

**AN ANALYSIS OF THE CODES OF GOOD PRACTICE ISSUED IN TERMS OF
THE BROAD BASED BLACK ECONOMIC EMPOWERMENT ACT 53 OF 2003**

by

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CONTENTS **Page**

CHAPTER 1: INTRODUCTION

1.	Introduction	1
2.	Purpose of the study	1
3.	Methodology	2
4.	Relevance	2
5.	Overview of study	3
6.	Referencing	4

**CHAPTER 2: A BRIEF HISTORY OF BLACK PEOPLE IN
BUSINESS IN SOUTH AFRICA**

1.	Introduction	5
2.	Holding back the tide	5
3.	The tide flows in	8
4.	General election 27 April 1994	9
5.	Constitution of the Republic of South Africa	10
6.	Conclusion	12

**CHAPTER 3: THE BLACK ECONOMIC
EMPOWERMENT COMMISSION**

1.	Introduction	14
2.	Establishment of the BEE Com	14
3.	Black business council	15
4.	Objectives of BEE Com	16

5.	Challenges BEE Com	17
6.	The BEE National Strategy	18
7.	BEE Com targets	19
8.	Recommendations by the BEE Com	20
8.1	Growth investment	20
8.2	Integrated Human Resource Development (HRD) Strategy	20
8.3	Access to Financial Services and Capital	21
8.4	Affirmative Procurement	22
8.5.	Enabling Framework	23
8.6	Empowerment framework for public sector restructuring	23
8.7	Rural development and access to land	23
8.8	Role of business organizations	24
9.	Conclusion	24

CHAPTER 4: BROAD BASED BLACK ECONOMIC EMPOWERMENT

1.	Introduction	26
2.	Apartheid	26
3.	Various definitions to Black Economic Empowerment	28
4.	Description	29
5.	Objectives of BBBEE	30
6.	Establishment of BEE Companies	31
6.1.	Black Company:	31
6.2	BEE Company:	32
6.3	A Black Women-Owned Enterprise	32
6.4	A Community or Broad-Based Enterprise:	32
6.5	A Co-operative or Collective Enterprise	32
7.	Codes of Good Practice	33
8.	Conclusion	33

CHAPTER 5 SECTOR CHARTER

1.	Introduction	34
2.	Objective of sector charters	34
3.	Different sector charters	36
4.	Conclusion	36

CHAPTER 6 CODES OF GOOD PRACTICE

1.	Introduction	38
2.	Phase 1	38
3.	Phase 2	40
4.	Conclusion	46

CHAPTER 7: STRUCTURE OF THE CODES OF GOOD PRACTICE

1.	Introduction	47
2.	Code 000: Statement 001: Fronting practices and other Misrepresentation of BBBEE Status;	47
3.	Code 000: Statement 002: Specific Verification Issues relating to complex structures	47
4.	Code 100: Statement 102: The Recognition of Ownership contributions arising from Investments by BEE Targeted Warehousing Funds,	47
5.	Code 100: Statement 103: The recognition of Ownership Contributions by Multinational Companies,	48
6.	Code 100: Statement 104: The recognition of Ownership Contributions made by Public Entities and the Organs of State	48

7.	Code 100: Statement 105: The recognition of Ownership Contributions made by Companies limited by Guarantee and Section 21 Companies.	48
8.	Code 300: Statement 300: Employment Equity	48
9.	Code 400: Statement 400: Skills Development	48
10.	Code 500: Statement 500: Preferential Procurement	36
11.	Code 600: Statement 600: Enterprise Development	50
12.	Code 700: Statement 700: Residual Element	51
13.	Code 1000: Statement 1000-1700: Qualifying Small Enterprise	51
14.	Conclusion	51

CHAPTER 8: APPLICATION THE OF CODES OF GOOD PRACTICE

1.	Introduction	53
2.	Example: Application of the Codes by a Decision-Maker	54
3.	BEE Procurement Recognition: Company X	56
4.	Enhanced BEE Procurement Recognition Levels:	56
5.	Resulting economic behaviour	57
6.	Comparative Reporting Effects of BEE Procurement Spend	57
7.	Conclusion	58

CHAPTER 9: MEASUREMENT OF BEE ACTIVITIES

1.	Introduction	60
2.	DTI-scorecard	62
3.	Determine ownership	64
4.	Application of the modified flow-through principle	65
5.	Selling shares or giving them away	68
6.	Learnerships and internships	
7.	The seven secrets of growth for economic development	70

8.	Enterprise development	71
9.	The seven secrets of growth for economic development	72
10	Conclusion	73

CHAPTER 10: CHARTER COUNCIL

1.	Introduction	75
2.	Support services and funding of council	76
3.	Industry charters	76
4.	Conclusion	78

CHAPTER 11: DRAFT LEGAL SERVICES CHARTER

1.	Introduction	79
2.	Governance and implementation of LSC Council	80
3.	Objectives of Council	81
4.	Powers and functions of council	83
5.	Persons qualified to serve on council	84
6.	Date of application of Charter	85
7.	Funding of council	85
8.	Achieving fundamental change in the racial and gender composition of the jury	85
9.	Enhance access to justice	85
10.	The attainment of the objectives of equality laws	87
11.	Empowerment of HDI's	88
12.	Indicators of empowerment	89
13.	Conclusion	96

CHAPTER 12: DURATION OF BBBEE

1.	Introduction	97
2.	Hypotheses related to BBBEE Transactions	100
3.	Study conducted in 2005	101

4.	Findings	102
5.	Conclusion	103

THE IMPORTANCE OF BLACK ECONOMIC EMPOWERMENT

1.	Introduction	104
2.	Challenges	104
3.	BEE as an Economic Driver	105
4.	Constraints	105
5.	Black entrepreneurs	106
6.	Conclusion	106

CHAPTER 14: RECOMMENDATIONS AND CONCLUSION

	CONCLUSION	107
1.	Summary	109
2.	Opsomming	109
3.	Keywords	111
4.	Sleutelwoorde	112
5.	Bibliography	113
5.1	Books and journals	114
5.2	Thesis	114
5.3	Magazines and newspaper reports	114
5.4	Internet	115
5.5	Table of statutes	121
5.6	Table of cases	121

ANNEXURE "B"

***DRAFT FOR
DISCUSSION ONLY***

***DRAFT LEGAL
SERVICES CHARTER***

AUGUST 2006

PREPARED BY THE DRAFTING TEAM OF THE STEERING COMMITTEE

***DRAFT
LEGAL SERVICES CHARTER***

***FOREWORD BY THE MINISTER OF JUSTICE AND CONSTITUTIONAL
DEVELOPMENT***

To be inserted later.

CHAPTER ONE

1. PREAMBLE

Recognising the injustices of the past, the accumulated disadvantages suffered by historically disadvantaged individuals, communities and social groups on the one hand, and the accumulated advantages by the historically advantaged on the other hand;

Whereas recognition of the inherent dignity and of equal and inalienable rights of all members of the human family is the foundation upon which civilised society pursues its quest for freedom, justice and equality;

Whereas the attainment of these rights has for so long been denied, impeded and frustrated for the majority of the people of South Africa by the policies of apartheid and racial segregation by successive Government;

Whereas significant progress has been made in restructuring and transforming our society and its institutions, systemic inequalities and unfair discrimination remain deeply embedded in social structures, practices and attitudes, undermining the aspirations of our constitutional democracy;

Whereas the Constitution enjoins government to promote the achievement of equality through legislation and other measures designed to protect or advance persons, or categories of persons, historically disadvantaged by unfair discrimination; and

Whereas the Constitution dictates that all constitutional obligations must be performed diligently and without delay;

Whereas the State has a duty and responsibility to promote and achieve equality, and where necessary or appropriate with the assistance of relevant constitutional institutions to develop codes of practice or other measures and implement programmes aimed at promoting equality, and provide advice, assistance and training on issues of equality;

Recognising that an independent and representative judiciary depends upon a strong, independent and representative legal services sector;

Whereas the Charter endeavours to facilitate a democratic society, united in its diversity dedicated to secure to all its citizens—

- *Justice, economic, social and political; and*
- *Equality, of status and opportunity;*

***NOW THEREFORE** the people of the Republic of South Africa, Government and the stakeholders in the legal services sector adopt this Charter to be a binding and guiding principle to eradicate the inequalities of the past perpetuated by the policies of apartheid and racial segregation.*

2. DEFINITIONS AND INTERPRETATION

In this Charter, unless the context indicates a contrary intention, the following words shall have the meaning ascribed to them:

*“**access to justice**” includes having the capacity and means to obtain and use affordable and responsive legal services in South Africa in a manner that is fair and equitable;*

*“**access to the legal profession**” means opportunity to qualify and practise in any field of law, including but not limited academia and the judiciary;*

*“**access to legal work**” means access to opportunity to sell one’s legal services such as legal advice, litigation services, legal drafting and legislative policy, and includes access to state legal briefs and other contracts;*

*“**access to legal services**” includes the provision of legal advice or services intended to benefit any individual, community, group or organisation which is disempowered financially, socially or by any other means;*

*“**BEE Act**” means the Broad-Based Black Economic Empowerment Act, 2003 (Act 53 of 2003);*

*“**black people**” is a generic term which includes Africans, Coloureds and Indians;*

*“**black person**” has a corresponding meaning with black people;*

*“**broad-based black economic empowerment**” means the economic empowerment of all black people including women, workers, youth, people with disabilities and people living in rural*

areas through diverse but integrated socio-economic strategies that include, but are not limited to—

- (a) increasing the number of black people that manage, own and control enterprises and productive assets;
- (b) facilitating ownership and management of enterprises and productive assets by communities, workers, cooperatives and other collective enterprises;
- (c) human resource and skills development;
- (d) achieving equitable representation in all occupational categories and levels in the workforce;
- (e) preferential procurement; and
- (f) investment in enterprises that are owned or managed by black people; (definition from BEE Act);

“Cabinet” means the Cabinet of the Republic of South Africa;

“Charter” means the Legal Services Charter;

“company” means an enterprise registered in terms of the Companies Act, 1973 (Act 61 of 1973), close corporations, trusts and any other such enterprise formed for business purposes, a legal entity registered in accordance with the laws of the Republic of South Africa for the purpose of conducting business;

“consumer” means any person who seeks or utilises any form of legal advice or service, and includes an individual, community, group or organisation which is disempowered financially, socially or by any other means;

“Constitution” means the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996);

“control” includes the authority and power to manage assets, the direction of business operations, the right or the ability to direct or otherwise control the majority of the votes attaching to the shareholders’ issued shares, the right or ability to appoint or remove directors holding a majority of voting rights at meetings of the board of directors and the right to control the management of the enterprise, and to participate in equitable sharing of the profits;

“direct ownership” means ownership of an equity interest together with control over voting rights attaching to that equity interest;

“discrimination” means discrimination as defined in the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act 4 of 2000);

“employment equity” has the meaning ascribed to it in the Employment Equity Act, 1998, (Act 55 of 1998);

“Equality Act” means to the *Promotion of Equality and Prevention of Unfair Discrimination Act, 2000*;

“enterprise development” means investment in, or development of or joint ventures with black owned or black empowered enterprises and SMMEs, with real economic benefit flowing to the recipient enterprise allowing it to be set up and run on a sustainable basis;

“equity” means the fair and rational distribution of an affordable package of quality legal services to the entire population of South Africa, ability to pay for such services and irrespective of their race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language or birth; and ‘equitable’ has a corresponding meaning;

“fronting” means any entity, mechanism or structure established in order to circumvent the BEE requirements as required under various policy instruments and this Charter;

“Historically Disadvantaged Individual (HDI)” means black people, women and people with disabilities;

“lawyer” means any person with a legal degree and who is engaged in a legal career and is a member of a legal services sector, an attorney, advocate, or legal practitioner;

“Legal Services Charter Council” means a Council that is broadly inclusive of stakeholders in the legal services that is charged with monitoring, evaluating and enforcing the implementation of the charter;

“law firm” means a company, organisation, business enterprise, concern, partnership or corporation in the practice of the law;

“legal services” means any form of legal advice, or drafting of documents, or representation of any person that requires the expertise of a person trained in the practice of law;

“legal practitioner” means a person engaged in the provision of legal services including a paralegal;

“Organised Legal Profession” means all Law Societies and Bar Councils;

“paralegal” means a person who has knowledge and understanding of the law, its procedures and its social context acquired through training, education, work experience and/or a national registered qualification in paralegal practice;

“paralegal services” means provision of primary legal services to the general public, especially the poor, marginalised, indigent individuals, groups or community.

“parties” mean parties to this Charter;

“pro bono” means the provision of legal services to poor, marginalized and indigent individuals, groups or community without a fee or expectation of compensation, in order to enhance access to justice for such people who cannot afford to pay for legal services;

“procurement” means procedures and expenditure, including capital expenditure, for the purpose of acquiring goods or services which, in the case of the public sector, are governed by legislation;

“public sector” means government departments, organs of state and institutions exercising a public power or performing a public function in terms of legislation;

“quality” in relation to legal services, means input of such a nature and applied in such a manner as to ensure optimum results within the available resources and the circumstances of each case, taking into account the constitutional rights of the consumer, including, but not limited to the rights to life, human dignity, freedom and security of the person, bodily and psychological integrity, freedom of religion, belief and opinion and privacy;

“skills development” means the process of enhancing individuals’ specialised capabilities in order to provide them with career advancement opportunities;

“State legal services” means legal services that are rendered within the state services;

“sustainability” means having a reasonable prospect of continued, successful existence in the present and the foreseeable future with regard to those critical success factors that define and affect the viability of a particular enterprise over time.

3. OBJECTIVES

To adopt a Charter which gives effect to the Constitution, the Equality Act and the BEE Act by facilitating empowerment of HDI’s through the transformation of the legal services sector, effecting access to justice to all the people of the Republic of South Africa and promoting economic, social and political justice. This includes the following:

- 3.1 Enabling the legal services sector and the provision of legal services broadly to transform in line with the constitutional vision of the achievement of equality.
- 3.2 Achieving fundamental change in the racial and gender composition of the judiciary.

- 3.3 *Transforming the legal services sector to be representative of the demography of the South African society and more accessible to all members of society..*
- 3.4 *Implementing measures to enhance access to justice which include promoting equitable access to legal services to all the people of South Africa, including the marginalized, poor and rural communities.*
- 3.5 *Improving access to the legal services sector which includes academic qualifications, apprenticeship opportunities, and professional qualifications by monitoring and evaluating the input, throughput and output of academic qualifications and apprenticeship of professional qualifications.*
- 3.6 *Providing a framework for building a common understanding, set benchmarks, design implementation mechanisms and develops support programmes for achieving equality in legal services.*
- 3.7 *Effectively and meaningfully promoting the equitable distribution of legal work with regard to race, gender and disability.*
- 3.8 *Transforming and standardising legal training and education, including continued legal training to develop and improve the skills base to ensure transparency and to eliminate barriers to equal opportunities.*
- 3.9 *Promoting and implementing skills development measures intended to empower legal professionals,, in particular HDIs, in fields of expertise where they previously did not have access.*
- 3.10 *Enhancing and promoting representivity in respect of ownership, management and control of legal practises or enterprises by black legal practitioners, including women, persons with disabilities and amongst rural communities.*
- 3.11 *Creating conditions conducive to ensuring that HDI legal service providers are able to start, manage and build sustainable practices or enterprises.*

- 3.12 *Ensuring that governance structures are transformed, inclusive and have balanced representation with regard to race, gender, and disability.*
- 3.13 *Supporting the attainment of the objectives of, inter alia, the Employment Equity Act, BEE Act and other equality and equity laws.*

4. SCOPE AND APPLICATION OF CHARTER

- 4.1 *This Charter shall apply to all persons engaged in the practice of law; the organised legal profession, all public and private institutions/bodies rendering legal services; and all private or public institutions/bodies and persons who consume legal services, including the State.*
- 4.2 *In the event of one or more charters being applicable to persons or companies envisaged in 4.1, the provisions of the Legal Services Charter shall take precedent.*

CHAPTER TWO

5. TRANSFORMATION OF LEGAL SERVICES SECTOR

5.1 OVERVIEW

The legal services sector occupies an important place in South Africa's democracy and the economy. However, the sector's ability to perform optimally is hampered by inherited, race, gender and disability distortions relating to access, participation and involvement in decision making. The charter seeks to address these distortions which are mainly characterised by systemic inequalities experienced primarily by black people, women and persons with disabilities, in all aspects of legal services, including access to quality services and participation in service provision and the regulatory framework

5.2 DISPARITIES IN LEGAL SERVICE PROVISION AND RELATED PROFESSIONAL AND ECONOMIC OPPORTUNITIES

5.2.1 *Access to and participation in virtually all aspects of legal services provision is skewed along race and gender lines and against persons with disabilities. This applies to:*

- *Enterprise and equity ownership;*
- *Composition of the management echelon;*
- *All employment opportunities;*
- *Levels of and access to skills development opportunities;*
- *Access to work, including legal briefs and other procurement opportunities;*
- *Access to finance and other enterprise development resources;*
- *Access to justice, including equitable access to quality legal services.*

5.2.2 *The issue of disparities in access to justice is discussed extensively in a devoted chapter. Disparities in professional and economic opportunities permeate virtually all aspects of the sector, including the following:*

- *Traditional Legal Practice(Work of attorneys and advocates);*
- *Academia(Teaching of Law and Legal Research);*
- *Legal Drafting;*
- *Legal Consulting;*
- *State and Corporate Lawyers;*
- *Legal publishing; and*
- *Paralegal work.*

5.2.3 *Except for para-legal work, the participation of black people, women and persons in the above and other areas of the provision of legal and related services is constrained by many barriers which are mostly traceable to the legacy of past injustices in the sector and other areas of life. The Charter needs to provide a framework for eliminating such barriers and fostering equal participation in all professional and economic opportunities in the sector. The diversification of participation would not only benefit the historically marginalised service providers but would contribute meaningfully to access to justice and global competitiveness.*

5.2.4 *Inequality in professional and economic opportunities is particularly acute with regard to access to and participation in the traditional legal profession (attorneys*

and advocates) , where the participation of black people, women and persons with disabilities is very limited compared to their representation in the national demography and university outputs. The key barriers to equal participation and related distortions in the profession are discussed in the following.

5.3 Access to legal profession

5.3.1 Access to the legal profession from the perspective of admission requirements in respect of the two professions. This refers to entry requirements to the Advocates and Attorneys professions.

5.3.2 Both professions are regulated by two separate pieces of legislation namely, the Admission of Advocates Act, 1964 (Act 74 of 1964), and the Attorneys Act, 1979 (Act 53 of 1979). In view of the fact that two separate regulatory regimes regulate the profession, their admission requirements differ.

5.4 Access to attorney's profession

5.4.1 Attorneys are admitted to practice law in terms of the Attorneys Act, 1979. No attorney is permitted to practise law without having been admitted as an attorney in the High Court of South Africa.

5.4.2 The attorney's profession has its own regulatory body, i.e. the Council of the Law Society of South Africa with its provincial divisions throughout the country. Some of the issues that pose challenges, include access to resources in the form of training opportunities and legal information.

*5.4.3 **Entry requirements:** A four year degree (LLB) and passing the Board's examination are required. Admission as an attorney on the basis of one of the following:*

- (a) *Two years articles of clerkship at any legal training institution or law firm and passing of the board examination;*
- (b) *one year articles of clerkship plus at least four months practical training course that has been approved by the Law Society concerned and the board examination;*
- (c) *one year community service at any institution as approved by the Law Society plus board examination; and*
- (d) *One year practical legal training at any public institution, including a state department plus board examination.*
- e) *Two year Candidate Attorney Learnership through SASSETA*

5.4.4 *The implementation of these entry requirements must take into account the socio-economic challenges of previously disadvantaged individuals. Currently, this is not the case. In fact many HDIs are unable to gain entry due to inability to secure the requisite apprenticeships. The entry of HDIs is also severely hampered by the entry examinations.*

5.5 Access to advocate's profession

5.5.1 *The Advocates Act, 1964, requires legal qualifications (i.e. currently the 4 year LLB) for eligibility and to apply to the High Court for admission to the Roll of Advocates.*

5.5.2 *Once admission as an advocate has been obtained, there are options available to practise in this profession. The first option is to register with an association accredited by the Council to practise as an advocate. The second requirement is to find a master for pupillage for further legal training. A third option is to start an independent practice after admission.*

5.5.3 *The period for pupillage is a period not exceeding twelve months.*

5.6 CHALLENGES OF ENTRY TO LEGAL PROFESSION

Specific barriers to entering the profession in this regard include the following:

- (a) *Ability to find articles and pupillage particularly by black people and women;*

- (b) *promotion of quality of the apprenticeship which will increase the pool of black candidates especially women in relevant law firms;*
- (c) *competitive and market related salary schemes;*
- (d) *high failure rate amongst black candidates;*
- (e) *unaffordable fees for practical legal training; at institutions; and*
- (f) *lengthy pupillage period for advocates compounded by new advocates' inability to find work.*

5.7 Towards a unified legal profession

5.7.1 In view of the current disparate admission requirements affecting access to the legal profession, and governance of the legal profession, steps need to be identified to address these issues with a view to creating a unified legal profession. These steps should include, inter alia, addressing the following:

- (a) *Standards of education and training;*
- (b) *qualification criterion for admission to the profession;*
- (c) *licence to practice;*
- (d) *discipline in respect of improper conduct; and*
- (e) *public indemnity in respect of the mismanagement of funds.*

5.8 A SINGLE REGULATORY BODY

5.8.1 Overview

The representative bodies are committed to reform of the regulatory regime of the profession. Legal practitioners agree on a single regulatory body for legal practitioners. The nature and structure of the regulatory body and its relationship with the sub-sectors of the profession will be informed by the Legal Practice Bill.

5.8.2 Entry requirements to legal profession

- (a) *A four year LLB as minimum degree as a single qualification for admission to practice law.*
- (b) *All graduates who want to be admitted as legal practitioners should be required to undergo a minimum of one year practical vocational training at any recognized institution, during which time they will be known as legal interns.*
- (c) *At least six months of the period of internship should be devoted to performing one or more of the types of community service prescribed.*
- (d) *The remainder of the six months period of internship legal interns may undergo one of the types of vocational training prescribed, or attend an accredited practical training course offered by an academic institution or a professional organisation, or continue to perform community service, or practice law in an organization engaging in the provision of legal services and under the supervision of an admitted attorney with more than 5 years post admission experience.*

5.8.3 Structure for regulation of legal practice

5.8.3.1A National Regulatory Body should be established by legislation. The members thereof should be appointed by the Minister for Justice, after consultation with the Chief Justice and the President of the Supreme Court of Appeal, comprising persons nominated by the professional organisations, representative of legal and paralegal practitioners and persons who represent the public interest, which will:

5.8.3.2 The Council shall, among others, have the following powers and functions:

- (a) *Prescribe qualifications for admission to legal and paralegal practice, subject to national legislation.*
- (b) *Maintain a roll of registered legal and paralegal practitioners.*
- (c) *Prescribe and levy annual fees for licence to practice.*
- (d) *Deal with complaints of malpractice through regional complaints tribunals and the office of a national ombudsman.*

- (e) *Collect interest on trust accounts for transmission to the Fidelity Fund and issue Fidelity Fund certificates.*

5.8.3.3 A South African Legal Practice Fidelity Fund be establish with the sole purpose to compensate members of the public in respect of monies misappropriated by legal and paralegal practitioners and to promote the achievement of high professional standards of legal and paralegal practice.

CHAPTER THREE

6. CREATING AN AFFIRMING ENVIRONMENT

Overview

Equality within the legal services sector envisages a sector which reflects the diversity of our society and in which all persons can participate fully and freely. Persons seeking legal services should not be prevented from doing so because of historical disadvantage or discriminatory treatment. This entails the removal of all barriers to access and participation, as well as the creation of conditions that enable legal practitioners to develop to their full human potential, and enable those using legal services to receive affordable and quality services.

The eradication of inequality based on race, gender and disability is a particular concern of this Charter. This chapter sets out various mechanisms for achieving this and for affirming the rich diversity of our society.

6.1 AFFIRMING DIVERSITY

6.1.1 All people- white, black, female, male, people with disability, gay, heterosexual- view the world through the prism of their own experience. Legal practitioners are susceptible to every prejudice imaginable: racism, sexism, homophobia, hostility based on class and age.

6.1.2 The legal system needs to give people a vital role as stakeholders. The ultimate objective is to maintain public trust and confidence in the profession as well as in the legal system.

6.1.3 Government, together with the legal services sector, should embark on a training programme and culture and diversity awareness programme for the role players in the legal services sector. Efforts should be made to ensure that every legal services provider, including the judiciary, is exposed to ongoing social context awareness education.

6.2 NON-DISCRIMINATION

6.2.1 *One of the legacies of apartheid that shadows the justice system is that the judiciary and the legal profession remain essentially white and male. The legacy of disrespect for black practitioners, black accused persons and consumers of legal services continues to bedevil the courts. For black women the situation is often exacerbated by the intersection of race and gender bias.*

6.2.2 *Government, the legal profession as well as the public must advocate and insist upon members of the judiciary and legal practitioners to embrace the values of non-discrimination in the Constitution and treat everyone with respect, fairness, dignity, humanity and courtesy.*

6.3 REASONABLE ACCOMMODATION

6.3.1 *In the legal profession there are legal practitioners with disabilities. The failure to provide reasonable accommodation makes it difficult for affected persons to function to their full potential, e.g. visually impaired lawyers. The legal profession and Government need to cater for the needs of all people with disability.*

6.3.2 *On this score, Government should engage with the legal profession and the organisations representing people with disabilities on what measures should be put in place to facilitate the entry and effective functioning in the legal profession for those living with disabilities.*

CHAPTER 4

7. EMPOWERMENT OF HISTORICALLY DISADVANTAGED INDIVIDUALS

ECONOMIC EMPOWERMENT

Indicators of empowerment:

The targets specified in this section are in respect of broad-based initiatives targeting HDI's. Save in respect of contributions specifically listed hereinafter in respect of each element, compliance is to be measured using the methodology and element of scorecards for each of the elements as specified in the Codes of Good Practice issued under section 9(1) of the Broad-Based Black Economic Empowerment Act 53 of 2003.

Legal practitioners will ensure that in seeking to comply with HDI's targets set out herein, they will seek to comply with specific targets stated in the Codes for BEE initiatives targeting black people. This implies that there are two targets:

- (a) A lower target as per the Codes specifically targeting black people; and*
- (b) A higher target as per the Charter which is inclusive of both black people and other HDI's.*

Overview

The ownership (public or private), enterprise development and preferential procurement are the main competitive fields which will be altered by the empowerment of HDI's in the legal service sector. The legal services is but one of the major components of the South African society fabric that has lagged behind in terms of transformation and embracing the values underlying the Constitution in as far as the legal profession and access to justice is concerned. The successful implementation of the empowerment of HDI's in this area depends on a government driven empowerment process and a coherent regulatory environment, strategic intent of the profession and that of the broader community as well as the competitive dynamics of the industry and an enabling business culture.

Indicators of empowerment:

7.1 Ownership and Control

Guiding principle:

We commit ourselves to the increase in the number of black people, women and people with disability that manage, own and control productive assets, across the entire spectrum of legal services. We also commit to the design of appropriate funding mechanisms to facilitate the process. This principle is linked to the long-term strategy of developing a body of highly developed, experienced and competent black legal practitioners in all areas of legal practice to ensure compliance with the principles and spirit of the Constitution and Equality Act. With appropriate adjustments, legal academia and other sites of legal expertise that lie outside the organised legal profession also commit to speedier increase of black people, women and people with disability to strategic leadership roles.

Legal Profession's undertaking:

The Organised Legal Profession undertakes to broaden beneficial participation and the ownership base of their companies/partnerships/associations to ensure that at least 35% of their services and ownership/partnership/association is black, of which at least 50% must be women, and at least 4% of people living with disability, within the next five years.

7.2. Management

Guiding principle:

The guiding principle is to redress inequalities with regard to race, gender, disability and culture in the legal service sector and to ensure that the people who manage and lead in this field, broadly reflect the diverse profile of the South African population and that they are appropriately empowered and skilled to manage. The objective of this element is to

increase the participation of black people and black women at board and senior management levels in the legal service industry that encompasses both government and private sector institutions and similar governing structures. Government and the private sector will need to commit to meet stringent targets and time lines in order to achieve this mandate. The legal services will be transparent, eliminate unscrupulous business practices including fronting and fraud, and adopt best-practice corporate governance policies.

Government's undertaking:

The Government undertakes to accelerate the appointment of—

- to accelerate the appointment of black people in boards of government institutions; and*
- to accelerate the appointment of black women in boards and executive management positions.*
- to accelerate the appointment of people with disabilities in boards and executive management positions*

Legal Profession's undertaking:

The legal profession undertakes to—

- promote the participation by black people in board positions of organisations providing legal services;*
- promote the participation by black people, in particular black women, at all levels of management;*

- *promote the participation of black women in board and executive management positions;*
- *Promote the participation of black people and women, especially black women, in management and leadership structures in Faculties and Schools of Law; and*
- *promote black ownership accompanied by an equal level of management control. However, the legal profession will recruit onto their executive boards and similar governing structures black directors (who do not necessarily own equity) to reach a target of at least 40% within 5 years. Fifty percent (50%) of this target for black representation on executive boards and similar governing structures should be earmarked for women and 4% for all people living with disability.*

7.3 Employment Equity

Guiding principle:

Employment equity and skills development targets should be achieved within the ambit of the Equality Act, Employment Equity and Skills Development Acts.

The principle is to increase the participation of black people in top management, senior management and professional positions to create a workforce that truly represents the racial, ethnic and gender diversity of our country. This will require that all stakeholders create a supportive culture within their organisations to be an 'Employer of Choice', attract new talent, facilitate the development of existing employees, and accelerate their progress into key positions within the industry.

Government's commitment:

Government undertakes to abide by the targets set by Cabinet and as encapsulated in the Employment Equity Plans.

Legal Profession's commitment:

The legal profession commits to abide by the targets as encapsulated in the Employment Equity Plans where such plans are required in terms of the Employment Equity Act.

Legal academia's commitment:

The legal academia commits to abide by the targets as encapsulated in the Employment Equity Plans where such plans are required in terms of the Employment Equity Act.

7.4 Skills development**Guiding principle:**

The vision is to substantially increase the economic value adding (or productivity) of every employee in the legal services through best practice human resource and skills development policies and to increase the scale of initiatives aimed at developing black professionals and experts. In particular, the development of expertise in the areas of corporate and commercial law and transactions; legal drafting; legal research and teaching; and trial advocacy will receive prominence in the development of skills. The transformation demands of the legal services and rapid changes in the global environment require that more resources should be mobilised for expanding the existing human capital pool through investing in people, employment equity, skills development and institutional transformation.

Government's undertaking

The Government undertakes to—

- *invest at least 5% of payroll on skills development initiatives;*

- *design and fund a coordinated framework and programme for career awareness and training that leverages off and adds value to existing initiatives;*
- *publicise and coordinate information regarding scholarships, training resources and careers in the public services (other stakeholders will be encouraged to contribute towards the cost and design of this initiative);*
- *to develop existing structures such as the State Attorney's Offices, in conjunction with the Justice College under the DOJ&CD and further to develop intra-industry exchange and internship programmes;*
- *to utilise all legislative and other measures available to it to influence the attainment of constitutional objectives.*

Legal Profession's undertaking:

The legal profession undertakes to—

- *invest at least 5% of payroll on skills development initiatives which target is inclusive of all associated costs and the current 1% skills development levy;*
- *identify within and outside their companies a talent pool of black professional assistants and candidate attorneys for accelerated development through--*
 - (i) *international assignments that provide high-quality legal and managerial exposure, where appropriate;*
 - (ii) *mentorship programmes;*
 - (iii) *learnerships;*
 - (iv) *intra-industry exchange and internship programmes; and*
 - (v) *higher education and training.*

The Legal Academia undertakes to -

To promote the development of skills of black people and women, especially black women through –

- (i) enhancement of research, teaching and writing skills;*
- (ii) mentorship programmes;*
- (iii) academic leadership and management skills*

7.5. Preferential procurement

Guiding principle:

The guiding principle is to accelerate procurement from black practitioners and black-owned and empowered enterprises operating within the legal services sector. Public and private institutions will implement a targeted procurement strategy to enhance equality. This will create opportunities for the establishment of new enterprises and the development of existing ones that will grow the industry, create jobs and sustain the growing body of highly experienced and developed black practitioners. The State has a great deal of leverage in its farming of contracts and the licence to operate, especially in PPP's. Public Enterprise Minister boasted to Parliament in 2003 that almost a quarter of the discretionary spending of Denel, Transnet and Eskom went to broad-based black economic empowerment.

Government's undertaking:

- Identify, prioritise and target black lawyers, legal practitioners and companies in awarding tenders, briefs and contracts within the public sector;*
- Procure the services of black lawyers and legal practitioners in the process of briefing advocates, and procuring the services of attorneys;*

- *Undertakes to allocate 50% of its briefs and other legal work requiring private practitioners to black lawyers and legal practitioners by 2007; and*
- *This target shall apply to all organs of State including State owned enterprises, and relevant provincial and local government structures.*

Legal Profession's undertaking:

- *To proactively identify and implement targeted procurement strategies and policies to realise the objectives of the Legal Services Charter;*
- *Report periodically on all procurement spent; and*
- *Undertakes to brief at least 40% black practitioners by 2007 and 60% by 2008.*

7.6 *Enterprise Development*

Guiding principle:

Enterprise development refers to the establishment, support and integration of black empowered and women empowered firms in mainstream business processes. The principal objective is to help set up, nurture and grow viable practices, partnerships, associations and businesses that are majority-owned by black persons while developing existing companies. All stakeholders undertake to seek viable opportunities to partner with firms in rural areas.

Government's undertaking:

The Government undertakes to—

- *utilise resources generated by State Owned Enterprises(SOEs) to create a fund to finance the legal services infrastructure and services in rural and township communities; and*
- *explore the options for the setting up of such fund, and to place the matter for discussion at the first meeting of the Council.*

Legal services sector's commitment:

- *Commits to partner with or promote collaborative relationships with rural and township practices, including paralegals, to develop the capacity of rural and township practices thereby prioritising black and women owned practices; and*
- *Strengthen and accelerate the development of operational and financial capacity of black entrepreneurs.*

7.7. Services Specific Targets

Guiding principle:

In view of the inaccessibility to legal services experienced by township and rural communities, our principal objective is to bridge the gap to access to legal services by giving of our time freely, and without reward in the pursuit of community service. The form of community service will not be limited to legal advice or representation, but may take any form where legal skills are required.

