

**A LEGAL ANALYSIS OF THE APPLICATION OF THE BROAD-BASED BLACK
ECONOMIC EMPOWERMENT IN THE MINING SECTOR IN SOUTH AFRICA**

by

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Declaration

The submitted dissertation by, I, Mojalefa Patrick Ralethe, certify that this work is my own and in its original format, I have not copied any previous work of other scholars to make it seem as it's my own work. I therefore declare that this work is my own and has been submitted in bona fide.

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Abstract

The study looks into the phenomenon of Black Economic Empowerment in South Africa (B-BBEE) in the mining sector. The newly elected government in South Africa had to deal with the injustices of the past under the apartheid government and had to introduce programmes to help the Historically Disadvantaged South Africans and building the economy.

For many years, the mining sector contributed to the South African economy; however, mining operations in South Africa have not given the Historically Disadvantaged South Africans opportunities to participate in the mining industries or partake in the mining sector. The introduction of the Broad-Based Black Economic Empowerment in South Africa aims to promote and provide better opportunities to the previously disadvantaged communities in South Africa.

However, it has been reflected that there is a slow transformation in the mining industry and economic participation of the Historically Disadvantaged South Africans in South Africa. The study finds that broad-based black economic empowerment (B-BBEE) policies have had little developmental impact and were not properly implemented in the mining sector.

Keywords: Broad-Based Black Economic Empowerment, Affirmative Action, Empowerment and the Mining Sector in South Africa.

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List of acronyms and abbreviations

ANC	African National Congress
B-BBEE	Broad-based Black Economic Empowerment Act
GDP	Gross Domestic product GM general manager
SLP	Social Labour Plan
HDSA's	Historically Disadvantaged South African's
MIDF	Malaysian Industrial Development Foundation
MPRDA	Minerals and Petroleum Resources Development Act
NDP	New Development Policy (Malaysia)
NEF	National Empowerment Fund
NEP	New Economic Policy (Malaysia) NEPFA National Empowerment
DME	Department of Minerals and Energy
HDSA	Historically Disadvantaged South Africans
JSE	Johannesburg Stock Exchange
MERG	Macro-Economic Research Group
MNC	Multi-National Companies
NEP	New Economic Policy
RDP	Reconstruction and Development Programme

CHAPTER 1: INTRODUCTION TO THE STUDY

1.1 Introduction

According to section 1 of the Broad-Based Black Economic Empowerment Act,¹ "Broad-Based Black Economic Empowerment" (B-BBEE) means the economic empowerment of all black people including women, workers, youth, people with disabilities and living in rural areas through diverse but integrated socio-economic strategies.²

The government introduced the Broad-Based Black Economic Empowerment as a strategy, which is aimed at uplifting and promoting economic growth in South Africa. In terms of the Codes of Good Practice in South Africa and the mining industry, Broad-Based Black Economic Empowerment focuses on involving the Historically Disadvantaged South.³

The coming to power of a new administration in South Africa in 1994 prepared the way for mining regulation and monitoring to achieve change in the sector.⁴ South Africa had to align with international practices on mineral rights. Since 1994, efforts to reform South African mineral resources have been geared towards redressing the imbalances of the past.⁵ Mining in South Africa is one of the significant contributors to the economy and has many employees within the mining industry.⁶

The MPDRA⁷ and the Broad-Based Black Economic Empowerment Act⁸ were introduced in South Africa. The reasons and purpose of introducing the MPDRA is to facilitate

¹ Act 53 of 2003 (hereafter the B-BBEE Act).

² Thomas A, 'The Impact of Black Economic Empowerment (B-BBEE): South African Minister Sets Date for Mining Act' (2014) 43 (1) *Journal of Energy & Natural Resources* 244.

³ Blaine S, 'Business Day Live: Twenty Years of Democracy' (2014) 33 (1) *Journal of Contemporary Management* 130.

⁴ Lawyers for Human Rights, 'Human Rights and Development in South Africa' (04 April 2020) <<http://www.south-africa.info/about/democracy/constitution>. >accessed 29 October 2020.

⁵ Krüger L, 'Developing Operations Strategies: Reassessing the Strength and Importance of Competitive Operations, Priorities for South African Businesses' (2012) 43 (3) *South African Journal of Business Management* 15.

⁶ Knight C, 'Theories of Distributive Justice: Post-Apartheid in South Africa' (2013) 41 (1) *African Journal of Political Science and International Relations* 220.

⁷ Act 28 of 2002(hereinafter the MPDRA).

⁸ Act 53 of 2003 (hereafter the B-BBEE Act).

sustainable transformation, growth and development of the mining and minerals industry. To give effect to section 100 (2) (a) of the MPRDA, section 9 of the Constitution and harmonise Government's transformation policies and the purpose of the Broad-Based Black Economic Empowerment is an integration programme launched by the South African government to reconcile South Africans and address the inequalities of apartheid by attempting to compensate for land that was repossessed from Africans to historical background of the mining industry in South Africa had to be changed, and a new direction had to be introduced in South Africa to deal with the minerals and resources in South Africa. Due to past racial segregation, black people that make up 91 percent of South Africa's population, have little or no authority over the economy. In contrast, the white population had complete control over the economy and minerals.⁹ The Broad-Based Black Economic Empowerment in South Africa had as its purpose to ensure that under the new South African dispensation, equality prevails and a new South Africa can be built without any segregatory laws.

1.2 The significance of the study

This research will focus on the policies and legislation introduced and adopted within the mining industry to empower black people. The Constitution and various legislation introduced in South Africa aim to redress the past injustices and deal with the mineral resources in South Africa. Transformation in the mining industry in South Africa is essential to build a solid foundation and bring equality in the mining industry and uplift the Historically Disadvantaged South Africans to be able to participate in the mining industry.¹⁰

1.3 The research question

The most important question of this study is whether the Broad-Based Black Economic Empowerment legal framework has attained the transformation of the mining sector in

⁹ Smit N, 'The Contribution of Labour Law and Non-Discrimination Law to Empowerment and Social Justice in an Unequal Society: A South African Perspective' (2013) 29 (4), *International Journal of Comparative Labour Law and Industrial Relations* 30.

¹⁰ Historically Disadvantaged South Africans (hereinafter the HDSA's).

South Africa. The ancillary questions are: The extent to which Broad-Based Black Economic Empowerment is effective in ensuring the participation of historically disadvantaged groups in the mining sector. The pertinence of the policy and legal framework for black people's empowerment in the mining sector.

1.4 The purpose of the study

The Broad-Based Black Economic Empowerment aims to redress past injustices and bring equality in the South African mining industry. The main primary purpose of the research is to analyse the implementation of Broad-Based Black Economic Empowerment in the mining sector. Furthermore, to focus on the socio-economic difficulties that South Africa faces, introducing Historically Disadvantaged South Africans into the mining industry will aid in the growth of the economy and development of the country. Black people will also be given the opportunity to participate in the mining industry and ensure that all people in South Africa enjoy the right to equality.

1.5 The research problem

There is poor transformation within the mining industry as a result of having few people benefiting from the Broad-Based Black Economic Empowerment (B-BBEE). The Mining companies are failing to meet the requirements which are set out in the Broad-Based Socio-Economic Charter, which are aimed at 26 percent upliftment of Historically Disadvantaged South Africans to own mines in South Africa. Lack of independent legal and professional guidance, the improper financial structure of transactions, and a lack of capital are all factors contributing to the mining sector's delayed change. The Broad-Based Black Economic Empowerment had the aim of creating opportunities, training on skills development of the historically disadvantaged, and reducing inequalities. However, recent debates have challenged the policy, stating that it is narrow and that it is aimed at the enrichment of few politically connected elites instead of the empowerment of previously disadvantaged people.

1.6 The research methodology

The methodology used in this study is qualitative in nature. The primary sources of the information for this research will be legislation, textbooks, case law, journal articles, government policy documents and other applicable resources. This is the applicable methodology because the nature of this study is qualitative.

1.7 Literature Review

Mining in South Africa is one of the most significant contributors to the economy.¹¹ Under the apartheid government, South Africans had less or no rights to access mineral resources. The wealth was shared among the minority, which were the white people that had total control and regulated the mining industry. Twenty-six years into democracy, South Africa is still faced with challenges to transform and ensure access to the mining industry.¹²

Since 1994, the government has had to restructure the mining industry and bring equality.¹³ According to section 25 of the Constitution, the government is responsible for reforming the mining industry in order to provide fair access to and enjoyment of South Africa's natural resources.¹⁴ As such, the MPDRA was enacted and implemented to redress past racial laws and equitable access to natural resources in South Africa. Considering section 100 of the MPDRA, which deals with the historically disadvantaged, proper and equitable access should be granted to bring equality in the mining industry.¹⁵

The MPDRA aims to redress the past injustices and regulate the mining industry to have access to the mineral resources in South Africa. The South African government has also

¹¹ KPMG T, 'Time for Transformative Leadership' (03 July 2010) < <http://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx> > accessed 19 November 2020.

