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**ATINER's Conference Paper Series
BLE2015-1457**

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Law and the Role of Business**

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This paper should be cited as follows:

Reddy, K. (2015). "Social Justice in South Africa: Law and the Role of Business", Athens: ATINER'S Conference Paper Series, No: BLE2015-1457.

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URL: www.atiner.gr
URL Conference Papers Series: www.atiner.gr/papers.htm
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ISSN: **2241-2891**
08/06/2015

Social Justice in South Africa: Law and the Role of Business

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Abstract

The far reaching and devastating effects of apartheid in South Africa, has burdened the nation with “unacceptably high levels of poverty, illiteracy and other forms of social and economic inequality” (Consumer Protection Act 68 of 2008: Preamble). In view of the ravages of discrimination, particularly on the basis of race and gender, equality and the prevention of discrimination have played a significant role in post-apartheid South Africa. Clearly, apartheid resulted in discrimination in almost every aspect of social, political and economic life. The impact extended from much of the population being prevented from fair opportunities for business ownership and management and securing senior jobs, as well as obtaining access to goods and services. Many businesses were closed to them and instead, separate and inferior facilities were provided. Further, workplace discrimination was supported by the law. Hence, with the adoption of the 1996 constitution, there has been much discussion and debate about correcting these discriminatory practices and improving the socio-economic situation of the disadvantaged. Since much of these inequalities were as a result of unjust legislation from the past, it is not surprising that the attainment of the ideals of equality and a fair and just society has been directed towards the state. Clearly, the state had to carry much of the responsibility in removing the unjust legislation and introducing measures to prevent inequalities in the future and to redress injustices of the past. However, the attainment of the ideals of a society free of discrimination and injustice is not attainable without the application of such ideals to the private sector, i.e. individuals and business. This paper investigates the role of business in post-apartheid South Africa and its role in economic and social transformation. It examines the initiatives in place in terms of which business has a role to play, particularly, the prevention of discrimination by the business sector, Broad-Based Black Economic Empowerment (BBBEE), corporate social investment, consumer protection, employment equity and the promotion of fair business practices. This paper uses a descriptive approach to reveal the social responsibility of business in a transforming society. It concludes that the impact of these initiatives for business in South Africa is far-reaching and that business has a significant role to play in the growth and success of the economy, and more particularly in the transformation of the historically disadvantaged communities. However, the initiatives in place have not had the expected result.

Keywords: Black Economic Empowerment; consumer protection; corporate social responsibility; discrimination; social justice; socio-economic transformation; South Africa; preferential procurement; employment equity

Introduction

The far reaching and devastating effects of apartheid in South Africa, has burdened the nation with “unacceptably high levels of poverty, illiteracy and other forms of social and economic inequality”.¹ In view of the ravages of discrimination, particularly on the basis of race and gender, equality and the prevention of discrimination have played a significant role in post-apartheid South Africa. Clearly, apartheid resulted in discrimination in almost every aspect of social, political and economic life. The impact extended from much of the population being prevented from owning land in “White” areas, securing senior jobs, obtaining access to civic amenities and even transport. Many businesses were closed to them and instead, separate and inferior facilities were provided.² Hence, with the adoption of the 1996 Constitution of South Africa,³ there has been much discussion and debate about correcting these discriminatory practices and improving the socio-economic situation of the disadvantaged. Since much of these inequalities were as a result of unjust legislation from the past, it is not surprising that the attainment of the ideals of equality and a fair and just society has been directed towards the state. Clearly, the state had to carry much of the responsibility in removing the unjust legislation and introducing measures to prevent inequalities in the future and to redress injustices of the past. However, the attainment of the ideals of a society free of discrimination and injustice is not attainable without the application of such ideals to the private sector, i.e. individuals and business. This paper investigates the role of business in post apartheid South Africa and its role in economic and social transformation. It examines the initiatives in place in terms of which business has a role to play, particularly, the prevention of discrimination by the business sector, Broad-Based Black Economic Empowerment (BBBEE), corporate social investment, consumer protection, employment equity and the promotion of fair business practices. This paper uses a descriptive approach to reveal the social responsibility of business in a transforming society.

Discrimination, particularly on the basis of race or gender, impairs human dignity and must be viewed as serious from the human rights perspective, especially since it is systemic in nature. Apartheid entrenched race-based discrimination in every facet of social, political and economic life.⁴ The next section examines the inequality and consequent poverty in South Africa, and the need for social justice.

