

**HAS AFFIMATIVE ACTION BECOME AN ILLUSIONARY RIGHT FOR  
CERTAIN DESIGNATED GROUPS?**

A thesis submitted in the fulfilment of the requirements for the degree of

**MASTER OF LAWS (LABOUR STUDIES)**

at the

**UNIVERSITY OF KWAZULU NATAL**

by

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**DECLARATION**

I, RAMESH HARKOO, declare that this work is original and that all the sources I have used or quoted have been indicated and acknowledged by means of complete references.

Signed: \_\_\_\_\_

**RAMESH HARKOO**

DATE: \_\_\_\_\_

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## ABSTRACT

South Africa consists of one of the most diverse societies in the world, comprising of people from different cultures, race, religion, gender and languages. During the apartheid era, unjust laws were applied to create disadvantages amongst races and gender. Women as well as people from the African, Coloured and Indian races were subjected to exclusions from amenities of life, education and labour arenas under the apartheid regime. With the emergence of democracy, the acknowledgement of the injustices perpetuated against these classes of people and the quest to achieve an egalitarian society, the need for restorative measures developed, in order to redress the disadvantages that those classes of people endured.

The South African constitution and other legislation provides for the implementation of affirmative action measures in order to protect and advance persons who have been disadvantaged by the unjust laws. However the application of affirmative action measures have often been done in an arbitrary manner, with irrational equity plans, resulting in numerous challenges to the implementation of affirmative action measures, eroding the statutory protections and benefits of certain designated groups thereby creating disillusionment among those groups.

This thesis was prompted by the numerous challenges to the implementation of affirmative action measures. It analyses the aims and objectives of affirmative action measures, the various legislative provisions as well as the approach by the courts. This thesis also examines the various issues pertinent to the implementation of affirmative action measures, such as the right to equality, equality of persons from the designated group, dignity, employment equity plans, quotas, absolute barriers and targets, and identifies possible solutions to the problem of implementation. This thesis also examines the recent CC case of *South African Police Service v Solidarity obo Barnard*, which identifies and analyses virtually every issue pertaining to affirmative action measures.

This thesis also provides clarity concerning the factors that should be considered when drafting the employment equity plan in order to ensure that the plan is not haphazardly drawn. It concludes with recommendations on the implementation of the employment equity plan to ensure that the plan is not arbitrarily or capriciously applied, thereby ensuring firstly, that the measure is fairly applied and secondly, that those adversely affected would understand and appreciate the purpose and need for the implementation of the affirmative action measures.

**ACRONYMS**

AA	–	Affirmative Action
BCEA	–	Basic Conditions of Employment Act 75 of 1997
B –BBEE	–	Broad Based Black Economic Empowerment
CC	–	Constitutional Court
CCMA	-	Commission for Conciliation, Mediation and Arbitration
COSATU	-	Congress of South African Trade Unions
DCS	-	Department of Correctional Services
EEA	–	Employment Equity Act 55 of 1998
EEP	-	Employment Equity Plan
ILJ	–	Industrial Law Journal
LAC	–	Labour Appeal Court
LC	-	Labour Court
LRA	–	Labour Relations Act 66 of 1995
NEDLAC	-	National Economic Development and Labour Council
PAJA	-	Promotion of Administrative Justice Act
POPCRU	-	Police and Prisons Civil Rights Union
PSA	-	Public Service Act
SCA	–	Supreme Court of Appeal
SSSBC	-	Safety and Security Sectoral Bargaining Council

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## **1. CHAPTER 1: INTRODUCTION**

### **1.1. THE RESEARCH TOPIC**

HAS AFFIRMATIVE ACTION BECOME AN ILLUSIONARY RIGHT FOR CERTAIN DESIGNATED GROUPS?

### **1.2. THE INTRODUCTION AND BACKGROUND**

With the emergence of a democratic state in South Africa, the need existed to address the historical legal inequalities that existed. South African history has been premised on unfair discriminatory and racial laws which discriminated against certain racial groups, in particular, in the social, educational and labour fields. The majority was severely prejudiced with limited access to education and job reservation, thereby creating a society that was disenfranchised and severely disadvantaged. Affirmative action measures have been designed to remedy the historical inequalities and create a society where everybody is treated equally and fairly.

The South African Constitution<sup>1</sup> and the Bill of Rights<sup>2</sup> includes measures to eradicate the effects of the past unfair discrimination and to protect and promote those persons or categories of persons who were victims of the past system. The legislative instrument

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<sup>1</sup> The Constitution of the Republic of South Africa Act 108 of 1996.

<sup>2</sup> Chapter 2 of the Constitution of South Africa.

employed to redress imbalances and facilitate change in access and advancement in the workplace is affirmative action.

Although legislation prohibits the implementation of quota systems<sup>3</sup>, numerical targets and quota systems have become the norm for implementing affirmative action.

### **1.3. THE STATEMENT OF PURPOSE**

The purpose of this dissertation is to consider whether the current implementation of affirmative action measures have created a misconception of the aims and objects of the measures resulting in an illusory right for certain designated groups.

### **1.4. THE PROBLEM TO BE ANALYSED**

The Constitution<sup>4</sup> provides that everyone is equal before the law and has the right to equal protection and benefits of the law.<sup>5</sup>

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<sup>3</sup> Section 15 of the Employment Equity Act 55 of 1998.

<sup>4</sup> The Constitution of the Republic of South Africa Act 108 of 1996

<sup>5</sup> Sect 9 (2) of the Constitution

It also provides for affirmative action “measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination.”<sup>6</sup>

The Employment Equity Act (EEA)<sup>7</sup> also provides for affirmative action measures<sup>8</sup> to be implemented in order to achieve equity for persons from designated groups<sup>9</sup> as well as the implementation of an employment equity plan (EEP).<sup>10</sup>

However the application of affirmative action measures have often been done in an arbitrary manner, with irrational equity plans and demographic figures resulting in numerous challenges and the erosion of the statutory protections and benefits of certain designated groups.

## **1.5. THE AIMS OF THE RESEARCH**

This paper will examine the historical background upon which affirmative action measures have been determined in South Africa, its comparison with other international jurisprudence such as America and India, the current implementation of affirmative action measures by designated employers, its proper application and effect on designated groups and whether the affirmative action measures in its present form seek to achieve the purpose for which it was designed.

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<sup>6</sup> Sect 9 (2) of the Constitution

<sup>7</sup> Employment Equity Act 55 of 1998

<sup>8</sup> Sect 15 of the EEA 55 of 1998

<sup>9</sup> Section 13 of the EEA 55 of 1988

<sup>10</sup> Section 20 of the EEA 55 of 1988

This paper examines the affirmative action measures of foreign jurisdictions, its implementation and the challenges that it faced. It will also analyse the courts approach in determining how competing interests have been addressed and whether the measures have succeeded in achieving its primary objectives. A comparison will be drawn with our current affirmative action measures.

This article will also examine how the implementation of affirmative action measures affect the constitutional rights of persons from non-designated groups and whether the current affirmative action measures serve the primary objectives for which it was designed. It will look at the methods, tests or standards that have been employed in an attempt to achieve equitable representation.

The current challenges facing the designated and non-designated groups will be analysed. An analysis of various court decisions will be undertaken to determine the courts approach in dealing with competing interests.

The factors that should be taken into account in drawing a rational equity plan will be considered, in particular whether national demographic figures should apply to local or regional areas.

Finally this paper will seek to illustrate the factors that should be taken into account in ensuring that there is a fair, reasonable, rational and consistent application of affirmative action measures.

## **1.6. THE RESEARCH METHODOLOGY**

The methodology employed in this research is desktop research which would include the review of materials that are available in the public domain such as legislation, published works, case law, journal articles, newspapers, websites, magazines, public reports, public statements, published reviews, literature reviews, collective reviews and “archived materials that are available in the public domain.”<sup>11</sup>

## **1.7. RESEARCH QUESTIONS**

- 1.7.1. What is affirmative action?
- 1.7.2. What are the primary objectives of affirmative action measures?
- 1.7.3. What is the court’s interpretation of the purpose of affirmative action?
- 1.7.4. What is meant by equitable representation?
- 1.7.5. What has equitable representation in general been interpreted to mean?
- 1.7.6. What methods or tests or standards have been employed in an attempt to achieve equitable representation?
- 1.7.7. Has the practice of numerical targets created a perverse competition within the designated groups on the basis of their race?
- 1.7.8. What are the courts’ approach to these standards, tests or methods?
- 1.7.9. What are the criticisms/supports for these methods, tests or standards?
- 1.7.10. What are the standards that should be employed to acquire equitable representation?

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<sup>11</sup> UKZN Exemption from Ethics Review Application Form: 2014.

- 1.7.11. Do the current affirmative action measures serve the primary objectives for which it was designed?
- 1.7.12. How do the implementation of affirmative action measures affect the constitutional rights of persons from the non-designated groups?
- 1.7.13. What are the current challenges facing the designated and non-designated groupings?
- 1.7.14. How should competing interest be approached?
- 1.7.15. What are the courts approach to how competing interests should be addressed?
- 1.7.16. How can a coherent and consistent guideline in the understanding, observance and implementation of affirmative action measures be achieved?
- 1.7.17. What are the factors that should be taken into account when drawing a rational equity plan?
- 1.7.18. Should national demographic figures apply to local/regional areas?
- 1.7.19. What factors should be taken into account in ensuring that there is a fair, reasonable and rational application of affirmative action measures?

## **1.8. CONCEPTUAL FRAMEWORK**

This study is underpinned by the doctrine of proportionality. This theory, best captured by the provisions of section 36 of the Constitution,<sup>12</sup> illustrates that the means selected

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<sup>12</sup> Supra note1.

to achieve a purpose, must be able to achieve the purpose it was desired to achieve. Preference should be given to the means which has the least adverse effect. This study dispels the judicial deference principle which postulates that decisions which were left to policy makers should be beyond judicial scrutiny. It is imperative that there be accountability in every matter that affects members of the public hence no subject should be left to the exclusive discretion of politicians. Once policy is embodied in a statute it is a natural consequence that administrative and judicial regulation follow.

## **1.9. LITERATURE REVIEW**

Employment Equity plans were borne out of the need to facilitate the reflection of diversity in the workplace which represents the South African society within the confines of the constitutional precinct. Scholars have written and explained the principles which underpin the Constitution<sup>13</sup>; chief among them, being equality. Scholars have also gone to the extent of explaining what the EEA provides as the way to implement equity plans. What follows is a review of their submissions in order to demonstrate an understanding of their submissions as well as identify areas they might have overlooked or areas that need further consideration.

Fredman,<sup>14</sup> defines the imports of the principle of equality. It is her understanding that from this principle of substantive equality (which is preferred over formal equality) emanates the duty to provide so as to alleviate disadvantage that is evident in society. Because this duty is upon the state, she argues that the judiciary can augment this role

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<sup>13</sup> Supra note1.

<sup>14</sup> S Fredman “*Providing Equality: Substantive Equality And The Positive Duty To Provide*” (2005) 21 SAJHR.



by being the referee of the ways set out to achieve equality.<sup>15</sup> Her assessment is achieved through an analysis of jurisprudence on equality.

The two known objectives of substantive equality are: equality of opportunity and equality of results.<sup>16</sup> Equal opportunity would entail removing obstacles that stop an individual from getting hired, for example nepotism. However, this is not sufficient because some people are at a disadvantage which was created in the past, hence there is need for the state to aid those who were put at a disadvantage to be able to compete with the rest of the people. Fredman's argument can be summed up as a campaign against social exclusion.

Of significant importance from Fredman's work is her insistence on democratic accountability. "This entails an explanation of the decision which is reasonable and proportionate and is based on evidence rather than generalizations or judicial notice."<sup>17</sup> Fredman, acknowledges that society operates in a system of perpetual scarcity of resources. This then necessitates the state to develop a criteria of distribution which may require that certain persons be prioritized.<sup>18</sup> In the employment field this argument finds expression in affirmative action and the insistence on a pre-determined plan. She then closes by stating that this prioritization should be checked by democratic principles and not merely left to those in power to dictate. However, the author's contribution is oriented in the inclination of social political rights. This study then directs the author's arguments to the workplace law and seeks to demonstrate how the same principles can be applied to the concept of affirmative action.

Solomon<sup>19</sup> narrates the provisions of affirmative action in the EEA. He states that the prioritization of the designated group cannot be challenged as discriminatory until

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<sup>15</sup> Pg 189.

<sup>16</sup> Pg 167.

<sup>17</sup> Pg 190.

<sup>18</sup> Pg 168.

<sup>19</sup> M Solomon "Regulation Of Affirmative Action By The EEA 55 Of 1998" (1999) 11 SAMLJ ,pg 1425

members of the designated group have been placed on a level at which they can competently compete with members of the non-designated groups.<sup>20</sup> He holds that “it is not so much about positive discrimination against those who have been previously advantaged, but about the positive upliftment of disadvantaged people thereby levelling the playing field in the workplace”.<sup>21</sup> He goes on to hold that:

“Since affirmative action is a positive measure and is therefore firmly rooted in legislative policy, there is little room for judicial pronouncement on the means used to achieve equality. Judicial deference to the legislative branch of government is thus the rule rather than the exception.”<sup>22</sup>

The article does not reflect and review the principles that are relied upon to come to this conclusion. One would expect an analysis on the concept of rationality in order to determine whether it is a sufficient standard of assessing affirmative action. Although it is now settled that affirmative action is not unfair discrimination, one would expect that there be principles regulating the decision. The author does not address the possibility of the arbitrary drafting and implementation of equity plans. This omission is addressed in this study below.

Rycroft<sup>23</sup> assesses “the role of the judiciary and arbitrators in interpreting and implementing affirmative action policies”.<sup>24</sup> He attempts to find a possible way to strike a balance between the contending individual rights and broader societal goal.

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<sup>20</sup> Pg 234.

<sup>21</sup> Pg 235.

<sup>22</sup> Pg 238.

<sup>23</sup> Rycroft “Obstacles to Employment Equity?: The Role of Judges and Arbitrators in the Interpretation and Implementation of Affirmative Action Policies” 1999 ILJ 1411 1423..

<sup>24</sup> Pg 1412.

He notes that “the target in the EEA is not explicitly the concept of disadvantage but designated groups”.<sup>25</sup> This is further supported by his allusion to the fact that the majority of applicants in affirmative action disputes are whites and adjudicators have decided such disputes with a preoccupation of protection of this group.

It is clear from the writing of the article that it was written before the case of *Barnard*<sup>26</sup>. The article still treats affirmative action as a suspect policy.<sup>27</sup> This is evident from the comparison with the American affirmative action as well as the emphasis of the narrow tailoring.<sup>28</sup> Furthermore, the author emphasizes the prominence of individual disadvantage over the broader spectrum.<sup>29</sup> The article closes by saying the EEA will be clear as the jurisprudence develops. This study will bring forth an updated analysis of the position of the EEA.