¹² Ngaka M, 'Molema District: The North West Province on BBBEE in South Africa' (2013) 34(3) *Journal of Social Sciences* 227.

¹³ Kalula E, 'Government of South Africa: A Strategy for Broad-based Black Economic Empowerment' (2018) 21(1) *Journal of Small Business and Enterprise Development* 19.

¹⁴ Section 25(8) (hereinafter the Constitution of South Africa)

¹⁵ Kalula E, 'Black Economic Empowerment: Both Rights and Obligations' (2014) 26(3) *Journal of Contemporary Hospitality Management* 30.

passed other legislation in dealing with mineral resources in South Africa and ensuring that every citizen should enjoy the mineral resources in South Africa. The Broad-Based Black Economic Empowerment Act ensures that mining in South Africa promotes equality and development in the mining industry.¹⁶ The majority that has been excluded due to past racial laws will also be allowed to participate in the mining industry and contribute to building South Africa's economy.

Several black owned companies contribute to the mining industry and the economy. In terms of item 7, schedule II of the MPDRA, mining companies that hold old order rights are given the platform to convert such rights into new mining rights under the MPDRA within a given period of five years. When such rights are being converted, they will comply with the new mining legislation and be monitored as mining operations in South Africa.¹⁷ This would allow the government to monitor and check that the Broad-Based Black Economic Empowerment has been complied with and also that mining operations are monitored.

One of the MPDRA main goals is to significantly and meaningfully increase possibilities for Historically Disadvantaged South Africans. Section 100(2) (a) of the Mining Charter, established on 13 August, 2004, provides direction on how the mining industry should operate and permits Historically Disadvantaged South Africans to participate in the mining sector of South Africa. Women are given the opportunity to participate in the mining industry. The Mining Charter has as its aim to redress the past injustices and help historically disadvantaged South Africans benefit from the mining industry. The Mining Charter introduced the concept of human resource development, in which the following were addressed housing and living conditions, mining operations and compliance and ownership.

Stakeholders in the mining industry have committed themselves to achieve a 26% of the mining industry should be under the operation of Historically Disadvantaged South

¹⁶ Balshaw T, 'Broad-Based Black Economic Empowerment: Amended Codes & Scorecard' (2020) 19(3) Journal of Sustainable Tourism 31.

¹⁷ Tourism Enterprise Partnership (TEP) 'The Land Question in South Africa' (03 May 2014) <http://en.wikipedia.org/wiki/Apartheid#Colour_classification >accessed 29 October 2020.

Africans. This is to enable a change within the mining industry and give more opportunities to the Historically Disadvantaged South Africans. However, there is slow progress in the mining industry to bring change in South Africa. This Broad-Based Black Economic Empowerment should be implemented in South Africa.

The Broad-Based Black Economic Empowerment, in line with the Constitution, is aimed at promoting equality and participation in the mining industry, which aim to: increase the level of the involvement of black people in the South African economy, to promote a speed growth to the economy, employment opportunities and access to mines in South Africa, to protect the minerals and resources and give equal distribution and enjoyment of the minerals in South Africa.

Most communities were disadvantaged and not given protection under the apartheid government. However, with the constitutional dispensation, equality becomes the key to developing and promoting such communities that mining operations are taking place by employing the local community members. At the same time communities benefiting with regards to infrastructure and programmes that would enable the community members to be skilled and also have an understanding of the mining sector.

Mining in South Africa plays an integral part in the development of the economy. The Mining Charter also promotes sustainable development and focuses on economic growth by developing the mines in South Africa.

It is also an expectation that the Mining Charter in South Africa would benefit the Historically Disadvantaged South Africans and positively influence the mining industry by rehabilitating mines. Socio-economic approaches create economic empowerment for black people in South Africa by improving the standard of living and implementing the Social Labour Plan.¹⁸

Despite their racial backgrounds, Broad-Based Black Economic Empowerment in South Africa should reconstruct the socio-economic status of previously disadvantaged people

¹⁸ Social Labour Plan (hereinafter SLP), 'A Guide to interpreting the First Phase Social Labour Plan' at http://www.dti.gov.za/bee/Chapterone_1_11.pdf (accessed on 30 July 2021).

and improve their living standards. Compared to the programmes which were introduced in other countries' namely Zimbabwe which also introduced land reform programmes to help with the standard of economy and building economic growth through various sectors involved in mining industry and sustainable development.

1.8 The hypothesis

The central hypothesis for this study is that the slow process of transformation in the mining sector is attributable, amongst others, to the weak legal and policy framework. Furthermore, despite adopting many transformative pieces of legislation and policies, like the Broad-Based Black Economic Empowerment, implementing such policies and legislative interventions remains one other cause of the slow progress of transformation in the mining sector.

1.9 Chapterisation

The study comprises five chapters.

Chapter 1: Introduction to the Study

This chapter provides the introduction to the study with regard to the context of the study, the problem statement, the study aims and objectives, the research questions and hypothesis, the rationale of the study, the significance of the study, definition of concepts, ethical issues and limitation of the study.

Chapter 2: An analysis of legal and policy framework of B-BBEE in South Africa

The purpose of this chapter is to provide the contextual framework for Broad-Based Black Economic Empowerment policy in South Africa, covering the macroeconomic context for B-BBEE policy, B-BBEE policy evolution, B-BBEE policy regulation and the strategic framework, compliance targets for Broad-Based Black Economic Empowerment policy, and a conceptual analysis of empowerment.

Chapter 3: A Critical Analysis of the Application of BBBEE in the mining sector

This chapter aims to provide a theoretical framework for the study that focuses on policies and laws that are applicable in the mining industry. And how these various policies and laws have been used and applied within the mining industry in South Africa.

Chapter 4: A Comparative Analysis between South Africa and Zimbabwe

This chapter will focus on a comparative analysis between South Africa and Zimbabwe in terms of how the Broad-Based Black Economic Empowerment has been applied and practised in South Africa compared to the indigenisation programme in Zimbabwe.

Chapter 5: Conclusions and Recommendation

This study will provide conclusion and recommendations

CHAPTER 2: THE LEGAL AND POLICY FRAMEWORK OF B-BBEE IN SOUTH AFRICA

2.1 Introduction

Affirmative action programmes were introduced in South Africa to help in ending unfair-discrimination.¹⁹ After 1994, every citizen of South Africa was given the same access to opportunities.²⁰ This chapter will focus on the analysis of affirmative action programmes and measures that have been introduced under the new constitutional dispensation in South Africa as a democratic country. The purpose of the chapter is to analyse the legal framework for affirmative action in South African in general and its implications for the transformation of the mining sector.²¹

2.2 Conceptualisation of affirmative action

Affirmative action has been defined in many ways.²² The main focus is the elimination of discrimination. Affirmative action aims to redress previous injustices to achieve social justice and fair balances based on equality.²³ A further goal of affirmative action is to place people on an equal footing in order to introduce a just and fair labour market.²⁴

¹⁹ Tzannatos Z, 'Reverse Racial Discrimination in Higher Education: In Malaysia has it Reduced Inequality and At What Cost to the Poor' (2013) 31 (1) International Journal of Educational Development 314.

²⁰ Grogan J, 'Levelling the Working Fields: The Employment and Occupational Equity Statute' (2011) 34(1) Employment Law Journal 340.

²¹ Mary L, 'Affirmative Action in Higher Education: Strategies and Perceptions about Sex Discrimination' (2011)32(2) Journal of Modern African Studies 230.

²² Pelak CF, 'Athletes as Agents of Change' legal-dictionary.thefreedictionary.com/affirmative action' (17 April 2020) <http://en.wikipedia.org/wiki/Apartheid#Colour_classification> accessed 15 April 2021.

²³ Hokowhitu B and Scherer J, 'The Maori All Blacks and The Decentering of the White Subject: Hyperrace, Sport and The Cultural Logic of Late Capitalism' (2008) 29(2) Sociology of Sport Journal 230.

²⁴ Booth D, 'The Political and Linguistic: Nationalization of South Africa (2009)33 (1) Journal of Modern African Studies 450.

