OPINION PIECE

# RADICAL ECONOMIC TRANSFORMATION

# – A CONSTITUTIONAL PERSPECTIVE

**Radical Economic Transformation** is a concept that has been accorded some notoriety in recent years in South Africa. This is rather unfortunate as it diverts the attention of South Africans away from where it should be.

As I understand it, **Radical Economic Transformation** is rooted in the Constitution of the Republic of South Africa (**"the SA Constitution"**) and, as a ***"measure designed to protect and advance categories of persons disadvantaged by unfair discrimination"***, it has found support in numerous judgments of the Constitutional Court of South Africa, the highest court in the South African court hierarchy.

How did we end up with a noble concept sitting in the gutter and being used as a blunt political instrument? I see a number of players contributing to this unfortunate state of affairs, but we could probably group them into two broad categories.

There are those who, rather mischievously, use the term in a negative sense, primarily because their economic interests seem to lie in the suppression of the Transformation of South Africa's economy. Simply put, if the South African economy were to be transformed so that the black majority can have a seat at the table, some people would need to give up the economic power they have held for eons. Thus, in creating a diversion, to what has now become an emotive issue, the South African people do not see the full picture.

Then there are those who do not see the connection between a diversion of attention, on the one hand, and the lack of transformation, on the other. And so, by their ignorance, they tend to serve as witting or unwitting conveyors of the first lot for the message that Radical Economic Transformation means looting of state resources or corruption. And thus, without much effort, a term that should have a positive meaning in South Africa has become a weaponised "swear word".

I would venture to say that there are many areas in which our legislators are, "wittingly or unwittingly", failing us in the role they are supposed to play. In this short paper, I shall focus on **Radical Economic Transformation** of the financial services sector from a constitutional perspective to illustrate my point. The scope of what needs discussing in this regard is wide as the sector has many tentacles. I shall confine myself to the Insurance Act, 18 of 2017 (**"the Insurance Act"**) and the Financial Sector Regulation Act, 9 of 2017 (**"the FSR Act"**), and the deleterious effect that these pieces of legislation may conceivably have on the Transformation of the financial services sector. Hopefully the rest of the tentacles can be taken up by others or on another occasion.

Now, let us consider the anchor for Radical Economic Transformation.

## The SA Constitution and the Legislation that gives effect to it

The starting point, as always, is the SA Constitution. Sections 9 and 217 of the SA Constitution are the provisions that **anchor Radical Economic Transformation** in South Africa's Transformation agenda.[1]

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[1] Section 9, in relevant part, says:

> ***"(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.***
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> ***(2) 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.***
>
> ***(3) . . ."***

Section 217 says:

> ***"(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.***

But, in their current phrasing, it would seem that these constitutional provisions do not make the taking of these measures, ***designed to protect or advance persons, or categories of persons, disadvantaged by*** apartheid, compulsory. They seem to leave that task in the discretion of each government administration. Whether that is commensurate response to the magnitude of the problem sought to be addressed, is a question I leave to you.

But once that discretion has been exercised favourably, there can be no valid complaint, except on the basis of the test laid down by the Constitutional Court in **Minister of Finance v Van Heerden 2004 (6) SA 121 (CC)** in these words:

> **"When a measure is challenged as violating the equality provision, its defender may meet the claim by showing that the measure is contemplated by s 9(2) in that it promotes the achievement of equality and is designed to protect and advance persons disadvantaged by unfair discrimination. It seems to me that to determine whether a measure falls within s 9(2) the enquiry is threefold. The first yardstick relates to whether the measure targets persons or categories of persons who have been disadvantaged by unfair discrimination; the second is whether the measure is designed to protect or advance such persons or categories of persons; and the third requirement is whether the measure promotes the achievement of equality."**

Pieces of legislation such as the Broad-Based Black Economic Empowerment Act, 53 of 2003 (**"the B-BBEE Act"**), and the Financial Sector Code issued pursuant thereto, are some of the ***"measures"*** envisaged in s 9(2) and s 217(3) of the SA Constitution. So, whenever South African politicians deliberate on legislation in Parliament, they are presented with an opportunity to Transform the sector to which that piece of legislation relates in order to fulfil the constitutional imperative expressed in s 9(2) and s 217(2) of the SA Constitution. When they do not do that, they fail in their constitutional duty and it is up to the voters to hold them accountable by, among other things, approaching the courts to force them to give effect to the objectives of the Constitution or vote them out in the next election.

The consideration of the Insurance Act and the FSR Act was one such opportunity for Members of Parliament to transform the financial services sector as the SA Constitution enables them to do. Members of Parliament failed to exercise their discretion judiciously in the transformation of one of the most stridently untransformed sectors of the South African economy. By so failing to exercise their discretion, they failed to fulfil their constitutional obligation in this regard. What have those people who are excluded from full participation on the supply side of the financial services sector done to correct that failure? Is it not time to take Members of Parliament to task about these constitutional failures?

The Financial Sector Code Published under GenN 997 in *GG* 35914 of 26 November 2012 (**"the Financial Sector Code"**) was prepared in terms of the B-BBEE Act. The Financial Sector Code was published in terms of section 9(1) of the B-BBEE Act and is based on a harmonisation of Generic Codes and the Financial Sector Charter gazetted under Section 12 of the B-BBEE Act.