¹Republic of South Africa, Consumer Protection Act 68 of 2008. Preamble.

²Brink v Kitshoff (1996) 6 BCLR 752 (CC) 768.

³Republic of South Africa, Act 108 of 1996.

⁴Brink v Kitshoff (1996) 768.

Inequality and Poverty in South Africa, and the Need for Social Justice

The highly unegalitarian economy in South Africa is due largely to the legacy of apartheid which perpetuated income poverty and exacerbated income inequality.¹ Sharma² recalls that, as a consequence of the past regime, Africans, Coloureds and Indians were dispossessed of their land, had restricted opportunities for employment and self-employment, had low-quality public education and health care and were confined to impoverished parts of the country. It comes as no surprise therefore that South Africa is among the countries with highest income inequality. Although the country had an average GDP growth rate of 3.26% during the period 1993-2011, the Gini coefficient, the yardstick of income inequality, increased from 0.66 in 1993 to 0.7 in 2008.³ In 1993 the Gini coefficient for South Africa was 0.66 and in 2011 it was 0.65 with the highest 10% of the population accounting for 54% of the country's income while the lowest 10% accounts for 1% of income.⁴

The racial dimension of the inequality in South Africa is startling. Although Africans make up 79% of the population, they accounted for only 44% of income distribution and 41% of total expenditure while Whites, who made up 9.2% of the population, accounted for 40.3% of income and 40.9% of total expenditure.⁵

The persisting inequality as a consequence of the Apartheid system, has denied people other than whites the opportunity to accumulate capital (such as land, finance, skills, education or social networks) and stemming from such inequality is the inability to create employment opportunities.⁶ Unemployment in South Africa averaged 25.25 between 2000 and 2014 which is among the highest in the world.⁷

Inequality is entrenched in the economic structure of South African society. It is closely related to the problems of unemployment and poverty. Although the government has been implementing various policies, these steps, such as social grants, are not sustainable in the long run, and policies aimed at creating jobs⁸ have only had limited success.⁹ A study by Leibbrandt, Finn and Woolard¹⁰ has shown that the South African labour market, at present, functions in a way that does not facilitate the equalization of income across racial groups or within racial groups. The authors maintain that this is largely due to rising unemployment and rising earnings inequality.

¹Sharma (2012).

²*Ibid.*

³Woolard, Leibbrandt and McEwen (2009).

⁴The World Bank (2015).

⁵Woolard, Leibbrandt and McEwen (2009); Sharma (2012).

⁶Sharma (2012).

⁷Trading Economics (2015).

⁸Such as the Expanded Public Works Programme aimed at providing the unemployed with temporary employment.

⁹Sharma (2012).

¹⁰(2012) 33.

According to Sharma,¹ addressing the inequality in South Africa requires “an integrated and multi-pronged approach”. The Government may not be able to achieve this on its own. Hence, the need arises for business to engage in various efforts to contribute to alleviating the associated problems.

Although much has been done to attain political justice, with a constitution enshrining rights for all citizens, there is increasing social inequality. Twenty one years after democracy, the new challenge is the attainment of social justice as set out in the constitution. Many of the efforts to bring about social upliftment for the marginalised and poor have been “government-centered and top-down” and have not been very successful;² hence, the need for the involvement of business as a means to assist in addressing socio-economic inequality. The next section highlights the inequality challenges that relate to business.

Discrimination by the Business Sector and other Inequality Challenges Requiring Legal Intervention

Race Discrimination against Customers

Apartheid not only resulted in inequality and discrimination imposed by the state, it supported, encouraged and even demanded discrimination by private individuals and business sector. Many shops were closed to Black people: separate and inferior services were provided.³ Legislation demanded separate services for different race groups, the consequence of which was inferior services for certain groups of customers. In fact retail chain stores did not even service many of the disadvantaged areas and Blacks were not seen as “customers” by the business sector. Chain stores supported by largely Black customers offered inferior quality of products as compared to products in their other stores, with lesser emphasis being placed on customer service. Access to credit facilities by banks and other financial institutions were problematic for Black customers, with higher rates of interest for poorer borrowers and the practice of “red-lining”. With accommodation, most establishments or facilities were closed to Black guests or inferior services were offered.⁴

Other Inequality Challenges by the Business Sector Requiring Legal Intervention

The Lack of Business Opportunity for Blacks

Due to inequalities in income, wealth and skills that prevailed between race groups, the Black majority in the country were not in a position to engage in formal business ventures;⁵

¹(2012).

