PGC Group of Companies (Proprietary) Limited
(Incorporated in the Republic of South Africa)
Registration number: 2004/024657/07

SUBMISSIONS ON THE INSURANCE BILL [B1-2016] BY THE PGC GROUP TO THE STANDING COMMITTEE ON FINANCE (NATIONAL ASSEMBLY) 3 FEBRUARY 2017

'Legislation alone cannot create relations or change attitudes. But it can set clear standards of acceptable behaviour and provide redress for those who have suffered in the hands of others. If law can play a repressive role by sanctioning racial segregation and discrimination as it has done in Nazi Germany, the American South, Rhodesia and South Africa, it can operate with equal force in the opposite direction by declaring that, equality of opportunity, regardless of race or colour, is to be pursued as a major social objective. It is a statement of public policy by Parliament intended to influence public opinion.'[1]

1. BACKGROUND

1.1. The PGC Group was established in 1997 as a diversified investment arm of the Police and Prisons Civil Rights Union (POPCRU). Within its portfolio holdings, it has investments in the hospitality and insurance industries. As a stakeholder in the insurance industry, PGC has an interest in the Insurance Bill [B1-2016] for which it makes these submissions and recommendations.

1.2. We are submitting this as a concerned *bona fide* South African corporate citizen.

1.3. Our submissions are two pronged:

1.3.1. Firstly, we submit that the Insurance Bill is unconstitutional to the extent that it fails to expressly provide, as one of its foundational objectives, the need to transform the insurance industry as

[1] Blackstone et al (1998) ' Race Relations in Britain: A Developing Agenda 'Routledge Publishers, London , Page 24

enjoined by the Constitution of the Republic of South Africa, 1996 (herein referred to as the Constitution).

1.3.2. Secondly, due to its lack of transformative objectives, the Insurance Bill fails to take sufficient cognizance of the political, social and economic history of South Africa in relation to the power to designate an insurer and other companies as an insurance group.

2. CONSTITUTIONAL FRAMEWORK TO THE SUBMISSIONS ON TRANSFORMATION OF THE INSURANCE INDUSTRY

'If the misery of our poor be caused not by the laws of nature, but by our institutions, great is our sin'- [2]

2.1. South Africa's democratic Constitution was adopted with the primary goal of transforming society from its oppressive past,[i3] and as such it expressly provides the primary basis for transformation.

2.2. In this regard, the epilogue to the Interim Constitution of 1993 is informative. It states:

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[2] Gould S.J. (1981)'The Mismeasure of Ma' W.W. Norton & Co. New York, 1981

The above quotation borrowed from Darwin, which appears in Gould's book says it all particularly in the area of scientific racism. Scientists have over a long period tried to justify racism on the basis of attaching some laws of nature to its origins. Guild looks at how scientists in the 18th and 19th century had used preconceived beliefs of racism to justify their findings about the imagined inferiority of other race groups. These scientists which are being vigorously challenged by Guild in his work, fixed the data of their research either by not including all their results or by using an unequal number of subjects of each race involved in that particular study to ensure that the findings will justify the preconceived belief that other race groups are inferior. Racism is based on pseudo-scientific theories. The concept of scientific racism refers to scientific theories, which drew several disciplines in order to provide a typology of different human races, based on a biological conception of the race. Such theories have provided ideological justifications to racism, slavery and colonialism during the new imperialism period in the second half of the 19th century. These scholarly theories sometimes worked in conjunction with racism, for example in the case of the human zoos, during which various human beings were presented in cages during exhibitions. Our own Saartjie Baartman, called the "Hottentot Venus", was displayed in London in the early 19th century as a pawn in a human zoo. It was only after the democratic government had intervened that her body was brought back to her motherland. Along with eugenics, invented by Francis Galton and popularized at the turn of the 20th century, such theories, which often postulated a master race, were a main influence of the Nazi racial policies and their program of eugenics and apartheid racial supremacists.

[3] See, *S v Makwanyane* 1995 (3) SA 391 (CC) para 262("What the Constitution expressly aspires to do is to provide a transition from [the] grossly unacceptable features of the past to a conspicuously contrasting future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex"); *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) para 157; *Rates Action Group v City of Cape Town* 2004 (12) BCLR 1328 (C) para 100; Dikgang Moseneke 'The Fourth Bram Fischer Memorial lecture: Transformative adjudication' (2002) 18 *SAJHR* 309; Pius Langa 'Transformative constitutionalism' (2006) 3 *Stell LR* 351; and Mtendeweka Mhango, 'Transformation and the Judiciary' in *The Judiciary in South Africa* (2014)(Hoexter & Olivier (eds)) at 68-79.