Government's undertaking:

Government undertakes to make available its legal aid services to areas where there is a need for delivery of legal services. Government also undertakes to conduct regular campaigns for the popularisation of the Constitution and promote legal literacy amongst the rural and township population.

Legal Profession's undertaking:

The legal profession undertakes to make available its human resources to townships and rural areas to, among others, conduct legal education programs, conduct programs to popularise the Constitution; and lend its management expertise to develop township and rural practices. This will enhance the image of the legal profession as being accessible to all people.

The legal profession undertakes to devote in at least 5% of its total billing hours per month on pro bono work.

The Legal Academia undertakes to -

The Faculties and Schools of Law undertake to –

- (i) Provide legal education in communities through Street Law and other outreach programmes;*
- (ii) Provide paralegal training, where appropriate;*
- (iii) Provide legal advice through law clinics; and*
- (iv) Work with government in realising community legal services that also provide context-learning as was decided at the all-inclusive National Forum in 1998.*

8. ACCESS TO LEGAL WORK INCLUDING STATE CONTRACTS

The Role of State Attorney's Office

8.1 CHALLENGES

- 8.1.1** *Access to legal work is a problem throughout the legal services. Black practitioners are forced to close down their firms because they are unable to get access to legal work. The Office of the State Attorney, government departments, SOEs and other big*

corporations are partly to blame by not providing adequate support consistently to black practitioners.

81.2 Black firms are crying foul in that the State distributes the bulk of its work to the traditional white firms. This contributes to their demise. The Office of the State Attorney is also seen as a contributor in this regard. Its briefing patterns must be seriously reviewed and strong interventions made. Cabinet has made a policy decision to address disparities in legal briefings

8.1.3. Government is one of the biggest consumers of legal services. A high volume of work is outsourced to private practitioners rather than the State Attorney conducting the work themselves. The Office of the State Attorney and all levels of government, including municipalities, have been accused of outsourcing work to mostly white legal practitioners. Further, there is a perception that black practitioners are unable to perform specialised legal work, which is also outsourced to white legal practitioners. Black legal practitioners are seriously disadvantaged.

8.1.4 In some instances, this creates unnecessary tensions amongst practitioners. Although it is argued that the Office of the State Attorney does not have the necessary capacity and competence to deal with highly specialised work, it bolsters the perceptions that black legal practitioners lack skills and experience and that only white firms have the competencies to deal with specialised work.

CHAPTER FIVE

9. THE ROLE OF LEGAL SERVICES SECTOR IN PROMOTION OF EQUALITY IN JUDICIARY

9.1 Overview

9.1.1 *Recognising the pivotal role that the legal services sector plays in judicial appointments, its influence on the culture and values of the judiciary, and in the development of the skills pool from which the judiciary is drawn, the legal services sector is well-placed to contribute meaningfully and ensuring the promotion and achievement of equality in the judiciary. The legal services sector also plays a central role in ensuring the independence of the judiciary.*

9.1.2 *In order to discharge the above responsibility, the legal services sector needs to be strong, independent and representative.*

9.2 UNDERTAKINGS BY LEGAL SERVICES SECTOR

9.2.1 Judicial appointments and broadening the pool

9.2.1.1 *The legal services sector commits itself to engage in dialogue relating to the criteria and processes for appointing judges, acting judges and lower court judicial officers, with the view to reviewing and eliminating any barriers which undermine the attainment of equality particularly on the grounds of race and gender.*

9.2.1.2 *The legal services sector commits itself to the development of innovative measures to broaden the pool of candidates who are eligible for judicial appointments, particularly with a view to addressing race and gender imbalances. Internal processes that promote exposure to the global environment in terms of exchange programmes to draw on international experiences will be pursued vigorously.*

9.2.1.3 *The legal services sector commits itself to engaging with the Government and other stakeholders to consolidate the unification of the judiciary. The legal services sector supports the standardisation of skills at all levels of the judiciary and the acceleration of the appointment of members of the lower judiciary to the higher courts.*

9.2.2. Judicial Education

9.2.2.1 *The legal services sector commits itself to strengthen its involvement in judicial education and efforts aimed at enhancing the effectiveness of programmes for prospective judicial officers and continuing professional development for members of the judiciary and other legal services sectorals in the judicial system.*

9.2.3 Culture and Values

9.2.3.1 *The legal services sector commits itself to the process of continuous evaluation of the alignment between the values enshrined in the Constitution and those that prevail in the judicial system and to implement ongoing measures such as education, and to promote and maintain value alignment particularly focusing on matters of non-discrimination.*

9.2.3.2 *The legal services sector, in recognition of the current patriarchal and Eurocentric values that prevail in the legal system, commits itself to the process of dialogue on African perspectives on justice with a view to ensuring a better alignment between the experiences of ordinary South Africans and the judicial system.*

9.2.3.3 *The legal services sector commits itself to efforts aimed at mainstreaming gender in all policy processes and educational measures relating to the transformation of the transformation of the judicial system.*

9.2.4. Alternative Dispute Resolutions (ADR)

9.2.4.1 *The legal services sector commits itself to engage with Government and other relevant stakeholders in a policy process that seeks to establish a uniform framework for*

regulating ADR processes and integrating appropriate aspects in the judicial system. Such processes should ensure that ADR is guided by the principles, and operates on the basis of equality, which includes non-sexism and non-racism.

9.2.5 Complaints Mechanism

9.2.5.1 The legal services sector commits itself to engage with Government and other relevant stakeholders in a policy process that aims to establish a framework for a complaints mechanism for the judiciary.

9.2.5.2 The legal services sector commits itself to support the implementation of the recommendations arising out of the policy process and will devise an integrated system for monitoring and evaluation to promote effectiveness of the complaints mechanism and to ensure that judicial independence is maintained.

CHAPTER SIX

10. ACCESS TO JUSTICE

- 10.1 *Affordable and equitable access to justice is an essential aspect of the rule of law and the enjoyment of human rights. Section 34 of the Constitution guarantees everyone ‘the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or ... tribunal’. Section 9 provides that everyone has the right to ‘equal protection and benefit of the law’ and may not be subject to unfair discrimination. Access to justice is a cornerstone of this Charter both in terms of the equal ability of persons to access and use legal services, including courts, and in terms of their equal treatment within these services and institutions.*
- 10.2 *The systemic, social and economic inequality that characterises South African society has meant that access to justice is skewed, particularly on the basis of race, gender and disability. Socio-economic status is also a major obstacle to access to justice for the poor. In so far as the poor constitute the majority of people in South Africa their ability to access legal services is critical to meeting the constitutional standards of equality and access to justice.*
- 10.3 *The State has a constitutional, moral and social responsibility for ensuring the realisation of the right of access to justice and the right of every citizen to be treated equally before the law. The DOJ&CD, in particular, has a constitutional responsibility to ensure that the regulation and delivery of legal services enhances access to justice for all.*

- 10.4 *The constitutional and other State institutions have a responsibility of ensuring that the delivery of legal services is in the interest of the public, advances human rights and contributes towards social upliftment of indigent communities.*
- 10.5 *The legal profession and other providers of legal services have a constitutional obligation to provide legal services in a non-discriminatory manner that respects the rights of clients and users. In addition, the legal profession has a moral and ethical duty to assist in providing legal services to the poor and marginalised.*
- 10.6 *The ability to access legal services and courts is dependent upon affordability, knowledge of the different services and information about them, physical access and location, as well as the nature of the issue (e.g. civil or criminal), the range of services that are available, the number and distribution of legal practitioners and the responses of the providers of the services to those seeking access.*
- 10.7 *Persons who access legal services are not always provided a quality service and may be subject to discriminatory treatment by legal practitioners and other service providers. Disabled persons experience particular problems within the legal system. When discriminatory treatment is experienced, there are insufficient avenues for redress.*
- 10.8 *The Legal Aid Board plays a critical role in ensuring access to justice by providing legal services to those who cannot afford legal services. However, the services are not yet available to everyone who requires such services and the responsiveness of the services needs continuous improvement.*
- 10.9 *The Charter seeks to address the following factors that undermine and prevent access to legal services, in particular for historically disadvantaged communities.*
- (a) The high cost of legal services;*
 - (b) the legal profession's lack of representivity;*
 - (c) the uneven geographical distribution of lawyers (they are almost non-existent in poor, rural and township communities);*
 - (d) the lack of recognition of the role played by paralegal practitioners;*
 - (e) lack of information about the availability of legal services;*
 - (f) the intimidating image lawyers have;*

- (g) *limited small claims court services;*
- (h) *the inadequacy of legal insurance schemes;*
- (i) *the limited effectiveness of the state legal aid scheme;*
- (j) *the failure on the part of many lawyers to provide any community services; and*
- (k) *the availability and responsiveness of services by the Legal Aid Board.*

10.9 *This Charter also addresses the following factors to enhance the quality of legal services and improve the protection of the public from inferior services and unethical conduct*

- (a) *the provision of professional development for legal service providers to ensure that they deliver quality services to all;*
- (b) *the eradication of discriminatory treatment; and*
- (c) *the effective regulation of legal services to ensure, in particular, that public complaints about services of legal practitioners are dealt with effectively.*

11. **Now therefore**, *in recognition of the above, the legal profession, government and the legal services sector, agrees that access to legal services by the public should be based on the norms and standards that underpin our constitutional democracy and pledges to respect and promote the following rights of persons seeking access to legal services:*

- (a) *the right to be treated with dignity and respect;*
- (b) *the right to competent and affordable legal representation;*
- (c) *the right to non-discriminatory treatment by providers of legal services;*
- (d) *the right to be informed of all matters related to the adjudication of their legal disputes;*
- (e) *the right of access to a legal practitioner of their choice;*
- (f) *the right to confidence and faith in the legal profession, including that legal matters are dealt with in utmost good faith by legal practitioners;*
- (h) *the right to have any dispute with a legal practitioner dealt with absolute impartiality by appropriate regulatory bodies;*
- (i) *the right of access to an adequate system of State funded legal services; and*
- (j) *the right of access to information on the availability of legal services.*

12 ACCESS TO UNIVERSAL AND AFFORDABLE LEGAL SERVICES

12.1 CHALLENGES

- 12.1.1 *There is generally a shortage in numbers and distribution of legal practitioners in the country. This particularly affects the provision of legal services in rural and historically black communities. Where these communities are served by small practices, the communities benefit from the reasonable fees that are charged. However this positive aspect is affected when smaller practices close down or are subsumed by bigger firms. This is primarily as a result of small practices not being able to access legal work.*
- 12.1.2 *Legal services provided by the state, including state justice centres, remain unevenly spread across the country. The in forma pauperis system, envisaged in Rule 40 of the Uniform Rules of Court to provide legal representation for the indigent, does not appear to be used.*
- 12.1.3 *The pro bono system enables the legal profession to provide legal services to the poor. There are associations that are in the process of developing such initiatives. However, this is in its infancy in many instances and is often voluntary meaning that the full reach of pro bono work has not been achieved.*
- 12.1.4 *The provision of legal services to the public by financial institutions or insurance companies is not regulated, and there are no mechanisms in place to address the nature and extent of the legal services offered to the public.*
- 12.1.5 *The majority of South Africans cannot afford to pay for legal services, and many cannot afford to pay the level of fees charged.*
- 12.1.6 *Legal Services providers tend to prioritise certain kinds of cases, and legal aid services prioritise criminal over civil cases, meaning that it is more difficult to access services in civil cases.*

12.1.7 *Paralegal practitioners, who play a significant role in expanding access to justice, are insufficiently recognised and regulated. They are also concentrated in metropolitan centres.*

12.1.8 *Disabled persons experience particular problems of access.*

12.2 UNDERTAKINGS BY STAKEHOLDERS

The Government, legal profession and other stakeholders, undertake to

12.2.1 *Consider the development of a programme of community service, in-service training or internship before admissions to the legal profession. This will assist in effecting access to legal services for the rural and other marginalised communities while promoting equal access to the profession.*

12.2.2 *Create legal services centres in rural areas and for the majority of people in South Africa who are poor.*

12.2.2.1 *Expand the reach paralegal services to rural, peri-urban and township areas to provide primary care legal services.*

12.2.3 *Develop and enhance the pro bono work system. A further system of incentives for legal practitioners who offer legal services to the rural and township communities will be developed so that legal practitioners are encouraged to do so frequently. This may be capped at certain hours of work per month or year for all legal practitioners.*

12.2.4 *Investigate the in forma pauperis system to develop a workable implementation plan, or a workable alternative.*

12.2.6 *Investigate the adequacy of legal insurance, as well as regulate and expand legal insurance in a manner that promotes equality of access to legal services and in particular addresses the need for effective distribution of services to rural areas, townships and other disadvantaged communities.*

- 12.2.7 *Develop and implement a mechanism similar to the mzanzi initiative to ensure comprehensive access to legal services across the country and for all economic classes.*
- 12.2.8 *Investigate the possibility of a comprehensive referral system for persons seeking legal services.*
- 12.2.9 *Investigate the affordability of services, including a review of the disparities and affordability of legal fees and implement measures aimed at regulating the fee structure to enhance affordability of legal services.*
- 12.2.10 *Consider ways on ensuring universal access to services, including civil cases.*
- 12.2.11 *Recognise paralegal practitioners and regulate their role, qualifications and services in legislation.*
- 12.2.12 *Address the needs of disabled people in accessing legal services.*

12.3 UNDERTAKINGS BY THE LEGAL AID BOARD

The Legal Aid Board and relevant stakeholders undertake to:

- 12.3.1 *Review the judicare system as a primary method of delivery of legal aid services;*
- 12.3.2 *Consolidate the delivery of legal services by salaried employees in legal aid clinics, advice offices and defender offices and strengthen the quality of services;*
- 12.3.3 *Enhance the capacity of Justice Centres to enable them to deliver quality legal services particularly to the poor, rural and township communities.*
- 12.3.4 *Develop policies to bolster co-operative agreements with non-governmental organisations capable of delivering legal services.*

123.5 *Assist legal aid centres in promoting access to the profession, including specialized work for historically disadvantaged persons.*

13. ACCESS TO QUALITY LEGAL SERVICES

13.1 CHALLENGES

13.1.1 *A critical component of access to justice is ensuring that every person or community has access to quality and non discriminatory legal services. Most poor people only have access to paralegals or poorly resourced small legal firms. This compromises the quality of legal services for these groups.*

13.1.2 *Persons accessing legal services may experience discriminatory treatment within those services. This is a particular problem for disabled people.*

13.1.3 *Existing avenues for redress are limited, difficult to access and lengthy. As a result, the public finds it difficult to achieve resolution for complaints of inferior services, or of discriminatory or unethical conduct.*

13.2 UNDERTAKINGS BY LEGAL PROFESSION

The legal profession and other providers of legal services hereby undertake to improve the quality of legal services by:

13.2.1 *Conducting continuous and sustained training programmes on current legal matters on behalf of legal practitioners including paralegals.*

13.2.2 *Encouraging legal academics and experienced practitioners to provide lessons on particular issues for skill enhancement.*

13.2.3 *The implementation of benchmarked quality assurance programmes that include a quality monitoring system and the measurement of the quality of legal services.*

13.2.4 *Encouraging joint programmes and sharing of resources by well-established law firms.*

The legal profession and other providers of legal services hereby undertake to address discriminatory treatment by legal providers by:

13.2.5 *Ensuring that all levels of training of legal practitioners incorporate social context awareness, gender mainstreaming and human rights.*

13.2.6 *Paying particular attention to the different needs of disabled persons using legal services*

The legal profession and other providers of legal services hereby undertake to improve the regulation of legal services by :

13.2.7 *Developing common ethical standards for all practitioners, including paralegals;*

13.2.8 *Developing ethical standards for the provision of legal insurance services;*

13.2.9 *Developing common disciplinary mechanisms in governance structures;*

13.2.10 *Establishing an affective complaints management system to handle complaints by users of legal services;*

13.2.11 *Use such information to continually improve on the delivery of quality legal services.*

CHAPTER SEVEN

15 GOVERNANCE AND IMPLEMENTATION OF CHARTER

15.1 Overview

The governance mechanisms of the legal profession can play an important role in the in the promotion of equality and improving access to quality legal services. A strong

independent and unified legal profession is strategically positioned to lead the legal services sector in overcoming its challenges and further protect the interest of the public in pursuit of the objectives of the Charter.

15.2. Establishment and Composition of Council

15.2.1 A Legal Services Charter Council should be established as a body that is broadly inclusive of stakeholders in the legal services and is charged with monitoring, evaluating and enforcing the implementation of the Charter.

15.2.2 The Council shall consist, among others, of the following members appointed by the Minister in consultation with the subsections undermentioned in the sector:

- (a) One member each from the sub-sector, which include the Government, legal components of State Owned Enterprises, the Organised Legal Profession and legal practitioners practicing outside the Organised Legal Profession (Prosecutors, State Law Advisors, the Judiciary, Legal Academics, Paralegals, Arbitrators and Insolvency Practitioners).*
- (b) Three (3) members, each appointed from the Departments of Finance and Trade and Industry and any other relevant Department as the Minister may deem fit.*
- (c) Three (3) members representing civil society.*
- (d) Other relevant interest groups participating in the Legal Services regard being had to gender, disability and rural communities as decided by the Council.*
- (e) The Minister, on the advice of the Council, may appoint any such person as he or she may deem necessary, for the effective execution of its responsibilities.*

15.2.3 Participants listed in paragraph 15.2.2, must be appointed to Council by their respective constituencies and must satisfy the principle of representivity and inclusiveness. More specifically, care must be taken to ensure gender balanced representation.

15.2.4 The Council shall be supported by a secretariat appointed in terms of the Public Services Act, 1994.

15.3 GOVERNING PRINCIPLES

The Council shall be guided by the following basic principles:

- (a) Equality.*
- (b) Independence.*
- (c) Transparency.*
- (d) Fairness.*
- (e) Good Corporate Governance.*
- (f) Consultation and Inclusivity.*
- (g) Equitable Socio-economic Transformation.*
- (h) Dignity*
- (i) Non-racism*
- (j) Non-sexism*
- (k) Transformative and Inclusive Mindsets*

15.4 POWERS AND FUNCTIONS OF COUNCIL

The powers and functions of the Council include—

- (a) provision of guidance on matters affecting broad-based black economic empowerment, equality and the constitution in the legal services;*
- (b) compilation of reports on the status of broad-based black economic empowerment , equality and the constitution in the legal services;*
- (c) sharing of information with approved accreditation agencies relevant to broad-based black economic empowerment , equality and the constitution in the legal services;*
- (d) as and when, in its opinion, the circumstances so require, appoint a committee of experts, with a view to assisting the Council in the exercise and performance of its powers, functions and duties;*
- (e) engaging and advising relevant regulatory entities in the broader legal services sector on the Charter;*
- (f) developing mechanisms and strategies to monitor compliance with the Charter and related matters;*
- (g) developing a strategy for consultation with provincial and local stakeholders;*

- (h) *developing guidelines for assisting practitioners to provide pro bono legal services in rural and other areas;*
- (i) *developing a practical manual, with examples, as well as implementing an interactive portal to communicate the basic methods of applying the broad-based black economic empowerment scorecard;*
- (j) *conducting or commissioning research for the purposes of ensuring the effective implementation of the Charter;*
- (k) *reporting to Government and the Broad-based Black Economic Empowerment Advisory Council on the implementation of the Charter;*
- (l) *receiving progress reports from relevant institutions within the sector on the implementation of the Charter; and*
- (m) *creating a fund financed by the profession to facilitate an affirming environment for persons with extraordinary needs.*
- (n) *access to all relevant and necessary information must be furnished*
- (o) *After consultation with subsectors as mentioned in paragraph 15.2.2, development of verification mechanisms and or tools for compliance.*

16. ANNUAL REPORTS

16.1 *The Council must prepare and submit annual reports to the Minister for Justice and Constitutional Development, the Department of Trade and Industry and the Broad-Based Black Economic Empowerment Advisory Council on--*

- (a) *baseline indicators for all the different elements of broad-based black economic empowerment;*
- (b) *aggregate scores of all indicators of the broad-based black economic empowerment scorecard for all enterprises under its jurisdiction;*
- (c) *initiatives undertaken by components within the legal services; and*
- (d) *other relevant information which would be useful in assessing the state of broad-based black economic empowerment and equality in the legal services.*

17. PERSONS QUALIFIED TO SERVE ON COUNCIL

Any person appointed to the Council must--

- (a) in the execution of his or her responsibilities, take into account the interests of the broader stakeholders within the legal services;*
- (b) be committed to transparency and fairness in the execution of their responsibilities in the Council;*
- (c) act in good faith and in the best interest of the legal services as a whole;*
- (d) be committed to the objectives of broad-based black economic empowerment and socio economic transformation as provided for in the Act and the Code of Good Practice; and*
- (e) possess suitable qualifications, expertise and knowledge in the legal services.*

18. ENFORCEMENT MECHANISM

In formulating the Legal Services Charter the parties will seek to ensure that appropriate enforcement mechanisms are implemented in respect of this charter.

19. CONFLICT OF INTERESTS

- 19.1 If a member of the Council has a personal or financial interest in any matter being discussed by the Council, the member must disclose that interest and withdraw from the Council when that matter is discussed.*
- 18.2 In dealing with matters of conflict of interest, the Council must take into account the provisions of the relevant legislation.*
- 18.3 If any member of the Council fails to declare his or her interest and is present at a venue where a meeting of the Council is held or in any manner whatsoever participates in the proceedings of the Council, the relevant proceedings of the Council shall be null and void.*

19. DATE OF APPLICATION OF CHARTER

- 19.1 *On the effective date of the application of the Charter, the Legal Services Charter Steering Committee must be dissolved and the implementation phase and all matters incidental thereto must be handed over to the Council.*
- 19.2 *The Councillors shall be deemed to have commenced operation on the effective date of commencement of the Charter.*

20. FUNDING OF COUNCIL

- 20.1 *The funding of the activities of the Council must be in accordance with the relevant provisions of the published Code of Good Practice.*
- 20.2 *The Council must keep proper accounting records of the monies received and the extent of their expenditure.*
- 20.3 *The Council must prepare and submit an annual report of its activities, including audited financial statements to Government.*

21. DISPUTE RESOLUTION

- 21.1 *The parties must use their best efforts to resolve matters in the furtherance of the objectives of the Charter. In the event of a dispute, the parties must resort to conciliation, mediation and arbitration;*
- 21.2 *Where matters remain unresolved, the parties undertake to present the dispute in writing to the Council for resolution.*
- 21.3 *The Council must appoint an arbitrator to adjudicate the dispute and the decision of the arbitrator shall be final and binding on the parties.*

Kindly send your comments to:

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CHAPTER 1

INTRODUCTION

1. Introduction

The Broad-Based Black Economic Empowerment Act of 2003¹ (hereafter referred to as the “Act”) came into effect on 21 April 2004. The objectives of the Act² is to transform South Africa’s economy to enable meaningful participation by black people³ and thereby changing the racial profile of companies’ owners, managers and skilled professionals.

The Act⁴ further aims to promote investment that leads to meaningful and broad-based participation in the economy by black people thereby assisting rural and local communities’ in accessing economic opportunities and access to finance for broad based black economic empowerment (hereafter referred to as BBBEE).

Section 9 of the Act⁵ authorizes the Minister of Trade and Industry (hereafter referred to as “the Minister”), by notice in the Government Gazette, to issue Codes (hereafter referred to as the “Codes”) on BBBEE. The Minister has subsequently issued draft Codes for public comment. The draft Codes have been issued in two phases and although not yet finalized,⁶ they provide valuable insight into the future of BBBEE.

2. Purpose of the study

¹ Act 53/2003.

² Act 53/2003.

³ In terms of the Act “black people” are African, coloured, or Indian South African citizens.

⁴ Act 53/2003.

⁵ Act 53/2003.

⁶ The codes were still in draft form at time of writing.

The Codes refer to guidelines for implementing the objectives of the Act⁷.

3. Methodology

During this study the draft Legal Services Charter will be analysed and the Codes applied thereon. The analysis contains basic principles and essential considerations for example Sec 38 of the Companies Act of 1973,⁸ as well as guidance on application as in the case of Standard Bank Group v Liberty Group Ltd⁹ and interpretation in the form of explanatory and other material.¹⁰

4. Relevance

An analysis of the Codes will contribute to solve some problems in the application of the Codes as the Codes are being perceived as being too complex and difficult to implement.

In terms of the Act of 2003¹¹, the government must apply the codes when entering into the following agreements: procurement, licensing and concessions, public-private partnerships, and the sale of state-owned assets or businesses.

Private companies must apply the Codes in their interactions with any government enterprise or organ of state, in order to tender for business, apply for licences, concessions, enter into public-private partnerships or buy state-owned assets.

Companies are obliged to apply the Codes in their interactions with one another as preferential procurement will effectively impinge on most private sector

⁷ Act 53/2003.

⁸ Companies Act 61/1973 as amended.

⁹ Standard Bank Group v Liberty Group Ltd unreported WLD case no 17352/2004.

¹⁰ <http://www.Dti.gov.za>:accessed 10 September 2006

¹¹ Act 53/2003.

enterprises throughout the chain of supplier, from first-tier suppliers to the government downwards.

Once passed into law, the Codes will be reviewed by the Minister of Trade and Industry after 10 years.

5. Overview of the study

The enabling legislation is the Act.¹² The Codes is a binding interpretative document providing guidelines for the completion of generic scorecards used to measure an enterprises' BBBEE status or progress.

The Codes distinguish between three components:

- Direct empowerment which relates to equity ownership and management.
- Human resource development which relates to employment equity and skills development.
- Indirect empowerment relates to preferential procurement, enterprise development and residual factor (investment in community).

The Codes serve as a framework for the development and implementation off sector transformation charters. These charters illustrate a specific sector's informal non-binding commitment to transformation. The Charter Council oversees the implementation process of BBBEE and sector charters illustrates a specific sectors informal non-binding commitment to transformation.

A sector's BBBEE performance is measured by using the balanced scorecard consisting of the various empowerment components weighted according to the importance attached to their respective contribution to BBBEE. The three core

¹² Act 53/2003.

components of the BBBEE scorecard relate to the three components of BBBEE as set out above

A total score is given to each organization classifying it as either an excellent, good, satisfactory or limited BBBEE contributor, depending on the score it achieves. Accredited BBBEE Rating Agencies will provide independent opinions on an organizations' BBBEE status using the balanced scorecard.

Thus far a number of sector charters have been drafted, the most well known of these are the Tourism Charter, ICT Sector Charter and the Financial Sector Charter

6. Referencing

The style of the referencing used in this study is that of the JOURNAL FOR JURIDICAL SCIENCE.

CHAPTER 2

A BRIEF HISTORY OF BLACK PEOPLE IN BUSINESS IN SOUTH AFRICA

1. Introduction

It was not because black people had no inclination for business in South Africa that the black business class was so poorly developed. It was because, for 100 years and more, black entrepreneurs were harassed and systematically beaten down by government. At the same time, giant white-owned corporations emerged that exhibited the characteristics of black holes, obliterating everything within reach

2. Holding back the tide

In spite of being relatively new to the cash economy, African South Africans seized emerging business opportunities in 19th-century South Africa. They opened stores, established mines, and entered the world of commercial agriculture. But their entrepreneurial instincts were soon dampened. Laws and regulations increasingly forced Africans out of the proprietorship of businesses. Cecil John Rhodes as Prime Minister of the Cape Colony pushed through legislation that destroyed the basis of African commercial farmers in the Eastern Cape.

In 1913 the Land Act of the Union of South Africa banned Africans from owning land outside areas scheduled for them – eventually less than 14% of the land area of South Africa. Almost all of the 14% was restricted to communal ownership, further inhibiting the development of African commercial farmers. Many African farmers managed to operate for years as sharecroppers or labour tenants on what had become white farms, but they were gradually squeezed out as the whites became more wealthy and powerful.²

African traders and manufacturers were not otherwise restricted by general statute before 1923, which did not prevent white local governments from hindering their development. The 1923 Native (Urban Areas) Act confined African residents in urban areas to 'Native Locations' and undermined their right to permanence. It also specified that urban local authorities could allow African traders to operate in the African rural 'villages' and urban 'locations'.

Things were destined to get far worse after the National Party (hereafter referred to "NP") came to power under the banner of apartheid in 1948. The same was true for Indian and coloured entrepreneurs – the key law applicable to them was the Group Areas Act of 1950, which removed their right to own or run businesses outside of 'their own group areas'. This was the first national legal assault on the commercial rights of coloureds, though Indians had already suffered statutory economic discrimination.

In 1955 the whites-only government explicitly excluded African traders from operating outside of the black reserves and locations. From then on it was downhill, fast. The Afrikaner Sakekamer (business chamber) complained that Africans were allowed to have trading licences in the locations/African townships.

Meanwhile, the apartheid government made half-hearted gestures towards supporting the establishment of African commerce and industry in the Bantustans/homelands. This was meant to keep alive the fiction of 'separate development' – the rationale for apartheid. As the infrastructure and the people were poor in these remote regions, and trading opportunities were already controlled by white-owned wholesalers and retailers, this gesture could never remotely compensate for the unbridled assault on African entrepreneurs in the urban areas.

So, for Africans, the capitalist path to progress through accumulation as an entrepreneur was erased by the apartheid regime. Simultaneously, the whites-only government blocked African advancement through companies they did not own. It placed a cast iron legal ceiling on the advancement of Africans through firms as wage earners.

The 'job colour bar' began as protection for white workers in skilled occupations on the gold mines around the beginning of the 20th century. In the 1920s, it extended into a 'civilised labour policy', which gave preference to white skilled and unskilled workers in the public sector, while the private sector was persuaded to comply. Under the apartheid government, the job colour bar rigidified to the point that the government issued list after list of occupations that Africans were not allowed to have, and imposed minimum white-to-African ratios on some industries. The government also attacked working-class solidarity across colour lines by defining African workers out of the formal system of industrial relations.³

3. The tide flows in

Perhaps the most important reason for the apartheid government's turnaround on the economic rights of Africans was its recognition that it had lost the war against the urbanisation of Africans. No doubt, apartheid had slowed down the influx of rural Africans into the urban areas – though the rural areas were generally poor and contributed a tiny proportion of national income, more than half of all Africans still resided in the rural areas in the 1980s. The stream to the cities, if not an engulfing torrent, was strong, steady and inexorable. While thousands of poor African people were deported daily to the homelands, thousands more would return.

Along with this, the leading National Party had undergone something of a conversion away from a highly regulated economy, which had helped it enrich its supporters, towards a version of free market economics, to protect its newly rich supporters from intervention. Influenced by Thatcherism, the government began to consider the virtues of privatisation, deregulation and small business development – small businesses even for Africans, coloureds and Indians, and even in the urban areas.

By the end of the 1980s, it was estimated that there were at least 500 000 African-owned businesses in South Africa, including 100–120 000 taxis, 150 000 hawkers and vendors, 50 000 small shopkeepers, and 70 000 backyard manufacturers in South Africa¹³

¹³ <http://www.rebirth.co.za>: accessed 12 August 2006.

The apartheid government also changed tack on the labour market. Black trade unions were legalised in 1979, Africans were allowed permanent urban status in 1986, and job reservation began to melt away in the late 1970.¹⁴ Gradually, Africans were permitted to progress to skilled, supervisory and managerial positions in enterprises they did not own. But progress was slowed down by prejudice, racial bias and the problem that black schools and colleges changed little for the better; in fact, many deteriorated.

4. General election 27 April 1994

As capitalist economies suffered under the international oil crisis of 1973, black trade unions were revived. The involvement of workers in resistance took on a new dimension with the formation of the Congress of South African Trade Unions and the National Council of Trade Unions. It can be stated that BBBEE really started to develop from this point onwards. In the 1970's the concept called "black advancement" was established in an attempt to solve and prevent the reoccurrence of events and the leading up to the Soweto tragedy on 16 June 1976. Multinational organizations decided to remove their investments from South Africa, but were put under pressure to work towards "black advancement" with determination through the development of this concept.

During the 1980's international pressure was mounting on the South African government. And a new term namely the equal opportunity programme emerged. This programme was based on the presumption of fairness that would exist when people from all backgrounds are given equal opportunity to succeed or fail in society.

¹⁴ <http://www.idrc.ca>: accessed 12 October 2006.

On 11 February 1991 Nelson Mandela was released from prison, and South Africa embarked on a period filled with hope and enthusiasm.¹⁵ As stated by Nelson Mandela at the Rivonia Trial of 1963:¹⁶

“I have fought against white domination, and I have fought against black domination. I have cherished the ideal of a democratic and free society in which all persons live together in harmony and with equal opportunities. It is an ideal which I hope to live for and to achieve. But if needs be, it is an ideal for which I am prepared to die.”

On 27 April 1994 South Africa had its first democratic election and changed from a state ruled by parliamentary sovereignty to a state where the rule of law and constitutional sovereignty. The term: “affirmative action” came back onto the scene when the NP released its political opponents from prison in the 1990’s. Affirmative action from this era seems to be dying a slow death as aims of employment equity are slowly, but surely being realized. Thereafter government’s intention to make transformation an imperative was illustrated by the inclusion of the Reconstruction and Development Program (hereafter referred to as “RDP”) in 1994. However, BBBEE as in this document lacked the fundamentals of practicality and a better proposal to facilitate transformation was required.¹⁷

5. Constitution of the Republic of South Africa

The most fundamental change that the enactment of the Constitution brought about was the change from a government of parliamentary sovereignty to that of constitutional supremacy, which is enshrined in section 2 of the Constitution.¹⁸ Thus any law in conflict with the Constitution was invalid and it binds all persons

¹⁵ <http://www.anc.org.za>; accessed 14 March 2006.

¹⁶ <http://www.anc.org.za>; accessed 15 May 2006.

¹⁷ Cliffe Dekker 2004:2.

¹⁸ Constitution of the Republic of South Africa of 1996, hereafter referred to as the Constitution.

and organs of state.¹⁹ All of these laws were passed because of a corrupt and illegitimate system of government.

It is therefore the responsibility of the current government to set the necessary in motion to reverse the injustices of the past. It must allow for those handicapped in the past to catch up their fellow citizens regardless of how unenviable and difficult the task may be.

On the contrary, BBBEE must be measured and performed in economic and political stability so as to transform South Africa as a whole and avoid reverse discrimination. At the same time BBBEE has to give effect to the Constitution, the supreme law of the land. In so doing it has passed several pieces of legislation²⁰ such as the Act²¹, arguably the single most important piece of legislation

The Constitution²² is the cornerstone of democracy and affirms the values of human dignity, equality and freedom on which the South African society is based. The Bill of Rights is the highest law in South Africa and aims to protect and promote rights of all persons in South Africa and even disables government to infringe upon any person's right or enact any law that discriminates or takes away any rights a person is entitled to.²³

The Constitution allows for the enactment of any legislation which is in line therewith in order to promote equality and prevent unfair discrimination in any sense.

