

**POSITIVE DISCRIMINATION IN SOUTH AFRICAN EMPLOYMENT LAW:
HAS AFFIRMATIVE ACTION OVERSTAYED ITS WELCOME?**



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DECLARATION

By submitting this dissertation, I declare that the entirety of the work contained therein is my own, original work, that I am the authorship owner thereof (unless to the extent explicitly stated otherwise) and that I have not previously in its entirety or in part submitted it for obtaining any qualification.

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VALENTINE MHUNGU, December 2013, Durban.

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CHAPTER 1: INTRODUCTION AND CONTEXT OF THE RESEARCH

1.1 Background

“Labour market policy was arguably the centerpiece of apartheid's mechanism of social control and of its economic growth strategy. Poverty, discrimination and inequality were all hallmarks of its workings and consequences. Labour market policy was the site of some of the system's most draconian elements-the pass laws and job reservation to name but two. The labour market was also associated with some of apartheid's greatest failures and defeats...the new government has been faced not merely with a policy vacuum, but also with a terrible legacy in the South African labour market: mass unemployment and poverty, discrimination and inequality, intense conflict at the workplace, low levels of productivity and a marked absence of the managerial and technical skills required to drive an economy increasingly open to the rigorous tests of international competition.”¹

South Africa has emerged from a history dogged by an oppressive system in which race was used as a medium of oppression. The system established developmental demarcations along racial lines. These demarcations are still evident in skewed workplace demographics.² Stratifications are not the problem per se, but rather the disadvantage that comes with it.³ Underrepresentation of a group of people in the workplace usually means that there is unequal distribution of wealth. It is imperative that persons from all walks of life occupy decision making positions in order to ensure participation of all groups in the making of decisions that affect their lives. Affirmative action was devised as a means to ameliorate this problem. Nonetheless, despite legislation sanctioning affirmative action having been in place for nineteen years,⁴ the situation remains unchanged.

¹ Preface to the 1996 report of the Presidential Commission to investigate Labour market policy entitled Restructuring the South African Labour Market. In O Dupper “*The current Legislative framework*” in E. M. L. Strydom (ed) *Essential Employment Discrimination Law* (2004) pg 15.

² Ibid.

³ C Albertyn “*Substantive equality and transformation in South Africa*” (2007) 23 *SAJHR* 253, pg 260.

⁴ Bearing in mind that the interim Constitution provided for measures to realize equality and a host of laws that followed including Employment Equity Act 55 of 1998 (hereinafter referred to as the EEA); Labour Relations Act 66 of 1995 and Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

1.2 Problem statement

South Africa is a democratic state based on a written Constitution.⁵ The Constitution is a product of negotiations to eradicate the previous system which was characterized by deprivation, denial and strife. The legislative instrument employed to facilitate change in access and advancement in the workplace is affirmative action. However, it appears that when the legislature set out to redress the imbalances apparent in South African society, it not only failed to solve the problem of inequality but instead exacerbated the existing problems.

From its inception affirmative action has been criticized for breaching equality rights. Courts have, however, condoned the implementation of affirmative action for the objective it seeks to achieve.⁶ What is clear from the reasoning behind this acceptance, however, is that affirmative action was meant to be a temporary remedy to rectify inequalities in various communities. Critics of affirmative action have noted that in its application, affirmative action compromises efficiency,⁷ especially in instances where gender or race has been used as a basis to overlook highly qualified candidates and appoint less qualified persons in their stead. Affirmative action has caused persons with skills to leave both the country and the public sector. Having traversed a period of nineteen years in the era of democracy, what is brought into question is whether the program of affirmative action should be retained.

1.3 Literature review

Affirmative action is a widely researched topic and space and time does not allow consideration of all the literature. However, there exists a commonality in the aspects articulated by the authors and this literature review confines its analysis to the writings of selected authors whose work are representative of the field. The views discussed in this literature review thus focuses on the views of Pretorius,⁸ Rycroft,⁹ Dupper,¹⁰ Garbers, Hepple¹¹ and Fredman.¹²

⁵ Constitution of the Republic of South Africa, 1996(hereinafter referred to as the Constitution).

⁶ A Rycroft "*Obstacles to Employment Equity: The Role of Judges and Arbitrators in the Interpretation and Implementation of Affirmative Action Policies*" (1999) 20 *ILJ* 1411, pg1413.

⁷ O Dupper, U Bhoola and C Barbers *Understanding the Employment Equity Act* (2009) 131.

⁸ J L Pretorius "*Accountability, Contextualization and the Standard of Judicial Review of Affirmative Action: Solidarity obo Barnard vs South African Police Services*" (2013) 130 *SALJ* 31; J L Pretorius "*Fairness in Transformation: A critique of the Constitutional Court's Affirmative Action Jurisprudence*" (2010) 26 *SAJHR* 536.

⁹ A Rycroft "*Obstacles to Employment Equity: The Role of Judges and Arbitrators in the Interpretation and Implementation of Affirmative Action Policies*" (1999) 20 *ILJ* 1411.

One of the themes shared in affirmative action literature is that the law is inadequate to effect social change. Hepple is of the opinion that it is too ambitious to employ the law to effect social change.¹³ He cites the absence of an identifiable tortfeasor as a factor hindering bringing the cycle of disadvantage into the precincts of the law.¹⁴ He explains that this frustrates the element of causation which is necessary if anti-discrimination measures are to be enforced effectively.¹⁵ This postulation is based on an understanding of inequality as a result of individualized acts of prejudice hence the insistence on identifying a tortfeasor before the remedy can succeed. Hepple assumes that once the culprit has been identified, restraining measures in the form of rights can be enforced against the tortfeasor and inequality be curtailed. Fredman, on the other hand, dispels Hepple's assertion by saying that substantive equality goes well beyond individual acts of prejudice.¹⁶ She reasons cogently that by making equality a right, a positive duty is imposed on the state to provide remedies even though it is not at fault.¹⁷ That way, the state can identify institutions in a best position to effect change, enact laws to facilitate provision of goods and ameliorate social inequalities.¹⁸ This dissertation agrees with Fredman's assertion and goes on to evaluate whether the state has identified a proper institution to effect the composition of social demographics.

The second limitation given by Hepple is that legislation dealing with redress concentrates on one element as a cause of disadvantage, namely discrimination.¹⁹ He opines that this makes it inadequate to deal with collective group disadvantage. Further to that, he agrees with the submission in the 1996 Green Paper on Policy Proposals for the Employment and Occupational Equity Statute,²⁰ which stated that racial inequalities do not primarily arise from discrimination.²¹ Such assertions are underpinned by the fact that it is erroneous to assume that society would have

¹⁰ O Dupper "Affirmative Action: Who, How and How Long?" (2008) 24 SAJHR 425.

¹¹ B Hepple "Equality Laws and Economic Efficiency" (1997) ILJ 598.

¹² S Fredman "Providing equality: Substantive equality and the positive duty to provide" (2005) 21 SAJHR 166.

¹³ Hepple note 11 above.

¹⁴ Ibid 605.

¹⁵ Ibid.

¹⁶ S Fredman "Providing equality: Substantive equality and the positive duty to provide" (2005) 21 SAJHR 163,166.

¹⁷ Ibid.

¹⁸ Fredman (note 16 above) 168.

¹⁹ Hepple (note 11 above) 605.

²⁰ Notice 804 of 1996 *Government Gazette* vol 373 1 July 1996.

²¹ Hepple (note 11 above) 603.

been equal if it was not for past discrimination.²² It is argued (not dismissing the adversity of discrimination) that other factors contributed to present day social disparities.²³ This dissertation then undertakes to evaluate how such assumptions have proved detrimental and defeated the objective of redress.

Another factor in Hepple's argument is the way the law is focused.²⁴ He argues that inequalities in the workplace lie in pre-entry discrimination.²⁵ He then advocates „a variety of governmental and private programs for education, training, and reconstruction“.²⁶ This dissertation agrees with Hepple, in that the solution lies in the regulation of pre market institutions. This dissertation takes the proposal a step further by articulating how such an option is relevant and how it could be more effective than affirmative action.

Another theme addressed in the literature on affirmative action is the use of race in determining eligibility for affirmative action. McGregor²⁷ elucidates the advantages and deficiencies which come with this approach. She takes an optimistic approach by asserting that such shortcomings can be ameliorated through amendments to the statutory instruments providing for affirmative action. Overall, she draws attention to the obvious fact that affirmative action is both under inclusive and over inclusive whereas it ought to account for multiple disadvantages that underlie the present day society.²⁸ She concurs with the role model theory²⁹ as a just explanation for over inclusiveness. Nevertheless, she acknowledges that over inclusiveness is a serious problem because it can create animosity among people of the same group and also that it intercepts aid meant for those persons who are genuinely disadvantaged. Despite such inconsistencies this dissertation questions the extent to which the role model theory has materialised. It will be

²² M Van Wyk & K Hofmeyer *“Affirmative Action Target Setting: More than Just a Head Count”* (1997) 21 *SA J of Labour Relations* 5, 6; Van Wyk argues that that it cannot be proven and is highly unlikely that if previous discrimination is factored out what remains is an equal society.

²³ Hepple note 11 above.

²⁴ Hepple (note 11 above) 599.

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ M McGregor *“Categorization to determine beneficiaries of affirmative action: Advantages and Deficiencies”* (2005) 46 *Codicillus* 1- 12.

²⁸ *Ibid.* 6.

²⁹ The role model theory states that the mere instance of having people of colour in high places encourages the deconstruction of stereotypes against blacks where they are perceived as incapable. It also states that it sets the pace of social participation for people of colour.

revealed through statistics, how, despite having role models, the expected cascading affirmative action has not materialised.

This conflict of the use of race for eligibility to benefit from affirmative action is further explored by Rycroft.³⁰ In ascertaining what the role of judges is, he identifies situations in which conflict is most likely to occur in the application of affirmative action.³¹ He goes on to justify assumed group identity. The basis of his support is premised on the difficulty in calculating individual disadvantage as well as the risk of such an endeavor exacerbating racial conflict.³² Realizing the risk of compromising standards through a generous interpretation of section 20 of the EEA, Rycroft proposes the establishment of a minimum threshold for prospective candidates. In brief, he criticizes a conservative approach when interpreting the precepts of affirmative action to workplace practice. This dissertation dispels such insistence and goes to show that courts have failed to balance the conflict between individual equality and social redress goals.

Pretorius does not depart much from Rycroft's views.³³ Nevertheless, he is of the opinion that the standard of scrutiny against affirmative action should change from rationality to proportionality.³⁴ His discussion revolves around the reasoning in a number of judgments where he finds hints of this possibility which are however not followed through. He argues that a balance can be struck between conflicting values if affirmative action is subjected to the proportionality test. Again, experience shows that this has been more theoretical than practical. It therefore provides a basis for the argument that affirmative action should be removed from employment law and replaced by a policy which does not threaten the Constitutional goal of an egalitarian state.

The contribution of Fredman to the issue of affirmative action builds on the foundations of the concept of equality.³⁵ Fredman's writings focus mainly on clarifying the meaning of substantive

³⁰ A Rycroft "Obstacles to Employment Equity: The Role of Judges and Arbitrators in the Interpretation and Implementation of Affirmative Action Policies" (1999)20 ILJ 1411.

³¹ These include when hiring and when promoting people.

³² Rycroft (note 30 above) 1423.

³³ JL Pretorius "Fairness in transformation: A critique of the constitutional court's affirmative action jurisprudence" (2010) 26 SAJHR 536.

³⁴ Ibid.

³⁵ Fredman (note16 above) 163.

equality and its links to proactive obligations.³⁶ Fredman articulates how and why it is necessary that equality be established as a right than left to be a matter of welfare or mere policy.³⁷ Her writing takes a paternalistic approach that makes it clear that judicial deference would be inimical to the protection of minority rights, whose access to political process is minimal and inadequate for their protection.³⁸ Just like Pretorius³⁹ she advocates for further involvement of the judiciary in the evaluation of policy, especially the eligibility criteria used in the distribution of social goods. However, she points out that this is not to second guess policy makers decisions but is a way of ensuring and maintaining the egalitarian society envisaged by the Constitution.⁴⁰ She contends that it is a way of achieving accountability by policymakers through „providing open, transparent and reasonable reasons, based on proper evidence rather than generalizations or assumptions which are at high risk of incorporating damaging stereotypes or worsening the lot of the disadvantaged“. ⁴¹ The discussion by Fredman is centered on socio-economic rights as provided for in section 27 of the Constitution. This dissertation shifts the focus from socio economic rights in general to employment law and in particular the exclusion of specific groups of people from employment opportunities through redress measures termed affirmative action. This dissertation imports the reasoning of Fredman to show how by passage of time the route taken by affirmative action has threatened the realization of an egalitarian state.

Dupper addresses the issues of beneficiaries of affirmative action, its implementation and the time frame in which it ought to operate.⁴² He queries the use of race as a criterion for eligibility,⁴³ asserting that the use of race is only legitimate when race is synonymous with disadvantage. He postulates that such criterion might become inappropriate when disadvantage no longer follows the axis of race.⁴⁴ This dissertation avers that the time referred by Dupper has

³⁶ Fredman (note 16 above).

³⁷ Ibid.

³⁸ Ibid at 166.

³⁹ *JL Pretorius Legal evaluation of affirmative action in South Africa 2001 Journal for Juridical Science 26(3): 12-28.*

⁴⁰ Fredman (note 35 above) at 184.

⁴¹ Ibid at 182.

⁴² Dupper (note 10 above).

⁴³ Ibid.

⁴⁴ Ibid at 428.

arrived and thus a way should be devised to ensure that aid goes to the right people, if real change is to be realized.

Dupper explores the dichotomy of section 9(2) and 9(3)⁴⁵ and explains how it is justified that redistribution interests take precedence over individual rights.⁴⁶ He avers that as long as non-designated group members are not made to suffer undue harm, redress measures can safely take precedence over individual rights. This dissertation argues that although a balance ought to be struck between competing rights, courts have failed to do so.

Dupper argues that a sunset clause would be permissible where affirmative action is meant to compensate for past discrimination.⁴⁷ He suggests that, since affirmative action is goal oriented, a sunset clause would not be permissible until the objective of equal representivity is achieved.⁴⁸ Dupper dismisses the possibility of phasing out affirmative action entirely.⁴⁹ He submits that phasing affirmative action out poses a danger of upsetting the balanced representation that would have been achieved.⁵⁰ He proposes that what would rather be permissible is to relegate it to a supportive role than a decisive one. What Dupper fails to appreciate is that affirmative action is supposed to be temporary. This dissertation proposes that a new way to achieve the objectives of affirmative action should be devised so that once its goals are achieved, the instrument falls away.

From the plethora of writings on the subject of affirmative action, a discernible pattern exists. The criticism of over inclusiveness ranks high. There are blacks who are better off and in no need of aid from affirmative action. Another consistent argument from the writers is that it is possible to apply affirmative action and achieve a balance between individual equity and social redress. The purpose of this dissertation is to evaluate the criticism leveled against affirmative action and to determine whether such criticism warrants the abrogation of affirmative action. In

⁴⁵ Dupper (note 10 above) 432.

⁴⁶ Ibid 434.

⁴⁷ Ibid 439.

⁴⁸ Ibid.

⁴⁹ Ibid 440.

⁵⁰ Ibid.

addition it aims to evaluate the economic ramifications of using affirmative action in the workplace.

1.4 Research questions

Not knowing a question is to forfeit the answer. The following questions will be considered in this dissertation.

1. What is affirmative action?
 - a) What prompted the policy?
 - b) What were its goals?
 - c) How was it implemented? (legal framework in which it was coined)

2. What are the challenges to the policy?
 - a) Does it infringe constitutional rights?
 - b) Has it achieved anything?
 - c) What is its effect on the labour market and trends?

3. Are the problems unique to South Africa?
 - a) What experience does the USA share with South Africa?
 - b) Which lessons can be learnt from this experience?

4. Is continuation of affirmative action in South Africa still desirable?

1.5 Focus of Research

The concept of affirmative action involves a number of areas. These include among many, business ownership, gender aspects, disability and racial issues. However, the constraints of a dissertation do not allow for all aspects to be dealt with and this research will focus its attention on the racial aspect of affirmative action in the labour market. This is not to say that those aspects left out are of less value. Every aspect covered by affirmative action is of paramount importance for it bears weight on the future of our socio-political and economic future.

1.6 Research outline

The purpose of Chapter 1 is to provide the context for the research by considering a brief historical background underpinning the socio-politico economic environment of South Africa.

Chapter 2 identifies the concepts of equality in which affirmative action is rooted. The chapter also provides an overview of the legislative framework in which affirmative action finds expression. The standards of review articulated serve as a basis on which affirmative action can be evaluated.

Chapter 3 provides the core discussion of the dissertation with arguments against affirmative action being presented. It articulates the legal implications of affirmative action that make it necessary to see to it that it is brought to an end. The adverse economic consequences of implementing affirmative action are also referred to and a look at statistics is employed to concretize the argument against affirmative action.

Chapter 4 compares the American jurisprudence with South African jurisprudence to substantiate arguments against affirmative action, namely its inability to effect change and its adverse impact on economic viability of business. The length of the period in which affirmative action has been in place in America enables the prospects of success of affirmative action in South Africa to be evaluated. The comparison also allows for a discussion of how a change in approach might impact on effectiveness.

Chapter 5 proposes alternatives to preferential employment or promotions. A number of proposals are advanced including skills development. This proposal is informed by the symbiotic relationship between lack of skill and low recruitment amongst designated group members. The chapter closes by summing up the findings of the entire dissertation. The dissertation concludes that affirmative action infringes the right to equality, fails to advance the masses, is not economically sustainable and undermines social cohesion.

