AFIRMATIVE ACTION FOR PEOPLE WITH DISABILITIES IN THE SOUTH AFRICAN WORKPLACE: COMPLIANCE AND ENFORCEMENT

by

DECIDE FRIDAY MAKHUBELE

Mini-dissertation

Submitted for the partial fulfillment of the requirements of the degree

MASTER OF LAWS
WITH SPECIALISATION IN LABOUR STUDIES

in the

COLLEGE OF LAW AND MANAGEMENT STUDIES AND SCHOOL OF LAW

at

UNIVERSITY OF KWAZULU-NATAL

Supervisor: Professor Tamara Cohen

May 2015

DECLARATION

I, Decide Friday Makhubele (student number: 212559644), hereby declare that the thesis submitted for the Master of Law degree to the University of KwaZulu-Natal, apart from the help recognized, is my own work and has not formerly been submitted to another university for a degree.

_____ _____

SIGNATURE DATE

(Mr. D.F. Makhubele

ABSTRACT

This study is concerned with affirmative action for people with disabilities in the South African workplace with a focus on compliance and monitoring. Affirmative action is a temporary means to promote equality[1].

In South Africa, the concept of affirmative action is constitutionally recognized in the form of substantive equality. This dissertation examines whether or not employers are complying with the Employment Equity Act by implementing affirmative action. It also seeks to determine whether affirmative action is enforced by the Department of Labour and the courts. The methodology involved a review of the relevant literature, legislation and policies on employment equity and an analysis of case law.

The study found that affirmative action is not implemented correctly by most employers and that there is little enforcement. It recommends that employees with disabilities, and trade unions, should challenge employers who are not complying with the Employment Equity Act.

[1]http://www.dejure.up.ac.za/index.php/volumes/44-vol-1-2011/articles/article-7.

ACKNOWLEDGMENTS

I would like to convey my sincere gratitude and thanks to the following people for assisting throughout my LLM:

- God for the Solomonic wisdom he bestowed on me and for his guidance.
- My loving parents, Patricia Sibuyi and Phineas Makhubele for their moral support, prayers, courage and motivation. My mother, who had no privilege of formal education, believes that education is the key to success. She always said, "you don't have eyes without education". My father always prayed for me during exams and throughout my studies. I quote his words in my home language, Tsonga, "*ndzi ta kuvekaxikhongelweni madala* ("I will keep you in my prayers, son").
- Last but not least, I extend my thanks to my supervisor Professor Tamara Cohen. She offered useful and encouraging comments and guidance from the onset until the final stages of this dissertation. Her support boosted my confidence and hopes of completing this dissertation. Without her support, this study would not have been completed.

TABLE OF CONTENTS

CHAPTER 1

INTRODUCTION

1.1 Background

Historically, persons with disabilities have been marginalised and have suffered disadvantages.[2]Persons with disabilities have generally confronted difficulties in enjoying their fundamental social, political and economic rights.[3]People with disabilities were one of the groups which were oppressed by apartheid law.[4] Disability is a major obstacle to the realisation of equal opportunities in South Africa and elsewhere.[5] Most people with disabilities are unemployed and often live in poverty, or with minimal social assistance from disability grants.[6]

In an effort to narrow the gap between previously advantaged and disadvantaged individuals, the democratic South African government has passed a series of employment laws mandating, amongst other things, affirmative action.[7]The legislature recognised the need to protect persons with disabilities and as a result the rights of this group were included in the Employment Equity Act (EEA) 55 of 1998. In order to give full protection to people with disabilities, government amended the EEA Act 55 of 1998 by introducing the Employment Equity Amendment Act 47 of 2013 which came into operation on 1 August 2014. These Acts are discussed in chapter two of this dissertation.

The main aim of this study was to examine affirmative action and people with disabilities in the South African workplace, focusing on employers' compliance with the legislation and enforcement of the legislation by the relevant authorities.

---

[2]Marumoagae MC 'Disability Discrimination and the Right of Disabled Persons to access the Labour Market:' (2012) 15 *PELJ* p. 348.
[3]Ibid at p.345.
[4]Ngwena C 'Equality for people with disabilities in the workplace: an overview of the emergence of disability as a human rights issue' (2004) 29 *Journal for Juridical Science* 167-197.
[5]Ibid.
[6] Christianson M 'People with disabilities inside (and outside) the South African workplace: The current status of the constitutional and statutory promises' (2012) *ActaJuridica*286-305.
[7]Deane T 'The Regulation of Affirmative Action in the Employment Equity Act 55 of 1998'(2006) 18 *SA Merc LJ* 381-388, at p.381.

1.2 Rationale

The rationale for this study is that people with disabilities were the most affected by apartheid laws which discriminated against them by, among other things, providing unequal education and job reservation for whites.[8]

Furthermore, 'as the prohibition of unfair discrimination is insufficient to achieve true equality, *affirmative action* measures are' required.[9]'Such measures distribute social goods' to groups 'on the basis of, for example, race and' gender, 'and seek to correct imbalances where factual inequalities and disadvantages exist'.[10]'Affirmative action is thus a temporary means to promote equality'.[11] The preamble to the Constitution of the Republic of South Africa notes the injustices of South Africa's 'past and sets out to heal the divisions of the past', although 'it does not elaborate on these injustices and divisions'.

1.3 Research problem

The main problem is that the majority of people with disabilities are unemployed and often live in poverty.[12]According to the Commission for Employment Equity Annual Report 2012-2013, employees with disabilities remain underrepresented. Furthermore, disabled African women are the most underrepresented.

One of the problems is that employers are not complying with the EEA to either implement affirmative action or comply with their employment equity plan. For example, eight years after the introduction of the Act that seeks to promote employment opportunities for

[8]McGregor M 'Judicial notice: discrimination and disadvantage in the context of affirmative action in South Africa' (2011) 44 *De Jure* 111-125.

[9] McGregor M 'Judicial notice: discrimination and disadvantage in the context of affirmative action in South Africa' (2011) 44 *De Jure* 111-125; http://www.dejure.up.ac.za/index.php/volumes/44-vol-1-2011/articles/article-7.

[10] McGregor M 'Judicial notice: discrimination and disadvantage in the context of affirmative action in South Africa' (2011) 44 *De Jure* 111-125; www.dejure.up.ac.za.

[11] McGregor M 'Judicial notice: discrimination and disadvantage in the context of affirmative action in South Africa' (2011) 44 *De Jure* 111-125; www.dejure.up.ac.za.

[12] Christianson M 'People with disabilities inside (and outside) the South African workplace: The current status of the constitutional and statutory promises' (2012) *ActaJuridica*286-305.

designated groups, the University of Venda still displayed the characteristics of non-compliance.[13]

Nematodzi[14]indicated that when the Act was implemented at this university, no disabled persons were recorded as either academic or administrative staff. The numerical target for South African universities in terms of the disabled is difficult to achieve; not to mention attracting better qualified or well-trained disabled persons, especially considering previous social prejudices that considered disability as a stigma. In African society such perceptions have denied disabled individuals access to appropriate education and better care. A lack of skills and qualifications and competition for positions and academic requirements in the modern era, are likely to feature high on the list of reasons for denying disabled people the opportunity to work in an academic environment.

1.4 Research questions

The EEA[15] is the principal piece of legislation that aims to achieve equality by promoting equal opportunities and 'fair treatment in employment through implementing affirmative action measures to redress the disadvantages' previously 'experienced by designated groups' and ensure 'that they are equitably represented in all occupational categories and levels' at the workplace. [16] Designated 'employers are required to prepare and implement an employment equity plan' in order to move towards employment equity.[17] The EEA provides that non-compliance with the Act, including an employer's failure 'to prepare and implement an employment equity plan', is punishable with a maximum fine of R500 000[18].

However, this does not seem to deter employers from remaining non-compliant. For example, a fine of R500 000 is affordable for a company with an annual turnover of R100 million. Thus, this study examines whether or not the legislature should introduce heavier penalties

[13]Sebola MS &Khalo T 'Implementation of Employment Equity: a case of the Universities of Venda and of Pretoria' (2010) 45 *Journal of Public Administration: Special Issue 1* 202-217.
[14]Sebola MS &Khalo T 'Implementation of Employment Equity: a case of the Universities of Venda and of Pretoria' (2010) 45 *Journal of Public Administration: Special Issue 1* 202-217, p.210.
[15]Act 55 of 1998.
[16]Section 2 of Act 55 of 1998.
[17]Section 20 of the Act 55 of 1998.
[18] www.workinfo.com/Articles/eecompliance.htm.

for employers who fail to comply with the Act in order to achieve the purpose of affirmative action of employing people with disabilities.

This research study therefore considers the following questions:

- What rationale is provided in the Constitution, legislation, labour policy both locally and internationally for affirmative action measures for persons with disabilities?
- How does the Constitution provide for affirmative action for people with disabilities?
- Does the legislation offer sufficient protection to persons with disabilities at the workplace?
- What affirmative action measures for persons with disabilities as a designated group are contained in the EEA?
- Is affirmative action measures implemented correctly by employers?
- Are employers complying with the EEA?
- How have the courts interpreted employers' compliance with these measures in the EEA?
- How are these affirmative action measures enforced by the Department of Labour?
- Does the Labour Court play a role in the enforcement of affirmative action measures?

1.5 Outline of chapters

Chapter two sets out the legal position pertaining to affirmative action for people with disabilities. Reference is made to the Constitution of the Republic of South Africa Act 108 of 1996, the EEA 55 of 1998 and Code of Good Practices on the Employment of People with Disabilities, the Broad-Based Black Economic Empowerment Act 53 of 2003, and the Employment Equity Amendment Act 47 of 2013.

Chapter three presents an analysis of the employer's duty to implement affirmative action as required by the EEA 55 of 1998. The literature on the employer's duty to implement affirmative action is reviewed and analysed.

Chapter four investigates whether employers are complying with the EEA and how this Act is enforced. The relevant literature on both subjects is reviewed.

Chapter five focuses on the Department of Labour's enforcement of the EEA. Case law is included in the discussion.

Chapter six discusses the courts' interpretation of an employer's duty to implement affirmative action, employers' compliance with the Act and its enforcement. The discussion is supported by a literature review.

Chapter seven concludes the dissertation by summarising the discussion and offering recommendations which might assist the South African government to achieve its objective of protecting the rights of people with disabilities.

CHAPTER 2

KEY ASPECTS OF THE LEGAL REGIME FOR AFFIRMATIVE ACTION FOR PERSONS WITH DISABILITIES IN SOUTH AFRICA

2.1 Introduction

The South African legal regime for affirmative action was developed during the early days of democracy to include not only measures for non-discrimination on the basis of disability, but also to ensure that persons with disabilities are beneficiaries of affirmative action in order to address their underrepresentation at the workplace during apartheid. This chapter considers key provisions of the various pieces of legislation, including *inter alia*: the stronger powers accorded tolabour inspectors to ensure compliance with the EEA under the Employment Equity Amendment Act of 2013; provision for skills development programmes under the Broad-Based Black Economic Empowerment Act; the narrower categories of persons that can benefit as designated groups under the Employment Equity Amendment Act; and the harsher penalties for non-compliance introduced in this Act.

The chapter begins by considering the constitutional framework for the protection of employees with disabilities.

2.2 Definition of disability

The word "disability" is not defined in the Employment Equity Act, but item 5 of the Code of Good Practice: Key Aspects on the Employment of People with Disabilities, enacted in terms of the Employment Equity Act, defines "people with disabilities" as "people who have a long term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment".[19] Item 5 commences with the following statement in item 5.1: The scope of protection for people with disabilities in employment focuses on the effect of a disability on the person in relation to the working environment, and not on the diagnosis or the impairment.[20]

[19] *IMATU & another v City of Cape Town* 2005 26 ILJ 1404 (LC) at par 90.
[20] Ibid.

2.3 The need to protect people with disabilities

Persons with disabilities have generally had difficulties in exercising their fundamental social, political and economic rights.[21] Even though a 'fair amount of attention has been given to discrimination relating to race, religion and gender, nothing has been accorded to disability discrimination, particularly in the workplace'[22]. Employers' ability to ensure that persons with disabilities access the labour market has been said to be one of the challenges[23]. It has been found that 'discrimination against people with disabilities is one of the worst social stigmas that society has not been able to overcome'[24].

There have been 'challenges against the state's implementing progressive measures to ensure that persons with disabilities attain their much needed equality within the labour market'[25]. Some of these challenges relate to persons with disabilities' lack of reasonable accommodation measures at work, access to public transportation to get them to and from work, and ignorance about their potential at work[26]. Persons with disabilities have not only experienced unfair discrimination in the past, but they continue to be at the receiving end of 'unjustified' perceptions by employers, which leads to their continued discrimination and marginalization in the labour market[27]. The high level of unemployment amongst this designated group in all categories of work, suggests that employers still have reservations in employing persons with disabilities[28].

Marumoagae argued that 'despite the increased sensitivity of this subject in this country, applicants for work and employees generally find themselves to be the victims of

[21] Marumoagae, MC *Disability Discrimination and the Right of Disabled Persons to access the Labour Market*: (2012) Vol 15 Potchefstroom Electronic Law Journal, 345-365, at pag 345.
[22] Ibid.
[23] Ibid.
[24] Marumoagae, MC *Disability Discrimination and the Right of Disabled Persons to access the Labour Market*: (2012) Vol 15 Potchefstroom Electronic Law Journal, 345-365, at pag 346; Cole, Elsabe Cynthia-Leigh & Van der Walt, Adriaan *The effect of labour legislation in the promotion and integration of persons with disabilities in the labour market* (2014) Vol 35, p.506-538, at p.507.
[25] Marumoagae, MC *Disability Discrimination and the Right of Disabled Persons to access the Labour Market*: (2012) Vol 15 Potchefstroom Electronic Law Journal, 345-365, at pag 347.
[26] Ibid.
[27] Marumoagae, MC *Disability Discrimination and the Right of Disabled Persons to access the Labour Market*: (2012) Vol 15 Potchefstroom Electronic Law Journal, 345-365, at pag 348.
[28] Cole, Elsabe Cynthia-Leigh & Van der Walt, Adriaan *The effect of labour legislation in the promotion and integration of persons with disabilities in the labour market* (2014) Vol 35, p.506-538, at p.508.

employment discrimination due to their disability'[29]. Marumoagae is of the view that when 'persons with disabilities have access to employment and training to acquire skills which are relevant to the labour market and suited to their abilities and interests, they can make a significant contribution in the workplace' [30]. In conclusion, Marumoagae stated 'the Constitution, the EEA and the LRA (including its Codes of Good Practice) protect employees with disabilities as a vulnerable group because they are minority with attributes different from mainstream society'[31]. The aim is their integration and inclusion in the workplace, not only in order that they may achieve equality but also to restore the dignity of persons with disabilities[32].

2.4 Constitution of the Republic of South Africa, 1996

As 'the supreme law of the land'[33], the Constitution of the Republic of South Africa, 1996 provides for legal rights for 'people with disabilities' in its 'Bill of Rights'. The state has a constitutional 'obligation to respect, protect, promote and fulfil' all 'the rights' set out in the Bill of Rights[34] and this extends to the rights of disabled persons. 'Section 9 of the Constitution provides for the right to equality and' specifically lists disability as a ground 'for protection against' unfair 'discrimination'.[35]However, nowhere else 'in the Constitution' are the specific rights of persons with disabilities explicitly outlined.

Furthermore, 'section 10 of the Constitution states that 'everyone' has inherent dignity and the right to have their dignity respected and protected'. This thus applies to people with disabilities.

---

[29] Marumoagae, MC *Disability Discrimination and the Right of Disabled Persons to access the Labour Market*: (2012) Vol 15 Potchefstroom Electronic Law Journal, 345-365, at pag 345.

[30] Marumoagae, MC *Disability Discrimination and the Right of Disabled Persons to access the Labour Market*: (2012) Vol 15 Potchefstroom Electronic Law Journal, 345-365, at pag 357.

[31] Marumoagae, MC *Disability Discrimination and the Right of Disabled Persons to access the Labour Market*: (2012) Vol 15 Potchefstroom Electronic Law Journal, 345-365, at pag 357.

[32] Ibid.

[33]Section 2 of the Constitution, 1996.

[34]Section 7(2) of the Constitution.

[35]Sections 9(3) and (4) of the Constitution provides that:

"(3) the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation. Age, *disability*, religion, conscience, belief, culture, language and birth;

(4) no person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination."

