



B M F

BLACK MANAGEMENT FORUM

DEVELOPING MANAGERIAL LEADERSHIP

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WORKPLACE DISCRIMINATION: BMF SUBMISSION TO PORTFOLIO COMMITTEE ON LABOUR 31 JULY 2007

Introduction

The Black Management Forum (BMF) is a thought-leadership organisation which has amongst others taken interest in socio-economic transformation of our country, in pursuit of socio-economic justice, fairness and equity. The BMF will continue to be vocal on these aforementioned matters and has been putting Corporate South Africa in check and encouraging participation of the broader South African stakeholders. The BMF with its more than three decades of credentials and expertise on the transformation landscape has often offered to assist, our government, parastatals and private sector companies.

The BMF salutes the Parliamentary Portfolio Committee on Labour for providing the nation with another opportunity to submit its views on the status of employment equity in our country. We as the BMF can state without any fear of being accused of arrogance or self-aggrandisement that we have always been at the forefront of the struggle for the empowerment of blacks in the workplace. This struggle saw us leading the "Affirmative Action" debate in the early 1990's, through an Affirmative Action Commission, culminating in the release of the Affirmative Action Blue Print 1993. This was an independent, non-statutory commission that was set up by the BMF and it produced, among others, what was later to be known as the Basotho Hat formula (for affirmative action targets). Worryingly, 13 years since this Commission released its recommendations, corporate South Africa is still nowhere near the targets for affirmative action that were suggested by the Affirmative Action Blueprint (BMF 1993). For instance, 20 percent of executive directors should have

been black by the year 2000; 30% of senior managers; 40 percent of middle managers, 50% junior managers and professionals (BMF 1993).

Employment Equity

The BMF went on to play a central role in the drafting and the subsequent legislation of what later became known as the Employment Equity Act. In an unprecedented move, the BMF was given a special seat at NEDLAC during the negotiations on the Employment Equity Bill (in 1998) and it provided some significant inputs in the drafting of the Employment Equity Act. Not only did it play a role in the negotiations from the other side, but the Director for Employment Equity (in the Department) at that crucial time was himself a BMF "graduate" and a committed transformation activist; a tribute to the skill and expertise that the BMF had developed.

Black Economic Empowerment

It was the BMF again that realised the need for a more broad-based approach to "affirmative action" and which facilitated the establishment of the Black Economic Empowerment Commission (BEE Com). The BEE Commission arose out of a BMF Resolution, calling for such a Commission, in 1997. The Commission's Report (2001) went a long way in reshaping the "black economic empowerment" landscape. Most of its recommendations ended up being endorsed by the government in its Broad-based BEE Policy (Department of Trade and Industry, 2003). The ground has now shifted in the "EE" debate and there is a need for some serious review of what it still entails and how it fits into the BBBEE Scorecard; the various BBBEE Charters and the new BBBEE Codes.

In 2005 the BMF submitted to the Labour Portfolio Committee that: " It is futile, we submit, for the Parliamentary Portfolio Committee, to debate employment equity in isolation from all the latter developments, which have, to a very large extent, absorbed EE within their approach, whilst taking precedence over it. Most of the BEE Charters, for instance, have got targets that they set for employment equity, among others, that all companies in that respective sector

need to meet. Due to the significance of the BEE Scorecard (and the related BEE Codes) for tenders and large private sector contracts, most employers are now more concerned about the Charter requirements for EE and the than their own EE plans, Employment Equity Act, its plans; reports and compliance processes. It is in this context that the debate needs to take place. We submit that the Portfolio committee investigate ways in which the BEE processes can be used to stimulate and re-ignite the EE process and targets. Our recommendations therefore take place in the above context.

The Codes of Good Practice were promulgated in December 2006. We are here today at the invitation of the Parliamentary Portfolio Committee on Labour once again to submit on RACISM IN THE WORKPLACE and the situation in our workplaces has worsened. The BMF amongst other, through the leadership of its president, Mr. Jimmy Manyi, who is also the chairperson of the Employment Equity Commission "has cried foul once more" according to its critics. We are concerned and disturbed about the slow pace of transformation in corporate South Africa. And, in particular, the painful neglect and non-compliance on Employment Equity and its Affirmative Action processes in business and other Institutions in our country.

THANK YOU FOR HEADING OUR CALL!