CHAPTER 2: THE CONCEPT OF EQUALITY

*“Where the government itself steps in to undertake a departure from the status quo as a matter of social policy, we require that its justifications rise to a particularly high standard. [This remains so] even though the weight of our scarred racial history may be invoked in order to justify such policies”.*⁵¹

2.1 Outline

Equality as a value and right stands to inform all law and is a standard against which all law is tested for Constitutionality.⁵² It is therefore necessary that transformation takes place within the precincts of equality. The aspect of equality is compound and made up of different concepts. This chapter unbundles the notions making up the concept and goes on to highlight principles of constitutionalism in a transitional state and considers how established standards are interpreted.

2.2 Equality

As in all transitional states, equality assumes a functional meaning in South Africa.⁵³ In the South African context, equality marks a break from the past and a benchmark for an objective. The history of South Africa is synonymously recognized with inequality made possible through structures of segregation. It is for this reason that the Constitution envisages equality as a founding value and an enforceable right.⁵⁴ The interaction of the law and this principle in the workplace has centered on accessing the labour market and career advancement. The best way to achieve this has been the subject of much controversy and the way it has been settled has been dependent on the interpretation of the principle of equality.

⁵¹ C A Ford *“Challenges and Dilemmas of Racial and Ethnic Identity in American and Post-Apartheid South African Affirmative Action”* (1953) *Christopher* 43 *UCLA L. Rev.*, 2015.

⁵² *Solidarity and Others v Department of Correctional Services and Others* [2013] ZALCCT 38 para 22.

⁵³ JC Mubangizi *The Protection of Human Rights in South Africa* 2nd ed (2013) 1.

⁵⁴ The preamble to the Constitution contains equality as a founding value whilst section 9 of the Constitution provides for equality as a right.

2.3 Formal equality

Formal equality refers to the basic notion of equality which holds that like should be treated alike.⁵⁵ The notion provides that characteristics of identity such as race, gender and religion do not warrant considering people different.⁵⁶ Every person is considered to have an equal capacity to hold rights. Such capacity is protected by enacting laws which require that the state and individuals refrain from action which infringes such capacity and the right. If it happens that this capacity is violated, formal equality requires that the situation be remedied by simple extension of rights so violated. Such reasoning is the basis upon which civil and political rights were extended to Africans after years of servitude.⁵⁷ After providing that like should be treated alike, the notion of formal equality does not provide how those who are different (and at a disadvantage) ought to be treated.⁵⁸ Thus the notion leaves those who are different vulnerable. Individuals face the predicament of having to conform to the abstract of what is deemed normal or face detriment.⁵⁹ Formal equality therefore only demands negative action for the preservation of equality. For failure to recognize the impact of circumstances of individuals and failure to provide for positive action, formal equality is deemed inept to address equity issues.

2.4 Substantive equality

Substantive equality was developed from the failings of formal equality. There are at least four ways to approach substantive equality namely “equality of results, equal opportunities; substantive rights and a broad value driven approach”.⁶⁰ Albertyn is of the opinion that substantive equality has four characteristics namely concern with impact of a measure on society, acceptance of difference, purposive and value based approach to rights to achieve equality.⁶¹

Equality of results was conceived out of the realization that identical treatment does not result in equal positions. In other words, anti discrimination laws are not adequate to achieve the transformational goal as envisaged in the Constitution. On the other hand, equality of opportunities is an acknowledgement of the fact that persons of different social groups are

⁵⁵ S Fredman *Discrimination Law (2001)* pg 16.

⁵⁶ Ibid.

⁵⁷ S Fredman “Facing the future: substantive equality under the spotlight” in O Dupper and C Garbers (eds) *Equality in the workplace: Reflections from South Africa and Beyond* (2009) 17.

⁵⁸ Fredman (note 55 above) 17.

⁵⁹ Ibid.

⁶⁰ C Barnard and B Hepple “Substantive Equality” (2000) 59 *Cambridge Law Journal* 562, 564.

⁶¹ C Albertyn “Substantive equality and transformation in South Africa” (2007) 23 *SAJHR* 253, 258.

positioned differently and cannot compete equally. This contextual approach to equality is the hallmark of substantive equality. It recognizes the effect of history on people's capacities. It therefore makes it necessary that proactive measures be taken to counteract the effect of historical factors on the realization of full human potential. Such action is allowed to the extent that it corrects the inequality of those being compared.

Substantive equality aims to eradicate socio-economic inequalities and the structures that cause them. Social inequality refers to situation whereby exclusion from a benefit is based on a person's social identity. Economic inequality refers to "unequal access to, and distribution of, basic needs, opportunities and material resources".⁶² Economic inequality in employment law manifests itself in underrepresentation in the workplace. Such underrepresentation means that there is an unequal distribution of resources such as jobs. It therefore is incumbent that measures be taken to redistribute such resources.

However, this does not mean that differences should be eliminated. Substantive equality requires the removal of difference which is tied to disadvantage.⁶³ Thus if being underrepresented in the workforce means unequal access to economic benefits of being in a job, such a scenario needs to be rectified. This, however, needs to be done in accordance with the Constitution.⁶⁴

Substantive equality recognizes the dignity and worth of an individual. Most importantly, substantive equality demands that the interpretation of rights should take into account both the context in which violation of rights takes place and the purpose for which the right was created.⁶⁵ This nuanced approach ensures that measures taken and decision made remain in line with the precepts of the Constitution.⁶⁶

⁶² C Albertyn (note 61 above) 255.

⁶³ Ibid 260.

⁶⁴ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA490 (CC) para 76.

⁶⁵ C Albertyn (note 61 above) 260.

⁶⁶ Ibid.

2.5 Equality as a right

Equality finds expression as a right in the Constitution.⁶⁷ Section 9 of the Constitution provides for the right to equality and has been interpreted to embrace substantive equality.⁶⁸ From the purpose of the Constitution,⁶⁹ it can be concluded that the equality clause is meant to be interpreted in line with substantive equality.⁷⁰ This is so because section 9(2) explicitly places a positive duty on the state to ensure equality. Thus such departure from identical treatment and recognition of the effects of the past on the present goes to the core of substantive equality. Furthermore, it is argued that the inclusion of indirect discrimination seeks to address structural barriers to equality as is aimed at by substantive equality.

The case of *Harksen vs Lane No*⁷¹ lays down the test by which conduct and law could be tested for consistency with the right to equality. The test involves a three stage enquiry. The first enquiry is whether there has been differentiation between people or categories of people. If differentiation has actually occurred it has to be considered if such differentiation has a rational connection to a legitimate government purpose. Absence of such a connection amounts to violation of section 9(1). However, even if such connection is there, conduct or law differentiating persons or categories of persons can still amount to discrimination.⁷²

The law does not proscribe discrimination but unfair discrimination. Firstly it has to be established whether the differentiation amounts to discrimination. If the differentiation is based on a specified ground,⁷³ discrimination is taken to have occurred.⁷⁴ If the differentiation complained of is not on a specified ground, then discrimination can only be deemed present upon

⁶⁷ Section 9 of the Constitution.

⁶⁸ *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) para 41; *Brink vs Kitshoff NO* 1996 (4) SA (CC) 197.

⁶⁹ Breaking the cycle of disadvantage that characterised the past and establishing a democratic state committed to development and upholding human rights.

⁷⁰ Dupper (note 1 above) pg 18.

⁷¹ *Harksen vs Lane No* 1998 (1) SA 300 (CC).

⁷² In *Prinsloo v Van der Linde* 1997 (6) BCLR 759 (CC) the court held that this does not mean discrimination has a neutral meaning.

⁷³ Specified ground under section 9(3) of the Constitution and Section 6 of the EEA.

⁷⁴ Para 49 it was held that the presumption exist because the listed grounds reflect ways in which people were in which people were marginalized during apartheid. Thus the presumption exist so as to safeguard against the continuation of that system (E Grant and J G Small "*Disadvantage and discrimination: the emerging jurisprudence of the South African Constitutional Court*" (2000) 51 *Northern Ireland Legal Quarterly* 174,180.

establishing that it is based on a ground that has the potential to impair human dignity.⁷⁵ The second leg of the second stage is determining whether the differentiation amounts to unfair discrimination. If the differentiation is based on a specified ground, unfairness is presumed.⁷⁶ If the differentiation is not based on an unspecified ground, the applicant has to establish that it is unfair discrimination. The ultimate determinant of unfairness is the impact of the discrimination on the victim.

The fairness of the impact that differentiation has on a complainant can be determined by three factors. The first is the consideration whether the complainant was prejudiced by past discrimination. Secondly, the purpose of the differentiating law or conduct. The purpose has to be a legitimate governmental goal for which power was given. The enquiry does not end there. The final factor is the consideration whether and extent to which the complainant's rights have been affected. The major consideration in this regard is whether the complainant's dignity has been seriously impaired.⁷⁷ These considerations make it clear that previous disadvantage is not the sole factor in determining fairness.⁷⁸

The final stage of the three stage enquiry is justification under the limitation clause. If the second stage shows that the discrimination is unfair, the court has to determine whether the law or conduct in question can be justified under the provisions of section 36 of the Constitution. The appropriateness of this test is found in its ability to balance contending collective and individual rights.

2.6 Designated group

Eligibility for affirmative action is determined upon the stratification formerly used by the apartheid system. The EEA identifies race as one of the criteria to determine eligibility for affirmative action benefits.⁷⁹ This group is branded „designated“ and is assumed to contain

⁷⁵ Harksen (note 71 above) par 49.

⁷⁶ Section 9(5) of the Constitution.

⁷⁷ Harksen (note 71 above) para 51.

⁷⁸ E Grant and J G Small *“Disadvantage and discrimination: the emerging jurisprudence of the South African Constitutional Court”* (2000) 51 *Northern Ireland Legal Quarterly* 174, 185.

⁷⁹ Section 1 of the EEA lists gender and disability as other groups targeted by affirmative action.

people who were prejudiced by the previous system of apartheid.⁸⁰ Such an assumption is an executive prerogative in which the state has discretionary power to categorize persons in the distribution of resources and to establish the order of priority when such distribution is undertaken.⁸¹ Persons belonging to this group are given an identical group characteristic. In this instance all are assumed to have been prejudiced by the system of apartheid. The assumption implies that but for apartheid; persons in this group would have advanced with their careers.⁸² It is on this basis that the term black was extended from referring to Africans only to include Indians, Chinese and Coloureds.⁸³ Such a homogenized character is supposed to entitle an equal claim to redress measures.⁸⁴ Even though the use of race has been challenged, it has been justified on the basis of the objective pursued.⁸⁵ It has been held that race conscious categorization is necessary for the eradication of disadvantage that has become synonymous with race.⁸⁶

2.7 Affirmative action defined

Affirmative action is defined as

“measures designed to ensure that suitably qualified people from designated groups have equal opportunities and are equitably represented across all occupational categories and levels in the workforce of a designated employer”.⁸⁷

What is clear from this definition is that the Act gives a purposive meaning to affirmative action. However, in the workplace affirmative action has manifested itself in the form of preferential hiring and promotion of those presumed to be disadvantaged by apartheid. Both these definitions carry with them value laden terms which need unpacking. This is addressed below.

⁸⁰ The Act brands them as people previously disadvantaged by previous discrimination.

⁸¹ S Fredman “Substantive equality and the positive duty to provide” (2005) 21 SAJHR163, 178; she, however, points out that this does not promote accountability (at 182).

⁸² AM Louw “*Extrapolating ‘equality’ from the Letter of the Law: Some Thoughts on the Limits of Affirmative Action under the Employment Equity Act 55 of 1998*” (2006) 18 SA MLJ 336, 347.

⁸³ *Chinese Association of South Africa & others v Minister of Labour & others* [2008] Case No. 59251/2007.

⁸⁴ O Dupper “*Affirmative Action: Who, How and How Long?*” (2008) 24 SAJHR 425, 427; Courts have interpreted affirmative provisions in a way that establish preference to the African race as will be discussed in the next chapter.

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Section 15 (1) of the Employment Equity Act.

2.8 Purpose of affirmative action

Affirmative action is a goal oriented concept. The purpose of affirmative action finds expression in two legal instruments, namely the Constitution and the EEA. Section 9(2) of the Constitution provides:

“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”.⁸⁸

From this provision it can be established that the purpose of affirmative action is to advance persons from designated groups. A careful reading of section 9(2) depicts that there are people prejudiced by discrimination that need to be advanced. This understanding depicts the ameliorative nature of affirmative action. Steps taken must ensure that people fully enjoy their rights and freedoms. Affirmative action was enacted to correct imbalances in social standings between people from different groups.

In line with the purpose illustrated above, Moseneke J in *Minister of Finance and another vs Van Heerden* laid,⁸⁹ down a test to determine whether affirmative action is constitutional. It was held:

“It seems to me that to determine whether a measure falls within section 9(2) the enquiry is threefold. The first yardstick relates to whether the measure targets persons or categories of persons who have been disadvantaged by unfair discrimination; the second is whether the measure is designed to protect or advance such persons or categories of persons; and the third requirement is whether the measure promotes the achievement of equality”.⁹⁰

It is on the basis of this test that the following chapter evaluates affirmative action. The first requirement has been addressed under the sub heading “designated group” above. The second requirement needs further expansion to see how courts have interpreted it.

The court has interpreted that the term “designed” entails a properly drafted plan.⁹¹ This serves to avoid arbitrariness in the way an employer would carry out affirmative action.⁹² It is for this

⁸⁸ Section 9(2) of the Constitution.

⁸⁹ *Minister of Finance and another vs Van Heerden* 2004 (12) BLLR 1181(CC) para 37.

⁹⁰ *Ibid.*

⁹¹ *Public Servants Association v Minister of Justice* 1997 (5) BCLR at 640.

⁹² *Ibid.*

reason that the court refused to condone the employer's refusal to promote an employee for affirmative action grounds where a plan did not exist.⁹³ The specifications with which these equity plans are to comply with are provided for under chapter three of the EEA.⁹⁴ The employment equity plan should carry a likelihood of advancing the designated persons.⁹⁵ Thus the validity of the employment equity plan is based on its ability to achieve what it sets out to, namely advancing designated persons.

The last requirement entails a consideration of whether the measure will lead to the attainment of substantive equality.⁹⁶ Judge Moseneke held that this entails considering the effect of the measure on society.⁹⁷ It therefore means that the measure is tested against its ability to effect change namely alteration of workplace demographics as well as not causing substantial and undue harm to the non-designated members.⁹⁸

The EEA adds the aspect of equitable representation to the purpose of affirmative action given in section 9(2).⁹⁹ The meaning of this term is not expressly provided for under the Act but has been taken to mean a situation whereby the workplace demographics are the same as those of the population of the country.¹⁰⁰ Proponents of affirmative action have argued that until this is achieved, it will not make sense to talk of a sunset clause.¹⁰¹ The following chapter will explain how this approach is untenable.

⁹³ *Public Servants' Association of SA obo Helberg v Minister of Safety & Security & another* 2004 (25) ILJ 2373 (LC).

⁹⁴ In accordance with Sections 16,17,19,20 and 21 of the EEA.

⁹⁵ JLPretorius, ME Klinck & C Ngwena (eds) *Employment Equity Law* (2012) pages 9-20.

⁹⁶ *Ibid* pages 9-27.

⁹⁷ *Van Heerden* (note 89 above) para 44.

⁹⁸ *Ibid*.

⁹⁹ Section 2(b) and section 15(1) of the EEA.

¹⁰⁰ J Grogan "*Like it or lump it*" (2013) 29 *Employment Law* 1, 5.

¹⁰¹ K Govender "*Affirmative action is morally defensible*" *Mail & Guardian* 01/03/2010 accessed at <http://mq.co.za/article/2010-03-01-aa-is-still-morally-defensible> .

2.9 Who is to implement affirmative action?

The Act designates employers to adopt redress measures.¹⁰² The procedure to be followed in adopting such is laid down in chapter III of the Act.¹⁰³ A lot of contention has arisen from these employers' obligation. The main contention has come from the assumption taken by many and endorsed by courts, namely that as long as it can be shown that there exists an affirmative action plan designed in accordance with chapter three of the Act, any employment decision based on it is beyond judicial scrutiny.¹⁰⁴ Such an approach is in line with the standard of rationality which is discussed below.

2.10 Standards set in achieving transformation

Affirmative action involves the distribution of resources that impacts on collective and individual rights.¹⁰⁵ Courts have been frequently approached to decide on how affirmative action ought to be applied and which standard of review ought to be employed. The dilemma in which the law is caught between has seen the court's opinion split. The courts have vacillated between proportionality and rationality as the possible standard of scrutiny.

2.11 Rationality

Rationality is an inquiry into the logical relation of a measure to its objective.¹⁰⁶ The test requires that the measure must be causally linked to its objective.¹⁰⁷ Du Plessis holds that the Constitutional Court has narrowed the rationality review to a determination of a "rational

¹⁰² Section 1 of the Employment Equity Act defines a designated employer to include organs of state, an employer bound to implement affirmative action by virtue of a collective agreement or an employer who employs 50 and more employees or one who employs less than 50 but whose annual turnover is equal to or more than the annual turnover in the appropriate sector as provided in Schedule 4 to the Act. It however excludes local spheres of government, the National Defence Force, the National Intelligence Agency and the South African Secret Service.

¹⁰³ Provisions of affirmative action in chapter III of the Act do not apply to non designated employers; Section 13(1) provides that employers falling out of the ambit prescribed by section 1 can apply to be designated.

