

**Mainstreaming black African women into managerial positions in the  
South African private sector: A critical analysis of transformative  
legislative interventions, challenges, and prospects**

**by**

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**DECLARATION BY PROMOTER**

**I, Professor Kolawole Odeku**, hereby declare that this thesis by **Matotoka Motlhatlego Dennis** for the degree of Doctor of Laws be accepted for examination.

**Signed .....**

**Date.....**

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## DECLARATION BY STUDENT

I, **Matotoka Motlhatlego Dennis**, declare that this thesis for the degree of Doctor of Laws in the University of Limpopo hereby submitted, has not been previously submitted by me for a degree at this university or any other university, this is my work in design and execution and all material contained herein has been acknowledged.

Signed .....

Date.....

**Matotoka Motlhatlego Dennis**

## **DEDICATION**

The plight of black African women in the private sector has motivated me to embark on this study, it is hoped that through this study legislative reform will be expedited to progressively realise transformation in the private sector.

A special dedication of this work to my son Ayabonga Mahlodi Matotoka and my future unborn children. There is no substitution for hard work!

## **ACKNOWLEDGEMENTS**

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I want to thank Professor Kola Odeku for his meticulous guidance throughout the discipline. Working with you was truly inspiring and kept me focused and motivated. Your passion for research and analysis of issues has truly provided me with greater insight into this discipline. I cannot thank you enough Prof, you are amazing!

I want to thank my family for being my pillar of strength and support. Your love and support have carried me throughout this journey. You have all contributed in your special way. Thank you!

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4. Basic Conditions of Employment Act 75 of 1997
5. Labour Relations Act 66 of 1995
6. Broad-Based Black Economic Empowerment Act, 2003
7. Employment Equity Amendment Bill, 2018
8. Industrial Conciliation Act of 1956
9. Black Administration Act 38 of 1927
10. The Pass Laws Act of 1952
11. Companies Act 71 of 2008
12. Employment Equity Amendment Act 47 of 2013
13. Norway Companies Act of 2003
14. Protected Disclosures Act 26 of 2000
15. The Constitution of Norway, 1814
16. Norwegian Equality and Anti-Discrimination Act of 1979
17. Equal Participation of Women and Men in Leadership Positions in the Private and Public Sector Act 2015
18. The Constitution of the Republic of Rwanda, 2003
19. Labour Law No 13/ 2009
20. Jamaican Constitution, 1962
21. The Employment (equal pay for men and women) Act 34 of 1975

## LIST OF ABBREVIATIONS

AU	African Union
ANC	African National Congress
BBBEE Act	Broad-Based Black Economic Empowerment Act, 2003
BCEA	Basic Conditions of Employment Act 75 of 1997
BMF	Black Management Forum
BPA	Beijing Declaration and Platform for Action
CEDAW	Convention on the Elimination of Discrimination against Women
CEE	Commission for Employment Equity
CEO	Chief Executive Officer
CFO	Chief Financial Officer
CGE	Commission for Gender Equality
COSATU	The Congress of South African Trade Unions
CRGE	Centre for Research on Gender Equality
DTI	Department of Trade and Industry
DWYPD	Department of Women, Youth and Persons with Disabilities
DPSA	Department of Public Service and Administration
EAP	Economically Active Population
EEA	Employment Equity Act, 1998
EAA	The Equality and Anti-Discrimination Act
EBIT	Earnings Before Interest and Taxes
ERC	Equal Remuneration Convention, 1951 (No. 100)
EODC	Employment and Occupation Discrimination Convention, 1958 (No.111)
EU	European Union

EC	European Commission
GMO	Gender Monitoring Office
GFP	Gender focal point
HOD	Head of department
ILO	International Labour Organisation
ICERD	Convention on the Elimination of All Forms of Racial Discrimination
JSE	Johannesburg Stocks Exchange
LRA	Labour Relations Act, 1995
MIGEPROF	Ministry of Gender and Family Promotion
MDG	Millennium Development Goals
NDP	National Development Plan
NGP	National Gender Policy
NGM	National Gender Machinery
NPGE	National Policy for Gender Equality
OECD	Organisation for Economic Co-operation and Development
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 200
RFPS	Rwandan Federation for the Private Sector
SAB	South African Breweries Pty Ltd
SAPS	South African Police Services
SAHRC	South African Human Rights Commission
SDG	Sustainable development goals
SSA	Statistics South Africa
SMS	Senior Management Service
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UDHR	Universal Declaration of Human Rights of 1948
UN	United Nations
UNDP	United Nations Development Programme
WEF	World Economic Forum
WEP	Women's Empowerment Principles



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1. *Chowan v Associated Motor Holdings (Pty) Ltd and Others* (22142/16) [2018] ZAGPJHC 40 (23 March 2018).
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11. *National Coalition for Gay and Lesbian Equality & another v Minister of Justice & others* [1998] ZACC 15; 1999 (1) SA 6 (CC) .
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19. *Smith v Darby School District*, 388 Pa.301 (1957) (Supreme Court of Pennsylvania).
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30. *Nehawu v UCT* (2003) 24 ILJ 95 (CC).
31. *Mokone v Highveld Steel and Vanadium* 2005, 12 BALR 5.
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34. *Mashegoane and another v University of the North* (1998) 1 BLLR 73 (LC).
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38. *NUMSA on behalf of Cook v Delta Motor Corporation* (2000) 9 CCMA 6.9.6 EC 20404.
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46. *Swanepoel v Western Region District Council and another* 1998 (19) ILJ 1418.
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## **ABSTRACT**

The private sector in South Africa lags in proliferating black African women into managerial positions. This is so despite the Employment Equity Act (EEA) requiring that the private sector must ensure that all occupational levels are equitably represented and reflects the demographics of South Africa. Since the EEA, the private sector has been white male-dominated and white females enjoy preference in terms of recruitment compared to black African women. Despite the legislative gaps in South Africa, the South African private sector demonstrates its unwillingness to transform it's by managerial positions by engaging in race-based recruitment, failing to train and develop black African women within the workplace, failing to create pipeline mechanisms into managerial positions and creating a workplace environment that caters for the needs and interest of women at leadership levels.

The progression of black African women requires South Africa to adopt a quota system that will result in the private sector being compelled to appoint suitably qualified black African women. The EEA does require the private sector to apply affirmative action measures to achieve equity in the workplace. It is submitted that since 1998 the private sector has been provided with an opportunity to set their targets to achieve equity, 20 years later black African women are excluded in key managerial positions. Some private sector companies engage in fronting practices to obtain a Broad-Based Black Economic Empowerment (BBBEE) certificate that enables the company to do business with the State. Black African women who are appointed as a 'front' do not obtain the necessary experience in managerial levels and as such limits their economic participation. Exposing black African women in managerial levels enhances their skills and increases their prospects to promotions and assuming further leadership roles in the private sector. Without a clear, a quota law in South Africa, the South African private sector would not be persuaded to accelerate the equitable representation at its managerial positions.

**Keywords: Black African women, private sector, equity, equality, fronting, quota, transformation and managerial positions.**

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# CHAPTER ONE

## INTRODUCTION AND BACKGROUND

### 1.1 Introduction

The process of transformation raises complex and emotive questions of equity, equality, gender, and race in the workplace. This is so because since the advent of democracy South Africa has been divided based on class, gender and race. This has led to the exclusion and oppression of black African women in the workplace and society in general. Consequently, white males have been dominating managerial levels in the private sector and the sector has been criticised for its failure to increase the representation of black African women at these positions.<sup>1</sup> This exclusion perpetuates the apartheid injustices where black African women were generally excluded from economic participation.

In 2018, Statistics South Africa reported that the population of black Africans is estimated to be 46 682 900 (equivalent to 80%), from this 22 786 200 are reported to be men whereas women are 23 896 700.<sup>2</sup> It was reported that the coloured population was 5 074 300 (equivalent to 8.8%), from this 2 459 500 were males and females were 2 614 800. The population of Indian people was found to be 1 448 300 (equivalent to 2.5%), from this males amounted to 740 200 and 708100 were females.<sup>3</sup> It was reported that the white population was at 4 520 100 ( equivalent to 7.8%) with males being 2 194 200 and females being 2 325 900.<sup>4</sup>

Black African women form most of the South African population, notwithstanding this, their representation at higher positions in the South African private sector is small and

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<sup>1</sup> Commission for Employment Equity, Annual report at page 87, 2016/2017, available at [www.Labour.gov.za](http://www.Labour.gov.za) accessed on 29 January 2018.

<sup>2</sup> Statistics South Africa, Mid-year population estimates for South Africa 2018, available at <https://www.statssa.gov.za/publications/P0302/P03022018.pdf> accessed on 3 February 2019.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

very poor. This study purposively focuses on the segregation of black African women in the higher positions in the private sector unlike other women in other race groups, their exclusion is uniquely based on race, gender, and class.

In the case of *Chowan v Associated Motor Holdings (Pty) Ltd and Others*<sup>5</sup> (Chowan) the Southern Gauteng High court in South Africa delivered a landmark judgement that demonstrated the prejudice that women experience in the workplace despite their educational background. In Chowan, the respondent (the chief executive officer in particular) was found to have infringed the dignity rights of the applicant (female employee) during 2018 by referencing the employee in question as “a female, employment equity, technically competent, they would like to keep her but if she wants to go she must go, others have left this management and done better outside the company...”.<sup>6</sup>

In *casu*, the applicant was assured of a Chief Financial officer (CFO) position twelve months after being employed as a Group Financial Manager of the company. After several years after this assurance, the applicant was overlooked for the CFO position despite academic qualifications and work experience and qualifications. The company offered the CFO position to a white male who lacked experience in the industry and further possessed no accounting and transaction knowledge required for the CFO position at the company.<sup>7</sup> The Chief Executive Officer (CEO) of the company argued that the applicant required more years (i.e. three to four years) to enhance her skills in leadership. The Chowan case demonstrates that fronting exists in the private sector, where female candidates are hired, trained but overlooked in available management opportunities. It is submitted that this practice amounts to window dressing where the appointment of women is arguably amounting tokenism.

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<sup>5</sup> *Chowan v Associated Motor Holdings (Pty) Ltd and Others* (22142/16) [2018] ZAGPJHC 40 (23 March 2018).

<sup>6</sup> *Chowan v Associated Motor Holdings (Pty) Ltd and Others*, paragraph 22.

<sup>7</sup> *Chowan v Associated Motor Holdings (Pty) Ltd and Others*, paragraph 48.

It is demonstrated in Chowan that patriarchal attitude exists in the workplace where women are viewed as less worthy to assume leadership and strategic roles. The patriarchal attitudes towards women, more in particular black African women, dates to the 20<sup>th</sup> century. Around the 20<sup>th</sup> century, black African women in South Africa were mostly employed as caregivers and further responsible for household activities. To the contrary, black men were employed as migrant labourers in the mining sector and this resulted in black African women supporting their families on their own by working in the fields to produce food.<sup>8</sup> The depletion of food supplies in rural areas influenced black African women to migrate to the cities in South Africa to seek employment.<sup>9</sup> In the cities, South African black African women were subjected to exclusion in terms of class, race and gender.<sup>10</sup> In terms of gender, women were predominantly confined to procreation roles and maintaining households.<sup>11</sup> In terms of race, black African women were inferior beings and in terms of class, they experienced exclusion due to lack of employment opportunities and poor education levels.<sup>12</sup> Due to this, black African women were only able to occupy lower-level job opportunities with the lowest remuneration.<sup>13</sup> These lower levels included domestic and agricultural services during the apartheid era.<sup>14</sup>

The private sector perpetuated the discriminatory practices by remunerating higher wages to black men, white men and women and lower wages to black African women.<sup>15</sup> Very few black African women who worked in the sewing and packaging factories received promotions however some factories considered whether black African women

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<sup>8</sup> ANC, Effects of Apartheid on the Status of Women in South Africa, 15 July 1980, available at <http://www.anc.org.za/content/effects-apartheid-status-women-south-africa> accessed on 02 February 2018.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> Nolde J, South African Women under apartheid: Employment rights, with particular Focus on Domestic service and forms of resistance to promote change, Third World Legal Studies vol. 10 at page 211-212, 1991.

<sup>12</sup> *Ibid.*

<sup>13</sup> ANC, Effects of Apartheid on the Status of Women in South Africa, 15 July 1980 available at <http://www.anc.org.za/content/effects-apartheid-status-women-south-africa> accessed on 02 February 2018.

<sup>14</sup> *Ibid.*

<sup>15</sup> Black Sash, Survey on black women in employment in a number of Pinetown factories, conference paper at the Black Sash National Conference on 14 March 1978, available at [www.sahistory.org.za](http://www.sahistory.org.za) accessed on 21 March 2018.

possessed educational qualifications.<sup>16</sup> Similarly, some private sector companies offered black African women lower pension benefits compared to white females, white males and black males.<sup>17</sup> When a female employee fell pregnant during the apartheid era, this resulted in the rendering of services being affected and did not guarantee their re-employment after maternity.<sup>18</sup> Essentially black African female employees who were pregnant were likely not to be re-employed. It is deduced that being viewed as inferior and lack of employment opportunities resulted in black African women not receiving exposure and skills in the private sector. This had a barring to their representation in decision-making positions during the apartheid because black African women were generally employed in positions that were arguably an extension of their household and traditional roles and not necessarily decision-makers.<sup>19</sup>

This exclusion of women persisted during apartheid in both private and public sectors however central to the democratic dispensation in South Africa was a guarantee of equality rights in the workplace for all persons, including black African women. The South African Constitution was enacted in 1996 and its founding principles include human rights, equality, and freedom for everyone in South Africa. Section 9 of the Constitution reaffirms that no person or State may discriminate unfairly against any person on the grounds of gender and sex. To achieve equity in the workplace, the Employment Equity Act 55 of 1998 (EEA) was enacted to compel employers to eliminate unfair discriminatory employment practices and achieve a diverse workforce that is reflective of the demographics of South Africa. To do this, the EEA through section 20, requires the private sector to develop employment equity plans to foster the achievement of employment equity in the workplace. Essentially, the private sector is required to develop measures that will address the poor representation of black African women in key decision-making positions in the private sector. This is so because the EEA recognises black African

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<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> Nolde J, South African Women under apartheid: Employment rights , with particular Focus on Domestic service and forms of resistance to promote change, Third World Legal Studies vol 10 at page 205,1991.

women to be part of the disadvantaged groups due to the intersection of race, class and gender.

Since its enactment, the EEA was expected to address the systemic historical exclusion of black African women in the workplace, as such, it was expected that the labour force would be inclusive of black African women to reflect the demographics of South Africa. An inclusive and diversified workforce implies that equal rights and benefits accorded to males and females from other race groups would be afforded to black African women in the private sector. Notwithstanding the aspirations of the EEA, the managerial positions in the private sector are still white male dominated, and black African women are underrepresented 22 years since the enactment of the EEA. Compared to the public sector, the private sector lags in increasing the representation of black African women in decision making positions.<sup>20</sup> This resulted in bodies such as the Commission for Gender Equality (CGE)<sup>21</sup> and the Commission for Employment Equity (CEE)<sup>22</sup> to conduct investigations in the private sector to determine the barriers that contribute to the slow pace of proliferating black African women in managerial positions. These investigations were informed by section 9 of the South African Constitution, 1996 (Constitution) that requires the private sector to not discriminate unfairly against black African women by eliminating gender and race inequalities in the workplace.

According to the CEE white males, white females and black males respectively dominated managerial positions in the South African private sector than black African females from the period 2006 to 2017.<sup>23</sup> This was also suggested by the CGE in 2017 when it asserted that black African women in the private sector in South Africa generally are

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<sup>20</sup> Commission for Employment Equity, Annual report at page 87,2016/2017, available at [www.Labour.gov.za](http://www.Labour.gov.za) accessed on 29 January 2018.

<sup>21</sup> The Commission for Gender Equality (CGE) was established in 1996 in terms of section 187 of the Constitution. Section 187 states that the CGE was created to strengthen and deepen the constitutional democracy in South Africa through promotion, protection, development and attainment of gender equality.

<sup>22</sup> Commission for Employment Equity(CEE) is established in terms of Chapter IV of the EEA. The functions of the CEE include *inter alia* to make awards, recognizing the achievements of employers in furthering the purpose of the EEA; to research and report to the Minister of Labour on any matter relating to the application of the EEA.

<sup>23</sup> Commission for Employment Equity, Annual report at page 87, 2016/2017, available at [www.Labour.gov.za](http://www.Labour.gov.za) accessed on 29 January 2018.



underrepresented in leadership positions.<sup>24</sup> To this end, a view is expressed that despite the enactment of the EEA, gender parity in decision-making positions in the private sector persists and remains unaddressed.

In South Africa, monitoring how the private sector implements gender legislation such as the EEA is a challenge.<sup>25</sup> This is influenced by the private sector's failure to submit their employment equity reports to the Director-General of the Department of Labour in terms of section 21 of the EEA.<sup>26</sup> The employment equity reports assist in the monitoring of compliance with the affirmative action measures prescribed by the EEA. The Director-General of the Department of Labour uses these reports to determine whether the implemented affirmative action measures can achieve equitable representation for previously disadvantaged groups in the workplace.<sup>27</sup>

The failure to monitor and enforce the EEA in the private sector has resulted in most companies not demonstrating a commitment to employment equity and delegating it to the bottom of the business priorities.<sup>28</sup> To compel and enforce compliance with the EEA, fines are usually issued to companies.<sup>29</sup> The challenge is that the South African private sector budgets for these fines and pay for any penalties imposed, as such, it is expressed that the imposed fines have not deterred the private sector to comply with the EEA.<sup>30</sup> It is against this backdrop that the private sector finds it easier not to proliferate black African women in managerial positions. Consequently, the imposed fines to enforce compliance with the EEA have not influenced the private sector to prioritise the achievement of equitable in all managerial levels.

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<sup>24</sup> Commission for Gender Equality, Employment Equity Report, page 63,2016/2017, available on [www.cge.org.za](http://www.cge.org.za) accessed on 29 January 2018.

<sup>25</sup> Statistics South Africa, Millennium Development Goals 3: Promote gender equality and empower women, page 60 , 2015 available at [www.statssa.gov.za](http://www.statssa.gov.za) accessed on 31<sup>st</sup> March 2018.

<sup>26</sup> Bezuidenhout A *et al*, Tracking Progress on the implementation and impact of the employment Equity Act since inception, page 24, March 2008 available at [www.labour.gov.za](http://www.labour.gov.za) accessed on 31 March 2018.

<sup>27</sup> Section 21 of EEA.

<sup>28</sup> *Ibid*, page 25.

<sup>29</sup> *Ibid*, page 25.

<sup>30</sup> *Ibid*, page 25

## 1.2 Background

The underrepresentation of black African women in the private sector's managerial positions has been in the spotlight in South Africa since the advent of democracy in 1994. This is so because South Africa has been divided along the lines of race, gender, class and this has resulted in black African women being mostly discriminated against. Against this backdrop post-1994, various domestic legislation was enacted to eliminate all barriers that hinder the progression of black African women into managerial positions. Firstly, the Labour Relations Act 66 of 1995 (LRA) was passed into law in 1995 and states, through section 187, that a dismissal is automatically unfair if the employee is dismissed because of her pregnancy, intended pregnancy or a reason related to her pregnancy. The LRA provides relief for such automatic dismissal in terms of section 193(4) and this includes reinstatement, re-employment, or compensation. Black African women may invoke section 187 of the LRA to exercise their rights if employment is terminated on the grounds of pregnancy.

Secondly, South Africa introduced the Basic Conditions of Employment Act 75 of 1997 (BCEA) in 1997 that provides for maternity rights to employees. Section 25 of the BCEA provides for four consecutive month's maternity leave. The private sector is prohibited in terms of section 26 of the BCEA to provide work that may be hazardous to a pregnant employee. Failure to comply with the BCEA attracts penalties or compensation.<sup>31</sup> Like the LRA, the BCEA offers pregnant employees with protection in the private sector.

Thirdly, South Africa introduced the Employment Equity Act 55 of 1998 (EEA) to realise the constitutional right of equality; eliminate unfair discrimination in employment; ensure implementation of employment equity, and achieve a diverse workforce that represents all citizens of the Republic of South Africa. The EEA requires designated employers<sup>32</sup> in terms of section 20 to develop and operate with an employment equity plan to

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<sup>31</sup> Schedule Two of the BCEA.

<sup>32</sup> The EEA defines a designated employer as an employer who employs 50 or more employees, or an employer who employs fewer than 50 employees, but has a total annual turnover as reflected in Schedule 4 of the Act.

progressively achieve employment equity. Designated employers are essentially required to develop measures to address the underrepresentation of designated groups in various occupational levels.<sup>33</sup> It is submitted that the EEA acknowledges that black African women to be at a disadvantage in the workplace primarily due to class, race, and gender and it is from this acknowledgement that the private sector is mandated to realise equity in terms of their representation.

Fourthly, South Africa enacted the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA) that aimed to promote equality, values of non-racialism and non-sexism, prevention of unfair discrimination and protection of human dignity, the prohibition of advocacy of hatred speech, based on race, ethnic, gender and religion, to promote measures for the eradication of unfair discrimination, hate speech and to provide remedies for victims of unfair discrimination.<sup>34</sup> PEPUDA does not necessarily apply to employment equity issues but still serves as critical legislation to address systemic inequalities that prejudice black African women in society because of their gender and race.

Fifthly, South Africa enacted the Broad-Based Black Economic Empowerment Act 53 of 2003 (BBBEE Act) with the objectives to fast-track economic transformation for black people through meaningful participation. This is done through *inter alia* increasing access to economic activities, infrastructure, and skills training.<sup>35</sup> It is observed that the BBBEE Act recognises the importance of including black women, in the effective economic participation of South Africa.

Lastly, to ensure the progression and inclusion of women in the South African economy, South Africa established in 2012 a National Development Plan (NDP) which seeks to achieve *inter alia* poverty alleviation, reduction of inequality of women and inclusive economy. The NDP goals are envisaged to be achieved by 2030. It is submitted that

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<sup>33</sup> In terms of the EEA designated groups means black people, women and people with disabilities.

<sup>34</sup> Section 2 of PEPUDA.

<sup>35</sup> Section 2 of the BBB EE Act.

without clearly defined plans to hold the private sector accountable for lack of transformation at managerial positions, the NDP aspirations would not be met and black African women would continue to be excluded in the private sector's managerial levels based on class, race and gender. It is argued that the goal to eliminate the exclusion of black African women fundamentally requires that the slow pace of transformation in the private sector be addressed with urgency given the NDP 2030 target.

### **1.3 Status of black African women in the South African workplace post-1994**

Qualified and skilled persons are required in South Africa to meet the skills demand in both the private sectors and ultimately the economy.<sup>36</sup> According to Statistics South Africa (SSA), most black African women over the age of 25 have no formal education in contrast to females in other population groups.<sup>37</sup> Similarly, very few black African women qualify for a qualification higher than Matric.<sup>38</sup> Most black African women are likely to be excluded in economic participation due to lack of formal education. Consequently, this results in black African women being employable at unskilled jobs such as domestic workers.

According to SSA black African women are more prejudiced in terms of employment opportunities compared to other women and men in other population groups.<sup>39</sup> It is recorded that only a third of black African women (30,8%) were employed in 2011 whilst 56,1% of white females, coloured women (43,2%) and Indian/Asian women (40.2%) were employed.<sup>40</sup> Black African women continue to be less absorbed in the workforce. Against this backdrop, black African women are often excluded in higher education and advanced managerial skills.

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<sup>36</sup> Bhorat H, Cassim A and Tseng D , Higher Education, employment and economic growth : Exploring the interactions, Development Southern Africa, page 317, 2016.

<sup>37</sup> Statistics South Africa, Gender Statistics in South Africa, page 23,2011, available on [www.statssa.gov.za](http://www.statssa.gov.za) accessed on 6 February 2018.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

## 1.4 Research methodology

A qualitative research methodology is primarily applied in this study. Included, is the internet, desk review, case laws, legislation, policies, Conventions and protocols to conduct a comparative research study. The purpose of a comparative study is to inform best practices applied in other jurisdictions that can assist South Africa in addressing the underrepresentation of black African women in managerial positions in the private sector. As such, a comparative research study and methodology was employed.

To this end, a comparative research study was employed between Norway, Jamaica and Rwanda to examine laws, policies and measures in these countries to proliferate females into higher positions in the private sector. Norway has enacted the Companies Act 2003 which essentially provides for mandatory quotas for the private sector to attain 40% female board members. The significance of Norway is that it is the first country to legislate gender quota systems through the Companies Act 2003 that provides harsh sanctions such as deregistration of the company if it fails to achieve the quotas. The Norwegian legal system has its genesis to the Roman legal system.<sup>41</sup> Like South Africa, the interpretation of laws is based both on the Constitution as well as interpretations by the courts. The introduction of the Companies Act 2003 in Norway has resulted in most companies achieving their 40% quotas. Importantly, 77 out of an estimated 450 public limited companies failed to comply, despite being afforded a grace period, with the 40% quotas. The companies only complied and increased the representation of women after being threatened with deregistration. The Norwegian quota system is a good model for South Africa to emulate as it has resulted in the increase of women representation once introduced.

Similarly, a comparative study is explored with Jamaica as it is ranked a global leader in having more women in decision-making levels with 12% of companies achieving gender balance at the executive level compared to the 8% globally.<sup>42</sup> Although Jamaica has not legislated quota law, Jamaica has established plans to increase the representation of

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<sup>41</sup> European Commission, Country report Non-discrimination Norway, Reporting period 1 January 2017 – 31 December 2017, page 5, 2018.

<sup>42</sup> Women in business and management: Gaining momentum in the Caribbean, at page 17, October 2018.

women in the high echelon levels in the private sector. These measures include the introduction of the Gender Seal Certification Programme in the private sector. The Gender Seal Certificate programme requires the private sector to have skills development for women and mentorship as part of the strategies to increase the capacity of qualified women eligible for managerial positions. Similarly, Jamaica subscribes to the Women Empowerment Principles that prescribes a quota system of 30% or greater in decision making positions at all levels and across the business areas.<sup>43</sup> It is critically observed that the increase of women in decision-making positions may not be achieved without a compelling tool that forces the private sector to transform its managerial levels. The significance of the Jamaican model is the proactive measures adopted to fast-track the progression of women in managerial levels.

Lastly, a comparative study is explored with Rwanda. Rwanda is the only country in Africa that achieved and exceeded 30% target (of women representation) of the Commonwealth in the private sector.<sup>44</sup> Rwanda subscribes to the Gender Seal Certificate programme that further aim to fast-track the progression of women in higher positions. The Rwandan Constitution, through Article 9, provides equality rights and mandates women representation to be at least thirty per cent (30%) of positions in decision-making bodies. As a result, Rwanda has the highest share of female parliamentarians globally (61%). Rwanda is a test case that demonstrates that the use of quotas increases women in managerial positions.

Against this backdrop, a legal comparative analysis was applied to this study to find solutions, especially an investigation on the way forward to address the underrepresentation of black African women in the South African private sector. Through this comparative methodology, best practices were examined, to inform legal recourse where South Africa is either non-responsive in terms of legal precedent, under-developed

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<sup>43</sup> Principle 2 of the WEP.

<sup>44</sup> Hinds B, Strategies for Increased Participation of Women in Leadership across the Commonwealth, Commonwealth Secretariat, page 6, 2015.

or absent to fast-track the progression of black African women in managerial levels in the private sector in South Africa.

## **1.5 Problem Statement**

Notwithstanding the adoption of affirmative action measures, laws, and statutory bodies to fast-track the progression and representation of black African women at the higher positions in the private sector, the private sector remains untransformed and stagnant to provide black African women with opportunities to occupy higher-level positions. In the private sector, unskilled labour positions are dominated by black African women.<sup>45</sup> Consequently, the South African private sector has not achieved diversity at managerial levels, unlike the public sector that has fast-tracked the progression of black African women in key strategic positions and thus accepted black African women to form part of an integral part of decision-making. The South African private sector contributes significantly to the economy and this contribution is a result of decision-makers in the private sector. As such, it is argued that the exclusion and minimal representation of black African women essentially denies them of economic participation and equality in the workplace.

## **1.6 Purpose of the study**

### **1.6.1 Aim**

The study aims to examine the lack of transformation in the South African private sector workplace with specific reference to black African women despite numerous laws (International and regional), international instruments and policies that have been introduced to ensure that black African women form part of middle, senior and top management positions. It is against this backdrop of lack of transformation in the

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<sup>45</sup> Statistics South Africa, Gender Statistics in South Africa, page 23, 2011, available on [www.statssa.gov.za](http://www.statssa.gov.za) accessed on 6 February 2018.

private sector workplace that this study seeks to use existing legal tools to address the problem.

### 1.6.2 Objectives

The main objective of the study is to look at the established legal prescripts that foster the progression of black African women into key strategic managerial positions in the private sector. However, another objective relevant to the key objective is to critically examine how these laws are being implemented to achieve the desired results. Also, to examine the enforcement of these legal provisions to compel the private sector companies to mainstream black African women into managerial positions. Further is to address the challenges posing as barriers in the private sector to mainstream black African women into top management positions. The last objective is to utilise the jurisprudence from Norway, Rwanda and Jamaica and learn lessons on how they are implementing, mainstreaming women into managerial positions. The reason for selecting Jamaica, Rwanda and Norway is that these countries have very good legislative and policy frameworks that are being implemented to mainstream women into managerial levels in the workplace. Furthermore, there are political and administrative wills by these countries to implement gender-responsive interventions and these have resulted in women being represented in managerial positions in the workplace.

### 1.7 Significance of the study

The black African women are still sharply underrepresented in the managerial positions in the private sector despite the introduction of the EEA in 1998. Their exclusion in key positions is not that black African women are incompetent but rather are excluded based on race, gender and class. The study attempts to answer the practical question of whether the application of the EEA has practically influenced the South African private sector to be reflective of the demographics of South Africa at managerial positions. Moreover, the study seeks to contribute to the understanding



and acceptance that the prohibition of quotas in the EEA is a legislative gap that contributes to the lack of equitable representation of previously disadvantaged groups such as black African women in managerial positions in the workplace.

Essentially the study contributes to a better understanding of the application of affirmative action measures, the setting of numerical goals envisaged in the EEA and the achievement of equity in key positions in the private sector. The study attempts to show the disjuncture that exists between the application of affirmative action measures and the application of preferential treatment to the extent that the latter creates legislative protection to the private sector for failing to advance black African women in the higher echelon positions whilst the former seeks to achieve equity for previously disadvantaged groups.

Contextually this study contributes to the understanding that no amount of affirmative active measures would result in an equitable representation of previously disadvantaged groups such as black African women in the workplace if quotas and harsh sanctions do not accompany such measures.

The study targets to benefit black African women, CGE and CEE. This study will provide solutions to the existing glass ceilings that bars black African women to occupy managerial positions in the private sector Accordingly, the study will result in suitably qualified black African women being targeted and prioritised for management positions in the private sector. For the CGE, the study will help in providing recommendations to the amendment of the CGE Act to expressly allow the recommendations of the CGE to be binding. It is expressed that without binding recommendations the CGE would not be able to persuade or compel the private sector to ensure that gender equality is realised in the workplace. Similarly, the study will help the CEE to further explore how the quota system may be introduced in the public sector to achieve equity. Ultimately this study will assist the South African private sector and public sector are progressively ensuring that black African women are part of the inclusive economy by 2030.

## 1.8 Conceptual clarifications

There are concepts pertinent to the subject of this study and these include, black African women, equity, fronting, gender, gender mainstreaming, managerial positions and transformation. Accordingly, the classification of persons in South Africa is highlighted in the EEA. Black people are defined in the EEA to mean Africans, Coloureds and Indians. Black African women are the most in terms of the South African population. Moreover, unlike women in other race groups, black African women have been subjected to discrimination in terms of race, gender and class and this distinctive feature make black African women vulnerable and more susceptible to further exclusions in the workplace. To this end, the study intentionally excludes Indian and coloured women and defines black African women to mean African women of colour to the exclusion of coloureds and Indian women.

The concept of equity is critical and arguably forms the basis of the study. Braveman *et al* defines equity to mean social justice or fairness and asserts that it is an ethical concept grounded in principles of distributive justice.<sup>46</sup> Oosthuizen *et al* define employment equity as “the employment of individuals in a fair and non-biased manner, thus to promote equal opportunity by eliminating discrimination in all employment policies and practices”.<sup>47</sup> Since the advent of democracy, South Africa experiences a challenge of achieving equitable representation and effective participation of black African women at the top echelons of the private sector. The majoritarianism of black African women in South Africa has not resulted in their equitable representation at managerial positions and their exclusion is primarily based on gender, race, and class. It is from this premise that this study aligns with the definition of equity to mean a process of elimination of discriminatory employment practices to provide equal opportunities to previously disadvantaged groups.

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<sup>46</sup> Braveman P and Gruskin S, Defining equity in health, *Journal of Epidemiology and Community health*, page 254, 2002 available [www.jech.com](http://www.jech.com), accessed on 16 March 2018.

<sup>47</sup> Oosthuizen R, Tonelli L, Mayer CH, Subjective experiences of employment equity in South African organisations. *SA Journal of Human Resource Management/SA*, vol 17, 2019.

Fronting is arguably one of the concepts that highlight the lack of commitment by the private sector to genuinely appoint black African women into managerial positions. According to the Department of Trade and Industry (DTI), fronting is a “deliberate circumvention or attempted circumvention of the B-BBEE Act and the Codes”.<sup>48</sup> DTI asserts that fronting mostly encompasses data reliance or compliance claims founded on incorrect facts, either by a person claiming compliance or by any other person.<sup>49</sup> Purposively, section 1 of BBEE defines fronting practice to be a “transaction, arrangement or other act or conduct that directly or indirectly undermines or frustrates the achievement of the objectives of the BBEE or the implementation of any of the provisions of the BBEE, including but not limited to practices in connection with a B-BBEE initiative-

- a) In terms of which black persons who are appointed to an enterprise are discouraged or inhibited from substantially participating in the core activities of that enterprise;
- b) In terms of which the economic benefits received as a result of the broad-based black economic empowerment status of an enterprise do not flow to black people in the ratio specified in the relevant legal documentation;
- c) Involving the conclusion of a legal relationship with a black person for that enterprise achieving a certain level of broad-based black economic empowerment compliance without granting that black person the economic benefits that would reasonably be expected to be associated with the status or position held by that black person; or
- d) involving the conclusion of an agreement with another enterprise to achieve or enhance broad-based black economic empowerment status in circumstances in which-
  - (i) there are significant limitations, whether implicit or explicit, on the identity of suppliers, service providers, clients or customers;

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<sup>48</sup> Department of Trade and Industry, Economic Empowerment, available at [www.thedti.gov.za](http://www.thedti.gov.za), accessed on 16 March 2018.

<sup>49</sup> *Ibid.*

- (ii) the maintenance of business operations is reasonably considered to be improbable, having regard to the resources available;
- (iii) the terms and conditions were not negotiated at arm's length and on a fair and reasonable basis”.

Warikandwa *et al* correctly observed that this definition encompasses three forms of business fronting and that is the utilisation of opportunistic intermediaries, diverting benefits and window dressing.<sup>50</sup> It is submitted that the fronting practices regresses the achievements and advancement of employment equity in those persons appointed at particular occupational levels are not actively performing duties in such positions. The appointment is merely a ‘front’ to be compliant with the BBBEE and the EEA respectively. Such appointment results in the ‘front’ of black African women managers not accumulating managerial skills and knowledge about the managerial positions. As such, they are unable to contribute meaningfully to company direction and its priorities such as addressing the glass ceiling for women. Similarly, the failure to remunerate black African women in management positions for the work of equal value to male employees in similar levels may arguably amount to fronting. Consequently, fronting is the oxymoron of the private sector’s commitment to achieve equity in the workplace. It is submitted that fronting undermines the BBB-EE and the EEA by conversely reversing the intended achievements of affirmative action in South Africa. It is concluded that a fronting practice, demonstrates the unwillingness of any sector to advance meaningfully black African women into managerial positions.

Central to this study is the concept of Gender. According to UNESCO gender is associated with the roles and responsibilities of women and men founded by social norms, culture and families. Furthermore, the concept is recognised to include those social expectations of men and women because of their characteristics, aptitudes and behaviours.<sup>51</sup> UNESCO argues that male domination and female’s subordination are

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<sup>50</sup> Warikandwa TV and Osode PC " Regulating Against Business "Fronting" to Advance Black Economic Empowerment in Zimbabwe: Lessons from South Africa" PER / PELJ ,page 17, Vol 20 2017.

<sup>51</sup> UNESCO, Gender Mainstreaming Implementation framework, 2003.

socially constructed and therefore can be changed.<sup>52</sup> From this premise, it is accepted that gender is not biologically predetermined but socially constructed in line with societal expectations on men and women. To this end, a view that sees black African women incapable to assume a managerial position but capable of assuming traditional roles such as cleaners and messengers is an example of socially constructed roles placed on women.

To achieve transformation in the private sector gender mainstreaming must be central to the core business of the sector. Gender mainstreaming is defined by the United Nations as

“the process of assessing the implications for women and men of any planned action, including legislation, policies or programs, in all areas and at all levels. It is a strategy for making women’s as well as men’s concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programs in all political, economic and societal spheres so that women and men benefit equally, and inequality is not perpetuated”.<sup>53</sup>

Similarly, South Africa's National Policy Framework for Women's Empowerment and Gender Equality defines gender mainstreaming as:

“a process that is goal-oriented, it recognises that most institutions consciously and unconsciously serve the interests of men. It encourages institutions to adopt a gender perspective in transforming themselves. It promotes the full participation of women in decision-making so that women’s needs move from the margins to the centre of development planning and resource allocation.”<sup>54</sup>

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<sup>52</sup> *Ibid.*

<sup>53</sup> Mootho-Padayanchie, Gender Mainstreaming in the South African Public Service, *Alternatives International Journal*, June 2011, available at <http://www.alterinter.org/spip.php?article3555> accessed on 23 March 2018.

<sup>54</sup> South Africa’s National Policy Framework for Women’s Empowerment and Gender Equality (Office on the Status of Women), page vxiii, 2002.

According to Van Dijk *et al* gender mainstreaming forms part of good governance and should be integrated into all policies, practices and programmes.<sup>55</sup> It is espoused that the achievement of equity in the private sector is dependent on whether gender mainstreaming has been implemented. To achieve both equity and gender equality in the private sector, the sector must engage in a gender mainstreaming strategy that encapsulates the application strategies for the promotion and progression of gender equality. Commonly, each company needs to tailor its strategy in line with its sector to suit their needs and requirements. Nevertheless, the private sector needs to adopt policies that centre around the promotion of women's empowerment. To be effective, these policies must be applied consistently by the employer to achieve transformation at various occupational levels including management.

It is argued that there is an interlink between gender mainstreaming and the concept of transformation in the workplace. One cannot be achieved without the other. According to Marus the concept of "transformation in the workplace" refers to "a process to change the racial, gender and economic status of the workplace to reflect the South African population demographics".<sup>56</sup> The underlying rationality for advocating for transformation is for the workforce in the private sector to be reflective of the demographics of South Africa. This is key in that black African women are the most vulnerable and susceptible to economic exclusion and participation in decision-making positions in the workplace. From this premise that it is argued that based on section 9 of the Constitution there exist a constitutional imperative for transformation in the South African private sector's managerial levels, to foster equal participation and non-discrimination, strengthened by affirmative action measures in the EEA. Against this backdrop, the study defines 'transformation in the workplace' as a state of changing of programmes, policies, practices and initiatives in the workplace to ensure that all employees who have been

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<sup>55</sup> Van Dijk H and Morwamohube E, Gender mainstreaming in the South African National School of Government : a senior management challenge, *Journal of Public Administration* 50, page 262 - 275,2015.

<sup>56</sup> Marus L, What is 'transformation'? 15 May 2018, available at <https://www.skills-universe.com/2018/05/15/what-is-transformation/> accessed on 7 May 2020.

disenfranchised due to past apartheid practices and patriarchy enjoy equal opportunities, fair treatment, respect and dignity.

Lastly, managerial positions for this study refer to middle management, senior management and top management levels in the workplace.

## **1.9 Literature review**

The exclusion of black African women in decision-making positions is largely due to patriarchal attitudes that view women as having less potential to hold managerial positions compared to males.<sup>57</sup> Both conscious and unconscious biases influence these perceptions. The private sector has recently attempted to create an upward movement of black African women in managerial positions. For example, BP Southern Africa (BPSA) employed a black woman for the first time as a chief executive officer in 2017.<sup>58</sup> It is observed that before her appointment the incumbent was exposed by BPSA to various opportunities to gain experience in management and this includes being appointed as Operations Director and Chief Financial officer.<sup>59</sup> It is observed that management skills enabled the incumbent to be considered and subsequently appointed as a Chief Executive Officer. It is submitted that the private sector must invest time and skills to nurture talent from the company to achieve equity.

A similar appointment was made in 2017 by the KPMG South Africa where Nhlamu Dlomu (a black African woman) was appointed as the chief executive officer following scandals relating to audit reports that hampered the reputation and credibility of KPMG.<sup>60</sup> The

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<sup>57</sup> Chartered Institute of Personnel and Development, Why are there so few women at the top: Submission to the Women and Equalities Select Committee, page 7, April 2016 available at [www.cipd.co.uk](http://www.cipd.co.uk) accessed on 31 March 2018.

<sup>58</sup> Priscillah Mabelane appointed BP Southern Africa's first black female CEO available at [www.destinyconnect.com](http://www.destinyconnect.com) accessed on 12 February 2018.

<sup>59</sup> Department of Energy South Africa, Minister Kubayi congratulates newly appointed BP Southern Africa CEO- Ms Priscillah Mabelane, Media statement issued on 30 August 2017, available at [www.energy.gov.za](http://www.energy.gov.za), accessed on 31 March 2018.

<sup>60</sup> Matotoka D and Odeku, European Review of Applied Sociology 37 Volume 11, Number 16, page 42 Year 2018 available at <https://content.sciendo.com/view/journals/eras/11/16/article-p36.xml> accessed on 9 August 2018.

handling of the scandals at KPMG by the incumbent demonstrated that black African women are competent to assume managerial roles. Notably, the appointment of Nhlamu Dlovu is arguably a significant milestone to achieve diversity in the private sector that is reflective of the demographics of South Africa. It is observed and argued that Nhlamu Dlovu was only appointed amid scandals over audit reports and that her appointment was not due to the company aiming to achieve equity in decision making positions. Arguably the scandals at KPMG contributed to the appointment of the first black African woman chief executive officer. It is argued the private sector should not be compelled by circumstances to appoint black African women into managerial positions.

In 2019, Phuthi Mahanyele-Dabengwa was appointed as the CEO of Naspers for its South African unit and consequently became the first black African woman to be appointed at such a company. It is recorded that her appointment follows years of white male dominance at this position since the establishment of the company for over a century.<sup>61</sup> The dominance of white males at Naspers at this position for over a century reaffirms a view that the managerial positions in the private sector had not been transformed for several years even post-democracy to reflect the demographics of South Africa. It is from this premise that it is submitted that without clearly defined plans, the managerial positions in the private sector in South Africa will remain dominated by white males. It is observed that before her appointment at Naspers, the incumbent had been in several managerial positions such as the CEO of Shanduka Group (Pty) Ltd., a board member of the Cyril Ramaphosa Foundation, a board member at Vodacom Group Ltd., a board member of miner Gold Fields Ltd. and airline company Comair Ltd.<sup>62</sup> It is submitted that her previous managerial experiences made Phuthi Mahanyele-Dabengwa eligible and suitable to be appointed as the CEO of Naspers. From this, it is observed that suitably qualified black African women may only break the glass ceilings if they are provided with the opportunities to enhance their managerial skills.

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<sup>61</sup> Kazeem Y, Africa's most valuable company has appointed its first black female CEO, 4 July 2019, available at <https://qz.com/africa/1658787/naspers-appoints-first-black-woman-ceo-mahanyele-dabengwa/> accessed on 9 May 2020.

<sup>62</sup> Bonorchis R, Prinsloo L, Naidoo P, Naspers Upends Century of History by Naming Black Woman CEO, 4 July 2019, available at <https://www.bloomberg.com/news/articles/2019-07-04/naspers-upends-a-century-of-tradition-by-naming-black-woman-ceo> , accessed on 8 May 2020.



The CGE observed in November 2017 that Sasol's managerial positions were dominated by white males and black African women were underrepresented.<sup>63</sup> To address the imbalance, the company adopted a framework that aimed to foster more females in succession pools.<sup>64</sup> As a result of the Sasol projected that this framework may result in the reduction of white male domination and increase the representation of black African women in managerial positions by 2022.<sup>65</sup>

The CGE found in 2017 that Hall and Sons Pty Ltd had no representation of black African women at Senior and top management positions.<sup>66</sup> To the contrary, white females were the only group females appointed in senior management positions at the company.

The CGE found in 2017 that South African Breweries Pty Ltd (SAB)'s top Management had 3 females (60% of the board composition) of which 2 are equity females (1 African female and 1 Coloured female). Notwithstanding this, white males significantly dominated senior management positions.

According to the CGE Rhodes Food Group's top management had males of which 85.7 per cent is white males and 14.3 per cent is African males.<sup>67</sup> It was found that black African women were not represented in managerial levels at the company.<sup>68</sup>

The above companies demonstrate that black African women are insufficiently underrepresented at decision-making levels despite the EEA that challenges these companies to achieve equitable representation at all levels. This is further confirmed by the CEE that found that white women were significantly represented in managerial levels in the private sector especially in top management, senior management, and

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<sup>63</sup> CGE, Progress report on Employment Equity, page 25, 2017/2018 available at [www.cge.org.za](http://www.cge.org.za) accessed on 9 March 2018.

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*

<sup>67</sup> Commission for Gender Equality, Employment Equity Report, page 19-20, 2016/2017, available on [www.cge.org.za](http://www.cge.org.za) accessed on 29 January 2018.

<sup>68</sup> *Ibid.*

professionally qualified positions, unlike black African women. In comparison with the public sector, it was found that the public sector increased its representation of black African women in managerial positions, unlike the private sector.<sup>69</sup> It is expressed that the private sector is not able to achieve equity given the slow pace of improvement between 2006 and 2017.<sup>70</sup>

The CEE reports 2006-2017 found that the private sector experience challenges of transforming decision-making positions to be inclusive and diversified both in terms of race and gender. Unlike white groups and black males, black African women are not afforded preferential treatment in the private sector in terms of recruitment, promotion and training opportunities for managerial levels.<sup>71</sup> It is submitted that the EEA has not resulted in the private sector's managerial levels being reflective of the demographics of South Africa. It is asserted that the private sector resists transformation and deliberately engages on racial favouritism in employment, the gender wage gap and not taking sufficient steps to recruit and promote black African women.<sup>72</sup>

In 2020 the CGE found that the senior and top management levels at Vodacom Group Limited and Woolworths holding Limited were dominated by white males.<sup>73</sup> As such, the CGE observed that there is still slow place transformation in the private sector, and this is said to be worsened by the failure to implement the EEA.<sup>74</sup> Moreover, the CGE observed that in 2020 previously disadvantaged groups such as black African women continue to be under-represented at managerial levels despite numerous policies and measures explored by the private companies.<sup>75</sup> This assertion indicates that without a commitment and intention to achieve transformation, development of policies and

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<sup>69</sup> Commission for Employment Equity, Annual report, page 87, 2016/2017, available at [www.Labour.gov.za](http://www.Labour.gov.za) accessed on 29 January 2018

<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.*

<sup>72</sup> Commission for Gender Equality, Employment Equity Hearings on Gender transformation in the workplace, page 8, 2013 available at [www.cge.org.za](http://www.cge.org.za) accessed on 1 February 2018.

<sup>73</sup> CGE, Report on Gender Transformation in the Public and Private Sectors, page 22 and page 29, 2019/2020, available at [www.cge.org.za](http://www.cge.org.za) accessed on 9 May 2020.

<sup>74</sup> CGE, Follow-up hearings on employment equity and gender transformation in the private sector for the financial year, page 83, 2019/2020, Available at [www.cge.org.za](http://www.cge.org.za) accessed on 9 May 2020.

<sup>75</sup> *Ibid.*

measures are ineffective. The CGE asserts that robust mechanisms such as sectoral targets need to be introduced to transform the private sector.<sup>76</sup> Sectorial targets are observed as key to respond to the lack of transformation in the private sector.<sup>77</sup> The CGE has not held the private sector accountable beyond producing a report that contains findings and recommendations to introduce sectoral targets. It is observed that the CGE is unable to enforce soft law to expedite the representation of black African women in managerial positions due to the impermissible quotas in the EEA.

Globally, the private sector contributes to the growth of the economy and as such underrepresentation of black African women in managerial levels arguably denies them of full economic participation. It is espoused that women empowerment into economic participation may be achieved through recruitment and promotion policies and women's workforce development.<sup>78</sup> Mlambo-Ngcuka observed in 2017 that there is a continuous inequality between women and men and substantive equality is not realised by most women globally.<sup>79</sup> From this, it is submitted that the discrimination against women and gender-based job restrictions is a global challenge which most countries battle to address despite progressive legislation.<sup>80</sup> Queisser observes that Nordic countries also experience challenges in integrating women in leadership positions despite these countries being advanced.<sup>81</sup> This study will therefore draw lessons from Norway, Jamaica and Rwanda. Norway is the first country to legislate stringent gender quota systems that mandate corporates to attain 40% of female board members.<sup>82</sup> The enforcement of these quota systems resulted in Norway achieving its quota target in 2008. Similarly, Rwanda is the only country in Africa that achieved and exceeded 30% target (of women

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<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.*

<sup>78</sup> UN Women, Private sector potential to advance women's economic empowerment, available at <http://www.unwomen.org/en/news/stories/2017/9/news-private-sector-potential-to-advance-womens-economic-empowerment> accessed on 23 January 2018.

<sup>79</sup> *Ibid.*

<sup>80</sup> Gonzalez A, In 155 countries women still face legal discrimination: the consequences are huge, available at [www.theguardian.com](http://www.theguardian.com) accessed on the 9<sup>th</sup> February 2018.

<sup>81</sup> Queisser M, Gender Equality and the Sustainable Development Goals, OECG Insights Debate Issues, 16 May 2016, available at <http://oecdinsights.org/2016/05/16/gender-equality-and-the-sustainable-development-goals/> accessed on 1 January 2018.

<sup>82</sup> Maseko N, Women Quotas on the Board of Directors: Evidence from the World's Major Markets, page 6, 2015 available at [www.researchgate.net](http://www.researchgate.net) accessed on 5 March 2018.

representation) of the Commonwealth in the private sector.<sup>83</sup> Jamaica is ranked as a global leader of having more women in managerial positions with 12% of companies achieving gender balance at the executive level compared to the 8% globally.<sup>84</sup>

With Norway, Gidlund *et al* assert that the gender quota law, in the medium-term perspective, had increased the dispersion of power and equality between female and male directors in the workplace.<sup>85</sup> It is espoused that the Norway gender quota law has provided female directors with opportunities to gain more experience and has consequently led to a higher proportion of female directors.<sup>86</sup> Unlike South Africa, Norway has resolved to legislate quotas to proliferate women into boards. South Africa uses targets to proliferate women into senior management positions. Klettner *et al* observe that quotas prescribe outcomes and forces compliance through legislation to companies whilst targets merely suggests outcomes and permit a degree of flexibility to achieve the targets stated.<sup>87</sup> Quotas aim to secure results through compliance of the law while targets are persuasive and require company strategies to achieve change.

The application of gender quotas in the workplace may create concerns that the appointed candidates may be tokenism and such candidates may fail to execute duties on the appointed positions. Alstott highlights these concerns and states that most gender quotas may be deemed unfavourable if female candidates are tokens or female directors are not experienced or trained on the appointed positions.<sup>88</sup> Nonetheless, Alstott opines

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<sup>83</sup> Hinds B, Strategies for Increased Participation of Women in Leadership across the Commonwealth, Commonwealth Secretariat, page 6, 2015.

<sup>84</sup> Women in business and management: Gaining momentum in the Caribbean, page 17, October 2018.

<sup>85</sup> Gidlund A, and Lund T, The Norwegian Gender Quota Law and its Effects on Corporate Board, page 55, 2017 available at <https://www.diva-portal.org/smash/get/diva2:1119270/FULLTEXT01.pdf>, accessed on 10 May 2020.

<sup>86</sup> *Ibid.*

<sup>87</sup> Klettner A, Clarke T, Boersma M, Strategic and Regulatory approaches to increasing women in leadership: Multilevel targets and mandatory quotas as levers for cultural change, page 413, 2016 available

[https://www.researchgate.net/publication/272532532\\_Strategic\\_and\\_Regulatory\\_Approaches\\_to\\_Increasing\\_Women\\_in\\_Leadership\\_Multilevel\\_Targets\\_and\\_Mandatory\\_Quotas\\_as\\_Levers\\_for\\_Cultural\\_Change](https://www.researchgate.net/publication/272532532_Strategic_and_Regulatory_Approaches_to_Increasing_Women_in_Leadership_Multilevel_Targets_and_Mandatory_Quotas_as_Levers_for_Cultural_Change) accessed on 10 May 2020.

<sup>88</sup> Alstott A, Gender Quotas for Corporate Boards: Options for Legal Design in the United States, 26 Pace Int'l L. Rev. 38 ,page 39, 2014 , available at: <https://digitalcommons.pace.edu/pilr/vol26/iss1/5> accessed on 8 May 2020.

that a gender quota if meticulously designed may address token appointments. Similarly, Alstott argues that the successful application of gender quotas must result in both creations of positions but should also create career paths for competent women to assume managerial positions.<sup>89</sup> It is submitted that gender quota laws do not aim to promote the appointment of untrained and inexperienced women in managerial positions. To the contrary, suitably qualified women are the targeted candidates to be appointed at managerial positions. It is argued that employers need to be proactive in training and developing talent from within and create pipeline measures to enable women to assume managerial positions. It is submitted that gender quota if applied consistently will break the glass ceiling that exists in the private sector.

Persuasion to achieve targets is dependent on whether the company management has a shared desire to achieve the targets. Simply without such a desire and commitment, the company would not adopt strategies to advance women into managerial positions. This is the position in South Africa in that the EEA provides for the setting of targets and prohibits quotas. It is from this premise that the private sector in South Africa lags in increasing black African women in managerial positions, this arguably is done with the express understanding that the EEA does not provide sanctions for failure to achieve equitable representation. The private sector in South Africa is not compelled to achieve equity in its managerial positions. To change this, South Africa needs to draw lessons from Norway in that women's participation in Norway companies increased in 2009 following the enactment of a quota law with enforceable sanctions for non-compliance. It is argued that without a quota law that enforces sanctions, targets do not compel the private sector effectively address the inequality experienced by black African women in managerial positions.

The significance of legislated gender quotas is further in the Rwandan parliament. Bauer *et al* observe that the gender quotas have increased the female representation in its

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<sup>89</sup> *Ibid*, page 56.

legislature since 2003.<sup>90</sup> In contrast to the private sector, the Gender Monitoring office in Rwanda states that Women occupy only 32% of decision-making positions in the private sector.<sup>91</sup> The challenge with Rwanda is that the measures to increase women in the legislature have not been replicated in the private sector. Instead, Rwanda opted for a soft law approach to achieve transformation in the private sector. This included the introduction of a Gender Equality Seal Certification Programme that aims to promote gender accountability in the private sector in Rwanda.<sup>92</sup> Contrast to the South African private sector, the Rwandan private sector has demonstrated interest and willingness to transform.

According to the Gender Monitoring Office, private companies have expressed their interest to join and implement the Gender Equality Seal Certification Initiative to promote gender equality within companies and specifically promote gender-sensitive work environment for employees.<sup>93</sup> To this end, twenty companies including *inter alia* Price Waterhouse Coopers, Sagicor Bank, Nestle Jamaica, Honeybun, Flow, First Global Bank, Red Stripe, LASCO Chin Foundation, and Stocks and Securities Limited, participated in the programme to address the gender pay gaps and increase women in decision-making.<sup>94</sup> The Gender Equality Seal Certificate programme is significant in creating an environment which enables women to access traditional male-dominated fields. It is however espoused that such a Gender Equality Seal Certificate would be effective if quotas are legislated. Quotas would compel the companies to ensure that the

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<sup>90</sup> Bauer G and Burnet J, Gender Quotas, Democracy and Women's Representation in Africa: Some Insights from Democratic Botswana and Autocratic Rwanda, Anthropology Faculty Publications, page 22, 2013, available [https://scholarworks.gsu.edu/cgi/viewcontent.cgi?article=1004&context=anthro\\_facpub](https://scholarworks.gsu.edu/cgi/viewcontent.cgi?article=1004&context=anthro_facpub) accessed on 10 June 2020.

<sup>91</sup> Gender Monitoring Office, Bridging the Gender Gap in the Private Sector: A Review of Gender Equality Seal Certification Initiative's Achievements, 2020 available at [https://gmo.gov.rw/index.php?id=19&tx\\_news\\_pi1%5Bnews%5D=209&tx\\_news\\_pi1%5Bday%5D=7&tx\\_news\\_pi1%5Bmonth%5D=2&tx\\_news\\_pi1%5Byear%5D=2020&cHash=86f6094b18298f08edd8d2db41cf4ebd](https://gmo.gov.rw/index.php?id=19&tx_news_pi1%5Bnews%5D=209&tx_news_pi1%5Bday%5D=7&tx_news_pi1%5Bmonth%5D=2&tx_news_pi1%5Byear%5D=2020&cHash=86f6094b18298f08edd8d2db41cf4ebd) accessed on 10 May 2020.

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.*

<sup>94</sup> UNDP Rwanda Gender Equality Seal Explained, 9 January 2019, available at <http://www.rw.undp.org/content/rwanda/en/home/presscenter/articles/2019/1/gender-equality-seal-explained.html> accessed 2 July 2019.

aspirations of gender equality and equity are applied practically and resulting in suitable women being absorbed in managerial positions.

The achievement of quotas is further dependent on whether the private sector adopts career path measures that lead women from administrative positions to managerial positions. Such measures must provide an additional path to lead women from middle to senior management, senior management to top management, respectively. Such a career path requires the private sector to foster strategically a pool of talented female candidates. Jamaica provides a good lesson on how the pool of suitably qualified women is developed. Saner *et al* observes that Jamaica has more female labour participation than compared to males.<sup>95</sup> In 2017 the Jamaican female labour force participation rate was 64 per cent.<sup>96</sup> Moreover, there is a higher proportion of women in possession of tertiary qualifications than males.<sup>97</sup> Wyss asserts that there are sufficient Jamaican females with educational qualifications and working experience.<sup>98</sup> Arguably these attributes contribute to Jamaica leading globally in having more women in managerial positions in the private sector. This rapid progress in Jamaica may be attributed to the Jamaican government support of its National Policy for Gender Equality to the extent that the policy requests skills development for the mainstreaming of gender in social, economic, cultural, social and political institutions, systems and structures.

Despite Jamaica leading globally in having more women in managerial positions, Wyss argues that Jamaican women are still underrepresented in managerial positions in the public and private sector.<sup>99</sup> To address this underrepresentation, gender quotas have been proposed to expedite the representation of women in these sectors. With the private

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<sup>95</sup> Saner R and Yiu L, Jamaica's development of women entrepreneurship: challenges and opportunities, *Public Administration and Policy: An Asia-Pacific Journal*, page 152-172 , 2 December 2019.

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.*

<sup>98</sup> Wyss B, Seats for the 51 %: Beyond the Business Case for Corporate Board Quotas in Jamaica, *Review of Black Political Economy*, 1 January 2015.

<sup>99</sup> *Ibid.*

sector, Wyss supports the recognition of gender quotas in the private sector and asserts that gender quotas are one potential strategy to develop a gender-inclusive economy.<sup>100</sup>

In contrast to Jamaica, the South African female labour force is lower compared to the male labour force. According to Statistics South Africa, women comprised 48.8% of the total employment in 2018.<sup>101</sup> Accordingly, there were only 32% of managers in South Africa.<sup>102</sup> Ackermann *et al* observe that black South African women make the greatest proportion of women with no formal schooling.<sup>103</sup> This observation suggests that although black African women form the majority of the South African population without formal education their labour market position will remain unchanged. Consequently, a lack of formal schooling excludes a significant proportion of black African women from participating in decision-making positions.

Nienaber argues most South African managers in the private sector had trouble in implementing employment equity in the workplace. It is argued that the private sector undervalues the importance of implementing employment equity in their practices or procedures to change the climate and organisational culture.<sup>104</sup> Accordingly, the private sector does not prioritise employment equity in the workplace and the perpetual exclusion of black African women in decision making positions persists.

According to Booysen some barriers contribute to the retention of black African women and this includes growth and development opportunities, inadequate training, failure to provide career pathing and succession plans and ineffective mentorship programmes.<sup>105</sup> In additional barriers include poor communication and understanding of employment

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<sup>100</sup> *Ibid.*

<sup>101</sup> Statistics South Africa, Quarterly Labour Force Survey second quarter of 2018, available at <http://www.statssa.gov.za/?p=11375> accessed on 6 May 2020.

<sup>102</sup> *Ibid.*

<sup>103</sup> Ackermann L and Velelo N, The position of women in the South African labour force: an overview, PULA: Botswana Journal of African Studies Vol. 27, No. 1, Issue # 4 , page 158, 2013.

<sup>104</sup> Nienaber, H, Assessing the management status of South Africa', European Business Review, 19(1), page 72-88, 2007.

<sup>105</sup> Booysen L, Barriers to employment equity implementation and retention of blacks in management in South Africa South African Journal of Labour Relations: Vol 31 No 1, page 68 , 2007.



equity, lack of commitment from the senior management of the company, inconsistent implementation of the employment equity, persistent male-dominated organisational culture and inadequate co-ordination and integration of existing implementation processes.<sup>106</sup> Mello and Phago observe that the private sector has been unable to manage diversity in the workplace and as such the sector is unable to implement the EEA effectively.<sup>107</sup> Oosthuizen and Naidoo argue that the EEA has had a positive impact on the workforce and consequently improved the diversity of the private sector.<sup>108</sup> It is thus observed that the enactment of the EEA had a positive impact in the workplace to ensure the representation of the black African women in the workplace in general.

The CGE found the private sector in South Africa can transform easily in terms in terms of race, but experiences difficulty to transform about gender.<sup>109</sup> This is perpetuated by the Broad-Based Black Economic Empowerment Act 53 of 2003 (BBBEE Act) that requires the private sector to foster economic transformation to enable participation of the previously disadvantaged groups.<sup>110</sup> In this regard, race participation is emphasised more than gender participation. This demonstrates that the gender transformation in the workplace is often overlooked and this is influenced by the historical economic segregation of black women. It is observed that patriarchy further hinders gender transformation in the workplace.<sup>111</sup>

The court observed in the case of *Barnard v South African Police Services* that:

“Our quest to achieve equality must occur within the discipline of our constitution. Measures that are directed at remedying past discrimination must be formulated

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<sup>106</sup> *Ibid.*

<sup>107</sup> Mello D and Phago K, Affirming Women in Managerial Positions in the South African Service. *Politia*, 26(2), page 145-158, 2007.

<sup>108</sup> Oosthuizen R and Naidoo V, Attitudes towards and experience of employment equity, (SA Journal of Industrial Psychology 36(1),page 9, 2010.

<sup>109</sup> Commission for Gender Equality, Employment Equity Report, page 7-8, 2016/2017, accessed on available at [www.cge.org.za](http://www.cge.org.za) accessed on 15<sup>th</sup> January 2018.

<sup>110</sup> The BBBEE Act recognises the exclusion of black people, particularly black women, in the effective economic participation of South Africa.

<sup>111</sup> Oosthuizen R and Naidoo V, Attitudes towards and experience of employment equity, (SA Journal of Industrial Psychology 36(1) , page 9, 2010.

with due care not to invade unduly the dignity of all concerned. We must remain vigilant that remedial measures under the Constitution are not an end in themselves. They are not meant to be punitive nor retaliatory. Their goal is to urge us on towards a more equal and fair society that hopefully is non-racial, non-sexist and socially inclusive”.<sup>112</sup>

It is reaffirmed that the South African Constitution challenges the private sector to aim to achieve transformation based on non-racial, non-sexist, and socially inclusive principles. The lack of transformation in the private sector raises concerns regarding transformation not to be inclusive of black African women. This is because of the understanding that transformation encompasses the right to equality, dignity and economic participation. Currie and De Waal observe that equality “is a difficult and deeply controversial social ideal”.<sup>113</sup> It is understood that formal equality suggests “that people who are similarly situated in relevant ways should be treated similarly”. Consequently, persons who are not similarly situated should not be treated alike.<sup>114</sup> From this, it is argued that black African women in the private sector be afforded access same recruitment, training and career paths that lead to promotions similar to male and females from other race groups.

The apex court observed in *Fraser v Children’s Court, Pretoria North*<sup>115</sup> that “There can be no doubt that the guarantee of equality lies at the heart of the Constitution. It permeates and defines the very ethos upon which the Constitution is premised.”<sup>116</sup> In balancing the interests in the corporate sector it is therefore required to ensure the advancement of black African women into management positions, whilst still aiming to attain profit and contribution to the South African economy. As such, the private sector cannot neglect its obligations to achieve equity and prioritise profit aspirations only.

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<sup>112</sup> *Barnard v South African Police Services* 2014 (6) SA 123 (CC) at paragraph 30.

<sup>113</sup> Iain Currie and Johan de Waal, *The Bill of Rights Handbook*, page 210,2013.

<sup>114</sup> *Ibid.*

<sup>115</sup> *Fraser v Children’s Court, Pretoria North* 1997(2) SA 261 (CC).

<sup>116</sup> See also Nicolette Naylor, *LEAD Practice Manual: Aspects of Gender Law* page 7,2014.

The court held in *Solidarity and others v Department of Correctional Services and Others*<sup>117</sup> that:

“...the EE Act seeks to achieve a constitutional objective that every workforce or workplace should be broadly representative of the people of South Africa. The result is that all the groups that fall under “Black” must be equitably represented within all occupational levels of the workforce of a designated employer...Therefore, a designated employer is entitled, as a matter of law, to deny an African or Coloured person or Indian person appointment to a certain occupational level on the basis that African people, Coloured people or Indian people, as the case may be, are already overrepresented or adequately represented in that level.”

From these remarks, the private sector is permitted to decline the appointment of a man or woman to a position on the basis that such a position is already overrepresented by either males or females. Moreover, the private sector in South Africa is justified if they decide to refuse the appointment of white males at managerial positions due to the existing white-male domination. It will not be a persuasive and accepted argument that the overrepresentation of white males in the private sector makes up for the absence of black African women.<sup>118</sup>

### **1.10 Scope and Limitation of the study**

This study will comprise of seven interacted chapters. Chapter one is the introductory chapter and it lays the foundation for the thesis. Chapter two will critically analyse the legislative and policy frameworks promoting gender equality in the private sector workplace. Chapter three will discuss the analysis of the fundamental rights of women in the workplace whilst chapter four discusses challenges being encountered in mainstreaming black women into managerial positions in the private sector workplace in

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<sup>117</sup> *Solidarity and others v Department of Correctional Services and Others* 2016 (5) SA 594 (CC).

<sup>118</sup> *Solidarity and others v Department of Correctional Services and Others* 2016 (5) SA 594 (CC) at paragraph 49.

South Africa. Chapter five will be addressing the paucity of black women in managerial positions through a comparative study between South Africa, Rwanda, Jamaica and Norway. Chapter 6 will explore the various roles of institutions supporting women's rights in the private sector workplace in South Africa whilst chapter 7 provides the conclusions and recommendations.

## CHAPTER TWO

### CRITICAL ANALYSIS OF THE LEGISLATIVE AND POLICY FRAMEWORKS PROMOTING GENDER EQUALITY IN THE PRIVATE SECTOR WORKPLACE

#### 2.1 Introduction

The International Labour Organisation (ILO) asserts that globally women are being employed however this has not resulted in their increase in management levels.<sup>119</sup> The significance of this assertion is that the poor representation of females in managerial positions in the private sector is not peculiar to South Africa but is a global challenge. It is essential to examine the international, regional and domestic instruments that promote gender equality in the private sector and determine the gaps that contribute to the paucity of women in managerial positions and also examine the impact of these instruments on how gender equality is achieved in the private-sector workplace in South Africa.

It is important to accentuate that South Africa is part of the United Nations (UN) and has been a member since the 7<sup>th</sup> of November 1945.<sup>120</sup> The consequence of this membership to the UN is that South Africa has to promote respect for human rights and fundamental freedoms. Before 1994, apartheid in South Africa was prevalent and therefore basic human rights to equality, dignity and to vote specifically of black people were not adhered to by the apartheid government. This segregation of black people during apartheid resulted in the oppression of black African women who were classified and treated as minors.<sup>121</sup> This implied that they were not positioned to make decisions in society and

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<sup>119</sup> ILO, Global Employment Trends for Women, 2004, available at [https://www.ilo.org/wcmsp5/groups/public/---ed\\_emp/---emp\\_elm/---trends/documents/publication/wcms\\_114289.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_elm/---trends/documents/publication/wcms_114289.pdf) accessed on the 13 June 2018.

<sup>120</sup> South African History Online, South Africa becomes a charter member of the United Nations Available at [www.sahistory.org.za/dated-event/south-africa-becomes-charter-member-united-nations](http://www.sahistory.org.za/dated-event/south-africa-becomes-charter-member-united-nations) accessed on 5 June 2018.

