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Review of the efficacy of the Companies Act 71 of 2008 in regulating employee share-ownership schemes to achieve socio-economic development

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ABSTRACT

The black majority in South Africa endured social and economic hardship under apartheid. Millions still lack everyday access to essential resources as a result of apartheid policies, even though the government has introduced legislative and institutional frameworks to alleviate poverty and inequality. This article considers the prospect of using employee share-ownership plans (ESOPs) to address issues of inequality in South Africa. These are procedures that makes it relatively easier for employees to hold shares of a company for their personal benefit. ESOPs are a type of investment in which businesses and employees set money aside in the hopes of generating returns in the future. The article explores the Companies Act 71 of 2008, which governs the administration of ESOPs, and argues that without capital growth, ESOPs cannot combat poverty effectively; however, government engagement through legislative reform and financial assistance could make it more feasible to adopt ESOPs. While many theories have been advanced in regard to economic growth, the article supports Kelso's binary economics theory, which holds that workers depend on capitalism and capital ownership.

Keywords: ESOPs; inequality; capitalism; employees; ownership; economic growth; authorisation of shares; share options.

1 INTRODUCTION

The socio-economic legacy of apartheid has proven difficult for the post-apartheid state to resolve since the latter's inception in 1994.[1] Despite progress in tackling this legacy, high rates of poverty, inequality, and unemployment persist.[2] The ANC-led government believes that an interventionist or developmental state is the best way to change the economy, provide jobs, and address the severe divides that the majority black population faced.[3] With the aim of overcoming the socio-economic injustices of the colonial era, South Africa adopted Vision 2030, which is to be achieved through implementation of the National Development Plan (NDP).[4] Clearly, there was a need for South Africa to establish and adopt a legal framework that promotes development both at the local and national level post-independence.

Chapter 3 of the NDP focuses on the economy and employment. It maintains that the quest to improve the living standards of South Africans can only be fully realised by achieving full employment, decent work and sustainable livelihoods. Arguably, creating jobs could contribute to poverty reduction; however, employment by itself might not address the root causes of poverty.[5] Hence, there is a need for South Africa to establish meaningful ways to address poverty and inequality.

The use of employee share-ownership plans (ESOPs) may enable workers to participate in the operations of the company where they work and collect dividends from their shares, thereby gaining both financial and participatory benefits. This article investigates the extent to which South Africa's Companies Act[6] facilitates the formation and operation of ESOPs for the benefit of employees as well as other stakeholders,

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1 Karriem A & Hoskins M "From the RDP to the NDP: A critical appraisal of the developmental state, land reform, and rural development in South Africa" (2016) 43(3) *Politikon* 325 at 325–343.

2 Karriem & Hoskins (2016).

3 Karriem & Hoskins (2016).

4 Fourth National Development Plan (NDP4) available at https://www.npc.gov.na/national-plans/national-plans-ndp-4/ (accessed 8 August 2025).

5 Awarab M *Applying employee share-ownership schemes as a transformation mechanism aimed at decreasing poverty levels in South Africa: A comparative socio-legal perspective* (LLD thesis, UNISA 2021).

6 Act 71 of 2008.

including employers. Yet before testing the efficacy of South Africa's corporate provisions in aiding the operation of ESOPs, it is crucial to outline the rationale for ESOPs.

The adoption of ESOPs by companies assists in realising the objectives of the Broad-Based Black Economic Empowerment Act,[7] which are

> [to] promote the achievement of the constitutional right to equality, increase broad-based and effective participation of black people in the economy and promote a higher growth rate, increased employment and more equitable income distribution; and establish a national policy on broad-based black economic empowerment so as to promote the economic unity of the nation, protect the common market, and promote equal opportunity and equal access to government services.[8]

Although participation in ESOPs is not limited to black employees, in view of the nature of the colonial era it is mostly black employees who are affected by poverty and unable to access resources meant for development. It is on this basis that ESOPs, though available to all types of employees, will contribute especially positively to the lives and livelihoods of black employees and their dependents.

2 THE RATIONALE FOR ESOPS

Before looking at the rationale for ESOPs, it is essential to lay a foundation for the meaning of a share. The case of *Borland's Trustees v Steel* provides a clear definition of a share, stating that it refers to

> the interest of the shareholder in the company measured by a sum of money, for the purpose of liability in the first place, and of interest in the second. A share is an interest measured by a sum of money and made up of various rights contained in the contract, including the right to a sum of money of a more or less amount.