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<sup>25</sup> Pg 1413.

<sup>26</sup> *South African Police Service v Solidarity obo Barnard and Others* [2014] ZACC 23.

<sup>27</sup> Pg 1423

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*

## **2. CHAPTER 2: DEFINITIONS AND OBJECTIVES**

### **2.1. INTRODUCTION**

This entire thesis is based on affirmative action. It is therefore imperative that we understand the concept of affirmative action and the principles that underpin it. This chapter sets out to define affirmative action and its objectives. In so doing, reference is also made to international jurisprudence such as the United States and India in order to gain a better understanding of the concept.

### **2.2. DEFINITION OF AFFIRMATIVE ACTION**

Affirmative action or positive discrimination (known as employment equity in Canada, 'job reservation' in India and Nepal and 'positive action' in the UK) is a policy of favouring members of a disadvantaged group who are perceived to suffer from discrimination within a culture.<sup>30</sup> What is clear from the various definitions is that behind every affirmative action policy, there is a history of persons or groups who are or have been previously disadvantaged.

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<sup>30</sup> The Free Dictionary. Retrieved 13 February 2014. '(Sociology) the provision of special opportunities in employment, training except for a disadvantaged group, such as women, ethnic minorities, etc. US equivalent: affirmative action'

## UNITED STATES

Affirmative action measures were first used in the United States in 1961 to promote actions that achieve non-discrimination. It was intended to promote opportunities for defined minority groups within a society in order to give them equal access to that of the privileged majority population.<sup>31</sup> The history of affirmative action in the United States is one of a political struggle over the meaning of discrimination and methods of dealing with it.<sup>32</sup> It was implemented in an attempt to achieve equality among racial groups (primarily in favour of the black minority group) after a long history of slavery and discrimination.<sup>33</sup>

In the USA context, affirmative action refers to a “broad array of race, ethnicity programs, enacted by the government and private sector, voluntarily or by court order, to promote equality of opportunity and racial diversity”.<sup>34</sup> The programs are meant to remedy the impact of historically unfair treatment. The Olivier Report<sup>35</sup> states that affirmative action is also practised in India.

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<sup>31</sup> Supra at note 12.

<sup>32</sup> Nicholas Smith *Affirmative Action: Its Origin and Point* 1992 SAJHR 234.

<sup>33</sup> Kende *Constitutional Rights in Two Worlds: South Africa and the United States* (Cambridge University Press, New York, 2009) at 174.

<sup>34</sup> LR Langston “*Affirmative Action, a look at South Africa and the United States: a question of pigmentation or leveling the playing field?*” Vol 13 1997 *American University International Law Review* 334.

<sup>35</sup> South African Law Commission *Working Paper 25 Project 58* (1989) art 2 and South African Law Commission *Project 58 Group and Human Rights Interim Report* (1991) art 36.

## INDIA

In the Indian context affirmative action is referred to as special provision for reservations of positions.<sup>36</sup> The policy is provided for in the Indian Constitution and makes provision for quotas in electoral constituencies and governmental posts, among others.<sup>37</sup> In furtherance of the policy's objective, the policy makes it permissible to relax entry requirements for certain reserved job reservations and designated groups.<sup>38</sup> The Indian community is divided on the basis of castes, tribes, religion, language and culture, some of which suffered greatly from discrimination.<sup>39</sup>

Article 14 of the Indian Constitution provides that “the state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India,” and Article 15(1) provides that the “State shall not discriminate against any citizen on the grounds only of religion, race, caste, sex, place of birth or any of them”. Article 15(4) permits “any special provision for the advancement of any socially and educationally backward classes of citizens. ...” Article 16 and article 29 of the Indian Constitution makes provision for the reservation of positions for the advancement of socially and educationally backward classes of persons belonging to the ‘Scheduled Castes’ and the ‘Scheduled Tribes’. The primary objective of this ‘reservation system’, which is essentially a form of a quota system, is to promote the opportunities for improved social and educational status of underprivileged communities. It provides opportunities for the members of the ‘Scheduled Castes’ and ‘Scheduled Tribes’ to increase their political representation and provides opportunities in the labour force, educational institutions, and other public institutions.<sup>40</sup>

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<sup>36</sup> O Dupper and C Garbers (Eds) *Equality in the Work Place: Reflections from South Africa and Beyond* 2009 287.

<sup>37</sup> Ibid; art 15(4) of the Indian Constitution of 1949.

<sup>38</sup> Ibid.

<sup>39</sup> They have been referred to as the depressed or backward classes.

<sup>40</sup> Basu, Durga Dass *Introduction to the Constitution of India* (2008) LexisNexis Butterworths Wadhwa P98.

Whilst it has been acknowledged that the 'reservation system' in India has achieved its basic objective, many argue that the reservation/quota system causes resentment amongst its citizens and creates greater discord in an already divided country.<sup>41</sup> Much of the provisions for equality and restorative measures in the Indian Constitution resemble that of the South African Constitution.<sup>42</sup> Like the South African Constitution, the Indian Constitution provides for anti-discrimination as well as for a pro-active role for the state to favour certain groups that were previously excluded by the caste system.

## MALAYSIA

The 1963 Constitution of the Federation of Malaysia affords special protection to 'Aboriginal People' and Malays. This protection includes the reservation of positions of public servants, scholarships and educational facilities for those groups, and the preferential granting of business licences. The measures in the Malaysian Constitution favour members of the majority population.<sup>43</sup>

## OVERVIEW OF FOREIGN JURISPRUDENCE

Whereas affirmative action measures in the United States were designed to protect and promote the interests of minorities against a privileged majority within its society; in Malaysia, the affirmative action measures were designed to promote and favour members of the majority population. It follows therefore, that a general justification for affirmative action cannot be given as there is no uniform practice to justify it.<sup>44</sup>

However, what is common is that affirmative action are measures, policies or procedures that are implemented to protect and/or promote persons or categories of persons who are disadvantaged or have been disadvantaged.

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<sup>41</sup> Twisha *the Economist* Jul 2<sup>nd</sup> 2013, 09.23 [www.economist.com/bligs/banyan/2013/06/affirmative-action](http://www.economist.com/bligs/banyan/2013/06/affirmative-action) accessed 15/10/14 at 11.59pm.

<sup>42</sup> Except that quotas are not permitted in the South African Constitution.

<sup>43</sup> Nicholas Smith, *Affirmative Action: Its Origin and Point* 1992 SAJHR 234.

<sup>44</sup> *Supra* at note 16.

### **2.3. THE SOUTH AFRICAN CONTEXT**

South Africa consists of one of the most diverse societies in the world. It comprises of people from different cultures, race, religion, gender and languages to mention a few. During the apartheid era unjust laws were applied to create disadvantages amongst races and gender. Women as well as people from the African, Coloured and Indian races were subjected to exclusions from amenities of life, education and labour arenas under the apartheid regime. The South African constitutional democracy was founded on defined values of “human dignity, the achievement of equality and the advancement of human rights and freedoms.”<sup>45</sup> However, unlike other constitutions, the acknowledgement of the injustices perpetuated against certain classes of people necessitated that restorative measures be put in place to redress the disadvantages that those classes of people endured.<sup>46</sup>

### **2.4. THE SOUTH AFRICAN LEGISLATIVE FRAMEWORK**

One of the primary objects of the South African Constitution is “the achievement of equality and the advancement of human rights and freedoms.”<sup>47</sup> The Constitution also provides for affirmative action measures in the following terms:

“Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.”<sup>48</sup>

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<sup>45</sup> Section 1 (a) of the South African Constitution; *South African Police Service v Solidarity obo Barnard and Others* [2014] ZACC 23 at Para 28.

<sup>46</sup> Section 9 (2) of the South African Constitution.

<sup>47</sup> Section 1 (a) of the Constitution.

<sup>48</sup> Section 9 (2) of the Constitution.



As indicated earlier under the definition of affirmative action in the Indian context, the South African Constitution allows pro-active measures to be taken in a bid to achieve equality amongst social groups. Clearly affirmative action measures must favour persons or a group of persons who have been victims of the past discriminatory laws.

The Constitution provides for the preservation of equality and prevention of unfair discrimination.<sup>49</sup> Because of this provision, there have been many challenges to the interpretation and application of affirmative action measures. Courts are required to draw a balance between these competing provisions. In the leading case of *Minister of Finance and Another v Van Heerden*<sup>50</sup>, the court held that in order to determine whether the affirmative action measure falls within the ambit of section 9 (2) of the Constitution, the enquiry is threefold:

“The first yardstick relates to whether the measure targets persons or categories of persons will have been disadvantaged by unfair discrimination; the second is whether the measure is designed to protect or advance such persons or categories of persons; and the third requirement is whether the measure promotes the achievement of equality.”<sup>51</sup>

From this judgement it has been established that affirmative action constitutes a valid defence against a claim of unfair discrimination. Of note to this study, is the provision that the beneficiaries of affirmative action measures must be persons or categories of persons who have been disadvantaged by unfair discrimination. As shall be discussed later in this study, the legislature put a general assumption that everyone who fall under the groups that were oppressed under apartheid is in need of affirmation. Whether the court’s interpretation has followed this reasoning is a question that puzzles many and shall be answered in the rest of this study.

The EEA was enacted to give effect to the constitutional provision for affirmative action. The Act recognizes that as a result of apartheid and other discriminatory laws and

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<sup>49</sup> Section 9 (1) and (2) of the South African Constitution.

<sup>50</sup> 2004 11 BCLR 1125 (CC), 2004 6 SA 121 (CC).

<sup>51</sup> Ibid at paragraph 37.

practices, there are disparities in employment, occupation and income within the national labour market, and that those disparities create such pronounced advantages for certain categories of people that they cannot be redressed simply by repealing discriminatory laws. The primary legislative provisions relating to the implementation of affirmative action in the workplace are contained in sections 6, 13 to 20 and 42 of the EEA which were enacted to give effect to section 9 of the Constitution which must be read with section 23(1) of the Constitution and section 186(2) of the Labour Relations Act (LRA).<sup>52</sup>

Section 6 of the EEA provides that: “no person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.” On the other hand it is provided under section 6(2) that “it is not unfair discrimination to take affirmative action measures consistent with the purpose of this Act; or distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.” It is quite clear that section 6 resembles section 9 of the Constitution by proscribing discrimination on arbitrary grounds and at the same time putting a disclaimer when such discrimination is done on the basis of affirmative action.

The EEA provides for affirmative action measures in the following terms:

- “(1) Affirmative action measures are measures designed to ensure that suitably qualified people from all designated groups have equal employment opportunities and are equally represented in all occupational categories and levels in the workforce of a designated employer.
- (2) Affirmative action measures implemented by a designated employer must include-
  - (a) measures to identify and eliminate employment barriers, including unfair discrimination, which adversely affect people from designated groups;

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<sup>52</sup> Act 66 of 1995.

- (b) measures designed to further diversity in the workplace based on equal dignity and respect of all people;
- (c) making reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities and are equally represented in the workforce of a designated employer;
- (d) subject to subsection (three), measures to –
  - (i) ensure the equitable representation of suitably qualified people from designated groups in all occupational categories and levels in the workforce; and
  - (ii) retain and develop people from designated groups and to implement appropriate training measures, including measures in terms of an act of Parliament providing for skills development.
- (3) The measures referred to in subsection (2) (d) include preferential treatment and numerical goals, but exclude quotas.
- (4) Subject to section 42, nothing in this section requires a designated employer to take any decision concerning an employment policy or practice that would establish an absolute barrier to the prospective or continued employment or advancement of people who are not from designated groups.”<sup>53</sup>

This chapter is not intended to deal with the implementation of the provisions of the EEA with regards to affirmative action measures, as this aspect will be specially dealt with in chapter 3, which follows; however, at this stage it is important to note that the EEA “embraces both a formal (equality of treatment) and a substantive (equality of outcome or the equality of results) approach equality.”<sup>54</sup>

## 2.5. EQUALITY

The right to equality is contained in section 9 of the Constitution whilst in the employment sector, this right is given effect by section 6 (2) of the EEA. Section 9 of the Constitution provides for both formal equality (section 9 (1) - equality before the law) and substantive equality (section 9 (2) - measures to promote equality).

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<sup>53</sup> Section 15 of the EEA.

<sup>54</sup> Duppers Garbers Landman Christianson and Basson *Essential Employment Discrimination Law* Juta 4<sup>th</sup> Ed 258.

Formal equality is based on merit; it is premised on the assumption that equality can be realised by implementing anti-discriminatory laws. Characteristics such as race, colour, gender, caste or other analogous status are irrelevant. It is based on the principle that individuals should be treated alike and that it would be unlawful to treat a person differently or less favourably on the basis of race, colour, gender or other status.<sup>55</sup> Considering the fact that South African history is premised on unjust laws that disadvantaged certain groups of people in the educational, social and employment environment, formal equality would be inadequate to achieve the equality envisaged in the Constitution. Not considering a person's status would entail ignoring the disadvantage experienced by individuals who have been victims of the unjust system. The consequence would be that the disadvantage would be perpetuated.<sup>56</sup>

Substantive equality, on the other hand, addresses the limitations of formal equality. It is applied in a way that recognises the historical background of society. Under substantive equality it is permissible that advantages be afforded to those groups of persons who have been previously disadvantaged. The focus of substantive equality is the result or outcome of a particular rule; the status of a person is very relevant.<sup>57</sup> Substantive equality embraces the historical background of the society in question, permitting that advantages be afforded to those previously excluded. The need for positive measures in pursuit of substantive equality have been emphasised in *Bato Star Fishing v Minister of Environmental Affairs and Tourism*<sup>58</sup> where the court stated:

“Our Constitution recognises that decades of systematic racial discrimination entrenched by the apartheid legal order cannot be eliminated without positive action being taken to achieve that result. We are required to do more than that.

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<sup>55</sup> O Dupper and C Garbers (Eds) *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 17.

<sup>56</sup> *Ibid* note 17; Fredman *Discrimination Law* (2002) 1-37;

<sup>57</sup> *Supra*, note 25 at 18.

<sup>58</sup> 2004 11 BCLR 687 (CC).