The preamble to the Financial Sector Code commits all participants ***"to actively promote a transformed, vibrant and globally competitive financial sector that reflects the***

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*(2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for-*
*(a) categories of preference in the allocation of contracts; and*
*(b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.*
*(3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented."*

***demographics of South Africa"***: This is yet another measure designed for the ***"protection and advancement of persons, or categories of persons disadvantaged by [apartheid]"*** (principally black people). The participants are there following sectors:

- Banking
- Long-term insurance
- Short-term insurance
- Re-insurance
- The management of retirement, pension and collective investment scheme assets
- Management of formal collective investment schemes
- Financial Services Intermediation and Brokerage
- Management of investments on behalf of the public, including, but not limited to, private equity, members of any exchange licensed to trade equities or financial instruments in South Africa and entities listed as part of the financial index of a licensed exchange
- Underwriting Management Agents.

Yet, these sectors of the South African economy remain virtually untouched by Transformation at ownership and control level. All we have seen, beginning in the early 2000s, is a proliferation of black people in senior positions but with hardly any power to determine the Transformation direction of the company. Even those appointments have begun to be scaled back. For example, a black chief executive at a large assurance company was hounded out and replaced with a white male; at least two black banking executives were not trusted to lead a bank on their own; so they were each paired with a white male as co-chief executives. All this happens despite constitutional measures in place designed for the protection and advancement of black people. For how long?

Section 10 of the B-BBEE Act says ***"every organ of stat***e***"*** and public entity ***must*** apply the relevant code of good practice issued in terms of the B-BBEE Act in determining qualification criteria for the issuing of licences, concessions or other authorisations in respect of economic activity in terms of any law.[2]

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[2] The full text of the section says:

> ***"(1) Every organ of state and public entity must apply any relevant code of good practice issued in terms of this Act in-***
> ***(a) determining qualification criteria for the issuing of licences, concessions or other authorisations in respect of economic activity in terms of any law;***
> ***(b) developing and implementing a preferential procurement policy;***
> ***(c) determining qualification criteria for the sale of state-owned enterprises;***
> ***(d) developing criteria for entering into partnerships with the private sector; and***
> ***(e) determining criteria for the awarding of incentives, grants and investment schemes in support of broad-based black economic empowerment.***
> ***(2) (a) The Minister may, after consultation with the relevant organ of state or public entity, exempt the organ of state or public entity from a requirement contained in subsection (1) or allow a deviation therefrom if particular objectively verifiable facts or circumstances applicable to the organ of state or public entity necessitate an***

The FSB (now called the Financial Sector Conduct Authority established in terms of s 56 of the FSR Act) is an organ of State. It is bound by the Codes of Good Practice issued in terms of the B-BBEE Act when determining criteria for the issuing of insurance licences and making concessions. The pre-amble to the Code commits all participants (including the FSB) to ***"actively promote a transformed . . . financial sector that reflects the demographics of South Africa"***. Yet there are still only four black-controlled insurance companies in South Africa, accounting (according to them) for only 1% of the insurance industry. For how long?

Now, what has the Constitutional Court said about all this?

**<u>Constitutional Court pronouncements on such remedial measures</u>**

The South African courts, including the SA Constitutional Court, have ruled in support of measures taken pursuant to s 9(2) of the Constitution, for the protection and advancement of people disadvantaged by apartheid.

- In **Stoman v Minister of Safety and Security and Others 2002 (3) SA 468 (T) at 477F-H** (cited with approval by van der Westhuizen J in **Barnard 2014 (6) SA 123 (CC) at para [137]**), the North Gauteng High Court said:

  ***"[T]he recognition of substantive equality means . . . that equality is more than mere non-discrimination. When a society, and perhaps the particular role players in a certain situation, come from a long history of discrimination, which took place individually, systemically and systematically, it cannot simply be assumed that people are in equal positions and that measures distinguishing between them amount to unfair discrimination."***

- In **National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others 1999 (1) SA 6 (CC) at para [60]** the SA Constitutional Court said:

  ***"It is insufficient for the Constitution merely to ensure, through its Bill of Rights, that statutory provisions which have caused such unfair discrimination in the past are eliminated. Past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes are eliminated, and unless remedied, may continue for a substantial time and even indefinitely. Like justice, equality delayed is equality denied."***

- In **South African Police Service v Solidarity obo Barnard 2014 (6) SA 123**

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*exemption or deviation.*

*(b) The Minister must publish the notice of exemption or deviation in the Gazette.*

*(3) Subject to section 9(6), an enterprise in a sector in respect of which the Minister has issued a sector code of good practice in terms of section 9, may only be measured for compliance with the requirements of broad-based black economic empowerment in accordance with that code.*

*(4) Enterprises operating in a sector in respect of which the Minister has issued a sector code of good practice in terms of section 9, must report annually on their compliance with broad-based black economic empowerment to the sector council which may have been established for that sector."*

