

**EMPLOYMENT EQUITY: THE IMPLIMENTATION AND APPLICATION OF  
AFFIRMATIVE ACTION IN THE WORKPLACE.**

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## **Dedication**

To my beautiful wife, Realeboha Mhambi

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***“I have a dream that my four children will one day live in a nation where they will not be judged by the colour of their skin, but by the content of their character” Martin Luther King, Jr***

## **CHAPTER I**

### **INTRODUCTION**

There are a various problems in South Africa, with regard to the implementation and application of affirmative action, and its ensuing effects. There is criticism which points to a policy that mainly benefits the middle and elite classes, while failing to meet the needs of those at the lower end of the income distribution. It may be argued that affirmative action is breaking, rather than building, the South African nation. It is suggested that it is a form of reverse discrimination, as it overlooks the skills and experiences of certain people through focusing on gender and race. The South African affirmative action policy has been accused of creating racial tension at the workplace, even within the designated groups. Coloured and Indian people often find themselves in situations where they are not “black enough” to benefit from affirmative action.

South Africa has a strong black middle class and upper middle class, as well as a growing percentage of poor whites in both rural and urban areas. The question that this study aims to address is whether affirmative action policy should be applied in a case, for example, where a privileged black child resides in Waterkloof or Sandton and enjoys a privileged lifestyle, when juxtaposed with a white child who resides in Danville and Elandspoort, who lacks a basic education and necessities of life? The disadvantaged person in this scenario needs the advantages envisaged by the affirmative action policy, but due to racial exclusion, this person will not be able to receive the benefit of such or any policy in the workplace.

It has been mentioned that South Africa is one of the most unequal societies with reference to race. That being said, unemployment affects numerous members of South African society, regardless of skin colour. This raises the question how an affirmative action policy is applied in a country where there are constant complaints about skills shortage and the

need for greater international competitiveness. It is difficult to reconcile the fact that South African policy allows for a large proportion of the country's productive labour force to go unemployed.

## CHAPTER II

### GENREAL CONCEPTS AND THE INTERNATIONAL ARENA

#### 2.1 What is Affirmative Action?

Affirmative action (known as positive discrimination in the United Kingdom and as employment equity in Canada and elsewhere) refers to policies that take factors including “race, colour, religion, sex, or national origin”<sup>1</sup> into consideration, in order to benefit an underrepresented group “in areas of employment, education, and business”.<sup>2</sup> According to both the United Nations Economic and Social Council, and the International Labour Organisation, affirmative action is defined as “a coherent packet of temperate measures, aimed at correcting the position of the target group to obtain effective equality”.<sup>3</sup>

#### 2.2 The Origins of Affirmative Action

The term “affirmative action” was first used in United States in Executive Order 10925 and was signed by President John F. Kennedy on 06 March 1961. It was used to promote actions based on non-discrimination. In 1965, President Lyndon B. Johnson issued Executive Order 11246 which required government employers to implement an affirmative action policy in a manner where authorities had to “hire without regard to race, religion and national origin”. In 1967, gender was added to the anti-discrimination list.<sup>4</sup>

#### 2.3 Purpose of Affirmative Action

Affirmative action includes “any measure aimed at ensuring the equal employment opportunities and equitable representation of suitable qualified persons from designed groups in all occupational categories and levels of the work”.<sup>5</sup> Affirmative action is usually intended to promote the opportunities of defined groups within a society, to give them access equal to that of the privileged majority population.

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<sup>1</sup> Executive Order 11246 – Equal employment opportunity.

<sup>2</sup> Fullinwider, R., “Affirmative Action”, Stanford University, [online] Available at <http://plato.stanford.edu/archives/fall2013/entries/affirmative-action/> (Accessed 15/3/2013).

<sup>3</sup> Buys (2013) “Why should affirmative action have a sunset clause?” [online] Available at <http://www.solidaritysa.co.za/Home/wmview.php?ArtID=164> (Accessed 15/3/2013).

<sup>4</sup> “Affirmative action: History and Rationale”. Clinton Administration’s Affirmative action Review: Report to the President. 19 July 1995.

see also [http://en.m.wikipedia.org/wiki/Affirmative\\_action](http://en.m.wikipedia.org/wiki/Affirmative_action) (Accessed 15/4/2013).

<sup>5</sup> Basson (2002) *Essential Labour Law: Volume 1 Individual Labour Law* 3<sup>rd</sup> ed, 324.



In the South African context, apartheid provides both a justification for the Employment Equity Act<sup>6</sup> and its implementation. The Act's explanatory memorandum opens with a proclamation of the legacy of inequality left by apartheid.

## **2.4 Employment Equity in the International Arena**

There are two important international conventions governing the elimination of all forms of discrimination and implementation of affirmative action. The first of these is the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)<sup>7</sup>, and the second is the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).<sup>8</sup>

### **2.4.1 International Convention on the Elimination of All Forms of Racial Discrimination**

ICERD was adopted and opened for signature and ratification by General Assembly resolution 2106(xx) of 21 December 1965, and has been enforced since 4 January 1969, in accordance with Article 19. In 1998, South Africa ratified its laws in accordance with this Convention. An important aspect from a South African perspective is the condemnation of segregation and apartheid under Article 3 of the Convention. Upon its adoption, this Convention became the "first human rights instrument to establish an international monitoring system and was also revolutionary in its provision of national measures toward the advancement of specific racial or ethnic group"<sup>9</sup>

### **2.4.2 The Convention on the Elimination of All Forms of Discrimination against Women**

The CEDAW was adopted in 1979 by UN General Assembly, and is often described as an international bill of rights for women. South Africa became a party to the Convention after ratifying it in 1995. In order to be capable of complying with the provisions of CEDAW upon ratification, "Parliament adopted the General Law Fourth Amendment Act<sup>10</sup> in 1993 which removed all traces of legislative discrimination against women so as to enable South Africa to ratify CEDAW".<sup>11</sup> In terms of this Convention, parties agreed to implement both formal and substantive equality measures in the promotion of equality between men and women.

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<sup>6</sup> Act 55 of 1998.

<sup>7</sup> Of 1965.

<sup>8</sup> Of 1979.

<sup>9</sup> Cotter (2005) *Discrimination Law: Professional Practice Guides*, 10.

<sup>10</sup> Act 132 of 1993.

<sup>11</sup> Dugard (2011) *International Law: A South African Perspective* 4<sup>th</sup> ed, 250.

## CHAPTER III

# THE CONSTITUTION OF THE RSA AND APPLICATION AND IMPLEMENTATION OF AFFIRMATIVE ACTION IN SOUTH AFRICA

### 3.1 Historical Background

It may be posited that, throughout the history of South Africa, the same “mistake” has been repeated. South Africans have never experienced a time when the colour of their skin and gender were not an issue or a ground for the exclusion of certain members of society from the labour market.

In 1910, the Union of South Africa was formed as a democracy, limiting the rights of all women and all non-whites. In 1956, coloured people (individuals of mixed race) were removed from the common voters roll. Furthermore, in 1948, the National Party Government started to implement a policy that provided for black ethnic groups to attain self-government and, eventually, total independence. This policy led to the independence of Transkei, Bophuthatswana, Venda, and Ciskei. A large number of white citizens remained in urban areas. In 1984, a new constitution for the Republic of South Africa was provided for a parliamentary system with separate houses for whites, coloureds and Asians. Blacks were still excluded from participation in the central government<sup>12</sup>. The united South Africa was formed in 1994. Former President Nelson Mandela addressed the issue of race in the speech he gave at the Rivonia Trial, through emphasising the importance of the fight against both white supremacy and black supremacy. The goal was to build a united, democratic, non-sexist, and non-racial South Africa<sup>13</sup>.

Subsequent to 1994, the South African labour market has undergone a transformation with regard to the elimination of labour inequalities and improvement of general working conditions. This became a fundamental right issue for all South Africans. The introduction of new labour legislation includes the interim Constitution of 1993<sup>14</sup> and the final Constitution.<sup>15</sup> This issue is entrenched in section 23(1)<sup>16</sup> of the Bill of Rights, and the

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<sup>12</sup> Southern Domain Travel Guide “Brief History of South Africa” [online] Available at: [http://www.southafrica-travel.net/history/eh\\_menu.htm](http://www.southafrica-travel.net/history/eh_menu.htm) (Accessed 3/3/2013).

<sup>13</sup> Southern Domain Brief History.

<sup>14</sup> Act 200 of 1993.

<sup>15</sup> Act 108 of 1996.

<sup>16</sup> Everyone has the right to fair labour practices.

Labour Relations Act.<sup>17</sup> (LRA), Basic Conditions of Employment Relation Act.<sup>18</sup> (BCEA), and the Employment Equity Act.<sup>19</sup>

This chapter focuses on the Employment Equity Act (EEA) and the Constitution of the Republic of South Africa. The EEA was introduced in South Africa by legislation that can be traced in the provision on equality in the Constitution. Section 9 forms the basis of legislation that aims to redress the rights of previous disadvantaged groups, in this instance, black people. Thus, sections 9(1)<sup>20</sup> and 9(2)<sup>21</sup> of the Constitution will be examined and their purposes will be analysed in terms of their application to affirmative action, and the intention of resolving the issue, which is evident in section 9(3)<sup>22</sup> and 9(4).<sup>23</sup>

The Employment Equity Act which allows fair discrimination against white people is viewed as constitutionally justifiable in order to redress previously disadvantaged people's rights in terms of section 9(2) of the Constitution. The Act recognises that as results of South African history, and other discriminatory laws and practices, there are disparities in employment, occupation, and income; and those disparities create such pronounced disadvantages for certain categories of people that they cannot be redressed simply by repealing discriminatory laws. Section 9(2) and its contained affirmative action policy came into question again before the Constitution Court in the case of *Minister of finance v Van Heerden*.<sup>24</sup> In this case, the court outlined the parameters and requirements for an affirmative action policy to be acceptable. The EEA fulfils the function of section 9(2) in promoting substantive equality by eliminating "unfair discrimination in the workplace and by providing for affirmative action measures".<sup>25</sup>

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<sup>17</sup> 66 of 1995.

<sup>18</sup> 75 of 1997.

<sup>19</sup> 55 of 1998.

<sup>20</sup> Everyone is equal before the law and has the right to equal protection and benefit of the law.

<sup>21</sup> 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.

<sup>22</sup> The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

<sup>23</sup> No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

<sup>24</sup> 2004 (6) SA 121 (CC).

<sup>25</sup> Kruger (2004) "Equality and Non-Discrimination in South Africa", 5.

### 3.2 Right to Equality

The importance of the right to equality is clearly stated in the Bill of Rights. The first individual right in the Bill of Rights is the right to equality. The right to equality is a value upon which South African democracy is founded. The preamble of the Constitution reads as follows: “lay the foundation for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law” and it is then referred to again in section 1 of the Constitution, which states that “the Republic of South Africa is one sovereign state founded on the following values: (a) Human dignity, the achievement of equality and the achievement of equality and the advancement of human rights and freedoms”<sup>26</sup>.

Section 9(1) “which was adopted from the Canadian Charter of Rights and Freedoms”<sup>27</sup> is a form of formal equality. “Formal equality means sameness of treatment: the law must treat individuals in like circumstances alike.”<sup>28</sup> Formal equality, however, adequately redress the inequality which was caused by the injustices of the past. “A formal approach to equality assumes that inequality is aberrant and that it can be eradicated simply by treating all individuals in exactly in the same way. A substantive equality, though, does not presuppose a just social order”.<sup>29</sup> The preamble to the South African Constitution refers to substantive equality. Section 9(2) of the Constitution reads as follows: “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”<sup>30</sup>.

This may lead to the misinterpretation that the drafters of the Constitution had substantive equality in mind. Affirmative action can also be read into this clause, as a mechanism to bridge the inequality between the classes in South African society, and to redress the discrimination and oppression of the past. In *Public Service Association of South Africa v Minister of Justice*,<sup>31</sup> the court held that the words “design” and “achieve” denote a causal connection between the designed measures and objectives.

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<sup>26</sup> Carpenter (2001) ‘Equality and Non-Discrimination in the new South Africa Constitutional Order (1):The early Cases’ 64 *THRHR* 409.

<sup>27</sup> Davis (1997) *Fundamental Rights in the Constitution: Commentary and Cases*, 61.

<sup>28</sup> Currie *et al* (2005) *The Bill of Rights Handbook* 5<sup>th</sup> ed, 232.

<sup>29</sup> Thompson and Benjamin (2005) *South African Labour Volume I*, C I-14.