The effects of discrimination may continue indefinitely unless there is a commitment to end it.”<sup>59</sup>

Discrimination is where a person or group is treated less favourably than another person or group or denied privileges or rights accorded others on the basis of an arbitrary ground or on the basis of one (or more) of the listed grounds set out in section 6(1). Discrimination is a relative concept. It involves a comparative analysis. A complaint of less favourable treatment or adverse treatment without relying on different treatment of other person/s cannot constitute discrimination. In *Harksen v Lane NO and Others*,<sup>60</sup> the court set out a three stage enquiry in order to determine whether there was a violation of constitutional provisions of equality. The first question of the enquiry is whether there has been a differentiation between persons or categories of persons which constituted discrimination. The position of the complainants in society will be considered, that is whether they were victims of the past unjust laws and whether the discrimination is on a specified ground or not. The second leg of the analysis consists of asking whether the discrimination is unfair. This entails examining the nature of the provision and the purpose sought to be achieved. It must be borne in mind that discrimination in itself is not actionable in law; it is only when such discrimination is unfair that a litigant may be entitled to relief.<sup>61</sup> The third stage is whether the discrimination arises out of a law of general application; if it is, it would be justified. If it is proved that the discrimination was necessary in order to implement affirmative action measures which are consistent with the provisions of the Constitution and the EEA, then the discrimination would not be unfair.

Affirmative action is a valid defence against a claim of infringement of section 9.<sup>62</sup> The court in *Van Heerden*<sup>63</sup> held that such a defence will pass the constitutional muster if it

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<sup>59</sup> Ibid at paragraphs 74.

<sup>60</sup> Ibid.

<sup>61</sup> *Naidoo v Minister of Safety and Security and Another* (2013) 5 BLLR 490 (LC) para 112.

<sup>62</sup> Chapter 3 of the EEA.

<sup>63</sup> Ibid note 62.

satisfies the following conditions: firstly, the measure must favour persons who have been victims of unfair discrimination; secondly, the measure must be designed to protect or advance those classes of persons, and thirdly, the measure must promote the achievement of equality.<sup>64</sup>

Moseneke J, went on to say, referring to the affirmative action measures and the Constitution, that:

“Legislative and other measures that properly fall within the requirements of section 9 (2) are not presumptively unfair. Remedial measures are not derogation from, but a substantive and composite part of, the equality protection envisaged by the provisions of section 9 and of the Constitution as a whole. Their primary object is to promote the achievement of equality. To that end, differentiation aimed at protecting or advancing persons disadvantaged by unfair discrimination is warranted provided the measures are shown to conform to the internal test set by section 9(2). When a measure is challenged as violating the equality provision, its defender may meet the claim by showing that the measure is contemplated by section 9 (2) in that it promotes the achievement of equality and is designed to protect and advance persons disadvantaged by unfair discrimination. It seems to me that to determine whether a measure falls within section 9(2) the enquiry is threefold. The first yardstick relates to whether a measure targets persons or categories of persons who have been disadvantaged by unfair discrimination; the second is whether the measure is designed to protect or advance such persons or categories of persons; and the third requirement is whether the measure promotes the achievement equality.”<sup>65</sup> [underline added]

In summary then, Moseneke held that if the measure properly falls within the ambit of section 9(2) it does not constitute discrimination, even if the measure is based on any of the grounds of discrimination set out in sections 9(3) and 9(4). When a

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<sup>64</sup> *Minister of Finance and Another v Van Heerden* [2004] ZACC 3; 2004 (6) SA 121 (CC); at para 37.

<sup>65</sup> *Van Heerden* above n 61 at para 32.

measure is challenged as violating the equality provision, its defender may meet the claim by showing that the measure is contemplated by section 9(2) in that it is designed to promote the achievement of equality and advance persons disadvantaged by unfair discrimination.

## 2.6. EQUALITY OF PERSONS FROM THE DESIGNATED GROUP

Affirmative action has been interpreted in a way that has established a hierarchy amongst the members of the designated group. This is despite the fact that all the three races have been designated as black people and the fair sex has been deemed a designated class despite its race. The earliest case to put this on paper was the case of *Motala and Another vs University of Natal*.<sup>66</sup> In this case the judge held that it would be to fly in the face of South African history to treat all members of the designated groups as if their suffering under the apartheid regime was the same. A series of cases have followed in the employment sector which have confirmed such an approach.<sup>67</sup>

As much as such an approach is understandable, there is need for caution lest there be a perverse competition amongst the designated group members themselves.<sup>68</sup> The CC warned that:

“We must be careful that the steps taken to promote substantive equality do not unwittingly infringe the dignity of other individuals – especially those who were themselves previously disadvantaged..... decision that redresses racial disadvantage but grossly aggravates gender disadvantage, for example, might be

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<sup>66</sup> 1995 (3) BCLR 374 (D); *Gerhard Koorts v Free State Provincial Administration* CCMA FS3915 21 May 1995; *McInnes vs Technikon Natal* (2000) 21 ILJ 1138 (LC).

<sup>67</sup> *Ibid.*

<sup>68</sup> *Naidoo vs Minister of safety and Security* 2013 (7) BLLR 490 (LC) para 158.

impermissible, as might a decision that advances only one disadvantaged racial group while limiting the others.”<sup>69</sup>

Instead of basing an exclusion on elusive grounds such as degree of disadvantage, Darcy du Toit propounds that representivity would work better in determining how to allocate posts.<sup>70</sup> However, as chapter 3 will show that the way representivity has been applied it has not been without its own flaws.

Designated employees do not have a right to be affirmed.<sup>71</sup> The court in *Dudley vs City of Cape Town*,<sup>72</sup> held that an employee aggrieved cannot approach the court on the basis that an employer has failed to follow an EEP until all the section 50 enforcement procedures have been exhausted. Not only does this argument augur abuse by employers of the restorative policy, such an approach frustrates certain members of the designated group. Whitcher AJ described it as leaving the designated members on a “wing and prayer”.<sup>73</sup>

## 2.7. DIGNITY

Equality entails upholding the human dignity of all its citizens. It means that society cannot accept legislative distinctions that would treat certain people disadvantageously or demean them, or ‘offend fundamental human dignity’<sup>74</sup>. Dignity has been regarded by many academics, practitioners and judges as the ‘central equality value’.<sup>75</sup>

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<sup>69</sup> Moseneke J paragraph 31 of the Barnard CC Case.

<sup>70</sup> Camron J para 80 Barnard CC case.

<sup>71</sup> *Dudley v City of Cape Town & another*, [\[2008\] 12 BLLR 1155](#) (LAC).

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*

<sup>74</sup> *Supra* note 24; *Law v Canada* (1999) 1 SCR 497 (51).

<sup>75</sup> *Supra* note 24 at p19.



The concept of dignity has not been clearly defined. This has been partly so because of its ability to fit into the understanding of other rights and that preference is given to relatively more specific rights when resolving disputes. The Kantian moral philosophy states that dignity is what gives an individual his intrinsic worth.<sup>76</sup> Hence the Constitution in section 10 demands that everyone has the right to have their dignity protected.<sup>77</sup> The Constitution goes further from acknowledging the equal worth of people to sanctioning pro-active measures for the protection of this right to dignity.<sup>78</sup> The court in *National Coalition for Gay and Lesbian Equality Vs Minister of Justice* found that anything that builds insecurity and vulnerability into an individual on the basis of an immutable trait, violates that individual's dignity.<sup>79</sup> Although dignity has not been clearly defined, one can find understanding of it in the way it informs other rights and how it is enforced and protected. It was stated in *Munsamy*<sup>80</sup> that the role of dignity as a substantive test should be relevant.

Whilst dignity plays a central role in achieving equality, it does have its complications. A claimant in an equality dispute claim would be required to prove not only that he has been disadvantaged, but also that the impugned measure signifies a lack of respect for him as a person, or has fundamentally impaired his or her rights of dignity or sense of equal worth.<sup>81</sup> The position has been borne out in the *President of the Republic of South Africa and Another v Hugo*<sup>82</sup>, where the claimant based his claim on the grounds of gender, but could not prove that his rights of dignity were impaired. The claimant challenged the pardon issued by President Mandela to all women prisoners who were mothers of young children. The pardon was challenged by a male prisoner, the sole carer of his young child, on the basis that it discriminated on the grounds of gender. The court

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<sup>76</sup> I Currie and J De Waal *The Bill Of Rights Handbook* 6<sup>th</sup> ed 2013 pg 251.

<sup>77</sup> *Ibid* at p 252.

<sup>78</sup> *National Coalition For Gay And Lesbian Equality Vs Minister Of Justice* 1999 (1) SA 6(CC).

<sup>79</sup> *Ibid* at p 28.

<sup>80</sup> *Munsamy v Minister of Safety and Security and Ano* 2013 (7) BLLR 695 LC.

<sup>81</sup> *Ibid* at p20.

<sup>82</sup> 1997 (4) SA 1 (CC); SACR 1997 (1) 567 (CC).

rejected the claim. Judge Goldstone, in the majority judgement found that “The Presidential Act might have denied fathers an opportunity it had for the mothers, but it could not be said to have fundamentally impaired their rights of dignity or sense of equal worth.”<sup>83</sup> However Kriegler J, in his dissenting opinion stated:

“One of the ways in which one accords equal dignity and respect for persons is by seeking to protect the basic choices they make about their own identities. Reliance on the generalisation that women are the primary caregivers is harmful in its tendency to cramp and stunt the efforts of both men and women to form the identities freely.”<sup>84</sup>

The difficulties relating to dignity are considerable, however what is important is that dignity is an element of equality which relates to basic humanity where individuals should not be humiliated or degraded on the grounds of race, gender, disability, age or other status-based or socio-economic disadvantage.<sup>85</sup> Thus, all people should be treated as individuals with worth and value.

One may ask what the link is between affirmative action and the right to dignity. It often occurs that the implementation of affirmative action gives the impression of punishing certain group members for the atrocities of their forebears.<sup>86</sup> To address this grey area, the CC held that such a shortcoming should be viewed in light of the policy that the affirmative action seeks to achieve.<sup>87</sup> The judge cautioned that such justification should not totally sacrifice the dignity of members of non-designated groups who are considered better off. All restorative measures need to be carried out within the precincts of the Constitution.<sup>88</sup>

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<sup>83</sup> Ibid at 47.

<sup>84</sup> Ibid at 80.

<sup>85</sup> Supra note 24 at page 22; S Fredman *Facing the Future: Substantive Equality under the Spotlight* (July 28, 2010).

<sup>86</sup> J Grogan “*Unequal race From swords to running shoes*”; Moseneke ACJ in *Barnard’s CC Case para 30*; *VAN DER WESTHUIZEN J in Barnard’s CC case para 126*.

<sup>87</sup> Moseneke J in *Barnard’s CC case para 30*; para 118.

<sup>88</sup> Ibid.

Thus in cases where it appears that individual dignity has been infringed for the benefit of a class of persons, such should be scrutinized under the light of the need to remedy the imbalances in the present society.

“We are not islands unto ourselves..... Dignity contains individualistic as well as collective impulses. Its collectivist attributes, including that we are “social beings whose humanity is expressed through . . . relationships with others”,... find resonance in the South African idea of *Ubuntu*, which foregrounds “interdependence of the members of a community.”<sup>89</sup>

In trying to harmonise these conflicting interests, it has become apparent that some values may need to yield to others at a point in time. Thus the court held that:

“In other words, it is not necessarily an injury to dignity to view a person only through the lens of one ground listed in section 9(3), provided the reason for doing so is to redress historical inequality. But this becomes dissonant if we ascribe only one identity at the cost of seeing the multitudes that make up each individual. The courts should give deference where decisions are made in a way that balances the mandate to achieve representivity with a full appreciation of the individual.”<sup>90</sup>

This does not mean that restorative measures are beyond judicial scrutiny. The implementation of restorative measures shall be scrutinised using rationality and fairness as a standard for Constitutional validity.<sup>91</sup> This is meant to safe guard the use of restorative measures in the workplace and does not leave some groups without legal protection.

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<sup>89</sup> Paras 186 and 187 of Barnard’s Constitutional case.

<sup>90</sup>Barnard’s CC case Paras 117 and 118.

<sup>91</sup> Barnard’s Constitutional Case.

## 2.8. DESIGNATED GROUPS

Clearly the affirmative action measures must favour persons or a group of persons who have been victims of the past discriminatory laws. It therefore becomes important at this point in time to look at who are the beneficiaries of affirmative action and understand the reasoning behind their designation.

Section 9(2) of the Constitution provides that the beneficiaries of affirmative action are persons, or categories of persons, disadvantaged by unfair discrimination. The EEA refers to the beneficiaries of affirmative action as the designated group.<sup>92</sup> The relevant section defines the designated group as black people, women and people with disabilities. On the other hand, black people are defined as Africans, Coloureds and Indians. Thus the beneficiaries of affirmative action are referred to as the designated group. It is noteworthy that the categorization of beneficiaries of affirmative action is based on the same classification that was used during apartheid, especially race.

The paragraph above indicates that the Constitution provides that beneficiaries of affirmative action are those persons who suffered historical discrimination because it is adversely retrogressive and difficult to determine the extent of an individual's disadvantage.<sup>93</sup> The EEA makes a blanket assumption that everyone in the designated group was disadvantaged. Thus, for example, even an African person who was educated up to tertiary level overseas during apartheid remains eligible for affirmative action. Both the Constitution and the EEA do not explicitly set out the kind of disadvantage that needs to be remedied or that qualifies a person to be deemed disadvantaged by the past. Reference is only made to persons who were discriminated in the past.

There has been much debate on the issue of whether affirmative action programmes are designed to benefit only those persons who were actually disadvantaged by the past

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<sup>92</sup> Section 1 of the EEA.

<sup>93</sup> M Solomon "REGULATION OF AFFIRMATIVE ACTION BY THE EMPLOYMENT EQUITY ACT 55 of 1998" (1999) 11 SA Merc LJ ,pg 1425; Rycroft "Obstacles to Employment Equity?: The Role of Judges and Arbitrators in the Interpretation and Implementation of Affirmative Action Policies" 1999 ILJ 1411 1423..

unjust discrimination or whether such measures should also include those persons who were not actually disadvantaged but belonged to a designated group (a group which suffered unfair discrimination).<sup>94</sup> In *Durban City Council (Electricity Department)*,<sup>95</sup> “an arbitrator interpreted the terms of the applicable affirmative action policy to require that, in order to qualify for preferential treatment, a person must establish that he or she is the actual victim of disadvantage.” In this case he found that an Indian applicant failed to provide any evidence of exclusion or disadvantage based on race.<sup>96</sup>

In *George v Liberty Life Association of South Africa*,<sup>97</sup> Landman J, stated that the Constitution recognises the fact that even within a disadvantaged racial group “there may be and indeed are persons who have had opportunities and who have not been, or not be disadvantaged to the extent of their fellows.” In his view affirmative action in a South African context is not primarily intended for their benefit.<sup>98</sup>

However the wording of section 9 (2) of the Constitution makes provision for both individual and group based on affirmative action measures. The reference to ‘persons or categories of persons, disadvantaged by unfair discrimination’ clearly favours individuals themselves who have been disadvantaged, as well as individuals who themselves may not have been victims of unfair discrimination, but who belong to a category which has been disadvantaged.<sup>99</sup>In *Stoman v Minister of Safety and Security and Others*,<sup>100</sup> Van Der Westhuizen J , held that the emphasis of affirmative action is on a group work category of persons who have been disadvantaged by unfair discrimination. The aim is not to reward individuals but to advance the category of

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<sup>94</sup> Pretorius JL, *Labour Law, Employment Equity Law* July 2012 Par 9.3.1. Gibson *op cit* 308; Sloot *Positieve discriminatie: Maatschappelijke: Ongelijkheid en Rechtsontwikkeling in de Verenigde Staten en in Nederland* (1986) 220.

