

**JOINT SUBMISSION TO PARLIAMENT ON THE INSURANCE BILL [B1-2016]
BY THE FOUR BLACK OWNED INSURANCE COMPANIES IN SOUTH AFRICA
7 FEBRUARY 2017**

- **THE PGC GROUP/WORKERSLIFE**
- **UNION LIFE**
- **NESTLIFE**
- **BOPHELO LIFE**



A joint submission

- This submission is being presented jointly by the four black owned insurance companies in South Africa which regrettably, after 22 years of freedom, have a joint market share of no more than 1%.
- If this bill were to be signed today in its current form, the little market share of black insurance companies will shrink to zero and we will by default be back to the pre-1994 economic ownership framework .
- The resultant situation is that, based on the 22 years experience alluded above, black insurance companies will be excluded from macro insurance and be relegated to micro insurance.

Structure of our submission

- **Our Submission is anchored on four fundamental Pillars:**
 - South African Legislation Review with a particular emphasis on the transformation mandate imposed by the Constitution.
 - South African Case Law Review , the decided cases of the Constitutional Court and related cases concurring on the transformation mandate imposed by the Constitution.
 - Literature review on the historicity of the transformation discourse , picking on one of the key variables that inform that discourse in countries that have emerged from legislated racism and deliberate economic exclusions of black people.
 - Theoretical frameworks , with the dominant theory being the Distributive Justice Theory expounded by Greek Philosopher , Aristotle.

Introduction

- Our starting point is that , the South African Insurance Industry is well advanced, it is praised the world over for its stability and was resilient during the 2008 Financial crisis; its main fundamental problem is its lack of transformation.
- We submit that, we shouldn't be on over-drive on fixing something that has not been broken. Our main pre-occupation should be to fix what has been broken ; that is , transformation in the Insurance Industry.
- Our submission should not be misconstrued for being anti-regulation, whilst we do have serious reservations about the SAM regime, particularly for small , black insurance companies , we believe that , if Parliament agrees with us that this industry has to be transformed, we will automatically revisit those aspects of SAM that have a propensity of being barriers to transformation.

The core of our submission

- ‘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’. - By Blackstone

Preamble of our Constitution

- 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
- [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....

Unconstitutional elements of the Bill

- We 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.
- 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 obligations

The Constitutional Mandate

- 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.’

Decisions of the Constitutional Court

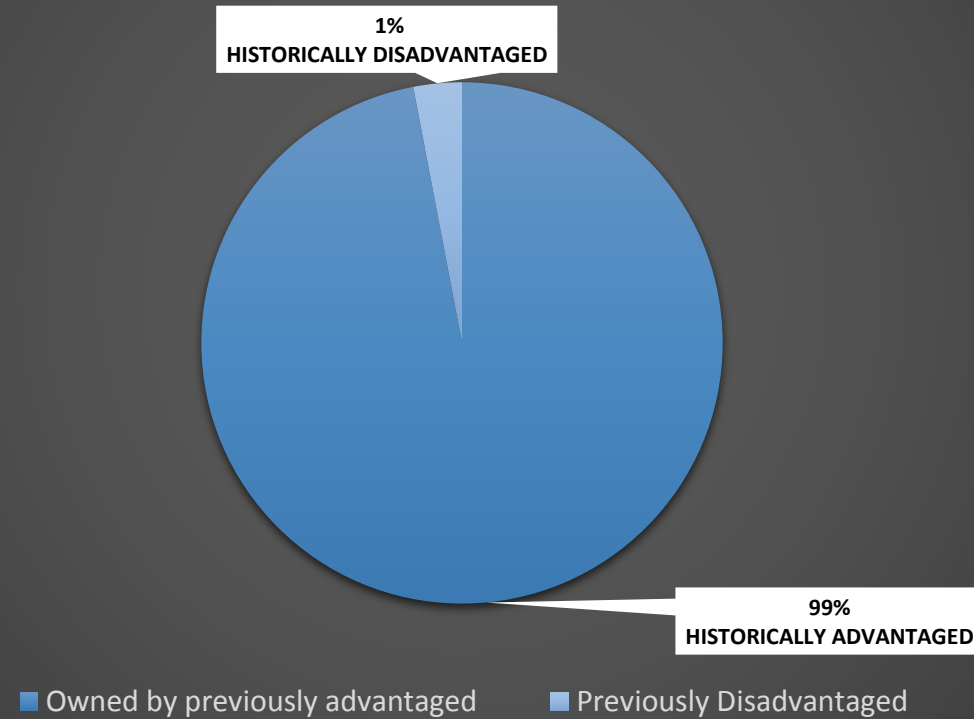
- The Constitutional Court has acknowledged that, measures that bring about transformation will inevitably affect some members of society adversely, especially those members of previously advantaged groups.
- Nevertheless, there is a positive constitutional commitment to achieving equality. *Bato Star 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.
- 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

Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

- 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...'*

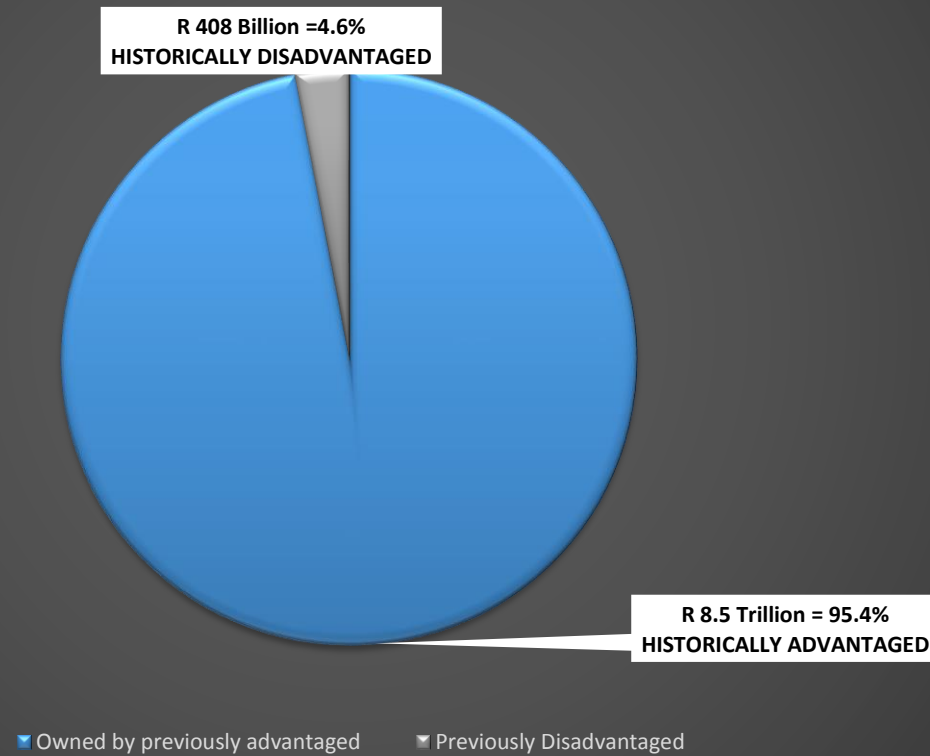
Current ownership reality of the Insurance Industry

OWNERSHIP (MARKET SHARE) OF INSURANCE COMPANIES IN SOUTH AFRICA 1994 - 2016



Current ownership reality of Assets under Management

ASSETS UNDER MANAGEMENT IN SOUTH AFRICA 1994- 2016



The bases of fear driving this change is unsound

- **The Bill seeks to sterilise resources, focusing on imaginary instead of real risk**

The intent of the Bill is to tighten compliance to prevent a once in a 200 years event, resulting in the sterilization of resources that should be used to grow the economy of the country today. The conversation instead should be about how insurance and retirement fund assets should be used to prevent an impending crises that will be brought to us by our increasing levels of unemployment.

- **The Bill will increase systemic risk as it seeks to promote only big players**

Systemic risk is not solved by pushing small players out of the industry as the Bill seeks to push small insurance companies which are mostly black out of the mainstream into micro insurance.