<sup>121</sup> Section 11(3) of the Black Administration Act of 1927 provided that women married under customary law were considered “ minors subject to the guardianship of their husbands”.

their customary marriages. The UN General assembly declared on the 2 December 1950 that South Africa's policy of racial discrimination (apartheid) is founded on the doctrines of racial discrimination.<sup>122</sup>

To exert pressure on South Africa to abandon apartheid, the UN General assembly issued resolution 176 (XII) of 1962 which required the Member States to take measures to abandon apartheid, including the ending of diplomatic, trade and transport relations with South Africa.<sup>123</sup> Additionally, in 1968 all States and Organisations were requested by the UN General Assembly to end "cultural, educational, sporting and other exchanges with the racist regime and organisations or institutions in South Africa".<sup>124</sup>

On the 12<sup>th</sup> of November 1974, South Africa was suspended by the UN General Assembly from the UN based on apartheid policy which was internationally opposed. The consequences of the suspension were *inter alia* the termination of economic relations with other countries. However, the emphasis laid by Resolutions 395(v) of the UN General Assembly during South Africa's suspension was largely on racial discrimination and gender discrimination of women was not emphasised. Resolution 395(v) of the UN General Assembly declared that "a policy of 'racial segregation' (apartheid) is necessarily based on doctrines of racial discrimination". This informs the view that racial discrimination was a priority to the UN General Assembly and the oppression of women was included under the umbrella of racial discrimination. Arguably the UN General Assembly failed to appreciate that women were not only subjected to racial discrimination but discriminated also in terms of class and gender.

The UN readmitted South Africa in 1994 during the transition into a democracy. Post-1994 South Africa committed to advance and promote human rights including the rights of women, particularly black African women in the workplace. This was achieved by

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<sup>122</sup> Resolutions 395(v) of the UN General Assembly, 2 December 1950.

<sup>123</sup> Faupin M, The Long Road to Durban: The United Nations Role in Fighting Racism and Racial Discrimination, Vol. XLIV No. 3 2007 available at <https://unchronicle.un.org/article/long-road-durban-united-nations-role-fighting-racism-and-racial-discrimination> accessed on 8th February 2019.

<sup>124</sup> *Ibid.*

enacting numerous legislations and developing policies that accord with international law. The Constitution espouses, in terms of section 39, that international law must be considered, and foreign law may be considered in the interpretation of the Bill of Rights. Both non-binding and binding law form part of the international law and accordingly serves as a guide as to the correct interpretation of the provisions of the Bill of Rights.<sup>125</sup> Several international and regional instruments promote and uphold the rights of women in the workplace. These instruments range from EEA, LRA, BBBEE and these instruments seek to eradicate discriminatory practices in the workplace that prejudiced women, particularly black African women in the private sector.

The effect of these instruments is to level the playing field for black African women to have equal opportunities like male employees in the workplace. Particularly, these instruments are fundamental tools that enhance and permit black African female employees to assume managerial positions at all levels in the private sector. Effectively these instruments allow black African women to participate in the South African economy like other white males, white females, and black African men in the private sector.

## **2.2 Overview of the international Laws protecting women's rights**

### **2.2.1 Universal Declaration of Human Rights of 1948 (UDHR).**

The UDHR was adopted by the UN General Assembly in 1948 and it states the fundamental rights and freedoms entitled by all persons. The UDHR is not legally binding however it expresses fundamental values of dignity, equality freedom, justice and peace which are shared by the international community. However, the South African apartheid government refused to sign the UDHR because the apartheid programme sought to systematically violate the rights recognised to all human beings. It is only when South Africa ushered in a democracy that the fundamental values of dignity; equality, freedom, justice and peace of the UDHR received protection under Chapter two of the Constitution of the Republic of South Africa titled the "Bill of rights".

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<sup>125</sup> S v *Makwanyane* 1995 (3) SA 391 at paragraph 35.

The preamble of UDHR emphasises the importance of the achievement of dignity and equality amongst everyone. Article 2 of the UDHR states that “everyone is entitled to all the rights and freedoms outlined in this Declaration. Without distinction of any kind, such a “sex”. Article 1 and 7 of UDHR respectively emphasis that all human beings are equal in dignity and rights and accorded equal protection against any differentiation that violate this Declaration. The UDHR recognises that men and women are equal, as such, the use of “human beings” and “everyone” was carefully crafted to ensure that all persons can seek protection against discrimination under the UDHR. Interestingly, the UDHR only recognises “sex-based distinction” and “not -gender-based distinction”. It is expressed that the UDHR alone does not adequately challenge patriarchal ideologies about women and therefore would not be a sufficient protective tool to address inequalities between male and female employees in the workplace. It is submitted that a sufficient protective tool would ideally address the needs and interests of women. As such, it is submitted that whilst UDHR promotes equality between female and male employees however it fails to recognise that such equality would not be achieved without equity measures in place to the benefit of women.

Frankie asserts that it is important not to treat sex-based discrimination laws as the same as gender-based discrimination laws.<sup>126</sup> The difference between sex-based discrimination and gender-based discrimination is that sex-discrimination is particularly limited to the “gross, stereotyped distinction between sexes” whilst gender-discrimination laws is not limited to the "gross, stereotyped distinctions between the sexes" but include the social construct that categories the roles of male and female.<sup>127</sup> It is expressed that gender-discrimination laws address the patriarchal attitudes that view women as inferior beings to males. As such, Frankie argues that sex discrimination laws have been not been effective in addressing the gender wage gap in the workforce and eliminating “glass ceilings” that prevent entry for women into the upper managerial levels.<sup>128</sup>

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<sup>126</sup> Franke K, The Central mistake of sex discrimination law, The Disaggregation of sex from gender, University of Pennsylvania Law Review, Vol 144, page 2 , Nov 1995.

<sup>127</sup> *Ibid.*

<sup>128</sup> *Ibid.*



It is submitted that the UDHR challenges employers to ensure that women in the workplace are treated equally and with dignity. Essentially, any workplace practice that infringes on the dignity and equality of women will consequently be against the values expressed in the UDHR. The challenge is that violation of the UDHR does not bring about legal consequences due to its non-binding effect. However, the significance of the UDHR is that States are required to take all appropriate measures to eliminate practices that undermine the right to equality and dignity of all human beings. Within the workplace, the UDHR advocates equal rights to men and women. In the premise, female employees have a right to fair wages, adequate working conditions, and employment without discrimination.

The impact of the UDHR is that it affords women similar rights to work in the labour force like men. On a broader scale, the UDHR aimed to restore basic human rights to all persons. As such, the UDHR influenced South Africa's founding values and principles of equality, dignity and freedom as entrenched in the Constitution. However, it does not address the systemic challenges that hamper the progression of women to be represented at managerial positions in the workplace. It is submitted that the UDHR is not an equity instrument to address the paucity of women in general at all levels in the workplace but rather guarantees basic human rights to be treated equally and with dignity in society and workplace. It is argued that the UDHR does not specifically challenge South Africa to enact laws to fast-track the progression of black African women into managerial positions in the private sector. Notwithstanding this, South Africa has through the Constitution, provided the right to equality and dignity to all women in South Africa irrespective of their status in society and the workplace.

## 2.2.2 Convention on the Elimination of Discrimination against Women

The Convention on the Elimination of Discrimination against Women (CEDAW) was adopted on the 18<sup>th</sup> December 1979. The preamble of CEDAW notes that the UDHR

affirms the principle of equality, dignity and non-discrimination on the grounds of sex. CEDAW recognises that notwithstanding the promotion of equality rights guaranteed, extensive discrimination against women persists. It follows from this preamble that the UDHR alone has not curbed the discrimination against women. CEDAW further recognises the need to establish an international economic order founded on justice principles justice and equity to promote equality between all persons. Article 1 of CEDAW defines the term discrimination

“as any distinction, exclusion or restriction made based on sex which has the effect or purpose of impairing, or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field”.

The definition of discrimination in terms of CEDAW is broader, although it is subject to sex-based discrimination; it recognises the need to have a balance of interest between men and women by ensuring equal human rights.<sup>129</sup> Similarly, any practice that discriminates a woman on the grounds of her marital status will not be permitted.<sup>130</sup> The jurisprudential question is whether the definition of discrimination outlined in CEDAW is adequate to ensure equal participation of women in managerial positions in the workplace? To answer this question, it is critical to evaluate Article 11 of CEDAW which specifically addresses the employment of women.

In terms of Article 11 of CEDAW requires State Parties to eliminate discriminatory practices in the workplace by taking measures to provide equal employment opportunities for male and female employees. Article 11 further promotes the principle of equal work for work of equal value in respect of employees irrespective of their gender or sex.

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<sup>129</sup> See Preamble of CEDAW.

<sup>130</sup> Article 1 of CEDAW.

CEDAW prohibits in terms of Article 11(2)(a) the discrimination of women based on pregnancy, instead, it advocates for paid maternity leave in terms of Article 11(2)(b).

The significance of Article 11 of CEDAW is that it laments the equality and dignity of women in the workplace. Importantly Article 11 of CEDAW is relevant in addressing the historical; and patriarchal attributes that view women as inferior beings and consequently not entitled to work. Essentially Article 11 provides women with the right to work and also provides women with equal opportunities in the workplace and equal remuneration for work of equal value. In other words, women and men who are executing the same duties in the same positions in the workplace must be remunerated equally.

CEDAW General Recommendation 25 recognises that in addition to the already existing discrimination of women, certain women experience various forms of discrimination based on race, class and other factors such as disability. Accordingly, it is recommended that to eliminate such discriminatory practices specific temporary special measures may be taken by State members. It is deduced that CEDAW General Recommendation 25 encompasses institutionalising female's participation in decision-making levels. In South Africa, black African women unlike other women in other racial groups have been subjected to all forms of discrimination based on race, gender and class and therefore leaving them more vulnerable. In accelerating the representation of black African women in managerial positions in the South African private sector, special measures such as affirmative action and quotas are key. These special measures may be discontinued once the objectives of such measures are achieved.

The World Economic Forum (WEF) asserts that diversified views and experiences are key in informing the private sector to make decisions that align with the interconnected and evolving world.<sup>131</sup> WEF found that companies with women in management levels often result in satisfactory performance in comparison to companies that have no female representation at management levels.<sup>132</sup> Pletzer *et al* argue that compared to males in

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<sup>131</sup> World Economic Forum, The Global Gender Gap Report, page 30, 2017.

<sup>132</sup> *Ibid.*

the workplace, females provide critical leadership qualities and skills in the workplace such development of sustainable investment strategies, making less radical decisions and risk averseness.<sup>133</sup> Pletzer *et al* assert that women directors provide leadership that is often transformative, encouraging and supportive of other employees and subordinates.<sup>134</sup> Pletzer *et al* observe that female managers, unlike their male counterparts, tend to value their responsibilities as managers more, this is key within the corporate governance framework.<sup>135</sup> McKinsey agrees with both WEF and Pletzer *et al* assertions and consequently examined the financial results and their gender composition of 345 companies in Latin America.<sup>136</sup> Mckinsey asserts that there is a link between the gender composition of the executive committees and financial results and unearthed that entities that have one or more women forming part of the executive committees performed better than those with only men on the committees.<sup>137</sup>

Companies with one or more women had 44% more of their returns, and their Earnings Before Interest and Taxes (EBIT) margin 47% higher.<sup>138</sup> It is suggested that a link exists between having more female executives, economic growth and corporate sustainability.<sup>139</sup> Whilst diversity is key for economic growth and contributes to the company's performance, Pletzer *et al* observes that gender diversity in the workplace should be endorsed to promote fairness.<sup>140</sup> Pletzer *et al* express that in an instance where the representation of female directors in large does not matter concerning the performance of the company, suitably qualified female employees should be prioritised in promotion opportunities at the workplace.<sup>141</sup>

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<sup>133</sup> Pletzer J, Nikolova R, Kedzior K, and Voelpel S, Does Gender Matter? Female Representation on Corporate Boards and Firm Financial Performance - A Meta-Analysis, PLoS One volume 10(6), 2015, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4473005/#pone.0130005.ref025> accessed on 17 May 2020.

<sup>134</sup> *Ibid.*

<sup>135</sup> *Ibid.*

<sup>136</sup> Mckinsey and Company , Women Matter: A Latin American Perspective Unlocking women's potential to enhance corporate performance,page 1, May 2013 available at <https://www.femtech.at/sites/default/files/Women%20Matter%20Latin%20America.pdf> accessed on 8 February 2019.

<sup>137</sup> *Ibid.*

<sup>138</sup> *Ibid.*

<sup>139</sup> World Economic Forum, The Global Gender Gap Report, page 30, 2017.

<sup>140</sup> Pletzer J, Nikolova R, Kedzior K, and Voelpel S, *op cit*,

<sup>141</sup> Pletzer J, Nikolova R, Kedzior K, and Voelpel S, *op cit*.

In 2017 WEF found that globally there is a remuneration gap between female and male employees and this has widened since 2006 and the average progress of closing this gap stands at 68%.<sup>142</sup> Essentially this means that across 144 countries women in the labour force irrespective of their ranks generally earn less than male employees.<sup>143</sup> Estupinan observes that the labour force participation of women across the world has been far less than men and this has negatively impacted their economic opportunities, stability and security.<sup>144</sup> Notably, the low labour force participation rate of women is an aggregation of their sectoral segregation.<sup>145</sup> In other words, women are mostly limited in their choices for employment across sectors with the agricultural sector being preferential to employ more women.<sup>146</sup> The agricultural sector is preferred as it is linked to the traditional roles of women in the society who contributes to the agricultural and rural economies in all developing countries.<sup>147</sup> These roles include looking after animals, planting crops and preparation of food.

The lack of equality between male and female employees in the labour market is usually gauged by gaps in pay, working hours and employment.<sup>148</sup> The European Commission also observes that the inequality is further exacerbated by the underrepresentation of women in decision-making positions in most publicly listed companies registered in European Union Member States.<sup>149</sup> The European Commission opines that equal

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<sup>142</sup> World Economic Forum, The Global Gender Gap Report, page 58 – 344, 2017.

<sup>143</sup> *Ibid.*

<sup>144</sup> Estupinan X, Close the gender pay gap – How far are we? International Women's Day 2017, available [https://www.ilo.org/newdelhi/info/public/fs/WCMS\\_545440/lang--en/index.htm](https://www.ilo.org/newdelhi/info/public/fs/WCMS_545440/lang--en/index.htm) accessed on the 13th June 2018.

<sup>145</sup> *Ibid.*

<sup>146</sup> International Labour Organisation , Global Employment Trends For Women, page 21, available at [https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms\\_195447.pdf](https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_195447.pdf) accessed on 13th June 2018.

<sup>147</sup> Raney T, Anriquez G, Croppenstedt A, Gerosa S, Lowder S, Matuscke I , Skoet J and Doss C, The role of women in agriculture, ESA Working Paper No. 11-02, page 2 March 2011, available at <http://www.fao.org/3/am307e/am307e00.pdf> accessed on 17 May 2020.

<sup>148</sup> European Commission, 2017 report on equality between women and men in the European Union, page 25 available at [https://eeas.europa.eu/sites/eeas/files/2017\\_report\\_equality\\_women\\_men\\_in\\_the\\_eu\\_en.pdf](https://eeas.europa.eu/sites/eeas/files/2017_report_equality_women_men_in_the_eu_en.pdf) accessed on 14 June 2018.

<sup>149</sup> European Commission, 2017 report on equality between women and men in the European Union, page 28 available at

participation of women and men in decision-making positions is essential to reflect the demographics of society and to strengthen democracy.<sup>150</sup> It follows that any company that ensures equal participation of women and men is essentially advancing Article 11 of CEDAW and promoting good governance. Against this context, there has been progress globally in ensuring that the right to work in terms of Article 11 of CEDAW is realised however globally women do not have equal opportunities and remuneration in the workplace like men.<sup>151</sup> This can be attributed to the stereotyped perceptions that view women as secondary earners to men. On the contrary, the exclusion of women in male-dominated sectors (sectorial segregation) has resulted in many women dominating some sectors in the economy, e.g. the unskilled positions in the agricultural sector.<sup>152</sup> The agricultural sector is largely linked to the traditional roles of women around households.

Black African women largely dominate in the small scale agricultural sector particularly for producing and processing crops to be sold and consumption by their households.<sup>153</sup> According to Raidini women's lack of education and confidence, increased workload contribute to the under-representation of women in managerial levels.<sup>154</sup> As such the extent of black African women's participation in farming companies and decision-making is limited due to their underrepresentation at managerial positions. Their underrepresentation is largely influenced by poor education of black African women in South Africa. To this end, women are predominately employed in the agricultural sector, such as farm labourers and are seldom employed at managerial positions.

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[https://eeas.europa.eu/sites/eeas/files/2017\\_report\\_equality\\_women\\_men\\_in\\_the\\_eu\\_en.pdf](https://eeas.europa.eu/sites/eeas/files/2017_report_equality_women_men_in_the_eu_en.pdf) accessed on 14 June 2018.

<sup>150</sup> *Ibid.*

<sup>151</sup> World Economic Forum, The Global Gender Gap Report, page 58 – 344, 2017.

<sup>152</sup> Raidimi E. N, The roles and activities of women in the six selected agricultural projects in Thulamela local municipality of Vhembe district municipality in the Limpopo province, South African Journal of Agricultural Extension vol.42 No.2 Pretoria Dec, page 10, 2014.

<sup>153</sup> Raidimi E. N, *Ibid*, page 14.

<sup>154</sup> Raidimi E. N *Ibid*, page 19.

### 2.2.2.1 Assessing South Africa's progress under CEDAW

South Africa signed and ratified CEDAW in 1995. This resulted in South Africa being a State Party to CEDAW and therefore accepting various legally binding provisions to abolish discriminatory practices against females in all spheres including, employment. By doing this, South Africa accepts to comply with the agreed standards by State Parties and further agree to be subjected to scrutiny by the CEDAW committee.<sup>155</sup> The basic State obligations under Article 2 of CEDAW include *inter alia* the following:

- To incorporate the equality rights of women and men in domestic laws and systems principle of the equality of men and women in the legal systems and ensure that these rights are practically realised. To ensure the realisation of this principle, State parties must abolish discriminatory laws against women and impose sanctions where necessary to prohibit the unfair discrimination of women.
- Put in place public institutions to protect women against any form of discrimination.
- To desist from perpetuating conduct that is discriminatory against women.

Essentially Article 2 charges State Parties to adopt the egalitarianism process that will eliminate direct and indirect discrimination against women. These processes include the adoption of laws that promote non-discrimination of women, the establishment of independent bodies that investigates discriminatory practices of the State and an effective justice system that can be used to compel the State not to discriminate unfairly against women. This is critical in that the achievement of representation of black African women in the private sector at managerial positions must be enforceable through the adoption of laws of the country and have an independent body to monitor the private sector's compliance with such laws. In compliance with Article 2, South Africa enacted the EEA, BBBEE, BCEA and the LRA that essentially promote non-discrimination between male and female employees in the workplace.

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<sup>155</sup> The CEDAW Committee has been established to monitor State Parties compliance of the recommendations issued by CEDAW.

Against this context, it is expected that laws, regulations, customs and practices that pose as barriers for women's emancipation in the workplace must be tackled by the State parties and as such South Africa can tackle on any barrier for women's emancipation through the implementation of laws such as the EEA that purposely balances the interest of female and male employees in the workplace, strengthening and respecting the powers of independent institutions such as the CGE to promote gender equality and through its judicial authority. An example is a decision in the case of *Barnard v SAPS* where the Constitutional Court held that affirmative action must be applied in line with the employment equity plan by employers.<sup>156</sup> This decision essentially challenges the private sector to implement affirmative action measures to achieve equitable representation of all previously disadvantaged groups in all levels in the workplace and this includes black African women at managerial positions.

#### 2.2.2.2 South Africa Report to CEDAW in 1998

The first report by South Africa was in 1998 by the then President Nelson Mandela. The first report covered the period 1994 – 1997. The reporting processes seek to ensure that there is an accountability mechanism at the international level for State Parties. South Africa's first report can be classified as a paradigm shift from a government that unashamedly undermined basic human rights before 1994 to a democratic government that was founded on the values of equality, freedom and dignity. South Africa's first report largely accentuated the progress made by a democratic government concerning repealing domestic discriminatory laws against women. These laws include *inter alia* section 23 of Black Administration Act 38 of 1927 that essentially promoted the rule of male primogeniture as in customary law that denied women and extra-marital children from inheriting property.<sup>157</sup>

This is against the background realisation that although racial discrimination took centre platform during the apartheid, gender inequality was a parallel struggle for women,

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<sup>156</sup> *Barnard v South African Police Services* 2014 (6) SA 123 (CC).

<sup>157</sup> See *Bhe and Others v Magistrate, Khayelitsha, and Others*, 2004 (2) SA 544 (C).



particularly black women who were subjected to three forms of discrimination based on race, gender and class.<sup>158</sup> It follows from this report that the deep-seated gender inequalities, although acknowledged, were out-weight legacies of racial discrimination. This is even though women's struggles in South Africa did not commence in 1994 but the 20<sup>th</sup> centuries.<sup>159</sup> In 1956, women mostly African's marched to the Union Buildings in Pretoria to resist and protest the extension of Pass Laws to women.<sup>160</sup> The Pass Laws Act of 1952 essentially required women to carry "reference book" that must be renewed monthly and signed by the employer to authorize women to be within specific places and certification of tax payments. It is submitted that the struggles of women have received less attention during apartheid and it was therefore expected in the first CEDAW report that democratic South Africa commits to redress the injustices of the past and promotes equality in all spheres of society.

In addition, South Africa repealed laws such as the Pass Laws Act 1952 and Group Areas Act 1950 as these legislations discriminated unfairly against black persons on race and classes. South Africa in the 1998 CEDAW report further dwelled on institutions and policies that have been enacted to support gender equality in South Africa. These institutions included the Commission for Gender Equality (CGE) that aimed to attain gender equality in South Africa and the enactment of the EEA that provides affirmative action measures to achieve equity in the workplace. It was further highlighted in the 1998 CEDAW report that the South African government is committed to ensuring that women are represented in decision-making positions until such time that gender parity was achieved.<sup>161</sup> Whilst the first report highlighted the clear intention of the government to achieve gender parity, the cardinal question is whether these intentions were shared by the South African private sector to increase women in decision making positions?

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<sup>158</sup> South African CEDAW Report, page 4, 1998.

<sup>159</sup> South African History online, History of Women's struggle in South Africa, available at <https://www.sahistory.org.za/article/history-womens-struggle-south-africa> accessed 14 June 2018.

<sup>160</sup> South African CEDAW Report page 4, 1998.

<sup>161</sup> *Ibid*, page 5.

The first report highlighted that women held 88 directorships in the Johannesburg listed companies in the mid-1997.<sup>162</sup> Of these 88 directorships, 68 were occupied by white females.<sup>163</sup> In 2017, it was found that of a total of 4898 executive managers at the JSE listed firms white women held the most of the executive manager positions (45.2%) while black African women held 28.8% of executive managers.<sup>164</sup> This asserts a view that white women have not endured the same discrimination as black African women; consequently, since 1996, the private sector afforded white women opportunities to be in managerial positions compared to black African women. Against this context, the playing field in the South African private sector, although it was discriminatory towards women, it however favoured and benefited white women to be in managerial positions by their race.

It was therefore expected that the first CEDAW report ought to highlight the plans by the South African government to comply with the obligations towards CEDAW. The first CEDAW report notes that black women generally occupy the least prestigious and lowest-paid positions<sup>165</sup> and proposes legislation that will promote an increase representation of disadvantaged groups by race, gender or disability. However, the proposed employment equity legislation in the first CEDAW report does not explicitly address the measures to improve the paucity of black African women in managerial positions. This is understandable because South Africa had at the time just emerged from the apartheid era and its primary focus was on repealing racial discriminatory laws and practices. Despite the enactment of the Constitution that provided equality rights to black African women, an employment equity legislation aimed at achieving equitable representation of black African was lagging in South Africa's report to CEDAW in 1998.

Nonetheless, the then President Nelson Mandela of South Africa envisaged an employment equity law that was meant to eliminate all forms of discrimination in terms of pay, gender, and opportunities. After this, the EEA was introduced in 1998 and it sought

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<sup>162</sup> *Ibid*, page 33.

<sup>163</sup> *Ibid*, page 33.

<sup>164</sup> Business Women's Association of South Africa, Women in leadership census, page 46, 2017 , available at <https://bwasa.co.za/wp-content/uploads/2018/04/2017-BWASA-CENSUS-report.pdf> , accessed on 14 June 2018.

<sup>165</sup> South African CEDAW Report, page 33, 1998.

to realise the constitutional right of equality; eliminate unfair discrimination in employment; ensure implementation of employment equity, and achieve a diverse workforce that represents all citizens of the Republic of South Africa. Although the EEA aims to eliminate unfair discriminatory practices, the exact has not been crafted explicitly to address the paucity of black African women at senior management positions. The rationale of the EEA was to ensure that affirmative action measures are applied to achieve equitable representation of previously disadvantaged groups in all occupational levels in the workplace. White women and black African males form part of this category even though in the private sector they are largely preferred to black African women.<sup>166</sup> The private sector employs black African women at lower-skilled positions and white women at senior positions as a disguise to comply with the EEA. The failure to advance black African women into managerial positions reflects the unwillingness of the private sector to give effect to the aspirations of the EEA to ensure that black African women are represented at all levels in the workplace.

#### 2.2.2.3 Concluding remarks of the CEDAW Committee on the 1998 South Africa's CEDAW report

The CEDAW Committee observed *inter alia* that the Constitution of South Africa did not define the concept 'gender discrimination'. It was recommended that South Africa defines this concept in the Constitution and other legislation as reflected in Article 1 of CEDAW.<sup>167</sup> The South African Constitution recognises gender as one of the prohibited grounds of discrimination. In other words, to discriminate a person purely on gender would be in contravention of the right to equality. The CEDAW Committee observed that notwithstanding the adopted legal measures by South Africa, the application of laws such as the EEA and affirmative action policies have not been achieved in South Africa.<sup>168</sup>

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<sup>166</sup> Commission for Employment Equity, Annual report, page 87, 2016/2017, available at [www.Labour.gov.za](http://www.Labour.gov.za) accessed on 29 January 2018.

<sup>167</sup> CGE, Measuring South Africa's progress under Convention on the Elimination of all forms of Discrimination against Women (CEDAW Report), page 36, 2013.

<sup>168</sup> *Ibid.*

This is attributed to the fact that South Africa had just become a democratic country and still needed to ensure full implementation of laws to address discriminatory practices. The CEDAW Committee recommended that there be the adoption of a statute to guarantee equal rights to women in South Africa.<sup>169</sup> Further, the CEDAW Committee observed that South Africa's national machinery and the CGE lacks resources (i.e. both financial and human).<sup>170</sup> The CEDAW committee recommended that both the National Gender Machinery (NGM), as well as CGE, are allocated sufficient resources for embedding gender equality in South Africa.<sup>171</sup> In South Africa, the concept NGM means the integrated structures that are placed at several levels of the government, civil society and statutory institutions.<sup>172</sup>

According to Warioba the purpose of NGM is to facilitate gender mainstreaming in all spheres on society.<sup>173</sup> Since the establishment of the CGE, there has been an outcry of the insufficient funding of the CGE in South Africa. The absence of sufficient funding of the CGE limits its human resource capacity to promote and advance gender equality in all spheres of the society.<sup>174</sup> It is argued that insufficient funding and lack of adequate resources of the CGE only weaken its impact on transforming society due to its inability to access all sectors and address gender inequalities.<sup>175</sup> As such the success of the CGE as with other gender machinery such as the Department of Women, Youth, Children and Persons with Disabilities are dependent on adequate state support and cannot be viewed as a burden to the economy.

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<sup>169</sup> *Ibid.*

<sup>170</sup> *Ibid.*

<sup>171</sup> *Ibid.*

<sup>172</sup> Warioba C, The role of National mechanisms to promoting gender equality and the empowerment of women: SADC Experience, EGM, page 5, 31 January 2005, available at <https://www.un.org/womenwatch/daw/egm/nationalm2004/docs/background%20paper%20rev,RJ%2012.12.04.pdf> accessed 14 June 2018 .

<sup>173</sup> *Ibid.*

<sup>174</sup> CGE, Annual report, page 6, 2011-2012.

<sup>175</sup> Waiganjo GA, Commission on gender equality: drawback or progress for rural disadvantaged women in South Africa? university of KwaZulu natal , master in social science dissertation, page 23 and 49, 2014, available at [http://researchspace.ukzn.ac.za/xmlui/bitstream/handle/10413/12312/Waiganjo\\_Gathambiri\\_Anthony\\_2015.pdf;sequence=1](http://researchspace.ukzn.ac.za/xmlui/bitstream/handle/10413/12312/Waiganjo_Gathambiri_Anthony_2015.pdf;sequence=1) accessed on 17 June 2018.

The failure by South Africa to allocate sufficient resources and budget to the CGE raises questions on the country's commitment to eradicate gender inequalities in South Africa. In the private sector, the minimal resources and budget would essentially restrict the CGE to comprehensively establish programmes that would be designated to interrogate the paucity of black African women at managerial positions. To address the challenge of underfunding of the CGE, funding prescripts or model in South Africa must bar the South African National Treasury from cutting or rodding budges of the CGE. This is against the backdrop understanding that the underfunding of the CGE goes against the recommendation of the CEDAW Committee and further casts doubt on South Africa's purported commitment to eradicate gender inequality in the workplace.

The remarks of the CEDAW Committee are against the backdrop that South Africa has just become a democratic country and it was still grappling with the repealing of laws that were discriminatory to women. The South African government was encouraged to use temporary special measures, including a quota system to expedite women's representation at decision-making positions in the private and public sector. A quota system essentially requires South Africa to set specific targets for women to be appointed in decision-making positions in the private sector. Critically, a quota system has the propensity to increase women's economic participation and occupy the managerial positions at an accelerated and determinable pace.

It is submitted that the South African private sector currently does not reflect the demographics of the country due to the lack of representation of black African women in managerial positions. As such the establishment of a system that compels the private sector to set targets would promote inclusivity and diversity in South Africa. However, South Africa has failed to establish a quota system and expressly excluded the application of quotas in terms of section 15(3) of EEA.<sup>176</sup> It is submitted that the failure to establish a quota system has not only contradicted CEDAW Committee recommendation but arguably contributed to the poor representation of black South African women in

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<sup>176</sup> Section 15(3) of the EEA.

managerial positions in the private sector. It is trite that the failure to establish a quota system in South Africa has its genesis to section 15 (3) of the EEA which specifically bars the application of quota to achieve equity.

The argument against the quota system is that it is deemed to be inflexible and rigid, as such the preferential treatment and numerical goals are preferred than quotas in South Africa.<sup>177</sup> In the case of *South African Police Service v Solidarity obo Barnard*, the courts succinctly stated that the distinction between numerical goals and quotas lies in the flexibility of the standard. To this end, the court stated that quotas amount to job reservations that are prohibited in terms of section 15(3) of the EEA whilst numerical goals serve as flexible employment guidelines.<sup>178</sup>

It is argued that the underfunding of the CGE highlights that the South African government is not fully prioritising gender-related issues.<sup>179</sup> Waiganjo points out that the budget of the CGE is disbursed under the budget of the Department of Women, Youth, Children and Persons with disabilities and such the CGE risks to be allocated a small budget.<sup>180</sup> To this end, it is argued that funding of the CGE is fundamentally about politics.<sup>181</sup> The consequence of underfunding ultimately prohibits the CGE to progress in achieving its objective to promote gender equality in South Africa.

To address this; the CGE should receive funding from the Parliament of South Africa and not from the Department of National Treasury (Government). This significant funding of the CGE by Parliament will ensure its independence and hold both the government and the private sector responsible for the lack of gender transformation in managerial positions. The current funding model for the CGE arguably jeopardises its independence

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<sup>177</sup> *Solidarity v Department of Correctional Services* 2016(5) SA 594 (CC).

<sup>178</sup> *Ibid.*

<sup>179</sup> CGE, Reviewing the work and contribution of the Commission for Gender Equality in South Africa (1996-2016) 20 year Review Report, page 140, 2017.

<sup>180</sup> Waiganjo G, Commission on Gender Equality: Drawback or progress for Rural Disadvantaged women in South Africa? Master of Science degree, University of KwaZulu-Natal ,page 43, 28 November 2014.

<sup>181</sup> *Ibid.*

and does not encourage the institution to investigate the government with rigour due to its dependency on funding.

### 2.2.3 South African Report to CEDAW in 2008

It was anticipated that in 2001 and 2005 respectively, South Africa would submit its progress report to the CEDAW Committee to outline the progress of addressing the recommendations to the 1998 CEDAW report. However, South Africa did not submit its report to the Committee. Consequently, South Africa submitted its CEDAW report in 2009 and the report covered the period 1998-2008. The cardinal question is whether South Africa's failure to timeously submit its periodic reports for 2001 and 2005 to the Committee can be attributed to being its non-commitment to gender mainstreaming and not taking serious CEDAW processes. It is submitted that South Africa's failure to submit its report timeously arguably reflects the lack of commitment to gender mainstreaming. The lack of sufficient commitment to gender mainstreaming in South Africa is further demonstrated by the inadequate resources and funds to the CGE as gender machinery.

South Africa's 2008 CEDAW report largely highlighted the adoption of significant legislative reforms, policy developments such as affirmative action and programmes such as Head of Department's 8 principles of Action Plan in Public Service that seek to promote and protect women's rights in the home, in the community and the workplace. Of importance South Africa's submissions related to the empowerment of women in all decision-making processes and development. Legislative reforms included the adoption of the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000, Basic Conditions of Employment Act 75 of 1997, Skills Development Act 97 of 1998, Broad-Based-Black Economic Empowerment Act 53 of 2003 and Labour Relations Act 66 of 1995. The aims and objectives of these legislations are discussed comprehensively below in this chapter.

The report highlighted South Africa's commitment to empower women and promote the concept of gender equality in the Public service workplace by introducing the Head of the

department's 8 principles of Action Plan. The Head of Department's 8 principles of Action Plan included *inter alia* achieving non-sexism through the promotion and protection of the right to dignity and human rights of female employees, this includes the rights of females with disabilities (Principle 1); ensuring that gender perspectives are incorporated in all the policies and practices of the department (Principle 2); developing and implementing gender management systems of the department, providing sufficient mechanisms and Gender Units in the department (Principle 3); employing 50% of women at senior management service (SMS) to ensure their full participation in decision making (principle 4); development of capacity building programmes to advance women and gender equality in the workplace (principle 5); implementing the national policies and implementing continuous empowerment of women and gender equality by developing departmental and sector-specific wellness and standard operating procedures (Principle 6); providing sufficient resources (financial, physical and personnel) to advance gender equality and ensure full responsibility (Principle 7), providing reports on the advancement of gender equality with the public service (Principle 8).

Principle 1 requires the Head of Department in the public sector, to promote and protect the basic human rights of black African women. Essentially black African women must be treated with dignity and equality in the workplace in the same way other males and females of different colours are treated. According to Carter sexual harassment by its very nature violates the dignity of female employees in the workplace.<sup>182</sup>

Principle 2 challenges the Head of Department to ensure that there is gender mainstreaming in the workplace, and this requires that policies must cover the needs and interests of all employees. It is submitted that policies on recruitment, selection, retention, promotion, mentorship policies address mainstreaming issues. This would mean that the

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<sup>182</sup> Carter V A, Working on Dignity: EC Initiatives on Sexual Harassment in the workplace, Northwestern Journal Of International Law and Business, Vol 2, Issue 3, page 453 available at [http://www.eif.gov.cy/mlsi/dl/genderequality.nsf/0/E3C9F3EAF4E66758C22579A70027D43D/\\$file/Working%20on%20Dignity-%20EC%20Initiatives%20on%20Sexual%20Harrassment%20in%20the%20W.pdf](http://www.eif.gov.cy/mlsi/dl/genderequality.nsf/0/E3C9F3EAF4E66758C22579A70027D43D/$file/Working%20on%20Dignity-%20EC%20Initiatives%20on%20Sexual%20Harrassment%20in%20the%20W.pdf) accessed on 11 July 2018.



application of such policies would consider the additional needs and interests of black African women in managerial positions.

Principle 3 requires the Head of Department to put in place department and sector Gender Management Systems, sufficient mechanisms and gender Units in the department. Essentially this principle challenges the public sector to establish an environment that enables women to work and be enabled to report grievances which would be timeously resolved by the Public sector. The CGE suggests that the lack of reporting mechanism results in the grievance of women not be adequately attended to and this motivates women to leave employment or adapt to an environment that does not cater for their needs and interests.<sup>183</sup> It is submitted that gender mainstreaming is essential in creating an enabling environment that encourages women to participate fully in the workplace without fear of their needs and interests not being protected.

Principles 4 requires the Head of Department to employ 50% of females at senior management services to ensure their full participation at decision-making levels. This principle is significant in that it compels the public sector to set targets for the acceleration of women at SMS. It is argued that it is this principle that resulted in the progress of black African women being significantly represented at managerial positions. Unfortunately, this principle does not apply in the private sector as it is designed to accelerate transformation in the public sector. As such it is argued that the progression of black African women in managerial positions in the private sector would be achievable should Principle 4 be adopted and applied in the private sector. Significantly to achieve desired results it is argued that if Principle 4 should be legislated. By doing so, Principle 4 would effectively be mandatory for the private sector to ensure that black African women are significantly represented in managerial positions.

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<sup>183</sup> CGE, Employment equity report into the private sector, page 37, 2017/2018, available at <http://www.cge.org.za/wp-content/uploads/2016/12/CGE-Employment-Equity-Report.pdf> accessed on 11 July 2018 .

Principle 5 essentially recognises that the achievement of gender equality in the workplace requires the capacity development of women. It is submitted that there is an inter-link between principles 5 and 4 in that the attainment of 50% of women at all levels of SMS would be possible if women in the workplace have been capacitated. It is argued that capacity should seek to empower women about their rights in the workplace, provide mentorship, provide assistance to enable female employees to obtain academic qualifications and prioritise women in acting positions in senior management positions to increase their eligibility for promotion in the workplace.

Principle 6 requires the public sector to implement national policies and guidelines regarding the empowerment of women and gender equality by developing departmental and sector-specific guidelines and standard operating procedures. These national policies include the affirmative action measures that require that previously disadvantaged persons be represented at all levels in the workplace. Additionally, principle 6 arguably complements principle 4 which set a 50% national target for women at SMS in the public sector. The CGE found that the monitoring and evaluation systems of gender mainstreaming in the public sector have not introduced gender-specific monitoring and evaluation mechanisms that are effective and coherent to South Africa's legislative frameworks on gender mainstreaming.<sup>184</sup> It is submitted that the failure to include the achievement of women's representation in the performance agreements of the Heads of Departments contributes to the lack of commitment by the public sector to put in place gender mainstreaming system for monitoring and evaluation.

Principle 7 is critical for the advancement of gender equality in the workplace. Principle 7 essentially challenges the Public sector to eradicate gender discrimination in the workplace to realise gender equality and equity. To achieve this, it is submitted that the public sector must address gender discriminatory practices and inequalities through the adoption and enforcement of rules, procedures, and processes. Moreover, Principle 7

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<sup>184</sup> CGE, Beyond the numbers: mainstreaming gender in the public service, page 55, 2014, available at <http://www.cge.org.za/wp-content/uploads/2014/05/Gender-Barometer-2014.pdf>, accessed on 10 July 2018.

challenges the public sector to allocate budgets to promote gender sensitivity in the workplace. It is submitted that this may be achieved through workshops and awareness that demonstrates the importance of addressing stereotyped perceptions that see females as secondary earners to male employees. It is submitted that these types of workshops are essential to address patriarchal attitudes in the workplace and assist males to accept that women are capable of occupying leadership positions.

According to the CGE, most public sector departments have put measures such as implementing the Head of Department's 8 principles of Action Plan to promote gender equality and transformation internally, however, it was unearthed that most of these measures lacked support from the political and administrative leadership and this resulted in the measures not properly co-ordinated.<sup>185</sup> This demonstrates the lack of commitment by senior managers in the public sector to advance gender equality in the workplace.<sup>186</sup>

The CGE concluded that the Public sector has failed to develop gender-responsive budgets because gender mainstreaming was often regarded as an *ad hoc* responsibility rather than a key strategic objective.<sup>187</sup> It is expressed that the responsibility to achieve gender mainstreaming in the workplace is placed in junior staff members who are provided with limited funds.<sup>188</sup> To address this, the performance agreements of Heads of the department should include the setting of targets for black African women in leadership positions, this will essentially channel the Heads of a department to render support to senior managers to advance gender equality in the workplace.

These principles highlight the commitment to ensure that South Africa's public-sector increases the representation of women in management positions and further ensures that the workplace environment is gender sensitive. This commitment is made with the espoused understanding that South Africa will only become an egalitarian State provided that it affords women, who were previously discriminated against, equal opportunities to

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<sup>185</sup> *Ibid*, page 54.

<sup>186</sup> *Ibid*, page 54.

<sup>187</sup> *Ibid*, page 52.

<sup>188</sup> *Ibid*, page 54.

male employees in the public service. It is observed that the South African local government levels for 10 years experienced the integration of gender parity provisions in the policy framework and this resulted in the increase of female representation in managerial positions.<sup>189</sup> On the contrary, the 2008 South Africa's CEDAW report acknowledged that the private sector experiences challenges with poor female representation in managerial positions.<sup>190</sup> Women in the private sector were 27% at managerial positions whilst in terms of the race, the sector only had 9% representation of African managers (the 9% includes males and females).<sup>191</sup>

Essentially, South Africa conceded that the lack of representation of women in senior positions necessitates the need to promote and foster gender parity in the private sector.<sup>192</sup> According to the CEE, during the period 2008/09 black female employees were continued to occupy the lowest percentages at all levels in the private sector workplace compared to their white female counterparts.<sup>193</sup> It was found that in the private sector black African women were 3.8% at managerial positions whilst white women were 13.8% and white men were 59.9%.<sup>194</sup> As such, at the top management and senior positions, black females constituted 5.5% as compared to 15.2% of their white female counterparts.<sup>195</sup> This significantly demonstrates that although women, in general, are underrepresented in the private sector, white women are much preferred than other women in other race groups.

South Africa's 2008 CEDAW Report refers to the adoption of various laws and policies as an achievement, however, it is difficult to measure the effectiveness of these laws and policies and their impact on women due to lack of monitoring and evaluation in the report. More, in particular, the laws such as the BCEA, EEA and LRA as referred in 2008,

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<sup>189</sup> South African CEDAW Report, Progress made on the implementation of the Convention for the period 1998 to 2008 , page 7, available at <http://www.women.gov.za/images/CEDAW.pdf> accessed on 10 July 2018.

<sup>190</sup> *Ibid.*

<sup>191</sup> CEE , Annual Report, page 41, 1999/2001 available at [www.labour.gov.za](http://www.labour.gov.za) accessed on 10 July 2018.

<sup>192</sup> CGE, Employment Equity Report in the private sector: Progress report, page 38, 2017/2018.

<sup>193</sup> CEE Annual Report 2008/2009 available at [www.labour.gov.za](http://www.labour.gov.za), accessed on 10 July 2018.

<sup>194</sup> CEE Annual Report at page 17 2008/2009 available at [www.labour.gov.za](http://www.labour.gov.za), accessed on 10 July 2018.

<sup>195</sup> CEE Annual Report 2008/2009 available at [www.labour.gov.za](http://www.labour.gov.za), accessed on 10 July 2018.

although bars discrimination based on sex and gender, they to some degree failed to transform the private sector to foster black African women into managerial positions. Additionally, there continue to be wage disparities between male and female employees both at the public and the private sectors notwithstanding numerous laws and policies. To address this challenge, it is imperative to strengthen and enforce laws by imposing penalties on sectors that are found to deliberately remunerate female employees lower than their male employees based on their gender.

#### 2.2.3.1 Closing comments of the CEDAW Committee on South Africa's CEDAW 2008 report

The CEDAW Committee remarks laid emphasis for South Africa to transform the public sector and minimal emphasis was laid to the private sector. It is submitted that the less emphasis on the private sector is influenced by the understanding that private sector companies are privately owned by persons and not the State. Against this backdrop, the CEDAW Committee observed that a lot still needed to be done in the public and private sector to advance women in managerial positions. Significantly the CEDAW Committee cautioned the unintended consequences of setting target achievements, is that when a sector reaches its set of targets, the sector may be complacent and put no further interventions for additional transformation or equity in the workplace. It is accepted that the achievement of equity in the workplace requires continuous efforts by the employer. To this end, to avoid complacency when targets are reached, legislation must permit the employer to apply preferential treatment in the appointment of employees after quotas are achieved.

#### 2.2.3.2 South Africa's Shadow report on the progress of implementation of CEDAW, 2011

The South African Shadow report, 2011 found that in 2006 females occupied less senior management positions in the private sector (i.e. females accounted for 5% of senior

management positions).<sup>196</sup> In particular, the Report unearthed that vulnerability of Black women who amounted to 14% in the formal employment, in comparison white men who amounted to 43%, white females constituted 34% and black men constituted 21%.<sup>197</sup> It was found that black women were largely received a poor level of remuneration in the South African labour force.<sup>198</sup>

The paucity of black African women in senior management positions in the private sector is a contentious issue. It is deduced from the 2011 Shadow report that the South African public service has progressed by accelerating black African women at managerial positions and the private sector continues to lag. It is submitted that black African women experience challenges in breaking the glass ceiling in the private sector to enable them to assume managerial positions in the private sector, unlike white women and white men and black men.<sup>199</sup> The disproportionate and inadequate representation of black African women in the decision-making levels in the private sector is indicative that South Africa's application of affirmative action has not persuaded the private sector to achieve equity. In the 2011 Shadow report, it is acknowledged that black African women are prejudiced and discriminated based on race and class and the South African government neglects to highlight the substantive measures to address this inequality in the private sector.<sup>200</sup> It is submitted that the achievement of equity in the private sector requires the South African government to adopt a quota law that will essentially compel the private sector to transform its managerial positions. It is argued that the self-regulation in the private sector and the lack of sanctions to achieve equity in the workplace has contributed significantly to the slow pace of transformation in the private sector.

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<sup>196</sup> Western Cape Network on Violence Against Women , South African shadow report on the implementation of the convention on the elimination of all forms of discrimination against women, page 15 available at [https://www2.ohchr.org/english/bodies/cedaw/docs/ngos/Joint\\_NGO\\_Report\\_for\\_the\\_session\\_SouthAfrica.pdf](https://www2.ohchr.org/english/bodies/cedaw/docs/ngos/Joint_NGO_Report_for_the_session_SouthAfrica.pdf) , accessed on 11 July 2018.

<sup>197</sup> Western Cape Network on Violence Against Women , South African shadow report on the implementation of the convention on the elimination of all forms of discrimination against women, at page 15, available at [https://www2.ohchr.org/english/bodies/cedaw/docs/ngos/Joint\\_NGO\\_Report\\_for\\_the\\_session\\_SouthAfrica.pdf](https://www2.ohchr.org/english/bodies/cedaw/docs/ngos/Joint_NGO_Report_for_the_session_SouthAfrica.pdf) , accessed on 11 July 2018.

<sup>198</sup> *Ibid.*

<sup>199</sup> *Ibid*, page 23.

<sup>200</sup> *Ibid*, page 23.

### **2.3 Beijing Declaration and Platform for Action,1995**

In 1995, 189 Countries took part in the 4th World Conference of Women which was held in China. South Africa participated in this conference. Following intense deliberations, exchanging best practices and experiences 189 Governments agreed to commitments that aimed to address the common challenges that hinder women's empowerment globally.<sup>201</sup> As such Beijing Declaration and Platform for Action (BPA) was adopted by 189 Member States and it served as a guiding yardstick to achieve gender equality. The BPA may be viewed as a significant tool to expedite the advancement and empowerment of women. The BPA is credited as one of the most significant agreements to materialise from an international conference.<sup>202</sup> This is so because the BPA aimed to remove all the barriers that hinder the participation of women in private and public life by putting measures to enable them to have equivalent opportunities in all spheres of life. Essentially the BPA advocates for the establishment of power-sharing shared between females and males in their private and public lives.

Essentially, the BPA covers twelve critical areas of concern and this includes the continuous poverty on females; disparities and imbalances in accessing education and training; disparities and imbalances in accessing health care and related services; violence against females; the effects of different conflicts including armed conflicts on females; disparities in economic ( both in terms of structures and policies) , in all forms of productive activities and in access to resources; Inequality and imbalances between females and males in power-sharing and decision-making at all levels; lack of tools to advance women at all levels ; insufficient and minimal respect for the protection and promotion of rights of women; stereotyping and patriarchal views of women and disproportion to access and participate in all communication systems by women, especially in the media; gender imbalances in the management of natural resources and

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<sup>201</sup> UN Women, Beijing+5 political Declaration and outcome, page 3, 2014, available at [http://unipd-centrodirittiumani.it/public/docs/Report\\_Conferenza\\_Pechino\\_1995.pdf](http://unipd-centrodirittiumani.it/public/docs/Report_Conferenza_Pechino_1995.pdf), accessed on 29 May 2018.

<sup>202</sup> South Africa's Beijing +20 Report, page 6, February 2015 available at <http://www.women.gov.za/images/Final-Draft-2-National-Beijing-20-Report--26022015-3.pdf> accessed on 29 May 2018.

in the safeguarding of the environment; continuous discrimination against and violation of the rights of the girl child.<sup>203</sup>

The Member States identified strategic objectives for each critical area of concern, as well as comprehensive actions that the governments and key stakeholders will take at domestic, regional and international levels.<sup>204</sup> For this study, the focus shall be on the inequality and imbalances between females and males in power-sharing and decision-making at all levels; lack of tools to advance women at all levels and disparities in economic ( both in terms of structures and policies) in the private sector.

Streeter observes that the five-year time frame to meet the goals and objectives of the BPA was impractical.<sup>205</sup> The deadline failed to take into consideration the third world realities.<sup>206</sup> These realities included the patriarchal attitudes, stereotypes which ultimately results in resistance. According to Defies, the BPA has persuaded countries to address challenges experienced by women around the world, however, contends that the Declaration has a non-binding effect.<sup>207</sup> The indirect impact of the BPA is that it contributes to the development of domestic laws such as EEA that translate BPA commitments into binding legal obligations among States.<sup>208</sup> As such, the BPA has aimed to persuade countries to adopt measures such as affirmative action including policy frameworks that seek to address the twelve identified critical areas of concern. The non-binding effect of the BPA, therefore, denotes that it is a voluntary decision by a country to comply with the BPA, countries only become obligated to implement the principles of the BPA if such principles have been legislated into domestic laws and policies. Nonetheless, South Africa subscribes to the BPA principles by enacting the EEA to ensure that both women and men share power in decision-making levels. Despite this, there has been a slow pace of fostering women in management levels 25 years since the BPA was

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<sup>203</sup> Beijing Platform for Action, 1995 at paragraph 44.

<sup>204</sup> *Ibid.*

<sup>205</sup> *Ibid.*

<sup>206</sup> Streeter N, Beijing and Beyond, 11 Berkeley Women's L.J. 200, page 204, 1996.

<sup>207</sup> Defeis E, The United Nations and Women - A Critique, 17 Wm. & Mary J. Women & L. 395, page 399 2011, available at <http://scholarship.law.wm.edu/wmjowl/vol17/iss2/5> , accessed 28 May 2018.

<sup>208</sup> *Ibid.*



adopted.<sup>209</sup> To this end, it is submitted that the BPA has been ineffective in persuading South Africa to achieve equality between men and women in decision making positions in all levels.

### 2.3.1 Inequality and imbalances between females and males in power-sharing and decision-making at all levels

The BPA recognises that the scale is not balanced between males and females in power-sharing and decision making at all levels. The scale is often in favour of having more males in management positions than females. The BPA emphasis that “achieving the goal of equal participation of women and men in decision-making will provide a balance that more accurately reflects the composition of society and is needed to strengthen democracy and promote its proper functioning”.<sup>210</sup> The BPA further emphasised that “Women’s equal participation in decision-making is not only a demand for simple justice or democracy but can also be seen as a necessary condition for women’s interests to be taken into account. Without the active participation of women and the incorporation of women’s perspective at all levels of decision- making, the goals of equality, development and peace cannot be achieved.”<sup>211</sup>

It is deduced that the full participation of women at all levels is significant for the advancement and empowerment of women. The achievement of females in management positions result in a real integration of the equality dimension between males and females. Such integration of females in management positions would reflect the demographics of a society and ultimately would strengthen the democracy in a country.

The BPA postulates that countries must promote and develop an effective active policy that fosters the mainstreaming of gender perspectives in policy frameworks and

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<sup>209</sup> Department of women, Youth, and persons with disabilities ,South Africa’s report on the progress made on the implementation of the Beijing platform for action, page 9, 2014-2019 , available at <http://www.women.gov.za/images/Final-National-Beijing-25-Report-2014-2019--Abridgeged-.pdf> accessed on 19 May 2020.

<sup>210</sup> Beijing Platform for Action, 1995 at paragraph 181.

<sup>211</sup> *Ibid.*

programmes to ensure that decisions that are taken do consider women's needs and challenges.<sup>212</sup> As such, the BPA resolved that all stakeholders including the private sector must take *inter alia* the following actions:

- a) Proactively build and increase the quantity of female leadership and place such females in strategic management positions;<sup>213</sup>
- b) Develop tracking tools to monitor the upward mobility of women's access to senior levels of management;<sup>214</sup>
- c) Revisit the recruitment and appointment criteria and remove any provisions in the criteria that may be prejudicial and discriminatory against female candidates ;<sup>215</sup>
- d) Embolden measures to balance the representation between males and females at different levels, including equal and full participation of all employees in decision-making structures at all levels;<sup>216</sup>
- e) Increasing access to managerial, technical and leadership training by reforming recruitment and career-development programmes in the workplace;<sup>217</sup>
- f) Establish career advancement programmes for all females and should include career planning, tracking, mentoring, coaching, training and retraining;<sup>218</sup>

It is evident from the outlined measures that proactive steps by the private sector are required to attract and retain black African women in managerial positions. These steps include the adoption of recruitment policies that specifically target previously disadvantaged groups in the private sector, career development, training and succession plans that target women, particularly black African women. The private sector must implement the monitoring and evaluation to monitor the application of the recruitments, promotion, and succession policies. According to Corner the measures alone will not be sufficient.<sup>219</sup> Corner argues that there is a need to foster gender perspectives with top

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<sup>212</sup> *Ibid* paragraph 189.

<sup>213</sup> *Ibid* paragraph 192.

<sup>214</sup> *Ibid* paragraph 192.

<sup>215</sup> *Ibid* paragraph 192.

<sup>216</sup> *Ibid* paragraph 192.

<sup>217</sup> *Ibid* paragraph 192.

<sup>218</sup> *Ibid* paragraph 192.

<sup>219</sup> Corner L, Women's participation in Decision- Making and Leadership A global perspective, Women in Decision-Making in Co-operatives: Report of a Regional Conference 7-9 May 1997, ACWF and ICAROAP, 1997.

managers of a company to create a working environment that is gender-sensitive and family-friendly.<sup>220</sup> This may include reducing working hours, the introduction of breastfeeding facilities and paid maternity leave.<sup>221</sup> Corner reasons that organisational cultures that are accommodating the needs of women is not based on deliberate policies but is a result of their development over time to meet the interest of male employees predominately dominated managerial positions for a long period. As a result, a new institutional setting is needed to provide space for both. In the private sector, an institutional setting would require a change of a company's culture and policies that exclude the needs and interests of women in the workplace. These interests and needs include *inter alia* career development mentorship, childcare facilities in the workplace.

The essential argument of Corner is that laws and policies are good to improve the representation of women in decision-making levels however the organisational culture which is generally male-dominated needs to be sensitised about these laws and policies for the laws to achieve greater impact. This is essential especially in the private sector where most owners of the companies are not fully alive to the realisation that their companies must reflect the demographics of the country as aspired by the EEA

The BPA tasks all stakeholders including the private sector to:

- a) Offer leadership and self-esteem training to black African females to strengthen their self-esteem and to occupy management positions;<sup>222</sup>
- b) Ensure transparency in the criteria that is used for management positions and ensure that the composition of the selecting structures is gender-balanced;<sup>223</sup>
- c) Development of a mentoring system that will provide training in management and leadership for inexperienced women;<sup>224</sup>

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<sup>220</sup> *Ibid.*

<sup>221</sup> Beijing Platform for Action, 1995 at paragraph 195.

<sup>222</sup> *Ibid.*

<sup>223</sup> *Ibid.*

<sup>224</sup> *Ibid.*

- d) Offer to both males and females gender-sensitive training to instil a culture of non-discriminatory working relationships and promotion of diversity management levels;<sup>225</sup>

It is evident from the above that the representation of women in decision-making positions is dependent on whether the leaders of an entity understand the importance of having a workplace profile that reflects the demographics of a country. To compel the private sector, fostering black African women into managerial positions should be made a mandatory listing requirement in the Johannesburg Stock Exchange (JSE) for listed companies. The directors of non-listed companies who fail to foster black African women into managerial positions should be disqualified as directors in terms of section 69(8) of the Companies Act.<sup>226</sup> Section 69(8) of the Companies Act, prescribe grounds which a director may be disqualified and this includes if the director is an unrehabilitated insolvent, has been being dishonesty or convicted to theft, fraud, forgery, misconduct and perjury.

It is submitted that progressive leadership in the private sector would result in an organisational culture that promotes non-discrimination and promotes diversity in work and management styles. Nyangiwe –Ndika asserts that mentorship is one of the critical strategies women need to invest in, for women to succeed in acquiring progressing to decision-making positions.<sup>227</sup> Mentorship and training of inexperienced women will result, especially in the private sector, in the creation of a pool of candidates eligible to assume managerial positions.

The promotion and skills development in the private sector play a fundamental role in changing the demographic representativity at managerial positions in South Africa. Conversely, the CEE observed that the preference for white groups in the private sector over the designated groups in promotions and skills development undermines

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<sup>225</sup> *Ibid.*

<sup>226</sup> Companies Act 71 of 2008.

<sup>227</sup> Welekazi Nyangiwe –Ndika, An analysis of barriers which affect women in leadership positions in Eastern Cape Municipalities. Case study of Amathole District Municipality at page 69, University of Fort Hare, 2015.

transformation progress in the workplace.<sup>228</sup> The non-binding effect of the BPA has not resulted in the private sector in South Africa not empowering its women in general and black African women, in particular, to participate in managerial positions. The BPA only provides guidelines, and without intentional commitment, the private sector has the discretion to overlook. As such it is critical to develop a quota legislation in South Africa that specifically makes it obligatory for the private sector to consider black African women in promotions and skills development to appoint them in managerial positions.

### 2.3.2 Education and training of women

The BPA recognises that access to education and training of women is key in the empowerment of women to participate in decision-making in society. It is espoused that investing in education for women contributes to economic growth and sustainable development.<sup>229</sup> Of importance, the BPA recognises the need for State parties to eradicate the level of illiteracy of women to empower them to participate effectively in society. To achieve this, the BPA requires State members to ensure equal access to education for both men and women.

State parties are tasked to:

- a) Put in place policies about education, training and retraining for the benefit of female employees and providing the necessary skills to empower these women to qualify for employment opportunities;<sup>230</sup>
- b) Put in place measures such as developing curricula and teaching materials to increase women's participation in male-dominated areas including technical and scientific areas,<sup>231</sup>

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<sup>228</sup> Employment Equity Commission Annual report, page 16, 2016/17.

<sup>229</sup> Beijing Platform for Action, 1995 at paragraph 69.

<sup>230</sup> *Ibid* at paragraph 82.

<sup>231</sup> *Ibid* at paragraph 82.

- c) Increase training in various employment sectors such as agriculture, fisheries, industry and business, arts and crafts, science and technology to increase women economic participation of women in decision-making.<sup>232</sup>

It is submitted that providing training and education to black African women in managerial areas enhances their capabilities of assuming managerial positions. However, in South Africa, it is unearthed that the private sector affords white groups preference in terms of recruitment, promotion and training opportunities at managerial levels.<sup>233</sup> This preferential treatment purposively excludes black African women and as such contributes to their minimal representation at managerial positions due to lack of sufficient training. It is submitted that quota legislation in South Africa would compel the private sector to recruit and train black African women to be equitably represented at managerial levels.

### 2.3.3 Women and the economy

The BPA recognises that inequality between women and men in accessing educational, employment, training and promotional opportunities that limit women's progression and participation in economic activities."<sup>234</sup> It is pointed out that patriarchy serves as a barrier to women's effective participation and further has an impact on the accessibility of education and training opportunities for women which are key for economic management.<sup>235</sup> Of importance, the BPA points that women are underrepresented at managerial levels in the private sector and denotes discriminatory hiring and promotion policies and practices.<sup>236</sup> To address this challenge the BPA tasks the private sector to *inter alia* hire women for managerial levels and offer, on a balanced scale, training opportunities to both men and women.<sup>237</sup>

State parties are tasked to "eliminate occupational segregation, especially by promoting the equal participation of women in highly skilled jobs and senior management positions,

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<sup>232</sup> *Ibid* at paragraph 82.

<sup>233</sup> Commission for Employment Equity, Annual report, page 87, 2016/2017, available at [www.Labour.gov.za](http://www.Labour.gov.za) accessed on 29 January 2018.

<sup>234</sup> Beijing Platform for Action, 1995 at paragraph 152.

<sup>235</sup> *Ibid* at paragraph 152.

<sup>236</sup> *Ibid* at paragraph 162.

<sup>237</sup> *Ibid* at paragraph 177.

and through other measures, such as counselling and placement, that stimulate their on-the-job career development and upward mobility in the labour market, and by stimulating the diversification of occupational choices by both women and men; encourage women to take up non-traditional jobs, especially in science and technology, and encourage men to seek employment in the social sector”.<sup>238</sup>

The BPA challenges State parties and private sector to further “implement and monitor positive public- and private-sector employment, equity and positive action programmes to address systemic discrimination against women in the labour force, in particular women with disabilities and women belonging to other disadvantaged groups, concerning hiring, retention and promotion, and vocational training of women in all sectors”.<sup>239</sup>

The CEE in South Africa has monitored employment in the South African private sector and observed that there is marginal interest to achieve equity in managerial positions.<sup>240</sup> The inability for the CEE to address this in South Africa is due to the EEA prohibiting the use of quotas to achieve equity. To this end, it is argued that South Africa is failing to achieve the aspirations of the BPA by not creating upward mobility for black African women into managerial positions. As such, due to their underrepresentation at managerial levels, black African women are unable to influence company policies to address equity, discriminatory hiring and recruitment practices in the workplace.

#### 2.3.4 Women and the environment

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<sup>238</sup> *Ibid* at paragraph 178.

<sup>239</sup> *Ibid* at paragraph 178.

<sup>240</sup> Commission for Employment Equity, Annual report , page 87, 2016/2017, available at [www.Labour.gov.za](http://www.Labour.gov.za) accessed on 29 January 2018.

Regarding sectors, the BPA recognises that women are underrepresented in management levels of financial and corporate bodies.<sup>241</sup> To this end, it is highlighted that women are seldom trained in these areas to be managers to increase their capabilities.<sup>242</sup> The BPA highlights that despite the training of women as professional natural resource managers, they continue to be disproportionately represented in formal bodies with policy-making capacities.<sup>243</sup>

State parties are encouraged to “develop programmes to involve female professionals and scientists, as well as technical, administrative and clerical workers, in environmental management, develop training programmes for girls and women in these fields, expand opportunities for the hiring and promotion of women in these fields and implement special measures to advance women’s expertise and participation in these activities.”<sup>244</sup> The BPA challenges the private sector to “facilitate the access of women agriculturists, fishers and pastoralists to knowledge, skills, marketing services and environmentally sound technologies to support and strengthen their crucial roles and their expertise in resource management and the conservation of biological diversity.”<sup>245</sup>

It is deduced from the BPA that women empowerment is critical to advance women in areas that are male-dominated such as the environmental sector. Once women are empowered in terms of skills and knowledge, it becomes important that substantial equality be realised by promoting these women into meaningful roles to advance their expertise and participation. In South Africa, the CGE found that women were disproportionately represented at managerial levels in both the mining and engineering sectors.<sup>246</sup> It is stressed that the achievement of black African women in managerial positions, requires special measures such as quota to encourage transformation and equitable representation. The problem in South Africa is that the EEA in principle aims to ensure that black African women are represented in all occupational levels in the

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<sup>241</sup> Beijing Platform for Action, 1995 at paragraph 249.

<sup>242</sup> *Ibid.*

<sup>243</sup> *Ibid* at paragraph 249.

<sup>244</sup> *Ibid* at paragraph 256.

<sup>245</sup> *Ibid* at paragraph 249.

<sup>246</sup> CGE, National Employment Equity report, page 7, 2010-2011.



workplace, however practically these aim is not achieved. Essentially the EEA has not addressed the problem of the segregation of black African women in managerial positions.

## 2.4 International Labor Organization Conventions (ILO)

### 2.4.1 Background

The concept of equal remuneration for women and men for work of equal value is not a recent phenomenon and it is recognised as significant for social justice.<sup>247</sup> According to Oelz *et al* post, achieving equal remuneration between women and men was critical post the second world war because it was understood that the indifference amounted to unfair discrimination.<sup>248</sup> Oelz *et al* argue that historical and stereotypical attitudes have resulted in female employees being paid less than male employees.<sup>249</sup> This was influenced by the notion that men were breadwinners and it was deemed unnecessary for women to earn income. As such, women were “secondary earners” and earned lower than males.<sup>250</sup> Oelz *et al* opine that remunerating men more than females for the same work of equal value constitutes discrimination in the workplace.<sup>251</sup> The concept of equal remuneration for women and men for work of equal value is a global phenomenon and reaffirms that globally women are subjected to this type of discrimination solely on the grounds of their gender. The ILO addressed this form of discrimination by adopting key Conventions that sought to ensure equal pay for men and females for work of equal value.

Fundamentally, the achievement of equity for black African women in the workplace requires companies to recognise that remunerating females equal to men for work of equal value in the workplace are necessary to retain talented females in the company.

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<sup>247</sup> Constitution of the International Labour Organization, as amended in 1946 to add a specific reference to equal remuneration for work of equal value in the Preamble (originally set out in Article 41): ILO, Geneva, Official Bulletin, 15 November 1946, Vol. XXIX, No. 4.

<sup>248</sup> Oelz M, Olney S and Tomei M, Equal pay: An introductory guide. Geneva: International Labour Office, page 2, 2013,.

<sup>249</sup> Oelz M, *ibid*, page 3.

<sup>250</sup> Oelz M, *ibid*, page 3

<sup>251</sup> Oelz M, *ibid*, page 3.

Accordingly, the ILO asserts that equitable remuneration of men and women in the workplace for equal work of equal value plays a critical role in advancing women into managerial positions and encouraging their effective participation at these positions.<sup>252</sup> As such, remunerating females less than males for equal work of equal value regresses any gains made by the company to achieve gender equality and equity in the workplace. Consequently, such differentiation contributes to women not being retained in the private sector particularly in managerial positions.

#### 2.4.2 The Equal Remuneration Convention, 1951 (No. 100) (ERC)

Remuneration is defined in Article 1 of the ERC 100 to include “the ordinary, basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or kind, by the employer to the worker and arising out of the worker's employment”. Similarly, Article 2 of the ERC 100 requires that the principle of equal pay for male and female employees for work of equal value should be implemented by all member States. Essentially ILO Convention No.100 requires the adoption of laws and policies by member States to ensure that women have equal opportunities in the workplace and further eradicate discrimination in the workplace.

Fredman contends that the ILO Convention No. 100 requires that the equal pay for equal work right should include work of equal value and not be restricted to equal pay for the same work.<sup>253</sup> Fredman reasons that the challenge of job segregation is not that females are paid less for the same work, rather females are concentrated in feminised work such as cleaning and administration which is most undervalued.<sup>254</sup> Fredman asserts that the principle of work of equal value requires that the job requirements such as skills and

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<sup>252</sup> ILO, Pay equity a key driver of gender equality, page 1 available at [https://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/briefingnote/wcms\\_410196.pdf](https://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/briefingnote/wcms_410196.pdf) accessed on 18 May 2020.

<sup>253</sup> Fredman S, Background Paper For The World Development Report 2013 Anti-discrimination laws and work in the developing world: A thematic overview, page 23, World Bank ,2012.

<sup>254</sup> Fredman S Background Paper For The World Development Report 2013 Anti-discrimination laws and work in the developing world: A thematic overview, page 28, World Bank, 2012. See also Fredman S, Literature Review on the Enforcement of ILO Convention 100: Report prepared for the ILO and the South African Government Feb page 6, 2013.

working environment should be compared instead of a comparison that is restricted to the content of the work.<sup>255</sup>

Essentially ILO Convention No.100 specifically recognises that in the labour market women are underpaid and undervalued due to the understanding that historically women have worked unpaid in their homes and have been primarily the carers of children.<sup>256</sup> Whilst the ILO 100 addresses the unequal pay for work of equal value, It fails to address discriminatory practices relating education, training and development and promotion which confines women in lower-paying jobs.<sup>257</sup> This assertion highlights that lower-paid jobs are often because of a lack of promotion and training in the workplace. In context, any employer who essentially neglects to provide training and ultimately promotion to women undermines the principle of equal pay for work of equal value. Fredman postulates that the establishment of equal pay legislation is key in addressing the pay difference between men and women in the workplace.<sup>258</sup> The significance of this Convention is that it is binding.<sup>259</sup> In other words, State members are obliged to enact legislation and policies to address any form of unequal pay for work of equal value in the workplace.