According to the Constitution, section 9 (2) equality is defined:

¹⁹ Refer to Sec 8 of Chapter 2 of Constitution of the Republic of South Africa of 1996.

²⁰ See paragraph 4 hereafter.

²¹ Act 53/2003.

²² Bill of Rights

²³ Sec 9 of Constitution of Republic of South Africa 108/1996.

“Equality includes the full and equal enjoyment of all rights and freedoms. 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.”

Therefore, in a democratic society unfair discrimination cannot be tolerated, especially in the labour market, proof hereof is the enactments of the Labour Relations Act of 1995,²⁴ the Employment Equity Act of 1998,²⁵ Promotion of Equality and Prevention of Unfair Discrimination Act of 2000²⁶ and the Act of 2003,²⁷ all of which are in support of the Constitution.²⁸

In 1997, government issued a green paper on procurement reform. Government is the largest buyer in the economy and has a responsibility towards the local entrepreneur in fulfilling its BBBEE policy objectives and to develop a labour intensive construction through preferential procurement requirements.

6. Conclusion

Although Government has passed various pieces of legislation since 1994 to promote BBBEE until recently it had no official BBBEE policy. The first King Report on Corporate Governance dealt briefly with affirmative action policies as an aspect of good governance. The King II-report²⁹ deals in detail with BBBEE. The report argues that transformation makes good business sense and that if the corporate world does not rise to the challenge of facilitating transformation through self regulation, obligations may be imposed by legislation. A year after the publication of the King II report, the Department of Trade and Industry

²⁴ Act 66/1995.

²⁵ Act 55/1998.

²⁶ Act 4/2000.

²⁷ Act 53/2003.

²⁸ Refer to Constitution of the Republic of South Africa 108 of 1996: sec 2 and sec 9 (2).

²⁹ Published in March 2002.

released a strategy for BBBEE.³⁰ The BBBEE Commission was established in May 1998 to assist government in the empowerment process which will be discussed in chapter 3.³¹

³⁰ <http://www.africanhistory.about.com>: accessed 3 March 2005.
<http://www.businessmap.org.za/>: accessed 18 April 2006.

CHAPTER 3

THE BLACK ECONOMIC EMPOWERMENT COMMISSION³²

1. Introduction

The Black Economic Empowerment Commission (hereafter referred to BEE Com) has drawn a great deal of attention in the South African media since its establishment.³³ The BEE Com completed its work in 2001 and its recommendations influenced the governments' future empowerment efforts as well as the public debate on the subject of BEE.

In this chapter the establishment, objectives, challenges, targets and recommendations of the BEE Com will be discussed.

2. Establishment of BEE Com

Commission arose out of a resolution taken at the Black Management Forum (BMF), a conference held in Stellenbosch, from 14 to 15 November 1997.³⁴

The Black Business Council initially appointed a team to investigate the following:

- to develop a clear strategy and a coherent vision and strategy for BEE;
- to construct a clear and unambiguous definition for BEE;
- to integrate the Empowerment project in the South African society;
- to identify the role of Black women in the Empowerment process;
- to determine the role of Black Business in the transformation process;
- to evaluate methods whereby the management skills of Black people can be developed; .³⁵

³² This is merely a brief exposition for the purposes of historical background; as the topic is to extensive for purpose of this study.

³³ <http://www.handels.gu.se> accessed 4 June 2006.

³⁴ <http://www.handels.gu.se> accessed 27 June 2006.

- to examine ways in which Black Business can ensure that it's business conduct and ethics remain credible

3. Black Business Council

The Black Business Council (BBC) was established in 1996 by various black leaders, most of whom were involved in various Black Businesses and professional formations.³⁶ They consisted of:

- 1 Association for the Advancement of Black Accountants of South Africa (ABASA),
- 2 Association of Black Securities and Investment Professionals (ABSIP),
- 3 African Mineral and Energy Forum (AMEF)
- 4 Black Business Executive Circle (BBEC),
- 5 Black Information Technology Forum (BITF),
- 6 Black Lawyers Association (BLA),
- 7 Black Management Forum (BMF),
- 8 Congress of Business and Economics (CBE),
- 9 FABCOS,
- 10 National African Chamber of Commerce (NAFCOC),
- 11 National Black Business Caucus (NBBC),
- 12 South African Black Technical and Allied Careers Organisation (SABTACO),
- 13 South African Communication Forum (SACF) and
- 14 South African Institute of Black Property Practitioner (SABTACO)

The key objective of BBC was to play a central role in key national economic initiatives. The BBC appointed the BEE COM, which consisted of 22

³⁵ Executive Summary Report of the BBEE Com 2001 (Online) Available <http://www.bmfonline.co.za> :accessed 11 November 2006

³⁶ <http://www.foundation-development-africa.org> accessed 13 September 2005

members namely: Cyril Ramaphosa (He headed the BEE Commission's work), Danisa Baloyi, David Moshapolo, Gavin Pieterse, Irene Charnley, Itumeleng Mosala, Jabulani Sikhakhane, Jake Moloji, JB Magwasa, Lot Ndlovu, Molefe Tsele, Moss Kgosana, Mzolisi Diliza, Nozipho January-Bardill, Pamela Mgulwa, Peter Vundla, Phinda Madi, Ruel Khoza, Saki Macozoma, Salukazi Dakile-Hlongwane, Sango Ntsaluba and Vusi Montsho.

4. Objectives of BEE Com

At the BMF conference held on the 14 and the 15 November 1997, it was argued by the forum that the BEE Com should address issues such as: the lack of a national vision of BEE; the failure of Government and Black Business to provide leadership and a vision for BEE; Empowerment versus Enrichment; the Empowerment process being driven by white institutions, and the lack of a coherent definition for BEE.³⁷

The BEE Com objectives were to gain insight into the BEE process through empirical research and to make observations on the pace and results of BEE initiatives during the 1990's, resulting in the development of an accelerated national BEE strategy and to develop benchmarks and guidelines to monitor the implementation of the National BEE strategy.³⁸

The Definition of BEE as given by the BEE Com The fact that a substantial increase of black participation in the economy was indispensable in order to attain growth, formed the basis for the research by the BEE Com.

³⁷ <http://www.businessmap.org.za> accessed 14 September 2006

³⁸ Discussion points were strategies to ensure the broadest ownership of productive assets and resources, increase levels of employment in the formal economy, increase household incomes, expanding literacy and skills development and extend basic services to those who do not currently have them.

The BEE Commission's defined BEE as an integrated and coherent socio-economic process, located within the context of the country's national transformation program, the RDP. BEE is aimed at redressing the imbalances of the past by seeking substantially and equitably transfers of ownership, as well as transferring management and control of South Africa's financial and economic resources to the majority of its citizens. It seeks to ensure that black people have a broader and meaningful participation in the economy in order to achieve sustainable development and prosperity.³⁹

The BEE Commission argued that BEE should be viewed and include: job creation, rural development, urban renewal, poverty alleviation, specific measures to empower black women, skills and management development, education, meaningful ownership and access to finance for household and for conducting business.⁴⁰

5. Challenges BEE Com

Apartheid and Colonial policies led to significant structural distortions in the South African economy. These distortions eventually resulted in crises in the Apartheid economy, which are still evident today. There were various problems that the Democratic economy inherited from the Apartheid economy and these problems, even ten years into democracy, still left the economy with major challenges. The challenge of disempowerment was addressed by the BEE Com in their report.

BEE Com encouraged continued marginalisation of the majority of its people from the mainstream economy and catapult the country onto a course of sustained rates of economic growth. The BEE Com believed that deliberate

³⁹ <http://nedlac.org.za>:accessed 17 November 2006

⁴⁰ <http://www.businessmap.org.za> :accessed 17 November 2006

disempowerment provided a sufficient, moral and political basis to justify an Integrated National BEE strategy.⁴¹

6. The BEE National Strategy

The BEE Com proposed an Integrated National BEE strategy⁴² that included the following: An investment for Growth Accord between businesses labour and government aimed at reaching agreements on a concrete strategy to lift the country's levels of fixed investment and economic growth.⁴³ The design and the implementation of an Integrated Human Resources Development (HRD) Strategy. The implementation of the Integrated Rural Development Strategy and the creation of an agency to streamline and co-ordinate funding and other initiatives in rural areas and this should include land reform. A National Procurement Agency located within the Department of Trade and Industry which was aimed at transforming the public and private sector procurement environment. A National Black Economic Empowerment Act aimed at enabling legislation to create uniformity in policy and establish the necessary institutional support and instruments for the BEE strategy.

The Act should also define BEE in depth and set uniform guidelines that would facilitate deracialisation of economic activities in the public and private sectors.⁴⁴ An Empowerment Framework for Public Sector restructuring that outlined empowerment principles to be followed. An enabling framework aimed at improving access to finance for household and businesses, to be attained through disclosure and reporting requirements in the banking sector. Targets should also be implemented to encourage service delivery and the enhancement

⁴¹ <http://www.businessmap.org.za> accessed 14 September 2006

⁴² Strategy – A plan designed to achieve a particular long term aim. South African Concise Oxford Dictionary. Page 1160

⁴³ <http://www.businessmap.org.za>:accessed 14 September 2005

⁴⁴ <http://www.businessmap.org.za>: accessed 14 September 2006

of existing State capacity in the Post Bank. Recommendations on the streamlining and co-ordination of public sector funding initiatives through a National Empowerment Funding Agency (NEFA). Recommendations on building the capacity of business structure especially Black Business structure. The strategy incorporated national targets to be met by the stakeholders.⁴⁵

7. BEE Com targets

In order to guide the BEE Com National BEE strategy, targets were proposed by the BEE Com, over a ten year period.⁴⁶

The government targets were:

30% productive land in black hands. This includes black individuals as well as enterprises;

25% participation by blacks in all sectors of the economy;

40% of senior and executive management in private sector companies with more than 50 employees should be black;

40% of non-executive and executive directors of companies listed on the JSE should be black;

50% of all state owned enterprises (hereafter SOE's) and government procurement should go to black enterprises. (30% of these companies should be black -owned SME's);

30% private sector procurement should go to Black Companies;

30% of long term contracts and concessions from government should be awarded to Black Companies;

40% of government incentives should be awarded to Black Companies. Included are tax deductions and subsidies.

⁴⁵ <http://www.foundation-development-africa.org>:accessed 25 August 2006.

⁴⁶ <http://www.businessmap.org.za>:accessed 25 August 2006.

8. Recommendations by the BEE Com

Note that many of the recommendations discussed below has already been considered by leaders and strategist. Some of the recommendations may have been implemented.

8.1 Growth investment

In the year 2000, seven years after the country's democratic elections, South Africa still experienced low levels of economic growth.⁴⁷This resulted in high unemployment- and poverty rates. South Africa's rural areas are trapped by a cycle of underdevelopment. Private sector confidence remains low because of poor levels of economic growth.

It was proposed that stakeholders should reach consensus on an investment for growth accord, thereby highlighting participation in targeted development investment strategies, to substantially increase the levels of fixed investments and elevate the economy growth path.

8.2 Integrated Human Resource Development (HRD) Strategy

During Apartheid, the biggest crime against humanity was the denial of education and the deliberate enforcement of an inferior education. As a result South Africa has no human capital required to attain or sustain, high levels of economic growth.

The BEE Com recommended that government introduced various measures to ensure an increase of black graduates; that all 36 universities and technikons in South Africa have clear output targets; penalties to be imposed on those institutions that fail to meet targets; partnership be formed between the higher education and training system and the secondary schools. Programmes be

⁴⁷ <http://www.businessmap.org.za>:accessed 14 September 2006.

designed to promote entrepreneurship. BEE Com further proposed that government introduce clear targets for tertiary institutions in respect of transforming staff profiles. Gradual increasing of Skills levies.⁴⁸ The implementation and integration of the HRD Strategy with the country's policies in order to develop the Information Communication and Technology⁴⁹sector. The private sector needs to demonstrate far greater commitment to the implementation of a National Human Resource plan. Government should expedite programmes aimed at addressing the problem of the unemployed youth.

8.3 Access to Financial Services and Capital

Market failures and continued racism in established businesses, particularly the financial sector, are amongst the major obstacles preventing meaningful transformation.⁵⁰ Financial institutions served the needs of the minority white section of the population. This resulted in biased allocation of resources to the disadvantaged of the black majority. The financial industry failed to provide banking services to the vast majority of the South African's and financial institutions generally fail to provide finance to the poor.

BEE Com submitted that government should intervene in the financial sector to promote BEE by selling its current stake in Business Partners to raise funds, and focus on building a sustainable and larger network of retail financial intermediaries.

The state should continue to promote an environment that facilitates the emergence of sustainable development oriented at Micro- Finance. The review of the functions and regulation of the credit bureaux;. The State should implement a programme aimed at broadening the ownership base in the interest of promoting

⁴⁸ <http://www.businessmap.org.za>:accessed 14 September 2006.

⁴⁹ Hereafter referred ITC.

⁵⁰ <http://www.businessmap.org.za>:accessed 14 September 2006.

savings and of encouraging a wider ownership in the economy; Future BEE transactions should be guided by principles of integrity, equity, sustainability and effective ownership

8.4 Affirmative Procurement

Systematic and institutionalised racism in the South African society continued to restrict Black business to public- and private sector contracts, thus preventing growth. Government procurement policies were inadequate for performance monitoring due to inconsistent yardsticks.

There was an abuse of systems within tender boards which resulted in ineffective empowerment outcomes.

The proposals of BEE Com provided for an amendment to the public sector procurement system to ensure that procurement meets the objectives of RDP. An accreditation unit to be established as a joint venture between the public and private sector to stimulate private sector procurement from black suppliers and to broaden ownership structures. The following initiatives to reform public sector procurement were noted :

- increasing the amount of procurement officials when transforming tender boards;
- implementing systems to evaluate ongoing procurement;
- to uniform adjudication criteria, guidelines and targets;
- to enhance the review and complaints capability;
- a turnaround strategy for procurement offices/agencies through a
- comprehensive skills audit, training programmes and an institutional capacity building strategy;
- the improving of Tender Advice Centres for potential suppliers;
- services should be accessed for a fee by the private sector to promote private sector support for affirmative procurement policies.⁵⁸⁸

- facilitation of upskilling existing staff as part of a HRD Strategy for procurement.⁵¹

8.5. Enabling Framework

Black people remain at the outer limits or a marginal and secondary position in the economy because of the absence of a coherent BEE framework from the government as well as a lack of commitment from the private sector.⁵²

The BEE Com recommended that the Integrated National BEE Strategy⁵³ (INBS) be adopted as a cabinet approved policy position and the Act be promulgated.

8.6 Empowerment framework for public sector restructuring

Government had huge budgetary constraints after the 1994 national elections and had to attract the private sector for capital to increase the country's growth rate. The country's capital stock was tied up in SOE's⁵⁴ generating negative returns. The country had to attract foreign and domestic skills and technology whilst the public service was being characterized as having a lack of resources, inefficient productive service delivery outputs, malpractices such as crime, corruption and nepotism, debt burdens and backlogs that drains the economy and that the public sector was designed to serve a minority of the population.

The BEE Com recommended an adoption of an Empowerment Framework for restructuring.

8.7 Rural development and access to land

⁵¹ <http://www.businessmap.org.za>:accessed 14 September 2006.

⁵² <http://www.businessmap.org.za>:accessed 14 September 2006.

⁵³ Hereafter referred INBS

⁵⁴ SOE's – Single Ownership Enterprises

As a natural consequence of Apartheid policies and the forced removals of millions of black people, the BEE Com proposes an integrated sustainable rural development strategy in four areas to accelerate Land Reforms, to promote community ownership, to improve access to finance and to invest in rural infrastructure.

8.8 Role of business organisations

Businesses in South Africa still reflect the Apartheid past and have limited impact on the economic landscape.⁶⁰⁸ Businesses constructed along racial lines make interaction with the government and mobilisation on national issues very difficult. There is no unifying voice among the businesses in South Africa.

The BEE Com proposed that agreements should be introduced towards a unified business voice between BSA⁵⁵ and BBC. The new entity would have a chief executive officer (CEO) with two levels such as a co-ordinating council and full time secretariat with presentation of both BSA and BBC equally. The Coordinating council will focus on support for transformation, working towards unity within businesses and the advancement of BEE.⁵⁶ The secretariat will focus on pursuing common purposes.

9. Conclusion

There are justifications for the delay of the release of the BEE Com report. The commission was made up of a diverse group of individuals from various disciplines. As such, they were not full time commissioners and they had their own varied interests besides working on the BEE Commission.⁵⁷ This could be seen as an ultimate advantage for the recommendation findings of the

⁵⁵ BSA - Business South Africa

⁵⁶ <http://www.businessmap.org.za>:accessed 14 September 2006.

⁵⁷ Wadula, P. (2001) Delays no good for SA. Business Day 19 February 2001.

commission. Many of the recommendations have already been implemented⁵⁸ and show great success. Some of the recommendations have been reviewed, updated and amended to current prevailing circumstances. These recommendations and implementations play a big role in transferring ownership to the black majority. However some of the recommendations made by the BEE Commission are unrealistic especially when short deadlines are set which are not practically realisable.

⁵⁸ Wadula, P. (2001) Delay in report threatens black empowerment. Business Day, 26 March 2001.

CHAPTER 4

THE ESTABLISHMENT OF BLACK ECONOMIC EMPOWERMENT AND BLACK ECONOMIC EMPOWERMENT COMPANIES

1. Introduction

In order to comprehend the necessity for BEE, the history that led to the implementation of BEE needs to be examined from a historical perspective. The negative impact and consequences of Apartheid will be focused on and the implementation of a concept known as Black Economic Empowerment. The focus will also include the formation of Black Economic Companies.

2. Apartheid

Apartheid is a term which referred to a 'system of segregation or discrimination on grounds of race.'⁵⁹ This system was in place from the year 1948 to the year 1991.⁶⁰ Pre-1994, Apartheid represented the codification of all the laws and regulations that politically, economically, and socially oppressed the majority of the population, which consisted largely of Africans and included Coloreds as well as Asians.⁶¹ Race distinction was used to control access to South Africa's productive resources and access to skills.

The consequences of the Apartheid system were not only racial oppression, prejudice, unjust behaviour or bias. It was also gender oppression which was ultimately the abusing of power and placing control in the interest of a minority white population.⁶² Thus the South African economy was based to a very large

⁵⁹ South African Concise Oxford Dictionary. (2002). Page 48

⁶⁰ South African Concise Oxford Dictionary. (2002). Page 48

⁶¹ <http://www.sn.apc.org>:accessed 11 September 2005

⁶² <http://www.businessmap.org.za>:accessed 14 September 2006

extent on domination, exploitation and marginalisation of the black majority. Racial oppression led to white power, privileges and wealth that only benefited white people.⁶³

Gender oppression led to the abuse of women which led to the impoverished role of African women, being denied basic, social and economic rights, being barred from living in cities, from owning land, inheriting, borrowing money and participating in political and social struggles.

It is submitted, however, that although we now live in a country of democracy, South Africa's economy still excludes the vast majority of its people, namely Black including Coloureds and Asians, from having significant ownership of productive assets and the possession of advanced skills.

In view of the majority of South Africa's people that generates and earns a low level of income resulting in South Africa's economy performing below its potential., it may be asked whether it is not time to increase the effective participation of Black people in the economy, by means of BEE.

The stability and the prosperity of the economy in the future, could have and would have been undermined to the detriment of not only Black people, but of all South African's, irrespective of race, if BEE was not introduced. Therefore the Act came into existence to establish a legislative framework for the promotion of BEE.

The Act promotes the achievement of the constitutional right to equality, to increase broad-based and effective participation of black people in the economy and promotes a higher growth rate, increases employment and more equitable income distribution. The Act also establishes a national policy on broad-based

⁶³ <http://www.businessmap.org.za>:accessed 14 September 2006

BEE so as to promote the economic unity of the nation, as well as protect the common market and promote equal opportunity and access to government services.

3. Various definitions to Black Economic Empowerment.

The Black Economic Empowerment Commission defined BEE as an integrated and coherent socio-economic process.⁶⁴ BEE is located within the context of the country's national transformation program, namely the Reconstruction and Development Program (hereafter referred to as RDP). The aim of BEE is to redress the imbalances of the past by seeking to substantially and equitably transfer and confer the ownership, management and control of South Africa's financial and economic resources to the majority of its citizens. BEE seeks to ensure broader and meaningful participation in the economy by black people in order to achieve sustainable development and prosperity.

BEE was adopted at the Growth and Development Summit (GDS) to include strategies to ensure the broadest ownership of productive assets and resources, increase levels of employment in the formal economy, increase household incomes, expanding literacy and skills development and extend basic services to those who do not currently have them. The GDS's view was also that the promotion of BEE should benefit women, workers, youth, people with disabilities and those living in rural areas.

Government consulted with various interest groups in South Africa, in order to formalize the BEE program of the government into the so-called Broad Based Empowerment Act 53 of 2003.

⁶⁴ <http://www.bmfonline.co.za>:accessed 25 April 2005

The Broad Based Black Economic Empowerment Act 53 of 2003 extended or broadened on BEE to Broad Based Black Economic Empowerment (BBBEE) and defines Broad-Based Black Economic Empowerment as the economic empowerment of all black people that includes women, workers, youth, people with disabilities and people living in rural areas through diverse but integrated socio-economic strategies that include, but not limited to –

- a) increasing the amount of black people that manage, own and control enterprises and productive assets;
- b) facilitating ownership and management of enterprises and productive assets by communities , workers, cooperative and other collective enterprises;
- c) human resource and skills development;
- d) achieving equitable representation in all occupational categories and levels in the workforce;
- e) preferential procurement; and
- f) investment in enterprises that are owned and manage by black people;

4. Description

BEE can be described as a method to increasing the number of black persons that participate in and manage the South African economy. This involves economic ownership by previously disadvantaged individuals and implies economic interest, profit sharing, which include the sharing of cost and wealth creation.

BEE is an external factor that influences any entity⁶⁵ that intends to do business in South Africa. An entity is defined as something with a distinct and independent existence, this external factor recognised as BEE, influences any independent

⁶⁵ An entity is defined as something with a distinct and independent existence,

existence such as and not limited to a company, close corporation, sport organisations and non-profit organisations. Furthermore, this external factor has a certain impact on the country and its enterprises.

BEE is seen as an economic entity, the economic entity must, as with any external factor, adjust to be competitive in the market. 'The potential impact on the enterprise will differ depending on the target market of the enterprise.'⁶⁶ As the external factor BEE, moves through the transmission channels of the economy, all enterprises will be affected, be it directly or indirectly..

BEE as the external factor may hold significant advantages as well as risks for an enterprise, depending on how it is managed.

5. Objectives of BEE

The objectives of the Act are to facilitate BBBEE by:

- a) promoting economic transformation in order to enable meaningful participation of black people in the economy;
 - b) achieving a substantial change in the racial composition of ownership and management structures and in the skill occupation of existing and new enterprises;
 - c) increasing the extent to which communities, workers, cooperative and other collective enterprise own and manage existing and new enterprise and increasing the access to economic activities, infrastructure and skills training;
 - d) increasing the extent to which black women own and manage existing and new enterprises, and increasing their access to economic activities, infrastructure and skills training;
-

- e) promoting investment programmes that lead to broad-based and meaningful participation in the economy by black people in order to achieve sustainable development and general prosperity;
- f) empowering rural and local communities by enabling access to economic activities, land, infrastructure, ownership and skill; and
- g) promoting access to finance for BEE

BEE is important If the South African economy is to reach its potential. If applied correctly the process will create jobs for many South Africans. Other advantages will be; rural development, urban renewal, poverty alleviation, measures to empower black women, skills and management development and training, education, meaningful ownership and access to finance for households and for the purpose of conducting business.⁶⁷

6. Establishment of BEE Companies

BEE Companies are companies that are owned or partly owned by black persons and has the ability to empower companies which are white owned or companies acquired under the Apartheid laws.

The face of companies as we know it has changed. In light of this, an order of transparency is needed for clear distinction between companies and or enterprises. It is important to define the following companies:

6.1. Black Company:

In a Black Company, 50.1% must be owned by black persons and there should be substantial management control by black persons.

⁶⁷ <http://www.bmfonline.co.za>:accessed 25 April 2005

Ownership refers to economic interest while management refers to the membership of any board or similar governing body of the enterprise.⁶⁸

6.2 BEE Company:

In a BEE Company, 25.1% must at least be owned by black persons and there should be substantial management control by black persons.⁶⁹ Ownership refers to economic interest. Management refers to executive directors. This is whether black enterprise has control or not.⁷⁰

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6.3 A Black Women-Owned Enterprise:

A Black Women Owned Enterprise must at least have a 25.1% representation of black women within the black equity and management portion.

6.4 A Community or Broad-Based Enterprise:

This kind of enterprise has an empowerment shareholder that represent a broad base of members such as a local community or where the benefits support a target group, for example black women, people living with disabilities, youth and workers. Shares are held via direct equity, non-profit organisations and trusts.

6.5 A Co-operative or Collective Enterprise:

A Co-operative or Collective Enterprise is an autonomous association of people who voluntarily join forces to meet their economic, social, cultural and inspirational needs through the formation of a jointly-owned enterprise and democratically controlled enterprise.

⁶⁸ <http://www.brain.org.za>:accessed 27 June 2005

⁶⁹ <http://www.brain.org.za>:accessed 27 June 2005

⁷⁰ <http://www.brain.org.za>:accessed 27 June 2005

The above companies can be used as methods and processes to transform and empower companies that previously were not empowered. There is no doubt that the BEE concept as an external factor is an influence, to the economy needs, but with concept application, there should be constant and effective monitoring to evaluate the progress and success of the concept.

7. Codes of Good Practice

Presents a basis for compliance to BEE and are to be applied in the development, evaluation and monitoring of BEE charters, initiatives, transactions and other implementation mechanisms. The statement contains basic principles and essential considerations, as well as guidance in the form of explanatory, and other, material. It presents a basis for greater clarification to BEE.

8. Conclusion

BBBEE can be seen as an effective vehicle which separates the past (Apartheid) from the present. In order for effective transformation to take place, the people of South Africa have to embrace BBBEE. There is no doubt that the BBBEE concept as an external factor is an influence, to the economy needs, but with concept application, there should be constant and effective monitoring to evaluate the progress and success of the concept. It presents the basis for compliance and clarification to BBBEE, which will be discussed and applied to the draft Legal Services Charter in the next chapter.

CHAPTER 5

SECTOR CHARTER

1. Introduction

Section 12 of the Act of 2003⁷¹ affords the Minister to publish the charters developed by a specific industry sector. These charters will then serve as the guideline for measuring BBBEE in that specific industry sector.

The Codes⁷² for BBBEE are applicable to the development, evaluation and monitoring of BBBEE charters, initiatives, transactions and other implementation mechanisms.⁷³ To date a number of industry sector charters have been published these include the charters for the financial sector, ICT sector, property sector, tourism industry, maritime transport and service industry, construction sector, petroleum and liquid fuels industry and the mining industry.

2. Objective of sector charters

The Act envisaged and allows for different targets by the different sectors. In terms of the Codes, the different sector charters must however incorporate the following factors: The financing required to meet the sector's BBBEE targets and any factors relevant to the specific sector which will enable it to achieve BBBEE.⁷⁴

The BBBEE scorecard, in practical terms is the way in which the BBBEE progress or status of a business is measured; it further enables government and

⁷¹ Act 53/2003.

⁷² Detailed discussion in paragraph 5 below

⁷³ <http://www.Dti.gov.za> accessed 11 October 2006

⁷⁴ Paper delivered by Gihwala 15 September 2005 The rationale behind BBBEE

other procurement agencies to effectively select a BBBEE- compliant enterprise for preferential procurement purposes. This is because BBBEE is not a requirement enforced through prohibition, but rather through moral, social and of course, legislative imperative. By providing accredited means of measurement, the co-operation created between government and the private sector, will result in the expansion of the economy.

A Charter Council⁷⁵ will be established as an independent body with a mandate to oversee the implementation of the charter. The Charter Council will⁷⁶ monitor and audit the transformation process to 2008 and 2014. The Charter Council will address the issues of principles and, in particular conduct the reviews and monitor: If there is a material change in circumstances or the environment in which the charter has to be implemented, it will consider whether the targets and implementation strategies are still appropriate, and if not how they should be varied. There will be equality between sector association representatives and all others on the Charter Council. The Charter Council must fairly reflect the interests of all marketing and communication sub-sectors.

Decisions of the Charter Council will be taken on a consensual basis. If, on any issue, the Charter Council is unable to achieve consensus, there will be a dispute-breaking mechanism in the Charter Council either by some agreed mechanism with the Charter Council, or by reference to arbitration or mediation.

The Charter Council will establish an executive to attend to its routine work and specifically to: receive, consider and approve annual audits from each of the marketing and communication sub-sectors; to issue guidance notes on the interpretation and application of the charter; to prepare an annual review which outlines progress and evaluates new areas of intervention; submit annual review to the BBBEE Advisory Council for publication prepare interim reports at appropriate intervals; to undertake the reviews identified in terms of the charter;

⁷⁵ To be discussed in chapter 10

⁷⁶ <http://www.bizcommunity.com>:accessed 5 November 2006

to engage with government, marketing and communication sub-sectors, the BBBEE Advisory Council and other regulatory bodies to promote the implementation of the charter.

3. Different sector charters

The different sector charters contain different goals and objectives.

In terms of the Financial Sector charter the following targets were set:

- 25% of ownership must be in the hands of blacks by 2008;
- 20% -25% of all senior management must be black by 2008;
- 30% of middle management must be black by 2008;
- 50% of procurement (measured in rands spent) from black persons/entities by 2008 and 70% by 2014;

In terms of the ICT Sector charter the following targets were set:

- 30% ownership by 2010;
- 30% blacks in senior management by 2010;
- 55% black management other than senior management by 2010;
- 60% of preferential procurement to black owned enterprises by 2010;

In terms of the Mining Sector charter the following targets were set:

- 26% ownership in the hands of historically disadvantaged South Africans by 2015;
- 40% historically disadvantaged South Africans participating in management by 2010.

4. Conclusion

A more equitable economy will benefit all South Africans. The process of BBBEE is an inclusive one and all enterprises operating within South Africa must

participate in this process. All enterprises, irrespective of the racial categorization of its equity holders and management, can contribute toward the elements of the BBBEE process. The level of contribution is recognised and measured in terms of the balanced scorecard presented in this statement. No economy can grow by excluding any part of its people and an economy that is not growing cannot economically integrate its citizens in a meaningful way. This strategy will be implemented across all sectors in the economy and is not limited only to those sectors and enterprises that derive their income from government procurement or to those that are regulated directly by government.

Although the different Charters may set different targets, there should nevertheless be some comparability among them to assess the progress of each sector. For this reason, harmonisation is required in respect of the content of the charter, indicators for scorecards, targets and weightings. The Charters and Codes⁷⁷ should not be seen as punitive measures they re not It should be seen as guidelines to assist the promotion of BBBEE and to measure the progress that is made to this end, as discussed in the next chapter.

⁷⁷ Discussion in chapter 6 to follow

CHAPTER 6

CODES OF GOOD PRACTICE

1. Introduction

The Act is the legislative framework for the enactment of the Codes of Good practise. The primary aim of the codes is to deal with the past and the future, and in general will add to the process of addressing the issue of poverty failure in the economy. The codes lay out the instruments of state that are necessary to measure the BBBEE status of companies. The codes must be considered by every government agency when dealing with matters of BBBEE and with business as they provide through definitions, a common understanding.⁷⁸ In order to promote the purposes of the Act, the Minister may by notice in the Gazette issue Codes on BBBEE that may include;

- 2002 Further interpretation and definition of BBBBEE,
 - 2003 Indicators to measure BBBBEE
 - 2004 Guidelines for stakeholders in the relevant sector of the economy to draw up
 - 2005 Any other matter necessary to achieve the objectives of the Act
- 2003⁷⁹

2. Phase 1

The Codes, which are still in draft form at the time of writing, have been published in two phases. Phase 1 of the Codes deals with:

- the general framework and measurement of BBBEE;
- Ownership;

⁷⁸ The golden thread weaving through all the legislation is the achievement of equality as contemplated in Section 9 of the Constitution.

- Management Control;
- Transformation Charters; and
- Verification Agencies.

Certain industries, such as the mining, financial services and liquid fuels industries, have, through industry bodies and negotiations with government, developed transformation charters setting BBBEE targets for those particular industries. Under the Codes, these charters can be recognised either as Transformation Charters under section 12, in which case only the participants in that industry are bound to the Charter, or as Sector Codes under Section 9, in which case organs of state and public bodies are obliged to apply them in the same manner as other Codes.

Verification Agencies are authorised under the Codes to provide Verification Certificates to enterprises confirming their BBBEE status. Verification Agencies require accreditation from the South African National Accreditation Service, a state owned company affiliated to the Dti.

The following table illustrates the Codes and Statements (numbered documents dealing with specific issues arising under a particular Code) included in Phase 1:

Code	Statement	Description
000	000	The organisation of the Codes, the elements of BBBEE and the Generic Scorecard
000	010	Guidelines for the development and gazetting of Transformation Charters
000	020	The approval, accreditation and regulation of BBBEE Verification Agencies
100	100	The general Ownership Scorecard and the recognition of Ownership arising from the sale of equity

		instruments
100	101	The general Ownership Scorecard and the recognition of Ownership Contributions arising from sales of businesses/assets in Qualifying Transactions
200	200	The general recognition of Management Control

In December 2005, Phase 2 of the Codes was released for public comment and the period for making submissions closed on 31 March 2006. The second phase of the Codes deals with the remaining elements of BBEE (other than ownership and management control), i.e. employment equity, skills development, preferential procurement, enterprise development and residual contributions.

3. Phase 2

Phase 2 of the Codes also contain:

- a statement dealing specifically with multinationals; and
- a statement specifying a separate scorecard for enterprises that fall below a particular turnover level and have fewer than a specified number of employees (the turnover and employment levels depend on the sector in which the enterprise operates). Measurement under this Qualifying Small Enterprises Scorecard is less onerous. It appears that, in the final codes, qualification as a Qualifying Small Enterprise will depend solely on turnover.