<sup>30</sup> Section 9(2) of the Constitution 1996.

<sup>31</sup> 1997 18 ILJ 241(T).

In *South African Police Service v Solidarity on behalf of Barnard*,<sup>32</sup> the Labour Appeal Court was called upon to decide whether “the restitutionary measures envisaged by section 9(2) must be applied in accordance with the principles of fairness and due regard to the affected individual’s constitutional right to equality”.

Section 9(2) and affirmative action came under scrutiny in Constitutional Court in *Van Heerden*, Harms, JA stated that section 9(2) of the Constitution does not postulate a standard of necessity between the legislative choice and the governmental objective. The text requires only that the means should be designed to protect or advance. It is sufficient if the measure carries a reasonable likelihood of meeting the end. To require a sponsor or remedial measures to establish a precise prediction of a future outcome is to set a standard not required by section 9(2). Such a test would render the remedial measure moot, and defeat the objective of section 9(2).<sup>33</sup>

### 3.3 The Prohibition of Unfair Discrimination

Section 9(3)-(4) of the Constitution deals with the prohibition of unfair discrimination. Section 9(3) reads as follows: “The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth”.

When one reads section 9(3) together with section 9(4), one might conclude that it is in conflict with section 9(2), because in section 9(3) any discrimination based on one of the listed grounds, including race and gender is presumed to be unfair. “Most forms of affirmative action explicitly require consideration of race or sex. They plainly invoke discrimination in the ordinary sense; they require race or sex to be taken into account in awarding benefits or advantages.”<sup>34</sup>

Section 9(5) provides that discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair. In *National Coalition for Gay and Lesbian Equality v Minister of Justice*<sup>35</sup> in summary the case centred on the fact that sodomy was a criminal offence and this was discrimination on the basis of sexual orientation and gender. Both sexual orientation and gender are listed grounds in the

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<sup>32</sup> 2013 1 BLLR 1 (LAC).

<sup>33</sup> *Minister of Finance v Van Heerden* 2004 (6) SA (CC).

<sup>34</sup> Townshend-Smith (1998) *Discrimination Law: Text Cases and Materials*, 64.

<sup>35</sup> 2000 117 SALJ 17.

Constitution. The court held that it was unconstitutional for sodomy to be considered as a crime.

In *Fraser v Children's Court, Pretoria North*<sup>36</sup> the applicant and Naudé (the second respondent) lived together and during that time Naudé became pregnant. She decided to give the child up for adoption. The applicant did not agree with this decision and section 18(4)(d) of the Child Care Act<sup>37</sup> only requires the consent of the mother to give up a child born out of wedlock for adoption. The Constitutional Court has declared this section to be unconstitutional, as it discriminates against fathers of children born out of wedlock on the basis of their sex.

The *Harksen v Lane NO*<sup>38</sup> case was decided under the interim Constitution,<sup>39</sup> which did not include marital status as one of the listed grounds. Discrimination on the basis of marital status was brought into question. Goldstone J, acknowledged the importance of dignity in discrimination and stated that “at the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their memberships of particular groups”.

In *Hoffman v South African Airways*,<sup>40</sup> the applicant applied to SAA for employment as cabin attendant. After a four-stage selection process, the applicant, together with 11 other applicants, was found to be a suitable candidate for employment. This decision was subject to a pre-employment medical examination which included a blood test for HIV/AIDS. He was found to be clinically fit. However, his blood test showed that he was HIV positive. He was therefore regarded as unsuitable for employment as a cabin attendant and was not employed. Hoffman argued that he had been unfairly discriminated against on the grounds of disability due to being HIV positive. The Constitutional Court held that HIV was not a disability but that discrimination on this basis would constitute an infringement of dignity, as it was discrimination due to person's health. The court held that Hoffman was unfairly discriminated against based on his illness.

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<sup>36</sup> 1998(1) SA 300 (CC).

<sup>37</sup> Act 74 of 1983.

<sup>38</sup> 1998(1) SA 300 (CC).

<sup>39</sup> Act 200 of 1993.

<sup>40</sup> 2000 (11) BCLR 1211 (CC). See Cameron (2006) “Legal and Human Rights Responses to the HIV/AIDS Epidemic” 17(1) *Stellenbosch Law Review* 39 at 47 for a further discussion on the case of *Hoffman v South African Airways*.

In *Independent Municipal & Allied Workers Union & Another v City of Cape Town*,<sup>41</sup> the respondent refused to appoint the second applicant to the position of firefighter on the grounds that he was an insulin-dependent diabetic. The blanket ban imposed by the respondent on the employment of diabetics was opposed by the applicant union on the basis that it amounts to unfair discrimination in terms of section 6(1)<sup>42</sup> of the Employment Equity Act. The respondent, relying on section 6(2) (b)<sup>43</sup>, argued that the ban was fair and justified on the basis of the inherent requirements of the job of a firefighter. The applicant contended that the decision to exclude him was based on a blanket ban that applied outdated, prejudiced stereotyping to his particular situation. The court considered his medical evidence and his experience as a volunteer firefighter for 13 years, and concluded that the ban had contrary to the provisions of the EEA, unfairly discriminated against the applicant in its employment policy and practice on the grounds of his medical condition.

### 3.4 Employment Equity Act 55 of 1998

“In any society this would be significant; in ours, it is a watershed, signifying the perpetuation of precisely the institutionalized race consciousness that has already proved to divisive and destructive in our country”.<sup>44</sup> This act was first introduced as Employment Equity Bill (EEB) which was a product of debate and discussions triggered by green paper on employment and Occupational Equity published in July 1996. On 12 October 1998, the EEA was passed as a law and since then this act has become an important part of the South African labour law and political debate. This piece of legislation was intended to be a vital tool to bridge the gap which exists within the workplace. The EEA prohibits unfair discrimination in any workplace and it encourages all employers to take appropriate steps promote equal opportunities at the workplace, and sets out the affirmative action measures.

There are two broad views on the EEA. The first is the libertarian perspective,<sup>45</sup> whereby “proponents of this view regard labour legislation with the disdain normally reserved for an alien plant species. Law is imposing unwarranted regulation on the freedom to contract on equal terms in the marketplace. They argue that laws intended for the protection of employees have the unintended consequence of protecting the employed at the expense of

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<sup>41</sup>(2005) 26 ILJ 1404 (LC).

<sup>42</sup> No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.

<sup>43</sup> Distinguish, exclude, or prefer any person on the basis of an inherent requirement of a job.

<sup>44</sup> Brassey (1998) “The Employment Equity Act: Bad For Employment And Bad For Equity” ILJ 1359.

<sup>45</sup> Van Niekerk *et al* (2011) *Law @ Work* 2<sup>nd</sup> ed 6.



the unemployed”.<sup>46</sup> The second broad perspective is the social justice perspective which “regards law as a tool to further the interests of social justice. The social justice perspective focuses on what Hugh Collins has referred to as the role of labour law in setting the distribution of wealth and power in society”.<sup>47</sup>

### 3.4.1 Preamble

The act finds its justification solely from the apartheid policy. The first paragraph of the preamble’s act reads “that as a result of apartheid and other discriminatory laws and practices, there are disparities in employment, occupation and income within the national labour market; and that those disparities create such pronounced disadvantages for certain categories of people that they cannot be re-dressed simply by repealing discriminatory laws”.

The preamble of the EEA operates on two assumptions: firstly, that all racial inequality in South Africa results from apartheid laws. Secondly, that inequality only exists between whites and Africans, and that all Africans are poor, while whites are wealthy. As much as apartheid contributed to inequality, these two assumptions cannot be accurate, as inequality is found in various countries where there is no institutionalised history of racial discrimination, such as Great Britain. It is submitted that inequality is more natural than inflicted.

### 3.4.2 Chapter 1 of the Act: Definition, Purpose, Interpretation, and Application

#### (i) Purpose of the EEA<sup>48</sup>

Section 2 of the Act states its purpose is to “achieve equity in workplace” by placing obligation on employers to eradicate all barriers to advancement of “designated groups”<sup>49</sup> in all categories of employment by way of affirmative action. This clause may be interpreted in two ways: firstly as a legislative measure, as required by section 9(2) of the Constitution to achieve the right to equality, as contained in section 9(2) in terms of substantive equality. Secondly, this can also be negatively viewed as job reservation.

#### (ii) Interpretation of the EEA<sup>50</sup>

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<sup>46</sup> Van Niekerk *et al* (2011) *Law @ Work* 2<sup>nd</sup> ed 6-7.

<sup>47</sup> Van Niekerk *et al* (2011) *Law @ Work* 2<sup>nd</sup> ed, 8-9.

<sup>48</sup> See section 2 of the Employment Equity Act 55 of 1998

<sup>49</sup> The Act defines designated groups to mean blacks people, woman and people with disabilities.

<sup>50</sup> See section 3 of the EEA.



The EEA must be interpreted in accordance with the Constitution. Thus, to give effect to its purpose as set out in section 2, and in the preamble of the Act, Code of Good Practice and International Law (International Labour Organisation Conventions)

### **(iii) Application of the EEA**

The EEA applies to employees and employers. It binds the State, and excludes the National Defence Force, National Intelligence Agency, South African Secret Service or South African National Academy of Intelligence.

### **3.4.3 Chapter II of the EEA: Prohibition of Unfair Discrimination**

Section 5<sup>51</sup> of the EEA obliges employers to take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice. Section 6(1) emphatically prohibits unfair discrimination in accordance with section 9(4) of the Constitution. Section 6(1)<sup>52</sup> serves as a duplication of section 9(4) of the Constitution.

Section 6(2) provides two exceptions where the employer can fairly discriminate against employees. Firstly, an employer may “take affirmative action measures consistent with the purpose of this Act”<sup>53</sup> The second exception allows an employer to “distinguish, exclude or prefer any person on the basis of an inherent requirement of a job”.<sup>54</sup> The word “inherent” suggests that possession of a particular personal characteristic must be necessary for effectively carrying out the duties attached to a particular position”.<sup>55</sup> While the EEA does not define discrimination, it can be assumed that the “EEA contains no more than the basic structure of a prohibition on unfair discrimination. It is left to the courts to give content to and develop discrimination law. As a result, the context within which the EEA operates becomes important as the courts grapple with some very difficult issues raised under the banner of discrimination”.<sup>56</sup>

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<sup>51</sup> Every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice.

<sup>52</sup> No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.

<sup>53</sup> Section 6(2)(a) of the EEA.

<sup>54</sup> Section 6(2)(b) of the EEA.

<sup>55</sup> Grogan (n.d.) *Workplace Law* 298.

<sup>56</sup> Thompson (n.d.) *Labour Law* CC 1-1.

In *NUMSA v Vetsak Co-Operative Ltd & Others*<sup>57</sup> the court held that “in finding an unfair labour practice, the tribunal concerned is expressing a moral or value judgment as to what is fair in all circumstances. This test is too flexible to be reduced to a fixed set of sub-rules”.<sup>58</sup>

In terms of the EEA, “harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection (1).<sup>59</sup> “In order to assist employers and employees in determining the scope and measures relating to sexual harassment, the Code of Good Practice on the Handling of Sexual Harassment was published by the Department of Labour.<sup>60</sup> Although sexual harassment may be committed against employees by non-employees, the code does not confer jurisdiction in respect of non-employees on employers”.<sup>61</sup>

### **(i) Medical and Psychological Testing and Other Similar Assessment**

In terms the EEA, it is unfair to expect employees, or prospective employees to undergo medical and psychological tests and similar assessments “unless legislation permits or requires testing: or such testing is justifiable in light of medical facts, employment conditions, social policy, the fair distribution of employment benefits; the inherent requirement of the job”.<sup>62</sup>

### **(ii) Dispute Resolution Procedure<sup>63</sup>**

In terms of EEA,<sup>64</sup> “any party to a dispute concerning unfair discrimination, medical testing or psychometric testing or other similar assessment, excluding a dispute concerning an unfair dismissal, may refer the dispute in writing to the Commission for Conciliation, Mediation and Arbitration (the CCMA) within six months after the act or omission allegedly constituted the unfair discrimination took place”.<sup>65</sup> If the dispute remains unresolved after conciliation, it may be referred directly to the Labour Court, unless both parties consent to arbitration by CCMA.

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<sup>57</sup> 1996, 17 ILJ 455 (A).

<sup>58</sup> Thompson (n.d.) *Labour Law*, 386.

<sup>59</sup> Section 6(3) of the EEA.

<sup>60</sup> Government Gazette 19049 Gen 1367, 17 July 1998.