#### 2.4.3 Employment and Occupation Discrimination Convention, 1958 (No.111) (EODC, 1958)

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<sup>255</sup> Fredman S, Background Paper For The World Development Report 2013 Anti-discrimination laws and work in the developing world: A thematic overview; page 28, World Bank, 2012. See also Fredman S, Literature Review on the Enforcement of ILO Convention 100: Report prepared for the ILO and the South African Government page 6, Feb 2013.

<sup>256</sup> S. Fredman, Background Paper For The World Development Report 2013 Anti-discrimination laws and work in the developing world: A thematic overview, page 7, World Bank, 2012. See also Fredman S Literature Review on the Enforcement of ILO Convention 100: Report prepared for the ILO and the South African Government page 6, Feb 2013.

<sup>257</sup> Fredman S, Literature Review on the Enforcement of ILO Convention 100: Report prepared for the ILO and the South African Government page 2-3, Feb 2013.

<sup>258</sup> S. Fredman Background Paper For The World Development Report 2013 Anti-discrimination laws and work in the developing world: A thematic overview, page 23, 2013. See also Fredman S, Literature Review on the Enforcement of ILO Convention 100: Report prepared for the ILO and the South African Government page 2-3, Feb 2013.

<sup>259</sup> Article 6 of the Convention.

Article 1 of the EODC states that the inherent requirement of a job justifies the exclusion of persons in particular employment positions and such exclusion does not amount to discrimination. EODC defines the terms “employment” and “occupation” to include access to opportunities such as employment and vocational training. Essentially the EODC serves as a protective mechanism against workplace practices that provide favourable terms and conditions of employment to male employees and not female employees. Any failure to adhere to this principle, employers risk contravening this convention on the grounds of sex. The only instance in which this may be justified is only in respect of the inherent requirements of a particular job. The court in *Whitehead v Woolworths (Pty) Ltd* observed that the inherent requirement of a job refers to an indispensable attribute that must relate in an inescapable way to the performing of the job.<sup>260</sup> As such, Article 2 of EODC requires member states to foster the principle of equal remuneration to females and males for work of equal value.

According to Ebrahim the adoption of laws on equal remuneration consistent with the ERC are critical for the promotion of pay equity.<sup>261</sup> It is submitted that such a legal framework should strengthen compliance by imposing penalties on employers that are persistently remunerating black African women less compared to their male counterparts at managerial positions. Additionally, it is submitted that South Africa should impose a regulatory process that would result in the termination of State contracts with the private sector unless such a company has black African women represented at managerial positions. This will be provided and be protected in terms of section 53 of the EEA. Section 53 of the EEA relates to designated employers and non-designated employers who seek to do business with an organ of the State. In particular, section 53(4) states that employers that fail to comply with the provisions of the EEA provide a justification for the organ of State to reject their offer to render services to it and also justifies termination of the agreement already entered into. It is submitted that the failure to do business with the State will essentially motivate the private sector to consider accelerating black African

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<sup>260</sup> *Whitehead v Woolworths (Pty) Ltd* 1999 8 BLLR 862 (LC).

<sup>261</sup> Ebrahim Critical analysis of equal remuneration claims in South African law, Master of Laws with specialisation in labour law, university of south Africa, page 3, June 2014.

women into managerial positions due to losing money if the State terminates services of private sector companies.

#### 2.4.4 The position of equal pay for work of equal value in South Africa

The principle of equal pay for equal work is applicable in many aspects but applies particularly concerning race and sex. Du Toit argues that the responsibilities of an employee should determine the appropriate remuneration as economic factors as regards to race and sex are equal.<sup>262</sup> This principle in South Africa has been largely emphasised on the racial side than sex and the narration frequently indicates equal pay for equal work, notwithstanding race and colour.<sup>263</sup> In 1997, South Africa ratified ILO Convention No. 100 and in 2000 ratified Discrimination (Employment and Occupation) Convention. Since the ratification of these conventions, South Africa did not immediately enact legislation to address equal remuneration for equal work and work of equal value as expected by the Convention. This was primarily because South Africa had just become a democratic state and its focus was on repealing racially discriminatory laws and practices.

South Africa enacted the EEA in 1998 to achieve equity in all levels in the workplace by eliminating unfair discriminatory practices and putting in place affirmative action measures. The principles of equal remuneration for equal work and work of equal value were however not included in the EEA as expected by the Convention.

Notwithstanding the non-existence of legislation, the South African courts accepted that the principles of “equal pay for work of equal value” were principles of justices, equity and logic which may be taken into consideration in determining whether an unfair labour practice has been committed.<sup>264</sup> The case of *Louw v Golden Arrow Bus Services (Pty) Ltd*<sup>265</sup> serves as a good precedent on the principle of equal pay for equal work in South Africa. In this case the applicant, Mr Louw was an employee at a wholly owned subsidiary

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<sup>262</sup> *Ibid.*

<sup>263</sup> *Ibid.*

<sup>264</sup> *Louw v Golden Arrow Bus Services (Pty) Ltd* 2000 21 ILJ 188 (LC) at paragraph 23.

<sup>265</sup> *Louw v Golden Arrow Bus Services (Pty) Ltd* (2000) 3 BLLR 311 (LC).

of Golden Arrow and earned a salary of R750 a month in 1984. The employee's salary increased by R1500 in 1990. The employee contended that the employer discriminated against him in 1990 when Mr Beneke (a white male), was appointed on a similar position on a salary of R2300,00 per month and subsequently promoted him to a supervisory position in 1994. The applicant contended that his remuneration and that of Mr Beneke resulted in a gap of R2055.00 by 1998 even though his work and that of Mr Beneke were of equal value. It was argued that the disparity in remuneration between both employees was disproportionate to the value of the two jobs. The applicant argued that the reason for such differentiation was that he was black, and Mr Reneke was white.

Additionally, the applicant argued that the differentiation of remuneration amounted to indirect discrimination on the grounds of race, colour or ethnic origin because the company "applied facts in its pay evaluation that had a disparate impact on black employees". The applicant listed these factors as performance, potential, responsibility, experience, education, attitude, skills, entry-level and market forces. However, the company acknowledged the differentiation of remuneration between the employees. The company stated that such differentiation was because the work of the applicant was not of equal value to that of Mr Beneke and the distinction was due to several considerations, none of which included racial discrimination.

It is accepted in South African law that the onus in civil cases is on the applicant to prove on a balance of probabilities that his/her version is more probable than that of the respondent.<sup>266</sup> In Louw, the court found that the applicant failed to discharge this onus by not proving that his job and that of Mr Beneke were of equal value. On the argument of racial discrimination, particularly, on the inference that racial discrimination is the basis for the difference in remuneration. The court rejected this argument and stated that even if the differentiation in remuneration was disproportionate, an inference of racial discrimination could not be drawn from this fact alone.

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<sup>266</sup> *Gates v Gates* 1939 AD 150 at 154-5.

The key lesson from the case of Louw is that it is not sufficient to just allege that the work between employees is of equal value and therefore warrants equal remuneration. The employee must prove on the balance of probabilities that jobs have equal value. Similarly, the disproportionality with the value of two jobs is not the sole determining factor that such disproportion is based on racial or gender discrimination. It is therefore submitted that in the private sector the same principles would apply for black African women with equal value claims. As such a black African woman in the managerial position who wants to pursue equal value claims, must prove on the balance of probabilities, if receiving less remuneration, to other employees, particularly, white females, white males and black males, that such positions have equal value.

The enactment of the EEA is key in ensuring equity and elimination of unfair discrimination practices in the workplace, however, South Africa was criticised for not including direct provisions that cover equal remuneration claims in the EEA.<sup>267</sup> Against this criticism, the EEA was amended by Employment Equity Amendment Act 47 of 2013, which directly included provisions that regulate equal pay claims. Ebrahim posits that before the Employment Equity Amendment Act 47 of 2013 came into effect, claims relating to unequal pay were dealt with in terms of section 6(1) of the EEA, which prohibits unfair discrimination on several grounds.<sup>268</sup> Section 6(4) of the EEA provides that :

“A difference in terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value that is directly or indirectly based on any one or more of the grounds listed in subsection (1), is unfair discrimination.”

It is accepted that the cause of action of equal pay for work of equal value is more complex.<sup>269</sup> This is attributed to the difficulty to measure and evaluate job content to

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<sup>267</sup> Ebrahim S, Equal Pay for Work of Equal Value in Terms of the Employment Equity Act 55 of 1998: Lessons from the International Labour Organization and the United Kingdom, PER / PELJ,(19), page 2, 2016.

<sup>268</sup> *Ibid.*

<sup>269</sup> Ebrahim S, Equal Pay for Work of Equal Value in Terms of the Employment Equity Act 55 of 1998: Lessons from the International Labour Organization and the United Kingdom, PER / PELJ (19), page 3 2016 .

constitute its value. According to Ephraim, the following factors apply in the assessment of the value of the work: skill; physical and mental effort responsibility; and the conditions under which the work is performed.<sup>270</sup>

In *Louw v Golden Arrows*<sup>271</sup> the court laid essential principles to determine the extent of difficulty in proving unfair discrimination on the grounds of race, sex and gender in terms of wages. The court, in this case, emphasized that disparate treatment of persons from different races is not discriminatory on the ground of race unless the difference in race was the reason for the disparate treatment.<sup>272</sup> In other words, a female employee who alleges discrimination in terms of salary difference must prove that the difference constitutes direct discrimination, must further prove that the salary is less than those of male employees because of sex. As such, in case of sex and gender discrimination both grounds need to be the reason for the disparate treatment and the mere differentiation is not *per se* discriminatory if one wants to prove gender wage discrimination. Essentially a difference in salary is not alone sufficient to prove unfair discrimination, there must be a causal link between ones' gender /or sex with the salary difference. Arguably this serves as a constraint.

This observation resonates with the findings of the court in *CF Association of Professional Teachers and another v Minister of Education and others*<sup>273</sup> where the court remarked that "in simple terms of sex discrimination may be described as the less favourable or differential treatment of women solely based on her sex". Bourne and Whitemore also opine that "a simple juxtaposition of a woman and a man who has received different treatments or two persons of different racial groups who have been treated differently is insufficient".<sup>274</sup>

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<sup>270</sup> *Ibid.*

<sup>271</sup> *Louw v Golden Arrow Bus Services (Pty) Ltd* 2000 21 ILJ 188 (LC).

<sup>272</sup> *Louw v Golden Arrow Bus Services (Pty) Ltd* 2000 21 ILJ 188 (LC at paragraph 26).

<sup>273</sup> *CF Association of Professional Teachers and another v Minister of Education and others* 1995 16 ILJ 1048 (IC) at 1051.

<sup>274</sup> Bourne and Whitemore, *Race and Sex Discrimination* 2<sup>nd</sup> Edition 1993, at paragraph 2.06. See also Dupper O et al, *Essential Employment Discrimination Law*, page 146, 2007.



The critical challenge that faces the courts is the lack of in-depth knowledge in job grading and apportionment of value to different jobs. Ephraim postulates that in-depth knowledge in job grading and the apportionment of value to different jobs is critical in claims relating to equal pay for work of equal value, as the assessment of jobs is different.<sup>275</sup> Ephraim argues that in instances where both litigants furnish evidence from an expert that apportions the value to different jobs it becomes easier for the court to apply its mind to arrive at a finding as to the appropriate value of the jobs. However, when the claimant is unable to secure the services of a job evaluation expert due to affordability the court is unable on its own to apportion value to the different jobs.<sup>276</sup>

In South Africa, equal pay claims fail due to female employees being unable to establish a linkage between the reason for discrimination and pay differentiation. This is solely because remuneration is treated as confidential and therefore it is often a challenge to prove that one is paid less than their male employees on the grounds of gender or sex. In the case of *SAMWU and Nokuthula Tenyana v Nelson Mandela Bay Municipality*,<sup>277</sup> the applicant alleged that she was unfairly discriminated on gender because her male counterparts earned more than she was. However, the court was not persuaded and found that the applicant had failed to show that the gender difference was the primary reason for the differentiation in remuneration.

To address the equal pay for work of equal remuneration value challenges, South Africa developed a Code of Good practice on equal pay/remuneration for work of equal value on the 1 June 2015 (the Code). The Code was established in terms of section 54 of the EEA it applies to both the public and the private sector. To eliminate unfair discrimination, the Code requires employers to eliminate remuneration differences between employees who perform substantially work of equal value.

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<sup>275</sup> Ebrahim S, Equal Pay for Work of Equal Value in Terms of the Employment Equity Act 55 of 1998: Lessons from the International Labour Organisation and the United Kingdom, PER / PELJ page 22, (19)2016.

<sup>276</sup> *Ibid.*

<sup>277</sup> *SAMWU and another v Nelson Mandela Bay Municipality* 2016 BLLR 202 (LC).

The Code recognises that pay discrimination based on the sex of employees is common in most countries.<sup>278</sup> The Code acknowledges that there are perceptions about women's work; traditional job evaluation methods are designed based on male-dominated jobs; and that there is weaker bargaining power on behalf of female workers.<sup>279</sup> As such the Code acknowledges that predominantly female jobs often involve different requirements from those of predominantly male jobs, whether in terms of qualifications, effort, responsibility or working conditions.<sup>280</sup> It is pointed out that traditionally, female-dominated jobs were evaluated based on methods designed mainly for male-dominated jobs, which partly accounts for wage discrimination.<sup>281</sup>

Against this backdrop, the Code requires employers to be vigilant when selecting the method of job evaluation and to ensure that its content is equally tailored to both female-dominated and male-dominated jobs.<sup>282</sup> Female dominated jobs primarily include administrative positions such as clerks and male-dominated fields include managerial positions such as a foreman manager in a mine. The public and private sectors are therefore required to establish the value of male- and female-dominated jobs to be able to ascertain whether particular jobs have been undervalued and to align female-dominated jobs with comparable male-dominated jobs in the organisation.<sup>283</sup> The Code provides that it is not unfair discrimination if the differentiation, including pay/remuneration of employers who perform work that is the same or substantially the same or is work of equal value if such differentiation is based on the following factors,

- a) An employee's respective seniority or length of service;<sup>284</sup>
- b) The employees' respective qualifications, ability, competence or potential above the minimum acceptable levels required for the performance of the jobs;<sup>285</sup>

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<sup>278</sup> The Code, page 12.

<sup>279</sup> The Code, page 12.

<sup>280</sup> The Code, page 12.

<sup>281</sup> The Code, page 12.

<sup>282</sup> The Code, page 12.

<sup>283</sup> The Code, page 12.

<sup>284</sup> The Code, page 13.

<sup>285</sup> The Code, page 13.

- c) Employee's respective performance, quantity or quality of work, provided that employees are equally subject to the employer's performance evaluation system and that the performance evaluation systems are consistently applied;<sup>286</sup>
- d) Where an employee is employed temporarily in a position for purposes of gaining experience or training and as a result receives different pay/remuneration or enjoys different terms and conditions of employment;<sup>287</sup>
- e) The existence of a shortage of relevant skills in a particular job classification.<sup>288</sup>

It is submitted that the Code serves as a critical guiding tool to address wage discrimination between female and male employees in the workplace. This Code is progressive in terms of addressing the assumptions that Jobs involving caring for others or cleaning may be undervalued because of the erroneous assumption that the skills involved in these jobs are intrinsic to nature of women and not acquired through learning and experience and thereby suggesting that such employees must be paid less.

Despite this progressive framework in South Africa, Zurnamer *et al* assert that female managers earn 21% less than male employees in the private sector although performing the same job.<sup>289</sup> Female managers are paid less despite being highly qualified.<sup>290</sup> It is submitted that the differentiation of pay between men and women is based on gender biases against female managers that seep into the human resource process in the company.<sup>291</sup> In consequence, the pay inequalities contribute to the scarcity of females at managerial positions in the private sector. To address this

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<sup>286</sup> The Code, page 13.

<sup>287</sup> The Code, page 13.

<sup>288</sup> The Code, page 13.

<sup>289</sup> Zurnamer S and Shivdasani A, The gender pay gap in South Africa, Giraffe, page 9, August 2019, available at [https://cdn2.hubspot.net/hubfs/4630444/Downloadable%20Assets/Giraffe\\_South\\_African\\_Gender\\_Pay\\_Gap%20Analysis\\_2019\\_final.pdf?\\_hstc=154348135.ab6336531e2ab5722df6228a8a5186fd.1590354765285.1590354765285.1590354765285.1&\\_hssc=154348135.6.1590354765285](https://cdn2.hubspot.net/hubfs/4630444/Downloadable%20Assets/Giraffe_South_African_Gender_Pay_Gap%20Analysis_2019_final.pdf?_hstc=154348135.ab6336531e2ab5722df6228a8a5186fd.1590354765285.1590354765285.1590354765285.1&_hssc=154348135.6.1590354765285) accessed on 18 May 2020.

<sup>290</sup> *Ibid.*

<sup>291</sup> ILO, Pay equity a key driver of gender equality, page 1 available at [https://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/briefingnote/wcms\\_410196.pdf](https://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/briefingnote/wcms_410196.pdf) accessed on 18 May 2020.

enforcement of the EEA, BCEA and the LRA are required in South Africa to eradicate the gender wage gap in the private sector.

## 2.5 Millennium Development Goals

In 2000 world leaders declared and adopted a proclamation to attain a decent standard of living, peace and unity for citizens. The proclamation was in the form of measurable targets envisaged to be attained in 2015. This proclamation was called the Millennium Development Goals (MDGs). The MDGs aimed to address critical areas such as lack of employment opportunities and extreme poverty.<sup>292</sup> South Africa embraced and approved the 8 Millennium Development Goals.

According to Sachs the MDGs represent the essence of basic human rights, as such, there is an integral link between the MDGs and the Universal Declaration of Human Rights.<sup>293</sup> Sachs defines the MDGs as “time-bound and quantified targets for addressing extreme poverty, in its many dimensions - income poverty, hunger disease, lack of adequate shelter, and exclusion while promoting gender equality, education and environmental sustainability”.<sup>294</sup>

The 8 MDG goals include the following; reducing poverty and hunger<sup>295</sup>; obtaining universal primary education<sup>296</sup>; promoting gender equality<sup>297</sup>; decreasing under-five mortality by two-thirds<sup>298</sup>; decreasing maternal mortality by three-quarters<sup>299</sup>; reversing

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<sup>292</sup> Olasupo O, Plaatjie, SR, Problems and Prospects of Millennium Development Goals in Ghana, Africa's Public Service Delivery & Performance Review, page 625, available at <https://apsdpr.org/index.php/apsdpr/article/viewFile/144/133> accessed on 19 July 2018.

<sup>293</sup> Sachs, J, Investing in Development: A practical plan to achieve the millennium development goals, London: Earthscan,2005 available at <http://web.worldbank.org/archive/website01021/WEB/IMAGES/TF1MAINR.PDF> accessed on 19 July 2018

<sup>294</sup> *Ibid.*

<sup>295</sup> Goal 1 of the MDG.

<sup>296</sup> Goal 2 of the MDG.

<sup>297</sup> Goal 3 of the MDG.

<sup>298</sup> Goal 4 of the MDG.

<sup>299</sup> Goal 5 of the MDG.

the spread of HIV and AIDS, malaria and TB<sup>300</sup>; ensuring environmental sustainability<sup>301</sup> and developing a global partnership for development, with targets for aid, trade and debt relief.<sup>302</sup> For the purpose and relevance of this study, the focus shall be on the promotion of gender equality goals. Goal 3 of the MDGs aimed to eliminate gender disparity in education (both primary and secondary) by 2005, and in 2015 such disparities were aimed to be eliminated in all levels of education. According to Mulaudzi *et al* most international countries have achieved access to primary education and 98% has been attained in South Africa and most females attained primary education than males.<sup>303</sup>

Achievement in education is critically important for women's representation in management positions. It is trite that decision-making positions generally require academically qualified persons. The empowerment of women to access education in fields that are historically male-dominated is arguably envisaged by goal 3. Consequently, the empowerment of women in education parity is the starting point for sustainable empowerment and effective participation in various opportunities. The MDGs did not specifically place targets for the representation of women in decision making positions. This omission neglects to take into consideration the economic exclusion of women and participation in the labour market. This omission has been addressed by the Sustainable Development Goals discussed below.

### 2.5.1 Sustainable Development Goals

Leaders of 193 countries globally met in 2015 after the realisation that the most MDG goals have not been fully achieved by countries such as the economic emancipation of women and their participation in the labour force at decision making position. The countries agreed on a plan called the Sustainable Development Goals (SDGs).

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<sup>300</sup> Goal 6 of the MDG.

<sup>301</sup> Goal 7 of the MDG.

<sup>302</sup> Goal 8 of the MDG.

<sup>303</sup> Mulaudzi *et al*, Challenges experienced by South Africa in attaining Millennium Development Goals 4, 5 and 6, African Journal of Primary Health Care & Family Medicine, page 1,2016 available at <http://www.scielo.org.za/pdf/phcfm/v8n2/08.pdf> accessed on 3 March 2019.

According to Ruhil SDGs extend the MDGs and seek to protect human rights and eliminate poverty by ensuring inclusive and sustainable development post-2015.<sup>304</sup> Bayeh posits that political development/good governance issues and the protection of human rights are key to the achievement of sustainable development.<sup>305</sup> As such, gender equality and empowerment encompasses the protection of the rights of women and is not achievable without the equal, full and effective participation of women at all levels of decision-making. Bayeh contends that attaining sustainable development is inconceivable without women empowerment and obtaining gender equality.<sup>306</sup> It is submitted that the empowering of women in the workplace requires employers to create training and development programmes and afford women opportunities to act in decision-making positions in the workplace. It is submitted that this would promote inclusivity and equal participation of males and females in the economy.

Goal number 5 of the SDGs recognises the inequalities that exist in the workplace, unpaid “women’s work” that there are still gross inequalities in work and wages and unpaid household duties for women such as childcare. Goal number 5 aims to eliminate discrimination against females globally. Goal number 5 recognises that women experience additional roles in which they are not compensated and further remunerated less than male employees. Similarly, Goal number 8 requires the promotion, sustainability, inclusive and sustainable economic growth, productive employment and decent work for all persons. As such Goals 5 and 8 seek to address the patriarchal attitudes that see women as secondary earners to men both in the workplace and in the broader economic participation.

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<sup>304</sup> Ruhil. Millennium Development Goals to Sustainable Development Goals Challenges in the Health Sector, December 2017, available at <https://doi.org/10.1177/0020881717725926>, accessed on 20 July 2018.

<sup>305</sup> Bayeh E , The role of empowering women and achieving gender equality to the sustainable development of Ethiopia, Pacific Science Review B: Humanities and Social Sciences 2, page 37-42, 2016, available at [https://ac.els-cdn.com/S2405883116300508/1-s2.0-S2405883116300508-main.pdf?\\_tid=5ef54fc2-a0ef-4296-b15d-ef4e1a29a761&acdnat=1534516832\\_bfacd3ec7993db9eca7dcc8d3ae91320](https://ac.els-cdn.com/S2405883116300508/1-s2.0-S2405883116300508-main.pdf?_tid=5ef54fc2-a0ef-4296-b15d-ef4e1a29a761&acdnat=1534516832_bfacd3ec7993db9eca7dcc8d3ae91320), accessed on 19 July 2018.

<sup>306</sup> *Ibid.*

Against this backdrop, Goal 5 requires the full and effective participation of women in management levels in the private sector. This obligation essentially challenges the South African government to proactively and robustly introduce measures or laws that may expedite the representation of women in the private sector. It is submitted that there are only 10 years left for South Africa to meet Goal 5 of the SDG and as such, a quota is a key tool that is required to expedite female representation in all decision-making levels. A quota has been recommended to South Africa by the CEDAW committee in 1998 and such it envisaged that it will result in the achievement of equity and diversity in the private sector.

## **2.6 Regional instruments promoting gender equality in the workplace**

### **2.6.1 African Charter on Human and People's Rights, 1981**

African Charter on Human and People's Rights was adopted on the 27<sup>th</sup> of June 1981 and came into force on the 21<sup>st</sup> October 1986 and is defined as an application of the UNDHR to the African perspective.<sup>307</sup> The African Charter contains two significant provisions that may be used to ensure women's representation and active participation in managerial positions in the private sector. Article 15 of the African Charter states that 'every individual shall have the right to work under equitable and satisfactory conditions and shall; receive equal pay for equal work.' Article 15 specifically refers to women being entitled to the rights to work under equitable conditions but rather refers to "every individual".

The wording "every individual" denotes that the African Charter intended to include all persons i.e. both males and females. Significantly, Article 15 accords with the principles of equal pay for work of equal value. State parties are required in terms of Article 18 to eliminate discriminatory practices against women and ensure the protection of their rights. It is concluded that Article 15 read with Article 18 of the African Charter mandates the

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<sup>307</sup> Droit A, The African Charter and Human and Peoples' Rights: How effective is this legal instrument in shaping a continental human rights culture in Africa , 21 December 2014, available at [www.lepetitjuriste.fr](http://www.lepetitjuriste.fr) accessed on 10 June 2018.

private sectors to eliminate barriers such as unequal remuneration between males and females in the workplace. It is submitted that the elimination of unequal pay between males and females in the workplace is key in addressing discriminatory practices against women that are envisaged by Article 18 of the African Charter. Moreover, such elimination of unequal pay in the private sector contributes to the advancement and participation of women in managerial positions.

The African Charter is not without challenges. According to Droit African States have asserted their sovereignty and permitted respective national laws over the Charter and international instruments such as CEDAW.<sup>308</sup> This has hindered the implementation of the Charter. As such the African Charter as an instrument is unable to protect individuals from their governments and ultimately the private sector.<sup>309</sup> Droit concludes that the African Charter has only managed to raise awareness around human rights issues, but in context, it remains a smokescreen for the African States to create an impression to the international community that African leaders are committed to promoting human rights.<sup>310</sup> This assertion postulates that most African countries do not commit to ensuring the full realisation of the African Charter. To strengthen the African Charter, reform is required to make the Charter to be binding to all member States. Additionally, consequences must be imposed for any member state that fails to enhance the aspirations of the Charter.

It is trite that without political will Article 15 read with Article 18 will not result in the emancipation of women in the private sector. However, in 2016, it was reported that in the past 10 years Africa has 5% women as Chief Executive Officers in the private sector, compared to 4% globally.<sup>311</sup> This suggests that 95% of men occupy chief executive officers in the private sector in Africa. Although Africa slightly surpasses the 4% globally it is submitted that the 5% women as a chief executive officer in the private sector remain

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<sup>308</sup> Droit A, The African Charter and Human and Peoples' Rights: How effective is this legal instrument in shaping a continental human rights culture in Africa , 21 December 2014, available at [www.lepetitjuriste.fr](http://www.lepetitjuriste.fr) accessed on 10 June 2018.

<sup>309</sup> *Ibid.*

<sup>310</sup> *Ibid.*

<sup>311</sup> McKinsey, Women Matter Africa report , August 2016 available at <https://www.mckinsey.com/~media/McKinsey/Featured%20Insights/Women%20matter/Women%20matter%20Africa/Women%20Matter%20Africa%20August%202016.ashx> accessed on 10 June 2018.



critically low in the context of the 95% occupied by males. This is indicative that the private sector managerial positions in Africa are male-dominated and without sanctions, members' states will lag in expediting women in managerial positions.

Notwithstanding Article 15 and 18 of the African Charter, a substantial pay gap in the private sector in Africa between male and female employees holding senior positions exist. Particularly in South Africa, it is unearthed that women board members earn 17% less than their male counterparts.<sup>312</sup> Articles 15 and 18 have not influenced South Africa to eliminate all forms of discrimination against women, particularly in the workplace. It is concluded that a failure to impose penalties for any State to comply with the African Charter will indeed result in the Charter failing to protect and promote human rights within the context of Article 15 and 18 and as such, the Charter will remain a façade for most African countries. It is submitted that the African Charter needs to have a binding effect like CEDAW on member States to prevent it from just being a façade.

#### 2.6.2 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa was adopted on the 11<sup>th</sup> of July 2003 by the Assembly of the African Union in Maputo. This protocol is largely referred to as the Maputo Protocol. The Maputo protocol came to effect in November 2005 and has a binding legal effect on State Parties. South Africa ratified the protocol and thus expected to comply and promote its principles. The Maputo Protocol is founded on the principles of promoting gender equality and the full participation of African women as equal partners in Africa's development.<sup>313</sup> Essentially the Maputo protocol recognises that women play a critical role in the preserving African values founded on equality, justice and dignity principles.

Article 1 of the Maputo Protocol defines "discrimination against women" to mean any distinction exclusion or restriction or any differential treatment based on sex and whose

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<sup>312</sup> IPSOS, Pulse of the People report 2017 available at [www.ipsos.com](http://www.ipsos.com) accessed 10 June 2018.

<sup>313</sup> See preamble of Maputo Protocol.

objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life.” The Maputo Protocol Challenges State parties to include the principle of equality between males and females in their constitutions and ensure effective application. In other words, the principles of equality must be enforced by State Parties to ensure that there is no unfair discrimination of women.<sup>314</sup> The Maputo Protocol requires the integration of gender in-laws, programmes, plans, decisions on policies, activities and all areas in life.<sup>315</sup> South Africa has progressed in terms of adopting the Constitution that promotes the principles of equality, freedom and dignity, the adoption of the EEA that seeks to ensure that black African women are represented at all levels in the workplace. Notwithstanding these laws, the South African private sector lags in terms of accelerating black African women in managerial positions compared to the public sector.

State Parties are required in terms of Article 9 to increase the representation and participation of females all management levels. Article 9 is a mandatory provision that mandates countries to take proactive steps to ensure the realisation of women at decision-making levels. Essentially the failure by State Parties to ensure effective representation and participation would be in breach of the Protocol. The significant of Article 9 is that it seeks to challenge State Parties not to just increase women representation but ensure that women do take part in making a key decision that impacts their companies. It is deduced that Article 9 seeks to prohibit fronting. The Protocol, however, does not mention a measuring tool to determine whether a country is significantly taking steps to ensure increased and effective realisation and participation of women in a managerial position. It is understood that the Protocol did not put any monitoring and evaluation tools as it is appreciated that each country’s history and economic developments are uniquely applicable to that country alone.

Notwithstanding this key provision, most State Parties have neglected to ensure the effective representation and full participation of women in decision making positions in

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<sup>314</sup> Article 2 (a) of Maputo Protocol.

<sup>315</sup> Article 2(C) of Maputo Protocol.

the private sector. This is evident from reports that suggest that only 5% of women occupy Chief Executive officer positions in the private sector.<sup>316</sup> This can be attributed to a weak monitoring and evaluation function which ultimately stifled the potential of the Protocol to eliminate discrimination against women in the private sector. Essentially there is a lack of accountability for the State Parties to increase women representation and participation in the private sector. According to Viljoen, the Maputo protocol may be viewed as an interpretation of the African Charter for females and a combination (although not comprehensive) of existing international standards and norms.<sup>317</sup> The Protocol creates an eclectic impression because it does engage systematically with the African Charter.<sup>318</sup> To ensure that the Maputo Protocol is fully implemented by the State parties, it is submitted that a special institution such as the African Commission on Human and peoples' Rights needs to be strengthened with powers to enforce penalties against State Parties that fail to implement the Protocol.

The Maputo Protocol is enhanced in the domestic framework of South Africa since the advent of democracy. This is propelled by section 39 of the Constitution that mandates the State to consider international law and foreign law. Motlhalsedi and Du Toit assert that the African Charter and the protocol have not been used as an interpretative source or as the basis of remedy in South Africa.<sup>319</sup> Motlhalsedi and Du Toit argue that the African Charter and the Maputo Protocols are referred to in a cursory manner by the South African court judgments. This viewpoint resonates with the assertion of Ayalew where the latter argues that the South African Courts in their application of law largely considers the UN treaties decisions of the European Commission, as well as European Court of Human Rights and little consideration, is made to African instruments such as the African Charter

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<sup>316</sup> McKinsey, Women Matter Africa report, August 2016 available at <https://www.mckinsey.com/~media/McKinsey/Featured%20Insights/Women%20matter/Women%20matter%20Africa/Women%20Matter%20Africa%20August%202016.ashx> accessed on 10 June 2018.

<sup>317</sup> Viljoen F, An introduction to the protocol to the African Charter on human and peoples' Rights on the Rights of women, page 18-19, 2009.

<sup>318</sup> Twinomurinzi A, Challenges women face in trying to access the African human rights protective system, a mini dissertation University of Pretoria, page 43, 2003.

<sup>319</sup> Motlhalsedi and Du Toit, The impact of the African Charter and the Maputo Protocol in South Africa, Pretoria University Law Press, page 224, 2016.

and the Maputo Protocol in particular.<sup>320</sup> Motlhalsedi and Du Toit argue that South Africa purports to support the African Charter and the Maputo Protocol, however, South Africa seldomly directly used these instruments to formulate national policies on gender.<sup>321</sup> For instance, South Africa's National Development Plan 2030 and the South African National Policy Framework on Women's empowerment and Gender Equality 2000 does not refer to Africa's Charter and Maputo Protocol notwithstanding the overlapping content.

Therefore, one cannot conclude that the Maputo protocol and African Charter have significantly influenced policy-making, legislative actions and court decisions in South Africa. As such, the impact of the Maputo Protocol and African Charter cannot be significantly ascertained, particularly in the South African private sector. The Maputo Protocol is a binding legal instrument and South Africa is expected to comply with it whilst the African Charter is non-binding. As such to strengthen the application of the Maputo Protocol, the African Union (AU) should be capacitated through enabling legislation that imposes harsh penalties to member States that wilfully neglect to implement the Protocol. Similarly, the African Charter can be strengthened if an addendum is adopted to ensure that the African Charter has a binding effect on the Member States.

Southern African Development Community Protocol on Gender and Development (SADC Protocol) was adopted by the Heads of State on the 17 August 2008. The objectives of the SADC Protocol is to attain Regional Integration and Eradicate Poverty within the Southern African region. This protocol marked its 10<sup>th</sup> anniversary on the 17<sup>th</sup> of August 2018. The SADC Protocol encompasses undertakings of countries in regional, international and continental instruments for the achievement of gender equality. The SADC Protocol espouses accountability by all community member States by addressing gaps and setting specific, measurable targets to achieve gender equality. The SADC Protocol is consequently a community legal instrument that laid the basis for mainstreaming gender in all other Community protocols and policies.

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<sup>320</sup>Ayalew GA, The impact of the African Charter on Human and Peoples' rights and the protocol on the rights of women on the South African Judiciary, LLM dissertation, University of the Western Cape, page 27, 2011.

<sup>321</sup> Motlhalsedi and Du Toit, *ibid*, page 222.

Munalula posits that the foundation of the SADC Protocol is a result of the failure by SADC countries to achieve specified targets set under various non-binding agreements in support of gender equality.<sup>322</sup> This assertion indicates that any agreement and Convention that does not have a binding effect results in countries not demonstrating commitment. Nagar and Mutasa posit that the implementation of SADC's Gender Protocol was further propelled by the global instruments and frameworks that SADC had to implement to create gender machinery at national levels, including the 2005 Beijing Plus Ten review, and the 2005 progress review of implementing the Sustainable Development Goals (SDGs).<sup>323</sup> According to Nagar and Mutasa SADC's biggest challenge for the implementation of its Gender Protocol is its institutional architecture, its Secretariat in particular. It is argued that SADC's secretariat does not have capacity-building programmes such as requisite skills aimed to strengthen the organisation's regional integration implementation work.<sup>324</sup> Nagar and Mutasa suggest *inter alia* formalising guidelines for implementing and developing model laws and regulations designed specifically for the implementation of SADC's Protocols and policies that are not implemented by its member States; the creation of legal frameworks and laws for its Member States regarding non-adherence to implementing regional policies and protocols; creation of monitoring and evaluation unit and framework could enhance the work of SADC.<sup>325</sup>

Article 5 of the SADC's gender Protocol requires State Parties to put in place affirmative action measures to eliminate the glass ceiling that prevents women from economic and societal participation and create an environment that is conducive for such participation. Essentially, Article 5 recognises the exclusion of women in various roles in society

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<sup>322</sup> Munalula M, SADC Protocol on Gender and Development: Road map to equality?, SADC Law Journal Vol 1 page 190 2011 available at <https://pdfs.semanticscholar.org/8117/3d33f0db1b594fb66376592a0cfb17f99e44.pdf> accessed on 18 July 2018.

<sup>323</sup> Nanga D and Mutasa C, The implementation gap of the regional integration agenda in SADC, August page 2, 2017.

<sup>324</sup> Nanga D and Mutasa C, The implementation gap of the regional integration agenda in SADC, August page 3, 2017.

<sup>325</sup> *Ibid.*

including barriers existing in the workplace that ultimately contributes to the failure to attain gender equality and equity. It is submitted that the application of affirmative action measures is critical measures that would result in the achievement of equity in the workplace, however without regulatory body that conducts monitoring and evaluation, the Member States may not comply with Article 5, particularly because of stereotype views about the role of women in society.

Article 12 of the SADC's Gender Protocol Challenges States Parties to ensure the attainment of at least fifty per cent female representation at decision-making positions in the public and private sectors, by 2015. It is evident from this study that South Africa has not achieved this target. To achieve this, States Parties are required in terms of Article 12 (2) of the SADC's gender Protocol to conduct public awareness campaigns that purposely focuses on the significant link between the equal representation and participation of females and males in management positions, democracy, good governance and citizen participation of citizens. Essentially Article 12 of the SADC's gender Protocol recognises that gender equality and equity is a fundamental human right and State parties are charged to renew and intensify efforts such as affirmative action to scale up interventions and ensure female representation of women in the public and private sector.

States Parties are required in terms of Article 13(2) to ensure that there is equal participation between males and females at decision-making by developing policies, strategies and programmes for (a) capacitating women to effectively participate through mentoring, leadership and gender sensitivity training; (b) putting in place supportive structures for female management;(c) developing structures to enhance gender mainstreaming, and (d) purposively addressing the discriminatory norms and attitudes of management structures and processes.<sup>326</sup> It is deduced that the achievement of transformation requires innovative and proactive measures such as training for women in the workplace to develop capabilities. By so doing, the employers would have sufficient competent black African women for leadership positions. It is further deduced that an

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<sup>326</sup> Article 13(2) of the SADC's gender protocol.

enabling environment, with supporting mechanisms such as mentoring, and coaching are required to fully realise the progression of black African women into competent managers.

According to Mckinsey, only 5% of CEOs in the private sector in Africa are women.<sup>327</sup> The target of 50% representation of women in decision making positions in the private sector has not been achieved by State parties. The failure by the Member States resonates with the assertions of Nagar and Mutasa that there is a failure to formalise guidelines for implementing and developing model laws and regulations designed specifically for the implementation of SADC's Protocols and policies that are not implemented by its Member States. A careful reading of Article 12 and 13, does not specifically require State Parties to establish domestic laws to ensure that countries achieve the 50% target of the SADC Gender Protocol. As such, the failure by the SADC gender Protocol to include this mandatory clause for State parties to establish laws has arguably provided State members not to robustly commit to achieving the 50% target. It is therefore clear that a quota system alone would result in State Parties achieving the target, however, the establishment of laws to support a quota system supported by consequences for non-adherence to the quota targets would result in members States committing to achieve the 50% target for women representation in decision-making positions in the private sector.

Article 13 challenges the private sector to be proactive in mainstreaming gender equality in the workplace. Article 13 envisages company policies to be gender-sensitive and promote inclusivity in the workplace between female and male employees. However, it is submitted that the private sector in Africa has demonstrated its lack of commitment to advance women into managerial positions, as such, the strengthening of the African Commission on Human and Peoples' rights with enforcement powers is critical in compelling the private sector to comply with Article 13 of the SADC Protocol.<sup>328</sup>

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<sup>327</sup> McKinsey Women Matter August 2016, available at <https://www.mckinsey.com/~media/McKinsey/Featured%20Insights/Women%20matter/Women%20matter%20Africa/Women%20Matter%20Africa%20August%202016.ashx> accessed on 20 July 2018.

<sup>328</sup> *Ibid.*

### 2.6.3 African Agenda 2063

The African Agenda 2063 was adopted in June 2015 and is a framework formulated for guiding Africa's development by 2063. The African Agenda 2063 is spearhead by the African Union (AU) on a broad front taking into consideration economic, social, political, scientific as well as cultural. The African Agenda contains seven aspirations and this includes a prosperous Africa based on inclusive growth and sustainable development;<sup>329</sup> an integrated continent, politically united and based on the ideals of Pan-Africanism and the vision of Africa's Renaissance;<sup>330</sup> an Africa of good governance, democracy, respect for human rights, justice and the rule of law;<sup>331</sup> a peaceful and secure Africa;<sup>332</sup> an Africa with a strong cultural identity, common heritage, shared values and ethics;<sup>333</sup> an Africa whose development is people-driven, relying on the potential of African people, especially its women and youth, and caring for children<sup>334</sup> and Africa as a strong, united and influential global player and partner.<sup>335</sup>

Aspiration 3 aims for Africa to promote a culture of respect for human rights, rule of law, gender equality and good governance by 2063. It is envisaged that by 2063 effective institutions that have diverse leadership at all levels and an independent judiciary will be in place in Africa.

Similarly, Aspiration 6 aims to promote the involvement of all African citizens in decision making in all aspects by 2063. Aspiration 6 denotes that no person irrespective of their gender, religion, age, political affiliation shall be excluded in Africa that would be an inclusive continent.<sup>336</sup> It is envisaged that by 2063 Africa would have achieved gender parity where female occupy at least 50% of elected public offices at all levels and half of

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<sup>329</sup> Agenda 2063 at page 2.

<sup>330</sup> *Ibid.*

<sup>331</sup> *Ibid.*

<sup>332</sup> *Ibid.*

<sup>333</sup> *Ibid.*

<sup>334</sup> *Ibid.*

<sup>335</sup> *Ibid.*

<sup>336</sup> Agenda 2063, Aspiration 8, page 8.



the managerial positions in the public and the private sectors.<sup>337</sup> As such the glass ceiling that deprived women of progress would be eliminated.<sup>338</sup> However, achieving these aspirations African leaders need to implement instruments to empower women to be suitably qualified to assume managerial positions such as CEOs in the private sector workplaces.

Aspiration 6 seeks to address the paucity of women in managerial positions, the Agenda 2063, however, does not state how this Aspiration is going to be achieved. The Aspiration is not detailed and is left open to the Member States as to how this will be achieved. Without a clear commitment to gender equality, lack of good governance, democratic values and the rule of law Aspiration 6 may not be realised of ensuring women are represented at managerial positions by 2063. To this end, it is key that the African Commission on Human and Peoples' Rights is provided with not only a monitoring function but also enforcement powers to ensure that the Member States comply with Aspiration 6.

## **2.7 Gender and the Constitution**

### **2.7.1 The Constitution of the Republic of South Africa, 1996**

Since the advent of democracy in 1994, South Africa ensured that its legislative framework encompasses principles of equality, including gender equality and the empowerment of women. The South African Constitution is regarded as one of the progressive Constitutions globally and a beacon for emerging countries.<sup>339</sup> A special feature of the South African Constitution is that everyone is equal before the law and all people enjoy the equal benefit of the law.<sup>340</sup> Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other

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<sup>337</sup> Agenda 2063, Aspiration 8, page 9.

<sup>338</sup> *Ibid.*

<sup>339</sup> Stevens C and Ntlama N, Promoting women's right to development in South Africa law, democracy & development/ vol 20, page 49, 2016.

<sup>340</sup> Section 9 of the South African Constitution.

measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.<sup>341</sup>

The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.<sup>342</sup> No person may unfairly discriminate directly or indirectly against anyone on one or more grounds highlighted. National legislation must be enacted to prevent or prohibit unfair discrimination.<sup>343</sup> Discrimination on one or more prohibited grounds is unfair unless it is established that the discrimination is fair.<sup>344</sup> Essentially this means that the respondent must prove that the discrimination has taken place, but such discrimination was fair. This is particularly because the right to equality is subject to the limitation in terms of section 36 of the Constitution.

The significance of the right to equality was laid in *Fraser v Children's Court, Pretoria North*<sup>345</sup> where the court observed that "there can be no doubt that the guarantee of equality lies at the very heart of the Constitution. It permeates and defines the very ethos upon which the Constitution is premised."<sup>346</sup> According to Mubangi, the importance of the right to equality in the post-apartheid constitutional context cannot be overemphasised.<sup>347</sup> This right is the basis of most sections of the Constitution.<sup>348</sup> The reason for equality's paramount and central role is due to its non-existence before 1994. It is expressed that

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<sup>341</sup> Section 9(2) of the South African Constitution.

<sup>342</sup> Section 9(3) of the South African Constitution.

<sup>343</sup> Section 9(4) of the South African Constitution.

<sup>344</sup> Section 9(5) of the South African Constitution.

<sup>345</sup> *Fraser v Children's Court, Pretoria North* 1997 (2) SA 261 (CC).

<sup>346</sup> *Fraser v Children's Court, Pretoria North* at para 20.

<sup>347</sup> Mubangizi C, *The protection of Human Rights in South Africa*, page 72, Juta 2013.

<sup>348</sup> The right to equality appears in the Preamble of the Constitution. It is included also in section 1(a) of the Constitution where it reads: 'Republic of South Africa is one, sovereign, democratic state founded on human dignity, the achievement of equality and the advancement of human rights and freedoms'. Equality is mentioned in four further provisions. It is mentioned in sections 3 (1) and 7 (1) respectively. It is then mentioned in both sections 36 and 39 (1) (a). See Laher I, *A Critical Analysis of Employment Equity Measures in South Africa*, LLM Dissertation, Rhodes University, page 20, 2007.

the provision of equal rights to everyone is appropriate to achieve a just society in South Africa.<sup>349</sup>

Section 9(1) of the Constitution provides for formal equality. Formal equality means “treatment in the same way without distinction”: the application of the law must be the same for persons in similar circumstances.<sup>350</sup> It is often argued that formal equality does not redress the inequalities of the past.<sup>351</sup> As a result of formal equality only, most South Africans continue to experience social and economic inequalities.<sup>352</sup> It is submitted that section 9 of the Constitution must be interpreted to give effect to substantive equality.<sup>353</sup> Substantive equality acknowledges that persons must be treated differently to achieve an equality goal. Accordingly, the Constitutional Court in the case of *President of the Republic of South Africa v Hugo*<sup>354</sup> observed that:

“ we need to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment based on equal worth and circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is in one context may not necessarily be unfair in a different context.”<sup>355</sup>

In principle, black African women can invoke the equality clause when discriminated against unfairly in the private sector. This view resonates with the findings of the court in the case of *Brink v Kitshoff NO*<sup>356</sup> where it was held that “although in our society,

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<sup>349</sup> Laher I , A Critical Analysis of Employment Equity Measures in South Africa, LLM Dissertation, Rhodes University, page 20-21, 2007.

<sup>350</sup> De waal J and Currie I, The Bill of Rights Handbook, page 213, 2013.

<sup>351</sup> *Ibid.*

<sup>352</sup> Laher I , A Critical Analysis of Employment Equity Measures in South Africa, LLM Dissertation, Rhodes University, page 21,2007.

<sup>353</sup> De Waal J and Currie I, The Bill of Rights Handbook, page 233, 2013.

<sup>354</sup> *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC).

<sup>355</sup> *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) at paragraph 41.

<sup>356</sup> *Brink v Kitshoff NO* 1996 (4) SA 197 (CC).

discrimination on grounds of sex has not been as visible nor as widely condemned, as discrimination on the grounds of race, it has nevertheless resulted in deep patterns of disadvantage. These patterns of disadvantage are particularly acute in the case of black women, like race and gender discrimination overlap”.<sup>357</sup>

Currie and De Waal observe that equality “is a difficult and deeply controversial social ideal”.<sup>358</sup> It is understood that formal equality suggests “that people who are similarly situated in relevant ways should be treated similarly”. Consequently, persons who are not similarly situated should not be treated alike.<sup>359</sup> It is expressed black African women who are employed in the public sector are not different from black African women employed in the private sector except that they are employed in different sectors of employment. Holistically and from a labour force perspective, the efforts and measures such as the HODs 8-Principle Plan of Action for Promoting Women's Empowerment and Gender Equality within the Public Service Workplace that escalates black African women into managerial positions should also be implemented in the private sector. It is argued that the exclusion and lack of recognition of black African women to assume managerial positions essentially fails to promote gender equality in the private sector.

The right to equality is one of the fundamental rights in the Constitution and its value was reaffirmed in the case of *Fraser v Children's Court, Pretoria North*<sup>360</sup> where the apex court observed that “there can be no doubt that the guarantee of equality lies at the heart of the Constitution. It permeates and defines the very ethos upon which the Constitution is premised”.<sup>361</sup> South African body of laws, policies and programmes are based on the constitutional vision of the realisation of equality including equality between men and women. As such the right to equality of black African women in the private sector is achievable through the implementation of the Constitution. It is submitted that the CGE,

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<sup>357</sup> *Brink v Kitshoff NO 1996 (4) SA 197 (CC) paragraph 44.*

<sup>358</sup> Iain Currie and Johan de Waal, *The Bill of Rights Handbook*, page 210, 2013.

<sup>359</sup> *Ibid.*

<sup>360</sup> *Fraser v Children's Court, Pretoria North 1997(2) SA 261 (CC).*

<sup>361</sup> See also Nicolette Naylor, *LEAD Practice Manual: Aspects of Gender Law*, page 7, 2014.

as a constitutional body, has a constitutional mandate to hold the private sector accountable for failure to advance black African women in the private sector.<sup>362</sup>

Whilst the CGE held public investigative hearings in the private sector in 2016 and 2017, in an endeavour to hold the private sector accountable for lagging in terms of transformation, the CGE, however, failed to impose penalties to private sector companies that failed to accelerate black African women into managerial positions.<sup>363</sup> It is argued that whilst the CGE commended the private sector for taking initiatives to ensure that policies are not gender blind, the representation of black African women in managerial positions remains dismal and the CGE has not fined nor imposed any sanctions against non-compliant companies. This failure to impose fines is primarily because the EEA does not set quotas for black African women at managerial positions to enable the CGE to enforce.

## **2.8 South African Legislative framework promoting gender equality in the workplace**

### **2.8.1 The Promotion of Equity and Prevention of Unfair Discrimination Act, 4 of 2000 (PEPUDA)**

The PEPUDA was established to give effect to section 9 of the Constitution. PEPUDA seeks to eliminate unfair discrimination against all persons. The preamble of PEPUDA notes “the persisting systemic inequalities and unfair discrimination that manifest in the institutions of society and the practices and attitudes of South Africans insofar as these undermine the aspirations of our constitutional democracy”.<sup>364</sup> PEPUDA tasks natural and juristic persons to promote equality.<sup>365</sup> From this notion, it accepted that the private sector as a juristic person has the mandate to promote equality in terms of PEPUDA.

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<sup>362</sup> CGE, Employment Equity Report in the private sector, 2017/2018.

<sup>363</sup> *Ibid.*

<sup>364</sup> Preamble of the PEPUDA.

<sup>365</sup> Section 26 and 27 of PEPUDA.

The preamble of PEPUDA recognises that South Africa has international legal obligations to promote equality and prevent unfair discrimination. Accordingly, it recognised that these obligations flow from both the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Elimination of All Forms of Racial Discrimination.<sup>366</sup>

The PEPUDA aims to achieve a society 'a democratic society, united in its diversity, marked by human relations that are caring and compassionate, and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom'.<sup>367</sup> Fairness under PEPUDA includes, but is not limited to, notions such as the fact that discrimination was necessary due to the intrinsic nature of the job and the extent to which the employer has taken steps that are reasonable to accommodate diversity.<sup>368</sup>

The cardinal question is whether the scope of application of PEPUDA applies in the workplace to the extent of discrimination of black South African by the private sector? According to Tafirenyika, it is unconvincing to apply PEPUDA to achieve equal treatment and opportunity as PEPUDA does not include labour relations.<sup>369</sup> Tafirenyika argues that the concept of equality under PEPUDA is broad enough to include a wide range of equality issues in society, it consequently includes equal treatment and opportunity for women in the workplace.<sup>370</sup>

Section 5(3) of PEPUDA provides that PEPUDA does not apply to any person to whom and to the extent to which the EEA applies. Henrico states that the courts must consider when dealing with equality jurisprudence in the employment relationship, consider the applicable provisions and principles contained in legislation outside the employment

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<sup>366</sup> See Preamble of PEPUDA.

<sup>367</sup> See Preamble of PEPUDA.

<sup>368</sup> Section 14 (2) and (3) of PEPUDA.

<sup>369</sup> Tafirenyika ET, Decent work: The promotion of equal treatment and opportunity in the South African workforce with regards to gender at page 35 available [http://repository.nwu.ac.za/bitstream/handle/10394/25908/Tafirenyika %20ET 2016.pdf?sequence=1&isAllowed=y](http://repository.nwu.ac.za/bitstream/handle/10394/25908/Tafirenyika%20ET_2016.pdf?sequence=1&isAllowed=y) accessed on 1 August 2018.

<sup>370</sup> *Ibid.*

relationship.<sup>371</sup> Henrico reasons that the effects of unfair discrimination surpass the confines of the employment dynamic.<sup>372</sup> This assertion means that although PEPUDA cannot be relied upon to address equality disputes in the workplace, then courts can, however, draw lessons from the application of PEPUDA particularly on account to address inequality instances in the public and private domain.

It was held in the case of *Nongena v Ali No and Others*<sup>373</sup> that the Labour Court only adjudicates on employment-related matters and it was stressed that discrimination disputes related to work do not fall under PEPUDA. In other words, disputes of gender discrimination of black South African women fall within the provisions of the EEA and the Labour Court would have jurisdiction to adjudicate on them. It is submitted that whilst the black African women are not able to use PEPUDA to seek recourse against the private sector failing to escalate them to managerial positions, PEPUDA, however, appreciates the need to eliminate both economic and social inequalities that have their origin to apartheid and patriarchy.<sup>374</sup> It is submitted that black African women in the private sector may, therefore, be able to invoke PEPUDA to address patriarchal attitudes experienced in the private sector.

## 2.8.2 Employment Equity Act 55 of 1998

It is trite that black people were subjected to racial discrimination and exclusion during the apartheid era and Africans, in particular, were largely affected and subjected to hardships.<sup>375</sup> Matotoka and Odeku observe that the EEA created an expectation that workplaces would be diversified and black African women access equal benefits and opportunities similar to male employees.<sup>376</sup> The purpose of the EEA is to achieve equity

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<sup>371</sup> Henrico R, Religious discrimination in the South African workplace, 2016, page 170, available at [https://repository.nwu.ac.za/bitstream/handle/10394/24876/Henrico\\_R\\_2016.pdf?sequence=1&isAllowed=y](https://repository.nwu.ac.za/bitstream/handle/10394/24876/Henrico_R_2016.pdf?sequence=1&isAllowed=y) accessed on 1 August 2018.

<sup>372</sup> Henrico R, *ibid*, page 171.

<sup>373</sup> *Nongena v Ali No and Others (JR231/09) [2010] ZALC 281* (8 December 2010).

<sup>374</sup> See Preamble of PEPUDA.

<sup>375</sup> *Solidarity v Department of Correctional Services* [2016] ZACC 18 at para 46.

<sup>376</sup> Matotoka D and Odeku, *European Review of Applied Sociology* 37 Volume 11, Number 16, page 37 Year 2018 available at <https://content.sciendo.com/view/journals/eras/11/16/article-p36.xml> accessed on 9 August 2018.

in the workplace by (a) promoting equal opportunity and fair treatment through the elimination of unfair discrimination (b) Implementing positive measures (affirmative action) to ensure the equitable representation of black people, women and the disabled at all levels in the workplace.<sup>377</sup> In the case of *Solidarity v Department of Correctional Services*,<sup>378</sup> the court observed that the EEA must be read and interpreted in line with the Constitution and the proper interpretation of the EEA reflects the objective to have workforces in South Africa broadly representative of the people of South Africa.<sup>379</sup> Consequently, all black people must be equitably represented in all occupational levels of the workforce in the workplace.<sup>380</sup> This is against the backdrop understanding that during apartheid in South Africa black people were deprived of employment opportunities and consequently excluded from economic participation.<sup>381</sup> As such the representation of black people is a measure to achieve a diverse workforce broadly representative of all South Africans.

The EEA recognises women as part of the designated groups<sup>382</sup> and charges designated employers to create and implement employment equity plans that outline the achievable goals and timeframes that will result in the workplace is representative of all South Africans. The EEA also recognises the need to ensure the representation of black people and persons with disabilities at all levels in the workplace. For this study, Employment Equity Plans may be defined as a central mechanism, established by the EEA, that seeks to compel designated employers to commit to equity in the workplace.

Essentially the EEA tasks designated employers to implement measures to prevent discrimination on the grounds of race, sex, pregnancy, HIV status and religion, etc in any employment policy or practice.<sup>383</sup> In terms of the EEA employment policy or practice to include, but is not limited to recruitment procedures, advertising and selection criteria;

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<sup>377</sup> Section 2 of the EEA.

<sup>378</sup> *Solidarity v Department of Correctional Services* [2016] ZACC 18.

<sup>379</sup> *Solidarity v Department of Correctional Services* [2016] ZACC 18 at paragraph 49.

<sup>380</sup> The EEA defines a designated employer as an employer who employs 50 or more employees, or an employer who employees fewer than 50 employees, but has a total annual turnover as reflected in Schedule 4 of the Act.

<sup>381</sup> See Preamble of the EEA.

<sup>382</sup> The EEA defines designated groups to means women, black people and persons with disability.

<sup>383</sup> Section 5 of the EEA.



appointments and the appointment process; job classification and grading; remuneration, employment benefits and terms and conditions of employment; job assignments; the working environment and facilities; training and development; performance evaluation systems; promotion; transfer; demotion; disciplinary measures other than dismissal and dismissal.<sup>384</sup> Designated employers in the private sector are not immune to obligations. The private sector equally must take steps to eliminate discrimination practices on the grounds of sex and gender in the workplace. To achieve this, the EEA requires designated employers in the private sector to consult employees and employee representatives<sup>385</sup> and conduct an analysis of all employment practices.<sup>386</sup> This analysis includes *inter alia* the preparation of a workforce profile in all levels from senior management to unskilled persons.<sup>387</sup> This is to ensure that the Department of Labour in South Africa holds the private sector accountable and compels the private sector to address issues identified in the employment equity plan established in terms of section 20 of the EEA. The employment equity plan assists the designated employers to achieve reasonable progress towards employment equity by highlighting issues that are barriers to achieving equitable representation in the workplace.

The EEA challenges designated employers to commit to achieving redress for previously disadvantaged in the workplace. The CGE unearthed that the lack of understanding of the EEA contributes significantly to the non-compliance by the private sector in general.<sup>388</sup> It has been nearly 22 years since the EEA was enacted into law in South Africa, as such, failure to comply with it amounts to ignorance of the law which is accepted not to be an excuse and not justifiable. During the public investigative hearing in 2016, the CGE unearthed that a private company that was established since 1895, throughout its business, it lacked priority on employment and gender issues because it was a family business and was not fully conversant with legislation promoting gender equality.<sup>389</sup> To this end, the CGE recommended that the company adopt policies to advance women in

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<sup>384</sup> Section 1 of the EEA.

<sup>385</sup> Section 16 of the EEA.

<sup>386</sup> Section 19 of the EEA.

<sup>387</sup> Section 19 of the EEA.

<sup>388</sup> CGE, Employment Equity Report in the private sector, page 67, 2017/2018.

<sup>389</sup> CGE, Employment Equity Report in the private sector, page 65-66, 2016/2017.

general into managerial positions. The company achieved slight progress on advancing women into managerial positions after it retrenched employees due to financial constraints during 2017.

Section 15 of the EEA introduces affirmative action measures in the workplace. In terms of this section, affirmative action measures are measures intended to ensure that suitably qualified employees from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels of the workforce. Section 15 of the EEA tasks designated employers to implement affirmative measures in the workplace and such measures include identification and elimination of barriers with an adverse impact on designated groups;<sup>390</sup> measures which promote diversity;<sup>391</sup> making reasonable accommodation for people from designated groups;<sup>392</sup> retention, development and training of designated groups (including skills development); and preferential treatment and numerical goals to ensure equitable representation.<sup>393</sup> The department of Labour in South Africa is currently monitoring the compliance of both the public and private sector with section 15 of the EEA.

The EEA has directed that the affirmative measures must be implemented by the designated employers to eliminate unfair discrimination and ensure the equitable representation of suitably designated groups in occupational categories and levels in the workplace. The EEA does not impose a quota system for representation of the designated groups in the occupational categories and levels in the workplace, instead, the EEA requires the designated employers to include preferential treatment and numerical goals in implementing affirmative action.<sup>394</sup> It is submitted that numerical goals in South Africa have failed to transform the managerial positions in the private sector for 22 years since the EEA was enacted into law. This is largely because the numerical goals provide a degree of flexibility to designated employers. In contrast, quotas are vital and ideal by

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<sup>390</sup> Section 15(2) (a) of the EEA.

<sup>391</sup> Section 15 (2) (b) of the EEA.

<sup>392</sup> Section 15 (2) (c) of the EEA.

<sup>393</sup> Section 15 (2) (d) of the EEA.

<sup>394</sup> Section 15(3) of the EEA.

their nature they do not afford employers a degree of flexibility, instead requires full compliance, failing which sanctions are imposed.

The EEA provides that the designated employers are not expected to decide on an employment policy or practice that is likely to result in an absolute barrier to prospective or continued employment or advancement of people not from designated groups.<sup>395</sup> It is submitted that this allows designated employers in the private sector not to commit to the elimination of unfair discrimination in the workplace because section 15(4) of the EEA provides the designated employers with ground not to change the overrepresentation of persons who are not designated groups in managerial positions. As such it is conceivable that the private sector lags behinds in terms of black women representation because section 15(3) and section 15(4) EEA do not fully impose an obligation to change the current overrepresentation of white males at managerial positions in the private sector.

It is 22 years since the EEA has been enacted and the cardinal question is whether the EEA eliminated unfair discrimination and successfully implemented affirmative actions to enable the equitable representation of black South African women in the private sector? Harris opines that there is slow progress in improving the employment status of the designated groups, however, Harris asserts that without affirmative action the representation of the designated groups would have been far worse.<sup>396</sup> Harris posits that slow progress is influenced by unfair practices such as discrimination in pay, gender and treatment in the workplace.<sup>397</sup> This could be addressed if the private sector adopted remuneration policies that aim to remunerate persons without attributing payment to an employee's gender.

Louw posits that the application of affirmative action in employment through demographic target-setting is an unlawful application under the Constitution because it is arbitrary and

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<sup>395</sup> Section 15 (4) of the EEA.

<sup>396</sup> Harris G, Revisiting affirmative action in levelling the playing field: Who have been the true beneficiaries anyway? Review of Public Personnel Administration, 29(4), page 354-372, 2009.

<sup>397</sup> *Ibid.*

irrational and may, in practice, lead to the reservation of posts.<sup>398</sup> In 2018, the CEE found that the private sector is still lagging in the representation of females in top management in the private sector and the public sector.<sup>399</sup> Similarly, in 2018 a Jack Hammer report unearthed that there was only one female chief executive officer in the top 40 listed companies in South Africa.<sup>400</sup>

According to the CEE lack of equitable representation at the top Management, the level does not embrace the sustainable economic growth of South Africa due to the exclusive representative of the demographic population distribution in the workplace in terms of population groups, gender and disability. The CEE concludes that to reach equity at the top management level, a multi-pronged strategy should either be strengthened or developed.<sup>401</sup> Interestingly, the CEE unearthed that the private sector largely employs males as opposed to females whilst the public sector largely employs females. The public sector understands its international obligations in respect of CEDAW, SDGs, SADC 2030 to increase the representation of women in decision making positions. In the premise, the EEA has not significantly persuaded the private sector to eliminate unfair discrimination of black African women in occupying managerial positions. It is submitted that the EEA can compel the private sector to accelerate black African women into managerial positions if the EEA permits quotas for suitably qualified persons from the designated groups, particularly black African women.

### 2.8.3 Basic Conditions of Employment Act 75 of 1997

The Basic Conditions of Employment Act 75 of 1997 (BCEA) has been established to give effect to the right to fair labour practices envisaged in terms of section 23(1) of the Constitution. It is accepted that the BCEA recognises South Africa's obligation to the International Labour Organisation. It is submitted that the international community

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<sup>398</sup> Louw A, The Employment Equity Act, 1998 (and other myths about the pursuit of "equality", "equity" and "dignity" in post-apartheid South Africa) PER / PELJ (18)3, page 651, 2015.

<sup>399</sup> CEE, 18th Commission for Employment Equity Report, page 32, 2017-2018.

<sup>400</sup> Jack Hammer report volume 5 2018 available at [www.jhammer.co.za](http://www.jhammer.co.za) accessed on 13 August 2018.

<sup>401</sup> CEE, 18th Commission for Employment Equity Report, page 55, 2017- 2018.

inspired South Africa to establish legislation that aims to guarantee the basic condition of employment.

The BCEA has critically ensured that female employees are afforded the same basic conditions of employment similar to male employees. Significantly the BCEA provides female employees with four consecutive months of maternity leave.<sup>402</sup> Maternity leave is mostly unpaid in South Africa and this is because employers including the private sector companies are not obliged to provide paid.<sup>403</sup> It is submitted that in the private sector female employees are largely not to enjoy maternity leave benefits if the employer has not registered pregnant employees with the Department of Labour to claim maternity benefits in terms of section 24 of Unemployment Insurance Act 63 of 2001 (UIA).<sup>404</sup> It is submitted that paid maternity leave serves as attractive benefits for women to be employed and retained in the private sector. It is espoused that the retention of black African women in the private sector creates room for the sector to develop a pool of potential female candidates to assume managerial positions. As such one of the measures to attract and retain black African women in managerial positions in the private sector is to provide paid maternity leave to female employees.

#### 2.8.4 Labour Relations Act 66 of 1995

The Labour Relations Act (LRA) aims to achieve social justice by providing specific rights and duties to both employers and employees respectively. Particularly, section 27 of the Constitution, entrenches these rights to form organisations for collective bargaining.

During apartheid, it was an acceptable norm for employers to dismiss female employees at work due to pregnancy. This form of discrimination has been in the spotlight during apartheid and post-1994.<sup>405</sup> It is submitted that termination of employment of a pregnant

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<sup>402</sup> Section 25 of the BCEA.

<sup>403</sup> Section 25 of the BCEA does not state that maternity leave must be paid.

<sup>404</sup> Section 34 and 37 of the UIA provides for the payment to the employee by the Unemployment Insurance Fund (UIF) of maternity benefits during a period of maternity leave.

<sup>405</sup> The Black Sash, [Survey on Black Women in Employment in a number of Pinetown factories: Conference Paper presented at the Black Sash National Conference 1978.](#), available at [www.sahistory.org.za](http://www.sahistory.org.za) accessed on 21 March 2018.

female is not only automatic dismissal in terms of the LRA but arguably amounts to unfair discrimination in terms of pregnancy, sex and gender espoused in section 9 of the Constitution. In the case of *De Beer v SA Export Connection CC t/a Global Paws*<sup>406</sup> the applicant (employee) was working as a travel consultant and fell pregnant. An agreement was entered between the employee and the employer to return to work a month after she had given birth. The female employee gave birth to children who had a colic illness. Against this background, the employee requested two to three days before returning to work an additional month to look after her children. The employer was amenable to provide the employee with an extra two weeks. The employee declined this, as such, the employer terminated her services. The complainant argued that the dismissal was automatically unfair in terms of section 187(1)(e) of the LRA and referred a dispute to the CCMA.<sup>407</sup>

The court observed that:

“Section 187(1)(e) of the LRA must be seen as part of social legislation passed for the specific protection of women and to put them on an equal footing with men. I have no doubt that it is often a considerable burden to an employer to have to make the necessary arrangements to keep a woman’s job open for her while she is absent from work to have a baby, but this is a price that has to be paid as part of the social and legal recognition of the equal status of women in the workplace. If an employer dismisses a woman because she is pregnant and is not prepared to make the arrangements to cover her temporary absence from work the dismissal would be automatically be unfair”.<sup>408</sup>

It is clear from the above remarks that to level the playing field for pregnant female employees in the workplace, employers must keep the position of a pregnant employee

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<sup>406</sup> *De Beer v SA Export Connection CC t/a Global Paws* 2008) 29 ILJ 347 (LC).

<sup>407</sup> Section 187(1)(e) of the LRA provides that:

“A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is the employee’s pregnancy, intended pregnancy, or any reason related to her pregnancy”.

