Analyses

Affirmative Action: The Sword versus Shield Debate Continues

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1 Introduction

Affirmative action is a topic with a tendency to evoke much emotion and spark heated debate amongst South Africans from all walks of life. Yet few can deny the need for measures of some sort to address the racial inequality in the labour market experienced during the apartheid years. With this in mind, I will first give a broad overview of why affirmative action was necessary in South Africa as a tool for social change. Secondly, I will sketch the landscape of South Africa's jurisprudence on affirmative action, touching on relevant legislation, though limiting the discussion to whether affirmative action is a right in the hands of the scorned employee or a defence to be raised by the employer against that employee, with reference to case law. Lastly, I will attempt to show how the labour courts have all answered this question unanimously in recent cases, in response to the decisions of *Harmse v City of Cape Town* ((2003) 24 *ILJ* 1130 (LC)) and *Dudley v City of Cape Town & Others* ((2004) 25 *ILJ* 305 (LC)).

2 The Rationale behind Affirmative Action

2.1 South African Historical Perspective

South Africa has a long history of racial inequality in the workplace (see Martin Brassey 'The Employment Equity Act: Bad for Employment and Bad for Equity' (1998) 19 *ILJ* 1359 at 1362; Marié McGregor 'The Nature of Affirmative Action: A Defence or a Right?' (2003) 15 *SA Merc LJ* 421 at 424; Martheanne Finnemore *Introduction to Labour Relations in South Africa* 9 ed (2006) 22 et seq). After the discovery of diamonds in 1867, rapid industrialisation swept the country (Finnemore op cit at 21). But the fast-paced economic growth came with the implementation of cheap labour – usually at the expense of non-whites. To satisfy the need for increased labour at the mines, former rural dwellers were attracted to towns. Most of these people were black. It was this cheap labour that provided the impetus for an economic boom that would last well into the twentieth century, and its effects

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would be felt much longer. After the 1948 elections, the National Party widened the chasm between white and black by distributing jobs along racial lines, suppressing black trade unions, and providing sub-standard education for non-whites (idem at 27). All this contributed to a general lack of opportunities for blacks, and, most importantly, to an unequal playing field.

With the advent of the Constitution of the Republic of South Africa, 1996, however, it was hoped that the wrongs of the past could be rectified, slowly but surely, through a programme of affirmative action that would give previously disadvantaged groups a preferential platform from which to gain employment in our emerging democracy (see generally Nicholas Smith 'Affirmative Action under the New Constitution' (1995) 11 *South African Journal on Human Rights* 84). In this context, Parliament promulgated the Employment Equity Act 55 of 1998 ('the EEA').

2.2 Purpose and Justiciability

Section 2 of the EEA states, among other things, that the purpose of this statute is 'to achieve equity in the workplace by implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups in order to ensure their equitable representation in all occupational categories and levels in the workforce' (see *Public Servants Association on behalf of Karriem v SA Police Service & Another* (2007) 28 *ILJ* 158 (LC) at 167D-E). Under s 3, the EEA must be interpreted in compliance with the Constitution to give effect to its purpose. The purpose of affirmative action has been described as follows: 'Affirmative action, viewed positively, is designed to eliminate inequality and address systemic and institutionalised discrimination including racial and gender discrimination' (*George v Liberty Life Association of Africa Ltd* [1996] 8 BLLR 985 (IC) at 1005H, quoted in *Kimberley Girls' High School & Another v Head, Department of Education, Northern Cape Province & Others* 2005 (5) SA 251 (NC) in par 19 at 259E-G).

Section 9(2) of the Constitution is concerned with the achievement of substantive equality as opposed to formal equality (McGregor op cit at 423). Formal equality holds that the law is neutral, where the state is a neutral force between citizens and favours no one above the other. Substantive equality is fundamentally different, taking cognisance of structural inequality in society in relation to certain groups and attempting to remedy this inequality. Substantive equality is justified in South Africa by constitutional reasoning (*Ntai & Others v SA Breweries Ltd* (2001) 22 *ILJ* 214 (LC) in par 14 at 218):

> 'The premium placed on the achievement of equality is evident where this ideal is identified as a value on which the democratic South African state is founded (in terms of s 1(*a*) of the Constitution). In other words, not mere formal equality but substantive equality is the constitutional goal in the sense of outcome of results and not merely equality of treatment. . . . In this regard s 9(2) of the Constitution also specifically endorses the use of affirmative action in that ''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.'