The goal of affirmative action is to achieve equality, which is embraced under section 9 of the Constitution of South Africa.²⁵ The historically disadvantaged groups are now preferred as they were deprived of opportunities before the new constitutional dispensation in South Africa. Affirmative action is described as giving precedence to specified groups based on race and gender. Under the apartheid government, discrimination and the unequal treatment of black people was the norm, which had been practised for many years in South Africa.²⁶ In attempting to deal with the wrongs of the past, affirmative action was entrenched in the Constitution of 1996.²⁷ The apartheid laws had to be changed and comply with the new constitutional dispensation in South Africa.

One of South Africa's most significant difficulties since the dawn of a new democratic age has been attaining workplace equality. Legislative procedures have been put in place to eliminate inequality and unjust discrimination in the workplace to reduce inequality and unfair discrimination. Affirmative action was established as a means of redressing inequalities that had been perpetuated.²⁸

The policy of affirmative action considers the Historically Disadvantaged South Africans in which enterprises give the underrepresented population the opportunity to participate in the economic building and give equal opportunities in the workplace without being discriminated against due to race, sex, religion and national origins.

²⁵ Ngaka M, 'Molema District: The North West Province on BBBEE in South Africa' (2013) 34 (3) *Journal of Social Sciences* 227.

²⁶ Bacchi C, 'The Politics of Affirmative Action: Women Equality and Category Politics London Sage' (2010) 31(2) *Journal of Modern African Studies* 320.

²⁷ Act 108 of 1996 (Hereafter the Constitution of South Africa).

²⁸ Lawyers for Human Rights, 'Development in South Africa' (04 March 2021) <<http://www.southafrica.info/about/democracy/constitution>. > accessed 20 April 2021.

Table 1

The United Nation member states have agreed to sign to a set of 17 sustainable development goals (SDGs) which will be shared global development framework for the coming generation. Mining companies have the potential to become leading partners in the SDGs. Through their direct operations, mining companies can generate profit, employment, and economic growth in low-income countries.²⁹ And through partnerships with government and civil societies, they can ensure that benefits of mining extend beyond the life of the mine itself, so that mining industry has a positive impact on the natural environment, climate change, and social capital.³⁰

Unemployment Statistics in South Africa before Affirmative Action

1993 Unemployment Rates: Male	Female Unemployment Rate in 1993
31.6 percent of African male	43.9 percent of African female
21 percent of colored male	26.4 percent of colored female
12.5 percent of Indian male	23 percent of Indian female
5.3 percent of white men	12.9 percent of white women

Source: South African Institute of Race Relation, 2008.

The South African Institute of Race Relations outlines that 85 percent of senior managers in the public sector were white males, 10 percent were African males, 2 percent were White female, and 0.6 percent were African and Indian females in 1996 female of colour.³¹ According to a 1995 survey of 657 South African enterprises, 89 percent of senior managers were White males, 6 percent were Black males, and 5 percent were Asian and Indian males. Female directors made up only 1.9 percent of the board of directors, and

²⁹ BHP `Sustainability Report 2019' (14 November 2019) <<https://www.bhp.com/-/media/documents/investors/annual-reports/2019/bhpsustainabilityreport2019.pdf>> accessed on 10 November 2021.

³⁰ Rio Tinto `Sustainability Reporting' < <https://www.riotinto.com/sustainability/sustainability-reporting>> accessed on 10 November 2021.

³¹ Smith T, `Theories of Distributive Justice: Post-Apartheid in South Africa' (2013) 41 (1) African Journal of Political Science and International Relations 120.

female executives made up only 3.14 percent of the executive team. Based on these figures, it was assumed that affirmative action would revolutionise society in the aftermath of apartheid governments, bringing equality and social justice to all South Africans. Affirmative action policies in large corporations are also targeted at addressing gender inequality.

2.3 The constitutional framework for affirmative action

When the Interim Constitution, was adopted in the year 1993, there was a negotiation on building a new democratic South Africa. The most important and valued clause contained in the Interim Constitution was that “everyone shall be equal before the law” and “to equal protection of the law”, which was aimed at eliminating discrimination in South Africa.³² The constitution states in section 9 subsection (1) and (2) that everyone has the right to benefit and have equal enjoyment of the law without anyone discriminating against others, this also guarantees the right to freedom.

2.3.1 The Broad-Based Black Economic Empowerment (B-BBEE) and the Constitution

Broad-Based Black Economic Empowerment (B-BBEE) has been introduced in South Africa as early as 1993. The Constitution and other laws that were enacted focused on equality, the Black Economic Empowerment in South Africa (B-BBEE) policies were introduced to redress and deal with the injustices of the past and in development the black communities and focusing on the economic development. Chapter 2 of the Constitution introduces a Bill of Rights, which is the complete antithesis of what existed under apartheid. The Bill of Rights includes the right to equality, as the very first right, prohibiting unfair discrimination based on, amongst other grounds, race.

The right to equality is a fundamental human right. First-generation rights protect citizens from the state and, although basic, were absent during most of South Africa's history.

³² Smith T , ‘The Contribution of Labour Law and Non-Discrimination Law to Empowerment and Social Justice in an Unequal Society: A South African Perspective’ (2018) 30 (2) International Journal of Comparative Labour Law and Industrial Relations 30.

After the Second World War, second-generation human rights developed. These are economic, social and cultural rights, such as education, housing, health and food. These rights are more progressive and are sorely needed in South Africa. There are third generation of human rights, such as the right to a healthy environment, group rights and intergenerational rights.

2.3.2 How Broad-Based Black Economic Empowerment (B-BBEE) fits into South Africa's constitutional framework

Promoting equality and non-discrimination is one of the most important clause enshrined in the South African Constitution. Section 9(1) of the Right to Equality clause in the Bill of Rights states, "to promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken".

The objectives of the Broad-Based Black Economic Empowerment (B-BBEE) Act in section 2, outlines economic transformation for a meaningful participation of black people in the economy. This clearly ensures that the participation of black people will be taken into account without being discriminated against. This shows that 26 years into democracy South Africa had to ensure that new strategic plans are put into place to ensure equality and fair treatment for all South Africans.

2.4 Legislative and policy framework for black economic empowerment as an affirmative action strategy

Majority of South Africans were faced with discrimination and little or less privileges were granted to them particularly in the economy. This has become the mandate of the democratic elected government to deal and strive for a better South Africa for all without discriminating against anyone and uplifting the historically disadvantaged people of South Africa to have the opportunity to enjoy the minerals and resources.³³

³³ KPMG, 'Transformation into the new South Africa' (03 August 2012) < <http://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx> > accessed 19 April 2021.

Most private sectors already had strategies in place, which had a focus on the empowerment and redress of the injustices of the past. These rules were put in practices by these private sectors even before affirmative action policies were introduced. However, these rules lacked the main goals of redressing the injustices of the past and to uplift the black majority population, as a result this clearly stated that majority of the population of black people were still denied access to many aspects of the South African economy.

On 14 September 1995, the Presidential Labor Market Commission was established through an Act of Parliament, measures were proposed which focused on redressing discrimination in the labour market.³⁴The Commission considered the policy framework for affirmative action in the workplace. This resulted in job creation, fair compensation depending on the workload, and analysis on the stability of the economy in terms of their report, which was dealing with the restructuring of the South African Labour market.³⁵

According to the Green Paper on Employment Equity the stakeholders, have to conduct an organisational audit, and allow employees to participate in the decision making within the workplace in order to have equal treatment in the workforce.³⁶ This duties and guidelines were outlined in the Employment Equity Act, which is addressed below in detail. The Act defines these groups as "Blacks (including Africans, mixed colour such as Colored and Indians)".³⁷

Affirmative action measures aim to redress the injustices and inequality that has for many years been practiced in workplaces. The Act incorporated these principles from the Green Paper. Equal opportunities should be granted to the employees and this paves and

³⁴ Balshaw T, 'Broad-Based Black Economic Empowerment: Amended Codes & Scorecard' (2012) 33 (2) Journal of Sustainable Tourism 30.

³⁵ South Africa's Transformation: A Strategy for Broad Based Economic Empowerment' available < <http://www.dti.gov.za/bee/bee.htm> >(accessed 30 July 2021).

³⁶ The Sector Transformation Charters are available at <http://www.dti.gov.za/bee/beecharter.htm> (accessed on 30 July 2021).

³⁷ Mbeki M, 'Architects of poverty: Why African Capitalism needs changing, Johannesburg, Picador' (2016) 44(1) Journal of Human Rights 214.

establishes a substantive equal ground that will amount to equal and fair treatment in the workplace.