The 'Constitution provides that everyone is equal before the law and has the right to equal protection and benefit of the law'.[36] It is clear that people with disabilities are included. This particular right is connected to 'many of the other rights in the Bills of Rights because without equality before the law, it is difficult to ensure rights such as the 'right to' freely 'choose a trade, occupation or profession'.[37]

Accordingly, 'equality includes the full and equal enjoyment of all rights and freedoms.'[38] 'To promote the achievement of equality, legislative and other measures' may be 'designed to protect or advance persons or categories of persons' that 'are disadvantaged by unfair discrimination'.[39]Section 9(2) authorises affirmative action by stating, firstly, 'that equality includes the full and equal enjoyment of all rights and freedoms'.[40]The Constitution thus 'confirms both a formal approach to equality, by outlawing unfair discrimination, and substantive equality, by providing for affirmative action'.[41] Persons with disabilities are covered both under the anti-discrimination clause on the basis of their status, and as beneficiaries of affirmative action due to the fact that they were systematically discriminated against during apartheid and denied employment opportunities.[42]

The constitutional rationale for affirmative action is 'that an employment equity programme must be designed to break' the 'continuing cycle of' systematic 'discrimination'.[43]Quoting Kentridge, McGregor argues 'that the constitutional wording' "disadvantaged by unfair discrimination" refers to 'people who are, or have been, disadvantaged by measures which impair their fundamental dignity or adversely affect them in a comparably serious' manner.[44] She argues that the wording implies 'that it is not necessary to' prove current 'unfair

[36]Section 9(1) of the Constitution.
[37]Section 22 of the Constitution.
[38]Section 9(2) of the Constitution.
[39]Ibid.
[40]McGregor M 'A legal historical perspective on affirmative action in South Africa (part 2)' (2007) 13 *Fundamina,* p.104.
[41]McGregor M 'A legal historical perspective on affirmative action in South Africa (part 2)' (2007) 13 *Fundamina,* p.103.
[42] McGregor M 'A legal historical perspective on affirmative action in South Africa (part 2)' (2007) 13 *Fundamina,* p.103-104.
[43]McGregor M 'A legal historical perspective on affirmative action in South Africa (part 2)' (2007) 13 *Fundamina,* p.104;
http://uir.unisa.ac.za/bitstream/handle/10500/3873/Fundamina%20finaal%20McGregor%2029%20Nov.pdf?sequence=1
[44]Ibid.

discrimination against the beneficiaries of an affirmative action policy'.[45] 'Past unfair discrimination, the effects of which are felt in the present, is sufficient'.[46]

The legislature promulgated the EEA[47] in order to give 'effect to section 9(2) and 9(4) of the Constitution' which logically requires 'that affirmative action measures must be' taken.[48]

2.5 Employment Equity Act 55 of 1998 and Codes of Good Practice

Among other things, 'the EEA aims to achieve' equality at 'the workplace by implementing affirmative action measures to redress the disadvantages' relating to 'employment experienced by designated groups' and 'to ensure their equitable representation in all occupational categories and levels' at 'the' workplace.[49] The 'EEA was passed to give effect to section 9 of the Constitution and, in particular, to give effect to the constitutional notion of equality which embraces both formal and substantive equality'.[50]

In 'terms of this Act, in order to achieve employment equity', all 'designated' employers have an 'obligation to implement affirmative action measures for people from designated groups'.[51]For compliance and enforcement purposes, it is important to establish who qualifies as a designated employer.

In 'terms of section 1 of the' EEA[52]a *designated employer* 'is defined as':

> "an employer who employs 50 or more employees; an employer who employs fewer than 50 employees, but has a total annual turnover that is equal to or above the applicable annual turnover of a small business in terms of Schedule 4 of this Act; a municipality, as referred to in Chapter 7 of the Constitution; an organ of state as defined in section 239 of the Constitution, but excluding local spheres of government, the National Defence Force, the National Intelligence and the South African Secret Service; and an employer bound by a collective agreement in terms of section 23 or 31 of the Labour Relations Act, which appoints

[45]Ibid.
[46]Ibid.
[47]Act 55 of 1998.
[48]Ibid, p.104.
[49]Section 2 (b) of the Employment Equity Act 55 of 1998; www.saflii.org.
[50]http://www.saflii.org/za/cases/ZALC/2009/78.html.
[51]www.saflii.org/za/cases/ZAKZHC/2006/11.rtf.
[52]Act 55 of 1998.

it as a designated employer in terms of this Act, to the extent provided for in the agreement".[53]

Section 15(1) of the EEA defines 'affirmative action measures' as those designed to ensure that suitably qualified people from designated groups receive equal employment opportunities and are equitably represented in all occupational categories and levels at the workplace of a designated employer. A suitably qualified person with disability may be someone who meets the minimum requirements of a specific job. That person should be able to be trained in other to fit in the operations of the employer. Such person should be given a preference against his/her able bodied counterpart who exceeded the minimum requirements of a specific job.

Affirmative action involves more than just adding a number of employees from a designated group. In terms of the Act, reasonable accommodation of people with disabilities is also an affirmative action measure.[54] Such measures would include "making reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce of a designated employer".[55] Reasonable accommodation by employers under the EEA and Code of Good Practice for the needs of people with disabilities is both a non-discrimination and *affirmative action* requirement.[56] The aim of the EEA is to protect people with disabilities against unfair discrimination in the workplace and directs employers to implement affirmative action measures to redress discrimination[57]. While the aim of the Code is to guide employers and employees on promoting equal opportunities and fair treatment for people with disabilities as required by the EEA[58].

[53] Section 1 of the Employment Equity Act 55 of 1998.
[54]Section 15(2)(c) provides that 'Affirmative action measures implemented by designated employer must include – making reasonable accommodation for people from designated groups in order to ensure that they enjoy opportunities and are equitably represented in the workforce of a designated employer".
[55]Ngwena C 'Interpreting aspects of the intersection between disability, discrimination and equality: lessons for the Employment Equity Act from comparative law. Part II: reasonable accommodation' (2005) 16 *Stellenbosch Law Review* p.534-561, at p.535.
[56]See section 6.1 of the Technical Assistance Guidelines on the Employment of People with Disabilities.
[57] Section 2.1 of the Code of Good Practice on the Employment of People with Disabilities.
[58] Section 2.2 of the Code of Good Practice on the Employment of People with Disabilities.

Against the background of the provision of reasonable accommodation in the Americans with Disabilities Act of 1990, the United States Equal Employment Opportunity Commission stated that[59]:

> "a key component of non-discrimination toward people with disabilities is the requirement of reasonable accommodation. The non-discrimination mandate and its reasonable accommodation component address acts, policies, and barriers that currently operate to exclude, segregate, or impede people with disabilities. Affirmative action, on the other hand, in the context of disability discrimination refers to some effort beyond non-discrimination and reasonable accommodation to increase the participation of people with disabilities. It does not focus upon eliminating discrimination, but rather on removing the present effects of discrimination. The premise underlying such an affirmative action requirement is that the class of persons with disabilities has been so seriously underrepresented in the past, whether by the particular individual or agency involved or on a broader societal basis, that extra efforts are required to achieve an equitable level of participation. Typically this takes the form of outreach and recruiting efforts designed to increase the numbers of applicants and participants with disabilities."[60]

Affirmative action requires that positive measures be taken to achieve participation in the workplace, whilst measures to ensure non-discrimination and reasonable accommodation are not restricted to the workplace, but can also be implemented in the public sphere, in schools, hospitals and even in privately owned spaces.[61]

The responsibility for policing the EEA falls on labour inspectors. Any employee or trade union representative may bring an alleged contravention of the Act to the attention of another employee; an employer; a trade union; a workplace forum; a labour inspector; the Director-

[59]http://www.unk.edu/offices/human_resources/aaeo/sexual_harassment/harassment_resource_materials.php.

[60]Ngwena C 'Interpreting aspects of the intersection between disability, discrimination and equality: lessons for the Employment Equity Act from comparative law. Part II: reasonable accommodation' (2005) 16 *Stellenbosch Law Review* p.534-561, at p.542.

[61] For example, Schedule 1 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 provides a list of unfair practices in certain sectors, including labour and employment, education, health care services and benefits, housing, accommodation, land and property, insurance services, pensions, partnerships, professions and bodies, provision of goods, services and facilities, and clubs, sport and associations. The Equality Courts found in favour of reasonable accommodation at a privately owned school in *LH Oortman v St Thomas Aquinas Private School and Another* case 1/2010 Witbank (EqC); as well as for accessibility to a court building in *E Muller v Minister of Justice and Another* Case 01/2003 (EqC) and a police station in *WH Bosch v Minister of Safety and Security and Another* case no 25/2005 Port Elizabeth (EqC).

General; or the Commission.[62] A labour inspector has the power to enter, question and inspect any workplace or any other place where an employer carries out business.[63]If the inspector has reasonable grounds to believe that the employer has failed in its duties listed in the Act, he/she must request and obtain a written undertaking from a designated employer to comply with section 36 (a) to (j)[64] within a specified period.

Employers' duties include the following: to consult with employees[65]; to conduct an analysis[66]; to prepare an employment equity plan[67]; to implement its employment equity plan; to submit an annual report[68]; to publish its report[69]; to prepare a successive employment equity plan[70]; to assign responsibility to one or more senior managers[71]; to inform its employees[72]; and to keep records[73].

While it appears that labour inspectors are given substantial enforcement powers, unfortunately, one interpretation of sections 35 and 36 of the EEA is that they may only act against a non-compliant employer upon notification of an alleged contravention of the EEA. In the absence of an alleged contravention, the labour inspector will not conduct an inspection. The EEA should provide for labour inspectors to inspect all designated employers on their own accord in order to monitor compliance and thus ensure full compliance.

The Technical Assistance Guidelines on the Employment of People with Disabilities (TAG) were introduced to assist employers, employees, trade unions and people with disabilities to understand the EEA of 1998 and its Code of Good Practice on the Employment of People

[62]Section 34 of the EEA.
[63]See section 35 of the EEA read with section 65, 66 of the Basic Conditions of Employment Act, 1997.
[64]Section 36 of the EEA provides that: A labour inspector must request and obtain a written undertaking from a designated employer to comply with paragraphs (a) to (j) within a specified period, if the inspector has reasonable grounds to believe that the employer has failed to- (a) consult with employees as required by section 16; (b) conduct an analysis as required by section 19; (c) prepare an employment equity plan as required by section 20; (d) implement its employment equity plan; (e) submit an annual report as required by section 21; (f) publish its report as required by section 22; (g) prepare a successive employment equity plan as required by section 23; (h) assign responsibility to one or more senior managers as required by section 24; (i) inform its employees as required by section 25; (j) keep records as required by section 26.
[65]Section 16 of the EEA.
[66]Section 19 of the EEA.
[67]Section 20 of the EEA.
[68]Section 21 of the EEA.
[69]Section 22 of the EEA.
[70]Section 23 of the EEA.
[71]Section 24 of the EEA.
[72]Section 25 of the EEA.
[73]Section 26 of the EEA.

with Disabilities.[74]Among other things, the TAG aims to assist employers to understand their obligation towards people with disabilities regarding non-discrimination and affirmative action.[75]

2.6 Broad-Based Black Economic Empowerment Act 53 of 2003

'Broad-based black economic empowerment' is broadly defined in the Broad-Based Black Economic Empowerment Act (the BBBEE Act).[76] Black persons with disabilities are identified as one of the groups of beneficiaries of economic empowerment through dedicated socio-economic strategies. The strategies proposed in the BBBEE Act include:

> "increasing the number of black people that manage, own and control enterprises and productive assets; facilitating ownership and management of enterprises and productive assets by communities, workers, cooperatives and other collective enterprises; human resource and skills development; achieving equitable representation in all occupational categories and levels in the workforce; preferential procurement; and investment in enterprises that are owned or managed by black people".[77]

The Codes of Good Practice encourage employers to empower people with disabilities through skills development programmes. In terms of the BBBEE generic scorecards, an employer will obtain 20 points for skills development for black people with *disabilities.*[78] The BBBEE Act focuses on employment equity and skills development.[79] The BBBEE Act provides that, the relevant measures for employment equity are black people with disabilities.[80] In order to be awarded full BBBEE points for the zero to five-year period, 2%

[74]Item 1.1 of TAG.

[75] Item 2.3.1 of TAG provides:

"The TAG aims to assist employers by helping them to understand:

- "Their obligation to implement non-discrimination and affirmative action measures in respect of people with disabilities in the workplace
- Their right to generate economically viable enterprises and/or organisations which effectively provide services and products without discriminating against people with disabilities.
- Practical ways to move forward that are relevant to their business and that ensure the application of non-discrimination and affirmative action measures for potential and existing employees with disabilities."

[76]Act 53 of 2003.

[77]See section 1 of the Broad-Based Black Economic Empowerment Act 53 of 2003.

[78]See para. 8.1 of the Codes of Good Practice on Broad-Based Black Economic Empowerment Act 53 of 2003 issued under notice 1019 of 2013.

[79]Newman A 'Enabling the disabled complying with the BBBEE Act' (2013) *De Rebus*, p.44-46.

[80]Ibid.

of the total workforce of the measured entity needs to be made up of black people with disabilities.[81]

In terms of skills development, the BBBEE Act specifies that, 0.3% of skills development expenditure[82] should be earmarked for black employees with disabilities.[83] The measured entity must comply with this requirement in order to receive maximum BBBEE points.[84] In contrast with the EEA, that imposes fines of up to R500 000 on an employer that contravenes the Act, the BBBEE Act makes no provision for penalties.[85] Failure to meet the targets/compliance set out in the BBBEE Act simply means that points are not awarded.[86] It could be argued that the legislation encourages employers to comply in order to gain points when applying for government tenders. This argument is supported by Newman who explains that BBBEE points are very valuable in the procurement workforce profile at the skilled level, where the representation of workers with disabilities is 2.3%.[87]

2.7 Employment Equity Amendment Act 47 of 2013

The Employment Equity Amendment Act[88] came into operation on 1 August 2014 and has significant implications for employers.[89] It introduced new provisions which were not in the EEA. Some of these provisions are discussed below.

The definition of 'designated groups' in section 1 of the EEA 55 of 1998 has been amended by section 1 of the Employment Equity Amendment Act. "Designated groups means black people, women and *people with disabilities* who are citizens of the Republic of South Africa by birth or descent; or became citizens of the Republic of South Africa by naturalization before 27 April 1994; or after 26 April 1994 and who would have been entitled to acquire

[81]Ibid.
[82]Learning programmes in the workplace refer to occupational training or on-job-training in order to develop employees. See http://www.beesa.co.za/consulting/DownloadFiles/400-SkillsDevelopment.pdf.
[83]Ibid.
[84]Ibid.
[85]See schedule 1 of the Employment Equity Act 55 of 1998.
[86]Newman A 'Enabling the disabled complying with the BBBEE Act' (2013)*De Rebus*, p.44-46.
[87]Ibid.
[88]47 of 2013.
[89]http://www.polity.org.za/article/employment-equity-amendment-act-becomes-law-2014-07-31.

citizenship by naturalisation prior to that date but were precluded from doing so by apartheid policies."[90]

It is important to note the difference between the EEA and the Employment Equity Amendment Act in terms of the meaning of designated groups. The legislature's intention in the amendment act is to benefit disabled people who are citizens of the Republic of South Africa. The definition of 'designated groups' in the amendment act can be interpreted to mean that the legislature seeks to benefit the victims of apartheid and exclude any other person who may be black, female, or *disabled* but not meet the criteria for 'designated groups'. Thus it can be concluded that this provision protects people who are victims of past discriminatory laws. Thus, the implication is that some people who benefitted as designated group under the EEA, for instance, a disabled foreigner who resides in South Africa, may no longer benefit. However, this new provision is in line with the original purpose of the EEA which, among other things, was to implement affirmative action measures in order to redress the disadvantages in employment experienced by designated groups, and ensure their equitable representation in all occupational categories and levels at the workplace.[91]

The problem is that it excludes persons who may have been deprived of work opportunities or equal treatment in their countries of origin. This is problematic because the underrepresentation of persons with disabilities has not only been due to apartheid policies and laws (such as unequal education) but also because of pervasive discrimination outside of the apparatus of the previous government. An example is the stereotype of disabled persons having less ability than their able-bodied counterparts. Similarly, the underrepresentation of women at the workplace is not solely due to the effects of apartheid, but to patriarchy and gender stereotypes. The new definition of 'designated groups' therefore narrows the ambit of the EEA to citizens that are black, female, or persons with disabilities, defined as such due to possible discrimination or disadvantage due to previous legislation, policies and practices in South Africa. The Constitution provides that legislative and other measures 'may' be taken to protect or advance persons, or categories of persons *disadvantaged* by unfair discrimination.[92] It was therefore left up to the legislature to decide whether it desired such legislation (as indeed it did by promulgating the EEA), and the categories of disadvantaged

[90]Section 1 of the Employment Equity Amendment Act 47 of 2013.The previous section under the Employment Equity Act of 1998 defined 'designated groups' as black people, women and *people with disabilities.*
[91]Section 2 of the Employment Equity Act 55 of 1998.
[92]Section 9(2) of the Constitution.

persons was also left to the legislature. In the EEA and now the Amendment Act, the legislature has confined the possible categories of 'disadvantage' to narrow groups that will benefit from advancement at the workplace. This begs the question of whether this narrower reading of 'designated' groups provides increased protection for persons with disabilities.