- **Insurance and Retirement Fund prudential will always take second place to Banking prudential under RB**

Sheer common sense should dictate that the Reserve Bank will always give priority to Banking regulation, insurance and retirement fund prudential will always come after Bank. Moving Insurance prudential from where it is priority to where it is second best could never improve insurance prudential.

Why the Reserve Bank should not be allowed to

- **Ownership of the Reserve Bank**

The private ownership of the Reserve Bank and its independence will mean that where the people have entrusted parliament with responsibilities over their savings in insurance and retirement fund, parliament has outsourced those responsibilities to a party they have no control over.

- **Failure to protect consumers**

The Banking Industry in South Africa is the best in the world, but it does not mean that South Africans have the best banking services in the world, the Reserve Bank has regulated without due regard to consumers, why should it be given power of consumer savings created out of its domain.

- **Failure to transform the Banking Industry**

The Reserve Bank is hostile to black banks, except for VBS bank all homeland banks some of which were acquired by black operators were regulated into extinction.

The Bill should instead open up Financial Services

- Our submission is that , parliament has an opportunity to break down this interwoven , carefully crafted and well executed exclusion strategy of black people in the financial services sector by taking bold decisions.
- We submit that, the current practice that insurance companies in South Africa are compelled to use Banks , Auditing Firms and Actuarial firms that have been ring-fenced is not assisting the transformation agenda.
- The secrecy around which service providers are to be used and what criteria has informed their preference is an affront to this parliament because , this is not legislated, but it is standard practice .
- With the banking and the auditing sectors being controlled by a few white people, this practice further haemorrhages any attempt to transform the financial services.
- Instead, the Bill should in an unambiguous and crystal clear language champion the use by insurance companies of emerging Actuarial firms, Auditing Firms and other banks.

Amendment of the Preamble (1)

- Whilst black people are major consumers of financial services due to their numerical superiority, black control of financial services is less than 1%
- The current preamble or the long title of the Insurance Bill is silent pertaining to transformation in the insurance industry.
- We recommend that the preamble or the long title of the Insurance Bill must give due regard to transformation. In other words, it must expressly state that it will give due regard to transformation

Amendment of Section 3 of the Insurance Bill (2)

- The Insurance Bill does not make an express commitment to transform the insurance industry and the inclusion of previously disadvantaged persons in the industry.
- We recommend that section 3 of the Insurance Bill be amended by the incorporation of a subsection (e) which should read as follows:

‘transforms the insurance industry to address historical imbalances and achieve equity within the insurance industry’;

Capturing the South African Context (3)

- Time and again, the Constitutional Court has cautioned against importing foreign legal principles that ignore the political, social and economic history of South Africa.
- 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, this is more so of the SAM regime.
- We recommend that section 2(2) of Insurance Bill be amended by the inclusion at the end of the sentence the following words:

‘with due consideration of the South African context’;

Amendment of Section 10 of the Insurance Bill(4)

- A major part of the proposed prudential supervisory framework is contained in section 10 of the Insurance Bill. This section reads: **Designation of insurance group and licensing of controlling company,**
- 10. (1) (a) *“The Prudential Authority may, for the purpose of facilitating the prudential supervision of insurers, designate as an insurance group”.*
- We recommend that section 10 be removed from the Insurance Bill or alternatively be amended and enjoin the Prudential Authority to exercise its power by taking into account transformation of the insurance industry, particularly the impact of its decisions on people who were previously disadvantaged by unfair discrimination.
- We remind Parliament that this recommendation is predicated upon a principle that has been affirmed by the judiciary time and again that “the Constitution makes an exception because it recognizes that substantive equality can be achieved only by providing advantages to groups of people upon whom apartheid imposed heavy disadvantages.

Designation as a Group (5)

- Due to past unfair discrimination, most businesses owned and controlled by persons from designated groups have distinct business practices of raising capital by diversifying their investment portfolios to include in their stable different types of businesses.
- Their business portfolios may include insurance business and other lines of businesses, which all feed into their overall business group. Despite this, the Insurance Bill seeks to regulate these businesses as a single business group without regard to the fact that some activities in the group might be non-insurance related.
- The problem is that once a designation as an insurance group is made under the Insurance Bill, the Prudential Authority would enjoy broad authority, particularly in the context of the power to review a designation under section 10(3), to supervise the insurance group including the non-insurance related activities of the group.