<sup>61</sup> Van Jaarsveld, Fourie & Olivier (n.d.) *Principles and Practice of Labour Law*, par 715.

<sup>62</sup> Thompson (n.d.) *Labour Law*, CC 1-75.

<sup>63</sup> Van Jaarsveld *et al* (n.d.) *Principles and Practice*, par 719.

<sup>64</sup> Section 10(2).

<sup>65</sup> Van Jaarsveld *et al* (n.d.) *Principles and Practice*, par 719.

### **(iii) Burden of Proof<sup>66</sup>**

Section 11 of the EEA states that “whenever unfair discrimination is alleged in terms of this Act, the employer against whom the allegation is made must establish that it is fair”. In the case of *Transport & General Workers Union & Another v Bayete Security Holdings*,<sup>67</sup> it was held that the mere claim that discrimination has occurred is not sufficient to shift the onus of proving or disproving that discrimination has occurred. The courts have interpreted section 11 to mean that “the onus of proving discrimination, on a prima facie basis, still rests with the employee”.<sup>68</sup>

## **3.4.4 Chapter III: Affirmative Action**

### **(i) Application and Implementation of Affirmative Action in the Workplace**

Chapter III applies only to designated employers.<sup>69</sup> According to the definition in the EEA, a designated employer is “an employer who employs 50 or more employees or employer who employs fewer than 50 employees, but has a total annual turnover that is equal to or above the applicable annual turnover of a small business in terms of Schedule 4 to this Act”.<sup>70</sup> Designated employers include: a municipality<sup>71</sup> and organ of state, but exclude local spheres of government, the National Defence Force, the National Intelligence Agency, and the South African Secret Service.<sup>72</sup> The EEA<sup>73</sup> provides that an employer who is a designated employer may voluntarily comply with the affirmative action measures. Section 13 of the EEA contains duties that every designated employer must, in order to achieve employment equity, implement affirmative action measures for people from designated groups in terms of EEA. In order to achieve equity “a designated employer is not required to take any decision concerning his employment policy or practice that will establish an absolute barrier to the prospective or continued employment or advancement of people who are not from designated groups”.<sup>74</sup>

A controversial concept is entrenched in the term “designated groups”. This term refers to those groups to which affirmative action measures apply. According to the EEA definition,

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<sup>66</sup> Section 11 of the EEA

<sup>67</sup> 1999 20 ILJ 1117 (LC).

<sup>68</sup> Van Eck and Van Jaarsveld (2005) *Principles of Labour Law* 3<sup>rd</sup> ed, 297.

<sup>69</sup> Section 12 of the EEA.

<sup>70</sup> Section 1(a) of the EEA.

<sup>71</sup> Section 1(b) of the EEA.

<sup>72</sup> Section 1(c) and (d) of the EEA.

<sup>73</sup> Section 14 of the EEA.

<sup>74</sup> Van Jaarsveld *et al* (n.d.) *Principles and Practice*, par 721.

designated groups are “black people, women and people with disabilities”.<sup>75</sup> The term “black” includes Africans, coloured people, and Indian people. A number of issues arise from this broad definition; when one takes into account the previous example of the privileged black child getting an education rather than the poor white child who has no opportunity for education. In the USA “one of the main criticisms of affirmative action has been that it has primarily benefited middle class women and black people who were able to look after their own interests and were less deserving assistance than those trapped in the underclass”.<sup>76</sup>

Another concept which also need attention is “suitably qualified person”, as section 15(1) of the EEA provides that “affirmative action measures ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer. A careful reading of section 20(3)-(4) of the EEA shows the term “suitably qualified” to be inclusive in the sense it includes the potential ability to do the job. “Although the Labour Court accepted that candidates from previously disadvantaged would mostly lack the necessary experience, it considered that experience would remain relevant, not decisive”.<sup>77</sup>

To determine whether a person is suitably qualified for a job, a prospective employer must review all factors listed in section 20(3) and determine whether that person has ability to do the job in terms of any one of, or any combination of those factors.<sup>78</sup> This means that competence is no longer the requirement for employment, and that race and gender play are paramount in the consideration.

An example of decisions relating to this issue is found in the case of *Stoman v South African Police Service*,<sup>79</sup> the applicant, a white employee, sought to review the appointment of an African employee. The applicant had been short-listed and had scored the highest number of points in the interview process. He was recommended for the promotion but the black candidate, who was the most suitable candidate for the post amongst the black applicants, was appointed. The Minister denied that it had unfairly discriminated against the applicant and contended that in appointing the best black applicant, it had given effect to the employment equity plan drawn up in accordance with the EEA. While the applicant contends that he was better qualified for the position than the black employee, it was not

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<sup>75</sup> Section 1 of the EEA.

<sup>76</sup> Johnson (2013) “The Last Twenty-Five Years of Affirmative Action” [online] Available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=577283](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=577283) (Accessed 15/7/2013).

<sup>77</sup> McGregor (2002) “Affirmative Action: An Account of the Case Law” 14 SA Merc LJ 253 at 262.

<sup>78</sup> Section 20(4) of the EEA.

<sup>79</sup> (2002) 23 ILJ 1020 (T).

contended by the applicant that the black applicant was not qualified at all for the position. The applicant also argued that there was no proof that the black employee, as an individual, had been previously disadvantaged. The court held that to allow considerations regarding representivity and affirmative action to play a role, only on this very limited level, would be too give meaningful effect to the constitutional provision for such measures and the ideal of achieving equality. This case demonstrates that efficiency only trumps representivity in circumstances where the appointment of the representative candidate would be rational justifiable on account of such persons qualification, suitability, or ability.

## **(ii) Affirmative Action Measures**

Affirmative action measures designated employers are required to implement are contained in section 15(2) of the EEA and can be summarised as follows:

Section 15(2)(a) deals with identification and removal of barriers in the workplace. This provision seems to create a sense of formal equality among employees by identifying and eliminating employment barriers which include unfair discrimination, which adversely affect people from designated groups.

Section 15(2)(b) of affirmative action measures creates diversity in the workplace and develops a working environment where all workers can enjoy their constitutional rights irrespective of their backgrounds.

Section 15(2)(c) of the EEA measure makes provision for accommodation for all people from designated groups at workplace in order to ensure that they enjoy equal opportunities and they are represented in all sectors of the workforce.

Section 15(2)(d) of the EEA contains two affirmative action measures that the designated employers must implement. These measures are set out in section 15(2)(d)(i) and require the designated employers to give preferential treatment<sup>80</sup> to suitably qualified people from designated groups in all occupational categories and levels in the workforce in addition to retain and develop people from designated groups by training them<sup>81</sup> in terms of Skills Development Act.<sup>82</sup>

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<sup>80</sup> See section 15(3) of the EEA.

<sup>81</sup> Section 15(2)(d)(ii).

<sup>82</sup> Act 97 of 1998.

### **(iii) Consultation and Parties to the Consultation**

Sections 16 and 17 of the EEA empower consultation over employment equity matters. Section 16 identifies parties to the consultation while section 17 outline matters that need to be consulted over by parties in section 16.

### **(iv) Disclosure of Information**

Section 18 provides that when the designated employer consults with parties identified in section 16, the employees or trade unions and/or their representatives, the employer is obliged to disclose all the relevant information for effective consultation. Section 18(2) goes on to state that the provisions of section 163 of the LRA, with the relevant changes apply to the disclosure of information.

### **(v) Analysis**

Section 19 of the EEA requires the designated employer to collect all the information at workplace and conduct data analysis in order to identify all the barriers which negatively affect people from designated groups.

### **(vi) Employment Equity Plans**

In terms of section 20(1) of the EEA, the designated employers are obliged to prepare and implement employment equity plan (EEP) which will achieve equity in all sectors of the workplace. The act goes further prescribe the content of the EEP,<sup>83</sup> Firstly, the plan must contain its objectives, measures and strategies, as well as a duration which may not be shorter than a year or longer than five years, procedures to resolve disputes and to monitor and evaluate the implementation of the plan.

### **(vii) Report**

Section 21 of the EEA provides that every designated employer must submit reports to the Director General, on progress made in implementing its EEP as required.<sup>84</sup> A designated employer that employs less than 150 (one hundred and fifty) employees must submit the first

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<sup>83</sup> Section 20(2)(a)-(i).

<sup>84</sup> Section 13(2)(d) of the EEA.

report within twelve months of the commencement of the Act and submit a subsequent report every two years on 1 October.<sup>85</sup> The EEA further provides that the designated employers who employ more than 150 (one hundred and fifty) employees are also obliged to submit a report within six months of implementation of the EEA and every year subsequent to the first report on 1 October.<sup>86</sup>

The designated employer who is a public company must publish the report required in terms of section 21, and is also required to publish the summary of the report in its annual financial report.<sup>87</sup> When the designated employer is an organ of the state, the Minister is required to table the report in Parliament.<sup>88</sup>

Every designated employer must assign one or more senior managers to take responsibility for monitoring and implementing the EEP,<sup>89</sup> provide the managers with the authority and means to perform their functions;<sup>90</sup> and take reasonable steps to ensure that the managers perform their functions.<sup>91</sup> The fact that a manager is assigned with implementation of the EEP does not relieve the designated employer of any duty imposed by EEA or any law.<sup>92</sup>

#### **(viii) Duty to Inform**

In the workplace, an employer must visibly display a notice in a prescribed form, informing employees about the provision of the EEA.<sup>93</sup> This notice must be in all official languages,<sup>94</sup> and if the employee cannot read the notice, the employer has responsibility to make sure that the employee knows about the content by reading it verbally in a language that the employee understands.<sup>95</sup> A designated employer must display the following visibly, in accessible areas of the workplace:<sup>96</sup>

- (a) the most recent report submitted by that employer to the Director-General;
- (b) any compliance order, arbitration award or order of the Labour Court concerning the provisions of the EEA in relation to that employer, and

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<sup>85</sup> Section 21(1) of the EEA.

<sup>86</sup> Section 21(2) of the EEA.

<sup>87</sup> Section 22(1) of the EEA.

<sup>88</sup> Section 22(2) of the EEA.

<sup>89</sup> Section 24(1)(a) of the EEA.

<sup>90</sup> Section 24(1)(b) of the EEA.

<sup>91</sup> Section 24(1)(c) of the EEA.

<sup>92</sup> Section 24(2) of the EEA.

<sup>93</sup> Section 25(1) of the EEA.

<sup>94</sup> Regulation 5(1).

<sup>95</sup> Regulation 5(2).

<sup>96</sup> Section 25(2)(a)-(c) of the EEA. See also Van Jaarsveld *et al* (n.d.) *Principles and Practice* par 733.



(c) any other document concerning the EEA as may be prescribed.

### **(ix) Duty to Keep Records**

An employer must establish and maintain, for the prescribed period, records in respect of its workforce, its employment equity plan, and other records relevant to its compliance with the EEA.<sup>97</sup>

### **(x) Income Differentials**

Every designated employer, when reporting to the Director General of Labour as required in terms of the EEA,<sup>98</sup> must submit a statement, as prescribed by regulation,<sup>99</sup> to the Employment Conditions Commission established by section 59 of the BCEA on remuneration and benefits received in each occupational category and level of the employer's workforce.<sup>100</sup> Where disproportionate income differentials are reflected in the statement sent to the Employment Conditions Commission, a designated employer must take measures progressively to reduce such differentials subject to such guidance as may be given by the Minister of Labour.<sup>101</sup>

The measures that the designated employer may take include:<sup>102</sup> collective bargaining, compliance with sectoral determinations made by the Minister of Labour in terms of the BCEA,<sup>103</sup> applying the norms and benchmarks set by the BCEA, and ensuring the application of the relevant measures contained in skills development legislation.

The Employment Condition Commission must research and investigate norms and benchmarks for appropriate income differentials and advise the Minister of Labour on appropriate measures for reducing proportional differentials.<sup>104</sup> The Commission may not disclose any information pertaining to individual employees or employers.<sup>105</sup> Parties to a

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<sup>97</sup> Section 26 of the EEA. See also Van Jaarsveld *et al* (n.d.) *Principles and Practice* par 733.

<sup>98</sup> Section 21 (1) and (2).

<sup>99</sup> Regulation 6 and form EEA 4. See also Van Jaarsveld *et al* (n.d.) *Principles and Practice* par 734.

<sup>100</sup> Section 27 (1) of the EEA. See also Van Jaarsveld *et al* (n.d.) *Principles and Practice* par 734.

<sup>101</sup> Section 27 (2) of the EEA. See also Van Jaarsveld *et al* (n.d.) *Principles and Practice* par 73.