¹⁰⁴ *Harmse v City of Cape Town* 2003 (6) BLLR 557 (LC); a polarized approach was taken by the Labour Court in *Munsamy vs Minister of Safety and Security and another* 2013 (7) BLLR 695 (LC); *Naidoo vs Minister of Safety and Security and another* 2013 (7) BLLR 490 (LC) the court held that equity plans must not create absolute barriers.

¹⁰⁵ JL Pretorius "Fairness in Transformation" (2010) 26 SAJHR 536, 557.

¹⁰⁶ Ibid pg 566.

¹⁰⁷ E. M. L. Strydom et al (eds) *Essential Discrimination Law* (2004) pg 270.

connection between the premise and conclusion”.¹⁰⁸ He makes this point clear by reference to *Merafong v President of the Republic of South Africa*¹⁰⁹ where the court ruled out the ability of an adjudicator to consider less onerous alternatives to deal with a legal problem.¹¹⁰ In applying this test, courts have preferred a non-exacting standard so as to allow „significant measure of latitude to the government“. ¹¹¹ The rationality test in labour matters is derived from a narrow interpretation of the provisions of section 9(2) of the Constitution. This requires that the measure taken in line with affirmative must be intended to balance representation in the workplace and secondly must be „capable of doing so“. ¹¹²

The majority opinion in *Van Heerden* held that affirmative action is subject to the rationality test only.¹¹³ Pretorius points out that Mokgoro J was referring to the establishment of rationality as the sole condition for constitutional compliance when she averred that „it would be inimical if the state would be required to show that its restitutionary measures are fair“. ¹¹⁴ Fredman asserts that such reasoning emanates from the fact that the positive duty to redistribute social goods is a duty of a political nature and traditionally left to politicians.¹¹⁵ She however adds that this does not justify abdicating judicial monitoring of the way such is carried out.¹¹⁶ Her justification is based on the democratic principle of accountability and the need to protect the politically vulnerable groups.¹¹⁷ Therefore courts have a duty to ask for justified criterion of eligibility or exclusion.¹¹⁸

¹⁰⁸ M Duplessis and S Scott “*The Variable Standard of Rationality Review: Suggestions for Improved Legality Jurisprudence*” (2013) 130 *SALJ* 597, 601.

¹⁰⁹ *Merafong Demarcation Forum v President of the Republic of South Africa* 2008 (5) SA 171 (CC) para 63.

¹¹⁰ *Ibid.*

¹¹¹ K Govender is of the same opinion in “*The Developing Equality Jurisprudence in South Africa*” 107 *Mich. L. Rev. First Impressions* (2009) pg121.

¹¹² E. M. L. Strydom (note 124 above) pg 270.

¹¹³ JL Pretorius “*Fairness in Transformation*” 26 *SAJHR* (2010) at 570.

¹¹⁴ *Ibid* 562.

¹¹⁵ S Fredman “*Providing Equality: Substantive Equality and the Positive Duty to Provide*” (2005) 21 *SAJHR* 163.

¹¹⁶ *Ibid.*

¹¹⁷ She argues that such a role is not second guessing executive decisions but is a way of supporting accountability of the executive by asking that they provide justified reasons for their distributive decisions.

¹¹⁸ Fredman (note 16 above) 164; this serves to safeguard against decisions which are based on stereotypes and unwarranted generalization which perpetuate inequality.

Affirmative action is not an exception to the right to equality.¹¹⁹ Such an assertion can only be true if the extent of affirmative action measures are delimited by principles of non-discrimination.¹²⁰ Affirmative action would be an exception to equality if it is applied in a way that does not account for its effect on individuals affected (both affirmed and deprived).¹²¹ Pretorius makes reference to *Van Heerden* where it was held that „the starting point of equality analysis is almost always a comparison between affected classes“.¹²² His reference serves to indicate that the Court was conscious of the need for proportional considerations when adjudicating equity measures. He, however, laments that although Moseneke J started out his analysis with a proportionality approach, the enquiry was reduced to a rationality test. Pretorius notes that rationality is one sided and concludes that it is “ill-suited to fulfill the basic function of an equality actualising norm, since it lacks the normative content to be able to determine whether a differentiating measure actually promotes the overall purpose of s 9”.¹²³ This conclusion enlightens one to the inappropriateness of rationality as a test against which affirmative action ought to be scrutinised.

2.12 Proportionality

Proportionality on the other hand refers to a standard of judicial scrutiny that involves the balancing of contending values.¹²⁴ The standard is used by decision makers to determine whether a measure has exceeded the requirements for attaining a legitimate goal. This usually involves a cost benefit analysis.¹²⁵ Critics of proportionality as a standard for review have castigated it on the grounds that it favours the complainant and defeats the remedial goal of affirmative action.¹²⁶ Pretorius counters this argument by adding that the incorrectness of such assertions lies in the assumption that the enquiry ends with the consideration of the impact of affirmative action on a

¹¹⁹ *Van Heerden* (note 89 above) para 30; Pretorius (note 33 above) 569.

¹²⁰ Pretorius (note 33 above) 569.

¹²¹ *Hugo* (note 68 above) para 41 the court also emphasized the need to consider the impact of differentiating measures on the affected people. Also, in *National Coalition for Gay and Lesbian Equality 1999 (1) SA 6 (CC) para 126*.

¹²² Para 39.

¹²³ Pretorius (note 33 above) 565.

¹²⁴ POMFR: Proportionality Analysis and Models of Judicial Review accessed at <http://europeanlawblog.eu/?p=1833> on 21/11/2013.

¹²⁵ That is, whether benefits exceed cost.

¹²⁶ Mokgoro J in *Van Heerden* at 80; Mlambo Jin *SAPS v Solidarity obo Barnard* 2013 (34) ILJ 590 (LAC) para 30.

complainant.¹²⁷ Proportionality goes on to balance contending interests taking into account all relevant factors.¹²⁸ The cumulative effect of these factors determines which side weighs more than the other. The provision of section 36 of the Constitution ensures that the redress goal is given its due weight.¹²⁹ Proportionality is more compatible with the attainment and maintenance of an egalitarian state because it is cognisant of competing interests and strikes an optimal reasonable balance in accommodating them.¹³⁰

Proportionality is also preferable in that it results in decisions that are „strongly congruent with the constitutional and other public interests at stake“. ¹³¹ Pretorius chooses to support proportionality as a proper standard on the grounds that proportionality does away with „ideological, dogmatic or otherwise abstract ranking“ of constitutional provisions.¹³²

In all, even though the duty to decide who should benefit and the order of priority is a mandate better executed by the legislature, a program designed to exclude certain people from socio-economic benefits should be scrutinised using the criteria of proportionality. Proportionality is preferable because of its ability to account for the duty to redress societal imbalances and at the same time cater for individual rights.

2.13 Summation of findings

All in all, the above has been an interaction with principles upon which affirmative action is built. The interaction has managed to establish the purpose of affirmative action, namely to establish a means through which equal participation could be facilitated, equal opportunity to compete in the labour market and consequently to reflect this in the workforce demographics. The discussion has established ideal approaches as well as the current approach adopted by our courts. What then follows is an evaluation of the current approach to affirmative action adopted by our courts whilst contrasting it with the ideals enumerated above.

¹²⁷ Pretorius (note 33 above) 553; K Govender, is of the same opinion in *“The Developing Equality Jurisprudence in South Africa”* 107 Mich. L. Rev. First Impressions (2009) pg122.

¹²⁸ Pretorius *ibid*.

¹²⁹ *ibid*.

¹³⁰ *ibid* at 555.

¹³¹ *Mohunram v National Director of Public Prosecutions (Law Review Project as amicus curiae)* 2007 (4) SA 222 (CC).

¹³² JL Pretorius note 130 above.

CHAPTER 3: AFFIRMATIVE ACTION CHALLENGED

“We are all prisoners of our own experience and knowledge. It is difficult, even threatening, to have to admit that many of the things we preached and practiced were mistaken from the start or have become obsolete.”¹³³

3.1 Outline

Having been versed with what informs the formulation of affirmative action, this chapter then moves on to address why it is imperative that affirmative action should come to an end. The main thrust of the argument will be on constitutional grounds and economic considerations that necessitate the phasing out of affirmative action in the employment sector.

3.2 Temporary nature of affirmative action

Affirmative action by its very nature is a temporary measure. Continuation with affirmative action indefinitely would be to go against international instruments which categorically state that affirmative action is temporary. The International Labour Organization Convention 111 of 1958 provides that measures such as affirmative action ought to be temporary.¹³⁴ Also, the Convention on the Elimination of all Forms of Discrimination against Women¹³⁵ permits affirmative action as a temporary measure aimed at accelerating *de facto* equality between men and women. Such reference to international instruments is in line with section 233 of the Constitution which obliges courts to interpret all statutory provisions in accordance with international law standards. Section 3(b) and the Preamble to the EEA make it mandatory to interpret the EEA in line with international instruments. Section 39(1) (b) of the Constitution also provides for the consideration of international law when interpreting the Bill of Rights. Courts’ acceptance of the need to apply the law in accordance with international law is evident in judgments in which these instruments were referred to.¹³⁶ Thus, the indefinite continuation with affirmative action is a violation of both international instruments and indirectly the Constitution.

¹³³ H W Arthurs “Labour Law and Industrial Relations in the Global Economy” (1997) 18 *ILJ* 571, 575.

¹³⁴ 25 June 1958, UNTS vol 362.

¹³⁵ (CEDAW) (1980) *ILM* 33.

¹³⁶ *Hoffmann vs South African Airways* 2001 (1) SA 1 (CC); *Allpass vs Mooikloof Estates (Pty) Ltd t/a Mooikloof Equestrian Centre* 2011 (2) SA 638 (LC); *S vs Makwanyane and another* 1995 (3) SA 391 (CC).

Continuing with affirmative action indefinitely would amount to reverse discrimination. Reverse discrimination refers to a situation whereby the discriminated person exchanges positions with the discriminator. This simply that means the system of discrimination remains and what only changes is that the person who was oppressed now becomes the oppressor. Having traversed nineteen years into the era of freedom, it has become reasonable to question the lifespan of affirmative action. The EEA mandates that equity plans designed by individual members must have a life span of five years which can be renewed if need be.¹³⁷ However, it is difficult to comprehend why the same could not be applied to the whole affirmative action system nationwide.

Affirmative action on a permanent basis reinforces stereotypes widely held against people of colour. Apartheid was informed by white supremacy and blacks were perceived as inferior in all faculties of life.¹³⁸ In addition to establishing diversity, affirmative action was brought to deconstruct stereotypes.¹³⁹ Carrying on with the application of affirmative action indefinitely goes against this objective. This is so in that continuation with affirmative action will create a perception that black people are in the position they hold, not because of their hard work, but because of compassion reasons.¹⁴⁰ In the case of *Stoman vs Minister of Safety and Security and others*,¹⁴¹ the court rejected a milder version of affirmative action whereby affirmative action would play the role of a tie breaker when candidates for an appointment have the same credentials. This decision seems to imply that because of affirmative action, there will never come a time when black people's credentials will match up to the standard of white people hence the need for perpetual affirmation. In light of such a detrimental implication it is necessary that an end to affirmative action is sought before such stereotypes become entrenched.

¹³⁷ Chapter III of the EEA.

¹³⁸ D.G Mailu "P.W Botha's 1985 speech" available at <http://www.nairaland.com/248669/bothas-speech-1985-must-read> ,accessed at 06/10/13.

¹³⁹ O Dupper and C Garbers "The Prohibition of unfair discrimination and the Pursuit of affirmative action in the south African workplace" in R le Roux and A Rycroft (eds) *Reinventing Labour law* (2012) 263.

¹⁴⁰ P Brest and M Oshige "Affirmative Action For Whom?" (1995) 47 *Stanford Law Review* 855, 870.

¹⁴¹ 2002 (3) SA 468 (T).

3.3 Failure to adequately advance the masses

“It would therefore be improper and unfortunate to section 9(2) to be used in circumstances for which it was not intended. If used in circumstances where a measure does not in fact advance those previously targeted for disadvantage, the effect will be to render Constitutionally compliant, a measure which has the potential to discriminate unfairly. This cannot be what section 9(2) envisages.”¹⁴²

A legal provision’s failure to fulfill its primary objective renders it obsolete and compels its abrogation. The court has interpreted affirmative action and established that its legitimacy is drawn from its ability to advance those disadvantaged by previous discrimination.¹⁴³ It is submitted that affirmative action has not resulted in the advancement of the majority of the persons it was supposed to advance. The Quarterly Labour Force Survey for the second quarter of 2013 estimates that the unemployment rate of Africans is 29.1 %, Coloureds 25.1 %, Indians 13.4% yet unemployment of the White race stands at 6.1 %.¹⁴⁴ Before the implementation of affirmative action the statistics reflected population unemployment rate as follows: Africans 37%; Coloureds 23 %; Indians 13% and Whites 6 %.¹⁴⁵ Such disparity remains despite affirmative action being in place since 1998. It is suggested that the South African economy is becoming more capital and less labour intensive.¹⁴⁶ This in turn creates the need for skilled workers. What worsens the situation is that many individuals lack relevant skills for the effectiveness of preferential hiring. This goes to show the inadequacy of preferential hiring or promotion to address the present day inequalities.

Affirmative action has failed to secure access to better paying jobs. Access to such is not only for prestigious reasons but is vital for the alleviation of poverty. This is so because a better paying job means one can afford and have access to essential amenities of life. The 13th Commission of the Employment Equity Annual Report¹⁴⁷ indicates that white people continue to dominate top management (73 %) whereas they only make up 11.3% of the economically active population.

¹⁴² Mokgoro J in *Van Heerden* (note89 above) para 77.

¹⁴³ Moseneke J in *Van Heerden* (note89 above) para 41; *Public Servants’ Association of SA v Minister of Justice* 1997 (5) BCLR 577 (T).

¹⁴⁴ It is estimated that the economically active of the groups classified as black add up to 30 323 000 and the White race add up to 3 029 000 Accessed at statssa.gov.co.za on 04/10/2013.

¹⁴⁵ 1995 OHS Labour Force Survey accessed at statssa.gov.co.za on 04/10/2013.

¹⁴⁶ R Burger and I Woolard “*The State Of The Labour Market In South Africa After The First Decade Of Democracy*” (2005) CSSR Working Paper No. 133 University of Cape Town; B Hepple “*Is South African Labour Law Fit for the global economy?*” In R Le Roux and A Rycroft (eds) *Reinventing labour law* (2012) pg2.

¹⁴⁷ 2013 available at www.labour.gov.za, accessed on 28/11/2013.

On the other hand Africans constitute 12.3%, Coloureds 4.6% and Indians 7.3% of the top management. Commenting on the *South Africa Survey*, published by the South African Institute of Race Relations, Alexander states that “median wages of white earners are four times as high as those of African earners”.¹⁴⁸ These statistics reflect the continuation of exclusion of blacks from high salaried jobs despite having had affirmative action in place for so long. Therefore affirmative action has failed to advance disadvantaged persons who remain below the poverty datum line.

Inefficiency of affirmative action can also be drawn from the slow progress it has made so far. Trends of its progress have been dubbed the “drunkard/random” movement by the 13th Commission Employment Equity Annual Report.¹⁴⁹ Such a term has arisen from the movement of progress which has been back and forth while making small strides.¹⁵⁰ From 2002 to 2004 a mere 1.8% change for Africans was noticed in the top management position representivity.¹⁵¹ From 2006 to 2008 the change was still small and changed by 2.3%.¹⁵² A dramatic drop was noticed from the year 2008 to 2010 in top management with representation dropping from 13.6 to 12.7 %.¹⁵³ The figure further dropped in 2012 where it fell from 12.7 to 12.3 percent.¹⁵⁴ Thus although there are few Africans in the top management their numbers continue to drop despite the implementation of affirmative action.

Furthermore, the achievements of affirmative action have benefited a few middle class persons from the designated groups.¹⁵⁵ The prime targets of the program have not benefited from the promotions and hiring that come with affirmative action.¹⁵⁶ What has actually occurred is that those who were already better off have amassed benefits at the expense of those who have been

¹⁴⁸ G Alexander “White men still top of the pay scale” available at www.sairr.org.za, accessed on 29/11/13.

¹⁴⁹ 13th Commission of Employment Equity Annual Report 2013 available at www.labour.gov.za, accessed on 28/11/13.

¹⁵⁰ Ibid.

¹⁵¹ Ibid.

¹⁵² Ibid.

¹⁵³ Ibid.

¹⁵⁴ Ibid.

¹⁵⁵ United Nations Development report on South Africa in 2004; K Bentley and A Habib ‘Racial Redress, national identity and citizenship in post-apartheid South Africa’ in K Bentley and A Habib (eds) *Racial Redress and Citizenship in post-apartheid South Africa (2008)* 21.

¹⁵⁶ K Bentley and A Habib *ibid.*

prejudiced by the effects of discrimination and require advancement.¹⁵⁷ In the end a new class of black elite has emerged and the poverty gap has increased amongst persons of the same group.¹⁵⁸ Dupper and Garbers rely upon Gini coefficient figures to show intra racial inequalities. The figures reflect the following: Africans 0.62, Coloureds 0.54; Indians 0.61; Whites 0.50.¹⁵⁹ These figures reflect that Africans have the widest intra racial gap and it is held that the gap increased significantly in the period after apartheid, which is the period in which affirmative action was vigorously applied.¹⁶⁰ This situation challenges the validity of Moseneke J's assertion that windfall beneficiaries do not affect the validity of the scheme.¹⁶¹ The presence of windfall beneficiaries has created another problem in trying to resolve one. A new path of inequality, namely, among persons of the same group and races has emerged.