<sup>408</sup> *De Beer v SA Export Connection CC t/a Global Paws* (JS270/06) [2007] ZALC 104; [2008] 1 BLLR 36 (LC) at Paragraph 10.

vacant until the employee returns to work. It is submitted that this is part of social justice and recognition that female employees have additional burdens that affect their full participation as employees in the workplace. As such it is inconceivable for the private sector to dismiss an employee due to pregnancy by citing economic and extra expenses to be incurred by the employer during the absence of the employee.<sup>409</sup> Such a decision will not escape being automatically unfair. Interestingly section 187(1)(e) of the LRA further grants protection to an employee against dismissal for any reason related to her pregnancy. The dismissal is probably likely to be unfair not only when pregnancy or any reason connected with the pregnancy is the reason for the dismissal, but also when the woman is dismissed for reasons connected with the exercise of her rights in respect of maternity leave.<sup>410</sup>

Commonly, the private sector in South Africa is largely profit-driven and it is submitted that it is conceivable that the private sector neglects to employ women in general because of the financial implications when they are pregnant. This assertion resonates with the observations of Bosch where the latter indicated that in the workplace most employers encounter challenges once a female employee is pregnant and this includes the relocation of hazardous tasks, insufficient production when shifting women from their production lines scheduling of work, accommodation of females employees who are absent for at least four months during maternity leave as well as costs of training for temporary replacement personnel.<sup>411</sup> Similarly, Vettori asserts that a workplace environment must be accommodative of pregnant employees even if it has financial implication to the employer-provided that such cost is not disproportional to the reasonable accommodation.<sup>412</sup> These challenges have an enormous financial implication on employers. It is suggested that the private sector in South Africa needs to be

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<sup>409</sup> *De Beer v SA Export Connection CC t/a Global Paws* (JS270/06) [2007] ZALC 104; [2008] 1 BLLR 36 (LC) at Paragraph 11.

<sup>410</sup> *De Beer v SA Export Connection CC t/a Global Paws* (JS270/06) [2007] ZALC 104; [2008] 1 BLLR 36 (LC) at paragraph 12.

<sup>411</sup> Bosch A, Pregnancy is here to stay or is it? , The SABPP Women's Report 2016 , Pregnancy in the workplace, page 5., available at <https://www.uj.ac.za/faculties/cbe/Industrial-Psychology-and-People-Management/Documents/UJSABPPWomensReport2016.pdf> accessed on 3 March 2019.

<sup>412</sup> Vettori S, Employer duties towards pregnant and lactating employees in the hospitality industry in South Africa, African Journal of Hospitality, Tourism and Leisure - Vol. 5 (4),page 12, 2016 , available at [http://www.ajhtl.com/uploads/7/1/6/3/7163688/article\\_2\\_vol\\_5\\_4\\_.pdf](http://www.ajhtl.com/uploads/7/1/6/3/7163688/article_2_vol_5_4_.pdf) accessed 3 March 2019.

encouraged through tax incentives to employ black African women in managerial positions irrespective of their pregnancy. For example, employers who employ suitably qualified black African women into managerial positions may benefit up to R12 000.00 per year for every such appointment of black African women. This is feasible in that South Africa already provides incentives for companies who employ the youth. The scope of incentives may be extended to the appointment of black African women into managerial positions in the private sector.

### 2.8.5 Broad-Based Black Economic Empowerment Act, 2003

The BBB EE Act aims to enhance economic transformation and participation of previously disadvantaged groups in the South African economy. In terms of section 11 of the BBBEE Act, the Minister is required to provide a strategy on the broad-based black economic empowerment; a strategy that outlines a unified approach for BBBEE by all State organs, public and private sector, non-government entities and other stakeholders.<sup>413</sup> A BBBEE strategy that aims to achieve economic growth to redress the segregation of previously disadvantaged groups from accessing wealth, income equality, skills development and equal opportunities in South Africa.<sup>414</sup>

The significance of the BBBEE Act is that it recognises the need to afford black women the opportunities to manage existing and new enterprises. According to Kleynhans and Kruger, a balanced scorecard and targets were created to ascertain the compliance by BEE companies.<sup>415</sup> According to Acemoglu *et al*, a company must prove to be BEE compliant if it aspires to bid tenders or enter business with the public sector.<sup>416</sup> A BEE

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<sup>413</sup> Section 11(2) of the BBB EE Act .

<sup>414</sup> EY, Broad - Based Black Economic Empowerment, page 2, 2013, available at [https://www.ey.com/Publication/vwLUAssets/Broad-Based\\_Black\\_Economic\\_Empowerment/\\$FILE/BBBEE%20brochure%20%20-%2017%20August%202012-1.pdf](https://www.ey.com/Publication/vwLUAssets/Broad-Based_Black_Economic_Empowerment/$FILE/BBBEE%20brochure%20%20-%2017%20August%202012-1.pdf) accessed on 31 July 2018.

<sup>415</sup> Kleynhans E and Kruger M, Effect of Black Economic Empowerment on profit and competitiveness of firms in South Africa, *Acta Commercii* 14(1) 2014 available at <https://actacommercii.co.za/index.php/acta/article/view/200/316>, accessed on 31<sup>st</sup> July 2018.

<sup>416</sup> Acemoglu D , Gelbz S and Robinsonx J, Black Economic Empowerment and economic performance in South Africa , August , page 9-10,2007 available at <http://www.treasury.gov.za/publications/other/growth/06-Procurement%20and%20BEE/02->



compliant company would demonstrate *inter alia* that it has shares owned by black people and that several directors and senior management positions are held by black people. A BEE certificate will be issued if a company is BEE compliant, and this results in the existence of a public-private economic relationship in terms of economic transactions.<sup>417</sup> The public-private economic relationship essentially means that the private sector company, after acquiring a BEE Certificate, would be available to bid for tenders and contracts with the Public Sector departments. In other words, the BEE Certificate increases the eligibility of a private sector to bid for tenders issued by the public sector.

The BBB EE process, however, present challenges to companies that do not comply with the BBB EE and these companies resort to fronting<sup>418</sup> to qualify for a BEE certificate. This view resonates with the assertions of Sibanda where the latter submits that the implementation of the BBB EE Act has not been an easy process. Sibanda reasons that some business entities are accused of contravening the legislation by deliberately misrepresenting facts about the extent of their compliance with the empowerment

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[BLACK%20ECONOMIC%20EMPOWERMENT%20AND%20ECONOMIC%20PERFORMANCE%20IN%20OSO.pdf](#) accessed 31 July 2018.

<sup>417</sup> *Ibid.*

<sup>418</sup> In terms of the BBB EE Act fronting practice “means a transaction, arrangement or other act or conduct that directly or indirectly undermines or frustrates the achievement of the objectives of this Act or the implementation of any of the provisions of this Act, including but not limited to practices in connection with a B-BBEE initiative-

- (a) in terms of which black persons who are appointed to an enterprise are discouraged or inhibited from substantially participating in the core activities of that enterprise;
- (b) in terms of which the economic benefits received as a result of the broad-based black economic empowerment status of an enterprise do not flow to black people in the ratio specified in the relevant legal documentation;
- (c) involving the conclusion of a legal relationship with a black person for the purpose of that enterprise achieving a certain level of broad-based black economic empowerment compliance without granting that black person the economic benefits that would reasonably be expected to be associated with the status or position held by that black person; or
- (d) involving the conclusion of an agreement with another enterprise in order to achieve or enhance broad-based black economic empowerment status in circumstances in which-
  - (i) there are significant limitations, whether implicit or explicit, on the identity of suppliers, service providers, clients or customers;
  - (ii) the maintenance of business operations is reasonably considered to be improbable, having regard to the resources available;
  - (iii) the terms and conditions were not negotiated at arm's length and on a fair and reasonable basis”

obligations, such as the up-skilling of black people within the employ of the company, outlined in the B-BBEE scorecard.<sup>419</sup>

In the case of *Passenger Rail Agency of South Africa v Swifambo Rail Agency (Pty) Ltd*<sup>420</sup> the Passenger Rail Agency of South Africa (PRASA), approved the award of a tender for the supply of various train locomotives to a recently incorporated company, Swifambo Rail Leasing (Pty) Ltd (Swifambo). The award was vitiated by several material irregularities, primarily the dishonest and corrupt conduct of officials of PRASA in advertising the Request for Proposals in respect of the supply of locomotives and in awarding the contract. Swifambo argued that it had no knowledge of PRASA's dishonesty; and that it was not equitable to set aside the contract in the circumstances.<sup>421</sup> As such Swifambo insisted that it was an innocent tenderer, and that the contract between it and PRASA ought nonetheless to remain in existence and that the parties should be permitted to continue performing their respective obligations<sup>422</sup>. The Court established that the business arrangement between Swifambo and Vossloh qualified as a fronting practice because Swifambo accepted monetary compensation in return allowed Vossloh to use its B-BBEE. As a front, Swifambo subcontracted all projects required by PRASA tender to Vossloh. It is argued that the fronting practice results in black women being appointed as tickets to obtain a BEE certificate. In terms of section 130 of the BBBEE Act, a person found guilty of fronting is liable for a fine or to imprisonment for a period not exceeding 10 years or to both fine and such imprisonment or, if the convicted person is not a natural person, to a fine not exceeding 10 per cent of its annual turnover. It is submitted that section 130 of the BBBEE Act should be enforced with rigour to curb fronting in South Africa. This should include penalties that favour imprisonment than fines as it is expected that fines would be easily paid by big companies.

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<sup>419</sup> Sibanda A, weighing the cost of "bee fronting" on best practices of corporate governance in South Africa, *Speculum juris* volume 29 part 2, page 24, 2015.

<sup>420</sup> *Passenger Rail Agency of South Africa v Swifambo Rail Agency (Pty) Ltd* [2017] 3 All SA 971 (GJ).

<sup>421</sup> *Passenger Rail Agency of South Africa v Swifambo Rail Agency (Pty) Ltd* [2017] 3 All SA 971 (GJ) at paragraph 1.

<sup>422</sup> *Passenger Rail Agency of South Africa v Swifambo Rail Agency (Pty) Ltd* [2017] 3 All SA 971 (GJ) at paragraph 1.

According to Jack Hammer women are being appointed to senior positions however such appointment remains in supportive roles. It is expressed that support roles are encouraged to provide women with experience; however, these positions do not result in women being represented at the top levels in the company. Jack Hammer asserts that it is imperative for the private sector to actively source and appoint women to the critical profit-and-loss positions i.e. the strategic business roles that will influence gender transformation at top management.<sup>423</sup> Core business roles include for example business strategy, operations or finance positions. According to the Jack Hammer on the JSE top 40 listed companies, white executives constitute 79%, black South African executive constitute 21%, female executives are 17% and black female constitute 7% of the executives.<sup>424</sup> Despite the BBBEE Act's objective to redress the economic inequalities and the transformation of the economy, this has however not resulted in black African women assuming executive positions in large numbers in South Africa. To address this, it is suggested that companies must become proactive and strategic about achieving transformation at their managerial levels. To this end, appointments of black African women must be made in core business functions where they are placed in influential and strategic roles that may result in women being able to make executive decisions without hindrance.<sup>425</sup>

## 2.9 Conclusion

There are several legislative and policy frameworks international, regional and domestic that seek to protect the rights, needs and interests of women in all spheres of society. Notwithstanding these frameworks, there are a few black African women in a managerial position in the private sector and the gender wage gap reflects that women earn far less than men. It is clear from these instruments that a lot of emphases has been laid on the public sector to develop mechanisms to accelerate the representation of women in

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<sup>423</sup> Jack Hammer, Executive report Volume 3, page 24, 2015 , available at <https://www.jhammer.co.za/wp-content/uploads/2016/03/JackHammer-ER3.pdf> accessed on 21 May 2020.

<sup>424</sup> Jack Hammer, *ibid*, page 18.

<sup>425</sup> Jack Hammer, *ibid*, page 22.

decision-making positions and there is the little emphasis laid on the private sector to do likewise.

It is submitted that the failure to compel the private sector to equally develop and implement measures that would result in women occupying managerial positions, would result in the SDGs, SADC Protocol goals to achieve inclusivity being a facade. It is submitted that the international and African instruments have potential to address gender inequality in the workplace however the lack of a regulatory body that can compel State parties to comply with the SDGs, African Charter, Maputo protocol results in these instruments being ineffective and ultimately having no impact.

In South Africa, the public sector has demonstrated its commitment to empower women and promote the concept of gender equality in the Public service by introducing the Head of department's 8 principles of Action Plan. These principles are welcomed because they seek to hold the Head of Department accountable for lack of transformation, particularly the advancement of black African women in managerial positions. It is submitted that the Head of Department would demonstrate a commitment to achieve these principles if these principles are all included in the Head of the Department's performance contract. If the terms of the performance contract are not fulfilled, then it is conceivable that the Head of the department should be asked to provide reasons for the failure. The failure to provide sound reasons should result in consequences.

The private sector has not implemented similar 8 principles of action to empower women and promote the concept of gender equality. It is submitted that this contributes to the South African private sector lagging in terms of accelerating black African women into managerial positions. Similarly, the EEA does not contain a quota system that mandates the private sector to obtain a specific target of previously disadvantaged groups at all occupational levels in the workplace. Despite existing international conventions and Regional instruments, the South African government has been unable to persuade the private sector to develop and capacitate black African women to be eligible for managerial positions in the workplace.

## CHAPTER THREE

## THE RIGHTS OF WOMEN IN THE WORKPLACE

### 3.1 Introduction

Lues postulates that during the early 80s women in South Africa were not permitted to partake in the workplace on an equal basis with men.<sup>426</sup> This restriction was primarily because of a lack of legislation that provided all women with the right to participate equally in the workplace.<sup>427</sup> To this end, the public and private sectors invested lesser resources in providing management training of female employees than male employees.<sup>428</sup> As such, fewer women occupied managerial positions in both the private and public sectors.<sup>429</sup> Notwithstanding this, Lues asserts that the underrepresentation of women in managerial positions is a global challenge and therefore cannot be as a result of the social conditions South Africa only.<sup>430</sup> In South Africa, the unequal participation of women in the workplace resulted in most black African women being left more vulnerable and discriminated against in terms of race, gender and class. Democratic South Africa adopted various laws including the LRA, BCEA and EEA that provided an array of rights to black African women in the workplace. In principle, these rights sought to place black African women on an equal footing with other employees from other race groups. Against this backdrop, this chapter examines the rights of women in the workplace and determine whether these rights sufficiently allow women, particularly black African women to occupy managerial positions in the private sector.

### 3.2 The concept of women's rights

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<sup>426</sup> Lues L, The history of professional African women: a South African perspective , page 109 , available at <http://ir.cut.ac.za/bitstream/handle/11462/428/Lues,%20Liesel.pdf?sequence=1&isAllowed=y> accessed on 14 September 2018.

<sup>427</sup> *Ibid.*

<sup>428</sup> *Ibid.*

<sup>429</sup> *Ibid.*

<sup>430</sup> *Ibid.*

The discourse of women's rights raises debates as to whether there is a need to have this concept because women are automatically entitled to human rights by being human beings. Truyol argues that directing attention on women's rights as human rights is not only proper but also imperative as the lives of women demonstrate their historic invisibility and denial of rights discourse due to their second-class citizen status.<sup>431</sup>

According to Rosenfeld *et al* the concept "women's rights" is one of the difficult terms to define as it encompasses various areas that affect women and this includes sexual, health and reproductive rights, social security benefits, civil rights, discrimination in the workplace, human rights and sexual orientation.<sup>432</sup>

According to the UN the concept "Women's Rights" has resulted in most political pledges being made at several international conferences towards the achievement of women's human rights and equality.<sup>433</sup> This includes the 1975 International world conference, Mexico City on the International Women's Year which developed the World Plan of Action and declared the period 1975–1985 as the United Nations Decade for Women,<sup>434</sup> the 1980 international conference on women that was held in Copenhagen and resulted in CEDAW being open for signature<sup>435</sup> and the 1985 third World Conference on Women that was held in Nairobi.<sup>436</sup> According to the UN, these three world conferences observed peculiar activism from women from around the world and this resulted in the Beijing conference held in 1995 that developed the BPA. The BPA aimed to eliminate the barriers that affect the active participation of women in all spheres.

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<sup>431</sup> Berta E. Hernández-Truyol, Women's Rights as Human Rights - Rules, Realities and the Role of Culture: A Formula for Reform, 21 Brook. J. Int'l L. 605, page 612-613, 1996 available at <https://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1530&context=facultypub> accessed on 9 March 2019.

<sup>432</sup> Rosenfeld D *et al* , Harvard Law School's *Women's Rights Guide*, page 4, 2007. available at <https://hls.harvard.edu/content/uploads/2008/07/guide-women.pdf> accessed on 9 March 2019.

<sup>433</sup> United Nations, Women's rights are human rights ,page 11, 2014, available at <https://www.ohchr.org/Documents/Events/WHRD/WomenRightsAreHR.pdf> accessed on 9 March 2019.

<sup>434</sup> *Ibid.*

<sup>435</sup> *Ibid.*

<sup>436</sup> *Ibid.*

Bunch and Frost assert that the concept of women's rights is a revolutionary notion that incorporates the needs and interest of women within the human rights framework and compels countries to provide the right to dignity to all women by being human beings.<sup>437</sup> Essentially the concept “women’s rights” denotes that as human beings women have human rights and this is influenced by past historical practices that deprived women of basic rights including the right to be treated equally and with dignity. Truyol asserts that the concept of women’s rights aims to eliminate the lack of visibility of women in all spheres, to develop measures for the implementation of existing rights that are beneficial to women and to ensure that women’s rights are reflective of the realities experienced by women and enforce women’s equality.<sup>438</sup> Truyol concludes that the incorporation of the multiplicity of experiences and challenges of women in the reformulation of rights.<sup>439</sup>

It is submitted that women’s rights are a reclamation of humanity and insistence of women as such serves as a profound transformative framework that empowers women to identify, express practices that are discriminatory and degradation in society. As such the concept of women’s right assert that women have the right to not to be unfairly discriminated, excluded, restricted and further live free from violence, slavery and be remunerated fairly.

It is submitted that the concept of women’s rights advocates for equal opportunities for women in the workplace irrespective of their race and class. To this end, black African women essentially are entitled to the same equal opportunities as white females, white males, Indian males and black African males. Arguably, this concept paves way for black

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<sup>437</sup> Bunch C and Frost S , Women's Human Rights: An Introduction, Routledge International Encyclopedia of Women: Global Women's Issues and Knowledge, Routledge, 2000, available at <http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=12&ved=2ahUKEwi71uaYzfTgAhVUShUIHbgkDAM4ChAWMAF6BAgPEAI&url=http%3A%2F%2Fwwda.org.au%2Fwp-content%2Fuploads%2F2013%2F12%2Fwhrintro1.doc&usq=AOvVaw3hFVBufXvzRYxjl50UxtVT> accessed on 9 March 2019.

<sup>438</sup> Berta E. Hernández-Truyol, Women's Rights as Human Rights - Rules, Realities and the Role of Culture: A Formula for Reform, 21 Brook. J. Int'l L. 605 at page 606, 1996, available at <https://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1530&context=facultypub> accessed on 9 March 2019.

<sup>439</sup> Berta E. *ibid*, page 610.



African women to have access to similar training benefits, mentorship programmes and access to managerial positions offered to other employees in other race groups. It is argued that women's rights for black African women effectively mean that black African women can enjoy all benefits in the workplace, including being recruited, selected and appointed at managerial positions in the workplace similar to white females, white males, and black African males. Conversely, the paucity of black African women at managerial positions in the private sector indicates that black African women do not enjoy all the benefits afforded to other employees. This is significantly influenced by the resistance of the private sector to transform its workplace and empower women to occupy managerial positions. Such resistance is arguably influenced by the lack of a quota system in South Africa that makes it mandatory for the private sector to appoint black African women at managerial positions.

### **3.3 The evolution of women's rights in South Africa**

The apartheid period in South Africa denied black African women of significant employment rights and ultimately active participation in the South African economy. During the 1920s black African women in South Africa slowly began to enter the labour market, particularly as domestic workers to the wealthy white families and industrial jobs.<sup>440</sup> The discrimination of black African women was exacerbated in the factory jobs during late 1978.<sup>441</sup> Black Sash unearthed that during this period women were paid less in factories, employment was terminated if women became pregnant and no pension or provident funds were provided for women notwithstanding the physical, emotional and time-intensive work allocated to them.<sup>442</sup> Essentially the exploitation of women in the

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<sup>440</sup> South African History Online, Women, employment and changing economic scene, 1920s, 30 March 2011 Available at [www.sahistory.org.za/womens-struggle-1900-1994/women-employment-and-changing-economic-scene-1920s](http://www.sahistory.org.za/womens-struggle-1900-1994/women-employment-and-changing-economic-scene-1920s) accessed on 16 September 2018.

<sup>441</sup> *Ibid.*

<sup>442</sup> The Black Sash. "Survey on Black Women in Employment in a number of Pinetown factories: Conference Paper presented at the Black Sash National Conference 1978." available at [www.sahistory.org.za](http://www.sahistory.org.za) accessed on 21 March 2018.

workplace was prevalent particularly because they were targets of even more oppression because of the lack of rights to be employed.<sup>443</sup>

Chapman asserts that the lack of rights to women in the workplace resulted in senior male managers abusing female employees by soliciting sexual favours in exchange for women keeping their jobs.<sup>444</sup> This suggests that the employment of women was not dependent on the competency of the female employees but rather on the sexual favours rendered to those in the authority of the company. Chapman asserts that the discrimination and exploitation of women were addressed through the formation of trade unions such as Garment Workers Union that resisted gender inequality and social injustice.<sup>445</sup> During the 1970s unions progressed in assisting employers to realise the importance of entering into negotiation to bring solutions to grievances. Chapman notes that the formation of women unions was delayed because of the Industrial Conciliation Act of 1956 which perpetuated legal oppression under the apartheid government by banning unionisation of African women working in South Africa.<sup>446</sup> The triple oppression of women during this period further made it difficult for black African women, in particular, to work and form trade unions. Essentially it meant that women, particularly black African women lacked the working experience and as a result, this impacted their eligibility to be managers in the workplace.

Meer points out that the Institute for Black Research unearthed that during the 1980s women were given odd jobs and management refused them time to see doctors when they were sick.<sup>447</sup> Meer asserts that most women were not having medical aid schemes and also not having pension funds. During this period women had no job securities and were not allowed to have conversations while at work and were restricted with time when

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<sup>443</sup> Chapman C, Women's Workplace Oppression in 1970s South Africa, South African History Online on 14-May-2015 available at <https://www.sahistory.org.za/article/women%E2%80%99s-workplace-oppression-1970s-south-africa-cait-chapman> accessed on 16 September 2018.

<sup>444</sup> *Ibid.*

<sup>445</sup> *Ibid.*

<sup>446</sup> Meer F, Women in Apartheid Society, available at <https://www.sahistory.org.za/archive/women-apartheid-society-fatima-meer-0> accessed on 16 September 2018.

<sup>447</sup> *Ibid.*

going to the lavatory. It was unearthed that there was insufficient maternity leave, and sick leave was subjected to several processes that required proof.<sup>448</sup> It is pointed out that during this period few women were promoted and dismissals and retrenchments of women were frequent.<sup>449</sup> Essentially during apartheid, black women had limited rights and choices both in society and in the workplace and this resulted in African women not only penalised due to race but discriminatory practices allowed their exploitation in the workplace. This further perpetuated their exclusion to higher echelon positions in the private sector.

According to Lues, the history of South Africa reflects the discrimination of women based on race and gender.<sup>450</sup> It was anticipated that post-1994 South Africa would enact legislation that sought to equally protect the rights of black women, particularly in the workplace. It is against this backdrop that the Constitution of South Africa guaranteed the right to dignity, equality, right to fair labour practice to all persons irrespective of their position in life, more particular their gender. In principle, South Africa has significant laws to support the empowerment of women, promote gender equality and bars oppression and all forms of discrimination. The cardinal question is whether the EEA provides adequate rights and protection to black African women to enable them to progress to senior management positions. It is submitted that the EEA does not sufficiently fast-track the equitable representation of black African women into management positions in the private sector. The laws such as the EEA allow the private sector to have discretion, to set numerical goals through preferential treatment to increase the representation of qualified black African women at managerial positions in the private sector.

Designated employers are not expected, in terms of section 15(4) of the EEA to make any determination pertaining an employment policy or practice that would be an absolute barrier to the employment or progression of white people who prospective or continued

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<sup>448</sup> *Ibid.*

<sup>449</sup> *Ibid.*

<sup>450</sup> Lues L, The history of professional African women: A South African perspective, page 109, available at <http://ir.cut.ac.za/bitstream/handle/11462/428/Lues,%20Liezal.pdf?sequence=1&isAllowed=y> accessed on 14 September 2018.

employment or advancement of people not from designated groups.<sup>451</sup> Primarily section 15(4) of the EEA provides the designated employers with ground not to change the overrepresentation of persons who are not designated groups in managerial positions. As such it is conceivable that the private sector lags in terms of black women representation because of section 15(3) and section 15(4). These sections endorse numerical goals in pursuit of workplace representivity and equity and as such encourages flexibility employment guidelines to the private sector. Conversely, section 15(3) and section 15(4) of the EEA qualify as grounds to justify the overrepresentation of white males at managerial positions and consequently provides shield to the private sector when it opts to employ black African women at lower positions to achieve equity.

Essentially both section 15(3) and section 15(4) of the EEA prohibits the use of quotas and as such does not fully impose an obligation to change the current white male domination at management positions in the private sector. It is submitted that due to high rate of unemployment in South Africa and costs of litigation in South Africa, most black African women are unlikely to challenge the preferential treatment of the employer not to appoint them at managerial positions and as such results in black African women maintaining their status of discomfort and perpetual inequality at various occupational levels.

According to Lewis-Enright *et al* legislation and Regulation themselves are not sufficient to promote gender equity in the workplace. To address this problem, it is suggested that two models need to be implemented. Lewis-Enright *et al* suggest that the first approach is the implementation of employment equity that is not gender blind because male and female employees are not the same nor do they have similar needs.<sup>452</sup> It is observed that employment equity that is gender blind ignores specific challenges that are experienced

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<sup>451</sup> Section 15 (4) of the EEA.

<sup>452</sup> Lewis-Enright *et al* , Towards a workplace conducive to the career advancement of women, SA Journal of Industrial Psychology. vol.35 n.1 Johannesburg, page 137,Jan 2009.

by female employees.<sup>453</sup> These include *inter alia* the needs and interests of women when it comes to pregnancy, patriarchy and stereotyping in the workplace.

Lewis-Enright *et al* suggest a second approach which includes diversity management that concentrates on the diverse essentials of women and ensures that these are protected.<sup>454</sup> Lewis-Enright *et al* acknowledge that these approaches are not complete solutions however, they are significant if female employees are to experience equality in the workplace.<sup>455</sup> It is submitted that diversity management in the workplace must take into consideration, the plight of black African women to assume leadership roles in South Africa since the advent of democracy. As such the recruitment and retention of black African women at the place of work depends on whether the working environment prioritises equity especially when one considers the segregation of black African women in society and the workplace.

The provision of gender equality in-laws and regulations is critical in addressing the past and present differentiation of females at the place of work. It is submitted that to achieve the full effect of laws and regulations on gender equality employers need to determine key approaches that will achieve the full realisation of gender equality in the workplace. It is, however, a challenge if this determination of approaches is the prerogative of the employers, as such a uniform approach informed by legislation is required to fully realise and achieve diversity in management positions of the private sector. This may be achieved through the amendment of the EEA to set targets and quotas to accelerate black African women in management levels. Section 6-11 of the Companies Act 2003 was introduced in Norway and the representation of women on boards improved to 40.3% (in 2010) from 7% (in 2003).<sup>456</sup> In Norway, the companies were provided with an ultimatum

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<sup>453</sup> *Ibid.*

<sup>454</sup> *Ibid.*

<sup>455</sup> *Ibid.*

<sup>456</sup> Whelan J and Wood R, Exploring the use of quotas for women in leadership roles, The Conversation 10 May 2012 available at <http://theconversation.com/exploring-the-use-of-quotas-for-women-in-leadership-roles-6864> accessed on 16 September 2018.

to reach the quotas or have such companies dissolved in terms of the Companies Act for non-compliance. As such all companies complied by 2008.<sup>457</sup>

Whelan and Wood argue that targets have been used in various areas of work where managers are held accountable for the achievement of targets of work-related projects.<sup>458</sup> Whelan and Wood contend that the assignment of targets may be replicated to hold managers accountable for the achievement of diversity in the workplace.<sup>459</sup> It is suggested that targets would be effective and enhanced if there are complementary plans in place to eliminate constraints to accept gender targets in the workplace and this includes processes and systems that are gender blind.<sup>460</sup> It is submitted that the assignment of gender targets to managers would accelerate the appointment of black African women in a managerial position in the private sector. However, without a mandatory provision in the EEA, such as Norway's section 6-11 of Companies Act 2008 40% which targets of women representation in the boards of publicly listed companies, it is unlikely that the South African private sector would voluntarily assign gender targets to managers to achieve diversity.

### **3.4 The concept of 'fair labour practices' in South Africa**

The concept of a fair labour practice recognises that there must be equity and fairness at a place of work.<sup>461</sup> The concept denotes that labour practices should be both lawful and fair. It is accepted that the Constitution has not defined the term 'fair labour practices'

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<sup>457</sup> Pande *et al* , Gender quotas and female leadership: A review , A Background paper for the World Development Report on Gender,page 15, 7<sup>th</sup> April 2011, available at <https://siteresources.worldbank.org/INTWDR2012/Resources/7778105-1299699968583/7786210-1322671773271/Pande-Gender-Quotas-April-2011.pdf> accessed on 28 August 2019.

<sup>458</sup> Whelan J and Wood R, Exploring the use of quotas for women in leadership roles, The Conversation 10 May 2012 available at <http://theconversation.com/exploring-the-use-of-quotas-for-women-in-leadership-roles-6864> accessed on 16 September 2018.

<sup>459</sup> *Ibid.*

<sup>460</sup> *Ibid.*

<sup>461</sup> *NEWU v CCMA* 2004 (2) BLLR 165 (LC).

however in the case of *Pretorius v G4S Secure Solutions (SA) (Pty) Ltd and Others*<sup>462</sup> it was observed that:

‘The concept of fair labour practice must be given content by the legislature and thereafter left to garner meaning, in the first instance, from the decisions of the specialist tribunals including the Labour Appeal Court and the Labour Court.’<sup>463</sup>

According to Cohen, it is intentional that the term ‘fair labour practices’ is not defined in the Constitution.<sup>464</sup> It is espoused that the concept of fair labour practices is intended to strike a balance between rights, duties and interests of employees and employers.<sup>465</sup> It is clear that the term “fair labour practice” does not have an exact definition, however, it is deduced that the conduct that violates fair labour practice qualifies as an unfair labour practice which is prohibited in South Africa. The Court in *Newu v CCMA* refers to Poolman where the latter expressed that:

“The concept ‘unfair labour practice’ is an expression of the consciousness of modern society of the value for the rights, welfare, security and dignity of the individual and groups of individuals in labour practices. The protection envisaged by the legislature in prohibiting unfair labour practices underpins the reality that human conduct cannot be legislated for in precise terms. The law cannot anticipate the boundaries of fairness or unfairness of labour practices. The complex nature of labour practices does not allow for such rigid regulation of what is fair or unfair in any particular circumstance. Labour practices draw their strength from the inherent flexibility of the concept ‘fair’. This flexibility provides a means of giving effect to the demands of modern industrial society for the development of an

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<sup>462</sup> *Pretorius v G4S Secure Solutions (SA) (Pty) Ltd and Others* (JR2498/13) [2015] ZALCJHB 414 (24 November 2015).

<sup>463</sup> *Ibid.*

<sup>464</sup> Cohen T, Understanding Fair Labour Practices- *NEWU v CCMA*, South African Journal on Human rights vol 20, issue 3, page 482, 2004.

<sup>465</sup> *Ibid.*

equitable, systematized body of labour law. The flexibility of 'fairness' will amplify existing labour law in satisfying the needs for which the law itself is too rigid."<sup>466</sup>

Similarly, in the case of *WL Ochse Webb & Pretorius (Pty) Ltd v Vermeulen*<sup>467</sup> the court observed that:

"The fair labour practice jurisdiction allows for a labour law dispensation that pays due regard to the needs and interests of both employer and employee. Neither employer nor employee benefits from a static employment concept where their respective rights and obligations are cast in stone at the commencement of the employment relationship. What the employer bargains for is the flexibility to make decisions in a dynamic work environment in order to meet the needs of the labour process. What the employee exacts in return is not only a wage, but a continuing obligation of fairness towards the employee on the part of the employer when he makes decisions affecting the employee in his work".<sup>468</sup>

The concept of fair labour practice in South Africa has a significant impact on the relationships between the employer and employee. For this chapter, it is accepted that fair labour practices ensure that black African women, as employees are subjected to practices that are not only lawful but also fair when compared with other employees. Similarly, the right to fair labour practice denotes that the private sector employers must afford black African women the equivalent employment benefits and opportunities that are afforded to other employees. This may be achieved through the adoption of policy frameworks, such as the 8 principles of Action Plan in the public sector that targets black African women for employment benefits and opportunities. Effectively access to employment benefits and opportunities in the workplace enhances and capacitates black African women to be eligible for higher positions in the workplace.

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<sup>466</sup> Poolman T, *Principles of Unfair Labour Practice*, Juta, page 11, 1985.

<sup>467</sup> *WL Ochse Webb & Pretorius (Pty) Ltd v Vermeulen* 1997 ILJ 361 (LAC).

<sup>468</sup> *WL Ochse Webb & Pretorius (Pty) Ltd v Vermeulen* 1997 ILJ 361 (LAC) at paragraph 365I-366A.



### 3.4.1 The right to fair labour practice under the South African Constitution

The coming into operation of the South African Constitution in 1996 is ground-breaking as it bestowed legal rights in the workplace, particularly the fundamental right to fair labour practices. According to section 23 of the Constitution ‘everyone has the right to fair labour practices’. Furthermore, every worker has the right (a) to form and join a trade union; (b) to participate in the activities and programmes of a trade union; (c) to strike. Notably, section 23 of the Constitution refers to “everyone” and “worker” and not the word employee *per se*.

In *Khosa v Minister of Social Development*, the court noted that the word

“everyone” ‘is a term of general import and unrestricted meaning. It means what it conveys. Once the state puts in place a social welfare system, everyone has a right to have access to that system.’<sup>469</sup>

The Constitutional Court considered the meaning of ‘worker’ in section 23 (2) of the Constitution in the case of *South African National Defence Union v Minister of Defence*<sup>470</sup> and observed that section 23(2) refers to ‘worker’ and this extends to members of the armed forces, despite their relationship not being a normal employment relationship’.<sup>471</sup>

The distinction between a worker and employee has a thin line, safe to say that an employee is often associated with a valid contract of employment for the LRA and a worker, on the other hand, a worker is not. It can be deduced from the term “employee” and “worker” that the intention of the legislature was not to limit the beneficiaries of section 23 (2) to persons who are defined as employees in section 213 of the LRA<sup>472</sup> but to include those persons who are employed but not necessarily recognised as employees as defined in the LRA. Essentially, the right to fair labour practices is not confined to those workers who are involved in an employment relationship with a valid contract of

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<sup>469</sup> *Khosa v Minister of Social Development* [2004] ZACC 11; 2004 (6) SA 505 (CC) at paragraph 111.

<sup>470</sup> *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 (CC).

<sup>471</sup> *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 (CC) at paragraphs 24 and 30.

<sup>472</sup> Section 213 of the LRA defines an employee as anyone, other than an independent contractor, who works for another person or who assists in conducting the business of an employer.

employment. A worker is entitled to fair labour practice by merely being involved in an employment relationship, whether such a right is limited, it would depend on the limitation test in the Constitution.<sup>473</sup> Section 36 of the Constitution provides the limitation test and states that:

“The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including

- a. the nature of the right.
- b. the importance of the purpose of the limitation;
- c. the nature and extent of the limitation;
- d. the relation between the limitation and its purpose; and
- e. less restrictive means to achieve the purpose.

Currie and De Waal argue that the term “everyone” suggests that the right to fair labour practices extends to both workers and employees and this right is not subject to an existing contract of employment.<sup>474</sup> As such the court in *Kylie v CCMA (Kylie)* expressed that labour practices in section 23(1) of the Constitution broadly encompass acts such as working hours, termination of employment and discipline notwithstanding the legality or illegality of the work.<sup>475</sup>

The court in *Kylie* accepted that the right to fair labour practices vests in ‘everyone’ and, it includes employees with a contract of employment and workers in employment

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<sup>473</sup> Section 36 of the Constitution provides that the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose. the nature of the right;

<sup>474</sup> Iaan and De Waal, *The Bill of Rights Handbook*, Juta, page 474, 2013.

<sup>475</sup> *Kylie v Commission for Conciliation Mediation and Arbitration and Others* 2010 (4) SA 383 (LAC) at paragraph 29.

relationships.<sup>476</sup> This approach was also followed in the case of *Nehawu v UCT*<sup>477</sup> where the court reaffirmed that section 23(1) of the Constitution concentrated was on the 'relationship between the worker and the employer and the continuation of that relationship on terms that are fair to both'.<sup>478</sup>

Against this backdrop, it is accepted that black African women in the South African private sector are entitled to fair labour practice. This means that if this right is violated, the employee may pursue the matter in the civil courts. The cardinal question is whether a female employee in the private sector may invoke section 23(1) of the Constitution on the basis that the employer failed to appoint her to a managerial position? According to *Iaan et al* persons who may find protection directly in terms of section 23 of the Constitution are applicants for employment, who do not qualify for any remedy under the LRA, save discrimination on the grounds of trade union membership, and who may claim under the grounds prohibited by that Act, or a ground akin thereto.<sup>479</sup> In other words, the applicant in terms of section 23 of the Constitution is not a person who is already recognised as an employee but a person who still seeks entry to employment to be recognised as an employee. As such, a female employee who seeks promotion to a managerial position in the private sector cannot rely on section 23 of the Constitution for protection.

The proliferation of black African women into managerial positions does not qualify as unfair labour practice as defined in section 23 of the Constitution. Conversely, a black African female who applied for a job but not accepted based on her gender and race can seek protection in terms of section 23 of the Constitution. This is so because the applicant in this instance is not yet an employee for section 185 of the LRA which states that "every employee has the right not to be subjected to an unfair labour practice". To this end, a promotional dispute of a black African woman to a managerial position can be adjudicated

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<sup>476</sup> *Kylie v Commission for Conciliation Mediation and Arbitration and Others* 2010 (4) SA 383 (LAC) at paragraph 22.

<sup>477</sup> *Nehawu v UCT* (2003) 24 ILJ 95 (CC).

<sup>478</sup> *Nehawu v UCT* (2003) 24 ILJ 95 (CC) at paragraph 40.

<sup>479</sup> *Iaan and De Waal*, *The Bill of Rights*.

in terms of the LRA because the incumbent would be an employee in terms of section 185 of the LRA.

### 3.4.2 The right to fair labour practice under the Labour Relations Act

The LRA is a fundamental legislation that gives effect to the right to fair labour practices as guaranteed by section 23 of the Constitution. Section 185 of the LRA particularly states that ‘every employee has the right not to be unfairly dismissed and not to be subjected to unfair labour practices’. It is important to understand who qualifies as an employee under the LRA. Section 213 of the LRA provides that an employee is anyone, other than an independent contractor, who works for another person or who assists in conducting the business of the employers. Further, the LRA in terms of section 200A presumes that a person is an employee if any one of the following circumstances arises:

- How the person works, or his/her hours of work is/are subject to the direction or control of another person;
- The person forms part of the organisation;
- The person has worked for the other person for an average of at least 40 hours per month for the last three months;
- The person is economically dependent on the other person;
- The person is provided with tools of trade by the other person; and
- The person only provides services to one person.

It is deduced from section 200A of the LRA that a black African woman who is doing work in the private sector to acquire training in their line of work is not defined as an employee but rather a learner. Similarly, if a private sector company finances the studies of a learner such a learner cannot be presumed to be an employee.<sup>480</sup> As such a claim of unfair labour practice is likely not to be successful. The LRA defines “Unfair labour practice” under section 186(2) as an unfair act or omission that arises between an employer and an

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<sup>480</sup> See *Mokone v Highveld Steel and Vanadium* 2005, 12 BALR 5.

employee involving - (a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee; (b) unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee; (c) a failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement; and (d) an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act 26 of 2000), on account of the employee having made a protected disclosure defined in that Act. The objective of the Protected Disclosures Act is *inter alia* to protect an employee, whether in the private or public sector from being subjected to an occupational detriment on account of having made a protected disclosure.<sup>481</sup> Essentially a black African woman who is subjected to an occupational detriment on account of having made a protected disclosure would find protection in terms of the Protected Disclosures Act and section 186(2) of the LRA.

Essentially section 185 and section 186 of the LRA protect employees not to be unfairly dismissed and subjected to unfair Labour practice. As such, it is not everyone who will be able to seek protection in terms of section 185 and section 186 of the LRA. In the premise, black African women who are defined as 'employees' would be eligible to invoke the provisions of sections 185 and 186 of the LRA when unfairly dismissed and subjected to unfair labour practice. It is submitted that the failure to proliferate of black African women into managerial positions falls within the ambit of unfair labour practices as defined in section 186 of the LRA.

Contrary to the fair labour practice entrenched under section 23 of the Constitution, the right to fair labour practice under the LRA distinctively provides that employees may not be unfairly dismissed and subjected to unfair labour practice. As such, section 185 and 186 of the LRA does not apply to everyone. In the case of *the National Union of Metal Workers of SA v Vetsak Co-operative Limited and others*,<sup>482</sup> the court stated that the

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<sup>481</sup> Section 2 Protected Disclosures Act, 2000 (Act No. 26 of 2000).

<sup>482</sup> *National Union of Metal Workers of SA v Vetsak Co-operative Limited and others* (4) SA 577 (SCA).

establishment of an unfair labour practice requires that both employer and employee be treated fairly. In other words, there must not be any bias favouring either of the parties.<sup>483</sup> Essentially, black African women who are not “employees” in the private sector may not be able to use the provision of section 185 and 186 of the LRA to seek protection from unfair dismissals and unfair labour practices.

This view is also supported by *Kylie v CCMA*, where the court found that the appellant was not an employee and therefore could only seek legal recourse in terms of section 23 of the Constitution. *Kylie* was employed as a sex worker in a massage parlour where she rendered sexual services for remuneration or reward. During April 2006, her employment was terminated without a prior hearing. The matter was heard at CCMA however the CCMA found that it lacked jurisdiction because the nature of employment which was found to be unlawful. It is against this ruling that the matter was sent on review at the labour court. At the labour court, it was decided that section 213 of the LRA provided a broader definition of employee which arguably include parties whose contract of employment cannot be enforced in terms of the common law.<sup>484</sup> The Labour Court, however, concluded that *kylie* was not covered under section 185(a) of the LRA and therefore did not have protection against unfair dismissals. The court reasoned that protecting *kylie* in terms of section 185(a) of the LRA would be at odds with a common law principle that courts “ought not to sanction or encourage illegal activity”.<sup>485</sup> The Labour Appeal Court concluded that sex workers, irrespective of the illegality of their work, are entitled to the constitutional protection of their right to dignity and a right to fair labour practices in terms of section 23 of the Constitution.

It is common in most workplaces that employers enjoy various discretionary powers in terms of their policies and rules. The Labour Court in the case of *Pretorius v G4S Secure Solutions (SA) (Pty) Ltd and Others* expressed that section 186(2)(a) of the LRA regulates the employer’s discretionary powers and imposes a duty of fairness notwithstanding that such duty is found expressly or implicitly in the contract of employment that establishes

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<sup>483</sup> *National Union of Metal Workers of SA v Vetsak Co-operative Limited and others* SA (4) 577 (SCA) at paragraph 8-9 996.

<sup>484</sup> *Kylie v Commission for Conciliation Mediation and Arbitration and Others* 2010 (4) SA 383 (LAC) at paragraph 3.

<sup>485</sup> *Ibid.*

the benefit.<sup>486</sup> Essentially section 186(2)(a) of the LRA was introduced primarily to monitor the discretion accorded to employers in consideration of employee benefits.<sup>487</sup> It is submitted that the private sector in South Africa has taken advantage of these discretionary powers conferred in terms of section 186 (2) of the LRA. It is argued that discretionary powers in terms of section 186(2) of the LRA are the fundamental factor that results in black African women not being appointed at managerial positions. To achieve their representations at the higher echelons in the private sector, the employer's discretionary powers need to be limited and be compelled, through affirmative action, to ensure that black African women as a previously disadvantaged group are represented at all levels in the workplace. By so doing the discretionary powers would still be left to the employers, however, in exercising such discretion employers would be compelled to consider affirmative action that seeks to ensure *inter alia* that black African women are escalated to managerial positions. Primarily, it is submitted that enactment of legislation that puts targets and quotas in managerial positions would be most effective in regulating the discretionary powers in section 186(2) of the LRA. It is so because the private sector employer would exercise discretion whilst be guided by the targets and quotas in existing legislation.

Discretionary targets or numerical goals in South Africa have not effectively resulted in black African women being appointed at managerial positions. Similar to Norway when the voluntary gender quotas were set at 40 per cent in 2003, companies failed to comply until it was mandatory in 2006 while already publicly listed companies had two years to comply with the gender quota law.<sup>488</sup> To ensure that the quota law is effective, the Norway law provides that the failure to comply with the gender quotas may result in the dissolution of a company.

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<sup>486</sup> *Pretorius v G4S Secure Solutions (SA) (Pty) Ltd and Others* (JR2498/13) [2015] ZALCJHB 414 (24 November 2015).

<sup>487</sup> *Ibid.*

<sup>488</sup> Gidlund A and Lund T, *The Norwegian Gender Quota Law and its Effects on Corporate Boards*, page 5, 2017, available at <http://www.divaportal.org/smash/get/diva2:1119270/FULLTEXT01.pdf> accessed on 23 March 2018.

3.4.3 Promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee

Section 186(2) of the LRA recognises unfair labour practice as *inter alia* any unfair act or omission that arises between an employer and an employee involving unfair conduct by the employer relating to promotion, demotion, and probation (excluding disputes about dismissals for a reason relating to probation). This section discusses the concepts of promotion and demotion and determines how they can be used to escalate black African women in the private sector to managerial positions.

#### 3.4.3.1 The right of black African women to promotion in the workplace

In the case of *Mashegoane and another v University of the North*,<sup>489</sup> the court recognised that a promotion to a position is significant in that it elevates an employee to a higher level with additional responsibilities.<sup>490</sup> Essentially, promotion to a higher-level position is not a token position and that such a position has greater authority. Promotion in the workplace is fundamental to enhance black African women into managerial positions in the private sector. The cardinal question is whether a black African woman in the private sector who has already been employed by a company or years' of working experience in the position just below the advertised position has a right for a promotion or to be preferred above any other candidates.? To answer this fundamental question, it is critical to first understand the concept of promotion and its application in the workplace and should also consider historical denial and segregation of black women in the workplace.

McGregor *et al* postulate that promotion falls within the managerial prerogative.<sup>491</sup> As such it is within the discretion of the employer to promote an employee. McGregor *et al* argue that employees are not conferred with the right to promotion, however, in some instances, it demonstrates that an employee had a reasonable expectation regarding

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<sup>489</sup> *Mashegoane and another v University of the North* (1998) 1 BLLR 73 (LC).

<sup>490</sup> *ibid.*

<sup>491</sup> McGregor M, 'Labour Law Rules!', Siber Ink page 78, 2012.



promotion.<sup>492</sup> To avoid unfair labour practice, the employer has to conduct and follow a fair process when promoting or choosing not to promote an employee. The employer's failure to conduct such a process would constitute an unfair labour practice in terms of the LRA.<sup>493</sup> The employer needs to be both procedurally and substantively fair when promoting an employee.<sup>494</sup> Substantive fairness challenges employers to abide by the law and rules when promoting an employee and the procedural fairness provides for the standards and criteria for preferring one employee over another for promotion. It is settled that in the private sector there are no uniform criteria for employers to use to determine the promotion of an employee. The establishment of these criteria is solely at the discretion of the employer. It is however expected that such criteria must promote fair labour practices in the workplace. It is submitted that such a criterion, in the advancement of black African women, must take into consideration the principles of equality and equity in the workplace. Apart from experience and educational background, the criterion should also consider the historical apartheid denial and segregation of black women in the workplace.

The challenge with the discretion of the employer in the private sector is that the employers have the discretion to determine its criteria and that criterion may not necessarily take into consideration the achievement of equity particularly the need to have black African women into managerial positions. The discretion conferred on employers in the private sector on promotions often lacks monitoring and evaluation and it contributes to the non-compliance with domestic laws, regional and international instruments that ensure equality and advancement of women in the workplace. It is submitted that an employer that has patriarchal attitudes that sees women as inferior beings to males is unlikely to promote a black African woman into a managerial position. The centrality of the promotion of black African women necessitates the creation and development of favourable working conditions for women in managerial positions. As such, an employer

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<sup>492</sup> *Ibid.*

<sup>493</sup> Section 186(2)(a) of the Labour Relations Act 66 of 1995, protects employees against unfair employer conduct in respect of promotion.

<sup>494</sup> Odeku K, Employee's Perception of Fairness of Advancement: Implications for Fair Labour Practices, *Mediterranean Journal of Social Science*, Vol 13, page 869, November 2013.

in the private sector who is not conscious about South Africa's international obligations under CEDAW, SADC protocol and the EEA is unlikely to develop a promotional criterion that advances women in the workplace into managerial positions.

#### 3.4.3.2 The right of black African women to substantive fairness in the workplace

To be satisfied that the employer's decision is substantively fair, the employer must advance the reasons for promoting an employee. If a justifiable explanation exists, the court is unlikely to interfere with an employer's substantive decision to promote certain employees. As such the courts have accepted that there is a justifiable element of subjectively or discretion applied by the employer to promote an individual.<sup>495</sup> It is expected that the employer must demonstrate that its decision was based on the correct principle and that the promotion of the employee is based on an employee's suitability for the position. According to Odeku, there must be a link between a reason and the decision of the employer to justify the promotion of an employee failing which is likely that the employer's conduct constitutes unfair labour practices.<sup>496</sup>

Numerous factors may be considered to determine the promotion of one employee over the other. These factors generally include possession of the necessary qualification, competence, prior learning, training and development, experience and performance at an interview and so on. One of the substantive reasons that may be acceptable for the deviation of considering these are the affirmative action measures. It is vital to accentuate that affirmative action predominately applies to "designated employers" as defined in the EEA. The EEA defines designated employers as employers with 50 or more workers or whose annual income is more than the amount specified in schedule 4 of the EEA. The EEA makes it mandatory in terms of section 15, for designated employers to implement affirmative action measures to achieve equitable representation of designated groups. To achieve this, a designated employer is required to conduct a consultation with employees, conduct an analysis of issues identified during consultation with employees, develop an

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<sup>495</sup> *Ncane v Lyster No and others*, 2017 38 ILJ 907 at paragraph 25.

<sup>496</sup> Odeku K, Employee's Perception of Fairness of Advancement: Implications for Fair Labour Practices, *Mediterranean Journal of Social Science*, Vol 13, page 871, November 2013.

employment equity plan that outlines steps to be taken by the employer to achieve equitable representation at all occupational levels in the workplace and report to the Director-General on progress made in the implementation of the employment equity plan.

The EEA states that such measures must identify and remove barriers that negatively impact on designated groups, develop measures to promote diversity, make reasonable accommodation for people from designated groups.<sup>497</sup> The EEA states that affirmative action measures must apply to employers who volunteer to comply. Despite section 15 of the EEA, Bezuidenhout *et al* argue that the private sector budgets for fines that may be imposed by the Department of Labour for failing to comply with the affirmative action measures.<sup>498</sup> These fines have minimal impact on the private sector employers due to massive profits generally made.<sup>499</sup> This argument highlights a deliberate intention of the private sector not to comply with affirmative action measures, as such, it is conceivable that higher fines that are proportional to the annual turnover of the companies need to be imposed to compel the private sector, alternatively, disqualification of directors who fail to meet gender quotas should be included in terms of section 69(8) of the Companies Act 71 of 2008.

It is conceivable that through affirmative action measures designated private sector employers must consider the promotion of black African women into managerial positions to achieve equity and diversity in the workplace. Fundamentally, affirmative action by its very nature seeks to channel the discretion of designated employers during the promotion. Careful consideration of the necessary qualification, competence, prior learning, training and development, experience, performance at an interview and affirmative action should be the necessary tools to motivate for the promotion of black African women in the private sector. The achievement of the qualification, competence, training, development and experience needs a concerted effort from both employees and employers. It is submitted that the private sector employers should essentially invest in

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<sup>497</sup> Section 15(2) of the EEA.

<sup>498</sup> Bezuidenhout A *et al*, Tracking Progress on the implementation and impact of the employment Equity Act since inception, page 25 March 2008 available at [www.labour.gov.za](http://www.labour.gov.za) accessed on 31 March 2018.

<sup>499</sup> *Ibid*.

the training, development of black African women and confer the necessary skills to ensure their eligibility to managerial positions.

By so doing, the private sector would be conscious of the fundamental historical background that resulted in black African women suffering from triple oppression in terms of gender, race and class. As such innovative measures such as training, and mentoring must be adopted to ensure that black African women are eligible for promotion in the workplace. It is, however, a challenge to impose in South Africa affirmative action to employers in the private sector who are not designated employers unless such an employer voluntarily chooses to comply with the EEA. In such cases where employers are not compelled to implement affirmative action measures, black African women are unlikely to be promoted to managerial positions due to an even wider discretion to the employers to run their business in a manner that satisfies them. To ensure that women are considered widely within the spectrum of employment in South Africa, monitoring and evaluation, the progression of women in general into managerial positions should be considered and made mandatory to all employers.

It is submitted that although non-designated employers<sup>500</sup> are not compelled to implement affirmative action measures, they are however compelled to promote the principles of equality and non-discrimination in the workplace. As such it is argued that the non-designated private sector employers also have a constitutional obligation to ensure that black African women are not discriminated in the workplace. It is conceivable that any practice in the non-designated employer's workplace that seeks to solely ensure that black African women are not promoted is likely not to pass the constitutional test. It was in *S v Makwanyane* that:

“Section 36(1) of the Constitution sets out the criteria for the limitation of rights. The limitation must be by means of a law of general application and

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<sup>500</sup> The EEA defines a designated employer as an employer who employs 50 or more employees, or an employer who employs fewer than 50 employees, but has a total annual turnover as reflected in Schedule 4 of the EEA. Accordingly, a non-designated employer is an employer who employs less than 50 employees or has a total annual turnover less than the amounts reflected in Schedule 4 of the EEA.

determining what is fair and reasonable is an exercise in proportionality, involving the weighing up of various factors in a balancing exercise to determine whether or not the limitation is reasonable and justifiable in an open and democratic society founded on human dignity, equality and freedom.”<sup>501</sup>

The Constitutional test enunciated in section 36 of the Constitution requires any person, including the private sector employers, to prove that the limitations of black African women’s rights to be treated equally are reasonable and justifiable. It is submitted that any conduct that deprives black African women of rights in the workplace based on their gender and race violates the right to equality and it may be perceived to be unreasonable and not justifiable in terms of section 36 of the Constitution. This is against backdrop understanding that there is no right to a promotion or appointment to a position in the workplace. However, it is argued that restrictions to enjoy the promotional benefits in the private sector are based on the prohibited grounds of unfair discrimination highlighted in section 9 of the Constitution and this includes *inter alia*, race and gender. To this end, when an employer states that they do not want to promote black African women to a managerial position in the private sector based on their gender and race arguably violates section 9 of the Constitution

It is settled practise in South Africa that aggrieved black African women may bring a claim of unfair labour practice before the Commission for Conciliation Mediation and Arbitration(CCMA) and prove that in the selection process for promotion, the employer did not apply its minds when exercising its discretion, the employer’s reasons are unsubstantiated and further, the decision is based on an incorrect principle, or there was biasness when the decision was taken. According to Balton an employee that succeeds in proving that the conduct of the employer was unfair, the employee still has to a duty to proof on a balance of probabilities that he/she was the suitable candidate for the job in

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<sup>501</sup> *S v Makwanyane and Another* 1995 (6) BCLR 665 (CC); 1995 (3) SA 3921 (CC) paragraph 102 .

consideration of academic qualification, working experience, ability and competence.<sup>502</sup> To successfully prove this, the employee will have to compare with the successful candidate and demonstrate that he/she possess more academic qualification, working experiences and applicable training.<sup>503</sup>

As such, black African women in the private sector who are overlooked for promotions must essentially demonstrate that the employer's decision to hire another person was unfair and employer's actions were frivolous or arbitrary and further demonstrate they merit a promotion. A failure to demonstrate this will result in the employer not being found guilty of unfair labour practice.

In *NUMSA on behalf of Cook v Delta Motor Corporation*<sup>504</sup>, the employee, Ms Cook, has been employed by the employer for 18 years. Ms Cook worked in the fleet section for 10 years. During this period, she has acted as the section co-ordinator although not officially. In May 2000 this position was advertised and was put on the notice board. The employee was unsuccessful after applying for the position. She was not shortlisted for the interviews. The vacancy was filled by Mr Jo Walters. It was argued that Ms Cook did not have the necessary tertiary qualifications and managerial experience as such she was not shortlisted -listed.

The company acknowledged that Ms Cook had some supervisory experience but not three years or more which is what was expected to the advertised post. As such the company Management felt that they already knew everything about Ms Cook, therefore there was no need to call her for an interview. The arbitrator established that different standards were applied in the shortlisting process, leading to one employee being given the opportunity for an interview and another not. As such, by not applying the same standard the employer deprived other employees of an opportunity to apply.

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<sup>502</sup> Balton SR, An analysis of promotions and unfair discrimination in applications for employment/appointments within the ambit of the labour laws of South Africa University of Kwazulu Natal, page 22, 2003.

<sup>503</sup> *Ndlovu v Commission for Conciliation, Mediation and Arbitration and others* (2000) 21 ILJ 1653 (LC).

<sup>504</sup> *NUMSA on behalf of Cook v Delta Motor Corporation* (2000) 9 CCMA 6.9.6 EC 20404.

It is observed that the matter is largely that Ms Cook was not allowed to contest for the position. It is from this basis that the arbitrator ordered the employer to start the recruitment process for the position afresh by providing all an equal opportunity to all candidates. The key lessons from this case are that employers must apply uniform and consistent standards in the shortlisting processes, failure to do so results in employees being denied an opportunity to be shortlisted and demonstrate their performance at the interviews. Balton posits that the failure to consider an employee whose qualifications and experience exceed those of an appointed candidate is likely to constitute an unfair labour practice.<sup>505</sup>

#### 3.4.3.3 The right to procedural fairness

It is of paramount importance that the employer conducts a fair promotion procedure when promoting or choosing not to promote an employee. The procedural fairness in the context of promotions means that, where there are company policies, collective agreements and a statute that entails the procedures for promoting an employee, an employer has to follow and comply with such procedures when promoting an employee.<sup>506</sup> If the employer failed to comply with the adopted procedure, as a general rule it is expected that a new procedure must then be followed. This means that the whole process regarding selection and evaluation must start afresh.<sup>507</sup>

In *PSA obo Bruwer v Department of Justice*,<sup>508</sup> the applicant had the required formal qualification and was considered promotable. The vacancy was advertised twice, and the applicant was not appointed. The vacancy was temporarily filled by a person who did not possess the formal qualification required. The employer, in this case, failed to provide the

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<sup>505</sup> Balton SR, An analysis of promotions and unfair discrimination in applications for employment/appointments within the ambit of the labour laws of south Africa, University of KwaZulu Natal, page 23,2003.

<sup>506</sup> Balton SR, *ibid*.

<sup>507</sup> Balton SR, *ibid*,page 201.

<sup>508</sup> *PSA obo Bruwer v Department of Justice (WE16272) commissioner: Galant*.available at <http://www.workinfo.com/free/Downloads/10.htm> accessed on the 13 February 2019.

substantiated reasons for its decision hence the commissioner ruled in favour of the applicant and held that the conduct of the employer constituted unfair labour practice on the ground that the employer did not adhere to its criteria for the appointment, the employer also did not comply with its processes of developing a contract of appointment, and did not provide reasons for administrative action.

Where irregularities in the procedure existed, the employer has to remedy such irregularities by conducting a fresh procedure. This includes advertising the position again or providing candidates with an interview that was initially declined.<sup>509</sup> It is critical to state that if an employee opines that the selection panel is not competent, such an employee is allowed to challenge the competency of a selection panel and/or its composition.<sup>510</sup> An employee who challenges the composition and /or the competency of the selection panel must take cognizance of the fact that it is not required that members of the selection panel must have academic qualifications for them to form part of such a panel. The aspect of great importance is whether the selection panel has applied its mind during the selection process, if not, then the employee has a good ground to challenge the competency of the selection panel and/or its composition.

In the case of *Van Rensburg v Northern Cape Provincial Administration*<sup>511</sup> it was stated that

“once the panelist complies with the requirements for the performance of an administrative act *ratione persone*, there cannot be a legal objection to his or her sitting on such a panel. All that is required is that the persons on the panel should be in a position to make a reasonably informed decision, in other words, that they should be reasonably knowledgeable”.<sup>512</sup>

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<sup>509</sup> PSA obo Bruwer v Department of Justice (WE16272) commissioner: Galant. Available at <http://www.workinfo.com/free/Downloads/10.htm> accessed on the 13 February 2019.

<sup>510</sup> *Ibid.*

<sup>511</sup> *Van Rensburg v Northern Cape Provincial Administration* 1997 18 ILJ 1421 (CCMA).

<sup>512</sup> *Van Rensburg v Northern Cape Provincial Administration* 1997 18 ILJ 1421 (CCMA) at paragraph 1423B –E.



According to the CGE interview panellists must have a representation of women. The CGE argued that an interview panel in the private sector of only males is likely to be biased towards males and not consider the female candidates.<sup>513</sup> This argument is persuasive particularly with the dominance of the males in the private sector. As such it is critical for the recruitment policies to make it mandatory for the interview panel to be gender balanced. Although the CGE has not advanced evidence to suggest that this mechanism is likely to minimise the biasness in the interview session, it is conceivable that the assertion was based on the potential influence that female panellists may have of male panellists, particularly to ensure that male panellists understand the challenges faced by women, both in society and in the workplace.

Webb encourages diversity during interviews and argues that women are likely to join a company when they can interact with women who are already there and can attest to a company's commitment to diversity.<sup>514</sup> Although Webb argues that the presence of a female in the interview has the effect of influencing female candidates to accept the job offered by the employer,<sup>515</sup> conversely, gender biases contribute to the barriers that hinder the progression of women in the workplace. Moss Racusin *et al* assert that there are gender biases in interviews and postulates that male and female interviews often judge a female candidate as incompetent compared to the male candidate with similar backgrounds.<sup>516</sup> To this end, it is argued that the diversity of the panel in an interview has the effect of minimising gender biases against black African women who apply for managerial positions.

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<sup>513</sup> CGE, Employment Equity hearings in the private sector, page 68, 2016/2017.

<sup>514</sup> Webb M, How to Alter your hiring practices to increase diversity, 29 October 2017, Forbes available at <https://www.forbes.com/sites/maynardwebb/2017/10/29/how-to-alter-your-hiring-practices-to-increase-diversity/#50114eb22029> accessed on 21 March 2019.

<sup>515</sup> *Ibid.*

<sup>516</sup> Moss Racusin C, Dovidio J, Brescoll V, Graham M, Handelsman J, Science faculty's subtle gender biases favour male students, Proceedings of the National Academy of sciences of the United States of America, 109 (41) at page 16474, October 2012.

#### 3.4.3.4 The concept of demotion

The concept of demotion in South Africa was explored by the Industrial Court in 1992 in the case of *Ndlela v SA Stevedores Ltd* where it was held that the ordinary meaning of the concept “demotion” is to appoint an employee to a lower position or level.<sup>517</sup> In 2017 the Labour Court in the case of *Mangcu v City of Johannesburg* categorised demotion as the converse of promotion and essentially meant a cutback of duties, remuneration and status.<sup>518</sup> In *Mangcu*, the applicant was employed by the Johannesburg Tourism Company (JTC) as a general manager: tourism development. In 2012 the applicant was hired as the acting chief executive officer of the JTC. The applicant was charged with various acts of misconduct which charges relate to a contravention of the supply chain management during her tenure as the acting chief executive officer.

At arbitration, it was found that the applicant was guilty of all charges and her conduct constituted gross negligence which was akin to gross dereliction of her duties as the acting chief executive officer of JTC.<sup>519</sup> The arbitrator recommended that the applicant be demoted, as such the applicant was demoted to the position of a deputy director. The applicant argued that the arbitration award stated that she must be demoted but the arbitration award did not state anything on the reduction of her salary. However, the court was not persuaded by this argument and established that demotion to the rank of deputy director meant that the applicant will perform the duties associated with the said rank and will be remunerated according to the salary band applicable to deputy directors. The *Mangcu* case demonstrates that when a person is demoted to a lower position, the demoted employee would be remunerated the salary scale that applies to the demoted position.

In the case of *Smith v Darby*, it was expressed that a demotion of a professional employee is removed from one position and an appointment to a lower position; it is a reduction in a type of position as compared with the other professional employees having the same

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<sup>517</sup> *Ndlela v SA Stevedores Ltd* (1992) 13 ILJ 663 (IC).

<sup>518</sup> *Mangcu v City of Johannesburg* [2017] 10 BLLR 1055 (LC) at paragraph 31.

<sup>519</sup> *Mangcu v City of Johannesburg* [2017] 10 BLLR 1055 (LC) at paragraph 16.

status.<sup>520</sup> Grogan posits that an employee is deemed to be demoted if the terms of employment have resulted in the material reduction of the remuneration, responsibility or status of the employee in the workplace.<sup>521</sup> The test of demotion was clearly outlined in the matter of the *Minister of Justice v Bosch*<sup>522</sup>(*Bosch*). In *Bosch* case, the employee was employed as a Senior Administrative Clerk and was appointed to the relief component at the Randburg Magistrates' court in 1995. The appointment to the relief component did not alter his rank.<sup>523</sup>

The relief component was established to ease other staff and the functions related to the roles and responsibilities of an Acting Magistrate, State prosecutor and an interpreter. In terms of this, the Randburg Chief Magistrate decided where the relief component would be stationed and perform duties per the identified nature of the relief function.<sup>524</sup> On the 31<sup>st</sup> January 2000, the employee was informed that he was "relinquished of all functions of a judicial officer with immediate effect".<sup>525</sup> The employee argued the decision to relinquish him of all responsibilities of a judicial officer amount to demotion and unfair labour practice.

The court in *Bosch* emphasized that the determination of whether the employee was demoted should be informed by firstly understanding if the employee had specific responsibilities or benefits that have been taken away by the employer. In *Bosch*, the court stated that the directive that an employee was to be relieved of all responsibilities of a judicial officer, for it to amount to a demotion, it must be determined "whether the employee was either a judicial officer or at least enjoyed the right to be temporarily appointed as a judicial officer".<sup>526</sup> The court held that the directive to relinquish the

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<sup>520</sup> *Smith v Darby School District*, 388 Pa.301 (1957) (Supreme Court of Pennsylvania) .

<sup>521</sup> Grogan J, *Dismissal, Discrimination, and Unfair Labour Practices*, second edition, page 60,2007.

<sup>522</sup> *Minister of Justice and Another v Bosch NO and Others (J1099/01) [2005] ZALC 95 (20 October 2005)*

<sup>523</sup> *Minister of Justice and Another v Bosch NO and Others (J1099/01) [2005] ZALC 95 (20 October 2005)*, paragraph 6.

<sup>524</sup> *Minister of Justice and Another v Bosch NO and Others (J1099/01) [2005] ZALC 95 (20 October 2005)*, paragraph 6.

<sup>525</sup> *Minister of Justice and Another v Bosch NO and Others (J1099/01) [2005] ZALC 95 (20 October 2005)*, paragraph 11.

<sup>526</sup> *Minister of Justice and Another v Bosch NO and Others (J1099/01) [2005] ZALC 95 (20 October 2005)* paragraph 22.

employee of the responsibilities of a judicial officer did not amount to a demotion. The court reasoned that the directive did not result in devaluing the employee's status because the employee in question was not a judicial officer, nor did he have the qualifications. The court emphasised that the "employee's appointment to the relief staff did not vest him with the status of a judicial officer nor an entitlement as of right to perform the functions of a judicial officer".<sup>527</sup> It is deduced from the *Bosch* case that a demotion applies to a position which an employee was appointed for, to the extent that if so demoted, it would diminish the employee's status.

It is trite that demotion takes place generally in three instances, firstly if the employer is on the process of embarking on retrenchments, then demotion can be an alternative to retrenchment. It is critical that when an employer embarks on the retrenchment process, to ensure that there is substantive and procedural fairness.<sup>528</sup> The court reaffirmed in the case of *Jansen van Rensburg v Super Group Trading (Pty) Limited* that the burden of proof lies with the employer to demonstrate that a dismissal for operational reasons is substantively and procedurally fair. Substantive fairness must be based on various needs and this includes economic, technological and structural.<sup>529</sup> Equally in the private sector employers who retrenches black African women without exploring demotion may be found to have committed unfair labour practices, particularly if the reasons for retrenchment are not sound, fair and justifiable.

The second one is that demotion can place as a disciplinary measure, particularly in circumstances where dismissal is justified, and the employer decides not to dismiss the employee.<sup>530</sup> This is evident from the *Mangcu* case where the employee was demoted to a deputy director position after being found that her conduct constituted gross negligence which was akin to gross dereliction of her duties as the acting chief executive officer of JTC. Thirdly demotion may take place where the employee fails to meet the job

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<sup>527</sup> *Minister of Justice and Another v Bosch NO and Others (J1099/01) [2005] ZALC 95 (20 October 2005)* at paragraph 23.