<sup>102</sup> Section 27 (3) (a)-(e) Of the EEA. See also Van Jaarsveld *et al* (n.d.) *Principles and Practice* par 734.

<sup>103</sup> Section 51 of the BCEA.

<sup>104</sup> Section 27 (4) of the EEA. See also Van Jaarsveld *et al* (n.d.) *Principles and Practice* par 734.

<sup>105</sup> Section 27 (5) of the EEA. See also Van Jaarsveld *et al* (n.d.) *Principles and Practice* par 734.



collective bargaining process may request the information contained in the statement for collective bargaining purposes.<sup>106</sup>

### **(xi) Limits to Affirmative Action**

It seems that for affirmative action to pass the test of fair discrimination, the decision must be rational, and this means that the implementation and application must be rationally justifiable, as affirmative action measures cannot be arbitrary. In the recent decision by the Supreme Court of Appeal in *Solidarity obo Barnard v South African Police Service*,<sup>107</sup> the court held that the facts in this case determine the outcome. It was stated that:

In striving to achieve an egalitarian society and in addressing employment equity while maintaining fairness as a standard and meeting the country's needs, there can be no victors nor should there be persons considered to be vanquished. Dealing with race classifications, as is necessary under the EEA, feels almost like a stepping back in time to the grand apartheid design. If we are to achieve success as a nation, each of us has to bear in mind that wherever we are located, particularly those of us who have crossed over from the previous oppressive era into our present democratic order, it will take a continuous and earnest commitment to forging a future that is colour blind. This necessarily includes serious and sustained efforts to overcome the prejudices that inevitably attached to us because of our programming, relative to the segregated societies from which we emerged, in order to build a cohesive and potentially glorious rainbow nation. For now, ironically, in order to redress past imbalances with affirmative action measures, race has to be taken into account. We should do so fairly and without losing focus and reminding ourselves that the ultimate objective is to ensure a fully inclusive society- one complaint with all facets of our constitutional project.<sup>108</sup> In the promotion of achieving equality, implies that affirmative action programmes should be realistic in the sense that indiscriminate hiring, aimed at achieving equality overnight, will not be tolerated.<sup>109</sup>

### **3.4.5 Chapter V of the EEA: Enforcement of Affirmative Action**

Section 10 of the EEA governs only disputes that concern Chapter II, and it is evident that any dispute arising in respect of chapter III of the EEA falls within the framework of Chapter

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<sup>106</sup> Section 27 (6) of the EEA. See also for discussion Van Jaarsveld et al Principles and Practice par 734.

<sup>107</sup> (165/2013) [2013] ZASCA 177.

<sup>108</sup> (165/2013) [2013] ZASCA 177 par 80.

<sup>109</sup> Basson et al (2002) *Essential Labour Law: Volume 1: Individual Labour Law* 3<sup>rd</sup> ed, 325.

V. Section 36 of the EEA sets out the initial enforcement that “any employee or trade union representative may bring an alleged contravention of the EEA to the attention of another employee, an employer, a trade union, a workplace forum, a labour inspector, the Director General of Labour or the Commission for Employment Equity”.<sup>110</sup>

In terms of section 65 and 66 of the BCEA, a labour inspector has authority to enter, question, and inspect as provided for in term of EEA.<sup>111</sup> An inspector must request a written undertaking from designated employer to comply with the provisions of the EEA within a specified period, if there is reasonable ground to believe that the employer has failed to<sup>112</sup> consult with its employees or conduct an analysis of its workforce, prepare and implement EEP, submit an annual report, assign responsibility to one or more senior managers, or to keep records.

If the designated employer fails to give a written undertaking or having given a written undertaking, fails to abide by the undertaking, the labour inspector may issue a compliance order and the compliance order must set out any steps that the employer must take; the period within which those steps must be taken in order to comply and the maximum fine, if any, that may be imposed on the employer in terms of Schedule 1 for failing to comply with the order.<sup>113</sup> An employer may, within 21 days of receiving a labour inspector’s compliance order, make representation to the Director General objecting to the compliance order.<sup>114</sup> The Director General, after receiving and considering written representations, may confirm or vary or set aside the order.<sup>115</sup> An employer may, within 21 days of receiving the Director General’s decision, appeal to the Labour Court against such an order.<sup>116</sup> An appeal suspends the operation of an order.<sup>117</sup> If an employer does not object to the order within 21 days, and does not comply with an order, the Director General may apply to the Labour Court for the compliance order to be made an order of court.<sup>118</sup>

### **3.4.6 Chapter IV of the EEA: Establish a Commission for Employment Equity**

The function of this Commission is to establish codes of good practice which are issued by the Minister of Labour, to create policies concerning the EEA, give employers who further the

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<sup>110</sup> Section 34 of the EEA. See also Van Jaarsveld *et al* (n.d.) *Principles and Practice* par 735.

<sup>111</sup> Section 35 of the EEA.

<sup>112</sup> Section 36 of the EEA. See also Van Niekerk *et al* (2011) *Law @ Work* 2<sup>nd</sup> ed, 167.

<sup>113</sup> Section 37 of the EEA. See also Van Niekerk *et al* (2011) *Law @ Work* 2<sup>nd</sup> ed, 167-168.

<sup>114</sup> Section 39(1) of the EEA. See also section 71(1) of the LRA.

<sup>115</sup> Section 39(3) of the EEA. See also section 71(3) of the LRA.

<sup>116</sup> Section 40(1) of the EEA.

<sup>117</sup> Section 40(3) of the EEA. See also section 73 of the LRA.

<sup>118</sup> Section 39(6) of the EEA.

EEA rewards, research and report on any matter relating to the application of the Minister, and to perform any other function as prescribed by the Minister.<sup>119</sup> **3.4.7 Chapter VI of the EEA: General Provisions**

The final chapter of the EEA consists of twelve provisions to the EEA. These provisions are the rules regarding contracting with the State to the issuing of codes of good practice to sanctions for contravention of the provision of the EEA.

### 3.5 Affirmative Action a Shield or Sword?

The shield and sword debate came into existence because of the cases *Harmse v City of Cape Town*,<sup>120</sup> and *Dudley v City of Cape Town*.<sup>121</sup> The contrast lies between the “shield” and “sword”. Affirmative Action is said to be a shield in the hands of an employer and not a sword to be used by individuals.<sup>122</sup> “This means that, as a rule, an applicant for employment or promotion cannot rely on affirmative action in order to compel the employer to appoint or promote him/her. Affirmative action exists as a justification grounds for employers against allegations of discrimination”.<sup>123</sup> In *IMAWU v Greater Louis Trichardt Transitional Local Council*,<sup>124</sup> the court held that affirmative action can only be used as defence to justify an employer’s decisions where members of non-designated groups are affected in relation to one or more of the designated groups.

There was an early decision in the *Harmse* case, where the court held that if one were to have regard only for section 6, then one might be drawn to the conclusion that affirmative action is no more than a defence to a claim of unfair discrimination. Affirmative action is indeed a defence to be deployed by an employer against claims that it has discriminated unfairly against an employee. However, from a reading of the Act, it appears that affirmative action is more than just a “defence” in the hands of an employer, and affirmative action should not be confined to the limited role of a defence mechanism in the process of the elimination of unfair discrimination in the workplace.

The definition of affirmative action in section 15 is indicative of a role for affirmative action that goes beyond the tameness of its status as a defence mechanism. Affirmative action

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<sup>119</sup> Section 30 of the EEA.

<sup>120</sup> [2003] 6 BLLR 557 (LC).

<sup>121</sup> [2004] JOL 12499 (LC).

<sup>122</sup> *Abbott v Bargaining Council for the Motor Industry (Western Cape)* (1999) 20 ILJ 330 (LC) .

<sup>123</sup> Anonymous (2013) “The Regulation of Affirmative Action and Discrimination in South Africa”

[online] Available at: <http://etd.unisa.unisa.ac.za/ETD-db/theses/available/etd/unrestricted/07chapter6.pdf#search=%22affirmative%2Baction%2Bsword%2Bshield%22> (Accessed: 1/7/2013).

<sup>124</sup> (2000) 21 ILJ 1119 (LC) at 1129B-D.

measures include measures to “eliminate employment barriers” to “further diversity” in the workplace; and to ensure “equitable representation”. In these respects, affirmative action takes on more than just a defensive position. It includes pro-activeness on the part of the employer. The Act places an obligation on the employer to take measures to eliminate unfair discrimination in the workplace.<sup>125</sup>

What is significant about the *Harmse* case is that the Judge found that the protection and advancement of persons disadvantaged by unfair discrimination is recognised by the Constitution as part of the right to equality. The Judge was of the opinion that affirmative action is more than just a shield for employers but is also a sword for employees. The implication was that the employees had the right to litigate if the employer does not implement affirmative action.

In *Dudley*, the court distinguished between claims arising in terms of Chapter II of the EEA and claims that arise in terms of Chapter III. The court compared Chapter II which prohibits unfair discrimination, with Chapter III which concerns affirmative action measures. The distinction between the two chapters is significant. The prohibition against unfair discrimination is directly enforceable by a single aggrieved individual or by members of an affected group, whether or not there has been discrimination is a matter of law and the application of law to the facts. That is a matter for the decision of the Labour Court or an arbitrator, and the content of the prohibition is not in any way the subject of consultation between employer and employees.<sup>126</sup>

By contrast, the structure of Chapter III is such that, by definition, it is intended to and can be brought into operation only within a collective environment. This is inherent in the nature of the duties of an employer outlined in section 13(2). These are consultation, analysis, preparation of an EEP and reports to the director general on progress in the implementation of the plan. Each of these phases is given statutory content. This is important, for section 13(1)<sup>127</sup> qualifies the employer’s obligation as being one that is in terms of this Act. It is clear from a survey of the provisions of Chapter III that its essential nature is programmatic and systematic. Importantly, its methodology is uncompromisingly collective.<sup>128</sup>

In conclusion, the court held that since the EEA does not establish an independent, individual right to affirmative action and there is no right of direct access to the Labour Court

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<sup>125</sup> *Harmse v City of Cape Town* (2003) JOL 11047 (LC) at 5-6.

<sup>126</sup> *Dudley v City of Cape Town* (2004) 25 ILJ 305 (LC) at F-G.

<sup>127</sup> Every designated employer must, in order to achieve employment equity, implement affirmative measures for people from designated groups in terms of this Act.

<sup>128</sup> *Dudley v City of Cape Town* 2004 JOL 12499 (LC).

in respect of such claim, it follows that an individual applicant does not have *locus standi* to approach court directly for an order that the employer prepare and implement an EEP. Chapter V has catered for the enforcement of EEP.<sup>129</sup>

The significance of the *Dudley* Judgment is to confirm a link between Chapter II and Chapter III of the EEA which was created by *Harmse* judgment. By separating these two Chapters of the EEA, “should an applicant be suitably qualified and not be successful in being appointed for a particular post, the matter must be dealt with administratively as set out in the EEA”.<sup>130</sup>

In terms of the *Dudley* judgment, the aggrieved employee is under a duty to exhaust all enforcement procedures as provided for in the EEA to ensure implementation of affirmative action by designated employers. This limits the fundamental right to access to court as state in the Constitution.<sup>131</sup>

*FAGWUSA & another v Hibiscus Coast Municipality & Others*<sup>132</sup> was decided after *Dudley* case. What is important about this case is that it went on to hold that “designated employees are not entitled to an appointment merely because they are designated. If the employer *bona fide* considers the qualifications, suitability and experience of the candidates, the appointment of a white male might not be unfair to a black candidate merely because the successful candidate was a white male”.<sup>133</sup> It is submitted that this case create a voluntary status on affirmative action rather than mandatory status that is currently enjoying, because it allows for the appointment of a candidate from a non-designated group over an equally qualified candidate from a designated group, it renders the preferential treatment in the EEA impotent.

Returning to the debate of shield or sword, both the *Harmse* and *Dudley* cases they agree that affirmative action function as a shield (defence) for employers. This shield can be used when an unsuccessful applicant from designated group claims that he/she has be unfairly discriminated against due to the preferential treatment that is given to designated group. The difference in two cases it is when it comes to the question of whether affirmative action can also function as a sword (action). This would mean that an unsuccessful applicant from a designated group can bring an action against the employer for not applying affirmative action measures given the fact that the applicant is from designated group.

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<sup>129</sup> *Ibid* at 307 F.

<sup>130</sup> Wilken (2013) “Affirmative Action Case Law Developments” [online] Available at <http://www.deneysreitz.co.za/news/news.asp> (Accessed 18/12/2013).

