

**Cliffe Dekker Incorporated:
The Status of South Africans
of Chinese Descent**

Prepared for Empowerdex (Proprietary) Limited.

INTRODUCTION

Cliffe Dekker Incorporated is pleased to furnish this assessment of the status of South Africans of Chinese descent for its client Empowerdex Limited. We trust that the following document will enable Empowerdex to fully assess the scope for inclusion of South Africans of Chinese descent within the context of broad based black economic empowerment and other similar socio economic empowerment initiatives in South Africa.

Cliffe Dekker has published a widely acknowledged guidebook to black economic empowerment in South Africa, which guidebook may be downloaded from our website at URL: <http://www.cliffedekker.com>. This publication has been distributed to in excess of 6000 recipients.

BASIS FOR ANALYSIS

We are briefed with an instruction to comment upon whether South Africans of Chinese descent fall within the ambit of the various definitions provided by current legislation and regulations pertaining to broad based socio economic empowerment.

In considering this question, Cliffe Dekker will have regard to a variety of legislative and regulatory instruments including the Constitution of the Republic of South Africa Act¹, the Preferential Procurement Policy Framework Act², the "Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry" ("Mining Charter") adopted in terms of the Mineral and Petroleum Resources Development Act³, the "Charter for the South African Petroleum and Liquid Fuels Industry on Empowering Historically Disadvantaged South Africans in the Petroleum and Liquid Fuels Industry" ("Petroleum Charter") provided for in the Petroleum Products Amendment Bill⁴ and the Broad Based Black Economic Empowerment Act⁵. In so doing, Cliffe Dekker will seek to establish whether South Africans of Chinese descent would qualify to benefit from those legislative and regulatory instruments.

Section 9 of the Constitution of the Republic of South Africa Act states at section 9(1):

Everyone is equal before the law and has the right to equal protection and benefit of the law.

Section 9(2) of the same Act states that:

***Equality includes the full and equal enjoyment of all rights and freedoms.
To promote the achievement of equality, legislative and other measures***

¹ Act 108 of 1996

² Act 5 of 2000

³ Act 28 of 2002

⁴ Bill 25B of 2003

⁵ Act 53 of 2003

designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

The definition of a "historically disadvantaged individual" is provided in terms of Preferential Procurement Regulations, 2001 issued in terms of the Preferential Procurement Policy Framework Act and states:

“Historically Disadvantaged Individual (HDI)” means a South African citizen

(1) who, due to the apartheid policy that had been in place, had no franchise in national elections prior to the introduction of the Constitution of the Republic of South Africa, 1983 (Act No 110 of 1983) or the Constitution of the Republic of South Africa, 1993 (Act No 200 of 1993) (“the Interim Constitution”); and / or

(2) who is a female; and / or

(3) who has a disability:

Provided that a person who obtained South African citizenship on or after the coming to effect of the Interim Constitution, is deemed not to be an HDI

The Petroleum Charter defines the term "historically disadvantaged South African" as:

[referring]... to all persons and groups who have been discriminated against on the basis of race, gender and disability.

The Mining Charter defines the same term "historically disadvantaged South African" as follows:

[referring]... to any person, category of persons or community, disadvantaged by unfair discrimination before the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993) came into operation.

The Broad Based Black Economic Empowerment Act defines the term "Black people" as:

a generic term which means Africans, Coloureds and Indians;

ANALYSIS: PRE 1984

The Population Registration Act⁶ provided for three separate racial categories. These were:

- ***"coloured person" means a person who is not a white person or a native;***
- ***"native" means a person who in fact is or is generally accepted as a member of any aboriginal race or tribe of Africa;***
- ***"white person" means a person who in appearance obviously is, or who is generally accepted as a white person, but does not include a person who, although in appearance obviously a white person, is generally accepted as a coloured person.***

These definitions were substantially elaborated over the remaining 41 years of the operation of the Population Registration Act, with the category "Indian group" entering the racial lexicon at a latter date and distinguishing within the original definition of "coloured person" those persons being members of any race or tribe whose national home was India or Pakistan. However, it is submitted that at the very outset of the operation of the Population Registration Act, there were for all intents and purposes only three major racial categorisations in South Africa, being "coloured person", "native" (later amended to read "Bantu") and "white person".

Proclamation 46 of 1959⁷ further refined membership of the classification "coloured person" to include seven sub-categories, being "Cape Coloured", "Malay", "Griqua", "Indian", "Other Asiatic", "Other Coloured" and (most significantly) "Chinese". A Chinese person was thus a "coloured person" (i.e. other than a "white person" or a "native/Bantu") who was also a member of a race or tribe whose national home was China.

⁶ Act 30 of 1950 (repealed by Act 114 of 1991)

⁷ Government Gazette 6191 of 6 March 1959

While it is extremely difficult to trace the development of the Apartheid era racial categorisations through their often-haphazard regulatory evolution, it must be accepted that citizens and residents of South Africa who were of Chinese descent were considered to be other than a "white person" with effect from the promulgation of the Population Registration Act.

Over the following 34 years prior to 1984, reference is made in several items of legislation to the terms "Chinese person" and "Chinese group", and without exception, all of these references involve the identification of Chinese people in South Africa as qualifying for rights substantially diluted when considered in relation to persons defined as "white persons".⁸ As members of the "coloured persons" group, Chinese people in South Africa were subject to the provisions of the Group Areas Act⁹, Prohibition of Mixed Marriages Act¹⁰ and the limitations upon franchise contained in the Republic of South Africa Constitution Act¹¹ as well as a host of other legislation ranging from education to health care.