3.4 The problem in the standard of equity

It is submitted that the measurement of equitable representation as it is applied today is erroneous. The term equitable representation has been taken to mean that a population group's economically active population should be similarly reflected in the workplace demographics. Thus, if Whites constitutes 11% of the economically active population, they are taken to be over represented if their presence in management exceeds a ratio equivalent to 11%. Even though this makes sense verbally, it has been proved to be problematic and untenable.¹⁶² It is untenable because to hold that workplace demographics must mirror national demographics is to assume that people have the same aspirations. Racial groups consist of people with common characteristics but such common attributes are not fixed, there exists differences as well.¹⁶³ This difference in interests results in people choosing different professions. Even if the percentage of

¹⁵⁷ Bentley and Habib (note 55 above); O Dupper and C Garbers *The Prohibition of unfair discrimination and the Pursuit of affirmative action in the South African workplace: Reinventing Labour law* (2012) 257.

¹⁵⁸ S Terreblanche *The History of Inequality in South Africa* (2002) 400.

¹⁵⁹ R le Roux and A Rycroft (eds) *Reinventing labour law* (2012) 259.

¹⁶⁰ O Dupper and C Garbers "The Prohibition of unfair discrimination and the Pursuit of affirmative action in the South African workplace" in R le Roux and A Rycroft (eds) *Reinventing labour law* (2012) 259.

¹⁶¹ Van Heerden (note 89 above) para 44.

¹⁶² *Naidoo vs Minister of Safety and Security and Another* 2013 (7) BLLR 490 (LC) at 151 it was held that to say a group is overrepresented means that group is neither desirable nor sought after. The court held that this is not only unfair but is a violation of people's dignity.

¹⁶³ S Fredman "Facing the future: Substantive equality under the spotlight" in O Dupper and C Garbers (eds) *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 35.

economically active blacks is 73 % it is unlikely that 73 % of its population wants to be in the management. Such an approach to the remedial measures fails to accommodate the existence of diversity among different people.

More so, affirmative action is aimed at promoting employment of previously disadvantaged groups.¹⁶⁴ Even if the number by which Whites are overrepresented in the top management is scaled down,¹⁶⁵ a huge number of Blacks would still remain unemployed, not to mention unable to occupy top management positions.¹⁶⁶ This goes to discredit the assumption behind affirmative action, namely, that replacing Whites in top positions with Blacks will advance the majority of **disadvantaged** persons. The Solidarity Institute reports that scaling down of whites in top management opens up 28 097 positions which is a meager figure when the reality is that seven million people remain unemployed.¹⁶⁷ This argument demonstrates how it is trivial to work against white ratio as a target for equity. By focusing on the few positions, which are taking time to realize, affirmative action has unfortunately taken attention off matters of substance namely employment of many. It is submitted that there needs to be a strategy which seeks to achieve the advancement of the disadvantaged majority and not just a few persons. Clearly the standard of affirmative action namely matching of national demographics with workforce demographics is a problematic standard.

Matching workplace demographics with national population group structures is also problematic because national demographics are a moving target. Mushariwa proposes that affirmative action should be put aside once workplace targets are reached in specific individual enterprises.¹⁶⁸ On the face of it such a proposition seems to offer a clear and simple answer. However, such an assertion does not go far because it does not take into account the fact that national demographics are not fixed. This in turn will mean that upon every such change affirmative action will have to

¹⁶⁴ KC Naff and O Dupper "Footprints Through the Courts: Comparing Judicial Responses to Affirmative Action Litigation in South Africa and the United States" (2009) 25 International Journal Of Comparative Law 157, 161 quoting paragraph 434 of the 1996 Labour Market Commission's report "Restructuring the South African Labour Market".

¹⁶⁵ To 6.4 % which is their percentage of the economically active according to the 13th Commission Employment Equity Annual Report of 2013.

¹⁶⁶ Solidarity Research Institute "A critical analysis of the 13th Commission for Employment Equity report" May 2013 pg 7 available at navorsing.co.za, accessed on 28/11/2013.

¹⁶⁷ Ibid.

¹⁶⁸ M Mushariwa "UNISA v Reynhardt [2010] 12 BLLR 1272 (LAC): Does affirmative action have a life cycle?" (2012) 15 PER 412.

be activated.¹⁶⁹ Such an approach goes against the temporary nature of affirmative action as explained earlier on.

The problem does not end there. There are instances whereby national demographics of the economically active group do not tally with regional demographics of the economically active persons. For example, it is common knowledge that the coloured population is denser in the Western Cape than anywhere else in the country. Thus, designing a plan in accordance with national demographics would prejudice the Coloured group in the Western Cape Province. To this end, in *Solidarity and Others v Department of Correctional Services and others*¹⁷⁰ it was held that an equity plan was discriminatory for failure to take account of regional demographics.¹⁷¹ The court held that regard to regional demographics would serve to assert rights of all persons designated as black.¹⁷² The court, however, added that there is a need to feature national demographics in all considerations because such an approach will tip the scales for Africans who suffered the most under apartheid.¹⁷³ Such ranking is what the Labour Court castigated in *Naidoo vs Minister of Safety and Security* where it was held that numerical targets should not have such effect to create rank of preference which does not exist in the statutes.¹⁷⁴ Section 42 of the EEA provides for factors which are to be considered by the Director General when assessing whether an employer is complying with the EEA. The factors include regional and national demographics of the economically active group. In *Munsamy vs The Minister of Safety and Security*¹⁷⁵ the respondent had relied on the demographics of the general population and not the specific economically active group as required under section 42 of the EEA. The effect was that non designated employees had more posts whilst designated members had few with some being excluded, which the court found irrational.

¹⁶⁹ *UNISA v Reynhardt* 2010 (12) BLLR 1272 (LAC).

¹⁷⁰ *Solidarity and Others v Department of Correctional Services and Others* [2013] ZALCCT 38 (18 October 2013).

¹⁷¹ *Ibid* at 46.

¹⁷² Para 45.

¹⁷³ Para 45.

¹⁷⁴ 2013 (3) 486 (LC) para 164.

¹⁷⁵ 2013 (7) BLLR 695 (LC).

3.5 The plight of individual rights

The implementation of affirmative action disregards individual rights. It has been held that remedial goals take primacy over individual rights.¹⁷⁶ Moseneke J ruled in *Van Heerden* that the prejudice incurred by persons from non-designated groups during the application of affirmative action does not warrant the invalidation of affirmative action.¹⁷⁷ It is an unavoidable consequence of affirmative action that, upon its implementation, non-designated group members may have to be excluded from a benefit.¹⁷⁸ The benefit can be in the form of a job or a promotion opportunity or a pension scheme to mention a few. Such pejorative consequences have been justified by the court on the basis of the aim it seeks to achieve, namely attaining an equal society.¹⁷⁹ In other words, teleological reasoning has been the basis upon which the measure has been sustained. This dissertation argues that the exclusive justification of affirmative action on teleological reasoning does not accord with the constitutional ethos of an egalitarian society nor does it sustain the assertion that affirmative action is not an exception to equality. Affirmative action has been held not be an exception to the right to equality but an integral part thereto.¹⁸⁰ Such a holding is not consistent with the way individual rights have been flouted in the name of redress.¹⁸¹ This has been so despite the judgment in the case of *Coetzer & others v Minister of Safety and Security & another*¹⁸² which held that the realisation of equity ought to be done in a manner that does not disregard the dignity of those who do not belong to the non-designated groups.¹⁸³ The refusal by courts to test affirmative action against the standard of fairness has left members of non designated groups at the mercy of equity plans without regard to their individual rights.¹⁸⁴

The over-inclusiveness that is inherent in affirmative action results in persons similarly positioned being unfairly differentiated. In the designated groups, there are individuals who were

¹⁷⁶ *South African Police Service v Solidarity obo Barnard* 2013 (1) BLLR 1 (LAC) at 30.

¹⁷⁷ *Van Heerden* (note 89 above) para 44.

¹⁷⁸ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism & others* 2004 (4) SA490 (CC) para 76; *South African Police Service v Solidarity obo Barnard* 2013 (1) BLLR 1 (LAC) para 26.

¹⁷⁹ *Harksen v Lane NO & others* 1998 (1) SA 300 (CC), *Van Heerden* (note 89 above) at 37; Rycroft (note 30 above)

¹⁸⁰ *Van Heerden* (note 89 above) para 30.

¹⁸¹ In *South African Police Service v Solidarity obo Barnard* 2013 (1) BLLR 1 (LAC) para 30 the Court held that the goal of redress takes precedence over the individual right to equality.

¹⁸² (2003) 24 ILJ 163 (LC).

¹⁸³ *Ibid* para 25.

¹⁸⁴ *Barnard* (note 176 above).

not prejudiced by past discrimination or who remain privileged even if discriminated.¹⁸⁵ Even though affirmative action was not primarily meant for such people,¹⁸⁶ the policy includes such as beneficiaries. Such over inclusiveness is facilitated by the extension of beneficiaries from “persons” to “categories of persons” in the Constitution.¹⁸⁷ In *Van Heerden*, the creation of the new pension fund resulted in some who had not been prejudiced by past discrimination being included as beneficiaries.¹⁸⁸ This had the consequence that, even though the “windfall beneficiaries”¹⁸⁹ were similarly positioned with the disfavoured, these two were unfairly differentiated.

The use of rationality as a standard of scrutiny for affirmative action fails to integrate conflicting legitimate values. Rationality is an inquiry into the logical relation of a measure to its objective.¹⁹⁰ The test requires that the measure must be causally linked to its objective.¹⁹¹ The standard of rationality precludes a court from enquiring into whether the measure taken by the government could have been done in a less onerous way.¹⁹² The reasoning behind such a non-exacting standard has been to allow „significant measure of latitude to the government“.¹⁹³ However this dissertation agrees with Ford and contends that

“Where the government itself steps in to undertake a departure from the status quo as a matter of social policy, we require that its justifications rise to a particularly high standard. [This remains so] even though the weight of our scarred racial history may be invoked in order to justify such policies”.¹⁹⁴

Thus it is argued that there is need for a new redress measure which protects the politically vulnerable group.

¹⁸⁵ *George v Liberty Life Association of SA Ltd 1996 (8) BLLR 985 (IC); Van Heerden note 8 above.*

¹⁸⁶ Landman J in *George v Liberty Life Association of SA Ltd [1996] 8 BLLR 985 (IC) at 1005.*

¹⁸⁷ Section 9(2) of the Constitution.

¹⁸⁸ 21 % of the beneficiaries had not been prejudiced by apartheid.

¹⁸⁹ As used by Moseneke to refer to those who became beneficiaries even though they are not eligible according to the criteria of past disadvantage in *Van Heerden*.

¹⁹⁰ Pretorius (note 33 above) 566.

¹⁹¹ *E. M. L. Strydom et al (eds) Essential Discrimination Law (2004) 270.*

¹⁹² *Merafong Demarcation Forum v President of the Republic of South Africa 2008 (5) SA171 (CC) para 63.*

¹⁹³ Deference; K Govender “*The Developing Equality Jurisprudence in South Africa*” (2009) 107 Mich. L. Rev. First Impressions 120, 121.

¹⁹⁴ C A Ford “*Challenges and Dilemmas of Racial and Ethnic Identity in American and Post-Apartheid South African Affirmative Action*” (1953) 43 UCLA L. Rev 1995, 2015.

Courts have also been hesitant to readily condone affirmative action merely for its purpose.¹⁹⁵ The central premise in *Van Heerden*,¹⁹⁶ namely that affirmative action should not be treated as *prima facie* discriminatory is not always adhered to.¹⁹⁷ This serves to show courts' acknowledgement of the detriment brought about by such an approach. If the correct standard of assessment is applied to affirmative action cases a few cases will barely pass constitutional muster. What then becomes apparent is that the policy has been a source of equity infringements and this calls for a reconsideration of redress measures implemented.

3.6 Racial tension

The effect of a measure on society can be used to determine whether it is desirable to continue implementing that measure.¹⁹⁸ Affirmative action has been interpreted in such a way that groups previously disadvantaged have been ranked.¹⁹⁹ It has been held that groups that have been previously disadvantaged do not benefit equally from affirmative action.²⁰⁰ The reasoning behind such rulings has been that since apartheid had racial hierarchies, to deny that would be an undue disregard of the suffering experienced by different groups. Justice Sachs in *Van Heerden*²⁰¹ held that differentiation among members of the designated groups requires that social, historical and legal evidence be led before the court can depart from according similar treatment to members of designated groups.²⁰² Save for *Motala vs University of Natal*,²⁰³ practice has been that, it is accepted as a given that Africans suffered more than any other designated group. Consequently the perception that affirmative action is for the benefit of Africans has been strengthened. Nuff and Dupper hold that such an approach creates tension among members of

¹⁹⁵ *Gordon v Department of Health: KwaZulu-Natal* 2009 (1) BCLR 44 (SCA); *Solidarity obo Barnard v SAPS* 2010 (5) BLLR 561 (LC).

¹⁹⁶ Note 89 above.

¹⁹⁷ *Gordon v Department of Health, KwaZulu-Natal* 2008 (6) SA 522 (SCA); *Solidarity obo Barnard v South African Police Services* (2010) 31 ILJ 742 (LC); *Naidoo v Minister of Safety and Security and another* 2013 (3) BLLR 486 LC.

¹⁹⁸ Moseneke J in *Van Heerden* (note 89 above) para 44.

¹⁹⁹ *Fourie v Provincial Commissioner of the SA Police Service (North West Province)* 2004 (25) ILJ 1716 (LC).

²⁰⁰ *Henn v SA Technical (Pty) Ltd* 2006 (27) ILJ 2617 (LC).

²⁰¹ Para 149.

²⁰² However in *Stoman v Minister of Safety and Security and others* 2002 (3) SA 468 para 483 it was held that eligibility for affirmative action is not dependable on personal circumstances.

²⁰³ 1995 (3) BCLR 374 (D).

different designated groups.²⁰⁴ In *Naidoo* it was held that such a practice “creates a perverse competition within the designated group on the basis of their race”.²⁰⁵ In all, social cohesion has been deeply fractured by such practices emanating from affirmative action.

Racial targets which come with affirmative action have led to resentment between races. Section 15(3) of the Employment Equity Act permits the setting of numerical goals when applying affirmative action.²⁰⁶ In *Naidoo vs Minister of Safety and Security*,²⁰⁷ the applicant’s case was that an insurmountable barrier had been placed through the calculation of numerical targets by her employer. The targets were such that prospects of promotion for Indian women were reduced to a fraction. The court condemned the way the numerical targets had been set on the basis that they had an exclusionary effect.²⁰⁸ In a related case of *Munsamy v The Minister of Safety and Security*,²⁰⁹ an Indian male was overlooked in a promotion opportunity because his race was considered overrepresented. Again, the numerical targets were such that Indian males had to migrate to other provinces for promotion to be possible.²¹⁰ The court held that the targets constituted a quota system. Whitcher AJ drew the difference between quotas and numerical goals by holding that “the imposition of a strict quota is a rigid measure requiring a certain fixed proportion or percentage to be included whereas preferential treatment and goals is more flexible allowing the achievement of objectives over a period of time”.²¹¹ The targets were condemned for being based on general population demographics instead of the economically active population demographics.²¹² The effect of such a plan was that a non designated group would have more posts than a designated one. It was further found that the targets had not been set after a proper consultation as required by the EEA.²¹³ As was in *Naidoo*, the court found that the equity plan was not rational based on these procedural errors in the adoption of the plans. The decisions, however, fail to dispel the limiting effect of numerical targets in cases where the employer has

²⁰⁴ KC Naff and O Dupper “Footprints Through The Courts: Comparing Judicial Responses to Affirmative Action Litigation in South Africa and the United States” (2009) 25 *The International Journal of Comparative Labour Law and Industrial Relations* 157, 181.

²⁰⁵ 2013 (3) 486 (LC) para 164.

²⁰⁶ Section 15(4) of the EEA prohibits quotas.

²⁰⁷ 2013 (5) BLLR 490 (LC).

²⁰⁸ *Ibid* para 140.

²⁰⁹ 2013 (7) BLLR 65 (LC).

²¹⁰ Para 38.

²¹¹ Para 21.

²¹² Para 57.

²¹³ Para 54.

followed the procedure in the EEA. In many cases, a non-designated group member's right to choose a trade²¹⁴ or excel in it has been met with a ceiling of numerical goals.²¹⁵ This has been common practice in instances where a racial group is considered overrepresented.²¹⁶ Courts have attempted to distinguish numerical goals from quotas²¹⁷ but the difference has failed to take away reservation of opportunities which translate into a ceiling to advancement.

“It would be myopic to deny that immense weight is given to race in situations where certain positions or places are expressly set aside. On that basis, membership in a „designated group“ is not only a tie-breaking factor when two candidates are equally qualified, but is a consideration that may even outweigh other qualifications, provided the person in question has, in the view of the employer, the potential to „grow“ into the job within what is seen to be a reasonable period of time”.²¹⁸

When a numerical target is set, race will be decisive even though merit is considered.²¹⁹ Race is elevated to the inherent requirement of the job.²²⁰ The injustice mirrors the way people were marginalized during the apartheid era. Racial categories were used to attach grave consequences despite the individual's circumstances. The practice has left „a number of better qualified dispreferreds with the distinct feeling of having been wronged“.²²¹ Herman²²² argues that „affirmative action is not only the attrition of white employees but a blockade on new whites who want to enter high positions in employment as they face quotas or numerical goals“.²²³ A combination of these young whites and all those denied promotion on account of race creates an appreciable number of persons who resent the other group to whom they lost the promotion to.²²⁴ In the end, it becomes apparent that the remedial measure needs to be revised.

Continuation with the use of race, entrenches racial consciousness. It is acknowledged that race was used as a criterion to deprive during apartheid and that amelioration should follow the same

²¹⁴ Section 22 of the Constitution.