For compliance and enforcement purposes, employers should be guided by the new definition of 'designated groups' when employing non-citizens who, even though they are black, female and disabled, will not benefit in terms of the EEA.

Section 36 of the EEA which deals with 'undertaking to comply' is replaced by section 13 of the Employment Equity Amendment Act 2013.This empowers a labour inspector to request and obtain a written undertaking to comply from a designated employer.[93]If the employer does not comply with the written undertaking within the period stated therein, the Labour Court may, on application by the Director-General, make the undertaking, or any part of the undertaking, an order of the Labour Court.[94]

One can interpret section 13 (1) of the Employment Equity Amendment Act as giving discretion to the inspector to request and obtain a written undertaking from a designated employer to comply, as opposed to the original EEA which seemed to place a loose obligation on the employer. This interpretation is based on the wording used in the Amendment Act which is different from the EEA. The Amendment Act states that the labour inspector '*must'* request and obtain whereas the EEA states that the labour inspector '*may'* request and obtain an undertaking from a designated employer to comply.

The vexed question of how to ensure compliance with the requirements on employers is the next topic for discussion.

In terms of the Employment Equity Amendment Act, the maximum fine that may be imposed for contravention of the Act is R1 500 000 or 2% of annual turnover.[95] This is significantly harsher than the fine of R500 000 provided forin the EEA. Newman comments that the fine

[93] Section 13 of the Employment Equity Amendment Act provides that a labour inspector may request and obtain a written undertaking from a designated employer to comply with paragraph (a),(b),(f),(h),(i), or (j) within a specified period. These paragraphs are identical to those in section 36 of the EEA of 1998.
[94]Section 13 (2) of the Employment Equity Amendment Act 47 of 2013.
[95]Schedule 1 of the Employment Equity Amendment Act 47 of 2013.

set out in the Employment Equity Amendment Bill 2012 (which has since became law) is effectively the same as that contained in schedule 1 of the Employment Equity Amendment Act 47 of 2013.[96]Newman poses the question of whether employers will do what is right or good.[97] In other words, will the harsh punishment contained in the Employment Equity Amendment Act force employers to comply with the Act? Newman goes further to argue that if employers had any intention to do right or good, there would be no need for any of the legislation.[98]

I would agree with Newman that the amendment to the EEA to include a harsher fine for contravention of the Act is likely due to the fact that employers are not intending to comply. The following chapter considers whether this is indeed the case.

2.8 Conclusion

It is clear that affirmative action is a constitutional principle in the form of substantive equality. The Constitution, 1996 requires that affirmative action measures be taken in order to advance the rights of people with disabilities to equal benefits and representation. The affirmative action provision in the EEA was introduced in order to give effect to the Constitution, 1996. Affirmative action remains a challenge in South Africa, particularly when it comes to employing people with disabilities. In seeking to achieve its goal of ensuring equality through affirmative action, the South African government introduced the Employment Equity Amendment Act. This Act has yet to be tested in practice since it only came into operation on 1 August 2014.

The EEA, BBBEEA and Employment Equity Amendment Act operate hand in hand with the Constitution. It should be borne in mind that the EEA was promulgated to give effect to the constitutional right to equality provided in section 9 of the Constitution. Therefore, in applying the EEA to *people with disabilities*, it is of paramount importance to take into account the right to equality for people with disabilities in this section.

[96]Newman A 'Enabling the disabled complying with the BBBEE Act' (2013) *De Rebus*, p.44-46.
[97]Ibid.
[98]Ibid.

The following chapter discusses the implementation of affirmative action. It seeks to answer the question of whether employers are implementing affirmative action as required by the EEA.

Whilst failure to observe the Code of Good Practice on the Employment of Persons with Disabilities does not on its own render a person liable in law, the courts must consider it when interpreting and applying the EEA.[99] The TAG does not place a similar obligation on the courts, but it should be read and used together with the EEA, and the Code or other codes as well as related labour legislation and policies. This is because the TAG is meant to be used as a practical guide to assist employers, employees and trade unions to understand and implement the EEA.

[99]Clause 3.1.of the TAG.

CHAPTER 3

IMPLEMENTATION OF AFFIRMATIVE ACTION FOR PERSONS WITH DISABILITIES IN SOUTH AFRICA

3.1 Introduction

By law, all designated employers are required to implement affirmative action measures for disabled people who are one of the targeted designated groups in order to achieve employment equality.[100]This chapter discusses the implementation of affirmative action by employers as required by the EEA. It focuses on the problems of implementing affirmative action measures and considers whether employers are correctly implementing affirmative action. Research has found that the majority of employers are failing to implement affirmative action measures. These findings will be discussed and critically analysed.

This chapter also highlights the challenges facing South Africa when it comes to implementing affirmative action and the employability of people with disabilities. Employability of people with disabilities is one of the key issues and challenges facing the South African public service.[101]

3.2 Compliance with Employment Equity

It is evident from the details of 13th Commission for Employment Equity Report that South Africa is still found wanting in relation to equitable representation of designated groups, in particular women and *people with disabilities* in the middle-to-upper occupational levels.
It is found that representation of black people with disabilities is much less that those of the white group, particularly at the middle-to-upper levels. This shows that population group raises its ugly head, even in the employment of people with disabilities.

[100]Section 13(1) of the Employment Equity Act 55 of 1998.
[101] Sing D 'Legislative, institutional and policy measures for people with disabilities in the South African Public Service : forum sector' (2006) 30 *South African Journal of Labour Relations,* 82-92, at p.82.

The lack of progress at middle management and professional levels remains of great concern to the Commission as it reflects corporate South Africa's unwillingness to embrace the transformation agenda.[102].

3.3 Problems in implementing affirmative action

Despite the positive intentions of affirmative action programmes, affirmative action is often not well-implemented by South African employers.[103] Several factors have a negative impact on successful implementation. Rankhumise *et al* identify these as: 'lack of empowerment of affirmative action candidates on the job; lack of adequate training and development of affirmative action candidates; head hunting of external affirmative action candidates; [and] poor management skills of affirmative action candidates'. [104] Rankhumise *et al* cite McWhirter[105], who states that, in reality, affirmative preference has all too often been due to corrupt decision-making in which someone's personal friend is given a job or promotion.[106] As a result, an incompetent person from a designated group could be appointed or promoted, whereas a competent person might fail.[107] All people from designated groups then suffer from the stigma created by affirmative preference.[108]

The factors cited by Rankhumise *et al* apply equally to workers with disabilities. For example, a suitably qualified person with a disability could have been appointed to a position, but another candidate from the designated group is appointed due to nepotism. [109] Furthermore, it is submitted that lack of empowerment on the job has a more detrimental effect on workers with disabilities than on their able-bodied counterparts, particularly if they are not given a voice in the organisational structure or if there is evidence of stigma or a lack of will to ensure reasonable accommodation. Similarly, a lack of adequate training and development can disempower a worker with a disability to the extent that it may lead to

[102]Ibid.
[103]Rankhumise E, Netswera G & Meyer M 'Employees' perceptions of the implementation of affirmative action in the health sector in the Standerton District in South Africa' (2001) *Curationis*52-58, at p.53.
[104]Rankhumise E, Netswera G & Meyer M 'Employees' perceptions of the implementation of affirmative action in the health sector in the Standerton District in South Africa' (2001) *Curationis*52-58, at p.53.
[105]McWhirter (1996:133).
[106]Rankhumise E, Netswera G & Meyer M 'Employees' perceptions of the implementation of affirmative action in the health sector in the Standerton District in South Africa' (2001) *Curationis*52-58, at p.53.
[107]Ibid.
[108]Ibid.
[109] Rankhumise E, Netswera G & Meyer M 'Employees' perceptions of the implementation of affirmative action in the health sector in the Standerton District in South Africa' (2001) *Curationis*52-58, at p.53.

incapacity or even constructive dismissal in extreme cases due to a lack of accommodation.[110] Lack of adequate training and development can also hinder the growth of employees with disabilities. The poor management skills of affirmative action candidates affect people with disabilities because they do not have the same skills as their able-bodied counterparts[111]. Employers should thus ensure that affirmative action candidates are empowered and able to compete with candidates from non-designated groups. In adopting affirmative preference, it is essential that efforts be made to implement affirmative action effectively.[112]

Rankhumise *et al* are of the view that if affirmative action were to be properly implemented, there would be a decrease in the number of complaints about discrimination in the work situation and unfair labour practices, and labourers, the majority of whom are black, would be less aggrieved with management practices than is currently the case.[113]

It is submitted that if affirmative action were to be properly implemented, people with disabilities would enjoy the equal benefit of the law. This would ensure that they enjoy their constitutional right to dignity. The incorrect implementation of affirmative action results in the unfair exclusion of people with disabilities which defeats the purpose of the Constitution and EEAto fight discrimination and inequality at the workplace.

Sebalo and Khalonote that a report on the implementation of the EEA at the University of Venda does not record disabled persons as employees in either academic or administrative positions.[114] The authors argue that the numerical target to be achieved by South African universities in terms of the employment of persons with disabilities is difficult to attain; not to mention attaining better qualified or well-trained disabled persons,[115]especially considering previous social prejudices that stigmatized disability.[116] In African society such perceptions

[110] Ngwena C *Equality for people with disabilities in the workplace: an overview of the emergence of disability as a human rights issue* (2004) Journal for Juridical Science 29(2), p.167-197, at p.193.
[111] http://www.sajip.co.za/index.php/sajip/article/view/836/960.
[112]Rankhumise E, Netswera G & Meyer M 'Employees' perceptions of the implementation of affirmative action in the health sector in the Standerton District in South Africa' (2001) *Curationis*52-58, at p.53.
[113]Rankhumise E, Netswera G & Meyer M 'Employees' perceptions of the implementation of affirmative action in the health sector in the Standerton District in South Africa' (2001) *Curationis*52-58, at p.55.
[114]Sebola MS &Khalo T 'Implementation of Employment Equity Act: a case of the Universities of Venda and of Pretoria' (2010) 45 *Journal of Public Administration* 202-217, at p.210.
[115] Ibid.
[116]Sebola MS &Khalo T 'Implementation of Employment Equity Act: a case of the Universities of Venda and of Pretoria' (2010) 45 *Journal of Public Administration* 202-217, at p.210.

have denied the disabled accessto appropriate education and better care.[117]A lack of skills and qualifications and competition for positions and academic requirements in the modern era, are likely to feature high on the list of reasons for denying them the opportunity to work in an academic environment.[118]

South African organisations' human resources departments are also faced with challenges in implementing the EEA. [119] Many employers have focused on balancing workplace demographics. One of the challenges confronting universities is the laws and policies that prescribe the racial and gender composition of staff.[120] The setting of quantitative racial targets, without replacing research talent has proved to be costly in terms of South African universities' research image and academic scholarship.[121] It has been argued that employers mainly comply with the EEA to avoid penalties such as fines for non-compliance that do not consider the difficulties that such organisations face in implementing these requirements.[122] It has further been argued that while numerical goal setting is important, organisations should realise that achieving the objectives of the EEA involves more than just getting the numbers right.[123]Even when the required number of persons with disabilities are employed, the successful achievement of equity is marred by factors such as those identified by Rankhumise that undermine transformation.

The problem of implementing affirmative action is also identified in the finance industry. Booysen argues that Money Bank has all the necessary policies and formal procedures for good employee relations and practices, equity, equality, fairness, inclusion and non-discrimination in place, since these are protected and embodied in the South African Constitution. [124] However, like most South African organisations, Money Bank still underperforms in terms of employment equity targets.[125]

[117] Ibid.
[118] Ibid.
[119]Sebola MS &Khalo T 'Implementation of Employment Equity Act: a case of the Universities of Venda and of Pretoria' (2010) 45 *Journal of Public Administration* 202-217, at p.210.
[120]Ibid.
[121]Ibid.
[122]Ibid.
[123]Ibid.
[124]Booysen L 'Barriers to employment equity implementation and retention of blacks in management in South Africa' (2007) 31 *South African Journal of Labour Relations*47-71, p.54.
[125] Ibid.

Booysen states that Money Bank's Employment Equity Policies and strategies are in place, are perfectly aligned with employment equity legislation and the Financial Services Charter regulations and requirements, and reflect good practice.[126] However there seems to be a relative lack of translation of policy and strategy into action plans.[127] It also seems that the implementation of the policies is loosely coordinated.[128] Furthermore the analysis shows that EE implementation occurs at different levels in the Money Bank Division and the larger banking group.[129]Booysen cites statements by individuals charged with employment equity implementation to support his findings:[130]

> "*How we plan for it and we see that it is a business imperative –absolutely full marks … We plan very well, but implement not that well"* and *"At the espoused level we are there … How we have implemented it – I think is very bad."*

> "W*e have great policies; guidelines and frameworks in place… It is still at a very theoretical or intellectual level rather than at a practical, implementation level."*

It should be borne in mind that financial institutions are some of South Africa's major employers. If these institutions are not implementing affirmative action plans as required by the EEA, it will be difficult for the South African government to achieve its goal of equality at the workplace[131]. Failure to ensure implementation of employment equity plans amounts to non-compliance with the Act which requires employers to ensure equitable representation at all occupational levels.[132] It is clear that financial institutions have employment equity plans in place; the problem is implementing them. It can be argued that a policy which is not applied is useless because it does not achieve its purpose. It is therefore submitted that the main problem with affirmative action policy is implementation.

[126]Ibid.
[127]Ibid.
[128]Ibid.
[129] Ibid.
[130] Ibid.
[131] Booysen L 'Barriers to employment equity implementation and retention of blacks in management in South Africa' (2007) 31 *South African Journal of Labour Relations* 47-71.
[132]Section 15(1) of the Employment Equity Act 55 of 1998.

Reasons cited for the slow increase in the number of people with disabilities at the workplace include ignorance, fear and stereotypes.[133]Gida and Ortlepp's research revealed that there is a tendency to identify certain types of positions exclusively for people with disabilities. For example, one organisation was considering placing all people with disabilities in their call centres.[134]

Gida and Ortlepp argue that, while this could be a positive initiative, it could also lead to the further exclusion of people with disabilities because it would not be easy to integrate with the rest of the organisation.[135] These employees would be working in an isolated area, which would deprive the rest of the organisation of the opportunity to better understand people with disabilities, and to accept them as part of the organisation, as noted in the Code of Good Practice on the Employment of People with Disabilities of 2002.[136]This causes stigmatisation. It would limit other people's opportunities to appreciate the capabilities of people with disabilities, and the value they can add to the organisation.[137]The authors also argue that 'herding' people with disabilities into call centres would mean that they would have few opportunities for career advancement. This violates the spirit and intent of the EEA.[138] Ultimately, designating some jobs as 'only for' persons with disabilities is exclusionary as it limits perceptions of their abilities and competence at the workplace.

Failing to implement affirmative action obligations properly thus becomes a problem of compliance and, ultimately, enforcement. The following chapter discusses this issue.

3.4 Conclusion

This chapter examined the implementation of affirmative action in the South African workplace in both the private and public sectors. It can be concluded that most employers are facing challenges in implementing affirmative action. The following common factors affect the implementation of affirmative action: some employers concentrate on filling quotas and

[133]Gida P &Ortlepp K 'Employment of people with disabilities: implications for HR management practices' (2007) 7 *ActaCommercii* 135-150, p.139.
[134]Gida P &Ortlepp K 'Employment of people with disabilities: implications for HR management practices' (2007) 7 *ActaCommercii* 135-150, p.139.
[135]Ibid.
[136]Ibid.
[137]Gida P &Ortlepp K 'Employment of people with disabilities: implications for HR management practices' (2007) 7 *ActaCommercii* 135-150, p.139.
[138]Ibid.

disregard the appointment of suitably qualified disabled candidates; the lack of representation of people with disabilities at management level; some employers focus on implementing affirmative action measures for race and gender and exclude people with disabilities; a lack of adequate training and development of affirmative action candidates; and ignorance, fear and stereotypes on the part of both employers and people with disabilities.