**(CC)**, the Constitutional Court said (at para 29):

> ***"At the point of transition, two decades ago, our society was divided and unequal along the adamant lines of race, gender and class. Beyond these plain strictures there were indeed other markers of exclusion and oppression, some of which our Constitution lists. So, plainly, it has a transformative mission. It hopes to have us re-imagine power relations within society. In so many words, it enjoins us to take active steps to achieve substantive equality, particularly for those who were disadvantaged by past unfair discrimination. This was and continues to be necessary because, whilst our society has done well to equalise opportunities for social progress, past disadvantage still abounds."***

- In **Minister of Finance v Van Heerden 2004 (6) SA 121 (CC)** the Constitutional Court said:

> ***"The essence of restitutionary measures is to guarantee the right to equality for the reason that, without such measures, the achievement of equitable treatment will continue to elude us as a society. The Labour Court (Waglay J as he then was) commented, in Harmse v City of Cape Town, that the implementation of employment equity orientated measures is a duty placed upon designated employers by the Employment Equity Act which also provides them with affirmative action as a defence against claims of unfair discrimination. Commenting on that decision, Prof Carole Cooper states that employment equity orientated measures 'do not amount to an exception to equality but are integral to its achievement' which is in essence 'substantive equality'."***

- In **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others 2004 (4) SA 490 (CC)** it said:

> ***"[75] The commitment to achieving equality and remedying the consequences of past discrimination is immediately apparent in section 9(2) of the Constitution. That provision makes it clear that under our Constitution '[e]quality includes the full and equal enjoyment of all rights and freedoms'. And more importantly for present purposes, it permits 'legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination'. These measures may be taken '[t]o promote the achievement of equality'.***
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> ***[76] But transformation is a process. There are profound difficulties that will be confronted in giving effect to the constitutional commitment of achieving equality. We must not underestimate them. <u>The measures that bring about transformation will inevitably affect some members of the society adversely, particularly those coming from the previously advantaged communities. It may well be that other considerations may have to yield in favour of achieving the goals we fashioned for ourselves in the Constitution. What is required, though, is that the process of transformation must be carried out in accordance with the Constitution</u>."***

- Again, in **Minister of Finance and Another v Van Heerden 2004 (6) SA 121 (CC)**, the SA Constitutional Court made it clear that measures implemented to redress past imbalances are not a deviation from, or invasive of, the right to equality, but rather contribute to the constitutional goal of

achieving equality in order to ensure the full and equal enjoyment of all rights. Moseneke J (as he then was) said:

> ***"[30] Thus, our constitutional understanding of equality includes what Ackermann J in National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Another calls 'remedial or restitutionary equality'. Such measures are not in themselves a deviation from or invasive of, the right to equality guaranteed by the Constitution. They are not 'reverse discrimination' or 'positive discrimination' as argued by the claimant in this case. They are integral to the reach of our equality protection. In other words, the provisions of s 9(1) and s 9(2) are complementary; both contribute to the constitutional goal of achieving equality to ensure 'full and equal enjoyment of all rights'. A disjunctive or oppositional reading of the two subsections would frustrate the foundational equality objective of the Constitution and its broader social justice imperatives.***
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> ***[31] Equality before the law protection in s 9(1) and measures to promote equality in s 9(2) are both necessary and mutually reinforcing but may sometimes serve distinguishable purposes, which I need not discuss now. However, what is clear is that our Constitution and in particular s 9 thereof, read as a whole, embraces for good reason a substantive conception of equality inclusive of measures to redress existing inequality. Absent a positive commitment progressively to eradicate socially constructed barriers to equality and to root out systematic or institutionalised underprivilege, the constitutional promise of equality before the law and its equal protection and benefit must, in the context of our country, ring hollow.***"

The South African equality jurisprudence is clear. The taking of measures aimed at advancing persons or categories of persons disadvantaged by apartheid is to be celebrated and reinforced, not ridiculed. Radical Economic Transformation falls among that category of measures envisaged in s 9(2) of the SA Constitution. Those in the executive of government, and who swore an oath to protect and uphold the Constitution, who either actively campaign against Radical Economic Transformation or who fail to implement it, are failing in their constitutional obligation and there is a remedy in the SA Constitution itself against an executive which is guilty of such conduct. Section 89(1)(a) of the SA Constitution says the National Assembly (Members of Parliament) may remove the President ***"a serious violation of the Constitution or the law"***.

If Members of Parliament should themselves fail to hold the President to account for his failure to fulfil his constitutional obligation of Radical Economic Transformation, citizens can approach the courts to force them to do just that. The Secret Ballot Case of the SA Constitutional Court is a perfect illustration of the exercise of that right.