²¹⁵ *SAPS vs Solidarity obo Barnard* (2013) 34 ILJ 590 (LAC).

²¹⁶ *Ibid.*

²¹⁷ *Munsamy* (note 209 above).

²¹⁸ Dupper (note 10 above) 436.

²¹⁹ Louw (note 82 above) 339.

²²⁰ *Ibid.*

²²¹ Ford (note 194 above) 2016; Rycroft (note 30 above) observes that in 40 cases he studies, the applicant is a white male. He asserts that this has created anxiety amongst white males as they identify themselves as victims of affirmative action.

²²² G Modisha “Affirmative action and Cosmopolitan citizenship in South Africa” in *K Bentley and A Habib (eds) Racial redress and citizenship in South Africa* (2008) 171.

²²³ *Ibid.*

²²⁴ This includes their families and friends too.

fault-line so as to rectify the damage that was done.²²⁵ However, it is submitted that continuation with this approach reinforces racism. The indefinite reference to race in policy and legislation, bolsters instead of eradicates people's understanding of relationship in terms of race.²²⁶ This is incompatible with a state coming from a history of racial oppression and trying to move beyond it.

3.7 Inconsistency in the approach by the courts

Disjunctive precedence characterised by affirmative action jurisprudence is evidence enough to show that affirmative action does not bode well in the precepts of justice. The decisions of the court have been in discord concerning similar principles relating to affirmative action. This alone motivates the phasing out of affirmative action in the workplace if legal certainty is to be restored in our courts.

The most crucial issue is the standard of scrutiny that applies to affirmative action. Moseneke J held that rationality is the standard that applies when reviewing affirmative action measures.²²⁷ Judge Mokgoro disagreed and asserted that affirmative action ought to be subject to the test in section 9(3) of the Constitution.²²⁸ A previous court had held that the absence of fairness would greatly undermine the dignity of those not considered as beneficiaries.²²⁹ Although Moseneke J wrote for the Constitutional Court, Labour Court decisions that followed did not follow such assertion.²³⁰ Such a deep split has served to emphasise the incompatibility of affirmative action with legality.

Related to the above is the question of value of an equity plan. A principle adopted in many decisions is that once an equity plan has been properly adopted it is beyond scrutiny.²³¹ Sections 13 to 20 of the EEA provide for the procedure to be followed when implementing affirmative

²²⁵ O. Dupper "In Defence of Affirmative Action in South Africa" (2004) 121 *SALJ* 187, 213.

²²⁶ P De Vos "The Past Is Unpredictable: Race, Redress and Remembrance in The South African Constitution" (2012) 129 *SALJ* 73, 79.

²²⁷ *Van Heerden* (note 89 above) Par 41.

²²⁸ Mokgoro J in *Van Heerden* ibid para 67.

²²⁹ *Hugo vs President of South Africa* 1997 (4) SA 1 (CC) para 41; *Willemse v Patelia NO and Others* 2007 (2) BLLR 164 (LC) pars 34, 64–66; *Gordon v Department of Health* 2009 (1) BCLR 44 (SCA).

²³⁰ *Henn v SA Technical (Pty) Ltd* 2006 (27) ILJ 2617 (LC) para 25; *Willemse v Patelia NO and Others* (2007) 2 BLLR 164 (LC) at pars 34, 64–66 *Gordon v Department of Health* 2009 (1) BCLR 44 (SCA) at par 28.

²³¹ *Barnard* (note 176 above).

action. In the case of *Coetzer and others vs Minister of Safety and Security and another*²³² it was held that leaving positions vacant in instances whereby suitable candidates from designated groups could not be found is unconstitutional. In *Barnard*,²³³ the SAPS Commissioner's choice to leave posts vacant after failing to find suitably qualified candidates from the designated group was also in contest. The Commissioner had refused the appointment of Barnard on the grounds that such appointment would not address representivity for which the post had been created. Furthermore, the Commissioner was of the opinion that the post could be left vacant because it was not critical and would not affect service delivery. The Labour Court found that such a decision although made for remedial purposes was unconstitutional. It held that the applicant had been overlooked in a manner which disregarded her dignity and right to equality. The Commissioner had found it better to leave the post vacant (twice) than appoint a white woman. The Court was of the opinion that redress measures should not be applied rigidly but must be balanced with the individual's right to equality. The decision was reversed on appeal in the Labour Appeal Court.²³⁴ The Labour Appeal Court held that the decision to overlook Barnard had been made in terms of a properly drafted employment equity plan and therefore justified. It was held that the plan was rational because it identified gaps and set timed measures to address such disparities and that it did not just seek appointment of blacks but of suitably qualified blacks. It further held that regard to individual rights would defeat the constitutional purpose of redress because affirmative action would always have an adverse effect on the previously advantaged individuals.²³⁵ The Labour Appeal Court reasoned that an equity plan is a constitutionally mandated tool to remove inequalities of the past and as long as it had been drafted in accordance with the EEA, its implementation was rational and not reviewable.

The Labour Appeal Court's reasoning seems to follow the precedent laid in *Van Heerden*. The *Van Heerden* three prong test establishes that an affirmative action measure need only comply with the rationality standard for Constitutional consonance. The Appeal Court's decision has been taken further on appeal and a different decision will add uncertainty to the already disjunctive precedent.

²³² 2003 (24) ILJ 163 (LC).

²³³ 2010 (5) BLLR 561 (LC).

²³⁴ 2013 (34) ILJ 590 (LAC).

²³⁵ Para 26.

Meanwhile, there are two more judgments that were delivered after the Labour Appeal Court's decision. These two judgments explicitly departed from the rigid implementation of equity plans. In the case of *Naidoo*,²³⁶ an affirmative action plan was implemented such that the employment chances of Indian women were removed. The Labour Court ruled that such an exclusionary effect represented a quota and therefore unfair. This approach went against what the Labour Appeal Court in *Barnard* had ruled to be beyond judicial scrutiny. The court's interpretation in *Naidoo* called for an approach closely related to that of the Labour Court in *Barnard*. It called for a situation sensitive approach which took into account the effect of the impugned affirmative action measure.

However, in *Munsamy* the court refused to decide whether an affirmative action measure can be challenged if it did not result in representivity as alleged. The case concerned a challenge to an equity plan which was ruled invalid for not being a product of consultation and in accordance with the required demographics. The plan was also unlawful for establishing a quota. However, what is of interest is the fact that the Court refused to decide on the fact that the plan should be challenged on the basis that even if it had been implemented in line with the procedure laid in the EEA, it did not result in a representative outcome because the station was mostly constituted with Africans. The Court held that it was debatable if it could decide on such issues. This again was a setback to the issue of status of an equity plan.

Another inconsistency regards eligibility criteria. Disadvantage as a result of past discrimination need not be proven individually. In other words, the court has accepted holding disadvantage synonymously with race. Surprisingly foreign nationals have been ruled not to qualify because they did not personally suffer from past discrimination.²³⁷ The court decided to revert to considering personal prejudice as a criterion of eligibility yet it is the same criterion that has been held not to apply in determining the eligibility for affirmative action.²³⁸ It is submitted that the court's reasoning is justified on the basis that it took a contextual and purposive approach.²³⁹ Purposive interpretation reasons that affirmative action was enacted to ameliorate representation

²³⁶ *Naidoo v Minister of Safety and Security* 2013 (3) 486 (LC).

²³⁷ GN 8471 GG 29130 RG 841 of 18 August 2006.

²³⁸ *Auf der Heyde v University of Cape Town* 2001(12) BLLR 1316 (LAC).

²³⁹ McGregor "Affirmative action for South African citizens" (2005) 13 *Juta's Business Law* 99, 99.

in the workplace.²⁴⁰ However, it is contended that inclusion of foreigners would have had the same effect. This is so in that proponents of affirmative action have asserted that it is also the purpose of affirmative action to put black people into positions so that they work as role models to aspirants of different work occupation. It is bemoaned that such considerations were not taken into account in coming to the decision in *Auf der Hyde*.²⁴¹ Such inconsistencies not only undermine justice but go against legal certainty.

It also remains unclear what ought to happen after equity targets have been reached. In *UNISA v Reynhardt*,²⁴² the Labour Appeal Court held that an affirmative action appointment would be impermissible when equity targets have been reached. Again, this was in sharp contrast with the opinion of the Murphy J in *Alexandre v Provincial Administration of the Western Cape Department of Health*,²⁴³ who expressed doubt whether the fact that equity targets have been met calls for an end to preferential treatment for remedial purposes.²⁴⁴ Again it remains unclear whether affirmative action ends with the reaching of equity targets.

Of concern as well is the issue of how affirmative action should be enforced. Courts have emerged divided in deciding whether an employee can institute a claim against an employer for failure to implement affirmative action. In *Harmse v City of Cape Town*²⁴⁵ and in *Dudley vs City of Cape Town & another*,²⁴⁶ the court was approached by applicants claiming an infringement of the right to preferential treatment after having been overlooked in a promotion selection. In *Harmse*²⁴⁷ it was held that an employee has a right to preferential treatment and can sue for the employer's failure to implement an equity plan. On the other hand, in *Dudley*, it was held that enforcement of equity plans is left to the Director General not the individual employee.

In *Harmse v City of Cape Town*, *Waglay* J reasoned that affirmative action obliges an employer to take pro-active steps in the elimination of discrimination and promotion of diversity. Thus, if

²⁴⁰ Preamble of the EEA.

²⁴¹ *Auf der Heyde* (note 238 above).

²⁴² 2010 (12) BLLR 1272 (LAC).

²⁴³ 2005 (26) ILJ 765 (LC).

²⁴⁴ *Ibid* para 33.

²⁴⁵ *Harmse v City of Cape Town* 2003 (6) BLLR 557 (LC).

²⁴⁶ *Dudley v City of Cape Town & another* [2004] JOL 12499 (LC).

²⁴⁷ note 245 above.

an employer failed to take such measures, it amounted to unfair discrimination against designated employees. On that basis he reasoned that Harmse had a cause of action against the employer. On the other hand, Tip AJ in *Dudley*, held that discrimination in chapter II of the EEA is different from the consultation process of chapter III of the EEA. He held that chapter III enforcement provisions were left to the Director General for enforcement whereas chapter II discrimination claims are for the courts to enforce. It was concluded that the two claims, namely discrimination and enforcement claims, are separate and are to be enforced separately. Again, the same question of law brought about two conflicting answers. In *Harmse*, it was held that a designated employee can approach the court citing unfair discrimination where an employer has failed to promote or appoint him in accordance with affirmative action. In *Dudley*, it was held that such a claim is for the Director General to enforce and not the individual employee. Attention is drawn to the conflicts that are inherent in the jurisprudence of affirmative action.

3.8 Economic consequences of the implementation of affirmative action in South Africa

The motivation to phase out affirmative action does not only come from legal reasons but economic reasons as well. The years that have passed have seen the implementation of affirmative action in the workplace and it appears that the measure is not economically sustainable.

3.8.1 Brain drain

The preferential hiring and promoting characteristic of affirmative action has led to the movement of skilled labour out of the country.²⁴⁸ Members of the non-designated groups whose career expectations have been frustrated have left the country in search of places where they have a better chance of career advancement. The brain drain is not restricted to the national level but domestic levels too. Disgruntled members of the non-designated group have moved from the public sector to join the private sector. Their disgruntlement emanates from the frustration

²⁴⁸ D Hermann "Rectify Affirmative Action" available at navorsing.co.za, accessed on 26/07/13; K Bentley & A Habib "An Alternative Framework for Redress and Citizenship" in K Bentley & A Habib (eds) *Racial Redress and Citizenship in South Africa* (2008) 342.

encountered when overlooked for promotion opportunities. Such migration of labour has greatly hampered service delivery especially in critical services such as the health sector.²⁴⁹

3.8.2 Efficiency against diversity

Affirmative action has compromised service delivery in the public sector. Affirmative action has been applied more vigorously in the public sector than the private sector.²⁵⁰ This is reflected in the statistics which report that top management of government business constitutes 46.6% African males; 6.2% Coloureds; 4.9% Indians and only 11.5% white males.²⁵¹ Section 20(3) of the EEA makes it permissible to prefer persons with less qualifications or experience when hiring or promoting provided that they have the capacity to acquire the ability to do the job within a reasonable time.²⁵² This was undertaken in the public sector without regard to a minimum threshold of qualifications.²⁵³ The result has been poor performance of the public sector. In turn rampant strikes against poor service delivery has ensued. Such consequence is a manifestation of the argument that affirmative action lowers the threshold level of performance. Although other factors contribute to the poor service delivery from the public sector, it is reasonable to infer that maladministration caused by incompetence is one of the factors resulting in the under performance of the sector. In 2003 the State admitted that the consequences of affirmative action have been „severe and counterproductive“.²⁵⁴ The private sector moderately applies affirmative action and its performance is better than the public sector.²⁵⁵ In the light of this reality one therefore can safely agree with Devenish’s assertion that affirmative action has hampered service delivery in the public sector.²⁵⁶ This also amounts to a violation of section 195 of the Constitution which provides for efficiency in the running of state departments.

Affirmative action has been extended to sports with similar dire consequences. Professional sports players fall under the ambit of employees as regulated by the Labour Relations Act and by

²⁴⁹ G Devenish “*Affirmative Action revisited*” accessed at <http://www.fwdeklerk.org> accessed on 04/10/2013; J Grogan *Employment Law* (2013) 29 pg 3.

²⁵⁰ This can be attributed to cadre deployment.

²⁵¹ 13th Commission of Employment Equity Annual Report 2013 available at www.labour.gov.za.

²⁵² Section 20(5) specifically provides against refusing hiring a designated group member for the absence of experience; Waglay J in *Harmse and Dudley v City of Cape Town & another* [2004] JOL 12499 (LC).

²⁵³ Dupper (note 10 above) 436.

²⁵⁴ *Ibid* 437.

²⁵⁵ Although it is aided by financial incentives.

²⁵⁶ Devenish note 249 above.

extension the EEA.²⁵⁷ Even though EEA has not been relied on directly in matters of sports, the policy trends have been the same.²⁵⁸ Affirmative action in sports has been brought in to eradicate discriminatory patterns as well as to enhance the number of people of colour in the teams.²⁵⁹ However the government's obsession with numbers has seen the disregard of the need to field the best players for success.²⁶⁰ This is not to say that sportsman brought in through affirmative action cannot be the best in sports. Criticism has arisen whereby those in power insist on numerical targets even if that would compromise efficiency. Former President Thabo Mbeki was quoted as saying "for two to three years let's not mind losing international competitions because we are bringing our people into these teams".²⁶¹ The pursuit of numerical goals is not cogniscent of how sport's efficiency relies on individual's character for viability. Louw states that the only reason why sports fans would pay for sports is because when sports are competitive they are unpredictable, thrilling and interesting.²⁶² Thus replacing a talented player whose personal attribute and skill draws crowds to the screen and stadiums, flies in the face of what sustains such business. Again this is not to say people of colour are not talented. It has occurred that in trying to look for the talent expected such persons are not readily available. When this was brought to the fore, Mr Majeke in his capacity as manager of the South African Sports Confederation and Olympic Committee was quoted as saying "we do not care, they should go and find them in the streets of Alexander".²⁶³ Consequently, the South African team's poor performance at the 2008 Beijing Olympics was largely attributed to the insistence of racial numbers in sports teams.²⁶⁴ Louw then draws attention to how preferential selection in disregard of merit compromises business efficiency.²⁶⁵ This is true in situations where a business requires a person who can take up a position and perform promptly rather than someone who will need time to adapt. The search

²⁵⁷ Louw (note 82 above) 353.

²⁵⁸ Ibid.

²⁵⁹ Ibid.

²⁶⁰ A.M Louw "Of rainbow teams and stolen dreams: a critical evaluation of the application of affirmative action in South African professional sport." Paper prepared for presentation at Equality in the Workplace Conference University of Stellenbosch 10-12 September 2008, 1.

²⁶¹ Ibid 5.

²⁶² Louw (note 82 above).

²⁶³ Louw (note 260 above) 9.

²⁶⁴ S Ngalwa and S Mkhwanazi "Stop meddling in sport: ANC blamed for Olympics failure" Sunday Tribune, 17 August 2008.

²⁶⁵ Ibid.

for talent has been replaced by the search for racial numbers and the consequences have been mostly dire.

The enforcement of affirmative action can also discourage investment. Foreign investors would like to come with their own experts to attend to key performance areas. They are likely to shun investing in a country which requires them to put persons other than their own experts in some of those areas for representivity purposes. The uncertainty that has characterised affirmative action jurisprudence does not make the country attractive to investment. Such uncertainty can make stability of the investment environment questionable and consequently discourage investment.

3.9 Summation of findings

From the discussion above, it appears that there is a discordant jurisprudence on affirmative action. From such conflict, there exist an established pattern of individual rights trammled under the guise of social redress. The greater good namely, advancement of the disadvantaged, for which such violations have been rendered permissible, has not materialized to an appreciable extent. This has made the promise of the measure, being temporary, questionable. Affirmative action has been linked to economic under performance in the public sector. All in all, such challenges have made it doubtful if the retention of affirmative action remains desirable. The chapter that follows will take a look into how other jurisdictions have dealt with affirmative action and determine whether any lessons can be taken from such.

CHAPTER 4: COMPARATIVE STUDY

4.1 Outline

The failure of affirmative action is not unique to South Africa. The conflict of individual rights and restitutionary goals has been the subject of controversial debate in the USA. Societal imbalances linked to discriminatory practices is also an occurrence found in the USA. It gives great cause to explore channels employed to ameliorate such imbalances when one learns that one of the methods adopted as a solution is similar to our very own. The debates arising out of such methods and constituting the USA jurisprudence are of immense importance in the assessment of the method we have chosen to ameliorate our imbalances.