Employees are therefore mandated by the Department of Labour to report on their progress in their employment equality plan.³⁸ When the employer submits the report, it gives the Commission for Employment Equity the platform to compile an annual report. These reports are published and made available to the public. Under the Employment Equity Act, inspectors are therefore ordered to compare the report made by the employers with the conditions on ground.

However, there was considerable doubts on the reports that were made by the Commission for Employment Equality in compiling, there was new drafts of programmes and implementations on the programmes were made to improve the standard. Firstly it has been highlighted that the Department of Labour does not have sufficient skilled inspectors that would be able to ensure a continuous monitoring and updating reports on progress. Secondly, surveys that are conducted are overlooked and not given attention to help rebuild and implement the development in accordance to the principles and guidelines.

³⁸ Edigheji O, 'The Evolution of Black Economic Empowerment in South Africa: From the lenses of business, the tripartite alliance, community groups, and the apartheid and post-Apartheid governments' (2014) 43 (1) South African Journal on Human Rights 110.

The Department of Trade in March 2003, released a draft policy statement on 'broad-based black economic empowerment'.³⁹ Which focused on empowerment and was signed into place on 7 January, 2004.⁴⁰ The Act aims to "empower all black people, including women, workers, youth, and individuals with disabilities, economically.³⁹ The Minister of Trade Industry has the mandate to create and publish codes of Good Practice for the Broad-Based Black Economic Empowerment (BBBEE) process throughout the economy.⁴¹ The Department of Trade and Industry employs a balanced scorecard with three broad components to assess compliance with Broad-Based Black Economic Empowerment (B-BBEE) regulations. The scorecard will be applied to government procurement, public-private partnerships, state-owned firm sales, license applications, and other related economic activities. A company's Broad-Based Black Economic Empowerment (B-BBEE) rating is used in any government contract.

As an affirmative action strategy, the Policy Framework for Black Economic Empowerment strives to increase the proportion of black people who manage, own, and control businesses and productive assets. The facilitation of community, worker, co-operative, and other collective enterprises owning and managing businesses and productive assets.

The Department of Trade and Industry ultimately released the finalised Codes of Good Practice before the end of December 2006,⁴² which the Cabinet subsequently approved. On 09 February 2007, the Codes were published in the Government Gazette. Firms having a turnover of more than R35 million will be subject to the full Codes, while those with a turnover of between R5 million and R35 million will be subject to a limited version of the

³⁹ Chirwa D, 'The Long March to Binding Obligations of Corporations in International Human Rights Law' (2006) 34 (3) South African Journal on Human Rights 76.

⁴⁰ Department of Trade and Industry, 'Media Statement on the Construction Sector Charter Council Baseline Report in Media Statements' (04 July 2016): <https://www.thedti.gov.za/editmedia.jsp?id=3041>>accessed 20 March 2021. ³⁹ B-BBEE Commission 'A National Integrated Black Economic Empowerment Strategy' 2000 BEE Commission Report.

⁴¹ Grey J, 'Transformation into the Construction Sector in South Africa since the end of Apartheid' (20 September 2009)<http://www.lrs.org.za/docs/BI2014lowres_Chapt5.pdf>accessed 10 April 2021.

⁴² Mary O, 'Black Economic Empowerment: Regulatory Article' (15 Feb 2006) http://bee.sabinet.co.za/bee_regulatory_article2.html (accessed on 30 July 2021).

Codes. Micro and survivalist businesses are excluded from the Codes requirements.⁴³ This sector employs 88 per cent of South Africans and accounts for 33 percent of the country GDP. The updated version of the Codes was designed to make the Broad-Based Black Economic Empowerment (B-BBEE) requirements easier to understand. First, since the previous draft, the Codes have been decreased to eight instead of ten, and the empowerment indicators have been cut from 45 to 25.

The Constitution gave rise to the concept of The Broad-Based Black Economic Empowerment (B-BBEE) which is a goal for every citizen to participate in development activities and paved ways to strengthen economic growth and participation in South Africa. There are other elements as well, so understanding how the two function together is a crucial part of the process. We can track the evolution of a progressive and empowered South Africa thanks to the Constitution, which serves as a firm reference point. The Employment Equity Act serves as a blueprint for implementing affirmative action for specific populations. This is to ensure that all sectors and levels of the workplace have equal employment opportunities and that representation is encouraged. The Employment Equity Act covers only authorised employers.⁴⁴ This is in contrast to the Broad-Based Black Economic Empowerment Amendment Act which requires all businesses or bodies to improve black people's representation at all levels of the organisation.⁴⁵

The Broad-Based Black Economic Empowerment Amendment Act, which was established, was the Skills Development Act that enables a clear version that will guide employers to follow and implement these changes in the workplace. The Skills Development Act assists

⁴³ Lee A, 'What's All the Buzz About?' Publications (January 2005) < http://www.clasa.co.za/artk_buzz.html> (Accessed on 30/07/2005).

⁴⁴ Gumede W, 'Thabo Mbeki and the battle for the soul of ANC: Employment transformation enhancement in South Africa (2007) 33 (3) South African Journal of Labour Relations 24.

⁴⁵ Rohman I, 'Industrial expectation from hospitality school :What has changed ?(2012) 32 (3) Journal of Hospitality and Tourism Education 24.

in this regard by granting learner ships that lead to recognised qualifications.⁴⁶ Another Act, which is important, is the Preferential Procurement Policy Framework Act, which advocates for fair, equitable and transparent relationship between employers and employees in workplaces .This is especially important when considering how many different parts of the government deal with procurement.⁴⁷

Mining companies are faced with challenges of achieving high production and productivity target in order to remain competitive in the market. As such proper performance measures and intensive equipment's are deployed in the mining industries .Because mining activities are the integral part of societal development. The strategic management and assessment of social and environmental impact that the government and policy makers focus on the economic development of the country and economic growth.

Conclusion

The Broad-Based Black Economic Empowerment (B-BBEE) programme's operation is analysed in order to draw conclusions on the constitutionality thereof. Within the framework of the Constitution, several provisions empower the state to adopt remedial measures to correct systemic injustice. The most apparent of these is the right to equality in section 9. The constitutional imperative for policy tools to transform the South African economy in particular, by means of black economic empowerment is therefore clear. In this study the legacy of apartheid, with specific reference to the economic aspect thereof, is researched. From this it becomes clear that transformation in the way economic resources are divided is necessary. The enactment of specific legislation dealing with the subject resulted from the recognition of the need for regulatory intervention to give momentum to the process of reform. The Broad-Based Black Economic Empowerment Act (B-BBEE) and its Codes of Good Practice provide the foundation for the drafting and

⁴⁶ Ujuh ` WBHO shows a high B-BBEE score, drawn largely from high black ownership (20 March 2020)<:http://www.ujuh.co.za/bbbee/wbho-shows-a-high-bbbee-score-drawn-largelyfromhigh-black-ownership/>accessed 17 March 2021.

⁴⁷ Tereblanche, S` A History of Inequality in South Africa: The International Covenant on Economic, Social and Cultural Rights (2013) 78 (2) Journal of Personality and Social Psychology 938.

implementing of the Broad-Based Black Economic Empowerment (B-BBEE) . The B-BBEE programme's operation is analysed in order to draw conclusions on the constitutionality thereof. Within the framework of the Constitution, several provisions empower the state to adopt remedial measures to correct systemic injustice. The most apparent of these is the right to equality in section 9.

It provides that everyone is equal before the law and has the right to equal protection and benefit of the law and entrenches the right not to be discriminated against, either directly or indirectly, on a number of specifically enumerated and analogous grounds. Section 9(2) makes specific provision for remedial measures, not as an exception to the equality guarantee, but rather an extension thereof a restitutionary equality conception. In the Preamble to the Broad-Based Black Economic Empowerment (B-BBEE) it is stated that one of the objectives with the Act is to "promote the achievement of the constitutional right to equality".

CHAPTER 3: A CRITICAL ANALYSIS OF THE APPLICATION OF B-BBEE IN THE MINING SECTOR

3.1 Introduction

One of the most contentious programmes advocated by the ANC-led government is Black Economic Empowerment.⁴⁸ The policy is viewed as a crucial notion in debates about South Africa's growth and public policy with broad goals. This chapter explains the background and application of the Black Economic Empowerment strategy in the mining industry by contextualising it in the context of South Africa's oppressive apartheid history and describing its relevance in the mining industry.⁴⁹

The advancement and expanded engagement of black people in the economy is central to these goals, as stated in the Broad-Based Black Empowerment legislation.⁵⁰ The word 'broad-based' was eventually added to the project to emphasise that the Broad-Based Black Economic Empowerment (B-BBEE) was not elitist but rather aimed at achieving greater socio-economic justice and development. Promoting the Broad-Based Black Economic Empowerment (B-BBEE) will ensure transformation; promote equality in the workplace and involvement of the historically disadvantaged.⁵¹

⁴⁸ Janisch P, 'Returning Expats and the Future of South Africa' (15 January 2007) <<http://www.entrepreneur.co.za/BEE/home.aspx> >(accessed on 30 July 2021).

