



RESEARCH BRIEF ON  
**RACE AND EQUALITY**  
IN SOUTH AFRICA  
2013 - 2017





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## Abbreviations and Acronyms

ACHPR	African Charter on Human and Peoples' Rights
CERD	United Nations Committee on the Elimination of Racial Discrimination
DAC	Department of Arts and Culture
DOJCD	Department of Justice and Constitutional Development
EAO	Emoluments attachment order
EEA	Employment Equity Act, 55 of 1998
HIV	Human Immunodeficiency Virus
ICERD	United Nations International Convention on the Elimination of All Forms of Racial Discrimination
MEC	Member of the Executive Committee
MTSF	Medium Term Strategic Framework
NAP	National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerances
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000
SAHRC	South African Human Rights Commission
SAPS	South African Police Service
Stats SA	Statistics South Africa
UN	United Nations

## 1

## INTRODUCTION

Issues of discrimination on the basis of race have received significant attention over the past years, with matters such as the separation of students on the basis of race at a private school,<sup>1</sup> as well as highly visible racist utterances on social media, receiving national attention. It is clear that race relations continue to be a significant fault line in South Africa.

In 2015, a survey by the Institute for Justice and Reconciliation found that over half of all respondents occasionally or frequently experienced racism.<sup>2</sup> Importantly, however, the same survey found that most respondents felt that *income inequality* – not race – was the most significant dividing feature in contemporary South Africa.<sup>3</sup> South Africa's complex history means that these two characteristics are closely linked. When examining race relations, we must accordingly consider issues of discrimination alongside more systemic challenges.

This research brief provides a succinct overview of the state of equality in respect of the ground of race, highlighting the relevant legal framework and some of the most notable challenges to advancing a more equal society that have emerged in the period between 2013 and 2017. It also provides an overview of the work of the South African Human Rights Commission in seeking to advance the right to equality through its work on race. However, this research brief does not aim to comprehensively delve into all issues relating to race-based inequality, bearing in mind that further focus will be placed on race and equality in a separate, forthcoming equality report.

## 2

## MANDATE OF THE SAHRC

The South African Human Rights Commission (SAHRC or Commission) is mandated by section 184 of the Constitution to promote respect for human rights and a culture of human rights; to promote the protection, development and attainment of human rights; and to monitor and assess the observance of human rights in South Africa. The Commission does so through a number of means, one of which is by conducting research.<sup>4</sup>

1 Gauteng Province Department of Education *MEC Lesufi's decision on Curro Roodeplaat* (26-06-2015) <[http://www.education.gpg.gov.za/Media/Statements/Documents/Media%20Statement%20\(MEC%20Lesufi%27s%20Decission%20on%20Curro\)%2026%20June%202015.pdf](http://www.education.gpg.gov.za/Media/Statements/Documents/Media%20Statement%20(MEC%20Lesufi%27s%20Decission%20on%20Curro)%2026%20June%202015.pdf)>.

2 Institute for Justice and Reconciliation *SA Reconciliation Barometer 2015 Briefing Paper 1: National Reconciliation, Race Relations and Social Inclusion* (8-12-2015) 10-11.

3 Ibid 16.

4 S 184(2)(c) of the Constitution.

# 3

## APPLICABLE LEGAL FRAMEWORKS

### 3.1 South African legal and policy framework

The Constitution makes the achievement of equality a foundational value of the Republic of South Africa, while section 9 of the Constitution guarantees the right to equality. It does so by providing for equality of all before the law, allowing for positive redress measures to advance previously disadvantaged persons, and by prohibiting unfair discrimination by the state and by individuals on several grounds, including race. In addition, the Constitution includes provisions that consider the need for the state to actively advance equitable access to land (section 25(5)); housing (section 26(2)); health care; food, water and social assistance (section 27(2)); and equity in education (sections 29(1)(b) and 29(2)(a)).

Various statutes aim to give effect to the constitutional right to equality, the most prominent of which for purposes of this research brief are the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000 (PEPUDA) and the Employment Equity Act, 55 of 1998 (EEA). PEPUDA is the national legislation mandated by section 9(4) of the Constitution, and thus enjoys special constitutional status. Significantly, the Act recognises the need to address systemic discrimination and specifically aims at the 'eradication of social and economic inequalities'.<sup>5</sup> In terms of section 7 of PEPUDA, discrimination based on the prohibited ground of race is considered unfair, unless it is established that the discrimination is fair. Section 7 of PEPUDA prohibits the following forms of unfair discrimination based on race:

- (a) the dissemination of any propaganda or idea, which propounds the racial superiority or inferiority of any person, including incitement to, or participation in, any form of racial violence;
- (b) the engagement in any activity which is intended to promote, or has the effect of promoting, exclusivity, based on race;
- (c) the exclusion of persons of a particular race group under any rule or practice that appears to be legitimate but which is actually aimed at maintaining exclusive control by a particular race group;
- (d) the provision or continued provision of inferior services to any racial group, compared to those of another racial group;
- (e) the denial of access to opportunities, including access to services or contractual opportunities for rendering services for consideration, or failing to take steps to reasonably accommodate the needs of such persons.

Following a review of PEPUDA, numerous suggestions were made for its improvement. The Promotion of Equality and Prevention of Unfair Discrimination Amendment Bill is, at the time of writing, being drafted by the Department of Justice and Constitutional Development (DOJCD). The Commission, as Chair of the Equality Review Committee, will be monitoring this process closely.

<sup>5</sup> See Preamble to PEPUDA.

Another important Act that will be referred to throughout this research brief is the Employment Equity Act. The EEA was passed in order to promote equal opportunity and fair treatment in employment through the elimination of unfair discrimination. The EEA promotes substantive equality through the implementation of affirmative action to ensure redress and equitable representation in the workforce. The Broad-Based Black Economic Empowerment Act, 53 of 2003 and the Broad-Based Black Economic Empowerment Amendment Act, 55 of 2013 are reflections of the EEA and provide practical legislative definitions and policies to realise substantive equality. Important aspects of these laws include the definition of Black people (Africans, Coloureds and Indians), and the need to empower marginalised and vulnerable groups, including women, the youth and people with disabilities, as well as people who live in rural areas.

In terms of the policy framework relevant to combating racial inequality in South Africa, the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance was convened in Durban in 2001. The conference adopted the Durban Declaration and Programme of Action<sup>6</sup> (the Durban Declaration), which expressed concern at ongoing prejudice and discrimination and called for a 'global fight against racism, racial discrimination, xenophobia and related intolerance'.

As a signatory to the Durban Declaration, South Africa is required to enact the National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerances (NAP). The Draft National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerances was released for public consultation and comment in 2016. The SAHRC, as a consultative member of the Steering Committee of the NAP, will continue to engage with the DOJCD and other relevant stakeholders to ensure the finalisation of the draft NAP.