The preceding chapter has articulated how affirmative action has failed to advance the disadvantaged. It has articulated the problematic nature of affirmative action as it is applied today and how it is necessary that affirmative action be phased out. This chapter draws attention to how affirmative action has been implemented in the USA and ultimately failed. The chapter also highlights how problems with affirmative action in South Africa were also experienced in the USA. Ultimately, it is brought to bear that continuation with affirmative action on the speculation that it will work, is unlikely to materialize. A contrary view would be that circumstances of the compared jurisdictions are different. Such criticism necessitates mentioning the extent and respects in which the compared jurisdictions converge.

4.2 Why choose U.S.A for comparison?

Firstly, reference to the USA jurisprudence is necessitated by the fact that the concept of written constitutionalism originated in the USA.²⁶⁶ The time that has passed with the USA applying the concept puts them in a better position to understand how affirmative action is interpreted in light of the doctrine of constitutionalism. One of the reasons motivating the phasing out of affirmative action is its incompatibility with the Constitution.²⁶⁷ Therefore, the USA jurisprudence would provide ways to deal with the contention.

²⁶⁶C A Ford "Challenges and Dilemmas of Racial and Ethnic Identity in American and Post-Apartheid South African Affirmative Action" (1953) 43 UCLA L. Rev 1995, 1960.

²⁶⁷See Chapter two.

Secondly, the length of time which affirmative action has been implemented makes it possible to gauge prospects of success against time. The USA has applied affirmative action for 48 years. With that length of time, all that could ever become of affirmative action has been experienced in the USA. The comparison then dispenses the need to continue with affirmative action in the hope that it will succeed with time. The USA has tried it for longer and the measure did not work. Thus most of the challenges that come with affirmative action have been considered in U.S.A courts.²⁶⁸ Valuable lessons and reasoning can thus be derived from their judgments.

The two jurisdictions have a number of factors in common. It is necessary to highlight such similarities because it has often been held that the two jurisdictions are not comparable because of difference in context and political framework.²⁶⁹ It then becomes incumbent to articulate what the U.S.A share in common with South Africa. The two countries have a history of racial discrimination which greatly prejudiced designated races. Amongst the discriminated races, both countries share the African race as a discriminated population.²⁷⁰ Thus the struggle for equality is a phenomenon shared by both countries. „Although racial discrimination has never been official government policy in the USA as in South Africa, it nevertheless is a problem that has run equally deep in the US“.²⁷¹ Thus legislation framing affirmative action and laws of equality are informed by a substantially similar background. Hence it is safe to allude to the U.S.A jurisprudence for the purposes of clarity.

4.3 Origins

Just like in South Africa, affirmative action in the USA refers to proactive measures that favour relatively disadvantaged groups with the object of attaining equality of standard of living.²⁷² The inception of affirmative action in the USA jurisprudence was marked by the executive order issued by John F Kennedy in 1961 after a long battle of civil rights struggles.²⁷³ That same order was carried on by Lyndon Johnson in 1965.²⁷⁴ The orders' requirements were that all contractors

²⁶⁸ Ford note 266 above.

²⁶⁹ Moseneke J in *Van Heerden* at para 29, expressed scepticism over the American notions of equality.

²⁷⁰ M McGregor "Actual past discrimination or group membership as a requirement to benefit from affirmative action: A comparison between South African and American case law" (2004) 29(3) *Journal for Juridical Science* 122, 123.

²⁷¹ *Ibid.*

²⁷² H Holzer and D Neumark "Assessing affirmative action" (2000) XXXVIII *Journal of Economic Literature* 483, 484.

²⁷³ C.J Harish "The Economics of Affirmative Action" (2005) 60 *Industrial Relations* 828, 828.

²⁷⁴ Order 11246.

dealing with the federal government who had fifty employees and above or whose contracts were valued at fifty thousand dollars and above were to account for the under representation of minority members in their employ.²⁷⁵ The contractors were then required to take positive action, including drawing of timetables, to ameliorate for disparities in minority representation in their work force.²⁷⁶ The order also prohibited racial discrimination, among other grounds, when hiring or when making employment decisions.

Pursuant to the above executive order, Title VII of the Civil Rights Act of 1964 was promulgated.²⁷⁷ The Act prohibits inter alia racial discrimination when hiring or providing employment privileges.²⁷⁸ The Act established the Equal Employment Opportunities Commission to police compliance with the Act.²⁷⁹ The Commission requires periodic reports containing the racial demography of the workforce to be submitted to it. In that way discrimination and affirmative action can be monitored at a public and private level²⁸⁰ as well as voluntarily or involuntarily.²⁸¹ It was to be implemented at recruitment, promotion, hiring or training among other employment activities.²⁸²

4.4 Purpose

The initial objective of affirmative action in the USA was numerical in nature.²⁸³ Programmes such as the Philadelphia Plan were aimed at increasing the number of minority members in the construction industry.²⁸⁴

The legal framework providing for affirmative action in the US was aimed at fettering discrimination. Black people among other minorities had been exposed to systemic discrimination.²⁸⁵ The government took upon itself the mandate to deconstruct racial practices

²⁷⁵ Harish note 273 above.

²⁷⁶ Section 202(1).

²⁷⁷ This was later amended by the Civil Rights Act of 1972 and the Civil Rights Act of 1991.

²⁷⁸ Section 703 (a) of Title VII of the Civil Rights Act of 1964.

²⁷⁹ Ibid.

²⁸⁰ Section 706 (g) (1) of Title VII of the Civil Rights Act.

²⁸¹ H Holzer and D Neumark (note 272 above) 484.

²⁸² Ibid.

²⁸³ F Bloch *Antidiscrimination Law and Minority Employment* (1994).

²⁸⁴ Ibid.

²⁸⁵ M McGregor "Actual past discrimination or group membership as a requirement to benefit from affirmative action: A comparison between South African and American case law" (2004) 29(3) *Journal for Juridical Science* 122, 133.

and their effects on the minority of the population.²⁸⁶ Affirmative action was aimed at the advancement of African Americans who had been prejudiced by past discriminatory practices.²⁸⁷ It sought to put African Americans into position from which they were previously excluded.

Title VII of the 1964 Civil Rights Act was promulgated to guarantee equal opportunity in accessing employment.²⁸⁸ It was envisaged to break the cycle of racial preference and exclusion of black people from certain jobs.²⁸⁹ There was an over concentration of the white race in decision making positions. The policy attempts “to eliminate those discriminatory practices and devices that have fostered racially stratified job environments to the disadvantage of minority citizens”.²⁹⁰ This can entail imposing affirmative action on employers with a reputation of discrimination and whom minority employees might not apply to because of such reputation. Thus, affirmative action was purported to remove employment barriers built on race and acting to the prejudice of African Americans among other races.

4.5 How affirmative action is applied in the United States

4.5.1 Individual rights against the goal to address societal imbalances

In the USA, affirmative action has been tested both politically and legally through referendums and lawsuits since the 1970s.²⁹¹ The USA’s current legal position regarding affirmative action reflects more of a formal than substantive equality approach. In the case of *Regents of the University of California v Bakke*,²⁹² it was held

²⁸⁶ C McCrudden “*The Constitutionality of Affirmative Action in the United States: A Note on Adarand Constructors Inc. v. Pena*” (1996) 1 *International Journal of Discrimination and the Law* 369, 371.

²⁸⁷ McGregor (note 285 above).

²⁸⁸ *Griggs v Duke Power Co* 401 US 424 (1971); the Act also provides against indirect discrimination.

²⁸⁹ Justice Brennan in *Local 28 Sheet Metal Workers’ International Association v EEOC* 15 478 US 421 (1986) at 474.

²⁹⁰ *Griggs v. Duke Power Co* 401 U.S. 424, 429 (1971); Title VII.

²⁹¹ Holzer and Neumark (note 272 above) 486.

²⁹² 98 S. Ct. 2733 (1978).

“...[i]t is the individual who is entitled to judicial protections against classifications based upon his racial or ethnic background because such distinctions impinge upon personal rights, rather than the individual only because of his membership in a particular group”²⁹³

Such an approach entails making the governmental goal yield to individual rights.²⁹⁴ It stands in sharp contrast with South African Labour Appeal Court position in the case of *SAPS vs Solidarity obo Barnard*.²⁹⁵ In this case the court stated in no ambiguous terms that the governmental goal of attaining equality reigns supreme over individual rights when the two considerations are in conflict.²⁹⁶ The effect of the USA approach is such that the governmental restitutionary and integrative objectives are greatly hindered. This is so because affirmative action always includes a negative impact on an individual.²⁹⁷ One would find that this has been the ground upon which affirmative action has been banned in many States in the USA.²⁹⁸ The USA approach would not work because it threatens any race conscious initiative to ameliorate social disparities.²⁹⁹ On the other hand, the approach of the Labour Appeal Court in *Barnard* does not settle well with the constitutional goal of an egalitarian state. This so because the transformational goal does not entail disregarding non-designated group members completely.³⁰⁰ In the end, one would realize that there is a continuous battle between affirmative action and individual rights that is not unique to South Africa.

²⁹³ At 2752-3(10); *Adarand Constructors v Pena* 115 S. Ct. 2097 (1995) at 2112-3 O’Connor J put it more bluntly that that the law protects individuals and not groups.

²⁹⁴ *Fire-fighters Local Union No. 1784 v Stott’s* 104 S. Ct. 2576 (1984).

²⁹⁵ 2013 (1) BLLR 1 (LAC).

²⁹⁶ *Ibid.*

²⁹⁷ *Van Heerden* (note 89 above) and *Barnard* (note 176 above).

²⁹⁸ States like Michigan have banned affirmative action, R A Primus “*Equal Protection and Disparate Impact: Round Three*” (2003) 117 *Harv. L. Rev* 494.

²⁹⁹ *Ibid.*

³⁰⁰ JLPretorius, ME Klinck & C Ngwena (*Eds*) *Employment Equity Law* (2012) pgs 9-28.

4.5.2 The strict scrutiny test

In an attempt to ameliorate the adverse impact of affirmative action and yet secure its continuation, Americans apply affirmative action subject to the strict scrutiny test.³⁰¹ The landmark case establishing the strict scrutiny test was penned by Justice Sandra Day O'Connor for the majority in *Adarand Constructors v Pena*.³⁰² This decision holds to the present day and established that race based programs imposed by the federal government must be applied subject to a standard of strict scrutiny. It is however incumbent to mention that this test was introduced in 1995 and before then the standard of review was almost similar to that applied in South Africa currently.

The test requires that an employer, who applies affirmative action, must do so in light of strong evidence of the need to remedy effects of past or present discrimination or for a compelling governmental interest.³⁰³ In the South African context this would be termed legitimate governmental interest.³⁰⁴ Such an interest would be the goal which is sought to be achieved.³⁰⁵ In both countries' courts, it has been widely accepted that the need to redress societal imbalances is an imperative issue.³⁰⁶ What remains controversial is the way such objective ought to be attained.

Thus, the second requirement addresses how the objective is to be achieved. It requires that the means used should be narrowly tailored in meeting its objective.³⁰⁷ It serves to ensure that racial preferences do not unduly burden non-designated group members.³⁰⁸ This approach resembles the South African Constitution's limitation clause.³⁰⁹ This clause provides that the means employed when limiting a right should be one with the least adverse effect.³¹⁰ Naturally this would entail considering alternatives which are less adverse as well as a consideration of the

³⁰¹ Under the Equal Protection Clause of the 14th Amendment because it has been classified a suspect programme; *Adarand Constructors v Pena* 515 US 200 (1995).

³⁰² *Adarand* (note 301 above); however, the *Regents of the University of California v Bakke* 98 S. Ct. 2733 (1978) and *City of Richmond v Croson* 486 US 469 (1989) had a similar test as well.

³⁰³ *Ibid* and *Wygant v. Jackson Bd. of Educ* 476 U.S. 267, 277, 106 S.Ct. 1842, 1849, 90 L.Ed.2d 260 (1986).

³⁰⁴ In line with the test laid in *Harken vs Lane (Harksen test)* 1997 (11) BCLR 1489.

³⁰⁵ McCrudden (note 286 above) 371.

³⁰⁶ *Van Heerden* (note 89 above) and *Adarand* (note 301 above) serve as examples among others.

³⁰⁷ *Adarand* (note 301 above).

³⁰⁸ I Ayres "The Economics of Affirmative Action: Narrow Tailoring" (1996) 43 *UCLA Law Review* 1781, 1788.

³⁰⁹ Section 36 of the Constitution.

³¹⁰ "The less restrictive means to achieve the purpose" Section 36 (1) (e) of the Constitution.

extent of the burden imposed.³¹¹ America's jurisprudence has promoted this requirement to guard against race being used as a sole requirement to access social goods.³¹² Courts enquire „whether race is a factor determining eligibility for a programme or whether race is just one factor in the decision making processes“.³¹³ In elucidating the rationale behind such strictness, it has been held that

„...even in the pursuit of remedial objectives, an explicit policy of assignment by race may serve to stimulate our society's latent race consciousness, suggesting the utility and propriety of basing decisions on a factor that ideally bears no relationship to an individual's worth or needs.“³¹⁴

All in all, it appears that South African courts try to justify the adversity of affirmative action³¹⁵ whilst USA courts try to minimise it.³¹⁶ What becomes clear is that both courts are trying to elude the conclusion that experience has shown, namely that affirmative action does not settle well with the right to equality. Clearly having an open approach like South Africa entails a compromise for the non designated groups members whereas a restricted approach seem not to take the objective of redress any further. Thus one can conclude that a time has come to reconsider the redress strategy.

The American approach to affirmative action reflects a departure from the presumption that all people in the designated groups are disadvantaged. In *Firefighters Local Union No. 1784 v Stotts*,³¹⁷ the Supreme Court followed the victim specificity approach. The Court discredited membership to a designated group as a qualification to benefit from affirmative action. The aggrieved person has to prove that he was personally prejudiced by past discriminatory practice.³¹⁸ The South African approach does not require proof of personal disadvantage on the basis that it is difficult to calculate degrees of disadvantage.³¹⁹ Courts have reasoned that focus

³¹¹ *In re Birmingham Reverse Discrimination Employment Litigation* 12 20 F.3d 1525 (11th Cir. 1994).

³¹² *Patrick Hamacher v Lee Bollinger et al* 123 S Ct 2325 (2003).

³¹³ *Engineering Contractors Association v Metropolitan Dade County* 122 F3d 895 (11th Cir 1997) at 926.

³¹⁴ *Brennan J in United Jewish Orgs. v. Carey* 430 U.S. 144, 173, 97 S.Ct. 996, 1014, 51 L.Ed.2d 229 (1977).

³¹⁵ It held that affirmative action is not unfair discrimination because its objective is to achieve an equal society.

³¹⁶ The requirement that affirmative action plans be narrowly tailored is an attempt to minimize the adverse effect of affirmative action.

³¹⁷ 104 S. Ct. 2576 (1984).

³¹⁸ At 2588(11); *Wygant v Jackson Board of Education* 476 US 267 (1986).

³¹⁹ For example C A Ford in (note 194 above) 2019 asks “ At what point, for example, does someone from an underprivileged background, given access to prestigious education and job opportunities, cease to be meaningfully disadvantaged?”.

should rather be on the objective of the policy.³²⁰ The requirement to show individual prejudice on the basis of race has also been criticised for being “retrospective in orientation, rather than prospective”.³²¹ Thus it has been rejected for failure to advance the objective of reconciliation.

Unlike the South African context, affirmative action in the U.S.A is applied to facilitate equality of opportunity.³²² In *United Steelworkers of America vs Weber*,³²³ the majority held that affirmative action entails equality of opportunity.³²⁴ The approach is such that if it is possible to adopt a race neutral remedy to cure a race-based problem, anything else other than that does not pass the strict scrutiny test. South African law reflects an approach bent on equal distribution of resources. Resources are transferred to individuals based upon ascribed immutable characteristics and this is justified on the basis of objective. In *Barnard*,³²⁵ the Labour Appeal Court condoned that a position would rather be left vacant if a person of colour is not found than give it to a non-designated group member. The effect of this approach is such that similarly motivated individuals cannot compete on an equal footing because of race.

Legal action can be brought against an employer under Title VII of the Civil Rights Act of 1964.³²⁶ Upon an allegation and finding of discriminatory patterns, a court can decree affirmative action in a way it deems fit to interrupt such patterns.³²⁷ A court can even make a punitive order against an employer whom it finds applying discriminatory practices. An employment pattern is regarded as having a disparate impact if “the selection rate for any race, sex, or ethnic group is less than four-fifths of the rate for the group with the highest rate”.³²⁸ The problem with this approach is that numbers are not always reflective of equality of opportunity. An Equal Employment Opportunity Commission³²⁹ „auditor can observe the rate at which minorities are hired in the various firms, but not the employers“ inclination to discriminate or the characteristics

³²⁰ Rycroft (note 30 above) 1423.

³²¹ Ibid 1425.

³²² Section 703(a).

³²³ 443 US 193 (1979).

³²⁴ Ibid.

³²⁵ Note 176 above.

³²⁶ *Local 28, Sheet Metal Workers' International Association v EEOC* 15 478 US 421 (1986).

³²⁷ Section 706(g) of Title VII of the Civil Rights Act of 1964..This can be an order directing the employer to reinstate or to hire those discriminated against; Holzer and Neumark (note 272 above) 484.

³²⁸ Code of Federal Regulations, Section 1607.4, 1998.