**Government Policy**

Not only is **Radical Economic Transformation** anchored in the SA Constitution, it is also, **rightly**, a resolution of the ruling party and a policy of government. On 9 February 2017, the then President of the ruling party and of South Africa unfurled the policy of **Radical Economic Transformation** at his State of the Nation Address. He said:

> ***"The skewed nature of ownership and leadership patterns needs to be corrected. There can be no sustainability in any economy if the majority is excluded in this manner. In my discussions with the business community, they accepted these transformation imperatives.***
>
> ***Today we are starting a new chapter of radical socio-economic transformation. We are saying that we should move***

***beyond words, to practical programmes. The State will play a role in the economy to drive that transformation. In this regard, government will utilise to the maximum, the strategic levers that are available to the State. This includes legislation, regulations, licensing, budget and procurement as well as Broad-based Black Economic Empowerment charters to influence the behaviour of the private sector and drive transformation...***

***During this year, the Department of Economic Development will bring legislation to Cabinet that will seek to amend the Competition Act, 1998 (Act 89 of 1998). It will, among others, address the need to have a more inclusive economy and to de-concentrate the high levels of ownership and control we see in many sectors. We will then table the legislation for consideration by Parliament. In this way, we seek to open up the economy to new players, give black South Africans opportunities in the economy and indeed help to make the economy more dynamic, competitive and inclusive. This is our vision of radical economic transformation."***

The Insurance Act and the FSR Act were supposed to be the first pieces of legislation through which the government's ***"vision of radical economic transformation"*** was realised or made a reality. Instead, the messenger was removed from office, and these two pieces of legislation were passed into law falling far short of the Radical Economic Transformation measure they were meant to embody. President Zuma resigned in February 2018. Two months later, on 1 April 2018, the FSR Act became law without any trace of meaningful Transformation in its text apart from a platitude in s 7(g) which pronounces, as one of its objectives, ***"establishing … a regulatory and supervisory framework that promotes transformation of the financial sector"***. The Insurance Act came into effect three months later on 1 July 2018 suffering from the same malaise.

The FSR Act introduced something called the Prudential Authority. Chapter 3 of that Act confers on this body extraordinary powers of life and death for many businesses in the financial services sector. Yet the FSR Act pronounces that the Prudential Authority is not a public entity. That means it is not bound by the strict governance strictures that apply to every organ of state, including the Financial Sector Code that, in giving effect to the constitution, directs that all participants to ***"actively promote a transformed, vibrant and globally competitive financial sector that reflects the demographics of South Africa"***. Why? The Prudential Authority, which is housed within the South African Reserve Bank, is (at least ostensibly) funded from the public purse. The FSR Act does not say why this body's activities must fall outside the governance legislation that regulates the functioning of all other government bodies. It also does not say

- who serves on this body
- how many people serve on this body
- how are these people appointed
- by whom are they appointed (we know only that the Chief Executive is appointed by the Governor)
- for how long are they so appointed
- what qualifies a person to be appointed to this body

The South African financial services sector – one of the major engines driving the South African economy – is ruled by a body with enormous powers. Yet South Africans know very little of substance about it.

I do not know whether President Zuma meant to follow through with implementing his government's **"vision of radical economic transformation"** that he described in the National Assembly that evening of 9 February 2017. Now I, together with millions of hopeful South Africans, will never know.

Now, let us consider some of the principal objects of the Insurance Act and questions raised in relation thereto.

**The objectives of the Insurance Act**

The Explanatory Memorandum on the objects of the Insurance Bill, 2016 listed 3 ***"key policy objectives"*** that were sought to be achieved by the Insurance Bill. They were:

- Enhancing access to insurance by, among other things,

  a) lowering barriers to entry, which should encourage broader participation in the market and promote competition among insurers, further supporting poverty alleviation through economic growth and job creation;
  b) lowering the minimum regulatory capital requirement for micro-insurers as well as a simpler dedicated prudential regulatory model (to be prescribed) suited to the risk profile of micro-insurers;
  c) to support the ease and effectiveness of supervision, the Bill provides that entities must be registered as dedicated micro-insurers, under a separate licence, in order to benefit from the lighter prudential requirements.

- Enhancing financial soundness – the SAM regime – by, among other things,

  a) introducing a forward-looking risk-based approach to solvency, by aligning the capital requirements with the underlying risks of the insurer;
  b) primarily protecting policyholders and beneficiaries;
  c) establishing a proportionate, risk-based approach to supervision with appropriate treatment both for small insurers and large, cross-border groups;
  d) providing incentives to insurers to adopt more sophisticated risk monitoring and risk management tools; and
  e) helping to maintain financial sustainability.

- Alignment with international standards.

The question that arises is whether the text of the Insurance Act achieves the key policy objective of ***"lowering barriers to entry"*** and ***"promote competition among insurers"***. Usually there is no better place to look for answers to this question than the provision dealing with the objectives of the legislative instrument in question.

Section 3 of the Insurance Act is such a provision.[3]

The lowering of barriers to entry into the insurance industry and the promotion of competition among insurers are legislative interventions under the first policy objective of enhancing access to insurance. Yet section 3(c) of the Insurance Act seems to confine ***"access to insurance"*** to the ***"consumption side"*** of the access equation.

