contract of apprenticeship had to be registered within one month after the date it was entered into.<sup>154</sup> The registrar had the prerogative to refuse registration if it was of the opinion that “it is not in the interest of the prospective apprentice to register the contract”.<sup>155</sup> Whilst considering if the contract should be approved “the prospective apprentice’s prospects of obtaining employment in the industry ... at the expiry of the contract” could be taken into account.<sup>156</sup> The registrar had broad powers to ensure adequate training and consequently could dictate the content of the training an apprentice should receive from an employer.<sup>157</sup> It could specify *inter alia* the type of work; where, how and when the work should be done and the degree of supervision required.<sup>158</sup> By also prohibiting the establishment of private training schools and institutions, the government had ensured complete control over who had access to trade apprenticeships.<sup>159</sup>

## 5 2 Large scale black industrial unrest leading up to the 1948-election

The Second World War galvanised capital-intensive operations and likewise increased mechanisation of production, resulting in a significant number of black workers being employed in semi-skilled positions and therefore a considerable rise in wages for black workers.<sup>160</sup> Afrikaners still had limited access to industrial capital; and Afrikaner-owned industrial concerns were few and small.<sup>161</sup> Consequently, “rapidly rising labour costs placed them in increasingly uncompetitive positions ...”<sup>162</sup> and interest groups pressurised the government to sustain a system which would safeguard the supply of cheap black labour.<sup>163</sup> In 1944, 2 000 black workers, from five of the six power stations servicing the Witwatersrand, went on strike in protest of the exclusion of workers from the power stations and mining industry from Wage

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<sup>154</sup> S 23.

<sup>155</sup> S 23.

<sup>156</sup> S 23.

<sup>157</sup> S 24.

<sup>158</sup> S 24.

<sup>159</sup> S 33.

<sup>160</sup> O’Meara *Volkskapitalisme* 171.

<sup>161</sup> 171.

<sup>162</sup> 171.

<sup>163</sup> 171.

Determination No 105.<sup>164</sup> The Determination substantially raised the minimum wage for unskilled blacks working in urban industries.<sup>165</sup> The unrest was suppressed through a combination of coercion and the threat of military and police force.<sup>166</sup>

In 1946, 60 000 black mineworkers went on strike to demand an increase in the minimum wage.<sup>167</sup> The strike ended with demoralising results – twelve strikers dead; more than a thousand injured; trade union offices raided and numerous unionists arrested; and a subsequent three-year delay in wage increase.<sup>168</sup> During the same year of the mineworkers' strike, Henry Fagan was appointed by Jan Smuts to head a commission to investigate and report on black urbanisation, including the pass laws and migrant labour.<sup>169</sup> The Fagan Report was published in the year of the 1948 election. The commission concluded that a “policy that accepted that whites and blacks had to co-exist” was the only practical option.<sup>170</sup> By then, “poor white” unemployment had largely been eliminated.<sup>171</sup> White labour was now firmly entrenched in a superior position relative to black labour within the labour hierarchy.<sup>172</sup> The Fagan Report's recommendations were not compatible with the NP's agenda and after the 1948 election, the report fell by the wayside.<sup>173</sup>

## 6 Conclusion

Throughout the first half of the twentieth century, direct and determined governmental intervention had succeeded in artificially elevating white labour, and specifically “poor white” labour, to a superior position relative to black labour.

Job reservation and the institution of colour bars were the main vehicles through which the economic upliftment of the “poor whites” was attempted. Although “poor white” workers were generally unskilled, the white wage rate was substantially higher than the black wage rate. In addition, the work efficiency of white workers was often

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<sup>164</sup> Clark *Labor at the State Corporations During World War II* 10-12.

<sup>165</sup> 10-12.

<sup>166</sup> 13-14.

<sup>167</sup> Giliomee & Mbenga *New History of South Africa* 299.

<sup>168</sup> 299.

<sup>169</sup> 309.

<sup>170</sup> 309.

<sup>171</sup> Lewis *Industrialisation and Trade Union Organisation in South Africa* 76.

<sup>172</sup> 76.

<sup>173</sup> Giliomee & Mbenga *New History of South Africa* 310.

lower than that of their black counterparts. As a result, white labour had to be politically protected from competition from black labour in order to gain preference in the labour hierarchy. Reserved semi-skilled positions were often little more than fabrications, as many of these positions were supervisory in nature and highly diluted of practical function. Perceived white superiority had to give way to economic reality on numerous occasions – most noteworthy in 1921 when the decision by the Chamber of Mines to replace semi-skilled white mineworkers with cheaper black mineworkers, in order to sustain profitability, resulted in the 1922 Rand Revolt.

The 1922 Apprenticeship Act, the Vocational Education and Special Schools Act and the 1944 Apprenticeship Act aimed to add substance to the artificially created labour hierarchy. Blacks were not explicitly excluded from the application of these acts. However, as formal black education provision during the first half of the twentieth century was sporadic and highly inadequate, it was very unlikely that a black student would qualify for admission to a trade school or for an apprenticeship. By 1948, white labour had been entrenched in a superior position compared to black labour through a combination of job reservation, colour bars and an absence of adequate formal black education and training provision. Chapter 3 will discuss how blacks were denied equal education and skills development in an effort to prevent a challenge to the labour hierarchy.

## CHAPTER 3: THE DEVELOPMENT OF BLACK EDUCATION AND TRAINING DURING THE TWENTIETH CENTURY

*“...[I]n ‘n land soos Suid-Afrika moet ... [beleid] verenigbaar wees met ‘n aansienlike mate van verskeidenheid van bevolkingselemente, ieder waarvan op die gebied van afkoms, tradisie en selfs taal en kultuur kenmerkend sy eie is. ... Die getroue en gulhartige erkenning van mekaar se gelyke regte ... is daarom fundamenteel.”*

(In a country such as South Africa ... policy must complement the diverse array of population groups, each with its own unique heritage, tradition and culture. ... The constant and wholehearted acknowledgement of each other's equal rights ... is therefore fundamental.)

– DF Malan<sup>174</sup>

### 1 Introduction

Chapter 2 described how a legislated labour hierarchy was established during the twentieth century in order to support white socio-economic and political objectives. In continuation, Chapter 3 provides an exposition of the legislation that was enacted in order to maintain blacks at the lower end of the labour hierarchy by means of, amongst others, the deliberate customisation of black education.

This chapter introduces the historical phases of development the provision of black education underwent from the early nineteenth century until 1994. Formal black education provision in South Africa originated within the independent Christian missions. Up until the late nineteenth century, the missionary schools were the primary source of education provision to blacks. In 1886, Natal became the first province to prescribe a customised curriculum for education provision in black schools. In time, the Transvaal, Cape and Free State would follow. The provinces retained discretion concerning the content of the curriculum up until the mid-1950s, when black education provision became wholly centrally controlled as an integral part of Apartheid policy. In this chapter, after the historical context of black education has been described, a discussion will follow on how black education was progressively incorporated into labour policy to serve white economic and political

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<sup>174</sup> DF Malan *Afrikaner-Volkseenheid en my ervarings op die pad daarheen* (1959) 45-46.

aspirations. Throughout the course of the twentieth century, an uncomfortable balance had to be struck between economic reality and political ideals. Although a racially segregated education policy complemented the spatial separation of the races; and the provision of substandard and limited education to blacks supported the labour hierarchy, economic development necessitated political compromises. The chapter thus concludes with a discussion of the disintegration of black education as a separate institution and finally its incorporation into a universal national education system. Despite the deracialisation of public education post-1994, the steep inequality in standard between historically black and white schools, that characterised the Apartheid-era education system, is still evident today.

## **2 The phases of provision of black education in South Africa pre-1994**

### **2.1 Missionary schools**

The missionary phase can be described as the period wherein black education was almost exclusively provided through church schools, administered by missions of the Christian faith, working in isolation from each other and the state.<sup>175</sup> The period can be further subdivided by distinguishing between the initial period where missions took full responsibility and control of black education; and the period after 1850 when the government started to provide limited financial assistance to the mission schools in the form of subsidies.<sup>176</sup>

The missionary period ended in the early 1950's with the introduction of the Bantu Education Act 47 of 1953 ("Bantu Education Act") and the subsequent nationalisation of the majority of the mission schools by the NP government. Although the missionaries had varied personal views on the morality and fairness of the Bantu Education Policy within the South African context, "no missionary could remain 'indifferent' " as all missions' prerogative, to administer their schools as they wished, were severely curtailed.<sup>177</sup> Up until the nationalisation of the mission schools, the

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<sup>175</sup> PC Luthuli *What ought to be in black education* (1985) 53.

<sup>176</sup> Union of South Africa *Report of the Commission on Native Education 1949-1951* (1951) 33.

<sup>177</sup> F Hale "Adapting to Apartheid: The Church of Sweden Mission on the Witwatersrand in the 1950s" (2008) *Journal of Church and State* 451 455-456.

state had partially subsidised teachers' salaries.<sup>178</sup> After the nationalisation, missions were forced to either sell or lease their school buildings to the government in order to continue to receive government funding.<sup>179</sup> In protest, some mission schools, such as those administered by the Roman Catholics and the Seventh-Day Adventists, opted out of government funding and became wholly independent private schools – however, these were rare instances.<sup>180</sup> Limited remuneration for the loss of the school buildings was paid with income generated from black taxes.<sup>181</sup> Criticisms and appeals against the new policy were met by an uncompromising response from the government, which included the denial of visas to dissenting missionaries.<sup>182</sup>

Luthuli argues that the education provided, by the mission schools, did not take the cultural and political context wherein black South Africans lived into consideration.<sup>183</sup> Consequently, mission education risked alienating black students from their culture, without the benefit of gaining any significant economic benefit in return. He explains as follows –

“Blacks who had gone through school soon found themselves poised between the two chairs [that is, the black and white English way of life] and were unable to achieve anything because their education did not prepare them for anything. They were accepted neither by their own people nor by the English-speaking Whites in South Africa.”<sup>184</sup>

Dr HF Verwoerd, the minister of Native Affairs at the time, expressed a similar view, albeit from a different ideological standpoint -

“There is no place for the Bantu in the European community above the level of certain forms of labour. Until now he has been subjected to a school system which drew him

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<sup>178</sup> 459 and 463.

<sup>179</sup> 461-462.

<sup>180</sup> 462.

<sup>181</sup> 462.

<sup>182</sup> 455-457.

<sup>183</sup> Luthuli *What ought to be in black education* 53-54.

<sup>184</sup> 54.

away from his own community and misled him by showing him (the) green pastures of European society in which he was not allowed to graze.”<sup>185</sup>

## 2.2 Incorporating educational objectives into the administration of Native Affairs

By the late nineteenth century, the government started to show an inclination towards taking control of the administration of black education (as distinct from white education). In 1886, Natal was the first province to draft a special curriculum for black schools.<sup>186</sup> The other provinces subsequently introduced curriculums intended specifically for black education - that is the Transvaal in 1904, the Cape in 1921 and the Free State in 1924.<sup>187</sup> The segregationist patterns that had started to emerge in state-controlled education were cemented in 1925, when the Native Development Fund was created “to provide for the education and other advancement and welfare of the Bantu”.<sup>188</sup> The fund was partially funded through a fixed annual budgetary allocation of £340,000 and a portion of the direct taxation paid by blacks;<sup>189</sup> and was administered by the Minister of Native Affairs, in consultation with the Native Affairs Commission.<sup>190</sup>

In 1936, the Interdepartmental Committee on Native Education (1935-1936) (“Welsh Commission”) listed the arguments against the expansion of black education, as gathered from evidence, as follows –

- “(a) *dit hom lui en ongeskik vir handearbeid maak;*
- (b) dit hom ‘brutaal’ en as bediende minder handelbaar maak; en*
- (c) dit hom van sy eie volk vervreemd en hom dikwels sy eie kultuur laat verag”.*<sup>191</sup>

((a) it will make him lazy and unsuitable for manual labour;

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<sup>185</sup> South African History Online “Segregationist Legislation Timeline 1856-1979” (2017) *South African History Online* <[http://www.sahistory.org.za/pages/governance-projects/liberation-struggle/legislation\\_1950s.htm](http://www.sahistory.org.za/pages/governance-projects/liberation-struggle/legislation_1950s.htm)> (accessed 25-05-2010).

<sup>186</sup> Union of South Africa *Report of the Commission on Native Education 1949-1951* (1951) 34.

<sup>187</sup> 34.

<sup>188</sup> 35.

<sup>189</sup> 35.

<sup>190</sup> 35.

<sup>191</sup> Union of South Africa *Interdepartmental Committee on Native Education 1935-1936* (1936) 92.

- (b) it will cause him to become insubordinate and difficult to manage as a servant; and
- (c) it will alienate him from his own people and culture.)

The Committee added that the detractors of black education were not against the provision of black education *per se*, but they were opposed to the “wrong” type of education – meaning education that would cause blacks to not “know their place”.<sup>192</sup> By the start of the 1940’s, the template for a segregationist schooling system – that would form the foundation for the perpetuation of racial inequality in state provided education – had been established.<sup>193</sup>

The Native Education Finance Act 29 of 1945 (“Native Education Finance Act”) placed the financing of black education under the administration of the Minister of Education, Arts and Science, advised by the Union Advisory Board.<sup>194</sup> Although the Minister of Native Affairs and the Minister of Education, Arts and Science respectively both centrally controlled the funding of black education, budget and policy (and therefore curriculum) in respect of black education was determined by local provincial administrations.<sup>195</sup>

Luthuli argues that the change to central government-controlled funding of black education did little to align black education with black interests. It continued to alienate the educated black person from his or her own community without providing the person with the necessary skill and opportunity to prosper within the white community –

“[T]he curriculum was foreign in orientation, it was foreignly inspired and resulted in a Black who regarded himself as different from his Black brothers. [However] ... that ... education did not succeed in making a Black man a White man.”<sup>196</sup>

According to Christie and Collins “schooling for blacks was based overtly on religious and moral training, with values such as cleanliness, punctuality, honesty,

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<sup>192</sup> 92.

<sup>193</sup> P Christi & C Collins “Bantu Education: Apartheid Ideology or Labour Reproduction?” (1982) *Comparative Education* 59 62.

<sup>194</sup> Luthuli *What ought to be in black education* 54.

<sup>195</sup> Union of South Africa *Report of the Commission on Native Education* 35; Luthuli *What ought to be in black education* 54.

<sup>196</sup> Luthuli *What ought to be in black education* 55.

respect [and] ... courtesy ...” directing the composition of the curriculum.<sup>197</sup> The curriculum was primarily aimed at instilling a subservient mind-set “geared towards appropriate work attitudes”<sup>198</sup> and the limited skills, such as communication in one of the official languages (either Afrikaans or English) and basic numeracy and literacy, required by employers from their workers.<sup>199</sup>

### 2.3 The emergence of Bantu Education as an integral component of Apartheid policy

In 1948, the Commission on Native Education, headed by Werner Eiselen, (“Eiselen Commission”) was requested to investigate the administration of black education.<sup>200</sup> The Commission included the following caveat in its report, which is telling of the priority black education enjoyed within government before 1948 –

“[In] to the absence of complete and available information and [owing to] the complexity of the present administrative systems, as a result of which experts in the field of Bantu Education experience difficulties in keeping themselves informed, your Commissioners give a somewhat detailed ... description ... of Bantu Education.”<sup>201</sup>

In response to the Commission’s findings, the Bantu Education Act was promulgated and came into force in 1954.<sup>202</sup> Subsequently, black education became centrally controlled by the state through a new department – the Department of Bantu Education and Bantu Administration.<sup>203</sup>

The introduction of the Bantu Education Act effectively ended the independent school phase by prohibiting the establishment of private black schools that’s “establishment or continued existence ... [would not be] in the interests of the Bantu people ... or ... [would be] likely to be detrimental to the physical, mental or moral

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<sup>197</sup> Christi & Collins (1982) *Comparative Education* 63-64.

<sup>198</sup> 65.

<sup>199</sup> 63.

<sup>200</sup> Luthuli *What ought to be in black education* 55.

<sup>201</sup> Union of South Africa *Report of the Commission on Native Education* 44.

<sup>202</sup> Luthuli *What ought to be in black education* 55. The Bantu Education Act repealed the Native Education Finance Act.

<sup>203</sup> Luthuli *What ought to be in black education* 55.

welfare of the ... students attending ... such school.”<sup>204</sup> The likelihood that black students could face a possible disadvantage as a result of attending an independent school was determined by the Minister of Native Affairs, in conjunction with the Native Affairs Commission.<sup>205</sup> After the risk assessment, the school could be registered (through publication in the Gazette) at the Minister’s discretion.<sup>206</sup> By 1959, only 700 Catholic schools – of the more than 5 000 mission schools that had existed prior to the introduction of Bantu Education – survived.<sup>207</sup>

For the first time, black communities had a degree of influence in formal black education through participation on school boards, committee boards and school committees – although the boards and committees functions were by and large administrative.<sup>208</sup> The authority to determine the curriculum (including religious instruction); the medium of instruction and the amount of school fees all resided in the minister.<sup>209</sup> The act prescribed “the constitution, duties, powers, privileges and functions of regional, local and domestic councils, boards or other bodies ...” and therefore allowed the boards and committees almost no leverage to promote black education outside of the government’s policy framework.<sup>210</sup> After 1972, Departments of Education and Culture were established for each homeland in accordance with the granting of partial self-governance.<sup>211</sup>

1976 was a watershed year for black education in South Africa. The student uprising in Soweto had lit a spark to the growing tension and discontent among black students. As upsurges of student boycotts continued, the NP government had to concede that the Bantu Education policy had not only failed to create a black population amenable to its political and economic ideology – but instead threatened to politically destabilise the country. In 1979, the Education and Training Act 90 of

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<sup>204</sup> S 9 of the Bantu Education Act.

<sup>205</sup> S 9.

<sup>206</sup> S 9.

<sup>207</sup> Christi & Collins 1982 *Comparative Education* 60.

<sup>208</sup> Luthuli *What ought to be in black education* 55. It is important to note that most of the members of the school committees and school boards were illiterate and that half of the members, including the chairman, were appointed by the department.

<sup>209</sup> S 15(1)(d-e), (j) of the Bantu Education Act.

<sup>210</sup> S 15(1)(q).

<sup>211</sup> Luthuli *What ought to be in black education* 57.

1979 (“Education and Training Act”) repealed the Bantu Education Act and its subsequent amendments.<sup>212</sup>

### **3 Introducing the Bantu Education policy as a complement to black labour regulation**

Racial segregation and inequity had been firmly entrenched within South African culture and society before the 1948 election of the NP and the subsequent introduction of its Apartheid policy. In 1911, the Native Labour Regulation Act was enacted to regulate the recruiting, employment and compensation of black labour.<sup>213</sup> The first definitive legislation by the SAP, after unionisation, regarding the management of black affairs, was the Natives Land Act 27 of 1913 (“Native Land Act”). The act listed a schedule of approved “native areas” and made provision for the appointment of a commission of enquiry to consider which areas should be reserved for black and white occupation respectively.<sup>214</sup> The act prohibited further trade (unauthorised by the Governor-General) in land between blacks and whites, outside of the scheduled black areas.<sup>215</sup>

The NP and South African LP coalition (Pact) government (with James Hertzog, leader of the NP, as Prime Minister) further developed the notion of spacial separation of the races through the enactment of the Native Administration Act 38 of 1927 (“Native Administration Act”) which authorised the Governor-General to –

“define the boundaries of the area of any tribe or of a location, and from time to time alter the same, and may divide existing tribes into one or more parts or amalgamate tribes or parts of tribes into one tribe, or constitute a new tribe, as necessity or the good government of the Natives may in his opinion require”; [and]

“whenever he deems it expedient in the general public interest, order the removal of any tribe or portion thereof or any Native from any place to any other place within the Union ...”<sup>216</sup>

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<sup>212</sup> Education and Training Act Schedule.

<sup>213</sup> Preamble of the Native Labour Regulation Act.

<sup>214</sup> S 2 of the Natives Land Act.

<sup>215</sup> S 1.

<sup>216</sup> S 5(1) of the Native Administration Act.

A racially segregated education system complemented the notion of ousting “uncivilised” blacks to “native reserves” and in 1932, the *Ekonomiese Naturellekommissie* found that –

*“[daar] vir die hergeboorte van ‘n primitiewe volk opvoedkundige behoeftes is wat aan die gewone skoolonderwys voorafgaan. Die Europese skoolonderwys is gebaseer op ‘n beskaafde omgewing: vir ‘n groot gedeelte van die naturellebevolking moet hierdie beskaafde omgewing nog geskep word”.*<sup>217</sup>

(In regard to the development of a primitive nation, a civilised environment must first be created before a European education system can be implemented.)

The United Party<sup>218</sup> further nuanced the practicalities of racial segregation by enacting the Native Trust and Land Act 18 of 1936 (“Native Trust and Land Act”) which established the South African Native Trust to administer the “settlement, support, benefit, and material and moral welfare of the natives of the Union”.<sup>219</sup> All land the government had reserved for blacks vested in the trust.<sup>220</sup> The trust was

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<sup>217</sup> *Verslag van die Ekonomiese Naturellekommissie* (1932) para 627 in Union of South Africa *Interdepartmental Committee on Native Education* (1935-1936) 102.

<sup>218</sup> The NP’s support was badly damaged by the disastrous economic impact on agriculture resulting from Hertzog’s unwillingness to abandon the gold standard until 1932. Hertzog, apprehensive about the coming elections, merged the NP with the SAP to form the United National South African (United) Party. The United Party subsequently won the 1934 election, with Hertzog reappointed as Prime Minister and Jan Smuts acting as his deputy. Shortly after the election a disgruntled faction within the NP, led by DF Malan, broke away from the United Party in protest and formed the *Gesuiwerde* (purified) National Party. Beinart states that the reasoning behind the split is not patently obvious, as Malan’s supporters benefitted from the economic growth experienced after the fusion of the NP and SAP. Malan drew his support from both young intellectuals and poor whites, disillusioned by the depression and the loss of community experienced as a result of urbanisation; and susceptible to the ideology of *Nationalisme as Lewensbeskouing* (nationalism as a way of life) and the superiority of the Afrikaner *volk*. In 1939 divisive opinions, regarding South African participation in the Second World War on the allied side, split the United Party Government. Although the *Herenigde* (reunited) National Party (incorporating the *Gesuiwerde* National Party) was founded the next year, the United Party, led by Jan Smuts as Prime Minister, remained at the helm until the 1948 election of the National Party to government. W Beinart *Twentieth Century South Africa* (2001) 117, 119-122 and 143.

<sup>219</sup> S 4(1), (2) of the Native Trust and Land Act.

<sup>220</sup> S 6.

administered by the Governor-General, who could delegate his powers and functions to the Minister, who had to act in consultation with the Native Affairs Commission.<sup>221</sup>

In 1936, the Welsh Commission described a prevalent view on the function of the “native reserves” as follows –

*“Daar kan die naturel sonder die belemmering van aanraking met blankes ‘langs sy eie lyne’ ontwikkel – en vermoedelik sy eie kultuur, regeeringsvorme en ekonomiese stelsel sonder enige belemmerende kleurslagbome ontwikkel. Hierdie naturellestaat sal mettertyd soos ‘n reservaat met sy eie primitiewe ongeskonde kultuur word – ‘n aantreklikheid vir oorsese toeriste en ‘n gelukkige studieterrein vir etnoloege en antropoloege.”<sup>222</sup>*

(Here black people will be able to presumably develop their own culture, government and economy in alignment with their own nature, without influence and interference from whites. Over time, these reserves will develop their own primitive culture and will become a tourist attraction and a valuable resource for ethnologists and anthropologists.)

The Commission concluded however, that the function of education was not to keep blacks in the reserves or to segregate those who were not in the reserves.<sup>223</sup> It stated that the purpose of education was to assist the black student to interpret and control his or her own circumstances.<sup>224</sup> The skill of “interpretation” was construed to mean an understanding of black indigenous tribal culture, as well as a comprehension of white culture pertaining to Christianity and western modes of government, administration and trade.<sup>225</sup> The skills to enable a student to control his or her environment included reading, writing and arithmetic, in addition to vocational training.<sup>226</sup> The Commission cautioned that –

*“[s]onder hierdie werktuie word hy tot minderwaardigheid en magteloosheid teenoor die ingewikkeldhede van die blanke beskawing gedwing.”<sup>227</sup>*

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<sup>221</sup> S 4(3).

<sup>222</sup> Union of South Africa *Interdepartmental Committee on Native Education (1935-1936)* (1936) 92.

<sup>223</sup> 92.

<sup>224</sup> 115.

<sup>225</sup> 115.

<sup>226</sup> 115.

<sup>227</sup> 115.

(without these means he will be compelled to inferiority and helplessness when faced with the complexities of white civilisation.)