³²⁹ Established by virtue of Section 705 of Title VII for the enforcement of equality legislation.

of the applicants".³³⁰ Thus the institutional deconstruction which the policy of affirmative action seeks to address is elusive to the policy. The fact that discrimination still persists goes to show the inadequacy of the policy to attain its goal.

4.6 Success rate of affirmative action

Having established that the U.S.A has a different approach in the way it applies affirmative action, a look at its success rate would motivate whether a different approach is what is needed in the South African context or abandonment of the policy in employment law. What follows is an analysis of empirical research reports dating back from the early periods of affirmative action in the U.S.A. so that the effect of affirmative action can be assessed both when it had an approach similar to South Africa and when its approach became stricter.

4.7 Effect of affirmative action on enterprises

Holzer and Neumark report from an empirical survey and submit that affirmative action leads to the hiring of less-qualified workers from groups of minority workers.³³¹ Griffin,³³² using data of imputed wages from population census, also came to the conclusion that contractors applying affirmative action end up with high costs of production.³³³ Holzer and Neumark concede that the application of affirmative action when hiring probably leads to higher costs, because minorities hired with less qualifications would need extra help to adapt to the job requirements.³³⁴ They also state that administration costs for compliance with affirmative action are also high.³³⁵ They go on to say the cost on resources is even higher in the public sector.³³⁶ The conclusion therefore becomes obvious that continuation with affirmative action would be adverse to the profitability of business.

³³⁰ 'Low hiring rates for minorities may reflect either outright discrimination or lack of applications from the minorities'; B Holmlund *"Comment on H J Holzer: The economic impacts of affirmative action in the US"* (2007) 14 *Swedish Economic Policy Review* 73, 76.

³³¹ H.J Holzer and D.B Neumark *"What Does Affirmative Action Do?"* (2000) 53 *Industrial and Labor Relations Review* 240, 261.

³³² Holzer and Neumark (note 272 above) 535.

³³³ *Ibid.*

³³⁴ Holzer and Neumark (note 331 above) 269.

³³⁵ Holzer and Neumark (note 272 above) 544.

³³⁶ *Ibid.*

However, Holzer and Neumark try to trivialize such effect by postulating that „the costs that employers bear as a result of affirmative action in hiring are likely to be a one-time cost associated with bringing skills up to speed.³³⁷ However, considering that labour is a mobile commodity, such a submission is rendered inapt. Job skipping can necessitate the application of affirmative action repeatedly and a corresponding cost is incurred repeatedly as well. This substantiates remarks by Fraser³³⁸ whereby she alleges that affirmative action measures need to be repeated again and again. Her conclusion is based on the premise that affirmative action addresses effects of discrimination without deconstructing the underlying structures that generate them.

4.8 Distributive effects of affirmative action

Neumark and Holzer attribute the growth of minority employment from (1960 to 1995) to affirmative action³³⁹ but this omits to mention that there was a growing trend already. A close analysis by Jones reveals that this is erroneous.³⁴⁰ Jones illuminates this error by figures which show that even before the inception of affirmative action, employment of the minorities was already on the rise (though slow). The 87% figure of black families living below the poverty line in 1940 went down to 47 % by 1960.³⁴¹ It went down further to 30 % in 1970.³⁴² Such figures serve to rebut the assertion that affirmative action resulted in the growth of employment rate for minorities in the U.S.A.

If one is to reflect what the situation was 28 years after the inception of affirmative action, it appears that progress in redistribution was a disappointment.³⁴³ In 1995, 97% of senior management positions were held by individuals of the white race.³⁴⁴ This was so despite them

³³⁷ Holzer and Neumark (note 331 above) 270.

³³⁸ N Fraser *Social Justice in the age of identity politics, redistribution, recognition and participation* The Tanner Lectures on human values Stanford University (1996) 1, 45-46.

³³⁹ Holzer and Neumark (note 272 above) 504.

³⁴⁰ S Jones “Lessons from *Affirmative action around the world*” (2005) 20 *South African Journal of Economic History* 131, 133.

³⁴¹ *Ibid.*

³⁴² *Ibid.*

³⁴³ This is the period in which the standard of scrutiny was the same with that in South Africa.

³⁴⁴ Glass Ceiling Commission Report “Glass Ceiling Commission - Good for Business: Making Full Use of the Nation's Human Capital” (1995) available at http://digitalcommons.ilr.cornell.edu/key_workplace accessed on 15/09/2013.

constituting only 78.8% of the workforce.³⁴⁵ On the other hand African Americans constituted 10% of the workforce but only held 2.5% of the senior management positions.

The 2013 statistics released by the Bureau of Labour Statistics US Department of Labour indicate that overall unemployment sits at 7.3%.³⁴⁶ It is disheartening to note that unemployment rate of Blacks exceeds this percentage and is recorded as 13.0% whereas Whites' unemployment rate is only 6.4%.³⁴⁷ These disparities continue despite the continued application of affirmative action.

Scholars both against and in support of affirmative action concur that despite the implementation of affirmative action in the U.S.A, its objectives have not been realized. J.S Leonard reported that the process studies by the U.S. Commission on Civil Rights (USCCR), the General Accounting Office (GAO), and the House and Senate Committees on Labour and Public Welfare all conclude that affirmative action has been ineffective.³⁴⁸ In 2004 McGregor lamented that despite affirmative action having been in place for quite a time, prejudice and covert discrimination against African-Americans continue.³⁴⁹ Using audit studies, wage regression tests and employer characteristics and behaviour among other approaches to test for race discrimination in the labour market, Neumark and Holzer conclude that discrimination still continues.³⁵⁰ They lament the redistributive efficacy of affirmative action saying the redistribution of earnings from white men to minorities is not likely to be very large.³⁵¹ They are, however, of the opinion that such setbacks are offset by gains experienced by minorities and women who enter the labour market with known disadvantages and who often face discrimination there in the absence of these forces.³⁵² Despite being hopeful such assertions do not take away affirmative action's failure to redress imbalances created by past discrimination despite being in force for so long.

³⁴⁵ Ibid.

³⁴⁶ Household data survey estimates, available at www.bls.gov/cps accessed on 08/09/2013.

³⁴⁷ Ibid.

³⁴⁸ J.S. Leonard "The Impact of Affirmative Action on Employment" (1984) 2 *Journal of Labor Economics* 439, 441.

³⁴⁹ M McGregor (note 285 above) 127.

³⁵⁰ Holzer and Neumark (note 272 above) 493.

³⁵¹ Holzer and Neumark (note 331 above) 270.

³⁵² Ibid.

4.9 Summation

The discussion above explored the legal position of U.S.A in terms of affirmative action. It has established that the U.S.A's initial approach to affirmative action was similar to the present South African approach. As time went by the application of the policy became stringent and ultimately got banned in 13 states including Michigan. However, the implementation of affirmative action has never reached a success rate which compels eradication by consummation of intention. Both South African and American courts grapple with the conflict between individual rights and the governmental aim to redress the society's inequalities. Discrimination and its effects continue to thrive in both South African and American workplace. This is so despite the U.S.A having fine-tuned its approach of affirmative action by qualifying it with the strict scrutiny test. Thus one can see clearly that affirmative action is an inadequate method of social redress. In summation affirmative action has outlived its tenure on the grounds elucidated above namely, its contention with individual rights, failure to redress imbalance and its adverse impact on business enterprises.

Chapter 5: RECOMMENDATIONS AND CONCLUSION

5.1 Recommendations

Having advanced arguments which support the phasing out of affirmative action in the workplace, the following recommendations serve to provide the way forward.

Any proposal of reform should be able to cater for the polarized interests of an unequal society such as South Africa today. It is also appreciated that the way forward should provide means which do not replicate the problems which have necessitated the phasing out of affirmative action in the first place. Moreover, economic sustainability of any measure should not escape consideration. The major criticism leveled against affirmative action is that it addresses the end result without dealing with the structures giving rise to the problem.³⁵³ The way forward therefore is a solution that is sensitive to the rights of all, economically sustainable, curbs the underlying structures giving rise to inequality and offers long lasting amelioration to the problem.

5.2 Education and skills development

The first recommendation goes to addresses the structures that generate inequality in the workplace. West avers that affirmative action is neither a major solution to poverty nor a sufficient means to equality.³⁵⁴ Thus, as the Labour Market Commission suggested, it is incumbent that focus be shifted to extra-market factors that perpetuate unequal opportunities.³⁵⁵ It is common cause that the hiring or promotion of workers is based on formal qualifications among other considerations. It is therefore necessary that persons coming from disadvantaged backgrounds acquire these qualifications. The solution therefore calls for the prioritization of educating those who are excluded from the labour market for lack of these qualifications.

Education can take two forms, namely academic education and skills development. Both of these make for the qualifications of a worker. The importance of academic education lies in it being

³⁵³ R le Roux and A Rycroft (eds) *Reinventing Labour law* (2012) 252.

³⁵⁴ C West *Race Matters* (1994) 95.

³⁵⁵ Labour Market Commission Report (1996) 138-139.

the foundation upon which skills development takes place. Thus it is necessary that efforts of improvement be channeled to schools, most importantly primary schools. It is a common feature that persons from disadvantaged schools are limited in terms of their careers whereas those coming from private schools excel.³⁵⁶ This usually occurs because public schools which are government sponsored are poorly managed and under resourced. It is therefore recommended that government efforts and the corporate world channel funds towards public schools so that they are well resourced and can provide the essentials necessary for the grooming of human capital in its infancy. The same goes for high schools and universities. Funds need to be channeled towards scholarships, bursaries and even loans. This is not to say that nothing of this nature has been done. What is of essence is that it has not been enough to strengthen a wide and rich pool of human capital. Trends are that private schools and former white universities continue to rank high so that a candidate educated from public\government institutions is looked down upon during the job seeking period. Thus efforts should not end only at putting people into schools but also at improving the quality of services offered by these schools.³⁵⁷

Skills development refers to the processes of practical learnership. There appears to be a symbiotic cause and effect trend in the way persons are recruited. The group with the highest rate of skills development has the highest recruitment rates. Statistics produced by the 13th Commission Employment Equity Annual Report of 2013 show that the white race has the highest proportion of people undergoing skills development, with a percentage of 34.5.³⁵⁸ This corresponds with a high recruitment rate for Whites which stand at 42.6% at management level. The skills development rate of Africans was estimated to stand at 16.8%, Coloured 5.6 percent and Indians 7.1%. Consequently these low percentages in skills development correspond with a low recruitment rate.³⁵⁹ Thus the recruitment rate of African males stood at 12.7 %, Coloured males 4 % and Indian males 6.7%. A similar pattern is also apparent in the top management; skills development rates correspond with the recruitment rates. It is therefore concluded that efforts should be made to put disadvantaged people through skills development. This can be done through awareness campaigns, offering incentives to motivate people and subsidizing fees for attending such institutions.

³⁵⁶ The importance of education is evidenced by calls to categorize it as an essential service.

³⁵⁷ There is need for textbooks, quality educators (who seem to be in urban areas only).

³⁵⁸ www.labour.gov.za accessed at 16/10/2013.

³⁵⁹ Ibid.

Skills development and education is necessary not only to gain employment but also to ensure that people put in positions of influence are persons who can respond „flexibly to rapid economic and technological change“.³⁶⁰ It does not do any good to employ or promote to people with low credentials. Such practices have brought governmental service delivery into disrepute.³⁶¹ Therefore, it is essential that persons chosen for such positions receive adequate training. Education and skills development is the only way to ensure that those who occupy these positions can participate meaningfully. This would avoid a situation whereby dummy positions are created just to satisfy representivity (tokenism) as in the case of *Barnard*.³⁶²

Affirmative action was envisaged to create equality of opportunity; the acquisition of skills would give meaning to this goal by capacitating individuals. Thus, educating people would enable them to enjoy all rights and freedoms fully as envisaged in section 9 of the Constitution. As highlighted in chapter two, there are instances in which employers have opted to leave positions vacant because suitable candidates from designated groups could not be found.³⁶³ It is therefore argued that previously disadvantaged group members need to be trained to qualify for relevant vacancies.

Another reason why skills development is recommended as the way to ameliorate disparity is that affirmative action in its current form has contributed to racial tension. Affirmative action is not being applied in a vacuum. It involves persons being prejudiced on account of their race and as argued in chapter two, this has created racial tension. Although no program would be without shortcomings that cause complaints, education would be met with less resistance than affirmative action in the employment sector.³⁶⁴

The above recommendation is likely to be met with a counter argument that even skill acquisition involves race as well. Thus, it is recommended that the criteria for eligibility for assistance with education and skills development assistance would have to shift from race to

³⁶⁰ H.W.Tan, and G. Batra “Enterprise Training in Developing Countries” Private Sector Development Department World Bank (1995) pg 1.

³⁶¹ As discussed in chapter 3.

³⁶² (note 176 above) SAPS argued that leaving the advertised position vacant would not compromise service delivery because the position was not essential. This went on to point out that an insignificant position had been created and the service could do without it. Certainly this flies in the face of dignity of designated group members.

³⁶³ *Barnard* note 176 above.

³⁶⁴ Ford (note 194 above) 2017; Dupper (note 10 above) 442.

financial status. This is necessitated by the argument in the previous chapters that disadvantage has shifted and no longer follows a racial axis. Assumed group characteristics need to be revised. In this way persons who are really in need of assistance will receive assistance.³⁶⁵ In the past this proposition has been criticised on the basis that it is too difficult to ascertain the economic status of an individual.³⁶⁶ It was further assumed that such a move would upset social coherence in that one would have to constantly refer to the past to prove that one is a victim.³⁶⁷ However, America³⁶⁸ and India have done so without such assumptions materialising and South Africa can surely follow suit. This development serves to affirm that affirmative action is not a compensation programme but a measure to redress societal imbalances.

5.3 Proxy positions

It is recognised that experience is one of the requirements for job eligibility and that academic qualification is not enough. Therefore, it is proposed that positions which mimic the top executives should be created with an intention of creating a pool of candidates with experience. In this way, those with academic qualifications only are exposed to experience without having to occupy the actual positions. Mobility to high positions would be a smooth transition because of the experience obtained and such persons would be preferable since they would have acquired work ethic during that period. In the end those who get promoted do not compromise service delivery. All in all, the recommendation goes to capacitating people through the acquisition of skills. This way service delivery will not be compromised by appointments of persons without adequate credentials.

³⁶⁵ *Le Roux and Rycroft* (note 353 above) 268.

³⁶⁶ M Mushariwa "Who Are The True Beneficiaries of Affirmative Action?" (2011) 32 *obiter* 439, 447.

³⁶⁷ *Ibid.*

³⁶⁸ Section 631 of the Small Business Act 102 of 1996 has included economically disadvantaged individuals amongst those who are eligible for state aid interventions; the criteria for determining economic indigence is set out in section 124 of the Small Business Act.

5.4 Job Creation

Job creation also remains one of the most effective ways to improve representivity. It has been shown in chapter 2 that even if the percentage by which whites are overrepresented is scaled down, there still remain a large number of people without employment. This therefore points to the need for additional jobs to cater for those who are unemployed.³⁶⁹ The years in which affirmative action has been in implementation have shown that waiting on preferential treatment when jobs arise has not helped advance people as expected.³⁷⁰ Thus, to ensure that persons excluded from the labour market and those who wish to excel are catered for, employment creation is necessary.

Job creation can take the form of training lay off schemes. Such schemes entail „skills training and an allowance to employees during a negotiated layoff period“.³⁷¹ This solution also goes to address skills development and short term relief to the unemployed.³⁷² In addition it is also recommended that employment subsidy for new recruits and learnerships be resorted to.³⁷³ Parliament has adopted the Employment Tax Incentive Bill which will come into effect in January 2014. This is a government scheme which encourages employers to hire youths between the age of 18 and 29. All employers registered to pay employees“ tax to South Africa Revenue Authority Services will receive a deduction on the tax if they hire youths. The incentive ameliorates the risk and costs of hiring inexperienced persons or first time employment seeker.³⁷⁴ It serves the additional advantage of exposing the unemployed and inexperienced to an opportunity of gaining experience as well as employment opportunities.

It is also appreciated that job creation is made possible through investment. State policies determine how much investment a state will attract. It is therefore imperative that economic and political policies are investor friendly. Such a solution lies in the ambit of government and it is recommended that government engage with stake-holders and potential stake holders in the

³⁶⁹ 4 723 000 according to Quarterly Labour Force Survey Quarter 2, 2013 available at www.statssa.gov.za/Publications/P0211/P02112ndQuarter2013.

³⁷⁰ See Chapter 3.

³⁷¹ T Cohen and L Moodley *“Achieving “Decent Work” In South Africa?”* (2012) 15 *P.E.R* 320,325.

³⁷² *ibid*

³⁷³ M Beaumont *“Some reflections on 2001 Budget”* (2001) 4 *Labour Law* 431, 431.

³⁷⁴ <http://m.news24.com/fin24/Economy/How-to-qualify-for-youthemployment-incentive-20131101> accessed on 21/11/2013.

drafting of policies which are just, sustainable and investor friendly. Such a solution can best be described as „expanding the pie“³⁷⁵ in that instead of focusing on the few jobs held by whites (which will not alleviate issues of substance), ways are devised that will advance people collectively. This is in line with the test laid down by Moseneke J in *Van Heerden* where he mentioned that the measure be tested by asking if it is advancing the majority of disadvantaged persons.³⁷⁶ Job creation will ensure that those with the required skills have employment opportunities and are able to earn adequately for their economic well-being and for the alleviation of poverty.³⁷⁷

All in all, the recommendations advanced aim to attain a racial balance in the workplace in ways that are economically viable and sensitive to individual rights. It is submitted that measures that seek to rectify imbalances should target people with demonstrable need of state intervention. It is argued that such measures will only be effective if they go to the root cause of inequality, namely skills and education. Although these remedies may take time, it is submitted that they are preferable because they are more ethical and capable of bringing about significant change.