Furthermore, in June 2012, the Department of Arts and Culture (DAC) circulated the National Strategy for Developing an Inclusive and Cohesive South African Society (the Strategy). The Strategy notes that challenges relating to social difference on the basis of characteristics such as race and culture remain persistent throughout South Africa, and derive from a past that was deliberately divisive.<sup>7</sup> It notes that, if left unchecked, this legacy 'will continue indefinitely, to ultimately threaten the long-term sustainability of democracy in South Africa'.<sup>8</sup> Social cohesion is also part of the Medium Term Strategic Framework (MTSF), which is government's framework for achieving the goals set out in the National Development Plan.<sup>9</sup>

### 3.2 International and regional legal framework

Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) defines 'racial discrimination' as:

Any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

6 The Durban Declaration and Programme of Action, UN Doc A/CONF.189/12 (2001).

7 Department of Arts and Culture *A National Strategy for Developing an Inclusive and Cohesive South African Society* (2012) 5 <<http://www.gov.za/sites/www.gov.za/files/Social-Cohesion-Strategy-1.pdf>>.

8 Ibid.

9 National Planning Commission *National Development Plan* (2012). Social cohesion is represented in Outcome 14 of the MTSF, with the DAC designated as a national focal point for this purpose. However, the content of these outcomes remains unclear, and implementation has been erratic.



The ICERD further establishes the Committee on the Elimination of Racial Discrimination (CERD) and explains that ‘special measures’ (such as affirmative action) taken to ensure the equal enjoyment of rights are not considered unfair discrimination. However, special measures should not create permanent separate rights for different race groups, and should be discontinued once equality is realised.

In November 2014, South Africa deposited its fourth to eighth periodic reports to the CERD Committee, noting that while significant advancements had been made in advancing formal equality in South Africa, these had not translated into equality in its substantive form. The CERD report also stated that issues of unfair discrimination intersected considerably with challenges relating to economic and social inequality and land reform, noting that indigenous peoples, sexual minorities and HIV positive individuals were especially vulnerable to discrimination and marginalisation.<sup>10</sup>

The African Charter on Human and Peoples’ Rights (ACHPR) explicitly prohibits unfair discrimination, particularly based on race and ethnic group. Equality before the law and equal benefit and protection of the law are explicitly provided for in Article 3 of the ACHPR, while the charter also makes specific reference to the rights of non-nationals, racial and ethnic groups in Article 12(5).

# 4

## CONCEPTUALISING EQUALITY

The following research brief aims to provide a facts-based account of the state of race-related equality in South Africa. Nonetheless, it is useful to provide a brief overview of some key equality-related concepts that are often used in legislation and by government, judges, human rights practitioners, civil society actors and academics.

Equality can be thought of in a ‘formal’ or ‘substantive’ sense. *Formal equality* refers to laws and policies that appear neutral by treating everyone the same. Such laws and policies may in fact cement existing race-based inequalities since they do not seek to change an unequal status quo. *Structural or systemic inequalities* – in other words, unequal structures, hierarchies and power relationships that underlie our society and economy and that prejudice people based on their race – are therefore left unaddressed. As the Constitutional Court has stated, ‘[a]lthough the long term goal of our constitutional order is equal treatment, insisting upon equal treatment in established inequality may well result in the entrenchment of that inequality’.<sup>11</sup> The idea of formal equality remains useful in cases of *direct discrimination* based on race, but falls short in dealing with cases of *indirect discrimination*, where equal treatment prejudices those who are different. Formal equality is similarly incapable of addressing structural inequalities inherited from the apartheid era, which are currently reflected in South Africa’s huge income gap and grossly unequal distribution of wealth and land.

10 Committee on the Elimination of Racial Discrimination *Consideration of reports submitted by States parties under article 9 of the Convention - South Africa* CERD/C/ZAF/4-8 (2014) 223-225.

11 *President of the Republic of South Africa v Hugo* 1997 (4) SALR 1 (CC) 41 para 112 (per Justice O’Regan).

Whereas formal equality tries to ensure equal treatment for all regardless of their identities, substantive equality aims to achieve *equal outcomes* by treating people and groups differently.<sup>12</sup> Different treatment is justified where some people are discriminated against on the basis of their identities or characteristics. This is reflected in the constitutional endorsement of positive redress measures, or ‘affirmative action’, in section 9(2). This places an obligation on the state to adopt legislative and other measures aimed at creating equal opportunities and achieving equal outcomes particularly with regard to employment and education. Since fundamental inequalities exist in society and the economy, it is crucial that private actors work together with the state to achieve substantive equality.

Closely related to affirmative action is the concept of *reasonable accommodation*. Reasonable accommodation is defined in the EEA as ‘any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to or participate or advance in employment’. In terms of PEPUDA, failure to reasonably accommodate vulnerable groups amounts to unfair discrimination on the ground of, amongst others, race. As explained by former Chief Justice Langa:

At its core is the notion that sometimes the community, whether it is the State, an employer or a school, must take positive measures and possibly incur additional hardship or expense in order to allow all people to participate and enjoy all their rights equally. It ensures that we do not relegate people to the margins of society because they do not or cannot conform to certain social norms.<sup>13</sup>

However, when equality of outcomes is advocated for, it must be borne in mind that equal outcomes can be achieved without addressing structures of society that perpetuate discrimination.<sup>14</sup> For example, a Black woman might be employed at the same level as her White male counterpart, but to procure the job in question she might have had to conform to Western notions of working patterns that do not acknowledge her unpaid work related to motherhood or other culturally-rooted caring responsibilities.<sup>15</sup> In cases of racial discrimination, reasonable accommodation might require an underlying societal norm to be changed, whereas in other instances a specific adjustment may need to be made to accommodate difference in a particular instance.<sup>16</sup> Substantive equality should therefore encompass more than equality of outcomes.<sup>17</sup>

Finally, the concept of *intersectionality* is important in the context of equality. Intersectionality refers to cases where people face multiple forms of discrimination, based on their identities and character traits. For example, whereas a Black man may face direct and indirect discrimination, a Black woman may be discriminated against on the bases of gender and race, whereas a Black homosexual woman faces discrimination based on gender, race and sexual orientation, and a poor Black lesbian faces additional discrimination on the ground of socio-economic disadvantage.

12 This is supported by the definition of ‘equality’ in PEPUDA: “equality” includes the full and equal enjoyment of rights and freedoms as contemplated in the Constitution and includes *de jure* and *de facto* equality and also equality in terms of outcomes’.

13 *MEC for Education: Kwazulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC) para 73.

14 S Fredman ‘Substantive Equality Revisited’ (2014) *University of Oxford Legal Research Paper Series No 70* 1, 14.

15 *Ibid.*

16 *Ibid* 30.