⁴⁹ Lee K, 'Malaysian development experience: Changes and challenges human and skills development (2020) 30 (31) Journal of Social Issues 77.

⁵⁰ Employment Equity in South Africa' The North West Province on BBBEE in South Africa '(10 April 2015) <http://en.wikipedia.org/wiki/Gender_Discrimination_in_the_South_African_Labour_Market>accessed 10 September 2020.

⁵¹ Thomas S, 'Broad-Based Black Economic Empowerment : The dawn of the new South Africa(2015) 1 (89) Journal of Economic Literature 165.

3.2 The policy and legislative framework

The mining industry in South Africa is one of the country's few world-class industries, with the potential to generate huge amounts of money and jobs. The mining industry continues to be one of the country's most important sources of revenue. South African mining law has a long history of rewarding and protecting private enterprises mineral exploitation interests. This is not to argue that the government had no involvement in mining operations. Historically, and under the Mining Rights Act,⁵² the state has always maintained authority over mining operations. Even in the case of precious metals, the state had sole ability to grant mineral rights.⁵³

The Minerals Act had three main effects: it consolidated the fragmented mineral law, brought all mining and prospecting rights under common law, and shifted the balance of governmental and private mineral interests firmly in favour of private enterprise. The MPRDA ensures that the nation's mineral and petroleum resources are accessible to all citizens and are developed sustainably.⁵⁴ The MPDRA designates the state as the guardian of South Africa's mineral resources.⁵⁵

The Minister of Minerals and Energy has the authority to issue prospecting and mining rights, among other things. This is a departure from the common-law position, which the Minerals Act reinforced, in which mineral rights were owned by or acquired from the mineral right holder, who might provide authorisation to mine or prospect, but only with a state license or permit.⁵⁶Section 26 of the MPDRA currently states that the Minister may encourage mineral beneficiation in South Africa, subject to the Minister's terms and

⁵² Act 20 of 1967(herein after the Minerals Act).

⁵³ Smith S ` BBE in South Africa workplace: Reduced Form and Structural Estimates' (2020) 47(3) Journal of Human Rights 320.

⁵⁴ Gerwitz s ` Plural conceptions of social justice: implications for policy sociology.'(2008)33(3) Journal of Education Policy 17.

⁵⁵ Booyse L, 'Barriers to employment equity implementation and retention of blacks in management in South Africa' (2014) 13 (3), South African Journal of Labour Relations 47–71.

⁵⁶ W Hermkens ` Modernisation Theory, Income Evaluation: The Transition in Eastern Europe' (2000) 40 (1) International Journal of Comparative Sociology 60-78.

conditions.⁵⁷ It also mandates that anyone who wishes to beneficiate minerals outside of South Africa communicate with the Minister first.⁵⁸

The Minister has the authority to prescribe a level of beneficiation under section 26. These levels will be established in regulations, informed by the local beneficiation industry's current and future absorptive ability. These measures will ensure that downstream companies have a consistent supply of input materials for converting into higher-value commodities, resulting in more job possibilities and increased export earnings from increasing economic activity resulting from improved mineral value gains. Beneficiation aims to use comparative advantage as a fulcrum to boost industrialisation in accordance with government policy. In this regard, mining enterprises must follow section 26 of the MPRDA and the mineral beneficiation plan to make local beneficiation of mineral commodities easier.⁵⁹The MPDRA led to the Mining Charter, which was created with the goal of converting existing rights. The Charter established ownership as a counterbalance to mineral beneficiation and prospecting.

However, because a corporation beneficiates a mineral, the Department of Mineral Resources (DMR) has never excused it from its full Black Economic Empowerment (BBBEE) ownership obligation. No one questioned the empowerment goal, which aimed to provide all South Africans with "equitable access," "substantially and meaningfully expand opportunities for blacks, particularly women," and "ensure that mining companies contribute to the socio-economic development of communities where they operate".⁶⁰

⁵⁷ Abdullah F, 'Affirmative Action Policy In Malaysia: To Restructure Society, to Eradicate Poverty' (2012) 14 (3) Journal of Ethnic Studies Report 36-39.

⁵⁸ Statistics South Africa 'Architects of Poverty: Why African Capitalism Needs Changing. Johannesburg (17 May 2014) <[http://en.wikipedia.org/wiki/ Perceptions of the dimensions of fairness of affirmative action](http://en.wikipedia.org/wiki/Perceptions_of_the_dimensions_of_fairness_of_affirmative_action)>accessed 30 April 2021

⁵⁹ Department of Trade and Industry 'South Africa's economic transformation: A strategy for broad-based economic empowerment' (12 September 2010)< <http://www.thedit.gov.za/bee/bee.htm>> accessed: 30 April 2021.

⁶⁰ Whyte 'Apartheid and Other Policies' (undated) no. 17 New Africa Pamphlet 8. (1947) The Natal Witness Ltd, Pietermaritzburg.

The MPDRA⁶¹ and the Mining Charter are tools used to ensure that those who own mining rights are committed to the community's development through their different activities. For example, section 25(2) (h) requires the holder of a mining right to submit an annual report detailing the extent of compliance with section 2(d) and (f), which deal with expanding opportunities for historically disadvantaged people, promoting employment, and advancing the social and economic welfare of all South Africans. In the end, the holders of mining rights would have used their discretion in deciding both the undertakings and the commitment amounts. Let's say there are any revisions to the documents supplied as a result of the right's application. If the company can no longer afford to hire as many workers as they had planned, they can file an amendment to their mini-contract. Furthermore, under section 93 of the Act, any authorised person may enter mining production without a warrant during office hours to check any operation carried out and ask the holder of the right to present any book, record statement, or other document for inspection.⁶²

3.3 The broad-based socio-economic empowerment charter for the mining and minerals industry, 2018

The Mining Charter, which laid forth specific, measurable goals for the industry's development, was announced by the Minister in 2004.^{63 64} According to the charter, holders of new prospecting rights must have a minimum of 50 percent and 1 vote black shareholding.⁶⁵ According to the Revised Codes, the aim for compliance is 26 percent

⁶¹ The Mineral and Petroleum Resources Development Act (herein referred to as the MPDRA)

⁶² Fortescue Metal Group Ltd ` Annual Report FY19. Affirmative Action in South Africa' (12 March 2021) <https://www.fmgil.com.au/docs/default-source/annual-reporting-suite/fy19-annual-report.pdf> (accessed on 10 November 2021).

⁶³ Boliden Annual and Sustainability Report 2008, ` A Sustainable Future with Metals on Mining Charter' (13 October 2008) < <https://vp217.alertir.com/afw/files/press/boliden/202003107199-1.pdf>> (accessed on 10 November 2021).

Chay, K and Fairlie R, 'Minority business set-asides and black self-employment' (19 February 2008)

⁶⁴ <<http://econ.ucsc.edu/~fairlie/papers/setaside.pdf#search=%22preferential%20procurement%20the%20USA%20for%20minorities%22>> (accessed on 30 July 2021).

⁶⁵ The Mining Charter, (2018) available < <http://www.dti.gov.za/bee/beecodes.htm> > (Accessed on 30 July 2021).

black ownership. If a holder wants to acquire prospecting rights (or mining rights, as described below), he or she must follow the Revised Codes' basic standards as well as the stipends.

Even though the state is the custodian of the country's natural wealth on behalf of the country, the Mining Charter was not completely embraced. Compliance was viewed to maintain "social the license to operate," in the mining industry.⁶⁶ In certain circumstances, there has been a noticeable improvement in compliance. The updated Mining Charter now includes a sustainable development component to strengthen the mining industry's long-term transformation and growth. However, the total transformation of the mining industry remains unacceptably low.⁶⁷

Because of the following factors, achieving meaningful participation by Historically Disadvantaged South Africans remains a challenge: the trickle of flow benefits, which were intended to settle debt and provide cash flow to B-BBEE partners directly, are woefully inadequate, and trusts that protect the interests of employees and communities have stifled the flow of information as a result of poor administration.⁶⁸ Competitiveness and growth are mutually reinforcing developments, according to the Mining Charter. As a result, by defining new definitions, phrases, and targets consistent with existing legislation, the amended Mining Charter intends to eliminate discrepancies and offer regulatory clarity. The purpose of harmonising the laws is to ensure that persons who have been historically marginalised can participate constructively. In 2018, the Minister had to revise the Mining Charter to fulfil the standard of enhancing the mining sector as well as the regulation of the precious metals and diamond industries.⁶⁹

⁶⁶ Hill H, 'Understanding Implementation: Street-level Bureaucrats' Resources for Reform (2003) 13 (3) *Journal of Public Administration Research and Theory* 282.