<sup>528</sup> Termination of the employment contract for operational requirements provided for in terms Section 189 of the LRA, as amended.

<sup>529</sup> *Janse van Rensburg v Super Group Trading (Pty) Limited [2009] 3 BLLR 201 (LC)* at paragraph 34.

<sup>530</sup> *Van Niekerk v Medicross Health Care Group (Pty) Ltd [1998] 8 BALR 1038 (CCMA)*.

requirements, in such instances the employer would be justified to consider demotion.<sup>531</sup> This is evident from the *Bosch* case where the court found that the employee did not meet the qualifications of the judicial officer and therefore was not deemed to have been demoted.

Grogan contends that employees who are temporarily acting in senior positions are generally deemed demoted if they are relegated to their original positions.<sup>532</sup> Given Grogan's argument, it is plausible that in the private sector a black African woman who is temporarily employed in a managerial position and subsequently relegated to her original position cannot succeed with an unfair dismissal on the grounds of demotion. It is however submitted that demotion on arbitrary grounds, particularly on the grounds race, gender and sex constitute an unfair labour practice. The problem with the private sector generally is that it does not afford black African women opportunities to act in higher positions to confer them with managerial skills and if appointed to act in managerial positions, when such positions are advertised, female candidates are still overlooked notwithstanding their qualifications and managerial experience.<sup>533</sup>

Davis asserts that window-dressing is still prevalent in the workplace where females, are promoted to higher positions however accorded with no power to take decisions.<sup>534</sup> Vokwana agrees with this view and points out that generally, black women are hired in managerial positions without being provided with decision making powers.<sup>535</sup> This amounts to window-dressing because of the barriers that hinder the progression of women in leadership levels. It is submitted that the transformation in the private sector must be beyond "faces and numbers game", there must be a change in institutional culture that encompasses ideologies that influences, attitudes and perceptions about women in the workplace.

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<sup>531</sup> *Minister of Justice and Another v Bosch NO and Others (J1099/01) [2005] ZALC 95 (20 October 2005).*

<sup>532</sup> Grogan J, *Dismissal, Discrimination, and Unfair Labour Practices*, second edition, page 60, 2007.

<sup>533</sup> *Chowan v Associated Motor Holdings (Pty) Ltd and Others (2018) 39 ILJ 1523 (GJ).*

<sup>534</sup> Davis S, *Gender equality in the workplace*, 10 May 2015, available at [https://sharondavis.co.za/index2.php?option=com\\_content&do\\_pdf=1&id=38](https://sharondavis.co.za/index2.php?option=com_content&do_pdf=1&id=38) accessed on 24 March 2019

<sup>535</sup> Vokwana T, *Hear Our Voices: Race, Gender and the Status of Black South African Women in the Academy*. Feminist Africa Issue 4. 2005: Women Mobilised.

### 3.5 The right to form and join a trade union

The right to form and join a trade union enjoys international recognition and protection. The UDHR stipulates that "everyone has the right to form and to join trade unions for the protection of his interests".<sup>536</sup> The right to form and to join a trade union is also recognised under the International Covenant on Economic, Social and Cultural Rights of 1966 (ICESCR). The ICESCR stipulates that "the right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests." Article 8 of the ICESCR prescribes that no restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others.

The ILO also protects the right of workers to form and to join trade unions through Convention no. 87 on Freedom of Association and Protection of the Right to Organize, adopted in 1948 (Convention 87), and the Convention 98 on the Right to Organize and Collective Bargaining adopted in 1949 (Convention 98). Convention 87 stipulates that:

"workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation."<sup>537</sup>

The Convention further states that "workers' and employers" organisations shall have the right to establish and join federations and confederations and any such organisation, federation or confederation shall have the right to affiliate with international organisations of workers and employers<sup>538</sup> Similarly Convention 98 provides for the protection of workers against all acts of discrimination that might bring into question the exercise of

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<sup>536</sup> Article 23 paragraph 4 of the UDHR.

<sup>537</sup> Article 2 of the Convention 87.

<sup>538</sup> Article 5 of the Convention 87.

trade union freedoms. Particularly Convention 98 states that workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment. Such protection shall apply more particularly in respect of acts calculated to (a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership; (b) cause the dismissal of or otherwise prejudice a worker because of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours.

Essentially Convention 87 and 98 provides international protection of trade union freedoms in general.<sup>539</sup> Majhoshev and Velinovska observe that the right to assembly and organization serves as significant international labour standards and principles of employment.<sup>540</sup> Majhoshev and Velinovska posit that the right to form and join unions aims to protect and promote the rights of union members that ascend from employment.<sup>541</sup>

International instruments must make references to workers. It is accepted that the word “workers” refers to any person who renders services to an employer for remuneration. As such, males and females’ workers are included and therefore irrespective of their genders are entitled to form and join trade unions. In South Africa, the right to form a trade union finds its recognition and protection under section 23 of the Constitution. Section 23 of the Constitution provides that everyone has the right to fair labour practices and that workers have the right to form and join trade unions and go on strike. Similarly, section 23 provides employers with the right to form and join employers’ organizations. The importance of section 23 of the Constitution is that it provides women, as workers, with a tool to form trade unions to protect and promote the rights of women that arise from employment. Essentially, the paucity of black Africans in managerial positions can be addressed

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<sup>539</sup> Majhoshev A and Velinovska KK, The right to form and to join trade unions as defined in international legal instruments, *Journal of Process Management – New Technologies*, International Vol. 5, No 3, page 83,2017.

<sup>540</sup> *Ibid.*

<sup>541</sup> *Ibid.*

through the political will of trade unions that specifically have an interest in changing the overrepresentation of white males at managerial positions in the private sector.

### 3.5.1 The role of trade unions in South Africa to advance women empowerment in the private sector

The South African Trade Unions have a crucial role to ensure full participation of women equally in the South African labour market. According to Statistics South Africa, in 2011 most members of trade unions were women during 2011.<sup>542</sup> This is unsurprising particularly because post-1994 inequalities and discrimination experienced by women persist. The majority membership of women in Unions reflects the women's desire to participate equally in the South African labour market without having to face gender barriers or glass ceilings.

The South African trade unions are however unable to address the paucity of black African women in managerial positions in South Africa particularly because the unions themselves are largely male-dominated in leadership positions as such they fail to address issues concerning women in the workplace. The Congress of South African Trade Unions (COSATU) is one of the trade union federations in South Africa founded in 1985 and its leadership levels are dominated by males.<sup>543</sup> COSATU posits that many leaders understand the fundamental principle around the need to achieve gender equality in South Africa however they fail to implement such principles and hold patriarchal and stereotype views about women.<sup>544</sup> As such the most leaders in Trade unions hold patriarchal and sexist views about women and this is reflecting in their conduct that does not reflect their intention to address male dominance in unions, public sector and private sector.<sup>545</sup> In 2018, COSATU made a progressive step of appointing its first black African

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<sup>542</sup> Statistics South Africa, Gender Statistics in South Africa, page 46, 2011.

<sup>543</sup> COSATU, Gender, politics and trade unions, page 8, available at <http://www.cosatu.org.za/docs/policy/2016/Gender-Politics-and-Trade-Unions.pdf> accessed on 30 November 2018.

<sup>544</sup> *Ibid.*

<sup>545</sup> *Ibid.*



woman president Zingiswa Losi. The uncontested election of Zingiswa Losi is a positive indicator that women are capable and equally have confidence in women's leadership. It is envisaged that as a female president of the largest Federation in South Africa Zingiswa Losi would be positioned to address the needs and interests of workers, particularly women in the workplace.

In South Africa, trade unions have successfully advanced the needs and rights of workers particularly rights entrenched in the BCEA. Post-1994 increase of wages for workers and decent working environments have been the priority of most unions in South Africa. Essentially unions in South Africa have influenced and improved both job security and pay levels in the labour force. South African unions have not taken the opportunity of their collective bargaining powers to advance the disparity of black African women in managerial positions in the private sector.

It is generally accepted that unions have their interest on all its members on a non-sexist basis, however the failure to strategically address the paucity of black African women in managerial positions in South Africa reflects the lack of will to address this phenomenon. The protests and strike action by unions are seldom about women empowerment and their advancement to managerial positions both in the public and the private sector. It is thus submitted that the lack of political will of unions to address women underrepresentation is a fundamental contributor to the exclusion of women to participate fully in the South African market at the higher echelons.

Horwitz *et al* observed that there are minimal consultations with the unions when it comes to racial and gender representation in the workplace notwithstanding section 16 of the EEA requiring reasonable steps to consult and reach an agreement with unions by employers.<sup>546</sup> It is evident that women's emancipation in the workplace is largely not an integral part of unions and employers and as such, there is a lack of conscious effort to advance gender issues in the workplace. The South African trade unions are failing to change their organisational culture that is generally patriarchal. It is submitted that unions

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<sup>546</sup> Horwitz F, Jain H and Mbabane L, Trade unions consultation by employers under employment equity legislation, South African Journal of Labour Relations, Vol. 29 No. 2-4, page 4-31, 2005.

that lack gender mainstreaming are unlikely to pursue women's emancipation in the workplace. Essentially the progression of women in management without complimentary organisational change of culture and practices results in women being included in untransformed structures.<sup>547</sup> This poses a challenge for women who are appointed at managerial positions who ultimately opt to resign from such positions due to a lack of inclusivity of women's needs and interests. It is submitted that gender mainstreaming must first be fostered in unions in which its leaders and members will examine how patriarchy in the workplace is constructed and perpetuated. Such an examination would influence the unions to pursue a change of patriarchal structures and enhancement of black African women in managerial positions in the private sector.

### **3.6 The right to maternity leave**

The right to maternal leave enjoys international recognition and protection. The Maternity Protection Convention, 2000 (MPC 2000) was adopted on the 15<sup>th</sup> June 2000 and recognises the need to promote equality of all women in the workplace and health and safety of the mother and child. Article 4 of MPC 2000 provides a female employee is entitled to a period of maternity leave of not less than 14 weeks. However, Maternity Protection Recommendation 2000, (No 191), (MPR No 191) states that member states should endeavour to extend maternity leave to at least 18 weeks. Article 6 of MPC 2000 states that cash benefits shall be provided to women who are absent from work due to maternity leave. Article 8 of MPC 2000 states that it unlawful for an employer to terminate the employment of a woman during her pregnancy or absence of maternity leave or her return to work. Article 8 of MPC 2000 further states that a woman is guaranteed the right to return to the same position or an equivalent position paid at the same rate at the end of her maternity.

Article 9 of MPC 2000 states that the Member States need to adopt appropriate measures to ensure that maternity does not constitute a source of discrimination in employment

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<sup>547</sup> COSATU, Gender, politics and trade unions, page 10, available at <http://www.cosatu.org.za/docs/policy/2016/Gender-Politics-and-Trade-Unions.pdf> accessed on 30 November 2018.

including access to employment. Article 10 of MPC 2000 provides that a woman shall be provided with the right to one or more daily breaks or a daily reduction of hours of works to breastfeed her child. Article 10 of MPC 2000 denotes that the nursing or breastfeeding or reduction of daily hours of work shall be counted as working time and remunerated according.

The Convention recognises the importance of giving protection to female employees who are pregnant at work. It is argued that the Convention assists in ensuring that women participate in the economy and contribute toward the economic growth of a country without being marginalised in the labour market due to pregnancy. It is accepted that the marginalisation of pregnant women in the workplace deprives women of choice and opportunities in employment and is essentially contrary to the normative considerations of fairness and justice.<sup>548</sup>

The South African BCEA in terms of section 25 provides employees with four consecutive month's maternity leave. Section 25(4) of the BCEA provides that

“no employee may work for six weeks after the birth of her child unless a medical practitioner or midwife certifies that she is fit to do so. An employee who has a miscarriage during the third trimester of pregnancy or bears a stillborn child is entitled to maternity leave for six weeks after the miscarriage or stillbirth, whether or not the employee had commenced maternity leave at the time of the miscarriage or stillbirth”.<sup>549</sup>

The BCEA requires employers to offer during the employee's pregnancy, proper or alternative employment on terms and conditions that are no less favourable than her ordinary terms and conditions of employment. The reading of the BCEA informs the view that the intention of the legislature when drafting the BCEA was to cater *inter alia* for the needs of female employees by ensuring that their jobs are safeguarded even during and after pregnancy. It is thus key for the private sectors to note that profitability or efficiency

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<sup>548</sup> ILO, Maternity Protection Resource Package, Maternity Protection at Work: Why is it important ? page 4, 2012.

<sup>549</sup> Section 25(4) of the BCEA.

of the company cannot be used to justify the discrimination of an employee based on pregnancy.<sup>550</sup> It is trite that where an employer relies on the inherent requirement of a job, that the requirement must be so inherent and if not complied with the candidate would not meet the criteria for the vacancy.<sup>551</sup> It was decided in the matter of *Woolworths v Whitehead* that a party who claims discrimination, must show that but for her pregnancy, she would have been appointed.<sup>552</sup> In other words, there must be a causal connection between her pregnancy and the decision not to appointed to a post.

In the case of *Woolworths v Whitehead* Ms Whitehead (Respondent) had applied for a senior human resources position at Woolworths (Appellant). The respondent contended that, based on her pregnancy, the appellant withdrew the permanent employment offer and offered temporary employment for five months. The appellant argued that the discrimination was based on the understanding that the position required an uninterrupted job continuity by any applicant for the advertised position, and that uninterrupted job continuity for at least twelve months was rationally and commercially supportable”.<sup>553</sup>

The court observed that:

“A careful balancing of interests is required in a case such as this. We live in a country with pervasive poverty, poor social security, high unemployment and a low growth rate. Without a rapidly expanding economy, it will be impossible to deliver to our society so many of the changes and improvements it so desperately needs. At this stage of our history, to hold that an employer cannot take into account a prospective employee’s pregnancy would be widely regarded as being so economically irrational as to be fundamentally harmful to our society.”<sup>554</sup>

Notwithstanding the progressive legal framework that guarantees basic conditions of employment, the lack of compulsory paid leave arguably adds a financial burden to

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<sup>550</sup> *Whitehead v Woolworths* (C 122/98) [1999] ZALC 82 (28 May 1999) at paragraph 32.

<sup>551</sup> *Whitehead v Woolworths* (C 122/98) [1999] ZALC 82 (28 May 1999), paragraph 37.

<sup>552</sup> *Woolworths (Pty)Ltd v Whitehead* (CA06/99) [2000] ZALAC 4 (3 April 2000).

<sup>553</sup> *Woolworths (Pty)Ltd v Whitehead* (CA06/99) [2000] ZALAC 4 (3 April 2000), paragraph 46.

<sup>554</sup> *Woolworths (Pty)Ltd v Whitehead* (CA06/99) [2000] ZALAC 4 (3 April 2000), paragraph 136.

pregnant employees. In 2017 the Labour Court in the case of *Manetsa v New Kleinfontein Gold Mine*<sup>555</sup> the court held that

“ it can further not be doubted that whilst on maternity leave , whether paid or unpaid , pregnant employees by virtue of their absence from the workplace in certain instances invariably lose out on advantages of being at the workplace, such as bonuses, promotions, and career development in the form of training and development offered to other employees”<sup>556</sup>

The court correctly further pointed out that

“pregnant women continue to worry about the prospects of their continued employment once they disclose their pregnancy or even after childbirth...workplaces that provide child care facilities. These problems cut across all industries but are even more prevalent in sectors of our economy that are traditionally male-dominated such as mining...Female employees become unintended casualties of their pregnancies or womanhood”.<sup>557</sup>

These remarks inform the view that pregnancy has the effect of denying women of opportunities that can be of assistance in their progression into managerial positions especially in predominately male-dominated sectors. This resonates with the findings of the National Research Council that unearthed that motherhood is a major reason that companies promote fewer women compared to their male counterparts.<sup>558</sup> The National Research Council unearthed further that women with children are often not promoted at companies and this has resulted in other women hiding their pregnancies.<sup>559</sup> Interestingly, the CGE has observed that most private sector companies do not have childcare facilities in the workplace, do not offer breastfeeding breaks in the workplace nor offer paid

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<sup>555</sup> *Manetsa v New Kleinfontein Gold Mine* [2018] 1 BLLR 52 (LC).

<sup>556</sup> *Manetsa v New Kleinfontein Gold Mine* [2018] 1 BLLR 52 (LC) paragraph 4.

<sup>557</sup> *Manetsa v New Kleinfontein Gold Mine* [2018] 1 BLLR 52 (LC) paragraph 4 .

<sup>558</sup> National Research Council, Women Scientists and Engineers employed in industry : Why so few, page 41, 1994.

<sup>559</sup> National Research Council, Women Scientists and Engineers employed in industry : Why so few, page 42, 1994.

maternity leave.<sup>560</sup> It is submitted that an employer that fails to introduce an environment that is sensitive to the needs of women, will unlikely not attract potential female employees and would similarly not retain its female employees. It is from this premise that pregnancy is a critical barrier for black African women who are or aspires to be at the managerial level because of the increased visibility and responsibility in the workplace.

### **3.7 The right of black African women to attain managerial positions in the private sector**

The achievement of diversity in South Africa requires fundamental and clearly defined steps to be taken to address the paucity of black African women in managerial positions in the private sector. This will assist the country's commitment to the National Development Plan 2030 and assist in reaching gender equality and empowerment of all women and girls by 2030 as required by the SDGs target; as such there can be no victors without fundamental obligations on employers to escalate women into managerial positions. Against this backdrop, South Africa does not have a stand-alone legislation or policy that specifically challenges the private sector to ensure that black African women are represented in managerial positions. The proliferation of black African women into managerial positions in the private sector is not a legislated right in terms of the South African laws notwithstanding progressive and expansive laws dealing with equality in the workplace.

It is accepted that in South Africa, the appointment of a black African woman into a managerial position in the private sector is largely dependent on the political will of those responsible for a company. In South Africa the EEA and BBBEE Act are equity legislation that can address the underrepresentation of black African women at managerial positions in the workplace. However, since the enactment of the EEA, the private sector has failed to have more black African women represented in managerial positions. As such it is argued that the EEA has not achieved its objective of ensuring that previously disadvantaged persons are represented at all levels of the workplace. The failure of the

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<sup>560</sup> CGE, Employment Equity hearings in the private sector, page 52 and 58 ,2017/2018.

EEA to include a specific right to black African women into managerial positions is largely because such a right would be discriminating unfairly against women of other race groups, who generally experience the same exclusion in the private sector.

In *Barnard v SAPS*, the applicant had been an employee of the South African Police Service since 1989. In 2005 the applicant applied for the position of the superintendent and this position related to “evaluating and investigating priority and ordinary complaints nationally” to enhance the delivery of services to members of the public.<sup>561</sup> The applicant had applied for this position twice and was unsuccessful in both attempts. Despite the applicant scoring the highest at the interview and being recommended to the position, the National Commissioner for the South African Police Service, argued that the advertised position was not a critical position for service delivery and expressed that it was not mandatory to fill it. Moreover, it was argued that the appointment of Barnard at the position would not improve racial representivity.

At the Labour Court, the applicant argued that she was not promoted because she was a white woman and submitted that she was unfairly discriminated against on the listed ground of colour as contemplated in section 6(1) of the EEA. The Labour Court found that the failure to appoint the applicant was both unfair and invalid. The Labour Court emphasised that there must be a fair application of the employment equity plan about the right to equality of affected individuals and that representivity must be considered against that right. It is submitted that representivity is central to the right to equality. The failure to achieve representivity of the designated groups at all levels in the workplace is essentially a violation of the right to equality of designated groups. The affirmative action aims to provide the protection and development of previously disadvantaged groups based on past injustices.<sup>562</sup>

The Labour Appeal Court set aside the order of the Labour Court. It was expressed that the employee was not overlooked by the National Commissioner. The Labour Appeal

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<sup>561</sup>*Barnard v South African Police Services* 2014 (6) SA 123 (CC) at paragraph 7.

<sup>562</sup>*Barnard v South African Police Services* 2014 (6) SA 123 (CC) at paragraph 35.

Court reasoned that there was no appointment as such discrimination had not taken place.<sup>563</sup> Labour Appeal Court acknowledged that:

“The over-representivity of white males and females is itself a powerful demonstration of the insidious consequence of our unhappy past. White people were advantaged over other races especially in the public service. This advantage was perpetuated by the transfer of skills, some critical, to the same white race to the exclusion of others, especially blacks. The over-representivity of whites in level 9 is a stark reminder of our past and indeed the present and yet another wake up call to decisively break from these practices. These are practices that can be effectively broken by embracing the restitutionary spirit of the Constitution.”<sup>564</sup>

This remark suggests that any enquiry into the implementation of affirmative action measures needs to consider the contextual background that resulted in white employees dominating managerial levels. Interestingly, the Supreme Court of Appeal disagreed with the Labour Appeal Court and found that the failure to appoint Ms Barnard constituted discrimination based on race. The Supreme Court of Appeal expressed that the Police Service did not demonstrate that the discrimination was fair.<sup>565</sup> The Constitutional Court found that the South African Police Service’s Employment Equity Plan is a restitutionary measure contemplated in section 9(2) of the Constitution and section 6(2) of the EEA. In a separate judgement, Van Der Westhuizen observed the failure to appoint Ms Barnard despite her being a woman who has been historically excluded and discriminated against to that the decision not to appoint Ms Barnard even though she is a woman and has suffered past exclusion and discrimination did not put in jeopardy the constitutional vision of a non-sexist, non-racial society.

The Court in *Barnard* emphasises that:

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<sup>563</sup> *Barnard v South African Police Services* 2014 (6) SA 123 (CC) at paragraph 22.

<sup>564</sup> *Barnard v South African Police Services* 2014 2 BLLR 107 (SCA) at paragraph 38.

<sup>565</sup> *Barnard v South African Police Services* 2014 (6) SA 123 (CC) at paragraph 24.



“there are profound difficulties that will be confronted in giving effect to the constitutional commitment of achieving equality and these difficulties must not be underestimated. The measures that bring about transformation will inevitably affect some members of the society adversely, particularly those coming from the previously advantaged communities.”<sup>566</sup>

It is submitted that in the private sector transformation difficulties are influenced by deliberate intention not to comply with the array of legislation that encourages the representation of the previously disadvantaged at all levels of the workplace. Secondly, the lack of legislative specific obligation that compels the private sector to proliferate black African women into managerial positions increases transformation difficulties in the private sector. The court in *Barnard* opined that “the process of transformation must be carried out under the Constitution”.<sup>567</sup> Similarly in *Bato Star Fishing Pty Ltd v Minister of Environmental Affairs & others* the court observed that “the commitment to achieving equality and remedying the consequences of past discrimination is immediately apparent in section 9(2) of the Constitution”.<sup>568</sup> This suggests that transformation in South Africa must promote non-racialism and a non-sexist society that is supported by the rule of law and human rights. It is argued that transformation must ensure that all black African women are treated equally and with dignity in the private sector.

It is a conceivable argument that conferring a specific right to escalate black African women into managerial positions would result in the discrimination of white females, white males and black males who aspire to occupy managerial positions in the private sector. To address this juxtaposition, the court in *Barnard* rightfully pointed out that white groups may have to forego employment opportunities for employers to achieve employment equity.<sup>569</sup>

Although the case is not specifically about gender discrimination but more on racial discrimination of *Barnard*, the case, however, reflects the narrative that while males

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<sup>566</sup> *Barnard v South African Police Services* 2014 (6) SA 123 (CC) at paragraph 57.

<sup>567</sup> *Ibid.*

<sup>568</sup> *Bato Star Fishing Pty Ltd v Minister of Environmental Affairs & others* 2004 (4) SA 490 (CC).

<sup>569</sup> *Barnard v South African Police Services* 2014 (6) SA 123 (CC) at paragraph 79.

regardless of their previous and current advantaged status are preferred than any other gender and race. The cardinal question in *Barnard* is why appointing a white male temporarily promotes the agenda of employment equity? It is submitted that the failure to appoint a woman temporarily is a missed opportunity to enhance women in general in the workplace.

### **3.8 Are black African women entitled to receive training and development at the workplace for promotion?**

It is submitted that training and development plays a fundamental role in increasing the prospect of any employee being promoted in the workplace. In the premise, the advancement of black African women in managerial positions in the private sector is depended on whether the eligible women have received training and development. It may be argued that it is the responsibility of black African women as employees to ensure that they receive the necessary training and development to be eligible for the promotion. In *Marra v Telkom SA Ltd*<sup>570</sup> the employee argued that the employer committed an unfair labour practice because it degraded him unfairly, inconsistently and sought an order that the employer upgrades him retrospectively. The employee argued that he had been denied opportunities to acquire skills that are key for development and this includes distinctive technologies and equipment.

In essence, the employee contended that the failure by the employer to expose him to different skills barred his progress to develop as an employee. The court held as follows

“there is no evidence that Telkom was contractually or otherwise obliged to transfer him beyond its own operational requirements. Telkom may have lacked innovation and creativity in the way it developed or even deployed its workforce or employees. It may also be that an enterprise which does not develop its staff will not succeed. It does not however follow that an enterprise which does not use its human

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<sup>570</sup> *Marra v Telkom SA Ltd* (1999) 20 ILJ 1964 (CCMA).

resources wisely, commits an unfair labour practice, within the meaning of the Act.”<sup>571</sup>

The decision in *Marra* suggests that there must be a contractual obligation between the employer and employee to compel the employer to develop its employees. Failure to do so constitutes an unfair labour practice. It is accepted that the needs of the employees must be compatible with the needs of the employers.<sup>572</sup> It is argued that the decision in *Marra* that suggests that employers need to be contractually bound to provide training and development to employees, in essence, provides employers with an opportunity to determine whether they want to include or exclude these obligations in the contracts of employment. As such in the private sector, this will even be more prejudicial to the black African women who pre-1994 and post 1994 have been poorly represented in managerial positions. In contrast to the *Marra* decision, it is submitted that the training of employees is not entirely the discretion of the employers but an obligation in terms of section 15(2)(d) of the EEA which provides that employers must retain and develop people from previously disadvantaged groups and implement the appropriate training measures and skills development.

According to *Mokabane et al*, employers must train and develop employees in consideration of affirmative action.<sup>573</sup> It is argued that the failure to promote employees based on lack of skills that could have been addressed through training, constitutes unfair conduct by employers.<sup>574</sup> *Mokabane et al* suggest that unfair conduct relating to training could constitute an unfair labour practice.<sup>575</sup> It is submitted that the appointment of a well-trained and developed black African woman at a managerial position would enhance the performance of a company in the same way if a white female, white male and black male would have. As such it is argued that the advancement of the black African women into

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<sup>571</sup> *Marra v Telkom SA Ltd* (1999) 20 ILJ 1964 (CCMA) at 1968 D and 1968 I -1970-I.

<sup>572</sup> *Marra v Telkom SA Ltd* (1999) 20 ILJ 1964 (CCMA).

<sup>573</sup> Mokabane M, Odeku K and Nevondwe T , Employer’s failure to adhere to its promotional policy and procedure: Implications for fair labour practices, African Journal of Business Management Vol.6 (46), page 11443, 21 November 2012.

<sup>574</sup> *Ibid.*

<sup>575</sup> *Ibid.*

managerial positions is dependent on whether the private sector provides training and development to this previously disadvantaged group. It is submitted that any private sector that is committed to addressing the injustices of the past and achieving equity in the workplace, it needs to set adequate budgets for training and development of black African women. According to Mokabane *et al* observe that employees may be rotated in various sections of the company, as part of job-training to acquire diverse skills and experience to perform a variety of tasks. rotating employees to various sections of the company as part of the job-training measure.<sup>576</sup>

The benefit of training and development of employees is the agile functioning of a company and increasing the eligibility of promotion to employees. Mokabane *et al* postulate that managerial prerogative in promotion is a barrier to applicants to occupy positions in the workplace.<sup>577</sup> Mokabane *et al* suggest that managerial prerogative empowers employers to appoint inexperienced and not qualified persons to vacant positions based on the obligation to achieve equity in the workplace or even certain ulterior motives.<sup>578</sup> This submission fails to appreciate the rationale and importance of affirmative action measures in South Africa. It is submitted that the objective of affirmative action is not to appoint less qualified persons, but rather to appoint suitably qualified persons to achieve the equity at all occupational levels in the workplace.

It is submitted that there are qualified black African women who are highly qualified for managerial positions in the private sector but are not appointed to these positions because of a lack of commitment to achieve equitable representation of previously disadvantaged persons in all levels of the workplace. It is submitted that the achievement of training and development should be accompanied by allowing black African women to act in managerial positions. It is a conceivable argument that the private sector in South Africa is hesitant to provide “legitimate expectation” to employees who act in managerial positions. It is accepted in South Africa that when an employee acts in a senior position

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<sup>576</sup> *Ibid.*

<sup>577</sup> *Ibid.*

<sup>578</sup> *Ibid.*

that does not guarantee a right to be promoted to that position.<sup>579</sup> In the case of *Swanepoel v Western Region District Council*, the court passed the following remarks when an employee argued that an employer committed an unfair labour practice about promotion:

“It matters not that the applicant immediate supervisors may have been impressed with her diligence, trustworthiness and all-round abilities. Indeed, the applicant’s qualification and the appropriateness thereof in relation to the job which she applied as well as her competence, were not an issue...what the applicant refers to as legitimate expectation is, in fact, no more than an expression of her expectations based, *inter alia* on the support and encouragement she received from within the workplace from union members and her immediate supervisors alike... In the race for employment there must, indeed be few seekers who do not in their own minds, either with or without encouragement of others, form expectations as to their suitability. These expectations are however not ‘legitimate expectations’ upon which applicant could conceivably rely on”.<sup>580</sup>

It is deduced from the above remarks that acting senior positions does not in itself create a legitimate expectation to be appointed permanently to that position. Similarly, the remarks addressed any potential argument that suggests that the appointment of black African women to act in managerial positions would automatically create legitimate expectations and ultimately leading to expensive litigation. To avoid unnecessary litigation between employers and employees, it is prudent that the terms of acting in a managerial position be reduced to writing and be supported by company policy.

### **3.9 Conclusion**

South Africa has an array of legislation that confers rights to female employees in the workplace. These rights are essential to level the playing field between male and female

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<sup>579</sup> *Swanepoel v Western Region District Council and another* 1998 (19) ILJ 1418.

<sup>580</sup> *Swanepoel v Western Region District Council and another* 1998 (19) ILJ 1418.

employees in the workplace. It is demonstrated that black African women have a right to fair labour practices including the rights to form trade unions to further promote and protect their rights in the workplace. It has been demonstrated that trade unions in South Africa seldom address women's challenges in the workplace because leaders of trade unions often also hold patriarchal attitudes about women. It is submitted that the lack of political will of trade unions to address employment equity in the workplace results in the challenges of black African women not being addressed notwithstanding the rights guaranteed. There is no legislated right in South Africa that entitles black African women into managerial positions. Put differently, the legislation in South Africa does not specifically oblige the private sector to ensure that black African women are represented at managerial positions in the private sector. The promotion or the failure to promote black African women into a managerial position in South Africa is the discretion of the employer. Such discretions must be substantive and procedurally fair to justify promotion or non-promotion.

It is accepted that the achievement of transformation in the private sector, particularly the proliferation of black African women into managerial positions may often be seen as “reverse discrimination” i.e. discrimination of those who were previously advantaged. It is submitted that the achievement of equality requires the implementation of measures to fast-track and address the underrepresentation of previously disadvantaged groups action who have suffered unfair discrimination in the past.<sup>581</sup> As such the court in the case of *Minister of Finance and others, v Van Heerden*<sup>582</sup> correctly observed that the achievement of equality may often come at a price for those who were previously advantaged.<sup>583</sup> In the context of broader society and the envisaged participation of black African women in the South African economy, it is submitted that clear and specific legal obligations need to be imposed on the South African private sector to accelerate the representation of black South African women into managerial positions.

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<sup>581</sup> *Minister of Finance and others v Van Heerden* 2004 (6) SA 121 (CC), paragraph 44.

<sup>582</sup> *Minister of Finance and others v Van Heerden* 2004 (6) SA 121 (CC).

<sup>583</sup> *Minister of Finance and others v Van Heerden* 2004 (6) SA 121 (CC).

South Africa has a diversified society as such the exclusion of black African women in the economic partition is contrary to the central vision of a society that is non-racial and non-sexist. It is submitted that imposing legal obligations such as the quota law in Norway on the private sector will in the long-term promote equality and would not unduly harm those who were previously advantaged society. It is submitted that to ensure that a quota law is effective in South Africa, companies that fail to comply with the quota law must result in the directors of the company being disqualified in terms of section 69 of the Companies Act 71 of 2008. Moreover, the representation of black African women at managerial levels should be made a mandatory listing requirement in the Johannesburg Stock Exchange (JSE) for listed companies.

## CHAPTER FOUR

### CHALLENGES IN MAINSTREAMING BLACK AFRICAN WOMEN INTO MANAGERIAL POSITIONS IN THE SOUTH AFRICAN PRIVATE SECTOR

#### 4.1 Introduction

South Africa has enacted an array of legislation including the EEA and BBBEE to ensure that equity and equality are realised in the workplace. Essentially the EEA and BBBEE provide black African women in the private sector with rights to be afforded opportunities to be represented in all levels in the workplace. This is against the background understanding that black African women were excluded from economic participation by the apartheid government.<sup>584</sup> Notwithstanding the enactment of these pieces of legislation, the representation of black African women in the managerial positions in the private sector has been dismal. The private sector has demonstrated a preference for white males, white females, black African males and not black African women in managerial positions. The appointment of white women in managerial positions demonstrates that the private sector concedes that women, in general, are eligible to occupy managerial positions however deliberately opt not to appoint black African women to these positions. This resonates with the findings of the South African Human Rights Commission that unearthed that white women were mostly appointed to managerial positions in the private sector.<sup>585</sup> It is conceivable that the exclusion of black African women to these positions is based on race, gender and class and this leaves most black African women vulnerable in various occupational levels in the workplace.

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<sup>584</sup> Mofokeng N, Giampiccoli A, Jugmohan S, Black Economic Empowerment led transformation within the South African accommodation industry: The case of Clarens, African Journal of Hospitality, Tourism and Leisure, Volume 7 (1), page 2,2018 available at [https://www.ajhtl.com/uploads/7/1/6/3/7163688/article\\_33\\_vol\\_7\\_1\\_2018.pdf](https://www.ajhtl.com/uploads/7/1/6/3/7163688/article_33_vol_7_1_2018.pdf) accessed on 30 January 2019.

<sup>585</sup> SAHRC Business and human Rights dialogue Report, page 26, 13-14 March 2018.



South Africa is recognised as an unequal society which is based on racial lines.<sup>586</sup> It is submitted that the preference of white women in the private sector is the consequence of the historical economic practices that excluded black African women from economic participation on the grounds of their race, gender and class. The paucity of black African women at managerial positions necessitates the fast acceleration of transformation within the private sector as it is vital for economic growth in South Africa. This chapter shall examine the challenges that exist in the private sectors that contribute to the paucity of black African women at managerial positions.

## 4.2 Race-based recruiting in the private sector

The high levels of inequality and racism post the democratic dispensation in South Africa is as a result of periods of indifference between indigenous Africans and white settlers.<sup>587</sup> Similarly, the paucity of black African women in managerial positions in the private sector is a result of systematic racial discrimination and segregation that existed in South Africa during apartheid.<sup>588</sup> According to Nkomo the effects of apartheid is that race and gender hierarchy were institutionalised and this placed white males at the top of the organisations.<sup>589</sup> Nkomo argues that this perpetuated both white male domination at managerial levels and white male privilege.<sup>590</sup> The overrepresentation of white males at managerial positions in the private sector continues to exist notwithstanding the plethora

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<sup>586</sup> The World Bank, overcoming poverty and inequality in south Africa: an assessment of drivers, constraints and opportunities, page 42-58, March 2018, available at <http://documents.worldbank.org/curated/en/530481521735906534/pdf/124521-REV-OUO-South-Africa-Poverty-and-Inequality-Assessment-Report-2018-FINAL-WEB.pdf> accessed on 22 January 2019 .See also Ford, N, South Africa's unequal society still divided by race. African Business Magazine.2 February 2017 available at <https://africanbusinessmagazine.com/region/southern-africa/south-africas-unequal-society-still-divided-race/> accessed 30 January 2019 .

<sup>587</sup> Mthanti T, systemic racism behind South Africa's failure to transform its economy, January 2017 , The Conversation.

<sup>588</sup> Seekings J and Natrass N, Class, Race and Inequality in South Africa Yale University, page 49, Press 2005 available at [https://www.sahistory.org.za/sites/default/files/file%20uploads%20/professor\\_jeremy\\_seekings\\_nicoli\\_natrass\\_classbookos.org\\_.pdf](https://www.sahistory.org.za/sites/default/files/file%20uploads%20/professor_jeremy_seekings_nicoli_natrass_classbookos.org_.pdf) accessed on 31 January 2019.

<sup>589</sup> Nkomo S, Why white men still dominate the top echelons of South Africa's private sector, August 4, 2015, The Conversation , available at <http://theconversation.com/why-white-men-still-dominate-the-top-echelons-of-south-africas-private-sector-44873> accessed on 31 January 2019.

<sup>590</sup> *Ibid.*

of legislation such as the EEA that tasks the private sector with the obligation to ensure that black African women are equally represented at all levels in the workplace.

The domination of white males and females in the private sector reflects resistance by owners of companies not to comply with the EEA however such resistance has found practical institutional ways of being implemented without contravening the law.<sup>591</sup> This includes widow-dressing in the private sector and the case Chowan serves as an example of how systemic discrimination and inequalities exist in the South African private sector. Ms Chowan was repeatedly overlooked for a chief financial officer position despite her wealth of experience and academic qualifications. It became evident that Ms Chowan was appointed because she was an “employment equity employee”. In other words, women are appointed for merely achieving equity targets in the workplace however they are not promoted to senior positions despite their qualification. It is observed that Ms Chowan was overlooked for the managerial position repeatedly largely on the grounds of race and gender.

Martin and Durrheim unearthed that when the private sector engages the services of recruitment companies they do specifically instruct recruitment companies to recruit candidates that are white notwithstanding the existence of other competent candidates of other race groups.<sup>592</sup> It is suggested that most recruitment companies are unable to decline such racially discriminatory requests from the private sector because it will result in the recruitment company not receiving business from the private sector companies.<sup>593</sup> As such, it is submitted that recruitment companies can overlook competent candidates on their database and proceed to appoint white persons because of the requests from the private sector.<sup>594</sup> This assertion finds support from Camejo who reaffirmed that the private sector preferred to employ certain racial groups in certain positions and exclude

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<sup>591</sup> Martin G and Durrheim K, Racial recruitment in post –apartheid South Africa: dilemmas of private recruitment agencies PINS 33,1-1, page 3, 2006, available at [http://psychology.ukzn.ac.za/Libraries/publications/Martin\\_Durrheim.pdf](http://psychology.ukzn.ac.za/Libraries/publications/Martin_Durrheim.pdf) accessed 31 January 2019.

<sup>592</sup> Martin G, *ibid*, page 5.

<sup>593</sup> Martin G, *ibid*, page 5.

<sup>594</sup> Martin G, *ibid*, page 5.

other race groups ( particularly the previously disadvantaged groups ) in such positions.<sup>595</sup>

Martin and Durrheim point out that the perception that suggests that blacks are deficient in terms of skills, experience and personality perpetuates racial hierarchy and racial privilege for white males and females in post-apartheid South Africa.<sup>596</sup> It is submitted that recruitment practices in South Africa serve as a barrier for black African women from being appointed to assume managerial positions in the private sector and as such white males continue to dominate these positions. Martin and Durrheim assert that the recruitment of white male and female candidates is therefore accepted as reasonable and understandable while the failure of blacks, largely influenced by stereotyping that sees blacks as less competent, are used to justify why blacks have not attained positions in the private sector.<sup>597</sup>

Against this backdrop, it submitted that the racial segregation has a deep and enduring influence on inequality experienced by black African women in the South African private sector. This has arguably influenced most black African women to seek employment opportunities in the public sector. Paradoxically, the South African public sector has employed more African people than white people.<sup>598</sup> It is suggested that private sector companies must establish and implement non-discriminatory recruitment policies. The establishment of such policies will serve as a directive to recruitment agencies to recruit candidates without specifically discriminating against any person on the ground of race, gender or sex. Recruitment agencies are faced with difficulty in terms of executing racially discriminatory requests from the private sector and the need to retain their business.

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<sup>595</sup> Camejo A, Racial discrimination in employment in the private section in Trinidad and Tobago: A case of the business elite and the social structure. *Social and economic Studies*, Vol 20 No3 , page 294, September 1971 .

<sup>596</sup> Martin G and Durrheim K, Racial recruitment in post –apartheid South Africa: dilemmas of private recruitment agencies PINS 33,1-15, page 12, 2006, available at [http://psychology.ukzn.ac.za/Libraries/publications/Martin\\_Durrheim.pdf](http://psychology.ukzn.ac.za/Libraries/publications/Martin_Durrheim.pdf) accessed 31 January 2019.

<sup>597</sup> *ibid.*

<sup>598</sup> CEE, Employment Equity Annual Report 2016/2017 page 16,20 and 25, 2017.

It is submitted that the perpetual discriminatory recruitment practices by recruitment agencies are not justifiable in terms of section 36 of the Constitution, as these discriminatory practices are solely on the grounds of gender, sex and race and not on the competency of black African women to assume managerial positions. As such the constitutional obligation to promote non-discriminatory recruitment practices outweighs the need by recruitment agencies to retain business with the private sector that solely requests white men and women to the exclusion of competent black African women on an existing database of potential candidates.

#### **4.3 Non- compliance with the EEA**

According to Mkhonza, 50% of the JSE securities-listed companies were in 2017 found not to be compliant with the EEA.<sup>599</sup> It is highlighted that the Department of Labour found that the areas of concern included *inter alia* failure to establish consultative forums; established EE Plans were not based on proper audit and analysis; junior staff members were assigned as senior EE managers and lacked support to perform their duties; Mts EE Plans were not compliant with the requirement of the legislation.<sup>600</sup> It is submitted that the most companies that failed to comply with the EEA were predominantly in construction, electricity, manufacturing, catering/accommodation, gas (chemical), retail and motor trade, catering and accommodation sectors.<sup>601</sup> To this end, below is an in-depth discussion of issues about non-compliance with the EEA.

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<sup>599</sup> Mkhonza T, 59 JSE Securities companies not compliant with EE Act, 31 October 2017, available at <https://www.iol.co.za/business-report/companies/50-jse-securities-companies-not-compliant-with-ee-act-11787393> accessed on 3 April 2019.

<sup>600</sup> *Ibid.*

<sup>601</sup> *Ibid.*

#### 4.3.1 Established EE Plans are not based on proper audit and analysis

The purpose of the EE Plan is set out in section 20 of the EEA and its purpose is to attain employment equity in the workplace. Primarily the EE Plan must set out the measures by the employer to achieve equity. The EE Plan is regarded as a tool to ensure that equity is achieved in the workplace. It is submitted that the EE Plan is a tool that has the potential to achieve the aspirations of every workplace to be broadly representative of all persons in South Africa. This is achievable because the EEA expressly requires designated employers to take account of both the regional and national economic active population profile when setting numerical targets.<sup>602</sup>

The past and present exclusion of black persons in the workplace espouses that the EE Plan will result in their equitable representation within all occupational levels in the workplace. To achieve equal representation in the workplace the private sector needs to reject the hiring of white males and females who are overrepresented at a managerial position. In *Solidarity v Department of Correctional Services*<sup>603</sup>, the complainant was denied a promotion based on the overrepresentation of white people at the occupational level. The legal question was whether an employer may decline the appointment of other race groups such as Africans, Coloured or Indians on the basis that such persons are already overrepresented at a particular occupational level? The second legal question was the same principle may be applied in terms of gender i.e. whether a man or woman may be refused to be hired at a certain occupational level based on the already existing overrepresentation of men or women at that level?<sup>604</sup>

The court in *Solidarity v Department of Correctional Services*<sup>605</sup> stated that:

“It will not be enough to have one group or two groups only and to exclude another group or other groups on the basis that the high presence of one or two makes up

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<sup>602</sup> Section 42(a)(i) of the EEA.

<sup>603</sup> *Solidarity v Department of Correctional Services* [2016] ZACC 18.

<sup>604</sup> *Solidarity v Department of Correctional Services* [2016] ZACC 18 at paragraph 38.

<sup>605</sup> *Solidarity v Department of Correctional Services* [2016] ZACC 18.

for the absence or insignificant presence of another group or of the other groups. Therefore, a designated employer is entitled, as a matter of law, to deny an African or Coloured person or Indian person appointment to a certain occupational level on the basis that African people, Coloured people or Indian people, as the case may be, are already overrepresented or adequately represented in that level. On the basis of the same principle, an employer is entitled to refuse to appoint a man or woman to a post at a particular level on the basis that men or women, as the case may be, are already overrepresented or adequately represented at that occupational level.”<sup>606</sup>

Commonly, a properly drafted EE Plan would be able to demonstrate if a group of persons is overly represented at a particular occupational level. Moreover, in the private sector, an EE Plan would demonstrate if black African women are underrepresented at managerial positions and therefore forms a proper basis to deny the appointment of further white males based on their overrepresentation. It is submitted that the EE Plan is fundamental in ensuring that black African women are represented at the managerial positions. The failure by the private sector companies to establish the EE Plan suggests that these private sector companies operate without any direction to address the paucity of black African women at managerial positions. Similarly, without the EE Plan the private sector companies would not discharge its duty to establish measures to increase the paucity of women in the private sector.

Interestingly, most private sector companies have EE Plans in place and rely on these plans to achieve equity in the workplace.<sup>607</sup> The EE Plans are expected to highlight the steps or measures that the employer plans to achieve equitable representation of previously disadvantaged groups at all occupational levels. It is established that the EE targets encapsulated in the EE Plans are often reached at the lower levels in the private sector however, there were bottlenecks in the upwards mobility of these employees to

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<sup>606</sup> *Solidarity v Department of Correctional Services* [2016] ZACC 18 at paragraph 49.

<sup>607</sup> CGE, Progress report on Employment Equity, page 61, 2017/2018 available at [www.cge.org.za](http://www.cge.org.za) accessed on 9 March 2018.

senior and top management.<sup>608</sup> It is argued that senior positions are not immediately available, so the blockage persists for the advancement of women.<sup>609</sup> It is submitted that the analysis of barriers in the workplace as envisaged by section 19 of the EEA would assist the private sector in setting numerical targets that are achievable. However, the failure to achieve equity targets at managerial levels as set out in the EE Plan has not resulted in consequences that compel the private sector to commit to achieving these targets. Moreover, the private sector budgets for potential fines that may be imposed for its failure to comply with the EE Plan, to this end, such conduct undermines equity aspirations of the EEA and renders the EE Plans to be ineffective in the private sector.

Section 19 of the EEA requires employers to collect information and conduct an analysis of its employment policies, practices, procedures and the working environment to identify employment barriers that adversely affect people from previously designated groups. The analysis must determine the degree of underrepresentation of people of previously designated groups in various occupational levels.<sup>610</sup> The private sector companies such as Vermeulens Build It that appeared before the CGE do have these EE Plans in place however these EE Plans do not result in the appointment of black African women in managerial positions. One of the critical factors for this is that EE Plans are based on numerical goals which provide flexibility in setting targets. Often when targets are not achieved, there are no consequences, instead, companies revisit their numerical goals to set targets again. To this end, it is submitted that the achievement of equity for black African women in the private sector should not merely be an aspiring paradigm that the private sector must attempt to comply with, but must be an objective that must be complied with and strictly enforced.

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<sup>608</sup> CGE, Progress report on Employment Equity , page 17, 2017/2018, available at [www.cge.org.za](http://www.cge.org.za) accessed on 9 March 2018.

<sup>609</sup> CGE, Progress report on Employment Equity, page 18, 2017/2018,available at [www.cge.org.za](http://www.cge.org.za) accessed on 9 March 2018.

<sup>610</sup> Section 19(2) of the EEA.

#### 4.3.2 Failure to appoint senior Employment Equity Managers

In terms of section 24 of the EEA, it is required that one or more senior manager(s) be assigned by employers to implement and monitor the EE Plan and employers must make available necessary resources such as enforcement powers for this purpose.

It is deduced from the word “must” that the designated employers are obligated to assign a senior manager to ensure the implementation and monitoring of the EE Plan. The emphasis of section 24 of the EEA is that the person assigned with this responsibility must be a senior manager. It is accepted that a senior manager would be able to influence a company to comply with the EE Plan rather than a junior employee. The incumbent needs to have decision-making powers to ensure that the targets of the EE Plan are achieved. These powers must include *inter alia* the powers to refuse the appointment of any person who is overrepresented at an occupational level and powers to establish programmes at the entry levels of the company to groom talent for senior management levels.

In the private sector, the assigned senior employment equity manager must have the power to decline the hiring of white males and females and ensure that black African women are targeted for managerial positions. To ensure that the assigned senior manager effectively achieves this role, the achievement of gender equality must be included in the incumbent’s performance contract. To do this, will result in the assigned senior manager being held accountable for the paucity of black African women at managerial positions. It is submitted that the assignment of a senior manager is a good indicator for a company to demonstrate its commitment to gender equality.

The CGE found that the private sector mostly does not assign persons to ensure that a company complies with its employment equity plan.<sup>611</sup> It is argued that the failure to assign a senior manager to ensure compliance with the EE Plan is not only indicative of the company’s failure of its understanding of the EEA but also lack of commitment towards the change of the current underrepresentation of black African women at managerial

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<sup>611</sup> CGE, Progress report on Employment Equity ,page 18, 2017/2018 available at [www.cge.org.za](http://www.cge.org.za) accessed on 9 March 2018.



positions in the private sector. The lack of monitoring and evaluation of the EE Plan is arguably a contributing factor to the failure of the private sector to achieve targets set out in their EE Plan. Further, the failure to appoint a senior employment equity manager is in contravention of the EEA and it attracts a penalty between R1.5 million and up to 10% of an employer's annual turnover. It is submitted that such fines do not deter the private sector to comply primarily because of the private sector budgets for fines that may be imposed for its failure to comply with the EEA.

#### **4.4 Failure to attract, develop and retain black women in the private sector**

In South Africa, the public and private sector have a common law duty of care to its employees to create a safe working environment.<sup>612</sup> Tshoose emphasises that the employer's common law duty in South Africa is often associated with safe premises, safe machinery, tools and safety systems.<sup>613</sup> It is submitted that an employer's duty of care manifests itself in many different ways and arguably this duty extends to include protection from harassment and bullying in the workplace.

The CGE found that there are private sector companies that do not have sexual harassment policies in place nor do the private sector companies conduct awareness sessions of sexual harassment in instances where a sexual harassment policy is in place.<sup>614</sup> The CGE asserts that employers must have strategies in place to ensure that women feel that management in the company is responsive to claims of sexual harassment. McLaughlin *et al* argue that women who work in male-dominated industries tend to experience sexual harassment.<sup>615</sup>

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<sup>612</sup> Tshoose I C, Employer's duty to provide safe working environment: A South African perspective, Journal of International Commercial Law and Technology Vol.6 Issue 3, page 166, 2011.

<sup>613</sup> *Ibid.*

<sup>614</sup> CGE, Employment equity hearings, page 24, 2016/2017, available at [www.cge.org.za](http://www.cge.org.za) accessed on 9 March 2018.

<sup>615</sup> McLaughlin H, Uggen C and Blackstone A, The economic and career effects of sexual harassment on working women, *Gend Soc.* Jun; 31(3), page 333-358, 2017.

Mclaughlin *et al* assert that women who experience sexual harassment tend to quit their jobs rather than continue in a harassing environment.<sup>616</sup> Lindquist and McKay argue that sexual harassment harms the career of a woman to the extent that women who are sexually harassed tend to withdraw from active participation in the workplace including interaction with their mentors.<sup>617</sup> It is deduced that the failure by the private sector to address sexual harassment in the workplace, put in place sexual harassment policies and conduct awareness sessions has the effect of discouraging black African women to join the private sector at managerial positions.

The EEA and LRA have not codified measures that must be put in place for the private sector to attract black African women to managerial positions. It is submitted that to achieve equity in the private sector, the sector needs to take proactive steps to attract, develop and retain black African women. To achieve this, it is expected that the private sector needs to create a workplace environment that is accommodative of the needs of black African women. Against this backdrop, the BCEA contains a Code of Good Practice on the Protection of Employees during Pregnancy and After the Birth of a Child (the Code of Good practice) that protects for black African women to return to work while breastfeeding and challenges the private sector to evaluate and regulate risks to the health and safety of pregnant and breast-feeding black African women.

To this effect, the Code of the Good Practice prescribes that “arrangements should be made for pregnant and breastfeeding employees to have breaks of 30 minutes twice a day for breastfeeding or expressing milk each working day for the first six months of the child’s life”.<sup>618</sup> For the breastfeeding breaks to benefit employees, it is conceivable that the private sector must provide child-care facilities in the workplace alternatively provide flexible- working hours to women who are still breastfeeding.

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<sup>616</sup> Mclaughlin H, Uggen C and Blackstone A, The economic and career effects of sexual harassment on working women, *GenD Soc.* Jun; 31(3) page 333-358,2017.

<sup>617</sup> Lindquist C and McKay T, Sexual harassment experiences and consequences for women faculty in Science, Engineering and medicine, RTI Press publication, page 1 June 2018 , available at <https://www.rti.org/sites/default/files/resources/rti-publication-file-31e1407f-8fc5-478e-9e17-beefe65e2ca7.pdf> accessed on 10 March 2019.

<sup>618</sup> Code of Good Practice on the Protection of Employees during Pregnancy and After the Birth of a Child, 13 November 1998, section 5.13.

It is submitted that the existence of child care facilities in the workplace will assist women to balance their work role and family responsibilities. The CGE unearthed that most private sector companies in South Africa do not provide childcare facilities in the workplace.<sup>619</sup> Conversely, Doubell and Struwig postulate that child care duties related to school-going children are not indicative that it hinders women's career success.<sup>620</sup> It is submitted that a workplace that provides breastfeeding breaks and facilities would be viewed as an enticement and has the effect of attracting black African women to join the private sector and not leave to other sectors. This is against the backdrop understanding that most employers do not provide opportunities for women to breastfeed at work.<sup>621</sup> Commonly, managerial positions are generally demanding in nature, and generally requires more hours at work. As such to ensure that women are on an equal footing with their male counterparts, breastfeeding facilities are imperative in the workplace. The establishment of breastfeeding facilities would essentially assist black Africa women to have a work-life balance.

#### 4.4.1 Lack of pipeline programmes to promote black African women into managerial positions

The achievement of black African women in managerial positions in the private sector requires a commitment and concerted effort by those in charge of a company. Gomez and Medina argue that promoting more diversity at the entry-level in the workplace does not necessarily influence the diversity of managerial positions in the company.<sup>622</sup> Similarly, Gassam asserts that there is a need for a company to focus on a company's diversity initiatives and goals however these tend to fail because the private sector does

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<sup>619</sup> CGE, employment equity hearings, page 39, 2016/2017, available at [www.cge.org.za](http://www.cge.org.za) accessed on 9 March 2018.

<sup>620</sup> Doubell M and Struwig M, Perceptions of factors influencing the career success of professional and business women in South Africa , South African Journal of Economic and Management Sciences vol.17 n.5 , Pretoria page 532, 2014.

<sup>621</sup> Netshandama V, Breastfeeding practices of working women, Curationis, February, page 21, 2002.

<sup>622</sup> Gomez P and Medina S, As companies crack the diversity code, leadership Teams still lag behind, 8 September 2016 available at <https://www.workforce.com/2016/09/08/companies-crack-diversity-code-leadership-teams-still-lag/> accessed on 15 April 2019.

not prioritise these goals and initiatives within the company.<sup>623</sup> The challenge with the private sector in South Africa is that most companies do not have any designed programmes and measures in place to proliferate black African women into managerial positions. This view is supported by the CGE's observations that private sector companies do not have measures in place to foster and monitor the upwards mobility of women to top and senior management.<sup>624</sup>

A view may be expressed that there is a shortage of highly skilled black African women to assume managerial positions as labour market largely requires high skilled employees. To address this more coherently, it is argued that the private sector must focus on the surplus of low skilled black African women with potential and train and mentor them to enable them to qualify for high positions of authority in the workplace.

It is submitted that to create a pipeline for black African women to upward mobility to managerial positions, the private sector needs to demonstrate its commitment by establishing a skills development programme on operations, finance and strategy that will have the effect of grooming black African women to be eligible to assume managerial positions in the workplace. It is argued that there is a need for such a skills development programme to focus on management and leadership skills and this must be integrated into the overall business plan of the company.<sup>625</sup> It is submitted that this will ensure that the business model of the private sector company makes it mandatory for black African women to receive such training under the skills development programme notwithstanding the change of leadership of the company.

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<sup>623</sup> Gassam J, How to increase female leadership in your company, August 2018, available at <https://www.forbes.com/sites/janicegassam/2018/08/07/how-to-increase-female-leadership-in-your-company/#4f0ef86b4fd9> accessed on 15 April 2019.

<sup>624</sup> CGE, Employment Equity hearings, page 57, 2016/2017, available at <http://www.cge.org.za/wp-content/uploads/2014/11/CGE-EE-Hearing-Private-Sector-Report-2016.pdf> accessed on 9 March 2019.

<sup>625</sup> See also Jinabhai D, New challenges for south African Development and Training- Linkages to empirical research, 1 March 2005, SAGE Journals.

#### 4.5 Reports of the private sector companies that appeared before the CGE's employment equity hearings

The CGE conducted hearings in the private sector and the purpose of these hearings was to determine the factors that contribute to the lack of transformation in the South African private sector.<sup>626</sup> According to the CGE, its hearings showed mostly that:<sup>627</sup>

- Women were less represented in senior managerial levels and occasionally constitute more than 12%;<sup>628</sup>
- Most companies neglected to implement the employment equity components on gender and disability and this contravened the EEA;<sup>629</sup>
- Most companies lacked rational policies to address gender transformation and disability in the workplace;<sup>630</sup>
- Most companies lack skills development programmes, targets and goals strategies; skills development programmes; and lack of clear measures to manage transformation in the workplace;<sup>631</sup>
- Most companies did not have systems to monitor and evaluate gender equity in the workplace.<sup>632</sup>

The CGE asserts that there is a clear indication that the private sector resists to comply with the EEA's transformation objective and this is evident in conduct that favours the appointment of white groups, exclusion of previously disadvantaged groups and inadequate steps to purposively employ and advance black women in the workplace.<sup>633</sup> In assessing progress between the public and the private sector, it is suggested that the public sector has progressed speedily than the private sector.<sup>634</sup> To support this view, it

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<sup>626</sup> CGE, Employment equity hearings , page 7-8, 2016/2017, available at <http://www.cge.org.za/wp-content/uploads/2014/11/CGE-EE-Hearing-Private-Sector-Report-2016.pdf> accessed on 9 March 2019.

<sup>627</sup> CGE, National Employment Equity report, page 7, 2010-2011.

<sup>628</sup> *Ibid.*

<sup>629</sup> *Ibid.*

<sup>630</sup> *Ibid.*

<sup>631</sup> *Ibid.*

<sup>632</sup> *Ibid.*

<sup>633</sup> *Ibid.*

<sup>634</sup> *Ibid.*

was submitted that black women comprise of 56.3% of government employees and dominate at all salary levels in government.<sup>635</sup> It is observed that the public sector had placed efforts to develop the skills of women by allocating bursaries, coaching and leadership development.<sup>636</sup> Moreover, the CGE avers that the public sector provides executive training for females, develops employment equity targets and assigns this duty to a senior person in the workplace, and integrates and monitor employment equity in the strategic plans.<sup>637</sup>

The CGE found that the public sector has integrated gender transformation targets in the performance appraisals of managers.<sup>638</sup> It is submitted that the inclusion of gender transformation targets in the performance appraisals of managers would have the effect of compelling the managers in the public sector to target black African women into managerial positions. It is argued that such would positively result in managerial positions being ring-fenced for qualified black African women. On the contrary, the private sector has not initiated measures such as the inclusion of targets in the performance appraisals of managers and as a result, there is nothing compelling managers in the private sector to ring-fence managerial positions to qualified black African women.

EH Hassim Builders World, a hardware company based in Limpopo (South Africa) submitted during the CGE's public investigative hearings in 2017 that it had training and development programmes that focused on business leadership, coaching, negotiating for results, leadership skills for supervisors, and human resources.<sup>639</sup> However, these programmes did not result in the company allocating the participants to managerial positions because the company was still male-dominated at managerial positions.<sup>640</sup> Similarly, Mercedes Benz South Africa demonstrated its commitment to training females within its Graduate Development Programme who constituted 54% of the beneficiaries in

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<sup>635</sup> *Ibid.*

<sup>636</sup> CGE, National Employment Equity report, page 4, 2010-2011.

<sup>637</sup> *Ibid.*

<sup>638</sup> *Ibid.*

<sup>639</sup> CGE, Employment equity hearings , page 66, 2016/2017 available at <http://www.cge.org.za/wp-content/uploads/2014/11/CGE-EE-Hearing-Private-Sector-Report-2016.pdf> accessed on 9 March 2019.

<sup>640</sup> CGE, Employment equity hearings , page 65. 2016/2017 available at <http://www.cge.org.za/wp-content/uploads/2014/11/CGE-EE-Hearing-Private-Sector-Report-2016.pdf> accessed on 9 March 2019.

2017.<sup>641</sup> Notwithstanding this, women were poorly represented in the workforce and amounted to 28.2% of the total workforce of 3609 persons. Also, the gender imbalance at Mercedes Benz South Africa was visible in the upper echelon levels.<sup>642</sup>

It is argued that the skills development programmes in the private sector should be focused on providing skills to black African women, absorb them within the system and afford them opportunities to exercise the skills learned at managerial positions. To ensure that there is no mismatch between skills and diversity in managerial positions, it is submitted that the private sector can provide acting opportunities to black African women who have the necessary skill and competence. Conversely, the South African Breweries (SAB) stated at the CGE's investigative hearings that it had resolved to set targets at distinguished positions at senior and top management levels to address the paucity of women in these positions. To achieve these targets, SAB submitted that it had established pipeline programmes such as skills development programme at the entry levels of the company to develop skills and identify talent for senior management levels.<sup>643</sup> SAB expressed that 123 trainees in total were recruited and females constituted 55%.

It is submitted that the private sector may embark on processes of subjecting female employees to training as part of skills development however due to the glass ceiling, black African women are unable to occupy managerial positions in the private sector. This view resonates with the views expressed by Doubell and Struwig who assert that the progression of most women in leadership positions is prevented by glass ceilings.<sup>644</sup> It is expressed that the most prominent barriers for women in the workplace are gender and

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<sup>641</sup> CGE, Progress report on Employment Equity, page 11 2017/2018 available at <http://www.cge.org.za/wp-content/uploads/2016/12/CGE-Employment-Equity-Report.pdf> accessed on 9 March 2018.

<sup>642</sup> CGE, Employment equity hearings , page 10, 2016/2017 available at <http://www.cge.org.za/wp-content/uploads/2014/11/CGE-EE-Hearing-Private-Sector-Report-2016.pdf> accessed on 9 March 2019

<sup>643</sup> CGE, Employment equity hearings , page 35, 2016/2017 available at <http://www.cge.org.za/wp-content/uploads/2014/11/CGE-EE-Hearing-Private-Sector-Report-2016.pdf> accessed on 9 March 2019.

<sup>644</sup> Doubell M and Struwig M, Perceptions of factors influencing the career success of professional and business women in South Africa , South African Journal of Economic and Management Sciences vol.17 n.5 Pretoria, page 531, 2014.

leadership stereotypes.<sup>645</sup> Leadership stereotype denotes the narrative that females are inferior to males and as such females are unable to cope with challenges of senior management positions.<sup>646</sup> Conversely, Bidvest was one of the companies that appeared before the CGE and was found to have had an in-house crèche facility available to its employees.<sup>647</sup> Overall, the figures reveal that 61.89% of the staff complement are women but the figures for the organisation reflect the favouring of white women. It is a conceivable argument that the crèche facility at Bidvest was an attractive measure to entice women to join the company; however, the company failed to create a pipeline for black African women to managerial positions and still results in the company not being transformed and not reflective of the demographics of South Africa.

#### **4.6 South African Legislation does not compel the private sector to proliferate black African women into managerial positions**

The EEA has been enacted to ensure that previously disadvantaged are represented at all levels in the workplace. It is common that since the enactment of the EEA, the private sector has not progressed in ensuring that previously disadvantaged groups are represented at all levels in the workplace. Oosthuizen and Naidoo argue that the reasoning for the enactment of the EEA in South Africa was the understanding that companies will not voluntarily empower enough black employees and as such required an enforcement tool to compel them.<sup>648</sup> Moreover, black African women are underrepresented at managerial positions in the private sector whilst the white males are overrepresented. In terms of the EEA, designated employers (including the private sector) are tasked to develop and implement an EE Plan to achieve equity in the workplace. The EE Plan often requires designated employers to set specific employment equity targets that will result in the achievement of equity in the workplace. The setting of employment

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<sup>645</sup> Doubell M and Struwig M, Perceptions of factors influencing the career success of professional and business women in South Africa , South African Journal of Economic and Management Sciences vol.17 n.5 Pretoria , page 531, 2014.

<sup>646</sup> Doubell M, *ibid*, page 532.

<sup>647</sup> CGE, National Employment Equity report, page 15, 2010-2011.

<sup>648</sup> Oosthuizen E and Naidoo V, Attitudes towards and experience of employment equity, SA Journal of industrial psychology, Vol 36, No 1, page 1,2010.



equity targets in the EE Plan is often informed by the underrepresentation of previously disadvantaged groups in certain occupational levels. Oosthuizen and Naidoo assert that employment equity is applied in the workplace to redress the injustices committed under the apartheid rule, however, fails to achieve the desired result because it is applied inconsistently in the workplace and is often not aligned with specific skills development programmes.<sup>649</sup>

In *Solidarity and others v Department of Correctional Services and others*<sup>650</sup>, the court asserted that employers need to take into consideration both the regional and national demographics when preparing an EE Plan.<sup>651</sup> The court reasoned that when an employer takes into consideration the national demographics of society it recognises past injustices suffered by the African majority in South Africa.<sup>652</sup> Similarly, consideration of regional demographics asserts the right to substantive equality for Africans, coloureds and Indians<sup>653</sup> Essentially, an EE Plan that does not take into consideration both regional and national demographics renders such an EE Plan to be defective. It is argued that if the private sector fails to take into consideration both the national and regional demographics when preparing an EE Plan, it provides legitimate grounds for black African women to challenge unfair discrimination and exclusion if denied job opportunities during the implementation of such a plan. Louw argues that numerical goals and even quotas are relevant only in the pursuit of an objective of equality of the outcomes and asserts that where the objective is simply to treat all persons equally, fairly and impartially, then there is no place for a goal or quotas for the representation of such persons in the workplace.<sup>654</sup> Louw objects to the arrangement of numerical goals founded on demographics because of the following reasons:

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<sup>649</sup> Oosthuizen E and Naidoo V, Attitudes towards and experience of employment equity, SA Journal of industrial psychology, Vol 36, No 1, page 8, 2010.

<sup>650</sup> *Solidarity and Others v Department of Correctional Services and Others* [2013] ZALCCT 38; [2014] 1 BLLR 76.

<sup>651</sup> *Solidarity and Others v Department of Correctional Services and Others* [2013] ZALCCT 38; [2014] 1 BLLR 76 at paragraph 45.

<sup>652</sup> *Ibid.*

<sup>653</sup> *Ibid.*

<sup>654</sup> Louw A, The Employment Equity Act, 1998 (and other myths about the pursuit of "equality", "equity" and "dignity" in post-apartheid South Africa) PER / PELJ (18)3, page 635, 2015.

- Affirmative action may be applied by corporates in instances where employees are not represented in the workforce;<sup>655</sup>
- There must be a reasonable and rational justification for a determination. In other words, there must be a basis for an outcome that suggests that existing representation of a particular group is not equitable;<sup>656</sup>
- The inequitable representation must be established first before measures are taken to address the imbalance. The measures should be established with the understanding of setting goals for the representation of groups that would be equitable;<sup>657</sup>
- The goal must be equitable to address the imbalances and inequality, the setting of such a goal must encompass a rational and reasonable exercise;<sup>658</sup>
- It may be achieved if there is consideration to objectively verifiable facts, as against a value judgment;<sup>659</sup>
- the EEA's preference envisaged by the EEA imposes value judgement at the very outset in the target-setting exercise.<sup>660</sup>

It is observed that the EEA does not set specific targets for the private sector to achieve in terms of equitable representation. Moreover, the EEA has left it to the employers to establish what "equitable representation" must be in the workplace. However, the court in *Solidarity* has laid guiding tools to determine equitable representation i.e. the setting of targets by the employers must take into consideration regional and national demographics of the economically active population when preparing EE Plan. It is submitted that the court in *Solidarity* has laid guidance to employers; however, the private sector continues not to have black African women into managerial positions equitably represented.

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<sup>655</sup> Louw A, The Employment Equity Act, 1998 (and other myths about the pursuit of "equality", "equity" and "dignity" in post-apartheid South Africa) PER / PELJ (18)3, page 637,2015.