This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, class, race, belief or sex.

2.3. Equally informative is the preamble to the Constitution, which provides in pertinent part that

[W]e, the people of South Africa, recognize the injustices of our past. . . . [and therefore] adopt this Constitution as the supreme law of the Republic so as to– heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; lay the foundations for a democratic and open society in which every citizen is equally protected by law; [and] improve the quality of life of all citizens....

2.4. The society envisioned by the Constitution is one based on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms.[4]

2.5. The achievement of substantive equality is one of the fundamental objectives of the Constitution.[5] As the courts have confirmed, the Constitution 'recognizes that decades of systematic racial discrimination entrenched by apartheid legislation cannot be rid of without positive action being taken to achieve that result, especially given that the effects of discrimination may continue

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[4] *Bato Star Fishing* (Pty) Ltd *v Minister of Environmental Affairs and Tourism* ZACC 15; 2004 (4) SA 490 (CC).

[5] See these authorities, *Bato Star Fishing* (Pty) Ltd *v Minister of Environmental Affairs* and para 74; *Minister of Finance and Other v Van Heerden* 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC) para 31 (what is clear is that our Constitution and in particular section 9 thereof, read as a whole, embraces for good reason a substantive conception of equality inclusive of measures to redress existing inequality.); *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice* 1999 (1) SA 6; 1998 (12) BCLR 1517 at para 62 (Section 9 of the Constitution clearly contemplates both substantive and remedial equality. Substantive equality is envisaged when section 9(2) unequivocally asserts that equality includes "the full and equal enjoyment of all rights and freedoms." The State is further obliged "to promote the achievement of such equality" by "legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination," which envisages remedial equality); *South African Police Service v Barnard* 2014 (6) SA 123 (CC); (2014) 35 ILJ 2981 (CC) para 29 (reasoned that "at the point of transition, two decades ago, our society was divided and unequal along the adamant lines of race, gender and class. [Our Constitution] has a transformative mission… 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."); *City Council of Pretoria v Walker* 1998 (2) SA 363; 1998 (3) BCLR 257 at para 140 (held that the City is obliged to develop a coherent and serious strategy which, looked at rationally and objectively, would be capable of advancing substantive equality and truly promoting the idea of a city of civic equals); *Daniels v Campbell* 2004 (5) SA 331 (CC); 2004 (7) BCLR 735 (CC) (ruled that the Intestate Succession Act and the Maintenance of Surviving Spouses Act infringes the substantive equality and dignity commitments of our Constitution and must be declared unconstitutional and invalid); *AB and Another v Minister of Social Development* [2016] ZACC 43 (held that the right to equality provides a mechanism to achieve substantive equality which, unlike formal equality that presumes that all people are equal, tolerates difference)

indefinitely unless confronted with a commitment to end it.' [6] The Constitutional Court has acknowledged in *National Coalition for Gay and Lesbian Equality v Minister of Justice*[7] and affirmed the importance of remedial measures to achieve substantive equality:

'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 thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely. Like justice, equality delayed is equality denied.'

2.6. Therefore, section 9(2) of the Constitution encapsulates the commitment to achieve substantive equality and remedy the mischief of past discrimination. The section provides:

'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.'

2.7. As the Constitutional Court has acknowledged that, measures that bring about transformation will inevitably affect some members of society adversely, especially those members of previously advantaged groups.[8] Nevertheless, there is a positive constitutional commitment to achieving equality. This commitment is more demanded in the insurance industry where for decades the industry has been and continues to be dominated by companies controlled and owned predominantly by members of the community that were privileged under apartheid and had exclusive access to the market.[9]

Obligations Under Section 7(2) of the Constitution

'It is argued first of all that race is a common element , a concept which forms together the various elements of the presentation of the crisis facing society as a crisis caused by its victims.'[10]

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[6] Ibid

[7] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC).

[8] *Bato Star Fishing* (Pty) Ltd *v Minister of Environmental Affairs and Tourism; Bel Porto School Governing Body v Premier of the Province, Western Cape* 2002 (3) SA 265 (CC); 2002 (9) BCLR 891 (CC) at para 7.

[9] See for example, Financial Services Board, 18th Annual Report of the Registrar on the Results of the Long-term Insurance Industry for the Period ending 2015 (noting that an aggregate 67.38% of the percentage of total assets in the long-term insurance in South Africa is held by 4 insurance companies being Liberty at 13.62%; MMI Holdings at 14.24; Old Mutual at 23.72% and Sanlam at 15.80%), available at https://www.fsb.co.za/Departments/insurance/Documents/LT%20Tables%202015.pdf. See, Attached Annexure A.