The need for substantive equality has been explained by Moseneke J in the Constitutional Court as follows (*Minister of Finance & Another v Van Heerden* 2004 (6) SA 121 (CC) in par 27 at 134; a case of vital importance as it was the first concerning affirmative action that was brought before the Constitutional Court):

> 'Th[e] substantive notion of equality recognises that besides uneven race, class and gender attributes of our society, there are other levels and forms of social differentiation and systematic under-privilege, which still persist. The Constitution enjoins us to dismantle them and to prevent the creation of new patterns of disadvantage.'

According to Moseneke J, our constitutional understanding of equality is one of remedial or restitutionary equality (par 30 at 136). Remedial equality espouses the promotion of the achievement of substantive equality. Remedial equality, such as affirmative action, is therefore not in derogation from, but forms a 'substantive and composite part' of, the protection afforded by the Constitution (par 32 at 136-7). Section 9 of the Constitution, read as a whole, embraces a substantive conception of equality in order to redress existing inequalities within our society (par 31 at 136). The EEA is therefore intended to give effect to the substantive notion of equality espoused by the Constitution (see John Grogan *Workplace Law* 9 ed (2007) at 289). Though affirmative action forms an integral part of substantive equality, the concepts should not be confused. Affirmative action is merely a measure, but equality is a value. Measures are temporary, but values are enduring cornerstones of our society.

As Brassey points out (op cit at 1365), affirmative action, logically, should be a temporary measure. It could be argued that if affirmative action were to continue indefinitely, its results could have tremendous economic and social consequences. Once substantive equality has been attained, the affirmative action policy should end (see also OC Dupper, C Garbers, AA Landman, M Christianson, AC Basson & EML Strydom (eds) *Essential Employment Discrimination Law* (2004) at 262; McGregor op cit at 425-6; *George v Liberty Life Association Ltd* supra at 1007-8). It is against this background that Brassey has voiced his concerns regarding the EEA (op cit at 1364): not only does the EEA contain no 'sunset clause' (ibid) but also it is concerned, not with addressing disadvantage, but with racial representativeness. He emphasises that the only way that such a piece of legislation could pass constitutional muster is if representativeness were to be equated with past disadvantage (at 1363). Furthermore, he states that the 'social engineering propounded by the Act . . . will scratch at the scabs of the wounds inflicted by racism and rub salt into them' (ibid).

3 Affirmative Action in South Africa

3.1 Legislation

Because of the long history of racial inequality in employment, the EEA was promulgated. In terms of section 9(2), the Constitution provides for the

institution of measures to address previous inequality (McGregor op cit at 426; *Minister of Finance v Van Heerden* supra at 136). The EEA thus gives effect to the Constitution by seeking to implement affirmative action measures to redress the disadvantages experienced in employment by designated groups (see 2(*b*) of the EEA). 'Designated groups' is a term encompassing black people, women and the disabled. Moreover, 'black people' is a broad term and includes Africans, Coloureds and Indians (see s 1 of the EEA and André van Niekerk (ed), Marylyn Christianson, Marié McGregor, Nicola Smit & Stefan van Eck *Law@Work* (2008) at 147; SR van Jaarsveld, JD Fourie & MP Olivier *Principles and Practice of Labour Law* 13th service issue (2007) in par 715)). These groups – black people, women and the disabled – have been identified as beneficiaries of affirmative action measures, and so the employment of people from these designated groups seeks to achieve employment equity (Van Niekerk, Christianson, McGregor, Smit & Van Eck op cit at 147).

The EEA also provides for designated employers (see s 1 'designated employer', and Van Niekerk, Christianson, McGregor, Smit & Van Eck op cit at 146; Van Jaarsveld, Fourie & Olivier op cit in par 714; McGregor op cit at 428; Dupper, Garbers, Landman, Christianson, Basson & Strydom op cit at 262). The phrase 'designated employer' is defined as meaning:

- a person who employs 50 or more employees, or
- a person who employs less than 50 employees but has a turnover greater than or equal to an amount stipulated,
- a municipality,
- an organ of state (except the local spheres of government, the South African National Defence Force, the National Intelligence Agency, and the South African Secret Service), and
- an employer bound by a collective agreement in terms of s 23 or 31 of the Labour Relations Act 66 of 1995, which appoints it as a designated employer in terms of the EEA.

The EEA also states that a member of a designated group may be suitably qualified, provided that one or any combination of the following points is considered (s 20(3)): formal qualifications, prior learning, relevant experience, and capacity to acquire, within a reasonable time, the ability to do the job (see Van Niekerk, Christianson, McGregor, Smit & Van Eck op cit at 150; Van Jaarsveld, Fourie & Olivier op cit in par 722).