It has been argued that problems arise in implementing affirmative action policy in the public and public sectors, mainly affecting people with disabilities. The challenges confronting universities identified by Sebola *et al* such as a focus on numerical targets whilst discounting the stigmatising effect of the perceived lack of capacity or qualifications of employees with disabilities can be removed by focusing on more than just the numbers. Universities should provide scholarships for research degrees to students with disabilities; this would improve employment opportunities for people with disabilities in the academic environment. The lack of action plans and coordination is identified by Booysen in the banking sector, whilst Gida and Ortlepp point to potentially exclusionary hiring practices that can have further stigmatising effects. Most of these factors can be ameliorated by proper planning, implementation and monitoring of employment equity plans[139]. It is also recommended that employers conduct awareness programmeson the rights of people with disabilities[140] and ensure that people with disabilities understand their disability in terms of the labour legislation and guidelines and that, employers understand their obligations in terms of the EEA to ensure the effective implementation of affirmative action[141].

The factors identified by Rhankhumise*et al* are not insurmountable. The Technical Assistance Guidelines (the Guidelines) can be of great use to employers in coming to grips with the practicalities of implementing employment equity. For example, the Guidelines set out how to go about employment equity planning in respect of people with disabilities.[142]They set out the three phases of preparation, implementation and monitoring of an employment equity plan. The implementation phase is broken down into five steps: The first is developing an implementation plan that will address the factors that adversely affect employees with

[139] Mekwa MS *The Implementation of Employment Equity in the Public Service with specific reference to the Department of Justice and Constitutional Development* 2012 UNISA.
[140]Clause 17.1 of the Technical Assistance Guidelines.
[141] Clause 17.1 of the Technical Assistance Guidelines.
[142]Clause 16 of the Technical Assistance Guidelines.

disabilities[143]. Some of these factors would have been disclosed in the preparation phase where the employer evaluated and reviewed its recruitment policies and practices in order to avoid the potential for disability specific discrimination.[144] Corrective measures and objectives can then be implemented, aimed at the reasonable accommodation of prospective or current employees with disabilities.[145] The Guidelines provide that interview processes that are inaccessible to persons with a hearing impairment would require the employer to consult with an organisation for the hearing impaired to assist in putting together policy and guidelines on reasonable accommodation.[146] The other steps include setting time frames for milestones and targets to ensure representivity at all levels; allocation of resources for reasonable accommodation; communication of the content of the plan to employees; and integration of the plan into all organisational plans.[147]

Implementation therefore requires consultation with persons with disabilities, and should be preceded by proper planning, followed by an implementable plan that is monitored for efficacy. The Guidelines not only provide the know-how on how to implement an employment equity plan, but also address the question of how to overcome potential challenges in recruitment and selection,[148] placement,[149] and training and career advancement.[150]The lack of training and development, a factor identified by Rankhumise*et al*, can be avoided by engaging the employee with the disability in planning his or her own career development.[151] Whether training for job performance or career advancement, the training should not just be provided (as for able-bodied employees), but must be adapted to the circumstances of the employee with the disability. For example, the Guidelines suggest that an employee with a visual impairment should be provided with training materials in large print.[152]

It is clear that with proper planning, implementation and monitoring, employers can ensure that they comply with their obligations in terms of the EEA. The following chapter discusses

[143] Clause 16.2.2.of the Technical Assistance Guidelines.
[144]Clause 16.2.1.of the Technical Assistance Guidelines.
[145]Clause 16.2.2.of the Technical Assistance Guidelines.
[146]Technical Assistance Guidelines 55.
[147]Steps 6 to 10 Technical Assistance Guidelines 55.
[148]Clause 7 of the Technical Assistance Guidelines.
[149]Clause 9 of the Technical Assistance Guidelines.
[150]Clause 10 of the Technical Assistance Guidelines.
[151]Clause 10.1.of the Technical Assistance Guidelines.
[152]Technical Assistance Guidelines 41.

compliance and enforcement of the EEA. It analyses, among other things, the powers given to labour inspectors with regard to enforcement.

CHAPTER 4

EMPLOYERS' COMPLIANCE WITH THE EMPLOYMENT EQUITY ACT

4.1 Introduction

This chapter investigates whether employers are complying with the EEA by implementing an affirmative action plan in respect of persons with disabilities. It examines whether employers lack understanding of the Act, which results in non-compliance. It further considers whether employers are failing to implement affirmative action plans and are failing to submit employment equity reports to the Department of Labour. Non-compliance with the EEA and incorrect application of the Act is investigated.

4.2 Affirmative action in terms of the Employment Equity Act

In terms of section 13 of the EEA, in order to "achieve employment equity, all designated employers must implement affirmative action for people from designated groups". Section 13(2) (a) require a designated employer to consult with its employees in terms of section 16.[153]

The case law examined in chapter 6 demonstrates that employers are failing to implement affirmative action as required by EEA. For example, the case of *Director General,*

[153]Section 16 of the Employment Equity Act provides:
"(1) A designated employer must take reasonable steps to consult and attempt to reach agreement on the matters referred to in section 17-
(a) With a representative trade union representing members at the workplace and its employees or representatives nominated by them; or
(b) if no representative trade union represents members at the workplace, with its employees or representatives nominated by them.
(2) The employees or their nominated representatives with whom an employer consults in terms of subsection (1) (a) and (b), taken as a whole, must reflect the interests of-
(a) employees from across all occupational levels of the employer's workplace;
(b) employees from designated groups; and
© employees who are not from designated groups.
(3)This section does not affect the obligation of any designated employer in terms of section 86 of the Labour Relations Act to consult and reach consensus with a workplace forum on any of the matters referred to in section 17 of this Act."

Department of Labour v Win-Cool Industrial Enterprise (Pty) Ltd [154] shows that the respondent employer "failed to consult with its employees as required by section 16 of the EEA".[155]

4.3Compliance with Employment Equity

The Department of Labour during the Director-General review "found employers wanting in complying with the requirements stipulated by the Employment Equity Act".[156] During the Director-General's review the Department found among other things, the following challenges experienced by employers in complying with the Employment Equity Act:[157]

1. There was no buy-in from senior and top leadership to embrace employment equity as part of business imperatives.
2. Employment Equity managers assigned were mostly junior staff with no authority and the necessary resources to execute their mandate.
3. Consultative Forums were not existing or if existing they were not properly constituted.
4. Lack of consultation on the preparation and development of Employment Equity Plans including preparation of annual Employment Equity reports before submission to the Department.
5. In matters referred to the Labour Court companies were reluctant to submit requested information in the Director-General Reviews and companies failed to comply with recommendations made by the Director-General.[158]

The Commission is a statutory body established in terms of section 28 of the EEA to advise the Minister of Labour. It is required to submit an annual report to the Minister on the implementation of employment equity in terms of section 33 of the Act.[159]The following chapter discusses the role and powers of this commission in more detail. The lack of progress at middle management and professional levels remains of great concern to the Commission as

[154]http://www.saflii.org/za/cases/ZALC/2007/27.html ; (2007) 28 ILJ 880 (LC).
[155] Director General, Department of Labour v Win-Cool Industrial Enterprise (Pty) Ltd (D731/05) (2007) ZALC 27 para. 136; www.saflii.org/za/cases/ZALC/2007/27.html.
[156]2013/14 Commission for Employment Equity Report, p.8.
[157]2013/14 Commission for Employment Equity Report, p.8.
[158] 2013/14 Commission for Employment Equity Report, p.8.
[159]Employment Equity Report, 2013-2014, p.1.

it reflects corporate South Africa's *unwillingness* to embrace the transformation agenda.[160]Achievement of the objectives of the EEA is reported to be slow because some employers fail to report whilst others merely concentrate on filling quotas.[161]

According to the Employment Equity Report, employers "who seemed to make visible progress in attracting, developing, advancing and retaining suitable qualified persons, black people, woman and *people with disabilities*, the designated groups in terms of the Act, were those who saw affirmative action in favour of these groups as one of their key strategies to pursue corporate goals such as achieving and maintaining productivity, excellence and global competitiveness.[162]These employers regarded employment equity as a business imperative rather than as an issue of complying with the law[163]."

The submission that employers are mainly concerned about global competitiveness is similar to Newman's argument that employers comply with the BBBEE in order to gain points which are valuable in the procurement workforce profile.[164]

Based on the above submissions, it can be argued that some employers do not really care about equal employment for people with disabilities. Seemingly there is no focus on developing and empowering people with disabilities by providing training and there is also a lack of reasonable accommodation of people with disabilities.[165] It appears that once employers manage to balance the quotas and BBBEE level, they believe that compliance has been achieved. Such perceptions are incorrect, as complying with employment equity is not only about quotas, and "achieving and maintaining productivity, excellence and global competitiveness."[166] In addition to achieving the required number people with disabilities, designated employers should follow the "guidelines in the Technical Assistance Guidelines on the Employment of" Persons "with Disabilities" in order to reasonably accommodate

[160]Ibid.
[161]Employment Equity Report, 2003.
[162]www.labour.gov.za; Employment Equity Report, 2002; SA Board for People Practices (2014) *Position Paper on Employment Equity and Transformation* 19.≤available on www.sabpp.co.za/position-papers.
[163]www.labour.gov.za; Employment Equity Report, 2002; SA Board for People Practices (2014) *Position Paper on Employment Equity and Transformation* 19.≤available on www.sabpp.co.za/position-papers.
[164]Newman A 'Enabling the disabled complying with the BBBEE Act' (2013) *De Rebus*, p.44-46.
[165] Newman A 'Enabling the disabled complying with the BBBEE Act' (2013) *De Rebus*, p.44-46.
[166] Newman A 'Enabling the disabled complying with the BBBEE Act' (2013) *De Rebus*, p.44-46.

"people with disabilities". [167] Employers 'should familiarise themselves with' these Guidelines and follow them in order to effectively comply with employment equity.[168]

Research conducted in 2002 'by the Department of Labour among 67 private sector employers' revealed, among other things, the following factors which are evidence of non-compliance:

> "General compliance patterns showed excellent compliance on paper, but poor compliance overall when deeper level workplace change associated with the Act was evaluated; the objectives and goal setting processes in companies were poorly executed, and not linked to their core business strategy; in approximately 85% of the companies evaluated, no formal policies and/or programmes existed to proactively deal with racism, sexism and disability discrimination; very few companies demonstrated effort in the development of comprehensive employment equity plans, and in particular, affirmative action strategies; there were few affirmative action interventions reported, most linked to pre-existing strategies in large companies; some companies demonstrated a fair to good execution of employment equity performance, but there were concerns around the validity of the reported data by companies, particularly with regard to Barrier Audits; overall, companies demonstrated a lack of commitment to employment equity processes, a lack of leadership and real internal capacity to implement change; low-level input from organized labour into employment equity processes was a serious problem".[169]

---

[167] www.pulp.up.ac.za.

[168]Section 6.1 of the Technical Assistance Guidelines on the Employment of Persons with Disabilities defines reasonable accommodation as follows:

"All designated employers under the Act and Code, "should reasonably accommodate the needs of people with disabilities." This is both a non-discrimination and an affirmative action requirement. For employers who are required to develop employment equity plans, reasonable accommodation is an effective affirmative action measure. The aim of this accommodation is to reduce the impact of the impairment on the person's capacity to perform the essential functions of the job.

Accommodation, which are modifications or alterations to the way a job is normally performed, should make it possible for a suitably qualified would depend on the job and its essential functions, the work environment and the person's specific impairment.

Example of reasonable accommodation measures may:

Assistance in making the workplace more accessible on the kind of person's limitations and needs – for example, among others, removal of physical barriers and access to information and technology (equipment and software); Workstation modifications; Adjustment to work schedules; Adjustment to the nature and duration of the duties of the employee at work, either on a temporary or permanent basis; The reallocation of non-essential job tasks and any other modifications to the way the work is normally performed or has been performed or has been performed in the past."

[169] SA Board for People Practices (2014) *Position Paper on Employment Equity and Transformation* 19 www.sabpp.co.za/position-papers.

Some employers do recognise trade unions; hence, the 'low-level input' by 'organised labour' in 'employment equity processes'.

The Commission for Employment Equity's 'report of 2008/9 adopts a more aggressive tone, defending employment equity against its detractors and noting that':

> "It is disconcerting to observe from the DG Review work that all 106 companies that were reviewed were found to be in breach of procedural and substantive compliance. The majority of these companies are in the top 100 JSE listing, which implies that they have the resources to implement the Act. This creates an impression that these companies are treating the Act with contempt even 10 years after its promulgation. The Commission for Employment Equity (CEE) will continue to monitor compliance with the agreed DG Review recommendations and will 'name and shame' those who fail to comply with the agreed recommendations. The Report does note, however, that only one of these employers (Comair) was referred to the Labour Court for non-compliance, the others having accepted the recommendations of the Department of Labour (DoL). From the detail provided in the Report, it appears that companies mistakenly used their Sector Charters or BBBEE Codes to derive their targets, rather than the Economically Active Population (even though, according to the Act, this should have been acceptable)."[170]

The fact that the Commission found that even top employers listed on the JSE were in breach of employment equity in 2008 did not bode well for the government's goal of workplace equality in the second decade of democracy. It should be borne in mind that non-compliance by major employers has a major, negative impact on affirmative action for people with disabilities. One must concur with the 2008/9 Commission's Report that employers are treating the Act with contempt. It is possible that this is due to the fact the punishment for non-compliance is not sufficiently harsh. The DG Review recommends that employers that fail to comply should be 'named and shamed' as a lesson for other employers. No employer likes bad publicity. However, there is no evidence to suggest that the DG has taken steps to do so.

4.3 Conclusion

[170] SA Board for People Practices (2014) *Position Paper on Employment Equity and Transformation*19 www.sabpp.co.za/position-papers.

This chapter discussed employers' non-compliance with employment equity that negatively affects people with disabilities.

It was noted that many top 100 companies listed on the JSE are not complying with employment equity, even though they have the necessary resources to do so.[171] This affects people with disabilities either because there is no policy that caters for them or because employers are not complying with own policies to advance people with disabilities. It is possible for employers, both big and small, to implement affirmative action in a cost-effective manner. Large employers have an advantage in that they have qualified and experienced HR Officers that are familiar with the EEA and are well-equipped to draft an employment equity plan. Smaller employers might have to use the services of private labour consultants to draft their plan.

It appears that the Department of Labour is making progress in ensuring compliance with the EEA. The compliance review by '[172]the Commission for Employment Equity is a' positive step. In terms of its recommendations, the Department of Labour should issue compliance orders in terms of section 36 of the EEA when employers fail to comply. In the event of failure to 'comply with' the 'compliance order, the 'labour inspector will 'apply to the Labour Court' to have 'the compliance order' made 'an order of' court, where 'the court' may impose a fine of up to R1 500 000. Should the Department not do so, it will be remiss in its duties. The proposed enforcement process may improve employers' compliance with the EEA, which will yield results in employing people with disabilities.

While the notion of 'naming and shaming' employers that do not comply with employment equity is a good one, strict enforcement action must also be taken. The following chapter discusses enforcement of the EEA.

[171] SA Board for People Practices (2014) *Position Paper on Employment Equity and Transformation*19 www.sabpp.co.za/position-papers.
[172] www.gov.za.

CHAPTER 5

ENFORCEMENT OF THE EMPLOYMENT EQUITY ACT

5.1 Introduction

This chapter discusses enforcement of the EEA for those employers failing to comply. It focuses on instances and cases where the Department of Labour took action against non-compliant employers and considers whether employees and trade unions, amongst others, are utilising the available channels to challenge non-compliant employers. Finally, the chapter examines how the lack of enforcement affects people with disabilities.

In the first instance, it is necessary to consider the role of the Department of Labour as the main enforcer of this legislation.

5.2 Enforcement procedure

Section 34 of the EEA sets out the procedure for dealing with contraventions of the EEA.[173]In *Director General, Department of Labour v Win-Cool Industrial Enterprise (Pty) Ltd*[174]the Labour Court stated that:"the enforcement procedures, namely, of obtaining an undertaking and issuing a compliance order, are not prerequisites for the Court to issue a fine against the employer.[175] They nevertheless facilitate proof that the employer was aware of its statutory obligations and had an opportunity to comply."

It should be borne in mind that the reference to 'a workplace forum' in section 34 of the EEA includes amongst others, Commission for Conciliation, Mediation and Arbitration (CCMA). Section 34 states that any employee or trade union representative *may bring* an alleged contravention of this Act to the attention of, amongst other, a workplace forum. It is interesting and useful to note that in *Director General, Department of Labour v Win-Cool Industrial Enterprise (Pty) Ltd*, the Labour Court stated that: "it is not a prerequisite to first

[173] Section 34 of the Employment Equity Act provides that:
"Any employee or trade union representative may bring an alleged contravention of this Act to the attention of- (a) another employee; (b) an employer; (c) a trade union; (d) a workplace forum; (e) a labour inspector; (f) the Director-General; or (g) the Commission".
[174] (D731/05) (2007) ZALC 27.
[175]http://www.saflii.org/za/cases/ZALC/2007/27.html; (D731/05) (2007) ZALC 27, para. 112.

obtain a compliance order from the Department of Labour in order for the court to impose a fine". This clearly means that the Department, through the Director-General may bring an application to the Labour Court against a non-compliant employer without first issuing a compliance order.