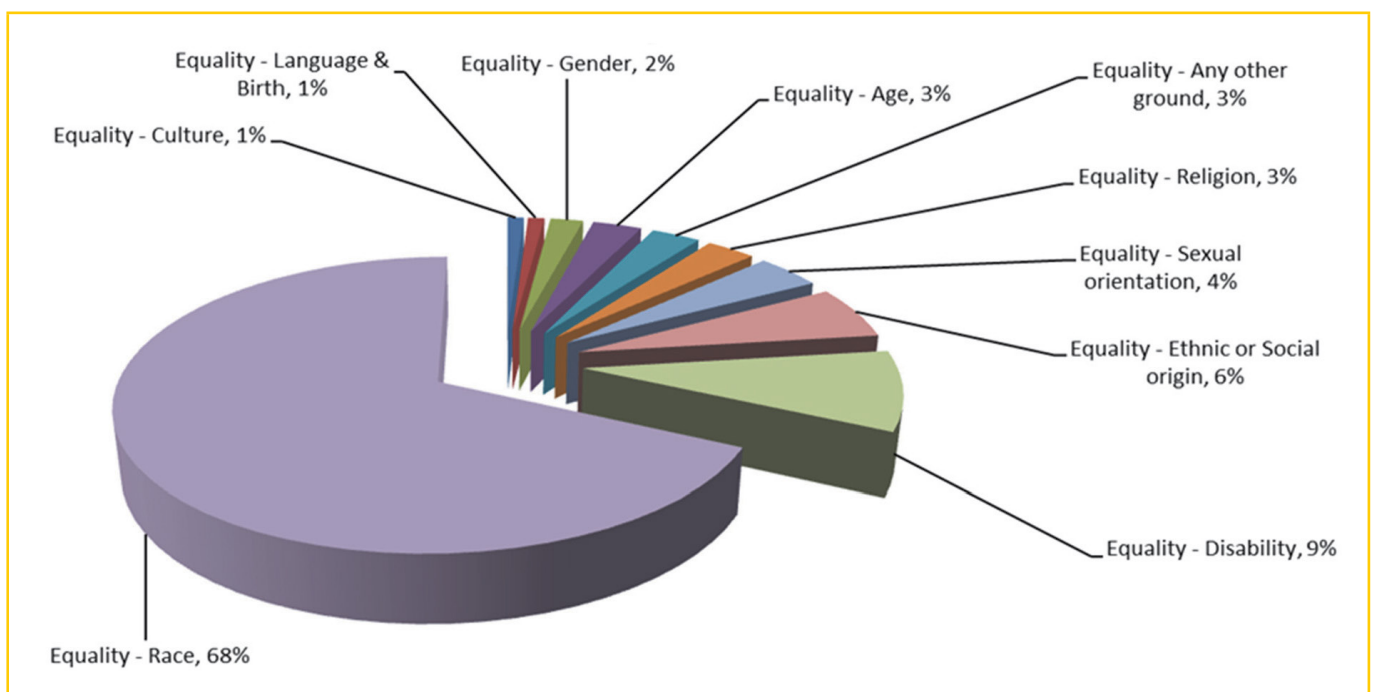
17 *Ibid* in general.

# 5

## CURRENT TRENDS

In terms of the complaints received by the SAHRC, violations of the right to equality continue to be the highest recorded grievance made to the SAHRC.<sup>18</sup> In the financial year ending 31 March 2016, 16 percent of the total complaints received alleged a violation of the right to equality. A total of 749<sup>19</sup> equality-related complaints were received and two thirds of the complaints are classified as race-related discrimination. This is indicative of the fact that racist speech and hate speech continue to cause some of the greatest human rights violations in South Africa.

### Equality-related complaints from the public received by the SAHRC 1 April 2015 – 31 March 2016



“

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<sup>18</sup> SAHRC *Annual Trends Analysis Report* (2016) 31.

<sup>19</sup> *Ibid.*

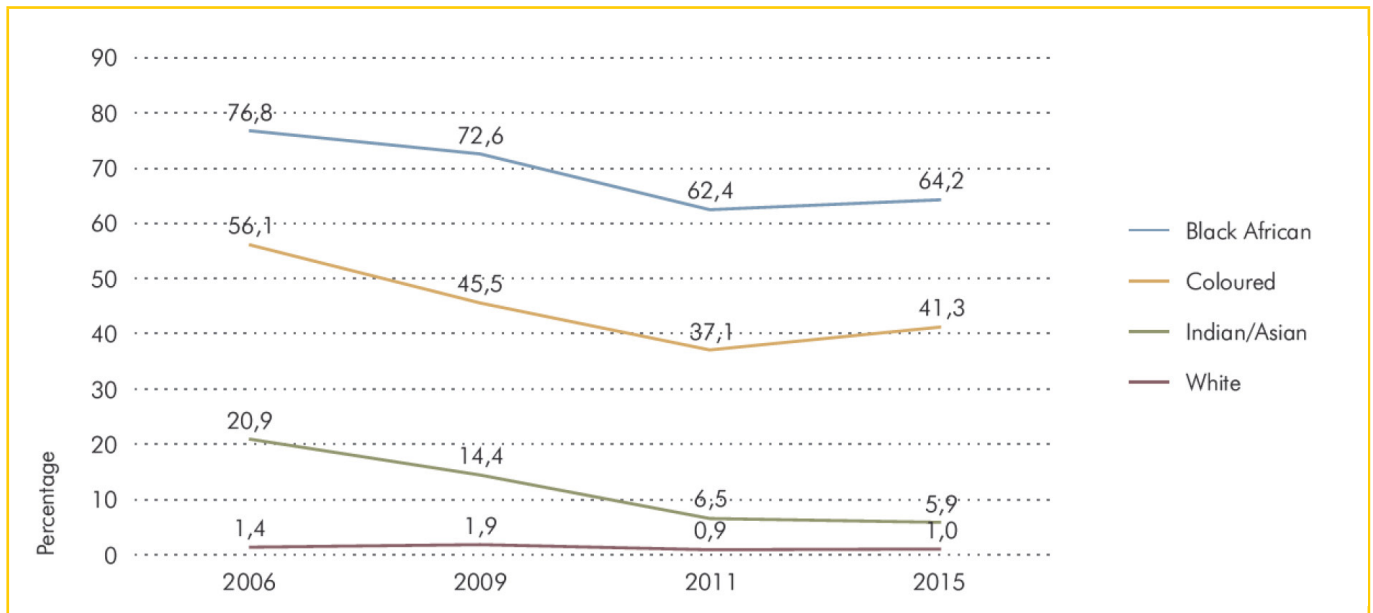
# 6

## THE DENIAL OF ACCESS TO INCOME-GENERATING OPPORTUNITIES

Section 7(e) of PEPUA prohibits unfair discrimination based on race in the form of ‘the denial of access to opportunities’, whereas subsection (c) prohibits ‘the exclusion of persons of a particular race group under any rule or practice that appears to be legitimate but which is actually aimed at maintaining exclusive control by a particular race group’.

In South Africa, poverty and socio-economic disadvantage intersect directly with race due to the legacy of apartheid:<sup>20</sup>

### Poverty headcount by population group<sup>21</sup>



Whereas our past of social, political and economic racial segregation means that poverty has always been high amongst the Black African population group, poverty levels decreased between 2009 and 2011, but rose again between 2011 and 2015, at which point approximately three of every five Black Africans were poor. The severely disproportionate gap between poverty experienced by the White population group and the Coloured and Black African population groups, starkly illustrates the persistence of structural inequality and the intersection of race and socio-economic disadvantage.