Similarly, the Companies Act defines a share as "one of the units into which the proprietary interest in a profit company is divided".[9] The definitions provided in the *Borland's* case and in terms of the Companies Act both talk about the proprietary interests

7 Act 53 of 2003.

8 Preamble of the Broad-Based Black Economic Empowerment Act 53 of 2003.

9 Section 1 of the Companies Act 71 of 2008.

that the holder of the shares has in relation to the shares. The legally enforceable right to own or utilise property in conformity with an official recognition of that right is known as a proprietary interest.

An employee share scheme is defined in the Companies Act as

> a scheme established by a company, whether by means of a trust or otherwise, for the purpose of offering participation therein solely to employees and officers of the company or a subsidiary of the company, either (i) by means of the issue of shares in the company; or (ii) by the grant of options for shares in the company.[10]

According to Mazibuko, an ESOP gives workers the chance to own shares in the firm and have a say in how the business is run.[11] An employee share ownership scheme refers to the process that enables employees to hold shares in their employer's business and benefit from such shares.[12] Put it differently, employers and employees can invest through an ESOP, setting aside money in the hopes of receiving returns later.[13]

In the African context, ESOPs are not widely used. The reasons may be closely related to the employer's inability to establish and operate ESOPs. Operating ESOPs may prove difficult for an employer due to financial constraints. Regardless of this hurdle, certain employers, as well as employees, may decide to establish ESOPs due to the benefits they hold. There are various reasons why an employer may introduce ESOPs in the workplace, including ones in relation to business succession, the fight against insolvency, and employee loyalty and commitment.

2.1 Benefits of ESOPs for employers

ESOPs are used for a number of goals, including as a means for raising capital for business needs and promoting privatisation in previously state-owned enterprises. They are also

[10] Section 95(1)(c) of the Companies Act.

[11] Mazibuko NE & Boshoff C "Employee perceptions of share ownership schemes: An empirical study" (2003) 34(2) *South African Journal of Business Management* 31.

[12] Cassim FHI et al. *Contemporary company law* 2nd ed Claremont: Juta (2012) 10.

[13] Laopodis N *Understanding investments: Theories and strategies* 2nd ed Oxon and New York: Routledge (2021) at 15.

used to carry out reform measures and increase ownership.[14] Some of these reasons are briefly discussed below.

2.1.1 Business or ownership succession

Entrepreneurs establish businesses for a variety of reasons. Motivating factors include an interest in taking on new challenges, overcoming challenges, setting personal goals, improving one's productivity, managing resources, and working with experts.[15] Other factors that inspire entrepreneurs are the desire to be one's own boss; the enjoyment of managing a business and directing others towards predetermined goals, mobilising resources, and enlisting a labour force to accomplish objectives; competitiveness; and wishing to showcase one's abilities.[16]

Regardless of these goals, all entrepreneurs intend to make money and, importantly, achieve business succession. Business succession is the process of planning for the transfer of ownership to ensure the founder's goals and legacy continue**.** In other words, even after the death or departure of the business owner from the business, such a business will continue to pursue the goals and objectives for which it was formed.[17]

2.1.2 Insolvency

Insolvency refers to the situation where one's liabilities exceed one's assets, resulting in the inability to pay debts when they become due.[18] A court-granted insolvency order removes the insolvent person's control over their estate, placing it under the authority of a trustee. The trustee administers the insolvent estate for the benefit of the creditors. Insolvency is a process that limits a company's right to continue practising under normal business conditions.

Notably, ESOPs can be used as a means to avoid insolvency and liquidation because they have the potential to increase the employee's loyalty and productivity: when loyalty

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[14] Gates JR & Saghir J "Employee stock ownership plans (ESOPs): Objectives, design options and international experience" Discussion Paper, The World Bank (1995) available at https://documents1.worldbank.org/curated/en/298931468741588461/pdf/multi-page.pdf (accessed 31 March 2024).

[15] Medaković V et al. "Motives for starting a business" Paper presented at the "Interdisciplinary approach to quality" conference, Sarajevo: Faculty of Mechanical Engineering, University of East Sarajevo (2015) at 108.

[16] Medaković et al. (2012).

[17] Awarab (2021).

[18] Awarab (2021).

increases, so do productivity and profits. With an increase in productivity, the possibility of making a loss and running into insolvency becomes slimmer. Moreover, by using the corporate processes of business rescue and adoption of ESOPs, companies in financial distress can become profitable.[19]

2.1.3 Employee loyalty and commitment

It is essential to ensure that employees identify with the organisation and thereby promote loyalty. In other words, employees become loyal to employers if they gain some form of ownership or reward. This is important because, as joint owners of the employer's business, employees then have an incentive to be loyal to the employer, as this is mutually beneficial.