²von Broemsberg and Davis (2008).

³*Brink v Kitshoff* (1996) 768.

⁴Reddy (2006) 785-786.

⁵Beach (2012).

Unethical BUSINESS PRACTICES

The impact of inequality resulted in lower literacy levels of Black customers and a lack of awareness of their rights as consumers. This includes the lack of the means to contest unfair and unethical business practices.¹

Discrimination in the Workplace

Job reservation resulted in disproportional representation of different population groups in the workplace and at different levels.²

Corporate Social Responsibility, Social Equity and the Role of the Law in South Africa

There appears to be a shift in how CSR is viewed. The initial perception was that CSR was the situation where the organisation goes beyond compliance and engages in actions to further some social good beyond the interests of the business and that which is required by law.³ McBarnet, Voiculescu and Campbell⁴ argue that CSR is no longer a mere voluntary act. They emphasise that the law does play a role to compel companies to act in a socially responsible manner and that CSR must be viewed as a complex interaction between business, the government and the community. In terms of the Companies Act,⁵ there is an obligation on business to safeguard, not only the interests of shareholders, but also those of consumers and the community. The Act is clear that business has a broader social role to play⁶ and requires organisations to report on their activities with respect to social and economic development, and the promotion of equality in the communities in which they operate.⁷ Prior to democratic change in the country, business argued that CSR was neither related to admitting guilt for corporate support for apartheid and the resultant support for Apartheid, nor was it related to accepting the responsibility for socio-economic welfare of the country. Yet, presently, CSR is closely associated with reconstruction and development.⁸ In South Africa, the social aspect of CSR includes BBBEE and employment equity, as well as efforts to uplift society.⁹

¹Woker (2010) 218.

²Bendix (2010) 463.

³Hodes (1983); Wolmarans and Sartorius (2009).

⁴(2007).

⁵Republic of South Africa, Act 71 of 2008.

⁶Section 7.

⁷Section 72.

⁸Skinner and Mersham (2008).

⁹Terry (2010).

The Role of Business in Promoting Equality and Preventing Discrimination

The South African Constitution rejects the social and economic status quo and one of its aims is transformation into a more just and equitable society where people can realise their full potential as human beings.¹ On the one hand, the equality guarantee set out in Section 9 of the Constitution places a negative obligation on the state and other entities (including business) not to discriminate against any individual. On the other hand it places a positive obligation on the state and other entities to take steps to ensure full and equal enjoyment of all rights and freedoms. To this end it authorises legislative and other measures to protect or advance those disadvantaged by unfair discrimination. Such measures include the Promotion of Equality Act;² the Broad-Based Black Economic Empowerment Act³ (BBBEE Act); the Preferential Procurement Policy Framework Act;⁴ the Consumer Protection Act⁵ and the Employment Equity Act.⁶

The Promotion of Equality Act

The impact of the Promotion of Equality Act prohibits discrimination generally⁷ and particularly on the basis of race,⁸ such as a restaurant refusing admission to Black customers or where an establishment informs Black customers that they are fully booked but take on white customers.

The Act places a prohibition on racial exclusivity⁹ for instance, credit assessment criteria that deny or restrict Black customers access to credit or opening bank accounts. Where particular business entities deny access to credit facilities to persons earning below a certain income, this may be discriminatory unless it is based on a policy that is rational. The provision of “inferior services to any racial group” is specifically prohibited.¹⁰ In determining whether services are of an inferior nature, a comparison may be made with the quality of services offered to other groups.¹¹ Where business denies access to services and contractual opportunities to Black customers, this is also prohibited.¹²

Broad-Based Black Economic Empowerment (BBBEE)

Due to inequalities in income, wealth and skills that prevailed between race groups, the Black majority in the country were not in a position to engage

¹De Vos (2001).

²Republic of South Africa, Act 4 of 2000.

³Republic of South Africa, Act 53 of 2003.

⁴Republic of South Africa, Act 5 of 2000.

⁵Republic of South Africa, Act 68 of 2008.

⁶Republic of South Africa, Act 55 of 1998.

⁷Section 6.

⁸Section 7.

⁹Section 7(b); (c).

¹⁰Section 7(d).

¹¹Reddy (2006) 799.