1.0Whereas:

- 1.1 The Employment Equity Act was passed in August 1998 and it was promulgated from May to December 1999; whereupon all designated employers are to submit their first EE Reports in June 2000 (those who employ 150 employees or more) or in October 2000 (those who employ less than 150);
- 1.2 The Commission for Employment Equity (CEE, hereafter) was established in May 1999, to *inter alia* advise the Minister (of Labour);

2.0 Noting:

- 2.1 The continuing flagrant violation of the provisions of the Employment Equity Act, demonstrated in more designated employers (up to 60% according to CEE Report of 2002) failing to submit EE Reports that comply with the requirements of the Act,
- 2.2 The continued perceived lack of capacity in the Department of Labour as far as its operational and human resources capacity are concerned (including the quality and quantity of its Inspectorate),
- 2.3 The consequent general state of non-compliance in the country by employers, complacent in their common understanding of the above constraints,
- 2.4 The consequent hesitation by the DOL to enforce EE Act to designated employers, notwithstanding the wide-ranging powers and jurisdiction that the EE Act confers on Labour Inspectors (sections 36 – 38) and on the Director General of Labour,
- 2.5 The virtual absence of any "cases" that have been taken through the inspection process, the DG review and eventually through the Labour Court. Consequently, the lack of any serious precedence in EE compliance; enforcement and meting out of the fines (which could serve as an incentive for other employers to comply), and;

3.0 Concerned

- 3.1 At the failure by the Commission for Employment Equity (CEE) to issue guidelines for the country on the setting of numerical targets and benchmarks, in spite of being so mandated by Section 29 of the EE Act and notwithstanding the serious need for such guidelines, especially during the first five years of the EE compliance process (2000- 2005). Such failure resulting, among others, in the abuse of the EE process and the preference of white females, in some sectors, to the exclusion of the African majority. The June 2007 Employment Equity Commission report statistics revealed that white women have reached and surpassed their

Economically Active Population target by far. What does this mean? The BMF proposes the unequivocal acceptance of this fact that Employment Equity can work if instituted and adhered to by companies; hence the confirmation of this fact through the deployment of white Women.

We therefore assert that white women bow out of Employment Equity and that this committee help institute an amendment to the Employment Equity Act through a SUNSET clause for white women. This would help re-focus targets on people with disabilities, black people and in particularly black women who are at the lowest end of their EAP targets.

- 3.2 The resultant lack of any yardstick for evaluating the EE targets that companies have been developing; and for guiding them in advancing the various designated groups (as Section 42 recommends);
- 3.3 The general and spectacular failure by the CEE in its seven years of existence to seriously and demonstrably advance and bring about punitive measures to those employers who continue to violate the EE Act and its tenets. This would herald the advancement of transformation through Employment Equity in South Africa; (this is in spite of the various "Codes of Good Practice" and "regulations" that the CEE advised the Minister of Labour on);
- 3.4 The lack of a qualitative and in-depth approach to employment equity and the tendency to focus on "procedural compliance" and quantitative aspects whilst not reviewing the real challenges that blacks and other designated groups are faced with in the respective industries. The BMF is inundated with anecdotal stories of frustrated, besieged and demotivated black people in the workplace despite 13 years of democracy.
- 3.5 Linked to the above concern, is also concern about the lack of a pro-active approach to enforcing EE and non-discrimination, rather than the re-active approach of "inspection" when there is a problem.