It is estimated that the number of blacks living in urban areas trebled between 1921 and 1946, with the result that a quarter of the black population was urbanised by 1946.<sup>228</sup> The deteriorating condition of agriculture in the reserves contributed to the rapid urbanisation of blacks.<sup>229</sup> The large-scale migration coincided with severe poverty and the increased prevalence of informal settlements in urban areas.<sup>230</sup> The 1940's was beleaguered by industrial unrest as trade unionism (although not officially recognised) and the Black Nationalist movement grew in size and militancy.<sup>231</sup> The significant number of destitute and unskilled blacks in urban areas heightened the threat of political mobilisation and defiance of the government.<sup>232</sup>

In 1948, the De Villiers Commission reported –

“A number of witnesses, including responsible municipal officials contended, in evidence before this Commission, that juvenile delinquency among Natives was assuming alarming proportions, ..., and that compelling all Native children of school age to attend school would reduce the incidence of delinquency. It was argued that these children, being usefully occupied during part of the day, would acquire habits of orderliness and industry, and become amenable to discipline.”<sup>233</sup>

The advance of secondary industrialisation necessitated a semi-skilled labour force to work in the factories as machine operatives.<sup>234</sup> In 1943, industrial sector growth surpassed growth in the mining sector.<sup>235</sup> Yet, the limited education provided by the mission schools was inadequate to provide the required education to the majority of black youth.<sup>236</sup> In 1945, only 7.7% of the black population was receiving

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<sup>228</sup> Christi & Collins (1982) *Comparative Education* 65.

<sup>229</sup> J Hyslop *The Classroom Struggle: Policy and Resistance in South Africa 1940-1990* (1999) 1.

<sup>230</sup> 1.

<sup>231</sup> Christi & Collins (1982) *Comparative Education* 65.

<sup>232</sup> Hyslop *The Classroom Struggle* 2.

<sup>233</sup> 4.

<sup>234</sup> 1.

<sup>235</sup> Christi & Collins (1982) *Comparative Education* 65.

<sup>236</sup> Hyslop *The Classroom Struggle* 2.

formal education, of which merely 3.4% were being educated on post-primary level.<sup>237</sup>

Both the United Party government and the subsequent NP government supported the maintenance of an artificial labour hierarchy (outside of the homelands) where blacks were restricted from obtaining skills training at artisan level.<sup>238</sup> Yet, both administrations understood the need for efficient semi-skilled black labour to support the growing industrial sector.<sup>239</sup> The United Party's support base - primarily comprised of mining and manufacturing capital - lobbied for a more sympathetic stance toward urban-based black labour and the phasing out of the migrant labour system.<sup>240</sup> Conversely, the NP - that garnered its support largely from the white proletariat, *petit bourgeoisie* and farmers - supported the expansion of the homeland base and the associated migrant labour system.<sup>241</sup> The NP adopted the Bantu Education policy as an integral cornerstone in the successful implementation of the homeland system, within the greater framework of Apartheid.

In 1951 the Native Building Workers' Act 27 of 1951 ("Native Building Workers' Act") and the Training of Artisans Act 38 of 1951 (Training of Artisans Act") were enacted to address the demand for skilled labour in the economy.<sup>242</sup> The Native Building Workers' Act provided for "natives to be trained to perform skilled work of a nature and standard required for the construction of buildings for use by natives in native areas".<sup>243</sup> The Act listed designated trades that qualified as "skilled work" to be performed by black workers,<sup>244</sup> while making provision for white supervisors or instructors.<sup>245</sup> In this regard, Jones and Griffiths point out that although the Act acknowledged that black workers could be trained and employed as skilled workers, the prohibition on black workers working in white urban areas effectively prevented competition between skilled white and black workers.<sup>246</sup>

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<sup>237</sup> Christi & Collins (1982) *Comparative Education* 63.

<sup>238</sup> Hyslop *The Classroom Struggle* 6.

<sup>239</sup> 7.

<sup>240</sup> Christi & Collins (1982) *Comparative Education* 66.

<sup>241</sup> 66.

<sup>242</sup> RA Jones & HR Griffiths *Labour Legislation in South Africa* (1980) 84-86.

<sup>243</sup> S 10(1) of the Native Building Workers Act 27 of 1951.

<sup>244</sup> S 1(xvi).

<sup>245</sup> S 14(1)(b).

<sup>246</sup> Jones & Griffiths *Labour Legislation in South Africa* 86.

In addition, the Training of Artisans Act made “provision for the training of persons other than minors as artisans, where there is a shortage of artisans ...”.<sup>247</sup>

Although the act does not racially discriminate between black and white workers, there were no training facilities available for black trainees within South Africa.<sup>248</sup>

In the early 1950’s a “floating colour bar” was used to compensate for the lack of supply of available white labour to meet the industrial demand for semi-skilled labour.<sup>249</sup> This practice allowed black workers to be employed in semi-skilled positions on condition that white workers would be systematically upgraded “from unskilled to semi-skilled and semi-skilled to skilled posts”.<sup>250</sup>

Consequently, a labourer had to be educated at primary school level to be able to perform semi-skilled work. Black education up until the 1950’s was primarily limited to the education provided by the mission schools. These schools did not have the financial or logistical capacity to educate the majority of black youth and therefore a substantial number of blacks had not had access to the any formal education. In order to meet industrial demand for semi-skilled labour the government had to intervene and start to provide a minimum level of education to black youth that could sustain a continued supply of labour to industry. In 1949, the NP government<sup>251</sup> appointed the Eiselen Commission to formulate –

“the principles and aims of education for Natives as an independent race, in which their past and present, *their inherent racial qualities, their distinctive characteristics and aptitude, and their needs* (own emphasis) under everchanging social conditions are taken into consideration ... [; and]

[t]he extent to which the existing primary, secondary and vocational educational system for Natives and the training of Native teachers should be modified in respect of the content and form of syllabuses, in order to conform to the proposed principles and aims, *and to prepare Natives more effectively for their future occupations* (own emphasis).”<sup>252</sup>

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<sup>247</sup> Preamble of the Training of Artisans Act.

<sup>248</sup> Jones & Griffiths *Labour Legislation in South Africa* 88.

<sup>249</sup> Hyslop *The Classroom Struggle* 7.

<sup>250</sup> 7.

<sup>251</sup> 2. Hyslop notes at 5 that the United Party would have pursued similar educational policies had it won the 1948-election.

<sup>252</sup> Union of South Africa *Report of the Commission on Native Education 1949-1951* (1951) 7.

Therefore, the Bantu Education Act was partially drafted based on the recommendations made by the Eiselen Commission. Although the scope of Bantu Education policy<sup>253</sup> included the majority of urban black youth, the state still inadequately funded black education.<sup>254</sup> Parents were expected to contribute to the upkeep of the schools through participation in school administration (through service on school boards and committees) and the payment of school fees.

In contrast to the practice of the mission, schools who generally taught in English, African languages were used as a means of instruction in primary school.<sup>255</sup> Schooling at secondary level remained in English or Afrikaans, contrary to the notable recommendation of the Eiselen Commission that mother-tongue instruction should apply to the whole school system and that –

“[t]he Bantu child has the right to expect that the knowledge which is imparted to him should be understood by him.”<sup>256</sup>

The Eiselen Commission stated that African languages “are capable of defining and describing the most intricate nuances of abstract thought” and could be developed to deal with modern concepts.<sup>257</sup> In addition, it found “[n]o evidence of a decisive nature ... to show that as a group the Bantu could not benefit from education *or that their intelligence and aptitudes were of so special and peculiar a nature as to demand on these grounds a special type of education*”<sup>258</sup> (own emphasis), yet it found that “the general orientation of the [mission] school work is too academic ...”.<sup>259</sup> Moreover, when the Commission proposed a school system it

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<sup>253</sup> The Native Trust and Land Act defined a “native” as “[a]ny member of any aboriginal race or tribe of Africa”. The Eiselen Commission defined the word “bantu” as a means to refer in the collective to the “languages spoken by aboriginal tribes inhabiting ... Africa south of the equator”. The “native” or “bantu” designation was used interchangeably, but the NP government preferred to refer to black South Africans in the collective as “Bantu” – therefore Bantu Education referred to the education of all black South Africans.

<sup>254</sup> Hyslop *The Classroom Struggle* 51.

<sup>255</sup> 61-62.

<sup>256</sup> 62. Union of South Africa *Report of the Commission on Native Education 1949-1951* (1951) 15.

<sup>257</sup> 9.

<sup>258</sup> 13.

<sup>259</sup> 163.

reiterated the notion that black students needed a distinct type of education, which would serve a patent political and economic purpose, when it stated:

“[w]e envisage an educational plan which would ... prepare the young Bantu for effective participation in the development *we have in view* (own emphasis)<sup>260</sup>; and furthermore, that there is a “need for education as a means to increase the productivity of the Bantu ...”<sup>261</sup>

Because of the language barrier, many black students struggled to obtain the necessary vocabulary needed to understand concepts within the syllabus at secondary level, demoralising both teachers and students and on average necessitating an additional year of schooling to reach Junior Certificate level.<sup>262</sup> By hampering the accessibility of secondary education, the policy was systematically depriving industry of skilled employees.<sup>263</sup>

The 1950's was characterised by the introduction of the model of “grand Apartheid” into Afrikaner nationalist politics.<sup>264</sup> “Grand Apartheid” entailed the “the division of South Africa into a white South Africa and separate, independent ‘homelands’ for Africans”.<sup>265</sup> Consequently, the promulgation of the Population Registration Act 30 of 1950 (“Population Registration Act”) and Group Areas Act 41 of 1950 (“1950 Group Areas Act”) and the Bantu Authorities Act 68 of 1951 (“Bantu Authorities Act”) created the framework for the implementation of a policy of separate development according to racial lines.

The Population Registration Act directed the Director of Census to classify and subsequently record in the union population register –

“every person ... as a white person, a coloured person or a native, as the case may be, and every coloured person and every native ... according to the ethnic or other group to which he belongs.”<sup>266</sup>

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<sup>260</sup> 140.

<sup>261</sup> 160.

<sup>262</sup> Hyslop *The Classroom Struggle* 62. Union of South Africa *Report of the Commission on Native Education 1949-1951* (1951) 11.

<sup>263</sup> Hyslop *The Classroom Struggle* 103.

<sup>264</sup> Norval *Deconstructing Apartheid Discourse* 160.

<sup>265</sup> 160.

<sup>266</sup> S 5(1) of the Population Registration Act.

The 1950 Group Areas Act authorised the Governor-General to assign designated areas of land to each of the three population groups – namely the “white group”; the “native group”; and the “coloured group”.<sup>267</sup> It was at the Governor-General discretion to define a group according to ethnicity, language and culture and to declare who belonged to which group.<sup>268</sup> No group was allowed to occupy any land, immovable property or premises, which were assigned to another group, without a permit.<sup>269</sup>

The Bantu Authorities Act authorised the Governor-General to establish Bantu tribal authorities, regional authorities (consisting of two or more tribal authorities) and territorial authorities (consisting of two or more regional authorities) in respect of areas assigned to chiefs and headmen of tribes and communities.<sup>270</sup> A regional authority had the power “to provide for the establishment, maintenance, management and conduct of educational institutions, and the advancement of scholastic and other education”, subject to the direction of the Minister of Native Affairs.<sup>271</sup>

The Industrial Conciliation Act 36 of 1937 (“1937 Industrial Conciliation Act”) excluded from its definition of employee “a person, whose contract of service or labour is regulated by ... the Native Labour Regulation Act, 1911 ..., or by the Natives (Urban Areas) Act, 1923 ...”<sup>272</sup>; and thereby excluded black workers from collective bargaining. In 1953, the Native Labour (Settlements of Disputes) Act 48 of 1953 was enacted to create an alternative structure to collective bargaining which would allow for industrial negotiation between black workers and individual firms.<sup>273</sup> Nevertheless, any agreement reached between a work committee and an employer was not legally enforceable.<sup>274</sup> In addition, the act prohibited all strikes involving black workers.<sup>275</sup>

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<sup>267</sup> Ss 2(1), 3(1) of the 1950 Group Areas Act.

<sup>268</sup> S 2(2).

<sup>269</sup> S 4(1).

<sup>270</sup> S 2 of the Bantu Authorities Act.

<sup>271</sup> S 5(1)(b)(i).

<sup>272</sup> S 1 of the 1937 Industrial Conciliation Act.

<sup>273</sup> Jones & Griffiths *Labour Legislation in South Africa* 98.

<sup>274</sup> 98.

<sup>275</sup> 98.

The Industrial Conciliation Act 28 of 1956 (“1956 Industrial Conciliation Act”) was enacted to *inter alia* “provide safe-guards against inter-racial competition”.<sup>276</sup> The act authorised the Minister of Labour to take measures, which could include job reservation, “to safeguard the economic welfare of employees of any race in any undertaking, industry, trade or occupation”.<sup>277</sup> Specific provision was made for job reservation within the mining sector through the Mines and Works Act 27 of 1956 (“1956 Mines and Works Act”). The act allowed the Governor-General to regulate the issuing of certificates of competency, required for employment in particular occupations, according to race and furthermore to allocate and restrict the performance of specified classes of work to particular races.<sup>278</sup>

By 1958, when Hendrik Verwoerd became Prime Minister, Apartheid policy lacked clear direction.<sup>279</sup> Verwoerd propagated the notion of a “moral” Apartheid or Separate Development (as grand Apartheid policy became known as), as a means by which all ethnic groups in South Africa could gain self-determination.<sup>280</sup> Verwoerd argued –

“[E]very group would ... be able to exercise control over its own people ... it could offer an opportunity of developing equalities among groups. It could satisfy the desire for the recognition of human dignity.”<sup>281</sup>

Although Verwoerd continued to advocate a policy, which restricted black educational and occupational advancement akin to the “civilised labour” policy of the Pact Government, he argued that these restrictions should only be applicable to the white areas.<sup>282</sup> The implication being that black educational and professional development would not be prejudiced within the homelands. The Bantu Investment Corporation Act 34 of 1959 (“Bantu Investment Corporation Act”) constituted the

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<sup>276</sup> Preamble of the 1956 Industrial Conciliation Act.

<sup>277</sup> S 77(1), 6(a). “Natives” were specifically excluded from the definition of an “employee” and therefore black workers were again excluded from participation in collective bargaining as provided for by the act. S 1(1)(xi).

<sup>278</sup> S 12(1)(n), 12(2)(a-b) of the 1956 Mines and Works Act.

<sup>279</sup> Norval *Deconstructing Apartheid Discourse* 160.

<sup>280</sup> 160.

<sup>281</sup> 164.

<sup>282</sup> Hyslop *The Classroom Struggle* 60.

Bantu Investment Corporation of South Africa Limited “to promote and encourage the economic development of Bantu persons in the Bantu areas”.<sup>283</sup> The company’s only shareholder was the South African Native Trust and its capacity was limited to black people and black business within the “bantus areas” (as defined by the Native Trust and Land Act).<sup>284</sup> The objects of the company was *inter alia* –

“the provision of capital or means, technical and other assistance, the furnishing of expert and specialised advice, information and guidance;

the encouragement and extension of existing [and new] industrial, financial and other undertakings ...; [and]

the promotion of self-help in the economic sphere ...”.<sup>285</sup>

To achieve its objectives, the Bantu Investment Corporation could lend money with or without security; administer the issue of a loan, shares, stock or debentures of a black company; guarantee the contracts of any black person; act as a representative for a black person or black business; and act as manager of any “Bantu business, Bantu estate, Bantu trust, Bantu company, Bantu corporate body or Bantu fund”.<sup>286</sup> Consequently, the corporation retained almost complete control over how trade and industry was conducted within the reserves. Furthermore, the Corporation could lend any of its own funds (including funds received from deposits by blacks) to anybody anywhere – that is, white persons and businesses in white areas.<sup>287</sup>

#### **4 An attempt to decentralise black education and the resulting erosion of the black semi-skilled urban working class**

During the 1960’s the South African economy experienced vast economic growth, amid a global economic boom, which could finance extensive governmental investment in the Apartheid policy. The economic boom fuelled a renewed drive by

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<sup>283</sup> Ss 2 and 4 of the Bantu Investment Corporation Act.

<sup>284</sup> Ss 3 and 10.

<sup>285</sup> S 49(a-c),(f).

<sup>286</sup> S 5(a-b),(e-g).

<sup>287</sup> S 5(i), (k).

the government to limit the number of blacks living and working in urban areas by encouraging an industry shift from the urban areas to the homelands through the enactment of the Physical Planning Act 88 of 1967 (“Physical Planning Act”); beginning the process of granting the homelands self-government; and restricting further construction of housing and secondary schools in black urban areas.<sup>288</sup>

In 1964 a central labour bureau, in addition to regional, district and local labour bureaus, was created by the Bantu Labour Act 67 of 1964 (“Bantu Labour Act”) to regulate the supply of black workers within white areas.<sup>289</sup> The Physical Planning Act expanded the regulations applicable to industrial land by prohibiting further zoning of land for industrial purposes; the subdivision of industrial land; and the establishment of industrial townships, without the prior consent of the Minister of Planning.<sup>290</sup> In addition, the act authorised the minister to prescribe conditions related to labour and housing within new industrial zones.<sup>291</sup> The “Bantu Areas” were excluded from the application of the act<sup>292</sup> to serve as an incentive for investment in the homelands.

Shortly after South Africa became a republic in 1961, the Transkei Constitution Act 48 of 1963 (“Transkei Constitution Act”) declared the Transkei, in accordance with the separate development policy, as the first “self-governing territory within the Republic of South Africa”.<sup>293</sup> The South African government only regarded citizens of the Transkei, as South African citizens for the purposes of foreign affairs in terms of international law.<sup>294</sup> The act authorised the establishment of an executive government for the Transkei, consisting of a cabinet administering *inter alia* a Department of Education.<sup>295</sup> “Citizens” of the Transkei therefore lost their entitlement to receive state-funded education outside of their homeland.

The Group Areas Act 36 of 1966 (“1966 Group Areas Act”) prohibited a person from one of the designated groups to occupy the land or premises of another group,

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<sup>288</sup> Hyslop *The Classroom Struggle* 103-104. The implementation of these governmental initiatives was in part made possible by the economic boom experienced during the 1960’s.

<sup>289</sup> S 22 of the Bantu Labour Act. D de Villiers *A Guide to the Manpower Training Act* (1984) 139.

<sup>290</sup> S 2(1) of the Physical Planning Act.

<sup>291</sup> S 2(2).

<sup>292</sup> S 13.

<sup>293</sup> S 1 of the Transkei Constitution Act.

<sup>294</sup> S 7(3).

<sup>295</sup> S 10(1), First Schedule Part A.

without a permit. However an exception was allowed for “bona fide scholar[s] attending ... school[s] controlled or aided by the State”.<sup>296</sup>

Initially black communities had to fund half the building cost of urban higher, primary and secondary schools, with the other half funded by the state on a rand-for-rand basis.<sup>297</sup> This scheme however allowed black communities a degree of influence in the development of the education system and did not efficiently curb the expansion of black urban schools to the extent the government expected.<sup>298</sup>

In 1968 the funding policy was altered – a 20 cent levy would in future be taxed on each black urban household to fund school building and the funds would be solely administered by the white local authorities according to an official formula.<sup>299</sup> The formula prescribed a ceiling level of facilities that municipalities could provide, namely “12 lower primary classrooms for each 800 families; 16 higher primary classrooms for each 1600 families; and 10 junior secondary classrooms for each 3200 families”.<sup>300</sup> In addition, school boards were prohibited from raising funds from private industry to supplement state funding and donations above R50 had to be approved by the Department of Bantu Education.<sup>301</sup>

The development of secondary, technical and tertiary educational institutions for black students was progressively limited to the homelands.<sup>302</sup> During the 1960’s several applications for the development of new urban technical colleges were denied; numerous technical colleges were closed; and those technical colleges that remained were limited to the provision of training at Junior Certificate Level (meaning the first three years of secondary school).<sup>303</sup> Black students, whose families originated from rural areas and were without urban residence rights, were restricted to the education provided by rural schools.<sup>304</sup> This effectively ended the educational aspirations of many urban students, since many urban-based parents could not

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<sup>296</sup> S 17(1)(f) of the 1966 Group Areas Act.

<sup>297</sup> Hyslop *The Classroom Struggle* 104.

<sup>298</sup> 105.

<sup>299</sup> 105.

<sup>300</sup> 105.

<sup>301</sup> 107.

<sup>302</sup> 104.

<sup>303</sup> 106.

<sup>304</sup> 106.

afford the additional cost of sending their children away to the homelands to be educated beyond primary school level.<sup>305</sup>

Initially the main labour requirement, demanded by industry, was semi-skilled machine operators.<sup>306</sup> The demand of which could be supplied by a black urban working class – without post-primary education.<sup>307</sup> However, the systematic displacement of the black urban working class to the homelands endangered the semi-skilled labour supply.<sup>308</sup> In addition, as industrial needs advanced, the dearth of successful black students at secondary and tertiary level education caused a lack of available labour to employ as technicians and clerical staff.<sup>309</sup>

The counterproductive effect Bantu Education had on economic development was masked to a degree by the economic growth of the 1960's. As the economy started to slow towards a recession in the late 1960's, the destructive effect of the policy started to crystallise.

## **5 A growing defiance against Bantu Education during the 1970's**

The Bantu Homelands Citizenship Act 26 of 1970 (“Bantu Homelands Citizenship Act”) granted homeland “citizenship” to persons who were deemed to belong to a specific “territorial authority area” due to their ethnic classification.<sup>310</sup> The following year, the Bantu Homelands Constitution Act 21 of 1971 (“Bantu Homelands Constitution Act”) was promulgated and provided for the establishment of legislative assemblies and executive councils for each homeland.<sup>311</sup> The Act also made provision for the proclamation of a homeland as a self-governing territory.<sup>312</sup> The Bantu Laws Amendment Act 23 of 1972 (“Bantu Laws Amendment Act”) expanded the “released areas” allocated to the Bantu Trust.<sup>313</sup>

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<sup>305</sup> 116.

<sup>306</sup> 114.

<sup>307</sup> 114.

<sup>308</sup> 114.

<sup>309</sup> 114.

<sup>310</sup> S 3 of the Bantu Homelands Citizenship Act.

<sup>311</sup> Ss 1, 5 of the Bantu Homelands Constitution Act.

<sup>312</sup> S 26.

<sup>313</sup> S 3 of the Bantu Laws Amendment Act.

By the early 1970's, industry faced a serious shortage of semi-skilled and skilled employees to meet economic needs.<sup>314</sup> Afrikaner businessmen within the NP started to exert pressure on the government to change its policy stance on black post-primary education, as the policy was significantly hampering economic growth.<sup>315</sup> Employers recognised an opportunity to decrease wage costs by substituting expensive white skilled artisans with semi-skilled black labour – black labour which was already frequently used in practice to perform artisanal work.<sup>316</sup> However, in 1970, a bill to introduce extensive job reservation failed to gain the necessary support for approval.<sup>317</sup> Shortly after, restrictions imposed by the Physical Planning Act on the employment of black labour in urban areas were relaxed – consequently deregulating labour control in almost all industries.<sup>318</sup> In 1976, the Bantu Employees' In-Service Training Act 86 of 1976 ("Bantu Employees' In-Service Training Act") was enacted to provide for the promotion and regulation of the training of black employees in the industrial, commercial and agricultural sectors.<sup>319</sup> The act made provision for the establishment of public training centres and the approval of private training centres for black workers.<sup>320</sup>

In 1972, the government made significant revisions to the Bantu Education policy: firstly, the restriction on the expansion of secondary and technical schools in urban areas was lifted; and secondly, the funding of black education would no longer be curtailed by its linkage to black taxation, but would be drawn from state consolidated revenue funds.<sup>321</sup> These policy changes resulted in an influx of students into secondary schools. Black secondary school enrolment rose from 122 000 in 1970 to 389 000 in 1976.<sup>322</sup> Although state expenditure on black education had increased, the per capita expenditure ratio between white and black students was still highly

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<sup>314</sup> Hyslop *The Classroom Struggle* 135.

<sup>315</sup> 135.

<sup>316</sup> 141.

<sup>317</sup> 144.

<sup>318</sup> 144.

<sup>319</sup> Preamble and S 1(vii) of the Bantu Employees' In-Service Training Act.

<sup>320</sup> Preamble. S 1(vi) of the In-Service Training Act excluded black employees from the definition of "employee" and therefore the application of the act.

<sup>321</sup> Hyslop *The Classroom Struggle* 135, and 144.