This is precisely the criticism that Dr Makhosi Khoza and Mr Sfiso Buthelezi (now Chair of the Parliamentary Standing Committee on Appropriations) levelled at the Insurance Bill. Dr Makhosi Khoza said:

> ***"I just want to know . . . whether these licence conditions that we have in the Bill do in fact encourage inclusion of those***

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[3] Section 3 says:

> ***"The objective of this Act is to, in a manner consistent with the Constitution of the Republic of South Africa, 1996, promote the maintenance of a fair, safe and stable insurance market for the benefit and protection of policyholders, by establishing a legal framework for the prudential regulation and supervision of insurers and insurance groups that-***
>
> ***(a) facilitates the monitoring and the preservation of the safety and soundness of insurers;***
> ***(b) enhances the protection of policyholders and potential policyholders;***
> ***(c) increases access to insurance for all South Africans;***
> ***(d) promotes broad-based transformation of the insurance sector; and***
> ***(e) contributes to the stability of the financial system in general."***

***previously excluded, especially from the supply side, I am not talking about the consumption side. . ."***

That question seemed directed at ASISA (the Association for Savings and Investments South Africa) which represents, among its members, large insurers. It never answered the question. Its idea of Transformation in the insurance industry seems to be ***"increasing access [to insurance products] in order to see that more South Africans are covered"*** and providing ***"consumer financial literacy"***. That is access on the consumption side which is now reflected in section 3(c) of the Insurance Act. It falls short of the first policy objective of the Act which includes ***"lowering barriers to entry"*** and ***"promoting competition"*** on the supply side.

Dr Makhosi Khoza is no longer a member of the ruling party, and Mr Sfiso Buthelezi is currently the focus of the State Capture Commission following allegations made against him, without prior notice, for alleged conduct during his time as chairman of the PRASA board of directors in 2012.

The promotion of ***"broad-based transformation of the insurance sector"*** remains, it seems, nothing more than an ephemeral aspiration that is defeated by other provisions in the Insurance Act that I shall discuss later. So reluctant are the politicians to transform the insurance sector that they are even averse to using the phrasing of an Act of Parliament (the B-BBEE Act) that they themselves passed into law in 2003, namely, ***"broad-based black economic"*** transformation of the insurance sector. Instead, they opt for the less precise ***"broad-based transformation"*** that may, conceptually, have the effect of watering down the substantive inclusion of black people on the supply side of the insurance sector by opening up argument for the inclusion, for example, of white women and white people living with disability of one form or another.

**The FSR Act**

The FSR Act aims, among other things, ***"to provide for the protection and promotion of rights in the financial sector as set out in the Constitution"*** and ***"to promote transformation of the financial sector"***.

It defines ***"transformation of the financial sector"*** as ***"transformation as envisaged by the Financial Sector Code for Broad-Based Black Economic Empowerment issued in terms of section 9(1) of the Broad-Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003)"***.

Section 11 (dealing with responsibilities of the Reserve Bank), section 33 (dealing with the objective of the Prudential Authority) and section 57 (which deals with the object of the Financial Service Conduct Authority) are silent on the Transformation imperative. Instead, they promote the other objects such as financial literacy of customers, stability of the financial system, protection of consumers, stability of financial institutions. This is the ***"status quo"*** lamented by Mr Floyd Shivhambu of an opposition party. On the opposite side of the spectrum, ASISA which represents large insurers, supports it.

It seems to me that in order to give effect to the express Transformation objective of the FSR Act, Transformation must feature prominently in sections 11, 33 and 57. The triumvirate that is the Reserve Bank, the Prudential Authority and the Financial Sector Conduct Authority is where regulatory power resides which has the potential of thwarting any transformation objectives or provisions of the FSR Act if not expressly incorporated in sections 11, 33 and 57. There is, in fact, a case currently before the North Gauteng High Court which proves precisely the deleterious effects of this omission on the Transformation objectives of the FSR Act and, by extension, on a small black-owned financial services provider and licensed credit provider.

But where did this all start?

**Brief Background of the Insurance Act and FSR Act, and concerns raised by black business**

The Insurance Bill was first approved by Cabinet on 15 April 2015 and published for public comment on 17 April 2015. A number of changes were subsequently made to the Bill which was approved by Cabinet at its meeting on 4 November 2015.

The Minister of Finance, Pravin Gordhan, then tabled the Bill in Parliament on 28 January 2016.

On 1 February 2016 National Treasury issued a statement in terms of which the Insurance Bill was to be considered by the Standing Committee on Finance in Parliament and anticipated to invite public comments and submissions on the Bill.

On 3 February 2017, the PGC Group of Companies (***"PGC"***), a black-controlled stakeholder in the insurance industry, made written submissions to the Standing Committee. It raised, among others, the following concerns:

- The objectives of the Insurance Bill as set out in section 3 fall short of the constitutional necessities to transform the insurance industry and address historical imbalances to achieve substantive equality within the insurance industry.
- The Insurance Bill does not make an express commitment to transform the insurance industry and the inclusion of previously disadvantaged persons in the industry as both consumers and business owners as required in section 7(2) and 9(2) of the Constitution.
- Parliament has a positive obligation in section 7(2) of the Constitution to incorporate into the Insurance Bill positive steps to transform the insurance industry by making it one of the foundational objectives of the Insurance Bill and include measures designed to achieve equality.
- The Insurance Bill is unconstitutional to the extent that it fails to incorporate express transformation objectives.
- There is a pressing need to ensure that access to the insurance industry (not just micro-insurance) is opened up to companies controlled and owned by members of designated groups that were previously excluded from this industry.
- The Insurance Bill seeks to distinguish between micro-insurance and macro-insurance business which will exacerbate the lack of transformation in the insurance industry by opening up only one aspect of insurance industry and not all. The definition of ***"micro insurance business"*** in the Bill promotes the ***"balkanization"*** of the insurance industry and is likely to perpetuate past imbalances.
- The Insurance Bill should pro-actively promote the opening up of the entire insurance industry as part of the scheme to radically transform the industry, including the removal of any other unreasonable barriers to transformation.
- The Insurance Bill makes no reference to transformation in relation to the powers and functions of the Prudential Authority which is entrusted with the authority to supervise the insurance industry.
- The Prudential Authority is not legislatively required to take into account the need to transform the insurance industry in the performance of its functions.
- The Insurance Bill fails to acknowledge that South Africa has a unique historical context.
- While the FSR Bill makes provision for the transformation of the financial sector, there is a distinct comprehensive legislative framework in the Insurance Bill specific to the insurance industry which should make specific commitments towards the insurance industry for which the Prudential Authority should be accountable for achieving them.

On 7 February 2017, the Standing Committee on Finance conducted public hearings on the Insurance Bill. Members raised the fact that financial inclusion, de-racialization and the transformation of the insurance industry was high on the Committee's agenda before the passing of the Bill. Only 1% of the entire

insurance industry of South Africa, it was alleged, is controlled by black people. This figure is in dispute. Some argue that in the short-term insurance industry the representation of black control is closer to 23%. Still, it is a far cry from the objectives of the Financial Sector Code which seeks to promote a ***"financial sector that reflects the demographics of South Africa"***. It is alleged that only 4.6% of insurance assets are managed by black companies. This, too, is far removed from the objectives as reflected in the Financial Sector Code.

A group of four black-controlled insurers made joint written submissions to the Standing Committee on Finance. They urged the Committee to include aspects in the Insurance Bill that would allow for smaller black owned companies to have access to the industry by lowering capital requirements and being more pro-active with shortening licencing time frames.

In addition, they raised, among other things, the following concerns:

- The Insurance Bill seeks to sterilise resources focusing on imaginary instead of real risk.
- The Insurance Bill will increase systemic risk as it seeks to promote only big players.
- The Reserve Bank is hostile to smaller black banks.
- The current practice that insurance companies in South Africa are compelled to use established Banks, Auditing Firms and Actuarial Firms that are accredited by the FSB and tend to be white-controlled is not assisting the Transformation agenda.
- The Insurance Bill should in unambiguous and clear terms champion the use by insurance companies of emerging Actuarial Firms, Auditing Firms and other banks.
- The preamble and section 3 of the Insurance Bill should give due regard to Transformation.
- Section 10 of the Insurance Bill should enjoin the Prudential Authority to exercise its power by taking into account Transformation of the insurance industry.
- The Insurance Bill seeks to regulate the entire business portfolio (including insurance business and other lines of business) as a single-business group without regard to the fact that some activities in the group might be non-insurance related. As a result, the Prudential Authority would enjoy broad authority and power in terms of s 10(3) of the Bill to supervise insurance groups including the non-insurance related activities of the group.
- Section 10(4) is overbroad and confers an unfettered power on the Prudential Authority to revoke or amend a designation on an insurance group. Section 10(4) of the Bill should contain parameters for the exercise of power and have due regard to Transformation.
- The distinction between micro-insurance and macro-insurance business exacerbates the lack of Transformation in the insurance industry by only opening up one aspect of the insurance industry and not all. The micro-insurance provision should be scrapped from the Bill because it promotes the balkanization of the insurance industry and is likely to perpetuate past imbalance.
- The Executive and Parliament have previously taken positive steps to transform other industries such as the fishing and mining industries.
- By incorporating Transformational objectives in the Insurance Bill, the insurance industry will become legally bound through the courts by reviewing decision of the Prudential Authority to ensure compliance with the objectives of the Bill.
- In a period of 22 years, the market share of black owned insurance companies has not been able to pass the 1% mark.
- The current statistics about transformation in the insurance industry are appalling and we are reminded about the constitutionally enshrined principles of Transformation that seem to have been forgotten over the past 22 years.

The four black-controlled insurers were, at that time, members of the South African Insurance

Association (***"SAIA"***) and the Association for Savings and Investment South Africa (***"ASISA"***). SAIA and ASISA supported the Bill as it was, and appealed for urgent processing of the Bill. In the end, it was passed virtually unchanged and came into effect on 1 July 2018.

All their concerns were "met" only by inclusion, in the final text of the Insurance Act, of references to the Constitution and the addition of an objective to ***"promote broad-based transformation of the insurance sector"***. The ***"balkanisation"*** of the insurance industry, by maintaining the macro-micro distinction, remains. Sections 11, 33 and 57 of the FSR Act – which are the statutory regulatory hub of the financial sector – remain free of considerations of Transformation.

In short, the response of a predominantly black Parliament to all these concerns was legislative platitudes. Established insurers, also members of SAIA, prevailed. The smaller black insurers, received platitudes.

Now, let us consider the susceptibility of the Insurance Act and the FSR Act to a constitutional challenge.