⁶⁷ Podder, N 'The Implications of Economic Inequality for Social Welfare and Social Conflict *International Journal of Social Economics* 130.

⁶⁸ Crankshaw O, 'Apartheid and Economic Growth: Craft Unions, Capital and the State in the South African Building Industry 1945-1975' (1990) 33(3) *Journal of Southern African Studies* 503.

⁶⁹ Chowa T, 'Zimbabwe's Indigenisation and Economic Empowerment Programme (IEEP): As an Economic Development Approach' (2002) 34 (3) *International Journal of Politics, Culture and Society* 129-134.

3.4 Conclusion

The Minerals and Petroleum Resources Development Act has been a contentious legislation in South Africa since it abolishes the concept of private ownership of mineral rights. It has given reality to the notion that the state is the custodian of the country's mineral resources and that the state has the right to exercise sovereignty over all of the country's mineral resources. The state owns all of South Africa's mineral resources and selects who can explore and utilise them through a licensing system. This was one of the Minerals and Petroleum Resources Development Act most significant successes since it transformed the old system of private and public ownership of mineral rights into a system of state custodianship through the Minerals and Petroleum Resources Development Act and mining charter. The sector has been liberalised, and previously disadvantaged South Africans have gained significant access to mine ownership and management. The Minerals and Petroleum Resources Development Act made a considerable improvement that moved South Africa closer to the practices of other mining countries.

CHAPTER 4: COMPARATIVE PERSPECTIVES FROM THE ZIMBABWEAN INDIGENISATION AND ECONOMIC EMPOWERMENT PROGRAMME

4.1 Introduction

Black Zimbabweans had to be uplifted in the participation of economic growth and reduce the dominance of foreign and white Zimbabweans in the country.⁷⁰ The Indigenisation and Economic Empowerment Programme was introduced in dealing with the injustices of economic imbalance and help build the economy because of the injustices of the past that have affected the lives and the economy in Zimbabwe. The programme is part of a larger effort by the Zimbabwean government to empower indigenous people, which began with the land reform program in 2000.⁷¹

Zimbabwe inherited economic inequality due to the racial segregation of the past under the colonial rulers.⁷² Many debates were put in place against the Indigenisation and Economic Empowerment Programme (IEEP) that it would destroy the economy and Zimbabwe's land reform. ⁷³ This has resulted in the Indigenisation and Economic Empowerment Programme (IEEP) having not reached its main goal of reducing poverty level.

The Zimbabwean economy was primarily designed to meet the requirements of the white minority, intentionally placing black people on the periphery of the country's economic activities, sentencing them to the vicious cycle of poverty, unemployment, and

⁷⁰ Potucek, M` Dimensions of Public Policy: Values, Processes, Implementation and Results><http://www>. In Public Policy in CEE: Theories, Methods, Practices. Bratislava: NISPAcee<14 November 2021.

⁷¹ Chowa T ,` Zimbabwe's Indigenisation and Economic Empowerment Programme (IEEP): As an Economic Development Approach (2002) 34(3) International Journal of Politics, Culture and Society 129-134.

⁷² Burger R,` Affirmative action in South Africa: An empirical assessment of the impact on labour market outcomes'><http://www3.geh.ox.ac.uk/pdf/crisewps/workingpaper76.pdf><30 July 2021.

⁷³ Montesino M, `Cross-cultural conflict and affirmative action: Inter- and intra-ethnic dilemmas of Malaysia's heterogeneous workplace' (2001) 12(1), International Journal of Cross Cultural Management 115-132.

underdevelopment that this situation engendered.⁷⁴ As a result, South Africa embraced the Broad-Based Black Economic Empowerment (B-BBEE) model for economic empowerment. The study also intended to learn how other nations had adopted and fared in comparable programmes and provide recommendations for the adoption of such criteria for Zimbabwe's Indigenisation and Economic Empowerment Programme (IEEP) to succeed. The goal of this chapter is to examine the prospective lessons for South Africa's mining industry development. The study also looks into any potential roadblocks to the Indigenisation and Economic Empowerment Programme's (IEEP) success.⁷⁵

4.2 Policy and legal framework

4. 2.1 Legal framework

The Indigenisation and Economic Empowerment Programme's Section 2(1) promotes a distributive justice agenda. This is because the ultimate policy goal of transferring land and natural resource ownership to indigenous Zimbabweans is to narrow the gap between rich and poor. This is because the ultimate policy goal of transferring land and natural resources ownership to indigenous Zimbabweans is to reduce the growing disparities between the rich and the poor.⁷⁶ Reforming societies has been the mandate of the Zimbabwean indigenisation process. Socio-economic inequities, and building a developed and modern society of equal access to the minerals and resources in Zimbabwe.⁷⁷ This shows that the indigenisation policy was only intended to benefit individuals and legal entities.⁷⁸ The following groups of beneficiaries are identified as indigenisation targets in section 2(1) of the Indigenisation and Economic Empowerment Act (IEEA)

⁷⁴ Kassner A, 'Deep into gold fields: South Africa's unrealized black economic empowerment in the shadows of executive discretion' (2008) 34(13) Cornell International Law Journal 667.

⁷⁵ Department of Statistics Malaysia 'Changing educational inequalities in India in the context of affirmative action 17 May 2013) [Online] <<http://www.statistics.gov.co.za> :> accessed: 20 May 2021.

⁷⁶ Burns R, 'Business research methods and statistics using SPSS: London Sage Publications' (2011) 3 (11) International Journal of Contemporary Hospitality Management 595-615.

⁷⁷ Boley B, 'Sustainability in hospitality and tourism education: Towards an integrated curriculum' (2011) 23(4) Journal of Hospitality & Tourism Education 22-33.

⁷⁸ Anciano A, 'Rethinking non-racialism: Reflections of a selection of South African leaders' (2012) 39(1) South African Journal of Labour Relations 149-169.

4.3 Justice, inequality and a just social order

Economic imbalances must be justified, according to the modern notion of distributive justice, and justice is concerned with the distribution of economic resources within a community. The project to promote indigenisation and economic empowerment is redistributive and based on the principles of equity, fairness, and justice.⁷⁹ These principles provide the government of Zimbabwe with a moral and intellectual foundation on which to advocate and accomplish its goal of indigenisation and economic empowerment.⁸⁰

The fair distribution of money or other goods that people require to live decent lives, such as physical security, food, water, shelter, jobs, education, medical care, and technology, is central to distributive justice. On moral as well as prudential grounds, a state may tax the wealthy to support the poor or make other arrangements necessary to reduce, eradicate, or otherwise address poverty.⁸¹

Compensatory justice is a widely utilised idea to support affirmative action. Compensatory justice refers to the extent to which people who have been injured or lost money as a result of the actions or inactions of others are adequately compensated.⁸² Those who are responsible for the loss or injury should normally pay the compensation.⁸³ When the perpetrators of the injustices or losses are alive and identifiable, and the victims are also

⁷⁹ Podder B, 'The implications of economic inequality for social welfare and social conflict' (2011) 30(1) *International Journal of Social Economics* 25.

⁸⁰ Obalola M, 'Beyond philanthropy: Corporate social responsibility in the Nigerian insurance industry' 2008 4(4) *Social Responsibility Journal* 538-548.

⁸¹ Montesino M, 'Cross-cultural conflict and affirmative action: Inter- and intra-ethnic dilemmas of Malaysia's heterogeneous workplace' (2001) 12(1), *International Journal of Cross Cultural Management* 115-132.

⁸² Vasoo S, 'Social development, housing and the central provident fund: The price of inequality' 30 (1) *International Journal of Social Welfare* 193.