- 3.6 The inability of the CCMA to stem the practice of covert discrimination at work, through serious rulings against discrimination and the continued disregard of the CCMA by most employers (which has affected the confidence of many victims of unfair discrimination in the CCMA as a forum that can assist)
- 3.7 The inconsistent jurisprudence in South Africa with respect to dealing with unfair discrimination. For instance the fact that the Promotion of Equality and Prevention of Unfair Discrimination Act (**PEPUDA** of 2000) allows for "class action" with respect to cases of discrimination whilst the EE Act does not. As a result the availability of wider remedies and a different mechanism to take up grievances under the **PEPUDA** (e.g. interest groups can take up a case of alleged discrimination on behalf of a victim, such as a Disabled Persons Group taking up a case for a person with a disability; or on behalf of their member, e.g. a union member; whereas this cannot happen in the EE process; according to the process allowed by section 10 of the EE Act).
- 3.8 The consequent difference in the remedies that are available for victims of discrimination. Victims of discrimination outside of work, under the **PEPUDA**, have access to Equality Courts, whereas those who are discriminated against "in employment" do not have this remedy (they must go through the internal process; the CCMA, whose constraints were noted above and ultimately the Labour Courts). This inconsistency in remedies and the "territorial approach" is despite the fact that the "mischief" that both Acts (the **PEPUDA** and Chapter II of the EE Act) seek to redress is the same and that both Acts seek to further the same provisions of the same Bill of Rights (Section 9(3)); upon the same society.
- 3.9 The pervasive and insidious nature of discrimination in virtually all the professions in South Africa; particularly those that continue to be dominated by the minority white population; including the judiciary; and the near impossibility of dealing with this via individual "grievances" and the mechanisms envisaged in section 10 of the EE Act. Evidence of this also being demonstrated by the recent

public discourse indicating serious challenges of institutional and individual racism within the judiciary.

4.0 Recommend:

- 4.1 The review of the overlaps of mandates of the institutions that enforce Section 9 of the Bill of Rights. These include the Commission for Employment Equity; the Commission on Gender Equality and the Office on the Status of Disabled Persons and other related institutions.
- 4.2 A renewed campaign and drive to enforce employment equity compliance under the supervision of the Department of Labour. This should be a partnership initiative between the Department; organised labour; black business and interest group organisations to work together to identify and eliminate all instances of unfair discrimination in South Africa; whilst enforcing compliance with the EE Act. A 24-month campaign with various roles for the different stakeholders is recommended.
- 4.3 A link between the new BEE enforcement mechanisms of the Department of Trade and Industry and the EE inspectorate. This should include the extension of the roles and responsibilities of the BEE Rating Agencies; as contemplated in Statement 050 of the Broad Based BEE Codes of Good Practice (DTI, December 2004) to also conduct inspections on compliance with the various provisions of the EE Act. The BEE certification process, which is envisaged in section 54 of the EE Act, now overlaps with the issuing of compliance certificates, which the BEE Policy and Codes have conferred on BEE Rating Agencies. The latter will also be fully monitored and accredited by the South African National Accreditation Systems (SANAS) which is part of the Department of Trade and Industry. There is therefore a built-in quality assurance system; including very rigorous standards for accreditation. We believe that an integrated approach should be adopted rather than to have various certificates issued on the same EE and other

related components. BMF also recommends a Forum, through which the DTI and other government departments, where prospective black directors, managers and employees in general who are approached by white firms to enter into BEE deals be provided with state of the art advice, thus avoiding the rampant "fronting" by companies.

4.4 The use of Accredited Rating Agencies to conduct EE inspections will also immediately alleviate the capacity problems of the DOL (in terms of the quantity and quality of its inspectorate) whilst costing the state nothing (NB: companies will pay for the services of the ratings agencies, like they pay for auditing services.).

4.5 The review of section 10 of the EE Act and a consideration for allowing class action law suits so that dealing with discrimination ceases to be an "individual grievance issue". This will entail the establishment of a common approach between the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) and the EE Act, particularly the Equality Courts of the former. This recommendation is consistent with the recommendations in 4.2 and 4.3. above (because the Human Rights Commission and the Department of Justice are the custodians of the PEPUDA and the Equality Courts).

4.6 We would like to say the time has come for our call of 2005 to be implemented, the call that says: "The setting up of a Commission of Enquiry into racism and other forms of unfair discrimination in South Africa. This Commission should be given a one-year mandate to review incidents and cases of racial discrimination in the workplace and the extent to which blacks; women and people with disabilities have been advanced (or not) in employment. This Commission of Enquiry should also look at all the so-called high-level professions

designated groups into all levels and professions of the economy (especially 13 years of democracy).

- 4.7 The BMF would like to re-iterate its call on the establishment of "The Commission of Enquiry, recommended above, should also collect, or cause to be collected, valid and reliable statistics on the demographic profile in all the major sectors of the economy. We propose that the Commission be appointed by the President and be given powers to subpoena and summon institutions and individuals. The Commission should also have the powers to recommend action in cases of violation."

We thank the Parliamentary Portfolio Committee on Labour for giving us the opportunity to make this submission.

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