<sup>95</sup> (1995) 4 ARB 6.9.5 (www.irnetwork.co.za).

<sup>96</sup> *Ibid* at note 45.

<sup>97</sup> (1996) 8 BLLR 985 (IC).

<sup>98</sup> *Ibid* at 1005.

<sup>99</sup> *Ibid* at note 45.

<sup>100</sup> 2002 (3) SA 468 at 484C-E.

persons to which the individual belongs and to achieve substantive equality in South African society. In his view, the aim is not to punish or otherwise prejudice the complainant as an individual but to diminish the over-representation which his group has been enjoying as a result of previous unfair discrimination.<sup>101</sup>

Our courts have appreciated the complications that arise in fulfilling the constitutional aspiration of achieving equality. In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others*,<sup>102</sup> the court stated that:

“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. As was recognised in *Bel Porto School Governing Body and Others v Premier of the Province, Western Cape, and Another*:”<sup>103</sup>

“The difficulties confronting us as a nation in giving effect to these commitments are profound and must not be underestimated. The process of transformation must be carried out in accordance with the provisions of the Constitution and its Bill of Rights. Yet, in order to achieve the goals set in the Constitution, what has to be done in the process of transformation will at times inevitably weigh more heavily on some members of the community than others.”<sup>104</sup>

What is clear from the jurisprudence on affirmative action is that the implementation of affirmative action gets complicated when it involves a person who suffers multiple discrimination, for example an Indian woman. The way some courts have resolved such dilemmas

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<sup>101</sup> Ibid.

<sup>102</sup> 2004 (4) SA (CC) 490.

<sup>103</sup> 2002 (3) SA 265 (CC); [2002 \(9\) BCLR 891](#) (CC).

<sup>104</sup> Ibid at para 7.

and the way some employers have implemented employment equity plans have made affirmative action a subject of much criticism. The next chapter examines the implementation of affirmative action as provided for by the EEA.

## **2.9. CONCLUSION**

This chapter has been an exposition of the elements, assumptions and general law underlying affirmative action. It has been established that it is the pursuit of substantive equality that saw affirmative action being given Constitutional recognition. The chapter has also clarified that within every group and every individual in the group, lies worthiness (dignity) which needs to be acknowledged, respected and protected. The need to redress the society has come with casualties of infringement of rights. Both the legislature have reacted to the fiasco and laid down principles and measures to ensure that affirmative action does not run contrary to the intended purpose of attaining an egalitarian state. The next chapter explores how this has been effected and weighs the constitutionality of the same.

### **3. CHAPTER 3: IMPLEMENTATION OF AFFIRMATIVE ACTION MEASURES**

#### **3.1. INTRODUCTION**

Having examined the meaning and objectives of affirmative action measures, it must be borne in mind that the implementation of these measures has a profound effect on both the designated groups as well as the non-designated groups. One must be careful that in implementing affirmative action measures, the other fundamental constitutional rights of others are not unjustifiably infringed. In *Barnard*, Moseneke ACJ, pointed out that:

“We must be careful that the steps taken to promote substantive equality do not unwittingly infringe the dignity of other individuals - especially those who were themselves previously disadvantaged’ he went further to state that whilst the remedial measures must be implemented to advance people who have suffered past discrimination, equally ‘they must not unduly invade the human dignity of those affected by them, if we are truly to achieve a non-racial, non-sexist and socially inclusive society.’<sup>105</sup>

This chapter provides an analysis of the legislation that governs the implementation of affirmative action measures as well as the approach by the courts in ensuring lawful application of the policy.

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<sup>105</sup> Ibid at para 32.



### 3.2. THE PROVISIONS OF THE EMPLOYMENT EQUITY ACT

The primary objectives of the EEA<sup>106</sup> are to give effect to the constitutional guarantees of equality and elimination of unfair discrimination in the workplace.<sup>107</sup> The EEA therefore aims to ensure “the implementation of employment equity to redress the effects of past discrimination in order to achieve a diverse workforce representative of our people.”<sup>108</sup> The court in *Bato Star Fishing v Minister of Environmental Affairs and Tourism and Others*<sup>109</sup> pointed out that affirmative action measures must be implemented within the confines of the Constitution. Section 13 of the EEA obliges designated employers to implement affirmative action measures. According to section 15 of the Act affirmative action measures are measures designed to ensure that suitably qualified people from designated groups have equal opportunities and are equitably represented across all occupational categories and levels in the workforce of a designated employer. In terms of section 15 (3) of the Act, legitimate affirmative action measures include preferential treatment and numerical goals, but exclude quotas. Sections 16 to 20, 42 and a gazetted Code regulate the drafting of employment equity plans. These sections are specific on how plans must be drafted, what must be taken into consideration and who must be consulted in the drafting process. In determining the compliance of affirmative action measures, section 42 of the EEA sets out the factors to be considered, namely:

“(a) The extent to which suitably qualified people from amongst the different designated groups are equitably 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

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<sup>106</sup> Employment Equity Act 55 of 1998. The preamble sets out the objective of the EEA, as being to ‘promote the constitutional right of equality and the exercise of true democracy’; to ‘eliminate unfair discrimination in employment’; to ‘ensure the implementation of an employment equity to redress the effects of discrimination’; to ‘achieve a diverse workforce broadly representative of our people’; to ‘promote economic development and efficiency in the workforce’; and to ‘give effect to the obligations of the Republic as a member of the International Labour Organisation’.

<sup>107</sup> Sections 5 and 6 of the EEA.

<sup>108</sup> *Barnard, supra*, at para 40.

<sup>109</sup> *Supra* at paras 97 and 99.

active population; (ii) pool of suitably qualified people from designated groups from which the employee may reasonably be expected to promote or appoint employees; (iii) economic and financial factors relevant to the sector in which the employer operates; (iv) present an anticipated economic and financial circumstances of the employer; and (v) the number of present and planned 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 within the same sector; (c) reasonable efforts made by a designated employer to implement it EEP; (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."

In considering the implementation of affirmative action measures Moseneke J in *Minister of Finance and Another v Van Heerden*,<sup>110</sup> pointed out that apart from 'uneven race, class and gender attributes of our society, there are other levels and forms of social difference relation and systematic under-privilege which still persist'. The courts are therefore required to scrutinise in each equality claim "the situation of the complainant in society; their history and vulnerability; the history, nature and purpose of the discriminatory practice and whether it ameliorates or adds to group disadvantage in real life context."<sup>111</sup> He pointed out further that in the assessment of fairness, a flexible but "situation-sensitive"<sup>112</sup> approach is indispensable because of the "shifting patterns of hurtful discrimination and stereotypical response in our evolving democratic society."<sup>113</sup>

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<sup>110</sup> (2004) 12 BLLR (CC).

<sup>111</sup> Ibid at paragraph 27.

<sup>112</sup> *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) at para 126.

<sup>113</sup> *Van Heerden*, supra, at para 27.

### 3.3. EMPLOYMENT EQUITY PLANS

As previously indicated affirmative action is a valid defence against a claim of unfair discrimination.<sup>114</sup> Like all government policies, affirmative action is subject to the rule of law.<sup>115</sup> Therefore, it is not enough that an employer accused of unfairly discriminating an employee/s raise affirmative action as a defence and end there. “The employer must rely on standards that have been developed for that purpose; those standards must not exceed the adequate protection and advancement of the favoured groups or categories of persons.”<sup>116</sup> Failure to have a plan which Hiemstra dubbed “standards” in implementing affirmative action, takes away the validity of affirmative action as a defence against unfair discrimination.

The legislature was particular as to the way in which affirmative action should be implemented. It is a must for every designated employer to have employment equity plans in place.<sup>117</sup> It has been held that the term “designed” in section 15 (1) of the EEA means that there should be a plan through which restitutionary measures are to be carried out.<sup>118</sup> The Supreme Court of Appeal in *Gordon v Department of Health: KwaZulu-Natal*,<sup>119</sup> considered whether an employer may merely point to the need to advance persons from a designated group, as a defence to an allegation of unfair discrimination. The court held that:

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<sup>114</sup> *Naidoo vs Minister of Safety and Security and another* 2013 (7) BLLR 490 (LC) , para 113; Section 13 and 6 (2)(a) of the Employment Equity Act, 1998.

<sup>115</sup> J Grogan “*Affirming the EEA*” Employment Law Journal.

<sup>116</sup> *Public Servants’ Association of South Africa & another v Minister of Justice & others* (1997) 18 ILJ 241 (T).

<sup>117</sup> *Naidoo vs Minister of Safety and Security and another* 2013 (7) BLLR 490 (LC) , para 119. Designated employer in terms of the EEA means an employer who employs more than 50 employees or if the employees are less than 50, an employer whose annual turnover is above that determined by schedule 4 to the EEA. It also means an organ of state, municipality or one deemed as such by a collective agreement.

<sup>118</sup> *Public Servants Association v Minister of Justice* 1997 (5) BCLR at 640; M Solomon “*Regulation Of Affirmative Action By The Employment Equity Act 55 Of 1998*” (1999) 11 SA Merc LJ ,pg 1420 .

<sup>119</sup> [2008] 11 BLLR 1023 (SCA).

“It is not sufficient that the purpose of the measures in question is to redress past discrimination - the means selected to effect that purpose must be reasonably capable of doing so. .... to ensure that affirmative action programmes are carefully constructed in ways which are best able to accomplish what they set out to achieve.”<sup>120</sup>

Failure to comply with this requirement would result in a haphazard implementation of affirmative action which is not only chaotic but impermissible.

The Act requires that there should be consultations amongst employers and employees.<sup>121</sup> The consultation is meant to ensure that interests of all employees are represented.<sup>122</sup> The absence of consultation can give an impression that the employer has an untrammelled discretion to earmark posts for a certain racial group.<sup>123</sup> Out of such consultations, a plan should be drafted and registered with the labour department before implementation.<sup>124</sup> The plan must be drawn from both regional and national demographics and identify gaps in representivity that need to be addressed.<sup>125</sup> A proper implementation of the plan ought to show how the workplace will become more representative.<sup>126</sup> According to the SCA in *Gordon v Department of Health, KwaZulu-Natal*<sup>127</sup> and the Labour Court in *IMATU v Greater Louis Trichardt Transitional Local*

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<sup>120</sup> *Gordon v Department of Health: KwaZulu-Natal* (2008) 11 BLLR 1023 (SCA), para 22

<sup>121</sup> Section 13, 16 and 17 of the EEA.

<sup>122</sup> Section 16.

<sup>123</sup> M Solomon “*Regulation Of Affirmative Action By The Employment Equity Act 55 Of 1998*” (1999) 11 SA Merc LJ ,pg1422.

<sup>124</sup> Section 20 (1) of the EEA.

<sup>125</sup> *Solidarity and Others v Department of Correctional Services and Others* [2013] ZALCCT 38 (18 October 2013), para 37 and 38. .

<sup>126</sup> In other words the plan should increase the representation of people from designated groups in each occupational category and level in the employer's workforce, where under-representation has been identified and to make the workforce reflective of the relevant demographics.

<sup>127</sup> *Gordon v Department of Health, KwaZulu-Natal* (2008) 29 ILJ 2535 (SCA).

*Council*,<sup>128</sup> this requirement ensures that there are clear known standards against which the implementation of affirmative action is measured or tested and ensure full participation in the establishment of the programme.

### 3.4. RATIONALITY

The Act requires that the plan meant for giving effect to affirmative action must be rational.<sup>129</sup> An appointment of a person simply because he/she is black is irrational.<sup>130</sup>

“An employer cannot not prefer one group of designated employees over another group of designated employees who are supposedly over-represented in the absence of proper proof of such representativeness and a valid EEP which permits the action of the employer.”<sup>131</sup>

The requirement for rationality is meant to ensure that an equity plan provides a basis upon which it can be measured as to whether restitutionary measures meet the constitutional objective. The constitutional objective is the attainment of substantive equality.<sup>132</sup>

Rationality and proportionality concern standards of judicial scrutiny. Rationality is a non-exacting standard that allows a significant measure of latitude to the decision maker. It is not the function of the court’s to second guess the decision maker: the enquiry is whether there is a rational connection between the premise and the conclusion or the logical relation of a measure to its objectivity. It is about whether the decision is rationally justifiable in relation to the reasons given for it and the purpose of the measure

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<sup>128</sup> (2000) 21 *ILJ* 1119 (LC) at paras 19 to 25.

<sup>129</sup> *Munsamy vs Minister of Safety and Security and another* 2013 (7) BLLR 695 (LC).

<sup>130</sup> *Gordon v Department of Health: KwaZulu-Natal* (2008) 11 BLLR 1023 (SCA).

<sup>131</sup> *Munsamy*, supra, para 18.

<sup>132</sup> *Stoman v Minister of Safety and Security and Others* 2002 (3) SA 468 (T) at 480B – D.

in question. The court does not have the power to consider less onerous alternatives to deal with a legal problem.<sup>133</sup> It shall be contended later that the rationality test suggested for affirmative action by the CC is derived from a narrow interpretation of the provisions of section 9(2) of the Constitution. This merely requires that the measure taken in line with affirmative action must be intended to balance representation in the workplace and secondly must be capable of doing so.

### **3.5. PROPORTIONALITY**

Proportionality refers to a standard of judicial scrutiny that involves the balancing of contending values and interests. The standard is used by decision makers to determine whether a measure has exceeded the requirements for attaining a legitimate goal. This usually involves a cost benefit analysis. It has been contended that this standard of review will not defeat the remedial goal because the enquiry does not end with the consideration of the impact of affirmative action on a complainant. Proportionality goes on to balance contended interests taking into account all relevant factors. The cumulative effect of these factors determines which side weighs more than the other.<sup>134</sup> The provision of section 6(2) and 9(2) and section 13 of the EEA ensures that the redress goal is given its due weight. In this enquiry, given the particular circumstances and context it may be appropriate to give more weight to redress than other interests or rights. It is a context sensitive approach.