Employees with disabilities and trade union representatives should challenge employers who contravene the EEA. It is worrying that most cases of contravention of the Act are brought to the Labour Court by the Department of Labour. Employees with disabilities and trade unions should be seen to take up the fight against employers for non-compliance with the Act. They should not wait for the Department of Labour to conduct an inspection to establish whether the employer is compliant. If employees were to become more involved, this would assist in achieving the purpose of EEA to ensure equitable representation of people with disabilities at the workplace.

5.3 Role of the Department of Labour

A labour inspector is given powers to enforce the EEA when designated employers do not comply with its provisions.[176]The Department successfully enforced compliance with the Act by a designated employer, Jinghua Garments (Pty) Ltd in the case of Director General of the Department of Labour v Jinghua Garments (Pty) Ltd (D730/05) (2006) ZALC 100. It took Jinghua Garments (Pty) Ltd to the Labour Court in 2007 for non-compliance and the court issued a fine of R200 000.[177] The Department called this a 'landmark' judgment and hoped that it would lead to better enforcement of the legislation.[178]The problem is that there are only a few cases where employees refer such matters to the Department of Labour.

5.4 Role of the Commission on Employment Equity

The role of this Commission is to advise Minister of Labour on Codes of Good Practice issued by the Minister in terms of section 54; regulations made by the Minister in terms of section 55; and policy and other matters pertaining to the Act.[179] In addition to the functions

[176]Section 35 of the Employment Equity Act 55 of1998.
[177]*Director-General, Department of Labour v Jinghua (Pty) Ltd* 2006 ZALC 100.
[178]http://www.labour.gov.za/DOL/media-desk/media-statements/2007/landmark-judgment-inspires-more-crackdown-on-equity-violators
[179]Section 30(1) of the Employment Equity Act.

in subsection (1) the Commission may make awards recognising employers' achievements in furthering the purpose of the Act; conduct research and report to the Minister on any matter relating to its application, including appropriate norms and benchmarks for the setting of numerical goals in various sectors; and perform any other prescribed function.[180]

It is important to examine whether the Commission on Employment Equity has played its role in terms of section 30 of the EEA. The Commission has submitted 14 annual reports to the Minister since its first report in the year 2000.[181] It was reported that the representation of black people with disabilities is much lower than those of the white group, particularly at the middle-to-upper levels.[182] This shows that race raises its ugly head, even in the employment of people with disabilities.[183]

In its Director-General Reviews, the Department found employers wanting in complying with the requirements of the EEA.[184] The Reviews revealed the following challenges, amongst others:

> "There was no buy-in from senior and top leadership to embrace employment equity as part of business imperatives; EE Managers assigned were mostly junior staff with no authority and the necessary resources to execute their mandate; Consultative Forums were not existing or if existing they were not properly constituted; Lack of consultation on the preparation and development of EE Plans, including preparation of annual EE reports before submission to the Department; In matters referred to the Labour Court, companies were reluctant to submit requested information in the DG Reviews and Companies failing to comply with recommendations made by the Director-General."[185]

It was reported that South Africa was still found wanting in relation to the equitable representation of designated groups, particularly women and people with disabilities in the middle-to-upper occupational levels. [186] As alluded above that the Commission on Employment Equity has submitted 14 annual reports for the past 14 years that is a clear

[180]Section 30(2) of the Employment Equity Act.
[181]Employment Equity Report, 2013/14 at page 1.
[182]Employment Equity Report, 2013/14 at page 7.
[183]Ibid.
[184] Employment Equity Report, 2013/14 at page 20.
[185] Employment Equity Report, 2013/14 at page 20.
[186]Employment Equity Report, 2012/13.

indication that the Commission played its role as required by Section 30 of the Employment Equity Act.

5.5 Challenges to enforcement

It has been found that employees and trade unions are not using legal frameworks to report cases of discrimination or a lack of progress in achieving employment equity.[187] For example, employees and trade unions are not reporting recalcitrant employers to the Director-General and are not referring cases to the Commission for Conciliation, Mediation and Arbitration (CCMA), Bargaining Councils or the Equality Court.[188]

The exception is trade union, Solidarity's actions on behalf of white men and women.[189] The activity of Solidarity Trade Union has tested the legislation and produced some useful rulings on the validity of the premises and implementation of the EEA.[190]The SA Board for People Practices has argued that:

> "…this reticence of previously disadvantaged people (and trade unions acting on their behalf), in the face of what is clearly still a situation of lack of affirmation, is due partly to the lack of capacity to address complex EE issues within the prescribed workplace structures such as the EE Committees. It is too easy for management to present strong arguments and reasons as to why progress is slow and why certain appointments happened and the employee representatives are unable to counter these arguments adequately."[191]

It can be argued that one of the reasons why employees and trade unions do not report recalcitrant employers to the relevant authorities is alack of knowledge.[192] This argument is supported by instances where affected employees and trade unions refer cases to the CCMA and Labour Court instead ofthe Department of Labour. It is worrying to note that only Solidarity Trade Union is active in challenging the legislation, mainly on behalf of white men

[187]SA Board for People Practices (2014) *Position Paper on Employment Equity and Transformation*19 www.sabpp.co.za/position-papers.
[188] Ibid.
[189] SA Board for People Practices (2014) *Position Paper on Employment Equity and Transformation*19 www.sabpp.co.za/position-papers.
[190] www.sabpp.co.za/position-papers.
[191] Ibid.
[192] SA Board for People Practices (2014) *Position Paper on Employment Equity and Transformation*19 www.sabpp.co.za/position-papers.

and women. This suggests that people with disabilities, particularly black disabled people, continue to suffer inequality. Organisations representing people with disabilities and people with disabilities themselves should rise to the challenge and take up the fight for their right to equality at the workplace. One solution is providing training on employment equity for people with disabilities to union representatives.

5.6 Technical Assistance Guidelines on the Employment of Persons with Disabilities

The purpose of the Technical Assistance Guidelines on the Employment of People with Disabilities (TAG) is to assist employers, employees, trade unions and people with disabilities to understand the EEA of 1998, and its Code of Good Practice on the Employment of People with Disabilities.[193] This includes non-discrimination and affirmative action measures and provides guidelines on how to implement it.[194]

The focus of item 16 of TAG is to assist employers to use the 'Code of Good Practice on Preparation, Implementation and Monitoring of Employment Equity Plans' to ensure that employees with disabilities are equitably represented in the workforce and are reported on accurately in their employment equity reports.[195] The Code of Good Practice on Preparation, Implementation and Monitoring of Employment Equity Plans sets out a 10-step plan to prepare and implement an employment equity plan in respect of people with disabilities.[196]

The TAG provides the following guidelines to employers:[197]

> 'Make sure the three options for disclosure noted in the Code are translated into clear communication with all employees and that specific procedures are set up to accommodate, encourage and ensure employees that disclosure will not result in adverse action of any kind; Consider especially how to structure the third option noted in paragraph 16.5(iii)[198] of the

[193]See item 1.1 of the Technical Assistance Guidelines on the Employment of People with Disabilities.
[194]Ibid.
[195]See item 16.2 of the Technical Assistance Guidelines on the Employment of People with Disabilities.
[196]See item 16 of the Technical Assistance Guidelines on the Employment of People with Disabilities.
[197]See item 16.3 of the Technical Assistance Guidelines.
[198]Section 16.5(iii) of the Code of Good Practice on the Employment of People with Disabilities provides:
"16.5 When designated employers are compiling their workplace profile in terms of Section 19 of the Act, employees with disabilities, including people with non-visible disabilities, may choose to either:
(i) not disclose their disability status; or
(ii) disclose their disability openly to their employer; and

Code; Revise existing employment equity planningprocesses to ensure that disability is included; Include employees with disabilities in the planning and monitoring process and use external expertise if appropriate."

In applying the EEA, it isnecessary for employers to consider any guidelines (codes) issued pursuant to Act. Although these codes are only guidelines, they have quasi-legal status as the courts are enjoined by the Act to consider them.[199]

It can be argued that the guidelines for employers provided in TAG are sufficient for employers to understand their duties. Research by the Department of Labour in 2002 among 67 private sector employers showed, among other things, that general compliance patterns showed excellent compliance on paper, but poor compliance overall when deeper level workplace change associated with the Act was evaluated.[200] Companies' objectives and goal setting processes were poorly executed. From the aforementioned findings it is clear that employers understand their duties in terms of the EEA, but it can be inferred that they are reluctant to comply with the Act.

5.7 Conclusion

Enforcing compliance with the EEA is crucial. It is evident that few employees or affected people have challenged employers on non-compliance. Since it appears that employees and trade unions lack adequate knowledge of the Act, it is suggested that union representatives empower themselves through training on employment legislation. The fact that employees and unions are not challenging employers on non-compliance indirectly affects people with disabilities who are looking for work as well as disabled employees. If employment equity were to be effectively enforced, people with disabilities would enjoy their right to equality in the workplace.

(iii) their identity musty be kept confidential."

[199]Section 54 of the EEA.

[200] SA Board for People Practices (2014) *Position Paper on Employment Equity and Transformation*19 www.sabpp.co.za/position-papers.

CHAPTER 6

THE COURTS' INTERPRETATION OF EMPLOYERS' DUTY TO IMPLEMENT AFFIRMATIVE ACTION, COMPLIANCE WTH THE EMPLOYMENT EQUITY ACT AND ENFORCEMENT OF THEACT

6.1 Introduction

This chapter discusses the courts' interpretation of employers' duty to implement affirmative action, compliance with the EEA and enforcement of the Act. It focuses on cases where people with disabilities as members of a designated group are directly or indirectly affected by court judgments. Some of the cases that will be discussed indirectly affect people with disabilities although they were not part of the litigation process.

6.2 Interpretation of implementation of affirmative action and compliance with the Employment Equity Act

In *Singh v Minister of Justice and Constitutional Development and Others*[201], the Equality Court ordered the respondent to include criteria to advance and promote disabled people in their recruitment process. For background purposes it is necessary to set out the facts of this case. The applicant (Singh), a disabled person who is deaf, applied for the position of magistrate and was not shortlisted. She then challenged the decision of the Selection Committee and maintained that not appointing her amounted to unfair discrimination and contravened the EEA. The respondent's advertisement stated that there is "a need for the judiciary to reflect broadly the racial and gender composition".[202]

The applicant argued that she was unfairly discriminated in that:[203]

> "She was excluded from consideration for appointment as a magistrate as a result of the requirement that applicants must have valid drivers' licenses. The requirement unfairly discriminates against people who have disabilities which preclude them from obtaining such

[201]http://www.saflii.org/za/cases/ZAEQC/2013/1.html;(2013) 34 ILJ 2807 (EqC).
[202](2013 para. 44.
[203](2013) 34 ILJ 2807 (EqC) para. 9.

> licenses. The criteria for selection employed by the Commission is rigid and discriminatory in that it exclude candidates from consideration for a range of posts on the basis of inflexible racial and gender preferences or quotas. The criterion is unfairly discriminatory and it resulted in her application not being considered on its merits. The selection criterion is unfairly discriminatory in that it directly or indirectly, actively or by omission, withholds benefits, opportunities or advantages from people with disabilities, in that it does not take into account disability in the criteria for short-listing of candidates." [204]

The respondent, in the papers and during arguments, tried to justify their failure to specifically mention disability in their policy and/ or criteria, because section 174(2)[205] of the Constitution was mentioned in their criteria.[206]

The court was of the view that disability should be included in order to encourage and promote disabled people to apply for positions.[207]The Equality Court considered, amongst other things, the following facts as evidence that the recruitment process discriminated against people with disabilities:

> "The policy of the Magistrates' Commission was silent as far as people with disabilities are concerned.[208] Hence the selection Committee did not notice or give any weight to the disability of the complainant even though it was mentioned in the application form.[209] Interestingly on the 3rd of October 2011 the legal administration office of the department responded to the complainant's attorney stating that the reason that the complainant was not short listed was because "there is an over representation of Indian females".[210] No mention is made that her disability was also considered."[211]

It appears that the above paragraph refers to affirmative action policy by stating "the policy of the Magistrates' Commission". It should be borne in mind that *disabled people* are also members of the designated group and that when a policy only makes reference to race and

[204] (2013) 34 ILJ 2807 (EqC), para.9.
[205]Section 174(2) of the Constitution states that:
"The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed."
[206](2013) 34 ILJ 2807 (EqC), para.20.
[207] Ibid.
[208](2013) 34 ILJ 2807 (EqC), para. 46.
[209]Ibid.
[210]Ibid.
[211]Ibid.

gender it discriminates against people with *disabilities.* The respondent's defence that the reason for not appointing the applicant was because of over-representation of Indian females is a clear indication that the employment equity policy was not properly applied. People with disabilities are also under-represented and are the most vulnerable people who should be accommodated.

The court was of the view that the reason for not shortlisting the complainant was her disability.[212] However, it is abundantly clear that when her application(s) was considered and the profile was prepared, the appointment committee did not take her disability into account and that it had a duty to advance and promote the position of disabled people.[213]

Knowing about the disability without understanding how the Constitution and conventions expect such people to be promoted and advanced is a serious injustice and is contrary to the spirit of the Equality Act.[214] Disabled people deserve to be given special status if the magistracy is to be transformed.[215] On this aspect Ngcobo J (as he then was in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*[216])said the following:

> "Transformation is a process. There are profound difficulties that will be confronted in giving effect to the constitutional commitment of achieving equality. We must not underestimate them. The measures that bring about transformation will inevitably affect some members of the society adversely, particularly those coming from the previously advantaged communities. It may well be that other considerations may have to yield in favour of achieving the goal we fashioned for ourselves in the Constitution. What is required, though, is that the process of transformation must be carried out in accordance with the Constitution."

The court made the interesting and important point that: "It is not enough to put a symbol of a wheelchair on the letterhead and to allege that the Magistrates' Commissioner is sensitive to the plight of disabled people".[217]

---

[212](2013) 34 ILJ 2807 (EqC) (23 January 2013), para. 32.
[213] Ibid.
[214](2013) 34 ILJ 2807 (EqC) (23 January 2013), para. 47.
[215] Ibid.
[216]http://www.saflii.org/za/cases/ZACC/2004/15.html; [2004] ZACC 15; 2004 (4) SA 490 (CC), para. 76.
[217](2013) 34 ILJ 2807 (EqC) (23 January 2013), para. 33.

It is submitted that it is common practice among employers to put a symbol of a wheelchair on their letterhead and advertisements, while not advancing and promoting the position of disabled people.

The Magistrates' Commission has since altered its selection criteria in line with this judgment, as is evident from its report to the National Council of Provinces (NCOP) on 23 July 2014.[218] Mr Abel Daniel Schoeman the Secretary of the Magistrates commission in his affidavit supporting the opposition of the complainant's application has set out the criteria considered for short listing purposes as follows: "section 174 (2) of the Constitution of the Republic of South Africa Act 108 of 1996; experience; qualification; the specific needs of the office and managerial experience." [219] Mr Schoeman further mentioned the criteria for interviews as follows: "qualification; legal knowledge; section 174 (2) of the Constitution; leadership and management skills; language proficiency and communication capabilities; vision; commitment to transformation and development; social context sensitivity; interpersonal relationships and integrity."[220]

The Equality Court in Singh referred to the dicta in *Du Preez v Minister of Justice and Constitution Development & Others*[221], where the court considered the application of a similarly insurmountable barrier to appointment by the selection committee.[222] The court referred to the argument of Pretorius, Klinck and Ngwena as follows:[223]

> "[The authors] describe as the most drastic form of preferential treatment' those employment policies or programs which afford absolute preference to members of designated groups who meet the minimum job requirements. 'The effect of such an approach is', they say, 'that selection is done irrespective of how the preferred designated group candidate compares with competitors from non-designated groups and, sometimes, irrespective of how the decision

[218] Magistrates' Commission 'Composition and Functioning of the Magistrates Commission' 23 July 2014 Report to NCOP Security and Justice http://www.pmg.org.za/report/20140723-composition-and-functioning-magistrates-commission-independent-police-investigative-directorate-its-2014
[219] (2013) 34 ILJ 2807 EqC, para.19.
[220] (2013) 34 ILJ 2807 EqC, para.19.
[221] http://repository.uwc.ac.za/xmlui/bitstream/handle/10566/659/DuToitWorkplace2007.pdf.txt?sequence=4 ; (2006) 5 SA 592 (EqC).
[222] (2013) 34 ILJ 2807 (EqC) (23 January 2013), para. 38.
[223] (2013) 34 ILJ 2807 (EqC) (23 January 2013), para. 38.