<sup>131</sup> Section 34 of the Constitution.

<sup>132</sup> 2004, 24 ILJ 1976 (LC).

<sup>133</sup> Grogan Workplace Law 298.

It is evident from the following two cases that the courts are in favour of the *Dudley* case, as, in the judgment of *Public Servants Association (PSA) ob I Karriem v South African Police Service*,<sup>134</sup> and *Josephine Thekiso v IBM South Africa (Pty) Ltd.*<sup>135</sup> Nel AJ, in the *Karriem* case, held as follows: “I have considered the reasoning of *Tipp AJ in Dudley* as well as that of Wagley J in *Harms* and, respectfully find myself in agreement with the reasoning of Tipp AJ”.<sup>136</sup> In the *Thekiso* case, Freund AJ held as follows: “I do not accept that there is any basis on which I could conclude that the decision in *Dudley* was clearly erroneous and I therefore regard myself as bound by it”.<sup>137</sup>

The difference between the two cases can be summarised as the *Harmse* judgment promoting substantive equality through stating that if two equally qualified applicants apply for the same position, the applicant from designated group must be appointed to the position, failing to appoint him, he can bring an action against the employer. The *Dudley* decision promotes formal equality, stating that although there should preferential treatment of people from designated group, the EEA must ensure that no barriers are in place of the preferential treatment. “The difference between *Harmse* and *Dudley* is not merely an issue of statutory interpretation. It highlights a policy choice”.<sup>138</sup>

*Dudley*, *Karriem*, *Thekiso* appears to deny the use of the sword in affirmative action. It is posited that a compromise should be reached between these cases; and if the purpose of affirmative action is to promote substantive equality as suggested earlier, the EEA should be amended in order to allow the applicant to bring an action against the employer preferential treatment on the basis of facts subscribing a legitimate right to affirmative action. Affirmative action should thus operate as both the shield and sword in South Africa, in order to promote formal equality and substantive equality in accordance with the Constitution.

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<sup>134</sup> (C435/04) [2006] ZALC 39 (23 February 2006).

<sup>135</sup> (JS415/05) [2006] ZALC 91 (18 October 2006).

<sup>136</sup> *Public Servants Association obo I Karriem v South African Police Service* (C435/04) [2006] ZALC 39.

<sup>137</sup> *Thekiso v IBM South Africa (Pty) Ltd* (JS415/05) [2006] ZALC 91.

<sup>138</sup> Grogan (2004) “Conflict over Equity” *April Employment Law Journal* 17 at 17.

## CHAPTER IV

### A COMPARATIVE STUDY OF AFFIRMATIVE ACTION

#### 4. 1 Introduction

This investigates four foreign legal systems and their relationship to affirmative action in South Africa. The foreign legal are system America, Brazil, Canada and Malaysia. The purpose of this comparison is to draw some lesson and make recommendation that may lead to an effective affirmative action policy in South Africa.

#### 4.2 Affirmative Action in the United States of America

As already previously stated, affirmative action programmes have been used in the United States to promote actions based on non-discrimination and “to address the country’s longstanding and deeply entrenched prejudice against racial and ethnic minorities and women”.<sup>139</sup> During the 1950s and 1960s, anti-discrimination laws were adopted; and it became clear that these laws could not address the effects of years of inequality and oppression on their own.<sup>140</sup> Affirmative action originated from Executive Order 10925,<sup>141</sup> and forbid the government to discriminate against any employee on the basis race, creed, colour, or national origins.<sup>142</sup> On 24 September 1965, President Lyndon B. Johnson signed Executive Order 11246; thereby replacing Executive order 10925, and affirming the Federal Government’s commitment to promote the full realisation of equal employment opportunity through positive, continuing program in each executive department. Affirmative action was also extended to women<sup>143</sup>.

The United States Constitution guarantees equality to all persons, the 14<sup>th</sup> Amendment of the Equal Protection Clause provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws”.<sup>144</sup>

In the USA, affirmative action has been a subject of a number of court cases. Constitutional legitimacy came under scrutiny, in *Adarand Constructors, Inc. v Peña*<sup>145</sup>, and the court held

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<sup>139</sup> Powell JA (2001) *Transformative Action: A Strategy for Ending Racial Hierarchy and Achieving True Democracy in Beyond Racism: Race And Inequality In Brazil, South Africa, And The United States* 389-390.

<sup>140</sup> See Affirmative Action Review: Report to the President, Clinton White House Staff, July 19 1995, at <http://clinton2.nara.gov/WH/EOP/OP/html/aa/aa-index.html> (Accessed 29/12/2013).

<sup>141</sup> Order signed by President John F. Kennedy on 06 March 1961.

<sup>142</sup> Affirmative Action Review: Report to the President Clinton White House Staff, July 19 1995.

<sup>143</sup> On the 13 October 1967 by Executive Order 11375.

<sup>144</sup> USA Constitution. 14<sup>th</sup> Amendment.



that while expanding the pool of applicants is permissible, quotas, set-asides, or other rigid numerical requirements must be avoided. In *Grutter v Bollinger*,<sup>146</sup> the court held that race-specific programmes must be looked at through a lens of “strict scrutiny” to ensure that the measures taken have been narrowly tailored to meet compelling governmental interests. Programmes must be avoided that can cause unnecessary disruptions and burdens to majority groups. Lastly, in *Wygant v Jackson Bd. of Educ.*,<sup>147</sup> the court held that affirmative action programmes must be limited in time and reviewed periodically to assess whether they remain necessary. In accordance with international standards, the USA has ratified the International Convention on the Elimination of all forms of Racial Discrimination (ICERD) and International Covenant on Civil and Political Rights (ICCPR), and has signed the International Covenant on Economic, Social and Cultural Rights (ICESCR) as well as the Convention on the Elimination of All Forms of Discrimination against Woman (CEDAW).

#### 4.2.1 Affirmative Action Measures in the USA

In the United States, affirmative action refers to equal opportunity employment measures that federal contractors and subcontractors are legally required to adopt. These measures are intended to prevent discrimination against employees or applicants for employment on the basis of colour, religion, sex, or national origin. Affirmative action is offered in the United States by the Department of Labour, and includes outreach campaigns, recruitment, employee and management development, and employee support programs.<sup>148</sup>

If the criteria have been met, affirmative action may be used when determining who receives government contracts. In 1989, the Supreme Court considered whether it was legal to require contractors who had won city construction contracts to subcontract a percentage of their project out to a minority business enterprise. The court established that racial classifications must be reviewed using “strict scrutiny” to determine their constitutionality and, using this standard, ruled that for affirmative action programs to be legal, there must have been a clear history of discrimination and the program must further a compelling state interest.<sup>149</sup>

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<sup>145</sup> 515 U.S. 200, 498 (1995).

<sup>146</sup> 539 U.S. 306 (2003).

<sup>147</sup> 476 U.S. 267, 280-281 (2003).

<sup>148</sup> Global Rights (2005) “Affirmative Action A Global Perspective” [online] Available at: [www.globalrights.org/site/.../AffirmativeAction\\_GlobalPerspective.pdf?](http://www.globalrights.org/site/.../AffirmativeAction_GlobalPerspective.pdf?) (Accessed 29/11/2013).

<sup>149</sup> *City of Richmond v J.A. Croson Co.*, 488 U.S. 469 (1989). See also Global Rights (2005) “Affirmative Action A Global Perspective” [online] Available at: [www.globalrights.org/site/.../AffirmativeAction\\_GlobalPerspective.pdf?](http://www.globalrights.org/site/.../AffirmativeAction_GlobalPerspective.pdf?) (Accessed 29/11/2013).



#### 4.2.2 Application and Implementation of Affirmative Action in the USA

Under certain circumstances, private sector workplaces in the United States can create affirmative action programmes to benefit members of a certain racial group.<sup>150</sup> In the United States, a prominent form of racial preferences relates to education, in particular admission to university and other form of higher education. Race, ethnicity, native language, social class, geographical origins, parental attendance of the university in question and gender are sometimes taken into account when the university assesses an applicant's grades and test scores.<sup>151</sup> The court requires a "strict scrutiny" test to determine whether the policies in question further a compelling governmental interest and if so, whether they are also narrowly tailored to meet the interest. Using this standard the court found that educational institutions have a compelling governmental interest in fashioning a diverse student body.<sup>152</sup>

In the United States, universities cannot establish quotas for members of certain racial groups, place members of those groups on separate admission tracks, or insulate applicants who belong to certain racial or ethnic groups from the competition for admission. They consider race or ethnicity more flexibly as an added advantage rather than a requirement. University admission programmes remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application for the race-conscious policy to be constitutional.<sup>153</sup>

When it comes to public housing for poor citizens, the United States cannot legally construct houses solely in racially segregated neighbourhoods, and when this has occurred affirmative action may be needed to remedy the problem.<sup>154</sup>

#### 4.2.3 Lessons for South Africa

Although affirmative action in the United States it is more than 50 years old, one could argue that it has successfully eliminated the imbalances of the past, but South Africa can still take lesson from its implementation. What is significant about the American system is that in order to benefit from affirmative action, an individual must prove that he/she has been

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<sup>150</sup> Global Rights (2005) "Affirmative Action A Global Perspective".

<sup>151</sup> Global Rights (2005) "Affirmative Action A Global Perspective".

<sup>152</sup> University of Calif. Regents v Bakke, 438 U.S. 265 (1978).

<sup>153</sup> Global Rights (2005) "Affirmative Action A Global Perspective".

<sup>154</sup> Global Rights (2005) "Affirmative Action A Global Perspective".

historically disadvantaged. The individual is assessed and scrutinised, as it is believed that affirmative action programmes must not be a burden to the majority groups, and that affirmative action programmes must be limited in time and reviewed periodically to assess whether they remain necessary.<sup>155</sup>

These measures are taken to ensure that affirmative action programmes are delivered where they are needed. It is submitted that this type of assessment can assist South Africa, as one often hear criticism that affirmative action policies mainly benefit the middle and elite classes, while failing to meet the needs of those at the lower end of the income distribution. This failure can be blamed on the lack of “strict scrutiny” and monitoring.

### 4.3 Affirmative Action in Brazil

In the sixteenth century, Brazil was conquered and colonised by the Portuguese and remained a colony of Portugal until the nineteenth century.<sup>156</sup> Brazil became an empire with a monarchy in 1822, while the rest of North and South America became republics.<sup>157</sup> Since gaining independence in 1822, Brazil experienced a series of military coups and there was significant political instability.<sup>158</sup> The country only gained a sense of political stability in 1994, 72 years after achieving independence.<sup>159</sup> Until 2001, Brazil insisted that its people were in a state of substantive equality, regardless of race. After the Third World Conference against

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<sup>155</sup> Oxford Reference “Affirmative Action” [online] Available at: <http://122.e0020&srn=2&ssid=355374901#firsthit> (Accessed 19/1/2014).

<sup>156</sup> Burns (1970) *History of Brazil* 110-111.

<sup>157</sup> Deal “Brief History of Brazil” [online] Available at: <http://www.brazilbrazil.com/historia.html> (Accessed 3/1/2014).

<sup>158</sup> Hasler *et al* (n.d.) “National Human Resource” [online] Available at: <http://adh.sagepub.com/cgi/reprint/8/1/99.pdf> (Accessed 4/12014).

<sup>159</sup> *Ibid.*

Racism,<sup>160</sup> Brazil changed its stance on the equality levels, and adopted affirmative action policies in 2001.

The objective of affirmative action in Brazil is to correct the racial discrimination of the past and to create a society that can live in harmony, irrespective of the country's multicultural background. Rio de Janeiro's programme has two possible objectives: Firstly, for legislature to correct current inequalities, and secondly, to compensate for past discrimination.<sup>161</sup>

Brazil is facing some serious challenges regarding the constitutional validity of its affirmative action. "[With] the adoption of a twenty percent quota the [federal Supreme Court] President, Marcio Aurelio reasoned that the adoption of affirmative action was not only constitutionally valid, but also necessary to achieve the constitutional principle of equality".<sup>162</sup> Therefore, affirmative action in Brazil passes the constitutional muster and does not infringe on the Brazilian Constitution.<sup>163</sup>

#### 4.3.1 Affirmative Action Measures, Implementation, and Application in Brazil

During 2000 and 2001, the state legislature of Rio de Janeiro passed laws demanding that two public universities over which it has jurisdiction set 50 percent of their seats to be reserved for applicants from public high schools, 40 percent for student who identified themselves as black or mixed race, and 10 percent for student with disabilities.<sup>164</sup>

Affirmative action has grown from its implementation at the State University of Rio de Janeiro in 2002, and spread to a large number of higher education institutions. Today, the majority of Brazil's federal and State Universities, which are attended by about 80 percent of Brazilian students in public higher education, have a form of a quota system.<sup>165</sup> Quota-

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<sup>160</sup> The Third World Conference against Racial Discrimination was held in Durban in September 2001.