<sup>656</sup> *Ibid.*

<sup>657</sup> *Ibid.*

<sup>658</sup> *Ibid*, page 638.

<sup>659</sup> *Ibid*, page 638.

<sup>660</sup> *Ibid*,page 638.

As such it is argued the failure of the private sector to develop and recruit black Africans into managerial positions is indicative that the EEA has not been effective in addressing the slow pace of transformation in the private sector. Moreover, the enforcement of penalties enforced by the Department of Labour in South Africa seems to have little effect on ensuring that the objectives of the EEA are met, particularly in ensuring that black African women are represented at managerial positions.

A critical analysis of the EEA reveals that this legislation does not necessarily compel the private sector to set targets that will result in black African women being targeted, recruited, developed and appointed into managerial positions. From this premise, it is unsurprising that the CGE hearings did not result in companies that failed to employ black African women being compelled to employ them at managerial positions. The lack of a Legislation that specifically sets targets to the private sectors renders any enforcement mechanism ineffective in South Africa. Against this backdrop, the EEA needs to be amended to include provisions that seek to compel the private sector companies to achieve diversified management. Failure to achieve such targets must result in consequences such as terminating work between the company and the State. Further consequences may include the disqualification of directors of the company in terms of section 69 of the Companies Act 71 of 2008. Consequently, the private sector would embark on innovative measures such as the headhunting of competent black African women in managerial positions. Presently, the flexibility in the EEA of setting feasible targets results in the achievement of equity not being prioritised by the private sector.

#### **4.7 Fronting practice in the South African private sector**

In terms of section 1 of the B-BBB Act, fronting is defined as any initiative or practice frustrating or undermining the objectives of the B-BBB Act. For this study, fronting is practices that seek to portray a company to be more compliant with the law whilst in essence it is not. As such fronting often takes the form of window-dressing to score more points to qualify for a State tender or a required license to operate in specific industries such as the mining sector. Particularly, black people are listed as directors, shareholders,

beneficiaries so that the company appears to have proper broad-based B-BBB status. Moreover Fronting in South Africa is prevalent and remains of the highest categories of complaints received by the Broad-Based Black Economic Empowerment (B-BBEE) Commission.<sup>661</sup> The B-BBEE Commission was established in terms of section 13B of the B-BBEE Act with effect from 24 October 2014 and reported that as of 31<sup>st</sup> March 2018 83.5% of the allegations it had probed were related to fronting.<sup>662</sup>

Sibanda observes that the B-BBEE Act is a critical legal instrument to address the economic inequality in South Africa emanating from the country's political history.<sup>663</sup> The B-BBEE Act essentially allows the private sector companies to do business with the State through tenders and contracts, provided that the private sector is compliant with the BBB EE. In South Africa, BBEE compliance is determined through a point system in which companies earn points based on their performance in five areas in the company and these are ownership, management control, skills development, enterprise and supplier development and socio-economic development.<sup>664</sup>

Whilst the importance of the legislation in addressing economic inequality in South Africa is an incontestable fact, Sibanda argues that the implementation of the B-BBEE Act remains challenged by the practice of fronting.<sup>665</sup> During 2017, it was reported that the BBEE Commission has initiated investigations into 17 companies for possible fronting.<sup>666</sup> It has been unearthed that the private sector in South Africa is placing black people as stakeholders in their companies, sometimes without their knowledge as a form of fronting to get higher BEE ranking.<sup>667</sup> This includes instances where black African

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<sup>661</sup> Gillan and Verdhuizen INC, B-BBEE is a criminal offence and how to report, 25 June 2018, available at [www.gvinc.law.za](http://www.gvinc.law.za) accessed on 17 May 2019.

<sup>662</sup> *Ibid.*

<sup>663</sup> Sibanda A, Weighing the cost of "BEE Fronting" on best practices of corporate governance in South Africa, *Speculum Juris* Volume 29 part 2, page 39, 2015.

<sup>664</sup> *Ibid.*

<sup>665</sup> *Ibid.*

<sup>666</sup> B-BBEE, Media statement 7 August 2017 "B-BBEE initiates investigations into possible fronting practices and non-compliance with the B-BBEE Act", available at <https://www.bbbeeecommission.co.za/b-bbee-commission-initiates-investigations-into-possible-fronting-practices-and-non-compliance-with-b-bbee-act/> accessed on 6 June 2019.

<sup>667</sup> Swano R, companies Guilty of fronting BBEE undermine transformation, available at [www.blackpages.co.za](http://www.blackpages.co.za) accessed on 6 June 2019.

women are appointed or introduced to a company based on tokenism and are barred from substantially participating in the core activities of the company. It has been reported that there are private sector companies that invite black people to be BEE partners of white-owned companies and are ditched after tenders are secured.<sup>668</sup>

Ntingi asserts that the involvement of black people in the economy is woefully low because at the heart of fronting is a deliberate attempt to exclude black people from participating in shareholdings and management structures.<sup>669</sup> According to Sibanda fronting practices in South Africa is an assault on the principles of good corporate governance which hinges on an unfaltered exercise of the fiduciary responsibilities of directors, stakeholder governance and ethical leadership.<sup>670</sup> Sibanda asserts that due to the complexity and multi-faceted manifestations, the mapping out of strategies to curb fronting practices has been an equally cumbersome process.<sup>671</sup>

Against this backdrop, it is conceivable that in the South African private sector, the practice of fronting has the effect of having black African women being excluded in the core activities of the company. The practice of fronting denotes that the appointment of black African women into managerial positions amounts to window-dressing and as such no skills are transferred to black African women. The lack of transfer of skills to black African women essentially minimises a pool of eligible black African women candidates for managerial positions in the workplace. As such, this perpetuates the underrepresentation of black African women in the private sector at managerial positions. It is argued that the private sector often fails to understand that the B-BBEE places responsibility on skills transfer and as such to achieve transformation in a substantiated economic environment, the private sector needs to stimulate an economic demographic that is representative of the demographics of South Africa. Similarly, the demographics

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<sup>668</sup> Ntingi A, Time to remove the BEE façade, available at <https://www.fin24.com/Finweek/Opinion/time-to-remove-the-bee-facade-20160411> accessed on 6 June 2019

<sup>669</sup> *Ibid.*

<sup>670</sup> Sibanda A, Weighing the cost of “BEE Fronting” on best practices of corporate governance in South Africa , *Speculum Juris* Volume 29 part 2, page 25,2015.

<sup>671</sup> *Ibid.*

of South Africa denote that black African women need to be included in managerial positions in the private sector and participate in the core activities of the companies.

#### **4.8 Conclusion**

It is trite that there are challenges in escalating black African women into managerial positions in the private sector. These challenges include *inter alia* race-based recruiting, non-compliance with the EEA, failure to attract black African women, lack of pipeline programmes to promote black African women into a managerial position, lack of legislation that compels the private sector to proliferate black African women into managerial positions and the practice of fronting that is prevalent in South Africa.

These challenges generally demonstrate the resistance from the private sector to transform and ensure that all previously disadvantaged persons, moreover black African women, are represented in all levels in the workplace. This resistance is further perpetuated by a lack of legislation that compels the private sector to proliferate black African women at managerial levels.

It is conceivable that an amendment of the EEA is necessary to compel the private sector to commit to employment equity in South Africa. An amendment to EEA must stipulate specifically that must be reached by the private sector to achieve diversity in the workplace. It is concluded that the envisaged diversity in the private sector would in principle reflect the equitable representation of black African women in managerial positions. Like the B-BBEEE, the amendment of the EEA must have sanctions to directors of companies that are found to have contravened the EEA by engaging in the race-based recruitment that specifically exclude competent candidates from other race groups. It is concluded that any director of a company who engages in race-based recruitment should be disqualified from serving as a director in the future. This will ensure that directors in the private sector not only discharge their fiduciary duties but also uphold the rule of law in South Africa by not engaging in conduct that excludes black African women on the grounds of race, gender and class.

## CHAPTER FIVE

### ADDRESSING THE PAUCITY OF BLACK WOMEN IN MANAGERIAL POSITIONS: A COMPARATIVE STUDY BETWEEN SOUTH AFRICA, NORWAY, RWANDA AND JAMAICA

#### 5.1 Introduction

The South African private sector is still facing challenges in addressing the lack of representation of black African women at managerial positions, despite existing legislation such as EEA that require the achievement of equity in the workplace. The South African government seems not to be able to compel or persuade the private sector to put efforts to promote gender equality and equity in the workplace. It has been demonstrated in chapter four that the private sector experiences challenges that serve as a barrier for the emancipation of black African women in the workplace. These challenges include *inter alia*, the disinclination by the private sector to achieve diversity in the workplace and the lack of quota legislation in South Africa that compels the private sector to achieve diversity. It is submitted that the inadequate representation of black African women in managerial positions, requires bold steps to fast-track transformation in the private sector.

In this chapter, a comparative study is embarked on between South Africa, Norway, Rwanda and Jamaica. The significance of this comparative study is that it allows an assessment of legal and policy interventions developed in these countries to address the comparative paucity of black African women in the private sector that would be useful to South Africa. It is conceivable that policy and legislative interventions such as the quota system in Norway and proactive measures such as the Gender seal programme in Rwanda and Jamaica form the basis of a comparative study to determine the success or failure of such measures given the challenges of the private sector in South Africa. The rationale of selecting these countries is influenced by the progress made, through clearly

defined plans such as the quota legislation, to ensure that the private sector is compelled to augment the representation of women in managerial positions. In this chapter, the study shall explore the measures and initiatives put in place by these countries and establish how South Africa can use such to augment the representation of black African women in managerial positions.

## 5.2 Norway in context

Norway is a Nordic and relatively homogenous country in North-western Europe with a population of 5.4 million.<sup>672</sup> In contrast to South Africa, Rwanda and Jamaica, Norway has more males than females in the Country. In 2019, it was recorded that there were 50.1% males and 49.9% of females.<sup>673</sup> The Norwegian legal system has its genesis to the Roman legal system.<sup>674</sup> In context, Norway has a civil law system and the Constitution, 1814 is the sovereign law of the Country. Like South Africa, the interpretation of laws is based on both preparatory works as well as interpretations by the courts.<sup>675</sup>

Historically most women commenced employment in the public sector during the 1970s and 1980s predominately because the public sector experienced growth due to the expansion of health and care services.<sup>676</sup> According to Statistics in 2018 the Norwegian public sector employed more women whilst the private sector employed more men.<sup>677</sup> Statistics Norway postulates that half of the employed women in Norway tend not to work in male-dominated positions and they are concentrated at low-paid occupations.<sup>678</sup> In the private sector, men are generally employed as engineers, technicians, or sales

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<sup>672</sup> United Nations Department of Economic and Social Affairs: Population Division, Norway Population, available at <https://countrymeters.info/en/Norway> accessed on 15 August 2019.

<sup>673</sup> *Ibid.*

<sup>674</sup> European Commission, Country report Non-discrimination Norway, Reporting period 1 January 2017 – 31 December 2017, page 5, 2018.

<sup>675</sup> *Ibid*, page 6.

<sup>676</sup> Statistics Norway, Women and men in Norway, page 13, available at [https://www.ssb.no/en/befolkning/artikler-og-publikasjoner/\\_attachment/347081?ts=1632b8bcba0](https://www.ssb.no/en/befolkning/artikler-og-publikasjoner/_attachment/347081?ts=1632b8bcba0), accessed on 15 August 2019.

<sup>677</sup> *ibid.*

<sup>678</sup> Statistics Norway, Women and men in Norway at Page 13, available at [https://www.ssb.no/en/befolkning/artikler-og-publikasjoner/\\_attachment/347081?ts=1632b8bcba0](https://www.ssb.no/en/befolkning/artikler-og-publikasjoner/_attachment/347081?ts=1632b8bcba0), accessed on 15 August 2019.



representatives whilst women in the public sector are generally employed as kindergarten teachers, primary and lower secondary teachers or nurses.<sup>679</sup> Consequently, this results in the gender pay gap that varies by sector, industry, occupation, level of education and age.<sup>680</sup> Statistics Norway postulates that a comparison between the public and private sectors reveals that the gender pay gap between males and females is the widest within the private sector in Norway.<sup>681</sup> Tomczak asserts that women constitute 20% in executive committees in 100 largest Norwegian companies and 30% of women were on Corporate Boards.<sup>682</sup> Similarly, in the executives, women constituted 7% and only 16% of the women occupied senior executive positions such as CFO, Country Head, Business Unit Head.<sup>683</sup> It was further found that 40% of these women were occupied in positions such as human resources, Communication, Legal services.<sup>684</sup>

The Centre for Research on Gender Equality (CRGE) found in 2017 that males in the private sector in Norway constituted 73% at top management positions whilst women were at 27%.<sup>685</sup> This is unsurprising as the private sector in Norway employs more males than females. This informs a view that in a workplace where a specific gender is employed in the majority, such gender is expected to dominate at all occupational levels in the workplace. Put differently, if women were employed in the majority in the private sector, it would have been expected that women would dominate most occupational and managerial levels in the workplace. This argument is rebutted by the CRGE statistics in 2017 that found that the public sector in Norway employs more women however at top managerial positions they occupy 34% at top management positions whilst men (who are

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<sup>679</sup> *Ibid*, page 17.

<sup>680</sup> *Ibid*, page 16.

<sup>681</sup> *Ibid*, page 17.

<sup>682</sup> Tomczak D, Gender equality policies and their outcomes in Norway, *Zarządzanie Publiczne* 4(36) s. 379–391, page 385, 2016.

<sup>683</sup> *Ibid*.

<sup>684</sup> *Ibid*.

<sup>685</sup> Centre for Research on Gender Equality, Gender balance on the top? Sector variation in business, academia, public sector and civil society organisations” ( In Norwegian), 2017, available at <https://www.samfunnsforskning.no/core/english/publications/core-indicator-status/gender-balance-on-the-top/> accessed on 15 August 2019.

in the minority) occupy 66% of top management positions.<sup>686</sup> Like South Africa top positions in both the private and the public sectors in Norway are male-dominated.

According to Kunze and Miller, the male dominance in corporate leadership presents barriers to women's advancement in corporate hierarchies and this includes "glass ceilings" that contribute to women's severe underrepresentation at the highest levels of corporate hierarchies.<sup>687</sup> To address this imbalance of women representation in managerial positions Norway adopted the Companies Act, 2003 (a quota law) that obliges boards of listed companies to be gender-balanced and be at least 40/60.<sup>688</sup> According to Gidlund *et al* Norway is known as the first country that legislated a quota law that affected the composition of Norwegian boards.<sup>689</sup>

It is espoused that a voluntary gender quota of at least 40 per cent of each sex in Norway was effected for the first time in 2003, subsequently made mandatory in 2006 for new companies while already publicly listed companies had two years to comply with the gender quota law.<sup>690</sup> According to Gidlund *et al* the objective of the quota law was to balance the board participation. It is espoused that the quota law in Norway resulted in an increase in female directors from 9% (during 2003) to over 40% (in 2008).<sup>691</sup>

It has been thirteen years since Norway introduced the quota law to address the imbalance of board participation between men and females in the workplace. From this premise, Norway becomes a model country to determine how a quota law can be introduced and enforced to augment the representation of women in managerial positions.

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<sup>686</sup> *Ibid.*

<sup>687</sup> Kunze A and Miller A, Women, Women helping women? evidence from private sector data on workplace hierarchies, National bureau of economic research, Working Paper 20761, December 2014, available at <https://www.nber.org/papers/w20761.pdf> accessed on 15 August 2019.

<sup>688</sup> Companies Act 2003.

<sup>689</sup> Gidlund A and Lund T, The Norwegian Gender Quota Law and its Effects on Corporate Boards , page 5, 2017 , available at <http://www.divaportal.org/smash/get/diva2:1119270/FULLTEXT01.pdf> accessed on 15th August 2019.

<sup>690</sup> *Ibid.*

<sup>691</sup> *Ibid.*

## 5.2.1 Legal framework supporting women's rights in Norway

### 5.2.1.1 The Constitution of Norway, 1814

According to Smith the Norwegian Constitution was adopted on the 17<sup>th</sup> May 1814 and is the second oldest written Constitution in the world.<sup>692</sup> According to the Norwegian Ministry of Culture, the Norwegian Constitution was strengthened in May 2014 with an inclusion of a separate Chapter on Human Rights. It is espoused that non-discrimination principles are included in Article 98 of the Constitution.<sup>693</sup> Article 98 of the Constitution states: "All people are equal under the law. No human being must be subject to unfair or disproportional differential treatment."

It is argued that the provision of Article 98 is gender-neutral in its formulation and therefore fails to provide explicit provisions on gender equality or prohibitions against gender discrimination. McClimans asserts that the Norwegian Constitution was founded on the principles of the sovereignty of the people and the separation of powers, the Constitution has had no provision regarding discrimination, and only makes general reference to human rights exist in section 92.<sup>694</sup>

The gender neutrality of the Norwegian Constitution has been noted by the CEDAW Committee and expressed its concerns that gender-neutral legislation, is likely to result in the lack of protection of females against both direct and indirect discrimination and delay the realisation of substantive equality between males and females.<sup>695</sup> To this end, it was recommended that Norway as a signatory to CEDAW include equality principles between men and women into the Constitution or other applicable statute per Article 2 of

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<sup>692</sup> Smith E, Old and Protected? On the "Supra-Constitutional" Clause in the Constitution of Norway, *Israel Law Review*, Volume 44, Issue 3 page 369-388, 2011.

<sup>693</sup> Norwegian Ministry of Culture, Beijing+25, The situation of women and girls in Norway: Development, progress and measures page 6, 2014–2019, available at [https://www.unece.org/fileadmin/DAM/Gender/Beijing\\_20/Norway.pdf](https://www.unece.org/fileadmin/DAM/Gender/Beijing_20/Norway.pdf) accessed on 17 August 2019.

<sup>694</sup> McClimans E, Norwegian Constitutional amendment includes protection against differential treatment, *European network of legal experts in the non-discrimination field* 14 July 2014, available at <https://www.equalitylaw.eu/downloads/2310-no-22-constitutional-protection-against-unjust-differential-treatment> accessed on 17 August 2019.

<sup>695</sup> Committee on the Elimination of Discrimination against Women, Concluding observations on the ninth periodic report of Norway, page 3-4, 22 November 2017.

the Convention; develop statute that is gender-specific, policies and programmes; and raise awareness concerning the nature of indirect discrimination and the principle of equality for all women, including women from ethnic minority background and women with disabilities, among Government officials, the judiciary and the general public.<sup>696</sup>

It is submitted that women's rights are constrained as a result of patriarchy, traditions, religion, and culture. As such, there is a need for an intersectionality perspective in the Norway Constitution that provides for the prohibited grounds of discrimination against women and in this includes gender, sex, ethnicity, religion, social class and sexual orientation. The failure to have these expressed in the Constitution will impede gender mainstreaming in the workplace. To address this, Norway adopted the Equality and Anti-Discrimination Act 1979 which expressly recognized gender and sex as one of the prohibited grounds against discrimination.

#### 5.2.2.2 Norwegian Equality and Anti-Discrimination Act 1979

The Equality and Anti-Discrimination Act (EAA) came into existence as the Gender Equality Act in 1979 and was amended numerously and recently been enacted into law in Norway and came into effect on the 1 January 2018. The purpose of the EAA is outlined in section 1. In terms of section 1, the purpose of the EAA is to promote equality and prevent discrimination based on gender, pregnancy, leave in connection with childbirth or adoption, care responsibilities, ethnicity, religion, belief, disability, sexual orientation, gender identity, gender expression, age or other significant characteristics of a person. Similarly, section 6 of EAA prohibits discrimination based on gender, pregnancy, leave in connection with childbirth or adoption, care responsibilities, ethnicity, religion, belief, disability, sexual orientation, gender identity, gender expression and age. The EAA applies to every sector of society, including family life and other personal relationships.

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<sup>696</sup> Norwegian shadow report on the convention to eliminate all forms of discrimination against women, Supplementing and commenting on Norway's 9<sup>th</sup> Periodic Report on the Implementation of CEDAW , page 10, available at <https://d3jkgvqmi357tqm.cloudfront.net/1504461291/shadowreport-cedaw-2017-norway.pdf> accessed on 17 August 2019.

Equally, the Norwegian private sector is bound by the EAA to not discriminate against women in the workplace on the grounds of gender.

Moreover, section 26 states that all employers shall make active, targeted and systematic efforts to promote equality and prevent discrimination based on *inter alia* gender, pregnancy, leave in connection with childbirth or adoption, care responsibilities, gender identity and gender expression. Contextually these duties include gender-perspective in combination with other grounds of discrimination, and the duties encompass a wide range of various matters such as hiring, remuneration and working conditions, promotion, development opportunities, accommodation, the opportunity to combine work with family life and preventing harassment.<sup>697</sup> The obligation to make active efforts does not stipulate the specified measures that must be taken however requires the employer to develop measures to eliminate discrimination challenges in the workplace.<sup>698</sup> Due to the different dynamics of each industry employers are essentially expected to design measures that seek to augment the representation of women at managerial positions.

The EAA, unlike the Norwegian Constitution, makes gender equality explicitly outlined and places a duty also on the private sector work towards the achievement of gender equality in the workplace. Essentially gender equality implies a requirement on the private sector in Norway to avoid unfair discrimination against women and to actively implement concrete steps such as recruitment of women to promote gender equality. To this end, the EAA in Norway seeks to ensure that women in the private sector are afforded the same opportunities as males and not excluded based on race or gender.

#### 5.2.2.3 The Companies Act (as amended in 2003)

The Norwegian government introduced the Companies Act 2003 that outlines the gender composition of Norwegian private and public limited companies. Section 6-11 of the

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<sup>697</sup> Norway's reply to a questionnaire from the UN Working Group on the Issue of human rights and transnational corporations and other business enterprises, available at <https://www.ohchr.org/Documents/Issues/Business/Gender/Norway.pdf> accessed on 19 August 2019.

<sup>698</sup> *Ibid.*

Companies Act makes it mandatory for both male and female employees to be represented on corporate boards in all public limited companies in the private sector. Section 6-11 state that in the boards of publicly listed companies both genders should be represented, as follows:

- a) Where there are two or three board members, both genders should be represented.
- b) Where there are four or five board members, both genders should be represented with at least two members each.
- c) Where there are six to eight board members, both genders should be represented with at least three members each.
- d) Where there are nine or more members of the board, each gender should be represented with at least 40 per cent each.

According to Sweigart if there are no penalties for noncompliance in the Norway quota legislation, companies will not be persuaded to augment women in managerial positions. Consequently, a failure to comply with Norway's Companies Act, including the gender quotas, results in the company being dissolved.<sup>699</sup> The effect of quota provisions in the Companies Act is to increase the fraction of women directors at the corporate boards. Bolso asserts that the women in the Norwegian boards of listed companies were poorly represented in 1993 and constituted 3% and slightly increased in 2003 to 7% however tremendously increased to 42% since the coming into operation of the quota provisions.<sup>700</sup> According to Sweigart a quota system in Norway is a progressive mechanism to achieve diversity on boards and adds significant value to companies.<sup>701</sup>

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<sup>699</sup> Sweigart, Women on Board for Change: The Norway Model of Boardroom Quotas as a Tool For Progress in the United States and Canada, Women on Board for Change 32:81A , page 89A ,2012, available at <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1007&context=njilb> 19, accessed on 19 August 2019.

<sup>700</sup> Bolso A Ignore the doubters. Norway's quota on women in the boardroom is working, The Guardian 11 July 2011, available at <https://www.theguardian.com/commentisfree/2011/jul/18/diversity-boardroom-corporate-decisions> accessed on 19 August 2019.

<sup>701</sup> Sweigart, Women on Board for Change: The Norway Model of Boardroom Quotas as a Tool For Progress in the United States and Canada, Women on Board for Change 32:81A , page 83A, 2012, available at

Sweigart postulates that the gender quotas in Norway have not made significant changes to decision making positions but only made a small impact at the lower positions of the companies.<sup>702</sup>

It is espoused that there must be an intentional commitment to increase opportunities that advance for women of colour, as such Sweigart asserts that diversity initiatives that are not focused on specific challenges are likely to have diluted effects.<sup>703</sup> According to Sweigart quotas should focus solely on gender, rather than on both race and gender.<sup>704</sup> It is argued that in South Africa the adoption of a quota system should focus on black African women in the private sector. This view is informed by the realisation that white women, although they are women, have been preferred by the private sector at managerial positions.

### **5.3 Measures to promote women in managerial positions: Advantage and critique of the Norwegian-model boardroom quotas**

The corporate quotas introduced in Norway require 40% of women on corporate boards and is considered as a model to be emulated by other countries. Bertrand *et al* assert that the objective of a quota law in Norway was to reduce the gender disparity and augment women's representation at senior levels in the corporate sector.<sup>705</sup> Viviers *et al* observe that quotas make it mandatory for the appointment of the targeted number of females managers within a particular time frame and results in fines or suspension from stock exchanges if the listed companies are non-compliant.<sup>706</sup> Pande *et al* conclude that quotas can and do increase female leadership in politics and the corporate sphere.<sup>707</sup> Pander *et*

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<https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1007&context=njilb> , accessed on 19 August 2019.

<sup>702</sup> Sweigart, *Ibid*, page 84A.

<sup>703</sup> Sweigart, *Ibid*, page 91A.

<sup>704</sup> Sweigart, *Ibid*, page 91A.

<sup>705</sup> Bertrand M, Black S, Jensen S, Lleras-Muney A, Breaking the glass ceiling? The effect of board quotas on female Labor Market outcomes in Norway, the National Bureau of economic research July 2017.

<sup>706</sup> Viviers *et al*, Mechanisms to promote board gender diversity in South Africa, Acta Commercii - Independent Research Journal in the Management Sciences, page 3, 15 September 2017.

<sup>707</sup> Pande *et al* , Gender quotas and female leadership: A review , A Background paper for the World Development Report on Gender, page 3, 7<sup>th</sup> April 2011, available at

*al* assert that were equitable representations in policy-making is desirable, quotas are a good policy tool to achieve it.<sup>708</sup> It is deduced that the introduction of the quota system, though appears to be coercive but appears to have the effect of increasing the representation of women in the workplace.

Stary observes that several disadvantages exist if a quota system is adopted in the workplace and this includes *inter alia*, the appointment of unqualified females at senior levels to comply with the quota legislation, quotas would promote tokenism appointment and window dressing board roles to fit the quota obligations.<sup>709</sup> In support of Pande *et al* argues that most companies have one woman on the board and this reflects such appointment are tokenism instead of substantive leadership success of women.<sup>710</sup> Despite this, Stary asserts that mandatory quotas are necessary to achieve equitable representation of women in the private sector.<sup>711</sup>

The cardinal question is whether the introduction of a quota system is the necessary tool to address the underrepresentation of women in managerial positions? Critics, such as Milne argue that board quotas in Norway worked for smaller public companies however failed to address the paradox of women's underrepresentation at the executive level.<sup>712</sup> This resonates with the views of Bertrand *et al* who argue that the quota law in Norway did not result in most women being employed in large numbers in the companies due to the quota.<sup>713</sup>

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<https://siteresources.worldbank.org/INTWDR2012/Resources/7778105-1299699968583/7786210-1322671773271/Pande-Gender-Quotas-April-2011.pdf> accessed on 28 August 2019.

<sup>708</sup> *Ibid.*

<sup>709</sup> Stary K, Gender diversity quotas on Australian boards: is it in the best interests of the company? page 16 available at [https://law.unimelb.edu.au/data/assets/pdf\\_file/0004/1709500/2-KateStary-CorporateGovernanceandDirectorsDutiesPaper2.pdf](https://law.unimelb.edu.au/data/assets/pdf_file/0004/1709500/2-KateStary-CorporateGovernanceandDirectorsDutiesPaper2.pdf), accessed on 28 August 2019.

<sup>710</sup> Pande *et al*, Gender quotas and female leadership, : A review, A Background paper for the World Development Report on Gender 7<sup>th</sup> April 2011, page 6, available at <https://siteresources.worldbank.org/INTWDR2012/Resources/7778105-1299699968583/7786210-1322671773271/Pande-Gender-Quotas-April-2011.pdf> accessed on 28 August 2019.

<sup>711</sup> Stary K, Gender diversity quotas on Australian boards: is it in the best interests of the company? page 16, available at [https://law.unimelb.edu.au/data/assets/pdf\\_file/0004/1709500/2-KateStary-CorporateGovernanceandDirectorsDutiesPaper2.pdf](https://law.unimelb.edu.au/data/assets/pdf_file/0004/1709500/2-KateStary-CorporateGovernanceandDirectorsDutiesPaper2.pdf), accessed on 28 August 2019.

<sup>712</sup> Milne R, Enlightened Norway's gender paradox at the top of business, 30 September 2018 available at <https://www.ft.com/content/6f6bc5a2-7b70-11e8-af48-190d103e32a4> accessed on 28 August 2019.

<sup>713</sup> Bertrand M, Black S, Jensen S, Lleras-Muney A, Breaking the glass ceiling? The effect of board quotas on female Labor Market outcomes in Norway, the National Bureau of economic research July 2017



Bertrand *et al* argue that the quota system in Norway only resulted in the reduction of gender pay in earnings between men and females in the workplace.<sup>714</sup> From this perspective, critics argue that there is a prejudice suffered by imposing gender composition of corporate boards and assert that the recruitment to corporate boards should be based on qualifications and not the gender of applicants.<sup>715</sup> It is contended that companies should be accorded with the rights to appoint candidates that are suitable and qualified to sit on the boards. Contextually it is argued that the quota regulations promote unequal treatment and discrimination against male employees.<sup>716</sup>

It is submitted that the resistance of the private sector to address the underrepresentation of women at boardrooms requires mandatory law that will compel them to recruitment. Storvik *et al* correctly observed that the quotas are implemented successfully if sanctions are imposed and within Norway the harshest being the dissolution of non-compliant companies.<sup>717</sup> It is observed that most companies in the initial phase did not implement the quota policy because there were no sanctions for non-compliance. This provides a compelling argument that a quota is key to the achievement of equity in the workplace. It is submitted that a quota has the effect of creating the much-needed pressure on the private sector and triggers employers to put recruitment measures that target women.

#### **5.4 Lessons to be learned from Norway by South Africa**

The critics of a quota system have to some degree argued that a quota has the effect of companies appointing women for tokenism purposes. This means that the appointed women would not be contributing meaningfully but merely appointed to meet the targets. Whilst this is a legitimate argument, it is recognised that the argument or concerns appear to be more of a supposed threat than an existing problem.

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<sup>714</sup> *Ibid.*

<sup>715</sup> Storvik A and Teigen M, Women on Board, The Norwegian Experience, Friedrich-Ebert-Stiftung International Policy Analysis, page 6, June 2010.

<sup>716</sup> *Ibid.*

<sup>717</sup> *Ibid*, page 3.

Sweigart observes this and states that “fear of tokenism operates more as a barrier to the passage of divisive legislation mandating higher boardroom participation of women rather than an obstacle to the effectiveness of women once they are situated on boards”.<sup>718</sup> The quota system has proved to increase the representation of women in managerial positions both in Rwanda and in Norway. In Rwanda, the setting of targets in the public sector has resulted in Rwanda having most women in parliament. In Norway, the introduction of a quota law has increased women's representation in managerial positions in the private sector.

Despite views that the quota system has not influenced change at the executive level at the boardroom, it is however conceived that the Norwegian quota legislation demonstrates how influential legislation can be used to regulate gender imbalances at managerial positions. To this end, quota legislation challenges employers to achieve diversity and establish measures to recruit suitably qualified women at managerial positions. These measures include the ring-fencing of managerial positions for suitably qualified women and will arguably enable a more equitable representation of women in decision making positions.

It is submitted that quota legislation that fails to have sanctions if a company fails to comply would render it ineffective. According to Pande *et al* 77 out of an estimated 450 public limited companies in Norway failed to meet the gender quota requirements by January 2008, after the grace period lapsed for compliance.<sup>719</sup> Consequently, the non-complying companies were provided with four weeks to comply with the gender quotas. According to Pande *et al* the companies were threatened to be dissolved in terms of the

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<sup>718</sup> Sweigart, Women on Board for Change: The Norway Model of Boardroom Quotas as a Tool For Progress in the United States and Canada, Women on Board for Change 32:81A , page 96A, 2012, available at <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1007&context=njilb> accessed on 28 August 2019.

<sup>719</sup> Pande *et al* , Gender quotas and female leadership: A review , A Background paper for the World Development Report on Gender, page 15 , 7<sup>th</sup> April 2011, available at <https://siteresources.worldbank.org/INTWDR2012/Resources/7778105-1299699968583/7786210-1322671773271/Pande-Gender-Quotas-April-2011.pdf> accessed on 28 August 2019.

Companies Act for non-compliance.<sup>720</sup> Strikingly, all companies complied by mid-2008.<sup>721</sup> This provides a compelling argument that sanctions are necessary against companies that resist complying with gender quotas. Similarly, a voluntary process for companies to comply would result in only a few companies with equitable representation at managerial positions.

In 2016 Germany became another country that resorted to introducing a quota law amid the poor representation of women on the board. Accordingly, the Equal Participation of Women and Men in Leadership Positions in the Private and Public Sector Act 2015 requires “a minimum 30 per cent representation of each gender on supervisory boards of large private corporations that are both listed and subject to full co-determination”.<sup>722</sup>

Fedorets A *et al* observe that the Equal Participation of Women and Men in Leadership Positions in the Private and Public Sector Act 2015 essentially introduced a *de facto* binding and enforceable female quota.<sup>723</sup> An enforceable female quota effectively indicates that there are sanctions for non-compliance with the quota. Fedoretz *et al* found that companies in Germany that defined their quotas freely had low numbers of women participating on the board of companies.<sup>724</sup> Conversely, Fedoretz *et al* assert that gender quotas have the effect of fast-tracking higher female representation at senior levels of the company provided that such quotas are mandatory.<sup>725</sup>

To effectively ensure that a quota law achieves meaningful results, South Africa must not adopt a soft law approach which essentially does not sanction for non-compliance. South African companies have further demonstrated their willingness to pay fines for any non-compliance with the EEA and as such, fines have not persuaded the private sector to intensively commit to addressing the paucity of women at managerial positions. It is

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<sup>720</sup> *Ibid.*

<sup>721</sup> *Ibid.*

<sup>722</sup> Fedorets A *et al*, Gender Quotas in the Boardroom: New Evidence from Germany, DIW Berlin, page 2, 2019.

<sup>723</sup> *Ibid.*

<sup>724</sup> *Ibid.*

<sup>725</sup> *Ibid.*

therefore clear that the private sector would comply with any law provided that there is hefty sanction. To this end, a quota law in South Africa should include, similar to Norway and Germany, a sanction that includes fines and disqualification of company directors.

## 5.5 Rwanda in context

Rwanda is a sovereign State situated in Eastern Africa and in 2019 its population was estimated at 12.63 million.<sup>726</sup> In 2019, women were 50.85% and males were 49.15%.<sup>727</sup> Like South Africa, women are in the majority in Rwanda. In 1994, there was genocide in Rwanda, and that resulted in 800 000 deaths and further collapsed the infrastructure and economy of the country.<sup>728</sup> According to Behnke pre genocide in 1994, Rwanda was patriarchal and women were restricted access to opportunities and their roles were confined to households and subordination to their husbands.<sup>729</sup> This submission resonates with the view of Newbury *et al* who asserts that patriarchal attitudes and practices have for a long time, permeated Rwandan politics and society.<sup>730</sup>

The genocide in 1994 has been largely characterised as catastrophic and has left many social relations, including the gender ones and exacerbated the already existing gender imbalances.<sup>731</sup> Most men were killed during the genocide, some arrested whilst others were forced to leave Rwanda.<sup>732</sup> As such, this resulted in a State with a population made up of 70% of women.<sup>733</sup> The genocide in 1994 has further resulted in most women

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<sup>726</sup> Worldometers, Rwanda Population, available at <https://www.worldometers.info/world-population/rwanda-population/> accessed on 19 June 2019.

<sup>727</sup> World Population Prospectus, 2019 available at [https://population.un.org/wpp/Publications/Files/WPP2019\\_Highlights.pdf](https://population.un.org/wpp/Publications/Files/WPP2019_Highlights.pdf) accessed on 19 June 2019.

<sup>728</sup> Behnke C, Redefining Gender Roles in Rwanda, available at <https://pulitzercenter.org/projects/redefining-gender-roles-rwanda> accessed on 19 June 2019.

<sup>729</sup> *Ibid.*

<sup>730</sup> Newbury C, Baldwin H, Aftermath: Women in Post genocide Rwanda, Center for Development Information and Evaluation, Working Paper No. 303 July 2000, available at <https://pdfs.semanticscholar.org/f10b/478bf40dd3e36e2d3572fa9a9b11f02df2b0.pdf> accessed on 19 June 2019.

<sup>731</sup> East African Community, Gender and community development analysis in Rwanda, page 5, January 2009,

<sup>732</sup> Abari N, Rwanda's Path to Gender Equity, 18 October 2017, available at <https://bpr.berkeley.edu/2017/10/18/rwandas-path-to-gender-equity/> accessed on 19 June 2019.

<sup>733</sup> *Ibid.*

experiencing serious economic deprivation.<sup>734</sup> According to Newbury *et al* female-headed households were affected and destitute due to their vulnerability.<sup>735</sup> Significantly, households headed by women post the genocide compelled women to perform non-traditional roles such as decision making, managing financial resources and constructing houses.<sup>736</sup> To this end, women started working in butcher shops, accounting firms and courthouses which were predominately occupied by males before the genocide in 1994. Abari observes that the significant loss of humans during genocide enabled women to occupy a myriad of positions that were exclusively for men.<sup>737</sup>

It is deduced that the genocide unintentionally created opportunities for women to work and assume positions that they could not previously occupy due to patriarchal attitudes that generally expected women to be confined to the household. Fundamentally, Rwanda recognises that women experienced and suffered mostly due to genocide and as such deserved meaningful roles in the nation's recovery post-genocide.<sup>738</sup> Against the backdrop understanding of the prevalence of patriarchy in Rwanda, it is submitted that had genocide not occurred in Rwanda in 1994 women would not have been appointed significantly in officials' roles.

To this end, it is observed that the rebuilding of Rwanda post-genocide had taken into consideration the need to ensure that women are recognised and afforded opportunities in decision making positions in the workplace. It is conceivable that the appointment of women to these positions was primarily influenced by the fact that women were in the majority in Rwanda post-genocide period and secondly it was recognised that women

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<sup>734</sup> *Ibid.*

<sup>735</sup> Newbury C, Baldwin H, Aftermath: Women in Post genocide Rwanda, Center for Development Information and Evaluation, Working Paper No. 303, page 3, July 2000, available at <https://pdfs.semanticscholar.org/f10b/478bf40dd3e36e2d3572fa9a9b11f02df2b0.pdf> accessed on 19 June 2019.

<sup>736</sup> East African Community, Gender and community development analysis in Rwanda, page 5, January 2009.

<sup>737</sup> Abari N, Rwanda's Path to Gender Equity , 18 October 2017, available at <https://bpr.berkeley.edu/2017/10/18/rwandas-path-to-gender-equity/> accessed on 19 June 2019.

<sup>738</sup> Powley E, Strengthening Governance: The role of women in Rwanda's transition, A summary, EGM/ELEC/2004/EP.5, page 3, 26 January 2004, available at <https://www.unicef.org/sowc07/docs/powley.pdf> accessed on 19 June 2019.

largely experienced severe cruelty and victimisation during the genocide. Like Rwandese women, South African Black African women have been subjected to triple oppression in terms of race, class and gender.

It is evident that before the genocide in Rwanda and apartheid in South Africa both countries were characterised by patriarchal attitudes that viewed women as secondary earners and therefore limited their economic participation. To this end, women have confined to household activities whilst men were generally breadwinners. Post genocide and apartheid both countries still encountered challenges in terms of dealing with patriarchy. Interestingly, Newbury *et al* argue that genocide has not eradicated patriarchy in Rwanda and suggests that the genocide has to the contrary reinforced the subordination of women.<sup>739</sup> This essentially promoted the exclusion of women's economic participation.

In 2018, the Global Gender report ranked Rwanda to be the sixth country globally to have closed the gender gap between females and males across four key areas such as health, education, economy and politics.<sup>740</sup> In Africa, Rwanda was found to be the top performer in closing the overall gender gap between females and males concerning access to health, education, politics and economic participation.<sup>741</sup> To this end, it has been found that Rwanda has closed 80% of its gender gap and this has been influenced by the country's strong performance with the most female parliamentarians globally (61%).<sup>742</sup> It is trite that Rwanda has been ranked the top performer in Africa in terms of gender parity but this is in respect to the political environment and not necessarily economic participation.<sup>743</sup> It is submitted that the economic participation of women in Rwanda will be a good indicator of how the country is progressing in terms of ensuring that black African women are appointed at managerial positions particularly in the private sector.

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<sup>739</sup> Newbury C , Baldwin H, *Aftermath: Women in Post genocide Rwanda*, Centre for Development Information and Evaluation, Working Paper No. 303, page 6, July 2000, available at <https://pdfs.semanticscholar.org/f10b/478bf40dd3e36e2d3572fa9a9b11f02df2b0.pdf> accessed on 19 June 2019.

<sup>740</sup> Global Gender Report, page 8,2018.

<sup>741</sup> *Ibid*, page 17.

<sup>742</sup> *Ibid* at page 20.

<sup>743</sup> *Ibid* at page 26.

Against this backdrop, it is significant to determine whether the dominance of females in the political environment is indicative that black women participate in managerial positions in the private sector. In 2016, the private sector in Rwanda had 53.9% of women employed and 46.1% of males employed.<sup>744</sup> In context, the private sector in Rwanda had more female representation than males in the private sector. Surprisingly, black African women were underrepresented at managerial positions and the majority were employed at administrative roles.<sup>745</sup> From this premise, it is submitted that the dominance of women in the political environment has not resulted in black African women being represented at higher echelons positions in the private sector. To understand the challenges of transforming the private sector in Rwanda, it is imperative to study the legal framework governing women's rights in the workplace and draw lessons from the proactive measures embarked by Rwanda to achieve equity in the private sector.

## **5.6 Legal and institutional framework promoting gender equality in the workplace**

Rwanda is a signatory to progressive international instruments that promotes the rights of women. Like South Africa, Rwanda has adopted the Beijing Platform for Action (BPA), UDHR and CEDAW. By ratifying CEDAW during November 1981, Rwanda essentially committed to taking steps including the adoption of legislation to eliminate discriminatory practices against women.

### **5.6.1 The Constitution of the Republic of Rwanda, 2003**

Article 9 of the Rwandan Constitution guarantees equal gender rights and requires women to be granted at least thirty per cent (30%) of posts in decision-making organs. A strict interpretation of this suggests that 30% of posts for women are restricted to the public sector and the private sector is excluded. Rugege posits that the 30% target has resulted in an increase of women appointments at decision-making positions at all levels

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<sup>744</sup> GMO, The state of gender equality in Rwanda, page 24, March 2019.

<sup>745</sup> National Institute of Statistics of Rwanda, National Gender Statistics Report ,page 58,2016.

of government.<sup>746</sup> The setting of targets has the effect to augment the representation of females in senior positions and essentially promotes diversity and equity.

The Rwandan Constitution conforms to the fundamental principles of equitable sharing of power between Rwandans. It is deduced that “equitable sharing of power” in Article 9 denotes that women must equally be included in the sharing of power. It is argued that Article 9 of the Rwandan Constitution forms a central argument that the private sector needs to equally ensure that there is equitable sharing of powers. To this end, it is argued that the sharing of power in the private sector means that black African women should be appointed to managerial positions. This is compelling considering that women are in the majority in Rwanda.

The Constitution of the Republic of Rwanda reaffirms, through Article 11, equal rights to Rwandans and prohibits discrimination based on *inter alia* ethnic origin, tribe, clan, colour, sex, religion and social origin. Essentially, the Rwandan Constitution, like the South African Constitution, guarantees women with equal rights and ensures that they are not discriminated against in terms of sex or gender. This is further reaffirmed by Article 37 which states that persons with the same competence and ability have a right to equal pay for equal work without discrimination. When construed in context, Article 17 does not distinguish between males and females, as such all employees irrespective of their gender have a right to equal pay for equal work. It is accepted that a woman who is paid less than his male counterpart despite them doing equal work may invoke Article 17 for constitutional protection.

Significantly, Article 185 of the Rwandan Constitution establishes a Gender Monitoring Office (GMO) which is tasked to monitor and promote gender equality and non-discrimination of equal opportunities for all persons and fairness.<sup>747</sup> Additionally, the preamble of the Rwandan Constitution reassures its commitment to ensuring equal rights

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<sup>746</sup> Rugege S, Women and Poverty in Rwanda: The Respective Roles of Courts and Policy, working paper No.1, page 7, January 2015.

<sup>747</sup> GMO, available at <http://www.gmo.gov.rw/index.php?id=553> accessed on 1 July 2019.



between men and women in Rwanda. . From this premise, it is argued that the private sector in Rwanda has the responsibility to promote gender equality in the workplace.<sup>748</sup> The principle of gender equality is embedded in the Rwandan Constitution and as such all laws including employment laws are expected to conform to the principle of gender equality.<sup>749</sup>

#### 5.6.2 Labour Law No 13/ 2009

To advance women's rights in the workplace, the Rwandan Government adopted labour law No 13/2009 which essentially establishes the principle of equality between employees in the workplace. Turamwishimiye observes that the Labour Law No 13/ 2009 prohibits direct or indirect discrimination which aims to deprive the worker the right to equal opportunity or the salary especially when the discrimination is based upon the different enumerated grounds including sex.<sup>750</sup> Additionally, the Labour Law No 13/2009 prohibits any direct or indirect gender-based violence or moral harassment at work.<sup>751</sup>

Just like the BCEA in South Africa, Labour Law No 13/2009 provides protections to pregnant and breastfeeding females from being exposed to work environments that is harmful to their lives or those of their babies.<sup>752</sup> Labour Law No 13/2009 fundamentally contains the rights and obligations of employers and employees between each other in the workplace and this includes the right to equal opportunities in the workplace irrespective of race and sex.<sup>753</sup> Notably the Labour Law No 13/2009 has its genesis to several international instruments including *inter alia* CEDAW and Convention 100 of 1951 concerning equal remuneration between men and women workers for work of equal value. However, Labour Law No 13/2009 does not expressly place an obligation on the

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<sup>748</sup> Rugege S, Women and Poverty in Rwanda: The Respective Roles of Courts and Policy, working paper No.1, page 8, January 2015.

<sup>749</sup> *Ibid.*

<sup>750</sup> Turamwishimiye, The role of African women in Post-conflict national development: The Case of Rwanda, page 18, 13 March 2017. See also Article 12 of the Labour Law 13/2009.

<sup>751</sup> *Ibid*, page 19.

<sup>752</sup> Article 74 of the labour law 13/2009.

<sup>753</sup> Article 12 of the Labour Law 13/2009.

employer to ensure equitable representation of women at all occupational levels in the workplace.

To this end, affirmative action measures in Rwanda are introduced by the Rwandan Constitution; however, these affirmative action measures are specifically focused on the public sector and the private sector. From this premise, like South Africa, Rwanda does not have legislation that categorically compels the private sector to ensure that women are represented in the higher echelons of the workplace. However, Rwanda has placed measures such as the National Gender Policy (NGP) to mainstream gender in all sectors in Rwanda. This includes the adoption of affirmative action to increase the number of women in import-export trade, banking and insurance and decision-making positions of the private sector in general.<sup>754</sup>

### 5.6.3 Institutional mechanisms to support women's rights

It is uncommon that in countries where an array of legislation exists to provide women with rights, institutions are generally established to monitor the effective implementation of these rights across all spheres. To this end, Rwanda has established *inter alia* the Ministry of Gender and Family Promotion and Gender Monitoring Office to monitor the implementation of women's rights concerning employment and progression in managerial positions in the private sector.

#### 5.6.3.1 Ministry of Gender and Family Promotion

The Ministry of Gender and Family Promotion (MIGEPROF) is defined as “central government institution mandated to ensure strategies co-ordination of policy implementation in the area of gender, family, women's empowerment and children's issues”.<sup>755</sup> It is observed that the MIGEPROF objectives are to:

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<sup>754</sup> National Gender Policy, Rwanda, page 26.

<sup>755</sup> East African Community Secretariat, Gender and community development analysis in Rwanda, page 12, January 2009.

- a) ensure that gender is mainstreamed at different levels of programming: designing, implementation, monitoring and evaluation;<sup>756</sup>
- b) formulate policies, programs, strategies to promote gender, family and children's welfare;<sup>757</sup>
- c) coordinate implementation, monitoring–assessment of policies, programs and strategies meant to promote women's, family and children's welfare;<sup>758</sup>
- d) mobilize and coordinate resources to promote gender, children's rights and family.<sup>759</sup>

To achieve the above objectives, a National Gender Policy (NGP) has been developed to serve as guidance on how to mainstream gender in all sectors in Rwanda. With the private sector, the NGP recognises that males are dominating, whilst women are underrepresented and traditionally appointed in low key positions.<sup>760</sup>

The NGP recognises that the private sector in Rwanda is male-dominated and women are generally underrepresented in decision making positions.<sup>761</sup> The NGP denotes that females are underrepresented at technical jobs such as managerial positions in engineering fields which are generally well paying.<sup>762</sup> Essentially women were confined to lower positions such as casual workers in agricultural and informal sectors that are paying less and this is indicative that there is no equity between male and female employees in the private sector in Rwanda. To increase the number of women in decision making within the private sector, the NGP prescribes that affirmative action measures must be applied in import-export trade, banking and insurance and decision making of the private sector in general.<sup>763</sup> The effect of affirmative action measures would result in the setting of targets for women to occupy managerial positions in the private sector. The

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<sup>756</sup> *Ibid.*

<sup>757</sup> *Ibid.*

<sup>758</sup> *Ibid.*

<sup>759</sup> *Ibid.*

<sup>760</sup> Rwanda National Gender Policy, page 17, July 2010.

<sup>761</sup> *Ibid.*

<sup>762</sup> *ibid.*

<sup>763</sup> *Ibid*,page 28.

NGP recognises that women are generally underrepresented at managerial positions in male-dominated sectors, as such, prescribes affirmative action in male-dominated sectors such as import-export trade, banking and insurance to increase the representation of women in these male-dominated fields.

To further augment the representation of women in leadership positions, the NGP recognises the need to expose females to existing opportunities in business and encourage women to occupy key positions. This is so because the Rwandan society is characterised by the patriarchy that translates in women embracing male's dominance in society and the workplace.<sup>764</sup> It is submitted that sensitising women to assuming decision making positions in male-dominated fields such as leadership positions in agriculture, is important in changing the mindset of women who still embrace male dominance in the workplace. To this end, South Africa needs to emulate this by sensitising black African women to assume managerial positions in male-dominated fields especially those black African women who still embrace male dominance in the workplace. The sensitisation of black African women may take place in the form of workshops. In addition, women's committees may be established in the workplace to understand the challenges and experiences of women to assume managerial positions in male-dominated fields. Such committees must be able to take identified challenges of women through to the management of the company to address to create an enabling environment for women to actively participate in leadership positions.

#### 5.6.3.2 Gender Monitoring Office

The Rwandan Private Sector encounters challenges to ensure equitable representation of women at managerial positions. The increase of women in women parliamentarians in Rwanda has not influenced the private sector to increase women's representation at managerial positions. This is primarily because the private sector companies are separate legal entities that are run by the Board of directors and owned by shareholders. It is submitted that the failure to place a mandatory quota system through legislation in the

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<sup>764</sup> Izabiliza J, The Role of women in Reconstruction: Experience of Rwanda, Sematic Scholar, page 5, 2005.

private sector has contributed to the poor representation of women at managerial positions. It was expected that the majoritarian of women in parliament would have resulted in women parliamentarians expediting the adoption of legislation that compels the Private sector to set targets at managerial positions.

Accordingly, the Gender Monitoring Office (GMO) is established through the Rwandan Constitution of 2003 and ensures that Rwanda complies with the national, regional and ratified international instruments.<sup>765</sup> The GMO has a mandate to monitor the respect of Gender Equality principles, promote gender accountability at all levels and fight against Gender-Based Violence and related injustices.<sup>766</sup> Essentially the GMO has the mandate to monitor the private sector and ensure that gender equality is achieved. To this end, the GMO posits that there is an underrepresentation of women in governance positions in the private sector.<sup>767</sup> The GMO unearthed that males are more involved in business than women in Rwanda and assert that there is significant participation of women in governance bodies, however, women's participation in economic development is poor.<sup>768</sup>

Against this backdrop, GMO argues that women's participation in social and economic development in Rwanda is far from being realised notwithstanding the political will of the Rwandan government to promote gender equity and equality.<sup>769</sup> It is recognised that gender equity and representation of women has progressed in a few pro-women sectors, such as COPEDU Ltd.<sup>770</sup> According to Nzamalu COPEDU Ltd is a microfinance registered company that is licensed by the National Bank of Rwanda and renders financial services for the socio-economic development of its customers including women.<sup>771</sup>

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<sup>765</sup> GMO, available at <http://www.gmo.gov.rw/index.php?id=553> accessed on 1 July 2019.

<sup>766</sup> *Ibid.*

<sup>767</sup> GMO, Gender Baseline and key indicators in four sectors: Decision making, agriculture, infrastructure and private sector, page 28, 2011. available at [http://gmo.gov.rw/fileadmin/user\\_upload/Researches%20and%20Assessments/Key\\_Gender\\_Indicators\\_and\\_Baseline\\_In\\_Four\\_Sectors.pdf](http://gmo.gov.rw/fileadmin/user_upload/Researches%20and%20Assessments/Key_Gender_Indicators_and_Baseline_In_Four_Sectors.pdf) 1 July 2019.

<sup>768</sup> *Ibid*, page 60.

<sup>769</sup> *Ibid*, page 64.

<sup>770</sup> *Ibid*, page 64.

<sup>771</sup> Nzamalu A, The impact of microfinance institutions in poverty alleviation in Rural area in Rwanda: Case study COPEDU Ltd Rwamagana Branch, 2016, available at <https://www.memoireonline.com/01/16/9365/Impact-of-microfinance-institutions-in-poverty-alleviation-in-rural-area-in-Rwanda-case-study-COPEDU.html> accessed on 1 July 2019.

The GMO posits that there were 12.5% of women board members at the Rwandan private sector.<sup>772</sup> During the fiscal year 2016-2017, the GMO conducted participatory gender audit in three tea private companies namely Shagasha Tea Factory Ltd, Kitabi Tea and Sorwathe). The rationale for selecting the tea sector is that the tea sector in Rwanda occupies a considerable part of income generation and source of employment for most Rwandans in rural areas.<sup>773</sup> The objective of the gender audit was aimed at ascertaining the level of gender mainstreaming in the tea value chain and to identify areas that require more effort and acceleration.<sup>774</sup> According to the GMO, the outcome of the gender audit resulted in improved levels of understanding of gender equality, institutional commitment to mainstream gender in the tea sector through elaboration and update of gender strategies; improved safety of women and men working in the plantation.<sup>775</sup>

The GMO unearthed that there was an absence of strategies to guide gender mainstreaming in the tea sector and that there was high involvement of women in low paying jobs (mostly tea plucking).<sup>776</sup> Additionally, the GMO found that women were less represented in tea processing operations which are essentially technical jobs.<sup>777</sup> It is argued that the allocation of women in lower-paying jobs perpetuates gender parity in the tea sector and results in women being secondary earners to men. To address this challenge, the GMO recommended that the private sector tea companies build capacity and put in place affirmative actions for potential females to assume leadership positions in factories and tea farmers' co-operatives.<sup>778</sup>

Also, the GMO recommended that the private sector must establish gender accountability measures to track the progress in implementing gender commitments in tea companies

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<sup>772</sup> GMO, Gender Baseline and key indicators in four sectors: Decision making, agriculture, infrastructure and private sector page 27, 2011, available at [http://gmo.gov.rw/fileadmin/user\\_upload/Researches%20and%20Assessments/Key\\_Gender\\_Indicators\\_and\\_Baseline\\_In\\_Four\\_Sectors.pdf](http://gmo.gov.rw/fileadmin/user_upload/Researches%20and%20Assessments/Key_Gender_Indicators_and_Baseline_In_Four_Sectors.pdf) , accessed on 1 July 2019.

<sup>773</sup> GMO, Annual report at page 24, 2016-2017.

<sup>774</sup> *Ibid.*

<sup>775</sup> *Ibid.*

<sup>776</sup> *Ibid.*

<sup>777</sup> *Ibid.*

<sup>778</sup> *Ibid*,page 25.

and further devise strategies to close or at least narrow the gender pay gap and to increase women working in high paying positions.<sup>779</sup> As a result of these recommendations and gender audit, the GMO espouses that the tea companies had improved their gender mainstreaming process and were further able to self-assess their own experiences in mainstreaming gender in the tea value chain and on their own, identify gaps in their daily operations. It is submitted that although the recommendation of GMO is arguably soft law in nature, they, however, influenced the tea sector to establish gender accountability measures to increase the representation of women in managerial positions.

It is submitted that the placing of affirmative actions or quotas in the tea sector is a significant measure to address the paucity of women in decision making positions. The GMO further recommended that the private sector tea companies put in strategies such as placing women in male-dominated fields to close or at least narrow the gender pay gap between males and females and to increase women working in high paying positions.<sup>780</sup> Similarly to address the phenomenon of window dressing, affirmative action measures need to result in women playing meaningful roles at managerial positions and not employed solely to meet the targets. The private sector companies must develop their monitoring and evaluation processes to ensure that women are placed in meaningful roles. The GMO further monitors the progress of ensuring that gender mainstreaming is prioritised in the private sector.

## **5.7 Progress of Rwanda in achieving gender equality in the workplace**

The CEDAW Committee welcomed the participation of women in Parliament of Rwanda and having the largest representation of women globally as well as the relatively high representation of women in decision making positions.<sup>781</sup> The CEDAW Committee observed that Rwanda has not addressed the paucity of women at local and district levels in the public sector and as such women were underrepresented at decision-making

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<sup>779</sup> *Ibid*, page 25.

<sup>780</sup> GMO, Annual Report, page 25, 2016-2017.

<sup>781</sup> CEDAW Report, Concluding observations on the combined seventh to ninth periodic reports of Rwanda, page 8-9, 9 March 2017.

positions. Similarly, the CEDAW Committee expressed that inequality between females and males persists with senior positions in the private sector. It is accepted that Rwanda has not introduced mandatory quotas in the private sector and as a result, it lags in ensuring that women are represented at managerial positions.

Against this backdrop, the CEDAW Committee recommended that the mandatory quotas, that will result in targets set for women's representation in decision-making bodies at the local and district levels at the public sector be introduced. To strengthen this, the CEDAW Committee recommended that Rwanda launch awareness-raising campaigns to focus on the significance of women's full and equal participation in all spheres including senior positions at all levels.<sup>782</sup> It is accepted that this recommendation was made because it was recognised that mandatory quotas have the effect of changing the representation of women in decision making positions. Surprisingly, the CEDAW Committee did not make the same recommendation on the private sector notwithstanding its concerns of poor representation of women at decision-making positions. It is submitted that the failure of the CEDAW committee to make recommendations for quotas to be mandatory and apply to the private sector is a missed opportunity to ensure that women are represented at all levels in the private sector.

The CEDAW Committee recognised that Rwanda has taken measures to address discrimination against women in employment including the implementation of Law 13/2009 of 27 May 2009 regulating Labour which *inter alia*, prohibits discrimination based on sex, marital status or family responsibilities, as well as gender-based violence against women and sexual harassment in the workplace. The CEDAW Committee expressed its concerns about *inter alia* women's occupational segregation, in particular their overrepresentation in the low-paid agricultural and informal sectors, and the relatively higher unemployment rate among women, no matter their level of education; the persistence of sexual harassment in the workplace in the State party. Notably, the CEDAW Committee did not express concerns about sexual harassment in the private sector. It is undisputed that the concerns expressed by the Committee are largely focused

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<sup>782</sup> *Ibid*, page 9.



on the public sector and neglects to hold the State accountable for the private sector's failure to advance women at a managerial position.

Notably, the CEDAW Committee recommended that Rwanda promote the integration of females into the workforce and develop an employment policy that is gender-sensitive and adequately resourced, which would encapsulate temporary special measures to fast-track the progression of women male-dominated fields in the formal sector. Also, the CEDAW Committee recommended that Rwanda

- (a) Promote the equal sharing of family and domestic responsibilities between women and men, including by introducing compulsory paternity or shared parental leave following childbirth.<sup>783</sup>
- (b) Adopt effective measures, including the provision of vocational training, and incentives for women to work in non-traditional fields and eliminate occupational segregation, both horizontally and vertically in the public and private spheres.<sup>784</sup>
- (c) Create a regulatory framework for the informal sector to provide women in that sector with access to social protection and monitor their working conditions.<sup>785</sup>
- (d) Expand the practice of free markets to all areas of the country, legalise street vending and prosecute and punish all forms of violence and harassment against women street vendors;<sup>786</sup>
- (e) Vigorously enforce the prohibition of sexual harassment, develop confidential and safe systems for women to file complaints and ensure that each complaint is investigated and that perpetrators are adequately punished.<sup>787</sup>

It is deduced from the recommendations above that the CEDAW Committee sought to ensure that women are not discriminated against in the workplace. Moreover, the CEDAW Committee sought to ensure that women are not excluded in the higher echelons' positions in the workplace. Arguably, this suggests that women must also not be excluded

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<sup>783</sup> *Ibid* page 10.

<sup>784</sup> *Ibid*, page 10.

<sup>785</sup> *Ibid*.

<sup>786</sup> *Ibid*, page 11.

<sup>787</sup> *Ibid*, page 11.

from managerial positions in the private sector. From this, it is learned that mandatory quotas are viewed as an appropriate measure to address the underrepresentation of women in leadership positions. Although the CEDAW Committee recommended mandatory quotas in the Rwandan public sector, South Africa may emulate the same measures in the private sector to increase the representation of black African women in managerial positions. The adoption of mandatory measures supported awareness-raising campaigns in the private sector to highlight the importance of black African women's full and equal participation in leadership positions at all levels in the workplace will result in a working environment where black African women are not subjected to occupational segregation and are confined in low paying positions.

### **5.8 Efforts to increase women in managerial positions in the private sector in Rwanda**

Like South Africa, Rwanda experienced challenges of increasing women representation at managerial positions. Nkurunziza posits that in 2019 economic sectors in Rwanda including mining, quarrying was 86% male-dominated whilst the construction sector was 81% male-dominated.<sup>788</sup> Similarly, the electricity, gas, steam and air-conditioning sectors were 80% male-dominated.<sup>789</sup> Essentially 80% of economic activities in Rwanda are considered male-dominated.<sup>790</sup>

Against this backdrop, Rwandan Federation for the Private Sector (RFPS)<sup>791</sup> committed to foster insight to the concept "gender" so that gender mainstreaming in the private sector may take place smoothly;<sup>792</sup> aid and accelerate the implementation of measures for gender mainstreaming that is effective in the various programs and projects and/or

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<sup>788</sup> Nkurunziza M, The Quest to get women in the corporate boardrooms , 19 March 2019, The Times, available at <http://www.rw.undp.org/content/rwanda/en/home/presscenter/articles/2019/3/gender-equality-for-increased-productivity-and-sustainable-growt.html> accessed on 2 July 2019.

<sup>789</sup> *Ibid.*

<sup>790</sup> *Ibid.*

<sup>791</sup> The RFPS was established in 1999 and is recognised as a professional organisation that seeks to promote and represent the interests of the Rwandan business community.

<sup>792</sup> Ministry of Gender and Family Promotion, National Gender Policy, page 32, July 2010.

activities<sup>793</sup> and facilitate and support promotion recruitment of women, especially in decision making roles in the private sector.<sup>794</sup> To achieve this the RFPS has encouraged private sector companies to partake voluntarily at the United Nations Development Programme initiative's Gender Equality Seal Programme initiative.

Rwanda has subscribed to the United Nations Development Programme Initiative's Gender Equality Seal Programme initiative. In 2019 it was reported that Rwanda is one of eight countries globally that held a Gold Certification in the Gender Equality Seal Initiative.<sup>795</sup> The purpose of the Gender Equality Seal Certificate is to provide a more efficient and equitable workplace and essentially contributes to the advancement of gender equality. In particular, Rwanda was awarded the Gold Certification for its gender-equality promoting initiatives which included *inter alia* introducing the Gender Equality Seal Programme within the private sector.<sup>796</sup> The Gender Seal programme commenced as a pilot with twenty companies including *inter alia* LASCO Chin Foundation Price Waterhouse Coopers, First Global Bank, Sagicor Bank, Stocks and Securities Limited, Flow, Red Stripe, Nestle Jamaica, and Honeybun, in the private sector and sought to assess their gender mainstreaming processes and provide recommendations for improvement where gaps are identified.<sup>797</sup> Moreover, the Gender Seal Programme tasks the private sector to *inter alia* increase women's roles in decision making, enhance access to non-traditional jobs for both males and females and eradicate sexual harassment at the workplace.<sup>798</sup>

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<sup>793</sup> *Ibid.*

<sup>794</sup> *Ibid.*

<sup>795</sup> UNDP Rwanda Gender Equality Seal Explained, 9 January 2019. Available at <http://www.rw.undp.org/content/rwanda/en/home/presscenter/articles/2019/1/gender-equality-seal-explained.html> accessed 2 July 2019.

<sup>796</sup> *Ibid.*

<sup>797</sup> *Ibid.*

<sup>798</sup> Ruggwe N, Gender Equality for increased productivity and sustainable growth, 12 March 2019, The New Times, available at <http://www.rw.undp.org/content/rwanda/en/home/presscenter/articles/2019/3/gender-equality-for-increased-productivity-and-sustainable-growt.html> accessed on 2 July 2019.

The GMO reported that in 2018 that the private sector companies were trained on how to promote gender equality in the workplace.<sup>799</sup> According to Rugwee in 2019 thirty-nine private sector companies subscribed to the Gender Seal Programme.<sup>800</sup> This demonstrates the willingness of the Rwandan Private sector to address gender equality in the workplace. It is observed that the subscription to the Gender Seal Programme is not mandatory to the private sector and as such may not be able to affect those companies that resist equitable representation between males and females at managerial positions.

It is submitted the Gender Seal Programme is a deliberate effort by Rwanda to attract and retain women in the workplace. It is submitted that South Africa should adopt the UNDP Gender Seal initiative in the private sector to increase the representation of black African women in managerial positions. It is submitted that the CGE in South Africa should spearhead the implementation of the Gender Seal Programme in the private sector in South Africa by ensuring that the Gender Seal Programme is adopted as a code of good practice in terms of the Labour Relations Act, 1995 read with the EEA and monitor its implementation in terms of the Commission for Gender Equality Act, 1996.

## 5.9 Jamaica

Jamaica is situated in the Caribbean Sea with a population of 2.8 Million.<sup>801</sup> In 2019 it was recorded that there were 49.2% of males and females were 50.8%. Like South Africa, there are more females than males in Jamaica. The discourse of women ascending to managerial positions in the private sector is not peculiar to South Africa and Rwanda. The

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<sup>799</sup> GMO, Private sector Companies trained on promotion of Gender Equality in the workplace, 4 November 2018, available at [http://www.gmo.gov.rw/index.php?id=19&tx\\_news\\_pi1%5Bnews%5D=124&tx\\_news\\_pi1%5Bday%5D=11&tx\\_news\\_pi1%5Bmonth%5D=4&tx\\_news\\_pi1%5Byear%5D=2018&cHash=75c369c8f6408ca9aef4c42d427978bb](http://www.gmo.gov.rw/index.php?id=19&tx_news_pi1%5Bnews%5D=124&tx_news_pi1%5Bday%5D=11&tx_news_pi1%5Bmonth%5D=4&tx_news_pi1%5Byear%5D=2018&cHash=75c369c8f6408ca9aef4c42d427978bb) accessed on 2 July 2019.

<sup>800</sup> Ruggwe N, Gender Equality for increased productivity and sustainable growth, 12 March 2019, The New Times , available at <http://www.rw.undp.org/content/rwanda/en/home/presscenter/articles/2019/3/gender-equality-for-increased-productivity-and-sustainable-growt.html> accessed on 2 July 2019.

<sup>801</sup> United Nation Department of Economic and Social Affairs, Population Division, available at [www.contrymeters.info](http://www.contrymeters.info) accessed on 3 July 2019.

exclusion of women into managerial positions is uncommon in Jamaica; as such the ILO asserts that Jamaica experiences challenges of women been retained at low and middle management and not advanced to the higher echelons in the private sector.<sup>802</sup> According to the ILO 2017 survey, women in the Caribbean make up 27% of Chief Executive Officers, 25% of board members and 18% of board chairs.<sup>803</sup> This reaffirms that males dominate managerial positions in the private sector in Jamaica. Interestingly, Jamaica is ranked as a global leader of having more women in managerial positions with 12% of companies achieving gender balance at the executive level against the 8% globally.<sup>804</sup> Against this backdrop, Jamaica becomes a model for South Africa to determine the measures put in place to increase the representation of women at managerial positions in the private sector.