[10] Solomon's et al ,(1982)"The Organic Crisis of British Capitalism and Race ",Centre for Contemporary Cultural Studies , London , Page 27

2.8. What is more, the Constitutional Court has ruled in *Glenister v President of the Republic of South Africa*[11] that section 7(2) of the Constitution, which requires "the State to respect, protect, promote and fulfil the rights in the Bill of Rights" imposes a positive obligation on the state and its organs —to provide appropriate protection to everyone through laws and structures designed to afford such protection.[12] The Constitutional Court further ruled that implicit in section 7(2) is a constitutional obligation and requirement that the steps the State takes to respect, protect, promote and fulfil constitutional rights must be reasonable and effective. In that case, the Constitutional Court found that the steps taken to create an anti-corruption unit that is not adequately independent would not constitute a reasonable step.[13]

2.9. The Court further ruled that since section 8(1) of the Constitution provides that "the Bill of Rights binds the legislature, the executive, the judiciary and all organs of state", it follows that Parliament, when enacting legislation such as the Insurance Bill, must give effect to the positive obligations section 7(2) imposes on the State.[14]

2.10. The same obligation is imposed on the Executive so that when it initiates legislation it must give effect to the rights in the bill of rights.

2.11. Based on the Constitutional Court's ruling in *Glenister v President of the Republic of South Africa,* we submit that passing the Insurance Bill without express and clear transformation objectives that seek to respect, protect, promote and fulfil the rights in the Bill of Rights, particularly the achievement of equality, would be unreasonable and inconsistent with Parliament's and the Executive's obligations under section 7(2) of the Constitution.

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[11] *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) para 189-190.

[12] *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) para 189-190.

[13] *Glenister v President of the Republic of South Africa* para 194

[14] *Glenister v President of the Republic of South Africa* para 194; *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) at para 69 (ruling that "in some circumstances, the correlative obligations imposed by the rights in the Bill of Rights will require positive steps to be taken to fulfil the rights"); *Carmichele v Minister of Safety and Security* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 44 (ruling that "in some circumstances there would also be a positive component which obliges the state and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection"); and *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors* 2000(1)SA545(CC), para.21.(ruling that "all statutes must be interpreted through the prism of the Bill of Rights. All law-making authority must be exercised in accordance with the Constitution [because the] Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance. As such, the process of interpreting the Constitution must recognise the context in which we find ourselves and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterises the constitutional enterprise as a whole.)

2.12. It is important for us to highlight that pursuant to their constitutional commitments and obligations to transformation and the achievement of equality, the Executive and Parliament have previously taken positive steps to transform other industries, such as, among others, the fishing and mining industries by adopting the Marine Living Resources Act 18 of 1998 and the Mineral *and Petroleum* Resources *De*velopment *Act* 28 of 2002 respectively.[15] The latter legislation contains express transformative objectives as required by the Constitution.

2.13. Among its objectives, section 2 of the *Marine Living Resources Act provides that ,*

'The Minister and any organ of state shall in exercising any power under this Act, have regard to the following objectives and principles: (j) the need to restructure the fishing industry to address historical imbalances and to achieve equity within all branches of the fishing industry'

2.14. In the case of *Bato Star Fishing* (Pty) Ltd *v Minister of Environmental Affairs and Tourism*,[16] the Constitutional Court upheld the validity of the transformation policy encapsulated in section 2(j) of the *Marine Living Resources Act.*

2.15. Similarly, the *Mineral* and Petroleum *Resources* Development *Act* provides in section 2 that:

> *the objects of this Act are to (d) substantially and meaningfully expand opportunities for historically disadvantaged persons, including women and communities, to enter into and actively participate in the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources*[17]

2.16. In the same way as the fishing industry, the Constitutional Court in *Agri SA v Minister for Minerals and Energy*[18] approved the validity of the transformation objectives in section 2 of the *Mineral* and Petroleum *Resources* Development *Act.*

2.17. In his acknowledgement and approval of the transformative objectives in the *Mineral and Petroleum Resources Development* Act, particularly in the context of the past exclusion of black people from access to mineral resources, Chief Justice Mogoeng remarked:

> *"[B]y design, the MPRDA is meant to broaden access to business opportunities in the mining industry for all, especially previously disadvantaged people. It is not only about the promotion of equitable access, but also about job creation, the advancement of the social*

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[15] See, also the Preamble and chapter 1 of the Competition Act 1998; Consumer Protection 2008; National Credit Act 2005.

[16] *Bato Star Fishing* (Pty) Ltd *v Minister of Environmental Affairs* and Tourism ZACC 15; 2004 (4) SA 490 (CC).

