

Does a person of Chinese descent born post 1994 qualify for recognition in terms of the B-BBEE Act?



In an attempt to create a more equitable society within a democratic South Africa, various pieces of legislation have been drafted since 1994 to redress the inequalities of the past. The Employment Equity Act 55 of 1998 and the Broad-Based Black Economic Empowerment Act 53 of 2003 (“B-BBEE Act”) were the two key pieces of legislation to promote economic equality.

The main goal was to give those members of society who had been discriminated against access to economic opportunities within the commercial environment.

The main question in terms of the implementation of the B-BBEE Act related to the specific races it applied to and whether Chinese people were seen as “black enough” under the newfound democracy.

In this article we will determine whether a person of Chinese descent born post 1994 qualifies for recognition in terms of the B-BBEE Act. Let’s see what the Broad-Based Black Economic Empowerment Act (B-BBEE Act / BEE Act) says about the above mentioned matter.

What is the definition of black people in the context of the B-BBEE Act?

Section 1 of the B-BBEE Act defines black people as “a generic term which means Africans, Coloureds, and Indians – (a) who are citizens of the Republic of South Africa by birth or descent; or (b) who became citizens of the Republic of South Africa by naturalisation (i) before 27 April 1994; or (ii) on/or after 27 April 1994 and who would have been entitled to acquire citizenship by naturalization prior to that date”.

What the current definition means for Chinese South Africans born before and after 1994?

Initially this definition specifically excluded people of Chinese descent who had been classified as “Coloured” during the Apartheid era. This led to a situation where people of Chinese ethnicity existed in a state of limbo, having previously been discriminated against but now did not fall into the category of previously disadvantaged citizens.

The Chinese Association of South Africa therefore rightly argued that the Act left their community vulnerable to the same discrimination they had suffered under apartheid and failed to recognise Chinese South Africans’ status as previously disadvantaged people.

Thus, having been excluded from all benefits during the apartheid era and having been classified as ‘coloured’ by the Population Registration Act in 1950, the Chinese Association believed that they should be included in the definition as they were being discriminated against in terms of economic empowerment in both the public and private sector.

Clarifying the status of Chinese South Africans in reference to the Chinese Association

In May 2002, the Chinese Association of South Africa addressed a letter to the Minister of Home Affairs seeking clarity as to the classification of Chinese people, but after numerous submissions to which no material response had been received, the Chinese Association had no other option but to take legal action and seek recourse through the courts, which led to the matter of *The Chinese Association of South Africa and others v Minister of Labour and others* under case number 59251/2007.

Caselaw: *Chinese Association of South Africa and Others v Minister of Labour and Others* (59251/2007) [2008]:

On 18 June 2008, Judge Pretorius in the North Gauteng Division of the High Court, Pretoria ruled that in terms of the definition of “black people” in both the Employment Equity and B-BBEE Acts, South African Chinese people are to be included in same. The Chinese community had won the eight-year battle and received clarity regarding their status in terms of affirmative action and empowerment legislation. This finding, however, was tempered by the fact that the definition of “black people” in terms of the B-BBEE Act was amended in 2013 and now reflects as per the definition above.

The situation this creates is that persons of Chinese ethnicity who were **not** born or descended from a South African citizen or entitled to be *naturalised as a South African citizen on or before 27 April 1994*, do not qualify as “black people” in terms of the B-BBEE Act. This means that a Chinese person from Mainland China, Hong Kong or Taiwan, who immigrated to South Africa and was not born here or descended from a South African citizen, does not qualify for the benefits as they are not deemed to be previously disadvantaged and had not become a citizen on or before 27 April 1994.

In conclusion

In light of the above, it is submitted that a person who was born here or is descended from a South African citizen of Chinese ethnicity, either pure or of mixed race, would qualify for B-BBEE status in that they are now classified as “black people”. This is further considered in that “coloured” refers to a person of mixed-race origin. If one of the biological parents of the person in question were to be of Chinese descent and the other Caucasian, it follows that such persons would be both “black people” in terms of the B-BBEE Act as well as “coloured”, which in any event makes them “black people”.

Therefore, the same criteria used to determine whether Africans, Coloureds and Indians fall within the definition of Black People for purposes of the *Employment Equity Act* and *B-BBEE Act*, will also apply to Chinese people. This court judgement has in essence extended the first sentence of the definition of Black People to read: *“Black people is a generic term which means Africans, Coloureds, Indians and Chinese people”.*

SERR Synergy assists businesses to implement viable B-BBEE initiatives and ensure alignment of initiatives with the legal requirements of the B-BBEE Codes.

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