¹²Section 7(e).

in formal business ventures.¹ Poverty is a major problem worldwide, including South Africa, and the role that business can play in alleviating poverty, is a tremendous one.²

The principle of equality is one of the fundamental freedoms laid down in the Constitution of South Africa. However, in terms of the principle of substantive equality, one cannot insist on equal treatment before equality is achieved.³ In promoting equality, the Constitution⁴ therefore provides for legislative measures that are designed to provide redress for historically disadvantaged individuals and groups. One such legislative measure is the BBBEE Act.⁵ The purpose of the Act was to contribute towards economic transformation and reduce income inequalities by allowing historically disadvantaged people the opportunity to own and control their own businesses.⁶ The Act was intended to empower the disadvantaged communities, which includes all Black people, youth, people with disabilities and people living in rural areas.

The objectives of the BBBEE Act include the promotion of economic transformation; a substantial change in the racial composition in respect of the ownership and management structures of new and existing enterprises; increasing the extent to which communities, workers and cooperatives own and manage new and existing enterprises; increasing the extent to which women own and manage such enterprises; empowering rural and local communities facilitating access to economic activities, land, infrastructure and training, and promoting access to finance for BBBEE.⁷ Employers are required to promote the achievement of these objectives. Employers have an obligation to audit their policies and practices to develop demographic profiles, identify under-represented groups, prepare employment plans, set out targets and measures to remove discriminatory barriers, and report to the Department of Labour on progress on the implementation of employment equity plans.⁸

In order to measure BBBEE compliance to a number of set criteria, the final codes of good practice provide a standard framework. The criteria include the effective ownership and control of enterprises by Black people; initiatives for equality in the workplace; the measures introduced to develop the competencies of Black people; the extent to which enterprises buy goods and services from BBBEE compliant companies; initiatives that are aimed at socio-economic and enterprise development; and initiatives that promote access to the economy for Black people.⁹ As there is a real risk of “fronting”, the BBBEE scorecard has been developed to measure the extent to which a business is BBBEE compliant.

¹Beach, 2012.

²Terry (2010).

³*President of South Africa v Hugo*, 1997(6) BCLR 708 CC 728-729.

⁴Section 9(2).

⁵Republic of South Africa, Act 53 of 2003.

⁶Noon (2009); Reddy and Rampersad (2013).

⁷Venter, Levy, Conradie and Holtzhausen (2009).

⁸Burger and Jafta (2010).

⁹DTI (2005).

Is there a legal obligation on all enterprises to conform to BBBEE codes? A number of government departments and public entities are legally obliged to apply the BBBEE code when making decisions in respect of procurement i.e. tenders, granting of licences, public/private partnerships and sale of assets.¹ Although private companies do not have a legal obligation to comply with the codes, if they intend doing business with government entities or obtain licences, they have to maximise their scores in terms of BBBEE rating.² Also, companies score higher if they buy goods or services from BBBEE/compliant suppliers. Hence, compliance with the code is more a commercial imperative than a legal one. Only organizations that deal with state departments are legally obliged to comply. However, even where companies do not engage in business with state entities, they may choose to comply out of a moral obligation.

The limited success of BBBEE has been emphasised by critics. In terms of the Employment Equity Report³ although black people comprise 88% of the population of the country of South Africa, only 18% hold management positions. Despite government efforts to implement BBBEE, change has been slow.⁴ One of the principal reasons for the poor success of BBBEE is that business organizations want to trade with established companies that have staff who are experienced and educated.⁵ Poor provision of information about the Act is another reason for the failure of BBBEE. The limited success in benefitting black business women in some provinces has been attributed to the opportunities of BBBEE being unknown to them.

There have been several challenges in implementing BBBEE, one of which is “fronting”. This is where companies create the impression that they are complying with BBBEE priorities just to benefit from government contracts. Another challenge is that only the elite few (now referred to as black diamonds) have benefitted from BEE. Vilakazi⁶ warns that as long as corporates in South Africa treat BBBEE as a compliant way of life, BBBEE cannot be a defining catalyst for socio-economic transformation. Thiel⁷ states that the irony in South Africa is that on the one hand there are vacancies for skilled occupations while there is a mass of unemployed people who do not have the skills to fill these vacancies and further that South African companies spend less than 1% on skills development, which is hardly adequate for a modern economy.

The Preferential Procurement System in South Africa

In fulfilling its role, governments sometimes need to construct and maintain infrastructure for the communities they serve and this may involve the purchase of supplies or payment for services rendered by the private sector.