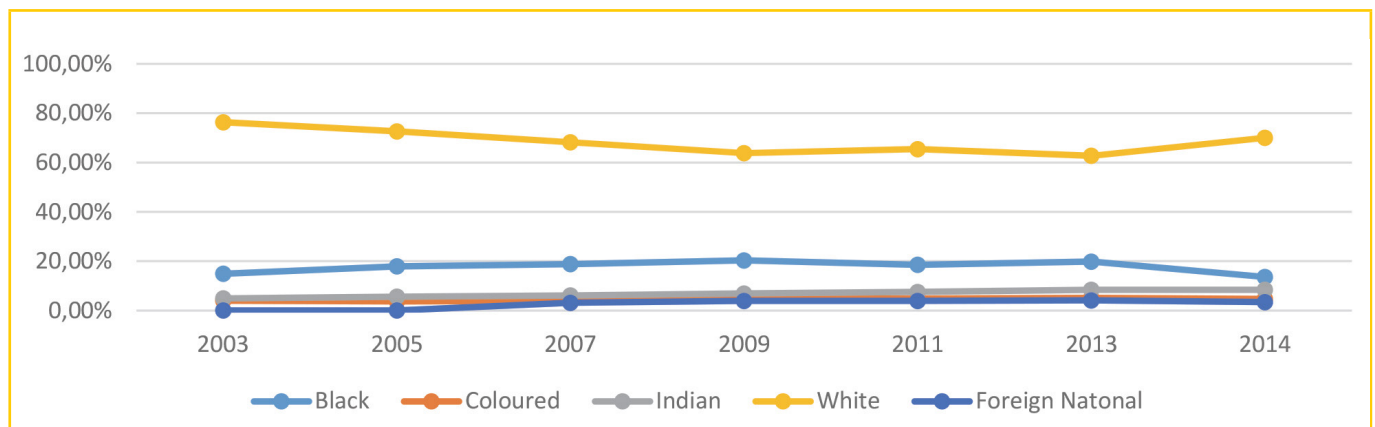
20 Stats SA *Poverty Trends in South Africa: An Examination of Absolute Poverty between 2006 and 2015* (2017) 14, 58; Stats SA *Poverty Trends in South Africa An Examination of Absolute Poverty between 2006 and 2011* (2014) 27, 40; Stats SA *Quarterly Labour Force Survey: Quarter 2: 2016* (2016) 62; Stats SA *Living Conditions Survey 2014/15* (2016) 15.

21 Figure reproduced from Stats SA *Poverty Trends in South Africa: An Examination of Absolute Poverty between 2006 and 2015* (2017) 58.

## 6.1 A racially segregated labour market

Today, the labour market remains effectively racially segregated, pointing to the violation of section 7(c) and (e) of PEPUDA. At the top management-, senior management- and professionally qualified-levels, the private sector is the biggest employer for the White population group, while Africans are employed to a large extent by government and the public sector as well as being represented in state-owned entities.<sup>22</sup> The African population group also constitutes the majority representation at the senior management- and professionally qualified-levels of the non-profit sector, but this trend is reversed in favour of White representation at the top management level.<sup>23</sup> The representation of the White group (72 percent) at top management level in the private sector is particularly high in comparison to the African (10.7 percent) and Coloured (4.7 percent) groups<sup>24</sup> as they are under-represented in relation to the Economically Active Population (EAP).<sup>25</sup> In plain terms, this means that although the White group has a low number of people that are economically active (9.5 percent), this group is disproportionately represented at decision-making levels. The converse is that although the African (78 percent) and Coloured (9.8 percent) groups have a large proportion of economically active people, very few are represented at decision-making levels.<sup>26</sup>

### National top management by race 2003-2014<sup>27</sup>



The trends highlighted by the above statistics show (in general) a gradual increase in the proportion of Black representation at top management levels, and a corresponding slow decline in White representation at top management until 2013.<sup>28</sup> However, 2014 saw a reversal in representation, with the percentage of White top managers increasing disproportionately, to levels similar to 2005/2007 levels (increasing by 7.3 percent to 70 percent).<sup>29</sup> During this same time period, Black representation dipped alarmingly to pre-2005 levels (decreased by 6.2 percent to 13.6 percent), reversing slow but steady gains that had been made.<sup>30</sup> This change occurred in the context of a general decline in economic growth, and a rise in unemployment, which would seem to indicate that (at least at the highest levels) a lack of economic growth and an increase in unemployment are unequally experienced by Black South Africans.

22 Commission for Employment Equity *Annual Report 2016/17* (2017) 16, 20, 25.

23 Ibid.

24 Ibid 16.

25 Ibid 25.

26 Ibid.

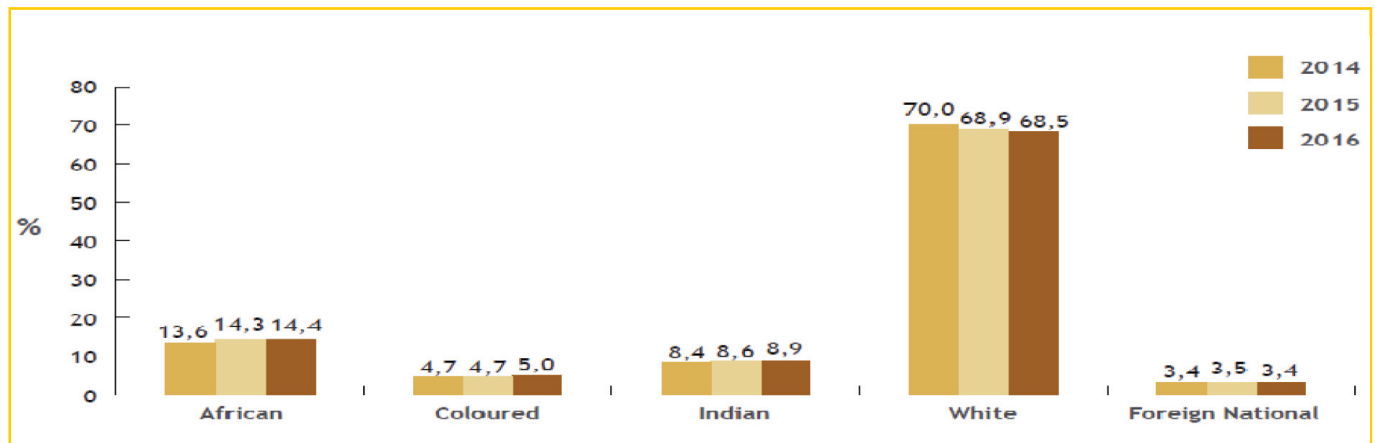
27 Figure reproduced from Commission for Employment Equity *Annual Report 2013/14* (2015) 15.

28 Ibid.

29 Ibid at 18.

30 Ibid.

## National top management by race 2014-2016<sup>31</sup>



From 2014 to 2016, this trend is again slowly reversed, but transformation appears to be painstakingly slow. It is also important to note that the trends indicated above come in spite of significant employment equity legislation designed to address racial representation.