It has also been contended that a program designed to discriminate against certain people on the basis of race and gender and to thus exclude these people from socio-economic benefits should be scrutinised using the criteria of proportionality. Proportionality is

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<sup>133</sup> *Merafong v President of the Republic of South Africa* 2008 (5) SA 171 (CC) at para 63.

<sup>134</sup> Pretorius JL, *Labour Law, Employment Equity Law* July 2012

preferable because of its ability to account for the duty to redress imbalances and at the same time cater for individual rights. Proportionality is more compatible with the attainment of an egalitarian state because it is cognisant of competing interests and strikes an optimal reasonable balance in accommodating them.<sup>135</sup>

This dissertation contends that where a measure on the basis of race excludes workers from benefits in the workplace, especially those from the designated group, as a matter of social policy, we require that its justification rise to a particularly high standard. This is so even though our racial history may be invoked in order to justify such measures.

It will also be contended that the use of rationality as a standard of scrutiny for affirmative action fails to integrate conflicting interests and rights. Rationality is an inquiry into the logical relation of a measure to its objective. The test requires that the measure be causally linked to its objective. The standard of rationality precludes a court from enquiring into whether the measure taken could have been done in a less onerous way.

It is contended that the absence of fairness undermines the dignity of those not considered as beneficiaries or as less deserving beneficiaries.

### **3.6. QUOTAS**

Under-representation refers to the statistical disparity between the representation of designated groups in the workplace compared to their representation in the labour

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<sup>135</sup> Pretorius JL, *Labour Law, Employment Equity Law* July 2012.

market.<sup>136</sup> This may indicate the likelihood of barriers in recruitment, promotion, training and development.<sup>137</sup> To ameliorate under-representation, section 15(3) provides for the creation of numerical goals but prohibits the imposition of quotas. Quotas refer to all preferential treatments that have the effect of reserving any portion of opportunities for a designated group.

There is a desperate attempt to distinguish quotas from numerical goals but courts have persistently failed to keep the line of distinction. In the case of *Munsamy*, it was held:

“The imposition of a strict quota is a rigid measure requiring a certain fixed proportion or percentage to be included whereas preferential treatment and goals is more flexible allowing the achievement of objectives over a period of time”.<sup>138</sup>

What this submission holds is that the difference between the two is that a quota’s envisaged result is sought after regardless of the circumstances of the matter (more like a reserve). “One aims at a goal but one is not required to attain it even if one retains the goal.”<sup>139</sup> However, the case of *Barnard* shows that courts only draw the distinction between the two on paper but when it comes to application, the difference is lost. The court condoned the act of not promoting Barnard even though she was both from a designated group and there was no one else to promote. The court did not agree that Barnard should have been promoted when no other eligible candidate could be found. The court looked at whether such an act would immediately achieve equal representivity. This clearly shows that the assertion that goals are achieved ‘over a

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<sup>136</sup> Code Of Good Practice On The Integration Of Employment Equity Into Human Resource Policies And Practices (GenN 1358 in GG 27866 of 4 August 2005).

<sup>137</sup> *Solidarity and Others v Department of Correctional Services and Others* [2013] ZALCCT 38 (18 October 2013), para 42.

<sup>138</sup> Para 18; this was identical to the US judgement in *In Local 28, Sheet Metal Workers’ International Association v EEOC*, where O’Connor J, drew the distinction between quotas and goals by holding that ‘A quota would impose a fixed number or percentage which must be attained, or which cannot be exceeded, and would do so regardless of the number of potential applicants who would meet necessary qualifications ..... By contrast, a goal is a numerical objective, fixed realistically in terms of the number of vacancies expected, and the number of qualified applicants are available in the relevant job’

<sup>139</sup> D Benatar “*Justice, Diversity And Racial Preference: A Critique Of Affirmative Action*” (125)SALJ pg 280.



period of time' was not followed, the court obsessed over immediate results. In *Coetzer v Minister of Safety and Security*<sup>140</sup> Landman J, found that the employment target of 70:30 in favour of designated groups in the South African Police Service did not in itself constitute a quota; but to the extent that it reserved posts for designated or non-designated groups status, it clearly the functions a quota.<sup>141</sup> Although the quota system is prohibited, the improper application of numerical targets creates an illusory right to many.

One of the factors that an employer who drafts an equity plan is obliged to take into consideration is “the pool of suitably qualified people from designated groups from which the employer may reasonably be expected to promote or appoint employees.”<sup>142</sup> It would be reasonable to presume that this factor reflects that a numerical goal cannot be pursued even when there is no candidate from the targeted group. This was the reasoning of the Labour Court in the case of *Barnard*. The EEA provides that implementation of affirmative action should be done after a proper workforce profile analysis. Failure to do so would create an absolute barrier.

It is appalling that the CC ruled that an employer may decide to leave a post vacant without running the risk of unfairly discriminating certain categories of people. The majority judgment held that as long as there is a rational connection between the purpose and the decision, such a decision passes constitutional muster.<sup>143</sup> The minority judgment argued that such a deferential approach would leave the defence of affirmative action in unfettered control of those in positions of designated employers.

In support of this argument Whitcher AJ rightfully held that:

“The absence of material prejudice does not detract from a finding of unfair discrimination because, while prejudice is highly relevant, the main mischief

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<sup>140</sup> (2003) 2 BLLR 173 (LC), (2002) 11 LC 6.9.2.

<sup>141</sup> *Ibid* at Para 23.

<sup>142</sup> Guideline 8.4.2 of the Code gazzeted to regulate the implementation of employment equity plans.

<sup>143</sup> *Minister of Finance v Van Heerden* (2004) 13 CC at par 36

guarded against in the right not to be unfairly discriminated and *solatium* awarded in unfair discrimination cases is the infringement of the right to dignity.”<sup>144</sup>

Although the CC held that an employer is not obliged to appoint when an affirmative action candidate of their choice cannot be found, the Labour Court found that this decision would constitute unfair discrimination in certain circumstances. Steenkamp J in *Solidarity obo Van der Walt and others v SAPS and others*<sup>145</sup> noted the holding of the LAC in para 47 in *Barnard* but also noted that the LAC had not considered the question of an absolute barrier to promotion. On the other hand, his brother Lagrange J in *Solidarity v Department of Correctional Services*<sup>146</sup> stated in para 24:

“In terms of section 15(2)(d) of the EEA, measures to ensure equal opportunities for suitably qualified individuals from designated groups and to achieve equitable representation in the workplace may include numerical targets and preferential treatment, but may not adopt quotas. What appears to have happened in this instance is that even when no suitably qualified person from a designated category was available, the [employee] could not be appointed. Thus, even when the EEP could not achieve the objectives of appointing a suitably qualified person from a designated group, the employee’s race was an insuperable obstacle to his appointment. It would seem on this basis that the [employee] might well have been discriminated against solely on the basis of his race and not for the purpose of advancing a suitably qualified person from a designated group pursuant to the legitimate aims of an employment equity plan.”

On this basis Steenkamp found that unfair discrimination had been established, namely that affirmative action had not been used for a legitimate equity purpose “...the [employee] might well have been discriminated against solely on the basis of his race and not for the purpose of advancing a suitably qualified person from a designated group pursuant to the legitimate aims of an EEP.”<sup>147</sup> So it is quite questionable that one of the

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<sup>144</sup> *Munsamy*, supra.

<sup>145</sup> (2013) 34 *ILJ* 2943 (LC).

<sup>146</sup> (2012) 11 *BLLR* 1163 (LC).

<sup>147</sup> In *Birjalal* the court found that the decision based on affirmative action was irrational and not lawful because the employer was unable to connect the targets and demographic formula relied upon to their equity plan. The

reasons the CC did not find in favour of Barnard was the absence of prejudice. It can however, be reasonably concluded that the dignity of Barnard was infringed.

There has been a considerable debate as to which demographics should be used in the workforce profile analysis. The main concern was that different racial groups are not evenly distributed and if equity plans were to be based on national demographics, certain groups would be prejudiced even though they belong to the designated group. For example, it is common knowledge that there is a high concentration of the Indians in KwaZulu Natal than anywhere else in the country and a high concentration of Coloureds in the Cape. So if the national demographics were to be applied, members of those races would be prejudiced and be overlooked. The same subject came under the spotlight in the case of *Solidarity and Others v Department of Correctional Services and Others*.<sup>148</sup> The court decided that regional as well as national demographics should be taken into consideration.<sup>149</sup> The amendments to the EEA confirmed the court's ruling and made provision for regional demographics. This came as a relief to certain members of the designated groups.

### **3.7. ABSOLUTE BARRIERS**

An absolute barrier refers to an obstruction which impedes the progress or advancement of an employee in his career, regardless of their accomplishments and merits.<sup>150</sup> The EEA is mandated to ensure that all employees are given equal opportunities to make progress in their careers. The Act provides some protection to persons who are not from the designated groups, and permits the employer a degree of latitude, to the extent that

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court held that where an employer relies on demographics to make a decision the employer must be able to show a rational connection between a defined standard in an EEP and the demographics relied on. The first respondent's witnesses did not know how and when the figures it had relied on to select the second respondent over the applicant were developed and whether they were still applicable.

<sup>148</sup> (2013) ZALCCT 38 (18 October 2013).

<sup>149</sup> (2013) ZALCCT 38 (18 October 2013), para 45.

<sup>150</sup> *Solidarity and Others v Department of Correctional Services and Others* 2013] ZALCCT 38 (18 October 2013).

section 15 (4) provides that an employer may not implement a practice or policy that “would establish an absolute barrier to the prospective or continued employment or advancement of people who are not from designated groups”. Clearly this Section does not permit the employment of affirmative action measures that would create an absolute barrier to the ‘employment or advancement’ of those not from the designated groups. However this does not militate against preferential treatment for persons deemed to have been prejudiced by historical factors, namely apartheid. This is permitted so that the constitutional objective of an egalitarian state does not ring hollow.<sup>151</sup>

The fact that the African majority were the most severely impacted group by the policies of apartheid has been abused by many designated employers. This has seen Indians and Coloureds expressing that during apartheid they were not white enough for privilege and after 1994 they are not black enough for privilege. Such dissatisfaction emanates from what has become common practice, namely the hierarchy of privilege. The EEA does not in any way provide for disparate degrees of prejudice of persons in the designated group. It appears that this is a product of adjudication which goes against the notion that holds that it is inimical to the goal of affirmative action that an individual’s degree of disadvantage be determined.<sup>152</sup> Pretorius concedes that it is not necessarily true that all persons from the designated group suffered equally but cautions that selection for a job from these people should be done on the basis of demonstrable need, and not on any arbitrary form of hierarchical ranking of the groups.<sup>153</sup> Surely this dissatisfaction has no room in a democratic society and ought to be rectified. “The Constitution’s injunction to heal the divisions of the past cannot contemplate law or conduct which add salt to the wounds caused by the divide and rule policy of by-gone eras...freedom is indivisible.”<sup>154</sup>

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<sup>151</sup> *Van Heerden* [2004] 12 BLLR 1181 (CC), para 35.

<sup>152</sup> C Albertyn

<sup>153</sup> *JL Pretorius* “*Legal evaluation of affirmative action in South Africa*” 2001 *Journal for Juridical Science* 26(3): pg 24.

<sup>154</sup> *Solidarity and Others v Department of Correctional Services and Others* 2013] ZALCCT 38 (18 October 2013), para 48.

Priority ought to be in terms of a group of persons that is under represented. Under representation should therefore be the determining factor when making employment decisions. Workforce profile audits often indicate imbalances in representations. The EEA mandates employers to identify the possible reasons for such imbalances.<sup>155</sup> In *Naidoo v Minister of Safety and Security and Another*,<sup>156</sup> Shaik AJ, pointed out that:

“The very purpose of an employment equity is to ‘redress the effects of past discrimination suffered by members of a designated group. Its purpose is not to create *de facto* barriers to employment. The fact that the barrier is created and results in a person from a designated group suffering from discrimination, both on her grounds of race and gender, is perverse.”<sup>157</sup>

Measures taken to ameliorate such imbalances ought to be progressive and not despotically instant (achieved overnight).<sup>158</sup> This is so because at times, imbalances are caused by the absence of suitably qualified candidates. It can also be because the region in question has an over concentration of persons of a designated group. Overemphasis on instant solution to imbalances will lead to the creation of absolute barriers.

### 3.8. CONCLUSION

The EEA sets out explicitly what is affirmative action, how it ought to be implemented and what it ought to strive for. However, polarized interpretations of the Act have seen the policy of affirmative action being thrown into disarray. The plight of persons belonging to the designated groups and being overlooked has been duly noted. It is for

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<sup>155</sup> Section 15(2) of the EEA; Code Of Good Practice On The Integration Of Employment Equity Into Human Resource Policies And Practices (GenN 1358 in GG 27866 of 4 August 2005).

<sup>156</sup> (2013) 5 BLLR 490 (LC).

<sup>157</sup> Ibid at Para 158.

<sup>158</sup> M Solomon “*Regulation Of Affirmative Action By The Employment Equity ACT 55 of 1998*” (1999) 11 SA Merc LJ ,pg238.

this reason that the last of this study shall recommend that Human Resources departments ought to be educated more on the implementation of affirmative action.

## 4. CHAPTER 4: BARNARD CONSTITUTIONAL COURT CASE

### 4.1. INTRODUCTION

Constitutional protection ought to be for all South Africans.<sup>159</sup> The seven year litigation history of *Barnard* illuminates the development of jurisprudence on the topic of affirmative action. The case demands a chapter of its own due to its significant contribution to the affirmative action principles. The case confirmed that affirmative action is a proper defence to a charge of discrimination. It further laid down the test for lawfulness of the implementation of affirmative action. What becomes clear at the end of the case is that the EEA in mandating affirmative action requires the exercise of a discretion that comprehends a balancing of all the factors relevant to the decision. A context-based proportional interrelationship balanced and weighed according to the fundamental constitutional values called into play by the situation.<sup>160</sup>

The purpose of this chapter is to examine this judicial debate and ask whether the CC in *Barnard* has clarified the matter and whether it assists the plight of the designated groups who have become marginalised. The facts of the *Barnard* case will be used to examine this issue since this case has dominated the judicial debate. Other cases will be referred to for critical comparative and analysis purposes.

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<sup>159</sup> *Fourie and Another v Minister of Home Affairs and Others* [2004] ZASCA 132 para 9.

<sup>160</sup> Sachs in *Van Heerden*.

## 4.2. BACKGROUND

Ms Renate Barnard (Barnard), a white female police officer<sup>161</sup> was denied promotion to a level 9 post of Superintendent, twice; in order to ensure the effective pursuit of the numerical goals for racial representivity set out in the South African Police Services (SAPS) affirmative action policy; even though she had been found to be the most suitable candidate. The appellant<sup>162</sup> had justified this decision on the basis that it was in line with efforts to attain equitable representivity in its workforce regime. The officer then challenged the decision on the grounds that it constituted direct discrimination because the only reason she was denied promotion was her racial identity. She alleged that the refusal to appoint her was an infringement of her right to equality as well as an affront to her dignity. What made it worse was that the post was left vacant simply because a suitable candidate could not be found from the designated group. Neither did the commissioner opt to appoint the second best candidates who were black males.