3.2 *Harmse v City of Cape Town*

In *Harmse v City of Cape Town* (supra), the Labour Court was required to consider the nature of affirmative action for the first time. The applicant, a black person according to the EEA, had applied for various posts with the employer but not been shortlisted for any of them. He then sued the respondent, stating that he had been unfairly discriminated against (among

things) because of race and lack of relevant experience (pars 1-2). Waglay J reached the rather strained conclusion that affirmative action was a right in the hands of an employee from a designated group (par 44; see also par 33):

> 'If one were to have regard only to s 6 of the Act 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. In this sense, it serves as a shield. However, having regard to the fact that the Act requires an employer to take measures to eliminate discrimination in the workplace it also serves as a sword.'

This reasoning, I submit, is incorrect (see generally C Garbers 'Is There a Right to Affirmative Action Appointment?' (2004) 13 *Contemporary Labour Law* 61). Although the Court made a fist of embracing substantive equality, it failed to maintain the distinction between chapter II of the EEA, which deals with the prohibition of unfair discrimination, and chapter III, which deals with affirmative action (see Dupper, Garbers, Landman, Christianson, Basson & Strydom op cit at 280, where it is argued that if South Africa is serious about substantive equality, it follows that the notion of unfair discrimination should be expanded to include infringements of substantive equality by an employer). This distinction between chapters II and III of the EEA will be discussed below (see par 3.3).

The Court justified this reasoning by stating that if affirmative action were not a right, it would leave employees who were unfairly discriminated against without a remedy if the employer failed to promote substantive equality in the workplace. Yet the Court did not take into account that such employees could still rely on ss 9(3) and 23(1) of the Constitution (cf, eg, *Hoffman v South African Airways* 2001 (1) SA 1 (CC); *Langemaat v Minister of Safety and Security & Others* 1998 (3) SA 312 (T), as well as other statutory provisions such as s 6(1) of the EEA and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA) in order to institute action (see also *Du Preez v Minister of Justice & Constitutional Development & Others* (2006) 27 *ILJ* 1811 (SE); 2006 (5) SA 592 (EqC)). In fact, if Harmse had merely reformulated his pleadings, he could easily have brought his action in terms of chapter II of the EEA.

Secondly, from a more practical standpoint, conferring a right to affirmative action upon individuals would lead to absurd results. For instance, what would happen if an employer had already met, or had even exceeded, the required level of representivity of all designated groups, but then failed to employ a person from a designated group? In terms of a strict interpretation of *Harmse v City of Cape Town* (supra), that employer could be held liable for his failure to promote affirmative action (see, eg, *Willemse v Patelia NO & Others* (2007) 28 *ILJ* 428 (LC)). A right to affirmative action, I submit, would give rise to frivolous lawsuits and vexatious litigation.

3.3 *Dudley v City of Cape Town & Others*

In *Dudley v City of Cape Town* (supra), the applicant, a black female, applied for the position of Director: City Health at the City of Cape Town but

was unsuccessful. A white male was appointed instead. The applicant alleged, firstly, that she had been unfairly discriminated against on the basis of race and/or sex in terms of s 6(1) of the EEA. Secondly, she contended that the employer's failure to employ her constituted a breach of the employer's affirmative action obligations in terms of the EEA (see *Dudley v City of Cape Town* supra in pars 1-13).

Tip AJ in the Labour Court disagreed with *Harmse v City of Cape Town* (supra) by stating that affirmative action was collective in nature and did not entitle an individual to interfere with the programmatic and systematic application of affirmative action measures (par 67; see also *Stoman v Minister of Safety & Security & Others* (2002) 23 *ILJ* 1020 (T) at 1035H-J, where the Court held that the aim of affirmative action is not to reward individuals, but to advance the categories of persons to which they belong). Furthermore, an employee was in no position to approach the Labour Court as a matter of first instance for affirmative action disputes, since the EEA specifically stated, in chapter V, that such matters were to be dealt with by the Director-General of Labour (see *Dudley v City of Cape Town* supra in pars 50-65; also Garbers op cit at 63-4). The Court held that the interpretation of the EEA in *Harmse v City of Cape Town* (supra) was incorrect. As Tip AJ correctly stated, unfair discrimination is dealt with under chapter II of the EEA, whilst chapter III is concerned with affirmative action. Accordingly, if affirmative action measures have been incorrectly applied, an enforcement issue falls under chapter III of the EEA, not chapter II, because such a dispute is not an instance of unfair discrimination (see *Dudley v City of Cape Town* supra in pars 75-6). Section 20(5) of the EEA relates only to the question of who is 'suitably qualified' for the purposes of affirmative action, and it does not apply to the entire EEA (see Garbers op cit at 65; Van Niekerk, Christianson, McGregor, Smit & Van Eck op cit at 151-3). This interpretation is submitted to be correct (Garbers op cit at 65).