Recruitment, promotion and skills development should be designed to promote transformation. Without this, a cycle of employment of White males, up-skilling of White males, promotion of White males, and retention of White males at the top management level will continue. However, at the top management level, White males benefitted the most from recruitment (40.1 percent) and promotion (37.7 percent), while simultaneously constituting the highest group by race and gender for termination of employment (49.1 percent). Whereas the attrition rate for White males may lead to less representation at this level over time, the pace hereof is slow, especially considering that disproportionately high levels of promotion impede transformation. African males benefitted the most from skills development opportunities (65.8 percent) with White females (6.1 percent) enjoying more skills development opportunities than African females (3.6 percent).<sup>32</sup>

## 6.2 The denial of access to diverse streams of income

Financial income is one of the most fundamental aspects linked to everyday sustenance, development, and economic opportunities. The Stats SA *Living Conditions Survey* (LCS) provides an overview of sources of household income. The survey indicates that work is the highest source of income for the majority of households in South Africa. The trends indicate that 72.6 percent of South African households obtain their income from work, and the average income (earned by working) for all households is R100 246 per annum.<sup>33</sup> The LCS also provides a grim racial outlook on the income sources of households in South Africa, suggesting that annual income for Black households is the lowest amongst the population groups with White-headed households (R444 446) having an income which is roughly 4.5 times larger than Black African-headed households (R92 983) and three times larger than the average national income.<sup>34</sup>

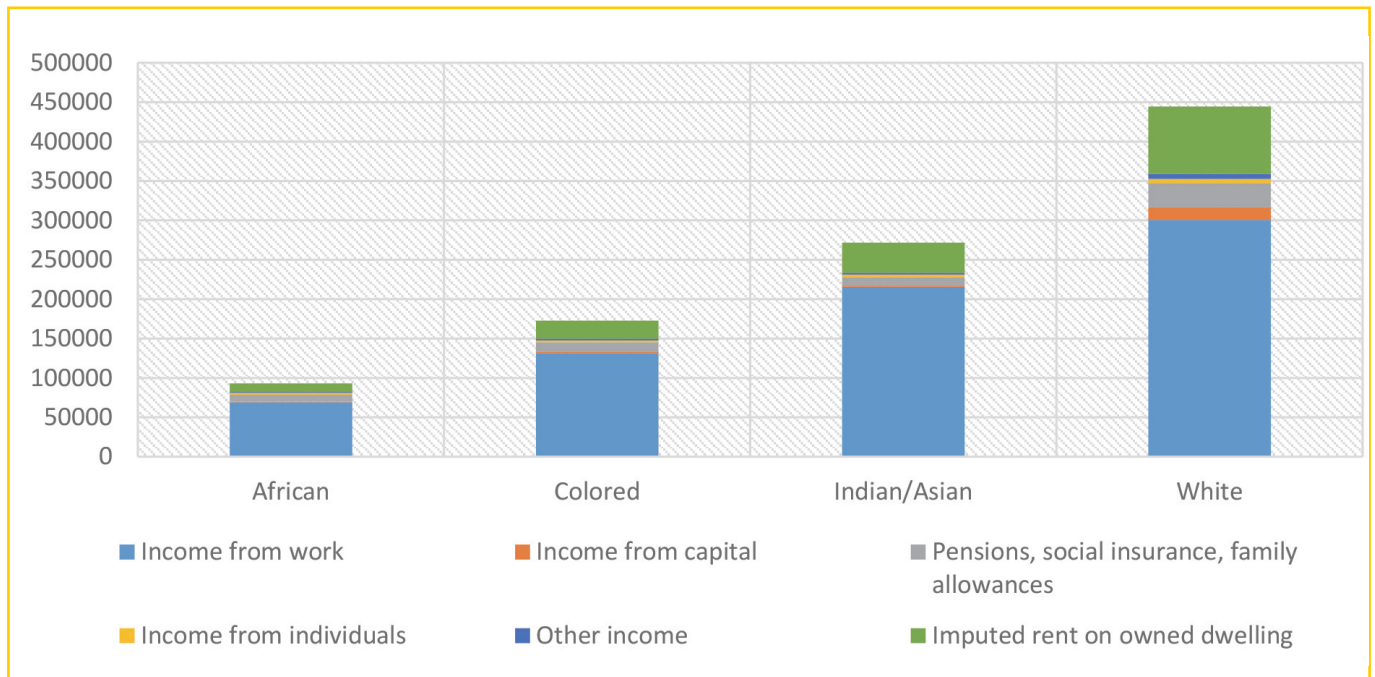
31 Figure reproduced from Commission for Employment Equity *Annual Report 2016/17* (2017) 55.

32 Ibid 16.

33 Statistics South Africa *Living Conditions Survey 2014/15* (2016) 15.

34 Ibid.

## Income sources by race 2015<sup>35</sup>



Worryingly, a large proportion of previously disadvantaged groups depend solely on their work for income and do not have access to other legitimate sources of income, with the exception of social grants for certain categories of people. White-headed households have the most diverse income streams, receiving two-thirds of their income from work and 22.8 percent from imputed rent and capital.<sup>36</sup> African-headed households make the least income from rent on owned dwellings, suggesting one of two things: either that Africans own land that does not provide rental income, or that Africans do not own as much property.

Section 25(7) of the Constitution makes provision for persons or communities dispossessed of property after June 1913 as a result of past racially discriminatory laws or practices, to be entitled either to restitution of that property or to equitable redress. This is confirmed by the enactment of the Restitution of Land Rights Act, 22 of 1994.<sup>37</sup> However, in terms of all the land claims that have been settled up to 31 March 2016, the vast majority of claimants have opted for restitution in the form of financial compensation rather than land. This trend is likely to continue as 94 percent of claimants of the 143 720 new claims that have been lodged since the re-opening of the new claims process, have indicated a preference for their claims being settled through payment of financial compensation.<sup>38</sup>

<sup>35</sup> Ibid.

<sup>36</sup> Ibid 15.

<sup>37</sup> In *Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others* 2016 (5) SA 635 (CC) the validity of the Restitution of Land Rights Amendment Act was challenged by civil society organisations on the basis that Parliament failed to conduct public participation in the manner required by the Constitution. The Constitutional Court upheld the challenge, and declared the Amendment Act invalid effective from 28 July 2016. The Constitutional Court reiterated that the right to restitution in land plays a pivotal role in South Africa's constitutional democracy, and is a means to achieving the guarantee of dignity for those who continue to suffer from the racist practices and laws of the past. The legislative processes which resulted in the Amendment Act, enacted to give effect to the right, by implication needed to include comprehensive public participation.

<sup>38</sup> Commission for Restitution of Land Rights *Annual Report 2015/16* (2016). Presently, there are 7 419 old land claims that have not yet been settled. Approximately 80 000 land claims were lodged by 31 December 1998. Of these old claims, 78 750 have been settled cumulatively as at 31 March 2016. The settlements have resulted in the award of 3.32 million hectares (of which 1.9 million hectares have been transferred to beneficiaries) and R10.2 billion has been paid as financial compensation. A total of 399 116 households (1.9 million individuals) have benefitted from the restitution programme as at 31 March 2016. The government has spent R19.9 billion on acquisition of land for restitution purposes, as at 31 March 2016.

This is an indication of the severity of the challenges posed by poverty, including the insufficiency of income earned by Black-headed households and an absence of alternative sources of income for this group.