5.5 CONCLUSION

The fight against inequality aims to attain a unified and diverse state in which human rights reign supreme in an economically advanced environment. It is therefore incumbent that all policy and laws enacted should not replicate the system from which society has moved away. Although affirmative action appeared as a plausible remedy to the problem of inequality, it has sadly failed to address the problem of inequality. To compound this failure, it has unwittingly introduced additional uncertainties into our law of employment. If the present system continues „resentment will be redistributed, the economy will be damaged and social peace destroyed“.³⁷⁸

³⁷⁵ S Fredman “*Substantive equality and the positive duty to provide*” (2005) 21 *SAJHR* 163, 167.

³⁷⁶ *Van Heerden* (note 89 above) para 40.

³⁷⁷ T Cohen and L Moodley note 371 above.

³⁷⁸ The ANC has stated this in its policy document on affirmative action and the new constitution available at www.anc.org.za. It has said that this will occur if affirmative action is not properly implemented.

The dissertation has proposed and motivated the contention that it is no longer desirable to continue applying affirmative action indefinitely. The time that has lapsed undermines the temporary nature of affirmative action. Further, it has been demonstrated how preferential hiring and promotion will always result in conflict between individual equity and collective rights and that no standard has managed to harmonize the conflict. Statistics have revealed that up to date affirmative action has not fulfilled the purpose it was set out to achieve namely, the significant alteration of workplace demographics. Not only has the measure failed to deliver desirable results, it has burdened enterprises and remains a threat to business viability.

Chapter three has demonstrated how affirmative action ought to be temporary, how it compromises legality and the economy. International instruments and the very nature of affirmative action assert that it is a temporary program. It has been nineteen years now since its inception and this is long enough to bring us to the point of questioning whether affirmative action is still temporary.

Statistics show how historical racial stratifications persist despite the application of affirmative action. This shows how ineffective the measure is in redressing what it set to achieve. This does not mean that law cannot channel social redress but simply that legislators have failed to identify the sector which ought to be carrying out the redress.

Courts have also been grappling with how to balance affirmative action and the right to individual equality. The courts have failed to strike a balance between the individual equity rights and the redress measures. Judicial certainty is an essential tenet of justice and precedent on affirmative action is so inconsistent that the legality of the notion of affirmative action is brought to question.

Not only does affirmative action compromise the constitutional vision of an egalitarian state but it also compromises economic development. It has been shown that affirmative action involves preference being given to less qualified personnel on account of their race and for redistributive purposes. Resultantly, service delivery and foreign investment have been hampered by the consequent emigration of skilled labour.

The comparison made between USA and the South African jurisprudence dispelled the speculation that, with time, affirmative action will eradicate workplace disparities. Conversant with the opposing view that the USA context is different from South Africa; reasons which make these jurisdictions comparable were advanced. Statistics show that substantial change did not materialize even when the legal approach of the USA was similar to that of South Africa. The discussion with regard to the USA jurisprudence was also used to show that even if South Africa is to take a different approach affirmative action is still likely to fail.

Without abandoning the need to attend to societal imbalances, the dissertation has sought to criticize the presumption behind affirmative action. This presumption holds that disparate distribution of resources emanates solely from past discrimination. It has been established that this approach is too narrow because many factors contribute to the current disparities. This does not by any means underrate the effects of apartheid on designated groups but advocates a more enlightened approach.

As a solution to the issues discussed above the dissertation has proposed the abrogation of affirmative action in the workplace. The reasons advanced include failure to address inequality in the workplace. The way affirmative action is applied mirrors a compensatory approach, yet such an approach is incompatible with the Constitutional vision of an egalitarian state. It has been displayed how affirmative action as it is applied currently focuses on symptoms and not the cause of inequality. Most importantly affirmative action has retarded the economy and service delivery. It is rather recommended that efforts should be directed towards empowering the disadvantaged by capacitating them to participate meaningfully in the positions to which they aspire. It is further submitted that the use of workplace demographics as a measure of progress is heavily flawed; rather success in redress ought to be measured on how many people have been capacitated to effectively compete in the labour market.

BIBLIOGRAPHY

STATUTES

Civil Rights Act of 1991.

Civil Rights Act of 1972.

Code of Federal Regulations, Section 1607.4, 1998.

Constitution Act 108 of 1996.

Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) (1980) *ILM* 33.

Employment Equity Act 55 of 1998 (EEA).

Equal Protection Clause of the 14th Amendment

GN 8471 GG 29130 RG 841 of 18 August 2006.

International Labour Organization Convention 111 of 1958.

Labour Relations Act 66 of 1995.

Promotion of Equality and Prevention of Unfair Discrimination Act 52 of 2002.

Small Business Act 102 of 1996.

Title VII of the Civil Rights Act of 1964.

TEXTBOOKS

Bentley K and Habib A (eds) *Racial Redress and Citizenship in post-apartheid South Africa* (2008)
www.hsrcpress.ac.za.

Bloch F *Antidiscrimination Law and Minority Employment* Chicago: U. Chicago Press (1994).

Currie I and de Waal J Human Rights Handbook 4th ed Juta Cape Town 2005.

Dupper O, Bhoola U and Barbers *Understanding the Employment Equity Act* Juta Cape Town (2009).

Dupper O and Garbers C (eds) *Equality in the Workplace: Reflections from South Africa and Beyond* (2009).

Fredman S *Discrimination Law* Oxford University Press (2001).

Grogan J Workplace Law 10th edition Juta Cape Town (2009).

le Roux R and Rycroft A (eds) Reinventing Labour law Juta Cape Town (2012.)

Pretorius JL, Klinck ME & Ngwena C (eds) Employment Equity Law LexisNexis Butterworths (2012)

Strydom E. M. L et al eds Essential Employment Discrimination Law Juta Cape Town (2004).

Tan H.W. and Batra G "Enterprise Training in Developing Countries." Private Sector Development Department, World Bank (1995).

Terreblanche S The History of Inequality in South Africa UKZN Press Durban (2002).

West C Race Matters Vintage (1994).

TABLE OF CASES

Adarand Constructors v Pena 515 US 200 (1995).

Alexandre v Provincial Administration of the Western Cape Department of Health 2005) 26 ILJ 765 (LC).

Allpass vs Mooikloof Estates Pty Ltd t/a Mooikloof Equestration Centre 2011 (2) SA 638 (LC).

Association of Professional Teachers & another v Minister of Education & others (1995) 16 ILJ 1048 (IC).

Auf der Heyde vs University of Cape Town 2001(12) BLLR 1316 (LAC).

Baxter v National Commissioner, Correctional Services and Another [2006] JOL 17476 (LC).

Brennan J in United Jewish Orgs. v. Carey 430 U.S. 144, 173, 97 S.Ct. 996, 1014, 51 L.Ed.2d 229 (1977).

Brink vs Kitshoff NO 1996 (4) SA 197 (CC).

City Council of Pretoria v Walker 1998 (2) SA 363 (CC).

City of Richmond v Croson 486 US 469 (1989).

Coetzer & others v Minister of Safety and Security & another (2003) 24 ILJ 163 (LC).

Dudley v City of Cape Town & another [2004] 7 BLLR 623 (CC).

Engineering Contractors Association v Metropolitan Dade County 122 F3d 895 (11th Cir 1997) at 926.

Fire-fighters Local Union No. 1784 v Stott's 104 S. Ct. 2576 (1984).

Fourie v Provincial Commissioner of the SA Police Service (North West Province) 2004) 25 ILJ 1716 (LC).

George v Liberty Life Association of SA Ltd [1996] 8 BLLR 985 (IC) at 1005.

Gordon v Department of Health: KwaZulu-Natal 2009 (1) BCLR 44 (SCA).

Griggs v. Duke Power Co., 401 U.S. 424, 429 (1971).

Henn v SA Technical (Pty) Ltd (2006) 27 ILJ 2617 (LC).

Harksen v Lane NO & others 1998 (1) SA 300 (CC).

Harmse v City of Cape Town [2003] BLLR 557 (LC).

Hoffmann vs south African Airways 2001 (1) SA 1 (CC)

President of the Republic of South Africa vs Hugo 1997 (4) SA 1 (CC).

In re Birmingham Reverse Discrimination Employment Litigation 12 20 F.3d 1525 (11th Cir. 1994).

Law v Canada (1999) 1 SCR.

Local 28, Sheet Metal Workers' International Association v EEOC 15 478 US 421 (1986).

Merafong Demarcation Forum v President of the Republic of South Africa 2008 (5) SA 171 (CC)

Minister of Finance and another Van Heerden [2004] 12 BLLR 1181 (CC)

Mohunram v National Director of Public Prosecutions (Law Review Project as amicus curiae) 2007 (4) SA 222 (CC).

Munsamy vs Minister of Safety and Security and another 2013 7 BLLR 695 (LC).

Naidoo vs Minister of safety and security and another [2013] 7 BLLR 490 (LC).

National Coalition for Gay and Lesbian Equality 1999 (1) SA 6 (CC)

Patrick Hamacher v Lee Bollinger et al 123 S Ct 2325 (2003).

Prinsloo v Van der Linde 1997(6) BCLR 759 (CC).

Public Servants' Association of SA obo Helberg v Minister of Safety & Security & another (2004) 25 ILJ 2373 (LC).

Public Servants' Association of SA v Minister of Justice 1997 5 BCLR 577 (T).

Regents of the University of California v Bakke 98 S. Ct. 2733 (1978).

SAPS vs Solidarity obo Barnard [2013] 1 BLLR 1 (LAC).

Solidarity and Others v Department of Correctional Services and Others [2013] ZALCCT 38 (18 October 2013).

Solidarity obo Barnard v SAPS [2010] 5 BLLR 561 (LC).

S vs Makwanyane and another 1995 (3) SA 391 (CC).

Stoman v Minister of Safety and Security and Others 2002 (3) SA 468 (T) at 484C–E.

Weber 443 US 193 (1979).

Willemse v Patelia NO & others (2007) 2 BLLR 164 (LC).

Wygant v Jackson Board of Education 476 US 267 (1986).

ARTICLES

Albertyn C “*Substantive Equality and Transformation in South Africa*” (2007) 23 SAJHR 253.

Arthurs H W “*Labour Law and Industrial Relations in the Global Economy*” (1997) 18 ILJ 571.

Ayres I “*The Economics of Affirmative Action: Narrow Tailoring*” (1996) 43 UCLA Law Review 1781.

Benatar D “*Justice, Diversity and Racial Preference: A Critique of Affirmative Action*” 125 SALJ 274.

Brest P and Oshige M “*Affirmative action for whom*” (1995) 47 Stanford Law Review 870.

Burger R and Woolard I “*The State of the Labour Market In South Africa after the First Decade of Democracy*” CSSR Working Paper No. 133 University of Cape Town 2005

Cohen T and Moodley L “*Achieving "Decent Work" In South Africa?*” 2012 15 P.E.R 320.

De Vos P “*The Past Is Unpredictable: Race, Redress and Remembrance in the South African Constitution*” (2012) 129 SALJ 73.

Duplessis M and Scott S “*The Variable Standard of Rationality Review: Suggestions for Improved Legality Jurisprudence*” (2013) 130 SALJ 597.

Dupper O “*Affirmative Action: Who, How and How Long?*” (2008) 24 SAJHR pg 442.

Ford C A “*Challenges and Dilemmas of Racial and Ethnic Identity in American and Post-Apartheid South African Affirmative Action*” Christopher (1953) 43 UCLA L. Rev. 1995.

Fraser N “*Social Justice In The Age Of Identity Politics: Redistribution, Recognition And Participation*” (1996) The Tanner Lectures On Human Values Stanford University 45-46.

Fredman S “*Providing equality: Substantive equality and the positive duty to provide*” (2005) 21 SAJHR 166.

Gaibie S “*Employment Equity and Anti-Discrimination Law: The Employment Equity Act 12 Years on*” (2011) 32 ILJ 22.

Govender K “*The Developing Equality Jurisprudence in South Africa*” (2009) 107 Mich. L. Rev. First Impressions 121.

Griffin et al. “*Regional Patterns of Affirmative Action Compliance Costs*” (1996) 30 Annals Reg. Sci. 321.

- Grogan J “*Like it or lump it*” (2013) 29 *Employment Law* 1.
- Harish C.J “*The Economics of Affirmative Action*” (2005) 60 *Industrial Relations* 828.
- Hepple B “*Equality Laws and Economic Efficiency*” (1997) 18 *ILJ* 605.
- Holmlund B “*Comment on H J Holzer: The economic impacts of affirmative action in the US*” *Swedish Economic Policy Review* 14 (2007) 76.
- Holzer H and Neumark D “*Assessing affirmative action*” (2000) XXXVIII *Journal of Economic Literature*, 493.
- Holzer H J. and Neumark D “*What Does Affirmative Action Do?*”(2000) 53 *Industrial and Labor Relations Review* 240.
- Jones S “*Lessons from Affirmative action around the world*” (2005) 20 *South African Journal of Economic History* 131.
- Leonard J. S. “*The Impact of Affirmative Action on Employment*” (1984) 2 *Journal of Labor Economics* 439.
- Louw A.M “*Extrapolating „Equality“ from the Letter of the Law: Some Thoughts on the Limits of Affirmative Action under the Employment Equity Act 55 of 1988*” (2006) 18 *SAMLJ* 336.
- Louw A.M “*Of rainbow teams and stolen dreams: a critical evaluation of the application of affirmative action in South African professional sport.*” Paper prepared for presentation at Equality in the Workplace Conference University of Stellenbosch 10-12 September 2008.
- McCrudden C “*The Constitutionality of Affirmative Action in the United States: A Note on Adarand Constructors Inc. v. Pena*” (1996) 1 *International Journal of Discrimination and the Law* 369.
- McGregor M “*Affirmative action for South African citizens*” (2005) 13 *Juta's Business Law* 99.
- McGregor M “*Actual past discrimination or group membership as a requirement to benefit from affirmative action: A comparison between South African and American case law*” (2004) 29 *Journal for Juridical Science* 122.
- McGregor M “*Categorisation to determine beneficiaries of affirmative action: advantages and deficiencies*” (2005) 46 *Codicillus* 1.
- Mushariwa M “*Who Are The True Beneficiaries of Affirmative Action?*” (2011) 32 *obiter* 439.
- Mushariwa M “*UNISA v Reynhardt [2010] 12 BLLR 1272 (LAC): Does Affirmative Action Have A Life Cycle?*” 2012 15 *PER* 412.
- Naff KC and Dupper O “*Footprints through the Courts: Comparing Judicial Responses to Affirmative Action Litigation in South Africa and the United States*” (2009) 25 *The International Journal of Comparative Labour Law and Industrial Relations* 157.

Pretorius J L “Accountability, Contextualization and The Standard of Judicial Review of Affirmative Action: *Solidarity obo Barnard V South African Police Services*” (2013) 130 SALJ 31.

Pretorius JL “*Fairness in transformation: A critique of the constitutional court’s affirmative action jurisprudence*” (2010) 26 SAJHR 536.

Pretorius JL “*Legal evaluation of affirmative action in South Africa*” (2001) 26 *Journal for Juridical Science* 12.

R A Primus “*Equal Protection and Disparate Impact: Round Three*” (2003) 117 *Harv. L. Rev.* 494.

Rycroft A “*Obstacles to Employment Equity: The Role of Judges and Arbitrators in the Interpretation and Implementation of Affirmative Action Policies*” (1999) 20 *ILJ* 1411.

Solomon M “*The Regulation of Affirmative Action by the Employment Equity Act 55 of 1998*” (1999) 11 *SAMLJ* 231.

Van Wyk M & Hofmeyr K „*Affirmative Action Target Setting: More than Just a Head Count*” (1997) 21 *SA J of Labour Relations* 5.

NEWSPAPER REPORTS

Ngalwa S and Mkhwanazi S “*Stop meddling in sport: ANC blamed for Olympics failure*” *Sunday Tribune*, 17 August 2008.

INTERNET REFERENCES

Alexander G “*White men still top of the pay scale*” available at www.sairr.org.za.

Devenish G “*Affirmative Action revisited*” accessed at <http://www.fwdeklerk.org>.

Employment equity annual report (2013) www.labour.gov.za.

Glass Ceiling Commission Report “Glass Ceiling Commission - Good for Business: Making Full Use of the Nation's Human Capital” (1995) accessed at http://digitalcommons.ilr.cornell.edu/key_workplace on 15/09/2013.

Hermann D “*Rectify Affirmative Action*” accessed at navorsing.co.za.

Household data survey estimates at www.bls.gov/cps accessed on 08/09/2013.

Labour Market Commission Report (1996:138-139).

Mailu D.G “*P.W Botha’s 1985 speech*” available at <http://www.nairaland.com/248669/bothas-speech-1985-must-read>.

Govender K “*Affirmative action is morally defensible*” *Mail& Guardian* 01/03/2010 accessed at <http://mg.co.za/article/2010-03-01-aa-is-still-morally-defensible> .

POMFR: Proportionality Analysis and Models of Judicial Review accessed at <http://europeanlawblog.eu/?p=1833>

The 1996 report of the Presidential Commission to investigate Labour market Restructuring the South African Labour Market.

Solidarity Research Institute “A critical analysis of the 13th Commission for Employment Equity report” May 2013 pg 7 accessed at navorsing.co.za.

The 13th Commission Employment Equity Annual Report of 2013.

www.anc.org.za

www.statssa.gov.za/Publications/P0211/P02112ndQuarter2013.