4 After *Harmse* and *Dudley* – An Overview of the Case Law

Given these two conflicting decisions by the Labour Court, it is interesting to observe how the courts have interpreted the two judgments in subsequent cases. In my view, the Court in *Harmse v City of Cape Town* (supra) equated, or rather confused, the absence of affirmative action with unfair discrimination (see pars 3.2 and 3.3 above). As such, it would seem that the correct way for the courts to progress would have been to follow the interpretation in *Dudley v City of Cape Town* (supra). It should be stated that the exact scope, nature and limits of a defence of affirmative action fall outside the ambit of this discussion and will accordingly not be canvassed (for a discussion, see Van Niekerk, Christianson, McGregor, Smit & Van Eck op cit at 135-9; Grogan op cit at 284 et seq; Dupper, Garbers, Landman, Christianson, Basson & Strydom op cit at 269 et seq; also *Coetzer & Others v Minister of Safety and Security* 2003 (3) SA 368 (LC)).

4.1 *Cupido v GlaxoSmithKline SA (Pty) Ltd*

In *Cupido v GlaxoSmithKline SA (Pty) Ltd* ((2005) 26 *ILJ* 868 (LC)), the applicant, a coloured man, alleged that he had suffered racial discrimination when seeking promotion as Human Resources Officer. He alleged that as the respondent had failed to implement an employment equity plan as required by ss 20 and 36 of the EEA, the dispute fell under chapter III of the EEA on affirmative action. The respondent excepted to this contention on the grounds that the applicant had no right of access to the Labour Court in terms of chapter III of the EEA.

The Court referred to *Dudley v City of Cape Town* (supra), stating that there was no such thing as an individual right to affirmative action (*Cupido v GlaxoSmithKline SA (Pty) Ltd* supra in pars 15-19). Moreover, failure to comply with affirmative action measures under chapter III gave rise to an application to the Director-General of Labour under chapter V of the EEA, not the enforcement mechanisms of chapter II (*Cupido v GlaxoSmithKline SA (Pty) Ltd* supra in par 21). So there was no conceivable way in which s 20 and Chapter II could be read together to create a right to affirmative action.

Cupido v GlaxoSmithKline SA (Pty) Ltd (supra) was the first case to be heard after *Dudley v City of Cape Town* (supra) concerning a right to affirmative action. The Court did not hesitate to point out that the construction of the EEA in *Dudley v City of Cape Town* (supra) was clearly correct and logical, whilst the reasoning applied by the court in *Harmse v City of Cape Town* (supra) was rejected.

4.2 *Willemse v Patelia NO & Others*

In *Willemse v Patelia* (supra), the applicant, a disabled white male, applied for promotion as Director: Biodiversity Management at the Department of Environmental Affairs and Tourism (par 3 et seq). He had been recommended for the position by a selection committee that had noted his exceptional qualifications for the post. But the Acting Director-General of the Department did not accept their recommendation because the applicant was not representative of the demographics of the country or in accordance with the imperative of transformation, and was obliged to give effect to the Constitution in this regard. The Court held that the Director-General had acted with the sole purpose of enhancing gender representativity and had applied affirmative action in an arbitrary and unfair manner.

What is interesting is that the Court in *Willemse v Patelia* (supra) did not mention *Harmse v City of Cape Town* (supra) or *Dudley v City of Cape Town* (supra). However, the Court did mention the obligations imposed on employers to give effect to s 9(2) of the Constitution and provide for affirmative action measures. It did not dispute the legitimacy of such a defence in the case of an employer's implementing such measures, but it was far more concerned with how they were implemented.

This decision illustrates well how the EEA was designed to work, because the applicant's claim was brought under chapter II of the EEA, and not

chapter III, as was suggested in *Dudley v City of Cape Town* (supra). Therefore, although the judgment does not directly discuss whether affirmative action is a right or a defence, it can be inferred, from the Court's approach to the matter, that it supports the approach in *Dudley v City of Cape Town* (supra).

4.3 *Public Servants Association on behalf of Karriem v SA Police Service & Another*

In *Public Servants Association on behalf of Karriem v SA Police Service* (supra), the applicant, a coloured female, alleged that the South African Police Service (SAPS) had discriminated unfairly against her by failing to appoint her to an advertised post and appointing a white woman instead. The grounds of discrimination were claimed to be race (s 6 of the EEA) or, alternatively, lack of experience (s 20). The evidence showed that the white woman had outscored the applicant in the objective criteria set for the position, and had been appointed because the SAPS's operational requirements required that the employee perform the necessary functions immediately (at 160I-167A).