2.2 Benefits of ESOPs for employees

2.2.1 Financial assistance to buy shares in the employer's business

The Companies Act is structured in a way that enables employers to provide employees with the finances to buy shares in the employer's business, provided that statutory requirements are met. Section 44 of the Act explicitly permits the employer's business to provide financial assistance to employees. Before such financial assistance may be provided to employees, the employer's business which is offering this financial assistance must comply with the requirements set out in section 97. In addition, the board of such a company must be satisfied that (i) immediately after providing the financial assistance, the company would remain solvent and liquid; and (ii) the terms under which the financial assistance is proposed to be given are fair and reasonable to the company.[20]

Once these requirements are complied with, a company can offer to implement the ESOPs and provide financial assistance to its employees to partake in ownership. The statutory requirements are discussed in detail further below.

Although it necessitates overcoming complicated legal regulations, establishing an ESOP is a strategic step to match employee interests with shareholder profit. In order to maintain the fundamentals of sound corporate governance, businesses must abide by

[19] Awarab (2021).

[20] Section 44 (3)(a) and (b) of the Companies Act.

sections 95(1)(c) and 97 of the Companies Act.[21] During the issuance of shares or financial aid, these parts provide accountability, transparency, and the preservation of stakeholder rights. However, the actual implementation of section 97 can be a laborious process that frequently necessitates stringent compliance procedures. Alternatively, getting a special resolution, which usually needs the consent of 75 per cent of the shareholders, acts as a high-level authorisation for important measures.

Despite the stringent statutory requirements under section 97, firms may consider the onerous compliance measures of section 97 to be relatively unimportant due to the procedural simplicity and familiarity of enacting a special resolution. Nevertheless, convenience should not come at the expense of compliance. Respecting the strict, sometimes burdensome, criteria of section 97 prevents future lawsuits and fosters trust with regulators. As a result, even while a special resolution is an effective instrument, it should be utilised in addition to, rather than in place of, careful adherence to all pertinent, prescriptive portions of the Companies Act in order to guarantee the ESOP's legal soundness.

2.2.1 Reaping the rewards of company dividends

Under company law, shareholders must receive dividends once these have been declared by the company; likewise, employee shareholders are entitled to receive dividends. According to Mercer Capital, "a dividend (or economic distribution) reflects the portion of earnings not reinvested in a business in a given year but paid out to owners in the form of current returns".[22] Simply put, dividends refer to the profit or financial gain that the company has made with the shares it holds on behalf of its shareholders. Dividend payouts can improve employees' socio-economic conditions.[23]

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[21] On the one hand, section 95(1)(c) of the Companies Act 71 of 2008 establishes that copies of annual returns maintained by a company under section 94 serve as *prima facie* evidence in legal proceedings regarding the matters required to be recorded therein, facilitating accountability and transparency. Section 97 of the Companies Act 71 of 2008, on the other hand, governs the restriction of offers to the public, setting out strict requirements for prospectus disclosure and authorisation to ensure transparency and protect investors when companies raise capital.

[22] "An introduction to dividends and dividend policy for private companies" *Mercer Capital* (2015) available at https://mercercapital.com/content/uploads/Article-Dividends-Introduction-Mercer-2015.pdf (accessed 4 April 2024).

[23] Section 96 of the Companies Act.

3 THE LEGISLATIVE FRAMEWORK FOR ESOPS

ESOPs are not catered for under the Labour Relations Act; instead, the Companies Act serves as the legislative framework for them in South Africa. The Act is structured in such as way that enables employees to become shareholders in the employer's business. This section highlights certain key rules applicable to employee share-ownership schemes.

3.1 Share capital and ESOPs

3.1.1 Authorisation and issuance of shares

The Companies Act prescribes two mandatory processes that have to be followed before one can become a shareholder, be it a normal or employee shareholder: that is, before shares may be taken up by shareholders, they must be authorised and issued.

Authorised shares are the total amount of the shares a company is allowed to issue but has not yet issued;[24] issued shares, in turn, are shares that have been authorised and taken up by shareholders. It is important to know the value of the shares that have been issued because it helps the company ascertain the financial value it has received or will receive from such issue.[25] Information regarding issued shares also helps to determine whether the company is over- or under-capitalised.[26] The board must ensure share issuance stays within the class and quantity limits authorised by the MOI to satisfy section 38 requirements.