Designation as a Group Cont...

- We recommend that section 10 be removed from the Insurance Bill or alternatively be amended to ensure that the Prudential Authority, when designating an insurer as an insurance group, takes into account insurance related activities of the insurance group only and prevent the implicit conferment of power to regulate other industries other than insurance to the Prudential Authority.
- We further recommend that section 10(4) of the Insurance Bill be amended to provide parameters for the exercise of the power within that provision. Parliament should provide that the power to revoke or amend a designation as an insurance group should be exercised with due regard to the transformation objectives of the Insurance Bill.
- We submit that section 10(4) is overbroad because it confers unfettered power to the Prudential Authority to revoke or amend a designation of an insurance group. We submit that this power must be constrained by providing guidelines on how it should be exercised.

Micro Insurance and balkanisation (6)

- 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.
- We submit that parliament should consider the implications of the introduction of micro-insurance against the backdrop of what we submit is an untransformed insurance industry.
- More specifically should be the consideration whether the introduction of micro-insurance will not serve to further balkanise the insurance industry and create permanent walls between those who are relatively rich and have a bigger share in the insurance industry and those who are relatively poor and having a smaller share in the insurance industry.

Micro Insurance Cont...

- We submit that the micro insurance provision should be scrapped from the Insurance Bill because it promotes the balkanization of the insurance industry and is likely to perpetuate 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.
- Our submission is that, it would have helped if we could get a combined hybrid of the micro-insurance and the macro-insurance frameworks rather than creating balkanised zones in insurance.

Equality test of the Bill (7)

- Parliament should take cognizance of its obligations in the Constitution to positively promote, respect and advance substantive equality.
- We urge parliament to take this into account before passing the Insurance Bill.
- While the Financial Sector Regulation Bill makes provision for the transformation of the financial sector, we submit given that there is a distinct comprehensive legislative framework in the Insurance Bill specific to the insurance industry, the Insurance Bill should make specific commitments towards the insurance industry for which the Prudential Authority should be accountable for achieving them.

Precedent on Transformation , Marine Living Resources Act

- 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.
- 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’

Precedent on transformation, Mineral and Petroleum Resources Development Act

- The *Mineral and Petroleum Resources Development Act* contains express transformative objectives as required by the Constitution. It 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

The positive implications of incorporating transformational objectives in the Bill

- There will be no lip service given to issues of transformation in the insurance industry because the Prudential Authority and Minister of Finance will be duty bound to give effect to that goal and the constitutional injunction.
- Transformation in the insurance industry will become legally enforceable through the courts. Courts and tribunals will have an obligation to review decisions of the Prudential Authority to ensure compliance with, among other things, the objectives of transformation.
- Parliament and the Judiciary will have a political and legal mechanism respectively to hold the executive, and in particular the Prudential Authority to account in relation to constitutional imperatives of transformation of the insurance industry.

Towards the centenary in 2094 and still sitting at 3% of black insurance ownership

- The fact that, in a period of 22 years, the market share of black owned insurance companies hasn't been able to pass the 1% mark indicates that, at this pace, we might as well have blacks occupying a 3% of less of the market share by 2094, when we celebrate the centenary of the democratic breakthrough.
- This is an unsustainable trajectory that may have disastrous social and economic consequences for South Africa in the long term.
- This is not only a betrayal to this generation but also to future generations.

Conclusion

- The current appalling statistics about transformation in the insurance industry are a reminder to all of us about the constitutionally enshrined principles of transformation that seem to have been forgotten over the past 22 years.
- The incorporation of transformation imperatives must require the Prudential Authority to adopt measures designed to protect and advance persons or categories of persons disadvantaged by the mischief of past discrimination so as to promote the achievement of equality and to regularly report to Parliament on its achievements in this aspect.
- We conclude by reiterating that, if this bill is signed without giving effect to transformation objectives, besides the fact that it will shrink the ownership of black insurances companies to zero, it would be a monumental betrayal to the thousands of our martyrs who died for our freedom.