¹Venter *et al.* (2009).

²Yuill *et al.* (2007).

³Commission for Employment Equity Report 2008/2009.

⁴Esser and Dekker (2008).

⁵Manyi (2008).

⁶(2008).

⁷(2008)

Public procurement refers to the role played by the government in securing goods, services or construction works through contract with the private sector.¹ Since it has the potential to create employment and business opportunities, public procurement can be used by government as a policy instrument to facilitate social and economic development.² In South Africa, the Constitution specifically provides for the use of public procurement as a policy tool to correct past inequalities and provide for the development of vulnerable groups.³ The Preferential Procurement Policy Framework Act⁴ created a procurement policy which grants preferences to historically disadvantaged persons.⁵ The Act makes it compulsory for state organs, including national or provincial departments and municipalities, to grant preference in awarding contracts.⁶ The Procurement Regulations,⁷ are intended to align the Preferential Procurement Policy Framework Act with the provisions of the BBBEE Act on procurement.

During Apartheid, price was the significant factor in awarding public procurement contracts. Now tenders are awarded according to the historically disadvantaged status⁸ of the contractor.⁹ In terms of the 2011 Procurement Regulations, preference must be given to Black people, women and the disabled. The promotion of South African-owned enterprises, creation of new jobs and promotion of rural enterprises are also taken into account. Tenders are awarded to tenderers with the highest points based on the preference system, depending on the BBBEE status level of the organisation. There is an 80/20 system for procurement value below 1 million rand where 20 points are awarded for BBBEE status level of the organisation and the other points are allocated for price scoring. For procurement value above one million rand, there is a 90/10 system and companies will be scored against a BBBEE status level on a scale of 0 to 10 points.¹⁰

Some of the challenges experienced relating to the preferential procurement system include possible conflict of interest resulting in financial gain by tender board members,¹¹ the lack of suitable Black suppliers, resulting in fronting, poor quality of services (mainly by inexperienced SMEs) and unfavourable pricing by SMEs,¹² mainly because of the reduced competition as a result of the preference.¹³ With the introduction of e-governance and e-procurement using the Internet, an added challenge is the information and

¹Govender and Watermeyer (2001) 1.

²Rogerson (2004) 181.

³Bolton (2007) 39.

⁴Republic of South Africa, Act 5 of 2000.

⁵This applies particularly to Black people. Migiro (2010) 1.

⁶Section 2.

⁷Republic of South Africa, Government Gazette No. 34350, June 8, 2011.

⁸Related to disadvantage in terms of race, gender or disability.

⁹Noon (2009) 218.

¹⁰Reddy and Rampersad (2013) 263.

¹¹Hill (2007).

¹²Skae (2006) cited in Migiro (2010)180.

¹³Bolton (2007) 257-258.

communication technology (ICT) challenges experienced by disadvantaged communities, including the lack of ICT skills, particularly computer literacy,¹ limited public access to Internet and other ICT technologies, and the know-how to operate ICT tools.² Several measures have been implemented to narrow the digital divide including Multi-purpose Community Centres (MPCCs), and public Internet terminals in post offices throughout the country. It is therefore understandable that the e-procurement process has been slow and has not achieved the required results.³

Transformation in South Africa, consumer Protection and Fair Business Practices

The equality clause in the Constitution⁴ provides for the equal protection and benefit of all persons, and allows for legislative measures that are designed to protect or advance persons who have been disadvantaged by unfair discrimination. The Consumer Protection Act (CPA) lays the basis for the protection of all consumers and more specifically, the disadvantaged consumer. Hence, business has a definite role to play in respect of consumer protection and the transformation of historically disadvantaged communities in South Africa.

Previously, consumers from disadvantaged communities were excluded from engaging in fair business transactions in many sectors. As mentioned earlier, Black customers were denied access to goods and services, or were supplied with an inferior quality of such goods or services. In addition to such unfair discrimination, consumer protection was unclear and not codified. Further, most businesses use “standard form” contracts. With standard form contracts, the terms and conditions applicable to a contract are set out in a standardised document and are determined by the supplier before the contract is concluded.⁵ In concluding such contracts, customers lack bargaining power and some of them fail to read the contract feeling that they will be bound in any event. Standard form contracts also include terms that are unfair, not negotiated and are generally one sided and over-protective of business.⁶ Sharrock⁷ maintains that although the customer has the option not to agree to the terms or look elsewhere, they generally agree to them without questioning them or requesting an amendment.