The Court held that there had been no unfair discrimination in this matter, since the appointment was made because of the very real and understandable operational requirements of the SAPS (at 172A-F). Concerning the alleged breach of s 20 of the EEA by the employer, the Court held that claims relating to affirmative action fell within chapter V of the EEA, in which s 36 sets out the relevant procedure to be followed. As a result, the Court held, there was no independent individual right to affirmative action, neither was there a right of direct access to the Labour Court in respect of such a claim (at 175A-J).

It is clear, then, that the Court in this case agreed with the decision in *Dudley v City of Cape Town* (supra) (see *Public Servants Association on behalf of Karriem v SA Police Service* supra at 175C). The Court was, however, silent on the collective and systematic nature of affirmative action identified in *Dudley v City of Cape Town* (supra).

4.4 *Thekiso v IBM South Africa (Pty) Ltd*

In *Thekiso v IBM South Africa (Pty) Ltd* ((2007) 28 *ILJ* 177 (LC)), the applicant was a black female who had been retrenched because of the operational requirements of the employer. In the Labour Court, she claimed that the employer's failure to consider certain requirements imposed by the EEA rendered her dismissal unfair. She based this claim on s 15(2)(*d*)(ii) of the EEA, which reads as follows:

> '(2) Affirmative action measures implemented by a designated employer must include-
> . . .
> *(d)* subject to subsection (3), measures to-
> . . .
> (ii) retain and develop people from designated groups and to implement appropriate training measures, including measures in terms of an Act of Parliament providing for skills development'.

The Court held that a retrenched employee could not pursue a complaint before the Labour Court in terms of chapter III by alleging that her employer had breached its affirmative action obligations by retrenching her (in par 49 at 192). Section 15(2)(*d*)(ii) of the EEA did not impose any obligation on an employer to give preference to persons from designated groups when making a decision on possible retrenchments. The Court went on to state, referring to *Dudley v City of Cape Town* (supra), that chapter III of the EEA did not create an individual right to affirmative action, and that there was also no right of direct access to the Labour Court in respect of a claim envisaged under that chapter (*Thekiso v IBM South Africa (Pty) Ltd* supra in par 46 at 191).

5 Conclusion

The decisions of *Harmse v City of Cape Town* (supra) and *Dudley v City of Cape Town* (supra) sparked considerable debate. However, it is apparent from the subsequent case law, as well as other legal literature, that *Harmse v City of Cape Town* (supra) was incorrectly decided. Chapter III of the EEA does not grant an individual an independent right to affirmative action. In keeping with *Dudley v City of Cape Town* (supra), the courts have been able to keep chapters II and III of the EEA separate. As Garbers states, while these two chapters deal with two mutually exclusive concepts, they are still similar and work together as a dovetailed package deal (see op cit at 66). One chapter deals with the prohibition of unfair discrimination, while the other deals with the promotion of affirmative action measures – both with the goal of attaining substantive equality as outlined by the Constitutional Court in *Minister of Finance v Van Heerden* (supra).

It is interesting to note that the decision *Dudley v City of Cape Town* (supra) was recently heard on appeal (see *Dudley v City of Cape Town & Another* [2008] 12 BLLR 1155 (LAC)). Unfortunately, the judgment is disappointing in that the Labour Appeal Court refrained from expressly answering the pivotal question once and for all regarding the existence of a right to affirmative action. It declined to address this specific issue because it fell outside the issues that were to be decided by the Court a quo in the pleadings (idem in par 55 at 1177). The Labour Appeal Court did, however, in passing show its support for the decision of the Court a quo (par 53 at 1177):

> 'To the extent that the *Harmse* judgment is in conflict with this judgment, it was, of course, wrongly decided. Subsequent to the judgment of the Labour Court in this matter, the judgments in *PSA obo Karriem v SAPS*; *Cupido v GlaxoSmithKline (Pty) Ltd* and *Thekiso v IBM South Africa* were given and they all followed Tip AJ's judgment now on appeal'.

Despite the lack of reasons given by the Labour Appeal Court for the incorrectness of the interpretation in *Harmse v City of Cape Town* (supra), the appellate judgment finally settles an issue of law that was generally regarded as being settled already (see, eg, Van Niekerk, Christianson, McGregor, Smit & Van Eck op cit at 153). In the light of the above quotation, I submit, it can safely be assumed that the Labour Appeal Court merely

concurred with the ratio of the Court a quo in *Dudley v City of Cape Town & Others* ((2004) 25 *ILJ* 305 (LC)) as well as the subsequent cases to similar effect, and so did not consider it necessary to restate those principles.