The following table illustrates the Codes and Statements published in Phase 2

Code	Statement	Descriptions
000	001	Fronting practices and other misrepresentation of

		BBBEE status
000	002	Specific verifications issues relating to complex structures
100	102	The recognition of Ownership Contributions arising from investments by BBBEE Targeted Warehousing Funds
100	103	The recognition of Ownership Contributions by Multinational companies
100	101	The recognition of Ownership Contributions made by public entities and organs of the state
100	105	The recognition of Ownership Contributions made by companies limited by guarantee and section 21 companies
300	300	The recognition of Employment Equity Contributions
400	400	The recognition of Skills Development and Organisational Transformation Contributions to Black Economic Empowerment
500	500	The recognition of Preferential Procurement
600	600	The organisation of the Codes pertaining to Qualifying Small Enterprises, the Elements of BBBEE and the Qualifying Small Enterprise Scorecard
700	700	The recognition of Residual Contributions
1000	1000	The organisation of the Codes pertaining to Qualifying Small Enterprises, the elements of BBBEE and the Qualifying Small Enterprise Scorecard
1000	1100	The general Ownership Scorecard and the recognition of Ownership arising from the sale of equity

		instruments for Qualifying Small Enterprises
1000	1200	The general recognition of Management Control for Qualifying Small Enterprises
1000	1300	The recognition of Employment Equity Contributions for Qualifying Small Enterprises
1000	1400	The recognition of Skills Development and Organisational Transformation Contributions for Qualifying Small Enterprises
1000	1500	The recognition of Preferential Procurement Contributions for Qualifying Small Enterprises
1000	1600	The recognition of Enterprise Development Contributions for Qualifying Small Enterprises
1000	1700	The recognition of Residual Contributions for Qualifying Small Enterprises

Under the Codes, BBBEE status is generally measured on the Generic Scorecard, except where a Sector Code provides for separate targets for a particular industry.

An enterprise's score on the Generic Scorecard is measured out of a possible score of a 100 (although it is possible to earn bonus points on the scorecard). An enterprise's numerical BBBEE score is the sum of its scores on the scorecards for each of the elements of BBBEE. The scorecards for the elements, in turn, measure particular indicators or sub-elements. Approximately 44 separate indicators are measured on the Generic Scorecard.

For example, on the employment equity scorecard, a target of 30% is set for black women employed by the Measured Entity at Senior Management level as a percentage of employees at Senior Management level. Two weighting points are

assigned to this indicator. If an enterprise attains the 30% target, the full two weighting points are awarded, which count towards the enterprise's total score (out of 100) on the Generic Scorecard. If black female senior managers make up only 15% of employees at senior management level, the enterprise will be awarded only one point (as it is only halfway towards meeting the target).

The following table illustrates the respective weightings of the seven elements:

Element	Weighting
Ownership	20%
Management Control	10%
Employment Equity	10%
Skills Development	20%
Preferential Procurement	20%
Enterprise Development	10%
Residual Contributions	10%

The following two examples illustrate how BBBEE status and BBBEE procurement recognition levels may affect businesses and investments in South Africa:

- in a privatisation exercise, a government department may decide that only companies that have a BBBEE status of level six or above will be considered for the purchase of a particular state-owned enterprise;
- a major financial institution, faced with quotes from two competing companies to supply a particular service, may choose the consultancy with the higher level of BBBEE status. R1.10 of every R1.00 spent will be counted as BBBEE procurement spend if it engages a consultancy with a level 3 rating, whereas only 50c of every R1.00 spent will be

counted as BBEE procurement spend if it engages a consultancy with a level 7 rating (see below for BBEE procurement recognition levels).

An enterprise's score on the Generic Scorecard will determine its BBEE status level and corresponding BBEE procurement recognition level in accordance with the following table:

BBEE Status	Qualification	BBEE procurement recognition level
Level one contributor	At least 100 points on the Generic Scorecard	135%
Level two contributor	At least 85, but less than 100 points on the Generic Scorecard	125%
Level three contributor	At least 75, but less than 85 points on the Generic Scorecard	110%
Level four contributor	At least 65, but less than 75 points on the Generic Scorecard	100%
Level five contributor	At least 55, but less than 65 points on the Generic Scorecard	80%
Level six contributor	At least 45, but less than 55 points on the Generic Scorecard	60%
Level seven contributor	At least 40, but less than 45 points on the Generic	50%

	Scorecard	
Level eight contributor	At least 30, but less than 40 on the Generic Scorecard	10%
Non-compliant contributor	less than 30 points on the Generic Scorecard	0%

Enterprises that fall below the turnover and employment thresholds described above are measured on an alternative Qualifying Small Enterprise Scorecard, which is simpler than the Generic Scorecard. In addition, Qualifying Small Enterprises can elect to be measured using only five of the seven elements of BBEE.

Exempted Micro Enterprises, which are those with a turnover below the threshold registration as a VAT vendor (currently R300 000 per year) will be entirely exempt from BBEE compliance and will have a deemed BBEE contribution level of Four and, consequently, a BBEE recognition level of 100%.

A strategy issued by the Minister in terms of section 11 of the Act of 2003⁸⁰ must be taken into account in preparing Codes. A Code of Good Practice issued in terms of subsection (1) of the Act of 2003⁸¹ may specify targets consistent with the objectives of the Act of 2003⁸² and the period within which those targets must be achieved. The Minister must before issuing, replacing or amending a Code of Good Practice, in terms of subsection (1) of the Act of 2003⁸³ publish the draft Code of Good Practice or amendment in the Gazette for public comment and grant interested persons a period of at least 60 (sixty) days to comment on the draft Code of Good Practice or amendment, as the case may be.

⁸⁰ Act 53/2003.

⁸¹ Act 53/2003.

⁸² Act 53/2003.

⁸³ Act 53/2003.

4. Conclusion

The Codes makes it clear that there is no legislative provision that compels the private sector to implement BBEE, it only compels government.⁸⁴ Therefore there is only an economic penalty as soon as the legislative framework has been established.

⁸⁴ See Code 000 of the first phase of the Codes.

CHAPTER 7

STRUCTURE OF THE CODES

1. Introduction

In this chapter each of the Codes and Statements will be summarized.

2. Code 000: Statement 001: Fronting practices and other Misrepresentation of BBBBEE Status;

Statement 001 provides clarity on fronting practices and risks, and specifies the requirements for reporting of fronting practices. It also provides guidance for the determination and evaluation of fronting risk, and specifies the consequences of fronting practices. Some of the examples of fronting contained in this statement include:

- Window dressing,
- Benefit Diversion,
- Opportunistic Intermediaries.

3. Code 000: Statement 002: Specific Verification Issues relating to complex structures

Statement 002 provides guidance as to which Measured Entities are subject to measurement under the codes and as to the consolidation of compliance data in certain specific instances. It further provides guidance as to the attribution and separation of compliance data and clarity as to transfer of certain BBEE contributions in the event of a sale of business.

4. Code 100: Statement 102: The Recognition of Ownership contributions arising from Investments by BBEE Targeted Warehousing Funds,

Statement 102 seeks to specify the key measurement principles associated with ownership by and contributions to Warehousing Funds, for the purposes of facilitating BBEE transactions.

A Warehousing fund is defined as a fund established by an enterprise, organs of the state or public entity for the specific purpose of holding an equity interest in another enterprise from exiting black participants for a fixed duration of time with the obligation of ultimately transferring that equity interest into ownership by the intended black participants and should be approved by the Minister.

5. Code 100: Statement 103: The recognition of Ownership Contributions by Multinational Companies.

Statement 103 defines the key measurement principles applicable to measurement of ownership contributions by Multinational Businesses and South African Multinationals. It further provides for the recognition of Equity Equivalent contributions made by Multinational Businesses, and provides for the recognition of ownership contributions arising from sales of offshore Equity Interests. The statement further provides for the recognition of ownership contributions arising from sales of businesses or assets by the Multinational Businesses or South African Multinationals; and specifies the approach to measurement of ownership contributions made by South African Multinationals. The statement continues to provide recognition of certain public programs or schemes as equity equivalents by Multinational Businesses to be approved by the minister of Trade and Industry in consultation with the sectorial line minister, premiers or other stakeholders in any government department, provincial government or local government.

This statement also allows both Multinational Businesses as well as South African Multinationals to receive indicative points on their Ownership Scorecard after having implemented some of the initiatives allowed for in this statement.

6. Code 100: Statement 104: The recognition of Ownership Contributions made by Public Entities and the Organs of State.

Statement 104 specifies the basis for the award of indicative points for the ownership Element of broad-based black economic empowerment in respect of public entities wholly owned by organs of state and in respect of organs of state. It further specifies the basis for the recognition of ownership of Equity Interests held by Designated Public Entities as being black ownership.

7. Code 100: Statement 105: The recognition of Ownership Contributions made by Companies limited by Guarantee and Section 21 Companies.

Statement 105 specifies the basis for the award of indicative points for the ownership Element of broad-based black economic empowerment in respect of companies limited by guarantee and section 21 companies; and it further specifies the basis for recognition of ownership of Equity Interests held by companies limited by guarantee and section 21 companies.

8. Code 300: Statement 300: Employment Equity

Statement 300 measures initiatives targeted to achieve employment equity in respect of all measured entities in the workplace. A fundamental principle of this statement is to ensure alignment with the EE Act of 1998⁸⁵. The statement provides targets for the inclusion of black people in occupational levels other than top management and semi-skilled and unskilled levels. The statement also emphasizes the importance of black women within Employment Equity through the allocation of half of the points to the inclusion of black women in Senior to Middle management positions.

9. Code 400: Statement 400: Skills Development

⁸⁵ Act 55/1998.

Statement 400 measures initiatives implemented by employers that are targeted at the promotion of competencies of black people within an organization. It further specifies the skills development scorecard, which will be used to measure the amount of contributions made by the measured entities towards development of black people. This statement is in line with the National Skills Development Act (1998), National Skills Development Strategy and Skills Development Levies Act. It further specifies the basis for the measurement of the organizational transformation contributions to BBBEE which is a qualitative aspect to transformation within the organization.

10. Code 500: Statement 500: Preferential Procurement

This statement measures the extent to which enterprises procure from companies that are BBBEE compliant. A preferential procurement scorecard has been included to provide targets for Preferential Procurement from the above-mentioned compliant suppliers. The statement further provides the key measurement principles to be applied when calculating preferential procurement contributions to BBBEE. It further specifies principles to be applied when calculating BBBEE Procurement Spend, and specifies the formula for the calculation of the individual criteria specified in the preferential scorecard.

11. Code 600: Statement 600: Enterprise Development

Statement 600 measures specific initiatives for assisting and/or accelerating the development, sustainability and ultimate financial and operational independence of such beneficiary entities through the expansion of those beneficiary entities' financial and/or operational capacity. It further specifies the key measurement principles to be applied when calculating Qualifying Enterprise Development Contributions to BBBBEE and provides guidance in terms of the measurement of monetary and non-monetary contributions. The statement further encourages

Enterprise Development initiatives in rural communities and in any geographical areas identified by government. In addition, a bonus point will be awarded against submission by the measured entity of adequate proof that it contributed to job creation.

12. Code 700: Statement 700: Residual Element

This statement specifies initiatives intended to directly provide black people who are natural persons, with a means of generating income for themselves. It is a fundamental principle of this statement to encourage initiatives intended to facilitate access to the economy by black people and is inclusive of both Corporate Social Investment and Industry specific contribution. It further specifies key measurement principles to be applied when calculating Qualifying Residual Contributions to BBBBEE. It also provides formula for the calculation of the criteria specified in the residual contribution scorecard, and is the basis for the award of bonus points.

13. Code 1000: Statement 1000 - 1700: Qualifying Small Enterprise

These statements are meant to measure BBBBEE in all the components of qualifying small enterprises. This will include the conceptual framework, the measurement of ownership, management, employment equity, skills development, preferential procurement, enterprise development, and the residual element of qualifying small enterprises. These codes attempt to provide a much less onerous BBEE compliance regime by providing certain exceptions.

14. Conclusion

The Dti will also be requesting public submission on the treatment of indirect ownership within BBBBEE, which includes pension funds⁸⁶, private funds,

⁸⁶ Comment on Pension Funds to be discussed in chapter

private equity and asset managers. The Dti intends to apply the Codes to guide and direct the BBBBEE process within the South African economy. The application of the Codes will be discussed in Chapter 6. According to Lionel October⁸⁷ the Codes and the charters for the agricultural, tourism, finance and construction sector are set to be approved by Cabinet during December 2006. Final legal drafting of the Codes and charters are to be gazetted before end January 2007.⁸⁸

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CHAPTER 8

APPLICATION THE OF CODES

1. Introduction

Once gazetted, the Codes will be binding on all organs of state and public entities. This implies that, as per section 10 of the Act of 2003⁸⁹, government must apply the Codes when entering into decisions affecting the following areas:

- procurement
- licensing and concessions
- public private partnerships ('PPP's')
- the sale of state-owned entities

By deduction, private sector enterprises must apply the Codes should they wish to interact with organs of state and public entities in one or more of the interactions described above, such as tendering for business, applying for licences and concessions, entering into PPPs and purchasing state-owned assets. Furthermore, private sector enterprises are encouraged to apply the Codes in their interactions

with one another for two reasons: First, enterprises should apply the Codes because preferential procurement will effectively impinge on most private sector enterprises throughout the chain of supplier, from the first tier suppliers to government, downwards.

In *Standard Bank v Liberty Group*⁹⁰ Judge Hussain remarked:

⁸⁹ Act 53/2003.

⁹⁰ 2004 (SA) WLD 17352. unreported 3-4 Annexure "B"

“The applicants have committed themselves to BBBEE, to this end the applicants became party to the Financial Sector Charter. The Charter has as its objective, inter alia, the promotion of BBBEE within the financial sector. One of the objectives of the Charter is black ownership and control of a financial institution.”

Second, all industry charters wishing to be gazetted as Codes will be required to align themselves with the Codes for the purposes of gazetting by the Minister. Therefore, those enterprises applying industry charters that have not yet been gazetted may be required to alter their means of measurement once these charters have been gazetted.

2. Example: application of the Codes by a Decision-Maker

The procurement officer of a public sector entity is considering a tender. Assuming that pricing, quality and other factors are similar across the three potential suppliers, the final decision will be based BBBEE credentials. The BBBEE scorecards of three competing enterprises are as follows:

- Company X: with a verified BBBEE status in terms of the Generic Scorecard, as contained in Statement 000, of 55%
- Company Y: with a verified BBBEE status in terms of the Generic Scorecard, as contained in Statement 000, of 78%
- Company Z: a black majority owned enterprise, with a verified BBBEE status in terms of the Generic Scorecard, as contained in Statement 000, is 55%.

The table⁹¹ below depicts the enterprise’s weighted score per element (i.e. the score achieved after multiplying each indicator’s raw score by the corresponding indicator weighting and summing the results for each element):

⁹¹ <http://www.Dti.gov.za>:accessed 14 October 2006.

ELEMENT	WEIGHTING	COMPANY X: WEIGHTED SCORE	COMPANY Y: WEIGHTED SCORE	COMPANY Z: WEIGHTED SCORE
Ownership	20%	12%	18%	21%
Management Control	10%	5%	9%	5%
Employment Equity	10%	7%	8%	8%
Skills Development	20%	12%	15%	5%
Preferential Procurement	20%	11%	12%	9%
Enterprise Development	10%	0%	6%	0%
Residual	10%	8%	10%	7%
TOTAL	100%	55%	78%	55%

Assuming the Procurement Officer awarding this tender is working towards the achievement of a set preferential procurement target, s/he will have to identify the BBEE recognition levels of the three suppliers when making this economic decision.

The following table,⁹² as contained in Statement 000, provides specifies BBEE procurement recognition levels for the procurement officer: The BBEE scores of the three enterprises in this example indicates that each enterprise enjoys a corresponding BBEE

BEE Status	Qualification	BEE procurement recognition level
Level One Contributor	≥ 100 points on the Generic Scorecard	135%
Level Two Contributor	≥ 85 but < 100 points on the Generic Scorecard	125%
Level Three Contributor	≥ 75 but < 85 on the Generic Scorecard	110%
Level Four Contributor	≥ 65 but < 75 on the Generic Scorecard	100%
Level Five Contributor	≥ 55 but < 65 on the Generic Scorecard	80%
Level Six Contributor	≥ 45 but < 55 on the Generic Scorecard	60%
Level Seven Contributor	≥ 40 but < 45 on the Generic Scorecard	50%
Level Eight Contributor	≥ 30 but < 40 on the Generic Scorecard	10%
Non Compliant Contributor	< 30 on the Generic Scorecard	0%

⁹²

<http://www.Dti.gov.za>:accessed 14 October 2006

3. BBBEE Procurement Recognition: Company X

As a Level Five Contributor, if the procurement officer selects company X, s/he will recognise only 80c for every R1 spent with Company X. In other words, if the officer spends R10 million with Company X in the year under measurement, his/her department will recognise R8 million of that spend when reporting on preferential procurement.

BBBEE Procurement Recognition Levels: Company Y In comparison, Company Y is a Level Three Contributor. Statement 000 provides for enhanced BBBEE procurement recognition levels when procuring from enterprises that are Level One, Two or Three Contributors, as per the Generic Scorecard. This means that Company Y will enjoy enhanced procurement recognition: i.e.: for every R1 spent with Company Y by its clients, the procurer may recognise R1.10. In other words, if the officer spends R10 million with Company Y in the year under measurement, his/her department will recognise R11 million when reporting on preferential procurement.

4. Enhanced BBBEE Procurement Recognition Levels: Company Z

In addition, an inherent bonus system has been provided for in Statement 000 for procurement from enterprises which are more than 50% black-owned (or majority black-owned enterprises) in that such enterprises may be 'promoted' one level in terms of their BBBEE status, provided that the enterprise has also achieved the full seven points under the net equity interest component of the Generic Scorecard. As a result, although Company Z, (a company in which black people hold 100% of the exercisable voting rights and 100% of the economic interest owned AND which has achieved all seven net equity interest points in accordance with Statement 100) scores 55 points on the Generic Scorecard (the same as Company X), it is promoted from a Level Five Contributor to a Level

Four Contributor. This means that the procurement officer will be able to claim R 1

for every R 1 spent with Company Z, instead of only 80c for every rand as is the case with Level Five Contributors. In other words, if the officer spends R10 million with Company X in the year under measurement, his/her department will recognise the full R10 million when reporting on preferential procurement.

5. Resulting economic behaviour

The selection of Company Y, the Level Three Contributor, will ensure that the procurement officer receives the most recognition for his/her spend through this tender. It will also act as an incentive to Company X and Company Z to implement further BBBEE initiatives to ensure that they will be more competitive in future tenders.

6. Comparative Reporting Effects of BBBEE Procurement Spend

Assuming that the procurement officer in the above example spends R 10 million on goods and/or services from Company X, Company Y and Company Z respectively, as well as R 50 million from another company, Company A, non-BBBEE compliant entity, the officer's BBBEE reporting will be as illustrated in the table⁹³ that follows:

Supplier	BEE Score	Level Contribution	BEE Recognition Level	Total Spend	BEE Spend
Company X	55%	Level 5	80%	10,000,000	8,000,000
Company Y	78%	Level 3	110%	10,000,000	11,000,000
Company Z	55%	Level 4 (Promoted)	100%	10,000,000	10,000,000
Company A	15%	Non-Compliant	0%	50,000,000	0
Total				80,000,000	29,000,000

⁹³

<http://www.Dti.gov.za>:accessed 14 October 2006

The BBEE procurement percentage for the procurement officer will be calculated as follows: = BBEE spend/ total procurement spend = 29,000,000/80,000,000 = 36.3%

The procurement officer receives full and enhanced recognition for procurement from Company Y and Company Z, whilst s/he receives 80% recognition for his/her spend with Company X and no recognition whatsoever for his spend with Company A. In order to improve his/her spend to reach target, s/he will prefer to procure from Company Y and Company Z and similar BBEE contributors and may reduce his spend with Company A and Company X

To be accredited, Verification Agencies inter alia, need to have a BBEE score of at least 65 and have sufficient operational capacity to perform verification themselves without undue reliance on other entities.

Personnel of Verification Agencies, who are involved in preparing a Verification Certificate may not provide any other service (such as consulting) to that client for a period of 24 months prior to the date of issue of the Verification Certificate.⁹⁴

The Minister of Trade and Industry, together with the Accreditation Body, will implement mechanisms to ensure that Verification Certificates are accurate and reliable.

7. Conclusion

The DTI published a set of codes in December 2004 in draft format. These codes are to become the generic scorecard that companies who do not subscribe to an industry charter will use to measure their empowerment status.

⁹⁴ <http://www.BBEEonline.co.za>:accessed 14 October 2006

There are seven codes.⁹⁵ As of September 2005, only Codes 100 and 200 have been published.

⁹⁵ . See table below

CHAPTER 9

MEASUREMENT OF BBBEE ACTIVITIES

1. Introduction

The Codes will be very important to the management of enterprises interacting with both public and private sector entities that make their decisions based on the Codes. Applying the Codes to an enterprise simply means that an enterprise will be measured in accordance with the Generic Scorecard, contained in Statement 000.

The measured enterprise's BBBEE status will be measured according to the targets and weightings contained in the Generic Scorecard, as well as the measurement principles contained in each of the corresponding statements. A measured enterprise will receive a score out of 100, which will confer upon it a corresponding BBBEE status according to its BBBEE contributions.

Entities will be viewed regarding their BBBEE contribution as follows:

- (a) Excellent contributor to BBBEE total score of 80% and above
- (b) Good contributor to BBBEE total score of 65% to 79.9%
- (c) Satisfactory contributor to BBBEE total score of 40% to 64.9%
- (d) Limited contributor to BBBEE total score of below 40%

Important is the points value of a deal. In the world of scorecards, points are an entities' lifeblood.⁹⁶ Often these high-profile deals generate very few points at the outset (often less than ten points) and for a fraction of that investment, these companies could look at building up a much greater score elsewhere on the

⁹⁶ Janisch 2006:50.

scorecard (human resource development, enterprise development and corporate social investment).

Voting points and realisation points are some of the anti-fronting mechanisms built into the scorecard. The 25% +1 vote target allows the minority shareholder to block certain resolutions of the board.

Bonus points will not be earned by selling to some of the more prominent businessmen. The codes have tried to encourage other players by offering bonus points for new entrants. A new entrant is a black participant holding in aggregate in excess of 5% of the total voting rights and economic interest who has not concluded similar transactions in respect of any other enterprise. The cumulative value of these transactions is less than R20 million. A bonus point is earned for every 5% of equity the partner gains to a maximum of 15% (total 3 points).

Realisation points are awarded as the loan is paid off. Many deals require financing or loans and are paid back over a period of time. The maximum time to repay the loan is ten years. To earn these points another 20% must be paid off every two years. There is a catch though, realisation points are only awarded for equity that exceeds 15%.

Sale of assets can be considered for points on the scorecard, a subsidiary of the existing business is considered an asset. This is a clever mechanism to open up equity to many companies and be very attractive to some businesses. A white-owned company still battling to find the right black partner, can now choose to leave out elements of black ownership or management control and may still score BBBEE points with only 5 of the 7 measures, namely: for employment equity, skills development, buying from black suppliers, enterprise development and corporate social investment.

But at the same time, the codes contain various incentives for businesses that choose to include ownership as one of the empowerment criteria. For instance, if a business scores 20 points for the ownership element, the ownership score is increased by 25%. Businesses owned by black women and those with employee share plans can score further bonus points. If more than 50% of the voting rights and more than 50% of the economic interest of a company are in black hands and if the company scores the full seven points under the net equity value indicator of the ownership element, their final BBBEE status will be moved up one "level".⁹⁷ The following detailed scorecard in Chapter 5 will demonstrate how the Codes will be implemented by such decision-makers when reporting BBBEE spend and initiatives and making economic decisions based on BBBEE criteria.

2. DTI-scorecard

The DTI's scorecard takes its lead from the Act and splits empowerment into the four main pillars:

- direct empowerment, (equity ownership; executive management)
- human resource development (employment equity and skills development)
- indirect empowerment (preferential procurement and enterprise development)
- and residual element (corporate social investment)

These four pillars are common to all the charters. It is the values and weighting that differ between them.

- Direct empowerment

Is the most emotionally charged element on the scorecard. This involves equity ownership (20 points) and executive management (10 points) in an organisation.

⁹⁷ <http://www.bizcommunity.com>: accessed 29 September 2006

It is very unlikely that the majority of white-owned businesses are going to find suitable black partners or investors. The business may not be lucrative enough or it may be a multinational that does not have a policy of selling local equity. If equity had a higher weighting, we would see many companies close down and the government would be flooded with UIF⁹⁸ and other welfare applications.⁹⁹

Equity ownership and control is the most established measurement of narrow-based BBBEE and is the most abused. Most of the abuses revolve around fronting-the newspapers regularly report on unsuspecting security guards, domestic servants and other types of people who have suddenly discovered that they own a share of a business or are directors of businesses and have never received any economic benefit from this state of affairs.

The codes have built in a series of failsafe mechanisms that try to circumvent fronting. It makes it quite difficult for a company to earn all 20 points. For instance, just the presence of a black shareholder does not guarantee the maximum points. Even if the company is black-owned and managed it may not be entitled to all the points.¹⁰⁰

Economic interest is a participant's claim to return his ownership in the enterprise. This is an entitlement to dividends or his share after the enterprise has been sold. Realisation points is if a share in an enterprise is sold and this share is financed by another party, then points are earned as that share is paid for.

Management and control (executive management) 10 points describes the strategic management of the entire enterprise. It differs from the other levels of management as people are involved in the actual strategic direction of the enterprise. In keeping with the spirit of BBBEE there is a specific emphasis on

⁹⁸ Unemployment insurance fund

⁹⁹ Janisch 2006:25.

¹⁰⁰ A voting right that is fully exercisable without any limitation on that right.

women. There are three types of executive managers. Board members are appointed to provide the management control of the enterprise. They must have voting rights.

Other executive management do not need to be members of the board, they are defined as employees who are appointed to undertake the day-to-day management of the enterprise. As with board members they are actively involved in the development and implementation of the enterprise's strategy in so far as it relates to their area of responsibility.

Senior executive management are employees who are appointed to undertake the day-to-day management of the enterprise and who have individual responsibility for the overall and financial management of the enterprise. They too are involved in the development and implementation of the enterprise's strategy.

Points are awarded for learners as a percentage of total staff (between 2% and 5% of total staff depending on the charter) and for the percentage of learners that are black people.

3. Determine ownership

In determining the extent of total black ownership, the ownership scorecards measures the different rights attached to ownership :

- Control

Control of the Enterprise, through the exercise of voting rights at shareholder meetings;

- Economic Interest

The entitlement of black people to dividends, capital gains and other economic rights of shareholders;

- Net Equity Interest

The accumulated net economic interest in the hands of the black shareholders, after the deduction of monies owed by these black shareholders.

The following can assist in the process of measuring ownership:

1. Identify the entitlement of black people to exercise voting rights through an evaluation of the shareholders agreement or other relevant agreements
 2. Identify any restrictions on black people to receive economic interest in the form of dividends and capital gains. Examples include the right of vendors to acquire the equity at non market related prices at a future date.
 3. Calculate net equity interest based on the relevant formulae.
 4. Determine whether the measured enterprise is able to claim additional points as a result of the introduction of new entrants and/or broad-based schemes.
 5. Sum the total ownership points in the enterprise and multiply by the 20% weighting for ownership.
4. Application of the modified flow-through principle

The modified flow-through principle¹⁰¹ was introduced to provide companies and black shareholders of companies with some relief when it comes to the use of external non-BBBEE funding or the introduction of non-BBBEE technical partners into its chain of ownership. The following section provides a step-by-step guide on the application of the principle when measuring black ownership:

- 1 Determine the ownership percentage at all ownership tiers using the normal flow-through

¹⁰¹ Janish 2006:51.

2. Identify ownership tiers that are black majority owned (where the ownership exceeds 50% by BBEE parties, under the normal flow-through)
3. Elect one black majority owned tier for the application of modified flow-through (the calculation favours the application over the tier with the lowest BBEE shareholding)
4. Recalculate the black ownership of the measured enterprise, after taking into account the converted ownership tiers (where black ownership is converted to 100% at one selected tier only)
5. The modified flow-through cannot be applied onto the measured entity itself (even if it is a black majority owned company)
6. The modified flow-through and control principles only apply to companies (and not to trusts or other forms of enterprises)
7. When working with complex ownership structures, the modified flow will only be applied when the specific chain of ownership of the measured enterprise consists of black majority owned companies

The ownership scorecard provides specific recognition of ownership participation by black women or black designated groups. As a result, a measured enterprise will only achieve full ownership points if there is equity participation by black women and black designated groups or broad-based schemes in its ownership structure.

5. Selling shares or giving them away

Many companies believe that the only way to make headway in the BBBEE process is to give shares away to a black company or person. It is difficult to see how this would benefit anyone in the long term.

Two of the principles of BBBEE advise against this very practice:

- BBBEE is part of South Africa's growth strategy. An economy cannot grow if people are handed over shares in companies. BBBEE's intention is to empower black people.
- BBBEE should be implemented within the context of sound business practices and within the ambit of the law as explained by Judge Hussain in *Standard Bank v Liberty Group*¹⁰²

The passing of the Amendment Act of 1999¹⁰³ has changed the position dramatically. The amendment has effectively swept away much of the previously existing capital maintenance provisions of both the common law and under the Companies Act of 1973.¹⁰⁴

Before the amendment¹⁰⁵ many black economic empowerment transactions would not have been possible.

- Human Resource Development

Human Resource development constitutes 30% of the scorecard. It consists of two sections: Employment equity (10 points) which is governed by the

¹⁰² *Standard Bank v Liberty Group* 2004 unreported WLD 17352/04 9; Ex parte Lomati Landgoed Beherende Edms 1985 (2) SA 517 (WLD).

¹⁰³ Act 37/1999.

¹⁰⁴ Act 61/1973.

¹⁰⁵ Companies Act 61/1973.

Employment Equity Act¹⁰⁶ (hereafter refer to as the EE Act) and Skills Development (20 points).

Black people constitute a large percentage of the workforce, but the overwhelming majority of these people have little or no skills and very few prospects for climbing the corporate ladder, the EE Act of 1998¹⁰⁷ has identified people from designated groups (black people women and people with disabilities) and prioritises their advancement in the workplace at all levels.

Although employment equity¹⁰⁸ impacts on executive management, the EE section on the scorecard applies to levels of management below executive, namely senior, middle and junior management. While the EE Act aims for greater representation of people from designated groups in all enterprises, the codes aim for a high proportion of black managers at these levels-extra points are awarded if black women are appointed in these positions.

Skills development (20 points) The DTI defines skills development as the development of core competencies of black people to facilitate their interaction in the mainstream of the economy. Skills development is governed by the Skills Development Act and the Skills Development Levies Act. Since August 2005 companies that had an annual payroll in excess of R500 000.00 per year had to pay 1% of their payroll as a skills development levy.¹⁰⁹ It is imperative that there be a focus on core and technical skills that would enable black people to participate in the wider economy in a meaningful manner.

6. Learnerships and internships

¹⁰⁶ Employment Equity Act 55/ 1998.

¹⁰⁷ Act 55/1998.

¹⁰⁸ Janisch 2006:11.

¹⁰⁹ SDL

Learnerships are similar to apprenticeships, but differ in that they apply to all parts of the economy. They are workplace learning programmes, supported by structured institutional training, which result in a qualification. The qualification must be registered by the South African Qualifications Authority¹¹⁰ and must be related to an occupation. Employers can offer learnerships to their own employees or can recruit unemployed people for training.

A learnership must comprise of the following elements:

- a structured learning component
- practical work experience of a specified nature and duration]
- be registered with the Director-General, Department of Labour in the form of a learnership agreement.

A person who successfully completes a learnership will have a qualification that is nationally recognised. Internship are typically found in professional organisations such as legal and accounting firms in the form of articulated clerks.

Points are awarded for learners as a percentage of total staff (between 2% and 5% of total staff depending on the charter) and for the percentage of learners that are black people.

Minister of Labour Membathisi Mdladlana noted: “the economic active population has grown faster than the jobs we created. Our economy needs more and more skilled workers and skills training is critical”.¹¹¹ It is not enough to pay the SDL, the money needs to be spend on Sectoral Education Training Authority (hereafter referred to as “SETA”) approved training.¹¹²

- Indirect Empowerment

¹¹⁰ SAQA

¹¹¹ <http://www.foundation-development-africa.org>: accessed 11 September 2006

¹¹² <http://www.info.gov.za>: accessed 14 October 2006.

There are two elements namely preferential procurement (20 points) and enterprise development (10 points). It would seem that indirect empowerment is the reason why most companies that operate in South Africa will develop a BBBEE profile.

7. Preferential procurement

The Preferential Procurement Act of 2000¹¹³ requires organs of state to create rules for procurement, for example if the contract is less than R500 000.00 then the 80/20 rule applies.¹¹⁴ The Preferential Procurement Act of 2000¹¹⁵ favours HDI and women (included white people) and people with a disability (included white people). White people are expressly excluded from the Act.

Contrary to common misperceptions, BBBEE is not simply about replacing existing suppliers with black-owned companies. In order for BBBEE to work successfully it is crucial that all companies in South Africa transform and the best way of achieving this is through preferential procurement.

The measurement of the procurement is one of the most important statistics. Keeping a record of procurement involves: identifying eligible procurement and ascertaining the BBBEE status of suppliers flagging these purchases in the accounting system so that they will produce an understandable report.

Levels of service should not be compromised all suppliers must conform to accepted levels. Certain aspects of procurement may be set aside for certain types of business.

Not every supplier has an impact on the score, initially those suppliers that will have an impact on the score should be identified. When calculating eligible

¹¹³ Act 4/2000.

¹¹⁴ 80 points for price and 20 points for other criteria

¹¹⁵ Act 4/2000.

procurement excluded items are, salary and wages, public utilities, procurement spending where there is a natural monopoly (e.g. Telkom), any items of procurement where the supplier is imposed in terms of a global policy for technical reasons, inter-entity charges for services rendered by other members of the group, social investment expenditure and donations are all VAT payable.¹¹⁶

8. Enterprise development

Is designed to stimulate and promote entrepreneurship. The DTI's draft codes define enterprise development as monetary and non-monetary investment. The term "investment" is not well defined-some regard it is a donation and others regard it as a recoupable monetary investment. It is possible for companies to take a strategic view with enterprise development. When developing an enterprise development strategy it is advisable to consider guidelines that the DTI's strategy for BBBEE provides:

- a) there must be real economic benefit flowing to the recipient enterprise to enable it to be set up and run on a sustainable basis;
- b) there must be resultant operational capacity from the investment into the enterprise;
- c) there must be active participation by black people in the recipient enterprise.