## 4.3. ISSUES

The prominent issue in the entire litigation history of Barnard was the question whether she had been unfairly discriminated on the ground of race.<sup>163</sup> This issue could only be adjudicated upon by determining the lawfulness of the way the SAPS commissioner had implemented the department's EEP.<sup>164</sup>

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<sup>161</sup>Ms Barnard Hereinafter referred to as Barnard.

<sup>162</sup>The term appellant shall be used to refer to interchangeably as the South African Police Service or the Commissioner throughout.

<sup>163</sup> 82 and 54.

<sup>164</sup> 76.



#### 4.4. CAUSES OF ACTION AND AFFIRMATIVE ACTION

The CC in *Barnard* said that courts can scrutinize whether the measure in question is a legitimate restitution measure (AA measure) within the scope of section 9(2) of the Constitution and that the application of a properly adopted AA measure – i.e. within section 9(2) – may be challenged.

The CC stated that the courts must identify whether the complainant:

- (i) Is challenging the constitutionality of the EEA [the provisions of the Act]
- (ii) Is challenging the constitutionality and/or validity of the measure itself [of the equity plan devised by the employer in question].
- (iii) Has a genuine unfair discrimination claim. The CC required this claim to be linked to a challenge to the constitutionality and validity of the measure itself [of the equity plan devised by the employer in question]. An unfair discrimination claim can only arise where the claimant has successfully challenged the constitutionality or validity of the measure itself.
- (iv) Is challenging the lawfulness of the measure itself [of the provisions of the equity plan devised by the employer in question]<sup>165</sup>
- (v) Is challenging the implementation of a lawfully adopted measure [the manner in which affirmative action measures drafted in accordance with the EEA is implemented]<sup>166</sup>

The CC stressed that courts must identify the real nature of the legal challenge [cause of action] because they are subject to different standards of judicial review. Thus it must be clear whether a law or rule is being challenged or whether conduct is being challenged,

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<sup>165</sup> Sections 13 to 20 and s42 if the EEA provide for the process to be followed when drafting affirmative action measures [an equity plan]

<sup>166</sup> In *Barnard*, the court said the pleaded issue was only whether the EEP was lawfully implanted.

i.e. the manner in which legitimate affirmative action measures are being implemented. The relevant standard of judicial review of each of these causes of action is discussed in the next chapter.

A further cause of action not mentioned by the CC involves asserting a failure on the part of the employer to comply with its statutory duties under the EEA [claims based on alleged breaches of obligations by designated employers as set out in Chapter III of the EEA]. However, the LAC held that individuals may not approach the court directly on such causes of action. In *Solidarity & others v Department of Correctional Services & others*,<sup>167</sup> the judge held at para [18] that the *Dudley* judgment bound her in respect of its *ratio* that claims based on alleged breaches of obligations by designated employers as set out in Chapter III of the EEA may only come before this court after exhaustion of the Chapter V compliance procedures. She ruled that in view of the fact that the applicants had not sought to proceed by means of the enforcement procedure contained in Chapter V of the EEA, read with the affirmative action obligations set out in Chapter 111, she was unable to grant a declarator that the EEP is in breach of the provisions of the EEA. Explanatory extracts from the judgment read as follows:

- The applicants submit that the content of the Department of Correctional Services EEP is not consistent with the EEA as viewed through the prism of the Constitution. Nor they allege is it consistent with the personnel placement practices that ought to be adopted by Department of Correctional Services under the Public Service Act and the Correctional Services Act.
- Chapter III of the EEA deals with ‘Affirmative action measures’ i.e. the obligations of designated employers in terms of the EEA. Chapter V of the EEA deals with Monitoring, Enforcement and Legal Proceedings. The architecture of the EEA in respect to the administrative compliance route set out in Chapter V read with Chapter 111, as opposed to the Chapter 11 unfair discrimination route

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<sup>167</sup> (2014) 35 ILJ 504 (LC)

to this court, was exhaustively dealt with by the LAC in *Dudley v City of Cape Town*.<sup>168</sup>

- The genesis of the *Dudley* matter in the court a quo was a case with four components, involving allegations dealing with unfair discrimination, affirmative action, constitutional obligations and an alleged unfair labour practice.<sup>169</sup> Exceptions were taken to these causes of action.
- The findings of the court, a quo, in relation to two of the claims raised before it were the subject of the appeal to the LAC. In that matter Zondo JP (as he then was) held in respect of the first claim (and the exception thereto) as follows:

“.....the conduct of a designated employer in failure to give a member of the designated group who has applied for employment preference to those candidates who are not members of the designated group in the filling of a post does not on its own constitute unfair discrimination.”<sup>170</sup>

- In respect of the second claim (and the exception thereto) the LAC held that-

“it is not competent to institute proceedings in the Labour Court in respect of an alleged breach of any obligation under chapter III of the EEA, prior to the exhaustion of the enforcement procedure provided for in chapter V of the EEA.”<sup>171</sup>

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<sup>168</sup> (2008)29ILJ 2685 (LAC)

<sup>169</sup> *Dudley v City of Cape Town* (2004) 25 ILJ 305 (LC)

<sup>170</sup> At paragraph 54.

<sup>171</sup> At paragraph 48.

#### 4.5. CHALLENGING THE CONSTITUTIONALITY OF THE MEASURE ITSELF

The LC<sup>172</sup> concluded that the failure to promote Barnard was a decision based on race and constituted discrimination that was unfair and not in compliance with the provisions of the EEA. It held that the EEP had to be applied in accordance with the constitutional principles of fairness and equality. It found that the strict application of numerical goals was too rigid. It found in favour of Barnard for the reason that the SAPS had failed to discharge the onus of fairness of its prima facie discriminatory decision considering that the reasons given for its decision were scant. The Labour Court decision was influenced by the need to balance interests that are in conflict; the need for representativity had to be weighed up against the individual's rights to equality; a fair decision had to be made.

The SAPS appealed that decision to the LAC. The LAC pointed out that the implementation of restitutionary measures could not be made, subject to an individual's right to equality; it would defeat the very purpose of having restitutionary measures as, the fact that there would be persons from non-designated groups who would be adversely affected, was a reality. LAC held that no discrimination had occurred because no appointment had been made. It upheld the appeal and set aside the order of the Labour Court. The LAC also based its finding on the absence of a comparator. Whereas a comparator is an important factor when deciding whether there has been discrimination, it cannot on its own deter a finding of discrimination. Discrimination can occur where a person's aspirations have been barricaded on the basis of an immutable character like race.<sup>173</sup> An allegation of discrimination requires that it be determined what the impact is on the individual complaining. Thus the finding of the LAC was wanting for the lack of a wholesome approach, it was piecemeal; it cherry-picked only a part that enabled it to get to a desired decision.

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<sup>172</sup> 2010 (10) BCLR 1094 (LC).

<sup>173</sup> S Fredman 'Providing equality: Substantive equality and the positive duty to provide' (2005) 21 SAJHR 163 at 182–5.

Barnard appealed to the SCA. As in the LC, the SCA held that Barnard had been unfairly discriminated when the commissioner failed to promote her. Again like the LC, its decision was based on the insufficiency of the commissioner's reasons for failing to appoint Barnard. The fatal mistake made by the SCA (which was later addressed by the CC) was its reliance on section 9(3) of the Constitution. By relying on this provision it confirmed what the LAC had incorrectly held, namely that the LC had made affirmative action subject to the individual right to equality. It reversed the decision of the LAC. The approach of the LC and the SCA reflected that in *PSA and another v Minister of Justice and others*<sup>174</sup> where the High Court regarded AA programs as an exception to the right to be treated equally and therefore needed to be subject to an exacting scrutiny. The court held that in deciding the appropriateness of an affirmative action measure, the word 'equal' must be taken to denote that the interests of the beneficiaries are not to be considered *in vacuo*, but with due regard to the rights of others, and to the possible disadvantage that the targeted persons or groups might suffer. The court ruled the AA policy of not considering White males and only appointing women and black candidates constituted unfair discrimination.

The SAPS then approached the CC. The CC held that the *Harksen* test<sup>175</sup> would be only applied if Barnard was challenging the equity plan. It further held that it was inappropriate to use the *Harksen* test because it treats affirmative action as 'suspect and unfair'.<sup>176</sup> It consequently dispelled the SCA's reasoning as based on a wrong principle.<sup>177</sup> What Moseneke establishes or rather confirms is that it is beyond doubt that affirmative action is a valid defence against the allegation of unfair discrimination. Thus applying the *Harksen* test would be inappropriate because it is an enquiry as to the constitutionality of affirmative action. If one is to challenge

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<sup>174</sup> *PSA v Minister of Justice* (1997) 18 ILJ 241 (T).

<sup>175</sup> The *Harksen* test first asks whether there has been differentiation. If the answer is in the affirmative, the next enquiry would be whether the differentiation is based on a prohibited ground like race. If again the answer is I the affirmative the enquiry proceed to ask if the differentiation on the prohibited ground is fair.

<sup>176</sup> Para 51

<sup>177</sup> Para 53

affirmative action, the three pronged test laid down in *Van Heerden*<sup>178</sup> would be the appropriate test for it. The *Van Heerden* test would serve to check whether what is held as affirmative action is actually affirmative action or not and not whether affirmative action is unfair or not.

The CC confirmed the LAC's holdings that legitimate implementation of restitutionary measures are not subject to an individual's right to equality in terms of section 9(3) of the Constitution. The LAC held that the failure by the SAPS to appoint a recommended white female candidate did not constitute unfair discrimination where the failure to appoint was in line with a rational, coherent EEP intended to redress inequitable representation in the workplace.<sup>179</sup> Moseneke in *Van Heerden*, however, held that if a measure does not fall within section 9(2), and it constitutes discrimination on a prohibited ground (because, for example, it is race based), it will be necessary to resort to the Harksen test in order to ascertain whether the measure offends the anti-discrimination prohibition in section 9(3).

#### **4.6. THE LAWFULNESS OF AFFIRMATIVE ACTION MEASURES [THE PLAN]**

As indicated earlier, the CC in *Van Heerden* and *Barnard* held that if a measure does not pass muster under section 9(2) and the conduct of the employer constitutes discrimination on a prohibited ground (because, for example, it is race based) it may be presumed to be unfair discrimination. It is arguable that the same reasoning can be applied to a plan that does not comply with the EEA. Sections 13 to 20 set out specific requirements for the drafting of affirmative action plans.

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<sup>178</sup> 2004 12 BLLR 1181(CC).

<sup>179</sup> *SAPS v Solidarity obo Barnard* (2013) 34 ILJ 590 (LAC) at para 47.

The court in *Birjalal v Ethekekwini Municipality*<sup>180</sup> and *Munsamy* held that the term ‘designed’ entails a properly drafted EEP.<sup>181</sup> They held that this means that when an employer makes a decision based on affirmative action, for that decision to be upheld as rational and fair discrimination, the employer must show, *inter alia*, that the decision was in terms of a clearly defined plan drafted in accordance with the specifications provided for in chapter 111 of the EEA.

In *Munsamy v Minister of Safety and Security and Another*, the Labour Court found that the EEP *in casu* had not been drafted in accordance with the relevant provisions of the EEA, especially section 20, in that there was no evidence that the plan was the product of a proper consultation process and that the measures used against the complainant had been drafted in accordance with the Act and section 20. On this basis the court found that since the decision against the complainant had been based on a plan inconsistent with the provisions of the EEA, the decision amounted to unfair discrimination.

There is merit in this approach on the basis that the CC in *Van Heerden* held that if a measure does not pass the three – fold test (and thus does not fall within section 9(2)) and it constitutes discrimination on a prohibited ground (because, for example, it is race based), it can be deemed unfair until the contrary is proved by the employer.

The CC confirmed that section 15 prohibits quotas and in this regard stated:

“Let it suffice to observe that the primary distinction between numerical targets and quotas lies in the flexibility of the standard. Quotas amount to job reservation and are properly prohibited by section 15(3) of the Act. The same section endorses numerical goals in pursuit of work place representivity and equity. They serve as a flexible employment guideline to a designated employer.”<sup>182</sup>

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<sup>180</sup> Unreported, 2014 (Whitcher AJ).

<sup>181</sup> *Gordon v Department of Health, KwaZulu-Natal* (2008) 29 ILJ 2535 (SCA); *PSA of SA obo Helberg v Minister of Safety and Security and Another* (2004) 23 ILJ 2373 (LC) at para 14.

<sup>182</sup> Para 54.

In *Solidarity & Others*, the LC found that the EEA, particularly section 42, allows for proportionality, balance and fairness when it requires both national and regional demographics to be taken into account. The court found that the individual applicants who were black employees in terms of the EEA had suffered unfair discrimination in that the EEP used to decide their applications for appointment did not take regional demographics into account.

*Naidoo v Minister of Safety and Security and Another*<sup>183</sup> and *Munsamy* scrutinised the plans and found that the plans in effect represented a quota and complete barrier to appointment and promotion of Indians and thus fell within the parameter of presumptively unfair discrimination. In *Munsamy* and *Naidoo*, the court found that the since the demographic formulas used by the employer effectively constituted a quota system [the EEA prohibits quotas] and resulted in a complete barrier to the promotion or appointment of Indian employees, the SAPS had unfairly discriminated against the applicant on the grounds of his race.

*Munsamy* essentially held that for decisions based on affirmative action to be considered lawful, the decision must have been in terms of ‘a rational coherent EEP.’ An employer may not prefer one group of designated employees over another group of designated employees who are supposedly over-represented in the absence of proper proof of such representativeness and a valid EEP which permits the action of the employer.

The court in *Munsamy* held that where an employer used affirmative action measures to prefer one designated group over another who were supposedly over-represented, the employer must prove the following to establish that its conduct was rational and in line with a defensible equity plan: (i) that there was an over-representation of the discriminated group and an under-representation of the preferred group in the level of

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<sup>183</sup> 2013 (34) ILJ 2279 (LC)



the post in question: this requires the conduct of a proper workplace profile audit; (ii) that the measure is sufficiently coherent and not open to arbitrary application or abuse; (iii) that the measure is permitted by the Act; (iv) an equity plan that permits the disputed measure, either expressly or by clear implication; (v) that the measure is intended to correct inequitable representation in the workplace; and, (vi) that the measure arose out of proper consultations, i.e. there had been proper consultation on the particular measure.