<sup>161</sup> Brooks (n.d.) "Efficient Affirmative Action" [online] Available at: [http://islandia.law.yale.edu/sela/SELA%202005/Richard%20Brooks%20English%20\(Final%20English%20Version\)%20v1.0.pdf](http://islandia.law.yale.edu/sela/SELA%202005/Richard%20Brooks%20English%20(Final%20English%20Version)%20v1.0.pdf) (Accessed 3/1/2014).

<sup>162</sup> Brooks "Efficient Affirmative Action" 20.

<sup>163</sup> Constitution of the Federative Republic of Brazil, 1988.

<sup>164</sup> Global Rights "Global Perspective" 19.

<sup>165</sup> UNESCO "Studies on Human Rights" [online] Available at: <http://redetis.iipe.unesco.org.ar/wp-content/uploads/2013/05/LASAForum-vol44-issue2.pdf> (Accessed 6/1/2014).

based programmes guarantee a certain percentage of university admission slots to students on the basis of race and/or class.<sup>166</sup>

The Labour Ministry's response to the call for government to implement affirmative action measures within itself was to reserve 20 percent of its job-training budget for dark-skinned people. Similarly, the Ministry of Foreign Relations created a scholarship for black students at the Instituto Rio Branco diplomatic training school, instead of creating a quota system as with the rest of government.<sup>167</sup>

In 2013, President Luiz Inacio Lula da Silva established a National Policy for the Promotion of Racial Equality, which has set out to establish quotas for certain government jobs. That same year, the Sao Paulo City Council approved a law to develop quotas for people of African descent in the city government.<sup>168</sup> The implementation of affirmative action in government is poor, the study shows that the system creates no sense of consistency, since an applicant for a position cannot be sure whether or not affirmative action measures will be applied to his/her application.

A complicating feature in the implementation of affirmative action in Brazil is that there are over 300 different classifications of race, and each of these various shades of brown is used to describe skin colour and ancestry. Because of this, opponents of affirmative action in Brazil say that "free-riders" or opportunists will exploit the system and reap all benefits from the programmes.<sup>169</sup>

#### **4.3.2 Lesson for South Africa**

Affirmative action measures in Brazil seem to have no direction. The measures are inconsistent, and success is not measurable. That being said, Brazil offers incentive to private schools and colleges that offer rewards for implementing effective transformation policies beyond the Brazilian quota system. This encourages higher enrolment of students from designated groups to schools around Brazil, and South Africa should consider adopting this policy of offering some form of incentive to private schools as part of its affirmative action policy. South Africa only offers State contracts.<sup>170</sup> South Africa also offers rewards to businesses for compliance with affirmative action measures with regard to employment

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<sup>166</sup> *Ibid* at 10.

<sup>167</sup> Hasler "National Human Resource".

<sup>168</sup> Global Rights "Global Perspective" 21.

<sup>169</sup> UNESCO "Studies on Human Rights" at 163.

<sup>170</sup> Section 53 of the EEA.

equity and for voluntary employers; while there are no incentives for private education institutions.<sup>171</sup>

## **4.4 Employment Equity in Canada**

### **4.4.1 Historical Background**

Until recently, people of Aboriginal ancestry made up two percent of Canada's population, and visible minorities comprised another 11 percent. These people, along with women and people with disabilities are provided with affirmative action measures, known in Canada as "employment equity," in a number of ways. The purpose of employment equity is to make the Canadian workforce reflective of the population at large and to correct conditions of employment disadvantage.<sup>172</sup> In 1986, the Canadian government enacted employment equity legislation in order to address the inequity with regard to these groups and the legislation was amended in October 1995, as contained in the Canadian Employment Equity

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<sup>171</sup> Laher (2007) "A Critical Analysis of Employment Equity Measures in South Africa (2007)" 102 [online] Available at: <http://eprints.ru.ac.za/2189> (Accessed 22/3/2013).

<sup>172</sup> Global Rights "Global Perspective" at 27.

Act<sup>173</sup> (CEEA). Although the CEEA is the legislation governing the entire country, most provinces and territories have their own forms of human rights legislation which prevent discrimination and promote preferential treatment of designated groups.<sup>174</sup>

The Canadian model and experience of employment equity serves as a good example for South Africa with regard to the implementation and application of affirmative action.<sup>175</sup> The Canadian model of “affirmative action” never explicitly uses the term “affirmative action”. The South Africa Employment Equity Act and the Canadian Employment Equity Act have similarities. The Canadian Charter of Human Rights<sup>176</sup> and the South African Constitution have much in common as well. Sections 9(1) and (2) of the South African Constitution are almost identical to sections 15(1)<sup>177</sup> and (2)<sup>178</sup> of the Canadian Constitution. The only difference is that the Canadian Constitution prohibits all forms of discrimination whereas the South African Constitution only prohibits unfair discrimination.

#### 4.4.2 Canadian Employment Equity

##### (i) Designated Groups

The CEEA provides benefits for people from designated groups. According to the CEEA, designated groups include women, aboriginal peoples, people with disabilities, and members of visible minorities.<sup>179</sup> The one additional requirement to be a beneficiary of affirmative action in Canada is disclosure, as, according to section 9(2), only employees who identify themselves or agree to be identified by an employer as a person falling into the categories of designated group will be considered as members of that designated group.

##### (ii) Deemed Employer

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<sup>173</sup> Act c44 of 1995.

<sup>174</sup> PSAC “Employment Equity Legislation” [online] Available at: [http://www.psac-afpc.org/what/empequity/EE\\_Employment\\_Equity\\_Legislation-e.shtm1#3.%20%20%What%20Are%20the%20Main%20Steps%20of%20Employment%20Equity%20Work](http://www.psac-afpc.org/what/empequity/EE_Employment_Equity_Legislation-e.shtm1#3.%20%20%What%20Are%20the%20Main%20Steps%20of%20Employment%20Equity%20Work) (Accessed 23/8/2013).

<sup>175</sup> Laher (2007) “A Critical Analysis of Employment Equity Measures in South Africa (2007)” 102-103.

<sup>176</sup> Act c H-6 of 1985.

<sup>177</sup> Every individual is equal before the and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

<sup>178</sup> Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

<sup>179</sup> Section 1 of the CEEA.

The CEEA does not apply to all employers in Canada. It is only applicable to deemed employers as set out in the act.<sup>180</sup>

### **(a) Private Sector Employers**

In the private sector, affirmative action measures apply firstly to any person who employs 100 or more employees and secondly, to any person “in connection with a federal work, undertaking or business as defined in section 2 of the Canada Labour Code, and includes any corporation established to perform any function or duty on behalf of the Government of Canada that employs one hundred or more employees.”<sup>181</sup>

### **(b) Public Administration**

Schedule 4 of the Financial Administration Act,<sup>182</sup> provides that the CEEA applies to specified areas of the public sector. In terms of the Public Service Employment Act<sup>183</sup> the definition of public sector excludes employees employed in an area for which the Public Service Commission exercises any power or performance functions.

### **(iii) Employment Equity Measures**

The CEEA,<sup>184</sup> sets out duties of “every employer” with regard to employment equity. Section 5 of the CEEA seems to indicate that only deemed employers are obliged to follow the duties of “every employer” as set out in Part 1 of the Act. Section 5 of the Act obliges deemed employers to implement employment equity in two forms. Firstly, by identifying and eliminating employment barriers against the designated groups caused by employment practices, policies and systems not authorised by law.<sup>185</sup> Secondly, the employer is obliged to implement “positive policies and practices” to ensure that a designated group’s members

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<sup>180</sup> Section 4 of the CEEA

<sup>181</sup> Section 3 of the CEEA. See also Laher (2007) “A Critical Analysis of Employment Equity Measures in South Africa” 110.

<sup>182</sup> RSC (1985) “Acts” [online] Available at: <http://www.scribd.com/doc/101111111/Acts> (Accessed 10/1/2014).

<sup>183</sup> Act c. 22 of 2003.

<sup>184</sup> Section 5 of the CEEA.

<sup>185</sup> Section 5(a) of the CEEA. See also Laher (2007) “A Critical Analysis of Employment Equity Measures in South Africa” 111.

are reasonably accommodated in the workplace as well as ensuring that these groups attain a measures of representation in all levels of the workforce.<sup>186</sup>

The CEEA provides that the employer need not implement the employment equity measures in the following instances: if it is likely to cause the employer undue hardship,<sup>187</sup> if the applicant does not have the requisite qualification to perform the job,<sup>188</sup> or in the public sector, where the Publics Service Employment Act requires hiring or promotion to be based on merit.<sup>189</sup>

The CEEA provides a preferential treatment section which reads as “notwithstanding any other provision of this Act, where a private sector employer is engaged primarily in promoting or serving the interests of aboriginal peoples, the employer may give preference in employment to aboriginal peoples or employs only aboriginal peoples”.<sup>190</sup> The exception is that the preference is not allowed to constitute a practice that would be viewed as discriminatory under the Canadian Human Rights Act. If a person from a non-designated group is preferred for a position over a person from designated group, even if the unsuccessful applicant is better qualified the CEEA does not consider that as discrimination.<sup>191</sup>

#### **(iv) Analysis and Review**

The CEEA requires deemed employers to collect data and conduct a workforce analysis to determine the representation of people from designated groups in all areas of its workforce.<sup>192</sup> This Analysis “compares the numbers of each designated group in each occupational group of the employer’s workforce to the Canadian workforce.”<sup>193</sup> The review focuses on “existing and new systems, policies, practices. The employment system review is to examine the following in order to identify barriers against the designated groups:

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<sup>186</sup> Section 5(b) of the CEEA. See also Laher (2007) “A Critical Analysis of Employment Equity Measures in South Africa” 111.

<sup>187</sup> Section 6(a) of the CEEA.

<sup>188</sup> Section 6(b) of the CEEA.

<sup>189</sup> Section 6(c) of the CEEA.

<sup>190</sup> Section 7 of the CEEA.

<sup>191</sup> Section 8 of the CEEA.

<sup>192</sup> Section 9(1)(a) of the CEEA.

<sup>193</sup> PSAC “Employment Equity Legislation”. See also Laher (2007) “A Critical Analysis of Employment Equity Measures in South Africa” 113.



recruitment, selection, hiring; development and training; promotion; retention and termination; and reasonable accommodation of the designated groups”.<sup>194</sup>

#### **(v) Consultation**

The CEEA requires that every employer to consult with employees in order to ensure proper implementation of employment equity measures.<sup>195</sup> The purpose of this consultation with employees’ representatives is to invite them to provide their views on certain issues<sup>196</sup> and to collaborate in the preparation, implementation and revision of the employment equity plan.<sup>197</sup>

#### **(vi) Employment Equity Plans**

The first measure that the employment equity plan must contain is to specify the positive policies and practices that will be implemented in the short term<sup>198</sup> with regard to hiring, training, promoting, and retaining persons from designated groups as well as making reasonable accommodations.<sup>199</sup> Secondly, the plan must contain a timetable for the implementation of the goals as set out in the plan.<sup>200</sup> A deemed employer is also required to set out long term goals that have the goal of increasing representation in the workforce.<sup>201</sup> The deemed employer can include any other matter that may be prescribed.<sup>202</sup>

#### **(vii) The Reports**

The CEEA requires every employer to submit reports on their implementation and to establish and maintain employment equity records regarding its workforce, the plan and the implementation of the plan. “Private sector employers are to provide yearly statistical reports to Human Resources Development Canada which compares the representation of designated group employees to the workplace population in the area of representation hires, promotions and terminations”.<sup>203</sup>

#### **(viii) The Duty to Inform**

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<sup>194</sup> Section 9(1)(b) of the CEEA. See also PSAC “Employment Equity Legislation” and Laher (2007) “A Critical Analysis of Employment Equity Measures in South Africa” 113.

<sup>195</sup> Section 15 of the CEEA.

<sup>196</sup> Section 15(1) of the CEEA.

<sup>197</sup> Section 15(3) of the CEEA. See also Laher (2007) “A Critical Analysis of Employment Equity Measures in South Africa” 114.

<sup>198</sup> Section 10(3) of the CEEA.