<sup>322</sup> 151.

imbalanced at 15:1 in 1975 to 1976.<sup>323</sup> In addition, classroom overcrowding led to a decline in educational standards.<sup>324</sup>

The Department of Bantu Education required that urban secondary schools followed the “fifty-fifty rule” regarding the language of instruction used.<sup>325</sup> The rule dictated that half of the exam subjects should be taught in English and the other half in Afrikaans.<sup>326</sup> In practice however, very few teachers were fluent in Afrikaans and most schools that applied, were granted permission by the department to deviate from the rule.<sup>327</sup> In 1973, the Department of Bantu Education revised the language policy and schools now had to choose between English and Afrikaans and decide on one to use as language of instruction.<sup>328</sup> The revision was well-received.<sup>329</sup>

However in 1974, amid an internal political power struggle within the NP, the Department of Bantu Education reverted to the “fifty-fifty rule”.<sup>330</sup> However, this time the rule was strictly enforced and much fewer applications for exemptions were granted.<sup>331</sup> In addition, the Southern Transvaal region specifically required that mathematics and social studies should be taught in Afrikaans.<sup>332</sup> The policy reversion proved to be a fatal mistake – escalating frustration and tension over the policy came to the fore on 16 June 1976 in the form of a mass student protest in Soweto against the use of Afrikaans as teaching medium.<sup>333</sup> The protest was met by a violent response from the police.

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<sup>323</sup> 145.

<sup>324</sup> 151.

<sup>325</sup> Giliomee & Mbenga *New History of South Africa* 363.

<sup>326</sup> Hyslop *The Classroom Struggle* 158.

<sup>327</sup> 158.

<sup>328</sup> 159.

<sup>329</sup> 159.

<sup>330</sup> Giliomee & Mbenga *New History of South Africa* 363.

<sup>331</sup> 363.

<sup>332</sup> 363.

<sup>333</sup> 363. The Cillie Commission noted the following evidence given in regard to the cause of the Soweto uprising:

“We suspect that ... Afrikaans has tragically come to be seen as the language of the minority oppressor who enforces the pass laws upon the subject majority”.

## 6 “Apartheid is dead”<sup>334</sup> – the collapse of the Bantu Education system

The Soweto revolt set off a wave of student uprisings that spread throughout the country and could only be brought under control by the end of 1977.<sup>335</sup> This culminated in Afrikaans being removed as a compulsory language of instruction<sup>336</sup> and the offensive use of the word “bantu” being abandoned when the Department of Bantu Education was renamed, to the neutral-sounding, Department of Education and Training.<sup>337</sup> Yet, a proposal to create a single education ministry was rejected.<sup>338</sup> In 1979, the Education and Training Act repealed the Bantu Education Act and its subsequent amendments.<sup>339</sup> However, the Education and Training Act still maintained the segregationist model by providing specifically for the “control of education for Blacks”, with “black person” defined in terms of the Population Registration Act.<sup>340</sup>

In 1980, the government requested the Human Sciences Research Council (“HSRC”) to perform an in-depth investigation into education provision in South Africa, and make recommendations on *inter alia* –

“an education infrastructure to provide for the manpower requirements of the RSA ..., and a programme for making available education of the same quality for all population groups.”<sup>341</sup>

The following year, in 1981, the HSRC proposed four policy guidelines for the systematic implementation of “a programme to attain education of equal quality for all inhabitants” by “the reduction and elimination of demonstrable inequality in the

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<sup>334</sup> Piet Koornhof (1979) Washington in W Beinart *Twentieth Century South Africa* (2001) 245.

<sup>335</sup> Hyslop *The Classroom Struggle* 168.

<sup>336</sup> 168.

<sup>337</sup> S 5 of the Bantu Education Amendment Act 44 of 1954.

<sup>338</sup> Hyslop *The Classroom Struggle* 168 and 170.

<sup>339</sup> Education and Training Act Schedule.

<sup>340</sup> S 1.

<sup>341</sup> HSRC *Report of the Main Committee of the HSRC Investigation into Education: Provision of Education in the RSA* (1981) preface, 1.

provision of education available to members of the different population groups”.<sup>342</sup>

These policy guidelines were:

“The progressive provision of adequate means to enable every inhabitant to obtain the essential minimum of knowledge, skills and values, will be recognized and maintained as the highest priority in the programme for the provision of education.

No person will on educationally irrelevant grounds be debarred from available educational opportunities from which he might benefit.

In the formal organization of the education system in respect of matters such as buildings and equipment, pupil/teacher ratios and the qualifications of teaching staff, the provision of equal advantages for all pupils and students of a particular educationally relevant group will be recognized and maintained as a priority.

Where educationally irrelevant inequalities are indicated in the provision of education, educational reforms in the interests of justice, will be aimed at the elimination of such inequalities.”<sup>343</sup>

The Manpower Training Act 56 of 1981 (“Manpower Training Act”) was enacted in response to the findings of the Commission of Enquiry into Labour Legislation, under the chairmanship of Prof NE Wiehahn (“Wiehahn Report”); and the Commission of Enquiry into Legislation Affecting Manpower Utilisation (except legislation administered by the Departments of Labour and of Mines), under the chairmanship of Dr P Riekert (“Riekert report”), in the late 1970’s.<sup>344</sup> The act repealed *inter alia* the 1944 Apprenticeship Act, the Training of Artisans Act, the Bantu Employees’ In-Service Training Act and the In-Service Training Act 95 of 1979 (“In-Service Training Act”).<sup>345</sup>

At the time of implementation of the reports, 39.9% of urban black males had no form of education and 82% of those with an education had only primary education.<sup>346</sup> Only 0.3% of urban black males had any form of tertiary education.<sup>347</sup> The

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<sup>342</sup> 205 and 211-212.

<sup>343</sup> 212.

<sup>344</sup> De Villiers *A Guide to the Manpower Training Act* 1 and 3.

<sup>345</sup> Schedule: Laws Repealed of the Manpower Training Act.

<sup>346</sup> De Villiers *A Guide to the Manpower Training Act* 3.

<sup>347</sup> 3.

Manpower Training Act represented the so-called “opening up of South African society” which De Villiers explains as follows –

“This “opening up” refers to the provision that all classes of labour should have access to all facilities and opportunities, and the removal of all institutions, processes and situations that give any form of advantage or preferential treatment to any class of worker, irrespective of whether the advantage is linked to colour, sex, or ethnic affiliation. The emphasis in the new dispensation is therefore on justice, fairness and equality.”<sup>348</sup>

The Manpower Training Act prohibited any differentiation between “any class, group, section, or type of employers or employees” “on the basis of sex, race or colour.”<sup>349</sup> “Apprentice”, “employee” and “trainee” were all defined in a racially neutral manner.<sup>350</sup>

In the early 1980’s student rebellions broke out with renewed verve across the country – starting in the Eastern and Western Cape, and then spreading to the Southern Transvaal and Northern Free State.<sup>351</sup> In 1985 the government declared a state of emergency in regions of the Southern Transvaal, Northern Free State and Eastern Cape, as hundreds of thousands of students boycotted their schools; frequent, violent clashes with police became frequent; and students called for “Liberation before Education” and 1986 to be “The Year of No Schooling”.<sup>352</sup> In 1981, 250 578 black students reached Standard 8; by 1984 the number decreased to 109 968.<sup>353</sup> The following year, only 64 806 black students reached Standard 10.<sup>354</sup> In an attempt to quell the escalating unrest, a Ministry of National Education was created to co-ordinate the restructuring of black education along with a progressive increase in government expenditure on black education, but the government had lost its credibility among students.<sup>355</sup>

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<sup>348</sup> 4.

<sup>349</sup> S 47(1) of the Manpower Training Act.

<sup>350</sup> S 1(i), (xii), (xxxvi).

<sup>351</sup> Hyslop *The Classroom Struggle* 168 and 170-171

<sup>352</sup> 171-174.

<sup>353</sup> Republic of South Africa President’s Council *Report of the Committee for Social Affairs on the Youth of South Africa* (1987) 14.

<sup>354</sup> 14.

<sup>355</sup> Hyslop *The Classroom Struggle* 171-172.

In 1985 the National Education Crisis Committee (“NECC”) was formed by members of the Soweto Parents’ Crisis Committee, the National Education Union of South Africa and the African Teachers’ Association of South Africa.<sup>356</sup> The organisation campaigned a strategy that encouraged students to advocate for transformation from within the school system rather than from outside it – the approach was referred to as “People’s Education for People’s Power”.<sup>357</sup> By January 1987, the NECC had successfully encouraged the majority of striking students to return to school.<sup>358</sup>

The same year the NECC convinced students to return to school, the Committee for Economic Affairs on A Strategy for Employment Creation and Labour Intensive Development reported –

“[t]he employment potential of the economy is ... directly affected by the employability of the country’s labour force; [and] education and skills extend the usefulness of job seekers ...”;<sup>359</sup>

“the Committee stresses that equal education for all population groups is a requirement, and further also that the best and full use should be made of all educational facilities ... to eliminate the large backlogs experienced by Asians, Coloureds and Blacks in education.”<sup>360</sup>

## 7 Conclusion

During the nineteenth century, missionaries viewed the formal education of black children in South Africa as their moral and Christian duty. Yet, politically, black unskilled labour was perceived as an economic commodity. Governmental administration and funding of black education and training were perceived to serve little or no purpose within this political and economic context. By the end of the nineteenth century, the government began to show interest in a formal education provision, customised to black students, which would provide industry with a “value-

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<sup>356</sup> 173-174.

<sup>357</sup> 173-174.

<sup>358</sup> 174-175.

<sup>359</sup> Republic of South Africa President’s Council *Report of the Committee for Economic Affairs on A Strategy for Employment Creation and Labour Intensive Development* (1987) 159.

<sup>360</sup> 160.

added” black labourer – a subservient worker able to communicate in either Afrikaans or English, with basic numeracy and literacy skills, and a basic understanding of Western customs.

The appointment of the Eiselen Commission, subsequent to the 1948 election of the NP, was the first significant move by the government to prioritise black education provision as an integral part of governmental policy. The resulting Bantu Education policy was designed to support the implementation of Apartheid. Although the policy was intended to balance the maintenance of an artificial labour hierarchy with the growing demand in the industrial sector for efficient semi-skilled black labour, it ultimately had a detrimental effect on economic development and social stability. By the mid-1980’s, amid continued political unrest and an economic downturn, the government was forced to abandon the concept of differentiated education provision for blacks and whites.

Black education and training provision before 1990, was designed to serve patent political and economic objectives. Blacks were not regarded as equal citizens to whites and therefore were not seen as eligible to receive the same quality of education. In the aftermath of the 1922 Rand Revolt, a NP propaganda booklet noted that “the force of custom” was “more important than ... Government ... regulations”.<sup>361</sup> The history of black education is intertwined with the history of racist ideologies within South African society. As these ideologies gradually became dishevelled and impracticable within a modernised society and economy, it became increasingly difficult to justify substandard education provision to blacks.

Although black and white children are no longer instructed to attend separate schools and all children are taught from the same government curriculum, the scars of colonialism and apartheid have yet to fade more than two decades after the first democratic election. A recent study indicated that a substantial portion of learners are functionally illiterate and innumerate by the end of their primary school careers.<sup>362</sup> On average, only 40% of Grade 1 learners will progress to pass Grade 12.<sup>363</sup> Moreover, a grade 12 certificate does not significantly improve a learner’s

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<sup>361</sup> Federal Council of the National Party of South Africa *The Government and the Strike: Plain Answers to Simple Questions* (undated) 7.

<sup>362</sup> N Spaul “South Africa’s Education Crisis: The quality of education in South Africa 1994-2011” (October 2013) Report Commissioned by CDE 3 and 7.

<sup>363</sup> 3, 5 and 8.

economic prospect. Learners who pass Grade 12, but do not acquire further tertiary education, are highly probable to be unemployed.<sup>364</sup> Moreover, a grade 12 certificate in itself does not increase a learner's likelihood of obtaining employment.<sup>365</sup>

The level of educational attainment of a parent or parents has been proven to have a direct bearing on the performance of learners.<sup>366</sup> The better educated a parent or parents are, the better a child is likely to perform at school.<sup>367</sup> As a result, many South Africans are caught in a downward socio-economic spiral, as children of parents become parents themselves, without a quality educational foundation to develop their capabilities and uplift them from adverse circumstances. Given the challenges within the education system, appropriate skills development within the workplace can act as a valuable intervention to improve the socio-economic outlook of many within the South African labour force. In the next chapter, government policy post-1994 in regard to skills development will be discussed.

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<sup>364</sup> 3.

<sup>365</sup> 7 and 8.

<sup>366</sup> N Spaul "Poverty & privilege: Primary school inequality in South Africa" (2013) 33 *International Journal of Educational Development* 436 and 443.

<sup>367</sup> 436 and 443.

## **CHAPTER 4: THE LEGISLATIVE AND POLICY FRAMEWORK FOR PROMOTING SKILLS DEVELOPMENT OF THE EMPLOYED POST-1994**

“Only a comprehensive approach to harnessing the resources of our country can reverse the crisis created by apartheid. Only an all-round effort to harness the life experience, skills, energies and aspirations of the people can lay the basis for a new South Africa.”

- The Reconstruction and Development Programme: A Policy Framework (1994)

### **1 Introduction**

As discussed in Chapters 2 and 3, government policies pre-1994 artificially skewed the skills base of the South African workforce towards a minority higher skilled white segment and a majority lower skilled black segment. This skills differentiation has a fundamental impact on the socio-economic context in which South Africans live. A lack of appropriate and adaptable skills, intrinsically affects employability and career progression, which sets a domino effect into motion resulting in the deterioration of an individual’s potential to support and develop him- or herself, support his or her family, the community and the economy.

Although skills development within the workforce has received considerable attention concerning government policy, the skill deficit created by colonialism and Apartheid has proven difficult to improve significantly.

Government policy regarding skills development post-1994 has undergone four phases, namely: the transition towards an inclusive training framework by means of the Reconstruction and Development Programme (“RDP”); the implementation of the Growth, Employment and Redistribution (“GEAR”) strategy and the corresponding first National Skills Development Strategy (“NSDS”); the Accelerated and Shared Growth Initiative for South Africa and the second NSDS; and finally the current New Growth Path strategy and the third NSDS. The use of skills development as a means to advance employment equity has been a constant and key priority throughout all three of the NSDSs.

This chapter commences by introducing the economic policies and the policies specific to skills development that have been applicable since 1994. Included in this section is a discussion on the enactment and implementation of legislation specific to

skills development, in addition to the institutions that were established to implement the legislation. Subsequently, an evaluation of the focus of and challenges faced within each policy period will follow. The promotion of employment equity is closely linked with skills development. Adequate skills development is critical to mitigate the skill imbalance within the labour force caused by historically discriminatory legislation. The chapter concludes with a discussion of the legislation relevant to the promotion of employment equity through skills development.

## **2 Governmental policy regarding skills development, post-1994**

### **2.1 The Reconstruction and Development Programme**

The RDP was a socio-economic policy principally conceptualised by the African National Congress (“ANC”) in an effort to steer South Africa through the 1994 transition into a democratic society.<sup>368</sup> The RDP identified the development of human resources as one of its five key policy programmes.<sup>369</sup> Regarding a skills development strategy, the RDP proposed “an integrated system of education and training” able to “address the development of knowledge and skills that can be used to produce high-quality goods and services in such a way as to enable us to develop our cultures, our society and our economy”.<sup>370</sup> In respect of the implementation of a skills development strategy, the RDP proposed the establishment of “a single national ministry responsible for education and training, to set national policies, norms and standards throughout the system, to undertake planning and provide budgetary resources for all aspects of education and training, and to manage higher education and training development”.<sup>371</sup> The RDP listed as a central goal for reconstruction and development the creation of a “strong, dynamic and balanced

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<sup>368</sup> P O’Malley “The Reconstruction and Development Programme (RDP): A Policy Framework” (undated) *Nelson Mandela Centre of Memory* <<http://www.nelsonmandela.org/omalley/index.php/site/q/03lv02039/04lv02103/05lv02120/06lv02126.htm>> (accessed 07-10-2012).

<sup>369</sup> O’Malley “The Reconstruction and Development Programme (RDP): A Policy Framework” (undated) *Nelson Mandela Centre of Memory*.

<sup>370</sup> O’Malley “The Reconstruction and Development Programme (RDP): A Policy Framework” (undated) *Nelson Mandela Centre of Memory*.

<sup>371</sup> O’Malley “The Reconstruction and Development Programme (RDP): A Policy Framework” (undated) *Nelson Mandela Centre of Memory*.

economy which will ... develop the human resource capacity of all South Africans so the economy achieves high skills and wages ...".<sup>372</sup>

The RDP policy's aim was to facilitate the transition from a racially and economically divided South Africa towards an integrated society, supported by a labour force able to sustain an economy that would serve all. New institutions had to be established and legislation enacted to enable inclusive policies to be implemented. Notably, in 1995, the LRA was enacted to protect labour rights, and in respect of training standards, the South African Qualifications Authority Act 58 of 1995 ("SAQA Act") was enacted in order to develop the National Qualifications Framework ("NQF").

The RDP laid the foundation for an envisioned integrated society and economy. However, it was clear with the introduction of the GEAR strategy in 1996 that government policy had undergone a shift regarding the economic context in which skills development had to be facilitated. Adelzadah argues that pressure from international financial institutions<sup>373</sup> in conjunction with a concern to maintain investor confidence, were key factors that influenced the departure from the RDP toward the more conservative neo-liberal GEAR.<sup>374</sup> GEAR prioritised the reduction of the fiscal deficit by diminishing government expenditure.<sup>375</sup> Adelzadah cautioned that a reduction in government spending would have serious implications for the achievement of the objectives of the RDP<sup>376</sup>:

"Given the country's need for radical improvements in social services and infrastructural development, the stated objective of the macroeconomic strategy to reduce government spending implies a shift to reliance on the private sector for the delivery of services. The experience of many countries indicates that in a market economy, the private sector generally fails to deliver public goods and social infrastructure adequately. Thus, reducing government expenditure diminishes the chances of RDP delivery, with adverse

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<sup>372</sup> O'Malley "The Reconstruction and Development Programme (RDP): A Policy Framework" (undated) *Nelson Mandela Centre of Memory*.

<sup>373</sup> A Adelzadeh "From the RDP to GEAR: The gradual embracing of neo-liberalism in economic policy Transformation" (1996) 31 *Transformation* 66-95 67.

<sup>374</sup> 92.

<sup>375</sup> 75.

<sup>376</sup> 75.

consequences for the long-term well-being and productivity of the majority of South Africans.”<sup>377</sup>

## 2.2 The Growth, Employment and Redistribution strategy

### 2.2.1 Introduction

In 1996, the government introduced GEAR: A Macroeconomic Strategy. In respect of skills development, reform was aimed at improving productivity by encouraging the upgrading of skills across all skill levels in both the formal and informal sectors.<sup>378</sup> However, the long-term strategy for skills development had to be balanced with the short-term need to create labour-intensive employment opportunities for the unemployed – a substantial number of which were unskilled and had little or no work experience.<sup>379</sup> South Africa had inherited a segmented labour market from colonialism and Apartheid, in which a substantial portion of black workers were either unskilled or low skilled.<sup>380</sup> As a result, expanding the low-skills formal economy to absorb unemployed workers was politically controversial. The concern was that generations of black workers could become trapped in the low-skills segment without any viable routes out of such work.<sup>381</sup> This risk could however be mitigated by providing training in conjunction with development and investment in the public non-traded sector.<sup>382</sup> The government stated its commitment to institute programmes to enhance the skill levels within governmental departments and agencies, with the aim of promoting efficient service delivery.<sup>383</sup> However, the policy’s overall success relied heavily on private investment into human resources and stated that “[i]ndustrial

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<sup>377</sup> 78.

<sup>378</sup> The GEAR strategy proposed two broad areas of reform regarding labour market policy. The reforms were designed to complement the greater macroeconomic strategy of enhanced openness and global competitiveness. The first was aimed at instituting a policy of “regulated flexibility”, whereby an increased number of workers would have access to regulatory protection and stability through “flexible collective bargaining structures, variable application of employment standards and voice regulation”. Department of Finance *Growth Employment and Redistribution* (undated) 18.

<sup>379</sup> 19.

<sup>380</sup> A Kraak, H Lauder, P Brown & D Ashton *Debating high skills and joined-up policy* (2006) 37.

<sup>381</sup> 37.

<sup>382</sup> 40.

<sup>383</sup> Department of Finance *Growth Employment and Redistribution* 20.

training ... [had to] remain mainly the responsibility of employers”.<sup>384</sup> To encourage and coordinate private investment into human resource development, the SDA and the Skills Development Levies Act 9 of 1999 (“SDLA”) were enacted.

The SDA introduced three new entities that would be primarily responsible for the development of skills and training, namely the National Skills Fund (“NSF”), the National Skills Authority (“NSA”) and the Sector Education and Training Authorities (“SETAs”).

The SDLA obligates employers, with an annual payroll exceeding R500 000, to pay 1% of the total amount of remuneration paid to employees as a skills development levy to the South African Revenue Service (“SARS”).<sup>385</sup> The income received from the levies is distributed to the SETAs and the NSF.<sup>386</sup>

### 2 2 2 *The National Skills Fund and National Skills Authority*

The NSF is intended to enable the state “to drive key skills strategies”; as well as address the skills development and training of the unemployed who are excluded from the ambit of the SETA system.<sup>387</sup> The fund receives its income from 20% of the levies paid by employers in terms of the SDLA.<sup>388</sup> The NSA plays an advisory role to the minister based on national priorities, the Human Resource Development Strategy

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<sup>384</sup> 20.

<sup>385</sup> SARS *Skills Development Levy (SDL) (2017) SARS* <<http://www.sars.gov.za/TaxTypes/SDL/Pages/default.aspx>> (accessed 09-08-2017).

<sup>386</sup> S 14 of the SDA.

<sup>387</sup> Department of Higher Education and Training “Framework for the National Skills Development Strategy 2011/12 – 2015/16” (29-04-2010) *DHET* <[http://www.inseta.org.za/downloads/framework\\_for\\_NSDFS\\_3.pdf](http://www.inseta.org.za/downloads/framework_for_NSDFS_3.pdf)> (accessed 08-10-2017). The Professional, Vocational, Technical and Academic Learning (“PIVOTAL”) skills development programmes are targeted at the pre-employed. The PIVOTAL programme generally combine course work at universities, universities of technology and colleges with structured learning at work, through work-integrated learning, apprenticeships, learnerships and internships, in order to prepare graduates for a wide range of challenges they may encounter in their chosen occupation. PIVOTAL programmes are distinguishable from skills development programmes as the former “does not include an academic qualification that, linked with workplace experience qualifies an individual to enter a particular trade or profession”.

<sup>388</sup> Department of Higher Education and Training “National Skills Fund (NSF)” (undated) *DHET* <<http://www.dhet.gov.za/SitePages/NSF.aspx>> (accessed 17-09-2017).

for South Africa (“HRD–SA”) and the objectives of the Department of Higher Education and Training (“DHET”).<sup>389</sup>

### 2 2 3 Sector Skills and Training Authorities

SETAs have been established for each economic sector as part of the implementation of the NSDS.<sup>390</sup> Each SETA coordinates skills development in its own particular sector.<sup>391</sup> The SETAs’ functions are to ensure that employees acquire the skills needed by employers; to enhance the skills of those already employed; to ensure that training takes place according to agreed standards within a national framework and subject to quality control; and to ensure that skills obtained are recognised not only within a certain company or province, but in the larger marketplace.<sup>392</sup> The SETAs must develop and implement five-year Sector Skills Plans (“SSPs”) from the Workplace Skills Plans (“WSPs”)<sup>393</sup> submitted by firms in each sector.<sup>394</sup> SSPs provide the framework from which decisions regarding priorities for skills development and identification of critical skills are made and identify the constraints to the effective utilisation and development of skills in relation to the objectives of the NSDS.<sup>395</sup>

The SDA uses an incentive approach to encourage employers to engage with SETAs in developing training within the workplace. Employers who have submitted their WSPs and annual training reports can claim back 20% of their levies paid as mandatory grants.<sup>396</sup> Employers can qualify for additional discretionary grants if they

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<sup>389</sup> *Draft NSA Work Plan 2010-11* Tabled at the NSA Meeting of 16 April 2010.

<sup>390</sup> Department of Labour “Useful Document: Sector Education and Training Authorities” (undated) *Department of Labour* <<http://www.labour.gov.za/downloads/documents/useful-documents/skills-development-act/Useful%20Document%20-%20NSF%20-%20Sector%20Education%20and%20Training%20Authorities.pdf>> (accessed 27-03-2008).

<sup>391</sup> Department of Labour “Useful Document: SETAs” (undated) *Department of Labour*.

<sup>392</sup> Department of Labour “Useful Document: SETAs” (undated) *Department of Labour*.

<sup>393</sup> A Workplace Skills Plan outlines the skills needed in a firm to achieve growth and describes how training will be delivered to develop these skills. Benefits of the Skills Strategy for Employers (11-11-2003) <<http://www.labour.gov.za>> (accessed 27-03-2008).

<sup>394</sup> Department of Labour *National Skills Development Strategy Implementation Report*.

<sup>395</sup> Department of Labour “Useful Document: SETAs” (undated) *Department of Labour*.