#### **4.7. CHALLENGING THE MANNER OF IMPLEMENTATION OF A LAWFUL PLAN**

As indicated earlier on, the CC noted that the *Barnard* case was not about the constitutionality or the legal validity of the EEP devised by the police (The validity of the plan was never challenged). The court stated that Bernard's statement of claim contained a narrow case, namely that the National Commissioner of Police acted lawfully when he twice declined to appoint Barnard as superintendent in order to ensure the effective pursuit of the numerical goals for racial representivity set out in the SAPS affirmative action policy. The reasons advanced in support of the narrow case were that the National Commissioner attached undue weight to demographic equity at the expense of her competency and furnished inadequate reasons [his letter reflecting his decision was silent on factors he weighed].

The issue in dispute was thus about the application of a valid plan [valid affirmative action measures].

The CC judges in *Barnard* seemed to differ on the exact standard imposed by the EEA to measure whether a constitutionally valid EEP was implemented lawfully in a

particular case [i.e. in cases directed not at unfair discrimination under section 6(1) of the EEA, but at a review of an employer's decision].

In the main judgment, Moseneke did not finally answer this question, but merely held that at bear minimum, implementation must pass a legality test: the principle of legality would require that a legitimate restitutionary measure must be used for an authorised purpose and the decision must be rationally related to the terms and objects of the measure. He held that when an EEP is implemented in a capricious manner or for ulterior or for an impermissible purpose it would be unlawful. Ordinarily, irrational conduct in implementing a lawful project creates an unlawful action. Therefore, implementation of corrective measures must be rational.

Moseneke further suggested that affirmative action decisions which prejudice the efficiency of the workplace, by for example, appointing non-suitable AA candidates would be unlawful and irrational as the decision would be inconsistent with the aims of affirmative action:

“I pause to underline the requirement that beneficiaries of affirmative action must be equal to the task at hand. They must be suitably qualified people in order not to sacrifice efficiency and competence at the altar of remedial employment. The Act sets itself against the hurtful insinuation that affirmative action measures are a refuge for the mediocre or incompetent. Plainly, a core object of equality at the workplace is to embrace and retain people who are also competent and effective in delivering goods and services to the public.”

The CC approved the LAC's holding that when applying legitimate affirmative action measures, the employer does not have to take into account an individual's right to equality. The LAC in *SAPS v Solidarity obo Barnard*<sup>184</sup> held as follows:

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<sup>184</sup> 2013 (34) ILJ 590 (LAC).

“The Labour Court clearly misconstrued the purpose of the employment equity oriented measures by decreeing that their implementation was subject to an individual’s right to equality and dignity. This misconception is highlighted in this case where the individual concerned is a white woman, whose group was overrepresented in level 9, and who was clearly advantaged by past unfair discriminatory laws. Importantly, she did not hope to be appointed as there were two appointable black candidates from designated groups. She was also aware that black candidates were targeted for the post for which she applied and which target was within the conscripts [sic] of National Instruction 1 of 2004.”<sup>185</sup>

The LAC held that the failure by the SAPS to appoint a recommended white female candidate did not constitute unfair discrimination where white females were overrepresented in the level of the advertised post and the failure to appoint was in line with a rational, coherent EEP intended to redress inequitable representation in the workplace.

The LAC’s approach merely requires that the affirmative action measure must be intended to balance representation in the workplace and as long as it can be shown that there exists an EEP designed in accordance with Chapter 111, any employment decision based on it is beyond judicial scrutiny.

The minority judgments said that fairness should be the test for lawful exercise of an employer’s discretion: the decision maker must put up sufficient reasons for implementation to be fair. They found the National Commissioner’s reasons were inadequate, but held that there were external factors that rendered his decision fair. This include the fact that there was an overrepresentation of white females at the occupational level in question, which meant that the Commissioner could place more weight on racial targets as opposed to any other considerations he was bound to consider when making his decision. This approach is akin to the proportionality test.

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<sup>185</sup> *SAPS v Solidarity obo Barnard* (2013) 34 ILJ 590 (LAC) para 47.

In applying the doctrine of legality and the rationality test to the discretion afforded to the National Commissioner as contained in the national instruction, the majority found there was nothing to conclude that in exercising his discretion not to appoint and to withdraw the post, the National Commissioner did so unlawfully. The Court concluded that the exercise of discretion not to appoint was rational and reasonable and in accordance with criteria in National Instruction, in pursuit of employment equity targets envisaged in the EEA. The court's decision was based on the following reasons:

- in addition to existing or potential competence, other relevant criterion is that promotion must heed the EEP of the relevant business unit;
- the National Commissioner was empowered in terms of the EEP to decline to promote candidate because her appointment would worsen representivity at the salary level (9) and the post was not critical for service delivery;<sup>186</sup>
- Ms Barnard's non-appointment did not sacrifice service delivery.
- the National Commissioner was entitled to refuse to fill the vacancy for the reason that it would have negatively affected the numerical targets of the EEP;<sup>187</sup>
- the EEP obliged the National Commissioner to take steps to achieve the targets, provided he acted rationally and with due regard to the criteria in the National Instruction;
- it was his right and duty to achieve targets.

The CC found that the commissioner did not pursue the targets too rigidly to comprise job reservation or quotas for two reasons<sup>188</sup>:

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<sup>186</sup> Para 62.

<sup>187</sup> Para 65 sets out the question.

<sup>188</sup> Paras 66 and 67.

- over-representation of white women at salary level 9 was pronounced, which meant SAPS had not pursued racial targets at the expense of other relevant considerations; had appointed white female employees despite equity targets; and the white females retained their posts;
- the decision not to promote her did not bar her from future promotions – she was Lieutenant-Colonel at time of hearing before CC; she had been promoted past salary level 9 to 10 or higher; her promotion was not precluded by race as an absolute bar.

The CC also found that Ms Barnard was always aware and accepted that her interview and selection would occur within the strictures imposed by employment equity; she accepted that even if she was the best candidate, that was not the only criterion; she was aware of over-representation of white females at salary level 9; and if Mr Mogadima and Mr Ledwaba had been appointed ahead of her, she would have no grievance<sup>189</sup>.

In summary then, according to the majority, the decision of the commissioner was not irrational because:

- (i) the SAPS EEP was not implemented in an overly rigid fashion;
- (ii) the EEA does not allow strict and rigid quotas to be enforced but does allow an EEP to set targets to be pursued by an employer. Rigid quotas would in effect place an absolute bar on the employment or promotion of a member of a privileged group. The SAPS EEP did not impose such rigid quotas and neither did the manner in which the plan was being implemented. The way in which the SAPS had implemented their plan did not amount to pursuing a rigid quota;

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<sup>189</sup> Para 68.

- (iii) there was no evidence that the SAPS plan placed an absolute barrier on the appointment of white SAPS members [there was no evidence that the SAPS affirmative action policy prevents the promotion of white applicants];
- (iv) there was a clear need for affirmative action measures in the unit of the SAPS under discussion.

It is contended that, even in terms of the strict rationality set by the CC, there was merit in the SCA's contrary decision: the SCA made quite a lot of the irrationality of the decision not to appoint Barnard in circumstances where qualified and shortlisted candidates were also not appointed. This almost suggested *male fides*. The CC completely ignored this.

#### **4.8. FAIRNESS**

When the Labour Court held that the commissioner could not have applied the equity plan "without more", it meant that after determining that the defence to an allegation of discrimination is actually affirmative action, the enquiry does not end there. There is more to it. This creates an enquiry as to what exactly should be the appropriate standard that should apply when a litigant challenges the implementation of a constitutionally compliant restitutionary measure.

It is submitted that an EEP ought to be implemented fairly. The Labour Court held that:

"... an Employment Equity Plan must be applied fairly with due regard to the affected individual's right to equality and that representivity must be weighed against that right. It added that it was not appropriate to apply without more numerical goals set out in an Employment Equity Plan."<sup>190</sup>

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<sup>190</sup> 2010 (10) BCLR 1094 (LC)

Ms Barnard scored very well before the interviewing panel, not once but twice. At all times, her race stood in her way of career progress.

The majority judgment in the CC preferred rationality as the test for the implementation of affirmative action. It averred that once the plan passes the three tier test<sup>191</sup> the restitutionary measure cannot be held to be unfair “because the Constitution says so.”<sup>192</sup> However, Moseneke was quick to add that this however, does not oust the court’s power to interrogate whether the measure is a legitimate restitutionary measure within the scope of the empowering section 9(2). He went on to say that the implementation of a legitimate plan can be challenged.<sup>193</sup> He explicitly stated that rationality was a minimum standard. It is, however, surprising and disappointing that it did not provide closure as to what the appropriate standard would be. One can safely infer that he was satisfied with rationality as a proper test for scrutinizing the implementation of restitutionary measures.

Van Der Westhuizen J defined the third requirement in the *Van Heerden* three prong test. He managed to identify how fairness as a standard can be deduced from the Van Heerden’s three prong test. He held that “The word ‘achievement’ implies some effect or impact.”<sup>194</sup> Whereas Moseneke was of the opinion that the commissioner’s decision was lawful because it was in accordance with his powers,<sup>195</sup> Van Der Westhuizen J disagreed, correctly it is submitted, and held that a “measure might be legitimate in form, but its application may be unlawful.”<sup>196</sup> He thus resonated the finding of the Labour Court that affirmative action measures cannot be implemented “without more”.

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<sup>191</sup> As was held in *Van Heerden* and which can be paraphrased as checking whether the measure advances designated persons and whether such persons have a possibility of achieving equality.

<sup>192</sup> Para 37.

<sup>193</sup> Para 38.

<sup>194</sup> At 143.

<sup>195</sup> Para 62.

<sup>196</sup> Para 145.

It therefore is settled that the effect and implementation of affirmative action need to be evaluated if the conflict of rights involved in restitution is to be settled harmoniously.

#### **4.9. SETTling CONFLICT OF RIGHTS**

“There will always be tension between fullness and limitation. It is good to work slowly but surely without obsessing about immediate results, to endure adverse situations. It needs to be realized that there will always be tension between reality and ideas. Reality is greater. We are called to action by the realities clarified by reason. We cannot lose alertness to the big picture while busy with details.”<sup>197</sup>

The implementation of restitutory measures always encounter conflict of rights. Courts are often at peril of preferring one constitutional imperative over another. This was the mistake both the Labour Court and the subsequent LAC committed. The LAC also reasoned that individual rights are secondary to individual rights because doing so would adversely affect the objective of affirmative action namely restitution. Fortunate enough the CC clarified how best to solve the dichotomy in our law regarding the implementation of affirmative action. Section 9 of the Constitution and section 6 of the EEA prohibit unfair discrimination and yet go on to make permissive a policy that discriminates. The conflict that arises therefrom is the dilemma of having to affirm the disadvantaged and avoid stepping on the dignity of those disfavoured.

The SCA held that the EEA in mandating affirmative action requires the exercise of a discretion that comprehends a balancing of all the factors relevant to the decision.

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<sup>197</sup> 19 October 2014 Catholic Link Redemptorist Pastoral Publication.



Moseneke acknowledged that the adjudication of such matters is quite delicate. He held that:

“Measures that are directed at remedying past discrimination must be formulated with due care not to invade unduly the dignity of all concerned. We must remain vigilant that remedial measures under the Constitution are not an end in themselves. They are not meant to be punitive nor retaliatory. Their ultimate goal is to urge us on towards a more equal and fair society that hopefully is non-racial, non-sexist and socially inclusive.<sup>198</sup> .....We must be careful that the steps taken to promote substantive equality do not unwittingly infringe the dignity of other individuals”.<sup>199</sup>

It is expected that this acknowledgement of the sensitivity of such matters makes it more onerous on decision makers to be thorough in their reasoning. It also is disappointing to note that Moseneke ended at highlighting the minimum standard of scrutiny after having highlighted the matter before him as volatile.

Cameron whilst writing for the minority was clear on what standard should be used in mediating the dichotomy referred to above. He argued that the test for whether implementation of affirmative action is contrary to the Act and the Constitution is fairness.<sup>200</sup> He reasoned that such should be the criteria so as to “ensure a decision-maker has carefully evaluated relevant constitutional and statutory imperatives before making a decision that relies predominantly on one of the criteria such as race.”<sup>201</sup> He also reasoned that if that were not the case “it would be difficult ever to hold that a decision-maker had impermissibly converted a set of numerical targets into quotas.”<sup>202</sup> He was correct in holding that rationality fails to balance the conflict of rights at play.

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<sup>198</sup> Para 30.

<sup>199</sup> Para 31.

<sup>200</sup> 98.

<sup>201</sup> 96.

<sup>202</sup> 96.

Cameron kept an open mind to challenges faced with using fairness as a standard. However he was quick to dissolve any doubts by giving examples of legal concepts which have been clarified through the development of jurisprudence.<sup>203</sup> Cameron elaborated that the standard of fairness enables one to determine whether the implementation has been done in accordance with the purpose of the act and not whether it is constitutional. By so doing he dispelled the misunderstanding that fairness questions whether affirmative action is constitutional or not.

It therefore followed that the reasons given by the commissioner were the subject of enquiry to determine fairness of the implementation. It did not mean that the enquiry transformed into a review application. It was simply relevant to the contention already laid before court by Barnard.

Even though Cameron agreed with the SCA that the commissioner's reasons were not substantial, he was satisfied that they together with external factors pointed to the fact that the commissioner managed to balance the conflicting rights.<sup>204</sup>

To the concern that Barnard came from a women's group which is also a designated group, the court adequately addressed this concern by reference to statistics which revealed that there was an even split between women and men.<sup>205</sup> However reference to salary levels revealed a huge gap of pay grades between men and women. Cameron recognised the prerogative of the commissioner on condition it was reasoned fairly. He reasoned such deference was necessitated by our historical background. One can note that Cameron seems to have fallen back on rationality against his earlier recommendation of proportionality. He explained his reasoning by adding that the decision maker must also take into account factors making up the person's identity and possible ways in which he could advance the restitutionary goal.<sup>206</sup> The Constitution

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<sup>203</sup> At para 100.

<sup>204</sup> At para 107.

<sup>205</sup> At para 115.

<sup>206</sup> 118.

and the Act require a holistic approach to the EEP in order to give effect to the Act's objectives.

In the words of Sachs J in *Van Heerden*:

“[W]here different constitutionally protected interests are involved, it is prudent to . . . opt for context-based proportional interrelationships, balanced and weighed according to the fundamental constitutional values called into play by the situation.”<sup>207</sup>

This serves to guard against the establishment of absolute barriers.

#### **4.10. ABSOLUTE BARRIERS**

Section 15(4) of the EEA provides that:

“Subject to section 42, nothing in this section requires a designated employer to take any decision concerning an employment policy or practice that would establish an absolute barrier to the prospective or continued employment or advancement of people who are not from designated groups.”