The strategic impact of BBBEE lies in new owners altering the strategies of newly acquired businesses and typically raising the levels of biodiversity in the industry.¹¹⁷

- Residual element

Corporate social investment (hereafter referred to as "CSI") 10 points is a company's contribution to charities. These contributions can either be industry

¹¹⁶ Janisch 2006:22-26.

¹¹⁷ <http://www.anc.org.za>:accessed 22 September 2006

specific or a contribution made by the company. Charters tend to be quite specific about CSI¹¹⁸

The advantage of industry-specific initiatives is that they make the whole CSI process easier. The Financial Services Charter has a very comprehensive definition of CSI. It lists CSI initiatives as including:

- a) education: support for community education facilities
- b) training; community training; skills development for the unemployed, adult basic education and training in communities, financial literacy programmes in communities
- c) development programmes: for youth and other target groups
- d) environment: support of conservation projects community clean-up projects; food garden initiatives
- e) job creation: projects external to the workplace or any commitments contained in empowerment financing
- f) art and culture: support of development programmes; development of new talent
- g) health: support of community clinics; health programmes in the community
- h) sport: support of developmental programmes.

Contributions are measured according to set criteria (eg. Profit before tax) and the search for charities and causes is eliminated.

9. The seven secrets of growth for economic development

There are a number of aspects to address in order to reach the growth and development objectives. This will be considered as the seven pillars of 6% average growth rate.¹¹⁹ They are addressing the skills deficit, ensuring monetary stability, progressively raising the ratio of capital formation to gross domestic

¹¹⁸ Corporate social investment

¹¹⁹ Parsons 2005:11

product, ensuring continual productivity growth, promoting enterprise development and deregulation, eliminating the bottlenecks that prevent more effective delivery of social services and strengthening local and provincial government delivery.

The 3.5 million employment opportunities that might be created between now and 2010 as will for the most part be jobs that require qualifications and skills.¹²⁰ The combined number of graduates from all government subsidised higher education institutions is only about 110 000 a year and without steady increases in the supply of requisite skills economic expansion there will be increasingly severe bottlenecks and inflationary pressures.

Several interventions could alleviate this situation, they are enhancing the conversion of enrolled students to graduate in the higher education sector, improving the effectiveness of the sector education and training authorities, increasing the incentives to the business sector to support learnerships, provide more opportunities for new graduates to acquire workplace skills and experience and adopt a more flexible and strategic approach towards the importation of critical skills.

10. Conclusion

The scorecard used to measure a companies BBBEE profile will either be an industry charter or the DTI's scorecard. If a specific industry charter is not yet finalized the DTI's scorecard must be followed. Empowerment is always measured using the four basic pillars: direct and indirect empowerment, human resource development, an corporate social investment. These pillars are to be used as a guideline in the process of aligning the initiatives with the targets and weightings of the charter's scorecard.,

¹²⁰

Parsons 2005:11

To monitor and audit the transformation process to 2008 and 2014, a Charter Council¹²¹ (to be discussed in chapter 10) will be established as an independent body with a mandate to oversee the implementation of the charter.

¹²¹ See discussion in Chapter 9 below.

CHAPTER 10

CHARTER COUNCIL

1. Introduction

The Charter Council will address the issues of principles and, in particular conduct the reviews and monitor If there is a material change in circumstances or the environment in which the charter has to be implemented, it will consider whether the targets and implementation strategies are still appropriate to receive, consider and approve annual audits from each of the marketing and communication sub-sectors; prepare interim reports at appropriate intervals, undertake the reviews identified in terms of the charter, engage with government, marketing and communication sub-sectors, the BBBEE Advisory Council and other regulatory bodies to promote the implementation of the charter.¹²²

Currently the Legal Services Charter Council is charged with monitoring, evaluating and enforcing the implementation of the Legal Services Charter (hereafter referred to as the LS Charter).¹²³

The Minister must issue a strategy for BBBEE and may change or replace a strategy issued in terms section 11 of the Act of 2003.¹²⁴ A strategy must provide for an integrated co-ordinated and uniform approach to BBBEE by all organs of state, public entities, the private sector, non-governmental organisations.

Local communities and other stakeholders, develop a plan for financing BBBEE, provide a system for organs of state, public entities and other enterprises to prepare BBBEE plans and to report on compliance with those plans and be consistent with the Act.

¹²² <http://www.germanchamber.co.za>:accessed 12 November 2006

¹²³ See Annexure "A"

¹²⁴ Act 53/2003.

2. Support services and funding of council

The Department of Trade and Industry¹²⁵ must provide the Council with the necessary support services and funding out of money appropriated by Parliament for that purpose. The funds referred to must be utilised for the establishment and operating costs of the Council and the development and implementation of a communication plan on BBBEE.

There will be equality between sector association representatives and all others on the Charter Council. The Charter Council must fairly reflect the interests of all marketing and communication sub-sectors.¹²⁶

Decisions of the Charter Council will be taken on a consensual basis. If, on any issue, the Charter Council is unable to achieve consensus, there will be a dispute-breaking mechanism in the Charter Council either by some agreed mechanism with the Charter Council, or by reference to arbitration or mediation.¹²⁷

3. Industry charters

Industry charters¹²⁸ are gazetted in terms of Section 12 of the Act of 2003¹²⁹ designed to assist companies in a certain industry in their empowerment process and gazetted in terms of section 12 of the Act must simply meet the following two criteria, as outlined in the Act:

¹²⁵ Sec 13 (1) of the Act
¹²⁶ <http://www.econoBBBEE.co.za>: access 14 May 2006
¹²⁷ <http://www.lib.uct.ac.za>:access 14 May 2006
¹²⁸ Also known as transformation charters.
¹²⁹ Act 53/2003.

The charter must be sufficiently consultative in that it must have been developed by the sector's major stakeholders. The charter must advance the objectives of the Act.

Since transformation charters gazetted in terms of section 9 of the Act of 2003,¹³⁰ become Codes and are therefore legally binding on organs of state and public entities, the procedure for gazetting these are far more stringent than that of section 12 charters:

Enterprise BBBEE plans are mission statements to achieve transformation by individual entities. These are voluntary company-specific commitments to BBBEE and may not be used for the purposes of measuring an entity's BBBEE status, save for internal assessment purposes.

Each industry has a unique nature and a generic scorecard may not be as effective for that particular industry. The charters are also a way to compel the private sector to comply with the legislation. Once gazette by government, the charter would also be binding on those who wanted to do business with the government. Those property industry players who chose not to be bound by the charter would not be able to do business with government.

There are numerous charters in various stages of completion. A few are:

- i) Maritime Transport & Service Industry BBBEE Charter
- ii) Forwarding & Clearing (F&C) industry Charter
- iii) Mining industry
- iv) Tourism industry
- v) Petroleum and liquid fuels industry
- vi) Financial sector¹³¹
- vii) Draft Legal Services Charter¹³²

¹³⁰ Act 53/2003.

¹³¹ Annexure "C"

¹³² Annexure "B"

4. Conclusion

By the beginning of 2004 when the BBBEE Act was promulgated, numerous sectors of the economy had drafted industry charters on BBBEE and transformation. Whilst some contained scorecards loosely based on the broad-based scorecard contained in the Strategy, others were merely written undertakings of commitment to transformation.¹³³

In addition, several of these charters were drafted prior to the release of the strategy and stakeholders therefore had little point of reference in terms of broad-based elements and weightings. Furthermore, it became evident that other pertinent issues surrounding the measurement of BBBEE needed to be addressed to further accelerate the transformation process. Non-compliance with the codes will not be interpreted as breaking the law, there will be no fines or jail terms. Compliance is voluntarily and if a big company thought it was important enough to their consumers that its business would flourish without empowerment verification, it would be free to take the risk.

¹³³ <http://www.rbmag.co.za>:accessed 3 October 2006

CHAPTER 11

DRAFT LEGAL SERVICES CHARTER

1. Introduction

This chapter investigates the establishment and composition of the Legal Services Charter council, development of the draft Legal Services Charter (hereafter referred to as LSC) and application of the Codes.¹³⁴

The LSC aims¹³⁵ to adopt a Charter which gives effect to the Constitution of the Republic of South Africa¹³⁶, the Equality Act of 2000¹³⁷ and the BBBEE Act of 2003¹³⁸ by facilitating empowerment of historically disadvantaged individuals¹³⁹ through the transformation of the legal services sector, effecting access to justice to all the people of the Republic of South Africa and promoting economic, social and political justice.

The governance mechanisms of the legal profession can play an important role in the in the promotion of equality and improving access to quality legal services. A strong independent and unified legal profession is strategically positioned to lead the legal services sector in overcoming its challenges and further protect the interest of the public in pursuit of the objectives of the Charter. This includes the enabling the legal services sector and the provision of legal services broadly to transform in line with the constitutional vision of the achievement of equality.

¹³⁴ Annexure "B" .

¹³⁵ Draft Legal Services Charter: preamble.

¹³⁶ Act 108/1996.

¹³⁷ Promotion of Equality and Prevention of Unfair Discrimination Act 4/2000.

¹³⁸ Act 53/2003.

¹³⁹ Referred to as HISTORICALLY DISADVANCED INDIVIDUALS's

2. Governance and implementation of LSC Council

A Legal Services Charter Council should be established as a body that is broadly inclusive of stakeholders in the legal services and is charged with monitoring, evaluating and enforcing the implementation of the Charter.

The Council shall consist, among others, of the following members appointed by the Minister in consultation with the subsections under mentioned in the sector:

- (a) One member each from the sub-sector, which include the Government, legal components of State Owned Enterprises, the Organised Legal Profession and legal practitioners practicing outside the Organised Legal Profession (Prosecutors, State Law Advisors, the Judiciary, Legal Academics, Paralegals, Arbitrators and Insolvency Practitioners).
- (b) Three (3) members, each appointed from the Departments of Finance and Trade and Industry and any other relevant Department as the Minister may deem fit.
- (c) Three (3) members representing civil society.
- (d) Other relevant interest groups participating in the Legal Services regard being had to gender, disability and rural communities as decided by the Council.
- (e) The Minister, on the advice of the Council, may appoint any such person as he or she may deem necessary, for the effective execution of its responsibilities.

Participants listed, must be appointed to Council by their respective constituencies and must satisfy the principle of representivity and inclusiveness. More specifically, care must be taken to ensure gender balanced representation.

The Council shall be guided by the following basic principles:

- Equality.
- Independence.
- Transparency.
- Fairness.
- Good Corporate Governance.
- Consultation and Inclusively.
- Equitable Socio-economic Transformation.
- Dignity
- Non-racism
- Non-sexism
- Transformative and Inclusive Mindsets

3. Objectives of Council

To adopt a Charter which gives effect to the Constitution, the EE Act of 1998¹⁴⁰ and the Act by facilitating empowerment of HDI's through the transformation of the legal services sector, effecting access to justice to all the people of the Republic of South Africa and promoting economic, social and political justice. This includes the following:

- 3.1 Enabling the legal services sector and the provision of legal services broadly to transform in line with the constitutional vision of the achievement of equality.
- 3.2 Achieving fundamental change in the racial and gender composition of the judiciary.
- 3.3 Transforming the legal services sector to be representative of the demography of the South African society and more accessible to all members of society..

¹⁴⁰

Act 55/1998.

- 3.4 Implementing measures to enhance access to justice which include promoting equitable access to legal services to all the people of South Africa, including the marginalized, poor and rural communities.
- 3.5 Improving access to the legal services sector which includes academic qualifications, apprenticeship opportunities, and professional qualifications by monitoring and evaluating the input, throughput and output of academic qualifications and apprenticeship of professional qualifications.
- 3.6 Providing a framework for building a common understanding, set benchmarks, design implementation mechanisms and develops support programmes for achieving equality in legal services.
- 3.7 Effectively and meaningfully promoting the equitable distribution of legal work with regard to race, gender and disability.
- 3.8 Transforming and standardising legal training and education, including continued legal training to develop and improve the skills base to ensure transparency and to eliminate barriers to equal opportunities.
- 3.9 Promoting and implementing skills development measures intended to empower legal professionals,, in particular HDI's, in fields of expertise where they previously did not have access.
- 3.10 Enhancing and promoting representivity in respect of ownership, management and control of legal practises or enterprises by black legal practitioners, including women, persons with disabilities and amongst rural communities.

- 3.11 Creating conditions conducive to ensuring that HDI's service providers are able to start, manage and build sustainable practices or enterprises.
- 3.12 Ensuring that governance structures are transformed, inclusive and have balanced representation with regard to race, gender, and disability.
- 3.13 Supporting the attainment of the objectives of, inter alia, the Employment Equity Act, BBBEE Act and other equality and equity laws.

4. Powers and functions of council

The powers and functions of the Council include—

- provision of guidance on matters affecting broad-based black economic empowerment, equality and the constitution in the legal services;
- compilation of reports on the status of broad-based black economic empowerment, equality and the constitution in the legal services;
- sharing of information with approved accreditation agencies relevant to broad-based black economic empowerment, equality and the constitution in the legal services;
- as and when, in its opinion, the circumstances so require, appoint a committee of experts, with a view to assisting the Council in the exercise and performance of its powers, functions and duties;
- engaging and advising relevant regulatory entities in the broader legal services sector on the Charter;
- developing mechanisms and strategies to monitor compliance with the Charter and related matters;
- developing a strategy for consultation with provincial and local stakeholders;
- developing guidelines for assisting practitioners to provide pro bono legal services in rural and other areas;

- developing a practical manual, with examples, as well as implementing an interactive portal to communicate the basic methods of applying the broad-based black economic empowerment scorecard;
- conducting or commissioning research for the purposes of ensuring the effective implementation of the Charter;
- reporting to Government and the Broad-based Black Economic Empowerment Advisory Council on the implementation of the Charter;
- receiving progress reports from relevant institutions within the sector on the implementation of the Charter; and
- creating a fund financed by the profession to facilitate an affirming environment for persons with extraordinary needs.
- access to all relevant and necessary information must be furnished
- Development of verification mechanisms and or tools for compliance.¹⁴¹

5. Persons qualified to serve on council

Any person appointed to the Council must-

- in the execution of his or her responsibilities, take into account the interests of the broader stakeholders within the legal services;
- be committed to transparency and fairness in the execution of their responsibilities in the Council;
- act in good faith and in the best interest of the legal services as a whole;
- be committed to the objectives of broad-based black economic empowerment and socio economic transformation as provided for in the Act and the Code of Good Practice; and
- possess suitable qualifications, expertise and knowledge in the legal services.

¹⁴¹

6. Date of application of Charter

On the effective date of the application of the Charter, the Legal Services Charter Steering Committee must be dissolved and the implementation phase and all matters incidental thereto must be handed over to the Council.

7. Funding of council

The funding of the activities of the Council must be in accordance with the relevant provisions of the published Code of Good Practice.

8. Achieving fundamental change in the racial and gender composition of the judiciary.

Recognising the pivotal role that the legal services sector plays in judicial appointments, its influence on the culture and values of the judiciary, and in the development of the skills pool from which the judiciary is drawn, the legal services sector is well-placed to contribute meaningfully and ensuring the promotion and achievement of equality in the judiciary. The legal services sector also plays a central role in ensuring the independence of the judiciary.

9. Enhance access to justice

Transforming the legal services sector to be representative of the demography of the South African society and more accessible to all members of society. Access to and participation in virtually all aspects of legal services is skewed along race and gender lines and against persons with disabilities. Implementing measures to enhance access to justice which include promoting equitable access to legal services to all the

people of South Africa, including the marginalized, poor and rural communities.

Access to the legal profession from the perspective of admission requirements in respect of two professions the attorneys and Advocates professions. Both professions are regulated by separate legislation namely, the Admission of Advocates Act of 1964¹⁴² and the Attorneys Act of 1979.¹⁴³ In view of the two separate regulatory bodies the admission requirements differ. Access to legal work is a problem throughout the legal services. Black practitioners are forced to close down their firms because they are unable to get access to legal work. The Office of the State Attorney, government departments, SOEs and other big corporations are partly to blame by not providing adequate support consistently to black practitioners.

Black firms are crying foul in that the State distributes the bulk of its work to the traditional white firms. This contributes to their demise. The Office of the State Attorney is also seen as a contributor in this regard. Its briefing patterns must be seriously reviewed and strong interventions made. Cabinet has made a policy decision to address disparities in legal briefings

Government is one of the biggest consumers of legal services. A high volume of work is outsourced to private practitioners rather than the State Attorney conducting the work themselves. The Office of the State Attorney and all levels of government, including municipalities, have been accused of outsourcing work to mostly white legal practitioners. Further, there is a perception that black practitioners are unable to perform specialised legal work, which is also outsourced to white legal practitioners. Black legal practitioners are seriously disadvantaged.

¹⁴² Act 74/1964.

¹⁴³ Act 53/1979.

In some instances, this creates unnecessary tensions amongst practitioners. Although it is argued that the Office of the State Attorney does not have the necessary capacity and competence to deal with highly specialised work, it bolsters the perceptions that black legal practitioners lack skills and experience and that only white firms have the competencies to deal with specialised work.

Providing a framework for building a common understanding, set benchmarks, design implementation mechanisms and develops support programmes for achieving equality in legal services. Effectively and meaningfully promoting the equitable distribution of legal work with regard to race, gender and disability. Transforming and standardising legal training and education, including continued legal training to develop and improve the skills base to ensure transparency and to eliminate barriers to equal opportunities.¹⁴⁴

10. The attainment of the objectives of equality laws

Promoting and implementing BBBEE, skills development measures intended to empower legal professionals, in particular HDI's in fields of expertise where they previously did not have access. Enhancing and promoting representation in respect of ownership, management and control of legal practises or enterprises by black legal practitioners, including women, persons with disabilities and amongst rural communities.

Creating conditions conducive to ensuring that HDI legal service providers are able to start, manage and build sustainable practices or enterprises.

¹⁴⁴ Annexure "A"

Ensuring that governance structures are transformed, inclusive and have balanced representation with regard to race, gender, and disability.

Supporting the attainment of the objectives of, inter alia, the EE Act, of 1998¹⁴⁵ Act of 2003¹⁴⁶ and other equality and equity laws.

11. Empowerment of HISTORICALLY DISADVANCED INDIVIDUALS's

The targets specified in this section are in respect of broad-based initiatives targeting HDI have in respect of contributions specifically listed hereinafter in respect of each element, compliance is to be measured using the methodology and element of scorecards for each of the elements as specified in the Codes issued under section 9(1) of the Act

Legal practitioners will ensure that in seeking to comply with HDI's targets set out herein, they will seek to comply with specific targets stated in the Codes for BBBEE initiatives targeting black people. This implies that there are two targets:

- A lower target as per the Codes specifically targeting black people; and
- A higher target as per the Charter which is inclusive of both black people and other HDI's.

The ownership (public or private), enterprise development and preferential procurement are the main competitive fields which will be altered by the empowerment of HDI's in the legal service sector. The legal services is but one of the major components of the South African society fabric that has lagged behind in terms of transformation and embracing the values underlying the Constitution in as far as the legal profession and access to justice is concerned. The successful implementation of the empowerment of HDI's in this area depends on a government driven empowerment process and a coherent

¹⁴⁵ Act 55/1998.

¹⁴⁶ Act 53/2003.

regulatory environment, strategic intent of the profession and that of the broader community as well as the competitive dynamics of the industry and an enabling business culture.

12. Indicators of empowerment

- Ownership and Control

Commitment to increase in the number of black people, women and people with disability that manage, own and control productive assets, across the entire spectrum of legal services. We also commit to the design of appropriate funding mechanisms to facilitate the process. This principle is linked to the long-term strategy of developing a body of highly developed, experienced and competent black legal practitioners in all areas of legal practice to ensure compliance with the principles and spirit of the Constitution¹⁴⁷ and Equality Act.¹⁴⁸ With appropriate adjustments, legal academia and other sites of legal expertise that lie outside the organised legal profession also commit to speedier increase of black people, women and people with disability to strategic leadership roles.

The Organised Legal Profession undertakes to broaden beneficial participation and the ownership base of their companies/partnerships/associations to ensure that at least 35% of their services and ownership/partnership/association is black, of which at least 50% must be women, and at least 4% of people living with disability, within the next five years.

- Management

The guiding principle is to redress inequalities with regard to race, gender, disability and culture in the legal service sector and to ensure that the people

¹⁴⁷ Act 108/1996.

¹⁴⁸ Act 4/2000.

who manage and lead in this field, broadly reflect the diverse profile of the South African population and that they are appropriately empowered and skilled to manage. The objective of this element is to increase the participation of black people and black women at board and senior management levels in the legal service industry that encompasses both government and private sector institutions and similar governing structures. Government and the private sector will need to commit to meet stringent targets and time lines in order to achieve this mandate. The legal services will be transparent, eliminate unscrupulous business practices including fronting and fraud, and adopt best-practice corporate governance policies.

The Government undertakes to accelerate the appointment of—

- to accelerate the appointment of black people in boards of government institutions; and
- to accelerate the appointment of black women in boards and executive management positions.
- to accelerate the appointment of people with disabilities in boards and executive management positions

The legal profession undertakes to promote the participation by black people in board positions of organizations providing legal services;

- promote the participation by black people, in particular black women, at all levels of management;
- promote the participation of black women in board and executive management positions;
- promote the participation of black people and women, especially black women, in management and leadership structures in Faculties and Schools of Law; and
- promote black ownership accompanied by an equal level of management control. However, the legal profession will recruit onto their executive

boards and similar governing structures black directors (who do not necessarily own equity) to reach a target of at least 40% within 5 years. Fifty percent (50%) of this target for black representation on executive boards and similar governing structures should be earmarked for women and 4% for all people living with disability.

- Employment Equity

Employment equity and skills development targets should be achieved within the ambit of the Equality Act of 2000¹⁴⁹, Employment Equity of 1998¹⁵⁰ and Skills Development Act of 1998¹⁵¹. The principle is to increase the participation of black people in top management, senior management and professional positions to create a workforce that truly represents the racial, ethnic and gender diversity of our country. This will require that all stakeholders create a supportive culture within their organisations to be an 'Employer of Choice', attract new talent, facilitate the development of existing employees, and accelerate their progress into key positions within the industry.

Government undertakes to abide by the targets set by Cabinet and as encapsulated in the Employment Equity Plans.

The legal profession commits to abide by the targets as encapsulated in the Employment Equity Plans where such plans are required in terms of the Employment Equity Act.

The legal academia commits to abide by the targets as encapsulated in the Employment Equity Plans where such plans are required in terms of the Employment Equity Act of 1998.¹⁵²

¹⁴⁹ Act 4/2000.

¹⁵⁰ Act 55/1998.

¹⁵¹ Act 97/1998.

¹⁵² Act 55/1998.

- Skills development

The vision is to substantially increase the economic value adding (or productivity) of every employee in the legal services through best practice human resource and skills development policies and to increase the scale of initiatives aimed at developing black professionals and experts. In particular, the development of expertise in the areas of corporate and commercial law and transactions; legal drafting; legal research and teaching; and trial advocacy will receive prominence in the development of skills. The transformation demands of the legal services and rapid changes in the global environment require that more resources should be mobilised for expanding the existing human capital pool through investing in people, employment equity, skills development and institutional transformation.

The Government undertakes to—

- invest at least **5%** of payroll on skills development initiatives;
- design and fund a coordinated framework and programme for career awareness and training that leverages off and adds value to existing initiatives;
- publicise and coordinate information regarding scholarships, training resources and careers in the public services (other stakeholders will be encouraged to contribute towards the cost and design of this initiative);
- to develop existing structures such as the State Attorney's Offices, in conjunction with the Justice College under the DOJ&CD and further to develop intra-industry exchange and internship programmes;
- to utilise all legislative and other measures available to it to influence the attainment of constitutional objectives.

The legal profession undertakes to invest at least **5%** of payroll on skills development initiatives which target is inclusive of all associated costs and the current 1% skills development levy. To identify within and outside their companies a talent pool of black professional assistants and candidate attorneys for accelerated development through international assignments that provide high-quality legal and managerial exposure, where appropriate mentorship programmes, learnerships, intra-industry exchange and internship programmes; and higher education and training.

The Legal Academia undertakes to promote the development of skills of black people and women, especially black women through enhancement of research, teaching and writing skills, mentorship programmes and academic leadership and management skills

- Preferential procurement

The guiding principle is to accelerate procurement from black practitioners and black-owned and empowered enterprises operating within the legal services sector. Public and private institutions will implement a targeted procurement strategy to enhance equality. This will create opportunities for the establishment of new enterprises and the development of existing ones that will grow the industry, create jobs and sustain the growing body of highly experienced and developed black practitioners. The State has a great deal of leverage in its farming of contracts and the licence to operate, especially in PPP's. Public Enterprise Minister boasted to Parliament in 2003 that almost a quarter of the discretionary spending of Denel, Transnet and Eskom went to broad-based black economic empowerment.

Government's undertaking:

- Identify, prioritise and target black lawyers, legal practitioners and companies in awarding tenders, briefs and contracts within the public sector;
- Procure the services of black lawyers and legal practitioners in the process of briefing advocates, and procuring the services of attorneys;
- Undertakes to allocate 50% of its briefs and other legal work requiring private practitioners to black lawyers and legal practitioners by 2007; and
- This target shall apply to all organs of State including State owned enterprises, and relevant provincial and local government structures.

Legal Profession's undertaking is to proactively identify and implement targeted procurement strategies and policies to realise the objectives of the LSC, to report periodically on all procurement spent; and undertakes to brief at least 40% black practitioners by 2007 and 60% by 2008.

The Government undertakes to utilise resources generated by State Owned Enterprises (SOEs) to create a fund to finance the legal services infrastructure and services in rural and township communities and explore the options for the setting up of such fund, and to place the matter for discussion at the first meeting of the Council.

LSC commits to partner with or promote collaborative relationships with rural and township practices, including paralegals, to develop the capacity of rural and township practices thereby prioritising black and women owned practices and strengthen and accelerate the development of operational and financial capacity of black entrepreneurs.

- Services Specific Targets

In view of the inaccessibility to legal services experienced by township and rural communities, our principal objective is to bridge the gap to access to legal services by giving of our time freely, and without reward in the pursuit of community service. The form of community service will not be limited to legal advice or representation, but may take any form where legal skills are required.

Government undertakes to make available its legal aid services to areas where there is a need for delivery of legal services. Government also undertakes to conduct regular campaigns for the popularisation of the Constitution and promote legal literacy amongst the rural and township population.

The legal profession undertakes to make available its human resources to townships and rural areas to, among others, conduct legal education programs, conduct programs to popularise the Constitution; and lend its management expertise to develop township and rural practices. This will enhance the image of the legal profession as being accessible to all people. The legal profession undertakes to devote in at least 5% of its total billing hours per month on pro bono work.

The Legal Academia undertakes to –

- Provide legal education in communities through Street Law and other outreach programmes;
- Provide paralegal training, where appropriate;
- Provide legal advice through law clinics; and
- Work with government in realising community legal services that also provide context-learning as was decided at the all-inclusive National Forum in 1998.

13. Conclusion

The draft LSC seeks to address three crises in the legal profession,¹⁵³ jurisprudence that may be out of sync with the thinking of society, the adequacy and quality of legal representation and the affordability of and access to the law. With regards to the quality of legal services, the majority of people would never enter the portals of large law firms, with large numbers of the poor receiving legal advice from outside the attorneys' and advocates' professions. The LSC was predicated on these defects. And it reminds us of the social context in which we practice

¹⁵³

De Rebus 2006:10.

CHAPTER 12

DURATION OF BROAD BASED BLACK ECONOMIC EMPOWERMENT

1. Introduction

In 10 to 20 years, South Africa must be a completely different country to the one we know. BBBEE is a ten-year plan from the commencement (gazetting) of the Codes or Transformation Charters. Every Transformation Charter has a ten-year target.¹⁵⁴ Some charters have milestones incorporated into the charter.¹⁵⁵ Human resources strategy must have eradicated illiteracy and produced thousands of black accountants, engineers and scientists. Workplaces must be areas of equality and opportunity to advance through training. Workers must have a meaningful influence in the production process. The levels of small and medium enterprise activity in the key growth sectors of the economy should have increased and the competitiveness of these industries substantially improved.

In recognition of the fact that many enterprises are still applying narrow-based or similar evaluation mechanisms, the Codes allow for the continuation of narrow-based evaluation until the end of the twelfth month of the publication and gazetting of Code 000. This is to allow all reporting entities the opportunity to initiate the reporting of BBBEE contributions using the Codes from the first reporting period that will begin subsequent to the release of the Codes.¹⁵⁶ Notwithstanding the latter, broad-based evaluation is encouraged to continue, or to begin, prior to the completion of the transitional period.

¹⁵⁴ Janish 2006:12.

¹⁵⁵ For example, Tourism and Mining charters have five- and ten-year targets and scorecards

¹⁵⁶ <http://www.Dti.gov.za>:accessed 15 May 2006.

If an enterprise elects to be measured on narrow-based principles during the transitional period, the sum of the measured enterprise's score for ownership and management will be multiplied by a factor of 1.92.

In other words,¹⁵⁷ the measured enterprise's narrow-based score will be calculated as follows: Unless a Code is amended, substituted or repealed as allowed for in section 9 of the Act of 2003,¹⁵⁸ the Codes will be reviewed after a period of ten years, following the gazetting thereof. An entity's BBBEE status is evaluated according to ownership and management control exclusively.¹⁵⁹

The Companies Act has to be brought in line with the constitution and the King Code with greater emphasis on corporate citizenship.¹⁶⁰ There should be no distinction between public companies, private companies and close corporations thereby recognizing only one corporate vehicle. Nominee shareholding should be abolished. A possible statutory code of conduct to be implemented for directors to codify their existing fiduciary duties at common level. Shareholder remedies should be examined, so that their rights can be enforced and protected and also so that they can promote greater shareholder activism.

Compliance requiring for disclosures of BEE is to be implemented as well as with labour and environmental legislation and the remuneration and bonuses of all directors and senior managers.¹⁶¹ The creation of a Companies Tribunal has to adjudicate matters under the Companies Act.¹⁶²

The King Code Report on Corporate Governance for South Africa is the barometer of sustainable business practice or the triple bottom line principles of environmental, social and financial sustainability.

¹⁵⁷ <http://www.globalbusiness.co.za>:accessed 14 April 2006.

¹⁵⁸ Act 53/2003.

¹⁵⁹ <http://www.ownershipsolutions.co.za>:accessed 14 April 2006.

¹⁶⁰ <http://www.werksmans.co.za>:accessed 21 November 2005

¹⁶¹ <http://www.werksmans.co.za>:accessed 21 November 2005

¹⁶² Act 61/1973.

The first King Report had become general accepted norms and procedures to be followed by corporate entities to promote transparent, accountable and responsible management. The report also made certain recommendations with a view to improving corporate governance in South Africa. The King Committee conducted a detailed review of the first Report and in March 2002 replaced it with the second King Report which applies to a wide range of corporate and governmental enterprises, including all companies listed on the JSE, all banks, financial and insurance entities and virtually all departments of state or administration in the national, provincial or local sphere of government.

The Second Report contains several recommendations which business will have to take into account including greater emphasis on the responsibilities of the board of Directors, on the role of independent non-executive directors, on separating the CEO and chairman functions, on the importance of safety, ethics, environmental and social issues, and on corporate disclosure including directors' remuneration to stakeholders. The King code is not prescriptive but rather recommends certain principles and practices. Its impact will largely depend on the extent to which its principles are implemented by business in South Africa. It is however important to note that there is increasing pressure on business from shareholders and other interest groups to comply with the principles of the King Code.

The guidelines to be followed will contribute to Empowerment in companies.¹⁶³
The Companies Act¹⁶⁴ section 38(1) states that:

'No company shall give whether directly or indirectly, and whether by means of a loan guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be

¹⁶³ <http://www.busrep.co.za>:accessed 24 August 2005

¹⁶⁴ Act 61/1973.

made by any person of or for any shares of the company, or where the company is a subsidiary company, or its holding company.”

Section 38 has interfered with empowerment deals by forbidding companies to lend parties money to buy into companies.¹⁶⁵

The continued existence of BEE Companies should not only rely on Company or Corporate law for transformation to occur but Company or Corporate law contributes a major part in the formation of BEE Companies. The mentioned reforms will however play a big role in the continued existence as well as the further growth of BEE

2. Hypotheses related to BBBEE Transactions

When a corporation in South Africa sells a portion of the firm to a black empowerment group, it is often viewed in a very positive light. This socially activist position of the firm can be taken as a signal that the firm embraces the moral imperative to include the previously disadvantaged majority in the economic growth of the country. Thus the firm receives favorable media attention for its actions.¹⁶⁶

The favorable attention can translate into increased business prospects for the firm in several ways. For firms whose business depends on government contracts, participation in a black empowerment deal ensures eligibility to bid on lucrative contracts that would not be otherwise available to the firm. Indeed,

¹⁶⁵ “As it appears from the Scheme of Arrangement an essential element is that Standard Bank and Liberty Group as holding companies, provide finance to their respective subsidiaries to acquire shares in their holding company. Prior to 1999 a Scheme of Arrangement of this nature would not have been possible by virtue of section 38 (1) of the Companies Act of 1973 “

¹⁶⁶ Jackson 2005:24.

those firms who were early movers were able to garner first-mover advantage by becoming eligible for the preferential treatment promised by the government.

Secondly, firms who participate in BBEE deals, again through favorable media coverage, increase their corporate reputations with the black South African citizenry. For consumer firms, this favorable corporate image represents a competitive advantage that can be easily exploited. Equally important, the companies participating in BBEE deals can benefit from the social and economic contacts of the black empowerment groups to gain access to new markets or opportunities, especially in the public sector. Many of the black empowerment groups represent influential consortia of unions, powerful business persons and former politicians and activists. These contacts may be very valuable in generating new business for the purchased firms. These activities could have a positive impact on the firm's future cash flows. And, a net increase in the firm's risk-adjusted cash flows would have a positive influence on the firm's stock price.

3. Study conducted in 2005

During a recent study on the market performance¹⁶⁷ of 208 empowerment deals from 1996 to 1998, three questions were specifically addressed.

The first question was whether BBEE transactions create or destroy wealth. To address this question they used an event study methodology to calculate the cumulative abnormal returns (hereafter referred to as CARs) associated with public announcements of BBEE transactions.

¹⁶⁷ Jackson 2005:28, conducted by WE. Jackson III, TM. Alessandri and SS Black

The second question was whether specific types of BBBEE transactions did better or worse than others. To address this they analyzed the cross-sectional variation in the CAR's associated with public announcements of BBBEE transactions.

The third question was whether firms that engaged in BBBEE transactions experienced negative post-announcement price performance. This last question was motivated by popular press accounts of the exploitation of black empowerment groups by white-owned South African corporations. To address this question, it was tested whether BBBEE transactions have benefited white corporate South Africa at the expense of the participating black empowerment groups.