### 6.3 Racially skewed unemployment and informal employment

The lack of income from work for Black households, compared to other population groups, highlights the fact that high unemployment remains the key challenge facing South Africa.<sup>39</sup> In 2016, the unemployment rate in South Africa rose to 27.1 percent in the third quarter of 2016 from 26.6 percent in the previous period, reaching its highest point since 2004.<sup>40</sup> In 2017, the unemployment rate decreased by 37 000 persons in the second quarter after an increase of 433 000 persons in the previous quarter. In 2017, the official unemployment rate is 27.7 percent, with only the Western Cape and North West provinces recording a decline in unemployment. The expanded unemployment rate, which includes those who wanted to work but did not look for work, stands at 36.6 percent.<sup>41</sup> Racial disparities reflect that a third of African and Coloured youth ages 15-24 years were not in employment, education or training in the second quarter of 2017, compared to 11 percent of the White population.<sup>42</sup>

In addition, South Africa has a significant informal sector which may not be included in the statistics. Stats SA defines informal employment as employment that is 'precarious' without access to basic benefits (such as a pension or medical aid) and that lacks a written contract of employment.<sup>43</sup> The informal sector generally occurs outside of the state licensing and regulatory framework. Consideration of the informal sector is especially important as workers in this sector are not protected by law and the sector is generally characterised by poor and vulnerable groups. Despite this, the informal sector provides employment for approximately 7 percent of the population aged 15-64 years, that is, 2.761 million workers.<sup>44</sup>

# 7

## EQUAL EDUCATION

The prohibitions set out in section 7(d) and (e) of PEPUDA relating to the provision of inferior services to any racial group compared to those of another racial group, and the denial of access to opportunities or services based on race, are also relevant in the education sphere. Education is an empowerment right, and holds the potential to lift the majority of South Africa's population (most of whom are Black) out of poverty, thereby contributing to greater substantive equality.

### 7.1 Equal opportunities through the transformation of education institutions

The difficulties of racial transformation in the South African education system have been a long-standing challenge and instances of complaints related to racial discrimination at universities and other institutions of higher education have been commonplace.

39 Although employment is not a right per se, it is strongly linked to dignity. It enhances autonomy, communal value and self-esteem. South Africa ratified the International Covenant on Economic, Social and Cultural Rights in 2015, which enshrines the right to work in Article 6.

40 Stats SA *Quarterly Labour Force Survey: Quarter 3: 2016* (2016) 9.

41 Stats SA *Quarterly Labour Force Survey: Quarter 2: 2017* (2017) 8-9.

42 Ibid 10.

43 Ibid 19.

44 Stats SA *Quarterly Labour Force Survey: Quarter 2: 2017* (2017) 21.



Prior to 1994, institutions of higher learning, as with all other institutions of learning, were formally divided along racial and language groups. The education system was instrumental in not only segregating the country along those lines, but also creating a huge racial division of the opportunities available in the country. It is for this reason that since the dawn of democracy in 1994, there have been persistent calls from students, academic staff and civil society for our institutions of learning to transform.

In the aftermath of the 'Reitz case',<sup>45</sup> the former Minister of Education established a Committee to examine progress on transformation and social cohesion and the elimination of discrimination in public higher education institutions. The Committee's report indicated that discrimination on the basis of race (and gender) remains 'pervasive'.<sup>46</sup> In 2014, the SAHRC convened a National Hearing on transformation in institutions of higher learning in South Africa. The Commission found that discrimination on the grounds of gender, race, disability and socio-economic status continues, and that unsatisfactory transformation has occurred at the management, staff and student levels.<sup>47</sup> Even though some progress has been made in educational attainment in general, the Black African population still lags behind in terms of higher educational attainment compared to other population groups, with only approximately nine percent of Black Africans having some post-secondary qualification.<sup>48</sup>

In March 2015, an organised campaign, known as the *Rhodes Must Fall* movement, began at the University of Cape Town. It sought to 'decolonise' the institution through, among others, the removal of a statue of colonialist Cecil John Rhodes that had occupied prominent placing on the campus.<sup>49</sup> Shortly after the *Rhodes Must Fall* campaigns, in October 2015, the *#FeesMustFall* movement emerged, calling for free, decolonised, quality education.

Fees and the limitation of access to education due to financial unaffordability are issues experienced mostly by non-white learners. The 2016 LCS indicates that for Black-headed households, food and clothing constitute some of the highest expenses, while for White-headed households, education is among the highest expenditures.<sup>50</sup> This suggests that education is not easily affordable for Black-headed households. During 2008-2015, the average annual increase in tertiary education fees was 8.8 percent, which was well above the headline Consumer Price Index (CPI) average annual increase of 6.2 percent over the same period. In other words, before 2016, tertiary education fees were rising faster than the average price of the CPI basket of goods and services.<sup>51</sup> These increases in tertiary fees and the CPI would undoubtedly have a devastating impact on Black-headed households, particularly those headed by women. A lack of financial resources extends to a potential inability to afford textbooks, transport or adequate nutrition and can negatively impact the ability of students to receive quality education.<sup>52</sup>

45 In 2008, the Commission conducted investigative and reconciliatory activities at the University of the Free State (UFS) in the wake of what came to be known as the 'Reitz incident'. This incident, which was widely publicised, involved the abuse of four Black African staff members of the University by White students and became a topic of national conversation related to the problem of racism at universities. It led to a formal investigation on the part of the Department of Education, culminating in the Ministerial Report as well as an investigation and subsequent report by the Commission.

46 Department of Education *Report of the Ministerial Committee on Transformation and Social Cohesion and the Elimination of Discrimination in Public Higher Education Institutions* (2008) 13.

47 SAHRC *Transformation at Public Universities in South Africa* (2016) viii.

48 Stats SA *Education Series 3: Education Enrolment and Achievement 2016* (2016) 15 <<http://www.statssa.gov.za/publications/Report%2092-01-03/Report%2092-01-032016.pdf>>.

49 Cecil John Rhodes was a colonial-era British businessman, politician and mining magnate who believed strongly in the supremacy of white, English-speaking people. Rhodes was the Prime Minister of the Cape Colony from 1890 to 1896. Rhodes established the Rhodes scholarship in his will, and there are several institutions and organisations in South Africa and internationally that bear his name. However, Rhodes remains a controversial figure due to his ardent colonial imperialism, his inherent racism, and his beliefs in white supremacism.

50 Stats SA *Living Conditions Survey 2014/15* (2016) 50.

51 Stats SA *Tuition Fee Trends Over Time: What do the Data Show?* (2016) <<http://www.statssa.gov.za/?p=9131>>.

52 Commission of Inquiry into Higher Education and Training *Interim Report of the Commission into the Feasibility of Fee-Free*

Progress has been made since the beginning of *#FeesMustFall*, including a no-fee-increase in 2016 and the clearing of historical debts of beneficiaries of the National Financial Aid Scheme (NSFAS). Students currently funded by NSFAS, as well as those whose family income is less than R600 000 per year, will not experience any fee increment. In October 2016, government announced that higher education funding would be increased by R17.6 billion over the next three years. In addition, President Jacob Zuma established the Fees Commission in 2016, which is chaired by Judge Jonathan Heher, in order to investigate the feasibility of free higher education and training. According to the Commission's interim report, the prevailing view from submissions so far is in line with government's position on free education for poor students.<sup>53</sup>

Although the SAHRC welcomes the developments thus far, the SAHRC acknowledges the need to make tertiary education financially accessible to all. The right to higher and further education is a constitutionally enshrined right, which, in terms of the Constitution, must be made progressively available and accessible by the state through reasonable measures. At the same time, actors in the private sector (for whom graduates are produced) must actively contribute to the dialogue on free, quality education.<sup>54</sup>

The Commission does, however, note with concern the violent scenes that arose from student protests and related action at various universities across the country. The Commission condemns protest-related action that is destructive and that impacts adversely on others, inside and outside universities. Furthermore, allegations and scenes of police heavy-handedness need to be addressed. The Constitution promotes a vision of human rights-compliant policing and the Commission calls on the SAPS to remain cognisant of this vision in exercising its duties.