The above section serves as a safety net against the abuse of restitutionary measures. It is one of the guidelines on how affirmative action ought to be implemented. Thus it provides that even though diversity is the objective, such goal should not be attained in a manner that disregards equal dignity and respect for all people.<sup>208</sup> This can only be achieved if the approach to restitution measures is flexible. A situation whereby

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<sup>207</sup> *Minister of Finance v Van Heerden* (2004) 13 CC 1.11.2 at par 140

<sup>208</sup> Para 42.

designated employers obsess over achieving immediate results can make their approach rigid and consequently unlawful.

The establishment of absolute barriers in the form of quotas is unlawful.<sup>209</sup> Moseneke refrained from defining the term ‘quotas’ as he reasoned that it was not a matter that was before him.<sup>210</sup> He, however, was courteous enough to give a distinction between quotas and numerical goals. The court held that “...the primary distinction between numerical targets and quotas lies in the flexibility of the standard. Quotas amount to job reservation and are properly prohibited by section 15(3) of the Act.”<sup>211</sup> Numerical goals serve as a ‘flexible guideline’ to a designated employer.<sup>212</sup>

He concedes that if a valid plan is applied rigidly, it may constitute job reservation.<sup>213</sup> Moseneke rejected the view that the implementation of the plan created quotas for the following reasons: firstly, White females were overly represented; to him that meant White females had been employed despite equity targets;<sup>214</sup> secondly, the commissioner’s decision did not bar her future employment or promotion,<sup>215</sup> and thirdly, she was aware of the equity targets envisaged in the department. The question to be asked is does this refute the finding of quotas? The commissioner had chosen to create an opportunity to enhance employment equity goals by not appointing her. Moseneke found that the decision was reasonable because it was rational.<sup>216</sup>

Cameron provided a better way of balancing the conflict of rights. He held that “We should also be careful not to allow race to become the only decisive factor in

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<sup>209</sup> Section 15 (3) of the EEA.

<sup>210</sup> At 42.

<sup>211</sup> Para 54.

<sup>212</sup> Ibid.

<sup>213</sup> Para 66.

<sup>214</sup> 66.

<sup>215</sup> 67

<sup>216</sup> 70

employment decisions.”<sup>217</sup> He advocated that caution be taken not to over emphasise race to such an extent that we become blind to the plight of other members of society.

“The Act does not countenance employment decisions “that would establish an absolute barrier” to the employment or advancement of those not from designated groups.<sup>218</sup> Employers “must” implement affirmative action measures that benefit people from all designated groups. So no affirmative action decision is consistent with the purpose of the Act unless it considers the advancement of each of the different categories of persons designated by the Act. A decision that redresses racial disadvantage but grossly aggravates gender disadvantage, for example, might be impermissible, as might a decision that advances only one disadvantaged racial group while limiting the others”.

Cameron reasoned that the need to be cautious arises from the similarity that affirmative action has with the medium of oppression used under apartheid. Cameron held that even though the plan’s employability of Indian women was 0.4, it would be absurd to insist that they not be employed. He thus stressed the need for flexibility.

Cameron also disagreed with Moseneke’s finding that there was no question of absolute barriers with regards to the implementation of the equity plan.<sup>219</sup> He argued that this question was clear from the Barnad’s papers and went on to quote it verbatim.

#### 4.11. CRITICAL ANALYSIS

The court in *Munsamy* however appeared to support a strict *rationality* test, rather than a test based on fairness. It held that:

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<sup>217</sup> At para 80.

<sup>218</sup> At para 87.

<sup>219</sup> At para 91.

“whether a court may be called upon to adjudicate the fairness, in the wide sense of the word, of ‘measures’, especially where they have been the subject of proper consultation and agreement between management and labour in the consultative forum and where the aggrieved parties have the right to advance their interests through political and industrial action, is debatable.”<sup>220</sup>

It was only prepared to set aside the employer’s decision on the ground that the demographic formula used amounted to a quota system and a complete barrier to further promotion for Indian employees.

The LAC held that a plan must be crafted in terms of section 20 of the EEA.<sup>221</sup> The LAC found that the plan was crafted with due regard to the SAPS’s workplace dynamics and identifies the gaps requiring attention as well as providing for a programme of action that is time bound regarding the closing of gaps.<sup>222</sup> It cannot be argued that the plan seeks the appointment of only blacks irrespective of other criteria. One of the criteria set out in the plan is the suitability of candidates. The LAC held that the Labour Court clearly misconstrued the purpose of affirmative action measures by decreeing that their implementation was subject to an individual’s right to equality. It noted that this misconception is highlighted in this case, where the individual concerned is a white woman whose group is overrepresented in the relevant occupational level.

The EEA provides for a process to be followed when drafting an equity plan. The central principle adopted by the LAC and CC in *Bernard* is that once an equity plan has been drafted in accordance with the EEA and properly adopted it is beyond scrutiny, i.e. its implementation was rational and not reviewable. Both courts held that a decision to overlook a dedicated and excellent white female candidate had been made in terms of a properly drafted EEP and therefore justified. It was held that the plan was rational because it identified gaps and set timed measures to address such disparities and that it

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<sup>220</sup> Munsamy, supra at para 30.

<sup>221</sup> At para 32.

<sup>222</sup> At para 44.

did not just seek appointment of blacks but of suitably qualified blacks. It further held that regard to individual rights would defeat the constitutional purpose of redress because affirmative action would always have an adverse effect on the rejected candidates.

In a nutshell, the approach of the LAC and CC merely requires that the AA measure must be intended to balance representation in the workplace and as long as it can be shown that there exists an EEP designed in accordance with Chapter 111, any employment decision based on it is beyond judicial scrutiny. But is this correct considering that the EEA defines the employer's obligation in terms such as achieving 'equitable representation' which is defined to mean "fair and reasonable" in the dictionary?

The LAC, the SCA and the minority in *Barnard* appeared to insert a proportionality test: a balancing of interests and the weight of the balance will be determined by the specific context and facts of each case. They suggest that in certain situations, more weight should be placed on other facts as opposed to racial targets and more weight should only be placed on racial targets when there was a major underrepresentation. The majority, as long as there is underrepresentation, irrespective of the extent and other factors.

#### **4.12. CONCLUSION**

It is submitted that if the implementation of affirmative action is to be evaluated in the way the majority reasoned, the benefits of affirmative action will be an illusory right to some persons of the designated groups.

The judgment by Cameron presents a more wifful judgment. Despite identifying flaws, he found in favour of the applicant. The judgment is more informed and canvasses every question that was left wanting by the majority judgment. Unlike the main judgment it

did not attempt to evade pertinent issues on technical grounds but faced them and immaculately answered them. Now that was justice served. Although it did not find in favour of Barnard, it is most probable that she went satisfied.



## **5. CHAPTER 5: RECOMMENDATIONS**

### **5.1. INTRODUCTION**

The previous chapters have made it crystal clear that even though the EEA provides for specific ways in which affirmative action should be implemented; a number of abuses have been witnessed and tainted the policy of affirmative action. This chapter draws from the court's interpretation of how the occlusion in the implementation of affirmative action can best be cleared.

### **5.2. FLEXIBILITY**

The purpose of equity plans is to ensure a diverse workforce. The EEA places the burden of giving effect to such purpose on the employer.<sup>223</sup> This study recommends that it is good to work slowly but surely without obsessing about immediate results. Hence the CC held that the achievement of Equity goals should be attained via a flexible approach.<sup>224</sup> Cameron held that where an equity plan suggests that Indians who are employable are 0.4, it does not imply that no Indians should be employed.<sup>225</sup> Such an application would create barriers and would fly in the face of human dignity.

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<sup>223</sup> Section 20 of the EEA.

<sup>224</sup> Cameron at 119.

<sup>225</sup> Cameron at 119.

The call to have employment equity plans implemented in accordance with considerable flexibility is in line with the acknowledgement that affirmative action involves measures that adversely affect certain members of the society. The courts have also held that over rigidity in the application of numerical targets would constitute quotas.<sup>226</sup>

### 5.3. FURNISHING REASONS

One of the lessons learnt from the jurisprudence developed in the *Barnard* case is that there is need to furnish reasons to a person adversely affected by an employment equity decision.<sup>227</sup> Anyone who has his or her rights affected is entitled to an explanation in the form of written reasons.<sup>228</sup> This is important in that a person can evaluate whether the limitation imposed on their rights is justified.<sup>229</sup> It is also important that such adverse decision be explained because doing so ensures public confidence in the system.<sup>230</sup> In sum, the requirement that every employment equity decision must be backed by written reasons boils down to the need to curb against abuse and arbitrariness. If the impression that affirmative action has become an illusion for other members of the designated group is to be curtailed, the need to furnish reasons should be statutorily provided for in the EEA.

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<sup>226</sup> *Munsamy v Minister of Safety and Security and Others* 2013 7 BLLR 695 LC at para21; *Barnard* para 119.

<sup>227</sup> *South African Police Services v Solidarity obo Barnard and Others* 2014 (10) BLLR 1195 (CC) at paras 106,107, 113,114, 121, 122, 152,191 to 193 and 212.

<sup>228</sup> In line with the right to a fair and just administrative action.

<sup>229</sup> *Bell Porto School Governing Body v Premier, Western Cape* 2002 (3) SA 265 (CC) at para 159.

<sup>230</sup> *Judicial Services Commission v Cape Bar Council* 2013 (1) SA 170 SCA Case No (2012) ZA SCA 115 at para 46

#### 5.4. REGIONAL DEMOGRAPHICS

It has been conceded in numerous cases that different races are concentrated in different districts.<sup>231</sup> This has seen Coloureds being prejudiced in the Western Cape and Indians in KwaZulu Natal. Thus this study submits that regional demographics should rank higher than national demographics. Failure to do so would strengthen the impression that affirmative action is for African persons mostly despite the fact that Indians and Coloureds are part of the designated group.

Courts have failed to address the issue of hierarchy of disadvantage. It has been accepted that different races suffered differently; the EEA does not provide for different degrees of disadvantage among the designated groups. This study recommends that legislature should do away with hierarchy of disadvantage. This is so because when Africans, Coloureds and Indians were deemed black, it was implicitly acknowledged that all these races suffered under apartheid. The legislature and courts acknowledged that determining actual prejudice would be inimical to the goal of attaining an egalitarian state.<sup>232</sup> It is quite surprising that the implementation of equity plans has been done as if it is possible to ascertain the extent of prejudice of an affirmative action candidate. It is recommended therefore that when determining the beneficiary of affirmative action measures, preference should be given to the degree of representativity (regional demographics) rather than the degree of disadvantage.

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<sup>231</sup> *Solidarity and Others v Department of Correctional Services and others* 2013 (7) BLLR 695 (LC).

<sup>232</sup> *Minister of Finance & another v Van Heerden* [2004] 12 BLLR 1181 (CC) para 84.

## **5.5. COMPULSORY TRAINING**

It has become necessary that all human resources departments for designated employers be trained on how to implement affirmative action measures. The preceding chapters have demonstrated how employers have abused affirmative action measures. This has emanated both from ill intentions as well as ignorance of the policy. It is recommended that the legislature should make it a policy that all human resources departments of designated employers undergo specific training on how to implement equity plans.

Although equity plans are approved by the labour department first, one cannot help but notice that even those who are approving the problematic equity plans need training too. The implementation of equity plans seems easy on the face of it but the numerous challenges to the plan itself demonstrated that even the department requires guidance on this aspect. A properly drafted, rational and coherent plan would guard against animosity and despair that may result in those adversely affected by the implementation of the measures; it could also curb a haphazard application of the affirmative action measure.

## **5.6. CONCLUSION**

Affirmative action involves emotive issues which have raised tension amongst races. The above recommendations drew from the jurisprudence that has been developed in affirmative action litigation. The pursuit of an egalitarian state demands that people move forward from the injustices of the past. It is therefore imperative that measures devised to facilitate such transition do not do more harm than good. Thus, this study recommends that all restitution measures must be fair and rational.

## 6. CHAPTER 6: CONCLUSION

The understanding of affirmative action is founded on its purpose, namely to redress the effects of apartheid. This understanding has also informed the ways in which the policy of affirmative action is implemented. The policy is not to be implemented leaving those assumed to be privileged in limbo. There ought to be regard for everyone affected by the policy. Of course the policy confused many in its early developmental stages but as the jurisprudence developed, clear guidelines were set and left to employers to follow and the courts to enforce.

Chapter one of the study outlined the parameters of the study, its background, objective, review of literature as well as the point of departure. It was made clear that affirmative action is a product of history and a current solution to a problem.

Chapter two of the study explored the understanding and objectives of affirmative action measures and the court's interpretation of the constitutional principles underlying the policy of affirmative action. The chapter went further to show how the constitutional law is brought into the employment fold. The most important point that was brought to bear was that within each individual is a recognised right to dignity. This right/principle serves to conscientize policy makers of the effects of their acts.

The gist of chapter three was the criticism of the ways in which affirmative action has been implemented. Chapter three highlighted different instances in which the implementation of affirmative action has been misconstrued to an extent that it appeared as if it was only meant for Africans. The discussion of the provisions of the EEA providing for affirmative action served to show what the law says on affirmative action. What it says on how it ought to be implemented.

As the study went into chapter four it became clear that there was need to critique the case of *Barnard*. This is a very important case which addresses virtually every aspect of affirmative action. The chapter was made in the form of a case note which criticises whether and how the CC has put to rest questions that created confusion in the lower courts pertaining to affirmative action.

Recommendations were proposed in chapter five of the study. The recommendations centred on what could be done to make affirmative action effective as well as to guard against the improper implementation of the policy. The recommendation drew mostly from the errors of lower courts as well as employers' mistakes in interpreting the policy. If these recommendations are carried out, the success of affirmative action would be bolstered, the legality of the policy would be kept in check and there would be a better understanding and acceptance of affirmative action measures by all interested parties.

In essence, the study has demonstrated that there is need for proper administration of the policy of affirmative action. The policy was promulgated for the benefit of all classes of people who were prejudiced by apartheid. The establishment of hierarchies amongst the designated group itself has no legal basis. It is from this development that the study emphasised the need to adhere to the principles of administrative justice and legality. It has been argued that if too much is left to the discretion of individuals, arbitrariness and unlawfulness is likely to reign. The selection of beneficiaries of affirmative action ought to be in accordance with demonstrable need and disparity in representivity. It is for this reason that the law demands that there be an equity plan before affirmative action can be implemented.

The law is clear on how affirmative action ought to be implemented. It has been promulgated with sound reasoning and all fairness. If carried out properly, affirmative action will contribute to the attainment of an egalitarian society. An egalitarian state in

the context of labour law does not refer to an equal distribution of resources but rather to full participation and inclusion in the society's major institutions.

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