4. Findings

The findings were on average,¹⁶⁸ the announcement of a BBBEE transaction was associated with a significant positive increase of almost two percent in the market value of equity of the announcing firm. The positive abnormal returns associate with BBBEE transactions were significantly positively correlated with the proportion of the firm's equity acquired by the BBBEE group. For example, their regression analysis suggested that black economic empowerment groups that acquired twice the average acquisition percentage of equity would likely experience an announcement abnormal return of 3.3% as opposed to the average 1.83%. Additionally, it was found that the average BBBEE transaction was completed at a significant discount (of almost ten percent) from the market price of equity for the participating firm.

It was documented an average positive post-announcement risk-adjusted return for the sample of BBBEE transaction firms. This latter finding implied that BBBEE

¹⁶⁸ Jackson 2005:29-31.

transactions have not, on average, exploited black empowerment groups to the benefit of white corporate South Africa.

5. Conclusion

It was demonstrated that BBBEE transactions were associated with significant positive abnormal returns for the shareholders of the announcing firms. Thus, in the case a typical BBBEE transaction the price of corporate social responsibility was smaller than the benefit. That was, over a sample period, the equity market rewarded South African companies for entering into BBBEE transactions.

BBBEE is therefore a necessary measure and the responsibility of all stakeholders to implement. A BBBEE strategy alone will not solve all the problems facing the economy and its people, similarly an employment strategy and a poverty relief strategy and finally an industrial strategy are key drivers of growth. As a result of their direct relation to each other these strategies must be implemented simultaneously and in an integrated manner.¹⁶⁹

¹⁶⁹ <http://www.busrep.co.za>:accessed 12 September 2006

CHAPTER 13

THE IMPORTANCE OF BLACK ECONOMIC EMPOWERMENT

1. Introduction

This chapter will focus on the importance of BEE for transformation and long term stability. One of the most important objectives in South Africa is economic development. A strong economic development program will assist in building a better and more prosperous future for South Africans. Economic development requires a focus on additional investment, faster growth, and increased job creation. BEE is not something to apologise for - it makes economic sense to have BEE and grow the number of people who participate in the economy.

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2. Challenges

Facing the challenge of BEE, one needs to view it not as a business impediment, but rather as a program that improves business opportunities while it simultaneously uplifts the historically disadvantaged. South Africa will only achieve its full potential when those who were previously excluded are full participants in its dynamic economy.

BEE will only occur when business and government agree and co-operate in its implementation. BEE is in the interest of all South Africans and has the potential further enhance other countries seeking successful business relations in South Africa. This endeavour is in everyone's best interests, whether it be as a compassionate individual concerned about others and the future of South Africa, or as business people looking at profit margins. With the empowerment of the previously disadvantaged, business will continue to grow and prosper.

BEE is therefore a subject that cannot be divorced from economic growth, job creation and greater equality in our country and should be embraced by all South Africans. It is also an area that is closely linked to small business development and entrepreneurship in South Africa.

3. BEE as an Economic Driver

Empowerment is part of the growth strategy and that the kind of inequality which exists in South Africa is a structural constraint to economic growth. Part of the growth strategy is therefore to ensure that the potential is unleashed which exists in this country by empowering the people. BEE is therefore an important component of the growth strategy. During the past ten years, economic growth as measured by GDP has been consistent, but modest, at 2,5 - 3,0 percent.

4. Constraints

In order to meet the country's economic challenges, especially unemployment, the growth rate must improve with 5%. There are a number of constraints preventing a higher growth rate, a major one being the low and narrow entrepreneurship base. BEE is essentially about removing this constraint and increasing the opportunity for more people to start and run businesses and to empower larger numbers of people. A non-racial economy is not only good for political stability but it will essentially raise the level of growth of the economy to the targeted level of 5% over the next ten years, thereby helping to resolve the major issue of unemployment. BEE should be seen as an agreement or contract between Government, the private sector and black entrepreneurs that will lead to effective transformation of the economy.

5. Black entrepreneurs

The role of black entrepreneurs is quite clear and this is to take advantage of the many opportunities that are being created in South Africa. By taking advantage of these opportunities, starting new enterprises and creating new wealth, black entrepreneurs will not only become empowered, but will also contribute to the growth of the economy, greater equality in our society and the creation of new jobs.

6. Conclusion

BEE is about those companies that have already been empowered finding ways and means to plough back and support up-and-coming black businesses through procurement, venture capital, offering guarantees and mentorship.

BEE is about addressing the two economies that co-exist to produce a more equal society.

CHAPTER 14

CONCLUSION

When a corporation in South Africa sells a portion of the firm to a black empowerment group, it is often viewed in a very positive light. This socially activist position of the firm can be taken as a signal that the firm embraces the moral imperative to include the previously disadvantaged majority in the economic growth of the country. Thus the firm receives favorable media attention for its actions. The favorable attention can translate into increased business prospects for the firm in several ways. For firms whose business depends on government contracts, participation in a black empowerment deal ensures eligibility to bid on lucrative contracts that would not be otherwise available to the firm. Indeed, those firms who were early movers were able to garner first-mover advantage by becoming eligible for the preferential treatment promised by the government.

Secondly, firms who participate in BBEE deals, again through favorable media coverage, increase their corporate reputations with the black South African citizenry. For consumer firms, this favorable corporate image represents a competitive advantage that can be easily exploited. While the per capita income of the black majority is modest, the share of black South Africans with household incomes in excess of R5,000 per month (a middle class threshold) has BBEEEn increasing rapidly, at a rate that greatly outpaces income growth in the white population).

Many black South Africans residing in former townships and central cities have a larger proportion of disposable income because living costs are low. Thus, even though their incomes are modest, they are fast adopters of many consumer

goods and services such as cellular phones and sophisticated financial services, such as whole life insurance and unit trusts. Perhaps equally important, the companies participating in BBBEE deals can benefit from the social and economic contacts of the black empowerment groups to gain access to new markets or opportunities, especially in the public sector. Many of the black empowerment groups represent influential consortia of unions, powerful business persons and former politicians and activists. These contacts may be very valuable in generating new business for the purchased firms. These activities could have a positive impact on the firm's future cash flows. And, a net increase in the firm's risk-adjusted cash flows would have a positive influence on the firm's stock price.

SUMMARY

BBBBBEE¹⁷⁰ is an essential ingredient in facilitating the meaningful participation of blacks at all levels of the South African economy, in order to ensure sustainable socio-political and economic stability and the sustainability of the economic growth and development.

BBBEE key principles

- It is an ongoing process and not an event
- It is a business imperative and an integral component of the company's business strategy and is based on the core values of the organization
-
- It must result in meaningful and significant participation of blacks in the company and in the broader economy, through substantial changes in the racial composition of ownership, control, management structures and of skilled and specialist positions
- It must lead to advantaged strategic position for the company, greater profitability, business growth and sustainable increase in stakeholder value
- it is the responsibility of all management in the organisation

OPSOMMING

Swart ekonomiese bemagtiging (hierna verwys "SEB")¹⁷¹ 'n belangrike bestanddeel in fasilitering van 'n betekenisvolle deelname van swart mense op alle vlakke van die Suid-Afrikaanse ekonomie is, ten einde volhoubare sosio-politieke en ekonomiese stabiliteit en volhoubare ekonomiese groei en ontwikkeling te verseker

SEB sleutelbeginsels

SEB is 'n deurlopende proses en nie 'n eenmalige gebeurtenis nie

¹⁷⁰

Act 53/2003.

¹⁷¹

Swart ekonomiese bemagtiging soos omskryf in die Broad Based Black Economic empowerment Act 53/2003

Dit is gebiedend noodsaaklik vir 'n besigheid, 'n integrale komponent van die besigheid se strategie en gebaseer op die kernwaardes van die maatskappy

Dit moet aanleiding gee tot betekenisvolle swart deelname aan die maatskappy en in die breër ekonomie, deur wesenlike verandering in die rasssamestelling van eienaarskap, beheer, bestuurstrukture en vaardigheids- of spesialis poste meebring. Dit moet aanleiding gee tot 'n voordelige strategiese posisie vir die maatskappy, groter winsgewendheid, besigheidsgroei en volhoubare verhoging van waarde vir belanghebbendes Dit is die verantwoordelikheid van alle bestuurslede in die organisasie

KEYWORDS

BROAD-BASED

BBBEE

BLACK

ECONOMIC

EMPOWERMENT

AFRICAN

APARTHEID

RACISM

CODES

SCORECARD

TRANSFORMATION

SECTOR CHARTER

SLEUTELWOORDE

BREE BASIS

SEB

SWART

EKONOMIE

BEMAGTIGING

SWARTMENS

APARTHEID

RASSISME

GEDRAGSKODES

TELLINGKAART

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IN THE HIGH COURT OF SOUTH AFRICA
(WITWATERSRAND LOCAL DIVISION)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	
(3) REVISED.	
DATE _____	SIGNATURE _____

In the ex parte application of:

CASE NO: 04/17352

STANDARD BANK GROUP LIMITED

Applicant

AND

CASE NO: 04/19223

LIBERTY GROUP LIMITED

Applicant

J U D G M E N T

HUSSAIN, J:

[1] On 17 August 2004 I granted an application brought by Standard Bank Group Limited (hereinafter referred to as "SBG") for the convening of a meeting in terms of section 311 of the Companies Act No. 61

***DRAFT FOR
DISCUSSION ONLY***

***DRAFT LEGAL
SERVICES CHARTER***

AUGUST 2006

PREPARED BY THE DRAFTING TEAM OF THE STEERING COMMITTEE

***DRAFT
LEGAL SERVICES CHARTER***

***FOREWORD BY THE MINISTER OF JUSTICE AND CONSTITUTIONAL
DEVELOPMENT***

To be inserted later.

CHAPTER ONE

1. PREAMBLE

Recognising the injustices of the past, the accumulated disadvantages suffered by historically disadvantaged individuals, communities and social groups on the one hand, and the accumulated advantages by the historically advantaged on the other hand;

Whereas recognition of the inherent dignity and of equal and inalienable rights of all members of the human family is the foundation upon which civilised society pursues its quest for freedom, justice and equality;

Whereas the attainment of these rights has for so long been denied, impeded and frustrated for the majority of the people of South Africa by the policies of apartheid and racial segregation by successive Government;

Whereas significant progress has been made in restructuring and transforming our society and its institutions, systemic inequalities and unfair discrimination remain deeply embedded in social structures, practices and attitudes, undermining the aspirations of our constitutional democracy;

Whereas the Constitution enjoins government to promote the achievement of equality through legislation and other measures designed to protect or advance persons, or categories of persons, historically disadvantaged by unfair discrimination; and

Whereas the Constitution dictates that all constitutional obligations must be performed diligently and without delay;

Whereas the State has a duty and responsibility to promote and achieve equality, and where necessary or appropriate with the assistance of relevant constitutional institutions to develop codes of practice or other measures and implement programmes aimed at promoting equality, and provide advice, assistance and training on issues of equality;

Recognising that an independent and representative judiciary depends upon a strong, independent and representative legal services sector;

Whereas the Charter endeavours to facilitate a democratic society, united in its diversity dedicated to secure to all its citizens—

- *Justice, economic, social and political; and*
- *Equality, of status and opportunity;*

***NOW THEREFORE** the people of the Republic of South Africa, Government and the stakeholders in the legal services sector adopt this Charter to be a binding and guiding principle to eradicate the inequalities of the past perpetuated by the policies of apartheid and racial segregation.*

2. DEFINITIONS AND INTERPRETATION

In this Charter, unless the context indicates a contrary intention, the following words shall have the meaning ascribed to them:

*“**access to justice**” includes having the capacity and means to obtain and use affordable and responsive legal services in South Africa in a manner that is fair and equitable;*

*“**access to the legal profession**” means opportunity to qualify and practise in any field of law, including but not limited academia and the judiciary;*

*“**access to legal work**” means access to opportunity to sell one’s legal services such as legal advice, litigation services, legal drafting and legislative policy, and includes access to state legal briefs and other contracts;*

*“**access to legal services**” includes the provision of legal advice or services intended to benefit any individual, community, group or organisation which is disempowered financially, socially or by any other means;*

*“**BEE Act**” means the Broad-Based Black Economic Empowerment Act, 2003 (Act 53 of 2003);*

*“**black people**” is a generic term which includes Africans, Coloureds and Indians;*

*“**black person**” has a corresponding meaning with black people;*

*“**broad-based black economic empowerment**” means the economic empowerment of all black people including women, workers, youth, people with disabilities and people living in rural*

areas through diverse but integrated socio-economic strategies that include, but are not limited to—

- (a) increasing the number of black people that manage, own and control enterprises and productive assets;
- (b) facilitating ownership and management of enterprises and productive assets by communities, workers, cooperatives and other collective enterprises;
- (c) human resource and skills development;
- (d) achieving equitable representation in all occupational categories and levels in the workforce;
- (e) preferential procurement; and
- (f) investment in enterprises that are owned or managed by black people; (definition from BEE Act);

“Cabinet” means the Cabinet of the Republic of South Africa;

“Charter” means the Legal Services Charter;

“company” means an enterprise registered in terms of the Companies Act, 1973 (Act 61 of 1973), close corporations, trusts and any other such enterprise formed for business purposes, a legal entity registered in accordance with the laws of the Republic of South Africa for the purpose of conducting business;

“consumer” means any person who seeks or utilises any form of legal advice or service, and includes an individual, community, group or organisation which is disempowered financially, socially or by any other means;

“Constitution” means the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996);

“control” includes the authority and power to manage assets, the direction of business operations, the right or the ability to direct or otherwise control the majority of the votes attaching to the shareholders’ issued shares, the right or ability to appoint or remove directors holding a majority of voting rights at meetings of the board of directors and the right to control the management of the enterprise, and to participate in equitable sharing of the profits;

“direct ownership” means ownership of an equity interest together with control over voting rights attaching to that equity interest;

“discrimination” means discrimination as defined in the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act 4 of 2000);

“employment equity” has the meaning ascribed to it in the Employment Equity Act, 1998, (Act 55 of 1998);

“Equality Act” means to the *Promotion of Equality and Prevention of Unfair Discrimination Act, 2000*;

“enterprise development” means investment in, or development of or joint ventures with black owned or black empowered enterprises and SMMEs, with real economic benefit flowing to the recipient enterprise allowing it to be set up and run on a sustainable basis;

“equity” means the fair and rational distribution of an affordable package of quality legal services to the entire population of South Africa, ability to pay for such services and irrespective of their race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language or birth; and ‘equitable’ has a corresponding meaning;

“fronting” means any entity, mechanism or structure established in order to circumvent the BEE requirements as required under various policy instruments and this Charter;

“Historically Disadvantaged Individual (HDI)” means black people, women and people with disabilities;

“lawyer” means any person with a legal degree and who is engaged in a legal career and is a member of a legal services sector, an attorney, advocate, or legal practitioner;

“Legal Services Charter Council” means a Council that is broadly inclusive of stakeholders in the legal services that is charged with monitoring, evaluating and enforcing the implementation of the charter;

“law firm” means a company, organisation, business enterprise, concern, partnership or corporation in the practice of the law;

“legal services” means any form of legal advice, or drafting of documents, or representation of any person that requires the expertise of a person trained in the practice of law;

“legal practitioner” means a person engaged in the provision of legal services including a paralegal;

“Organised Legal Profession” means all Law Societies and Bar Councils;

“paralegal” means a person who has knowledge and understanding of the law, its procedures and its social context acquired through training, education, work experience and/or a national registered qualification in paralegal practice;

“paralegal services” means provision of primary legal services to the general public, especially the poor, marginalised, indigent individuals, groups or community.

“parties” mean parties to this Charter;

“pro bono” means the provision of legal services to poor, marginalized and indigent individuals, groups or community without a fee or expectation of compensation, in order to enhance access to justice for such people who cannot afford to pay for legal services;

“procurement” means procedures and expenditure, including capital expenditure, for the purpose of acquiring goods or services which, in the case of the public sector, are governed by legislation;

“public sector” means government departments, organs of state and institutions exercising a public power or performing a public function in terms of legislation;

“quality” in relation to legal services, means input of such a nature and applied in such a manner as to ensure optimum results within the available resources and the circumstances of each case, taking into account the constitutional rights of the consumer, including, but not limited to the rights to life, human dignity, freedom and security of the person, bodily and psychological integrity, freedom of religion, belief and opinion and privacy;

“skills development” means the process of enhancing individuals’ specialised capabilities in order to provide them with career advancement opportunities;

“State legal services” means legal services that are rendered within the state services;

“sustainability” means having a reasonable prospect of continued, successful existence in the present and the foreseeable future with regard to those critical success factors that define and affect the viability of a particular enterprise over time.

3. OBJECTIVES

To adopt a Charter which gives effect to the Constitution, the Equality Act and the BEE Act by facilitating empowerment of HDI’s through the transformation of the legal services sector, effecting access to justice to all the people of the Republic of South Africa and promoting economic, social and political justice. This includes the following:

- 3.1 Enabling the legal services sector and the provision of legal services broadly to transform in line with the constitutional vision of the achievement of equality.
- 3.2 Achieving fundamental change in the racial and gender composition of the judiciary.

- 3.3 *Transforming the legal services sector to be representative of the demography of the South African society and more accessible to all members of society..*
- 3.4 *Implementing measures to enhance access to justice which include promoting equitable access to legal services to all the people of South Africa, including the marginalized, poor and rural communities.*
- 3.5 *Improving access to the legal services sector which includes academic qualifications, apprenticeship opportunities, and professional qualifications by monitoring and evaluating the input, throughput and output of academic qualifications and apprenticeship of professional qualifications.*
- 3.6 *Providing a framework for building a common understanding, set benchmarks, design implementation mechanisms and develops support programmes for achieving equality in legal services.*
- 3.7 *Effectively and meaningfully promoting the equitable distribution of legal work with regard to race, gender and disability.*
- 3.8 *Transforming and standardising legal training and education, including continued legal training to develop and improve the skills base to ensure transparency and to eliminate barriers to equal opportunities.*
- 3.9 *Promoting and implementing skills development measures intended to empower legal professionals,, in particular HDIs, in fields of expertise where they previously did not have access.*
- 3.10 *Enhancing and promoting representivity in respect of ownership, management and control of legal practises or enterprises by black legal practitioners, including women, persons with disabilities and amongst rural communities.*
- 3.11 *Creating conditions conducive to ensuring that HDI legal service providers are able to start, manage and build sustainable practices or enterprises.*

- 3.12 *Ensuring that governance structures are transformed, inclusive and have balanced representation with regard to race, gender, and disability.*
- 3.13 *Supporting the attainment of the objectives of, inter alia, the Employment Equity Act, BEE Act and other equality and equity laws.*

4. SCOPE AND APPLICATION OF CHARTER

- 4.1 *This Charter shall apply to all persons engaged in the practice of law; the organised legal profession, all public and private institutions/bodies rendering legal services; and all private or public institutions/bodies and persons who consume legal services, including the State.*
- 4.2 *In the event of one or more charters being applicable to persons or companies envisaged in 4.1, the provisions of the Legal Services Charter shall take precedent.*

CHAPTER TWO

6. TRANSFORMATION OF LEGAL SERVICES SECTOR

5.1 OVERVIEW

The legal services sector occupies an important place in South Africa's democracy and the economy. However, the sector's ability to perform optimally is hampered by inherited, race, gender and disability distortions relating to access, participation and involvement in decision making. The charter seeks to address these distortions which are mainly characterised by systemic inequalities experienced primarily by black people, women and persons with disabilities, in all aspects of legal services, including access to quality services and participation in service provision and the regulatory framework

5.2 DISPARITIES IN LEGAL SERVICE PROVISION AND RELATED PROFESSIONAL AND ECONOMIC OPPORTUNITIES

5.2.1 *Access to and participation in virtually all aspects of legal services provision is skewed along race and gender lines and against persons with disabilities. This applies to:*

- *Enterprise and equity ownership;*
- *Composition of the management echelon;*
- *All employment opportunities;*
- *Levels of and access to skills development opportunities;*
- *Access to work, including legal briefs and other procurement opportunities;*
- *Access to finance and other enterprise development resources;*
- *Access to justice, including equitable access to quality legal services.*

5.2.2 *The issue of disparities in access to justice is discussed extensively in a devoted chapter. Disparities in professional and economic opportunities permeate virtually all aspects of the sector, including the following:*

- *Traditional Legal Practice(Work of attorneys and advocates);*
- *Academia(Teaching of Law and Legal Research);*
- *Legal Drafting;*
- *Legal Consulting;*
- *State and Corporate Lawyers;*
- *Legal publishing; and*
- *Paralegal work.*

5.2.3 *Except for para-legal work, the participation of black people, women and persons in the above and other areas of the provision of legal and related services is constrained by many barriers which are mostly traceable to the legacy of past injustices in the sector and other areas of life. The Charter needs to provide a framework for eliminating such barriers and fostering equal participation in all professional and economic opportunities in the sector. The diversification of participation would not only benefit the historically marginalised service providers but would contribute meaningfully to access to justice and global competitiveness.*

5.2.4 *Inequality in professional and economic opportunities is particularly acute with regard to access to and participation in the traditional legal profession (attorneys*

and advocates) , where the participation of black people, women and persons with disabilities is very limited compared to their representation in the national demography and university outputs. The key barriers to equal participation and related distortions in the profession are discussed in the following.

5.3 Access to legal profession

5.3.1 Access to the legal profession from the perspective of admission requirements in respect of the two professions. This refers to entry requirements to the Advocates and Attorneys professions.

5.3.2 Both professions are regulated by two separate pieces of legislation namely, the Admission of Advocates Act, 1964 (Act 74 of 1964), and the Attorneys Act, 1979 (Act 53 of 1979). In view of the fact that two separate regulatory regimes regulate the profession, their admission requirements differ.

5.4 Access to attorney's profession

5.4.1 Attorneys are admitted to practice law in terms of the Attorneys Act, 1979. No attorney is permitted to practise law without having been admitted as an attorney in the High Court of South Africa.

5.4.2 The attorney's profession has its own regulatory body, i.e. the Council of the Law Society of South Africa with its provincial divisions throughout the country. Some of the issues that pose challenges, include access to resources in the form of training opportunities and legal information.

*5.4.3 **Entry requirements:** A four year degree (LLB) and passing the Board's examination are required. Admission as an attorney on the basis of one of the following:*

- (a) *Two years articles of clerkship at any legal training institution or law firm and passing of the board examination;*
- (b) *one year articles of clerkship plus at least four months practical training course that has been approved by the Law Society concerned and the board examination;*
- (c) *one year community service at any institution as approved by the Law Society plus board examination; and*
- (d) *One year practical legal training at any public institution, including a state department plus board examination.*
- e) *Two year Candidate Attorney Learnership through SASSETA*

5.4.4 *The implementation of these entry requirements must take into account the socio-economic challenges of previously disadvantaged individuals. Currently, this is not the case. In fact many HDIs are unable to gain entry due to inability to secure the requisite apprenticeships. The entry of HDIs is also severely hampered by the entry examinations.*

5.5 Access to advocate's profession

5.5.1 *The Advocates Act, 1964, requires legal qualifications (i.e. currently the 4 year LLB) for eligibility and to apply to the High Court for admission to the Roll of Advocates.*

5.5.2 *Once admission as an advocate has been obtained, there are options available to practise in this profession. The first option is to register with an association accredited by the Council to practise as an advocate. The second requirement is to find a master for pupillage for further legal training. A third option is to start an independent practice after admission.*

5.5.3 *The period for pupillage is a period not exceeding twelve months.*

5.6 CHALLENGES OF ENTRY TO LEGAL PROFESSION

Specific barriers to entering the profession in this regard include the following:

- (a) *Ability to find articles and pupillage particularly by black people and women;*

- (b) *promotion of quality of the apprenticeship which will increase the pool of black candidates especially women in relevant law firms;*
- (c) *competitive and market related salary schemes;*
- (d) *high failure rate amongst black candidates;*
- (e) *unaffordable fees for practical legal training; at institutions; and*
- (f) *lengthy pupillage period for advocates compounded by new advocates' inability to find work.*

5.7 Towards a unified legal profession

5.7.1 In view of the current disparate admission requirements affecting access to the legal profession, and governance of the legal profession, steps need to be identified to address these issues with a view to creating a unified legal profession. These steps should include, inter alia, addressing the following:

- (a) *Standards of education and training;*
- (b) *qualification criterion for admission to the profession;*
- (c) *licence to practice;*
- (d) *discipline in respect of improper conduct; and*
- (e) *public indemnity in respect of the mismanagement of funds.*

5.8 A SINGLE REGULATORY BODY

5.8.1 Overview

The representative bodies are committed to reform of the regulatory regime of the profession. Legal practitioners agree on a single regulatory body for legal practitioners. The nature and structure of the regulatory body and its relationship with the sub-sectors of the profession will be informed by the Legal Practice Bill.

5.8.2 Entry requirements to legal profession

- (a) *A four year LLB as minimum degree as a single qualification for admission to practice law.*
- (b) *All graduates who want to be admitted as legal practitioners should be required to undergo a minimum of one year practical vocational training at any recognized institution, during which time they will be known as legal interns.*
- (c) *At least six months of the period of internship should be devoted to performing one or more of the types of community service prescribed.*
- (d) *The remainder of the six months period of internship legal interns may undergo one of the types of vocational training prescribed, or attend an accredited practical training course offered by an academic institution or a professional organisation, or continue to perform community service, or practice law in an organization engaging in the provision of legal services and under the supervision of an admitted attorney with more than 5 years post admission experience.*

5.8.3 Structure for regulation of legal practice

5.8.3.1A National Regulatory Body should be established by legislation. The members thereof should be appointed by the Minister for Justice, after consultation with the Chief Justice and the President of the Supreme Court of Appeal, comprising persons nominated by the professional organisations, representative of legal and paralegal practitioners and persons who represent the public interest, which will:

5.8.3.2 The Council shall, among others, have the following powers and functions:

- (a) *Prescribe qualifications for admission to legal and paralegal practice, subject to national legislation.*
- (b) *Maintain a roll of registered legal and paralegal practitioners.*
- (c) *Prescribe and levy annual fees for licence to practice.*
- (d) *Deal with complaints of malpractice through regional complaints tribunals and the office of a national ombudsman.*

- (e) *Collect interest on trust accounts for transmission to the Fidelity Fund and issue Fidelity Fund certificates.*

5.8.3.3 A South African Legal Practice Fidelity Fund be establish with the sole purpose to compensate members of the public in respect of monies misappropriated by legal and paralegal practitioners and to promote the achievement of high professional standards of legal and paralegal practice.

CHAPTER THREE

6. CREATING AN AFFIRMING ENVIRONMENT

Overview

Equality within the legal services sector envisages a sector which reflects the diversity of our society and in which all persons can participate fully and freely. Persons seeking legal services should not be prevented from doing so because of historical disadvantage or discriminatory treatment. This entails the removal of all barriers to access and participation, as well as the creation of conditions that enable legal practitioners to develop to their full human potential, and enable those using legal services to receive affordable and quality services.

The eradication of inequality based on race, gender and disability is a particular concern of this Charter. This chapter sets out various mechanisms for achieving this and for affirming the rich diversity of our society.

6.1 AFFIRMING DIVERSITY

6.1.1 All people- white, black, female, male, people with disability, gay, heterosexual- view the world through the prism of their own experience. Legal practitioners are susceptible to every prejudice imaginable: racism, sexism, homophobia, hostility based on class and age.

6.1.2 The legal system needs to give people a vital role as stakeholders. The ultimate objective is to maintain public trust and confidence in the profession as well as in the legal system.

6.1.3 Government, together with the legal services sector, should embark on a training programme and culture and diversity awareness programme for the role players in the legal services sector. Efforts should be made to ensure that every legal services provider, including the judiciary, is exposed to ongoing social context awareness education.

6.2 NON-DISCRIMINATION

6.2.1 *One of the legacies of apartheid that shadows the justice system is that the judiciary and the legal profession remain essentially white and male. The legacy of disrespect for black practitioners, black accused persons and consumers of legal services continues to bedevil the courts. For black women the situation is often exacerbated by the intersection of race and gender bias.*

6.2.2 *Government, the legal profession as well as the public must advocate and insist upon members of the judiciary and legal practitioners to embrace the values of non-discrimination in the Constitution and treat everyone with respect, fairness, dignity, humanity and courtesy.*

6.3 REASONABLE ACCOMMODATION

6.3.1 *In the legal profession there are legal practitioners with disabilities. The failure to provide reasonable accommodation makes it difficult for affected persons to function to their full potential, e.g. visually impaired lawyers. The legal profession and Government need to cater for the needs of all people with disability.*

6.3.3 *On this score, Government should engage with the legal profession and the organisations representing people with disabilities on what measures should be put in place to facilitate the entry and effective functioning in the legal profession for those living with disabilities.*

CHAPTER 4

7. EMPOWERMENT OF HISTORICALLY DISADVANTAGED INDIVIDUALS

ECONOMIC EMPOWERMENT

Indicators of empowerment:

The targets specified in this section are in respect of broad-based initiatives targeting HDI's. Save in respect of contributions specifically listed hereinafter in respect of each element, compliance is to be measured using the methodology and element of scorecards for each of the elements as specified in the Codes of Good Practice issued under section 9(1) of the Broad-Based Black Economic Empowerment Act 53 of 2003.

Legal practitioners will ensure that in seeking to comply with HDI's targets set out herein, they will seek to comply with specific targets stated in the Codes for BEE initiatives targeting black people. This implies that there are two targets:

- (c) A lower target as per the Codes specifically targeting black people; and*
- (d) A higher target as per the Charter which is inclusive of both black people and other HDI's.*

Overview

The ownership (public or private), enterprise development and preferential procurement are the main competitive fields which will be altered by the empowerment of HDI's in the legal service sector. The legal services is but one of the major components of the South African society fabric that has lagged behind in terms of transformation and embracing the values underlying the Constitution in as far as the legal profession and access to justice is concerned. The successful implementation of the empowerment of HDI's in this area depends on a government driven empowerment process and a coherent regulatory environment, strategic intent of the profession and that of the broader community as well as the competitive dynamics of the industry and an enabling business culture.

Indicators of empowerment:

7.1 Ownership and Control

Guiding principle:

We commit ourselves to the increase in the number of black people, women and people with disability that manage, own and control productive assets, across the entire spectrum of legal services. We also commit to the design of appropriate funding mechanisms to facilitate the process. This principle is linked to the long-term strategy of developing a body of highly developed, experienced and competent black legal practitioners in all areas of legal practice to ensure compliance with the principles and spirit of the Constitution and Equality Act. With appropriate adjustments, legal academia and other sites of legal expertise that lie outside the organised legal profession also commit to speedier increase of black people, women and people with disability to strategic leadership roles.

Legal Profession's undertaking:

The Organised Legal Profession undertakes to broaden beneficial participation and the ownership base of their companies/partnerships/associations to ensure that at least 35% of their services and ownership/partnership/association is black, of which at least 50% must be women, and at least 4% of people living with disability, within the next five years.

7.2. Management

Guiding principle:

The guiding principle is to redress inequalities with regard to race, gender, disability and culture in the legal service sector and to ensure that the people who manage and lead in this field, broadly reflect the diverse profile of the South African population and that they are appropriately empowered and skilled to manage. The objective of this element is to

increase the participation of black people and black women at board and senior management levels in the legal service industry that encompasses both government and private sector institutions and similar governing structures. Government and the private sector will need to commit to meet stringent targets and time lines in order to achieve this mandate. The legal services will be transparent, eliminate unscrupulous business practices including fronting and fraud, and adopt best-practice corporate governance policies.

Government's undertaking:

The Government undertakes to accelerate the appointment of—

- to accelerate the appointment of black people in boards of government institutions; and*
- to accelerate the appointment of black women in boards and executive management positions.*
- to accelerate the appointment of people with disabilities in boards and executive management positions*

Legal Profession's undertaking:

The legal profession undertakes to—

- promote the participation by black people in board positions of organisations providing legal services;*
- promote the participation by black people, in particular black women, at all levels of management;*

- *promote the participation of black women in board and executive management positions;*
- *Promote the participation of black people and women, especially black women, in management and leadership structures in Faculties and Schools of Law; and*
- *promote black ownership accompanied by an equal level of management control. However, the legal profession will recruit onto their executive boards and similar governing structures black directors (who do not necessarily own equity) to reach a target of at least 40% within 5 years. Fifty percent (50%) of this target for black representation on executive boards and similar governing structures should be earmarked for women and 4% for all people living with disability.*

7.3 Employment Equity

Guiding principle:

Employment equity and skills development targets should be achieved within the ambit of the Equality Act, Employment Equity and Skills Development Acts.

The principle is to increase the participation of black people in top management, senior management and professional positions to create a workforce that truly represents the racial, ethnic and gender diversity of our country. This will require that all stakeholders create a supportive culture within their organisations to be an 'Employer of Choice', attract new talent, facilitate the development of existing employees, and accelerate their progress into key positions within the industry.

Government's commitment:

Government undertakes to abide by the targets set by Cabinet and as encapsulated in the Employment Equity Plans.

Legal Profession's commitment:

The legal profession commits to abide by the targets as encapsulated in the Employment Equity Plans where such plans are required in terms of the Employment Equity Act.

Legal academia's commitment:

The legal academia commits to abide by the targets as encapsulated in the Employment Equity Plans where such plans are required in terms of the Employment Equity Act.

7.4 Skills development**Guiding principle:**

The vision is to substantially increase the economic value adding (or productivity) of every employee in the legal services through best practice human resource and skills development policies and to increase the scale of initiatives aimed at developing black professionals and experts. In particular, the development of expertise in the areas of corporate and commercial law and transactions; legal drafting; legal research and teaching; and trial advocacy will receive prominence in the development of skills. The transformation demands of the legal services and rapid changes in the global environment require that more resources should be mobilised for expanding the existing human capital pool through investing in people, employment equity, skills development and institutional transformation.