[17] Recently amended by *Act 49 of 2008 to* provide ''(d) substantially and meaningfully expand opportunities for historically disadvantaged persons, including women and communities, to enter into and actively participate in the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources; (e) promote economic growth and mineral and petroleum resources development in the Republic, particularly development of downstream industries through provision of feedstock, and development of mining and petroleum inputs industries;''.

[18] *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC); 2013 (7) BCLR 727 (CC)

and economic welfare of all our people, the promotion of economic growth and the development of our mineral and petroleum resources for the common good of all South Africans."[19]

2.18. The Preamble of the *Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* states that,

'The consolidation of democracy in our country requires the eradication of social and economic inequalities, especially those that are systematic in nature, which were generated in our history by colonialism, apartheid and patriarchy, and which brought pain and suffering to the great majority of our people.

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

These words drafted and adopted in 2000 still ring true 17 years later, more so in the Insurance Industry which remains largely untransformed and still reflecting our colonial and apartheid past.

2.19. We submit that these cases demonstrate the scope of the obligations imposed on the Parliament and the Executive towards the achievement of equality by transforming the insurance industry. It is against is background that our submissions must be understood and construed.

3. SUBMISSIONS ON SPECIFIC PROVISIONS OF THE INSURANCE BILL

'A collective failure of an organization to provide an appropriate and professional service to people because of their colour , culture or ethnic origin .It can be seen or detected in processes , attitudes and behaviour which amount to discrimination through unwitting prejudices, ignorance, thoughtlessness and racist stereotyping .'

Sir McPherson in his definition of institutional racism, from the Stephen Lawrence inquiry in the United Kingdom

Objectives of the Insurance Bill

3.1. Section 3 of the Insurance Bill provides the following as its objectives:

Objective of Act
3. The objective of this Act is to promote the maintenance of a fair, safe and stable insurance market for the benefit and protection of policyholders, by establishing a legal framework for insurers and insurance groups that—

[19] *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC); 2013 (7) BCLR 727 (CC) at para 61.

(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; and
(d) contributes to the stability of the financial system in general

3.2. While we commend the fact that the Insurance Bill makes reference to the necessity to promote the maintenance of a "fair" insurance market and the establishment of a legal regime that increases access to insurance for all South Africans, these objectives fall short of the constitutional necessities to transform the insurance industry and address historical imbalances and achieve substantive equality within that industry.

3.3. The problem is that 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 sections 7(2) and 9(2) of the Constitution. As illustrated in Table A below, extrapolated from the Financial Services Board Report of 2015, the insurance industry is one of the exceptionally non- transformed industries in the Financial Services Sector.