### 5.9.1 Constitution, Legal and institutional framework promoting gender equality in the workplace in Jamaica

#### 5.9.1.1 Jamaican Constitution

The Constitution of Jamaica was adopted in 1962 and is regarded as the highest law of the Country. The Jamaican Constitution was amended in 2011 by the Charter of Fundamental Rights and Freedoms Constitutional Amendment Act 2011 (The 2011 Charter). The State is obliged to promote and respect human rights and freedoms. Bulkan observes that the 2011 Charter embodies a progressive realisation of rights that were not included in the 1962 Jamaican Constitution.<sup>805</sup> The 2011 Charter provides an array of rights to Jamaicans and this includes *inter alia* the right to equality and the right to freedom from discrimination on the ground of being female or male.<sup>806</sup>

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<sup>802</sup> Women in business and management: Gaining momentum in the Caribbean, page 2, October 2018.

<sup>803</sup> Women in business and management: Gaining momentum in the Caribbean, page 17, October 2018.

<sup>804</sup> Women in business and management: Gaining momentum in the Caribbean, at page 17, October 2018.

<sup>805</sup> Bulkan, Constitution (Re)-making in the Commonwealth Caribbean, 2 Can. J. HuM. RTs. 81, page 82-83 2013.

<sup>806</sup> Chapter Three of the Charter of Fundamental Rights and Freedoms, Constitutional Amendment Act 2011.

The CEDAW Committee expressed its concerns that while the 2011 Charter bars discrimination on the grounds of “being male or female”, this was restrictive and did not provide relief to women who were discriminated on other grounds.<sup>807</sup> The CEDAW Committee expressed further that the 2011 Charter does not contain a legal definition of discrimination against women nor in any other legislation, per Article 1 of the CEDAW.<sup>808</sup>

The Jamaican Constitution does not expressly state that women are entitled to equal opportunities to men in the workplace, however, it is deduced that the prohibition of discrimination on the ground of being a female or male may be extended broadly to the workplace. As such, it is accepted that both males and females are entitled to enter Jamaica’s labour force and in principle are entitled to equal opportunities in the workplace. It is argued that the private sector, as a juristic person in Jamaica, has equally and opportunity to ensure that the provisions of equality under the Jamaican Constitution are complied with. In principle, the private sector in Jamaica must ensure that Jamaican women are not discriminated against in the workplace. Arguably, discrimination includes the intentional exclusion of women at managerial positions in the private sector.

Similar to the Jamaican Constitution, the South African Constitution provides an array of rights in Chapter Two of the Constitution titled the “Bill of rights”. Included in these rights is the right to equality (section 9) and dignity (section 10) that black South African women are also provided with. Although South Africa has a separate EEA legislation that deals with discrimination in the workplace, it is argued that the exclusion of black African women in managerial positions has its genesis to past historical practices that discriminated unfairly against black women in terms of race, class and gender. To this end, black African women’s deliberate exclusion in the managerial positions in the private sector borders on the equality and dignity rights of women.

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<sup>807</sup> Committee on the Elimination of Discrimination against Women, Concluding observations of the Committee on the Elimination of Discrimination against Women Jamaica, Fifty-second session 9-27 July 2012.

<sup>808</sup> *Ibid.*

### 5.9.1.2 The Employment (equal pay for men and women) Act 34 of 1975

The Employment (equal pay for men and women) Act 34 of 1975 (Employment Act) has been enacted into law in 1975 and provides that employers that fail to pay equal pay for equal work, discriminate between male and female employees in the workplace.<sup>809</sup> The Employment Act provides further that if employers fail to uphold the principle of equal pay for equal value, the employer would be guilty of an offence and shall accordingly be liable for *inter alia* a fine not exceeding two hundred dollars or to imprisonment with or without hard labour for a term not exceeding twelve months.<sup>810</sup> Primarily the obligation bestowed on the employers to provide equal pay for work of equal value has its genesis from patriarchal attitudes that undervalue the work done by female employees. It is argued that criminal sanctions on directors of a company would have the effect of ensuring that the private sector complies with the Employment Act because ordinarily, fines imposed are easily payable by the companies.

It is submitted the paucity of women in managerial positions in the private sector can be achieved through the implementation of similar legislation that provides for harsh sanctions if the private sector fails to employ black African women at managerial positions in South Africa. Within the context of South Africa, clear legislation with consequences must be adopted to compel the private sector to employ black African women. These consequences may include the disqualification of directors of companies.

Notwithstanding the enactment of the Employment Act, in 2012 women in Jamaica were concentrated in low paying positions in the labour force and there were pay inequalities in employment opportunities and this affected rural women mostly, and the horizontal and vertical gender segregation of the labour market persisted.<sup>811</sup> In this context, the CEDAW Committee recommended that Jamaica to (a) develop policies with time-bound targets and indicators to eliminate occupational segregation and achieve substantive equality

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<sup>809</sup> Section 3(1) of the Employment Act.

<sup>810</sup> Section 3 (2) of the Employment Act.

<sup>811</sup> Committee on the Elimination of Discrimination against Women, Concluding observations of the Committee on the Elimination of Discrimination against Women Jamaica, Fifty-second session 9-27 July 2012.

between men and women in the labour market, including in traditionally male-dominated fields through intensified technical and vocational training; promote overall employment of women and expand women's access to microcredit at low-interest rates for self-employment and income-generating activities;<sup>812</sup> (b) improve the enforcement and implementation of the Employment Act to eliminate pay disparities between men and women in practice.<sup>813</sup> Significantly, the CEDAW Committee recommended the introduction of a quota system to increase the poor representation of women in managerial positions.

For South Africa to achieve equitable representation in the private sector managerial positions, the introduction of a quota system is necessary to compel the private sector to recruit and appoint suitably qualified black African women in managerial positions. The CEDAW Committee favours the introduction of a quota system to expedite the equitable representation of women in managerial positions.

#### 5.9.2 The National Policy for Gender Equality in Jamaica

Jamaica adopted the National Policy for Gender Equality (NPGE) in 2011. The NPGE seeks to facilitate the integration of a gender perspective into all aspects of national plans, programmes and legislation as a fully binding initiative and commitment. In context, the objectives of the NPGE are:

- to eliminate gender discrimination, promote gender equality and attain social justice;
- to reinforce institutional mechanisms, and foster gender mainstreaming through skills and tools into various areas including economic, social and political institutions; and
- to foster sustainable behaviour and enhance the effectiveness of organisations and to encourage the public sector to develop gender-responsive plans and

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<sup>812</sup> *Ibid.*

<sup>813</sup> *Ibid.*



policies the capacity of public sector entities to develop, implement and monitor gender-responsive plans, projects, programs, and policies.

The NPGE is founded on the understanding that Jamaica is a democratic country that that embodies equality and dignity rights of all persons.<sup>814</sup> The NPGE recognises that the private sector is a key role player that will assist the State to ensure equal access to opportunity and elimination of discrimination based on gender between females and males.<sup>815</sup> The NPGE encourages the private sector to implement gender mainstreaming plans and promote gender equality.<sup>816</sup> It is submitted that whilst the NPGE is geared towards equal treatment for women and men, equal participation in areas in which they were previously denied or restricted, it is improbable to envisage that any significant impact would materialise without the active participation of the private sector. This is key because the private sector contributes significantly to the Jamaican economy and females are underrepresented in economic drivers such as financial and insurance in the private sector.<sup>817</sup> To achieve a greater impact, it is thus necessary to have females represented in the key sectors of the Jamaican economy.

Thame and Thakur argue that the NPGE does not seek to eliminate patriarchy and as such, it is expected that at its core the NPGE as a gender policy must reduce the persistent male domination in Jamaica.<sup>818</sup> It is argued that NPGE places more emphasis on the public sector in its approach to effect gender equality.<sup>819</sup> To this end, the NPGE states its objective to be “to transform gender ideologies, inequitable gender relations and gendered governance practices at all levels of public sector organizations.”<sup>820</sup> The NPGE

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<sup>814</sup> Jamaica NPGE, page 18, October 2010.

<sup>815</sup> *Ibid*, page 4.

<sup>816</sup> *Ibid* page 23.

<sup>817</sup> National Institute of Statistics of Rwanda, Labour force survey , 2018.

<sup>818</sup> Thame M and Thakur D, The Patriarchal State and the Development of Gender Policy in Jamaica; In Politics, Power and Gender Justice in the Anglophone Caribbean: Women’s Understandings of Politics, Experiences of Political Contestation and the Possibilities for Gender Transformation, page 33, 2014.

<sup>819</sup> *Ibid*, page 27.

<sup>820</sup> Jamaica NPGE, at page 17, October 2010. Thame M and Thakur D, The Patriarchal State and the Development of Gender Policy in Jamaica. In Politics, Power and Gender Justice in the Anglophone Caribbean: Women’s Understandings of Politics, Experiences of Political Contestation and the Possibilities for Gender Transformation, page 27, 2014.

emphasises on bridging private/public divide however, Thame and Thakur argue that this emphasis is confusing because the content of the NPGE appears to indicate public and private sectors.<sup>821</sup> The NPGE espouses to use gender mainstreaming, implement gender-responsive costing and budgeting and putting in place of gender focal points (GFPs) to change the public sector. According to the ILO, the role of the GFP is to act as a “catalyst” to assist the process of gender mainstreaming in a respective office or unit.<sup>822</sup> In other words, GFPs must precipitate gender transformation in the workplace. The application of GFP is predominately applied in the public sector and not the private sector.

On the contrary, the South African Private sector does not assign or appoint GFPs however is mandated to assign an employment equity manager whose responsibility is to ensure that a company prioritises its employment equity in its practices and policies.<sup>823</sup> The significance of an employment equity manager in the South African private sector is to ensure that the company adopts gender-focused policies, such as recruitment and selection policies and plan for the attainment of gender equality in terms of programmes, however, it is espoused that the employment equity manager’s role is ineffective if not embodied with powers to implement and nor resources available to them.<sup>824</sup> Arguably, the success of the employment equity manager in the private sector is dependent upon the specific dynamics such as the political will of the company directors, and the mechanisms, such as a designated gender budget meant to their programmes. This is significant to ensure that previously disadvantaged groups, particularly black African women are prioritised for recruitment, appointment and training in the workplace.

It is espoused that a private sector company that fails to assign an employment equity manager often results in the lack of accountability for the underrepresentation of the

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<sup>821</sup> Thame M and Thakur D, *The Patriarchal State and the Development of Gender Policy in Jamaica*; In *Politics, Power and Gender Justice in the Anglophone Caribbean: Women’s Understandings of Politics, Experiences of Political Contestation and the Possibilities for Gender Transformation*, page 27, 2014.

<sup>822</sup> ILO, *Gender Network Handbook*, section 3, page 1, 2006 available at [https://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/genericdocument/wcms\\_114230.pdf](https://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/genericdocument/wcms_114230.pdf) accessed on 27th August 2019.

<sup>823</sup> Section 24 of the EEA.

<sup>824</sup> Thame M and Thakur D, *The Patriarchal State and the Development of Gender Policy in Jamaica*; In *Politics, Power and Gender Justice in the Anglophone Caribbean: Women’s Understandings of Politics, Experiences of Political Contestation and the Possibilities for Gender Transformation*, page 28, 2014.

previously disadvantaged. For example, Moorddrift diary, a private sector company in South Africa, was found not to have an employment equity manager, as such no person was held accountable for failure to advance equity in the workplace and this resulted in the minimal representation of black African women in managerial positions in the company.<sup>825</sup> The CGE recommended that the Moorddrift diary assign an employment equity manager and as such the company complied with the recommendation and assigned an employment equity manager.

### **5.10 Progress of achieving gender equality in the Private sector in Jamaica**

The CEDAW Committee observed that there is an underrepresentation of women in managerial positions in the private sector.<sup>826</sup> Contextually women in the private sector were confined to low paying jobs and this constituted unequal remuneration between male and female employees in Jamaica. It is undisputed that in Jamaica most women managers are in management positions in both the public and private sectors are crowded in middle-management levels and poorly represented in top positions.<sup>827</sup> Jamaica expressed to the CEDAW Committee that there are underlying factors that contribute to the underrepresentation of women in managerial positions and this includes *inter alia* prevailing social and cultural attitudes that view women as less competent to assume managerial positions.<sup>828</sup>

To address the underrepresentation of women in managerial positions, Jamaica submitted before the CEDAW Committee that there is a need to strengthen and enhance skills in management, marketing, finance, product development, e-commerce and customer service in microeconomic enterprises which are led and dominated by women

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<sup>825</sup> CGE Report, Employment Equity Report into the private sector: Progress report, page 18, 2017/2018, available at [www.cge.org.za](http://www.cge.org.za) accessed on 27<sup>th</sup> August 2019.

<sup>826</sup> Committee on the Elimination of Discrimination against Women, Concluding observations of the Committee on the Elimination of Discrimination against Women Jamaica, Fifty-second session 9-27 July 2012, Responses to the list of issues and questions with regard to the consideration of the combined sixth and seventh, page 17, 2012.

<sup>827</sup> *Ibid.*

<sup>828</sup> *Ibid.*

in Jamaica. For South Africa to address the underrepresentation of black African women there must be skill development in male-dominated areas. From this premise skills development, coaching and mentoring for women needs to be included in a policy framework in the private sector and effectively implemented to achieve meaningful results that will make them competent to rise to managerial positions.

The CEDAW Committee recommended to Jamaica *inter alia* to:

- a) Take steps to achieve substantive equality between women and men, including the adoption of quotas and temporary special measures, in the public and private sectors, following Article 4, paragraph 1, of the Convention and the Committee's general recommendation No. 25(2004);<sup>829</sup>
- b) Strengthen measures to address cultural barriers that prevent women from entering decision-making and management positions, to remove discriminatory practices and promote proportionate representation of women in principal positions;<sup>830</sup>

It is submitted that the CEDAW Committee recognises the adoption of quotas in the private sector as a meaningful measure to address the imbalance between men and women in the decision-making position. It is contended that patriarchy is uncommon in Jamaica and as such women are expected to go the extra mile to get the same recognition as men in the workplace. To this end, it is argued that a quota system is necessary to address the imbalance between women and men in the workplace. Effectively a quota system compels the private sector to set a specific target of women and men to be represented at all occupational levels in the workplace. To this end, previously disadvantaged groups such as African women would have equal opportunities in the workplace without exclusion based on race, class and gender. Forbes observes that promoting quotas for female representation on boards and management is key is fast-

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<sup>829</sup> Committee on the Elimination of Discrimination against Women, Concluding observations of the Committee on the Elimination of Discrimination against Women Jamaica, Fifty-second session 9-27 July 2012, Responses to the list of issues and questions with regard to the consideration of the combined sixth and seventh, page 4, 2012.

<sup>830</sup> *Ibid.*

tracking equal participation between males and females in the development of Jamaica.<sup>831</sup>

It is argued that the systematic exclusion of women in the Jamaican private sector is founded on the patriarchal system which excludes women in equal participation, which can be effectively addressed by the adoption of the quota system. Essentially a quota system would require the private sector to achieve an equitable percentage of women at managerial positions. To achieve this, the private sector needs to address the pipeline that leads to managerial levels in the company. This can be done by conferring skills to women and creating a pool of talent that can climb the company ranks.

#### 5.10.1 Challenges of advancing women to top management positions in Jamaica

Similar to the South African private sector, the private sector in Jamaica encounters challenges that serve as a barrier for women emancipation at managerial positions. Similar to South African black women, women in Jamaica progress in their careers, however, encounter barriers to senior and top management positions. Notably, these barriers continue gender imbalances between women and men at decision-making levels.<sup>832</sup> In 2013 the ILO highlighted the following as barriers to women's leadership in Jamaica:

- a) Roles assigned by society to men and women;<sup>833</sup>
- b) Lack of flexible work solutions;<sup>834</sup>
- c) Masculine corporate culture;<sup>835</sup>
- d) Women have more family responsibilities than men;<sup>836</sup>
- e) Inherent gender bias in recruitment and promotion;<sup>837</sup>

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<sup>831</sup> Forbes M, The 51% Coalition – One Year Later, Caribbean Journal, available at <https://www.caribjournal.com/2012/11/27/forbes-jamaicas-womens-coalition-marks-first-anniversary/> accessed on 27 August 2019.

<sup>832</sup> ILO, Women in business and management: Gaining momentum in the Caribbean, Page 15, October 2018.

<sup>833</sup> *Ibid.*

<sup>834</sup> *Ibid.*

<sup>835</sup> *Ibid.*

<sup>836</sup> *Ibid.*

<sup>837</sup> *Ibid.*

- f) Lack of company equality policy and programmes;<sup>838</sup>
- g) Women with insufficient general or line management experience;<sup>839</sup>
- h) Stereotypes against women;<sup>840</sup>
- i) Men not encouraged to take leave for family responsibilities;<sup>841</sup>
- j) Few role models for women;<sup>842</sup>
- k) Lack of leadership training for women;<sup>843</sup>
- l) Gender equality policies in place but not implemented;<sup>844</sup>
- m) Management generally viewed as a man's job;<sup>845</sup>
- n) No strategy for retention of skilled women and;<sup>846</sup>
- o) Inadequate labour and non-discrimination laws.<sup>847</sup>

These barriers are not peculiar to Jamaica and arguably resonate with the barriers existing in South Africa. In context, these barriers manifest a gender bias and stereotypes against women in the workplace and this perpetuates male dominance in managerial positions in the workplace. It is argued that a societal and cultural norm that views women as secondary earners permeates the underrepresentation of women in managerial positions. This is evident from female managers who often execute supportive functions such as human resources and administration, while male employees execute strategic and operational management functions.<sup>848</sup> This results in male employees being exposed to a variety of skills relating to company operations and this is largely considered for the advancement to managerial positions.

As such most women's experience does not expose them to company operations and functional areas and therefore, they do not acquire the necessary experience to qualify

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<sup>838</sup> *Ibid.*

<sup>839</sup> *Ibid.*

<sup>840</sup> *Ibid.*

<sup>841</sup> *Ibid.*

<sup>842</sup> *Ibid.*

<sup>843</sup> *Ibid.*

<sup>844</sup> *Ibid.*

<sup>845</sup> *Ibid.*

<sup>846</sup> *Ibid.*

<sup>847</sup> *Ibid.*

<sup>848</sup> *Ibid*, page 26.

for a managerial position in the workplace.<sup>849</sup> The ILO refers to this paradigm as “occupational segregation” or “glass walls” that limit the progression of women into managerial positions.<sup>850</sup> To address occupational segregation, it is fundamental that a quota system that will precipitate bottom-up strategies be adopted to ensure that women are appointed at managerial positions. Arguably, this will accord with the NPGE that seeks to ensure that there is equal access to opportunities between males and women in the private sector.

#### 5.10.2 Efforts to increase women in the Jamaican private sector

In 2014 it was accentuated that Jamaica had most female employees ( 59.6%) in decision-making levels in the public sector and the private sector females accounted for 48.8% in decision-making levels.<sup>851</sup> Despite women being the majority in the Jamaican population, they however in 2014 occupied less than 20 per cent of members of private sector boards and approximately 35 per cent on public sector boards.<sup>852</sup> Notably, Jamaica was awarded the European Union (EU) award for strides made in empowering females and reducing the gender gap in the public sector.<sup>853</sup> This EU award is largely awarded to countries with significant representation of women in the legislature as senior managers.<sup>854</sup> Arguably, the EU award to Jamaica signifies the important milestone achieved in addressing the imbalance between men and women in the public sector. Similarly, Jamaica has the highest proportion of female managers globally with women accounting for 59.3% of all managers in the Caribbean nation. During April 2017, women in Jamaican held 22% of 507 directorships for listed companies women, and three of these were chaired by women.<sup>855</sup>

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<sup>849</sup> ILO, Women in business and management: Gaining momentum in the Caribbean, page 26, October 2018 .

<sup>850</sup> ILO Women in business and management: Gaining momentum in the Caribbean, page 17, October 2015 .

<sup>851</sup> UN, National Review Jamaica, In the context of the twentieth anniversary of the Fourth World Conference on Women and the adoption of the Beijing Declaration and Platform for Action, page 3,2014.

<sup>852</sup> *Ibid*, page 23.

<sup>853</sup> *Ibid*,page 4.

<sup>854</sup>*Ibid*, page 4.

<sup>855</sup> ILO, Women in business and management: Gaining momentum in the Caribbean, page 23,October 2018 .

It is argued that the progressive strides are not replicated in the private sector due to lack of commitment and therefore the sector is lagging in terms of increasing women in managerial positions. It is accepted that a major challenge is the slow pace of progression of women into senior levels in the private sector.<sup>856</sup> As a signatory to CEDAW and the BPA, Jamaica has initiated several efforts to increase women in the decision-making powers in the private sector. These efforts are discussed below and do reflect a commitment by the private sector in Jamaica to address the underrepresentation of women in decision making positions. These measures should be emulated in South Africa to increase the representation of black African women in managerial positions.

#### 5.10.2.1 The 51% Coalition – Development and Empowerment through Equity

In Jamaica, the “51% Coalition – Development and Empowerment through Equity” has been established to augment the participation of females in politics and on boards through a 60/40 quota system.<sup>857</sup> It is reported that the “51%” represents “the percentage of the Jamaican population that is comprised of women”.<sup>858</sup> The 51% Coalition is recognised as a dynamic group that comprises women in business owners, private sector organisations, non-profit organisations such as the Women’s Resource and Outreach Centre and seeks equity both in the public and private sectors.<sup>859</sup> To achieve representation of women in decision-making positions, the 51% Coalition lobbies for gender balance and inclusivity in company boardrooms annual general meetings across Jamaica.<sup>860</sup>

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<sup>856</sup> UN, National Review Jamaica, In the context of the twentieth anniversary of the Fourth World Conference on Women and the adoption of the Beijing Declaration and Platform for Action, page 23, 2014.

<sup>857</sup> Forbes M, The 51% Coalition-Development and empowerment through Equity, available at <http://www.marciaforbes.com/article/51-coalition-%E2%80%93-development-empowerment-through-equity> accessed on 22 July 2019.

<sup>858</sup> *Ibid.*

<sup>859</sup> Jamaica Observer, 1 Year old 51% Coalition Working to address gender imbalance, 6 December 2012 available at <http://www.jamaicaobserver.com/magazines/allwoman/1-year-old-51--Coalition-working-to-address-gender-imbalance?profile=&template=PrinterVersion> accessed on 22 July 2019

<sup>860</sup> UNWomen, Women shareholders in Jamaica’s board rooms are ready to achieve their share, available at <https://www.unwomen.org/en/news/stories/2012/9/women-shareholders-in-jamaica-s-board-rooms-are-ready-to-achieve-their-fair-share> accessed on 22 July 2019.



The 51% Coalition advocates for the use of quotas to increase women's participation in governance and decision making, politically, economically or socially.<sup>861</sup> The Coalition recognises that a quota system is the fastest track to gender equity. It is recognised that the private sector is conservative and therefore there is a need to change the mindset of the corporate sector.<sup>862</sup> The 51% Coalition utilises lobbying as a method to address gender inequality in the private sector, however, this has not yet translated into a legislative provision that makes it mandatory for the private sector to achieve 51% women representation at various occupational levels. South Africa needs to observe these proactive measures by 51% Coalition and lobby for the 51% representation of women in managerial positions in the private sector.

It is submitted that in South Africa, CGE as a legislative body has the mandate to lobby and make legislative recommendations on gender legislation to Parliament. To this end, the CGE is competent to recommend for parliament to adopt legislation that makes it mandatory for the private sector to appoint at least 50% of black African women at managerial positions in the workplace. It is espoused that mandatory quotas would increase the representation of black African women in managerial positions in the private sector.

#### 5.10.2.2 Gender Seal Certification Programme

The Government of Jamaica launched the United Nations Development Programme (UNDP) Gender Equality Certification Programme in 2017.<sup>863</sup> According to Williams, this programme was launched in Jamaica as a pilot and seeks to enhance gender equality and mainstreaming in the public and private sectors.<sup>864</sup> It is submitted that the programme aims to address the persistent gender gaps in the workplace by persuading employers to

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<sup>861</sup> *Ibid.*

<sup>862</sup> *Ibid.*

<sup>863</sup> Permanent Mission of Jamaica to the United Nations, More action to promote gender equality in the workplace, available at <https://www.un.int/jamaica/news/more-action-promote-gender-equality-workplace>, accessed on 22 July 2019.

<sup>864</sup> Williams R, More enterprises encouraged to take part in GES Certification Programme available at <https://jis.gov.jm/features/more-enterprises-encouraged-to-take-part-in-ges-certification-programme/> accessed on 22 July 2019.

create equitable conditions for both men and women. In context, the launching of this programme in Jamaica is a collective effort between the government and the private sector to put standards to empower women in the workplace. Arguably this programme in the private sector assists in ensuring that there is a balance of women and men at managerial positions. It is undisputed that the Programme is voluntary hence in 2017 only a few local companies in Jamaica participated in the programme.

For the private sector, the Gender Seal Certification Programme assists companies to adopt a strategy that encompasses gender equality foster it as part of good business. Also, it is submitted that the Gender Seal Certification Programme has advantages that benefit both companies and their employees. To this end, it is submitted that the Gender Seal Programme provides the following advantages to the private sector:

- Improves the performance of employees and their commitment at work, as well as minimizing absenteeism;<sup>865</sup>
- Enabling work environment that boosts the capacities of employees;<sup>866</sup> and
- An improved public image as part of corporate responsibility<sup>867</sup>
- An improved and gendered organizational culture that respects female's human rights;<sup>868</sup>
- Amplified understanding of the company by employees and improved communication between employees and employers;<sup>869</sup> and
- Better opportunities for developing females as professionals and developing career paths that lead to senior-level positions.<sup>870</sup>

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<sup>865</sup> United Nations Development Programme The Gender Equality Seal Programme for public and private enterprises: Putting principles into practice page 2, available at <https://www.undp.org/content/undp/en/home/librarypage/womens-empowerment/the-gender-equality-seal-certification-programme-for-public-and-.html> accessed on 22 July 2019.

<sup>866</sup> *Ibid.*

<sup>867</sup> *Ibid.*

<sup>868</sup> *Ibid*, page 3.

<sup>869</sup> *Ibid*, page 3.

<sup>870</sup> *Ibid*, page 3.

The Gender Seal Programme identifies women in decision-making positions as one of the critical areas.<sup>871</sup> Consequently, the programme recognises that to address the paucity of women there is a need to have strategies such as skills development for career development and mentorship and establishment of gender equality goals in the workplace.<sup>872</sup> The Gender Seal Programme is a significant tool to increase the representation of women at managerial positions. However, the Gender Seal programme would be effective in South Africa provided that it is made mandatory through legislation. The South African private sector has failed to comply with the EEA as such it is inconceivable that the sector will voluntarily subscribe to the Gender Seal Programme to achieve equity.

#### 5.10.2.3 Launching of the Women's Empowerment Principles in the Jamaican private sector

In 2019 it was highlighted that a total of twenty-four companies in Jamaica are signatories of the Women's Empowerment Principles (WEP).<sup>873</sup> The WEP was launched in 2010. The objective of the WEP is "to promote the inclusion of gender equality strategies as a cross-cutting component of corporate sustainability and private sector development frameworks".<sup>874</sup>

To ensure that women are represented at managerial positions in the private sector, the WEP requires the private sector in Jamaica to "affirm high-level support and direct top-level policies for gender equality and human rights".<sup>875</sup> There must be gender mainstreaming in the private sector that would result in the adoption of gender-sensitive policies such as recruitment and selection policies in the workplace. Interestingly, the WEP requires that the private sector to further develop goals and targets to attain gender

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<sup>871</sup> *Ibid*, page 6.

<sup>872</sup> *Ibid*, page 6.

<sup>873</sup> UN Women, Jamaican Private sector companies Join UN Women Gender Equality Initiative, 28 January 2019. available at <https://caribbean.unwomen.org/en/news-and-events/stories/2019/2/jamaican-private-sector-companies-join-un-women-gender-equality-initiative> accessed on 30 July 2019.

<sup>874</sup> *Ibid*.

<sup>875</sup> Principle 1 of the WEP.

equality and include these in the performance reviews of company managers.<sup>876</sup> It is submitted that this measure will ensure that there is accountability for managers in the private sector to advance women in decision-making positions. Additionally, the WEP tasks the private sector with a duty to foster recruitment and retention practices that are gender-sensitive and intentionally hire qualified women into managerial levels in the workplace.<sup>877</sup>

The WEP Principles espouses that there must be sufficient participation of women in decision making positions.<sup>878</sup> To achieve this, the WEP prescribes a quota system of 30% or greater in decision making positions at all levels and across the business areas.<sup>879</sup> It is submitted that the achievement of women at decision-making positions is not achievable without a quota system being implemented. It is argued that a quota system is a fundamental measure to achieve equity in the workplace for women at decision making positions. It is contended that the achievement of women at decision-making positions must further be supported by an investment of workplace policies and programmes (such as mentorship and leadership training for women) that provide opportunities to advance women at all levels including male-dominated job fields.<sup>880</sup>

The WEP further prescribes that there must be equal remuneration, including benefits, for work of equal value between female and male employees. The WEP challenges the private sector in Jamaica to offer equal opportunities for formal and informal networking and mentoring.<sup>881</sup> The WEP principles seek to ensure that women participate fully in the private sector without being discriminated against on the grounds of sex and gender. Effectively these principles provide women in the private sector to assume managerial positions in the private sector. It is clear that WEP, although it is soft law provides key

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<sup>876</sup> Principle 1 of the WEP.

<sup>877</sup> Principle 1 of the WEP.

<sup>878</sup> Principle 2 of the WEP.

<sup>879</sup> Principle 2 of the WEP.

<sup>880</sup> Principle 4 of the WEP.

<sup>881</sup> Principle 4 of the WEP.

features required to address the paucity of women in managerial positions in the private sector.

In context, the promotion of women is a priority for the government of Jamaica particularly in the private sector where women are concentrated in the low paying sectors of the Jamaican economy. The discrimination of women in Jamaica is common and this was equally observed by the 2006 CEDAW report which espoused that the continued discrimination kept women predominately at low paying positions. The 2006 CEDAW report recognised that the discrimination of women in the workplace is primarily embedded by attitudes and role stereotypes.

To address this discrimination against women and their representation in the private sector, the private sector companies have voluntarily joined a variety of mechanisms and this includes the Gender Seal Certificate programme and signing of the WEP principles. Notably, the willingness of the Jamaican private sector to transform its workplace is uncommon to South Africa. The intervention by the UN Women has tremendously influenced the private sector to recognise that participating with the Gender Seal Programme would not only be promoting women into managerial positions but would further enhance the public image for fostering corporate responsibility.

Whilst the Gender Seal Certificate and WEP are measures that are bold and progressive to address the paucity of women in decision making positions, it is however observed that there is lack of legislative prescripts that govern these measures and this has the effect of limiting their effectiveness by reducing them to policy aspirations rather than substantive legal obligations. The Gender seal Certificate and the WEP are soft laws that have the prospects of having women represented at managerial positions in the private sector. Their lack of influence to South Africa is that they are non-binding hence the disinclination to transform by the private sector. To this end, it is submitted that a mandatory Gender Seal Certificate read with the WEP would assist to achieve equity and equality between males and females in the workplace. Moreover, South Africa should

adopt legislation that includes Gender Seal Programme Certificate as a mandatory provision to achieve equity in the workplace.

### **5.11 Conclusion**

The underrepresentation of the black African women at managerial positions in the South African Private sector is not only a challenge to South Africa but proved to be also a challenge in Rwanda, Jamaica and Norway. Despite that women are in the majority in South Africa, Jamaica and Rwanda do not manifest into their dominance in managerial positions in the private sector. To this end, the private sector has demonstrated that it is conservative in all countries and this perpetuates male dominance in managerial positions. Consequently, countries such as Jamaica and Rwanda demonstrated commitment to achieving equity in the workplace by adopting various non-binding measures to persuade the private sector to recruit women in managerial positions. These measures include the Gender Seal Certificate Programme.

It is argued that whilst these measures have demonstrated, change of perception and attitudes about women in the workplace, they however have not significantly changed the underrepresentation of women at managerial positions. It is argued that the Gender Seal Certificate Programme is made voluntarily to the private sector and is therefore unenforceable against companies that resists to implement the measures that are outlined in the Gender Seal Certificate programme. These measures include mentoring of women and the creation of upward mobility for women in the workplace to assume managerial positions

The majoritarian of women in the country and the Parliament is not indicative that the private sector would replicate measures to have women dominating at all occupational levels in the workplace. Rwanda and Jamaica and South Africa are good examples where women are in the majority by population however are underrepresented at managerial positions in the private sector. Despite the willingness of some private companies to adopt

gender-sensitive policies, recruitment and retention practices that aim to appoint women to managerial levels, this will, however, have less impact if targets are not set.

It is submitted that the achievement of equitable representation and enough participation of women at managerial positions must be supported by a quota system that purposely seeks to achieve specified targets for gender equality in the workplace. It is evident from this chapter that the CEDAW committee recognises the setting of targets as an effective tool to achieve equitable representation of women in managerial positions. Norway has demonstrated that quota legislation has the effect of increasing women at occupational levels. Whilst it may be argued that the quota legislation in Norway has failed to change the male dominance at the executive positions, it is undisputed that Norwegian female's representation on the boards of listed companies increased from 7% in 2003 to 42% when the quota law was adopted.<sup>882</sup> This is further evident in Germany where a quota law has increased the representation of women in managerial positions

The South African private sector is conservative and demonstrates its unwillingness to recruit black African women into managerial positions. This is largely influenced by the lack of a quota system that makes it mandatory for the South African Private sector to ensure that black African women are appointed at managerial positions. The WEP requires that the private sector in all countries develop goals and targets to attain gender equality and include this in the performance reviews of company managers progress. It is argued that the provisions of the WEP would not be achieved in South Africa without quota legislation that compels the private sector to comply with this provision. To this end, it is submitted that a quota system is a fundamental measure to achieve equity in the workplace for women at decision making positions.

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<sup>882</sup> Bolso A Ignore the doubters. Norway's quota on women in the boardroom is working, The Guardian 11 July 2011, available at <https://www.theguardian.com/commentisfree/2011/jul/18/diversity-boardroom-corporate-decisions> accessed on 28 August 2019.

## CHAPTER SIX

### ROLES OF INSTITUTIONS SUPPORTING WOMEN RIGHTS IN THE PRIVATE SECTOR WORKPLACE IN SOUTH AFRICA

#### 6.1 Introduction

Article 2 of CEDAW obliges State Parties to establish public institutions to ensure that there is an effective protection against discrimination women. These institutions have been developed internationally, regionally, and locally. Internationally institutions such as the UN Women, International Labour Organisation, and the European Commission have been established to ensure that women have access to similar opportunities as men in the workplace. Equally the African Union has been established to ensure that African countries achieve equity in managerial positions. As a State Party, South Africa has established institutions that seek to eliminate direct and indirect discrimination of black African women in the private sector. These institutions include the CGE, South African Human Rights Commission (SAHRC), the Commission for Employment Equity and Department of Women, Youth, and Persons with Disabilities. Furthermore, South Africa has other organisations such as the Johannesburg Stocks Exchange and the Black Management Forum that advocate for the achievement of transformation in the private sector

This chapter seeks to harness the roles of these institutions in addressing the paucity of black African women in managerial positions in the South African private sector. The selection of both the CGE and the SAHRC is influenced by their constitutional mandate to strengthen democracy by addressing issues relating to gender equality and the protection of human rights respectively. The Commission for Employment Equity, on the other hand, plays a significant role in addressing inequalities and discrimination in the workplace through a set of policies and programmes such as affirmative action whilst department of women, youth and persons with disabilities has the mandate to spearhead women's socio-economic empowerment and the promote gender equality in South Africa.



These institutions were established to play a pivotal role in addressing the inequalities experienced by black African women in the workplace. Generally, these institutions are provided with statutory powers such as the enforcement of recommendations in terms of section 18 of the Commission for Gender Equality Act, 1996 to address the paucity of black African women in managerial positions in the private sector. Notwithstanding statutory powers bestowed on these institutions, white males continue to dominate managerial positions in the private sector since the advent of democracy in the private sector. It is from this premise that this chapter will examine the roles of these institutions and barriers identified in addressing the paucity of black African women in managerial positions in the private sector.

## 6.2 International organisations

### 6.2.1 UN Women

UN Women is an entity that was created in July 2010 by the United Nations General Assembly to promote gender equality and the empowerment of women globally.<sup>883</sup> UN Women prescribes global standards to achieve gender equality and in collaboration with governments develops laws, policies and programmes required to achieve set standards for the benefit of women globally.<sup>884</sup> Moreover, this organisation aims to achieve “the vision of the Sustainable Development Goals a reality for women and supports their equal participation in all aspects of life”.<sup>885</sup>

The UN Women observes that women are underrepresented in a leadership position in various structures of society including the private sector. This is so despite women’s proven abilities to assume leadership roles.<sup>886</sup> According to UN Women, women are

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<sup>883</sup> UN Women, about UN Women, available at <https://www.unwomen.org/en/about-us/about-un-women> accessed on 13 February 2020.

<sup>884</sup> *Ibid.*

<sup>885</sup> *Ibid.*

<sup>886</sup> UN Women, Women’s Leadership and Political Participation, available at <https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2013/12/un%20womenlgthembriefuswebrev2%20pdf.pdf?la=en> accessed on 13 February 2020.

increasingly well-educated, however, they are disproportionately confined into work considered traditionally acceptable for women such as administrators.<sup>887</sup> As such, it is espoused that there is no parity between men and women's participation in the labour force globally. To address these challenges, UN Women requires that employment policies be adopted to create an environment that improves working conditions and advance decent work for female employees. Accordingly, UN Women aims to promote women's economic participation both in the private and public sector.<sup>888</sup>

## 6.2.2 Interventions by the UN Women

The UN Women introduced the Women's Empowerment Principles (WEP) in its efforts to promote gender equality in the workplace. According to the UN, WEP is a "set of Principles offering guidance to businesses on how to promote gender equality and women's empowerment in the workplace, marketplace and community".<sup>889</sup> UN Women asserts that these principles "informed by international labour and human rights standards and grounded in the recognition that businesses have a stake in, and responsibility for, gender equality and women's empowerment".<sup>890</sup> WEPs are viewed as a "primary vehicle for corporate delivery on gender equality dimensions of the 2030 agenda and the United Nations Sustainable Development Goals".<sup>891</sup> The UN Women espouses that when the Chief executive officer of a company subscribes to the WEPs, it is viewed as a commitment at the highest levels of the company to foster business practices that empower women. There are 8 WEP principles and they are summarised as follows:

- Principle 1 - Establish high-level corporate leadership for gender equality.
- Principle 2 Fair treatment between females and males at work and further respecting human rights and non-discrimination.

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<sup>887</sup> UN Women, Employment and migration, available at <https://www.unwomen.org/en/what-we-do/economic-empowerment/employment-and-migration> accessed on 13 February 2020.

<sup>888</sup> *Ibid.*

<sup>889</sup> Women Empowerment Principles, available at <https://www.weps.org/about> accessed on 13 February 2020.

<sup>890</sup> *Ibid.*

<sup>891</sup> *Ibid.*

- Principle 3- provide an environment where the safety, health, and well-being of all employees is protected.
- Principle 4- Foster development programmes that focus on education and training of females.
- Principle 5- Implement practices on supply chain and marketing to empower females.
- Principle 7- Promotion of equality by engaging in community initiatives and advocacy.
- Principle 8- Assess and report publicly on the progress made to achieve gender equality

According to UN Women, the application of the above principles results in a gender-balanced business. In support of this assertion, the UN Women refers to a French-based company, Sodexo that applied these WEP Principles following the challenges of women representation at senior management level. Sodexo is a French-based company that encountered challenges of a disproportionately low number of women in senior roles.

During 2009, Sodexo had 17% of women at senior management positions and most of those were incorporate functions like human resources and communications rather than major business operations.<sup>892</sup> In addressing this imbalance, the company applied the 8 WEP principles. To this end, the company launched in 2009 a programme named “SoTogether Gender Advisory Board”.<sup>893</sup> The aim of the SoTogether Gender Advisory Board at the company was to spearhead gender equality at the company.<sup>894</sup> In context, the objectives of the Board were (a) to lead and drive the organization’s gender equality strategy, (b) to enlist highly influential individuals onto the board who could effectively champion its work in their region and (c) to make high potential women visible across the

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<sup>892</sup> Women Empowerment Principles, building a gender-balanced business, page 1, available at [https://www.weeps.org/sites/default/files/2020-02/Case%20Study %20Sodexo FINAL.pdf](https://www.weeps.org/sites/default/files/2020-02/Case%20Study%20Sodexo_FINAL.pdf), accessed on 13 February 2020.

<sup>893</sup> *Ibid.*

<sup>894</sup> *Ibid.*

global organization, something which had already been shown to be instrumental in helping them progress.<sup>895</sup> Significantly, the composition of the SoTogether Gender Advisory Board included senior women, middle management women and male employees.

The Board aimed to:

- Influence HR processes, recommending practices to improve the gender balance and challenge measurements,<sup>896</sup>
- Provide development opportunities to increase the pipeline of female talent, including mentoring, sponsorship and internal leadership development programmes,<sup>897</sup>
- Strengthen a common identity and connect existing gender networks to engage women and men in building an inclusive culture where women thrive.<sup>898</sup>

In 2016, the company set a goal of having at least 40 per cent of its senior positions occupied by women by 2025. To achieve this, 10 per cent of the company's annual incentives for executives were linked to meeting this target.<sup>899</sup> Moreover, the company set a target that all employees will work under gender-balanced management teams by 2025. To this end, it is reported that 500 women employees have participated in a women's leadership development programme at the company for middle-level managers and the majority have been promoted and take on senior roles.<sup>900</sup> It is therefore significant that women not only attend these mentorship and women's leadership programme but attendance and completion of these programmes must result in women being deliberately targeted for senior management positions.

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<sup>895</sup> *Ibid*, page 2.

<sup>896</sup> *Ibid*, page 2.

<sup>897</sup> *Ibid*, page 2.

<sup>898</sup> *Ibid*, page 2.

<sup>899</sup> *Ibid*, page 2.

<sup>900</sup> *Ibid*, page 2.

It is against this backdrop that in 2019, 37 % of senior executive positions at the company were held by women.<sup>901</sup> It is espoused that the achievement of this target was influenced by the board's decision to put in place clear metrics to ensure its goals were being met and individuals could be held accountable. This included key performance indicators in the contracts with a focus to these goals were put in place for the executive team, including that their performance was measured on them having diverse successors.<sup>902</sup> As such, the private sector in South Africa needs to ensure that performance indicators are included in the contracts of Chief executive officers, senior managers and Human resource managers. The inclusion of performance indicators promotes accountability and will compel the private sector to put in place clear metrics such as deliberate recruitment and promotion of black African women in managerial positions.

### **6.3 European Commission**

According to Verge *et al* strong sanctions together with equality plans of companies are required to achieve quotas for female representation at company boards.<sup>903</sup> To this end, the European Commission (EC) postulates that the over-representation of males in decision making roles is not only structural and multifaceted but is grounded in traditional gender roles. The EC asserts that this perpetuates views that women should focus on raising families and such views cast doubt on women's capacity to assume a professional career, particularly at the senior level. This results in the vertical segregation where women are under-represented in line management positions that lead to the top positions. The EC observes that women, compared to men, are less highly trained and are less often offered middle-level line management positions that would essentially make them eligible for higher managerial positions.<sup>904</sup> To this end, it is argued that the equal treatment between female and male employees suggests that former must have the same opportunities as latter to occupy managerial positions.<sup>905</sup>

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<sup>901</sup> *Ibid*, page 4.

<sup>902</sup> *Ibid*, page 3.

<sup>903</sup> Verge T and Lonbardo E, The differential approach to gender quotas in Spain: Regulated Politics and Self-regulated Corporate Boards, European University Institute, page 9, 2015.

<sup>904</sup> European Commission, 2018 Report on equality between men and women in the EU, page 31, 2018.

<sup>905</sup> *Ibid*.

The EC asserts that across Europe, individual companies recognise the need to develop women and break down the barriers that limit their access to managerial positions.<sup>906</sup> Notwithstanding this, the EC espouses that there has been a slow pace of transformation and this is indicative that there is insufficient commitment and that self-regulation does not bring about substantial and rapid change.<sup>907</sup> This observation is critical to South Africa because the legislative framework, the EEA in particular, arguably allows companies to self-regulate and this has also resulted in the underrepresentation of black African women in managerial positions.

### 6.3.1 Interventions by EC

The EU adopted a Directive Proposal (Directive)<sup>908</sup> that set a minimum target of 40% representation of under-represented sex at corporate boards by 2020. The Directive obliges listed companies that have less than 40% of the under-represented sex among non-executive directors to recruit and appoint at such positions based on a comparative analysis of the qualifications of each applicant, by applying established criteria to meet the 40% target.

Following the slow pace of transformation in the private sector, the EC recognised that there is a need for legislative action to expedite the empowerment of women in the EU. This is done against the backdrop understanding that self-regulatory initiatives have not resulted in the empowerment of women into leadership positions.

Consequently, the Member States adopted various legislation in their own countries to expedite the representation of women at the boards.<sup>909</sup> These countries include Denmark which set a quota of 30% women representation at the boards and Ireland which set a

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<sup>906</sup> European Commission, Women and Men in Leadership positions in the European Union: A review of the situation and recent progress, page 3, October 2013.

<sup>907</sup> *Ibid.*

<sup>908</sup> EU Directive Proposal for Gender balance among non-executive directors of companies listed on Stock exchanges

<sup>909</sup> Walby S , Legal Instruments for Gender Quotas in Management Boards, page 7, March 2013 .

40% quota for women representation at boards.<sup>910</sup> Walby observes that the proportion of women representation was set between 30% and 40% in the EU Member States, with the most set at 40% and the second being 30%.<sup>911</sup> Conversely, Mateos de Cabo *et al* argues that the EU Directive only obliges State Members to ensure the availability amongst the applicants and as such it is argued that the EU Directive allows member states the freedom to select between hard and soft law approaches.<sup>912</sup> Mateos de Cabo *et al* asserts that only a binding legal instrument can significantly increase the representation of females on boards.<sup>913</sup>

According to Walby, several EU quota legislation included various sanctions against the private sector companies that failed to comply with the quotas.<sup>914</sup> These penalties included *inter alia* annulment of board appointments and not remunerating board members due to composition of board members not compliant with France's Copé-Zimmermann Law (Law No. 2011-103 of January 27, 2011,<sup>915</sup> admonishment by a regulatory body, fine, annulment of the board in terms of the Italian Law 120/2011 that establishes legislated quotas to ensure gender-balanced corporate boards<sup>916</sup>; In Spain, there are no penalties but an incentive in potential priority status for government contracts<sup>917</sup>, Quota law in Spain was introduced through the Good Governance Code of Listed Companies (February 2015) which was adopted after the Companies Act 2010 was amended by Law 31/2014 and recommended that the directors' selection policy be adopted to achieve the objective of at least 30 % of women on the board.

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<sup>910</sup> Walby S , Legal Instruments for Gender Quotas in Management Boards, page 8, March 2013.

<sup>911</sup> *Ibid*, at page 9.

<sup>912</sup> Mateos de and Cabo R , Do 'Soft law' board gender quotas work? Evidence from natural experiment, European Management Journal 37 611-624,page 613, 2019.

<sup>913</sup> *Ibid* at page 622.

<sup>914</sup> Walby S , Legal Instruments for Gender Quotas in Management Boards, page 10, March 2013.

<sup>915</sup> *Ibid*. See also Nommick C, Update on the application of the rules designed to increase the presence of women in the boardrooms of large French companies, 29 November 2016, available at <https://www.soulier-avocats.com/en/update-on-the-application-of-the-rules-designed-to-increase-the-presence-of-women-in-the-boardrooms-of-large-french-companies/> accessed on 19 May 2020.

<sup>916</sup> Walby S , *opcit* page 10.

<sup>917</sup> Walby S , *opcit* page 10.

According to Walby, if the company in Italy does not comply with its quota legislation, the Consob (the regulatory body of the stock market) would require the company to restructure its board;<sup>918</sup> Should four months lapse with the company complying, then a fine between 100,000 and 1 million Euros is imposed on the company.<sup>919</sup> If after three months of the fine the company fails to comply despite the fine then the board and its elected members are annulled.<sup>920</sup> Each country has determined its sanctions and this includes de-listing the company and the annulling appointments of boards that are non-compliant. Similarly, some countries have opted for more of a soft approach such as the requirement to 'comply or explain' which generally does not encompass a fine.<sup>921</sup>

Walby argues that the legal principle is effective in achieving gender balance in economic decision-making on corporate boards provided that such a principle invokes not only private interest but also the public interest.<sup>922</sup> It is submitted that company law embeds the principle of public interest in economic governance much greater than labour law, as such, the development of legislative mechanisms to achieve quotas on corporate boards may be more effectively achieved through the application and consideration of company law than labour law.<sup>923</sup>

In context, Walby argues that labour law allows for positive action for equally qualified female candidates in contexts where women are under-represented and Company law permits quotas on corporate boards based on both the effective running of the company for its shareholders and of its wider duties to the public.<sup>924</sup> Within the context of South Africa, Walby's argument suggests that the EEA is vital in ensuring that equity for black African females in the private sector is achievable. Moreover, Walby's argument suggests that the Companies Act 2008 in South Africa may, therefore, be used to set quotas for the representation of black African women in managerial positions.

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<sup>918</sup> Walby S , *opcit* page 11.

<sup>919</sup> Walby S , *opcit* page 11.

<sup>920</sup> Walby S , *opcit* page 11.

<sup>921</sup> Walby S , *opcit* page 11.

<sup>922</sup> Walby S , *opcit* page 11.

<sup>923</sup> Walby S , *opcit* page 11.

<sup>924</sup> Walby S , *opcit* page 11.



It is argued that in South Africa the EEA is the founding piece of legislation that seeks to achieve equity in the workplace. As such, it is submitted that the equitable representation of black African women requires the EEA particular section 15(4) to be amended to permit the use of quotas. It is observed that the 2011 Regulations of the Companies Act, 2008 in South Africa permits the Minister of labour to prescribe a category of companies that must each have a social and ethics committee if it is desirable in the public interest. A company that has a social and ethics committee has the function to monitor the company's activities, about matters relating to - the Employment Equity Act; and the Broad-Based Black Economic Empowerment Act and the promotion of equality, prevention of unfair discrimination. This function suggests that the social and ethics committee must assess companies' performance in terms of complying with the achievement of equity in the workplace, more in particular the underrepresentation of black African women in managerial positions. The underrepresentation of black African women in the private sector suggests that the social and ethics committees in South Africa have not held the companies accountable for the failure to proliferate black African women into managerial positions.

To this end, it is argued that the social and ethics committee may be strengthened and complemented by the inclusion of quotas in the EEA. With quotas in place, it is argued that the companies would be expected to comply with the recommendations of the social and ethics committee to the extent that such recommendations assist in achieving quotas set. It is espoused that without quotas the role of the social and ethics committees is without impact on the advancement of black African women into managerial positions.

#### **6.4 Internal Labour Organisation**

The discourse regarding the under-representation of women in managerial positions is a global challenge. In 2019, the ILO found that the representation of women in middle and senior management is a challenge to several countries such as the United States, Spain,

Portugal, Greece, Thailand and Australia.<sup>925</sup> The ILO observes that there is a pyramid structure that exists in the workplace and often results in fewer women being able to access higher management positions.<sup>926</sup> It is found that globally 78% of companies have a male chief executive officer and ILO asserts that the larger the company size, the fewer women occupy senior management and top executive positions.<sup>927</sup>

According to the ILO, women are largely placed in the supporting management functions such as Human resources, finance and administration, marketing and sales whilst men are over-represented in strategic management functions such as operations, research and development, and profit and loss management functions.<sup>928</sup> It is observed that strategic functions are often viewed as higher managerial positions such as a chief executive officer or chief operations officer. To this end, it is argued that the concentration of women in less strategic positions is minimising their chances to assume higher managerial positions and this creates glass walls for females.<sup>929</sup> It is against this backdrop that the skills and development policies must be developed in the company and implemented to benefit women by affording the training and skills transfer into strategic functions. It is espoused that mentorship in strategic functions may further enhance the skills of women in the workplace.

The ILO asserts that the paucity of women in key management positions is influenced by gender stereotyping during recruitment and promotion processes at a company.<sup>930</sup> This assertion suggests that the recruitment and promotion of women would be largely be linked to work that is viewed as traditional roles of women and this will include sales, administration, etc. As such women are unlikely to be promoted in mass numbers into strategic positions that are viewed as roles of men. It is observed that a company that has

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<sup>925</sup> ILO, Women in Business and management: The business case for change, page 7, May 2019, available at [https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms\\_700953.pdf](https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_700953.pdf) accessed on 22 March 2020.

<sup>926</sup> *Ibid*, page 29.

<sup>927</sup> *Ibid*, page 40.

<sup>928</sup> *Ibid*, page 29.

<sup>929</sup> *Ibid*, page 44.

<sup>930</sup> *Ibid* page 45.

policies such as equal opportunity and gender diversity are likely to have more women in management than those without.<sup>931</sup> This is key because these policies if developed and implemented effectively, channel the companies to employ women to promote them into higher managerial positions. The ILO found that there is a leaky pipeline that persists in most companies with high numbers of women employed and moving into junior and middle management, however not progressing to higher managerial positions in large number.<sup>932</sup> As such, the overrepresentation of men in management positions becomes more distinct at the highest echelons at the company.

The ILO has however not passed a Convention that seeks member States to adopt 50/50 % representation of women in all occupational levels in the workplace. It is espoused that Conventions, such as the Equal Remuneration Convention, 1951 (No. 100) (ERC) has resulted in South Africa amending the EEA to specifically address the equal work for work of equal value. South Africa is a member state of the ILO and ratified most of its conventions and as such, the ILO Convention to increase the representation of women in managerial positions would assist South Africa to legislate its targets in the EEA to foster the progression of black African women into managerial positions in the private sector. This amendment may be done through a quota system in the EEA.

## **6.5 Regional institutions**

### **6.5.1 African Union**

The African Union (AU) was launched in 2002 and is a continental body that consists of a total of 55 member states which represent all countries on the African continent.<sup>933</sup> The objectives of the AU is to attain and strengthen unity and solidarity between the African countries and African people. The AU has developed Agenda 2063 as a strategic framework for the long term socio-economic and integrative transformation of Africa. Aspiration 6 of Agenda 2063 aims for member states to achieve gender balance with

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<sup>931</sup> *Ibid*, page 41.

<sup>932</sup> *Ibid*, page 42.

<sup>933</sup> African Union, About the African Union , available at <https://au.int/en/overview> , accessed on 22 March 2020.

women constituting at least 50% of elected public offices at all levels and half of the managerial positions in the public and the private sectors. To achieve this target, Member States are required to develop /implement policies for faster progression of Women towards gender parity in all spheres of decision making/positions.<sup>934</sup>

To guide member states on how to achieve gender parity, the AU established a Gender Policy. The Gender Policy aims to determine a vision and make commitments for gender mainstreaming and empowerment of women to influence practices, procedures and policies to fast-track the achievement of gender equality, gender justice, non-discrimination and fundamental human rights in Africa.<sup>935</sup> The objective of the policy includes amongst others, achieving a gender-responsive environment and practices and enforcing and respecting human rights, gender equality and women's empowerment undertakings made at international, continental, regional and Member States levels.<sup>936</sup> As such the AU gender policy requires the Member States to enforce a 50/50 gender parity and representation in all structural levels, policies and practices and ensure that gender parity targets are achieved.

It is deduced that the Member States are required to develop policy frameworks in all structures that seek to enforce a 50/50 gender parity in all structures. In South Africa, the public sector has implemented this by introducing the Head of Department's 8 principles of Action Plan. The Head of Department's 8 principles of Action Plan included *inter alia* ensuring women's full participation and decision making through the employment of 50% women at all levels of the Senior Management Service (SMS). This, however, has not been replicated in the private sector because the AU's 50/50 gender parity has not been legislated in South Africa and as such, it is not enforceable against the private sector.

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<sup>934</sup> The African Commission, Agenda 2063: A Shared Strategic Framework for Inclusive Growth and Sustainable Development , First ten-year implementation plan 2014 – 2023, page 78.

<sup>935</sup> African Union, Gender Policy ,page 10-11 available at [https://www.un.org/en/africa/osaa/pdf/au/gender\\_policy\\_2009.pdf](https://www.un.org/en/africa/osaa/pdf/au/gender_policy_2009.pdf) accessed on 13 March 2020

<sup>936</sup> African Union, Gender Policy , available at [https://www.un.org/en/africa/osaa/pdf/au/gender\\_policy\\_2009.pdf](https://www.un.org/en/africa/osaa/pdf/au/gender_policy_2009.pdf) accessed on 23 March 2020.

On the 14<sup>th</sup> to 15<sup>th</sup> June 2015, the Heads of State and AU held a summit under the theme “Women Empowerment and Development towards Africa’s Agenda 2063”. At this summit member states committed to implementing all AU policies on gender parity and participation of women especially in governance and at decision-making levels.<sup>937</sup> This commitment arguably included the adoption of a 50/50 gender parity policy frameworks in all structures. It is argued that the failure by the AU to recommend that the member states must legislate the 50/50 target between women and men in all structures is a missed opportunity which enables members’ states to develop such policies however such policy is developed for the public sector and not the private sector. To this end, the private sector in South Africa continues to lag in ensuring that black African women are adequately represented at managerial positions because South Africa has not legislated the 50/50 gender parity targets. Moreover, without legislation that mandates the private sector to foster the black African women into managerial positions, the private sector shall continue to demonstrate a lack of commitment to transformation. As such the EEA needs to be amended and put 50/50 targets to all employers in South Africa.

## 6.6 Domestic institutions

### 6.6.1 The powers of the SAHRC, CGE and CEE in enhancing the rights of black African women in the workplace

The challenges of black African women in the private sector require institutions with enforcement powers to ensure compliance with the EEA in South Africa. The Constitutional court provided guidelines on the importance of chapter 9 institutions and these include the CGE and South African Human Rights Commission in South Africa.<sup>938</sup> Although the facts in the matter of *Economic Freedom Fighters v Speaker of the National Assembly and others and the matter of the Democratic Alliance v Speaker of the National*

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<sup>937</sup> African Union, Assembly of the union twenty-fifth ordinary session 14 – 15 June 2015 Johannesburg, South Africa, page 5, available at <https://www.tralac.org/images/docs/7611/decisions-declarations-and-resolutions-of-the-25th-ordinary-session-of-the-au-assembly-jun-2015.pdf> , accessed on 13 March 2020,

<sup>938</sup> *Economic freedom fighters v speaker of the National Assembly and others and in the matter of the Democratic Alliance v Speaker of the National Assembly and Others* 2016 (5) BCLR 618 (CC).

*Assembly and Others* relate to the office of the Public Protector, it is, however, important to draw lessons from the principles laid out by the court. In this matter, the office of the public protector, a constitutional body established in terms of section 181 of the Constitution, received complaints from members of the public and a member of parliament about the construction of certain improvements at the private residence of the President of the Republic of South Africa in Nkandla.<sup>939</sup> The Office of the Public Protector issued an investigative report with adverse findings against the President of South Africa. In line with the findings, the Office of the Public Protector required the President of South Africa to comply with the remedial actions set out in the report.<sup>940</sup>

The President instead instructed the Minister of Police to determine if the improvements made at his place of residence included non-security features as per the findings of the Office of the Public Protector, and, if affirmative, determine the amount that constituted a reasonable percentage payable by the president. To this end, the Minister of Police produced a report that absolved the President from any liability.<sup>941</sup> Furthermore, the National Assembly endorsed the Minister of Police report and not that of the Public Protector. As such the president was deemed to have failed to comply with the remedial action of the Office of the Public Protector and the matter was challenged at court. The cardinal question was whether the recommendations of the office of the Public Protector are binding . To answer this fundamental question, the court stated that

“Like other Chapter Nine institutions, the office of the Public Protector was created to “strengthen constitutional democracy in the Republic. To achieve this crucial objective, it is required to be independent and subject only to the Constitution and the law. It is demanded of it, as is the case with other sister institutions, to be impartial and to exercise the powers and functions vested in it without fear, favour or prejudice...I hasten to say that this would not

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<sup>939</sup> *Economic Freedom Fighters v Speaker of the National Assembly and others and in the matter of the Democratic Alliance v Speaker of the National Assembly and Others* 2016 (5) BCLR 618 (CC) at paragraph 146.

<sup>940</sup> *Ibid* paragraph 146.

<sup>941</sup> *Ibid*, paragraph 147.

ordinarily be required of an institution whose powers or decisions are by constitutional design always supposed to be ineffectual. Whether it is impartial or not would be irrelevant if the implementation of the decisions it takes is at the mercy of those against whom they are made. It is also doubtful whether the fairly handsome budget, offices and staff all over the country and the time and energy expended on investigations, findings and remedial actions taken, would ever make any sense if the Public Protector's powers or decisions were meant to be inconsequential. The constitutional safeguards in section 181 would also be meaningless if institutions purportedly established to strengthen our constitutional democracy lacked even the remotest possibility to do so".<sup>942</sup>

It is observed that the court purposely included the words "like another chapter nine institutions ...." and "as is the case with other sister institutions" to mean that other all institutions listed under section 181 of the Constitution have powers to make decisions which if not implemented have consequences. The powers/ decisions of the Chapter 9 institutions have been provided to these chapter 9 institutions to strengthen constitutional democracy. It would therefore not have been the intention of the drafters of the Constitution to provide Chapter 9 institutions with a task to strengthen democracy and have their decisions not have consequences.

At paragraph 74 the court reasoned that

"this is so, because our constitutional order hinges also on the rule of law. No decision grounded on the Constitution or law may be disregarded without recourse to a court of law. To do otherwise would 'amount to a license to self-help'. Whether the Public Protector's decisions amount to administrative action or not, the disregard for remedial action by those adversely affected by it amounts to taking the law into their own hands and is illegal. No binding and constitutionally or statutorily sourced decision may be disregarded willy-nilly. It has legal

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<sup>942</sup> *Ibid* at paragraph 49.

consequences and must be complied with or acted upon. To achieve the opposite outcome lawfully, an order of court would have to be obtained”.

The court further emphasized that

“the rule of law requires that no power be exercised unless it is sanctioned by law and no decision or step sanctioned by law may be ignored based purely on a contrary view we hold. It is not open to any of us to pick and choose which of the otherwise effectual consequences of the exercise of constitutional or statutory power will be disregarded and which given heed to...”<sup>943</sup>

Arguably the above remarks affirm that chapter 9 institutions are clothed with statutory powers and the decisions taken by the CGE and SAHRC if sanctioned by law have consequences and cannot, therefore, be accepted for consideration purposes only. It is therefore expected that implicated parties should comply with the recommendations of the CGE and SAHRC, as it is the case with other chapter 9 institutions. A disgruntled party may take the CGE or SAHRC for review if not satisfied with its decisions. From this premise, it is submitted that the CGE and the SAHRC are competent bodies with statutory powers to address the challenges of black African women and the envisaged achievement of gender equality in the private sector.

Unlike the SAHRC and the CGE, the Commission for Employment Equity (CEE) is not a constitutional body established in terms of section 181 of the Constitution. The CEE is however statutory body established in terms of section 28 of EEA. The CEE advises the Minister of Labour on any matters concerning the EEA, including policy recommendations and matters about the implementation towards achieving the objectives of the EEA.<sup>944</sup> In terms of section 33 of the EEA, the CEE is required to submit an annual report to the Minister of Labour to monitor and evaluate progress towards achieving the objectives of

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<sup>943</sup> *Economic Freedom Fighters v Speaker of the National Assembly and others and in the matter of the Democratic Alliance v Speaker of the National Assembly and Others* 2016 (5) BCLR 618 (CC) at Paragraph 75.

<sup>944</sup> Section 30 of the EEA.



the EEA. In the main, the CEE as a statutory body seems to be confined to advising the Minister of Labour of matters concerning the application of the EEA and research on the appropriate norms and benchmarks for the setting of numerical goals in various sectors.<sup>945</sup>

It is therefore evident that the CEE is not clothed with binding powers to compel entities such as the private sector to comply with the EEA notwithstanding its extensive work of highlighting the sector's failure to advance black African women in managerial positions. Similarly, the CEE has submitted its reports from 1999 to 2018 regarding the private sector's failure to transform at its managerial positions however it appears these reports have not led to the immediate establishment of enforcement mechanisms and consequences to the private sector. To this end, it is therefore fundamentally important to assess in this chapter how the establishment of the CEE influenced the private sector to increase the representation of black African women in managerial positions.

Lastly, the Department of Women, Youth and Persons with Disabilities (DWYPD) was established to champion the rights of women. The department of women, youth and disabilities have since its inception emphasised the need to achieve gender parity in the public and private sector. It is however argued that it appears that little has been done by the department to persuade and hold the private sector accountable for the slow pace of transformation at managerial positions where white males predominately dominate. The department of women has, to the contrary, managed to persuade and hold the public sector accountable for the achievement of transformation at managerial positions. In this chapter, it shall be explored on the reasons why DWYPD is unable to hold the private sector accountable for its evident slow pace of transformation. The cardinal question is what precludes the department from equally holding the private sector accountable for the slow pace of transformation.

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<sup>945</sup> Section 30(2)(b) of the EEA.

### 6.6.1.1 SAHRC

The SAHRC is established in terms of section 181 of the Constitution of South Africa. As a constitutional body, the SAHRC is mandated in terms of section 184(1) of the Constitution of South Africa to promote respect for human rights and a culture of human rights; promote the protection, development and attainment of human rights; and monitor and assess the observance of human rights in South Africa. Following its mandate, the SAHRC resolved to address and promote human rights in the private sector by establishing tools such as a disability toolkit for employers that monitor awareness and implementation of business and human rights principles.<sup>946</sup> According to the SAHRC, the need for monitoring tools was a consequence of the State's failure to adequately and systematically hold the private sector accountable for practices that impacted on human rights.<sup>947</sup>

The SAHRC acknowledges that whilst women are under-represented at managerial positions in the private sector, white women were largely appointed to these positions compared to other female groups such as the black African women.<sup>948</sup> To this end, the SAHRC espouses that the domination of white males and females at managerial positions essentially renders black women vulnerable to various levels of discrimination in the workplace.<sup>949</sup> It is clear that the South African private sector generally lacks diversity in its managerial levels and thus perpetuates inequalities for the previously disadvantaged groups including black African women.

The SAHRC unearthed that the lack of transparency in the private sector concerning remuneration and availability of vacancies is one of the barriers to the achievement of employment equity.<sup>950</sup> It is highlighted as an example that in the private sector generally only 20 per cent of the vacancies are advertised while 80 per cent are filled within existing

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<sup>946</sup> SAHRC Business and human Rights dialogue Report, page 10,13-14 March 2018.

<sup>947</sup> *Ibid.*

<sup>948</sup> *Ibid* page 26.

<sup>949</sup> *Ibid* page 26.

<sup>950</sup> *Ibid* page 27.

networks or by internal employees.<sup>951</sup> To this end, it is argued that this practice in the private sector limits competition and opportunities and further perpetuates continued patterns of imbalance.<sup>952</sup> Arguably this practice contributes to the existing skewed demographics in the private where white males dominate most managerial positions in the private sector.

The SAHRC observes that the achievement of South Africa's NDP requires the private sector to contribute significantly to the NDP.<sup>953</sup> To this end, it is observed that the inadequate contribution to transformation by the private sector in South Africa impedes the achievement of substantive equality in the labour market according to the white male domination at managerial positions.<sup>954</sup> According to the SAHRC slow transformation is indicative of the private sector's failure to cognise both South Africa's commitment to radically transform both society and economy to achieve substantive equality.<sup>955</sup> Similarly, the private sector demonstrates its lack of understanding of the requirements imposed by the EEA to the sector to achieve equitable representation of black African women in all occupational levels in the workplace including managerial positions.

To the SAHRC, slow transformation in the private sector further demonstrates the lack of understanding of the importance of achieving a more equal society.<sup>956</sup> To this end, SAHRC espouses that greater equality would spur economic growth and would essentially benefit the private sector at various levels.<sup>957</sup> Moreover, it is argued that without the participation and collaboration of the private sector, South Africa's transformation project is unlikely to be achieved.<sup>958</sup> From this premise, it is undisputed that the private sector plays a pivotal role in the achievement of South Africa's

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<sup>951</sup> *Ibid*, page 27.

<sup>952</sup> *Ibid*, page 27.

<sup>953</sup> *Ibid*, page 5.

<sup>954</sup> SAHRC, Achieving substantive economic equality through rights-based radical socio-economic transformation in South Africa, page 38,2017/2018.

<sup>955</sup> *Ibid*, page 38.

<sup>956</sup> *Ibid*,page 38.

<sup>957</sup> *Ibid*,page 38.

<sup>958</sup> *Ibid*,page 38.

transformation agenda that encompasses gender equality and women's empowerment across various sectors in the workplace and society in general. To this end, it is argued that the South African government thus remains responsible to ensure that the private sector complies with South Africa's transformative laws such as the EEA to ensure that the black African women are equitably represented at all managerial positions. Moreover, the SAHRC opines that the private sector should not be left to regulate itself and operate in isolation from the State's commitment to gender equality.<sup>959</sup> Arguably, the State should enforce the EEA to rein in companies that fail to transform at the managerial positions.