<sup>396</sup> Department of Higher Education and Training “Guidelines on the implementation of SETA grant regulations” (undated) *DHET* 10 <<http://www.dhet.gov.za/Public%20FET%20Colleges/Planning%20->

implement training programmes that advance the relevant SETAs, SSP or national priorities.<sup>397</sup> Consequently, employers are not legally obligated to engage with SETAs or to provide training according to the requirements set by the SETAs. Employers, who are obligated to pay the levy, can opt to forgo the grants if they choose not to comply with the SETA requirements. As a result, the benefits of SETA accredited training are limited to those who are employed at employers, who not only contribute financially, but also engage and comply with the SETAs requirements. Similarly, it follows that employees in companies that fall below the qualification threshold for levy payment, are also generally excluded from the benefits of participation in SETA accredited training.

### 2.3 Accelerated Shared Growth Initiative of South Africa and the Joint Initiative on Priority Skills Acquisition

Streak argues that although GEAR increased economic growth, it resulted in the increase of inequality.<sup>398</sup> The premise of the strategy was that economic growth would trigger employment creation and wage growth, which on its part would counter inequality.<sup>399</sup> However, employment had contracted significantly during the GEAR policy period.<sup>400</sup> In addition, GEAR relied to a large degree on private sector investment to stimulate employment creation.<sup>401</sup> A substantial number of the South African workforce is low skilled and the type of growth generated through private sector investment did not produce jobs for the low-skilled segment.<sup>402</sup>

In 2005, the Accelerated and Shared Growth Initiative of South Africa (“AsgiSA”) identified a “[s]hortage of suitably skilled labour amplified by the impact of apartheid

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[%20Additional%20Resource%20Documents/Guidelines%20on%20SETA%20Grant%20regulations%202015%20approved.pdf](#)> (accessed 25-06-2017).

<sup>397</sup> Department of Higher Education and Training “Guidelines on the implementation of SETA grant regulations” (undated) *DHET* 13.

<sup>398</sup> JC Streak “The Gear legacy: did Gear fail or move South Africa forward in development?” (2004) 21 *Development Southern Africa* 271-288, 273.

<sup>399</sup> 273.

<sup>400</sup> 276.

<sup>401</sup> 280.

<sup>402</sup> 281.

spatial patterns on the cost of labour” as one of the six binding constraints on “accelerated and shared growth”.<sup>403</sup>

AsgiSA proposed a number of medium- and long-term interventions to address the skills shortage, which included amongst others:

- strengthening the educational foundation provided in public schooling;
- increasing the number of black graduates;
- expanding the tertiary institutions that produce specialist skills such as engineering; and
- expanding and improving work-based training programmes , especially in regard to scarce skills.<sup>404</sup>

AsgiSA made provision for the establishment of a new institution called the Joint Initiative on Priority Skills Acquisition (“Jipsa”).<sup>405</sup> In 2006, Jipsa was launched, with a joint task team comprising representatives from government, organised business and union leaders<sup>406</sup>, as an *ad hoc* measure until a revised national human resource strategy could be finalised<sup>407</sup>. Jipsa identified key skills shortages (referred to as “priority skills”); and provided advice on the alignment of the training and skills development efforts of the public and private sectors with the objectives of AsgiSA, in order to more efficiently address the shortage of suitably skilled labour inhibiting economic growth.<sup>408</sup>

In 2010, the Jipsa secretariat was incorporated into the Human Resource Development Support Unit, hosted by the DHET, after a period of parallel operation with the second Human Resources Development Strategy for South Africa (“HRD-SA II”), which was launched in 2009.<sup>409</sup>

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<sup>403</sup> The Presidency *Accelerated and Shared Growth Initiative – South Africa (ASGISA): A Summary* (2006) 5.

<sup>404</sup> 9-11.

<sup>405</sup> 10.

<sup>406</sup> 10.

<sup>407</sup> L Ensor “Cabinet approves formalised skills plan to replace Jipsa” *Business Day* (28-08-2008).

<sup>408</sup> The Presidency *Accelerated and Shared Growth Initiative* 10 and 16.

<sup>409</sup> Government Communications *Statement on the Cabinet Meeting of 3 September 2008* (04-09-2008) <<http://www.dfa.gov.za/docs/2008/cabinet0904.htm>> (accessed 07-10-2012).

## 2.4 The Human Resources Development Strategy for South Africa and the National Skills Development Strategy

### 2.4.1 *The Human Resources Development Strategy for South Africa*

The Human Resources Development Strategy for South Africa (“HRD-SA”) aims to align and coordinate the human resource development strategies of government, civil society sectors, organised business, labour, professional bodies and research communities.<sup>410</sup> The first HRD-SA (“HRD-SA I”) was launched in 2001 under the title of “Human Resources Development Strategy for South Africa: A nation at work for a better life for all”.<sup>411</sup> The second HRD-SA, “Human Resources Strategy for South Africa 2010-2030” (“HRD-SA II), was approved in 2009.<sup>412</sup>

HRD-SA I had five strategic objectives. The first two objectives related to education provision; the third related to private sector investment in training; the fourth involved the promotion of employment growth within emerging economic sectors; and the last objective dealt with data capturing and analysis, in addition to the allocation of responsibility for the implementation of the strategy.<sup>413</sup> In respect of private sector investment the strategy aims to align the number of private sector firms that prepare and implement WSPs with the aims of the NSDS; to promote learnerships for scarce skill programmes and to support the small business sector.<sup>414</sup>

HRD-SA II notes that a lack of stakeholder input was a significant flaw in the drafting of HRD-SA I.<sup>415</sup> In an attempt to address this concern, business and labour

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<sup>410</sup> B Nzimande *Budget Vote speech* (25-03-2010).

<sup>411</sup> Department of Higher Education and Training “Human Resource Development Strategy for South Africa (HRD-SA) 2010-2030” (22-02-2010) *DHET 7* <[http://www.gov.za/sites/www.gov.za/files/DoE\\_HRDS-SA\\_22022010.pdf](http://www.gov.za/sites/www.gov.za/files/DoE_HRDS-SA_22022010.pdf)>.

<sup>412</sup> 1.

<sup>413</sup> Department of Higher Education “Human Resource Development Strategy for South Africa: A Better Life for All” (undated) *Department of Higher Education 12* <<http://www.dhet.gov.za/Reports%20Doc%20Library/Human%20Resource%20Development%20Strategy%20for%20South%20Africa.pdf>> (accessed 09-8-2017).

<sup>414</sup> Department of Higher Education “Human Resource Development Strategy for South Africa” *Department of Higher Education 16*.

<sup>415</sup> Department of Higher Education and Training “Human Resource Development Strategy for South Africa (HRD-SA) 2010-2030” (22-02-2010) *DHET 5*.

were consulted through NEDLAC and JIPSA during the drafting of HRD-SA II.<sup>416</sup> HRD-SA II emphasises that a collective attempt from all stakeholders is critical to the successful implementation of the strategy.<sup>417</sup> To further reiterate the importance of a cooperative effort from all stakeholders, the policy is often versed using “we”, with stated “commitment[s]” linked to various strategic priorities.<sup>418</sup> Concerning skills development the strategy underscores the importance of learnerships as a means to support new entrants into the labour market; equitable representation in training; and that broad access to training opportunities should be made accessible to the labour force.<sup>419</sup> Although skills development as a means of support for small businesses was a priority of HRD-SA I, it is not an express concern of HRD-SA II.

#### *2 4 2 The National Skills Development Strategy*

The NSDS is a subordinate strategy to the HRD-SA<sup>420</sup> and is “the overarching strategic instrument for skills development”<sup>421</sup> which provides the basis from which the NSF discharges its responsibilities and the SETAs develop SSPs.<sup>422</sup> The Department of Labour presented the first NSDS, with the title of “Skills for Productive Citizenship for All” (“NSDS I”) in February 2001, in accordance with the mandate given by the SDA.<sup>423</sup> NSDS I was applicable from April 2001 until March 2005.

NSDS I had five primary objectives, namely:

- “to develop a culture of high quality lifelong learning;

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<sup>416</sup> Department of Higher Education and Training “Human Resource Development Strategy for South Africa (HRD-SA) 2010-2030” (22-02-2010) *DHET* 5-6.

<sup>417</sup> Department of Higher Education and Training “Human Resource Development Strategy for South Africa (HRD-SA) 2010-2030” (22-02-2010) *DHET* 5-6.

<sup>418</sup> Department of Higher Education and Training “Human Resource Development Strategy for South Africa (HRD-SA) 2010-2030” (22-02-2010) *DHET* 20-22.

<sup>419</sup> Department of Higher Education and Training “Human Resource Development Strategy for South Africa (HRD-SA) 2010-2030” (22-02-2010) *DHET* 18-19.

<sup>420</sup> B Nzimande *Budget Vote speech* (25-03-2010).

<sup>421</sup> Department of Higher Education and Training *Framework for the National Skills Development Strategy 2011/12 – 2015/16*.

<sup>422</sup> Department of Higher Education and Training *Framework for the National Skills Development Strategy 2011/12 – 2015/16*.

<sup>423</sup> Department of Labour *The National Skills Development Strategy (April 2001 – March 2005): Skills for Productive Citizenship for All*.

- to foster skills development in the formal economy for productivity and employability;
- to stimulate and support skills development in small businesses;
- to promote skills development for employability and sustainable livelihoods through social development initiatives; [and]
- to assist new entrants into employment”.<sup>424</sup>

Each objective was linked to qualitative and quantitative success.<sup>425</sup> General racial and gender equity targets, applicable to all the objectives, were also set.<sup>426</sup>

In March 2005, the second NSDS (“NSDS II”) was introduced. Like NSDS I, NSDS II listed five objectives, linked to qualitative and quantitative targets.<sup>427</sup> The objectives were as follow –

- “prioritising and communicating critical skills for sustainable growth, development and equity;
- promoting and accelerating quality training for all in the workplace;
- promoting employability and sustainable livelihoods through skills development;
- assisting designated groups, including new entrants to participate in accredited work, integrated learning and work-based programmes to acquire critical skills to enter the labour market and self-employment; [and]
- improving the quality and relevance of provision.”<sup>428</sup>

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<sup>424</sup> Department of Labour *The National Skills Development Strategy (April 2001 – March 2005)*.

<sup>425</sup> Department of Labour *The National Skills Development Strategy (April 2001 – March 2005)*.

<sup>426</sup> Department of Labour *The National Skills Development Strategy (April 2001 – March 2005)*.

<sup>427</sup> Department of Labour *The National Skills Development Strategy (1 April 2005 – 31 March 2010)* 3-21.

<sup>428</sup> Department of Labour *The National Skills Development Strategy (1 April 2005 – 31 March 2010)* 3-21.

Although NSDS 1 and NSDS II had broadly similar objectives, NSDS II introduced the concept of “critical skills” into the NSDS. Accordingly, the Departments of Labour and Education in collaboration with JIPSA developed the National Master Scarce and Critical Skills List for South Africa and published it in 2006.<sup>429</sup> Role players such as SETAs, employers, and the Departments of Home Affairs and Trade and Industry used the list to prioritise the acquisition and development of scarce and critical skills.<sup>430</sup> The National Master Scarce and Critical Skills List was formulated from the consolidation of the WSPs<sup>431</sup> submitted by employers and the five-yearly SSPs developed by the SETAs.<sup>432</sup>

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<sup>429</sup> Department of Labour “National Skills Development Strategy Implementation Report 1 April 2006-31” (March 2007) *Department of Labour* <<http://www.labour.gov.za/documents/annual-reports>> (accessed 14-03-2008).

<sup>430</sup> Department of Labour “National Skills Development Strategy Implementation Report” (March 2007) *Department of Labour*. “Scarce and critical skills”, as referred to in the National Master Scarce and Critical Skills List, is defined as an absolute or relative demand, current or in future, for skilled, qualified and experienced people to fill particular roles, professions, occupations or specialisations in the labour market. Within the concept of scarcity, the distinction is made between absolute and relative scarcity. Absolute scarcity refers to where suitably skilled people are not available in the labour market. Examples include a new or emerging market where there are few people with the requisite skills or when sectors are unable to implement planned growth strategies and experience productivity, service delivery and quality problems directly attributable to a lack of skilled people. Relative scarcity refers to where suitably skilled people are available but do not meet other employment criteria, for example where according to employment equity considerations there are few if any candidates with the requisite skills from specific groups available to meet the skills requirements of firms and enterprises. “Scarce skills” are measured in terms of occupation or qualification. “Critical skill” as a concept refers to the demand for practical competence, for example problem solving, literacy and mathematical skills; foundational competence ie a person’s ability to understand what he or she and others are doing and why; and reflexive competence ie a person’s ability to learn from his or her actions and the ability to adapt to changes and unforeseen circumstances. Department of Labour “National Scarce Skills List: Foreword” (2008) *Department of Labour* <[http://www.labour.gov.za/downloads/documents/useful-documents/skills-development-act/Scarce%20skills%202008\\_foreword.pdf](http://www.labour.gov.za/downloads/documents/useful-documents/skills-development-act/Scarce%20skills%202008_foreword.pdf)> (accessed 14-03-2008).

<sup>431</sup> A Workplace Skills Plan outlines the skills needed in a firm to achieve growth and describes how training will be delivered to develop these skills. Department of Labour “Benefits of the Skills Strategy for Employers” (11-11-2003) <<http://www.labour.gov.za>> (accessed 27-03-2008).

<sup>432</sup> Department of Labour *National Skills Development Strategy Implementation Report*.

On 1 November 2009, the responsibility for skills development was transferred from the Department of Labour to the DHET.<sup>433</sup> After the transition, the university, vocational college and skills development systems have been administered as sub-systems under a single post-school education and training system by the DHET<sup>434</sup>. The department placed its focus on five key areas that in its view needed to be addressed to ensure that skills development contributes meaningfully to society as a whole, namely – class, race, gender, HIV/AIDS and disability.<sup>435</sup> Thereby emphasising that skills development is essential to the furtherance of equality.

In 2011, the National Skills Development Strategy III (“NSDS III”) was issued by the DHET and will be in force until March 2018.<sup>436</sup> NSDS III presents a shift from a few broadly defined objectives, linked to numerical success indicators, towards a more expansive identification of broad problem areas, linked to priorities and goals rather than quantitative targets. The only exception being the numerical target set for the training and qualifying of artisans, namely 10 000 per year.<sup>437</sup>

The success of the strategy will be measured against qualitative priorities that focus on racial, gender and socio-economic equality, with particular attention to the support of youth under the age of 35.<sup>438</sup> In addition to priorities, NSDS III also sets various strategic goals, each of which have attached to them outcomes and outputs that will form the basis for monitoring and evaluation of the strategy’s implementation and results. These are amongst others, promoting access to work-based training; addressing the low level of skills of youth under the age of 35; and supporting small enterprises.<sup>439</sup>

## 2.5 The New Growth Path

According to the 2010 New Growth Path strategy, macro and micro economic policies must maximise the creation of decent work opportunities and support more

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<sup>433</sup> B Nzimande *Statement on the transfer of the Skills Development & Training Sector to the Department of Higher Education and Training in Parliament* (04-11-2009).

<sup>434</sup> B Nzimande *Budget Vote Speech: In Memory of the fallen heroes and heroines of the Seven Day War* (25-03-2010).

<sup>435</sup> Nzimande *Budget Vote Speech* (25-03-2010).

<sup>436</sup> R 925 in GG 39263 of 06-10-2015.

<sup>437</sup> Department of Higher Education and Training *National Skills Development III* 15.

<sup>438</sup> 8-9.

<sup>439</sup> 11-23.

labour-absorbing activities as a means to fight inequality and advance broad-based development.<sup>440</sup> The New Growth Path aims to “[i]mprove skills in every job”, a simplification of the aims of both RDP and GEAR.<sup>441</sup> The main indicators of success will be – jobs (the number and quality of jobs created); growth (the rate, labour intensity and composition of economic growth); equity (lower income inequality and poverty); and environmental outcomes.<sup>442</sup> Although NSDS III focuses on priorities and goals rather than numerical targets, the New Growth Path sets quantitative targets to meet skill shortfalls in important economic sectors. The New Growth Path emphasises the integral role of SETAs in the successful implementation of skills development initiatives.<sup>443</sup>

Labour-absorbing jobs tend to be low-skilled jobs. As a substantial section of the South African labour force is low skilled, it follows that an increase in labour-absorbing jobs will alleviate unemployment. The promotion of labour-absorbing jobs is however seemingly at odds with the encouragement of skills development. It also seems contrary to the promotion of employment equity in the workplace, as employment equity is primarily concerned with advancing the career progression of those, who were placed in a disadvantaged position pre-1994, within the higher echelons of the labour market.<sup>444</sup> This focus on low-skilled jobs and the contradictions it poses concerning skills development emphasises the scale of the challenge to improve skills within the South African labour force, as a balance has to be struck between acknowledging the limitations of the status quo and future ambitions. It also stresses the inefficiency of the current skills development framework to markedly improve the skill profile of the labour force, that two decades since the promulgation of the SDA, official policy still needs to put emphasis on the promotion of low-skilled jobs. As the economy becomes more capital rather than labour intensive;<sup>445</sup> and the sectors that primarily provide low-skilled jobs (such as

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<sup>440</sup> South African Government “The New Growth Path: The Framework” (22-11-2010) *South African Government* 6 <<http://www.info.gov.za/view/DownloadFileAction?id=135748>> (accessed 11-02-2011).

<sup>441</sup> *The New Growth Path: The Framework* 20.

<sup>442</sup> 6.

<sup>443</sup> 20.

<sup>444</sup> See the discussion in Chapter 5 in regard to which workers benefit from employment equity initiatives.

<sup>445</sup> Streak (2004) *Development Southern Africa* 276, 281.

mining and agriculture) consistently shrink,<sup>446</sup> this focus on low skill job creation becomes increasingly untenable in the attempt to develop the skills of the majority of South Africans in a manner that would significantly improve inequality.

## 2.6 The National Development Plan

The National Development Plan: 2030 (“NDP”) was launched in 2012 entitled “Our future – make it work”. The NDP is a long-term strategic development plan for South Africa drafted by the National Planning Commission. After two decades of national skills development policies aimed at improving the skills of the South African labour force, South Africa still faces significant skills shortages that impeded on social and economic stability and development. The strategy identifies the improvement of the quality of skills development as critical to the achievement of its objectives.<sup>447</sup>

The NDP promotes the achievement of “a minimum standard of living which can be progressively realised<sup>448</sup>” in accordance with the capabilities approach put forward by the National Planning Commission. This approach is explained as “the key capabilities that individuals need to live the life that they desire”. The NDP further states that “[o]f these capabilities, education and skills, and the opportunity to work are the elements where South Africa most needs to make progress”.<sup>449</sup> Over the longer term, the plan underscores the need to improve the skills base in order to enhance competitiveness and provide a comparative advantage within the global economy.<sup>450</sup> In 2015, an international survey reported that 31% of employers in South Africa reported concern regarding skill shortages.<sup>451</sup> In 2016, the World Economic Forum ranked South Africa as 101<sup>st</sup> out of 130 countries “for its ease of

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<sup>446</sup> Tralac “News: South Africa: Economy shrinks in the fourth quarter of 2016” (07-03-2017) *Tralac* <<https://www.tralac.org/news/article/11363-south-africa-economy-shrinks-in-the-fourth-quarter-of-2016.html>> (accessed 16-09-2017).

<sup>447</sup> National Planning Commission “National Development Plan: 2030, Our Future – make it work, Executive Summary” (undated) *South African Government* 17 <<https://www.gov.za/sites/www.gov.za/files/Executive%20Summary-NDP%202030%20-%20Our%20future%20-%20make%20it%20work.pdf>> (accessed 08-10-2017).

<sup>448</sup> 38.

<sup>449</sup> National Planning Commission “National Development Plan” (undated) *South African Government* 28.

<sup>450</sup> National Planning Commission “National Development Plan” (undated) *South African Government* 21.

<sup>451</sup> ManpowerGroup *Talent Shortage Survey* (2015) 28.

finding skilled employees".<sup>452</sup> It is therefore of critical importance to develop a skill set within the labour force that will enable South Africa to attract investment and remain competitive within the global economy.

### **3 GEAR and NSDS I (1996 – 2004): the creation of a legal framework to facilitate a transition towards an inclusive skills development and training system**

Although RDP recognised the need to develop the national skills base in an inclusive manner,<sup>453</sup> legislation to enable skills development policy was only enacted after the introduction of GEAR in 1996. In 1998 the SDA and in 1999 the SDLA, were enacted in accordance with the objective of GEAR to improve productivity through skills development. NSDS I represented the introductory period of skills development as a national policy.

The policy was broadly defined, but put specific emphasis on the support of training within small businesses and youth entering the labour market through learnerships. At the end of 2005, a survey was conducted to ascertain why a large number (73% in 2005) of levy-paying small businesses did not claim grants.<sup>454</sup> The reasons stated were a lack of awareness in respect of the manner grants could be claimed, coupled with the perceived complexity of applications, and the cost of claiming outweighing the benefit of receiving the grant.<sup>455</sup> However, 99% of respondents to the survey indicated that training of their workers improved productivity and profitability.<sup>456</sup> At the end of the NSDS I policy period, the target for learnership agreements registered was significantly exceeded and a survey showed that more than 70% of learners were employed after completion of the learnership.<sup>457</sup>

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<sup>452</sup> World Economic Forum *The Human Capital Report: Insight Report* (2016) 7.

<sup>453</sup> The RDP proposal, regarding the creation of a single ministry to oversee all higher education and training, would only be implemented 15 years after its inception, when the skills development and training function was integrated into the DHET in 2009.

<sup>454</sup> Department of Labour *National Skills Development Strategy Implementation Report* (1 April 2004 – 31 March 2005) 27 and 36.

<sup>455</sup> 36.

<sup>456</sup> 37.

<sup>457</sup> 53 and 47.

#### 4 AsgiSA and NSDS II (2005 - 2010): an attempt to steer skills development towards economic and social relevance

In 2006, Jipsa identified high-profile priority skills areas deemed for immediate attention.<sup>458</sup> Priority skills were defined as “an absolute or relative demand (current or in future) for skilled, qualified and experienced people to fill particular roles/professions, occupations or specialisations in the labour market”.<sup>459</sup> In this regard, the National Master Scarce and Critical Skills List for South Africa was compiled in accordance with the focus on specific required skills. The focus on specific scarce and critical skills during NSDS II was a departure from the broad scope of NSDS I and signalled a policy refinement. The support of small businesses was no longer an express objective of the NSDS, however “self-employment” was still said to be promoted.<sup>460</sup>

AsgiSA and NSDS II both prioritised the expansion and improvement of work-based learnership programmes, especially in respect of scarce and critical skills. However, overall participation in learnerships registered with SETAs decreased by 19% from 2005 to 2009.<sup>461</sup> An HSRC analysis indicated an overall shift towards registration at lower NQF levels.<sup>462</sup> The most popular NQF level learners registered for in 2005 was level 4; by 2009 the most common NQF level learners registered for was level 2.<sup>463</sup> More than 70% of all SETAs registered a majority of black participants in their respective learnership programmes, with blacks accounting for more than 85% of overall registered learners during NSDS II.<sup>464</sup> However, more than 80% of blacks registered for learnerships at an intermediary or low skill level.<sup>465</sup>

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<sup>458</sup> Jipsa *Annual Report 2006* 9.

<sup>459</sup> 9.

<sup>460</sup> Department of Labour *National Skills Development Strategy Implementation Report* (1 April 2008 – 31 March 2009) 3.

<sup>461</sup> D Janse van Rensburg, M Visser, A Wildschut, J Roodt & G Kruss *A Technical Report on Learnership and Apprenticeship Population Databases in South Africa: Patterns and Shifts in Skills Formation* (2012) 15.

<sup>462</sup> 19.

<sup>463</sup> 19.

<sup>464</sup> 40.

<sup>465</sup> 40.

Although AsgiSA aimed to improve the number of black graduates, the number of learnership completions remained very low.<sup>466</sup>

Research shows that during the implementation period of NSDS I “there was a clear trend towards the promotion of learnerships as a means of occupational certification in order to address high youth unemployment”, culminating in 79% of learners registered in 2005 being unemployed at time of registration.<sup>467</sup> However, during the NSDS II implementation period the trend reversed, with only 56% of newly registered learners being new entrants into the labour market.<sup>468</sup>

Jipsa identified artisanal skills as one of the five high-profile priority skills areas in need of immediate attention. Artisan training is conducted through an apprenticeship. The Skills Development Amendment Act 37 of 2008 (“Skills Development Amendment Act”) defines an apprenticeship as a “learnership in respect of a listed trade, and includes a trade test in respect of that trade”.<sup>469</sup> Apprenticeship registrations and completions in the priority artisanal skills areas (as determined by Jipsa) comprised respectively 78% and 77% of total apprenticeships for the duration of NSDS II.<sup>470</sup> It seems therefore that although the total number of learnership registrations for new entrants decreased during the period NSDS II was applicable, Jipsa was successful in the prioritisation of artisanal skills in respect of apprenticeship training.