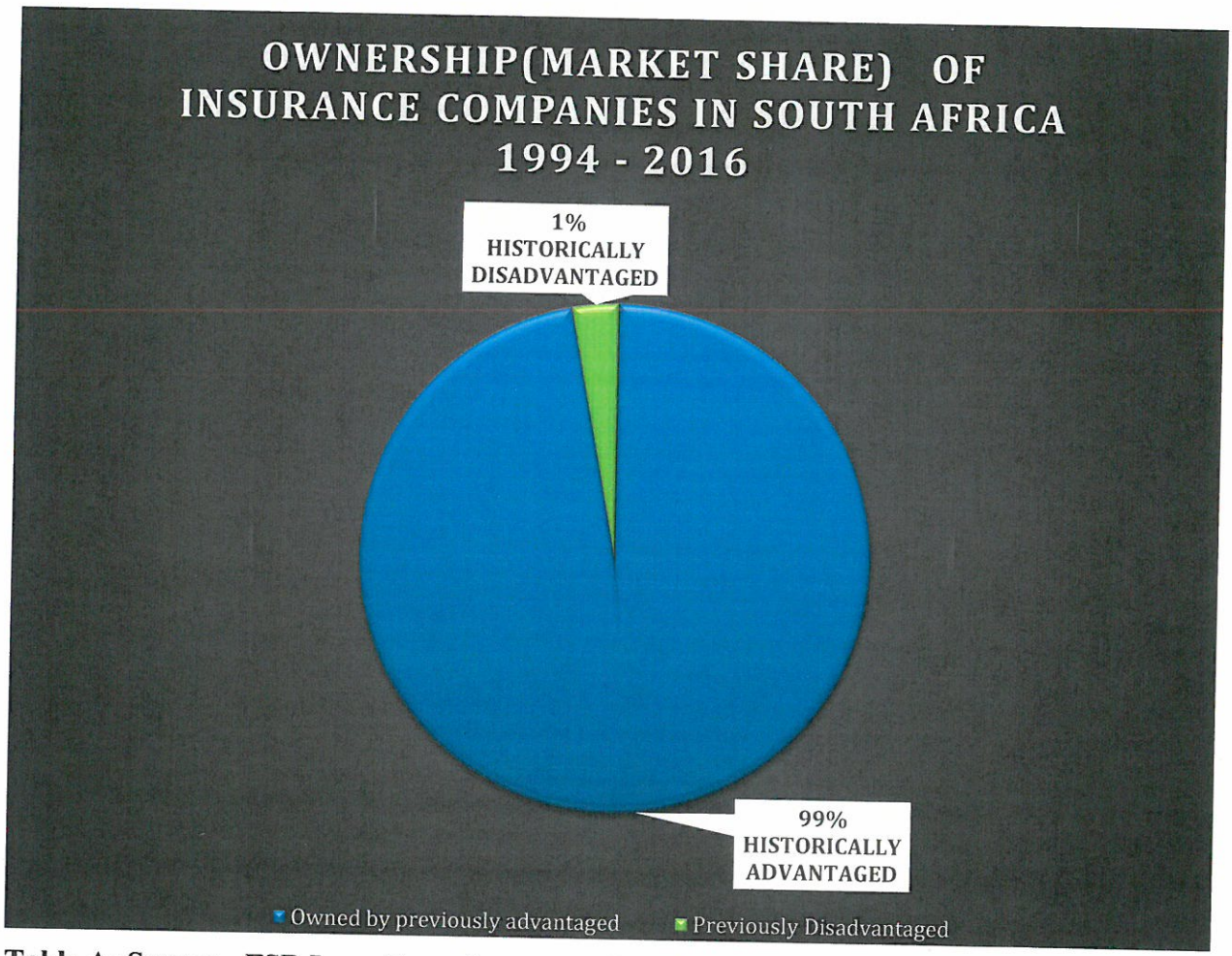

Table A: Source - FSB Long Term Insurance Individual Rating 2015

3.4. The literature on regulation supports the propositions that good regulation should be problem focused and goal oriented.[20] In a study conducted at a time of heightened concern about the global economy, professor Haines confirms that research in the area of regulation provides evidence that sharply defined and suitably enforced regulation can achieve set goals.[21] In the South African context, no regulatory reform can constitutionally be pursued without being underpinned by transformation imperatives. We submit that it is an affront to the Constitution for the Insurance Bill to fail to problematize transformation in the insurance industry and set goals to solve the transformation problem.

3.5. As the Constitutional Court observed in *Bato Star Fishing* (Pty) Ltd *v Minister of Environmental Affairs and Tourism*, our Constitution recognizes that decades of systematic racial discrimination entrenched by apartheid laws cannot be eradicated without positive action being taken.

3.6. And as held in *Glenister v President of the Republic of South Africa* at para 189, and other Constitutional Court cases, there is a constitutional obligation in section 7(2) of the Constitution to take positive and effective steps to respect, protect, promote and fulfil the rights in the Bill of Rights, without which renders the Insurance Bill unconstitutional.

3.7. Therefore, we submit that Parliament, pursuant to its positive obligations in section 7(2) of the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights, has an obligation 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.

3.8. We further submit that the Insurance Bill is unconstitutional to the extent that it fails to incorporate express transformation objectives. Without such incorporation, the Insurance Bill will not pass constitutional muster if challenged on constitutional grounds at a later stage.

3.9. More importantly, without such incorporation Parliament will fail in its constitutional obligation to respect, protect, promote and fulfil the rights in the Bill of Rights. Further, any steps taken by Parliament to pass this Insurance Bill in its current form will be ineffective and unreasonable and render the Insurance Bill unconstitutional.

3.10. In other words, just like the Constitutional Court in *Glenister v President of the Republic of South Africa,* found that the steps taken to establish the Directorate for Priority Crime Investigation (popularly known as the Hawks) without adequate independence were unreasonable and ineffective, the Insurance Bill will meet the same fate if passed without the incorporation of explicit goals to transform the insurance industry and address the imbalances of the past.

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[20] Fiona Haines, The Paradox of Regulation: *What Regulation Can Achieve and What It Cannot* (Edward Elgar Publishing 2011) at 8.

[21] Haines above at 8.

3.11. It is common cause that the insurance industry has been and continues to be dominated by a few companies. These companies were and continue to be controlled and owned predominantly by members of the communities that were privileged under apartheid.[22]

3.12. Therefore, there is a pressing need to ensure that access to this industry (not just the micro-insurance) is opened up to companies controlled and owned by members of designated groups that were previously excluded from this industry.