## 7.2 Discrimination through language and codes of conduct

Section 7(c) of PEPUDA prohibits 'the exclusion of persons of a particular race group under any rule or practice that appears to be legitimate but which is actually aimed at maintaining exclusive control by a particular race group'.

Codes of conduct are important mechanisms through which learning institutions can create a learning environment consonant with constitutional values, and should cater for the reasonable accommodation of difference on racial, gender, religious or cultural grounds.<sup>55</sup> In 2016, considerable attention was given to policies at schools that unfairly discriminate against students on the basis of their race. This did not only revolve around language policies, such as at the University of Pretoria or Stellenbosch University, but also around policies surrounding dress codes. The Commission noted with concern the allegations of marginalisation and discriminatory treatment of Black female learners at Pretoria High School for Girls, the Sans Souci High School in Cape Town, Saint Michael's School for Girls in Bloemfontein, as well as other incidents and allegations emanating from other schools.<sup>56</sup>

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*Higher Education and Training* (2016) para 6.

53 Ibid para 6.

54 Ibid para 4: 'There has been regrettably little participation by the resource-rich entities such as corporates, industry, the banking sector or organized labour, all of which might have been expected to contribute as the production of graduates and an academically prepared workforce is to their direct benefit.'

55 *MEC for Education: Kwazulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC).

56 SAHRC Media Statement: *Difference, Diversity & Reasonable Accommodation of Difference in South African Schools* (7-09-2016); SAHRC Media Statement: *School Rules and Codes of Conduct are Subject to the Supremacy of the Constitution* (26-07-2017). More instances of racism in language and dress code policies, as well as in racist statements made by teaching staff, have emerged since the last media release by the SAHRC. See, for example, Times Live 'St John's College: Teacher Found Guilty of Making Racist Remarks has Resigned' (27-07-2017) *Times Live*.

In particular, the Commission noted allegations of differential treatment as regards language and hairstyles, and allegations of the use of derogatory and racist language against Black learners by both educators and fellow pupils.

The allegations of discrimination provide an opportunity for the schools concerned and for other schools to review their Codes of Conduct to ensure that reasonable accommodation is made to protect the basic rights of learners, deepen understanding, and increase tolerance, respect, and protection for all in the school community.

## 8

### UNLAWFULLY OBTAINED EMOLUMENTS ATTACHMENT ORDERS

Another issue which implicates PEPUDA's prohibition of 'the exclusion of persons of a particular race group under any rule or practice that appears to be legitimate but which is actually aimed at maintaining exclusive control by a particular race group',<sup>57</sup> relates to unlawfully obtained emoluments attachment orders (EAOs). As was shown above, race and socio-economic disadvantage squarely intersect in South Africa,<sup>58</sup> which means that such orders have an especially negative impact on vulnerable population groups.

The SAHRC welcomed the ruling by the Constitutional Court in the matter of *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others*<sup>59</sup> that declared that judicial oversight in the granting of EAOs is a necessary prerequisite. The Court dealt with the case of a group of low-income earners living in Stellenbosch, who were represented by the University of Stellenbosch Legal Aid Clinic in these confirmation proceedings. They had fallen into arrears, and their salaries were attached by micro lenders through a debt collection mechanism known as EAOs. The central question that the Constitutional Court had to determine in this matter was whether the Magistrates' Court Act, 32 of 1944 (MCA), which governs the issuance of EAOs, provides for judicial oversight when an EAO is issued against a judgment debtor in favour of a judgment creditor. The SAHRC, represented by the Legal Resources Centre (LRC), was admitted as a friend of the court. The SAHRC made submissions on the treatment of EAOs in international law and other jurisdictions, as well as the appropriate remedy for the Court to order in these circumstances. Drawing from international and foreign law, the SAHRC submitted that courts must be vested with supervisory oversight powers prior to an EAO being granted. This is because any deprivation of wages/income had a detrimental effect on a number of human rights.

In his majority judgment, Zondo J held that to the extent that the MCA makes provision for EAOs to be issued without judicial oversight, it is inconsistent with section 34 of the Constitution (access to courts), and is therefore constitutionally invalid.<sup>60</sup> In a separate, concurring judgment, Cameron J highlighted the egregious impact of EAOs on debtors, and how EAOs threaten the livelihood and dignity of low-income earners who are a distinctly vulnerable and marginalised group in our society.<sup>61</sup>

57 S 7(c) of PEPUDA.

58 Stats SA *Poverty Trends in South Africa: An Examination of Absolute Poverty between 2006 and 2015* (2017) 58.

59 *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others* 2016 (6) SA 596 (CC).

60 *Ibid* para 212.

61 *Ibid* paras 131, 133.

The SAHRC welcomes this judgment as it struck a constitutionally appropriate balance between the rights of creditors to recover debts through the judicial system, and the protection of the rights of debtors. The Constitutional Court has clarified the law, which the SAHRC believes will provide guidance to the courts and ameliorate the human rights violations that are currently occurring.

The SAHRC notes that the Ministry of Justice and Correctional Services through the DOJCD subsequently introduced the Courts of Law Amendment Bill to Parliament, which seeks to address and remedy abuses of the EAO system. In 2017, the Courts of Law Amendment Act 7 of 2017 was enacted to amend certain legislation in order to assist socio-economically vulnerable persons who fall into a 'debt trap' and are therefore impeded from enjoying sufficient levels of their socio-economic rights. The SAHRC applauds both the DOJCD and Parliament for this legislative intervention.

# 9

## **THE DISSEMINATION OF ANY PROPAGANDA OR IDEA, WHICH PROPOUNDS THE RACIAL SUPERIORITY OR INFERIORITY OF ANY PERSON**

Section 7(a) of PEPUDA prohibits 'the dissemination of any propaganda or idea, which propounds the racial superiority or inferiority of any person, including incitement to, or participation in, any form of racial violence'. Section 10 of PEPUDA prohibits hate speech on the prohibited grounds, which could be construed to be intentionally hurtful, harmful or to promote hatred.

Tensions between the right to freedom of expression and the right to be protected from speech and actions that might be considered to be fuelled by prejudice are not new. Given South Africa's history and the severe and unjust limitation on both of these rights during apartheid, both rights are cherished and protected. In *S v Mamabolo*, Kriegler J noted:

Freedom of expression, especially when gauged in conjunction with its accompanying fundamental freedoms, is of the utmost importance in the kind of open and democratic society the Constitution has set as our aspirational norm. Having regard to our recent past of thought control, censorship and enforced conformity to governmental theories, freedom of expression — the free and open exchange of ideas — is no less important than it is in the United States of America. It could actually be contended with much force that the public interest in the open market-place of ideas is all the more important to us in this country because our democracy is not yet firmly established and must feel its way. Therefore we should be particularly astute to outlaw any form of thought-control, however respectably dressed.<sup>62</sup>

<sup>62</sup> *S v Mamabolo*, 2001 (3) SA 409 (CC) para 35.