At the conclusion of NSDS II, learners who registered for apprenticeships were predominantly black (72% of registrations), unemployed, and approximately 26 years old.<sup>471</sup> NSDS II focused particularly on the need to assist black youth in entering the labour market. It would seem that in this regard, the strategy was successful if youth is defined as persons between the ages of 15 and 34 years. However, the HSRC

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<sup>466</sup> 41.

<sup>467</sup> 20.

<sup>468</sup> 20. The average age of participants enrolled in a learnership was 28 years; and the average age of learners who completed their qualification was 30 years. 40-41.

<sup>469</sup> S 1(a) of the Skills Development Amendment Act.

<sup>470</sup> 48.

<sup>471</sup> Janse van Rensburg et al *A Technical Report on Learnership and Apprenticeship Population Databases in South Africa* 51-52, 64. White apprentices represented a larger proportion (22%) relative to their presence in the total population. The Energy Sector Education and Training Authority (“ESETA”), a specific priority area identified by Jipsa, was the only SETA where white learners composed the majority of registrations. 52-53.

noted the average age of 26 at registration as unexpected, “given that the concept of an apprenticeship would traditionally imply a ‘minor’ learning the trade under a ‘master’ tradesmen”.<sup>472</sup> It therefore raises a number of questions: what did the learners do after they left the education system until the age of 26; and why did they first enrol at the age of 26? Although there can be no simple answer, the mature age of registration has to be viewed within the context of widespread youth unemployment and the factors that contribute to it, namely, amongst others, below expected economic and job growth and an inefficient and underperforming public education system that leaves students ill equipped to utilise opportunities in the labour market.

The National Scarce Skills List (“NSSL”) used a wide definition of scarcity, incorporating both quantitative and qualitative elements. The numbers given could therefore not easily be corroborated or substantiated, which affected the credibility of the list. A study conducted by CDE suggests that since SETAs themselves define what is “scarce”, there is a tendency to inflate the category by nominating skills as scarce because they are within SETAs’ capacity to address as priorities rather than because they are in fact scarce skills.<sup>473</sup>

## **5 The New Growth Path and NSDS III (2010 - ): the challenges going forward**

### **5.1 Introduction**

In 2014, Statistics South Africa (“StatsSA”) released an analysis of data concerning the outcomes of skills development for the period between 1994 and 2014. StatsSA had found that the skilled proportion of the South African workforce had increased marginally from 21% to 25%; the semi-skilled proportion had decreased from 47% to 46%; and the low-skilled proportion had decreased slightly from 32% to 29%.<sup>474</sup> The skill level proportions of the black workforce saw a similar level of improvement: the skilled segment increased from 15% to 18%; the semi-

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<sup>472</sup> 52.

<sup>473</sup> CDE *The Skills Revolution* 9.

<sup>474</sup> StatsSA “Employment, unemployment, skills and economic growth: An exploration of household survey evidence on skills development and unemployment between 1994 and 2014” (undated) StatsSA <[https://www.statssa.gov.za/presentation/Stats%20SA%20presentation%20on%20skills%20and%20unemployment\\_16%20September.pdf](https://www.statssa.gov.za/presentation/Stats%20SA%20presentation%20on%20skills%20and%20unemployment_16%20September.pdf)> (accessed 08-07-2017).

skilled segment increased from 42% to 48%; and the low-skilled segment decreased from 43% to 34%.<sup>475</sup> Despite the government's continued stated commitment to improving the prospects of black youth, the percentage of workers in skilled occupations decreased for black labour aged between 25 and 34 years.<sup>476</sup> The minimal improvement of the skill level of the black workforce is especially stark when compared to the white workforce: the skilled segment of the white workforce improved from 42% to 61%; the semi-skilled segment decreased from 55% to 36% and the low-skilled segment remained constant at 3%.<sup>477</sup>

Given that the white segment of the labour force had a considerably higher skill base than the black segment in 1994, the upward progression in the white segment from semi-skilled to high skilled and the black segment from low-skilled to semi-skilled could be expected. However, it is debatable whether the slight improvement in the skill level of the black labour force is acceptable given the comprehensive policy framework that has been instituted to improve employment equity. Paradoxically, the improvement in the skill level of the white segment of the labour force could also in part be accredited to the institution of employment equity, as white labour had to upskill in order to find employment in a more competitive environment.

The absence of sufficient and reliable data<sup>478</sup> makes it problematic to measure the efficiency of the NSDS and its supporting institutions, such as the SETAs. It has been noted that the scale and nature of the data needed is such that only the government can feasibly gather it.<sup>479</sup> Although the government has acknowledged the need for improved data, a LMIP report noted that the government has still not

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<sup>475</sup> StatsSA "Employment, unemployment, skills and economic growth: An exploration of household survey evidence on skills development and unemployment between 1994 and 2014" (undated) *StatsSA*.

<sup>476</sup> StatsSA "Employment, unemployment, skills and economic growth: An exploration of household survey evidence on skills development and unemployment between 1994 and 2014" (undated) *StatsSA*.

<sup>477</sup> StatsSA "Employment, unemployment, skills and economic growth: An exploration of household survey evidence on skills development and unemployment between 1994 and 2014" (undated) *StatsSA*.

<sup>478</sup> Archer *Key Issues in the Assessment of Seta Performance in South Africa's National Skills Development Strategy* 6.

<sup>479</sup> 10.

been able to put the necessary mechanisms in place to compile the information needed.<sup>480</sup>

The dearth of data also compromises the ability to forecast skill requirements at sectoral and national level meaningfully, as a Southern Africa Labour - Development Research Unit (“SALDRU”) report elaborates:

“[T]here is no justification for the present emphasis on skills *planning* at sectoral and national levels. Planning in the sense of skill needs projections play at best a minor role in raising the volume of investment in training, in the matching of skills targets to vacancies on the shop floor, as well as within the production arena as a whole. This circumscribed role for planning applies equally to anticipating the bottlenecks said to result from skill shortages. By way of illustration, even the most successful Setas do not claim that their *sector skills plans* contribute to higher volumes of investment in training. Similarly, attempts to identify skill shortages at the national level emphasised by politicians and bureaucrats appear to play no visible role in assisting investment decision-taking in skills training.”<sup>481</sup>

## 5.2 Improving the low skills base of the employed, particularly those employed within small businesses

Research reveals that small businesses offer an alternative to unemployment and that 69.2% of persons involved in non-value added tax (“VAT”) registered businesses have no other source of income.<sup>482</sup> The NDP envisions that by 2030 “90% of jobs will be created in small and expanding firms”.<sup>483</sup> The New Growth Path underscores the importance of supporting the growth of small businesses.<sup>484</sup> Both NSDS I and NSDS III specifically mention the support of small businesses as a

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<sup>480</sup> Reddy et al *Skills Supply and Demand in South Africa* 10,14.

<sup>481</sup> Archer *Key Issues in the Assessment of Seta Performance in South Africa’s National Skills Development Strategy* 25.

<sup>482</sup> StatsSA *Survey of Employers and the Self-employed* (2013) 11.

<sup>483</sup> National Planning Commission *National Development Plan* (2011) 93.

<sup>484</sup> Department of Economic Development “The New Growth Path: Framework” (undated) *Department of Economic Development* 48  
<<http://www.economic.gov.za/communications/publications/new-growth-path-series>>  
(accessed 24-06-2017).

goal.<sup>485</sup> In alignment with the aims of the NDP and the New Growth Path, the DHET has stated that the SETAs should cultivate a climate for job creation.<sup>486</sup>

A 2016 research report, published by the Labour Market Intelligence Partnership (“LMIP”), and funded by the DHET, concluded as follows:

“The skills planning focus is not only on a small number of skilled people in the workplace, but also on the unemployed, the youth, the low- skilled, the marginalised, and *those in vulnerable forms of employment, including the self-employed* (own emphasis added). The dilemma facing policy makers is how to respond to these diverse sets of development and occupational pathways, and decide how resources should be targeted for inclusive skills development.<sup>487</sup>”

Although the NSF has allocated a substantial amount of R84 million in funding to the SEDA Basic Entrepreneurial Skills Development Programme in 2011 to *inter alia* “provide skills development to 2000 Emerging Entrepreneurs in all the provinces”,<sup>488</sup> the number of small businesses the incentive aims to impact is negligible when compared to the total number of 667 433 small, medium and micro-enterprise (“SMMEs”) that operate within the formal sector alone.<sup>489</sup>

Although the DHET emphasises that the development of small businesses is “a critical element in the economic growth and development of South Africa”,<sup>490</sup> it states that during the 2015/2016 reporting period, only 8420 small businesses were supported through SETAs.<sup>491</sup>

The 2016 LMIP report repeatedly emphasised the importance of acknowledging the low level of the skill base of the labour force and that the private sector, in collaboration with the SETAs, have a shared responsibility to improve the skill base. The report made the following recommendations:

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<sup>485</sup> Department of Higher Education and Training *National Skills Development III* 19.

<sup>486</sup> Briefing by the Department of Higher Education and Training on the overview & mandate of the National Skills Authority on 17-02-2010.

<sup>487</sup> Reddy et al *Skills Supply and Demand in South Africa* 10.

<sup>488</sup> Department of Higher Education and Training *NSDS III Progress Report (2011-2013)* 14.

<sup>489</sup> BER *The Small, Medium and Micro Enterprise Sector of South Africa* Research Note no 1 (2016) Executive Summary.

<sup>490</sup> Department of Higher Education and Training *NSDS III Progress Report (2011-2013)* 73.

<sup>491</sup> Department of Higher Education and Training *National Skills Development Implementation Report (2011-2016)* (2017) 200.

“The high number of workers with less than a grade 12 certificate calls for ... [the provision of] structured workplace training opportunities to improve workers’ skill levels to meet the challenges of the changing workplace conditions”<sup>492</sup>;

“Given that close to half of the employed do not have grade 12 ... certificates, workplaces should be offering general training to raise the education and skill level, as well as specialised training related to particular work tasks”<sup>493</sup>;

“Given that half of the labour force has less than a grade 12 certificate, workplace-supported education and training would be an appropriate mechanism to enhance skills levels”.<sup>494</sup>

An improvement to the skill base will significantly affect those within small businesses as 71.5 % of persons running non-VAT registered businesses did not complete secondary education.<sup>495</sup> Although small businesses are an integral part of the South African economy and are expected to play a significant role in future job creation, they only receive minor support from SETAs in regard to the upskilling of their, often low-skilled, workforce. Mechanisms should be sought to more efficiently integrate small businesses within the workings of the SETA framework. If small businesses remain on the margin of government policy regarding skills development, a significant opportunity to improve the skill base of the South African workforce will be underutilised.

### 5.3 Improving the prospects of young entrants into the labour market

The National Skills Accord contains commitments made by various stakeholders to achieve the targets set out by the New Growth Path. In regard to youth development, the Accord states that “[a]ll parties support efforts to ensuring that the education and skills base of the young people not in employment, education or training is raised through ... training programmes”.<sup>496</sup> NSDS III aims to facilitate “a national strategy ... to provide all young people leaving school with an opportunity to

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<sup>492</sup> Reddy et al *Skills Supply and Demand in South Africa* 43.

<sup>493</sup> 54.

<sup>494</sup> 56.

<sup>495</sup> StatsSA *Survey of Employers and the Self-employed* (2013) 9. The StatsSA Survey classifies a small business as a business that is not registered for VAT.

<sup>496</sup> Department of Economic Development *New Growth Path: Accord 1 National Skills Accord* (undated) 7.

engage in training or work experience”.<sup>497</sup> However, the 2013 progress report on NSDS III stated that: “[t]he inability of Stakeholders to provide Workplace-based Experience for learners is an indictment on both Government departments and Industry.”<sup>498</sup>

In 2016 there were 10 406 817 persons between the age of 15-24 in South Africa,<sup>499</sup> of which 30.6 % are classified as “Not in Employment, Education or Training” (“NEET”).<sup>500</sup> During the 2015/2016 reporting period, 64 025 unemployed learners were certified in SETA accredited learnerships, internships and skills programmes.<sup>501</sup> Therefore, in 2016, less than 1 % of youth, between the ages of 15-24, completed SETA accredited training – although this was a very meagre accomplishment, this outcome exceeded the official SETA targets.<sup>502</sup> The responsibility for the low levels of enrolment should however not be placed solely at the door of the SETAs. It should be kept in mind that the SETAs were not primarily established as a means of unemployment – and especially youth unemployment – mitigation or as an education provider, but as an institution to monitor and support the training of employees. Therefore these statistics may reflect more on employer attitudes toward training and the state of the economy, than on the efficiency of the SETAs per se, although the management of the SETAs have been widely criticised.<sup>503</sup>

The low completion rate can in part be ascribed to the financial constraints that learners enrolled in unpaid learnerships face.<sup>504</sup> In order to mitigate the problem of unemployed youth, the Employment Tax Incentive Act 26 of 2013 aims to encourage employers to employ young work seekers. Commencing 1 January 2014, employers can claim a tax benefit in respect of employees between 18 and 29 years old.<sup>505</sup> The tax benefit is calculated on the amount of remuneration paid to the employee.

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<sup>497</sup> Department of Higher Education and Training *National Skills Development Implementation Report (2011-2016)* 112.

<sup>498</sup> Department of Higher Education and Training *NSDS III Progress Report (2011-2013)* 16.

<sup>499</sup> StatsSA *Community Survey 2016: Statistical Release* 19.

<sup>500</sup> StatsSA *Quarterly Labour Force Survey Quarter 3:2016* 10.

<sup>501</sup> 126, 133 and 138.

<sup>502</sup> 126, 133 and 138.

<sup>503</sup> See the text to part 5 4 2 below.

<sup>504</sup> Department of Higher Education and Training *NSDS III Progress Report (2011-2013)* 16.

<sup>505</sup> S 6 of the Employment Tax Incentive Act.

Consequently, this incentive aims to encourage employers to employ youth under the age of 30 years old in paid jobs, rather than unpaid jobs that offer experience without remuneration. Therefore, the incentive should open up opportunities for young entrants into the market to gain work experience through jobs that they would not be able to afford to take up without compensation.

The mitigation of youth unemployment remains a significant challenge. The number of youth reached through SETAs is not sufficient to have a consequential impact on the upskilling of youth in South Africa. Government policy should consider how more students could be supported to access on-the-job SETA-accredited training opportunities by increasing the number of available learnerships and enhancing the readiness of the youth to register and complete their learnerships.

#### 5.4 The inefficient functioning of the SETAs

During a recent parliamentary committee meeting, it was stated that “industry no longer accepts responsibility for future skills needs in that industry. It is now government's problem and government has failed. All the industry players do now is just pay their levy.”<sup>506</sup>

Inefficiency of SETAs is partly caused by a lack of employer cooperation.<sup>507</sup> Although the active involvement of employers is critically important for the efficient functioning of the SETAs, employers are not obliged to engage with the SETAs beyond the payment of skills development levies. Research has suggested that employers are hesitant to invest in employees through training and risk those employees moving to another employer to utilise their enhanced earning capacity.<sup>508</sup> A SALDRU paper noted that information regarding the intentions and investment decisions of employers are difficult to obtain without the “willing collaboration of decision-takers in the sector”.<sup>509</sup> The lack of information not only hampers the

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<sup>506</sup> Department of Higher Education and Training “New SETA Landscape” (08-03-2017) PMG <<https://pmg.org.za/committee-meeting/24121/>> (accessed 17-09-2017).

<sup>507</sup> A Kraak *Sector skills councils in international perspective: in search of best practice: Final Report* Research Report commissioned by the Technical Task Team of the Human Resources Development Council (“HRDC”), the Presidency (16-09-2013) 5.

<sup>508</sup> Archer *Key Issues in the Assessment of Seta Performance in South Africa's National Skills Development Strategy* 7.

<sup>509</sup> 13.

assessment of the performance of the SETAs in fulfilling the objectives of the NSDS, but it inhibits the functioning of the SETAs in itself.

Mismanagement and inefficiency has damaged the SETAs' credibility.<sup>510</sup> In 2015, the DHET stated:

“There is a general sentiment that SETAs are not assisting in addressing the skills shortages that are holding back economic growth and which act as a barrier to inward investment and job creation. National Strategies ... are being held back and industries that want to expand and employ more people cannot do so because of serious skills gaps and the SETAs are viewed as failing to do what is needed to address these gaps.”<sup>511</sup>

That the SETAs continue to struggle with a lack of employer support and mismanagement was reiterated during a 2017 parliamentary session:

“There were several problems within the Skills Education and Training authority, particularly that corruption was rife, patronage was a way of doing business, levy payers are sceptical about the use of funds and the fact that they are often raided by the Department to pay, the Skills Education and Training Authority underspend, and long periods of time were spent going into skills identification which has proven to be ineffective.”<sup>512</sup>

Regardless of the challenges that the SETA system has faced, it remains one of the main mechanisms through which skills development policy is enabled. Consequently, if the lack of employer cooperation and mismanagement of SETAs are not addressed effectively, the progress of skills development in South Africa will be severely hampered.

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<sup>510</sup> B Phakathi “Trio of SETAs remain under administration” (07-04-2017) *Business Live* <<https://www.businesslive.co.za/bd/national/education/2017-04-07-trio-of-setas-remain-under-administration/>> (accessed 25-06-2017). B Phakathi “Protector targets suspected fraud at AgriSETA” (28-04-2017) *Business Live* <<https://www.businesslive.co.za/bd/national/2017-04-28-protector-targets-suspected-fraud-at-agriseta/>> (accessed 25-06-2017).

<sup>511</sup> Department of Higher Education and Training “Guidelines on the implementation of SETA grant regulations” (undated) *DHET* 4.

<sup>512</sup> Department of Higher Education and Training “New SETA Landscape” (08-03-2017) *PMG*.

## 5.5 List of Occupations in High Demand

In 2014, the DHET issued a “List of Occupations in High Demand” (“LOHD”).<sup>513</sup> The list was updated in January 2016 and will be reviewed every two years.<sup>514</sup> The LOHD uses the term “occupations in high demand” instead of the term “scarce skills” used by the Department of Labour.<sup>515</sup> The change in designation from scarce skills occupations to “occupations in high demand” does not seem to signify a change in policy outlook, but seems rather to provide an administrative distinction between the list used by the DHET and the “critical skills list” used for critical skills work visa evaluation by the Department of Home Affairs.<sup>516</sup> In compiling the list, the DHET consulted and invited input from a broad spectrum of stakeholders, across government departments and industry.<sup>517</sup> The LOHD does not attach numbers to the occupations listed as the NSSL did. As stated above, the numbers given previously represented a conflation of different qualitative factors and very limited quantitative data and therefore had a limited contribution to make to the attainment of policy objectives.

## 6 The promotion of employment equity through skills development

In the light of the disadvantage regarding skills development suffered by the greatest majority of South Africans because of Bantu Education,<sup>518</sup> the SDA expressly aims “to improve the employment prospects of persons previously disadvantaged by unfair discrimination and to redress those disadvantages through training and education.”

The promotion of employment equity through skills development formed an integral part of both NSDS I and NSDS II, and both NSDS I and NSDS II incorporated equity targets within their objectives. Although NSDS III recognises that

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<sup>513</sup> GN 863 in GG 38174 of 04-11-2014.

<sup>514</sup> GN 34 in GG 39604 of 19-01-2016.

<sup>515</sup> GN 863 in GG 38174 of 04-11-2014) 4.

<sup>516</sup> Department of Home Affairs “Critical Skills Visa” (2017) *Department of Home Affairs* <<http://www.home-affairs.gov.za:8087/index.php/scarce-skills-work-quotas>> (accessed 16-09-2017).

<sup>517</sup> GN 863 in GG 38174 of 04-11-2014 10-12.

<sup>518</sup> See discussion in ch 3 above.

skills development should advance employment equity, the strategy no longer focuses on the achievement of numerical equity targets as success indicators.

The EEA further provides as part of affirmative action measures that employers should ensure the equitable representation of suitably qualified people from designated groups in all occupational categories and levels of the workplace.<sup>519</sup> The SDA arguably plays a key role in rectifying the imbalances in workplace representation caused by past discrimination in skills development of especially black persons. Employers need suitably qualified persons to appoint to ensure equality in the workplace in terms of the EEA. If the SDA does not contribute to the pool of suitably qualified people, this aim will not be reached.

Although the SDA makes provision for a national standard of good practice in skills development to be established in order to achieve the purposes of the Act, no standard of good practice has been developed specifically for skills development. Reference is however made to skills development within the Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices.

In terms of this Code<sup>520</sup> skills development of employees is a key driver for the achievement of employment equity objectives, by contributing to a critical pool of candidates from designated groups from which employers could recruit. The Code<sup>521</sup> states that the SDA positions skills development of designated groups as an affirmative action measure; and that development and training are key strategies to enable designated groups to advance and to reach equitable representation in all occupational categories and levels.

Another relevant code is the Code of Good Practice issued under section 9(5) of the Broad-Based Black Economic Empowerment Act 53 of 2003. This Code offers businesses an incentive to advance employment equity through skills development by awarding points for training on the Broad Based Black Economic Empowerment (“B-BBEE”) scorecard. To qualify for points, the training provided must be compliant

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<sup>519</sup> S 15(2)(d)(i) of the EEA.

<sup>520</sup> Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices GN 1358 in GG 27866 of 04-08-2005.

<sup>521</sup> Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices GN 1358 in GG 27866 of 04-08-2005.

with SETA requirements.<sup>522</sup> The Preferential Procurement Regulations stipulate the criteria that organs of state should take into account when advancing a designated group through the allocation of tenders based on preferential procurement. The criteria delineate how preference is calculated based on the points accumulated in terms of the B-BEE Scorecard.

Data, collected from employment equity reports submitted by employers, indicates that there is a strong correlation between the level of skills development that employees receive and their likelihood of promotion (with the exception of employees at the top and senior management levels).<sup>523</sup> Consequently, in general, skills development is an effective means to advance the career progression of those who receive it and therefore it is a meaningful intervention to advance employment equity.

Contrary to expectation, data suggests that at senior and top management level there is not a consistent progression from skills development undertaken to promotion.<sup>524</sup> By way of illustration, in the 2016-2017 year of assessment, although , black males underwent 65.8% of skills development at top management level, black males only represented 13% of promotions.<sup>525</sup> In contrast, 17% of skills development at top management level was allocated to white males, but white males received 37.7% of total promotions.<sup>526</sup> Although these statistics have to be viewed within the context of the level of race representation at this occupational level, the extreme level of divergence remains significant. This disjointedness is also evident at senior management level, although to a lesser degree than at top management level.<sup>527</sup>

In May 2015, the Department of Trade and Industry (“DTI”) issued new, more stringent, score criteria on the B-BBEE Scorecard. In contrast to the former

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<sup>522</sup> Code of Good Practice issued under section 9(5) of the Broad-Based Black Economic Empowerment Act 53 of 2003 Statement 400: The Recognition of Skills Development and Organisational Transformation Contributions to Black Economic Empowerment.

<sup>523</sup> Commission for Employment Equity *Annual Report 2016-2017* Comparison of data from Tables 10, 15, 20, 25, 30 and 35 16-38. The report does not provide definitions for the term “top management” and “senior management”.

<sup>524</sup> Commission for Employment Equity *Annual Report 2016-2017* Comparison of data from Tables 10, 15, 20, 25, 30 and 35 16-38.

<sup>525</sup> Commission for Employment Equity *Annual Report 2016-2017* Table 10 16.

<sup>526</sup> Commission for Employment Equity *Annual Report 2016-2017* Table 10 16.

<sup>527</sup> Commission for Employment Equity *Annual Report 2016-2017* Comparison of data from Tables 10 and 15 16-21.

scorecard, skills development is designated as a priority element that has to be included within the calculation of the total score of the generic scorecard.<sup>528</sup> This should contribute to more meaningful and purposeful engagement with skills development in regard to the promotion of employment equity.

## **7 Conclusion**

The level and distribution of skills within the South African labour force were deeply influenced by discriminatory legislation that advanced white interests at the expense of black labour during colonialism and Apartheid. Despite the implementation of focused skills development policies, for more than two decades after the transition to a multi-racial democracy, the imprint of discriminatory legislation is still clearly visible on the labour force.

Governmental policy focused specifically on skills development was initiated by NSDS I. Although NSDS I had a broad scope, it focused on numerical targets as success indicators with specific emphasis placed on small businesses and support for youth entering the labour market. NSDS II refined the objectives of skills development policy with the inclusion of priority skills to be developed, while still linking the objectives to quantitative targets. The importance of supporting the development of priority skills remains integral to NSDS III, as is small business and youth development. However, NSDS III has moved toward qualitative indicators as a means to evaluate the success of the policy. There was, and still is, very limited data available regarding the skills required within the labour market. As a result, numerical targets have limited relevance in evaluating the success of policies as these targets are based upon limited evidence. The targets have also been modest in comparison to the scale of the challenges. However, it remains a mechanism by which performance can be measured. Without these targets, it will become even more complex to ascertain the impact of a specific policy intervention.