> affects the excluded non-designated group members personally, as well as the specific operational needs of the employer or the special requirements of the job'. The learned authors express the view that such measures would not be compatible with the variety of factors that need to be taken into account for an employment decision to meet the constitutional requirements of fairness and proportionality."

In the present case, the court was of the view that, in reconsidering the decision of the Selection Committee, the appointment committee used criteria that clearly did not promote and advance the employment of people with disabilities.[224]The court further stated that the Selection Committee and Appointment Committee should have a good understanding of the Constitution, Equality Act and conventions ratified by South Africa and should be seen to be promoting and advancing the position of disabled people so that the Magistrates' Commission can perform its functions properly in compliance with constitutional requirements. Race, gender and disability should not be subordinated[225]and the integration of people with disabilities in the magistracy should be encouraged.[226]

There is a need for a clear policy on the promotion and advancement of disabled people in order to attract such people to the Magistracy and offer facilities that enhance their potential.[227] The court concluded that the Magistracy will not be diverse or legitimate if it only represents the racial composition of the country and does not provide for proper and proportionate representation of people with disabilities.[228]

It is proposed that when cases such as *Singh* come to the attention of the Department of Labour, the labour inspector should take enforcement action against the employer in breach of the EEA. The inspector should not wait for an affected employee to lodge a complaint of non-compliance with the Act.

Singh chose the Equality Court as opposed to the Labour Court because her complaint concerned unfair discrimination in terms of Section 4 (2) of the Promotion of Equality and

[224](2013) 34 ILJ 2807 (EqC) (23 January 2013), para. 42.
[225](2013) 34 ILJ 2807 (EqC) (23 January 2013), para. 45.
[226](2013) 34 ILJ 2807 (EqC) (23 January 2013), para. 45.
[227](2013) 34 ILJ 2807 (EqC) (23 January 2013), para. 50.
[228](2013) 34 ILJ 2807 (EqC) (23 January 2013), para. 53.

the Prevention of Unfair Discrimination Act 4 of 2000.[229] Singh alleged that she was unfairly discriminated against in that:[230]

> "She was excluded from consideration for appointment as a magistrate as a result of the requirement that applicants must have valid drivers' licences. The requirements unfairly discriminate against people who have disabilities which preclude them from obtaining such licenses. The criteria for selection employed by the Commission is rigid and discriminatory in that it exclude candidates from consideration for a range of posts on the basis of inflexible racial and gender based preferences or quotas. The criteria are unfairly discriminatory and it resulted in her application not being considered on its merits. The selection criteria are unfairly discriminatory in that it directly or indirectly, actively or by omission, withholds benefits, opportunities or advantages from people with disabilities, in that it does not take into account disability in the criteria for short-listing of candidates."

One can infer that Singh relied on Section 9 (3) of the Constitution in alleging that the selection criteria were directly or indirectly discriminatory.[231] It should be noted that the Minister of Justice and Constitutional Development, as the first respondent in Singh's case, is an organ of state in terms of section 9(3) which is not supposed to discriminate against people with disabilities.

The court judgment in Singh is not sufficiently convincing in indicating that it protects people with disabilities. It appears from the judgment that the court did not take into consideration the arguments of the South African National Council for the Blind and League of Friends of the Blind.[232] These organisations applied to the court to be admitted as *amici curie.*[233] As

---

[229] Section 4 (2) of the Promotion of Equality and the Prevention of Unfair Discrimination Act states:
"that in the application of the Equality Act it is necessary to take into account the existence of systematic discrimination and inequalities particularly in respect of race, gender and disability in all spheres of life as a result of the past and present unfair discrimination, brought about by colonialism, the apartheid system and patriarchy."

[230] (2013) 34 ILJ 2807 (EqC), para 9.

[231] Section 9 (3) of the Constitution states:
"The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, *disability,* religion, conscience, belief, culture, language and birth.

[232] (2013) 34 ILJ 2807 (EqC), para 6. On 9 December 2011 the South African National Council for the Blind and League of Friends of the Blind issued an application seeking an order that they be admitted as *amic curiae* and that they be granted: the right to present evidence; the right to lodge written submissions in this matter; and the right to present oral argument at the hearing of this matter. The orders sought were granted and the matter was postponed to 16 January 2012.

[233] Ibid.

organisations fighting for the rights of people with disabilities, they had an interest in this case. The court should therefore have taken their arguments seriously in arriving at its decision. This judgment is not a good precedent to serve as a guide to employing people with disabilities. It makes no reference to the EEA and the Codes of Good Practice issued pursuant to the Act.

One of the solutions to the challenge of compliance is that managers in all key departments should be provided with training on employment equity. If managers could change their attitudes towards people with disabilities and come to regard them as people who are capable of doing the job, this would help to improve compliance with the EEA.

6.3 Interpretation of enforcement of the Employment Equity Act

In the case of *Dudley v The City of Cape Town* (2008) 12 BLLR 1155 (LAC), the Labour Appeal Court was faced with, among other issues, determining whether an applicant for employment the respondent employer had failed to comply with one or other of its obligations relating to affirmative action. The applicant is a member of the designated group who complains that a designated employer (respondent) failed to comply with its obligations relating to affirmative action. The court also had to determine whether the applicant may institute court proceedings to enforce such obligations prior to the exhaustion of the monitoring and enforcement procedure provided for in Chapter five.

The appellant (Dudley) directly approached the Labour Court, alleging that the respondent (the City of Cape Town) failed to implement affirmative action, and failed to prepare a proper employment equity plan and/or to adhere to employment equity principles and/or to comply with its obligations in terms of Chapter three of the EEA.[234]

The court held that the obligations placed upon a designated employer by the provisions of Chapter three can all be *enforced* by the use of the enforcement procedure provided for in Chapter five.[235] The court's view was that the reason the legislature did not include a dispute resolution procedure in Chapter three is because the idea was that the enforcement procedure

---

[234]*Dudley v The City of Cape Town*(2008) 12 BLLR 1155 (LAC), para.14
[235]Dudley v The City of Cape Town (2004) 13 LC, para.43.

provided for in Chapter five should be used instead or should at least be exhausted before there could be a resort to the institution of court proceedings.[236] I agree with the court's finding that the enforcement procedure provided in Chapter five must be adhered to before a party can approach the Labour Court. I also agree with the court's view that the legislature did not include a dispute resolution procedure in Chapter five because it intended that the remedies provided in Chapter five should be exhausted before approaching the Labour Court. It should be borne in mind that the enforcement procedures provided for in Chapter five of EEA are administrative; logic therefore dictates that administrative law should apply.

The case of *The Director-General of the Department of Labour v Jinghua Garments (Pty) Ltd*[237]sets a good precedent in that the court ordered the respondent to pay a fine of R200 000 for contravention of sections16, 19, 20, and 21 of the EEA. The respondent was a designated employer in that it employed 280 employees.[238] In terms of section 1 of the Act an employer with 50 or more employees is a designated employer and is required to implement affirmative action. The respondent operated without an employment equity plan even though they were required by law to have such a plan. Despite being ordered by the labour inspector to implement an affirmative action plan, the respondent failed to comply with the compliance order.[239] The facts of this case can be summarised as follows:

It can be argued that if employers with more than 200 employees do not have employment equity plans, it will be difficult for the South African government to achieve its goal of ensuring that people from designated groups, including *disabled people* have equal employment opportunities. It is not easy, if not impossible, to monitor whether an employer who does not have an employment equity plan is making any progress in terms of advancing and accommodating the needs of people with disabilities.

Director-General, Department of Labour vs Comair Ltd (2009) 11 BLLR 1063 (LC)

The [240]application before the court was a counter application to the main application in terms of which the applicant (in the main application) intended applying to the court for an order

[236] Ibid.
[237]2006 ZALC 100.
[238]2006 ZALC 100, para. 2.
[239] 2006 ZALC 100, para. 138.
[240]http://www.saflii.org/za/cases/ZALC/2009/78.html.

declaring, *inter alia*, that the respondent (in the main application) was in breach of section 20 of the [241]EEA by failing to prepare and implement an employment equity plan which would achieve reasonable progress towards employment equity in the respondent's workplace between the period 2000 and September 2007.[242] The applicant also intended asking for a declaration that the respondent was in breach of section 21 (2), (3),(4) & (5) of the EEA in that the reports that were submitted were not based on any existing employment equity plan and that the respondent was in breach of section 21(3) of the EEA in that the respondent failed to submit a report to the Director General (DG) of Labour (the First Applicant in the main application) [243]on the first working day of October 2007.[244] An order was also sought in terms of which the respondent must pay a fine in the sum of R900 000 [245]as prescribed by schedule 1 of the EEA.[246]

The issues before this Court were as follows:[247]

> "(1) The first is whether the DG is accountable through review proceedings for actions taken in the exercise of the powers vested in the DG under the EEA.
> (ii) If this Court finds that this is so, the second question to be considered is whether the DG properly exercised the public power bestowed (and applied to the Respondent) upon him in terms of the EEA.
> (iii) Should this Court find that the DG did not properly exercise the public power in question; the final question to consider is whether or not the decision should be set aside."

In the main application, the applicant described its efforts to chastise[248]Comair for its alleged non-compliance with its obligations in terms of the EEA.[249] Comair responded.[250] A further [251]reply was received from the DG which, in Comair's opinion, demonstrated that the DG lacked a proper appreciation of the system of enforcement created by the EEA.[252]

---

[241]http://www.saflii.org/za/cases/ZALC/2009/78.html.
[242]http://www.saflii.org/za/cases/ZALC/2009/78.html
[243]http://www.saflii.org/za/cases/ZALC/2009/78.html
[244]http://www.saflii.org/za/cases/ZALC/2009/78.html
[245]http://www.saflii.org/za/cases/ZALC/2009/78.html
[246]http://www.saflii.org/za/cases/ZALC/2009/78.html
[247]2009 11 BLLR 1063 (LC), para.4.
[248]2009 11 BLLR 1063 (LC), para.16.
[249]2009 11 BLLR 1063 (LC), para.16.
[250]2009 11 BLLR 1063 (LC), para.16.
[251]2009 11 BLLR 1063 (LC), para.16.
[252]2009 11 BLLR 1063 (LC), para.16.

Comair was of [253]the view that the DG misunderstood its powers in terms of the EEA and as a consequence thereof instituted a counter application to challenge, by way of review, the lawfulness of the exercise of the powers of the DG under the EEA, including, in the circumstances of this case, the act of referring the dispute to the Labour Court in terms of section 45 of the EEA.[254]Consequent to the [255]DG's assessment of Comair's compliance, the applicant referred Comair's alleged non-compliance to the Labour Court.[256]

In terms of the counter application, the respondent firstly sought to review and set aside the recommendations issued by the First Applicant (the DG) pursuant to section 44(b) of the EEA.[257][258]Secondly, the respondent sought to review and set aside the decision taken by the DG pursuant to section 45 of the EEA to refer the respondent's alleged non-compliance with the recommendations in terms of section 44 (b) of the EEA to the Labour Court.[259] The respondent argued that this court was empowered in terms of section 50(1)(h) of the EEA to review the decisions of the DG as contemplated by the EEA.[260] The respondent further argued [261]that the DG had patently not taken into account all of the circumstances required by section 42[262] of the EEA.[263]

---

[253]2009 11 BLLR 1063 (LC), para.17.
[254]2009 11 BLLR 1063 (LC), para.17.
[255]2009 11 BLLR 1063 (LC), para.18.
[256]2009 11 BLLR 1063 (LC), para.18.
[257]2009 11 BLLR 1063 (LC), para.19.
[258]2009 11 BLLR 1063 (LC), para.19.
[259] 2009 11 BLLR 1063 (LC), para.19.
[260] 2009 11 BLLR 1063 (LC), para.19.
[261]2009 11 BLLR 1063 (LC), para.43.
[262]Section 42 of the EEA provides:
"In determining whether a designated employer is implementing employment equity in compliance with this Act, the Director-General, or any person, or any body applying this Act, in addition to the factors listed in section 15, take into account all of the following:

(a) The extent to which suitable qualified people from and amongst the different designated groups are equitable represented within each occupational category and level in that employer's workforce in relation to the-
    (i) demographic profile of the national and regional economically active population;
    (ii) pool of suitably qualified people from designated groups from which the employer may be reasonable expected to promote or appoint employees;
    (iii) economic and financial factors relevant to the sector in which the employer operates;
    (iv) present and anticipated economic and financial circumstances of the employer; and
    (v) the number of present and planed vacancies that exist in the various categories and levels, and the employer's labour turnover;
(b) progress made in implementing employment equity by other designated employers operating under comparable circumstances and within the same sector;
(c) reasonable effort made by a designated employer to implement its employment equity plan;

The applicant submitted that the DG is empowered in terms of section 43[264] of the EEA to conduct a review to determine whether or not the employer is complying with the provisions of the EEA and that there can therefore be no doubt that the law empowers the DG to conduct such a review.[265] The court failed to understand why the counsel for the respondent (Advocate Sutherland) disputed this. What was disputed by the respondent was whether or not the DG properly exercised his powers in terms of section 43 of the EEA.[266]

The applicant argued that the DG had taken into account all other relevant factors including those set out in section 42 of the EEA.[267] The court agreed with Comairthat the recommendation by the DG did not reflect that he had applied his mind to the matter.This was supported by the fact that there was no indication from the recommendation that the DG had complied with the mandatory instruction contained in section 42 of the EEA. There was no indication that the DG even considered the factors which the DG is obliged to consider in terms of section 42 of the EEA. There was no indication that the DG had requested Comairto submit a copy of its current analysis or employment equity plan (section 43(2) of the EEA).

The court agreed with the respondent's submission that there was no indication from the recommendation that an effort was made to determine the number of suitably qualified people amongst the different designated groups within each occupational category atComair'sworkplace; no measurement wasmade against the demographic profile of

(d) the extent to which the designated employer has made progress in eliminating employment barriers that adversely affect people from designated groups; and
(e) any other prescribed factor."

[263](2009) 11 BLLR 1063 (LC), para.35.

[264] Section 43 of the EEA provides that:
"(1)The Director-General may conduct a review to determine whether an employer is complying with this Act.
(2) In order to conduct the review the Director-General may-
(a) request an employer to submit to the Director-General a copy of its current analysis or employment equity plan;
(b) request an employer to submit to the Director-General any book, record, correspondence, documentation or information that could reasonable be relevant to the review of the employer's compliance to with this Act;
(c) request a meeting with an employer to discuss its employment equity plan, the implementation of its plan and any other matter related to the compliance with this Act; or
(d) request a meeting with any-
(i) employee or trade union consulted in terms of section 16;
(ii) workplace forum; or
(iii) other person who may have information relevant to the review."

[265](2009) 11 BLLR 1063 (LC), para.37.

[266] Ibid.

[267](2009) 11 BLLR 1063 (LC), para.39.

thenational and regional economically active population[268][269]There also appeared to have been no consideration of the pool of suitably qualified people (section 42(a)(ii).[270] No[271] allowance was made for the economic and financial factors relevant to the sector or the financial circumstances of this particular employer; nor was any reference made to the number of vacancies in the various categories and levels within Comair, or the employer's labour turnover.

The applicant [272]argued that the factors listed in section 42 of the EEA were merely an assessment tool and not decisive.[273] It was further argued that, even if the factors in section 42 were not taken into account, this did not mean that the recommendation should be set aside. It was argued [274]further that thecourt should not follow a formalistic approach but should adopt a holistic approach.

The court had difficulties with the above argument.[275] The first was the plain language used in section 42, namely that the DG in "applying this Act, must in addition to the factors stated in section 15, take into account all of the following:

(a) The extent to which suitably qualified people from and amongst the different designated groups are equitably represented within each occupational and regional economically active population;
(b) Reasonable steps taken by a designated employer to train suitably qualified people from the designated groups;
(c) Reasonable steps taken by a designated employer to implement its employment equity plan;
(d) The extent to which the designated employer has made progress in eliminating employment barriers that adversely affect people from designated groups;
(dA) Reasonable steps taken by an employer to appoint and promote suitably qualified people from the designated groups; and
(e) Any other prescribed factor.[276]

[268] Section 42(a)(i) of the EEA.
[269]http://www.saflii.org/za/cases/ZALC/2009/78.html
[270]Ibid.
[271]http://www.saflii.org/za/cases/ZALC/2009/78.html
[272]http://www.saflii.org/za/cases/ZALC/2009/78.html
[273](2009) 11 BLLR 1063 (LC), para.45.
[274]http://www.saflii.org/za/cases/ZALC/2009/78.html
[275]Ibid, para.46.