Government's undertaking

The Government undertakes to—

- *invest at least 5% of payroll on skills development initiatives;*

- *design and fund a coordinated framework and programme for career awareness and training that leverages off and adds value to existing initiatives;*
- *publicise and coordinate information regarding scholarships, training resources and careers in the public services (other stakeholders will be encouraged to contribute towards the cost and design of this initiative);*
- *to develop existing structures such as the State Attorney's Offices, in conjunction with the Justice College under the DOJ&CD and further to develop intra-industry exchange and internship programmes;*
- *to utilise all legislative and other measures available to it to influence the attainment of constitutional objectives.*

Legal Profession's undertaking:

The legal profession undertakes to—

- *invest at least 5% of payroll on skills development initiatives which target is inclusive of all associated costs and the current 1% skills development levy;*
- *identify within and outside their companies a talent pool of black professional assistants and candidate attorneys for accelerated development through--*
 - (i) *international assignments that provide high-quality legal and managerial exposure, where appropriate;*
 - (ii) *mentorship programmes;*
 - (iii) *learnerships;*
 - (iv) *intra-industry exchange and internship programmes; and*
 - (v) *higher education and training.*

The Legal Academia undertakes to -

To promote the development of skills of black people and women, especially black women through –

- (i) enhancement of research, teaching and writing skills;*
- (ii) mentorship programmes;*
- (iii) academic leadership and management skills*

7.5. Preferential procurement

Guiding principle:

The guiding principle is to accelerate procurement from black practitioners and black-owned and empowered enterprises operating within the legal services sector. Public and private institutions will implement a targeted procurement strategy to enhance equality. This will create opportunities for the establishment of new enterprises and the development of existing ones that will grow the industry, create jobs and sustain the growing body of highly experienced and developed black practitioners. The State has a great deal of leverage in its farming of contracts and the licence to operate, especially in PPP's. Public Enterprise Minister boasted to Parliament in 2003 that almost a quarter of the discretionary spending of Denel, Transnet and Eskom went to broad-based black economic empowerment.

Government's undertaking:

- Identify, prioritise and target black lawyers, legal practitioners and companies in awarding tenders, briefs and contracts within the public sector;*
- Procure the services of black lawyers and legal practitioners in the process of briefing advocates, and procuring the services of attorneys;*

- *Undertakes to allocate 50% of its briefs and other legal work requiring private practitioners to black lawyers and legal practitioners by 2007; and*
- *This target shall apply to all organs of State including State owned enterprises, and relevant provincial and local government structures.*

Legal Profession's undertaking:

- *To proactively identify and implement targeted procurement strategies and policies to realise the objectives of the Legal Services Charter;*
- *Report periodically on all procurement spent; and*
- *Undertakes to brief at least 40% black practitioners by 2007 and 60% by 2008.*

7.6 Enterprise Development

Guiding principle:

Enterprise development refers to the establishment, support and integration of black empowered and women empowered firms in mainstream business processes. The principal objective is to help set up, nurture and grow viable practices, partnerships, associations and businesses that are majority-owned by black persons while developing existing companies. All stakeholders undertake to seek viable opportunities to partner with firms in rural areas.

Government's undertaking:

The Government undertakes to—

- *utilise resources generated by State Owned Enterprises(SOEs) to create a fund to finance the legal services infrastructure and services in rural and township communities; and*
- *explore the options for the setting up of such fund, and to place the matter for discussion at the first meeting of the Council.*

Legal services sector's commitment:

- *Commits to partner with or promote collaborative relationships with rural and township practices, including paralegals, to develop the capacity of rural and township practices thereby prioritising black and women owned practices; and*
- *Strengthen and accelerate the development of operational and financial capacity of black entrepreneurs.*

7.7. Services Specific Targets

Guiding principle:

In view of the inaccessibility to legal services experienced by township and rural communities, our principal objective is to bridge the gap to access to legal services by giving of our time freely, and without reward in the pursuit of community service. The form of community service will not be limited to legal advice or representation, but may take any form where legal skills are required.

Government's undertaking:

Government undertakes to make available its legal aid services to areas where there is a need for delivery of legal services. Government also undertakes to conduct regular campaigns for the popularisation of the Constitution and promote legal literacy amongst the rural and township population.

Legal Profession's undertaking:

The legal profession undertakes to make available its human resources to townships and rural areas to, among others, conduct legal education programs, conduct programs to popularise the Constitution; and lend its management expertise to develop township and rural practices. This will enhance the image of the legal profession as being accessible to all people.

The legal profession undertakes to devote in at least 5% of its total billing hours per month on pro bono work.

The Legal Academia undertakes to -

The Faculties and Schools of Law undertake to –

- (iii) Provide legal education in communities through Street Law and other outreach programmes;*
- (iv) Provide paralegal training, where appropriate;*
- (iii) Provide legal advice through law clinics; and*
- (iv) Work with government in realising community legal services that also provide context-learning as was decided at the all-inclusive National Forum in 1998.*

8. ACCESS TO LEGAL WORK INCLUDING STATE CONTRACTS

The Role of State Attorney's Office

8.1 CHALLENGES

- 8.1.1 Access to legal work is a problem throughout the legal services. Black practitioners are forced to close down their firms because they are unable to get access to legal work. The Office of the State Attorney, government departments, SOEs and other big*

corporations are partly to blame by not providing adequate support consistently to black practitioners.

81.2 Black firms are crying foul in that the State distributes the bulk of its work to the traditional white firms. This contributes to their demise. The Office of the State Attorney is also seen as a contributor in this regard. Its briefing patterns must be seriously reviewed and strong interventions made. Cabinet has made a policy decision to address disparities in legal briefings

8.1.3. Government is one of the biggest consumers of legal services. A high volume of work is outsourced to private practitioners rather than the State Attorney conducting the work themselves. The Office of the State Attorney and all levels of government, including municipalities, have been accused of outsourcing work to mostly white legal practitioners. Further, there is a perception that black practitioners are unable to perform specialised legal work, which is also outsourced to white legal practitioners. Black legal practitioners are seriously disadvantaged.

8.1.4 In some instances, this creates unnecessary tensions amongst practitioners. Although it is argued that the Office of the State Attorney does not have the necessary capacity and competence to deal with highly specialised work, it bolsters the perceptions that black legal practitioners lack skills and experience and that only white firms have the competencies to deal with specialised work.

CHAPTER FIVE

9. THE ROLE OF LEGAL SERVICES SECTOR IN PROMOTION OF EQUALITY IN JUDICIARY

9.1 Overview

9.1.1 *Recognising the pivotal role that the legal services sector plays in judicial appointments, its influence on the culture and values of the judiciary, and in the development of the skills pool from which the judiciary is drawn, the legal services sector is well-placed to contribute meaningfully and ensuring the promotion and achievement of equality in the judiciary. The legal services sector also plays a central role in ensuring the independence of the judiciary.*

9.1.2 *In order to discharge the above responsibility, the legal services sector needs to be strong, independent and representative.*

9.2 UNDERTAKINGS BY LEGAL SERVICES SECTOR

9.2.1 Judicial appointments and broadening the pool

9.2.1.1 *The legal services sector commits itself to engage in dialogue relating to the criteria and processes for appointing judges, acting judges and lower court judicial officers, with the view to reviewing and eliminating any barriers which undermine the attainment of equality particularly on the grounds of race and gender.*

9.2.1.2 *The legal services sector commits itself to the development of innovative measures to broaden the pool of candidates who are eligible for judicial appointments, particularly with a view to addressing race and gender imbalances. Internal processes that promote exposure to the global environment in terms of exchange programmes to draw on international experiences will be pursued vigorously.*

9.2.1.3 *The legal services sector commits itself to engaging with the Government and other stakeholders to consolidate the unification of the judiciary. The legal services sector supports the standardisation of skills at all levels of the judiciary and the acceleration of the appointment of members of the lower judiciary to the higher courts.*

9.2.2. Judicial Education

9.2.2.1 *The legal services sector commits itself to strengthen its involvement in judicial education and efforts aimed at enhancing the effectiveness of programmes for prospective judicial officers and continuing professional development for members of the judiciary and other legal services sectorals in the judicial system.*

9.2.3 Culture and Values

9.2.3.1 *The legal services sector commits itself to the process of continuous evaluation of the alignment between the values enshrined in the Constitution and those that prevail in the judicial system and to implement ongoing measures such as education, and to promote and maintain value alignment particularly focusing on matters of non-discrimination.*

9.2.3.2 *The legal services sector, in recognition of the current patriarchal and Eurocentric values that prevail in the legal system, commits itself to the process of dialogue on African perspectives on justice with a view to ensuring a better alignment between the experiences of ordinary South Africans and the judicial system.*

9.2.3.3 *The legal services sector commits itself to efforts aimed at mainstreaming gender in all policy processes and educational measures relating to the transformation of the transformation of the judicial system.*

9.2.4. Alternative Dispute Resolutions (ADR)

9.2.4.1 *The legal services sector commits itself to engage with Government and other relevant stakeholders in a policy process that seeks to establish a uniform framework for*

regulating ADR processes and integrating appropriate aspects in the judicial system. Such processes should ensure that ADR is guided by the principles, and operates on the basis of equality, which includes non-sexism and non-racism.

9.2.5 Complaints Mechanism

9.2.5.1 The legal services sector commits itself to engage with Government and other relevant stakeholders in a policy process that aims to establish a framework for a complaints mechanism for the judiciary.

9.2.5.2 The legal services sector commits itself to support the implementation of the recommendations arising out of the policy process and will devise an integrated system for monitoring and evaluation to promote effectiveness of the complaints mechanism and to ensure that judicial independence is maintained.

CHAPTER SIX

10. ACCESS TO JUSTICE

- 10.1 *Affordable and equitable access to justice is an essential aspect of the rule of law and the enjoyment of human rights. Section 34 of the Constitution guarantees everyone ‘the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or ... tribunal’. Section 9 provides that everyone has the right to ‘equal protection and benefit of the law’ and may not be subject to unfair discrimination. Access to justice is a cornerstone of this Charter both in terms of the equal ability of persons to access and use legal services, including courts, and in terms of their equal treatment within these services and institutions.*
- 10.2 *The systemic, social and economic inequality that characterises South African society has meant that access to justice is skewed, particularly on the basis of race, gender and disability. Socio-economic status is also a major obstacle to access to justice for the poor. In so far as the poor constitute the majority of people in South Africa their ability to access legal services is critical to meeting the constitutional standards of equality and access to justice.*
- 10.3 *The State has a constitutional, moral and social responsibility for ensuring the realisation of the right of access to justice and the right of every citizen to be treated equally before the law. The DOJ&CD, in particular, has a constitutional responsibility to ensure that the regulation and delivery of legal services enhances access to justice for all.*

- 10.6 *The constitutional and other State institutions have a responsibility of ensuring that the delivery of legal services is in the interest of the public, advances human rights and contributes towards social upliftment of indigent communities.*
- 10.7 *The legal profession and other providers of legal services have a constitutional obligation to provide legal services in a non-discriminatory manner that respects the rights of clients and users. In addition, the legal profession has a moral and ethical duty to assist in providing legal services to the poor and marginalised.*
- 10.6 *The ability to access legal services and courts is dependent upon affordability, knowledge of the different services and information about them, physical access and location, as well as the nature of the issue (e.g. civil or criminal), the range of services that are available, the number and distribution of legal practitioners and the responses of the providers of the services to those seeking access.*
- 10.7 *Persons who access legal services are not always provided a quality service and may be subject to discriminatory treatment by legal practitioners and other service providers. Disabled persons experience particular problems within the legal system. When discriminatory treatment is experienced, there are insufficient avenues for redress.*
- 10.8 *The Legal Aid Board plays a critical role in ensuring access to justice by providing legal services to those who cannot afford legal services. However, the services are not yet available to everyone who requires such services and the responsiveness of the services needs continuous improvement.*
- 10.9 *The Charter seeks to address the following factors that undermine and prevent access to legal services, in particular for historically disadvantaged communities.*
- (a) The high cost of legal services;*
 - (b) the legal profession's lack of representivity;*
 - (c) the uneven geographical distribution of lawyers (they are almost non-existent in poor, rural and township communities);*
 - (d) the lack of recognition of the role played by paralegal practitioners;*
 - (e) lack of information about the availability of legal services;*
 - (f) the intimidating image lawyers have;*

- (g) *limited small claims court services;*
- (h) *the inadequacy of legal insurance schemes;*
- (i) *the limited effectiveness of the state legal aid scheme;*
- (j) *the failure on the part of many lawyers to provide any community services; and*
- (k) *the availability and responsiveness of services by the Legal Aid Board.*

10.10 *This Charter also addresses the following factors to enhance the quality of legal services and improve the protection of the public from inferior services and unethical conduct*

- (d) *the provision of professional development for legal service providers to ensure that they deliver quality services to all;*
- (e) *the eradication of discriminatory treatment; and*
- (f) *the effective regulation of legal services to ensure, in particular, that public complaints about services of legal practitioners are dealt with effectively.*

11. **Now therefore**, *in recognition of the above, the legal profession, government and the legal services sector, agrees that access to legal services by the public should be based on the norms and standards that underpin our constitutional democracy and pledges to respect and promote the following rights of persons seeking access to legal services:*

- (a) *the right to be treated with dignity and respect;*
- (b) *the right to competent and affordable legal representation;*
- (c) *the right to non-discriminatory treatment by providers of legal services;*
- (d) *the right to be informed of all matters related to the adjudication of their legal disputes;*
- (e) *the right of access to a legal practitioner of their choice;*
- (f) *the right to confidence and faith in the legal profession, including that legal matters are dealt with in utmost good faith by legal practitioners;*
- (h) *the right to have any dispute with a legal practitioner dealt with absolute impartiality by appropriate regulatory bodies;*
- (i) *the right of access to an adequate system of State funded legal services; and*
- (j) *the right of access to information on the availability of legal services.*

12 ACCESS TO UNIVERSAL AND AFFORDABLE LEGAL SERVICES

12.1 CHALLENGES

12.1.9 *There is generally a shortage in numbers and distribution of legal practitioners in the country. This particularly affects the provision of legal services in rural and historically black communities. Where these communities are served by small practices, the communities benefit from the reasonable fees that are charged. However this positive aspect is affected when smaller practices close down or are subsumed by bigger firms. This is primarily as a result of small practices not being able to access legal work.*

12.1.10 *Legal services provided by the state, including state justice centres, remain unevenly spread across the country. The in forma pauperis system, envisaged in Rule 40 of the Uniform Rules of Court to provide legal representation for the indigent, does not appear to be used.*

12.1.11 *The pro bono system enables the legal profession to provide legal services to the poor. There are associations that are in the process of developing such initiatives. However, this is in its infancy in many instances and is often voluntary meaning that the full reach of pro bono work has not been achieved.*

12.1.12 *The provision of legal services to the public by financial institutions or insurance companies is not regulated, and there are no mechanisms in place to address the nature and extent of the legal services offered to the public.*

12.1.13 *The majority of South Africans cannot afford to pay for legal services, and many cannot afford to pay the level of fees charged.*

12.1.14 *Legal Services providers tend to prioritise certain kinds of cases, and legal aid services prioritise criminal over civil cases, meaning that it is more difficult to access services in civil cases.*

12.1.15 *Paralegal practitioners, who play a significant role in expanding access to justice, are insufficiently recognised and regulated. They are also concentrated in metropolitan centres.*

12.1.16 *Disabled persons experience particular problems of access.*

12.2 UNDERTAKINGS BY STAKEHOLDERS

The Government, legal profession and other stakeholders, undertake to

12.2.1 *Consider the development of a programme of community service, in-service training or internship before admissions to the legal profession. This will assist in effecting access to legal services for the rural and other marginalised communities while promoting equal access to the profession.*

12.2.5 *Create legal services centres in rural areas and for the majority of people in South Africa who are poor.*

12.2.5.1 *Expand the reach paralegal services to rural, peri-urban and township areas to provide primary care legal services.*

12.2.6 *Develop and enhance the pro bono work system. A further system of incentives for legal practitioners who offer legal services to the rural and township communities will be developed so that legal practitioners are encouraged to do so frequently. This may be capped at certain hours of work per month or year for all legal practitioners.*

12.2.7 *Investigate the in forma pauperis system to develop a workable implementation plan, or a workable alternative.*

12.2.6 *Investigate the adequacy of legal insurance, as well as regulate and expand legal insurance in a manner that promotes equality of access to legal services and in particular addresses the need for effective distribution of services to rural areas, townships and other disadvantaged communities.*

- 12.2.13 *Develop and implement a mechanism similar to the mzanzi initiative to ensure comprehensive access to legal services across the country and for all economic classes.*
- 12.2.14 *Investigate the possibility of a comprehensive referral system for persons seeking legal services.*
- 12.2.15 *Investigate the affordability of services, including a review of the disparities and affordability of legal fees and implement measures aimed at regulating the fee structure to enhance affordability of legal services.*
- 12.2.16 *Consider ways on ensuring universal access to services, including civil cases.*
- 12.2.17 *Recognise paralegal practitioners and regulate their role, qualifications and services in legislation.*
- 12.2.18 *Address the needs of disabled people in accessing legal services.*

12.3 UNDERTAKINGS BY THE LEGAL AID BOARD

The Legal Aid Board and relevant stakeholders undertake to:

- 12.3.1 *Review the judicare system as a primary method of delivery of legal aid services;*
- 12.3.2 *Consolidate the delivery of legal services by salaried employees in legal aid clinics, advice offices and defender offices and strengthen the quality of services;*
- 12.3.3 *Enhance the capacity of Justice Centres to enable them to deliver quality legal services particularly to the poor, rural and township communities.*
- 12.3.4 *Develop policies to bolster co-operative agreements with non-governmental organisations capable of delivering legal services.*

123.5 *Assist legal aid centres in promoting access to the profession, including specialized work for historically disadvantaged persons.*

13. ACCESS TO QUALITY LEGAL SERVICES

13.1 CHALLENGES

13.1.1 *A critical component of access to justice is ensuring that every person or community has access to quality and non discriminatory legal services. Most poor people only have access to paralegals or poorly resourced small legal firms. This compromises the quality of legal services for these groups.*

13.1.2 *Persons accessing legal services may experience discriminatory treatment within those services. This is a particular problem for disabled people.*

13.1.3 *Existing avenues for redress are limited, difficult to access and lengthy. As a result, the public finds it difficult to achieve resolution for complaints of inferior services, or of discriminatory or unethical conduct.*

13.2 UNDERTAKINGS BY LEGAL PROFESSION

The legal profession and other providers of legal services hereby undertake to improve the quality of legal services by:

13.2.1 *Conducting continuous and sustained training programmes on current legal matters on behalf of legal practitioners including paralegals.*

13.2.2 *Encouraging legal academics and experienced practitioners to provide lessons on particular issues for skill enhancement.*

13.2.3 *The implementation of benchmarked quality assurance programmes that include a quality monitoring system and the measurement of the quality of legal services.*

13.2.4 *Encouraging joint programmes and sharing of resources by well-established law firms.*

The legal profession and other providers of legal services hereby undertake to address discriminatory treatment by legal providers by:

13.2.5 *Ensuring that all levels of training of legal practitioners incorporate social context awareness, gender mainstreaming and human rights.*

13.2.6 *Paying particular attention to the different needs of disabled persons using legal services*

The legal profession and other providers of legal services hereby undertake to improve the regulation of legal services by :

13.2.12 *Developing common ethical standards for all practitioners, including paralegals;*

13.2.13 *Developing ethical standards for the provision of legal insurance services;*

13.2.14 *Developing common disciplinary mechanisms in governance structures;*

13.2.15 *Establishing an affective complaints management system to handle complaints by users of legal services;*

13.2.16 *Use such information to continually improve on the delivery of quality legal services.*

CHAPTER SEVEN

15 GOVERNANCE AND IMPLEMENTATION OF CHARTER

15.1 Overview

The governance mechanisms of the legal profession can play an important role in the in the promotion of equality and improving access to quality legal services. A strong

independent and unified legal profession is strategically positioned to lead the legal services sector in overcoming its challenges and further protect the interest of the public in pursuit of the objectives of the Charter.

15.2. Establishment and Composition of Council

15.2.1 A Legal Services Charter Council should be established as a body that is broadly inclusive of stakeholders in the legal services and is charged with monitoring, evaluating and enforcing the implementation of the Charter.

15.2.2 The Council shall consist, among others, of the following members appointed by the Minister in consultation with the subsections undermentioned in the sector:

- (a) One member each from the sub-sector, which include the Government, legal components of State Owned Enterprises, the Organised Legal Profession and legal practitioners practicing outside the Organised Legal Profession (Prosecutors, State Law Advisors, the Judiciary, Legal Academics, Paralegals, Arbitrators and Insolvency Practitioners).*
- (b) Three (3) members, each appointed from the Departments of Finance and Trade and Industry and any other relevant Department as the Minister may deem fit.*
- (c) Three (3) members representing civil society.*
- (d) Other relevant interest groups participating in the Legal Services regard being had to gender, disability and rural communities as decided by the Council.*
- (e) The Minister, on the advice of the Council, may appoint any such person as he or she may deem necessary, for the effective execution of its responsibilities.*

15.2.3 Participants listed in paragraph 15.2.2, must be appointed to Council by their respective constituencies and must satisfy the principle of representivity and inclusiveness. More specifically, care must be taken to ensure gender balanced representation.

15.2.4 The Council shall be supported by a secretariat appointed in terms of the Public Services Act, 1994.

15.3 GOVERNING PRINCIPLES

The Council shall be guided by the following basic principles:

- (a) Equality.*
- (b) Independence.*
- (c) Transparency.*
- (d) Fairness.*
- (e) Good Corporate Governance.*
- (f) Consultation and Inclusivity.*
- (g) Equitable Socio-economic Transformation.*
- (h) Dignity*
- (i) Non-racism*
- (j) Non-sexism*
- (k) Transformative and Inclusive Mindsets*

15.4 POWERS AND FUNCTIONS OF COUNCIL

The powers and functions of the Council include—

- (a) provision of guidance on matters affecting broad-based black economic empowerment, equality and the constitution in the legal services;*
- (b) compilation of reports on the status of broad-based black economic empowerment , equality and the constitution in the legal services;*
- (c) sharing of information with approved accreditation agencies relevant to broad-based black economic empowerment , equality and the constitution in the legal services;*
- (d) as and when, in its opinion, the circumstances so require, appoint a committee of experts, with a view to assisting the Council in the exercise and performance of its powers, functions and duties;*
- (e) engaging and advising relevant regulatory entities in the broader legal services sector on the Charter;*
- (f) developing mechanisms and strategies to monitor compliance with the Charter and related matters;*
- (g) developing a strategy for consultation with provincial and local stakeholders;*

- (h) *developing guidelines for assisting practitioners to provide pro bono legal services in rural and other areas;*
- (i) *developing a practical manual, with examples, as well as implementing an interactive portal to communicate the basic methods of applying the broad-based black economic empowerment scorecard;*
- (j) *conducting or commissioning research for the purposes of ensuring the effective implementation of the Charter;*
- (k) *reporting to Government and the Broad-based Black Economic Empowerment Advisory Council on the implementation of the Charter;*
- (l) *receiving progress reports from relevant institutions within the sector on the implementation of the Charter; and*
- (m) *creating a fund financed by the profession to facilitate an affirming environment for persons with extraordinary needs.*
- (n) *access to all relevant and necessary information must be furnished*
- (o) *After consultation with subsectors as mentioned in paragraph 15.2.2, development of verification mechanisms and or tools for compliance.*

16. ANNUAL REPORTS

16.1 *The Council must prepare and submit annual reports to the Minister for Justice and Constitutional Development, the Department of Trade and Industry and the Broad-Based Black Economic Empowerment Advisory Council on--*

- (a) *baseline indicators for all the different elements of broad-based black economic empowerment;*
- (b) *aggregate scores of all indicators of the broad-based black economic empowerment scorecard for all enterprises under its jurisdiction;*
- (c) *initiatives undertaken by components within the legal services; and*
- (d) *other relevant information which would be useful in assessing the state of broad-based black economic empowerment and equality in the legal services.*

17. PERSONS QUALIFIED TO SERVE ON COUNCIL

Any person appointed to the Council must--

- (a) in the execution of his or her responsibilities, take into account the interests of the broader stakeholders within the legal services;*
- (b) be committed to transparency and fairness in the execution of their responsibilities in the Council;*
- (c) act in good faith and in the best interest of the legal services as a whole;*
- (d) be committed to the objectives of broad-based black economic empowerment and socio economic transformation as provided for in the Act and the Code of Good Practice; and*
- (e) possess suitable qualifications, expertise and knowledge in the legal services.*

20. ENFORCEMENT MECHANISM

In formulating the Legal Services Charter the parties will seek to ensure that appropriate enforcement mechanisms are implemented in respect of this charter.

21. CONFLICT OF INTERESTS

- 19.1 If a member of the Council has a personal or financial interest in any matter being discussed by the Council, the member must disclose that interest and withdraw from the Council when that matter is discussed.*
- 18.2 In dealing with matters of conflict of interest, the Council must take into account the provisions of the relevant legislation.*
- 18.3 If any member of the Council fails to declare his or her interest and is present at a venue where a meeting of the Council is held or in any manner whatsoever participates in the proceedings of the Council, the relevant proceedings of the Council shall be null and void.*

19. DATE OF APPLICATION OF CHARTER

- 19.1 *On the effective date of the application of the Charter, the Legal Services Charter Steering Committee must be dissolved and the implementation phase and all matters incidental thereto must be handed over to the Council.*
- 19.2 *The Councillors shall be deemed to have commenced operation on the effective date of commencement of the Charter.*

20. FUNDING OF COUNCIL

- 20.1 *The funding of the activities of the Council must be in accordance with the relevant provisions of the published Code of Good Practice.*
- 20.2 *The Council must keep proper accounting records of the monies received and the extent of their expenditure.*
- 20.3 *The Council must prepare and submit an annual report of its activities, including audited financial statements to Government.*

21. DISPUTE RESOLUTION

- 21.1 *The parties must use their best efforts to resolve matters in the furtherance of the objectives of the Charter. In the event of a dispute, the parties must resort to conciliation, mediation and arbitration;*
- 21.2 *Where matters remain unresolved, the parties undertake to present the dispute in writing to the Council for resolution.*
- 21.3 *The Council must appoint an arbitrator to adjudicate the dispute and the decision of the arbitrator shall be final and binding on the parties.*

Kindly send your comments to:

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ANNEXURE “C”

Financial Sector Charter**1. Preamble**

1.1 *In August 2002, at the NEDLAC Financial Sector Summit, the financial sector committed itself to the development of a Black Economic Empowerment (BEE) charter. We made this commitment noting that:*

□ despite significant progress since the establishment of a democratic government in 1994, South African society remains □ recognizes □ □ □ by racially based income and social services inequalities. This is not only unjust, but inhibits the country’s ability to achieve its full economic potential;

□ BEE is a mechanism aimed at addressing inequalities and □ recognizes the energy of all South Africans. It will contribute towards sustained economic growth, development and social transformation in South Africa;

□ inequalities also manifest themselves in the country’s financial sector. A positive and proactive response from the sector through the implementation of BEE will further unlock the sector’s potential, promote its global competitiveness, and enhance its world class status;

□ equally, the financial stability and soundness of the financial sector and its capacity to facilitate domestic and international commerce is central to the successful implementation of BEE.

1.2 *We, the parties to this charter, therefore commit ourselves to actively promoting a transformed, vibrant, and globally competitive financial sector that reflects the demographics of South Africa, and contributes to the establishment of an equitable society by effectively providing accessible financial services to black people and by directing investment into targeted sectors of the economy.*

1.3 *This financial sector charter*

□ was voluntarily developed by the sector;

□ is a Transformation Charter as contemplated in the Broad-Based BEE legislation;

□ constitutes a framework and establishes the principles upon which BEE will be implemented in the financial sector;

□ represents a partnership programme as outlined in Government's Strategy for Broad-Based BEE;

□ provides the basis for the sector's engagement with other stakeholders including Government and labour;

□ establishes targets and unquantified responsibilities in respect of each principle; and

□ outlines processes for implementing the charter and mechanisms to monitor and report on progress.

2. Interpretation

2.1 Affected institution means every financial institution that takes designated investments.

2.2 Agreed standard valuation means a valuation of an asset (valued in terms of the context in which this term appears) based on normal valuation methodologies (representing standard market practice) given the nature and stage of development of the asset being valued provided that:

□ the principles set out in the table hereunder will serve only as a guide to possible valuation methodologies that could be employed:

Operation	Valuation methodologies
<i>Banking</i>	<i>Discounted cash flow</i>
	<i>Price to book</i>
	<i>Capitalisation of earnings</i>
	<i>Net asset value</i>
<i>Insurance</i>	<i>Discounted cash flow</i>
	<i>Embedded value</i>
	<i>Price-to-embedded value</i>

Capitalisation of earnings

Net asset value

Page 2

Brokerage firms

Discounted cash flow

Capitalisation of earnings

Net asset value

*Asset managers & Collective
Investment Schemes*

Discounted cash flow

Capitalisation of earnings

*Percentage of funds under
management*

Net asset value

□ where the financial institution is listed on the JSE Securities Exchange South Africa the market □ recognizes □ □ □ □ of the financial institution concerned shall serve as an overall benchmark for the individual valuations of the underlying assets and businesses of such financial institution such that, on a sum-of-the-parts basis, these would represent a value no higher than such market □ recognizes □ □ □ □.

□ Cash flows to a beneficiary or shareholder will be valued on an after-tax basis.

2.3 BEE, as defined in the Broad-Based Black Economic Empowerment legislation, means the economic empowerment of all black people, including women, workers, youth, people with disabilities and people living in rural areas, through diverse but integrated socio-economic strategies.

2.4 BEE accredited means being validated in terms of this charter as a BEE company, or being validated as having achieved a certain standard of BEE contribution in terms of a □ recognizes BEE charter scorecard or accreditation system.

2.5 BEE transactions means:

□ all transactions for the acquisition, by black people, of direct ownership in an existing or new entity (other than an SME) in the financial or any other sector of the economy; and

□ joint ventures with, debt financing of or other form of credit extension to, and equity investments in BEE companies (other than SMEs).

2.6 BEE companies refers to companies as defined in paragraphs 2.7, 2.8, 2.9, and 2.12.

2.7 Black companies mean companies that are more than 50% owned and are controlled by black people.

2.8 Black empowered companies mean companies that are more than 25% owned by black people and where substantial participation in control is vested in black people.

2.9 Black influenced companies mean companies that are between 5% and 25% owned by black people and with participation in control by black people.

2.10 Black people means all Africans, Coloureds and Indians who are South African citizens and includes black companies. However, in paragraphs 5 and 11 the term shall include permanent residents of the Republic of South Africa. The word “black” when used in conjunction with other words shall have the same implications.

2.11 Black SME means a small or medium enterprise (with a turnover ranging from R500,000 per annum to R20 million per annum) which is a black company or a black empowered company.

2.12 Black women-empowered enterprise means companies that are more than 30% owned by black women, and where substantial participation in control is vested in black women.

2.13 Broad-based ownership is where an empowerment shareholder represents a broad base of members such as employees (to the extent that the options have actually been exercised), collectives and/or communities, or where the benefits support a target group, for example black women, people living with disabilities and the youth. Shares are held directly or indirectly through non-profit □ recognizes□□□ and trusts. At the same time, directors and management of the groups should predominantly comprise black people.

2.14 Charter Council means the Charter Council established in terms of paragraph 15.1.

2.15 Company means an enterprise registered in terms of the Companies Act, 1973, close corporations, trusts and any other such enterprise formed for business purposes.

2.16 Control centres on the authority and power to manage assets, the determination of policies and the direction of business operations. Indicators of control may include:

☐ participation in control structures of a business unit or of the company (such as shareholder meetings, the Board of directors, board subcommittees, and divisional boards), the exercise of voting rights on the board of directors and committees thereof, and controlling equity;

Page 3

☐ participation in executive management.

2.17 Discrimination: means discrimination as defined in the Promotion of Equality and Prevention of Unfair Discrimination Act.

2.18 Designated investment means any form of statutory or voluntary deposit, saving, investment or risk insurance placed or made by the South African public (whether of a wholesale or retail nature, but not by one financial institution in another).

2.19 Development Finance Institutions or “DFI’s” means finance entities created or funded by a tier of Government. These include, but are not limited to, the DBSA, IDC, PostBank, NEF, Land Bank, Khula, NHFC, the PIC, the Umsobomvu Fund, and Provincial Development Corporations.

2.20 Direct ownership means ownership of an equity interest together with control over all of the voting rights attaching to that equity interest.

2.21 Empowerment financing means the provision of finance for or investment in:

☐ Targeted investment; and

☐ BEE transactions.

2.22 Effective access means

~~2.22.1~~ being within a distance of 20 Kms to the nearest service point at which first-order retail financial services can be undertaken, and includes ATM and other origination points, except in the case of the products and services of the long term assurance industry, where effective access, including physical access will be in terms of

the availability of these products and services, and in terms of proximity or accessibility of financial advisers to community-based infrastructure;

~~2.22.2~~ being within a distance of 20 Kms to the nearest accessible device at which an electronic (other than ATM) service can be undertaken;

~~2.22.3~~ a sufficiently wide range of first-order retail financial products and services to meet first order market needs and which are aimed at and are appropriate for individuals who fall into the All Media Product Survey (AMPS) categories of LSM 1-5;

~~2.22.4~~ non-discriminatory practices;

~~2.22.5~~ appropriate and affordably priced products and services for effective take up by LSM 1-5; and

~~2.22.6~~ structuring and describing financial products and services in a simple and easy to understand manner.

2.23 Enterprise development means support for existing, or the fostering of, new black SMEs and BEE companies in the financial and other sectors of the economy.

2.24 Executive management means X number of people identified by the Board of Directors by name and position as the top managers of that financial institution, where $X = 0.4\%$ of the total staff of the financial institution employed in South Africa, with a minimum of 9 people and a maximum of 50.

2.25 Financial sector means all the classes of financial institution defined in paragraph 2.26.

2.26 Financial institutions means banks, long-term insurers, short-term insurers, re-insurers, managers of formal collective investment schemes in securities, investment managers and other entities that manage funds on behalf of the public, including retirement funds and members of any exchange licensed to trade equities or financial instruments in this country and entities listed as part of the financial index of a licensed exchange. Any other institution in the financial sector, including licensed exchanges, may opt in.

2.27 First-order retail products and services means

2.27.1 transaction products and services, being a first order basic and secure means of accessing and transferring cash for day-to-day purposes;

2.27.2 savings products and services, being a first order basic and secure means of accumulating funds over time. (e.g. savings accounts, contractual savings products

such as endowment policies, collective investments and community-based savings schemes);

2.27.3 credit for low-income housing (as defined in paragraph 2.34.3, but with a minimum income of R500 per month), financing agricultural development, or establishing, financing or expanding a black SME (as defined in paragraph 2.11, but with no minimum turnover);

2.27.4 insurance products and services being the mitigation of impact of defined first order basic risks. (e.g. life insurance, funeral insurance, burial society, household insurance and health insurance).

2.28 Global policy means a globally and uniformly applied restriction, regulation, or directive imposed on a foreign owned financial institution by the parent company or on any financial institution by a regulator which governs that financial institution.