Through employment equity, blacks are progressively more proportionately represented within the higher occupational levels of the labour force. However, the majority of the black population remains vulnerable at the lower end of the skills range.

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<sup>528</sup> GN 408 in GG 38766 of 06-05-2015.

The main mechanisms that facilitate skills development of the employed namely, the SETAs and B-BBEE, have a limited reach and do not meaningfully extend to the most vulnerable segments of the labour force – the youth and the low-skilled workers, in particular those that rely on small businesses for income. It is of critical importance to facilitate an inclusive skills development framework in order to safeguard social stability, to ensure equality in the workplace, and encourage economic growth. In Chapter 5 it will be discussed whether employees could access skills development, outside of the scope of the SDA and EEA, through the application of labour legislation and the Constitution.

## CHAPTER 5: ADVANCING ACCESS TO SKILLS DEVELOPMENT THROUGH THE CONSTITUTION AND LABOUR LEGISLATION

### Part 1: An analysis of the legal framework relevant to skills development

#### 1 Introduction

The SDA lists a number of purposes that, although not disconnected, have different origins, namely the redress of skill inequalities created by historical discriminatory legislation, the support of economic development and unemployment mitigation, and the advancement of social justice. It is necessary to acknowledge that there are contextual differences between these objectives and the same means cannot accomplish all these objectives. This dissertation does not aim to address all these objectives and the various means through which they can be attained, but rather focuses on the means through which skills development can be promoted by the application and adaptation of the current legislative framework.

A number of the objectives relate to enhancing the employment prospects of the unemployed. However, as shown in Chapter 4, the main mechanisms for skills development, as it is currently being implemented, are focused on those already employed within the formal sector. Nevertheless, in discussions of the topic, the lack of skills development and unemployment are often closely linked.<sup>529</sup> Despite this connection, there is a distinct difference between skills development for the unemployed and those for the employed. Improving the skills of an unemployed worker to increase the likelihood of employment differs from improving the skills of employees within the workplace. An employer cannot assist an unemployed worker to access training and therefore such worker has to rely on the public or private education system for skills development, whereas the employed worker may have the opportunity to improve his or her skills through employer facilitation. This distinction is significant when the mechanisms for skills development are evaluated. As stated in part 2 2 above, the South African skills development framework is primarily geared towards those already employed within the labour market. Therefore, although the high rate of unemployment is of pressing concern, it has

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<sup>529</sup> See eg Department of Trade and Industry Media Statements “Skills Development is Vital in Reducing Youth Unemployment – Minister Davies” (04-03-2014) <<https://www.thedti.gov.za/editmedia.jsp?id=3009>> (accessed 21-10-2017).

limited value as a means to evaluate the efficiency of the legislative framework pertaining to skills development.

Chapters 2 and 3 examined the correlation between race and skills and highlighted the impact of discriminatory legislation on skills development. Chapter 4 delineated the diverse range of policy interventions relevant to skills development since 1994 and identified key challenges and shortcomings. This chapter provides a more detailed analysis of legislation that affects skills development, both directly and indirectly, and aims to show that the legislative framework has a limited reach, which hampers broad-based and inclusive skills development.

Part 1 of this chapter will commence by analysing the main legislative mechanisms through which skills development in South Africa is promoted, namely the SDA and EEA. Those excluded from the legislation will be identified, and a discussion will ensue on whether their *de facto* exclusion is justifiable in light of the goals that the SDA aims to achieve, and corresponding government policy. Thereafter, it will be considered whether section 23(1) of the Constitution (the right to fair labour practices) can be interpreted to include skills development. If so, it is argued that employees could approach the court and rely on a constitutional right to be trained. Public international law will furthermore be considered, specifically whether it supports the argument that section 23(1) of the Constitution should be interpreted to include a right to skills development.

In this section, the possible circumstances in which the denial of training can amount to an unfair labour practice in terms of the LRA will be discussed. It will be noted that a dismissal for poor work performance can be unfair if appropriate training was not provided. In conclusion of Part 1, it will be argued that employees may resort to collective bargaining to access training, since skills development may be considered a matter of mutual interest. Following Part 1, Part 2 will propose that an amendment to labour legislation could broaden the reach of and strengthen the application of skills development policy, while keeping current supportive institutions intact.

## 2 The implementation of skills development under the SDA and EEA

### 2.1 Introduction

As discussed in Chapter 4, the provision of skills development in South Africa is primarily focused on employees (particularly those within the formal sector), although there are specific programmes for the unemployed which are funded through the NSF. Two avenues primarily incentivise employers to comply with skills development policy, namely the incentive to claim mandatory and discretionary grants for SETA-accredited training,<sup>530</sup> and the incentive to attain a beneficial score on the B-BBEE scorecard.<sup>531</sup>

### 2.2 Are the mechanisms used to implement the SDA justifiable in terms of its stated purposes?

The SDA states that it aims “to develop the skills of the South African workforce”.<sup>532</sup> The use of the term “workforce” implies that the SDA aims to provide an inclusive rather than exclusive framework. As a result, it is arguable that the SDA aims to improve the socio-economic prospects of those employed in the formal as well as the informal sectors, as well as the unemployed. Nevertheless, despite the seemingly inclusive framework, a fixed term employment contract must underwrite SETA-accredited learnerships.<sup>533</sup> Therefore, although SETAs may assist unemployed persons in accessing learnerships, an accredited learnership cannot be completed while unemployed. As a result, SETAs facilitate training for those employed within the labour market; and the reach of skills development via learnerships is limited to available employment opportunities. Put differently, if an employer is not willing or able to carry the obligation of an employment contract, on-the-job training accredited via SETAs is not possible. Consequently, while the use of the term “workforce” does not exclude the unemployed, the predominant focus of the SETAs is on the employed.

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<sup>530</sup> Ch 4 2 2 3.

<sup>531</sup> Ch 4 6.

<sup>532</sup> S 1(1)(a) of the SDA.

<sup>533</sup> South African Qualifications Authority “What is a learnership?” (2014) SAQA <<http://www.saqqa.org.za/docs/webcontent/2014/web0310.html>> (accessed 08-10-2017).

The SDA established the SETA system as a means to administer skills development training programmes provided by employers. The SDA places no obligation on employers to provide SETA-accredited training to their employees, but rather incentivises employers (who are obligated to pay the skills development levy in terms of the SDLA) to comply with the SDA by awarding mandatory and discretionary grants.<sup>534</sup> However, not all employers are obligated to pay the levy. Employers who pay a total of less than R500 000 in remuneration per year are exempt from the payment of the skills development levy in terms of the SDLA.<sup>535</sup> Consequently, small businesses that fall below the remuneration threshold are not required to pay levies, which provide little incentive for them to adhere to SETA requirements.

## 2 3 Employment equity

### 2 3 1 *Achieving employment equity through skills development*

As discussed in Chapters 2 and 3, historical legislation had a significant impact on the ability of black persons to acquire formally recognised skills. The preamble of the Constitution acknowledges that the development of capabilities had been unjustly inhibited in the past, and provides that “...the people of South Africa, (r)ecognise the injustices of our past ... [and] therefore, ... adopt this Constitution as the supreme law of the Republic so as to ... free the potential of each person ...”.<sup>536</sup>

The EEA expands on the above and states as follows:

“As a result of apartheid and other discriminatory laws and practices, there are disparities in employment, occupation and income within the national labour market; and that those disparities create such pronounced disadvantages for certain categories of people that they cannot be redressed simply by repealing discriminatory laws ...”<sup>537</sup>

“Affirmative action measures *are measures designed to ensure that suitably qualified* (own emphasis) 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.”<sup>538</sup>

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<sup>534</sup> See ch 4 part 2 2 3.

<sup>535</sup> S 4(b)(i) of the SDLA.

<sup>536</sup> Preamble of the Constitution.

<sup>537</sup> Preamble of the EEA.

<sup>538</sup> S 15(1).

“(A) person may be *suitably qualified* for a job as a result of ... *that person’s ... capacity to acquire*, within a reasonable time, *the ability* to do the job [own emphasis].”<sup>539</sup>

Accordingly, the EEA acknowledges skills development for designated groups as an affirmative action measure. However:

“Affirmative action measures implemented by a designated employer must include - ... measures to ensure the equitable representation of suitably qualified people from designated groups in all occupational levels in the workforce; and retain and develop people from designated groups and *to implement appropriate training measures, including measures in terms of an Act of Parliament providing for skills development* [own emphasis].”<sup>540</sup>

The advancement of employment equity through skills development relates to the SDA’s purpose “to improve the employment prospects of persons previously disadvantaged by unfair discrimination and to redress those disadvantages through training and education”.<sup>541</sup> However, it must be kept in mind that affirmative action measures are enforced by administrative remedies and do not give an employee the right to claim that he or she should be the beneficiary of affirmative action measures.<sup>542</sup>

From the above it is clear that the SDA, in line with the Constitution and the EEA, constitutes an important vehicle to redress the injustices of the past relating to training and access to job opportunities. Skills development is critical in the pursuit of sustainable employment equity. As stated above, the EEA allows a person from a designated group to be appointed to a position without having the requisite skills, provided that such person will timeously acquire the required skills to perform the job. If the skills are not acquired as expected, that person could potentially be dismissed on account of incapacity relating to poor work performance<sup>543</sup> – thereby jeopardising equitable representation.

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<sup>539</sup> S 20(3)(d).

<sup>540</sup> S 15(2)(d).

<sup>541</sup> S 1(1) of the SDA.

<sup>542</sup> See *Dudley v City of Cape Town* 2004 25 ILJ 305 (LC).

<sup>543</sup> S 188 of the LRA read with item 9 of the Code of Good Practice: Dismissal.

A case in point is *Buthelezi v Amalgamated Beverage Industries* (“*Buthelezi*”)<sup>544</sup> where an employer promoted an employee to a position, even though the employer was aware that she did not have all of the required skills to perform the job. Although she was promoted on merit and not as part of the company’s employment equity programme, the judgment is relevant to the current discussion. She was later dismissed on account of her incapacity to perform the job as required. Although the employer provided specialised training to the employee, the procedure it had followed was found to be unfair, as it did not conform to the recommendations that stemmed from the counselling process. The Labour Court held that:

“When an employer appoints someone to a position whom it acknowledges may not meet all the requirements for that position, it is under an even greater obligation to adhere to its remedial plans for that employee ... [and] to devise a remedial plan and stick to it before taking action against the employee because he/she has not succeeded.”<sup>545</sup>

Although this case does not deal with an affirmative action appointment, it is analogous to someone being appointed as part of an employment equity plan and someone who is regarded as suitably qualified although they do not possess the necessary capabilities. The court affirmed that if employees in this position do not receive appropriate training, a dismissal due to incapacity relating to poor work performance will be unfair.

Consequently, although the EEA promotes the employment and career progression of those prejudiced by past discriminatory legislation, it is critical that those employees, who may lack the requisite skills for a position, receive the necessary skills development to support their capacity to perform their duties efficiently.

### *2 3 2 Employees who are not beneficiaries of and are excluded from the ambit of skills development in terms of the EEA*

Only “designated employers” are bound to take affirmative action measures,<sup>546</sup> who are described as:

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<sup>544</sup> 1999 20 ILJ 2316 (LC).

<sup>545</sup> Para 22.

<sup>546</sup> S 4 of the EEA.

- “(a) an employer who employs 50 or more employees;  
an employer who employs fewer than 50 employees, but has a total annual turnover that is equal to or above the applicable annual turnover of a small
- (b) business ...;
- (c) a municipality ...;
- (d) an organ of state ...; and
- (e) an employer bound by a collective agreement in terms of ... the Labour Relations Act, which appoints it as a designated employer ...;”<sup>547</sup>

In addition, the EEA defines “designated groups” as “black people, women and people with disabilities”.<sup>548</sup> This implies that black people who suffered injustice concerning training and education under apartheid should have the benefit of training as part of affirmative action if they are employed by a designated employer.

As discussed in Chapter 4, employers are incentivised to earn points for training provided on the B-BBEE scorecard. However, Exempted Micro Enterprises (“EMEs”) that have an annual total revenue, allocated budget, or gross receipts of R10 million or less are deemed to have a level-4 B-BBEE status and recognition level of 100%.<sup>549</sup> If the EME has more than 75% “black beneficiaries” it is automatically elevated to a level one contributor.<sup>550</sup> Therefore, small businesses with an annual turnover of less than R10 million have no incentive in terms of the B-BBEE scorecard to provide training to their employees. This means that a large number of employees are excluded from the benefits of skills development since SARS has estimated that EMEs represent 95% of economically active companies in South Africa.<sup>551</sup>

Consequently, the beneficiaries of skills development, through the application of the EEA, are employees who are black, female or who have a disability; who work in the formal sector; in a business that employs more than 50 employees; or in a

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<sup>547</sup> S 1.

<sup>548</sup> S 1.

<sup>549</sup> S 2.7 part 2.9.1 of Statement 004: Scorecards for Specialised Enterprises, Issued under section 9 of the Broad-Based Black Economic Empowerment Act of 2003 GN 408 in GG 38766 of 06-05-2015.

<sup>550</sup> S 2.8.1.

<sup>551</sup> Department of Trade and Industry *Presentation in regard to Amended Broad-based Black Economic Empowerment Codes of Good Practice* (2012) 15.

business that has an annual turnover higher than that of a small business (as determined by the EEA).

Although, according to a 2016 study commissioned by the Small Enterprise Development Agency (“SEDA”), the vast majority (69%) of SMME employers operate within the formal sector;<sup>552</sup> employees employed in small businesses that do not exceed the thresholds referred to above are excluded from skills development in terms of the EEA.

The SEDA study also found that the majority of SMME owners (71%) are black.<sup>553</sup> It can be argued that in small businesses, owners are more often than not also the workers that perform vital functions within the business, unlike in larger businesses where owners are not necessarily involved in the day-to-day operations of the business. Therefore, to illustrate the impact of the exclusion of black-owned SMMEs from skills development through the EEA, an owner can be equated to an employee. It is clear then that a considerable number of black workers receive no skills development benefits under current employment equity legislation.

Consequently, there is a large contingent of businesses in the formal sector that are not compelled to comply with the EEA’s affirmative action measures concerning skills development. As a result, their employees do not benefit from skills development through the employment equity mechanism, jeopardising the pursuit of inclusive, broad-based and sustainable employment equity.

### *2 3 3 Is the exclusion of small businesses from skills development justifiable?*

The NDP envisions that by 2030, “90% of jobs will be created in small and expanding firms”<sup>554</sup>. SEDA affirms the significant role of small businesses as “the cornerstone of the economy in South Africa”.<sup>555</sup> Research further indicates that small

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<sup>552</sup> Bureau for Economic Research *The Small, Medium and Micro Enterprise Sector of South Africa Research Note no 1* (2016) 15.

<sup>553</sup> 22.

<sup>554</sup> National Planning Commission *National Development Plan* (2011) 93.

<sup>555</sup> CM Maloka & M Dlamini *Challenges facing government agencies in providing non-financial support to SMMEs in the Upper End Market* (2016) paper presented at the SAAPAM Limpopo Charter 5<sup>th</sup> Annual Conference Proceedings 199 (copy on file with author).

businesses struggle to attract skilled employees.<sup>556</sup> Therefore, the required skills have to be acquired on the job. It has also been noted that small businesses are most skill-intensive in the early phases of expansion.<sup>557</sup> Given that necessary skills often need to be acquired after appointment, a lack of skills development will have a significant impact on the growth potential of especially, small businesses. The need for small businesses to improve the skills of their employees thus closely relates to the purpose in the SDA, namely “to encourage employers ... to provide employees with the opportunities to acquire new skills”.<sup>558</sup> Arguably, small businesses are excluded from the legislative framework to alleviate the administrative and financial burdens that compliance with the SDA, SDLA and EEA require. However, as Wijnberg aptly remarks, smaller businesses that are above these thresholds still face similar obstacles:<sup>559</sup>

“SMEs [Small and Medium Enterprises] are unable to access the benefits of the Seta system because many are individually too small to comply with the strict administration criteria that govern these programmes. Although some can claim back a portion of their skills development levy contributions for training, many generally fall outside the stringent administrative criteria required by the Setas, and some lack the resources or will to manage the convoluted official process. Small businesses by definition are run on tight margins and their lean structures leave no room for the additional administrative burden of Seta compliance”.

He further adds that:

“should the SME enter the system, the specific learning criteria of Seta-accredited training are frequently misaligned with the need for flexibility in a dynamic workplace environment. The emphasis of the Seta system ... is on the graduate or learner attaining academic learning rather than delivering practical value in the workplace or to the

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<sup>556</sup> Bureau for Economic Research *The Small, Medium and Micro Enterprise Sector of South Africa* 8 and 9.

<sup>557</sup> R Amra, A Hlatshwayo & L McMillan *SMME Employment in South Africa* (2013) paper presented at *The Biennial Conference of the Economic Society of South Africa, Bloemfontein* 19.

<sup>558</sup> S 1(c)(ii) of the SDA.

<sup>559</sup> C Wijnberg “Education: Small business finds Setas wanting” (10-05-2013) *Mail and Guardian* <<https://mg.co.za/article/2013-05-10-small-business-finds-setas-wanting>> (accessed 22-10-2017).

employer.” “This constrains the productivity of the small businesses, which require human resources to deliver practical, value-adding outcomes, not academic learning.”

As discussed above, it is detrimental from an economic and employment equity policy perspective to exclude small businesses and consequently a large number of employees from skills development. In the next section, the question of whether persons excluded from training or skills development by the SDA may rely on a right to be trained in terms of section 23(1) of the Constitution will be considered.

### **3 Is there a constitutional right to training?**

3.1 Is there a right to skills development in terms of section 23(1) of the Constitution?

Section 23(1) of the Constitution guarantees everyone “the right to fair labour practices”. In *National Education Health & Allied Workers Union v University of Cape Town* (“*National Education Health*”),<sup>560</sup> the court had to consider the meaning of section 197 of the LRA in light of *inter alia* section 23(1) of the Constitution.<sup>561</sup> While considering the scope of the application of section 23(1), the Constitutional Court held that although “(t)he concept of fair labour practice is incapable of precise definition... (i)t is ... neither necessary nor desirable to define this concept.”<sup>562</sup> The court’s reasoning was that a concrete definition would impair the court’s ability to make a value judgement, balancing the interests of both workers and employers while considering the particular circumstances. The court stated that although “(t)he concept of fair labour practice must be given content by the legislature and ... meaning ... from the decisions of the specialist tribunals”, the court has a “crucial role in ensuring that the rights guaranteed in section 23(1) are honoured.”<sup>563</sup> In *National Entitled Workers’ Union (NEWU) v CCMA* (“*NEWU*”)<sup>564</sup> the Labour Court declared that “[t]he LRA is not intended to regulate exhaustively the entire concept of a fair

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<sup>560</sup> 2003 24 ILJ 95 (CC).

<sup>561</sup> Para 1. The question that had to be considered was whether “upon transfer of a business as a going concern, the workers are transferred automatically with the business without a prior agreement to that effect between the transferor and transferee employer.”

<sup>562</sup> Para 33.

<sup>563</sup> Paras 34-35.

<sup>564</sup> 2003 24 ILJ 2335 (LC) 2340.

labour practice as contemplated in the Constitution 1993 nor the present Constitution. The field is far too wide to be contemplated by a single statute.”<sup>565</sup>

Therefore, the constitutional right to fair labour practices is not a strictly defined concept, but rather a fluid principle adaptable to changing circumstances, which enables the court to balance the interests of employees and their employers.

The question that needs to be answered in the context of this study is whether the right to fair labour practices can be interpreted to include a right to skills development. In this regard, Le Roux argues that:

“It is the practices that impair labour market participation that ought to become the focus of s 23 of the Constitution”<sup>566</sup>; and notes that “(t)here is a danger that if the right to fair labour practices is not developed to encompass the regulation of practices that impact on the broader labour market ... the right to fair labour practices will ... become less and less relevant”.<sup>567</sup>

She proposes that the traditional main aim of labour law, namely to provide a countervailing force to balance the power of employers, should make way for measures to ensure sustainable employment in a changing world of work.<sup>568</sup> She poses the question of whether a focus on, *inter alia*, skills development and training could be conducive to sustainable employment. She argues that sustainable employment is an element of sustainable development and (relying on Lobel<sup>569</sup>) states that:

“Embedded in the notion of sustainable employment is an understanding that indefinite employment, while still the norm to strive for is no longer a certainty; and that employability rather than stability should be developed as a new value. In other words ‘the promise of job security’ (by employers) is replaced with ‘the promise of training, networking and the opportunities for human development.’ Despite the obvious anomaly

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<sup>565</sup> *National Entitled Workers' Union (NEWU) v CCMA* 2003 24 ILJ 2335 (LC) 2340.

<sup>566</sup> R Le Roux “The new unfair labour practice” in R Rycroft & R Le Roux (eds) *Reinventing Labour Law* (2012) 54.

<sup>567</sup> 55.

<sup>568</sup> 45.

<sup>569</sup> O Lobel “The four pillars of work law” (2005-2006) 104 *Michigan Law Review* 1539 1547-1548.

(the employer is expected to invest in an employee from whom it may get no return) sustainable development requires an assumption of a societal value by the employer”.<sup>570</sup>

In light of the above, it is submitted that the constitutional right to fair labour practices could be interpreted to include a right to skills development. In a changing world of work, where employment with one employer over a lifetime is the exception, training and education may offer a means to achieve sustainable employment. A stated purpose of the SDA to “develop the skills of the South African workforce to improve the quality of life of workers, their prospects of work and labour mobility”<sup>571</sup> aligns with this view.

Although it is arguable that a right to skills development could be read into section 23(1) of the Constitution, it is unclear whether and to what extent such a right is directly enforceable. Cooper considers whether the court could be approached for a remedy, relying directly on the constitutional right to fair labour practices, in instances where legislation falls short of providing adequate protection.<sup>572</sup> Cooper refers to *NAPTOSA v Minister of Education* (“NAPTOSA”)<sup>573</sup> in which the High Court advised against the development of parallel avenues of labour law jurisprudence.<sup>574</sup> In *NAPTOSA*, the court affirmed that “[t]he High Court has the primary responsibility for the enforcement of fundamental rights. It has jurisdiction to pronounce upon all violations of fundamental rights.”<sup>575</sup> Nevertheless, the court cautioned that:

“To grant relief which would encourage the development of two parallel systems would in my view be singularly inappropriate. Taking into account the right to fair labour practices and the duties imposed thereby on employers and employees alike, it is not a right which can, without an intervening regulatory framework, be applied directly in the workplace. The social and policy issues are too complex for that.”<sup>576</sup>

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<sup>570</sup> Le Roux “The new unfair labour practice” in *Reinventing Labour Law* 49.

<sup>571</sup> S 1(1) of the SDA.

<sup>572</sup> C Cooper “Labour relations” in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (RS 4 2012) 53-19.

<sup>573</sup> *NAPTOSA v Minister of Education* 2001 22 ILJ 889 (C).

<sup>574</sup> Cooper “Labour relations” in *CLOSA* 53-19.

<sup>575</sup> *NAPTOSA v Minister of Education* 2001 22 ILJ 889 (C) 895.

<sup>576</sup> 897.

This principle of constitutional avoidance was affirmed in *Minister of Health v New Clicks SA*,<sup>577</sup> where the Constitutional Court held that:

“Where ... the Constitution requires Parliament to enact legislation to give effect to the constitutional rights guaranteed in the Constitution, and Parliament enacts such legislation, it will ordinarily be impermissible for a litigant to found a cause of action directly on the Constitution without alleging that the statute in question is deficient in the remedies that it provides”<sup>578</sup>; ...

“where a litigant founds a cause of action on such legislation, it is equally impermissible for a court to bypass the legislation and to decide the matter on the basis of the constitutional provision that is being given effect to by the legislation in question.”<sup>579</sup>

In *SANDU v Minister of Defence (“SANDU”)*<sup>580</sup> the Constitutional Court again asserted the principle of constitutional avoidance, and held as follows (when considering the right to engage in collective bargaining in terms of section 23(5)):

“Accordingly, a litigant who seeks to assert his or her right to engage in collective bargaining under section 23(5) should in the first place base his or her case on any legislation enacted to regulate the right, not on section 23(5). If the legislation is wanting in its protection of the section 23(5) right in the litigant’s view, then that legislation should be challenged constitutionally. To permit the litigant to ignore the legislation and rely directly on the constitutional provision would be to fail to recognise the important task conferred upon the legislature by the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights.”<sup>581</sup>

Cooper recommends that in instances where labour legislation is found to be constitutionally wanting, the Constitutional Court should direct the legislature to make the requisite amendments to remedy the shortcomings. Therefore, following Cooper’s reasoning, if approached, the Constitutional Court may direct the legislature to amend labour legislation to provide for a right to skills development to

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<sup>577</sup> 2006 2 SA 311 (CC).