In addition, a significant proportion of the disadvantaged community have low literacy levels, which seriously disadvantages them when it comes to understanding the terms included and the implications they have. The low literacy levels also mean that they are unable to negotiate business contracts on an equal footing. The lack of understanding of these consumers of their rights

¹Mkize (2007); Ntetha and Mostert (2011).

²Gosebo (2008).

³Reddy and Rampersad (2013) 268.

⁴Section 9.

⁵Newman (2010) 735-736.

⁶Sharrock (2010) 296.

⁷(2010) 295-296.

and the lack of the means to acquire legal assistance (which is costly) makes them easy prey for unscrupulous businesses and unfair business practices. Further, contracts are worded in a language and are set out in a format that dissuades customers from reading them.¹

Corporate social responsibility may include the responsibility of a business organisation to adopt ethical business practices when dealing with consumers. In many cases the business may have a choice in deciding whether or not to adopt such practices. However, with the adoption of legislation such as the CPA, ethical business practices in dealing with consumers, is now mandatory and there are stringent fines for non-compliance. It is clear that the CPA aims to empower disadvantaged consumers in several ways. Firstly, it aims to correct unfair discrimination and inequality, especially against the historically disadvantaged consumers.² Businesses are not allowed to unfairly discriminate against consumers on grounds such as race, gender and disability, or unfairly exclude any person from access to goods or services, or supply different quality of goods or services to consumers or unfairly charge different prices for any goods or services.³

Secondly, the CPA acknowledges the high level of poverty, illiteracy and other forms of social and economic inequality. It therefore requires that historically disadvantaged consumers must be assisted to realise their full participation as consumers.⁴ The consumer's right to disclosure therefore includes the right to information in plain and understandable language.⁵ Commenting on this provision, Newman⁶ maintains that the literacy levels in South Africa are so low that the drafters of contracts have to accept the responsibility to make contracts more readable for consumers and avoid onerous clauses written in fine print in unintelligible language. In the past the emphasis lay on compliance. It was sufficient if the business organisation simply complied with the requirements of the law. Now the emphasis is on communication, i.e. the consumer must understand the meaning and impact of the contract.⁷

Thirdly, the CPA empowers consumers, especially historically disadvantaged individuals who could become victims of unfair business practices, by granting them certain rights, such as the right to fair and responsible marketing;⁸ fair and honest dealing;⁹ the right to fair, reasonable and just terms,¹⁰ especially where it adversely affects the consumer, or are excessively one-sided in favour of the supplier or where it amounts to a false or

¹Newman (2010) 735.

²Reddy and Rampersad (2012) 7408.

³Section 8.

⁴Preamble of the CPA Act.

⁵Section 22.

⁶(2010) 745.

⁷Reddy and Rampersad (2013) 7411-7412.

⁸Sections 29-39.

⁹Sections 40-47.

¹⁰Sections 48-52.

misleading statement.¹ Lastly, in responding to the usually unfair terms of standard form contracts, the CPA reserves the consumer's right to choose including the right to select suppliers;² to renew fixed term contracts;³ right to pre-authorization of repair or maintenance;⁴ right to cancel;⁵ the rights to examine goods;⁶ and the right to return goods and claim a full refund in certain cases.⁷ The Act also protects the consumer by prohibiting a whole range of terms and conditions in contracts which could be unfair or unjust.

Employment Equity

The Apartheid system resulted in gross demographic imbalances in the workforce, particularly along lines of race and gender. Labour market discrimination through practices such as job reservation, together with past unequal education and training opportunities, resulted in White South Africans enjoying a discriminatory advantage over Blacks. Job reservation resulted in an over-representation of White males in key decision making positions and in the more skilled categories of employment in the public and private sectors.⁸ The Employment Equity Act⁹ aims to correct these imbalances at two levels. Firstly, it outlaws all forms of discrimination in the workplace. Secondly, employers with more than 50 employees are obliged to take affirmative action to achieve representative employment of designated population groups at all levels and in all occupations and this had to be achieved within a particular time period.¹⁰ The designated groups include Blacks,¹¹ women and the disabled. Designated employers have a duty to prepare equity plans in consultation with employees and report on progress made in implementing such employment equity plans.¹² Labour inspectors have wide powers to ensure compliance with the Act.¹³ Yet, the intended measures are not without challenges. According to Leibbrandt, Finn and Woolard¹⁴ contend that most South Africans who have been trying to enter the labour market have not been educated well enough to gain employment or earn decent wages. Past personal disadvantage need not be proved in order to benefit from affirmative action. Membership to a designated group would suffice.¹⁵

¹Section 48(2).