<sup>199</sup> Section 10(a) of the CEEA. Also see Laher (2007) “A Critical Analysis of Employment Equity Measures in South Africa” 115.

<sup>200</sup> Section 10(c) of the CEEA.

<sup>201</sup> Section 10(e) of the CEEA.

<sup>202</sup> Section 10(f) of the CEEA.

<sup>203</sup> PSAC “Employment Equity Legislation”.

In terms of the CEEA, every employer has a duty to inform employees about certain aspects of employment equity.<sup>204</sup> This includes the purpose of employment equity; any measures taken or plans to implement employment equity as well as the progress made in implementing such employment equity measures.**(ix) Enforcement**

The Canadian Human Rights Commission, established under section 26 of the Canadian Human Rights Act, is charged with enforcing the Employment Equity Act. Tribunals may be convened to review potential non-compliance and order remedial action, and employers who breach the Act may be fined.<sup>205</sup>

#### **4.4.3 Lesson for South Africa**

It is submitted that there is one lesson that South Africa can learn from CEEA. The Concept of preferential treatment of senior members i.e. seniority rights provide protection for senior employees. These employees are experienced and valued members of the workforce and they can assist by sharing their experience with the young employees therefore they deserve some preferential treatment. This provision validates affirmative action by demonstrating that affirmative action is not merely assisting designated groups to the detriment of everyone else but also makes measures for the protection of people from non-designated groups.

### **4.5 Affirmative Action in Malaysia**

#### **4.5.1 Historical Background**

In order to understand affirmative action in Malaysia, it is necessary to give a bite of history background of the country. This can as well explain the question as to why it was necessary for Malaysia to adopt affirmative action policy.

Since nineteenth century the majority of Malaya<sup>206</sup> was a colony of Britain until 1942.<sup>207</sup> During the reign of British, there was a mass immigration of Chinese and Indian people to such an extent that the Malay people became minority in their own country.<sup>208</sup>

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<sup>204</sup> Section 14 of the CEEA.

<sup>205</sup> Global Rights “Global Perspective” 28.

<sup>206</sup> Malaysia was known as Malaya until it obtained its independence.

<sup>207</sup> Miller (1965) “*The story of Malaysia*”, 155.

<sup>208</sup> Abdullah (1997) “*Affirmative Action Policy in Malaysia: To Restructure Society, to Eradicate Poverty*”, XV (2) *Ethnic Study Report* 190.

It was against this background that Malaysia adopted affirmative action policy in 1971. It was called the New Economic Policy (NEP).<sup>209</sup> It can be argued that, it is appropriate to compare Malaysia and South Africa in a social and economic context than South Africa and Canada. Because when affirmative action was implemented Malaysia the purpose was to develop economy, and like South Africa it did not have the resources of first world countries to rely on in order to implement an effective, practical and functional affirmative action policy.<sup>210</sup>

Similar to South African EEA, the NEP had two main goals. The first goal “ aim at reducing and eventually eradicating poverty by raising income levels and increasing employment opportunities for all Malaysians, irrespective of race.”<sup>211</sup> The second goal was to bring about a sense of substantive equality for the Bumiputera people. The second goal of the NEP is completely in line with one of the goals of the EEA i.e. to bring about a sense of substantive equality for the respective designated groups.<sup>212</sup> The first goal is in contrast with EEA because it ensures fair treatment of all employees by eliminating unfair discrimination irrespective of your background.

#### **4.5.2 Application and Implementation of the NEP in Business**

It is important to note that NEP set out goals for its aim to bring about substantive equality in commercial and industrial activities. “Specifically, the goal was to increase Malay share ownership from 3 percent in 1971 to 30 percent over a 20 years period; decrease the foreign share from 63 percent to 30 percent; and increase the non-Malay share from 34 percent to 40 percent.”<sup>213</sup> Further to these, the commercial requirements 30 percent of all government construction contracts were required to be given to firms owned by Bumiputera people.<sup>214</sup> Banks were also required to increase their loans to the Bumiputera population of Malaysia.<sup>215</sup>

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<sup>209</sup> *Ibid.*

<sup>210</sup> Emsley (1997) “*The Malaysian Experience of Affirmative Action: Lessons for South Africa*”.

<sup>211</sup> Abdullah (1997) XV (2) *Ethnic Studies Report* 190201.

<sup>212</sup> Ghee “*Social and Economic integration of Different Ethnic Groups in South-East Asia, with Special Reference to Malaysia: A Review of the Literature and Empirical Matter*” at <http://www.ilo.org/public/english/bureau/inst/download/dp8295.pdf> (Accessed on 23/01/2014).

<sup>213</sup> Ghee “*Social and Economic integration*” 3.

<sup>214</sup> *Ibid.*

<sup>215</sup> Global Rights “*Global Perspective*”.

To achieve these goals, the Malaysian government began acquiring economic assets from modern sectors of the economy by means of negotiation or stock purchase in order to reserve such assets for the Bumiputera people.<sup>216</sup> The government acted as a trustee for the Bumiputera people until these assets could be privatised.<sup>217</sup> To increase loans to the Bumiputera people, the Malaysian government set up financial institutions, most notably the Bank of Bumiputera.<sup>218</sup> The government established “a series of public sector enterprises, the leading one being the National Petroleum Corporation. In these government enterprises provided that opportunity and ethnic Malays were given preference in hiring for positions within these public sector firms.”<sup>219</sup> It appears that the NEP has been successful in at least ensuring a Bumiputera business presence, with Bumiputera business owners rising from 14.2 percent in 1973 to 32.37 percent in 1987.<sup>220</sup>

#### 4.5.3 Application and Implementation of the NEP in Education and Health

The government also set out specific education and health goals.<sup>221</sup> The government it began by establishment of clinics for the rural population as well as providing them with safe drinking water.<sup>222</sup> The Malaysian government was successful in these goals. “In 1970 the Infant Mortality Rate (IMR) stood at 45 per thousand, which was not particularly good even by developing country standards. By 1988 the IMR had fallen to 14.2 in 1970 only six countries in the world had a rate lower than 14.2.”<sup>223</sup> The safe drinking water provision was achieved for two-thirds of people in the rural areas by 1987.<sup>224</sup>

In education sector, before the adoption of the NEP, the Bumiputera people experienced a relative disadvantage in education that the first goal of the NEP could not rectify. As a result of their regional and rural location and family background and constraints, Malays obtain a shorter and inferior education than the Chinese and Indians.<sup>225</sup>

In order to promote equality in education sector, the government began by providing a higher number and a better standard of teachers in the rural areas, with the aim of promoting a

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<sup>216</sup> Esman (1991) “*Contrary Consequences of Affirmative Action In Malaysia in Conflict: Policy Interactions in the Pacific Basin CSIA Discussion Paper, Harvard*” (Available Online) at:

[http://besia.ksg.harvard.edu/BCSIA\\_content/documents/disc\\_paper\\_91\\_08.pdf](http://besia.ksg.harvard.edu/BCSIA_content/documents/disc_paper_91_08.pdf) (Accessed on 24/01/2014).

<sup>217</sup> Abdullah (1997) XV (2) *Ethnic Studies Report* 190.

<sup>218</sup> *Ibid.*

<sup>219</sup> Esman “*Contrary Consequences*” 28.

<sup>220</sup> Emsley “*Policy in Malaysia*” 64.

<sup>221</sup> *Ibid.*

<sup>222</sup> *Ibid.*

<sup>223</sup> *Ibid.*

<sup>224</sup> *Ibid.*

<sup>225</sup> Emsley “*Policy in Malaysia*” 38.

better education, and employment opportunities, for the rural population.<sup>226</sup> The Malaysian government also set about a successful campaign for secondary school education. During the 1960s, “secondary school enrolment was only 34 percent and great efforts were made in the course of the 70s and 80s to bring this closer to universal coverage. Enrolment increase to 72 percent in 1985, which is higher than in nearly any other comparable middle-income country.”<sup>227</sup>

Education reform for the Bumiputera people, was the introduction of the indigenous language, “Bahasa Malaysia”, as the medium of instruction, but permission was refused to Chinese community when they attempted to set up their own Chinese language Merdeka University.<sup>228</sup> The NEP also implemented a policy which gave a substantial preference to Bumiputera applicants to universities. Although this achieved good results in allowing for better education for the Bumiputera people, it also resulted in about sixty thousand Chinese students being forced to study overseas by 1985.<sup>229</sup> Malaysia government did rectify this problem at a later stage by offering university education in more languages.<sup>230</sup>

It is worth to mention that the Malaysian system is flexible since it sets out specific goals at the outset.<sup>231</sup> Thus, when the goal is achieved, the success of the NEP can be measured and that goal can be removed from the agenda. The main purpose of the NEP can then be moved elsewhere rather than be distracted by unnecessary, already fulfilled goals.

#### **4.5.4 Lessons for South Africa**

Similarities between the historical and economic backgrounds of both South Africa and Malaysia, makes it a very interesting model for South African legislators to study this NEP.

##### **(a) Goals of the NEP**

The goals which have been set by NEP are too wide compared to EEA; it may prove to be difficult to achieve them practically. The NEP aimed to achieve substantive equality for all people within its country through focusing in one group of people. On the other hand the EEA aims at achieving substantive equality to a limited group of people. But the NEP was successful in its goal to achieve substantive equality for a limited, designated group of

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<sup>226</sup> *Ibid.*

<sup>227</sup> *Ibid* 39.

<sup>228</sup> *Ibid* 40.

<sup>229</sup> Global Rights “*Global Perspective*”.

<sup>230</sup> Abdullah (1997) XV (2) *Ethnic Studies Report* 190.

<sup>231</sup> Emsley “*Policy in Malaysia*”.

people- the Bumiputera people. It submitted that South Africa can learn from this system to set goals and make sure that those goals are achieved.

### **(b) Health, Water and Education**

Malaysia government was very successful in delivering good health system, clean water and education through NEP, despite limited economic and human resources. Malaysia has managed to improve its IMR drastically over a period of ten years and to provide two-thirds of the people in rural area with water in a period of seventeen years.<sup>232</sup> Although this form of development does not fall under the current ambit of the EEA,<sup>233</sup> the Malaysian model serves as a good example for South Africa in eradicating poverty amongst all people. Accordingly, it is submitted that South Africa should take cognisance of the Malaysian approach and implement it in order to give effect to rights in the Constitution.<sup>234</sup>

Education is highly relevant to employment equity as Malaysia has demonstrated. Many townships and rural communities throughout South Africa still lack satisfactory standard of education including educational facilities.<sup>235</sup> If education is not prioritised EEA policy will be futile exercise, as most people in the rural and township communities belong to the designated groups. It is submitted that South Africa can take some valuable lesson on transforming education in Malaysian NEP.

### **(c) Flexibility**

This is arguably the most important lesson that South Africa should learn from the Malaysian NEP, its flexibility. In this regard the NEP is far stronger system than the EEA which does not set goals as well articulated as the NEP and, therefore the EEA does not even set out goals or time measures to meet those goals, like the NEP. This allowed for a review of successes and failures and further reforms in the shape of the National Development Policy.<sup>236</sup> It submitted that South African affirmative action needs a degree of flexibility so that affirmative action measures can have a detrimental effect on the economic growth rate, in order for government can respond.

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<sup>232</sup> Emsley "*Policy in Malaysia*".

<sup>233</sup> See section 27(1)(a) and (b) of the South African Constitution.

<sup>234</sup> Laher (2007) "A Critical Analysis of Employment Equity Measures in South Africa" 137.

<sup>235</sup> See Furlonger "Ignorance Is No Bliss For SA's 'Afterthought' Children" (Available online) at <http://free.fincialmail.co.za/rallytoread2006/mar06.htm> (25/01/2014).

<sup>236</sup> Emsley "*Policy in Malaysia*".

## **CHAPTER V**

### **THE EFFECTIVENESS OF AFFIRMATIVE ACTION IN SOUTH AFRICA**

#### **5.1 Introduction**

This Chapter attempts to answer the following questions: firstly, who benefits from the affirmative action policy? Secondly, who should benefit from the affirmative action programmes? These questions are answered in order to attempt to contextualise and understand the effects of application and implementation of affirmative action in South Africa.