<sup>578</sup> Para 437.

<sup>579</sup> Para 437.

<sup>580</sup> 2007 8 BCLR 863 (CC)

<sup>581</sup> Para 52.

give effect to the constitutional protection envisaged by section 23(1) rather than grant direct relief to the applicant.<sup>582</sup>

It could however be argued in the alternative that labour legislation does not adequately give effect to the right to training, as read into the section 23(1) right to fair labour practices. It could thus be argued that parliament has not enacted legislation to fulfil “the important task conferred upon the legislature by the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights” as stated in *SANDU* above, and as a result labour legislation does not adequately realise the constitutional right to fair labour practices. Consequently, an employee could approach the court and rely directly on section 23(1) to access skills development.<sup>583</sup>

The next section will consider the instruments of the International Labour Organization (“ILO”) regarding training and South Africa’s obligations in terms of these instruments. It will be argued that public international law supports the recognition of a right to skills development and strengthens the argument that section 23 should be interpreted to include a right to training.

### 3 2 Realising obligations as member state of the ILO

Section 233 of the Constitution provides that:

“(w)hen interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.”<sup>584</sup>

*S v Makwanyane* (“*Makwanyane*”) confirms that when interpreting a section within the Bill of Rights: “public international law would include non-binding as well as binding law”.<sup>585</sup> Therefore, ILO Conventions and Recommendations, whether binding or not, guide the interpretation of South African law.

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<sup>582</sup> Cooper “Labour relations” in *CLOSA* 53-19. See the discussion in Chapter 6 regarding the amendment of the BCEA to allow for skills development to be recognised as a basic condition of employment.

<sup>583</sup> *Piliso v Old Mutual Life Assurance Company (SA) Limited* 2007 28 ILJ 897 (LC).

<sup>584</sup> S 233 of the Constitution.

<sup>585</sup> *S v Makwanyane* 1995 3 SA 391 (CC) para 35.

The ILO Convention concerning Vocational Guidance and Vocational Training in the Development of Human Resources (“Convention 142”)<sup>586</sup>, states in article 4 that:

“Each Member shall gradually extend, adapt and harmonise its vocational training systems to meet the needs for vocational training throughout life of both young persons and adults *in all sectors of the economy and branches of economic activity* (own emphasis added) and at all levels of skill and responsibility.”<sup>587</sup>

In addition, the Recommendation concerning Human Resources Development: Education, Training and Lifelong Learning (“Recommendation 195”)<sup>588</sup>, states in article 5 that:

“Members should ... develop supportive social and other policies, and create an economic environment and incentives, to encourage enterprises to invest in education and training, individuals to develop their competencies and careers, and *to enable and motivate all* (own emphasis added) to participate in education and training programmes”.<sup>589</sup>

Both the abovementioned Convention and Recommendation emphasise that skills development should be comprehensive. Although South Africa has not ratified the Convention, its underlying principles should guide the interpretation of legislation towards an inclusive and broad-based approach. As discussed in parts 2 3 2 and 2 3 3 above, the current skills development framework largely excludes those employed in small businesses as well as the unemployed.

The ILO, in conjunction with various stakeholders and the South African Government, drafted and introduced a four-year South Africa Decent Work Country Programme (“Decent Work Programme”)<sup>590</sup> in 2010 to guide ILO programmes applicable to South Africa. This programme listed priorities linked to preferred

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<sup>586</sup> Convention concerning Vocational Guidance and Vocational Training in the Development of Human Resources (adopted on 23 June 1975, entered into force 19 July 1977) 1050 UNTS 9.

<sup>587</sup> Art 4.

<sup>588</sup> Recommendation concerning Human Resources Development: Education, Training and Lifelong Learning (adopted on 17 June 2004).

<sup>589</sup> Art 5.

<sup>590</sup> International Labour Organization “South Africa Decent Work Country Programme” (undated) ILO <[http://www.ilo.org/jobspact/resources/WCMS\\_145419/lang--en/index.htm](http://www.ilo.org/jobspact/resources/WCMS_145419/lang--en/index.htm)> (accessed 27-07-2017).

outcomes. One of the programme's key priorities was the "promotion of employment creation through an enabling environment for job rich growth, sustainable enterprises, including formalisation of the informal sector and skills development".<sup>591</sup> As a measure of success in respect of the attainment of this priority, the programme outcomes envisioned that skills development should increase the employability of workers through government policies that are responsive to the requirements of the labour market.<sup>592</sup>

Le Roux posits that the Decent Work Programme should be viewed as a guideline by which to evaluate labour standards in a manner that promotes inclusivity and broadens protections beyond the core standards and protections traditionally understood to be included in the interpretations of section 23(1) of the Constitution.<sup>593</sup> She persuasively argues that skills development (as a means of enabling job creation) is integral to the Decent Work Programme.

Consequently, as stated above, the court is required to take international law into account when interpreting the Constitution, and thus if cognisance is taken of the instruments above, section 23(1) of the Constitution could be interpreted to include a right to skills development.<sup>594</sup>

#### **4 The right to training in terms of the LRA**

Although there is no explicit right to training in the LRA, some sections could, in certain circumstances, be interpreted to support an indirect right to training. The LRA protects employees in various ways, including protection against unfair labour practices and unfair dismissal. Section 186(2)(a) of the LRA contains a closed list of unfair labour practices and defines an "unfair labour practice" *inter alia* as an "unfair act or omission that arises between an employer and an employee involving ... unfair conduct by the employer relating to the ... training of an employee". Therefore, under certain circumstances, the denial of training within employment can be construed as an unfair labour practice.

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<sup>591</sup> International Labour Organization "South Africa Decent Work Country Programme" (undated) *ILO*.

<sup>592</sup> International Labour Organization "South Africa Decent Work Country Programme" (undated) *ILO*.

<sup>593</sup> Le Roux "The new unfair labour practice" in *Reinventing Labour Law* 48.

<sup>594</sup> 49.

In *National Union of Mineworkers on behalf of Mashao and Eskom Holdings SOC Ltd* (“*Mashao*”),<sup>595</sup> the Commission for Conciliation Mediation and Arbitration (“CCMA”) held that within an “employment related context a legitimate expectation [in regard to training] can be founded upon either an existing practice or an undertaking received.”<sup>596</sup> The CCMA had to determine whether the removal of trainees from a training programme for nuclear reactor operators amounted to an unfair labour practice.<sup>597</sup> The trainees were removed from the programme following the outcomes of psychometric assessments they were obliged to undergo.<sup>598</sup> The CCMA determined that although the reasons for the psychometric assessments were fair and valid, “the principle of fairness ... requires employees to be consulted in respect of decisions which affect them”.<sup>599</sup> With reference to *Administrator of the Transvaal v Traub* (“*Traub*”)<sup>600</sup>, the CCMA held that the *audi alteram partem* rule could be extended to apply in an employment-related context where fairness requires it.<sup>601</sup> The CCMA held that in this case “a duty to consult arose both from an undertaking given and an established practice”.<sup>602</sup> Consequently, the employer should have made the trainees aware of the conditions for their continued participation in the training programme, namely that they would have to undergo further psychometric assessments and meet certain criteria.<sup>603</sup>

The Labour Appeal Court in *Maritime Industries Trade Union of SA (MITUSA) v Transnet Ltd* (“*MITUSA*”)<sup>604</sup> considered whether a denial of training constituted an unfair labour practice. The dispute concerned the obligations of Portnet, a trading division of Transnet Limited, to provide tugmasters with the necessary training to acquire a specific qualification, namely, a standards of training, certification and watchkeeping (“STCW”) qualification.<sup>605</sup> Transnet contended that they were not

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<sup>595</sup> 2014 35 ILJ 290 (CCMA).

<sup>596</sup> Para 67.

<sup>597</sup> 292.

<sup>598</sup> 292.

<sup>599</sup> 302 and 304.

<sup>600</sup> 1989 4 SA 731 (A).

<sup>601</sup> 302.

<sup>602</sup> 302.

<sup>603</sup> 302.

<sup>604</sup> 2002 23 ILJ 2213 (LAC).

<sup>605</sup> 2213.

contractually obliged to provide the training the tugmasters sought and “it had provided them with training that enabled them to qualify for the job that they had been employed to do”.<sup>606</sup> MITUSA, on behalf of the tugmasters, claimed that Transnet was contractually obliged to provide them with the training to acquire the STCW, but was refusing to do so.<sup>607</sup> MITUSA contended further that Transnet’s conduct in this regard constituted an unfair labour practice as defined in item 2(1)(b) of schedule 7 to the LRA,<sup>608</sup> which provides that, for purposes of item 2, an unfair labour practice means –

“any unfair act or omission that arises between an employer and an employee, involving -  
...

(b) the unfair conduct of the employer relating to the promotion, demotion or training of an employee or relating to the provision of benefits to an employee”.<sup>609</sup>

Consequently, the dispute in question that the court had to consider was:

(a) whether or not there was an agreement that the [tugmasters] were entitled to undergo the STCW training; and  
(b) ‘whether [Transnet]’s conduct in not allowing the [tugmasters] to undergo that training is in fact unfair looking at the totality of circumstances’.<sup>610</sup>

The court however found that there was no evidence of “what the terms were that were agreed in respect of the provision of the STCW training that ... [the tugmasters claimed] to have been contractually entitled to” and that therefore no such agreement existed.<sup>611</sup> The court then considered whether a “reasonable expectation” was created that the tugmasters would be provided with training to obtain the STCW.<sup>612</sup> Again, the court found that “there is no evidence suggesting what the

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<sup>606</sup> 2213.

<sup>607</sup> 2215.

<sup>608</sup> Item 2(1)(b) was removed from schedule 7 by the 2002 amendments to the LRA and incorporated as section 186(2) of the LRA.

<sup>609</sup> 2216.

<sup>610</sup> 2219-2220.

<sup>611</sup> 2238-2239.

<sup>612</sup> 2239.

terms are on which they expected ... [Portnet] to provide ... [the tugmasters] with the training” and therefore that no reasonable expectation could have been created.<sup>613</sup>

Thus, the court then had to consider whether it had jurisdiction to entertain a dispute about an alleged unfair labour practice. Despite the court affirming that a unilateral change of terms and conditions of employment is a dispute of right,<sup>614</sup> it added that

“[a] dispute of right is not excluded from the ambit of an unfair labour practice dispute under item 2(1)(b) of schedule 7. There can be no doubt that, where there is a dispute of right that relates to training, it is possible to have conduct by an employer that can be described as unfair conduct or as an unfair labour practice as contemplated by item 2(1)(b). Such a dispute would be arbitrable in terms of item 3(4) of schedule 7.”<sup>615</sup>  
The court continued that:

“[a] dispute about a unilateral change to terms and conditions of employment ... is a dispute in respect of which a strike is competent, may, arguably also be said to fall within the ambit of an unfair labour practice as defined in item 2(1)(b), especially in relation to training, demotion and the provision of benefits to an employee. A dispute falling under item 2(1)(b) is ... subject to arbitration in terms of item 3(4)(b)”<sup>616</sup>; ...

“It is therefore clear from the above that the fact that a strike is competent in respect of a dispute does not mean necessarily that it is not arbitrable in terms of the ... [LRA]. What needs to be done in each case is to examine the provisions of the Act to determine whether such a dispute is, indeed, not arbitrable.”<sup>617</sup>

Therefore, a dispute concerning training, may simultaneously fall within the ambit of unfair labour practices and be justiciable; in addition to being strikeable as a dispute of right in regard to a unilateral change in terms and conditions of employment.

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<sup>613</sup> 2241.

<sup>614</sup> 2244.

<sup>615</sup> 2245.

<sup>616</sup> 2246.

<sup>617</sup> 2246-2247.

Regarding an unfair dismissal, the Code of Good Practice: Dismissal<sup>618</sup> states that “an employee should not be dismissed for unsatisfactory performance unless the employer has given the employee appropriate evaluation, instruction, *training*, guidance or counselling (own emphasis added)”<sup>619</sup>. As discussed above in *Buthelezi*, this provision is especially relevant within the context of improving the skills and employability of those who had limited access to education pre-1994 and the advancement of sustainable employment equity. The Code is silent on the form the training should take and the length of the period of training, but states that it must be appropriate. Depending on the circumstances, SETA-accredited training would be one way for an employer to fulfil his or her duty in this regard.

## 5 A right to training included in a collective agreement

Grogan defines collective bargaining as “the process by which employers and organised groups of employees seek to reconcile their conflicting goals through mutual accommodation.”<sup>620</sup> Traditionally, bargaining subjects have been restricted to wages and conditions of service, for example hours of work and leave determination.<sup>621</sup> It is generally accepted that although employers are not required to bargain over work practices and socio-political disputes, unions may bargain over “matters of mutual interest” between employer and employee.<sup>622</sup> In *Vanachem Vanadium Products (Pty) Ltd v National Union of Metalworkers of SA (“Vanachem”)*,<sup>623</sup> one of the demands of employees was “that the employer should train not less than five artisans per term”. The employer endeavoured to obtain an interdict to restrain employees from striking on the basis that this and other demands could not be viewed as matters of mutual interest. The Labour Court considered the interpretation of “matters of mutual interest” within the context of an application to interdict a strike and held as follows:

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<sup>618</sup> Sch 8 of the LRA: Code Of Good Practice: Dismissal.

<sup>619</sup> S 8(2).

<sup>620</sup> J Grogan *Workplace Law* (2009) 405.

<sup>621</sup> J Grogan *Collective Labour Law* 2 ed (2014) 144.

<sup>622</sup> 145 and 148.

<sup>623</sup> 2014 35 ILJ (LC).

“[T]he use of the term ‘mutual interest’ in the LRA ... ultimately serves to define the legitimate scope of matters that may form the subject of collective agreements, matters which may be referred to the statutory dispute-resolution mechanisms, and matters which may legitimately form the subject of a strike or lock-out. In this sense, ‘matters of mutual interest’ serves to distinguish those disputes that concern the socio-economic interests of workers ... and what might be termed purely political disputes, for which the LRA does not afford any right to strike or lock-out”<sup>624</sup>; [and therefore] “the term ‘matters of mutual interest’ ... must concern the employment relationship.”<sup>625</sup>

The court held that the training of artisans is clearly a matter of mutual interest, and could therefore be the subject matter of a protected strike.<sup>626</sup>

The court asserted further that: “[t]he interpretation of ‘matters of mutual interest’ must take “the Constitution and the statutory injunction contained in s 3 of the LRA that any person applying the Act must interpret its provisions to give effect to its primary objects, in compliance with the Constitution and in compliance with public international law obligations”<sup>627</sup> into account.

As shown in part 3 1 above, it is arguable that a right to skills development may be read into the interpretation of a fair labour practice in terms of section 23(1) of the Constitution. It was further illustrated in part 3 2 that public international law makes allowance for skills development as an integral part of the expansion of labour protections. Consequently, if an employer created a legitimate expectation in regard to training, withholding the training could entitle the employee to certain remedies, and that a dismissal due to incapacity as a result of poor work performance can in some circumstances be unfair, if appropriate training was not provided.<sup>628</sup> Following the reasoning of the court in *Vanachem*, skills development could be regarded as a matter of mutual interest between employer and employee, creating a strategic opportunity for unions to bargain over skills development. The remedying of historical discrimination that resulted in the distorted dispersion of skills according to racial lines may be seen as falling outside of the scope of the workplace and within the socio-political realm. However, the EEA and affirmative action place it within the sphere of the employment relationship. In addition, training and investment in the

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<sup>624</sup> Para 17.

<sup>625</sup> Para 17.

<sup>626</sup> Para 24.

<sup>627</sup> Para 18.

<sup>628</sup> See the text to part 4 above.

improvement of skills is inherent to the achievement of greater efficiency and productivity in the workplace. It is therefore submitted that skills development is a matter of mutual interest within the employment relationship, and that trade unions should be encouraged to bargain on skills development with the aim of reaching collective agreements with employers in this regard. It should however be noted that employees can only benefit from skills development as part of a collective agreement if there is a trade union that can bargain on their behalf.

The question arises whether a dispute regarding a matter of mutual interest (which is therefore strikeable), could also be adjudicated in terms of the LRA. Section 65(1)(c) of the LRA states that “[n]o person may take part in a strike ... if the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of this Act”. In *Apollo Tyres SA (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration* (“Apollo Tyres”)<sup>629</sup> the court considered whether employees had a choice to settle a dispute concerning benefits either by way of industrial action or through adjudication. The court referred to *Maritime Industries* in which the court concluded that:

“Strikeable’ and arbitrable disputes do not necessarily divide into watertight compartments. Although in relation to dispute resolution the Act contemplates the separation of disputes into those that are resolved through arbitration, those that are resolved through adjudication and those that are resolved through power-play, there are disputes in respect of which the Act provides a choice between power-play on the one hand, and arbitration on the other as a means for their resolution.”<sup>630</sup>

The court found that although the LRA does not “preclude employees from engaging the employer in the collective bargaining/industrial action arena and the arbitration/adjudication forum, it is clear that the whole scheme of the Act as stated in *Maritime Industries* is to give employees an election”.<sup>631</sup> Consequently, a dispute in regard to training may constitute both a strikeable dispute of mutual interest, as well as an arbitrable dispute in terms of the LRA (as discussed in part 4 above above).

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<sup>629</sup> 2013 34 ILJ 1120 (LAC).

<sup>630</sup> *Maritime Industries Trade Union of SA v Transnet Ltd* 2002 23 ILJ 2213 (LAC) para 106.

<sup>631</sup> *Apollo Tyres SA (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration* 2013 34 ILJ 1120 (LAC) para 30.

The choice between industrial action and adjudication falls to the affected employee(s).

## 6 Conclusion

The SDA states that it aims “to develop the skills of the South African workforce”.<sup>632</sup> However, the implementation of the legislative framework created by the SDA and EEA angles skills development primarily towards large-scale employers within the formal sector, thereby excluding employees within small businesses from the benefits.

The socio-economic significance of small businesses in South Africa makes it imperative that they be included in the skills development framework. It is submitted that the exclusion of small businesses from the main mechanisms through which skills development are implemented impedes the potential of skills development to contribute to the promotion of broad-based socio-economic justice.

The chapter explored the legal framework concerning skills development, outside of the scope of the SDA and EEA. It was considered whether a right to skills development could be interpreted to be included within the right to fair labour practices in section 23(1) of the Constitution. It was argued that the interpretation of the constitutional right to fair labour practices is a value judgement left to the discretion of the court. Relying on *Le Roux*'s argument, it was contended that the traditional understanding of labour protections should be expanded to include skills development. In addition, both section 233 of the Constitution and *Makwanyane* direct the courts to be guided in their interpretation by public international law, which was shown to make allowance for a right to skills development. However, relying on *Cooper*, it is suggested that if labour legislation were to be found constitutionally wanting in regard to the protection of the right to skills development (as read into the right to fair labour practices), that the Constitutional Court may direct the legislature to make the requisite amendments to remedy the shortcoming and give effect to the constitutional protection envisaged by section 23(1), rather than provide direct relief. In the alternative it is argued that if labour legislation does not adequately give effect to the constitutional right to fair labour practices, then legislation purposely promulgated to give effect thereto could be bypassed, and the court approached

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<sup>632</sup> S 1(1)(a) of the SDA.

directly. It follows that if the LRA and BCEA are found to not fulfil the purpose of section 23(1) regarding training, then an employee should be able to rely directly on the Constitution to access skills development.

Following on the above, the circumstances under which a denial of training could constitute an unfair labour practice in terms of the LRA were considered. It was held that for the denial of training to be considered unfair, the terms and conditions of the training should have been agreed upon by the employer and the employee. It was also held that the employer has an obligation to be forthright in regard to the terms and conditions of the training and the employee has a right to be consulted in regard to factors that significantly influence the training provided. It was further noted that in terms of The Code of Good Practice: Dismissal, the dismissal of an employee for poor work performance could be regarded as unfair if appropriate training was not provided to the employee.

Finally, the question whether unions, through collective bargaining, could promote access to skills development for their members was addressed. Relying on the court's reasoning in *Vanachem*, it was argued that skills development could be considered a matter of mutual interest within the employment relationship, and that unions should be encouraged to include skills development as a bargaining topic with the aim of concluding binding collective agreements with employers.

In Part 2, recommendations for amendments to the current legislative framework in order to strengthen the application and broaden the reach of skills development will be put forward. It will be examined whether skills development could be recognised as a basic condition of employment, in terms of the BCEA due to its socio-economic relevance in mitigating the lasting consequences of past discriminatory policy. The chapter will close with a discussion in regard to the merits of drafting a Code of Good Practice specific to skills development.

## **Part 2: Recommendations for legislative reform**

### **1 Introduction**

From Part 1 above, it is clear that employees cannot enforce training in terms of the SDA. However, it could be argued that they have certain rights regarding training

or skills development,<sup>633</sup> outside of the SDA, based on the Constitution and the LRA, which could assist them in accessing skills development. In terms of the Constitution, it is arguable that the right to fair labour practices could, in a changing world of work, include a duty on the employer to train employees to ensure sustainable employment. There is judicial and legislative support for the view that where there is a contractual right to training or a legitimate expectation of training has been created, it would constitute an unfair labour practice in terms of the LRA if the employer does not provide such training. Further, the LRA provides that an employee may not be dismissed for poor work performance unless the employer has, *inter alia*, provided training. This is an important aspect in light of the fact that in terms of the EEA, designated employees could be appointed simply on the ground that they are “suitably qualified” and capable of acquiring the necessary skills to do the job within a reasonable period of time. Training of designated employees who upon appointment, may not have had the required skills, will ensure that equitable representation will not be compromised. Finally, trade unions could conclude collective agreements with employers to ensure that their members have a right to be trained. There is no doubt that training could be regarded as a matter of mutual interest.

Part 2 of this chapter provides suggestions on how the current legislative framework can be amended to allow for a more inclusive skills development strategy, while keeping the current institutional framework intact. Suggestions for reform made in this part will focus on workers who are employed, but who have not significantly benefitted from skills development under the current legislative framework. It will furthermore be proposed that an obligation on an employer to facilitate skills development be included within the BCEA. As shown in Chapters 4 and 5: Part 1, employers (that meet various thresholds) are incentivised, rather than obligated, to provide skills development to their employees in terms of the SDA and EEA. The SDA uses the payment of mandatory and discretionary grants to employers (as a means to recoup levies paid in terms of the SDLA) to reward adherence to SETA requirements. The EEA promotes skills development through the allotment of points towards compliance on the B-BBEE scorecard, which provides businesses with a

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<sup>633</sup> The terms “training” and “skills development” are used interchangeably. The SDA refers to “skills development” and “training”, but does not provide definitions, as does the EEA. The LRA refers only to “training”.

beneficial trading position relative to non-compliant businesses. However, as discussed in Chapter 4, a significant number of businesses choose not to engage with SETAs and adhere to its requirements. Chapter 4 described how the limited gains that have been made in respect of skills development are not sufficient to have a significant impact on socio-economic development in South Africa.

Therefore, it is argued that the incentive-based approach has failed to advance the skills of the post-Apartheid South African workforce in any meaningful way. In Chapter 5: Part 1 it was shown that although small businesses perform a vital socio-economic function in South Africa, they are largely excluded from the principal mechanisms used to promote skills development in the SDA and EEA because they fail to meet the minimum thresholds. It will be recommended that, due to the important role that small businesses fulfil within the economy and society, they should be obligated to provide skills development to their employees. However, care must be taken to mitigate the administrative and financial burdens that such an obligation may impose on such businesses. In order to make adherence to the legislation practicable, small businesses should be provided with administrative and financial support to provide skills development. In this regard, the current institutional framework could be utilised to allow for such support. Although the SDA and EEA aim to incentivise larger businesses to provide skills development, a significant number of employers choose not to provide SETA-accredited training. Therefore, it will be argued that larger businesses should not be exempted from the application of the proposed amendment to the BCEA. Part 2 will conclude with a discussion of the merits of promulgating a Code of Good Practice on Skills Development.

## **2 Amending the Basic Conditions of Employment Act**

### **2.1 Introduction**

The BCEA establishes a minimum level of labour protections in order to safeguard vulnerable employees in the labour market. The stated purpose of the BCEA is “to advance economic development and social justice” by giving effect to the right to fair labour practices in section 23(1) of the Constitution and realising the state’s obligations in relation to the ILO.<sup>634</sup> As discussed above, skills development could be included within the interpretation of the constitutional right to fair labour practices

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<sup>634</sup> S 2 of the BCEA.

contained in section 23(1). Furthermore, in certain circumstances, the LRA can be interpreted to support a right to skills development by way of the unfair labour practice dispensation.<sup>635</sup> In addition, the LRA provides that a dismissal for poor work performance can be unfair if the dismissal was made before the employer has *inter alia* provided training. Furthermore, skills development is a recognised component of labour protection within public international law. It is widely recognised that a skilled workforce is integral to socio-economic development. Therefore, it is submitted that skills development should fall within the ambit of the purposes, which the BCEA purports to achieve, and therefore it will be recommended that a training provision should be inserted in the BCEA as a basic condition of employment.