⁸³ Department of Statistics Malaysia 'Changing educational inequalities in India in the context of affirmative action 17 May 2013) [Online] <<http://www.statistics.gov.co.za> :> accessed: 20 May 2021.

alive and identifiable, applying the principle of compensatory justice is straightforward. The offenders are simply asked to reimburse their victims.⁸⁴

The case of colonialism in Africa is one in which compensatory justice is required because colonialism in Africa resulted in injustices against the indigenous peoples of Africa, resulting in socio-economic marginalisation, the effects of which are still felt by the victims, years after colonialism ended. Following the case of Malaysia, which reflected that the colonial rulers left the indigenous Bumiputera at an imbalance, the Malaysian economy had to recover in which reform programmes had to be introduced between the periods of 1997-1998 financial crisis. The recovery was made possible by numerous reforms (Better risk management and prudential regulations were also implemented) this case resulted to be similar to that of Zimbabwe and other countries in Southern Africa.⁸⁵

In these circumstances, the Indigenisation and Economic Empowerment Programme (IEEP) of Zimbabwe should be viewed as a sort of compensatory justice intended to compensate indigenous Zimbabweans for the wrongs and injuries they endured during colonialism. Another reason for the Indigenisation and Economic Empowerment Programme (IEEP) is the need to broaden economic involvement, which, in theory, leads to long-term economic growth and poverty reduction by raising citizens' income levels. A nation cannot flourish economically unless it harnesses the economic potential of all of its residents. As a result, post-colonial nations such as Zimbabwe should ensure that formerly excluded citizens are brought into the economic arena for the benefit of the national economy.

⁸⁴ Burns R, ` Business research methods and statistics using SPSS : London Sage Publications' (2011) 3 (11) *International Journal of Contemporary Hospitality Management* 595-615.

⁸⁵ Anciano A, ` Rethinking non-racialism: Reflections of a selection of South African leaders' (2012) 39(1) *South African Journal of Labour Relations* 149-169.

4.4 The Constitution

The post-independence Constitution of 2013,⁸⁶ Zimbabwe's first-ever autochthonous Constitution,⁸⁷ includes intriguing ideas on property rights protection. In Zimbabwe, the constitutional regime impacts the security of indigenous populations' land rights, which are held via customary law tenure systems.⁸⁸

Section 71(1) is the constitutional property clause, which aims to define property as "property of any description and any right or interest in property". The court fleshed out what is meant by definition. In the case of *Hewlett v Minister of Finance*,⁸⁹ the Supreme Court appeared unperturbed by this phrasing and decided that the definition "seems to embrace the widest possible range of property".⁹⁰ The observations by the Court find support from another angle. Under general common law, property generally refers to 'things' or valuable, corporeal objects of economic value, external to humans, which enjoy a separate legal existence and which can be subjected to juristic control. The objects of value that this definition can envisage are various.⁹¹ It can thus be strongly asserted that the Constitution recognises a wide range of objects as property, which is a positive aspect in protecting property rights in general. Both ordinary citizens and foreign investors

⁸⁶ Sweet M, 'Minority Business Enterprise Programmes in the United States of America: An Empirical Investigation' (2006) 31 (1) *Journal of Law and Society* 162.

⁸⁷ Galenson W 'South Africa's Transformation: A Strategy for Broad Based Economic Empowerment' available < <http://www.dti.gov.za/bee/bee.htm> > accessed on 30 July 2021.

⁸⁸ Barron P, 'Careers in hospitality management: Generation Y's experiences and perceptions' (2007) 13(3) *Journal of Hospitality and Tourism Management* 128.

⁸⁹ Kennedy D, 'Black Economic Empowerment in the South African Business Community: A Beginning of Economic Empowerment of Black South Africans' (1997) MBA Thesis: Graduate School of Business University of Cape Town (18 April 2014) < <https://www.businessinsa.co.za> > accessed 21 June 2021.

⁹⁰ Chay K, 'Minority business set-asides and black self-employment' (1998)

<<http://econ.ucsc.edu/~fairlie/papers/setaside.pdf#search=%22preferential%20procurement%20the%20USA%20for%20minorities%22>> accessed 30 July 2021).

⁹¹ Podder N, 'The implications of economic inequality for social welfare and social conflict: The price of inequality – How today's divided society endangers our future' (2013) 30 (3) *International Journal of Social Economics* 52.

become anxious in cases where the Constitution recognises a narrower definition of property than where such definition is as wide as it is currently envisaged.⁹²

It is also worth noting that both "rights" and "interests" in property are included in the constitutional definition of property. In practice, this means that everyone who has a right to another person's property is protected by the right to property. In addition, anyone who does not have such a right but has a "interest" in a property is protected. Of course, there must be a vested interest. ⁹³There seems to exist a blurred line between a land 'right' and a land 'interest' that is actionable and the subject of protection under section 71. ⁹⁴

Section 71 of the 2013 Constitution recognises the right of every person "to acquire, hold, occupy, use, transfer, hypothecate, lease or dispose of all forms of property, either individually or in association with others". In essence, this means that the section recognises four important rights: namely, (1) the right of private ownership (dominium), (2) the right of possession (possessio), (3) the right of use (usus) and (4) the right of occupation (occupatio). This means that the mere use, occupation, and possession of the property are protected under section 71. ⁹⁵

Accordingly, the occupation, use or possession of land by indigenous communities in rural areas for residential, subsistent agriculture, pasture, small scale farming, among other purposes, creates land rights and interests in their favour, and such rights are protected by section 71. Zimbabwe Platinum Mine (Pvt) Ltd (Zimplats), holds in excess of 80,000

⁹² Department of Statistics Zimbabwe `Changing educational inequalities in India in the context of affirmative action (17 May 2013) [Online] <<http://www.statistics.gov.co.za> :>accessed: 20 May 2021.

⁹³ Gerwitz S, `Plural conceptions of social justice: implications for policy sociology: Understanding implementation: street-level bureaucrats' resources for reform 31 (2) Journal of Education Policy 24.

⁹⁴ Hill H, `Understanding Implementation: Street-level bureaucrats' resources for reform (2013) 3 (10) Journal of Public Administration Research and Theory 282.

⁹⁵ Agcos C, `Canada's employment equity legislation and policy: The gap between policy and practice' (2008) 3 (30) International Journal of Manpower 56-276.

hectares of land.⁹⁶ Another example is the Zimbabwe Mining Development Corporation that holds land measuring 63,548 hectares under the special grant but was reduced to 59,817 hectares after the cession of part of such land to a private company Anjin Investments Pvt Ltd, in February 2010.⁹⁷ By setting this infrastructure on the land, they become users, occupiers or possessors of the land onto or under which the infrastructure is built or established. Ordinarily, however, due to the nature of mining as a land-intensive industry, large tracts of land are left for further and future exploration.

Under the Zimbabwean Constitution, the acquisition or deprivation of property is subject to compensation. In terms of section 71(3), in cases of compulsory acquisition or deprivation, the acquiring authority is required to give reasonable notice to all persons likely to be affected of the intention to acquire property before the acquisition can proceed. Implicitly, this means that an affected property owner can challenge the reasonableness of the notice period. The authorities have to pay a fair and adequate compensation prior acquiring the property or within a reasonable time.

4.5 An analysis of the pros and cons for the Indigenisation Program

In post-independence Zimbabwe, the population was divided into two groups: those with political power but little economic power (indigenous Zimbabweans) and those with economic power but little political influence (non-indigenous Zimbabweans) (white Zimbabweans).⁹⁸ It proposes giving indigenous black citizens 51 percent ownership of foreign enterprises.⁸⁸ The Zimbabwe Congress of Trade Unions has slammed the push for

⁹⁶ Chay K, 'Minority business set-asides and black self-employment' (1998) <<http://econ.ucsc.edu/~fairlie/papers/setaside.pdf#search=%22preferential%20procurement%20the%20USA%20for%20minorities%22>> accessed 30 July 2021.

⁹⁷ Anciano-White F, 'Thinking non-racialism: Reflections of a selection of South African leaders: South African v Zimbabwe' (2007) 39(1) *Journal of Labour Relations* 149-169.

⁹⁸ Akama J, 'Tourism and socio-economic development in developing countries: A case study of Mombasa Resort in Kenya' (2018) 15(6) *Journal of Sustainable Tourism* 735-748.

black majority control of multinational enterprises, claiming that indigenisation will only benefit a few blacks who will supplant minority whites.⁹⁹ It should be improved and turned into a pragmatic growth strategy aimed at realising the country's full economic potential while also assisting in integrating the black majority into the economy, thereby creating a market for businesses. The programme must identify individuals with potential who can be assisted in starting new firms and enterprises and create new wealth and jobs. Corporate governance ignores the role of the state in promoting strong corporate governance standards, focusing instead on the interactions between boards of directors, managing directors, shareholders, and other stakeholders.¹⁰⁰

4.6 Lessons for South Africa

In Zimbabwe and South Africa, black economic empowerment programmes have frequently seen indigenous peoples who were previously and continue to be mostly excluded from the economic mainstream for their existential socio-economic issues. For the sake of implementing indigenous economic empowerment laws, the phrase multinational corporation is used. The necessity to correct colonial injustices and significantly increase indigenous Zimbabweans' participation in the country's economic operations is frequently claimed as the major argument for indigenisation programs that attempt to economically empower formerly marginalised people.