(section 42(a)-(e) of the EEA). The court felt that a plain reading of this section showed that there is a mandatory duty on the DG to consider these factors.[277] It was clear from the documents filed by the state attorneys that these factors were not considered."[278]

The court stated that it was [279]not persuaded that the DG had properly exercised his discretion as contemplated by section 42 of the LRA. [280] The recommendation merely paraphrased [281] extracts from the relevant sections. Moreover, no attempt was made to properly consider the factors set out in section 42 of the EEA. The court was of the view that DG's decision was reviewable in terms of section 50 (1)(h) of the EEA and that it should be set aside.[282]

The court made the following order:[283]

1. The [284]recommendation by the First Applicant dated 15 March 2007 in terms of section 44(b) of the Employment Equity Act 55 of 1998 is reviewed and set aside.
2. The decision by the First Applicant in terms of section 45 of the EEA to [285]refer the Respondent's alleged non compliance with the recommendations dated 15 March 2007 to the Labour Court is reviewed and set aside.
3. The Applicant is ordered to pay the costs including the costs of two counsel.

The court stated that, in [286]order to give effect to the substantive approach to equality, a positive duty is placed upon government to ensure that every individual fully enjoys all rights and freedoms and to promote the achievement of equality though the adoption of measures designed to protect or advance persons or categories of persons disadvantaged by unfair

[276] Section 42 (1) of the EEA.
[277] Ibid.
[278] Ibid.
[279]http://www.saflii.org/za/cases/ZALC/2009/78.html
[280](2009) 11 BLLR 1063 (LC), para.47.
[281]http://www.saflii.org/za/cases/ZALC/2009/78.html
[282](2009) 11 BLLR 1063 (LC), para.48.
[283](2009) 11 BLLR 1063 (LC), para.51.
[284]http://www.saflii.org/za/cases/ZALC/2009/78.html
[285]http://www.saflii.org/za/cases/ZALC/2009/78.html
[286]http://www.saflii.org/za/cases/ZALC/2009/78.html

discrimination in the past.[287] These measures clearly include affirmative action measures.[288] In order to promote and ensure adherence to the goal of employment equity, the EEA thus places an obligation on every designated employer to implement affirmative action measures (substantive equality).[289]

One is of the view that the applicant in the above case should have conducted a proper assessment and review of the respondent's compliance. The applicant's failure to comply with sections 42 and 43 of the EEA contributed to thefailure to achieve the affirmative action policy's goal of equality in the workplace. Had the applicant complied, this would have revealed whether or not the respondent complied with the EEA. The applicant's non-compliance had an indirect impact on people with disabilities in that the respondent's report would show whether or not people with disabilities were represented.

Director General, Department of Labour v Win-Cool Industrial Enterprise (Pty) Ltd (D731/05) (2007) ZALC 27[290].

The respondent was a company that employed about 132 employees[291] in Newcastle.[292]As a designated employer[293] it was required to[294]comply with the affirmative action chapter of the EEA.[295] On[296] 4 November 2003, Hlonipile Gladys Nkomo, a labour inspector from the Department of Labour, [297] inspected the factory (respondent) to check that there was compliance with labour laws.[298] She reported that the respondent did not comply with any of the obligations in terms of the EEA.[299] She received an undertaking on behalf of the

[287](2009) 11 BLLR 1063 (LC), at para.10.
[288]Ibid.
[289](2009) 11 BLLR 1063 (LC), at para.12.
[290]http://www.saflii.org/za/cases/ZALC/2007/27.html
[291] In terms of section 1 of the EEA 'designated employer' means:
"a person who employs 50 or more employees." Win-Cool Industrial Enterprise (Pty) Ltd is a juristic person in terms of section 1 of the Companies Act 71 of 2008 and as such a designated employer in terms of section 1 of the EEA. Therefore it is expected to comply with chapter 3 of the EEA which provide for affirmative action.
[292](2007) ZALC 27, at para 2.
[293] Section 12 of the EEA provides that chapter 3 dealing with 'affirmative action' applies to designated employers.
[294]http://www.saflii.org/za/cases/ZALC/2007/27.html
[295] Ibid.
[296]http://www.saflii.org/za/cases/ZALC/2007/27.html
[297]http://www.saflii.org/za/cases/ZALC/2007/27.html
[298](2007) ZALC 27, at para 5.
[299] Ibid.

respondent in terms of section 36[300] that it would comply with sections 20,[301]21(1),[302] 25(1) and 25(2) and 25(3) of the EEA.[303],[304] Subsequent visits on 24 November 2003 and 2

[300] Section 36 of the EEA provides:
"(1) A labour inspector may request and obtain a written undertaking from a designated employer to comply with paragraph (a), (b), (f), (h), (i) or (j) within a specified period, if the inspector has reasonable grounds to believe that the employer has failed to-

(a) consult with employees as required by section 16;
(b) conduct an analysis as required by section 19;
(c) to (e) inclusive…… (Paras. (c) to (e) inclusive omitted by s.13 of Act 47 of 2013.)
(f) publish its report as required by section 22
(g) ……
(Para. (g) omitted by s.13 of Act 47 of 2013.)
(h) Assign responsibility to one or more senior managers as required by section 24;
(i) Inform its employees as required by section 25; or
(j) Keep records as required by section 26.

(2) If a designated employer does not comply with a written undertaking within the period stated in the written undertaking, the Labour Court may, on application by the Director-General, make the undertaking, or any part of the undertaking, an order of the Labour Court."
(S. 36 substituted by s.13 of Act 47 of 2013.)

[301] Section 20 of the EEA provides:
"(1) A designated employer must prepare and implement an employment equity plan which will achieve reasonable progress towards employment equity in that employer's workplace.
(2) An employment equity plan prepared in terms of subsection (1) must state-
(a) the objectives to be achieved for each year of the plan;
(b) the affirmative action measures to be implemented as required by section 15(2);
(c) where underrepresentation of people from designated groups has been identified by the analysis, the numerical goals to achieve the equitable representation of suitable qualified people from designated groups within each occupational level in the workplace, the timetable within which this is to be achieved, and the strategies intended to achieve those goals;
[Para. (c) substituted by s.10(a) of Act 47 of 2013.]
(d)the timetable for each year of the plan for the achievement of goals and objectives other than numerical goals;
(e) the duration of the plan, which may not be shorter than one year or longer than five years;
(f) the procedures that will be used to monitor and evaluate the implementation of the plan and whether reasonable progress is being made towards implementing employment equity;
(g) the internal procedures to resolve any dispute about the interpretation or implementation of the plan;
(h) the persons in the workforce, including senior managers, responsible for monitoring and implementing the plan; and
(i) any other prescribed matter.
(3) For purposes of this Act, a person may be suitably qualified for a job as a result of any one of, or any combination of that person's-
(a) formal qualification;
(b) prior learning;
(c) relevant experience; or
(d) capacity to acquire, within a reasonable time, the ability to do the job.
(4) When determining whether a person is suitably qualified for a job, an employer must-
(a) review all the factors listed in subsection (3); and
(b) determine whether that person has the ability to do the job in terms of any one of, or any combination of those factors.
(5)In making a determination under subsection (4), an employer may not unfairly discriminate against a person solely on the grounds of that person's lack of relevant experience.
(6)An employment equity plan may contain any other measures that are consistent with the purposes of this Act.

February 2004 showed that the respondent had not complied with his undertaking.[305] On 31 March 2004, Nkomo issued a compliance order in terms of section 37(1)(b), directing the respondent to comply with section 36(a)-(j) of the EEA within 30 days.[306] The respondent continued not to comply.[307]

On 31 January 2005 the respondent consulted with its employees to advise them of the EEA and its consequences.[308] As a copy of the plan that was delivered to the Department of Labour could not be found, the respondent instructed its attorneys to draft a new plan.[309]

The applicant submitted that the respondent should be found guilty of contravening sections 16, 19, 20 and 21 of the EEA.[310] Section 17 lists the matters for consultation.[311] However, 'in [312]motivating for the maximum penalty, it was' erroneously 'submitted that the respondent was guilty of contravening all the sections mentioned in Schedule 1 of the EEA'.[313] No submissions were advanced 'in [314]respect of sections 22 and 23'and 'it' was 'assumed that a

---

(7) The Director-General may apply to the Labour Court to impose a fine in accordance with Schedule 1, if a designated employer fails to prepare or implement an employment equity plan in terms of this section."
[Sub-s 97) added by s. 10(b) of Act 47 of 2013.]

[302]Section 21 of the EEA provides:
"(1) A designated employer must submit a report to the Director-General one every year, on the first working day of October or on such other date as may be prescribed".
[Sub-s. (1) substituted by s.11 (a) of Act 47 of 2013.]

[303] Section 25 of the EEA provides:
"(1) An employer must display at the workplace where it can be read by employees a notice in the prescribed form, informing them about the provisions of this Act.
(2) A designated employer must, in each of its workplaces, place in prominent places that are accessible to all employees-
(a) the most recent report submitted by the employer to the Director-General;
(b) any compliance order, arbitration award or order of the Labour Court concerning the provisions of this Act in relation to that employer; and
(c) any other document concerning this Act as may be prescribed.
(3) An employer who has an employment equity plan, must make a copy of the plan available to its employees for copying and consultation."

[304] Ibid.

[305](2007) ZALC 27, at para 6.

[306](2007) ZALC 27, at para 7.

[307]Ibid, para.7.

[308]Ibid, para.13.

[309]Ibid. It is clear that the respondent failed to comply with section 26 of the EEA in that it did not keep a record of the employment equity plan.

[310](2007) ZALC 27, at para 15.

[311]Ibid.

[312]http://www.saflii.org/za/cases/ZALC/2007/27.html

[313]Ibid.

[314]http://www.saflii.org/za/cases/ZALC/2007/27.html

declaration in terms of the aforesaid sections was 'no longer sought'.[315] It 'was' further submitted, that the '[316]respondent was defiant or indifferent to its statutory obligations'.[317]'In its response to the first application', the respondent 'alleged that it had complied with section 20'.[318]'As proof of that compliance it attached not a plan but a report'.[319]'The respondent was therefore not *bona fide* in attempting to comply with the EEA'.[320] It was further submitted that the '[321]respondent either admitted in the first application that it did not comply with its remaining obligations or that the evidence it proffered did not establish compliance'.[322]'The purported consultation was not in compliance with section 16, read with sections 17 and 19'.[323] It was submitted that the report lodged with the Department of Labour'[324]should have been for 2003'; however, 'the report that was lodged was dated 28 October 2004'.[325]'No report was therefore lodged for 2003'. 'Section 21 was not complied with'.[326]The Department of Labour' [327] received no plan and none was displayed at the respondent's premises'; therefore 'section 20'was'not complied with'.[328]'The plan that was attached to the Opposing Affidavit was clearly prepared recently'.[329]For the amount of the fine,[330] the respondent relied on the unreported decision of Sangoni AJ in *Director-General of the DOL v Ginghua Garments*.[331]'The penalty was high because the legislature intended it to act as both a deterrent and retribution and also preventive.'[332]'The contraventions had been continuous since at least November 2003'. 'An aggravating factor was that the respondent claimed to have complied when the evidence to the contrary was overwhelming.'[333]It was therefore argued 'that the amount of the fine should affirm the [334]principle of the rule of law'.[335]'In a

[315]http://www.saflii.org/za/cases/ZALC/2007/27.html
[316]http://www.saflii.org/za/cases/ZALC/2007/27.html
[317](2007) ZALC 27, at para 16.
[318]Ibid.
[319](2007) ZALC 27, at para 16.
[320]Ibid.
[321]http://www.saflii.org/za/cases/ZALC/2007/27.html
[322]Ibid, para.17.
[323]Ibid.
[324]http://www.saflii.org/za/cases/ZALC/2007/27.html
[325]Ibid, para.18.
[326]Ibid.
[327]http://www.saflii.org/za/cases/ZALC/2007/27.html
[328]Ibid.
[329]Ibid.
[330](2007) ZALC 27, at para 19.
[331]Case No D730/05.
[332](2007) ZALC 27, at para 19.
[333]Ibid.
[334]http://www.saflii.org/za/cases/ZALC/2007/27.html
[335](2007) ZALC 27, at para 20.

case such as this, the respondent's financial position was not relevant.' The '[336]maximum fine should be imposed with a portion suspended'.[337]

'Affirmative [338]action is politically sensitive. The adverse publicity that accompanies a mere complaint that an employer is not complying with affirmative action provisions can result in the employer being labelled racist, sexist, and anti-democratic or counter-revolutionary.'

The court found '[339]that section 50 (1)(g) of the Employment Equity Act does not create an offence but a contravention for which a penalty is payable'.[340] The prohibited conduct consists exclusively of omissions.[341]'An[342] example of a formal omission is the failure to file a report with the' Department of Labour.[343]

'Mechanical compliance with the prescribed processes is not genuine compliance with the spirit and letterof the EEA.[344] Compliance is not an end in itself. The employer must systematically develop the workforce out of a life of disadvantage. Disadvantage of all kinds is targeted by the EEA. Contrary to the submission by the respondent, employing exclusively black people and mainly women in low skilled jobs at low rates of pay cannot redress race, gender, or economic discrimination. Equality is about creating quality jobs that inspire the spiritual and material development of the workforce and thereby, economic growth.[345]'

The court stated that:"the [346]enforcement procedures of obtaining an undertaking and issuing a compliance order are not prerequisites for the court to issue a fine against the employer.[347][348]They nevertheless facilitate proof that the employer was aware of its statutory obligations and had an opportunity to comply."[349]

[336]http://www.saflii.org/za/cases/ZALC/2007/27.html
[337]Ibid.
[338]
[339]http://www.saflii.org/za/cases/ZALC/2007/27.html
[340](2007) ZALC 27, para.94.
[341]Ibid, para.103.
[342]http://www.saflii.org/za/cases/ZALC/2007/27.html
[343]Ibid.
[344](2007) ZALC 27, para.108.
[345] (2007) ZALC 27, para.108.
[346]http://www.saflii.org/za/cases/ZALC/2007/27.html
[347]Ibid, para.112.
[348]http://www.saflii.org/za/cases/ZALC/2007/27.html
[349] Ibid.

'Socio-economic re-engineering through the EEA will be a lost cause unless enforcement is effective.[350] If intention is an element of the contravention, employers can escape liability by simply blaming their consultants for not complying.[351]This would render enforcement well-nigh impossible.'[352]

The court further noted that:"[353]as a deterrent, the amount of the penalty has to be sufficiently high that it makes more commercial sense for employers to comply than to risk a penalty.[354]The [355]penalty should also be sufficiently high toinfluence other employers who are not complying to remedy their situations.'[356]

"As to the question of [357]whether the respondent contravened the EEA, the court found that the [358]respondent did not comply voluntarily with the EEA.[359] It failed to do so despite giving an undertaking.[360] The ultimatum set in the compliance order to comply within 30 days of 31 March 2004 also went unheeded.[361] Only after the first application was launched on 24 April 2004 did the respondent cause an employment equity plan to be delivered to the Department of Labour".[362]'The court accepted that the[363]plan was delivered to the Department, even though it could not be found'.[364]'By failing to keep a record of the plan the respondent contravened section 26 of the EEA'.[365]'Submitting a plan long after the deadline 'stated 'in the compliance order had expired' did 'not' represent 'compliance with the EEA'.[366]'The respondent had to prepare and implement the plan, not submit it to the' Department.[367]As 'the' respondent could not 'produce a copy of the plan, it' could not 'rebut the allegation that

[350](2007) ZALC 27, para.122.
[351] Ibid.
[352]Ibid.
[353]http://www.saflii.org/za/cases/ZALC/2007/27.html
[354] (2007) ZALC 27, para.129; Anthony Ogus and Carolyn Abbot 'Sanctions for pollution: Do we have the right regime?' 14 J. Envtl. L. 283 *Journal of Environmental Law* 2002.
[355]http://www.saflii.org/za/cases/ZALC/2007/27.html
[356](2007) ZALC 27, para.129.
[357] www.solidariteitinstituut.co.za
[358]http://www.saflii.org/za/cases/ZALC/2007/27.html
[359]Ibid, para.131.
[360] Ibid.
[361] Ibid.
[362] Ibid.
[363]http://www.saflii.org/za/cases/ZALC/2007/27.html
[364] Ibid.
[365](2007) ZALC 27, para.132.
[366] Ibid.
[367] Ibid.