#### **5.2 Beneficiaries and Non Beneficiaries of Affirmative Action**

The following cases demonstrate the beneficiaries of affirmative action in South Africa:

In the case of *Stulweni v SA Police Service*<sup>237</sup> the applicant alleged that he ought to have been given a preference based on his religious beliefs. The applicant was of Muslim religion and applied for a vacancy in the SAPS as a chaplain. He was unsuccessful and while some of the other successful applicants were from a designated group, all successful applicants were of the Christian religion. The arbitrator examined both the provisions of the EEA and the SAPS's employment equity plan, and noted that the plan only provided for affirmative action measures to be taken with regard to suitably qualified persons from designated groups. Designated groups included black people and people with disabilities.<sup>238</sup>

This case demonstrates that affirmative action measures are aimed at addressing the representivity of designated groups only. In other words, religion does not enter the definition of designated groups. It would not be open to the employer to advance an applicant on the grounds of religion on the basis of an affirmative action measure. The commissioner further contended that the applicant's case was not aimed at non-discrimination, but rather at positive discrimination on the grounds of his religion. Affirmative action measures, as presented in terms of the EEA, do not necessarily create rights for persons, but mainly presents designated employees with a duty and a defence.<sup>239</sup>

In the matter of *George v Liberty Life Association of Africa Ltd*,<sup>240</sup> the court considered who the beneficiaries of affirmative action would be. The court held that the beneficiaries of affirmative action are determined by the purpose of affirmative action. As the purpose of affirmative action is to redress the imbalances of the past, the beneficiaries should be those people who were disadvantaged in the past. The court concluded those disadvantaged groups were linked to the categories of race, gender and disabled people.<sup>241</sup>

However, this approach is problematic. To link affirmative action with race and gender and disability limits affirmative action's ambit. As a result, it will continue to be criticised as a policy that mainly benefits the middle and elite classes while failing to meet the needs of those at the lower end of the income distribution. Furthermore these views suggest that it

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<sup>237</sup> 2003, 24 ILJ 883.

<sup>238</sup> Anonymous "The Regulation of Affirmative Action and Discrimination in South Africa" [online] Available at: <http://etd.unisa.ac.za/ETD-db/theses/available/etd-08112006-145645/unrestricted/07chapter6.pdf#search=%22affirmative%2Baction%2Bsword%2Bshield22> (Accessed 3/5/2013).

<sup>239</sup> Du Toit *et al* (2003) *Labour Relation Law, Comprehensive Guide*, 563.

<sup>240</sup> [1996] 8 BLLR 985 (IC).

<sup>241</sup> Laher (2007) "A Critical Analysis of Employment Equity Measures in South Africa" 142.



affirmative action is a form of reverse discrimination, as it overlooks the skills and experiences of people while only focusing on gender and race.

Therefore, it may be posited that affirmative action policy should not be based on racial criteria, rather be based on temporary and non-racial criteria. In addition, if a person had suffered discrimination in the past, he/she must prove that in order to avoid “free riders” like those found in the USA, for example. In U.S.A in order to benefit from affirmative action an individual must clear prove that he has been historical disadvantage, in other words they assess the individual and scrutinize, in addition they believe that affirmative action program must not be a burden to the majority groups and finally affirmative action programs must be limited in time and reviewed periodically to assess whether they remain necessary. In South Africa we use race and gender. It is submitted that South Africa need to adopt U.S.A approach.<sup>242</sup>

In *Stoman*, Judge Van der Westhuizen addressed the issue of benefiting group rather than individual through stating that “the aim of affirmative action is not to punish or otherwise prejudice the applicant as an individual, but to diminish the over-representation which his group has been enjoying as a result of previous unfair discrimination”.<sup>243</sup>

The issue of groups to benefit instead of individual has caused controversy to the purpose of affirmative action. The purpose of affirmative action as set out in the act is to redress the discrimination of the past and give those people who have been disadvantaged an equal opportunity. The reality is that in each group, there are individuals who by virtue of their personal history have never been disadvantaged. Because these individuals belong to the group which has been identified as disadvantaged they are having an unfair claim by virtue of group identity. An individual who has been disadvantaged cannot claim in the affirmative action programmes if he/she belongs to a group identified as privileged, even if that particular individual is not privileged at all. It is submitted that individualised affirmative action will work better than the group system in this instance.

Another important case is that of *Auf der Heyde v University of Cape Town*<sup>244</sup> although this case fell short of determining the question of whether foreign nationals should be beneficiaries; it prompted the passing of Amended Employment Equity Regulations<sup>245</sup> which

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<sup>242</sup> Oxford Reference “Affirmative Action” [online] Available at: <http://122.e0020&srn=2&ssid=355374901#firsthit> (Accessed 19/1/2014).

<sup>243</sup> *Stoman v Minister of Safety & Security & others* 10351 I-J.

<sup>244</sup> (2000) 21 ILJ 1758 (LC).

<sup>245</sup> GN R480, Government Gazette 28858 of 26 May 2006.

limits the definition of designated groups to South African citizen. This means that only South African citizens can benefit from affirmative action.

Although white males are the only non-beneficiaries of affirmative action, there are disputes among designated groups as to who should get preferential treatment in terms of the affirmative action programs. In *Motala v University of Natal*<sup>246</sup> the university had a lower standard for admission for black applicant as compared to Indian applicants. The argument was that “African pupils were subjected under the ‘four tier’ system of education which was greater than that suffered by their Indian counterparts”.<sup>247</sup>

The issues of racial preference also arose in *Christiaans v Eskom*,<sup>248</sup> where the applicant was a coloured male who applied for the post as advertised by Eskom. Although nine applications were received only two applicants were shortlisted and interviewed (Christiaans and Mashigo, an African male). Both were subjected to the same test and the applicant scored far higher than Mashigo. Despite being recommended by the panel he was not appointed, the Management preferred Mashigo because he was African and Christiaans was coloured. Christiaans contended that he was unfairly discriminated against. The arbitrator dismissed his claim on the basis that the applicant failed to prove that he was unfairly discriminated against.

It is submitted that the real beneficiaries of affirmative action are black people.

### 5.3 An Evaluation of the Current Affirmative Approach

In *Public Servants Association (PSA) v Minister of Correctional Services*<sup>249</sup> the High Court held that affirmative measures cannot be haphazard or random action; the measures must be designed to achieve an intended purpose in rational adequate manner.

In the case of *PSA v Minister of Correctional Service*<sup>250</sup> the Labour Court outlined the measures that must be taken in application and implementation of affirmative action in order to achieve substantive equality. These criteria are:

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<sup>246</sup> (1995) (3) BCLR 374(D).

<sup>247</sup> *Motala v University of Natal* 383.

<sup>248</sup> Private Arbitration Proceedings Held at Bellville: Western Cape. [online] Available at: [www.sunsite.wits.ac.za/osall/docs/hotdocs/SOLIDARITY\\_OBO\\_CHRISTIAANS\\_V\\_ESKOM.pdf](http://www.sunsite.wits.ac.za/osall/docs/hotdocs/SOLIDARITY_OBO_CHRISTIAANS_V_ESKOM.pdf) (Accessed 13/1/2014).

<sup>249</sup> (1997) 18 ILJ 241 (T).

- **Designated to achieve:** means and ends must sufficiently linked. Furthermore, the measure must be applied having regard to the circumstances surrounding the implementation of the programmes;
- **Adequate protection advancement:** This criterion would require the measures to advance and protect persons previously discriminated against to be sufficient and not overbroad. The criterion simply requires the playing field to be levelled;
- **Disadvantaged by unfair discrimination:** This criterion refers to the beneficiaries of the positive action. The sponsors of such action will have to establish that the beneficiaries are past victims of apartheid and that their present position is still one of inequality in relation to those privileged under apartheid..<sup>251</sup>

In *Gordon v Department of Health, Kwazulu Natal*<sup>252</sup> the applicant was turned down in favour of a less experienced black candidate with whom he had competed for a promotional post in the department. He referred the dispute to Labour Court. He claimed he was a victim of unfair discrimination. One of the grounds was that the department had not adopted an affirmative action plan. The other grounds offered were that he was a better candidate; he had more experience than the black colleague who had been promoted. The department claimed that the appointment of a black candidate to the post was recommendation from selection committee, and, in addition, that it was to correct the under representation of black employees. The court had to decide whether the refusal to employ a suitable qualified and experienced white applicant solely because he is white constitutes unfair discrimination merely because the employer has failed to adopt affirmative action plan.

In *Eskom v Hiemstra NO & Others*<sup>253</sup> the arbitrator ruled that in the absence of an affirmative action plan, Eskom had unfairly discriminated against a white woman, and it could not raise affirmative action as a defence. On review, the Labour Court held that, even if the arbitrator was wrong, the error was not so gross to warrant interference. The court held further that racial discrimination is unfair, except the discrimination is justifiable or defensible as an affirmative action policy or practice. In *Independent Municipality & Allied Workers Union v Greater Louis Trichardt Transitional Local Council*,<sup>254</sup> the court held that for affirmative action to survive judicial scrutiny, there must be policy or practice through which affirmative action is to be effected, and that policy must be designated to achieve the

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<sup>250</sup> (1997) 18 ILJ (LC).

<sup>251</sup> Anonymous "The Regulation of Affirmative Action and Discrimination in South Africa" 199.

<sup>252</sup> (2004) 7 BLLR 708 (LC).

<sup>253</sup> (1999) 10 BLLR 1041 (LC).

<sup>254</sup> (2000) 21 ILJ 1119 (LC).

adequate advancement of certain categories of person disadvantaged by unfair discrimination.<sup>255</sup>

In the case of *Coetzer & Others v Minister of Safety & Security & Another*,<sup>256</sup> the court held that the failure to promote specialized white male employees even though there were no designated applicants for the posts violated the constitutional imperative to promote efficiency in the public service. The court also noted that there was no affirmative action plan for the unit. More important was the fact that failing to promote the available and eminently qualified white male applicants, the SAPS had failed to discharge its constitutional obligation to promote efficiency.

In the case of *University of South Africa v Reynhardt*<sup>257</sup> the respondent, a white male and Dean of the Faculty of Science at the appellant university, re-applied for the position when his three-year term expired. There was only one other candidate, a coloured male, and after a selection process, during which it was common cause that the respondent was the far superior candidate, the coloured candidate was appointed as dean allegedly in compliance with the university's employment equity plan. The Labour Court held that the university had already achieved the targets and accordingly found that the respondent had been unfairly discriminated on the basis of race.<sup>258</sup> The Labour Appeal Court first considered the relationship between equality and constitutionally mandated remedial measures and the test for unfair discrimination as set out in *Harksen*, the court found that the university failed to implement its equity plan correctly.

From reading of the above mentioned cases, it would seem that in order for affirmative action to withstand constitutional scrutiny, it must be instituted in conjunction with a properly implemented employment equity plan.

#### **5.4 Sunset Clause**

One of the flaws of the EEA is the omission of the "Sunset clause". The reason omission of sunset clause is a flaw; affirmative action is a project, which its purpose is to achieve employment equity in the workplace. Therefore, each project supposes to have objective and time limits to achieve. "It is unfortunate that a Sunset Clause was not included in the

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<sup>255</sup> Anonymous "The Regulation of Affirmative Action and Discrimination in South Africa" 171-172.

<sup>256</sup> (2003) 2 BLLR 173 (LC).

<sup>257</sup> (2010) 31 ILJ 2368 (LAC).

<sup>258</sup> *Reynhardt v University of South Africa* (2008) 29 ILJ 725 (LC).

Act. Even a date in the distant future, would have been a strong affirmation of the belief that the democratic child must ultimately progress beyond puberty to adulthood”.<sup>259</sup>

It is submitted that the “sunset clause” would also address the question as to whether affirmative action policy should be applied to the case of the privileged black child versus the disadvantaged white child. Again, the disadvantaged person in this scenario is in need of the advantages envisaged by the affirmative action policy, but due to racial exclusion, will not be able to receive the benefit of such or any policy in the workplace.

It submitted that by having on end to affirmative action, the past will repeat itself and again it will be white males who will need to be given a preferential treatment to allow them to be substantively equal to all South Africans.

## 5.5 Conclusion

The roughshod implementation of affirmative action policy defeats rather than promotes economic development and efficiency, and is leading to an increasing racial tension. To apply affirmative action in the narrow sense, only concerns with numbers of race and gender not skill and experience at work place, might prove to be no different from apartheid. Not all black people are previously disadvantaged. Many black people are more affluent than white people, and they continue to benefit from affirmative action while many South Africans are still facing poverty including, many white families. It may be argued that unemployment

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<sup>259</sup> Barker (2001) “An Act of Equity” (2001) *Camera, Rhodes University Law Students’ Journal*, 12.

affects all South Africans and the country needs to find a common goal on how to redress the imbalances of the past whilst building a common future which offers hope for all South Africans, without any form of discrimination or marginalization against any group of people.

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