-Zimbabwe was faced with economic collapse in which the land reform programme ICEE was introduced to help in economic building and South Africa had to also adopt new strategic plans to also build its economy.

⁹⁹ Chay K, 'Black Economic Empowerment: In South African Context' <<http://www.yokogawa.com/za/cp/overview/za-bee.htm> > accessed 30 July 2021 .

¹⁰⁰ Milward H, 'Governing the hollow state: White Paper for Reconstruction and Development 34(1) Journal of Public Administration Research and Theory 379.

Both Zimbabwe and South Africa were under colonial rulers which resulted in an imbalance within the growth of both countries economy and reform plans had to be introduced to help the Historically Disadvantage and develop the countries.

The primary argument for indigenisation programmes that seek to empower formerly disadvantaged Zimbabweans economically is the need to rectify colonial injustices and dramatically improve the level of indigenous Zimbabweans' participation in the country's economic operations. The mining houses and enterprises have responded to the challenge of black economic empowerment in a variety of ways. All have expanded their emphasis on internal career advancement programmes for workers from disadvantaged backgrounds, both in the mines and at head offices, through a range of specific training, recruitment, and mentorship programs.¹⁰¹ Given the industry's low starting point and largely technical character, it is commonly understood that changing the racial makeup of the industry's top professional and management cadres will take time. Non-executive appointments to company boards have also been made.

4.7 Conclusion

Zimbabwe can only achieve economic growth by implementing more economic programmes that can help in developing and promoting growth in the country. However Zimbabwe can also empower the Historically Disadvantaged to participate in mining industry and economic growth. Compared to focusing on the Zimbabwean Economic Empowerment Program that has slow development and progress in the economic development of the country. On the other hand South Africa introduced the BBBEE which was aimed at improving the standard of the Historically Disadvantaged South African even though there was a slow progress in the economic development more changes had to take place in the development of the mining industry and also in the improvement of the country.

¹⁰¹ Gerwitz N, ` Plural conceptions of social justice: Implications for Policy Sociology 2017 33(2) Journal of Education Policy 330.

CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction

The Broad-Based Black Economic Empowerment (B-BBEE) policy has gained considerable impetus in South Africa since the Broad-Based Black Economic Empowerment (B-BBEE) enactment.¹⁰² The Broad-Based Black Economic Empowerment (B-BBEE) policy emerged as a blueprint for transforming the South Africa economic system, which has excluded the majority and benefited the minority over the years. Therefore, the research examined mineral resources beneficiation legislation and policies in South Africa.¹⁰³ The study found that South Africa's mineral resources industry is highly regulated by various legislation and policies. Firstly, the Constitution of the Republic of South Africa is the supreme law founded on the fundamental values of freedom, human dignity and equality.

Section 9(2) of the Constitution for equality to prevail in South Africa authorises parliament to enact legislation that redresses historical imbalances. In the case of *Bato Star Fishing v Minister of Environmental Affairs and Tourism*,¹⁰⁴ it was stated that the transformation is a process that cannot be achieved overnight nor through the enactment of bill of rights.¹⁰⁵ The court held that the historically disadvantaged had also to be considered in order to enable fair participation in the economy without any discrimination. Therefore, South Africa has a legislative obligation to transform to redress the past injustices and cure the social ills in the communities, such as poverty and unemployment.

¹⁰² South African Mining Report `Broad-Based Black Economic Empowerment (18 March 2021)< (B-BEEDTI <http://www.thedtic.gov.za> > accessed 13 June 2021.

¹⁰³ Cawood, F` Threats to the South African minerals sector: An independent view on the investment environment for mining' (2001) 33 (1) *The Journal Of The Southern African Of Mining And Metallurgy* 468-470.

¹⁰⁴ 2004 (4) SA 490 (CC).

¹⁰⁵ Statistics South Africa `Mineral Beneficiation in Africa (17 May 2014) <[http://en.wikipedia.org/wiki/ what was missed and what can now be done? Mapungubwe Institute for Strategic Reflection](http://en.wikipedia.org/wiki/what_was_missed_and_what_can_now_be_done?Mapungubwe_Institute_for_Strategic_Reflection) >accessed 19 June 2021.

South Africa Mining industry for decades has been the backbone of the economy. However, it has paid lip service to socio-economic transformation, economic development and poverty alleviation in South Africa.¹⁰⁶

The mining charter had to make it easier for the mining and minerals industry to reform, grow, and develop in a sustainable way. This will be accomplished by establishing a framework, goals, and timeline for bringing previously disadvantaged South Africans into the mining business. The Mining Charter is important in regulating how mining companies' corporate ownership structures should be set up. The Charter applies to people who apply for mining and exploration licenses, but it does not apply to those who sell goods or services to the mining industry.¹⁰⁷

5.2 Key findings of the study

The findings are based on the observations that have been made as a result of the implementation of the Broad-Based Black Economic Empowerment (B-BBEE) in which prior to the dawn of the constitutional dispensation in South Africa, there was total control over the mining sector by the minority (whites) in South Africa. The Historically Disadvantaged South Africans for many years were not allowed to participate in the mining industry therefore the government had to introduce the BBBEE and Affirmative action programmes which would help in building a new South Africa and also economic growth.

However, there is a need for transformation in the mining sector, where there is slow progress in dealing with historically disadvantaged societies and introducing new skills that would aid in the upliftment and development of societies that have previously been disadvantaged as a result of past injustices, in South African by: (1) involving white corporates and providing an equal economic opportunity to black business people, (2)

¹⁰⁶ Business report, economy `Investors shun SA's R36 trillion in minerals, Retrieved from (2012) ><http://www.iol.co.za/business-report/economy/investors-shun-sas-r36-trillion-in-minerals1762558><accessed on the 25 February 2021.

¹⁰⁷ United Nations. Treaty Series. `Vienna Convention on the Law of Treaties of (2014) available at ><https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232english.pdf><accessed on the 17 June 2021.

using acquired skills and expertise to explore these opportunities, (3) entrepreneurship skills (4) Adequate funds.

5.3 Recommendations

All South Africans should have a full enjoyment of the natural resources of the country. However minority are still in control of the minerals and resources which resulted in the mining sector having a high unemployment rate which has affected the economy of South Africa. The South African government in redressing the injustices of the past have introduced the BBBEE programme in which has a slow progress in the development of the mining industry. However to have development and growth in the mining industry more development programmes should be introduced in developing South Africa.

Mining industry empowerment programmes only ensure that the companies' economic participation fails to redress the past injustices that surrounding communities may benefit from these mining operations in South Africa and participate in the mining sector. Mining companies have to ensure that the previously disadvantaged are also engaging in the mining industry's participation and engage in economic activities.

A high level of uneducated employees also impacts the participation in the mining industry in understanding the principles and the involvement of the people in the mining sector. Mining companies have to ensure that training is provided to the employee's ad policies, understanding the importance of the Broad-Based Black Economic Empowerment (BBBEE) and participation in the economy.

The mining industry had been the driving force in the South African economy. However, new amendments should be made to the current economic empowerment policies in order to ensure that within the mining industry, changes take place and there's the participation of the Historically Disadvantaged South Africans.

5.4 Conclusion

The BBBEE has been introduced by the South African government as a pillar to bring equality and equal opportunities within the mining sector and other sectors in the nation

building. Through the BBBEE there will be participation of the Historically Disadvantaged South Africans and also participation within the mining sectors .Zimbabwe through the IEE programme has resulted in little development taking place in the economy of Zimbabwe by the involvement of the Historically Disadvantaged.

Companies will have to re-visit the Based Black Economic Empowerment (B-BBEE) programme which will help in ensuring that there is consistency and compliance with the programme being implemented. There is an increased focus on ensuring genuine and sustainable Based Black Economic Empowerment (B-BBEE) in South Africa, essentially implementing suitable funding structures that are not superficial fronting arrangements. Because the current study is limited to the Limited case study's empowerment transactions, it may be good for future studies to investigate similar empowerment transactions in other mining sectors in the same depth as the current analysis.

It could be interesting to explore and compare empowerment transactions across industries within the South African economy in a similar vein to the current study. Future studies offered could help businesses structure and implement Broad-Based Black Economic Empowerment (B-BBEE) transactions more efficiently and cost-effectively. Future research could potentially look into Broad-Based Black Economic Empowerment (B-BBEE) transactions as B-BBEE evolves over time.

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