it did not comply with' section 20 of the EEA.[368] It was not able to show 'that the plan met the requirements of section 20 or that it was implemented'.[369] Nor could the Department of Labour assess' [370] the respondent's substantive compliance with the affirmative action' measures 'which should have been detailed in the' plan.[371]'There 'was 'no evidence that the section 19 analysis which feeds into the planning process was undertaken'.[372]'The plan that the respondent filed in this application' was 'undated and 'showed 'no interaction with the workers or their representatives'.[373]Except 'for the name of the respondent and the numerical goals in the schedules reflecting the profile of the workforce, there 'was 'little else that' connected 'the plan to the respondent'.[374]'It might as well 'have been 'a standard precedent tweaked for the' purpose 'of this application'.[375]

'As the respondent employed less than 150 employees, it was a designated employer that had to report once every two years on the first working day of October'.[376]'To comply with the compliance order, the respondent had to submit an employment equity report by 30 April 2004 covering the reporting period ending 30 September 2003'.[377]'By submitting a report dated 24 October 2004 the respondent did not obey the Department's compliance order'.[378]'The respondent failed to comply with section 21 (1)(b) of the EEA'.[379]

'In order to prepare and implement a plan and submit a report that were genuine, the respondent had to consult with the workforce'. [380] 'The respondent consulted with the workforce after the plan and report was submitted'.[381]'Furthermore, the consultation was not about the' analysis, 'the' plan, 'or the' report.[382]'It was to advise them of the EEA and its consequences'.[383]'The workers' reaction was to [384]fear for their job security'.[385]'The advice

[368] Ibid.
[369] http://www.saflii.org/za/cases/ZALC/2007/27.html.
[370]http://www.saflii.org/za/cases/ZALC/2007/27.html
[371] Ibid.
[372](2007) ZALC 27, para.133.
[373](2007) ZALC 27, para.134.
[374](2007) ZALC 27, para.134.
[375]Ibid.
[376](2007) ZALC 27, para.135; Section 21 (1)(b) of the EEA.
[377](2007) ZALC 27, para.135.
[378] Ibid.
[379] Ibid.
[380](2007) ZALC 27, para.136.
[381] Ibid.
[382] Ibid.
[383] Ibid.
[384]http://www.saflii.org/za/cases/ZALC/2007/27.html

could [386]not have favoured employment equity.[387] The respondent failed to comply with section 16 of the EEA'.[388]

In determining appropriate fine for the contravention 'of the EEA the court took the' following circumstances 'of' the case into account:

> "Mr Liu abdicated his responsibility by simply outsourcing his obligation to a labour consultant who turned out not to be knowledgeable or competent in carrying out his mandate.[389] He did not interact with the consultant regularly to give mandates, guidance or track progress.[390] Whether the consultant had an adequate knowledge of the nature of the business in order to determine what affirmative action measures would be appropriate, is also not evident.[391] Mr Liu did not exercise reasonable care in ensuring that the respondent complied with its obligations.[392] The respondent's non-compliance was grossly negligent.[393] Only when the reality of litigation struck did the respondent move into action.[394] It filed the first plan five days after the first application was launched.[395] Between October 2005 when this application was launched and January 2006 when he received the notice of set down for 19 April 2006, he made vague attempts at getting clarity about the application.[396] After he got the set down he continued to try and get clarity.[397] Only before Easter did he make a concerted effort at getting his file from the consultant's family. A day before the hearing he instructed his attorney to remove the matter from the unopposed roll.[398] The plan that he attached to his Opposing Affidavit might well have been prepared just for this application.[399]
> The respondent was manifestly reluctant to transform its workplace.[400] Employing exclusively black workers was its notion of implementing employment equity.[401] Such compliance as

---

[385] Ibid.
[386]http://www.saflii.org/za/cases/ZALC/2007/27.html
[387] Ibid.
[388] Ibid.
[389](2007) ZALC 27, para.149.
[390] Ibid.
[391] Ibid.
[392] Ibid.
[393] Ibid.
[394](2007) ZALC 27, para.150.
[395] Ibid.
[396] Ibid.
[397] Ibid.
[398](2007) ZALC 27, para.150.
[399] Ibid.
[400](2007) ZALC 27, para.151.
[401] Ibid.

there has been was delayed, contrived, superficial and unconvincing.[402] Apart from one so called consultation, no other effort was made to engage the workforce.[403] There is no evidence that since 2004 the respondent lodged a report with the DOL as it is required to do once every two years.[404] Its contraventions are serious, continuous, and coloured by its deviousness and bad faith.[405] The DOL failed to assist the Court with any evidence about the nature and size of the industry, the threats and opportunities that it faces, the effect of fluctuating currency levels, the area in which the respondent is located, the impact of the penalty on employment and the community, the costs or losses, if any, sustained by the DOL or the workers as a result of the non-compliance and whether the respondent is complying with the bargaining council agreement and other labor laws.[406]The respondent on the other hand has failed to provide any financial information on the basis of which the Court can make an assessment as to what is affordable and at what amount the penalty will be effective as a deterrent.[407] There is no evidence that the respondent invested any resources in implementing equity. [408] The respondent has given the Court very little to consider in mitigation.[409] In *Director General of the DOL v Ginghau Garments* where liability was not disputed and the only issue was the amount of the penalty, Sangoni AJ imposed a fine of R200 000, half of which was suspended on condition that the employer did not contravene the provisions for three years.[410] The respondent's conduct is distinguishable from that employer.[411] It attracts a higher penalty.[412] It is also distinguishable from large multinationals which, as first time violators, could also attract the maximum penalty.[413] Maximum penalties should also be reserved for the most egregious violators, such as those who refuse to comply at all.[414] As a small to medium sized cut, make and trim operation in an industry that is reputed to be under threat of decimation, and which is located in an economically unstable industrial area where few jobs are generated for the surrounding semirural population, the maximum penalty is not appropriate."[415]

The Court made the following order:[416]

[402] Ibid.
[403] Ibid.
[404] Ibid.
[405] Ibid.
[406](2007) ZALC 27, para.152.
[407](2007) ZALC 27, para.153.
[408](2007) ZALC 27, para.154.
[409](2007) ZALC 27, para.155.
[410](2007) ZALC 27, para.156.
[411](2007) ZALC 27, para.157.
[412]Ibid.
[413]Ibid.
[414]Ibid.
[415](2007) ZALC 27, para.157.
[416](2007) ZALC 27, para.161.

> "The respondent has contravened sections 16, 19,20 and 21 of the EEA; The penalty of such contravention is R300 000 of which R200 000 is suspended on condition that the respondent complies fully with sections16,19,20 and 21 of the EEA by 1 October 2007; The amount of R100 000 must be paid by 30 April 2007; The respondent must pay the DOL's costs, such costs being limited to the costs of one counsel."

It is advisable for employers to comply with the EEA in order to avoid penalties which may be higher in future. Non-compliance can be very costly. A good example is the case of Win-Cool Industrial Enterprise where the employer incurred the costs of the applicants' attorneys and legal counsel. In addition to these costs, the employer was fined R300 000 which is not the maximum fine. This employer could have avoided these costs by simply complying with the EEA.

6.4 Conclusion

This chapter discussed the courts' interpretation of employers' duty to implement affirmative action, compliance with the EEA and 'enforcement of the Act by the Department of Labour'.

In 'the' cases that were discussed and analysed, most employers were found by the court to be non-compliant with the EEA. The breaches ranged from failure to 'have an employment equity plan in place', to failure 'to' consult with employees and trade unions, failure to keep records of employment equity, failure to conduct analysis and failure to 'submit reports to the Department of Labour'. Some 'employers' made an undertaking to comply with the recommendations by the Department of Labour; however they failed to honour their undertaking.

In the case of *Singh*,[417] the respondent employer failed to specifically mention disability in their policy and/ or criteria and the court was of the view that disability should be included in order to encourage disabled people to apply.

Two more serious cases of non-compliance with the EEA were *Win-Cool Industrial Enterprise* and *Jinghua Garments (Pty) Ltd.* It should be noted that, as a designated

[417] (2013) 34 ILJ 2807 (EqC), para.46.

employer,*Jinghua Garments (Pty) Ltd*was requiredto adopt affirmative action measures, yet it operated without an employment equity plan. *Win-Cool Industrial Enterprise*started to take compliance more seriously when the Department of Labourtook legal action due to non-compliance. *Win-Cool Industrial Enterprise*also operated without an employment equity plan. The courts imposed different penalties on these employers, with a harsher penalty imposed on*Win-Cool Industrial Enterprise* because the employer deliberately persisted with non-compliance after it issued an undertaking to comply.

Employees with disabilities, and trade unions, should report employers such as *Win-Cool Industrial Enterprise*and *Jinghua Garments (Pty) Ltd*to the Department of Labour. This would increase the number of employers complying with the EEA.

CHAPTER 7

CONCLUSION AND RECOMMENDATIONS

This dissertation provided discussion of people with disabilities and the disadvantages they suffer. It noted that, during the apartheid era, people with disabilities were denied, among other things, economic rights.[418] As a result most people with disabilities are unemployed and often live in poverty.

The democratic South African government introduced a policy of affirmative action. Affirmative action is recognised by the country's Constitution in the form of substantive equality. Citing Kentridge, McGregor '[419]argues that the words' disadvantaged by unfair discrimination in the Constitution refers to'[420]people who are, or have been, disadvantaged by measures which' undermine'[421] their fundamental dignity or adversely affect them in a comparably serious way'[422]. She argues that 'the' wording implies 'that it is not necessary to' prove current 'unfair discrimination' among 'beneficiaries of an affirmative action policy'[423]. 'Past unfair discrimination, the effects of which are felt in the present, is sufficient.'

In light of Kentridge's argument, it is argued that people with disabilities'[424]have been disadvantaged by unfair discrimination' and are 'the' most vulnerable group of people in society.[425] As such, they should be afforded maximum protection by the legislature and the judiciary.

This study investigated employers' duties to implement affirmative action. It also sought to establish employers' level of compliance with the EEA and enforcement 'by the Department of Labour' and the courts.

---

[418] Marumoagae MC 'Disability Discrimination and the Right of Disabled Persons to access the Labour Market:' (2012) 15 *PELJ* p. 345.
[419] www.uir.unisa.ac.za.
[420]www.uir.unisa.ac.za.
[421]www.uir.unisa.ac.za.
[422] McGregor M 'A legal historical perspective on affirmative action in South Africa (part 2)' (2007) 13 *Fundamina,* p.104;
http://uir.unisa.ac.za/bitstream/handle/10500/3873/Fundamina%20finaal%20McGregor%2029%20Nov.pdf?sequence=1
[423] Ibid.
[424] www.nwpg.gov.za
[425] http://www.nwpg.gov.za/public%20works/Documents/PolicyDoc/EMPLOYMENT%20EQUITY.pdf.

'People with disabilities', and their representative trade unions, should challenge employers who do not comply with the EEA. Employees with disabilities may approach the Labour Court directly without first reporting their employers to the Department of Labour. This argument was supported by theLabour Court in *Director General, Department of Labour v Win-Cool Industrial Enterprise (Pty) Ltd* where it stated that:"[426]the enforcement procedures, namely, obtaining an undertaking and issuing a compliance order, are not prerequisites for the court to issue a fine against the employer."[427]

There have only been few court cases where employers were challenged for failing to 'implement affirmative action' measures. 'It is' noted from 'these cases' that 'not' much protection was afforded to people with disabilities. While the courts came out strongly against non-compliance with the EEA, their focus was race and gender. None of the cases showed 'protection for people with disabilities'. Even 'in the' case 'of' *Singh* where the applicant was deaf, the court did not take into consideration the arguments put forward by the *amicus curiae* representing people with disabilities. In this case, the court's emphasis was on equality in the workplace in general.

Employers should accommodate people with disabilities if to do so does not create undue hardship. The most common example of an accommodation that demonstrates little respect for the dignity of a person with a disability is a wheelchair entrance over a loading dock or through service area or garbage room[428]. Employers should also provide 'documentation supporting the need for particular accommodation (flexible hours, a different supervisor, a particular technical aid, for example) only to those who need to be aware of the information[429].

People with disabilities, trade unions and organisations representing people with disabilities should challenge employers that do not comply with the EEA. This would help to increase both employer and public awareness of the rights of disabled employees and the obligations of employers in this regard. On the other hand the legislature should establish a strict legislation that would protect people with legislation. Such legislation should make it an obligation for certain categories of employers to employ a number of people with disabilities.

[426]http://www.saflii.org/za/cases/ZALC/2007/27.html
[427]www.solidariteitinstituut.co.za/rabib/index.
[428] http://www.ohrc.on.ca/en/policy-and-guidelines-disability-and-duty-accommodate/4-duty-accommodate.
[429] http://www.ohrc.on.ca/en/policy-and-guidelines-disability-and-duty-accommodate/4-duty-accommodate.

BIBLIOGRAPHY

ARTICLES

McGregor M 'Judicial notice: discrimination and disadvantage in the context of affirmative action in South Africa' (2011) 44 *De Jure* 111-125.

Booysen L 'Barriers to employment equity implementation and retention of blacks in management in South Africa' (2007) 31 *South African Journal of Labour Relations* 47-71.

Christianson M 'People with disabilities inside (and outside) the South African workplace: The current status of the constitutional and statutory promises'(2012) *ActaJuridica*286-305.

Deane T 'The Regulation of Affirmative Action in the Employment Equity Act 55 of 1998' (2006) 18 *SA Merc LJ*381-388.

Gida P & Ortlepp K 'Employment of people with disabilities: implications for HR management practices' (2007) 7 *Acta Commercii*135-150.

Marumoagae MC 'Disability Discrimination and the Right of Disabled Persons to access the Labour Market' (2012) 15 *PELI.*

McGregor M 'A legal historical perspective action in South Africa (part 2)' (2007) 13 *Fundamina.*

McGregor M 'Judicial notice: discrimination and disadvantage in the context of affirmative action in South Africa' (2011) 44 *De Jure* 111-125.

Newman A 'Enabling the disabled complying with the BBBEE Act' (2013) *De Rebus* 44-46.

Ngwena C 'Equality for people with disabilities in the workplace: an overview of the emergence of disability as a human rights issue' (2004) 29 *Journal for Juridical Science* 167-197.

Ngwena C 'Interpreting aspects of the intersection between disability, discrimination and equality: lessons for the Employment Equity Act from comparative law. Part II: reasonable accommodation' (2005) 16 *Stellenbosch Law Review* 534-561.

Sing D 'Legislative, institutional and policy measures for people with disabilities in the South African Public Service: forum sector' (2006) 30 *South African Journal of Labour Relations* 82-92.

Rankhumise E, Netswera G & Meyer M 'Employees' perceptions of the implementation of affirmative action in the health sector in the Standerton District in South Africa' (2001) *Curationis*52-58.

SA Board for People Practices (2014) *Position Paper on Employment Equity and Transformation* 19.

Seboal MS &Khalo T 'Implementation of Employment Equity Act: a case of the Universities of Venda and of Pretoria' (2010) 45 *Journal of Public Administration* 202-217.

INTERNET SOURCES

http://www.labour.gov.za/DOL/media-desk/media-statements/2007/landmark-judgment-inspires-more-crackdown-on-equality-violators.

http://www.pmg.org.za/report/20140723-composition-and-functioning-magistrates-commission-independent-police-investigative-directorate-its-2014.

http://www.polity.org.za/article/employment-equity-amendment-act-becomes-law-2014-07-31.

www.saflii.org.za

www.sabpp.co.za/position-papers.

Magistrates' Commission "Composition and Functioning of the Magistrates Commission" 23 July 2014 Report to NCOP Security and Justice.

CASES

Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others (2004) ZACC 15; 2004 (4) SA 490 (CC).

*Director-General, Department of Labour v Comair Ltd (*2009) 11 BLLR 1063 (LC); (2009) 30 ILJ 2711 (LC).

Director-General, Department of Labour v Jinghua (Pty) Ltd 2006 ZALC 100.

Director-General, Department of Labour v Win-Cool Industrial Enterprise (Pty) Ltd (2007) 28 ILJ 880 (LC).

Dudley v The City of Cape Town (2008) 12 BLLR 1155 (LAC).

Du Preez v Minister of Justice and Constitutional Development & Others 2006 (5) SA 592 EqC.

Singh v Minister of Justice and Constitutional Development and Others (2013) 34 ILJ 2807 (EqC).

UNISA v Reynhardt (2010) ILJ 2368 (LAC).

LEGISLATION, REGULATIONS AND STATUTORY GUIDELINES

Americans with Disabilities Act of 1990.
Basic Conditions of Employment Act 1997.
Broad-Based Black Economic Empowerment Act 53 of 2003.
Code of Good Practice on the Employment of People with Disabilities 2002.
Constitution of the Republic of South Africa, 1996.
Employment Equity Act 55 of 1998.
Employment Equity Amendment Act 47 of 2013.
Labour Relations Act 66 of 1995.
Promotion of Equality and the Prevention of Unfair Discrimination Act 4 of 2000.