In Chapter 4 it was shown that the incentive approach (as *per* the SDA and EEA) to encourage employers to provide skills development has failed to garner significant employer support and has not had the necessary remedial effect on the racial skills distribution created by pre-1994 governmental policies. In addition, employees within small businesses are generally excluded from the main mechanisms, created by the SDA and the EEA, to promote skills development. However, it highlighted that government policy acknowledges the critical socio-economic function that small businesses fulfil, and therefore it is critical to support small businesses to access the skills development required to enable sustainability and growth.

Given the urgent imperative to address the skills shortage within the labour market, it can be argued that it is no longer sufficient to rely on the discretion of employers to facilitate skills development, but that employers should be obligated to provide skills development as a basic condition of employment. In addition, providing skills development in an accessible way to those within the small business sector will facilitate an equitable redistribution of skills and economic opportunity to those who are arguably the most vulnerable within the labour market. This section will commence by suggesting a draft formulation for the proposed amendment to the BCEA. Thereafter, the proposed amendment will be critically evaluated, in particular the potential adverse impact that it may have on small businesses. It will be argued that these negative consequences could be mitigated through the use of existing supporting institutions. The section will conclude with a consideration of the need for

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<sup>635</sup> See the text to part 1:4 above.

a multi-faceted and multi-pronged approach to reforming the current skills development framework in South Africa.

## 2.2 Formulating an amendment to the BCEA

It is proposed that a chapter be included in the BCEA that deals specifically with skills development. The number of skills development hours to which an employee is entitled will depend on the number of days an employee has worked, similar to the calculation of leave entitlement in the BCEA. It is proposed further that the amendment should follow the same structure as section 20 of the BCEA, which allocates annual leave, and the following draft text is suggested:

### **CHAPTER X**

#### Skills development

##### Application of this Chapter

- 1(1) This Chapter does not apply to an employee who works less than 24 hours a month for an employer.
- (2) Unless an agreement provides otherwise, this Chapter does not apply to skills development provided to an employee in excess of the employee's entitlement under this Chapter.

##### Annual skills development entitlement

- 2(1) In this Chapter, "annual skills development cycle" means a period of 12 months' employment with the same employer immediately following-
  - (a) an employee's commencement of employment; or
  - (b) the completion of that employee's prior skills development cycle.
- (2) An employer must grant an employee at least –
  - (a) <sup>636</sup> days' annual skills development on full remuneration in respect of each

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<sup>636</sup> The amount of skills development entitlement is not proposed. As it is proposed that skills development within small businesses be subsidised through the NSF, the decision in regard to the amount of entitlement should be the result of political debate, that has taken cognisance of budgetary constraints.

- annual skills development cycle; or
  - (b) by agreement, one day of skills development on full remuneration for every z days on which the employee worked or was entitled to be paid.
- (3) An employer must grant the annual skills development entitlement no later than 3 months after conclusion of the annual skills development cycle.
- (4) Annual skills development entitlement must be taken -
  - (a) in accordance with an agreement between the employer and employee; or
  - (b) if there is no agreement in terms of paragraph (a), at a time determined by the employer in accordance with this section.
- 5 An employer may not compensate an employee financially or otherwise *in lieu* of granting paid skills development in terms of this section except on termination of employment.
- (6) For the purposes of this section, a skills development programme must be
  - (a) accredited by the SETA for the relevant sector; or
  - (b) in regard to “small qualifying businesses”<sup>637</sup>, registered as a SEDA skills development programme.

It is argued that employees can ensure compliance with the amendment by reporting the non-compliance of an employer to a labour inspector in terms of section 64(1)(a) of the BCEA. If the labour inspector should find that an employer has not complied, a compliance order can be served on the employer in terms of section 69 of the BCEA. In the alternative, an employee could also approach the Labour Court in terms of section 77(2) of the BCEA in the event of an omission by an employer to comply with the Act.

## 2 3 A critical analysis of the proposed amendment

### 2 3 1 *The administrative burden of providing training*

The proposed amendment to the BCEA will place an extra administrative burden on all businesses but especially small businesses. Although it can be expected that a substantial number of employers in the small business sector will not comply with the

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<sup>637</sup> It is suggested that “Small qualifying businesses” should be defined as businesses that are below the threshold that establishes the employer obligation to pay the skills development levy in terms of the SDLA.

proposed BCEA amendments due to a lack of administrative capabilities,<sup>638</sup> the number of businesses that could comply (and whose employees would benefit) is significant. To demonstrate the possible reach of the proposed amendment: in 2013, 6.8% of non-VAT registered small businesses<sup>639</sup> in South Africa kept full annual accounts, which correlates to 102 000 small businesses.<sup>640</sup> Arguably, if a business has the administrative capability to keep full accounting records, it could also comply with the requirements of the proposed amendment. When compared with the 8 420 small businesses supported through SETAs in the 2015/2016 year,<sup>641</sup> the impact of including small businesses in this manner would be substantial.

The utilisation of established institutions could mitigate the administrative burden of providing training to employees within small businesses. SEDA<sup>642</sup> could, in cooperation with the SETAs, facilitate the provision of standardised training courses aimed at enhancing the general performance of small businesses, for example by offering courses in computer literacy, office management and basic financial skills (such as compiling a budget, calculating loan and interest repayments, establishing profit margins etcetera). As low skilled workers manage the majority of small businesses, general and standardised courses could help strengthen foundational

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<sup>638</sup> 71.5 % of persons that run non-VAT registered small businesses did not complete their secondary education. 75.7 % of persons that run non-VAT registered small businesses did not keep any records. StatsSA *Survey of Employers and the self-employed* (2013) 8.

<sup>639</sup> "It is mandatory for any business to register for VAT if the income earned in any consecutive twelve month period exceeded or is likely to exceed R1 million. Any business may choose to register voluntarily if the income earned, in the past twelve month period, exceeded R50 000". South African Revenue Service "Small businesses and VAT" (undated) SARS <<http://www.sars.gov.za/ClientSegments/Businesses/SmallBusinesses/Pages/Small-Businesses-and-VAT.aspx>> (accessed 05-11-2017).

<sup>640</sup> StatsSA estimated in 2013 that 1.5 million informal small businesses are not VAT registered.

<sup>641</sup> See Ch 4 5 2.

<sup>642</sup> Small Enterprise Development Agency "About Seda" (undated) SEDA <<http://www.seda.org.za/Pages/Home.aspx>> (accessed 05-06-2017):

"The Small Enterprise Development Agency (Seda) is an agency of the Department of Small Business Development. Seda was established in December 2004, through the National Small Business Amendment Act, Act 29 of 2004. It is mandated to implement government's small business strategy; design and implement a standard and common national delivery network for small enterprise development; and integrate government-funded small enterprise support agencies across all tiers of government."

business skills. Therefore, small businesses, which will be obligated by the proposed amendment to the BCEA to provide training, could be assisted through SEDA, and the applicable SETA, to access standardised training programmes. In the following section it will be argued that these training programmes could be subsidised through the NSF.

### 2.3.2 *The financial cost of providing training*

The proposed amendment will add a financial cost to the operations of businesses. Although businesses above the threshold in the SDLA can claim grants for SETA-accredited skills development, small businesses are often financially constrained and adding an additional cost (without a means to recoup some of the cost) could be detrimental to sustainability and growth. Although no levy income would be available to be distributed as mandatory grants (as the SDA and SDLA would not be applicable), the NSF could fund these standardised courses. The SDA provides that funds from the NSF may be used for projects identified in the NSDS as national priorities.<sup>643</sup>

The NSDS prioritises the encouragement and support of small enterprises as a goal, and maintains that “(l)ow levels of education and training, as well as the lack of standardised, appropriate and accredited training, are key constraints to enabling people to create their own opportunities.”<sup>644</sup>

The NSDS also states that:

“South Africa is challenged by low productivity in the workplace, as well as slow transformation of the labour market and a lack of mobility of the workforce, *largely as a result of inadequate training for those already in the labour market*[and furthermore], (t)he NSF will ... aim to support credible and quality worker skills development, education and training programmes.”<sup>645</sup> [own emphasis added]

Consequently, the funding of training for employees of small businesses complies with the priorities of the NSDS and the NSF could allocate the resources. The DHET

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<sup>643</sup> S 28 of the SDA.

<sup>644</sup> Department of Higher Education and Training *National Skills Development Strategy III* Goal 4.6.19 and 4.5.18.

<sup>645</sup> Department of Higher Education and Training *National Skills Development Strategy III* Goal 4.6.20.

confirmed that “(t)he National Skills Fund is expected to ... meet the training needs of non-levy-paying companies ...”<sup>646</sup>; and that “SETAs are expected ... to ... (c)ordinate the skills needs of the employers - levy-paying and non-levy paying - in their respective sectors.”<sup>647</sup> Therefore, funding could be allocated from the NSF to resource skills development programmes, administered through the SETAs, for small businesses that are required to provide training in terms of the proposed amendment to the BCEA.

### 2 3 3 *An amendment to the BCEA in lieu of the SDA and EEA*

The SDA states that it aims “to develop the skills of the South African workforce”; “to improve the quality of life of workers” and “to promote self-employment.”<sup>648</sup> However, a large contingent of employers does not facilitate skills development in accordance with the SDA. Furthermore, the *de facto* exclusion of employees within small businesses meaningfully hampers the development of skills of a significant segment of the labour force, which in turn has a negative effect on their socio-economic outlook. The purposes of the SDA must be interpreted in alignment with the Constitution and the objectives of the SAQA Act,<sup>649</sup> which underscores that no sector of the economy should be excluded, but that the Act should “contribute to the ... social and economic development of the nation at large”<sup>650</sup>.

Both the SDLA<sup>651</sup> and EEA contain thresholds that businesses need to meet or surpass before the legislation becomes applicable. As a result, employees within small businesses are not entitled to the same benefits in respect of skills development as those employees that are employed in businesses that meet or surpass these thresholds. It is imperative to broaden the scope of skills development legislation to include more beneficiaries, especially those employees who find

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<sup>646</sup> Department of Higher Education and Training *NSDS III Progress Report (2011-2013)* 24.

<sup>647</sup> 23.

<sup>648</sup> S 2(1)(a) of the SDA.

<sup>649</sup> S 3.

<sup>650</sup> S 2(e) of SAQA.

<sup>651</sup> The SDLA exempts employers who pay a total of less than R500 000 in remuneration per year from the payment of the skills development levy. Small employers that fall below this threshold, therefore have no incentive to comply with the SDA in order to claim mandatory grants. See s 4(b)(i) of the SDLA.

themselves employed by small businesses that are outside of the intended reach of the SDA and EEA.

The complex nature of the EEA and the B-BBEE scorecard makes it inappropriate for use by small businesses with simple structures; consequently, the requirements for compliance are relaxed for qualifying small businesses.<sup>652</sup> In so doing small businesses are still able to benefit from the application of the EEA and B-BBEE compliance, however the lack of incentive has a negative impact on skills development as small businesses are not incentivised to provide training in order to become compliant.

Nevertheless, it may not be feasible for all employees to be included within the scope of the SDA and EEA. It must be acknowledged that the provision of training places both an administrative and financial obligation on businesses, and adherence to requirements of the SDA and EEA adds to this burden. As a result, it is arguable that compliance with the SDA and the EEA could be detrimental to the development of small businesses, as they are often constrained financially and administratively. As explained in parts 2 3 1 – 2 3 2 above, the additional financial and administrative burdens which would result from the amendment could be mitigated through the use of existing institutions. Therefore, the proposed amendment to the BCEA will obligate qualifying small businesses, not currently obliged to provide training in order to become B-BBEE compliant, to facilitate subsidised skills development for their employees.

The SDA primarily establishes institutions to facilitate skills development, most notably the SETAs. It does not create employer obligations, but incentivises employers to offer SETA-accredited training. The proposed amendment to the BCEA will create employer obligations, while utilising the institutions created by the SDA. Consequently, the proposed amendment to the BCEA will strengthen the application of the SDA, while also including small businesses, which fall outside of the ambit of the SDA.

### **3 Code of Good Practice on Skills Development**

Although the SDA allows for the drafting of a code of good practice, there is currently no code specific to skills development. Skills development is incorporated

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<sup>652</sup> See Ch 5 2 3 2.

in the Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices in terms of section 54(1)(a) of the EEA.<sup>653</sup> As explained above, although employment equity is one of the main mechanisms through which skills development policy is implemented, the mechanism is not applicable to all employers. Therefore, not all businesses have an incentive to adhere to the Code.

The SETAs' requirements for accredited training already, to a large degree, serve the function that a code of good practice would. However as discussed above, a large contingent of employers do not have to adhere to the SETA requirements. Therefore, if the BCEA is not amended to obligate all employers to provide skills development, it could be argued that a separate code, which would cover all businesses, would be of value. It is suggested that such a Code should encourage employers to engage with SETAs and to provide SETA-accredited training to its employees.

#### **4 The need for a multi-pronged approach to skills development**

The BCEA establishes a minimum level of workplace protection, through prescribed minimum conditions of employment, in order to safeguard vulnerable employees in the labour market. The BCEA regulates fundamental conditions of employment and it is argued that, given the critical importance of skills development within the South African economy and society, it should be recognised as a basic condition of employment for all employees. The necessity of the proposed amendment is especially relevant within the context of small businesses given that the aim of the BCEA is to safeguard vulnerable employees and that the majority of those within the small business sector are low skilled and therefore arguably have limited resources and bargaining power.

As discussed in part 2 1, the stated purpose of the BCEA is “to advance economic development and social justice” by giving effect to the right to fair labour practices in section 23(1) of the Constitution and realising the state's obligations in relation to the ILO.<sup>654</sup> It has been recognised that in certain circumstances, the denial of training

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<sup>653</sup> Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices GN 1358 in GG 27866 of 04-08-2005.

<sup>654</sup> S 2 of the BCEA.

could constitute an unfair labour practice and dismissal for incompetence could be regarded as unfair, if the employer did not provide adequate training.<sup>655</sup> In addition, skills development is recognised within public international law as an important means of enabling sustainable employment in evolving economic circumstances.<sup>656</sup> Therefore, an amendment to the BCEA that would allow for skills development to be included as a basic condition of employment, aligns with the purpose of the Act.

The BCEA is applicable to all businesses, also those small businesses that currently fall outside the ambit of the SDA and EEA. Consequently, the inclusion of skills development within the provisions of the BCEA would provide employees within small businesses with access to skills development that they are currently excluded from.<sup>657</sup> By amending the BCEA to include skills development as a minimum condition for employment, skills development will become an integral part of employment within South Africa – benefitting all employees, and not only those in larger businesses. It will also ensure employers, that fall within the ambit of the SDA and EEA, but choose not to participate in skills development, will have an obligation to ensure that their employees are trained. Together with existing provisions in labour legislation, namely the LRA and the EEA, the new provision in the BCEA will form an interrelated scheme to ensure that training of employees enjoys the priority necessitated by the skills shortage in South Africa.

The administrative and financial obligations that would result from the proposed amendment could adversely affect small businesses. However, as discussed above, standardised, but relevant, training programmes could be subsidised through the NSF. Therefore, small businesses would not have to pay out-of-pocket for the training of their employees. Further, the administration of facilitating skills development programmes and training to employees could be simplified as SEDA, in conjunction with the SETAs, could provide standardised training programmes to small business employees. The first commitment of the National Skills Accord is “[t]o expand the level of training using existing facilities more fully”<sup>658</sup>. Thus, the proposed amendment to the BCEA would not alter the current mechanisms used to implement

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<sup>655</sup> See Ch 5 3 1- 3 2, 4.

<sup>656</sup> See Ch 5 3 2.

<sup>657</sup> See Ch 5 2 3 2 - 2 3 3.

<sup>658</sup> Department of Economic Development *New Growth Path: Accord 1 National Skills Accord* (undated) 5.

skills development policy, but would rather serve to include a significant segment of the labour force, that is not adequately served by the current framework. The amendment would also support the agenda of the NSDS and NDP to encourage the growth and development of small businesses. *In lieu* of an amendment to the BCEA, it was considered whether the drafting of a Code of Good Practice specific to skills development could result in a greater number of employees benefitting from skills development opportunities.

## CHAPTER 6: CONCLUDING REMARKS

In South Africa, skills development has historically been used (and continues to be used) as a means to steer political and economic outcomes. As chapters 2 and 3 indicate, during the periods of colonialism and Apartheid black education and skills development served a dual economic and political purpose. In the early twentieth century, at the outset of government involvement in education provision to blacks, black labour was dehumanised as an economic commodity. The state endeavoured to increase the productivity and “user-friendliness” of this “commodity” through limited and specified training. During the course of the century, as the economy modernised and became industrialised, the skills required from black labour evolved. In order for the economy to grow, black labour had to be developed to perform the new requisite functions – albeit with artificial barriers to protect the perception of white superiority. In order for whites to maintain political control pre-1994, the black population had to be suppressed and deprived of influence in the economic sphere. By systemically denying blacks the same quality of education and skills development as whites, blacks were confined to the lower skilled level of the labour hierarchy, while whites were afforded the opportunity and were encouraged to progress to the higher occupational levels. Chapter 2 illustrated how political and economic circumstances coalesced to allow for the formation of a labour hierarchy through legislation. Chapter 3 discussed the mechanisms through which the labour hierarchy was maintained and the chapter concluded with a discussion of the political and economic circumstances that led to its collapse at the dawn of democracy in 1994.

In Chapter 4, the evolution of government policy regarding skills development post-1994 was delineated, highlighting areas where progress was made, but also areas where challenges endure. As discussed in Chapter 4, the promotion of employment equity is a primary mechanism through which post-1994 government policy advances skills development. The perception that an acceptable level of redistribution is being achieved is critical to the maintenance of political stability in South Africa. The development of skills amongst previously disadvantaged persons facilitates access to and utilisation of opportunity, which in turn enables social and economic progression. A skilled workforce is vital to economic development. The perceived shortage in skills inhibits economic growth and impedes international

competitiveness. Consequently, an inclusive skills development policy is integral to achieve equitable representation in the labour market and sustain economic growth.

Chapter 5 commenced with an analysis of the legal framework relevant to skills development and evaluated whether the application of the main legislative mechanisms used to promote skills development, namely the SDA and EEA, attains the objectives of the SDA to provide for a broad-based inclusive skills development framework. The chapter determined that although the aim of the SDA is read to be inclusive, certain categories of workers are *de facto* excluded, namely the unemployed and employees within small business. In addition, the widespread non-compliance of larger businesses deprives many employees from the benefits of skills development as envisioned by the SDA. Following the analysis of the SDA, the application of the EEA, as a means to advance the skills of persons who were largely excluded from skills development opportunities pre-1994, was discussed. It is clear that not all employers are designated employers; and not all businesses are motivated through the B-BBEE scorecard. The large contingent of small businesses in the formal sector that do not have to comply with EEA affirmative action measures regarding skills development, is of specific concern given their socio-economic prominence. Employees in these small businesses do not benefit from skills development through the employment equity mechanism, thereby jeopardising the pursuit of inclusive, broad-based and sustainable employment equity.

Thereafter, a discussion of the possibility of a constitutional right to training, underscored by public international law ensued. Section 23(1) of the Constitution states that “(e)veryone has the right to fair labour practices”. In *National Education Health* the Constitutional Court stated that “(t)he concept of fair labour practice is incapable of precise definition”<sup>659</sup> and it was considered whether it can be said that the right to fair labour practices can be interpreted to include a right to skills development. Relying on the Labour Court’s reasoning in *NEWU*, it was concluded that the constitutional right to fair labour practices is not a strictly defined concept, but rather a fluid principle adaptable to changing circumstances, which allows the court the discretion to balance the interests of employees and their employers. In this regard, Le Roux persuasively argues that labour law protections should evolve to remain relevant within the modern workplace, and therefore non-traditional

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<sup>659</sup> 2003 24 ILJ 95 (CC) para 33.

protections, such as a right to skills development, should be considered. Section 233 of the Constitution determines moreover that: “(w)hen interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.”<sup>660</sup> *Makwanyane* confirms that when interpreting a section within the Bill of Rights: “public international law would include non-binding as well as binding law<sup>661</sup>”. Therefore, the underlying principles of ILO Convention 142; the Human Resources Development Recommendation, concerning Human Resources Development: Education, Training and Lifelong Learning and the Decent Work Programme for South Africa should guide the interpretation of the Constitution towards an inclusive and broad-based application. This therefore supports the argument for interpreting the constitutional right to fair labour practices to include a right to skills development.

The chapter then discussed the right to training in terms of the LRA, which allows for the denial of training within employment to be construed as an unfair labour practice under certain circumstances. In *Mashao*, the CCMA held, with reference to *Traub*, that fairness requires the *audi alterem partem* rule to be extended to the employer-employee relationship and therefore, that the employer should have made trainees aware of the conditions for their continued participation in a training programme, and the consequences should they not meet certain criteria. Thereafter, the Labour Appeal Court decision in *MITUSA* was discussed, where the court analysed the circumstances under which the denial of training could be regarded as an unfair labour practice. The court found that there was no evidence to suggest that the terms of the training had been agreed to and therefore that the tugmasters could not have held a reasonable expectation that contractually bound Transnet. Concerning the determination of jurisdiction of such a dispute, the court held that a dispute regarding training, may simultaneously fall within the ambit of unfair labour practices and be justiciable; in addition to being strikeable as a dispute of right in regard to a unilateral change to terms and conditions of employment. The section concluded by noting that the Code of Good Practice: Dismissal states that an employee should not be dismissed for poor work performance unless the employer

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<sup>660</sup> S 233 of the Constitution.

<sup>661</sup> *S v Makwanyane* 1995 3 SA 391 (CC) para 35.

has provided the employee, *inter alia*, with appropriate training. What is clear from this discussion is that the rights to training or skills development that employees enjoy in terms of the LRA, are not directly enforceable and could at the most be regarded as “conditional” rights, meaning that the employee can only rely on such rights in the face of a denial thereof by the employer.

Whether a right to training could be included in a collective agreement as a “matter of mutual interest” between employer and employee was considered next. Relying on *Vanachem*, it was argued that skills development is a matter of mutual interest within the employment relationship and that unions should be encouraged to bargain on skills development with the aim of reaching collective agreements with employers in this regard. In accordance with the reasoning of the court in *Apollo Tyres*, (which referenced *Maritime Industries*), it was argued that a dispute in regard to training may constitute both a strikeable dispute of mutual interest, as well as an arbitrable dispute in terms of the LRA, and that an employee has a choice between industrial action and adjudication to settle the dispute.

Part 1 of Chapter 5 illustrated that although the SDA states that it broadly aims to “develop the skills of the South African workforce”,<sup>662</sup> vital segments of the workforce are excluded from the benefits of skills development. Consequently, in order to enable a more comprehensive and inclusive skills development strategy, while keeping the current institutional framework intact, Part 2 of Chapter 5 considered specific legislative amendments. Reform suggestions focused on workers who are employed, but who have not significantly benefitted from skills development under the current legislative framework.

It was contended that skills development should be recognised as a basic condition of employment. The BCEA establishes a minimum level of labour protections with the purpose “to advance economic development and social justice” by giving effect to the right to fair labour practices in section 23(1) of the Constitution and realising the state’s obligations in relation to the ILO.<sup>663</sup> It was established in Chapter 5 that the denial of training could constitute an unfair labour practice in terms of section 23(1) of the Constitution and that skills development is recognised within international law as a significant element of labour protection within an

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<sup>662</sup> S 1(1)(a) of the SDA.

<sup>663</sup> S 2 of the BCEA.

evolving labour market. As shown in Chapters 2, 3 and 4, appropriate and efficient skills development is vital to economic growth and in redressing the social consequences of past discriminatory legislation. Therefore, an amendment to the BCEA that would allow skills development to be included as a basic condition of employment is aligned with the purpose of the Act. It was argued that the recognition of skills development within the BCEA as a basic condition of employment would strengthen the reach of the application of the SDA, as well as include employees that are currently largely excluded from the benefits of the skills development strategy, specifically those in small businesses. Lastly, it was noted that there might be merit in the promulgation of a Code of Good Practice, specific to skills development, *in lieu* of an amendment to the BCEA.

Today, as in the past, skills development is used as a means to further economic and political objectives. At present, lagging economic growth and a growing political disquiet threatens the hard-won stability and international recognition that South Africa has enjoyed post-1994. It is critical that the skills of the South African workforce are sufficiently developed to safeguard these privileges for future generations, and it is hoped that this dissertation will contribute to that development.

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