The Companies Act expressly sets out the procedure to be followed to ensure that the authorisation and issue of shares is in compliance with the required standard.[27] After employee shares are authorised and issued, employees can take part in the company's financial operations as shareholders by issuing shares in accordance with section 38 or by offering shares in accordance with section 40. In the same manner as when normal shares are authorised and issued, employee shares can be authorised and issued to employees. Employees can thus subscribe to these shares in accordance with section 38 or 96 of the Companies Act.

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[24] Cassim et al. (2012) at 221.

[25] Davies D et al. *Companies and other business structures in South Africa* (2013) 3rd ed Cape Town: Oxford University Press at 77.

[26] Davies et al. (2013) at 77.

[27] Sections 36 and 38 of the Companies Act.

In terms of the Companies Act, the board does not necessarily require shareholders' approval before issuing shares: once shares have been authorised, it has the power to issue them in the manner it deems fit in the circumstances. The broad powers the board has to issue shares without shareholder approval could thus lead to abuse in which the board engages in unfair conduct to the detriment of shareholders. It may be argued that shareholders could approach the court for relief in an undesirable situation where the board acts contrary to their interests.[28]

3.1.2 Increase of authorised share capital for ESOP purposes

A company may decide to increase its authorised share capital. It could happen that a company is unable to authorise and issue employee shares out of its existing pull of share capital. In such a situation, the Companies Act provides for the possibility to increase the authorised share capital. Upon increasing its authorised share capital, the company may then issue employee shares to its workforce.

A company can increase its share capital in two ways: through a fresh issue of shares, or by capitalising on retained earnings with a bonus issue. A company may increase the number of authorised shares of any class of shares. The board is vested with powers to take decisions on the increase or decrease of the number of authorised shares.[29] It may become necessary to raise the authorised share capital for ESOP purposes in an business wishing to adopt ESOPs.[30] Here, companies can make use of corporate rules to adopt ESOPs. The amendment of the company's memorandum of incorporation (MOI) is required if the company intends to increase its authorised shares to implement ESOPs.[31]

3.1.3 Share repurchases

A company is entitled to repurchase shares from its shareholders, provided that this complies with liquidity and solvency tests. A share repurchase helps the company guard against a hostile takeover.[32] Companies also attempt to increase market value and directly remunerate shareholders from whom the shares are repurchased without increasing

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[28] Section 163 of 1(c) of the Companies Act. In *Grancy Properties Limited v Manala* (665/12) [2013] ZASCA 57 (10 May 2013), the court applied this section, stating that the court enjoys latitude in the exercise of its discretion under section 163.

[29] Section 36 (3)(a) of the Companies Act.

[30] Awarab (2021). See also section 38 of the Companies Act.

[31] Awarab (2021). See also section 38 of the Companies Act.

[32] Priscariu M & Parascu D "The repurchase of shares: Another form of rewarding investors – A theoretical approach" (2013) 3 *Journal of Public Administration, Finance and Law* 75 at 76.

dividends.[33] Hence, an employer may enter into an agreement in terms of which the employee cedes the right of first refusal or pre-emptive right to the employee; such an agreement may also permit the employer to buy out the employee in the event that the latter ceases to be an employee.[34]

It should be noted, too, that the Companies Amendment Bill aims to amend section 95(1)(c)(i) of the Companies Act by inserting the word "or purchase" in the definition of an employee share ownership scheme. This entails not merely that the shares are authorised and issued, but that a substantive financial transaction must take place, one confirmed by the purchase of shares by or for the benefit of the employees.

4 ESTABLISHMENT AND OPERATION OF AN ESOP

In terms of the Companies Act, an ESOP may be administered in one of two ways. The first method involves appointing a compliance officer; the second involves setting up a trust. The statutory establishment of ESOPs is governed by sections 95(1)(a) and 97 of the Companies Act. Section 95 contains the definitional aspects of ESOPs, whereas section 97 sets out the procedure for establishing an ESOP. Section 97 outlines the standards for qualifying employee share schemes. It requires companies intending to offer shares to their employees to appoint a compliance officer for the scheme to be accountable to the directors of the company.[35] Moreover, the company must indicate in its annual financial statements the number of specified shares that it has allotted during that financial year in terms of its employee share scheme.[36]

An employer that intends to operate its ESOP through a trust must create a trust fund and appoint trustees to manage the ESOP.[37] The legal status of trusts has been a subject of debate for some years now. In *Tusk Construction Support Services (Pty) Ltd and Another v Independent Development Trust,*[38] the juristic nature and legal standing of a trust was issue. The court in this case confirmed trusts have their origins in English law and cited

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[33] Priscariu & Parascu (2013) at 76.