In summary, until at least 1984, Chinese people in South Africa were subject were subject to the same levels of unfair discrimination (as contemplated in section 9(2) of the Constitution of the Republic of South Africa Act) as applied to all "coloured persons" including "Indians".

ANALYSIS: POST 1984

The Republic of South Africa Constitution Act¹² entrenched the definition of "coloured person", "white person" and "Indian" on a similar basis as obtained prior to its enactment. However, the definition of "coloured person" was narrowed as follows:

⁸ See Disability Grants Act 27 of 1968; Blind Persons Act 26 of 1968; War Veterans Pensions Act 25 of 1968; Aged Persons Act 81 of 1967; Liquor Act 30 of 1928, amongst many others.

⁹ Act 36 of 1966 (repealed by Act 108 of 1991)

¹⁰ Act 55 of 1949

¹¹ Act 32 of 1961 (repealed by Act 110 of 1983)

¹² Act 110 of 1984 (repealed by Act 200 of 1993)

'Coloured person' means a person classified as a member of the Cape Coloured, Malay or Griqua group or the group Other Coloureds in terms of the Population Registration Act, 1950

The definition for "Indian" was stated to be:

'Indian' means a person classified as a member of the Indian group in terms of the Population Registration Act, 1950

It is noted that by the time of the adoption of the Republic of South Africa Constitution Act, the term "Indian" had been excised from the definition of "coloured person" as had the term "Chinese". It is submitted that prior to the adoption of the Republic of South Africa Constitution Act, the term "Chinese" had been absorbed into the category "Indian". While the exact nature of this reorganisation is not apparent from resources at our disposal at the time of writing, evidence of this change is apparent from the definition of the term "the Indian, Chinese and Other Asiatic population group" provided in terms of the Prohibition of Political Interference Act¹³ which stated:

'the Indian, Chinese and Other Asiatics population group' means the persons who are coloured persons as defined in the Population Registration Act, 1950, and are members of the Indian or Chinese group or the group Other Asiatics as prescribed and defined by proclamation under section 5 of the said Act, including all persons who have in terms of the said Act been classified as members of the one or the other of the said groups

This notwithstanding, one of the most significant change in the status of Chinese people in South Africa occurred with the enactment of the Group Areas Amendment Act¹⁴ which provided in section 49D:

The provisions of this Act shall not prohibit the holding, acquisition or occupation by a member of the Chinese group, which in terms of section

¹³ Act 51 of 1968 (repealed by Act 104 of 1985)

¹⁴ Act 101 of 1984

12 (2) has been defined a group or has been deemed to have been so defined and declared or deemed to have been declared a group for the purposes of this Act, of any land or premises which by virtue of the provisions of this Act may only be held or occupied by a member of the white group: Provided that the provisions of this subsection shall not apply to a man who is a member of the said Chinese group and between whom, and a woman who in terms of section 12 (1) (b) (i) or (c) (i) or a proclamation under section 12 (2) is a member of the Black, Coloured, Indian or Malay group, there exists a marriage, or who cohabits with such a woman, and that for the purposes of this Act such a man shall be deemed to be a member of the group to which that woman belongs.

In essence then, and with effect from the promulgation of the Group Areas Amendment Act, Chinese people in South Africa were no longer subject to the unfair discrimination contemplated under the Group Areas Act. However, the unfair discrimination against Chinese people in South Africa in terms of Population Registration Act, the Republic of South Africa Constitution Act and all other discriminatory legislation applicable to "coloured persons" and "Indians" remained in place until the repeal of that legislation in the early 1990's.

Accordingly, it is submitted that the status of Chinese people in South Africa following 1984, differed from that of "coloured persons" and "Indians" only to the extent that they were exempted from the provisions of the Group Areas Act.

ASSESSMENT

Prior to 1984, Chinese people in South Africa were subject to unfair discrimination as contemplated in section 9(2) of the Constitution of the Republic of South Africa Act. As such, they would fall within the definitions of:

- Historically Disadvantaged Individual as contemplated in the Preferential Procurement Policy Framework Act provided that they were citizens prior to the coming into effect of the Constitution of the Republic of South Africa Act 200 of 1993;

- Historically Disadvantaged South Africans as contemplated in the Petroleum Charter provided that they are citizens;
- Historically Disadvantaged South Africans as contemplated in the Mining Charter provided that they were citizens prior to the coming into effect of the Constitution of the Republic of South Africa Act 200 of 1993;
- Black people as contemplated in the Broad Based Black Economic Empowerment Act.

The position applicable following 1984 differs only to the extent that Chinese people in South Africa were offered limited relief from the provisions of the Group Area Act, which relief was not enjoyed by other members of the categories "coloured persons" and "Indians".

CONCLUSION

It is Cliffe Dekker's considered view that the breadth of discriminatory legislation applicable to Chinese people in South Africa between 1984 and 1993 is such that any suggestion that they should not qualify as being "Black people", "Historically Disadvantaged South Africans" or "Historically Disadvantaged Individuals" would patently unfair and, quite possibly, unfairly discriminatory as contemplated in section 9 of the Constitution of the Republic of South Africa Act.