**Are the Insurance Act and the FSR Act open to Constitutional Challenge?**

In terms of the South African Constitution, national legislative authority vests in Parliament. In the exercise of its legislative authority, Parliament is bound only by the Constitution, and must act in accordance with, and within the limits of, the Constitution. But like all exercise of public power, there are constitutional constraints that are placed on Parliament. One of these constraints is that there must be a rational relationship between the scheme which it adopts, on the one hand, and the achievement of a legitimate governmental purpose, on the other. Nor can Parliament act capriciously or arbitrarily. The onus of establishing the absence of a legitimate governmental purpose, or of a rational relationship between the law and the purpose, falls on the objector. To survive rationality review, legislation need not be reasonable or even appropriate (**Glenister v President of the Republic of South Africa 2011 (3) SA 347 (CC) at [55]**).

In **Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others 2001 (1) SA 545 (CC)** Langa DP said:

> ***"[22] . . . The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution."***

A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in absurdity (**Cool Ideas 1186 CC v Hubbard and Another 2014 (4) SA 474 (CC) at para [28]**). There are three important interrelated *caveats* to this general principle, namely:

(a) that statutory provisions should always be interpreted purposively;
(b) the relevant statutory provisions must be properly contextualised; and
(c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity.

Having regard to all of the above, there would appear to be sufficient ammunition for a reasonable constitutional test case challenging the Insurance Act, although the Act will have to be read in conjunction with the FSR Act and together with the Financial Sector Code. In short, the thread would start with section 9(2)

of the Constitution, through to section 10 of the B-BBEE Act, through to the Financial Sector Code and through to section 7(f) and (g) of the FSR Act read together with section 9 thereof.

Section 2(3) & (4)[4] of the Insurance Act is, in my view, one of those legislative provisions that, like in the casino, favours the persons who designed the rules whichever way you look at it. I haven't the foggiest idea what this provision means. It seems deliberately opaque, so that whichever way one interprets it, the big insurance companies win. That is the sort of thing that new players wishing to enter and compete in the financial services sector have to contend with. The dice is loaded against them by a democratically elected and predominantly black government.

Nevertheless, the FSR Act (which in s 7(g) expressly lists Transformation of the financial services sector as one of its objectives), and which by its s 9 trumps the Insurance Act, would, it would seem, trump the Insurance Act in the event of inconsistency.

## Section 10 of the Insurance Act

Section 10 of the Insurance Act[5] requires an especial treatment as it was particularly attacked by black business, unsuccessfully as it happens.

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[4] It reads:

> ***"(3) (a) If there is an inconsistency between any provision of this Act and a provision of any other legislation that –***
> ***(i) provides for the regulation of insurance business; or***
> ***(ii) affects or impedes the appropriate operation or implementation of a provision of this Act, the provision of this Act prevails, unless that other legislation by explicit reference, and not merely by reference to other legislation in general, provides that the other legislation applies in the event of a conflict.***
> ***(b) Subject to paragraph (a), this Act applies concurrently with and in addition to the Companies Act and the Co-operatives Act unless specifically provided for otherwise in this Act.***
> ***(c) Paragraph (a) does not apply –***
> ***(i) to the Financial Sector Regulation Act; and***
> ***(ii) to the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001);***
> ***(4) (a) Despite any other law, but subject to paragraph (b), if other legislation confers a power on or imposes a duty upon another organ of state—***
> ***(i) in respect of a matter regulated under this Act or the regulation of insurance business; or***
> ***(ii) that affects or impacts on the appropriate exercise of powers and the performance of duties under this Act by the Prudential Authority,***
> ***that power or duty must be exercised or performed in consultation with the Prudential Authority, and any decision taken in accordance with that power or duty must be taken with the concurrence of the Prudential Authority, irrespective of when that other legislation was enacted, unless that other legislation by explicit reference, and not merely by reference to other legislation in general, provides that such concurrence is not required. . ."***

[5] It says:

> ***"10 Designation of insurance group and licensing of controlling company***
> ***(1) (a) The Prudential Authority may, for the purpose of facilitating the prudential supervision of insurers, designate as an insurance group-***
> ***(i) an insurer;***
> ***(ii) any juristic person that is part of the group of companies of which the insurer is apart; and***
> ***(iii) any associate, or related or inter-related person of any juristic person that is part of the group of companies referred to in subparagraph (ii).***

The trouble with that provision is that a non-insurance business (for example, a licensed credit provider under the National Credit Act, 34 of 2005 [**"the NCA"**]) that provides ***"credit guarantees"*** under s 8(5) of the NCA, but which is part of a group of companies in the insurance sector (or a subsidiary of an insurance company) could be designated by the Prudential Authority as an insurance company and subjected to the stringent regulation of insurance companies, including high capital requirements and solvency assessment management regime.