[34] Rogan H "The employee shareholder" (8 August 2025) *Weightmans* available at https://www.weightmans.com/insights/the-employee-shareholder/ (accessed 29 November 2023).

[35] Section 97(1)(a)(i) of the Companies Act.

[36] Section 97(1)(a)(ii) of the Companies Act.

[37] Section 96 of the Companies Act.

[38] *Tusk Construction Support Services (Pty) Ltd and Another v Independent Development Trust* (Case No. 364/2019) [2020] ZASCA 22 (25 March 2020) ("*Tusk*").

with approval the dictum established in *Braun v Blann & Botha NNO and Another*[39] where it was stated that "in its strictly technical sense the trust is a legal institution sui generis". In *Commissioner for Inland Revenue v Friedman and Others NNO*[40] on the question of whether a trust is a legal persona, the court said that "according to the Anglo-American law of trusts a trust has no legal personality".

Though one could suggest that these two views are divergent of each other, it is accepted in South Africa, at least for now, that a trust is not an incorporated company.[41] In South Africa, trusts are regulated in terms of the Trust Property Control Act.[42] Thus, employers that intend to operate ESOPs through a trust must comply with the substantive requirements as well as procedures set out in both the Companies Act[43] and the Trust Properties Control Act. What is important in terms of the operations of a trust is the parties to a trust, namely the founder, trustee and beneficiaries.

As noted, as an alternative to creating a trust for managing ESOPs, the law requires the appointment of a compliance officer to deal with the administration of the fund.[44] This compliance officer has a statutory duty of accounting to the board of directors in relation to the employee share ownership plans.[45]

5 THE COMPANY'S ABILITY TO REDEEM SHARES

An important feature of the Company's Act is that it allows companies to redeem shares that were issued to shareholders. Section 37 in particular provides that the company's MOI may confer certain preferences, rights, and limitations. This includes the company's power to provide for shares of that class to be redeemable, subject to the requirements of sections 46 and 48, or convertible, as specified in the MOI. The company may redeem shares for cash, indebtedness, securities or other property, at prices and in amounts specified, or determined in accordance with a formula; or subject to any other terms set out in the MOI.[46]

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39 1984 (2) SA 850 (A).
40 1993 (1) SA 353 (A).
41 *Tusk* (2020).
42 57 of 1988.
43 Sections 44 and 97.
44 Section 97 of the Companies Act.
45 Awarab (2021).
46 Section 37(5)(b) of the Companies Act.

When implementing and managing ESOPs, redeemable shares become essential. Conditions pertaining to the buyback of shares may be stated in the company's MOI if the company is to deal exclusively or partially in employee stock purchases (ESOPs). This will allow employees to sell their shares to the company.[47]

6 CONCLUSION

The purpose of this article was to test the efficacy of South Africa's legislative framework for establishing and operating ESOPs. An ESOP is a mechanism that permits employees and management to share in the firm's profits.[48] After testing the efficacy of the Companies Act,[49] it was found that South Africa's legislative framework provides an enabling avenue for employers to establish and operate ESOPs.

The rules for authorising and issuing shares allow newly formed companies to authorise and issue employee shares. Employees can thus become shareholders and enjoy all the benefits connected thereto. Furthermore, the rules relating to increasing authorised share capital enables companies that previously did not make provision for employee shares to increase their share capital and cater for employee shares. The employer's business has the power to redeem shares from an employee in the event that the employee leaves the company through dismissal, redundancy or resignation. Moreover, the notion of redeemable shares ensures that the employer's business will always have employee shares, which can be issued on a rational basis. In other words, those shares that have been redeemed by the company from employees who leave the company can be re-issued to newly incoming employees.

However, a legislative framework alone cannot enable an employer to establish ESOPs, as funds are required for such an exercise. There are nonetheless avenues that can be followed in obtaining funds to establish and implement ESOPs (discussion of which is beyond the scope of this article).

Overall, companies should comply with sections 95(1)(c) and 97 of the Companies Act in order to uphold the principles of good corporate governance while creating an ESOP. Still, the ease of obtaining a special resolution may outweigh the burdensome

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47 Awarab (2021).

48 Mazibuko & Boshoff (2003) at 31.

49 Act 71 of 2008.

requirements of section 97, making the benefit of not requiring one seem insignificant.[50] It appears that sections 97 and 95(1)(c) offer minimal value, but they do offer an alternative in situations where the business is unable to get the necessary special resolution either completely or with excessive effort.[51]

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