3.13. In keeping with this transformative objective, we find it problematic that the Insurance Bill seeks to distinguish between micro-insurance and macro-insurance business. We believe this will exacerbate the lack of transformation in the industry by opening up only one aspect of the insurance industry and not all. Section 1 defines micro-insurance business as follows:

> *"micro insurance business" means insurance business—*
> *(a) conducted in respect of any of the following classes and sub-classes of insurance business set out in Schedule 2— (i) life insurance business, classes 1, 3, 4 or 9; and (ii) non-life insurance business, in the sub-class personal lines in— (aa) classes 1, 2, 9, 11, 14 or 17; and (bb) class 10, but only to the extent that the insurance obligations directly relate to the classes referred to in item (aa); and*
> *(b) in the case of life insurance business and class 14 referred to in paragraph (a)(ii)(aa), in respect of which the aggregate value of the insurance obligations relating to each life insured under an insurance policy does not exceed the maximum amounts prescribed; and*
> *(c) in the case of non-life insurance business other than class 14 referred to in paragraph (a)(ii)(aa), in respect of which the aggregate value of the insurance obligations under an insurance policy does not exceed the maximum amounts prescribed; and*
> *(d) in respect of which the aggregate value of the insurance obligations under all insurance policies issued by the same insurer to the same policyholder does not exceed the maximum amounts prescribed under paragraphs (b) and (c);*
>
> *"micro insurer" means an insurer licensed to conduct only micro insurance business;*

3.14. We submit that the above provision should be scrapped from the Insurance Bill because it promotes the balkanization of the insurance industry and is likely to perpetuate the past imbalances. The Insurance Bill should rather proactively 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.

3.15. In *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* [23]the Constitutional Court ruled that "the transformation that our Constitution requires includes economic redress." Therefore, we submit that the constitutional commitment to transformation of the insurance industry and the opening up of business

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[22] See, Financial Services Board 18th Annual Report of the Registrar on the Results of the Long-term Insurance Industry for the Period ending 2015 (noting that 76.38% of the percentage of total assets in the long-term insurance in South Africa is held that 4 insurance companies being Liberty at 13.62%; MMI Holdings at 14.24; Old Mutual at 23.72% and Sanlam at 15.80%), available at https://www.fsb.co.za/Departments/insurance/Documents/LT%20Tables%202015.pdf

[23] *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC) para 46.

opportunities for persons previously disadvantaged by unfair discrimination must be affirmed and enforced in the Insurance Bill as a foundation objective.

3.16. At the moment, the objective of the Insurance Bill simply provide for the increase of access to insurance by all South Africans without specific reference to the need to remedy the imbalances of the past. It does not speak to the goal designed to increase insurance companies owned and controlled by people from designated groups. This omission renders the Insurance Bill unconstitutional because there is an obligation to set those goals. This is more so of Assets Under Management which anchor Insurance Companies. The illustration in Table B below indicates clearly that, in a period of 22 years of democratic rule, black owned companies have only managed to secure only 4% of the market.