This is a notorious barrier to entry in the insurance sector which could have deleterious effects on businesses that are not insurance businesses but are simply designated as such by reason of being in a group of companies only one of which renders insurance services. This could conceivably have the effect of frustrating mostly small to medium-size black credit providers and the objectives of the NCA as expressed in the long title of that Act and in its objectives clause in s 3 as being:

- to promote a fair and non-discriminatory marketplace for access to consumer credit
- to provide for the general regulation of consumer credit and improved standards of consumer information
- to promote black economic empowerment and ownership within the consumer credit industry
- to prohibit certain unfair credit and credit-marketing practices
- to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry
- to protect consumers by promoting the development of a credit market that is accessible to all South Africans, and in particular to those who have historically been unable to access credit under sustainable market conditions.

This big sledge-hammer with which s 10 of the Insurance Act arms the Prudential Authority could conceivably frustrate all or some of these objectives.

In practice, even the Financial Sector Conduct Authority appears to ***"designate"*** small to medium size non-insurance businesses as insurers, regardless of their risk profiles, by virtue only of decreeing that a ***credit guarantee*** business under the NCA is, in fact, an insurance business. It then shuts down that credit guarantee business and imposes oppressive administrative penalties that ensure that the business never gets going again. This goes against the objectives of the NCA.

It does seem that the discretion conferred by s 10 of the Insurance Act on the Prudential Authority is overbroad and its parameters

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***(b) An insurance group designated in terms of paragraph (a) need not include all the juristic persons, associates, or related and inter-related persons referred to in paragraph (a).***

***(2) The Prudential Authority must as part of designating an insurance group also designate the holding company or juristic person that must apply for a licence as a controlling company of that insurance group under Chapter 4.***

***(3) The holding company of, or another juristic person that controls, an insurance group designated under subsection (1) and which is located in the Republic must, within 30 days of the designation, apply to be licensed as a controlling company of that insurance group under Chapter 4.***

***(4) The Prudential Authority must keep designations in terms of subsection (1) under review, including if the Prudential Authority becomes aware of a change in the risk profile of the designated insurance group.***

***(5) The Prudential Authority may amend or revoke a designation in terms of subsection (1) if the Prudential Authority becomes aware of a change in the risk profile of any juristic person that is part of the designated insurance group.***

***(6) The Prudential Authority must publish a notice on the official website of each designation and each amendment and revocation of a designation under subsection (1), (2) or (5)."***

imprecise. Invoked on companies that actually conduct the business of an insurer, it is not an unusual regulatory provision. But the wide designation power seems to me too untrammelled and need testing in the courts in line with the concerns raised by black business.

A company that feels unfairly or needlessly designated may invoke s 72(b) of the Insurance Act which confers on the Prudential Authority the discretion, where practicalities so require, to exempt any insurer, controlling company, key person or significant owner from any provision of the Act. In considering whether or not to exempt the company in terms of s 72(b) of the Act, the Prudential Authority will be bound by the provisions of s 10(1) of the B-BBEE Act which imposes upon an organ of State the duty to ***"apply any relevant code of good practice issued in terms of this Act in determining qualification criteria for the issuing of licences, concessions or other authorisations in respect of economic activity in terms of any law"***.

There is another barrier to entry in the South African insurance and banking sector: SAM.

## The SAM regime in the South African context

SAM (which stands for Solvency and Assessment Management), is a mechanism, based on European Solvency regulations, by which regulators stipulate minimum capital requirements, minimum solvency capital requirements, principles of risk management and assessment, and disclosure requirements for commercial and investment banks and insurance companies. Section 39 of the SA Constitution states that when interpreting the Bill of Rights, a Court, tribunal or forum:

- must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- must consider international law; and,
- may consider foreign law.

The South African courts have however held that, although they can derive assistance from public international law and foreign case law, they are in no way bound to follow it.

South Africa has a particular history of deliberate and man-made inequality. The pre-amble to the Employment Equality Act, 55 of 1998, sums it up best in two paragraphs:

- ***"as a result of apartheid and other discriminatory laws and practices, there are disparities in employment, occupation and income within the national labour market"*; and**

- ***"those disparities create such pronounced disadvantages for certain categories of people that they cannot be redressed simply by repealing discriminatory laws".***

The same point can persuasively be made in the context of participation of black-controlled entities on the supply side of the insurance sector simply by substituting ***"insurance market"*** for ***"national labour market"*** in the long title of the Insurance Act and the FSR Act. These disparities are what sets South Africa apart from the European developed economies with which National Treasury seems keen to compare the South African economy.

It is precisely because of high capital adequacy requirements that many black persons, disadvantaged by apartheid, are unable to enter the insurance and banking sectors on the supply side (not at the consumption level) and compete with established banks and insurance companies. The Insurance Act and the FSR Act did nothing to change that with a view to fulfilling the constitutional imperative, as recorded in the Financial Sector Code, of ***"actively promoting a transformed, vibrant and globally competitive financial sector that reflects the demographics of South Africa, and which contributes to the establishment of an equitable society …"***

## Conclusion

**Radical Economic Transformation** is a constitutional imperative. It is rooted in the Constitution itself. The South African courts, including the Constitutional Court, supports its implementation as a remedial measure intended to address the economic exclusion of black people under apartheid. The association of the measure (or label) with corruption is mischievous and, I venture, intended to suppress Transformation of the South African economy, especially in the financial services sector. Right-thinking South Africans dare not be deterred from a constitutional path by mischievous misalignment of a perfectly constitutional project.