Page 4

2.29 Indirect ownership occurs where an institution or other investor owns equity in a company on behalf of beneficiaries and there may not be direct participation by the beneficiaries in the voting rights.

2.30 Management

2.30.1 Management is divided into senior, middle and junior levels, and

□ Senior management means all employees with a package (excluding bonuses) in respect of which the cost to the employer is R450,000 per annum or more, but excludes all employees who fall within the definition of executive management;

□ Middle management means all employees with a package (excluding bonuses) in respect of which the cost to the employer is between R250,000 and R450,000 per annum;

□ Junior management means all employees with a package (excluding bonuses) in respect of which the cost to the employer is between R150,000 and R250,000 per annum.

2.30.2 If the bonus is in excess of 50% of total remuneration then 50% of the bonus will be included as part of the package.

2.30.3 The salary bands will be increased in line with the consumer price index ("CPIX") on the 1st of January each year commencing on 1st January 2004.

2.31 Procurement means all expenditure to acquire goods and or services including capital expenditure, but excluding

- broker commissions;
- reinsurance premiums;
- commissions paid to insurance intermediaries;
- property and rental purchases (although property management is specifically included);

- expenditure classes covered elsewhere in the charter e.g. salaries and wages. (Contract staff are regarded for this purpose as own staff and are excluded);

- procurement spending where there is a natural monopoly;
- any items of procurement where the supplier is imposed in terms of a global policy for technical (but specifically not commercial) reasons;

- inter-entity charges for services rendered by other members of the group;

- social investment expenditure and donations; and

- all V.A.T payable.

2.32 Regulation or regulate when used in this charter shall have a common law or economic meaning depending on the context in which it is used.

2.33 Sound business practice means business practice which is conducive to the establishment, maintenance and promotion of:

- domestic and international confidence in the financial sector;

- best international practice and prudential and other regulations relating to the custody and investment of the nation's savings and the acceptance of risk;

- the right to underwrite in both the long and short-term insurance industries;

- sustainable sources of finance, which take □ recognizes of the different resources available;

- level playing fields and competition between the different sub-sectors of the financial sector, and hence the avoidance of arbitrage between the sub-sectors; and

- BEE transactions taking place on a willing buyer and a willing seller basis.

2.34 Targeted Investment means debt financing of, or other form of credit extension to, or equity investment in South African projects in areas where gaps or

backlogs in economic development and job creation have not been adequately addressed by financial institutions. It specifically means financing of or investment in:

2.34.1 transformational infrastructure projects that support economic development in underdeveloped areas and contribute towards equitable access to economic resources. Such infrastructure projects could be in the following sectors-

□ transport;

□ telecommunications;

□ water, waste water and solid waste;

□ energy;

□ social infrastructure such as health, education, and correctional services facilities; and

□ municipal infrastructure and services.

2.34.2 agricultural development involving integrated support for resource-poor farmers, through enabling access to and the sustainable use of resources.

Page 5

2.34.3 low-income housing for households with a stable income in excess of R1,500 per month and less than R7,500 per month. This income band will be increased in line with the CPIX on the 1st of January each year commencing on 1 January 2004.

2.34.4 Black SMEs.

2.35 All references to a year mean 31 December of that year (e.g. 2008 means 31 December 2008).

3. The challenges facing the financial sector

3.1 In most economies the financial sector plays a central role in enhancing growth and development. The South African financial sector is generally □ recognizes as world class in terms of its skilled workforce, adequate capital resources, infrastructure and technology, as well as a conducive operating, regulatory and supervisory environment. However, the financial sector is confronted by a number of challenges which include the fact that:

□ it is □ ecognizes □ □ □ by the presence of a few very large institutions. Many of the smaller and foreign institutions have exited the market in recent years;

□ there are low levels of black participation, especially of black women, in meaningful ownership, control, management and high-level skilled positions in the sector;

□ there has been an inadequate response by the sector to the increasing demand for access to financial services;

□ the sector has not effectively provided credit to entrepreneurs, particularly black businesses;

□ the national level of savings and investment is inadequate to support sustained economic growth and individual financial security;

□ there is insufficient investment of the savings pool under the control of the sector into targeted investments of national priority;

□ a large pool of funds circulates outside the formal financial system, including but not limited to funds held by stokvels, informal traders and in other forms of short-term savings;

□ there has been limited support for new black firms in the financial sector by Government and the private sector; and

□ they need to find meaningful ways to support the Proudly South African Campaign.

3.2 By addressing the abovementioned challenges, the financial sector will make a significant contribution towards economic growth, development, empowerment and reduction of inequalities and poverty in our society. The initiatives envisaged will also promote growth in the financial sector.

3.3 The growth and development of the financial sector is central to the successful implementation of BEE and is an overriding principle and objective of this charter. In order to enhance the financial sector's global competitiveness and to address BEE, the following imperatives must be satisfied:

□ the long term financial stability and soundness of the sector and its capacity to finance economic growth and to facilitate domestic and international commerce must be maintained;

□the sector's ability to provide appropriate and effective access to financial services for a greater segment of the population must be substantially enhanced;

□a savings culture must be developed in South African society;

□the pool of intellectual capital in the sector must be improved by focusing on attracting new entrants and continually investing in the skills development and training of existing and new black professionals and managers;

□the development of black strategic and operational leadership must be fostered within the sector;

□diverse □recognizes□□□□ cultures must be promoted to cater for a wide range of customers and to reflect the principles of inclusivity;

□the financial sector must promote triple bottom line accountability, including principles of good corporate governance;

□the representation of black women and black people living with disabilities in the sector as employees, managers, suppliers and owners of equity must be increased;

□champions who understand and are committed to transformation are required at the highest level within each □recognizes□□ ;

□the number and quality of black firms providing services and products to the financial services industry must be increased and competition amongst domestic firms improved;

□entrepreneurial development must be promoted and enhanced by supporting black entrepreneurs;

Page 6

□the financial sector, which controls significant pools of savings, must be □recognize of the impact it has on directing savings towards targeted investments of national priority; and

□the regulatory environment and architecture of the sector must promote the empowerment objectives of this charter, lower the barriers to entry and facilitate competition.

4. Application of the financial sector charter

4.1 This charter applies to the South African operations of the financial sector.

4.2 *The targets in this charter will be applied from 1 January 2004 (the “effective date”) until 31 December 2014.*

4.3 *In 2009 (based on the reports for the year ended 31 December 2008), the Charter Council will undertake a comprehensive mid-term review and make decisions regarding the implementation of the charter in its second term. The ownership provisions will be reviewed in 2011 to address identified shortcomings. The ownership provisions will be reviewed by the Charter Council in 2011 to decide what further steps (if any) to address identified shortcomings should be taken at individual financial institution, sub sector, sector or national levels.*

4.4 *The parties to this charter agree that the principles contained in the charter will be relevant beyond 2015. In 2015 (based on the reports for the year ended 31 December 2014) the Charter Council will undertake a second comprehensive review of progress in terms of the charter, and draw conclusions as to the impact of the charter on the sector and the economy, and make decisions as to what further steps (if any) to address identified shortcomings should be taken at individual financial institution, sub sector, sector or national levels.*

4.5 *All the provisions of the charter are to be achieved in a manner consistent with sound business practice.*

4.6 *Certain of the provisions of the charter will not apply in the same manner to all financial institutions. The following qualifications are provided for:*

4.6.1 Exemption from the Human Resource Development provisions

If the financial institution has less than 50 staff members, it will be exempt from the provisions of paragraphs 5, 11.3 and 11.4 of the charter unless it opts to be so bound. But it will nevertheless remain bound by all labour legislation (and specifically the provisions of the Employment Equity, Labour Relations and Skills Development Acts).

4.6.2 Exemption from the Empowerment Financing provisions

If the financial institution has less than R10 m of designated investments it will be exempt from the provisions of paragraph 9 of the charter unless it opts to be so bound.

4.6.3 Exemption from all the provisions

If the financial institution has less than 50 staff members and less than R10 m of designated investments, it will be exempt from all the provisions of the charter unless it opts to be so bound.

4.6.4 Qualifications if there is a global policy to which the financial institution is subject

If, in terms of a global policy to which a financial institution is subject, –

- any board members, executive or senior managers are imposed on the local operation, those personnel will not be taken into account for the purposes of calculating ratios in terms of paragraphs 5 or 11 of the charter;*
- it is precluded from accommodating local ownership participation, it will be exempt from the ownership provisions of paragraph 10 of the charter.*

4.6.5 Exemption from the Access provisions

□ If the financial institution is a wholesaler, in the sense that it is not a provider of first-order financial products and services, it will be exempt from the provisions of paragraph 8 of the charter unless it opts to be so bound.

□ If the financial institution is a retailer of first-order financial products and services but, on grounds presented to and accepted by the Charter Council, it would be inconsistent with its business model for it to extend those products or services to low-income communities, it will only be responsible for the consumer education component of access (paragraph 8.4), and the points will be adjusted accordingly.

4.6.6 Qualifications in respect of retirement funds

If a retirement fund has less than 50 staff members, it will be exempt from all the provisions of the charter other than paragraphs 9 and 12.

Page 7

If a retirement fund has more than 50 staff members, it will be exempt from all the provisions of the charter other than paragraphs 5, 11.3 and 11.4, and paragraphs 9 and 12.

4.7 All financial institutions claiming exemptions in terms of this paragraph must submit a return to the Charter Council providing motivation and evidence supporting the exemption.

4.8 The participation of DFIs in certain aspects of the charter is required in order to give full effect to the intent of the charter.

4.9 If a financial institution is a member of a group, it will be measured and reported on as part of the South African group unless –

- the financial institution is a listed company; or
- the financial institution opts in.

4.10 Notwithstanding the provisions of paragraph 4.9 above, the boards of directors of all financial institutions will ensure that transformation plans are rolled out through all the divisions and subsidiaries of the group, and that measurement mechanisms are put in place, responsibility given and performance evaluated at all levels and in all areas.

4.11 The parties to this charter agree that the public and private sectors, when sourcing products and services from the financial sector, should apply the charter and its scorecard. Accordingly –

4.11.1 the financial institutions specifically agree that, when competing for business, they will use their charter rating to explain their BEE contribution;

4.11.2 in adjudicating tenders for the provision of financial services, all tiers of Government will base their adjudication of BEE contribution on the charter rating which has been accorded in terms of this charter; and

4.11.3 the parties to this charter agree that the private sector should base its evaluation of the BEE contribution of members of the financial sector on the charter rating which has been accorded in terms of this charter.

5. Human resource development

5.1 Disparities in the South African workplace resulting from past discriminatory practices and laws are not only unjust, but also have direct negative implications for economic efficiency, competitiveness and productivity. It is therefore in the country's

long-term national interests that a broad-based and diverse pool of skills is developed for the sector to unleash the potential of all South Africans.

5.2 Consequently, each financial institution undertakes to:

5.2.1 promote a non-racial, non-sexist environment and to enhance cultural diversity and gender sensitivity within the sector;

5.2.2 invest in human resource development across the full spectrum of skills, with special emphasis on increasing the participation of black people in skilled, strategic and operational leadership in the sector;

5.2.3 invest in and equip current and future leadership incumbents in the sector with the appropriate knowledge and capacity to enable them to play a central role in driving the transformation programme.

5.3 In addition to the obligations of the financial sector in terms of Employment Equity and Skills Development legislation, and –

5.3.1 based on an estimated ratio of 10% for 2002, each financial institution will have a minimum target of 20% to 25% black people at senior management level by 2008;

5.3.2 based on an estimated ratio of 1.6% for 2002, each financial institution will have a target of a minimum of 4% black women at senior management level by 2008;

5.3.3 based on an estimated ratio of 17%% for 2002, each financial institution will have a target of a minimum of 30% black people at middle management level by 2008;

5.3.4 based on an estimated ratio of 5% for 2002, each financial institution will have a target of a minimum of 10% black women at middle management level by 2008;

5.3.5 based on an estimated ratio of 28% for 2002, each financial institution will have a minimum target of 40% to 50% black people at junior management level by 2008;

5.3.6 based on an estimated ratio of 12% for 2002, each financial institution will have a target of a minimum of 15% black women at junior management level by 2008.

5.4 In recognition of the low starting points and targets, and the need for higher levels of black women representation at all three levels and at executive level, a 2014 target of 33% of the relevant total black representation target has been set for black women representation at all four levels. The financial sector commits, before 2008 and through a mechanism established by the Charter Council,

to establish the other 2014 targets for all management levels and at executive level (dealt with in paragraphs 11.3 and 11.4).

5.5 Over and above any skills levies payable by a financial institution, each financial institution will, from the effective date of the charter to 2008, spend 1.5% of total basic payroll per annum on training of black employees.

5.6 This skills development initiative shall be directed at skills programmes that promote black skills in the sector in line with a skills audit for each sub-sector. These skills audits may be undertaken by the financial institution, the sub-sectors or by the respective SETAs and the programmes shall be recognized and commenced by 1 July 2005.

5.7 The financial sector undertakes to implement a Learnership Programme in terms of which, over one learning cycle of three intakes, each financial institution will employ up to 4.5% of its total staff in the form of black matriculants, or the NQF Level Four equivalent, in registered learnerships. Direct spending in excess of that recovered from the SETAs or Government will form part of the skills development targets in 5.5. The sector commits to review its matriculant learnership programme after the first cycle in consultation with the department of labour, with a view to implementing a second cycle. This commitment is subject to satisfactory resolution of the principles and funding of matriculant learnerships with Government and the relevant SETAs.

5.8 Each financial institution undertakes to develop and report on the following programmes:

5.8.1 career pathing through the provision of the necessary support to black people at all levels to facilitate progress in their agreed careers;

5.8.2 the implementation of appropriate mentorship programmes within companies in the sector to assist in the rapid development of black professionals;

5.8.3 targeted recruitment to expand the base of potential recruits;

5.8.4 cultural diversity and gender sensitivity programmes at various levels of management in the financial institution, with the intention of promoting a vibrant, enabling and diverse institutional culture; and

5.8.5 where possible, in conjunction with institutions of higher learning, introduce training programmes in line with the NQF requirements and establish undergraduate and post graduate diplomas and degrees in financial services.

6. Procurement Policies

6.1 *Financial institutions will implement a targeted procurement strategy to enhance BEE. Provided there are charters in the information and communications technology ("ICT"), the advertising and the automotive and building sectors, and that international suppliers are subject to those charters, the target will be 50% of the value of all procurement from BEE accredited companies by 2008 and 70% by 2014.*

6.2 *A minimum of two thirds of that expenditure must be spent with BEE accredited companies as the primary vendor. The residual one third may be recognize to BEE accredited companies via a primary vendor, which is not a BEE accredited company, with only the BEE portion of the expenditure counting towards the target. Where a supplier is a BEE accredited company, which also sources from other BEE accredited companies, only the expenditure at the first tier will count towards the target.*

6.3 *Financial institutions will:*

6.3.1 *provide support to black SMEs to enable them to benefit from targeted procurement programmes. Such support will include programmes designed to assist black SMEs in tendering for financial sector business, setting aside areas of procurement reserved or preferred for black SMEs only;*

6.3.2 *promote early payment for services provided by SME's;*

6.3.3 *encourage existing suppliers to address BEE and become BEE accredited;*

6.3.4 *report on all spend as per the categories that fall within the definition of BEE accredited; and*

6.3.5 *explore meaningful ways of supporting the Proudly South African Campaign.*

6.4 *The Charter Council will review the 2008 and 2014 targets in 2005, to assess the status of charters in other sectors, and to assess the impact of 6.1 on procurement of services from black-owned SME'S. The Charter Council will specifically review the targets for claims procurement in the short-term insurance sub-sector in 2005.*

Page 9

7. Enterprise development

7.1 *The financial sector commits itself to fostering new, and developing existing BEE accredited companies through the following initiatives:*

7.1.1 improving the levels of assistance provided to BEE accredited companies in the financial sector and other sectors of the economy through skills transfer, secondment of staff, infrastructure support, and giving technical and administrative support and assistance. Measurable financial support given in this connection will be scored under procurement;

7.1.2 supporting the establishment and growth of BEE accredited companies as broking agencies and/or enterprises in the financial sector through which the sector sells its products and services. Measurable financial support given in this connection will be scored under procurement; and

7.1.3 joint ventures with, debt financing of, and equity investments in BEE companies, in the financial sector and other sectors of the economy. Measurable financial support given in this connection for a Black SME may be scored under Targeted Investments, or, for a BEE company, it may be scored under BEE transactions financing, measured on the basis of Rand spend.

7.2 The financial sector will ensure that where appropriate, it refers business opportunities to, and procures financial services from, black owned financial institutions.

7.3 The financial sector's support for the development of second and third tier financial institutions may take, but shall not be limited to taking, the form of measures set out in paragraphs 7.1.1 and 7.2

8. Access to financial services

8.1 The financial sector acknowledges that access to first-order retail financial services is fundamental to BEE and to the development of the economy as a whole.

8.2 In terms of the Declaration of the Financial Sector Summit on 20th August 2002, it was agreed that strategies would be put in place to ensure that the financial sector is more efficient in the delivery of financial services, which enhance the accumulation of savings and direct them to development initiatives. Insofar as it relates to access to financial services, specific actions were agreed in relation to:

- ensuring the provision of first-order retail financial services including:*
- sustainable and affordable banking services;*
- contractual savings schemes; and*

- *credit for small and micro enterprise and poor households.*
- *the development of sustainable institutions to serve poor communities;*
- *the regulation of Credit Bureaux;*
- *discrimination;*
- *HIV/AIDS; and*
- *supporting higher levels of savings and investment overall.*

8.3 In respect of this charter, the financial sector commits itself to substantially increase effective access to first-order retail financial services to a greater segment of the population, within LSM 1-5. The financial sector specifically undertakes:

8.3.1 by 2008 to make available appropriate first-order retail financial services, affordably priced and through appropriate and accessible physical and electronic infrastructure such that:

- *80% of LSM 1-5 have effective access to transaction products and services (defined in paragraph 2.27.1);*

- *80% of LSM 1-5 have effective access to bank savings products and services (defined in paragraph 2.27.2);*

- *a percentage (to be settled with the life assurance industry) of LSM 1-5 households have effective access to life assurance industry products and services (defined in paragraphs 2.27.2 and 2.27.4);*

- *1% of LSM 1-5 plus 250,000 have effective access to formal collective investment savings products and services (defined in paragraph 2.27.2); and*

- *6% of LSM 1-5 have effective access to short term risk insurance products and services (defined in paragraph 2.27.4).*

8.3.2 in accordance with the arrangements concluded with Government and the DFIs in terms of paragraph 9.1.3, to originate the low-income housing loans, agricultural development loans, and loans to black SMEs, necessary to achieve the desired breakdown of targeted investment

Page 10

established in terms of paragraph 9.1.3. For the purposes of determining the value of loans originated in terms of this paragraph, any loan which falls within the

definition of a first-order retail financial service or product as set out in paragraph 2.27.3 will be taken into account.

8.3.3 Each sub-sector will determine, in consultation with the Charter Council how the sub-sector targets will be divided between the individual financial institutions in the sub-sector.

8.4 Each financial institution commits, from the effective date of the charter to 2008, to annually invest a minimum of 0.2% of post tax operating profits in consumer education. Consumer education will include programmes that are aimed at empowering consumers with knowledge to enable them to make more informed decisions about their finances and lifestyles

8.5 The financial sector furthermore commits to:

- the elimination of discrimination in the provision of financial services;
- supporting the establishment of third tier community based financial
- recognizes □ □ □ or alternative financial institutions.

8.6 By 2005, the financial sector, together with Government, undertakes to establish standards to monitor access and to design a mechanism for the ongoing evaluation and review of the impact of its initiatives on access.

9. Empowerment financing

9.1 Resourcing

9.1.1 All the parties to the charter commit themselves to working in partnership with Government and its DFIs to □ recogniz resources for empowerment financing.

9.1.2 Based on preliminary calculations, it is estimated that the aggregate amount of new empowerment financing from the financial sector could exceed R75bn. All parties agree to working together to meet the objective of increasing the total amount of empowerment financing.

9.1.3 As part of the process, the parties will, by no later than 30 June 2004, establish:

9.1.3.1 the total amount of empowerment financing;

9.1.3.2 the desired breakdown between BEE transaction financing and the four components of targeted investment;

9.1.3.3 appropriate risk mitigating measures and risk sharing arrangements between Government and its DFIs on the one hand and the private sector on the other;

9.1.3.4 the period over which the empowerment financing will be done;

9.1.3.5 the institutional framework and financing models for the recognizes of the various resources; and

9.1.3.6 the extent to which and how past empowerment financing transactions will be taken into account in terms of paragraph 9.1.6.

9.1.4 Investment in transformational infrastructure will, in part, depend on the establishment of a mechanism to identify and analyse potential projects (including appropriate skills and post funding care).

9.1.5 The total amounts to be invested in BEE transaction financing and targeted investments in terms of 9.1.3.2 will be calculated as percentages of the total designated investments in the financial sector as at 31 December 2003, and currently estimated to be of the order of R2,000 bn. Those percentages of designated investments in each affected financial institution will constitute the targets for BEE transaction financing and targeted investment respectively.

9.1.6 Without reducing the total amount for new empowerment financing by the sector, the targets of individual affected institutions might be adjusted to take account of empowerment financing which they have on their books on the effective date of the charter.

9.1.7 Different affected institutions within the sector may choose to participate to a greater or lesser extent in each of the components of targeted investment, depending on where they are relatively better positioned to do so.

9.1.8 For the purposes of calculating the targeted investment made by an affected institution:

investments and financing made by the affected institution, and held on its own balance sheet, or any recognizes financing or investments in or financing to institutions which themselves hold targeted investments or financing, will be taken into account; and

any financing and investment which falls within the definition of a first-order retail financial service or product as set out in paragraph 2.27.3 will be taken into account.

9.1.9 *Each affected institution shall annually report its investment into each of the four targeted investment areas so that the aggregate can be monitored and actions taken to ensure that the desired results are achieved.*

9.1.10 *The Charter Council will review the financial sector's impact on the four classes of targeted investments at the end of the period determined in terms of paragraph 9.1.3.4.*

9.1.11 *Pension fund trustees, fund managers and consultants play a critical role in influencing the flow of funds. Initiatives will therefore be developed to enhance their understanding of investments in general and specifically their participation in targeted investments and BEE transaction financing and to make a material contribution to shareholder activism as contemplated in paragraph 12.*

9.2 Principles of BEE transactions

9.2.1 *BEE ownership initiatives should be aimed at promoting the productive and sustainable participation of black companies and black people in each sector of the economy;*

9.2.2 *Ownership will be particularly encouraged if it adds value to the companies involved and includes meaningful participation in management and control;*

9.2.3 *The funding structures should facilitate the transfer of full economic interest to the BEE partner and longer-term shareholder-type relationships, as opposed to short-term portfolio investments (especially where the transaction has been facilitated);*

9.2.4 *If the acquisition of equity by the BEE company is facilitated in terms of the provisions of this charter or Government assistance, the retention of the shareholding as a BEE share should be promoted to the greatest extent possible;*

9.2.5 *Initiatives aimed at achieving broad-based empowerment will be promoted. This would include employee ownership, community and collective ownership; and*

9.2.6 *Joint ventures or partnership arrangements should be meaningfully structured with equitable portions of the responsibility and benefit to each party.*

10. Ownership in the financial sector

10.1 *Each financial institution will have a target of a minimum of 25% black ownership, measured at holding company level, by 2010.*

10.2 *A minimum of 10% of the target set in terms of paragraph 10.1 must be satisfied by way of direct ownership by black people, provided further that the financial*

institution complies with the provisions of paragraph 11.1 concerning the appointment of black directors.

Should the balance or any part of the balance of 15% be achieved by way of direct ownership a maximum of four bonus points will be awarded.

10.3 Direct ownership as contemplated in 10.2 should where possible meet the principles outlined in paragraph 9.2 and may include:

10.3.1 direct ownership in the financial institution as a result of BEE transaction financing;

10.3.2 broad-based ownership;

10.3.3 disposal of any assets, operations, businesses or subsidiaries by the financial institution as a going concern to black people;

10.3.4 direct shareholding or ownership with control, commensurate with the level of ownership concerned, at subsidiary or divisional level; or

10.3.5 joint venture or partnership arrangements.

10.4 Any transaction which involves BEE parties acquiring equity on a conditional, deferred basis, with no issue of equity carrying upfront economic interest, shall, for the avoidance of doubt, not fall to be counted as direct ownership for the purposes of paragraph 10.3 until such time as the equity is actually transferred.

10.5 A maximum of 15% of the target set in terms of paragraph 10.1 may be satisfied by way of indirect ownership by black people at group or subsidiary level. Financial institutions may only score indirect ownership points if they have reached a level of 10% direct ownership, and if they have taken active measures to meet the responsibilities outlined in section 12 of this charter. Indirect ownership will be measured on a basis to be agreed and approved by the Charter Council.

10.6 For the purposes of this charter, black ownership will be calculated as the agreed standard valuation of the black interests referred to in paragraph 10.3 expressed as a percentage of the agreed standard valuation of the South African operations of the financial institution on the date of the transaction. Where a BEE transaction results in black people acquiring 100% of an asset, operation, business or subsidiary from a financial institution the agreed standard valuation of that asset shall be deemed to be the transaction consideration applicable to the BEE transaction concerned, and the

Page 12

forementioned percentage shall be calculated based on the agreed standard valuation (as defined) of the South African operations on the date of the transaction.

10.7 Only historical direct ownership transactions, which remain wholly or partially current on the effective date, can be included in the calculations of direct ownership. After the effective date, all direct ownership transactions can be included in the calculation of direct ownership, even if they unwind, provided they meet the principles of BEE transactions as provided in paragraph 9.2.

10.8 Any direct ownership transaction, which unwinds, must be referred to the Charter Council for analysis as to whether, when it was originally concluded, the transaction genuinely complied with the intent of paragraph 9.2. If the Charter Council decides that it was not, it may not be taken into account in calculating direct ownership.

10.9 If a financial institution is at least 25% owned by another financial institution, it may, in the calculation of direct black ownership, take into account a portion of the direct black ownership in that other company based on the percentage shareholding of that other company in the financial institution concerned.

10.10 Due to their unique nature, foreign banking groups with a branch structure will have the same target as is set out in paragraph 10.1, but will be permitted to address that target either –

10.10.1 by transactions contemplated in paragraphs 10.2 and 10.3 of this charter; or

10.10.2 by financing identified BEE transactions in addition to the investment contemplated in paragraph 9.1.5. Points and bonus points for such financing will be scored in the same way as if the financing (calculated as a percentage of the agreed standard valuation of the South African operations of the foreign banking group) equated the same percentage of direct ownership in terms of paragraph 10.2. At least 25% of this financing must be committed to BEE transactions in the financial sector.

10.10.3 Not more than 18 points may be earned in aggregate in terms of 10.10.1 and 10.10.2. BEE transactions identified in terms of 10.10.2 will, for the purposes of this charter, be treated as if they were ownership transactions, and shall be governed by all the provisions of paragraph 10, and shall not be measured or treated interchangeably with BEE transactions in paragraph 9.1.5.

11. Control in the financial sector

11.1 *Each financial institution will have a target of 33% black people on the board of directors by 2008;*

11.2 *Each financial institution will have a target of a minimum of 11% black women on the board of directors by 2008.*

11.3 *Based on an estimated ratio of 15% for 2002, each financial institution will have a target of a minimum of 25% black people at executive level by 2008;*

11.4 *Based on an estimated ratio of 2% for 2002, each financial institution will have a target of a minimum of 4% black women at executive level by 2008.*

12. Shareholder activism

12.1 *The financial sector recognizes that shareholder activism is a critical component of continued confidence and long-term growth of the sector.*

12.2 *Financial institutions therefore undertake within the parameters of good corporate governance to:*

12.2.1 *promote increasing levels of influence of direct black owners at board level;*

12.2.2 *encourage training and awareness programmes for all shareholders regarding the impact of indirect shareholding;*

12.2.3 *encourage shareholder awareness through triple bottom line reporting, reporting on performance in terms of the charter and information about the institution and the sector; and*

12.2.4 *facilitate, where possible, black companies or individuals voting on behalf of indirect owners.*

12.3 *Fund managers and asset consultants commit, as part of their obligations in the charter, to comply with the provisions of 12.2 and to improve their knowledge and that of union trustees regarding BEE transactions and targeted investment.*

12.4 *Pension fund trustees are encouraged to play an increasingly active role in promoting the objectives of the charter on their respective boards and in the entities in which they have taken significant investments.*

13. Corporate social investment

13.1 Each financial institution will have a target of directing 0.5% per annum of post tax operating profits to corporate social investment (CSI) between the effective date of the charter and 2014.

13.2 CSI means projects aimed primarily at black groups, communities and individuals that have a strong developmental approach and contribute towards transformation.

13.3 CSI projects may include, but will not be limited to –

☐ Education: support for community education facilities; programmes at secondary and tertiary education level aimed at promoting the industry; bursaries and scholarships, which are oriented towards the hard sciences;

☐ Training: community training; skills development for unemployed; adult basic education and training in communities; financial literacy programmes in communities;

☐☐ Development Programmes for youth and other target groups

☐ Environment: support of conservation projects; community clean up projects; food garden initiatives;

☐ Job Creation: job creation projects external to the workplace or any commitments contained in empowerment financing;

☐ Arts & Culture: support of development programmes; development of new talent;

☐ Health: support of community clinics; health programmes in the community; and

☐ Sport: support of developmental programmes.

14. Regulatory issues

14.1 The regulatory environment and architecture of the sector must promote the empowerment objectives of this charter, ensure appropriate standards of entry, operation and disclosure and facilitate competition.

14.2 The parties to this charter agree that, in consultation with Government, the relevant aspects of the regulatory environment which inhibit compliance with the provisions of this charter will be identified and amended to allow for compliance. By the effective date of the charter the specific areas of regulatory review will be defined and attached as an annexure to the charter.

14.3 A key principle informing this charter is that of support for community reinvestment. Any legislation aimed at giving effect to community reinvestment or which requires the setting of targets for the financial sector or any part of it should be brought within the framework of this charter.

14.4 The charter will be published as a Transformation Charter in terms of the Broad-Based BEE legislation. The Minister of Trade and Industry will be requested to publish a Code of Practice which will give effect to the provisions of paragraph 4.11.2.

15. Implementation

15.1 Charter council

15.1.1 Fundamental principles –

□ A Charter Council will be established as an independent body with a mandate to oversee the implementation of the charter.

□ The Charter Council will address the issues of principle and, in particular

□ conduct the reviews and take the decisions referred to in paragraphs 4.3 and 4.4; and

□ if there is a material change in the circumstances or the environment in which the charter has to be implemented, it will consider whether the targets and implementation strategies are still appropriate, and if not how they should be varied.

□ There will be equality between industry association representatives and all others on the Charter Council. The Charter Council must fairly reflect the interests of all the financial institutions.

□ Decisions of the Charter Council will be taken on a consensual basis. If, on any issue, the Charter Council is unable to achieve consensus, there will be a dispute-breaking mechanism in the Charter Council either by some agreed mechanism within the Charter Council, or by reference to arbitration or mediation.

15.1.2 The Charter Council will establish an executive to attend to its routine work and specifically to:

- receive, consider and approve annual audits from each financial institution;
- confirm ratings of financial institutions;

Page 14

- issue guidance notes on the interpretation and application of the charter;
- prepare an annual review which outlines progress and evaluates new areas of intervention;
- submit the annual review to the BEE Advisory Council for publication;
- prepare interim reports at appropriate intervals;
- undertake the reviews identified in terms of the charter;
- accredit agencies to perform audits; and
- engage with Government, public sector finance institutions, the BEE Advisory Council and other regulatory agencies to promote the implementation of the charter.

15.1.3 There will be a right to take any decision of the executive on review or appeal to the Charter Council.

15.1.4 The Charter Council will ensure that the executive is adequately resourced, capacitated and supported to fulfil its mandate as envisaged in the charter. A business plan will be commissioned which will, amongst other things, outline a budget for the work of the Charter Council. Financial Institutions will be required to fund the Charter Council in accordance with the budget.

15.2 Reporting and Review

15.2.1 Each financial institution will report annually to the Charter Council on its progress in implementing the provisions of this charter. If a financial institution is a member of a group, it should report as part of the group in the South African holding company unless –

- The financial institution is a listed company; or
- The financial institution opts in.

15.2.2 The first annual report will be for the year ending 31 December 2004, and must be submitted to by 31 March 2005.

15.2.3 Thereafter each financial institution will report as at 31 December each year thereafter, and submit the report by 31 March of the following year.

15.2.4 All financial institutions will publish, for general information, an annual BEE report. The BEE report will include the audited scorecard and an account of progress in discharging unquantified responsibilities as contained in paragraph 15.2.6.

15.2.5 Besides the general reviews outlined in 4.3 and 4.4, the following specific areas have been identified for review, and where necessary, the setting of targets:

- all targets for black women representation on the basis of the reports for 2006;
- 5.5 on employment equity targets for 2014 and 11 at board and executive management levels;
- 5.7 on learnerships;
- 6.4 on procurement;
- 8.6 on access;
- 9.1.3 on targeted investment; and
- 14 on regulations.

15.2.6 Progress on the following unquantified responsibilities (as set out in the charter) should be reported on annually by financial institutions and submitted together with the scorecard, to the Charter Council.

- 4.10
- 5.2
- 5.8
- 8.5
- 10.5
- 12

16. The scorecard

16.1 The scorecard set out in Annexure A forms an integral part of the financial sector charter and provides an objective and broad-based set of measurement indicators for purposes of measuring BEE progress in and between financial institutions, in different sub sectors and in the financial sector as a whole. It will be used by:

- each financial institution as a basis for self-assessment of its BEE endeavours;
- the Charter Council as a means of evaluating BEE progress in the sector;

□ *Government in the adjudication of contracts awarded to financial institutions;*
and

the private sector in the awarding of contracts to financial institutions.

16.2 Financial institutions, which are exempted from any paragraph in the charter in terms of paragraph 4 will not be required to complete the specific section in the scorecard, subject to paragraph 4. Under such circumstances, the points allocated to the paragraph from which the financial institution is exempted will be cancelled, and it will score out of the remaining points and calculate its score as a percentage of that reduced remainder.

SIGNED:

Association of Black Securities Association of Collective Investments and Investment Professionals

(As mandated by the Black Business Council)

Banking Council of South Africa Bond Exchange of South Africa

Foreign Bankers Association of SA Investment Managers Association of SA

Institute of Retirement Funds JSE Securities Exchange South Africa

Life Offices' Association of South Africa South African Reinsurance Offices' Association