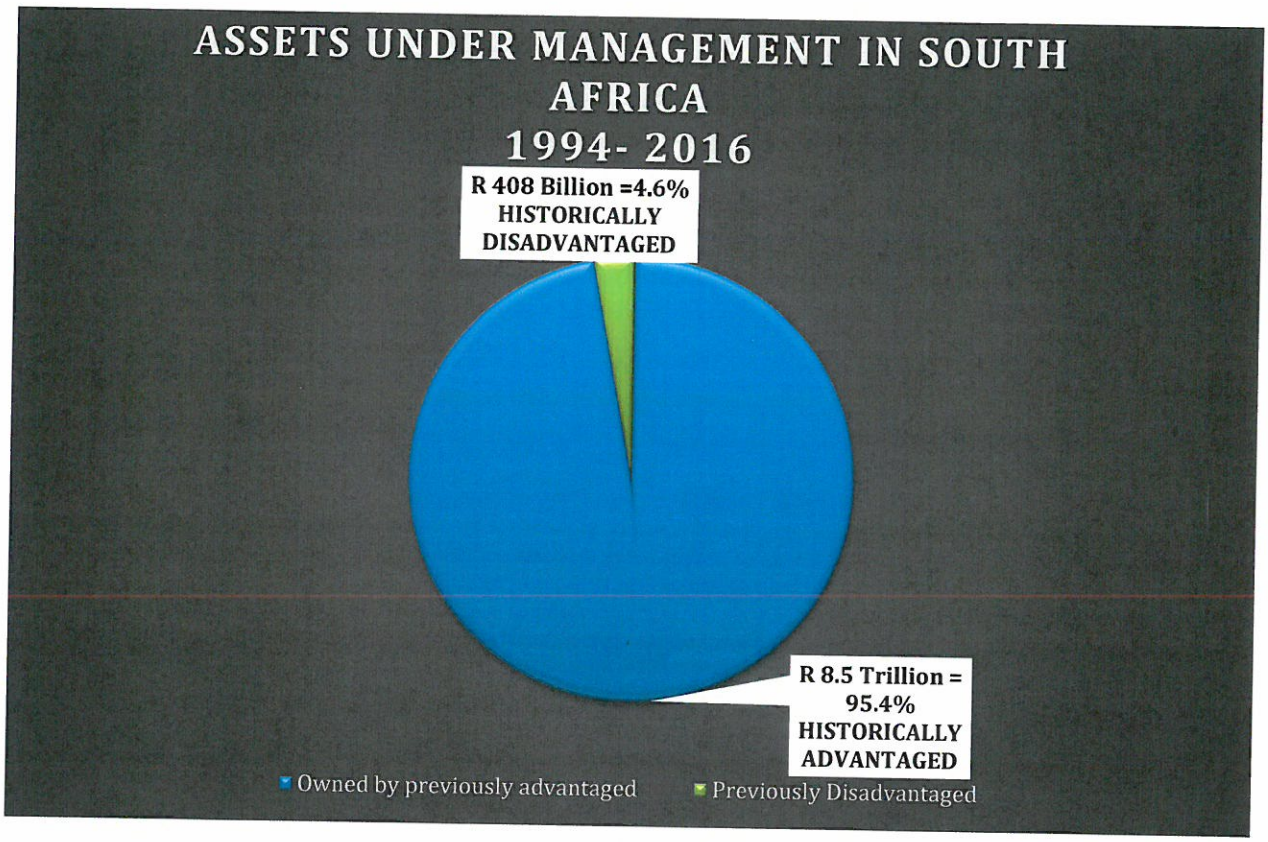

Table B: Source- Investment Managers, Annual Survey September 2016(*Excluding funds administered by the PIC and those administered by the GEPF: Africa Private Equity Fund Investments - GEPF Annual Report 2016)*

Powers and functions of Prudential Authority

4. Another major problem with the Insurance Bill is that it 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. Section 62 summarizes the powers and functions of the Prudential Authority:

General Powers and functions of Prudential Authority
62. (1) The Prudential Authority, in addition to other powers or functions conferred on the Prudential Authority by or in terms of any other provision of this Act or any other Act of Parliament—
(a) must take steps the Prudential Authority considers necessary to implement a regulatory framework that supports the objectives of the Act, including supervising and enforcing compliance with this Act;
(b) must take steps the Prudential Authority considers necessary to protect policyholders in their dealings with insurers;
(c) must determine the form, manner and period (if a period is not specified in this Act) in which any documentation, information or report must be published, disclosed, provided or submitted, that an insurer or a controlling company is required to publish, disclose, provide or submit under this Act; and
(d) may, at regular intervals, determine or amend any rate, parameter or percentage referred to or specified in this Act or a Prudential Standard relating to financial soundness by publishing a notice on the official web site.
(2) The Prudential Authority, in performing the powers and functions provided for, by or under this Act, including the making of Prudential Standards, must have regard to—
(a) the objective of this Act;
(b) international regulatory and supervisory standards; and
(c) the principle that requirements imposed on insurers or insurance groups and the exercise of supervisory.

4.1. The problem with this provision is that the Prudential Authority is not legislatively required to take into account the need to transform the insurance industry in the performance of its functions. This is deeply problematic given the social, political and economic history of South Africa, and the constitutional values and commitments contained in the Constitution. Therefore, we urge Parliament to reconsider this aspect of the Insurance Bill.

4.2. Furthermore and relatedly, section 65 of the Insurance Bill is problematic to the extent that it fails to acknowledge the need to build and grow the local insurance industry by promoting companies owned and controlled by members from previously disadvantaged groups so as to achieve substantive equality. The section provide as follows:

Determination of another jurisdiction as equivalent
65. (1) The Prudential Authority may by notice on the official web site determine that the requirements imposed by a foreign jurisdiction are equivalent to this Act if the Prudential Authority is satisfied that the laws, and supervisory and information sharing frameworks, established in that foreign jurisdiction meet the objects of this Act.
(2) The Prudential Authority may amend or repeal any determination under subsection (1) from time to time.

4.3. The problem with section 65 is that it does not acknowledge that South Africa has a unique political, social and economic history, particularly the constitutional commitments that seek to respond to

that history by imposing certain obligations to those entrusted with the implementation of legislation passed by Parliament. This historical context to the South African insurance industry and constitutional framework in which it operates is unique and not similar to other countries.