#### 6.6.1.2 Interventions by the SAHRC

The SAHRC evaluated in its Equality Report 2017/2018 whether the affirmative action or special measures outlined in the EEA comply with the international law obligations amplified in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) read with the CERD's relevant general recommendations and concluding observations in respect of South Africa. The ICERD identifies that special measures or affirmative action should not create permanent separate rights for different race groups, and should be discontinued once equality is realised.<sup>960</sup> On the other hand, the CERD's requires that the implementation of special measures be based on need and a related 'realistic appraisal of the current situation of the individuals and communities' concerned.<sup>961</sup> Similarly, the SAHRC espouses that CEDAW provides that temporary special measures do not constitute discrimination, but that separate rights should not be maintained where *de facto* equality between women and men is achieved in a specific context.<sup>962</sup>

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<sup>959</sup> SAHRC Business and human Rights dialogue Report, page 29, 13-14 March 2018.

<sup>960</sup> SAHRC, Achieving substantive economic equality through rights-based radical socio-economic transformation in South Africa, page 13, 2017/2018 .

<sup>961</sup> CERD General Recommendation No 32: The meaning and scope of special measures in the international Convention on the Elimination of All Forms Racial Discrimination, 2009 at paragraph 16.

<sup>962</sup> SAHRC, Achieving substantive economic equality through rights-based radical socio-economic transformation in South Africa, page 14, 2017/2018.

In South Africa, the EEA requires designated employers to adopt affirmative action measures aimed at achieving equitable representation of suitably qualified persons at all occupational levels of the workforce and to retain and develop employees from designated groups through training initiatives and skills development.<sup>963</sup> SAHRC argues that affirmative action measures should, therefore, be temporary, tailored to the needs of the groups or individuals concerned, and should cease once substantive equality is achieved.<sup>964</sup>

SAHRC asserts that the definition of designated groups as defined in the EEA is flawed as it does not accommodate indigenous persons, those whose ethnic descent may be from mixed-race marriages, and linguistic or tribal minorities within the designated groups.<sup>965</sup> As such, the lack of disaggregated data of who qualifies as designated groups result in special measures or affirmative action measures failing to target persons or categories of persons who have been disadvantaged by unfair discrimination.<sup>966</sup>

SAHRC suggests that South Africa's classification system of designated groups neglects to acknowledge multiple forms of discrimination faced within population groups.<sup>967</sup> Because of this, the SAHRC argues that it is possible based on inequality between members of the black African population group that is higher than in any other racial group, for the current practice to provide a job opportunity for a wealthy black man of Zulu origin, rather than a poor black woman from an ethnic minority.<sup>968</sup> As such special measures accordingly do not account for socioeconomic differences within broadly defined population groups. To this end, it is argued that special measures or affirmative action measures are not capable of being targeted at the most vulnerable groups in society.<sup>969</sup> In light of this, the SAHRC recommended that South Africa should act promptly

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<sup>963</sup> Section 15 of the EEA.

<sup>964</sup> SAHRC, *Achieving substantive economic equality through rights-based radical socio-economic transformation in South Africa*, page 30,2017/2018.

<sup>965</sup> *Ibid*,page 39.

<sup>966</sup> *Ibid*,page 34.

<sup>967</sup> *Ibid*,page 35.

<sup>968</sup> *Ibid*,page 35.

<sup>969</sup> *Ibid*, page 35.

to rationalise and align fragmented EEA legislation, Affirmative action policies and implementation practices of special measures to promote radical transformation and achieve substantive equality.<sup>970</sup> South African government has failed to amend the EEA and it was accepted that the recommendations of the SAHRC on this subject were not binding on government but were advisory.<sup>971</sup> SAHRC further recommended that the private sector must urgently be mobilised to contribute to transformation in society and the workplace.<sup>972</sup>

The arguments of the SAHRC contribute significantly to the discourse of transformation in the South African private sector also. It is conceivable that the EEA in its current form is fragmented and therefore enables employers in the private sector not to consider all women whose ethnic descent may be from mixed-race marriages into managerial positions. Whilst this argument has substance, it is, however, key to note that it is currently undisputed that the managerial positions at the private sector are white male-dominated and black African women are underrepresented. This can only be improved with strict enforcement of the EEA with amendments that will make it mandatory for the private sector to increase the representation of black African women at managerial positions.

The EEA currently does not permit quotas but rather provides that numerical targets may be set by the designated employers. The effect of the numerical targets is effectively capable of flexibility implementation whilst quotas by their very nature are rigid in implementation. Whilst it may be expressed that quotas serve as a barrier for those who are not from the designated groups, self-regulation through the setting of targets by the private sector has failed to diversify its managerial positions. Against this backdrop, strict mechanisms such as the introduction of quotas need to be explored in South Africa. Norway has introduced a quota law and this has resulted in most companies achieving their targets.

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<sup>970</sup> *Ibid* at page 8.

<sup>971</sup> *Solidarity v Minister of Labour and others* 2020 1 BLLR 79 (LC) at paragraph 26.

<sup>972</sup> SAHRC, *Achieving substantive economic equality through rights-based radical socio-economic transformation in South Africa*, page 8, 2017/2018.

## 6.6.2 CGE

The CGE is established in terms of section 181 of the Constitution of South Africa. As a constitutional body, the CGE is mandated in terms of section 187 of the Constitution of South Africa to promote respect for gender equality and the protection, development and attainment of gender equality. Per its mandate, the CGE has the power as regulated by the Commission for Gender Equality Act 39 of 1996 (as amended) to monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality.

### 6.6.2.1 Interventions by the CGE to address the underrepresentation of black African women in the private sector.

The CGE initiated in 2016 public investigative hearings into the private sector and sampled 18 private sector companies to assess compliance with the EEA and determining the movement of black African women into managerial positions in the private sector.<sup>973</sup> According to the CGE, the objectives of the public investigative hearings are to “assess the impact of the employment equity legislation and to hold companies accountable for non-compliance”.<sup>974</sup> These companies included Mercedes Benz South Africa, EH Hassim Builders World, Moordrift, RCL Foods, Jonsson Workwear, Sasol, Six Sons t/a Kloppers, Vermeulens Build It, South African Breweries, Tiger Brands, Mafikeng Toyota, NWK, OVK, Pick n Pay, Rhodes Food Group and HL Hall and Sons Ltd.<sup>975</sup> These companies were required to complete a questionnaire that largely focused on compliance with the EEA and was further requested to appear before the CGE and be engaged on issues relating to transformation.

NWK demonstrated that it is a white male-dominated in all its managerial positions. In 2016 in particular, the company had 263 white males at the top, senior, middle and junior

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<sup>973</sup> CGE, Employment Equity Report in the private sector , page 7, 2016/2017.

<sup>974</sup> CGE, Employment Equity Report , at page 8, 2016/2017.

<sup>975</sup> CGE, Employment Equity Report , at page 6,2016/2017.

management whilst white women were 101, black males were 21 and black African women were only 2.<sup>976</sup> Coloured and Indian women had one representative each at junior management positions.<sup>977</sup> To address this, NWK committed to ring-fence future positions for previously disadvantaged groups.<sup>978</sup> Black African women are underrepresented in managerial positions at NWK.

In 2016 white male domination was identified also in Mafikeng Toyota with 5 white males represented at the top, senior and middle management respectively.<sup>979</sup> White females were 2, African males were 2, coloured males were 1 and black African women were not represented at either of the management levels.<sup>980</sup> As such, the majority of black African females occupied skilled and semi-skilled positions which generally encompass the traditionally accepted roles of administrators, while the majority of men occupied management positions.<sup>981</sup> From this, it is clear that the company has female representation as part of its workforce; however, there is no upward mobility for these black African women into managerial positions.

Concerning Pick n Pay, it was found in 2016 that the majority of employees employed by the company were women who were 66%.<sup>982</sup> Ideally, it was expected that the majority of women, particularly black African women would be adequately represented at managerial positions. Interestingly at top management 86 per cent were males.<sup>983</sup> Of these males, 77 per cent were white males.<sup>984</sup> Black African women were underrepresented at managerial positions and as such the company argued that women are scarce with certain skills required in the senior positions in the industry.<sup>985</sup> Furthermore, the company argued that the nature of the industry about long trading hours, and late and early shifts

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<sup>976</sup> Presentation by NWK to the CGE during the transformation hearings , 2016/2017.

<sup>977</sup> Presentation by NWK to the CGE during the transformation hearings, 2016/2017.

<sup>978</sup> CGE , Employment equity report into the private sector: Progress report, page 51, 2017/2018

<sup>979</sup> CGE, Employment Equity Report into the private sector, page 47, 2016.

<sup>980</sup> Presentation by Mafikeng Toyota to the CGE during the transformation hearings, 2016/2017.

<sup>981</sup> CGE, Employment Equity Report into the private sector, page 47, 2016.

<sup>982</sup> *Ibid*, page 14.

<sup>983</sup> *Ibid* ,page 14.

<sup>984</sup> *Ibid*,page 14.

<sup>985</sup> *Ibid*,page 15.



are not conducive to some women who have multiple roles as mothers, wives and primary caregivers.<sup>986</sup> Despite this, the company highlighted that it has a Women's Empowerment Programme where graduates are partnered with members of the group executive for mentoring and coaching.<sup>987</sup> Through this programme, it is suggested that women can be advanced to senior and top management levels.<sup>988</sup> From this, it is clear that there is a need for workplaces to be accommodative of the needs and challenges of female employees in the workplace. These needs include balancing their roles as employees, mothers and primary caregivers.

According to UN Women when a company introduces child care facilities in the workplace it has the effect of improving punctuality, reduces absenteeism and further increases productivity and motivation for women.<sup>989</sup> Lack of childcare facilities is recognised as a barrier to female labour force participation. It is from this premise that the CGE recommended that the private sector must have child care facilities in the workplace to enable females to balance their roles as employees and their roles as mothers and/or primary caregivers.<sup>990</sup> This recommendation is based on soft law and is not legislated, as such, most companies that appeared at the commission have not implemented this recommendation to the detriment of female employees.

Concerning Big 5 Construction Company, it was found that the managerial positions were slightly balanced between males and females.<sup>991</sup> In particular, at the management level, it was found that there were 9 males and 8 females.<sup>992</sup> In terms of race, male employees were 4 Africans, 3 coloureds and 2 whites whilst the female employees were 2 Africans,

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<sup>986</sup> *Ibid*, page 15.

<sup>987</sup> *Ibid*, page 15.

<sup>988</sup> *Ibid*, page 15.

<sup>989</sup> International Finance Corporation, Tackling Childcare: The Business Case for employer- supported Child care, 2017, available at [www.ifc.org/wps/wcm/connect/topics\\_ext\\_content/ifc\\_external\\_corporate\\_site/gender+at+ifc/priorities/employment/tackling\\_childcare\\_the\\_business\\_case\\_for\\_employer\\_supported\\_childcare](http://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/gender+at+ifc/priorities/employment/tackling_childcare_the_business_case_for_employer_supported_childcare) accessed on 12 December 2019

<sup>990</sup> CGE, Employment Equity Report, page 18, 2016.

<sup>991</sup> *Ibid* at page 23.

<sup>992</sup> *Ibid* at page 23.

1 coloured, 4 whites and 1 Indian.<sup>993</sup> Furthermore, it was unearthed that the top management of the company had 6 males and females respectively.<sup>994</sup> Of the 6 females, it was found that 1 is African, 1 coloured, and 4 are whites.<sup>995</sup> Similarly, at the senior management levels, the company comprised of 4 males, of which 3 are Africans, 1 coloured. Females at senior management at this position comprised of 2 females of which 1 is African and 1 white.<sup>996</sup> It is deduced from Big Five Construction Company that white females continue to enjoy preference at managerial levels compared to black African women.

On the other hand, the CGE found in 2016 that the Six Sons Pty Ltd trading as Kloppers was equally male-dominated at its managerial positions with black African women being underrepresented.<sup>997</sup> To this end, the company's top management comprised of 5 white males. At its senior management positions, the company comprised of 5 white males and 2 white females only.<sup>998</sup> The company asserted that black African women are appointed at middle and junior management positions, and are developed to be promoted into senior management positions.<sup>999</sup> It was found that at middle management the company had 4 black African females, 1 coloured male, 1 coloured female, 2 white females, 5 African males and 9 white males.<sup>1000</sup> Moreover, it is suggested that black African women hired in junior and middle management positions are targeted for further development within the company.<sup>1001</sup> The CGE found that the company had no capacity-building programmes intended to accelerate women in senior and top management positions.<sup>1002</sup> It is argued that the appointment of black African women at junior managerial levels without a clear plan to create upward mobility to senior management positions may be viewed as tokenism. It is critical that when the private sector appoints black African women, a clear plan is developed to capacitate and appoint them at managerial positions.

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<sup>993</sup> *Ibid*, page 23.

<sup>994</sup> *Ibid*, page 23.

<sup>995</sup> *Ibid*, page 23.

<sup>996</sup> *Ibid*, page 23.

<sup>997</sup> *Ibid*, page 41.

<sup>998</sup> *Ibid*, page 41.

<sup>999</sup> *Ibid*, page 41.

<sup>1000</sup> *Ibid*, page 41.

<sup>1001</sup> *Ibid*, page 42.

<sup>1002</sup> *Ibid*, page 42.

Concerning RCL Foods Company it was found that the company's top management comprised 7 white males.<sup>1003</sup> At its senior management, the company comprised of 4 females (1 black African and 3 whites) and 33 males (29 whites, 2 Africans, 2 Indians).<sup>1004</sup> Similarly at RCL Foods, white females enjoy preference over black African women whilst white males also continue to dominate both top and senior management positions.

In its observation, the CGE asserts that most companies that formed part of its public investigative hearings presented a suite of policies such as recruitment and selection policies, but observed that these policies had little or no evidence of the impact of these policies.<sup>1005</sup> The recruitment and selection policies in the private sector did not effect changes at the higher echelons of the companies. Moreover, white males continue to dominate despite recruitment and selection policies that purportedly target previously disadvantaged groups such as black African women into managerial positions. Arguably, the adoption of transformative policies such as selection and recruitment policies are done solely for compliance purposes and not developed to ensure that black African women indeed benefit from such policies.

#### 6.6.2.2 Examining the role of the CGE in addressing the paucity of black African women in managerial positions in the private sector

The CGE is empowered by section 11(1) (e) of the CGE Act to conduct investigations about gender-related matters. The exclusion of black African women in managerial positions is arguably a gender issue on the basis that black African women are discriminated against based on gender, race and class. From this premise, the CGE is a competent body to address this imbalance. As a constitutional body, the CGE observed that in the private sector's employment pyramid "there is generally an inverse relationship

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<sup>1003</sup> *Ibid*, page 50.

<sup>1004</sup> *Ibid*, page 50.

<sup>1005</sup> *Ibid*, page 62.

between positions of seniority and the numbers of people from designated groups, especially black African women".<sup>1006</sup>

It is carefully observed that the CGE did not specifically recommend to the private sector companies to set targets of the number of black African women expected to be represented at managerial positions. Moreover, the CGE has not recommended that a quota system be explored by the private sector to address the paucity of black African women at managerial positions. This was purposely done because the EEA that is used by the CGE to hold the private sector accountable bars the use of a quota system but rather encourages employers to set numerical targets. Equally so, the EEA does not make it mandatory for employers to develop childcare facilities in the workplace. As a result of this legislative gap, the CGE's recommendations are based on soft law, i.e. encouraging employers to develop plans and measures to increase the representation of black African women into managerial positions. Consequently, the failure by the private sector to advance black African women has not been sanctioned by the CGE.

The CGE's public investigative hearings have arguably improved workplace environments in terms of the adoption of key policies such as recruitment and selection policies, sexual harassment and promotion policies. These policies are viewed as crucial for creating a workplace enabling environment for all employees in the workplace. However, these policies have not materially and significantly addressed white male domination in the private sector. Black African women continue to be underrepresented at managerial positions and the CGE has not effectively addressed this as a constitutional body.

The constitutional powers of the CGE arguably become ineffective if the current legislative framework fails to provide specific requirements relating to women in decision making positions in the private sector. Put differently, the CGE cannot enforce provisions that do not exist in the South African legal framework. The EEA does not expressly state the sanctions that follow when an entity fails to adequately have black African women

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<sup>1006</sup> *Ibid*, page 63.

adequately represented at managerial positions. The achievement of equity for black African women in managerial positions needs to have a basis in law. As such, it is argued that without an effective way of holding the private sector accountable for not meeting its transformation obligations at managerial levels, equity rights for black African women will only be on paper. It is argued that providing black African women with rights only in paper in the private sector amounts to formal equality and not substantive equality.

According to the CGE substantive equality is the favoured form of equality as it warrants that laws or policies do not bolster the subordination of individuals who already are socially and economically disadvantaged and require policies and laws treat persons as substantively equally whilst recognising and accommodating diversity and differences.<sup>1007</sup> The CGE asserts that substantive equality requires ensuring “equality of opportunity” (eliminating barriers which exclude certain groups from participation in the workplace) and “equality of results or outcomes” (seeking to achieve an equal distribution of social goods”.<sup>1008</sup> Against this backdrop, it is desirable to achieve substantive equality for black African women in the workplace through affirmative action measures by introducing quotas in the private sector to ensure their adequate representation at managerial positions.

### 6.6.3 The CEE

The CEE was established in terms of section 28 of the EEA. The function of the CEE is to advise the minister on

- Code of good practice issued by the Minister in terms of the EEA
- Regulations made by the Minister in terms of the EEA
- Policy and any other matter concerning the EEA

Also, the CEE may –

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<sup>1007</sup> CGE, *Reviewing the work and contribution of the Commission for Gender Equality in South Africa (1996-2016)*, page 26, 2017.

<sup>1008</sup> *Ibid*, page 26.

- Make awards recognising achievements of employers in furthering the purpose of the EEA;
- Research and report to the Minister on any matter relating to the application of the EEA, including appropriate and well-research norms and benchmarks for the setting of numerical goals in the various sector; and
- Perform any other prescribed function

Since its inception, the CEE has found that the private sector is lagging in terms of transformation. To this end, it was found that the managerial positions are generally dominated by white males. The CEE observes that employers often argue that there is a lack of a skilled labour pool from which to draw from to increase the percentage of black African women at managerial positions.<sup>1009</sup> The CEE asserts that this is a disingenuous argument by most employers as it is unearthed that most training and development activities reported by designated employers including the private sector seem to favour the white population group.<sup>1010</sup> The CEE further asserts that every year white employees, particularly white males are offered training and development.<sup>1011</sup> The intended beneficiaries including black African women for training as envisaged in section 15(2)(d) of the EEA are overlooked in the private sector. According to the CEE there is simply a lack of political will and commitment to transformation by the private sector.<sup>1012</sup> The lack of commitment by the private sector essentially renders the Skills Development Act ineffective and equally renders equity in the private sector as a right only in paper for black African women but not practically achievable.

The CEE posits that if the designated employers including the private sector consistently applied the EEA and the Skills Development Act, both pieces of legislation would have resulted in the creation of a pool of suitably qualified persons such as black African women for promotion to managerial positions. In the financial year 2018/2019, the CEE found that black African women in the private sector were least represented at top

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<sup>1009</sup> *Ibid*, page 3.

<sup>1010</sup> *Ibid*, page 3.

<sup>1011</sup> *Ibid*, page 3.

<sup>1012</sup> *Ibid*, page 3.

management levels when compared to white females, black males and white males.<sup>1013</sup> In particular black African women comprised of 3.9%, African males were 7.9%, and white women were 13.2%. Coloured women were found to be 1.9% whilst Indian women were 2.9%.<sup>1014</sup> One may argue that black African women are better represented compared to Indian and coloured women, whilst this argument is reliant on the percentages expressed by the CEE, cognisance should be taken that black African women are in the majority in South Africa and as such it is expected that they should be equitably represented in managerial positions in the private sector.

The public sector (national government) has gradually progressed and black African women comprise of 27.3% at top management.<sup>1015</sup> Moreover, in the provincial government black African women comprise 28.1% whilst at the local government they comprised of 24.9% at top management respectively.<sup>1016</sup> The public sector is committed to transformation and diversity in its managerial positions. The CEE observed that African population groups are largely represented at top management level in the public sector whilst White and Indian Population Groups are largely represented in the private sector.<sup>1017</sup>

Similarly, at the senior management positions in the public sector, black African women were least represented when compared to white males, white females and African males.<sup>1018</sup> To this end, the CEE found that black African women comprised of 5.9% whilst white women were 19.1%, white males were 41%, African males 10.8% and Indian males 7.7%.<sup>1019</sup> The CEE asserts that for women to access opportunities at the top and senior management level in all sectors drastic measures or interventions, to break the glass ceiling are required.<sup>1020</sup> This is against the backdrop understanding that equitable representation of women at the skilled technical/ junior management level to middle

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<sup>1013</sup> CEE, Annual report, page 24, 2017-2018 .

<sup>1014</sup> CEE, Annual report , page 24,2017-2018.

<sup>1015</sup> CEE, Annual report, page 24, 2017-2018.

<sup>1016</sup> CEE, Annual report , page 24, 2017-2018.

<sup>1017</sup> CEE, Annual report ,page 24, 2017-2018.

<sup>1018</sup> CEE, Annual report, page 28, 2017-2018.

<sup>1019</sup> CEE, Annual report page 28, 2017-2018.

<sup>1020</sup> CEE, Annual report, page 60, 2017-2018.

management echelons has not resulted in women being afforded opportunities to access top and senior management positions.<sup>1021</sup>

#### 6.6.3.1 Interventions by the CEE to address the underrepresentation of black African women at managerial positions in the private sector

To address the paucity of black African women to assume managerial positions in the private sector, the Employment Equity Amendment Bill, 2018 (EEA Bill) and the Draft Employment Equity Regulations, 2018 were published for comments on the 12 September 2018. The EEA Bill was further exacerbated by the realisation that most employers who were not complying with the EEA continue to unfairly benefit from the State by accessing State contracts despite their lack of commitment and willingness to transform and create equal opportunities and inclusion of designated groups in their organisations.<sup>1022</sup> The EEA Bill seeks to allow the Minister of Labour to establish sectoral numerical targets to ensure the equitable representation of suitably qualified people from designated groups (blacks, women and persons with a disability) at all occupational levels in the workforce; and enhance the administration of the EEA, including the implementation of section 53 of the EEA concerning state contracts.

In terms of this section employers (designated or not) are required to apply to the Minister of Labour for a certificate that confirms that they are compliant with the provisions of the EEA about the application of affirmative action measures for previously disadvantaged groups to achieve employment equity and prohibiting unfair discrimination in the workplace.

Amendment of section 53 of the EEA requires employers to either submit a certificate which is sufficient evidence that the applicant complies with the provisions of the EEA or submit a declaration by the employer that it complies with the relevant Chapters of the EEA, which, when verified by the Director-General, is sufficient evidence of compliance. More critically the Amendments provides that the Minister may only issue a certificate of

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<sup>1021</sup> CEE, Annual report , page 60, 2017-2018.

<sup>1022</sup> Minister of employment and labour opening statement that requires comments on the EEA Bill.



compliance to designated employers provided that the Minister is satisfied that the employer has met any sectoral targets in terms of section 15A of the EEA Bill that applies to it or has provided reasonable grounds, as contemplated by section 42(4) of the EEA, justifying its failure to comply.

The inclusion of section 15A (1) of the EEA Bill permits the Minister to identify and group national economic sectors for the administration of Employment Equity. Section 15A (2) permits the Minister to establish numerical targets for Employers in these sectors to ensure equitable representation of suitably qualified people from designated groups. By implication, designated employers will no longer be setting their targets in line with the EAP. Furthermore, section 15A(3) of the EEA Bill further proposes that the Minister may issue a notice which may set different numerical targets for the 6 occupational levels, or to set specific targets in regions within an economic sector, or, to set targets based on any other relevant factor.

Furthermore, the Minister must be satisfied that the employer has not been found by the CCMA or a court within the previous twelve months to have either breached the prohibition on unfair discrimination in Chapter 2; or failed to pay the national minimum wage in terms of the National Minimum Wage Act, 2017. The EEA Bill further proposes an amendment in terms of section 42 which provides that a designated employer's compliance with its obligations to implement affirmative action may be measured against the demographic profile of either the national or economically active population unless the Minister of Labour has set specific sectoral targets. These are targets that are set for each sector of the economy.

Significantly the intended amendment of section 53 of the EEA is a much-desired measure to fast track transformation in the private sector. In context, the private sector would be motivated in terms of the Skills Development Act to train and promote black African women to be represented at managerial levels. This view is expressed on the understanding that the private sector is generally profit-driven and it is foreseeable that most private sector companies would not want to lose business contracts with the State

as a result of non-compliance with the EEA. Whilst the amendment of section 53 is desirable in persuading the private sector to ensure equitable representation at all its occupational levels, it fails to provide on how the employers should set their targets inapplicable to their sectorial targets to enable them to be compliant with the EEA. It is submitted that the Minister should target each sector as self-setting of targets by the private sector will result in minimal targets set or non-compliance. The failure to achieve the set targets should not only lead to the termination of State contracts between the private sector and the State but should also lead to the disqualification of a director in terms of the Companies Act.

#### 6.6.4 The Department of Women, Children, Youth and Persons with Disabilities (DWYCP)

The mandate of the DWYCP includes the advancement of socio-economic empowerment and promotion of gender equality.<sup>1023</sup> According to its Annual report 2018/2019, one of the key services rendered by DWCP is to monitor and evaluate the impact of government policies and programmes on improving the socio-economic status of women. A scrutiny of the services rendered it appears such mandate is broad enough to advance and promote gender equality in all sectors of the economy including the private sector. It is trite that black African women in the private sector are not equitably represented at managerial positions however the role of DWYCP to address this is somewhat unclear. Conversely, it appears that the DWYCP has its focus on the promotion and evaluation of government policies and programmes in the public sector and the private sector is not held accountable.

It is argued that the advancement of socio-economic empowerment and promotion of gender equality can be realised for black African women in the private sector provided that barriers to assume managerial positions are addressed and removed. Arguably the lack of specific programmes by DWYCP that seek to hold the private sector accountable for its failure to transform in itself neglects to appreciate the challenges that black African

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<sup>1023</sup> Department of Women, Youth and Persons with disabilities, Mission and Vision , available at [www.women.gov.za](http://www.women.gov.za) accessed on 15 December 2019.

women experience being unable to assume managerial positions. To this end, it is argued that the achievement of equity in the private sector should be tackled by all key institutions established to advance gender equality and equity in the workplace.

To this end, it is argued that institutions established to advance the rights of women in the workplace should not operate in silos but collaborate to achieve greater impact. It is therefore imperative that the DWYCP places accredited Skills Development programmes that focus on managerial skills for the advancement of black African women in managerial positions in the workplace in both the private and public sector. Such programmes can be aligned with the sectoral targets envisaged to be introduced by the EEA Bill.

#### 6.6.5 Johannesburg Stocks Exchange Limited

The Johannesburg Stocks Exchange (JSE) is ranked 19<sup>th</sup> globally and therefore making it one of the largest Stock Exchange by market capitalisation and the largest exchange in the African continent.<sup>1024</sup> In South Africa, the private sector lists their companies on the JSE to raise money for growth.<sup>1025</sup> The JSE offers five financial markets such as equities and bonds as well as financial, commodity and Interest Rate Derivatives.<sup>1026</sup> The JSE is the oldest and largest licensed exchange in South Africa, listing the shares of 388 companies.<sup>1027</sup>

Moraka observes that in South Africa the King III report<sup>1028</sup> of governance recognises the need for the achievement of social transformation and companies to commit to national transformation.<sup>1029</sup> Moraka asserts that this includes adherence to employment equity

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<sup>1024</sup> Johannesburg Stocks Exchange , JSE overview, available at <https://www.jse.co.za/about/history-company-overview> accessed on 23 March 2020.

<sup>1025</sup> JSE, why do companies list? , available at <https://www.jse.co.za/grow-my-wealth/why-do-companies-list> accessed on 23rd March 2020.

<sup>1026</sup> Johannesburg Stocks Exchange , JSE overview, available at <https://www.jse.co.za/about/history-company-overview> accessed on 23 March 2020.

<sup>1027</sup> Page 25

<sup>1028</sup> The fundamental principles of the King III Report include leadership, sustainability and corporate citizenship. The King III further emphasis the achievement of integrated sustainability and social transformation.

<sup>1029</sup> Moraka N, Boardroom gender diversity in JSE-listed South African mining companies, Corporate Board: Role, Duties & Composition / Volume 11, Issue 2, Continued 1, page 217, 2015.

plans outlined in the EEA to equitable representation of previously disadvantaged groups, including black African women in all occupational levels.<sup>1030</sup> It is espoused that most States globally established governance tools by utilising a gender quota system to enhance gender diversity for listed companies.<sup>1031</sup> According to Viviers, quotas have the effect of compelling listed companies to recruit and hire a specific percentage of female directors within a particular time frame, failing which fines or suspension from certain stock exchanges are imposed.<sup>1032</sup>

Against this backdrop, Morake asserts that most listed mining companies in South Africa have poor females represented at managerial positions such as chief executive officers, executive and finance director positions. It is suggested that of the 51 listed mining companies in South Africa there was only one white female who occupied chief executive officer positions whilst the rest of the positions were dominated by white males and black African males.<sup>1033</sup> Executive director positions of the 51 listed mining companies comprised only two females, one white and one African female whilst the rest of the positions were dominated by males, particularly white males.<sup>1034</sup> Equally financial director positions in the mining sector are dominated by males with only five women ( three white women and two black African females) being appointed as financial directors.<sup>1035</sup>

Women, particularly black African women are underrepresented at managerial positions in the boards in South Africa. It is argued that the underrepresentation of women in listed mining companies at the managerial positions requires an alignment of recruitment, development and retention of female directors into a talent management framework.<sup>1036</sup> The King III Report requires companies to report on how a company has created an enabling environment that provides opportunities for females to be appointed on boards. King IV report requires listed companies to develop a policy and set a voluntary target for

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<sup>1030</sup> *Ibid.*

<sup>1031</sup> *Ibid.*

<sup>1032</sup> Viviers, S., Mans-Kemp, N. and Fawcett, R, Mechanisms to promote board gender diversity in South Africa', *Acta Commercii*, page 3, 17(1) 2017.

<sup>1033</sup> Moraka N, *Opcit*, page 218.

<sup>1034</sup> Moraka N, *opcit*,page 219.

<sup>1035</sup> Moraka N, *opcit*, page 219.

<sup>1036</sup> Moraka N, *opcit*,page 223.

the promotion of gender diversity at the board level. Consequently, a JSE listed company that agrees to set targets for gender diversity is required to provide progress on achieving the set targets.<sup>1037</sup> In 2018, it was unearthed that of the 267 of the companies listed on the JSE, only 217 reported on gender at board level and of those, only 37 achieved their targets of gender representation, while 32 have no women representation on their boards.<sup>1038</sup> Due to the lack of a compelling quota system in South Africa, no sanctions were imposed on these companies for failing to advance women in managerial levels.

The EEA is relevant to board composition on the companies listed on the JSE to the extent that directors may be employees of a company and thus excludes non-executive directors. Notwithstanding this, it is argued that the JSE companies have failed to meet their targets of gender representation and Bosch asserts that there have been no sanctions have been imposed for JSE-listed companies failed to comply with listing requirements allied to advance gender diversity at board level.<sup>1039</sup> This is primarily because the EEA and the Companies Act do not make it mandatory for the JSE listed companies to achieve gender balance at the board level. Thus far, the achievement of gender balance is a voluntary process as such companies are not under pressure to comply with the listing requirements of the JSE. It is argued that without consequences, such as disqualification of a director in terms of section 69 of the Companies Act 2008, the representation of black African women at managerial positions including at board level may not be realised.

#### 6.6.6 Black Management Forum

The Black Management Forum (BMF) is an organisation that aims to develop managerial leadership and the creation of managerial structures that are reflective of the demographics of the South African population.<sup>1040</sup> The BMF's goal is to advocate for

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<sup>1037</sup> JSE Listing requirements .

<sup>1038</sup> 30% Club Southern Africa, The state of gender on JSE listed boards, page 15, 2018 .

<sup>1039</sup> Botch A, Women on South African boards-facts, fiction and forward thinking, page 40,4 March 2020.

<sup>1040</sup> Black Management Forum, about us, available at <https://bmfonline.co.za/about-us> accessed 13 March 2020.

transformation in the social and socio-economic sphere and this includes lobbying for legislation that seeks to change the economic outlook in corporate South Africa and the broader society.<sup>1041</sup> The BMF offers workshops, conferences<sup>1042</sup> and programmes<sup>1043</sup> aimed at developing managerial and leadership skills.<sup>1044</sup> The BMF monitors and evaluates the pace of transformation in the South African private sector and has expressed the desire to accelerate the pace of transformation towards an inclusive economy.

In monitoring the pace of transformation, the BMF has expressed on numerous occasions where the private sector failed to advance women into managerial positions. As early as January 2020, Woolworths Holdings Limited (WHL) announced the resignation of Mr Ian Moir and the subsequent appointment of Mr Roy Bagattini as the incoming Group Chief Executive Officer (CEO).<sup>1045</sup> It is observed that both Mr Ian Moir and Mr Roy Bagattini are white males. As such, the BMF expressed that the resignation of Mr Ian Moir presented an excellent opportunity for the company to consider competent persons from previously disadvantaged groups.<sup>1046</sup> This included a woman such as Zyda Rylands, who is the current executive director and CEO of Woolworths South Africa, one of the best performing businesses within Woolworths.<sup>1047</sup> It is recorded that Rylands has been with the company for over 20 years, holding executive roles in different divisions at

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<sup>1041</sup> *Ibid.*

<sup>1042</sup> For example in 2018 the BMF held a conference under the theme “Ethical Leadership as a Catalyst for Transformation and Inclusive Economic Growth” see “BMF hosts Annual conference and Awards 2018” available at <https://transformsa.co.za/2018/10/the-black-management-forum-annual-conference-and-achievement-awards-gala-dinner-2018/> accessed on 18 May 2020.

<sup>1043</sup> For example, the BMF has a programme called “Duke women in power programme (WIP)” that is designed exclusively for female BMF members in senior executive positions. The programme is running annually and covers the concepts such as Leading self, Leading teams and Leading business.

<sup>1044</sup> Black Management Forum, about us, available at <https://bmfonline.co.za/about-us> accessed 13 March 2020.

<sup>1045</sup> Faku D, Woolworths Holdings Limited appoints new Group Chief Executive, 14 January 2020 available at <https://www.iol.co.za/business-report/careers/woolworths-holdings-limited-appoints-new-group-chief-executive-40561924> accessed on 13 March 2020.

<sup>1046</sup> Black Management Forum, The BMF notes with concern the announcement of the Woolworths group chief executive officer, 14 January 2020, available at <https://bmfonline.co.za/news-article?id=9> accessed on 13 March 2020.

<sup>1047</sup> Black Management Forum, The BMF notes with concern the announcement of the Woolworths group chief executive officer, 14 January 2020, available at <https://bmfonline.co.za/news-article?id=9> accessed on 13 March 2020.

the company.<sup>1048</sup> Against the backdrop, the BMF expressed and passed the following remarks:

“At this stage of the transformation trajectory, Woolworths should be implementing measures that facilitate and accelerate the process of transformation especially at top brass level, but they have sadly missed a crucial opportunity of having the first black CEO of a major JSE listed retailer. While bringing in an outsider of Bagattini’s experience might be justified, it is not acceptable to us when transformation is compromised and top-class, home-grown timber is overlooked, which in this case was created by Woolworths over two decades...In a country where businesses are lagging in increasing the racial diversity among CEOs, Woolworths, and corporate South Africa at large, need to constantly ensure that their operations, both internally and externally, are supportive of an environment which advocates for racial equity and diversity in all spheres. In instances where there is a pool of individuals capable and component to lead key companies such as Woolworths, we ought to be deliberate in our advancement of economic transformation through an intentional promotion of the historically marginalised sections of our population”.<sup>1049</sup>

It is deduced from these remarks leadership in a company plays a critical role to accelerate transformation. As such, the achievement of transformation cannot reach without a clear plan and thus requires purposive and accelerated development of upward mobility into managerial positions. Arguably, the development of a succession policy is key in achieving transformation in the upper echelons of a company. It is therefore argued that the existence of a succession plan that considers employment equity and the transformation agenda WHL would have resulted in black candidates, particularly black women being considered into the Group CEO of WHL. To this end, it is argued that transformation and employment equity needs to be a priority and a core of a company and this requires much more than legislation but rather commitment and leadership.

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<sup>1048</sup> *Ibid.*

<sup>1049</sup> *Ibid.*

Selby *et al* submit that transformation plans are essential to fast-track the pace of transformation in the private sector.<sup>1050</sup> Selby *et al* define these transformation strategies as “space creation”. Space creation is defined as any conduct that sways senior white managers to resign from the company to establish opportunities for black managers to assume their roles.<sup>1051</sup> This process requires senior white managers to be incentivised to exit the company to make space for black managers.<sup>1052</sup> To achieve employment equity in the private sector Selby *et al* further suggest that transformation strategies to accelerate transformation may include job shadowing, the appointment of black employees when a white manager reaches retirement age or when taking early retirement or retiring.<sup>1053</sup> Job shadowing is defined as experiential learning where a person is provided with an opportunity to observe an experienced employee performing their duties in the workplace.<sup>1054</sup> For this study, job shadowing may be viewed as an opportunity for black African women to observe white managers performing their duties as part of learning managerial duties. It is observed that job shadowing has the effect of transferring skills and practical knowledge. It is however expected that the black African female employees should be having the necessary educational background to enable job shadowing in the private sector to be meaningful.

Against this backdrop, it is espoused that transformation strategies such as job shadowing in the private sector cannot be achieved if there are fragmented human resources practices that fail to prioritise the empowerment of black African women into managerial positions. As such human resources practices must hold managers in the private sector accountable for achieving employment equity, but also to incorporate it into their performance contracts and even their incentive bonuses.<sup>1055</sup>

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<sup>1050</sup> Selby *et al*, “Space creation”: a strategy for achieving employment equity at senior management level, South African Journal of Labour Relations: Vol 30 No 2, page 62, 2006.

<sup>1051</sup> *Ibid*, page 42.

<sup>1052</sup> *Ibid*, page 47.

<sup>1053</sup> *Ibid*, page 61.

<sup>1054</sup> Rony Z *et al* , Job Shadowing as One of the Effective Activities in the Promotion Process Creates Quality Manager, International Journal of Recent Technology and Engineering , Volume-8 Issue-2S, at page 39, 1 July 2019.

<sup>1055</sup> Selby *et al*, “Space creation”: a strategy for achieving employment equity at senior management level, South African Journal of Labour Relations: Vol 30 No 2, page 42,2006.



It is argued that the lack of commitment and leadership from a company is a further barrier that may hinder the achievement of equity in the workplace. This is asserted by the BMF about the appointment of Mr Roy Bagattini as CEO of WHL instead of qualified women such as Zyda Rylands who is the current executive director and CEO of Woolworths South Africa. The BMF subscribes to the views of Selby *et al* to the extent that the resignation or retirement of a white manager in the company should be seen as an opportunity for black employees to be appointed at such managerial positions.

It is submitted that the private sector in South Africa has not been successful in achieving employment equity at managerial levels. As such, talent management and succession planning in the private sector are key internal mechanisms that can assist any private sector to achieve equity in managerial positions.

### **6.7 The intrinsic role of the judiciary in fostering and enabling black African women's progression into the managerial positions in the private sector**

Suitably qualified black African women are underrepresented in managerial positions in the private sector despite an array of legislation that seeks to achieve equity in all occupational levels in South Africa. The key to realising the violation of rights of black African women requires firstly knowledge of rights and secondly an independent judiciary that may be approached for recourse. It is suggested that women compared to men, experience more difficulty in accessing the justice system.<sup>1056</sup> It is therefore key that employers hold awareness workshops with regards to the rights to women in the workplace.

The judiciary in South Africa safeguards and protects the Constitution and its values. This is achieved through the judicial authority that is constitutionally entrenched. Several judgements have been delivered by the judiciary in South Africa that demonstrates that

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<sup>1056</sup> Judicial services of Ghana *et al*, Partners for gender justice conference 19-21 November 2008 ACCRA, Ghana, page 7, available at [https://www.brandeis.edu/ethics/pdfs/internationaljustice/Partners\\_for\\_Gender\\_Justice\\_Ghana\\_Report-English.pdf](https://www.brandeis.edu/ethics/pdfs/internationaljustice/Partners_for_Gender_Justice_Ghana_Report-English.pdf) accessed on 23 May 2020.

the rule of law is the basis for every decision of the judiciary. These judgements include the landmark decisions in *Solidarity and others v Department of Correctional Services and Others*<sup>1057</sup> where the court reaffirmed that:

“The EE Act, like all legislation, must be construed consistently with the Constitution. Properly interpreted the EE Act seeks to achieve a constitutional objective that every workforce or workplace should be broadly representative of the people of South Africa. The result is that all the groups that fall under “Black” must be equitably represented within all occupational levels of the workforce of a designated employer. It will not be enough to have one group or two groups only and to exclude another group or other groups on the basis that the high presence of one or two makes up for the absence or insignificant presence of another group or of the other groups”

In *National Coalition for Gay and Lesbian Equality v Minister of Justice*<sup>1058</sup> the Court expressed that :

“Particularly in a country such as South Africa, persons belonging to certain categories have suffered considerable unfair discrimination in the past. It is insufficient for the Constitution merely to ensure, through its Bill of Rights, that statutory provisions which have caused such unfair discrimination in the past are eliminated. Past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely. Like justice, equality delayed is equality denied. One could refer to such equality as remedial or restitutionary equality”<sup>1059</sup>

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<sup>1057</sup> *Solidarity and others v Department of Correctional Services and Others* 2016 (5) SA 594 (CC).

<sup>1058</sup> *National Coalition for Gay and Lesbian Equality & another v Minister of Justice & others* [1998] ZACC 15; 1999 (1) SA 6 (CC) .

<sup>1059</sup> *National Coalition for Gay and Lesbian Equality & another v Minister of Justice & others* [1998] ZACC 15; 1999 (1) SA 6 (CC) para 60-61.

It is submitted that the pronouncements of the judiciary provide a progressive interpretation of the Constitution and the EEA which results in substantive equality being enjoyed by black African women. Disgruntled black African women who have been overlooked for managerial positions, therefore, may approach the courts to get relief. The burden of proof nonetheless is on the black African female to demonstrate before the courts that she was unfairly discriminated on the grounds of race, gender, class and which ultimately violates the right to equality.

In *Harksen v Lane NO*<sup>1060</sup> the court expressed that the stages of an enquiry into a violation of the equality clause are as follows:

“(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not, then there is a violation of section 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.

(b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:

(i) Firstly, does the differentiation amount to “discrimination”? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

(ii) If the differentiation amounts to “discrimination”, does it amount to “unfair discrimination”? If it has been found to have been on a specified ground, then unfairness will be presumed. If it has been found to have been on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

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<sup>1060</sup> *Harksen v Lane NO & others* 1998 (1) SA 300 (CC)

If at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2).

(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitation clause.”<sup>1061</sup>

The above highlights that there must be a differentiation between black African women and other women and males in other race groups. Once the differentiation is established, then it needs to be determined whether such the decision to overlook black African women for managerial positions has a rational basis. Further to this, the court will need to determine whether there a rational connection between the differentiation and a legitimate government purpose. It is submitted that the exclusion of black African women in the private sector is based on race, gender and class and therefore is no rational basis for the differentiation between black African women and other employees. To the contrary, such exclusion and differentiation of black African women in the private sector set the government back on its endeavour equitable representation of women in decision making levels by 2030 as per its commitment to the SDGs.

In June 2020 the High Court in South Africa adjudicated the matter of *Cape Bar v Minister of Justice and Correctional Services and Others*<sup>1062</sup> which centred around the constitutionality of the Regulations and Rules published under the Legal Practice Act 28 of 2014. This matter involves the lack of transformation in the South African legal profession that is generally dominated by white males.<sup>1063</sup> The Regulations require 50% of the Provincial Council to be male and 50% to be female. The Regulations and Rules further provide how the composition of Provincial Councils should be structured in each province. Primarily, the Regulations and Rules prescribe 6 seats for attorneys (8 in Gauteng) and 4 seats for advocates in each Provincial Council. The Rules prescribed

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<sup>1061</sup> *Harksen v Lane NO & others* 1998 (1) SA 300 (CC) paragraph 54.

<sup>1062</sup> *Cape Bar v Minister of Justice and Correctional Services and Others* (9435/19) [2020] ZAWCHC 51 (10 June 2020).

<sup>1063</sup> *Cape Bar v Minister of Justice and Correctional Services and Others* (9435/19) [2020] ZAWCHC 51 (10 June 2020 at Paragraph 3.

that the 4 seats for advocates must comprise of one white male, one white female, one black male and one black female.

The Cape Bar argued that whilst the provisions in the Regulations and Rules are aimed at affirming that black and female representation at the provincial council, these provisions, however, comprise a rigid formula, it caps such representation, which is inimical to that well-intentioned objective. It is contended that this sort of capping, to the contrary, results in the protection of positions for white and male advocates.<sup>1064</sup>

Against this backdrop, the following nominees were made, Mr Gauntlett SC QC( a white man who received a total t164 votes; Ms Pillay ( a coloured woman who a total of 162 votes); Ms Buikman SC (a white woman who received 149 votes); Ms Mayosi ( a black woman who received 138 votes; Mr William John Downer SC ( a white man who received 44 votes; and Mr Paries ( a coloured man who received 30 votes).

The elected candidates were announced as Ms Pillay (coloured woman), Mr Paries ( coloured male), second, Ms Buikman ( a white woman), third, and Mr Gauntlett ( a white male). It is trite that Ms Mayosi was not elected despite having received most votes than Ms Parries. This was so done because two women ( Ms Pillay and Ms Buikman) were already elected, this resulted in two remaining seats to be occupied by males ( Mr Gauntlett and Mr Paries). The formula resulted in the exclusion of Ms Mayosi despite black African women being under-represented in the provincial council. To this end, it was argued that the formula was rigid despite vote outcomes and lack of transformation in the Provincial Council.

It was argued that whilst the Regulations and Rules aimed at increasing the representation of black people and women at the Provincial Council, these impugned provisions conversely resulted in the increase of representation of white people and males and limited the participation of women and black people at the Council. To advance the transformation of black people and women which would be reflective of the

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<sup>1064</sup> *Cape Bar v Minister of Justice and Correctional Services and Others* (9435/19) [2020] ZAWCHC 51 (10 June 2020 at paragraph 9.

demographics of South Africa, it was suggested that the quota should be at 75% of black people and women.<sup>1065</sup>

The Black Lawyers Association argued that the Regulations and the Rules, perpetuate white male dominance and fails to advance transformation by capping the black and women representation at 50%. The BLA asserts that the quota should be at 75% of black people and women to truly reflect the demographics of the Republic, which is what the Act seeks to achieve.<sup>1066</sup> According to the Minister of Justice, Ms Mayosi was not discriminated against because she was provided denied an opportunity to campaign, canvass for votes and stand for election. It was reasoned that there were only four seats were available and one of those was for a black woman, which was attained by Ms Pillay due to most votes in that category. Equally, Mr Paries secured a seat, not because of the highest number of votes of the black men that contested.<sup>1067</sup>

The court stated that black women, white women and black men were able to participate in the election process without hindrance by the impugned Regulations and Rules, as such, it was reasoned that there is no impairment of human dignity or the infringements of any constitutional rights, in circumstances where any candidate was not elected in their specific category of participation. There was only one seat for each category and not more.<sup>1068</sup>

It is deduced that the failure to argue on the advancement of a black African woman in this matter was due to the construction of the system that required an inclusive and diversified 50% of the Provincial Council to be male and 50% to be female both in terms of race and gender. Whilst the system seeks to achieve equity, its construction however limited opportunities for black African women who were already underrepresented in the legal profession. The system does not allow more than two black women due to the limited

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<sup>1065</sup> *Cape Bar v Minister of Justice and Correctional Services and Others* (9435/19) [2020] ZAWCHC 51 (10 June 2020 at Paragraph 35.

<sup>1066</sup> *Ibid.*

<sup>1067</sup> *Cape Bar v Minister of Justice and Correctional Services and Others* (9435/19) [2020] ZAWCHC 51 (10 June 2020 at Paragraph 39.

<sup>1068</sup> *Cape Bar v Minister of Justice and Correctional Services and Others* (9435/19) [2020] ZAWCHC 51 (10 June 2020 at Paragraph 76.

two seats available for women. Therefore, it is argued that the Cape Bar raised a legitimate argument for the need to have black women represented in the Provincial Council however erred by recommending and endorsing two black women to compete against each other in the same category. From this, it is learnt that the measure to advance black African women in the private sector's managerial positions, must be informed by the demographics of the country. This will result in the allocation of more percentages to women in the private sector's managerial positions.

In this matter, it is deduced that the achievement of diversity and inclusivity does require an acknowledgement that the white males constitute an important segment of the legal profession. As a result of historical advantages, white males, in general, have the advantage in terms of work, skills and resources, among others, owing to opportunities afforded to them.<sup>1069</sup> The court stressed that diversity and inclusivity are crucial elements of transformation. To this end, it was observed that:

“The goals of diversity, inclusivity and ongoing reconciliation are for the societal good. White male practitioners are part of the profession and a large segment in it. For transformation to succeed they should collectively participate in, and contribute towards the achievement of our constitutional and statutory objectives.”<sup>1070</sup>

The court concluded that:

“the election of black women to the governing structures of the profession is not in and of itself sufficient to fulfil the transformation objective of the legal profession. Transformation is an imperative that that must extend beyond that, to addressing

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<sup>1069</sup> *Cape Bar v Minister of Justice and Correctional Services and Others* (9435/19) [2020] ZAWCHC 51 (10 June 2020 at Paragraph 79

<sup>1070</sup> *Cape Bar v Minister of Justice and Correctional Services and Others* (9435/19) [2020] ZAWCHC 51 (10 June 2020 at Paragraph 81.

matters that include briefing patterns, attraction, retention and offering support to black and women legal practitioners, among others.”<sup>1071</sup>

Within the context of employment, a view is expressed that the appointment of black African women in managerial levels in the private sector is not in itself transformation, additionally, innovative measures such as the restructuring of the workplace to provide for the training and development of black African women, career paths, mentoring and succession plans are crucial to achieving transformation in the workplace.

The role of the courts in achieving equity in the workplace is clear from this matter. The role of the court is not to impose a measure that it deems would have been the most appropriate or which it would prefer in the South African private sector. Its role is to assess whether measures selected by the private sector to achieve equity passes the constitutional muster. In this assessment, the Courts rely on the EEA which currently bars the use of quotas to achieve equity.

## **6.8 Conclusion**

South Africa has established institutions to realise the rights of black African women in the private sector. The establishment of independent bodies such as the SAHRC and the CGE reaffirms South Africa’s commitment to advance and promote gender equality in all sectors of society. It is however observed that the effectiveness of these institutions established to advance the rights of black African women lingers due to existing legislative gaps in the EEA. The EEA allows employers to self-regulate by setting their targets at various occupational levels. This self-regulation has arguably failed to diversify managerial positions in the private sector but instead proved to be beneficial to white males, white females and black males.

The CGE has initiated processes such as holding hearings that seek to hold the private sector accountable for failing to implement the provisions of the EEA, it is, however,

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<sup>1071</sup> *Cape Bar v Minister of Justice and Correctional Services and Others* (9435/19) [2020] ZAWCHC 51 (10 June 2020 at Paragraph 108.



evident that these processes have not resulted in the black African women being considered and appointed at managerial positions. Instead, the processes resulted in the workplace environments adopting key policies and training of previously disadvantaged groups in various programmes, however, these have not cleared the glass ceiling for black African women to be appointed at managerial positions. Against this backdrop, it is argued that the CGE has been ineffective in addressing the existing glass ceiling that exists in the private sector for black African women and this is largely due to the EEA not allowing the quota system.

The SAHRC found that women were under-represented at managerial positions in the private sector and white women, in particular, enjoyed more preference to the managerial positions compared to other female groups such as black African women. This finding reaffirms the view that black African women suffer discrimination based on race, class and gender whilst white women enjoy preference in the private sector. This essentially renders black African women to be more vulnerable and susceptible to discrimination at various occupational levels in the workplace. The SAHRC found that the classification system of designated groups in the EEA neglects to acknowledge multiple forms of discrimination faced within population groups.<sup>1072</sup> The SAHRC argues that this classification has the effect of promoting males from the designated groups rather than black women from an ethnic minority. To this end, SAHRC concludes that special measures or affirmative action measures in the EEA are not capable of being targeted at the most vulnerable groups in society.<sup>1073</sup> This persuasive argument requires the EEA, affirmative action measures to be revisited to include persons from an ethnic minority.

The EEA Bill is a fundamental measure to compel the private sector in South Africa to comply with the provisions of the EEA. In light of the possible loss of profit due to termination of State contract flowing from non-compliance with the EEA; it is foreseeable that the EEA Bill will motivate the private sector to innovatively appoint previously

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<sup>1072</sup> SAHRC, *Achieving substantive economic equality through rights-based radical socio-economic transformation in South Africa*, page 35, 2017/2018.

<sup>1073</sup> *Ibid.*

disadvantaged groups including black African women in managerial positions. The setting of sectoral targets is the cornerstone of the EEA Bill; however, it needs to outline the factors that the Minister will take into considerations when setting up the targets. From this premise, it is submitted that equitable representation of black African women must be prioritised due to past and continuous discrimination on the latter based on class, gender and race.

It is however observed that the EEA Bill will possibly have a significant effect on the private sector companies that have contracts with the State. It is, however, unclear how private sector companies that do not have State contracts would be regulated to achieve equity for black African women. To this end, it is key that possible disqualification of directors of companies is explored to compel the private sector to comply. This was done in Norway and resulted in many companies achieving specific targets.

It is clear from this Chapter that the adoption of any measure to advance black African women must be reasonable and justifiable in terms of the constitutional muster. The courts do not impose measures that must be put in place to achieve equity, to the contrary, the courts pronounce on the constitutionality of such measures. It is evident from this chapter that the judiciary favour measures that promote both inclusivity and diversity without excluding white males who are dominating managerial positions. However, the continued domination of white males may be reduced through the adoption of a quota system that considers the demographics of the country to achieve equitable representation of black African women in the private sector's managerial position.

## CHAPTER SEVEN

### CONCLUSIONS AND RECOMMENDATIONS

This study focused on the proliferation of black African women into managerial positions in the South African private sector. This is not to suggest that other women in other race groups are equitably represented at these managerial positions, however, women in other race groups particularly white women enjoy preferential recruitment in the private sector than black African women. Moreover, black African women continue to be discriminated in terms of race, gender and class, as such are less likely to be employed than women and men in other race groups. As a consequence, most black African women are excluded from key economic drivers in the South African private sector and instead are employed mostly in unskilled jobs such as domestic workers. This demonstrates a clear justification for the importance of focusing on black African women compared to other women in other race groups.

The proliferation of black African women into managerial positions has been highlighted in chapter one as a challenge that is exacerbated by the unwillingness and lack of commitment of the private sector to transform. This is further evident from the private sector's ability to budget for any fines that may be imposed for the failure to achieve its targets at managerial levels. The EEA has been enacted to ensure that all previously disadvantaged groups are equitably represented at all occupational levels. Notwithstanding this, chapter one demonstrates that managerial levels in the private sector continue to be overrepresented by white males. This is indicative that the private sector has not refused to appoint white males at managerial positions notwithstanding their overrepresentation.

The court in *Solidarity v Department of Correctional Services* correctly pointed out that an employer is as a matter of law entitled to refuse the appointment of persons at a particular position if they are overrepresented or adequately represented.<sup>1074</sup> It is submitted that the

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<sup>1074</sup> *Solidarity v Department of Correctional Services* [2016] ZACC 18 at paragraph 49.

overrepresentation of white males at managerial positions is the oxymoron of equity envisaged by the EEA and is not reflective of the demographics of South Africa.

It is observed that section 20 of the EEA requires designated employers to establish innovative measures to address the paucity of black African women in all occupational levels. It is submitted that this provided flexibility and self-regulation in the setting of goals and targets by the private sector. This has failed to transform the managerial positions of the private sector to be inclusive and representative of the demographics of South Africa. Despite the aspirations of the EEA to achieve equity, it is submitted that the private sector has not embraced these aspirations. Instead delegated employment equity at the bottom of the business priorities.

The preferential treatment of white groups in the private sector for recruitment, promotion and training opportunities at top management levels is a sign of resistance from the private sector to improve the representation of black African women in managerial positions. Hence the EEA has not eliminated the unfair discrimination of black African women nor achieved equity in the private sector.

From this premise, the study does not advocate for the appointment of black African women who do not have the required educational background or experience to assume a managerial role. Conversely, the study emphasises on the appointment of suitably qualified black African women into managerial positions. The appointment of black African women who are not suitably qualified is arguably a contrast of the EEA and does potentially risk the performance of the private sector. To this end, this study aligns with the remarks passed the court in *South African Police Service v Solidarity obo Barnard* where the court stated as follows:

“I pause to underline the requirement that beneficiaries of affirmative action must be equal to the task at hand. They must be suitably qualified people in order not to sacrifice efficiency and competence at the altar of remedial employment. The Act sets itself against the hurtful insinuation that affirmative action measures are a refuge for the mediocre or incompetent. Plainly, a core object of equity at the

workplace is to employ and retain people who not only enhance diversity but who are also competent and effective in delivering goods and services to the public.<sup>1075</sup>

It is espoused that a lack of training, development and growth opportunities, career-pathing and succession planning for black African women compared to white women in the private sector often results in a view that suggests that black African women are not suitably qualified. As such, it is submitted that the appointment of black African women at managerial positions requires a concerted effort by the sector to expose black African women to management skills and training.

There are various international, regional, and local instruments that are in place to assist in the advancement of black African women into managerial positions in the private sector. These instruments include amongst others the UDHR, CEDAW, Beijing Platform for Action, SADC protocol and the EEA, etc. The instruments are significant in realising the rights of women in the workplace however the instruments are not without challenges. The UDHR, for example, is key in realising the rights to equality, dignity, freedom, justice and peace for both males and females in society and the workplace. This study argues that the UDHR leans towards sex-based distinction and not “gender-based distinction” and as such fails to address the “glass ceilings” that exists in the private sector for women to gain entry to the managerial positions. Notwithstanding its significance, the UDHR is not a sufficient protective tool alone to level the playing field for women’s rights to access managerial positions in the workplace. As such it is concluded that the UDHR is not an equity instrument to address the paucity of women in general in all levels in the workplace but rather guarantees basic human rights to be treated equally and with dignity in all spheres of society including in the workplace.

It is evident from this study that sectorial segregation exists in the workplace where women are excluded in male-dominated fields. This persists despite Article 11 of CEDAW providing women with the right to equal opportunities in the workplace. It is submitted that equal opportunities include access to managerial positions in the private sector. It is

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<sup>1075</sup> *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC) at paragraph 41.

submitted that the achievement of women representation in male-dominated fields and managerial positions requires bold steps and ring-fencing of positions for women. Regionally Article 13(2) of the SADC Protocol requires South Africa to ensure the equal participation of women and men in decision making positions in the workplace. This arguably includes equal participation in managerial positions in the private sector. It is submitted that without a quota system and sanctions to achieve quota targets, countries would not be compelled to take proactive measures to priorities equal participation of women in decision making in all sectors.

This view resonates with the CEDAW Committee recommendations to South Africa that it must use temporary special measures, including a quota system to facilitate women's achievement of decision-making positions in the private and public sectors. South Africa has failed to adopt a quota system to enhance the representation of black African women in managerial positions in the private sector. Section 15(3) of the EEA expressly prohibits quotas to achieve equity in all occupational levels. The impermissibility of quotas and the flexibility accorded in the setting of targets has arguably contributed to the slow pace of transformation in the private sector.

Unlike the public sector, the South African private sector does not have a monitoring tool that mandates the appointment of black African women being represented at managerial positions. The South African public sector has introduced the Head of Department's Eight principles of Action of which Principles 4 requires the Head of Department to accelerate the full participation and decision making through the employment of 50% women at all level of the Senior Management Service (SMS)

Black African women have a significant number of rights in the workplace and this includes the rights to maternity leave and freedom of association. However black African women, as a matter of law, do not have a right to a promotion. This is largely because the promotion of an employee is the prerogative of the employer. Plainly, there is no right to promotion in South Africa. Nonetheless, it is affirmed that promotion is integral to the proliferation of suitably qualified black African women into managerial positions.

It is submitted that whilst factors such as possession of the necessary qualification, competence, prior learning, training and development, experience and performance at an interview are considered before an employee is promoted it is argued that affirmative action measures must also be considered. In other words, the segregation of black women in the workplace and the overrepresentation of white males must be considered. The private sector must establish uniform criteria to use to determine the promotion of employees in the workplace.

There is a need for a concerted effort by the private sector to empower and build the capacity of black African women in terms of skills development. The appointment of Priscillah Mabelane in 2017 at BP Southern Africa (BPSA) as its new chief executive officer demonstrates that the incumbent was exposed to numerous managerial portfolios that further exposed her to managerial tasks at the BPSA.

It is submitted that the exercising of the employer's prerogative without mandatory equity targets would in all probability not consider employees from previously disadvantaged groups such as black African women. Moreover, the lack of political will, patriarchy, stereo-type and traditional views about women are likely to serve as barriers for black African women, in particular, to be afforded employment benefits and opportunities in the workplace that enhances and capacitates them to be eligible for higher positions in the workplace.

Against this backdrop, the introduction of a quota law in South Africa will channel the private sector to consider the appointment of black African women in managerial positions. The introduction of the companies Act 2003 in Norway has resulted in an increase of women representation on the boards from 7% in 2003 to 40.3% in 2010. Norway demonstrates that quotas have the effect of compelling the private sector to prioritise equity issues. Whelan and Wood correctly point out that targets have been utilised and highly effective in other areas of managerial work where managers are assigned targets for a variety of tasks such as sales, productivity and budget for which

they are held accountable.<sup>1076</sup> The contributing factor for the continued white male domination in the private sector is that no person is held accountable for failing to address it.

The paucity of black African women in managerial positions has also been failed by the lack of political will of the South African trade unions. It is submitted that the South African trade unions are unable to address the paucity of black African women in managerial positions in the private sector particularly because the unions themselves are largely male-dominated in leadership positions as such they fail to address issues concerning women in the workplace. The South African trade unions largely prioritise on wages and a decent working environment for their members rather than the equity issues.

There are challenges in mainstreaming black African women into managerial positions in the South African private sector. The challenges stem from race-based recruitment, failure to adhere to the EEA, failure to attract black African women and lack of legislation compelling the private sector to appoint black African women at managerial positions. The challenges to appoint black African women further highlight the unwillingness of the private sector to have a diversified workplace. This is evident from the race-based recruitment that purposively aims to recruit white groups notwithstanding the availability of competent persons from other race groups. This form of recruitment institutionalises race and gender hierarchy in the workplace and consequently perpetuates segregation of the previously disadvantaged groups.

The resistance of the private sector to transform is further evident from its failure to attract and develop pipeline programmes to promote black African women into managerial positions. These programmes must transfer skills and expose them to managerial roles in the form of mentorship. It is submitted that the lack of transfer of skills to black African women essentially minimises a pool of eligible candidates for managerial positions in the workplace. In other words, the private sector needs to build talent for management positions. Ultimately suitable candidates must be prioritised in managerial positions and

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<sup>1076</sup> Whelan J and Wood R, Exploring the use of quotas for women in leadership roles, The Conversation 10 May 2012 available at <http://theconversation.com/exploring-the-use-of-quotas-for-women-in-leadership-roles-6864> accessed on 16 September 2018.



must purposively be aimed at advancing black African women. A clear challenge is the lack of mechanisms to track the upward mobility of women into managerial positions. The lack of such mechanisms denies the private sector of the opportunity to introduce measures in to drive and monitor the upward movement of women to top and senior management.

A comparative study between South Africa, Norway, Rwanda and Jamaica was done which highlights that a quota system irrespective of sector or country is a significant measure to progressively realise the equity rights of women in the workplace. Norway demonstrates that it encountered challenges of poor representation of women in the senior executive roles. To address this challenge Norway enacted the Companies Act 2003 that requires boards of listed companies to have a gender balance of at least 40/60. The significance of this legislation resulted in an increase in female directors, from 9 per cent in 2003 to over 40 per cent in 2008 in the private sector. Although the quotas are forceful or compelling in nature quotas are a good policy tool to achieve it. Norway and Germany demonstrate that the successful way to implement a quota law was imposing harsh sanctions for non-compliant companies.

Like Rwanda the progression of women into managerial positions was as a result of the affirmative actions in the private sector that were introduced by the NGP. Similarly, women in Jamaica were concentrated in low paying positions in the labour force and the CEDAW Committee recommended that Jamaica develops policies with time-bound targets and indicators to eliminate occupational segregation and achieve substantive equality between men and women in the labour market, including in traditionally male-dominated fields through intensified technical and vocational training; promote overall employment of women and expand women's access to microcredit at low-interest rates for self-employment and income-generating activities;<sup>1077</sup> This recommendation is viewed as a quota. Similarly, the WEP prescribes a quota system of 30% or greater in decision

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<sup>1077</sup> Committee on the Elimination of Discrimination against Women, Concluding observations of the Committee on the Elimination of Discrimination against Women Jamaica, Fifty-second session 9-27 July 2012.

making positions at all levels and across the business areas.<sup>1078</sup> It is submitted that the achievement of women at decision making positions is not achievable without a quotas system being implemented.

The Gender Equality Seal Certificate is an important component to accelerate transformation in the workplace to provide a more efficient and equitable workplace and essentially contributes to the advancement of gender equality.

Numerous institutions advocate for the rights of women in the workplace. Although these institutions have initiated numerous measures and pronouncements to hold the private sector accountable for failing to proliferate black African women into managerial positions, such only amounted to soft law. Although soft law cannot be ruled out as it may have an impact on the private sector, such an impact, however, is not significant enough to ensure the equitable representation of black African women at managerial positions. It is submitted that the soft law is less effective if not supported by sanctions. Pronouncements of the SAHRC, CEE and CGE have not persuaded the private sector to achieve diversity because such pronouncements were not accompanied by harsh sanctions. To this end, a quota system is required in South Africa to persuade and compel the private sector to achieve equity in managerial positions. It is trite that the judiciary in South Africa may be approached to enforce the quota laws to achieve equity in the private sector.

The achievement of equity and the representation of black African of women in the private sector requires bold steps and as such this study recommends the following:

1. South Africa amends the EEA to permit the use of quotas. Private sector companies must have 'a minimum of 50%' black representation at its top and senior managerial levels, 60% at middle management level, and 70% at junior levels. Additionally, each target for black representation must further be sub-divided among black men and women, so that black African

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<sup>1078</sup> Principle 2 of the WEP.

women make up 20% of the 50% target at senior management level, 20% of the 60% target for middle management, and 25% of the 70% target for junior levels.

2. The failure to achieve stipulated quotas must result in the following
  - 2.1 Disqualification of company directors in terms of section 69 of the Companies Act. As such, the Companies Act 2008 particularly section 69 needs to be amended to reflect that a person may be disqualified as a director of a company if such persons fail to achieve equity targets stipulated in the EEA.
  - 2.2 Delisting of non-complying companies at the JSE.
  - 2.3 Termination of state contracts. Tender contracts between the State and the private sector must include the achievement of quotas as a requirement.
3. The Commission for Gender Equality Act is amended to provide it with provisions that provide that its recommendations are binding and not merely amounting to soft law. The CGE is a constitutional body and as such its recommendations must be such that they would not be ignored by the private sector. The silence of the binding nature of the recommendations of the CGE renders its transformation hearings against the private sector ineffective.
  - 3.1 Once the Commission for Gender Equality Act is amended, the CGE must spear-head a transformation agenda in the private sector by making it mandatory for the sector to
    - 3.1.1 ensure equal participation of female and male employees in managerial positions. This will assist in addressing window-dressing and token appointment
    - 3.1.2 build the capacity of females to participate effectively through leadership and gender sensitivity training and mentoring. This would include skills development programme

at the most junior levels of the company to build talent for managerial levels.

3.1.3 provide support structures for females in managerial positions. This must include the rotation of female employees to different sections of the company to acquire more managerial skills, knowledge and experience to do a variety of tasks at a given time.

3.1.4 establish and strengthen structures to enhance gender mainstreaming.

3.1.5 changing discriminatory attitudes and norms of managerial structures and procedures.

3.1.6 establishment of programmes for the inclusion of male employees in all gender-related activities, including gender training and community mobilization.

3.1.7 Ensure the achievement of women' representation in the performance agreements of the CEO's, Human Resources Managers and senior directors of different units for accountability

4. Discretionary powers in terms of section 186(2) of the LRA is the fundamental factor that results in black African women not being appointed at managerial positions. To achieve their representations at the higher echelons in the private sector, the employer's discretionary powers need to be limited and be compelled, through affirmative action, to ensure that black African women as a previously disadvantaged group are represented at all levels in the workplace.
5. The Department of Labour needs to establish a uniform criterion for employers to use to determine the promotion of an employee. The establishment of these criteria must take into consideration the principles of equality and equity in the workplace. Apart from experience and educational

background, the criterion should also consider the historical apartheid denial and segregation of black women in the workplace.

6. The private sector must apply uniform and consistent standards in the shortlisting processes, failure to do so result in employees being denied an opportunity to be shortlisted and demonstrate their performance at the interviews.
7. The South African trade unions must prioritise transformation in the private sector in the same way issues of wages and decent working environment issues are prioritised.

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