Nonetheless, the right to freedom of expression is not absolute, precisely because of this historical context. The Constitutional Court has recognised that:

South African society is diverse and has for many centuries been sorely divided, not least through laws and practices which encouraged hatred and fear. Expression that advocates hatred and stereotyping of people on the basis of immutable characteristics is particularly harmful to the achievement of these values as it reinforces and perpetuates patterns of discrimination and inequality.<sup>63</sup>

Similarly, in the recent case of *SAHRC v Qwelane*,<sup>64</sup> the Equality Court recognised that freedom of expression cannot protect speech which is harmful to constitutional values and human rights, and which threatens democratic pluralism.<sup>65</sup> Yet, instances of hate speech have surged in recent years.

On 1 January 2016, a Kwa-Zulu Natal real estate agent named Penny Sparrow revived an ongoing debate about the nature and extent of racism in South Africa 21 years into democracy. Referring to Black people as ‘monkeys’, Sparrow’s utterances on her Facebook page sparked an outcry after she complained about the manner in which Black South Africans celebrated the new year at Durban’s beaches.<sup>66</sup> She was subsequently fined R150 000 by the Equality Court.<sup>67</sup> Another Durban resident, Justin van Vuuren, made similar comments, referring to the revellers as the ‘scum of the nation’.<sup>68</sup> Soon after the Sparrow incident, an employee of the Gauteng Department of Sports, Arts, Culture and Recreation, Velaphi Khumalo, placed a post on his Facebook page calling for Black South Africans to do to White people ‘what Hitler did to the Jews’, sparking condemnation and renewing debates about the limits of free speech in South Africa.<sup>69</sup> A few months later, Matthew Theunissen posted the following on Facebook: ‘So no more sporting events for South Africa. I’ve never been more proud that to say our government are a bunch of KAFFIRS...yes I said it so go fuck yourselves you black fucking cunts.’ He subsequently entered into a settlement agreement with the SAHRC, which included the issuing of an apology, community service and a break from social media.<sup>70</sup>

A significant development aimed at addressing the prevalence of hate speech and other challenges is the draft Prevention and Combating of Hate Crimes and Hate Speech Bill<sup>71</sup> (Hate Bill), which was made available for public comment by the DOJCD in October 2016. The Hate Bill proposes the criminalisation of Hate Crimes and Hate Speech. The much-anticipated Hate Bill provided the opportunity for the SAHRC and other stakeholders to actively engage the draft legislation with a view to recommending measures to improve legislative frameworks in South Africa and ultimately strengthen human rights protection and promotion. The usefulness of criminalising hate speech, compared to the already existing laws (such as constitutional prohibitions and protections under PEPUDA as well as *crimen injuria* sanctions) is currently being publicly debated.

63 *Islamic Unity v Independent Broadcasting Authority and Others*, 2002 (4) SA 294 (CC) para 43.

64 *SAHRC v Qwelane* case no EQ44/2009 (EQ13/2012) EQC (18 August 2017).

65 *Ibid* paras 20, 45.

66 ‘Penny Sparrow Calls Black People ‘monkeys’ (4-01-2016) *The Citizen*.

67 *ANC v Sparrow* (01/16) [2016] ZAEQC 1 (10 June 2016) order para 5. Sparrow was separately convicted on charges of *crimen injuria* by the Scottburgh Magistrate’s Court and fined an additional R5 000 (in lieu of 12 months’ imprisonment).

68 ‘Justin van Vuuren Loses Futurelife Sponsorship because of Racist Slurs he made on Facebook’ (5-01-2016) *The Daily Post*.

69 T Gqirana ‘“Barbaric and racist” Facebook post lands Velaphi Khumalo in Hot Water’ (7-01-2016) *Mail and Guardian*.

70 SAHRC *Media Statement: Matthew Theunissen Apologises for Racist Remarks* (10-06-2016).

71 Prevention and Combating of Hate Crimes and Hate Speech Bill.

The Commission is of the view that the Hate Crimes Bill is, in itself, not sufficient to address the challenge of race-related or other forms of discrimination. Adequate resourcing for the development of a system which captures and stores disaggregated hate crimes and/or hate speech data, as well as training of officials on the determination of what constitutes a hate crime and/or hate speech will be essential to ensure that the objectives of the Bill are achieved. Moreover, Chapter 5 of PEPUDA, which requires all members of society to promote equality, could go some way in enhancing social cohesion (arguably in a more constructive manner than criminal sanctions would), but remains inoperative.

# 10

## SAHRC RESPONSES TO RACE-BASED DISCRIMINATION AND SYSTEMIC INEQUALITY

As noted throughout this Research Brief, the SAHRC has been active in litigation, settlement proceedings, the hosting of national hearings and legislative developments related to various forms of racial inequality.

Besides the hearing and resultant report regarding transformation in public universities,<sup>72</sup> the SAHRC also hosted a national hearing on unfair discrimination in the workplace between March and April 2016. The aim of the hearing was to generate a deeper understanding and awareness of the trends of discrimination in the workplace; the form and inter-relatedness of different types of discrimination; as well as the challenges and barriers to equality faced by all stakeholders, including employees, public and private sector employers, trade union bodies and government departments. Essentially, the inquiry found that unfair discrimination in the workplace remains pervasive in South Africa and includes both barriers to entry as well as discriminatory practices within the workplace itself. Although long-standing grounds of discrimination such as race, gender and disability persist, the changing nature of the workforce and social relations over time has given rise to newer forms of discrimination, including on the basis of HIV and AIDS status, age, sexual orientation and gender identity, language, religion and culture. Discrimination, in this way, is a moving target and requires constant attention and evaluation to ensure that no one is left behind in efforts to combat discriminatory practices and achieve the goal of equal rights and dignity for all.

Finally, Chapter 5 of PEPUDA, which is not yet operational, sets out a list of positive duties aimed at promoting equality. These responsibilities are placed both on the state as well as on private persons who directly or indirectly contract with the state or who exercise public power. Moreover, a social commitment by all persons to promote equality is similarly mandated.<sup>73</sup> However, challenges persist in respect of the full operationalisation of PEPUDA, whereby the promotional aspects of the Act have continued to be inoperative since its enactment in 2000. The Commission plans to recommend the proclamation of the commencement of this chapter in its forthcoming Equality Report.

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72 See section 7.1 above.

73 See ss 25-27 of PEPUDA.

# 11

## CONCLUSION

In terms of socio-economic circumstances, South Africa currently stands as one of the most unequal countries in the world, particularly due to the fact that the gap between the annual average household incomes of African-headed households and their White counterparts remains shockingly big. Although poverty has decreased since 2009, it has increased from 2011 to 2015, and still affects the Black majority disproportionately. Structural race-based inequality thus persists, whereas discrimination likewise continues, with a surge of racist incidents at schools and on social media being evident in recent years. Although legislation criminalising hate crimes is welcome, it must be asked whether the operationalisation of the promotional aspects of PEPUDA may hold comparative advantages for the cultivation of social cohesion in country that remains divided by, amongst other things, income, wealth and race.

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