4.4. South Africa's legislative system is informed by the Constitution, which includes a positive obligation to transformation. Under such system, one can never find congruence between legislative objectives passed in South Africa and those passed in a foreign country, as section 65(1) seems to imply, because the constitutional basis will be distinct. No country in the world has a supreme Constitution that enjoins its Parliament to pass laws that have the objective to transform society by addressing the imbalances brought about by colonialism and apartheid, with a particular focus on designated groups. To this extent, we submit that section 65 would be constitutionally invalid if passed in its current form because it is impossible to implement without compromising the Constitution and its goals of achieving substantive equality. Further, the impugned provision is in conflict with the Constitution to the extent that it purports to permits the Prudential Authority to supersede the imperatives in the Constitution in favour of laws and objectives passed by a foreign country.

4.5. Time and again, the Constitutional Court has cautioned against importing foreign legal principles that ignore the political, social and economic history of South Africa. For instance, in dismissing an argument urging the South African government to have regard to certain European practices and systems when it sought to design its social security system, Justice Van Der Westhuizen reasoned:

> *the submissions put forward on behalf of the fifth respondent ignore the political, social and economic history of South Africa. There are countless vast differences between this country and the other countries referred to by the fifth respondent. The way social assistance is structured and administered in Denmark and Austria, or even Canada, or India, can hardly be compared to the South African situation. Our history is well known. It is one of colonialization, apartheid, economic exploitation, migrant labour, oppression and balkanization. Gross inequalities were deliberately and legally imposed as far as race and also geographical areas are concerned. Not only were there richer and poorer provinces, but there were "homelands", which by no stretch of the imagination could be seen to have been treated on the same footing as "white" South Africa, as far as resources are concerned. These inequalities also applied to social assistance – an area of governmental responsibility very closely related to human dignity. The history of our country and the need for equality cannot be ignored in the interpretation and application of section 126(3) of the Constitution.*[24]

[24] *Mashavha v President of the Republic of South Africa*, 2005 (2) SA 476 (CC) para 48. See also, *Bernstien v Bester No* 1996 (2) SA 751 (CC) at para 133 (commenting that the second reason is that I wish to discourage the frequent - and, I suspect, often facile - resort to foreign authorities. Far too often one sees citation by counsel of, for instance, an American judgment in support of a proposition relating to our Constitution, without any attempt to explain why it is said to be in point.)

4.6. In Kenya, the authorities are considering the Insurance Bill 2014. In this process, which is informed by the country's constitutional commitments, the authorities have clearly stated that one of the purposes of the introducing the insurance reforms is to "ensure that the legislation is practically applicable in the Kenyan market and environment and enhance the development of the Kenyan insurance industry."[25] Some of these objectives are encapsulated in the draft Bill as follows:

10. (1) In performing its functions, the Authority shall—
(b) have regard to—
(i) the need to implement international standards and best practice in relation to the regulation and supervision of insurance; and
(c) seek to promote—
(i) effective competition in the insurance market in the interests of consumers; and
(ii) the development of an inclusive insurance market.[26]

4.7. We demonstrate the Kenyan experience to highlight the fact that that while recognizing the necessity to implement international standards and best practices, the focus of any regulatory reforms in a developing country like South Africa must ensure that those reforms are practically applicable and relevant to the domestic conditions and realities. We submit that the Insurance Bill has not done this.

4.8. Therefore, Parliament has an obligation to amend section 65 and require the Prudential Authority to have regard to transformation imperatives before exercising its power under that provision, and we urge Parliament to take sufficient consideration of the political, social and economic history of South African in this regard.

Financial Sector Regulation Bill

4.9. Lastly, we note that the Financial Sector Regulation Bill, which regulates financial institutions including insurance companies, provides as one of its objectives the transformation of the financial services sector. It reads as follows:

7. (1)The object of this Act is to achieve a stable financial system that works in the interests of financial customers and that supports balanced and sustainable economic growth in the Republic, by establishing, in conjunction with the specific financial sector laws, a regulatory and supervisory framework that promotes—
...
*(f) **financial inclusion;***
*(g) **transformation of the financial sector; and***
(h) confidence in the financial system.

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[25] http://www.ira.go.ke/attachments/article/141/Brief%20stakeholders%20-%20Review%20of%20the%20Insurance%20Act,%20Chapter%20487%20of%20the%20laws%20of%20Kenya.pdf
[26] http://www.ira.go.ke/attachments/article/197/Draft%20Insurance%20Bill%202014-%20version%20003.pdf