²Section 13.

³Section 14.

⁴Section 15.

⁵Section 16.

⁶Section 18.

⁷Section 20.

⁸Venter *et al.* (2009).

⁹Republic of South Africa, Act 55 of 1998.

¹⁰Marais and Coetzee (2006).

¹¹This includes Africans, Coloureds and Indians

¹²Sections 16-21 of the Employment Equity Act.

¹³du Plessis and Fouche (2007) 97.

¹⁴(2012) 33.

¹⁵*Minister of Finance and another v Van Heerden* (2004) (6) SA 121 (CC); McGregor (2011).

Conclusion

Milton Friedman's first formulation of CSR was that "the only obligation of business was to maximise its profit".¹ About three decades ago the perception was that business could play a role as far as social responsibility was concerned and that it would be good for business. Two decades ago in South Africa, the view that not only government, but the business sector too, had a role to play in ensuring social equity and social justice, was clear from the Constitution, especially with the horizontal application of the right to equality. Far from being a voluntary act on the part of business, the law now makes it compulsory for business to engage in social transformation in several contexts. The law not only makes such participation compulsory, but also provided for sanctions, and in some cases failure to comply could result in severe penalties for business (such as fines).

Efforts at social justice by business, generally grapples with sensitive issues and the balancing of rights and interests. Ultimately, the spirit of the country's Constitution and legislation that supports and requires socio-economic transformation, is that there should not be just compliance with the letter of the law, but a commitment to contributing to social change and meaningful programmes targeting those that have been disadvantaged in the past.

Does business have a role to play in a transforming society? It is clear that the equality principle applies horizontally in that it prohibits unfair discrimination by the private sector and where specifically required in terms of legislation, business has to implement measures of redress to promote the historically disadvantaged groups. The BBBEE Act clearly demonstrates that the law can make certain aspects for CSR compulsory. Not only is it aimed at redressing racial imbalances in corporate ownership, but it compels companies to contribute to socio-economic transformation.

Clearly the legislation reviewed established obligations for business with respect to historically disadvantaged groups in relation to three specific aspects of business, viz. corporate ownership and management, consumer protection and ethical business practices and employment equity. Firstly, the BBBEE Act and the Preferential Procurement Policy Framework Act aims at correcting the racial imbalance in corporate ownership and management. The BBBEE incentives and awareness has played a significant role in making businesses proactive with respect to engaging in BBBEE practices. However, there are significant challenges to the realisation of the BBBEE objectives, including non-compliance by corporates or fronting and the failure to achieve broad-based transformation. The preferential Procurement Framework Act makes it compulsory for state organs to grant preference in awarding tenders and contracts in order to contribute to the development of vulnerable groups. Particular challenges have been experienced in this respect as well. Secondly, the Consumer Protection Act provides the basis for the protection of consumers

¹Carson (1993) 3.

from disadvantaged communities by legally obliging businesses not to discriminate unfairly and to engage in fair and ethical business practices. Such practices include the duty to present contracts in plain and understandable language; fair and honest dealing and reasonable and just terms. Thirdly, the Employment Equity Act outlaws all forms of discrimination in the workplace and obliges designated employers to prepare equity plans and report on progress.

Instead of enacting legislation that directly compels companies to be socially responsible, government in South Africa has opted for a range of legislation that indirectly imposes the duty on business to engage with CSR¹. Vettori (2005) has cautioned that any legal measure that forces the private sector to be more socially responsible has to be linked to the reality that foreign confidence and investment is contingent upon an environment where a country's legislation not only allows profitability but encourages it. Although the government in South Africa has adopted various approaches to drive CSR, there appears to be support for the view that government's contribution in the form of CSR has not been successful.²

The law has attempted to influence business involvement in social justice in the country. A definite contribution has been made by business. However, there have been challenges experienced with implementation of each of the legislative measures introduced and they have not had the expected result. This should not detract from the fact that business is well placed to make a contribution and that transformation though slow and impeded, has come a long way.

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¹Ramlall (2012) 273.

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